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PETITION FROM MR. NINA H. SHEA, THE INTERNATIONAL LEAGUE FOR HUMAN
RIGHTS, CONCERNING THE TRUST TERRITORY OF THE PACIFIC ISLANDS

(Circulated in accordance with rule 85, paragraph 1 of
the rules of procedure of the Trusteeship Council)

The International League for Human Rights
236 East 46th Street, 5th floor
New York, N.Y. 10017

22 April 1983

Paul Poudade
President
Trusteeship Council
United Nations
New York, N.Y. 10017

Dear Mr. Poudade:

I should be grateful if the enclosed material (see annex) would be treated as a written petition from the International League for Human Rights to the Trusteeship Council and duly circulated. The League would also like to present an oral petition concerning these and related matters at the meeting of the Council which we understand begins on 16 May. The League's speaker will be Professor Roger S. Clark of the League's Board of Directors and Rutgers University Law School at Camden, N.J.

Thank you for your attention to this matter.

Sincerely,

(Signed) Nina H. SHEA, Esq.
Program Director

Annex

MEMORANDUM DATED 29 MARCH 1983 FROM MR. ROGER S. CLARK ADDRESSED TO THE
MICRONESIA SUPPORT COMMITTEE REGARDING THE PALAU PLEBISCITE: FAILURE
OF PROPOSITION ONE (B) TO OBTAIN A 75 PER CENT MAJORITY

I have been asked for my opinion of the State Department's explanation of the failure of proposition one (B) to obtain a 75 per cent majority in the 10 February plebiscite. The Department's explanation is contained in a revised press release of 23 February 1983 attached hereto. a/ The relevant paragraphs read:

Final unofficial results of the 10 February 1983 plebiscite in Palau represent a strong victory for the compact of free association. In the yes-or-no vote, Palauans awarded the compact of free association a mandate of better than 62 per cent. The voter turnout was very heavy, substantiating the high degree of support for the compact in Palau.

...

The ballot included an internal referendum question which asked the voters to approve a Palauan-American agreement relating to hazardous, including nuclear, substances. A majority - 53 per cent - voted to approve this agreement. However, because of provisions in the Palau Constitution, this, or a similar specific question, requires approval by a 75 per cent margin before the compact of free association can come into effect. This means that the Palauan authorities must now devise an acceptable method of reconciling their constitutional provisions to comply with the mandate of the Palauan electorate for free association with the United States. The United States has expressed its willingness to consult with Palau on this matter and awaits Palau's initiatives.

I believe this to be a serious distortion of the result of the vote. The failure of proposition one (B) to obtain a 75 per cent majority means that the compact package (which includes the agreement between the United States and Palau regarding radioactive, chemical and biological substances b/) was defeated in the plebiscite. In this memorandum I explain why I believe this to be so in light of: (a) the relevant provisions of the Palau Constitution; (b) the language contained on the ballot; and (c) the provisions of article I of the radioactive agreement.

The press release is, moreover, misleading in its reference to "an internal referendum question which asked the voters to approve a Palauan-American agreement relating to hazardous, including nuclear, substances". The "Palauan-American agreement" that runs afoul of the Palau Constitution is, in fact, an amalgam of four separate but interlocking provisions of the compact package:

Section 311 of the compact;
Section 312 of the compact;
Section 314 of the compact;
The radioactive agreement.

/...

The first two of these items were not mentioned in the ballot language, although they are closely related to section 314, which was. The other two items were jumbled up in the ballot language, as I note in part B of this memorandum.

Section 311 of the compact deals with the "authority and responsibility" of the United States for the security and defence of the Micronesian entities. It refers, inter alia, to the obligation of the United States to defend the entities "from armed attack or threats thereof as the United States and its citizens are defended". Section 312 provides that, subject to the terms of further agreements on defence facilities and operating rights, the United States may conduct within the entities "the activities and operations necessary for the exercise of its authority and responsibility" under the defence and security title of the compact.

The references in section 311 to defence "as the United States and its citizens are defended" and in section 312 to "activities and operations necessary" are broad enough, unless modified by other parts of the compact, to support a wide range of actions by the United States with nuclear and other harmful substances. Section 314 of the compact, which was being drafted during 1979 at the same time that the Palau Constitution was taking shape, was plainly designed to narrow some of the activities that the other sections might otherwise permit. It is, of course, like sections 311 and 312, an integral part of title 3, article I of the compact and all three sections must be read together in context. None of them stands alone.

