Wong v. Nakamura, 4 ROP Intrm. 331 (Tr. Div. 1994)

NANCY WONG and LUCIA TABELUAL
Plaintiffs,

v.

KUNIWO NAKAMURA, President of the Republic of Palau,
and ELECTION COMMISSION,
Defendants.

ISABELLA SUMANG, VALENTINA TMODRANG AND
JOHN DOES 1 THROUGH 1000 AND JANE DOES 1 THROUGH 1000,
Plaintiffs,

v.

REPUBLIC OF PALAU, Rep. by its President KUNIWO NAKAMURA,
and the UNITED STATES OF AMERICA in its capacity as the
Administering Authority of the Trust Territory of the Pacific Islands.
Defendants.

CIVIL ACTION NOS. 1-94, 2-94

Supreme Court, Trial Division
Republic of Palau

Decision and order
Decided: March 25, 1994

LARRY W. MILLER, Justice:

The complaints in these two matters each seek a judicial determination that, notwithstanding its apparent approval by the Palauan electorate in the plebiscite held on November 9, 1993, the Compact of Free Association between the Republic of Palau and the United States of America should not be implemented. With the consent of the parties at oral argument, the two cases are hereby ⊥332 consolidated for all future purposes.

Before the Court are defendant Republic of Palau's motion to dismiss the *Wong* complaint and all defendants' motions to dismiss, or for summary judgment on, the *Sumang* complaint.[1] Because briefing has not yet been completed on plaintiffs' motion to amend the

[1] Before going further, the Court notes, and hereby grants, the separate motion of the United States to be dismissed from the *Sumang* case. Without even reaching the jurisdictional arguments raised by the U.S. and unopposed by plaintiffs, the Court believes that dismissal is warranted for the simple reason that the *Sumang* complaint fails to request any relief against the U.S. independently and fails to request any relief against the Republic as to which the U.S. is a necessary party. It is therefore neither a necessary nor a proper party to that action.

Sumang complaint, the Court does not address that motion at this time.

I.

The *Wong* complaint, although containing four counts, makes essentially a single claim. According to the complaint, the Constitutional amendment enacted in November 1992, see *Gibbons v. Etpison*, Civil Appeal Nos. 19-92 & 4-93 (Oct. 29, 1993), was ineffective to lower the 75% approval threshold for approval of the Compact; therefore, the plebiscite held in November 1993, which garnered less than 75% of the vote, was insufficient to approve the Compact.

Defendants argue, and the Court is bound to agree, that this claim must fail in light of the express language of the Palau Constitution and the previous interpretation of that language by the Appellate Division of this Court. Article XV, Section 11, of ⊥333 the Constitution provides in pertinent part:

> "Any amendment to this Constitution proposed for the purpose of avoiding inconsistency with the Compact of Free Association shall require approval by a majority of the votes cast on that amendment and in not less than three-fourths (3/4) of the states."

In *Fritz v. Salii*, 1 ROP Intrm. 521 (1988), the Appellate Division found, among other things, that there was an inconsistency between the Compact and the Constitution within the meaning of Article XV, Section 11, and that approval of the Compact required either that the Compact "be conformed for compatibility [with the Constitution] or that the [Constitution] be amended by proper Constitutional process and according to the People's will." Id. at 541. That conclusion was a rejection of the argument made by plaintiffs there, and repeated in almost identical language by plaintiffs here, that "Article II, § 3 and Article XIII, § 6, of the Constitution provide the only means by which nuclear substances may be introduced into Palau, i.e., upon the achievement of a seventy five percent (75%) majority in a nationwide referendum." Id. at 529; see *Wong* Complaint ¶¶ 10-12.

In *Fritz*, the Court ultimately concluded that although Article XV, Section 11, of the Constitution allowed for its amendment, the amendment purportedly ratified in August 1987 had not been proposed in accordance with Article XIV, Section 1, and was therefore void. Id. at 545. Here, by contrast, the Appellate Division has already ruled in *Gibbons v. Etpison* that the amendment voted on in November 1992 was properly proposed and ratified.

