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The Republic of Palau and the United States: Self-Determination Becomes the Price of Free Association

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United States conduct toward the island territories of the Pacific has been replete with broken promises and self-dealing. On the island of Palau, the evolution toward sovereignty has stalled because the United States refuses to concede defeat on the provisions of the Palau Constitution that outlaw nuclear power, nuclear weaponry, and a foreign power's exercise of eminent domain in Palau. The United States has refused to continue negotiations on the Compact of Free Association, arguing that validating those provisions jeopardizes U.S. security interests in Palau to an intolerable degree. In this Comment, the author argues that U.S. intransigence in regard to the Compact violates multiple provisions of international law. The author argues that the United States has violated both the Trusteeship Agreement and the Palauans' right of self-determination under customary international law. Furthermore, even if the Compact is now approved according to Palau's constitutional processes, the author argues that the agreement would be invalid under the international law of treaties.

INTRODUCTION

On February 6, 1990, the citizens of Palau, an island chain in the western Pacific, voted for the seventh time in a decade on whether to approve an agreement with the United States known as the Compact of Free Association.[1] Under the Palauan Constitution, three-quarters of the electorate must approve the agreement in order for it to become effective.[2] The Compact requires 75% voter approval because it contains U.S.-imposed restrictions that would supersede certain provisions of the

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1. Compact of Free Association, Jan. 10, 1986, United States-Palau, 100 Stat. 3672 (codified as amended at 48 U.S.C. § 1681 (1988)) [hereinafter Compact of Free Ass'n].

2. *See* REPUB. OF PALAU CONST. art. II, § 3, *reprinted in* CONSTITUTIONS OF DEPENDENCIES AND SPECIAL SOVEREIGNTIES 5 (A. Blaustein & P. Blaustein eds. 1988).

Palauan Constitution adopted overwhelmingly in 1980.[3] Those provisions effectively bar nuclear weapons, power, and waste,[4] and prohibit the government from exercising its power of eminent domain for the benefit of foreign entities.[5] The Compact vote in the February 1990 plebiscite, as in six prior votes, exceeded a simple majority but fell short of the required 75%.[6]

Adopting the Constitution, which became known as the world's first nuclear-free constitution,[7] was to be one of the last steps taken before Palau gained its sovereignty for the first time in 400 years.[8] To complete the process, Palau must enter into an agreement with the United States, which is the administering authority under a 1947 trusteeship agreement with the United Nations.[9] The United States, however, has refused to negotiate any change in its relationship with Palau that would restrict the transit of U.S. nuclear-powered vessels or threaten the status of U.S. military bases. The United States has refused to negotiate on these points, claiming that they jeopardize its security interests. From the inception of the U.N. trusteeship, the United States has expressed its strategic interest in the islands.[10] In fact, the Trusteeship Agreement between the United States and the U.N. Security Council recognized and affirmed a strategic U.S. role in the "maintenance of international peace and security" in the Pacific.[11]

The same agreement obligated the United States to promote Palau's economic self-sufficiency and political development "toward self-government or independence" in accordance with the "freely expressed wishes of the people concerned."[12] In addition, the United States pledged to uphold the U.N. Charter, which unequivocally states that the interests of the inhabitants of non-self-governing territories are "paramount," and which provides that promoting their well-being is "a sacred trust."[13]

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3. *See infra* text accompanying notes 58-82.

4. *See* REPUB. OF PALAU CONST. art. II, § 3, art. XIII, § 6; *see also infra* note 125 (Palau trial court justice concluding that Palau Constitution effectively makes Palau nuclear-free).

5. REPUB. OF PALAU CONST. art. XIII, § 7.

6. L.A. Times, Feb. 11, 1990, at A10, col. 3.

7. *See, e.g., Palau Approves Nuclear Free Zone Constitution,* Associated Press, July 17, 1980 (LEXIS, Nexis library, AP file).

8. For a summary of Micronesia's colonial history, see Hirayasu, *The Process of Self-Determination and Micronesia's Future Political Status Under International Law,* 9 U. HAW. L. REV. 487, 488-91 (1987).

9. *See* Trusteeship Agreement for the Former Japanese Mandated Islands, Apr. 2-July 18, 1947, United States-U.N. Security Council, art. 2, 61 Stat. 3301, T.I.A.S. No. 1665 [hereinafter Trusteeship Agreement].

10. *See, e.g.,* 2 U.N. SCOR (113th mtg.) at 410 (1947) (statement of Warren R. Austin, U.S. Rep. to the United Nations).

11. Trusteeship Agreement, *supra* note 9, art. 5.

12. *Id.* art. 6.

13. *See* U.N. CHARTER art. 73, para. 1. Commentators have struggled for years to reach a workable formula to describe the administering authority's mission under the oxymoronic "strategic

A divergence of interests between Palauans and U.S. military planners was therefore foreseeable, if not inevitable. The Palauans wanted their promised sovereignty; the United States wanted to protect its strategic interests. Not surprisingly, the first rift appeared during the drafting of Palau's Constitution in the late 1970s.[14] Although the subsequently negotiated Compact has evolved over the ensuing decade, the conflict between the Palau Constitution and the Compact with the United States remains intractable so long as the Compact fails to gain 75% approval from Palau's voters.

Consequently, Palau's political situation remains essentially as it was in 1947 when the United Nations created the Trust Territory of the Pacific. The United States retains authority to engage in foreign relations on Palau's behalf, and even to run the Republic's domestic affairs. Although Palau today is largely internally self-governing, four decades after the United States pledged to promote Palau's political development, Palauans are still denied their sovereignty and the trusteeship continues.[15]

This Comment explores Palau's agonizing and so far futile efforts to terminate the trusteeship and enter into a mutually acceptable agreement with the United States to end the prolonged era of trusteeship. The Comment argues that the United States has violated both the Trusteeship Agreement and the Palauans' right of self-determination under customary international law. Moreover, the Comment asserts that even if the Compact in its present form is now approved according to Palau's constitutional processes, the agreement would be void or voidable under the international law of treaties.

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trust." In 1949, a writer described it as a "somewhat bastard and contradictory" concept. *See* A. MCDONALD, TRUSTEESHIP IN THE PACIFIC 54 (1949). Professor Prince, in one of the most recent articles on the trust territory, struggled to harmonize the strategic trusteeship's dual purposes: "[D]espite the undeniable primacy accorded to its security concerns, the United States ultimately made a binding commitment to make advancement of the Micronesian peoples the basic or paramount objective of the Trust Territory." Prince, *The United States, the United Nations, and Micronesia: Questions of Procedure, Substance and Faith*, 11 MICH. J. INT'L L. 11, 23 (1989).