The radioactive agreement is, I believe, best regarded as something of a renegotiation of section 314. In some respects it expands United States powers granted under section 314; in other respects it reduces them.

The Palau Constitution, as I explain in part A of what follows, prohibits things that sections 311, 312 and 314 and the radioactive agreement permit. Hence the starting point for the Palau electors must be what the Constitution allows. They refused to approve the modifications to the Constitution required by the present compact package. This is why I am troubled by the United States offer described in the press release "to consult with Palau" on how to "devise an acceptable method of reconciling their constitutional provisions to comply with the mandate of the Palauan electorate for free association with the United States". This language suggests that the Palauans must now find a way either to change their Constitution or to try again to obtain voter approval for the compact package as negotiated. This seems an unlikely possibility. One might have thought that the time is in fact ripe for the United States to consult with Palau in order to find a way to reconcile the status of free association apparently desired by the Voters with the provisions of the Palau Constitution. That the voters feel strongly about their Constitution is an obvious "given" in terms of what happens next.

A. The Palau Constitution

The relevant provisions of the Palau Constitution provide as follows:

Article II, Section 3:

Major governmental powers including but not limited to defence, security, or foreign affairs may be delegated by treaty, compact or other agreement between the sovereign Republic of Palau and another sovereign nation or international organization, provided such treaty, compact or agreement shall be approved by not less than two thirds (2/3) of the members of each house of the Olbiil Era Kelulau and by a majority of the votes cast in a nationwide referendum conducted for such purpose, provided that any such agreement which authorizes use, testing, storage or disposal of nuclear, toxic chemical, gas or biological weapons intended for use in warfare shall require approval of not less than three fourths (3/4) of the votes cast in such referendum.

Article XIII, Section 6:

Harmful substances such as nuclear, chemical, gas or biological weapons intended for use in warfare, nuclear power plants, and waste materials therefrom, shall not be used, tested, stored, or disposed of within the territorial jurisdiction of Palau without the express approval of not less than three fourths (3/4) of the votes cast in a referendum submitted on this specific question.

There is some overlap between the two provisions and I am aware of no drafting history on why they appear in separate parts of the Constitution. It appears, however, that article II, section 3 is primarily concerned with nuclear, toxic chemical, gas and biological weapons that might be brought in pursuant to an agreement with another State (especially in the United States) or an international organization. Article XIII, section 6 seems primarily concerned with restricting what the Palau Government itself might wish to do domestically. Nevertheless, this latter provision catches within its orbit some activities such as nuclear power plants and the waste therefrom in which the United States might wish to be involved, and would, indeed, have some right to do under section 314 of the compact. Whatever the relationship of the two constitutional provisions, two things are clear: (a) in some respects section 314 and the radioactive agreement run afoul of both provisions; (b) both provisions may be overridden by 75 per cent of the voters.

On a literal interpretation of article II, section 3 of the Constitution the compact itself required a 75 per cent majority. The State Department's "strong victory" of 62 per cent was in fact a defeat. Surely, the words "any such agreement" in article II, section 3 refer back to "treaty, compact, or other agreement" [i.e., one which delegates major governmental powers]. The compact involves a delegation of powers of this nature and in section 314, in the words of article II, section 3, it "authorizes [some kinds of] use, testing, storage or disposal of nuclear, toxic chemical, gas or biological weapons intended for use in warfare". It follows that the whole compact ["any such agreement"] would be

subject to the three fourths requirement. The radioactive agreement, while not perhaps a delegation treaty, is closely related to one (the compact) and it authorizes activities prohibited both by section 314 and the Palau Constitution. It would therefore appear to require a three fourths referendum majority also. Frankly, the argument that the whole compact requires a 75 per cent majority under the Constitution seems to me to be the only defensible one. c/ Why a different view was taken is beyond me. Be that as it may, as early as 17 November 1980 when the draft radioactive agreement was initialed, article I of that document proceeded on the basis that there would be a separate vote on the compact as a whole and on section 314 and the radioactive agreement. The latter would require a 75 per cent majority but no mention was made of the majority required for the compact itself. As I explain in part C of this memorandum, in October 1982 the Palauan authorities had apparently wavered some and were then contemplating only a single question on approval or disapproval of the compact including the radioactive aspects. A 75 per cent majority would be required by this single question. Ultimately, this course was not followed and two questions were asked.