⊥334 The only response by plaintiffs to defendants' motion to dismiss has been the suggestion in their opposing brief that "in cases of large public import, the Court's scrutiny of the record must be particularly exacting to insure there are no disputed issues of material fact." [2] Without questioning this principle or its applicability here, the Court can discern no basis on which to

[2] At oral argument, plaintiffs' counsel repeatedly assumed for the sake of another argument that the approval threshold had been lowered to 50%. Although he never expressly conceded the point, neither did he offer any reason why that assumption was not in fact the true state of affairs.

deny defendants' motion. Since it is clear under *Fritz* and *Gibbons* that the Constitution has now been "amended by proper Constitutional process and according to the People's will", the Court must give effect to that amendment and reject plaintiffs' contention that a 75% vote of approval was required for approval of the Compact. The *Wong* complaint is accordingly dismissed.

II.

The *Sumang* complaint, as initially filed, contained four claims. Plaintiffs' oral argument focused on the first of those claims, more or less conceding, although not formally withdrawing, the other three. The Court addresses each in turn.

A. Two-thirds Approval By The OEK

Plaintiffs' first claim, and the one on which they focused nearly sole attention at oral argument, asserts that "[t]he Compact has not been approved by not less than two-thirds (2/3s) vote of the members of each house of the Olbiil Era Kelulau pursuant to the applicable provision of the ROP Constitution." ⊥335 *Sumang* Complaint ¶ 9(a). Defendants respond to this claim by submitting evidence[3] of three separate occasions on which the Compact or related agreements have been approved by the OEK. Defendants assert that the Compact was approved by the requisite number of legislators in January 1986 and again in October 1986, and that certain subsidiary agreements were approved in June and July, 1993, as part of RPPL 4-9.

In reply, plaintiffs do not challenge defendants' arithmetic in any serious way,[4] but nevertheless raise two novel arguments as to why the votes relied on by defendants do not satisfy the Constitution.[5] First, plaintiffs argue that the votes taken in the OEK in 1986, when a 75% popular vote was required, are not now sufficient in light of the ultimate approval of the Compact, pursuant to constitutional amendment, by a simple majority of the ⊥336 people. Second, they argue that the 1986 votes are no longer valid in light of the subsequent votes -- prior to the November 1992 referendum and the November 1993 plebiscite -- which failed to obtain a 75% majority and thus did constitute approval of the Compact under the Constitution.

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[3] Defendants suggest that the Court can either take judicial notice of this information or can treat their motion as one for summary judgment. Since plaintiffs have suggested that summary judgment standards should apply, the Court adopts the latter alternative.

[4] Plaintiffs question the practice in both houses of the OEK to count abstentions as "Yes" votes. Whatever doubts might arise from that practice are satisfied in the Court's mind by the fact that it appears to be of long standing and there has been no suggestion that it was not well known by the legislators. Thus, whatever moral or political advantage may have been derived by abstaining, the Court has no doubt that every legislator who did so knew that his vote would be counted in favor of the Compact and thus fairly can be said to have approved it within the meaning of the Constitution.

[5] These arguments appear both in plaintiffs' hearing brief on the instant motions and in their proposed amended complaint. Whether these arguments are construed as an amended claim or simply as new arguments in favor of their existing claim, there is no dispute that they are properly before the Court.

Having given each of these contentions careful thought, the Court finds that neither is sustainable in the language of the Palau Constitution, in the comments of the framers of that Constitution, or in any source of constitutional interpretation. The Court will address each argument in turn, but first sets out the language of Article II, Section 3, which ultimately must govern:

> "Major governmental powers including but not limited to defense, 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."[6]

Plaintiffs' first argument relies on the observation that a legislator faced with the question of approving a Compact that requires 75% voter approval might have a different mindset from one who knows that the Compact needs only a majority of the popular vote to be approved. In the words of plaintiffs' counsel, a ⊥337 legislator in the former position (like those voting in 1986) might vote to approve the Compact even though personally opposed to it by asking himself, "If 75% of the electorate want this Compact, who am I to stand in their way?"