14. *See* STAFF OF HOUSE COMM. ON FOREIGN AFFAIRS, 96TH CONG, 1ST SESS., MICRONESIAN POLITICAL STATUS NEGOTIATIONS: REPORT OF A STAFF STUDY MISSION TO MICRONESIA, NOVEMBER 4 TO DECEMBER 1, 1978, at 7, 12 (Comm. Print 1979) (early drafts of the Constitution of the Federated States of Micronesia, successfully opposed by the United States, included a ban on testing and storage of nuclear material).

15. The failure to agree on the future political status of Palau is apparently frustrating for both the United States and Palau. *Compare, e.g.*, 134 CONG. REC. H9763 (daily ed. Oct. 6, 1988) (statement of Hon. Ron de Lugo, Delegate to Congress from the Virgin Islands) [hereinafter Statement of De Lugo] (U.S. interests in the Compact include "ending the embarrassment of the U.S. being the last trust administrator") *with* Position Statement on the Future Political Status of Palau, signed by Hon. Ngiratkel Etpison, President of the Republic of Palau, and by presiding officers of Palau's legislative body, the Olbiil Era Kelulau (OEK) (Jan. 13, 1989) ("present status as the last Trust Territory smacks of a quasi-colonial status which is degrading to Palauan people and unworthy of America").

Part I summarizes the history of the U.S. administration of the Trust Territory of the Pacific, giving particular attention to the negotiations between the United States and Palau, the plebiscites that resulted in the adoption of the Palauan Constitution, and the repeated rejections of the Compact of Free Association. Part II examines U.S. obligations under the Trusteeship Agreement with the U.N. Security Council and concludes that the United States has violated that agreement. Part III then discusses the nature of additional U.S. obligations under customary international law and concludes that the United States violated the Palauans' right of self-determination by undermining freely chosen constitutional provisions to protect Palau's environment and restrict foreign military activities in Palau.[16] Finally, Part IV examines the validity of the Compact under the international law of treaties and concludes that it could be void or voidable even if now adopted pursuant to constitutional processes.

I
BACKGROUND

A. U.S. Strategic Interests in Palau

Palau is a group of 8 principal and 252 smaller islands located 600 miles east of the Philippines and 4,450 miles southwest of Hawaii.[17]

16. This Comment does not attempt to analyze the international legal significance of nuclear weapons in the Palau controversy. The status of nuclear weapons under international law is itself a subject of significant debate. If nuclear weaponry is itself illegal, or its possession and use restricted under international law, an additional challenge could be made to the U.S. stance in Palau, where self-determination has been essentially conditioned on Palau's participation in the deployment of these weapons.

Significantly, the majority of commentators agree that international law limits the use of nuclear weapons. *See* Rosas, *International Law and the Use of Nuclear Weapons,* in ESSAYS IN HONOUR OF ERIK CASTREN 73, 77-78 (1979) (summarizing the main views on the legality of nuclear weapons under international law); *see also* Brownlie, *Some Legal Aspects of the Use of Nuclear Weapons,* 14 INT'L & COMP. L.Q. 437, 441-44 (1965) (nuclear weapons are prohibited by Geneva Gas Protocol because they qualify under provisions banning genocide and the use of poisonous and asphyxiating gas, and because targeting and casualties are inherently indiscriminate); Castren, *The Illegality of Nuclear Weapons,* 1971 U. TOL. L. REV. 89, 98 (prohibition against nuclear weapons is absolute, except perhaps where enemy uses nuclear weapons); Fried, *International Law Prohibits the First Use of Nuclear Weapons,* 16 REVUE BELGE DE DROIT INTERNATIONAL 33, 34 (1981) (while no treaty specifically forbids it, a first nuclear strike is prohibited by the "letter and spirit" of existing treaties); Meyrowitz, *Les Juristes Devant l'Arme Nucléaire,* 67 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 820, 846-47 (1963) (use of nuclear weapons illegal because of the inevitability of "unnecessary suffering").

A few international lawyers go further and conclude that nuclear weapons are inherently illegal. *See, e.g.,* Corwin, *The Legality of Nuclear Arms Under International Law,* 5 DICK. J. INT'L L. 271 (1987) (concluding that any use of nuclear weapons violates international law); Falk, Meyrowitz & Sanderson, *Nuclear Weapons and International Law,* 20 INDIAN J. INT'L L. 541, 578 (1980) (concluding that "global 'survivability' is so elemental to the international law of war that a prohibition on the use of nuclear weapons can be reasonably inferred").

17. THE FAR EAST AND AUSTRALASIA 1990, at 787 (Europa Pub. Ltd. 21st ed. 1990).

Palau and the Federated States of Micronesia form the archipelago of the Caroline Islands,[18] part of the Pacific region known as Micronesia, an expanse of ocean the size of the continental United States and dotted with 2,100 islands.[19]

Control over Micronesia essentially allows the United States to control the western Pacific.[20] Since World War II, the greatest concern has been the threat of Soviet expansion in the region.[21] Therefore, the primary strategic interest in controlling Micronesia is to deny hostile powers access to the region,[22] and Palau's location makes it an important part of U.S. military strategy.

Palau's strategic value also stems from its location in the far western Pacific near major shipping routes.[23] Moreover, Palau offers the best potential site for new U.S. bases if any such facilities are ever desired.[24] In this regard, Palau is often mentioned as a likely "fall-back position" if the United States is ever displaced from its two large military bases in the Philippines.[25]

B. Establishment of Trusteeship

Much of Micronesia, including Palau, was a major battle field dur-

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18. *Id.*

19. *Report of the United Nations Visiting Mission to the Trust Territory of the Pacific Islands, 1982,* 50 U.N. TCOR Supp. (No. 2) at 2, U.N. Doc. T/1850 (1983).

20. D. NEVIN, THE AMERICAN TOUCH IN MICRONESIA 70 (1977).

21. *See, e.g., Developments Regarding the Compact of Free Association Between the United States and Palau: Hearings on H.R.J. Res. 479 Before the Subcomms. on Human Rights and International Organizations, and on Asian and Pacific Affairs of the House Comm. on Foreign Affairs,* 100th Cong., 2d Sess. 60 (1988) [hereinafter *Hearings on H.R.J. Res. 479, Compact of Free Association*] (statement of Karl D. Jackson, Deputy Ass't Sec'y of Defense) (United States "should expect a long and multi-faceted competition with the Soviet Union throughout the Pacific"). The extent to which warming U.S.-Soviet relations may affect the Pacific region is unknown. Nonetheless, as the Iraq-Kuwait situation demonstrates, the end of the perceived Soviet threat does not mean the end of perceived threats from other quarters.