The present discussion, it will be noted, applies only to article II, section 3 of the Constitution. There is no reference to a compact in article XIII, section 6. In so far as the compact encounters that provision, it appears necessary to vote only on those parts of the compact package that contravene it, not the compact as a whole. The problem is, of course, that because of the overlap of the two constitutional provisions it is impossible to separate out the extent to which each provision is violated. There is a further complexity: article II, section 3 refers to approval of the compact by a 75 per cent vote. Article XIII, section 6 says that harmful substances are not to be used, tested, stored, or disposed of "without the express approval of not less than three fourths (3/4) of the votes cast in a referendum of this specific question". The single question which would have been asked in the Palau Government's draft of October 1982, discussed infra in part C, was apparently designed to cope with both constitutional provisions, to be both the approval of a compact containing the provisions proscribed by article II, section 3 and the "express approval" of the "specific question" required by article XIII, section 6.

Personally, I believe that the argument could stop here. The Constitution required a 75 per cent majority. Since that was not attained, the compact was defeated. I do not see how the Palau legislature or executive could override the Constitution by presenting the issue in a different way. Nor do I see how the Palau and United States executives (in the radioactive agreement) could override the Constitution. An unconstitutional treaty is just that - unconstitutional.

Nevertheless, the plain language of the Constitution was not applied in the way in which the issues were presented to the voters. In the next two sections of the memorandum, I therefore turn to the ballot language and to article I of the radioactive agreement which proceed on a different view of the Constitution. I contend that, even on their own terms, the vote represents a defeat which can only be reversed by a renegotiation of the compact package.

B. The ballot language

The relevant language of the ballot a/ reads:

BEFORE THE COMPACT CAN TAKE EFFECT SECTION 314 UNDER QUESTION (B) BELOW MUST ALSO BE APPROVED BY AT LEAST SEVENTY-FIVE PERCENT (75%) OF THE VOTES CAST.

* * *

(B) Do you approve of the agreement concerning radioactive, chemical and biological materials concluded pursuant to section 314 of the compact of free association?

The gist of this is plain enough. Voters were told that the compact could not "take effect" unless at least 75 per cent of them answered question one (B) in the affirmative. Sufficient votes were not forthcoming; the proposition was defeated in its own terms.

An examination of the drafting history of the ballot is instructive. In October 1982 it was apparently the intention of the Palauan authorities that there be only one question in proposition one on the approval of the compact "and its subsidiary [separate d/] agreements including the agreement on radioactive, chemical and biological substances concluded pursuant to section 314 of the compact". This seems to be the import of the first paragraph of a letter dated 24 October 1982, from James D. Berg of the Office for Micronesian Status Negotiations to Lazarus Salii, Palau's Ambassador for Status Negotiations: a/

You have asked for our comment with respect to the addition of certain language to the positive and negative questions contained in proposition one of the compact of free association plebiscite ballot language agreed by you and Ambassador Zeder on 26 August 1982. The language in question reads:

"... and its subsidiary agreements including the agreement on radioactive, chemical and biological substances concluded pursuant to section 314 of the compact."

The Berg letter, which is attached, went on to record that:

You are aware of the position of the United States that if the plebiscite results in approval of the compact by less than 75 per cent of the ballots cast, the compact cannot come into effect until Palau, by a separate referendum, approves by more than 75 per cent a specific question which would remove any incompatibility between the compact including its section 314 separate agreement, and the Constitution of Palau.

The Republic of Palau Public Law No. 1-43 a/ adopted on 9 November 1982, introduced a two-part question for proposition one. Its first part asked for approval or disapproval of the compact; its second part asked about the agreement concluded pursuant to section 314. Section 6 (b) of the act provided:

/...

A majority of the votes cast is required to approve free Association as set forth in the compact of free association; a three fourth's majority of the votes cast is required to approve the agreement concerning radioactive, chemical and biological materials concluded pursuant to section 314 of the compact of free association.