While it is possible that some legislator went through this mental calculus before casting his vote, the Court nevertheless finds nothing in the Constitution that would justify disregarding the 1986 votes on that account. Article II, Section 3, provides two distinct requirements for ratification of a treaty or compact -- approval by the OEK and approval by the people. The OEK having given its approval, plaintiffs' argument would require the Court to set it aside on the basis of what is, at best, speculation. Such speculation is surely impermissible; the Court is not entitled to look behind the approving votes of any legislator to discern the reasons therefor. If anything, the Court is required to presume that the votes taken in 1986 were cast with the full awareness that the OEK was thereby satisfying, without reservation, one of the two constitutional prerequisites for ratification of the Compact.[7]

Even were there any doubt on this score, the Court believes that the OEK's action in approving RPPL 4-9 during the Summer of 1993 satisfies any legitimate concern plaintiffs may have. Although it formally ratifies certain subsidiary agreements to the ⊥338 Compact negotiated

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[6] The Court quotes this provision as originally enacted; the last proviso has obviously been modified for Compact purposes by the constitutional amendment approved in 1992.

[7] Indeed, to have a complete picture of the OEK's mindset, one must also presume that the legislators cast their votes in full awareness of the constitutional mechanism for altering the popular vote requirement, see Article XV, Section 11, which those same legislators themselves attempted to invoke in August 1987, see *Frtiz*, 1 ROP Intrm. at 525, and which resulted ultimately in the amendment approved in 1992.

subsequent to 1986 rather than the Compact itself, see id. § 4, the stated intent of that legislation leaves no question that the OEK, knowing of the newly-adopted 50% vote requirement, see id. § 3(5)(b), approved of the Compact:

> "It is the intent and purpose of this Act to provide for fulfillment of all requisite steps and actions required of the Government of the Republic of Palau in order for the Compact of Free Association between the Republic of Palau and the United States of America to take effect." Id. § 2.

Indeed, without the passage of RPPL 4-9, the November 1993 plebiscite garnering the requisite voter approval would not have taken place. To require yet another OEK vote on the matter would elevate form over substance in a manner wholly uncalled for by the Constitution.

Plaintiffs' second argument -- to the effect that the Compact was required to be re-approved by the OEK following each unsuccessful referendum -- fares no better. No such requirement is evident from the text of Article II, Section 3, nor in the reports of the framers who drafted it. See Standing Committee Report Nos. 25, 65, 80; see also Nos. 29, 67, 90. Again, as defendants argue, the language of that provision simply creates two distinct requirements for approval of the Compact; when both have been satisfied, the Compact is ratified.

Moreover, any attempt to read into Article II, Section 3, an intent that the disapproval of the Compact by referendum should invalidate its prior approval by the OEK is negated by comparison with Article XIV, relating to the constitutional amendment process. Article XIV, Section 1, sets forth the three ways in which a ⊥339 constitutional amendment may be proposed. Article XIV, Section 2, then provides:

> "A proposed amendment to this Constitution shall become effective when approved in the next regular general election by a majority of the votes cast on that amendment and in not less than three-fourths (3/4) of the states."

The clear import of this provision, albeit by negative implication, is that a proposed constitutional amendment that is not approved "in the next general election" following its proposal shall not become effective. Thus, in designing the constitutional amendment process, the framers created a scheme where rejection by voters would terminate the process, and where reconsideration of any amendment would require that it be proposed again in accordance with Article XIV, Section 1. This design stands in marked contrast to Article II, Section 3, which requires voter approval in "a nationwide referendum" on an unspecified date, and which contains neither an express nor an implicit direction that the failure of one referendum should start the Compact approval process anew. Where the framers have shown an intention to impose such restrictions in one constitutional provision, the Court should be extremely hesitant to read such restrictions into another when no such intention is evident.