22. H. NUFER, MICRONESIA UNDER AMERICAN RULE 100 (1978).

23. *See Hearings on H.R.J. Res. 479, Compact of Free Association, supra* note 21, at 61 (statement of Karl D. Jackson).

24. *See id.*

25. *See, e.g., id.* at 64; H. NUFER, *supra* note 22, at 100-01. The possibility of a U.S. pullout from the Philippines has been increasing over time. In June, the U.S. Peace Corps announced it would withdraw its 261 volunteers from the Philippines because of perceived threats to their safety. United Press International, Jnne 30, 1990 (LEXIS, Nexis library, UPI file). Philippine officials suggested that this U.S. move might negatively affect forthcoming negotiations on the future of U.S. military bases there. *See id.; see also* B. ALDRIDGE & C. MYERS, RESISTING THE SERPENT: PALAU'S STRUGGLE FOR SELF-DETERMINATION 23-33 (1990) (examining Palau's military potential in some depth, and coneluding that Palau is the most logical location for a forward base for Trident submarines); *Compact of Free Association: Hearing Before the Subcomm. on Public Lands and National Parks of the House Comm. on Interior and Insular Affairs,* 98th Cong., 2d Sess. 178-81 (1984) [hereinafter *Compact Interior & Insular Affairs Subcomm. Hearing*] (analysis of potential unique strategic advantages offered by Palau).

ing World War II.[26] During the war, the United States seized all islands previously under Japanese control, incurring high civilian and troop casualties. Given the high cost of liberating Micronesia and given its strategic location, some inside the U.S. government called for the outright annexation of the islands in the interest of national security.[27]

In 1946, President Truman rejected calls for annexation of Micronesia and instead placed the islands under the newly formed United Nations trusteeship system.[28] This system, provided by chapter XII of the newly drafted U.N. Charter,[29] replaced the old mandate system for administration and supervision of non-self-governing territories.[30] Under the Charter, the trusteeship system would arrange supervision for formerly mandated territories, territories detached from the nations defeated in World War II, and other territories voluntarily included by states exercising sovereignty over them.[31]

Truman's decision included a condition that the islands liberated from Japan be designated a "strategic trust," with the United States as the administering authority.[32] Consequently, the United Nations agreed to a separate designation for strategic trusts.[33] The strategic trust would be formed under an agreement between the administering authority and the Security Council, rather than the General Assembly. This arrangement offered two advantages to the United States. As a permanent member of the Security Council, the United States would be guaranteed a veto over any contemplated actions. In addition, the United States gained the authority to make fortifications within Micronesia to contribute to the "maintenance of international peace and security."[34]

The United Nations Security Council approved the Trusteeship

26. D. NEVIN, *supra* note 20, at 67-70.

27. THE PRIVATE PAPERS OF SENATOR VANDENBERG 169 (A. Vandenberg ed. 1952); *see also* 93 CONG. REC. 87-33 (1947) (statement of Cong. Mansfield) ("I would prefer to have the United States assume complete and undisputed control of the mandates. We need these islands for our future defense, and they should be fortified wherever we deem it necessary. We have no concealed motives because we want these islands for one purpose only and that is national security. Economically they will be a liability . . . .").

28. *Draft Trusteeship Agreement for the Japanese Mandated Islands,* 2 U.N. SCOR Supp. (No. 8) (Annex 17) at 70, U.N. Doc. S/281 (1947).

29. *See generally* U.N. CHARTER arts. 75-85 (providing for establishment of international trusteeship system).

30. Haas, *The Attempt to Terminate Colonialism: Acceptance of the United Nations Trusteeship System,* 7 INT'L ORG. 1, 10-14 (1953).

31. U.N. CHARTER art. 77.

32. *See* 2 U.N. SCOR (113th mtg.) at 410 (1947) (statement of Warren R. Austin, U.S. Rep. to the United Nations).

33. Bunche, *Trusteeship and Non-Self-Governing Territories in the Charter of the United Nations,* 13 DEP'T ST. BULL. 1039 (1945). Articles 82 and 83 of the U.N. Charter govern strategic trusts. For a discussion of the extent and limits of the administering authority's military power within a strategic trust, see *infra* text accompanying notes 162-68.

34. Trusteeship Agreement, *supra* note 9, art. 5.

Agreement for the Former Japanese Mandated Islands on April 2, 1947,[35] and the agreement entered into force on July 18, 1947.[36] U.S. administration of the trust territories commenced the same day, under provisions of an executive order placing all responsibilities, on an interim basis, in the hands of the Navy Department.[37] In 1951, administration of the trust territories shifted from the Navy to the Interior Department.[38]

The United Nations created a total of eleven trusteeships,[39] including one strategic trust, the U.S.-administered Trust Territory of the Pacific.[40] The United Nations agreed to the termination of ten of the trusteeships, allowing each of those territories to become an independent state or part of an independent state formed by the merger of formerly dependent territories.[41] Today, Micronesians are the only people still under trusteeship.

C. U.S. Administration of the Trust Territory of the Pacific

During the early years of the trusteeship, political and economic development progressed slowly in the Trust Territory.[42] In the 1960s, however, the Micronesians began to take steps toward self-determination. The Congress of Micronesia, a legislature of the entire trust territory, first convened on the initiative of the Micronesians on July 12, 1965.[43] In 1966, that Congress petitioned U.S. President Johnson to establish a commission to promote Micronesian political development

35. S.C. Res. 21, 2 U.N. SCOR Resolutions & Decisions at 16, U.N. Doc. INF/2/REV.1 (II).

36. 8 U.N.T.S. 189, 190 n.1 (1947) (codifying the Trusteeship Agreement).

37. Exec. Order No. 9875, 12 C.F.R. 4837 (1947).

38. Exec. Order No. 10265, 16 C.F.R. 6419 (1951), *superseded by* Exec. Order No. 11,021, 27 C.F.R. 4409 (1962), *reprinted at* 48 U.S.C. § 1681 note (1988) (administration of the Northern Marianas returned to the Navy Department until 1961, when the Department of Interior again assumed control over the entire Trust Territory).

39. These eleven trusteeships and their administrators were: Nauru and New Guinea (Australia); Ruanda-Urundi (Belgium); Cameroons and Togoland (France); Somaliland (Italy); Western Samoa (New Zealand); Cameroons, Tanganyika, and Togoland (Great Britain); and the Trust Territory of the Pacific Islands (United States). *See* Clark, *Self-Determination and Free Association—Should the United Nations Terminate the Pacific Islands Trust?,* 21 HARV. INT'L L.J. 1, 2 & n.1 (Winter 1980).