The ballot language in 1-43 was unsatisfactory to the United States. A telephone conversation took place the day of its passage between Ambassador Fred Zeder of the Office for Micronesian Status Negotiations and Ambassador Salii. Following that conversation Ambassador Zeder sent his now infamous telegram of 11 November a/ which contained a new "Text of Agreed Ballot Language" apparently drafted by the United States. As Ambassador Zeder put it:

THE LANGUAGE WHICH I HAVE INCLUDED IN THE NEXT PARAGRAPH IS ACCEPTABLE TO T[HE] UNITED STATES BUT WOULD REQUIRE MINOR MODIFICATIONS OF THE LANGUAGE ACTUALLY INCLUDED IN THE OEK BILL. I UNDERSTAND, HOWEVER, THAT, UNDER THE PROVISIONS OF THE BILL, YOU CAN AGREE TO THE FOLLOWING BALLOT LANGUAGE ON BEHALF OF THE GOVERNMENT OF PALAU. I THEREFORE SEEK CONFIRMATION FROM YOU BY RETURN CABLE OF AGREEMENT TO THIS LANGUAGE BY THE GOVERNMENT OF PALAU. I UNDERSTAND THAT THE HIGH COMMISSIONER IS PREPARED TO ACT EXPEDITIOUSLY ON THE OEK LEGISLATION AS SOON AS OUR CONFIRMATION OF THE BALLOT LANGUAGE IS COMPLETE.

The "minor modifications" did two things: (a) they introduced the language of proposition one (B) concerning "restrictions and conditions on the United States" that the Supreme Court of Palau held in Koshiba v. Remeliik on 31 January 1983 a/ to be both misleading and unauthorized by Act 1-43; and (b) they included an instruction to precede (B) that read "Before the compact can take effect, question B must be approved by 75 per cent of the votes cast". Question B read: "Do you approve the agreement under section 314 of the compact which places restrictions and conditions on the United States with respect to radioactive chemical and biological materials?".

The United States' version was substantially that printed on the ballot prepared for the 11 January and 10 February plebiscite dates. The only noteworthy change was that the instruction concerning proposition one (B) became "Before the compact can take effect section 314 under question (B) below must also be approved by at least seventy-five percent (75%) of the votes cast".

None of the language was as precise as it might have been: (a) neither the instruction nor the proposition mentioned that it was the Palau Constitution that required submission of the question. Thus the uninformed voter did not necessarily know why it was that the compact could not "take effect" - because of something in the compact itself or something in the general law including the Palau Constitution; e/ (b) the instruction finally used said that: "Section 314 under question (B) below" must be approved by the 75 per cent majority. The question asked for approval of the agreement concluded pursuant to section 314. The draftsmanship is sloppy. Technically, both section 314 and the agreement (which is both a modification of the section and incorporates it by reference) required approval under the Constitution. One thing at least must have been clear to the voters - if question (B) failed to obtain 75 per cent of the votes, then the

compact could not "take effect". "Take effect" is not a term of art defined in the Constitution or any of the other documents. The voters must have understood it to mean that the compact package was defeated if less than 75 per cent of the votes were obtained. The United States, having acquiesced in, or perhaps even insisted upon, the way in which the issue was presented to the voters, is surely bound by the results. The voters were asked for a 75 per cent majority; they did not give it; section 314 and the agreement were defeated. The compact cannot take effect.

C. The agreement on radioactive chemical and biological substances

Article I of the radioactive agreement provides:

In accordance with article II, section 3, and article XIII, section 6, of the Constitution of the Republic of Palau, the Government of Palau shall seek approval of this agreement by not less than three fourths of the votes cast in a referendum in which this specific question shall be presented in conjunction with the plebiscite on the compact.

By the preamble and article II of the agreement, section 314 of the compact was to be "incorporated by reference into, and become a part of" the agreement.

The Government of Palau did just what it promised to do. It sought approval of the agreement in a referendum "in conjunction with" the plebiscite. It failed to obtain the necessary votes. The agreement incorporating section 314 was defeated. The compact cannot "take effect". We are driven back again to the terms of the Constitution and the ballot.

There is one curious sidelight on the radioactive agreement that may be worth recording. In a telephone conversation with me on 10 January 1983, Commander John Armstrong of the Office of Micronesian Status Negotiations made the (to me) surprising suggestion that "in conjunction with" as used by the parties in the radioactive agreement did not mean "at the same time as" or "simultaneously with". It was the Palau Government's ultimate wish that the two votes occur together, but that had not always been their position. From the United States' point of view, it did not matter when or how the constitutional problem was solved, as long as it was solved. f/ This is a remarkable construction of "in conjunction with", a phrase which surely carries some connotation of simultaneity in normal usage. The matter is moot at this point since the votes did occur together. It may raise some interesting questions later should a further attempt be made at a constitutional referendum without voting again on the compact as a whole.