In an attempt to be exhaustive as possible in considering plaintiffs' claim, the Court also looked to guidance to United States law. The closest analogy the Court could find was the question whether the failure of a state legislature to ratify a proposed constitutional amendment

(and instead to vote it down) ⊥340 bars it from thereafter voting in favor of the amendment.[8] There is no conclusive answer to this question, but the history is not helpful to plaintiffs' argument. In *Coleman v. Miller*, 307 U.S. 433, 59 S.Ct. 972 (1939), the Supreme Court held that this was a "political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment." 307 U.S. at 450, 59 S.Ct. at 980. It noted, however, that in declaring the Fourteenth Amendment to the Constitution to have been enacted, Congress counted toward the requisite three-fourths at least two states which had first rejected and then ratified it. Id. at 448-50, 59 S.Ct. at 979-80. It also found that it had no power in the case before it to forbid state officers from certifying a ratification of the amendment in question to the U.S. Secretary of State on the ground that it had been previously been rejected, noting in doing so that "Article V, speaking solely of ratification, contains no provision as to rejection." Id. at 450, ⊥341 59 S.Ct. at 980.[9] The same is true, of course, of Article II, Section 3.

Plaintiffs argue finally that to reject their argument would be to find that the votes of the people have no meaning. With respect, the Court must disagree. From the vantage point of the Court's relatively recent arrival in Palau, the history of the Republic thus far is one in which the people have been of paramount importance. Far from being meaningless, the votes that have failed to approve the Compact have ensured that, despite the generally consistent intentions of Palau's Presidents and legislators in favor of the Compact, it has not yet become effective. That the Compact now stands on the verge of implementation has come about only because the people of Palau proposed by constitutional initiative and then freely voted upon the constitutional amendment approved in November 1992, and then voted and finally approved the Compact in November 1993.

For all of these reasons, the Court believes that defendants' motion for summary judgment on this claim should be granted.

⊥342 B. Coercion

Plaintiffs contend next that the "approval of the Compact was procured by coercion in violation of the right of self- determination as provided for in the Charter of the United Nations, the Trusteeship Agreement, international law and custom and laws applicable to Palau". *Sumang* Complaint ¶ 9(b). In assessing this claim, it is important first to note the nature of the coercion alleged. Plaintiffs do not contend that they or others have been coerced by "force, violence, or

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[8] Under Article V of the United States Constitution, an amendment approved by a two-thirds vote in both houses of Congress must be ratified by at least three-fourths of the states.

[9] It should be noted that at least one state court had decided the question the other way, finding that a prior rejection barred subsequent ratification and that the rejection of a proposed amendment by more than a quarter of the states would render it a dead letter. See *Chandler v. Wise*, 108 S.W.2d 1024 (Ky. 1937), discussed in 16 Am. Jur. 2d, Constitutional Law § 22 at 335. Although the Supreme Court granted certiorari to review that decision, it dismissed the case on the same day it decided *Coleman*, finding that because the ratification had already been certified, there was no longer any justiciable controversy to be decided. *Chandler v. Wise*, 307 U.S. 474, 59 S.Ct. 992 (1939).

intimidation", see generally 26 Am. Jur. 2d, Elections § 286, but rather assert that coercion flows from the fact that the Compact has been repeatedly put forward for vote and, until now, repeatedly rejected. Defendants contend that this claim is both factually and legally deficient.

As a factual matter, although plaintiffs suggested that defendants' motion should be treated as one for summary judgment, they proffered no evidence that a single voter had voted for the Compact as a result of the alleged coercion, and plaintiffs' counsel freely and forthrightly conceded at oral argument that he did not believe that plaintiffs' claim in this regard could be proven. Nor is there any reason to presume that such coercion exists. As plaintiffs noted at oral argument, the Compact has always received a majority, but less than 75%, of the vote; its approval last year turned not on an increase in "yes" votes (in fact, the percentage voting in favor was less than in some of the previous plebiscites) but on the 1992 amendment to the Constitution. Thus, although the result was different, there is ⊥343 no basis for the Court to infer that any voter changed his vote, much less that he or she did so as a result of coercion.