40. The Trust Territory of the Pacific Islands included all the islands in Micronesia which were formerly under Japanese mandate. Micronesia comprises three extended archipelagos: the Northern Mariana Islands, the Marshall Islands, and the Caroline Islands—the latter including the smaller groupings of Palau, Yap, Truk, Ponape, and Kosrae. Some islands geographically within Micronesia were not under Japanese control and were not included in the Trust Territory. These include Guam, an American territory since 1898, Kiribati, which came under British control in 1892 and is now independent, and Nauru, originally under Australian administration and now also independent. *See* J. PEOPLES, ISLANDS IN TRUST: CULTURE CHANGE AND DEPENDENCE IN MICRONESIAN ECONOMY 7-9 (1985).

41. Clark, *supra* note 39, at 2 & nn.3-5.

42. *See* D. MCHENRY, MICRONESIA: TRUST BETRAYED 12 (1975).

43. *Id.* at 88.

toward self-determination.[44] Facing U.S. government inaction on the petition, the Congress of Micronesia unilaterally established the Micronesian Political Status Commission in 1967.[45]

The Commission's final report established four principles to guide future status negotiations: (1) sovereignty should rest in the Micronesian people and their duly constituted government or governments; (2) Micronesians have the right of self-determination and may, therefore, choose independence or self-government in free association with any nation or organization of nations; (3) Micronesians have the right to adopt their own constitution and amend, change, or revoke any constitution at any time; and (4) free association should take the form of a revocable compact, unilaterally terminable by either party.[46]

Progress toward self-determination was slow. Negotiations with the U.S. government began in September of 1969.[47] During the first formal negotiations in Washington, D.C., the Micronesian Political Status Commission rejected a U.S. government proposal that the islands become a U.S. territory under article IV of the U.S. Constitution.[48] The Micronesians wanted more internal autonomy and were particularly concerned about the prospect of the United States' retaining the power of eminent domain.[49]

In the ensuing five years, the Trust Territory of the Pacific fragmented into four separate political entities: the Commonwealth of the Northern Marianas, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau.[50] As a result, in 1975, the United States began negotiating separately with each of the political entities. Almost immediately, the Northern Mariana Islands acceded to Commonwealth status, which was the option encouraged by the United States.[51] The Northern Marianas covenant provided for self-government "in political union and under the sovereiguty of" the United States.[52]

In 1975, the rest of the Trust Territories held a constitutional con-

44. *Id.*

45. *Id.* at 89. Palauan Senator Lazarus Salii chaired the Commission.

46. Armstrong, *The Emergence of the Micronesians Into the International Community: A Study of the Creation of a New International Entity,* 5 BROOKLYN J. INT'L L. 207, 215 & n.27 (1979).

47. *See id.* at 215.

48. *Id.*; *see* U.S. CONST. art. IV, § 3, cl. 2.

49. *See* Armstrong, *supra* note 46, at 215.

50. *See id.* at 221; *see also* Compact of Free Association, June 25, 1983, United States-Marshall Islands; United States-Federated States of Micronesia, 99 Stat. 1800 (U.S. approval codified at 48 U.S.C. § 1681 note (1988)).

51. H. NUFER, *supra* note 22, at 85-95. For a discussion of the negotiations of the Covenant, see Leibowitz, *The Marianas Covenant Negotiations,* 4 FORDHAM INT'L L.J. 19 (1980).

52. The Covenant to Establish a Commonwealth of the Northern Marianas in Political Union With the United States, Feb. 15, 1975, United States-Northern Mariana Islands, 90 Stat. 263 (U.S. approval codified at 48 U.S.C. § 1681 note (1988)).

vention.[53] However, a divergence in views subsequently developed among the remaining three island groups.[54] The four central districts of the Caroline Archipelago—Yap, Ponape, Truk, and Kosrae—adopted the Constitution of the Federated States of Micronesia,[55] but voters in both Palau and the Marshall Islands rejected it.[56] The Marshall Islands later approved its own constitution in March 1979.[57]

D. The Palauan Constitution

Palau faced difficulties in drafting a constitution acceptable to the United States. Trouble between Palau and the administering authority arose when Palau's constitutional convention, known as the "ConCon," adopted several provisions opposed by the United States.[58] The United States found two provisions particularly objectionable: the first barred the use of the eminent domain power to benefit foreign entities, and the second required the approval of three-quarters of the electorate to enter into any agreement allowing the introduction of hazardous substances, including nuclear weapons, into Palau.[59]

The first provision, article XIII, section 7 of the Palau Constitution, establishes that the national government "shall have the power to take

53. *See* Armstrong, *supra* note 46, at 221. In April 1978, the U.S. and Micronesian negotiators meeting in Hilo, Hawaii signed a "Statement of Agreed Principles For Free Association" to guide negotiations. These "Hilo Principles" are reprinted as an Annex to the Armstrong article. *See id.* at 260.

54. *Id.* at 221-25; *see also Report of the Trusteeship Council of the Security Council on the Trust Territory of the Pacific Islands, 24 June 1977 - 8 June 1978,* 37 U.N. SCOR Supp. (No. 1) at 73, U.N. Doc. S/12971 (1979). In 1976, Palau voted 88.5% in support of independence from the other Trust Territory entities, A. RANNEY & H. PENNIMAN, DEMOCRACY IN THE ISLANDS: THE MICRONESIAN PLEBISCITES OF 1983, at 25 (1985), but the United States initially rejected Palau's request for separate negotiations, D. MCHENRY, *supra* note 42, at 134.

55. Armstrong, *supra* note 46, at 226-27.

56. *Id.*

57. *Id.* at 227; *see* MARSHALL ISLANDS CONST., *reprinted in* CONSTITUTIONS OF DEPENDENCIES AND SPECIAL SOVEREIGNTIES 69 (A. Blaustein & P. Blaustein eds. 1987).

58. Initially, three separate provisions of Palau's constitution created friction with the United States. These provisions concerned (1) Palau's expansive claim of territorial waters, REPUB. OF PALAU CONST. art. I; (2) a bar ou foreign cntities benefiting from the power of eminent domain, *id.* art. XIII, § 7; and (3) the nuclear prohibition, *id.* art. II, § 3, art. XIII, § 6.