D. Where do we go from here?

The United States has obligations under the Trusteeship Agreement. One of those obligations is to promote the progressive development of the Trust Territory towards self-government or independence. One of the manifestations of progress on this front is the Palau Constitution, the provisions of which the United States is well aware. If it is acting as a trustee, the United States must surely avoid

heavy-handed efforts to have the Constitution conform to what the United States wants. Indeed, efforts by the United States to have the Palau Constitution take another form in 1979 and 1980 were singularly unsuccessful - the voters overwhelmingly supported their nuclear free constitution.

It has been suggested to me that the approval by the voters of the compact apart from section 314 means that they have approved sections 311 and 312. Since these give the United States sufficient (nuclear) powers, the United States can simply go ahead and complete action on the compact.

This position is unsupportable. To the extent that these sections confer powers on the United States that contravene the Palau Constitution, it is simply unlawful under Palau law to enter into the compact. The Palau executive and legislature do not have the authority to do so. Indeed, the United States is well aware of the Palau Constitution; it stands in a fiduciary relationship to the Palauan people, and it can hardly go ahead and behave as though unconstitutional actions were lawful. Moreover, to suggest that the voters really approved sections 311 and 312 is to miss the point. Whether or not those sections were carved out for separate treatment the way the ballot was presented, they have no independent "severable" status. They stand or fall with section 314 and the radioactive agreement. In substance a defeat of section 314 and the radioactive agreement does not revive the generality of the other sections. It deprives them of force by driving the focus of attention back to the Constitution.

There is not much doubt that there is strong sentiment in Palau for some kind of free association but without the military implications currently contained in the radioactive agreement, section 314 of the compact and possibly the agreement regarding the military use and operating rights of the United States. I had the distinct impression two or three years ago that the United States' bottom line was "denial" plus transit and overflight rights for its nuclear powered and nuclear armed vessels. They negotiated for much more than this as part of the compact package. Has not the time come to negotiate another compact package which contains the United States' irreducible minimum and to present that to the voters? If the voters will not buy that, then both sides have to face up to independence. There are smaller Pacific mini-states than Palau that are surviving in the international community. There is nothing in the United Nations Charter which binds the people of the Trust Territory to permanent servitude to security interests as defined in Washington.

Notes

a/ The following attachments have been placed in the files of the Secretariat and are available to members of the Council for consultation:

1. Department of State press release No. 52 (revised) dated 23 February 1983;
2. Letter dated 24 October 1982 from Mr. James Berg, Office for Micronesian Status Negotiations, to Lazarus Salii, Ambassador for Status Negotiations and Trade Relations;

3. Telegram dated 11 November 1982 from Ambassador Fred Zeder, the President's Personal Representative for Micronesian Status Negotiations, to Ambassador Salii;
4. Telegram dated 12 November 1982 from Pedro Sanjuan, Assistant Secretary, Territorial and International Affairs, Department of the Interior, to Mrs. Janet McCoy, High Commissioner of the Trust Territory of the Pacific Islands;
5. Official Ballot, 10 February 1983;
6. Republic of Palau Public Law No. 1-43;
7. Judgement of the Supreme Court of Palau in Koshiba v. Remeliik, 31 January 1983.

Items 2 and 3 are part of the pleadings in Koshiba v. Remeliik in the Supreme Court of Palau. Item 4 was obtained by Roger S. Clark pursuant to the Freedom of Information Act.

b/ Hereinafter "radioactive agreement".

c/ There is nothing ambiguous about the language. Nor is the result absurd. I see no reason for applying any technique for documentary construction other than the plain meaning rule.

d/ The word suggested by the United States.

e/ My plea to the Trusteeship Council in December 1982, United Nations document T/PV.1541, to include a reference to the Constitution in this question fell on deaf ears.

f/ The Armstrong position is consistent with the way in which the United States view was formulated in the penultimate paragraph of the Berg letter of 24 October 1982 and with the wavering on the part of the Palau Government that evidently occurred. It merely involves butchering the language used by the parties.