Given the factual deficiency of plaintiffs' claim, the Court need not address at any length the thorny legal questions concerning plaintiffs' standing to invoke the United Nation Charter and other sources of international law as a basis for relief. Some note should be taken, however, of a law review article authored by the Republic's counsel prior to his assuming his current position and submitted to the Court by plaintiffs. See J. Hinck, The Republic of Palau and the United States: Self-Determination Becomes the Price of Free Association, 75 Cal. L. Rev. 915 (1990). That article argues that "even if the Compact [were to be] approved according to Palau's Constitutional processes, the agreement would be void or voidable under the international law of treaties." Id. at 917; see id. at 959-70. Although one of Mr. Hinck's arguments in that regard is based on a claim of coercion, the coercion to which he makes reference is not coercion of votes, but economic coercion -- that the economic dependence of Palau on the United States left it in a position of unequal bargaining power in its negotiations with the United States. See id. at 962-67. Whatever the merits of that argument, it is clear that it is one for Palau as a nation, and not the individual plaintiffs, to make and is accordingly not before the Court. See generally , Restatement (3d) of the Foreign Relations Law of the United States , § 331 (listing the grounds a state may invoke to invalidate an international agreement); id., Comment a (explaining that "[o]nly states, not ⊥344 individuals, may invoke these grounds").

C. Lack of a Favorable Response

Plaintiffs' third claim relates to the issue of whether the May 6, 1993, letter from U.S. Secretary of State Warren Christopher constituted a "favorable response" within the meaning of RPPL 3-76. See *Sumang* Complaint ¶ 9(c). Defendants argue that this claim raises a political question not justiciable by this Court, pointing out that two other courts have reached that very conclusion. See *Fritz v. Republic of Palau* , Civil Action No. 481-93 (Tr. Div. Nov. 2, 1993); *Fritz v. United States* , Civil Action No. 93-00024 (D.N.M.I. Feb. 25, 1994). While questioning the wisdom of Palau's legislature in relying on the Christopher letter, plaintiffs' counsel conceded at oral argument that this claim was non-justiciable.

Without belaboring the issue, in the Court's view, the question whether or not the

Christopher letter constituted a "favorable response" was a political question in the most literal sense in that it was one that every Palauan voter could decide and act upon as he or she thought best. Notwithstanding the expressed views of the OEK and the President, no Palauan entering the voting booth was required to accept them; each could decide on his or her own whether the Christopher letter was a favorable response and, more to the point, whether the Compact should be approved or voted down. The voters having spoken, it is all the more inappropriate ⊥345 that the Court should now re-visit the issue.[10]

D. Constitutionality of Eminent Domain Provisions

Plaintiffs contend finally that "[t]he provisions in the Compact regarding the taking of land by Defendant United States of America for military purposes violates Article XIII, Section 7 of the ROP Constitution." *Sumang* Complaint ¶ 9(d). As defendants point out, this claim has previously been put before the Appellate Division which concluded that

> "the Compact's defense site provisions are not unconstitutional on their face and . . . the question of whether any particular proposed action of the government would be constitutional is not ripe for decision." *Gibbons v. Salii*, 1 ROP Intrm. 333, 356 (1986).

Defendants argue, and the plaintiffs essentially agreed at oral argument, that the same conclusion is appropriate here. The Court is bound by the *Gibbons* court's determination of facial validity and, given that the Compact has not yet been implemented and no actual taking of land proposed, by its ripeness determination. Accordingly, plaintiffs' claim in this regard must also be dismissed.

CONCLUSION

For the reasons set forth above, the Court has determined that each of the claims set forth in the *Wong* and *Sumang* complaints as ⊥346 originally filed should be dismissed. The Court will rule separately, when briefing is completed, on plaintiffs' motion to amend the *Sumang* complaint to assert additional claims. As stated at oral argument, notwithstanding the pendency of that motion, plaintiffs should not delay the gathering of evidence that they believe may be relevant to those claims in the event they are allowed to go forward.

SO ORDERED.

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[10] Part of the language of plaintiffs' claim asserts that because of the asserted ineffectual nature of the Christopher letter, "[t]he Compact was procured through the corruption of Defendant Republic of Palau's representatives". *Sumang Complaint* ¶ 9(c). This language mirrors another asserted basis for voiding the Compact set forth in Mr. Hinck's article. See id. at 967-70. Again, however, any claim that the Christopher letter wrongfully induced Palau's entry into the Compact is one that may be asserted, if at all, only by the Republic itself. See p. 13 supra.