Article I of Palau's constitution purports to give Palau jurisdiction and sovereignty over all waters extending 200 miles from a straight archipelagic baseline "unless otherwise limited by international treaty obligations." Eventually Palauans yielded to prevailing interpretations of the Law of the Sea and accepted in an agreement with the United States much smaller territorial waters than provided in their coustitution. *See* Agreement Regarding the Jurisdiction and Sovereignty of the Republic of Palau Over its Territory and the Living and Non-Living Resources of the Sea, Aug. 26, 1982 (*cited in Report of the United Nations Visiting Mission to Observe the Plebiscite in Palau, Trust Territory of the Pacific Islands, February 1983,* 50 U.N. TCOR Supp. (No. 3) at 10, U.N. Doc. T/1851 (1983)).

59. *Despite Legal Complications Palau Pushing Ahead With a Referendum on Constitution,* Associated Press, Jnly 8, 1979 (LEXIS, Nexis library, AP file).

property for public use upon payment of just compensation."[60] It then restricts that power, stating that it "shall not be used for the benefit of a foreign entity."[61]

During Palau's ConCon, a Committee on General Provisions analyzed the proposal for this provision and unanimously concluded that

> [t]he power of eminent domain should not be used by either the National or State Governments for taking property for use by a foreign entity. . . . [Foreign entity shall mean] any entity whether a person, a government, a corporation, or other association or group, which is neither a citizen of [Palau] nor totally owned by citizens of [Palau].[62]

Land in Micronesia has a traditional societal value that cannot be measured solely in economic terms,[63] and consequently, the drafters of the constitution sought to keep Palauan land under Palauan ownership and control.[64]

The second provision found objectionable by the United States appears in two parts of the Palau Constitution. Under article II, section 3, Palau can delegate major governmental powers to another state, but any agreement delegating those powers must

> be approved by not less than two-thirds (2/3) of the members of each house of the Olbiil Era Kelulau [government] and by a majority of the votes cast in a nationwide referendum conducted for such purpose, provided, that any such agreement which authorities [sic] 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.[65]

Similarly, article XIII, section 6 provides that

> [h]armful 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 three-

60. REPUB. OF PALAU CONST. art. XIII, § 7.

61. *Id.*

62. COMM. ON GENERAL PROVISIONS OF THE PALAU CONSTITUTIONAL CONVENTION, REPORT NO. 30, at 4 (1979).

63. A. RANNEY & H. PENNIMAN, *supra* note 54, at 4-5 (land is intimately linked to local politics, economic development and social ties).

64. Additional insight on some of the framers' related concerns can be gained from committee comments on a proposal to restrict land ownership to Palauans (referred to as "Belauans"):

> The Committee feels that due to the limited amount of land in Belau and the importance of marine resources that ownership of the land and waters should be limited to citizens of Belau and corporations wholly owned by Belauan citizens. It is conceivable that unless this Constitution includes such a provision, that in the near future we will find our lands and waters under the control and ownership of non-citizens. The Committee feels that this would be destructive to Belauan society and traditions, and would also deprive Belauan citizens of many of the benefits from our natural resources.

COMM. ON GENERAL PROVISIONS OF THE PALAU CONSTITUTIONAL CONVENTION, *supra* note 62, at 5-6.

65. REPUB. OF PALAU CONST. art. II, § 3.

> fourths (3/4) of the votes cast in a referendum submitted on this specific question.[66]

Both provisions evince a clear intent to ban the introduction of nuclear weapons into Palau, making the Palauan Constitution the world's first nuclear-free constitution.[67]

The nuclear prohibiton first appeared in print in a proposal very similar to but less detailed than the Palau Constitution's article XII, section 7.[68] The Committee on General Provisions recommended adopting the proposal to protect the environment. According to the report,

> [t]he Committee felt that the environment of [Palau] . . . is a public trust of which all citizens, living and yet unborn, are beneficiaries. As a trustee, [Palau] is obligated to act in a manner best calculated to assure the protection of the air, water, and other natural resources from pollution, impairment, or destruction.[69]

The Committee also reiterated that the proposal's purpose was to exclude hazardous substances unless voters approved a referendum on the specific issue.[70]

The United States immediately expressed its opposition to both these provisions. Before the Palauan ConCon completed work on the constitution, U.S. Ambassador Rosenblatt sent a cable with comments on the draft constitution. Among other suggestions, Rosenblatt urged that Palau drop the nuclear prohibition since it "might effectively prevent U.S. warships and aircraft from transiting Palau."[71] Rosenblatt also called on Palau to eliminate the eminent domain provision because it could be "interpreted to cripple U.S. defense and security rights and responsibilities."[72]

The ConCon amended the draft constitution to conform to a number of Ambassador Rosenblatt's suggestions but did not remove the eminent domain or nuclear prohibition provisions.[73] The Palau District Legislature, however—reportedly acting under U.S. pressure—nullified

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66. *Id.* art. XIII, § 6.

67. *See* Associated Press, *supra* note 7.

68. *See* PALAU CONSTITUTIONAL CONVENTION, CONSTITUTIONAL PROPOSAL NO. 91 (1979).

69. COMM. ON GENERAL PROVISIONS OF THE PALAU CONSTITUTIONAL CONVENTION, REPORT NO. 29, at 1-2 (1979).

70. *See id.* at 2.

71. Cable from Ambassador Rosenblatt to Roman Tmetuchl, sec. 3, at 5 (March 22, 1979).

72. *Id.* at 6.

73. The U.S. warned in the Rosenblatt Cable of the potential effect of the draft language. *See* Cable from Ambassador Rosenblatt to Roman Tmetuchl, sec. 3 at 5-6 (March 22, 1979). The ConCon records show that the Palau Constitutional Drafting Commission responded affirmatively to certain suggestions in Ambassador Rosenblatt's cable, for example, by deleting language allowing government restrictions on the freedom of the press in the subsequent draft of the constitution. *See* PALAU CONSTITUTIONAL DRAFTING COMMISSION, REPORT TO THE PALAU LEGISLATURE, app. at 5 (1979).

the draft constitution and canceled the scheduled July plebiscite.[74] Nonetheless, as a result of a lawsuit filed by supporters of the constitution, the July plebiscite went ahead and 92% of the electorate voted in favor of the constitution.[75] The High Court of the Trust Territories, however, refused to certify the results because of the nullifying legislation.[76]

The Palau Constitutional Drafting Commission consequently redrafted the Palau Constitution with the " 'expressed intent' of accommodating U.S. interests."[77] The revised constitution deleted the nuclear prohibition language from article II, and amended article XIII, section 6, to exempt "transit and port visits of ships, and transits and overflights of aircraft."[78] The Commission also struck the restriction on who could benefit from the power of eminent domain.[79]

This revised constitution, deemed compatible with the U.S. assessment of its "defense and security rights,"[80] was submitted to the voters. The Palauans soundly rejected the U.S.-approved constitution, with 70% voting no.[81] A third election followed, with the original nuclear prohibition and limitations on the power of eminent domain reinstated into the constitution. On July 17, 1980, Palauans adopted the "nuclear-free" constitution with 79% of the electorate voting their approval.[82] The three votes (two overwhelmingly approving the nuclear prohibition and eminent domain provisions and one rejecting a softening of these provisions), the plain meaning of the language of the Palau Constitution, and the legislative history lead to one conclusion: Palauans, in a remarkable display of electoral consensus, expressly chose to adopt very strong constitutional bans on nuclear weapons and the use of the power of eminent domain to benefit foreign states.

E. The Compact of Free Association

After the adoption of a constitution, the next and final step toward sovereignty was to negotiate an agreement with the administering authority, the United States. In 1980, the three Micronesian entities still under trusteeship—Palau, the Marshall Islands, and the Federated States

74. *See* R. CLARK & S. ROFF, MICRONESIA: THE PROBLEM OF PALAU 8 (Minority Rights Group Report No. 63, 2d ed. 1987).

75. *Id.*

76. *Id.*

77. *People of Palau Try to Win American Approval With Second Draft Constitution,* Associated Press, Oct. 21, 1979 (LEXIS, Nexis library, AP file).

78. *See* PALAU CONSTITUTIONAL DRAFTING COMMISSION, REPORT TO THE PALAU LEGISLATURE, app. at 29 (1979).

79. *See id.*, app. at 30.

80. *Id.*, app. at 3.

81. R. CLARK & S. ROFF, *supra* note 74, at 8.

82. Associated Press, *supra* note 7.

of Micronesia—initialed the Compact of Free Association, a document containing the basics of an agreement for their future relationship with the United States.[83] The change in U.S. administrations in 1981, however, delayed the progress of Micronesian status negotiations.[84] By the time negotiations resumed, the interests of each of the three island groups had diverged.[85] As a result, the Reagan administration began to negotiate with each entity separately.[86]

The original Compact, initialed in 1980, provided that the United States would have responsibility for Micronesian security and defense matters for fifteen years, with specific military operational rights to be set forth in separate agreements with each entity.[87] Palau's constitutional restriction on the power of eminent domain and on the introduction of nuclear material conflicted with the U.S. interpretation of those rights;[88] these conflicts complicated the Compact approval process in Palau.

Palau's first plebiscite on the Compact of Free Association took place on February 10, 1983.[89] The ballot included two questions: (1) Do you approve of Free Association as set forth in the Compact of Free Association? (2) Do you approve of the Agreement concerning radioactive, chemical, and biological materials concluded pursuant to section 314 of the Compact of Free Association?[90] The two questions received affirmative votes of 61% and 51%, respectively.[91]

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83. Armstrong, *Strategic Underpinnings of the Legal Regime of Free Association: The Negotiations for the Future Political Status of Micronesia,* 7 BROOKLYN J. INT'L L. 179, 183-84 (1981). Under "free association" the trust territories would become sovereign states but would cede certain powers primarily dealing with defense and defense-related foreign affairs to the United States. *Id.*

84. The Reagan administration reviewed the initialed version for several months before accepting it. *Micronesian Status Negotiations: Hearing Before the Subcomm. on East Asian and Pacific Affairs of the Senate Comm. on Foreign Relations,* 97th Cong., 2nd Sess. 3 (1982) (statement of Fred M. Zeder II, U.S. Ambassador and President's Personal Rep. for Micronesian Status Negotiations).

85. Armstrong & Hills, *The Negotiations for the Future Political Status of Micronesia,* 78 AM. J. INT'L L. 484, 487 (1984).

86. *Id.* at 487-88.

87. *Id.* at 486.

88. *See id.* at 487-88.

89. A. RANNEY & H. PENNIMAN, *supra* note 54, at 27.

90. *See* Koshiba v. Remeliik, No. 17-83, slip op. at 66-67 (Palau Sup. Ct., Trial Div., Jan. 31, 1983). The opinion summarizes events related to a divisive controversy over ballot language originating in a cable from Ambassador Fred M. Zeder II, the U.S. President's Personal Representative for Micronesian Status Negotiations, to Ambassador Lazarus Salii of Palau. Citizens of Palau brought a suit challenging the language because it wrongly implied that a pro-Compact vote would restrict the U.S. military. A justice of the Palau Supreme Court enjoined the ballot language, holding that its use would deny the plaintiffs their constitutional voting rights. *Id.* at 72.

91. *Report of the United Nations Visiting Mission to Observe the Plebiscite in Palau, Trust Territory of the Pacific Islands, February 1983,* 50 U.N. TCOR Supp. (No. 3) at 38, U.N. Doc. T/1851 (1983); *see also* Gibbons v. Salii, App. No. 101-86, slip op. at 2 n.1 (Palau Sup. Ct., App. Div., Sept. 17, 1987).

Following the announcement of the results, the U.S. State Department declared the Compact approved in " 'a valid and sovereign act of self-determination by the people of Palau.' "[92] Despite the claim of victory for the Compact, the United States also demanded separate assurances from the government of Palau that, under its constitution, the United States would have the authority to bring nuclear weapons into Palau.[93] Meanwhile, Palauan opponents of the Compact filed suit challenging the approval, arguing that the constitution prohibited the United States from carrying nuclear weapons into Palau.[94] The Palau Supreme Court upheld their challenge, concluding that the Compact had not passed by the 75% margin required under the constitution's nuclear control provisions.[95]

Ambassador Fred M. Zeder II, the U.S. President's Personal Representative to the Micronesian Status Negotiations, disagreed with the court's decision. He sent a cable to Palau's negotiator, Ambassador Lazarus Salii, in which he reiterated the U.S. position that the vote had satisfied the legal requirements for the Compact's approval.[96] According to Ambassador Zeder, the vote was sufficient to demonstrate that the United States had fulfilled its obligation to guarantee Palauans their right of self-determination.[97] The United States thereby adopted the view that after the 1983 plebiscite, any concerns over self-determination in Palau had become "an internal problem."[98]

Over the next two years, the Palauans attempted to negotiate an agreement acceptable to both the U.S. government and the Palauan citizens. In September 1984, Palauans voted again on a modified but substantially similar version of the Compact.[99] The 67% affirmative vote in

92. Reuters, Feb. 18, 1983 (quoting U.S. Dep't of State announcement) (LEXIS, Nexis library, Reuters file).

93. *See* Armstrong & Hills, *supra* note 85, at 488 & n. 17 (citing Letter from Ambassador Fred M. Zeder II, the President's Personal Representative for Micronesian Status Negotiations, to Palauan President Haruo I. Remeliik (April 21, 1983)).

94. *See* Gibbons v. Remeliik, 1 Repub. of Palau Intrm. 80, 81 (No. 67-83) (Palau Sup. Ct., Trial Div., Aug. 6, 1983).

95. *Id.* at 82.

96. *See* R. CLARK & S. ROFF, *supra* note 74, at 17.

97. *Id.* Ambassador Zeder attempted to clarify the U.S. position in a letter several months later to the Palau Senate. In the letter, Zeder insisted that the nullified plebiscite was a "valid act of self-determination in the international context of the Trusteeship Agreement and as an approval of the compact." *See* Letter from Ambassador Fred M. Zeder II to Mr. Peter L. Sugiyam, Senate, First Olbiil Era Kelulau (Oct. 25, 1983), *reprinted in* 51 U.N. TCOR Annex (Sess. Fas.) at 18, U.N. Doc. T/1861 (1986).

98. *Compact Interior & Insular Affairs Subcomm. Hearing, supra* note 25, at 13 (statement of Ambassador Fred M. Zeder II) ("The problem . . . that [the Palauans] have is making their compact and the constitution compatible . . . . They drafted their own constitution. We look on this as an internal problem that their constitutional government has to come to grips with.").

99. *See* A. RANNEY & H. PENNIMAN, *supra* note 54, at 49-50 (describing the main alteration as a deletion of any "explicit reference to the storage or transshipment of nuclear materials").

this second Compact referendum was again insufficient to meet the constitutionally required three-quarters majority.[100] In contrast, between the two Palauan plebiscites, voters in both the Federated States of Micronesia and the Marshall Islands approved their Compacts of Free Association with the United States.[101]

On June 30, 1985, Palau's President Haruo Remeliik was assassinated,[102] and the identity and motive of the assassins remain a mystery to this day.[103] Within two months of the assassination, Lazarus Salii, the veteran political negotiator, was elected Palau's second president.[104] On January 10, 1986, Salii and President Reagan signed the third and latest version of the Compact.[105] The preamble of that version declares that with the adoption of a constitution and the "entry of their Government into this Compact of Free Association," the Palauan peoples will exercise their "sovereign right to self-determination."[106] The relevant provisions of that Compact are discussed below.[107]

Title I of the Compact defines the general structure of relations between the two governments under the Compact, including the division of authority. It declares that the people of Palau are self-governing,[108] and establishes that Palau has the capacity to conduct foreign relations within certain parameters.[109] In addition, it provides that the United States assumes no responsibility for the actions of Palau's government unless otherwise expressly approved.[110]

Title I also governs those aspects of the bilateral relationship involving environmental protection in Palau.[111] Under these provisions, the United States pledges during trusteeship to apply standards "substantially similar" to those required under the National Environmental

100. *See* REPUB. OF PALAU CONST. art. II, § 3.

101. *See* A. RANNEY & H. PENNIMAN, *supra* note 54, at 49. Ranney and Penniman's book provides a detailed account of all three plebiscites, written by a group of observers under U.S. Information Agency sponsorship. *See id.* at xi (President's Foreword). The Federated States of Micronesia recorded a 79% affirmative vote for the Compact. *Id.* at 72. In the Marshall Islands, 58% of the electorate voted approval. *Id.* at 103. In January 1986, the U.S. Congress approved those Compacts of Free Association. *See* Pub. L. No. 99-239, 99 Stat. 1770 (codified as amended at 48 U.S.C. § 1681 note (1988)).

102. N.Y. Times, Nov. 27, 1986, at A18, col. 1.

103. Rampell, *Assassination in Palau,* HONOLULU MAG., Aug. 1987, at 44 (motives and murderers still unknown); N.Y. Times, July 21, 1987, at A16, col. 1 (describing appellate court acquittal of the three men convicted of the assassination).

104. N.Y. Times, Sept. 2, 1985, at A5, col. 5.

105. Leich, *Contemporary Practice of the United States Relating to International Law,* 81 AM. J. INT'L L. 405, 408 (1987).

106. Compact of Free Ass'n, *supra* note 1, preamble.

107. *See infra* text accompanying notes 108-21.

108. *See* Compact of Free Ass'n, *supra* note 1, tit. I, art. I, § 111.

109. *See id.* tit. I, art. II, § 121.

110. *See id.* §§ 126, 127.

111. *See id.* art. VI.

Policy Act.[112] The environmental protection provisions, however, contain an escape clause for the U.S. military. Under this clause, the U.S. President may exempt any U.S. government activities in Palau from these provisions "if the President determines it to be in the paramount interest of the Government of the United States to do so" under either international law or the Compact's security and defense provisions.[113]

Title III of the Compact structures "security and defense relations" between Palau and the United States.[114] Article 1 of title III provides for the following:

(A) Section 311 establishes that Palau is to be closed to all foreign militaries except that of the United States, except as provided in section 312;[115]

(B) Section 312 specifies that the U.S. "has full authority and responsibility for security and defense matters" in Palau and thus may invite the armed forces of other nations into Palau;[116]

(C) Section 313 compels Palau to refrain from actions which the United States determines to be "incompatible with its authority and responsibility for security and defense matters."[117]

Article II of title III of the Compact provides for "Defense Sites and Operating Rights."[118] Sections 321 and 322 of that article direct the government of Palau to make land and water areas designated "defense sites" by the United States available to the United States "for the duration and level of use specified."[119] Section 324 provides that although the United States cannot "use, test, store or dispose of nuclear, toxic chemical, gas or biological weapons" in Palau, the United States can operate "nuclear capable or nuclear propelled vessels and aircraft within the jurisdiction of Palau without either confirming or denying the presence or absence of such weapons."[120]

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112. *Id.* § 163.

113. *Id.*

114. *Id.* tit. III.

115. *Id.* art. I, § 311.

116. *Id.* § 312.

117. *Id.* § 313; *see also* Clark, *supra* note 39, at 26-27. Professor Clark postulates that this "defense veto" (which remains essentially unchanged in the current version of the Compact) would allow the United States to prevent Palau from assigning fishing rights to third-party states or even to build an agricultural warehouse with foreign financing. *Id.* at 26.

118. Compact of Free Ass'n, *supra* note 1, tit. III, art. II.

119. *Id.* art. I, §§ 321, 322. This provision, and the provisions of section 324, *see infra* text accompanying note 120, seem to conflict with the eminent domain and nuclear prohibition provisions of the Palau Constitution. The Palau Supreme Court agreed. *See infra* text accompanying notes 126-30.

120. *Id.* § 324. According to Ambassador Zeder, the intent of this revised provision was to "ensure compatibility between the Compact and Palau's constitution" without impairing the "ability of the U.S. to carry out fully [its] defense role." *The Compact of Free Association Between the United States and Palau: Hearings on H.R.J. Res. 626 Before the House Comm. on Foreign Affairs,* 99th

Title IV contains the termination and survivability provisions. Although Palau may terminate the Compact by a majority vote in a plebiscite, certain provisions, including all of title III, "shall remain in full force and effect" until the fiftieth anniversary of the effective date of the Compact.[121] In essence, for fifty years, Palau under the Compact cannot avoid certain obligations to the United States, primarily those involving security and defense matters under title III, without U.S. consent.

On February 21, 1986, the third version of the Compact received a 72% affirmative vote in Palau's third plebiscite.[122] Three days later, President Salii certified the results and declared the Compact approved.[123] The United States accepted Salii's certification of the vote, taking the position that 75% approval was no longer required in light of the Compact revisions.[124] On its face, however, the revised Compact failed to satisfy both the total nuclear prohibition and the eminent domain provisions of the Palau Constitution; the Compact would still permit both offending practices.

Supporters of Palau's Constitution challenged Salii's approval of the Compact, and in *Gibbons v. Salii,* the Palau Supreme Court held that the Constitution was "supreme in Palau" and that the new version of the Compact, like its predecessors, would require a 75% affirmative vote for approval.[125] According to the court, the nuclear prohibition in the Palau Constitution applied to the transit of nuclear-capable and nuclear-powered ships.[126] The Compact, even in its revised form, permitted such transit.[127] Therefore, the Compact revisions failed to resolve the conflict between that agreement and the Palau Constitution.

The *Gibbons v. Salii* court also considered whether Palau's

Cong., 2d Sess. 76-77 (1986) [hereinafter *Hearings on H.R.J. Res. 626, Compact of Free Association*] (statement of Fred M. Zeder II, U.S. Ambassador and President's Personal Rep. for Micronesian Status Negotiations).

121. Compact of Free Ass'n, *supra* note 1, tit. IV, art. V, §§ 452, 453.

122. *Hearings on H.R.J. Res. 626, Compact of Free Association*, *supra* note 120, at 75 (statement of Ambassador Zeder).

123. *Id.* at 66 (statement of Ambassador Zeder).

124. *Id.* at 77-78 (statement of Ambassador Zeder).

125. Gibbons v. Salii, App. No. 8-86, slip op. at 22, 27 (Palau Sup. Ct., App. Div., Sept. 17, 1986). At the trial court level, the court offered insights into its futile search for legal authority to uphold the Compact. Justice Gibson stated:

> It is patent that the intent of the Constitntional Convention delegates was to make it wellnigh impossible to, as the Plaintiffs say, over-ride the Constitntion. Each and every source to which I turned for help in endeavouring to find validity for the Compact, confirmed a contrary intent and the unarguable conclusion that it was the intention of the delegates to make . . . Palau forever nuclear-free. . . . [I]t follows of natural consequence that all things sounding of nuclear warfare, including nuclear-propelled and nuclear-capable vessels are forbidden to transit, enter, or port in the Palauan waters.

Gibbons v. Salii, No. 101-86 (Palau Sup. Ct., Trial Div., July 10, 1986) (oral opinion) (*quoted in* R. CLARK & S. ROFF, *supra* note 74, at 20).

126. Gibbons v. Salii, App. No. 8-86, slip op. at 22-23.

127. *See supra* text accompanying note 120.

obligations to supply land to the U.S. military under sections 321 and 322 of the Compact could be reconciled with the constitutional restriction against using the power of eminent domain for the benefit of a foreign entity. The court held that because the Compact does not itself require the exercise of the power, the provisions were not unconstitutional on their face and the issue was not ripe for adjudication.[128] Nevertheless, the court found that the provisions raised "the specter of future constitutional crisis"[129] and gave the following admonition:

> [W]e caution the government of Palau that the exercise of eminent domain powers will be unavailable to it in attempting to comply with its obligations under the Compact to make land available to the United States. We suggest that this Compact section be carefully evaluated before further steps are taken to obtain Compact approval.[130]

Despite the Palau Supreme Court's invalidation of the Compact, the U.S. Congress voted to approve that same document on November 14, 1986.[131] The congressional act authorized the U.S. President to implement the Compact following approval by Palau, and to take into account "any procedures with respect to the United Nations for termination of the Trusteeship Agreement."[132]

With encouragement by President Salii, Palau subsequently held two plebiscites on the same version of the Compact. In both votes, the Compact again failed to muster the required 75% approval.[133] Following this fifth failure to approve the Compact, financial and political tensions erupted in Palau. Faced with large budget deficits, and indebted to the United States for money advanced for political education campaigns counected with the plebiscites, President Salii announced a fiscal emergency.[134] In an attempt to reduce government expenditures, Salii furloughed 900 of Palau's 1,331 government employees, thereby putting 40% of the Palauan workforce out of work.[135]

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128. Gibbons v. Salii, App. No. 8-86, slip op. at 36.

129. *Id.* at 29.

130. *Id.* at 37.

131. *See* Compact of Free Association Between United States and Government of Palau, Pub. L. No. 99-658, 100 Stat. 3672 (1986) (codified as amended at 48 U.S.C. § 1681 (1988)).

132. *Id.* § 101(a), 100 Stat. at 3673.

133. In the December 2, 1986 plebiscite, with a turnout of over 80% of the Palauan electorate, 66% of the votes were cast in favor of the Compact. *Report of the United Nations Visiting Mission to Observe the Plebiscite in Palau, Trust Territory of the Pacific Islands, December 1986,* 54 U.N. TCOR Supp. (No. 1) at 13-14, U.N. Doc. T/1906 (1987). In the June 30, 1987 plebiscite, the affirmative vote was only slightly higher: 68%. *Report of the United Nations Visiting Mission to Observe the Plebiscite in Palau, June 1987,* 54 U.N. TCOR Supp. (No. 2) at 9, U.N. Doc. T/1919 (1987).

134. *See* W. BUTLER, G. EDWARDS & M. KIRBY, PALAU: A CHALLENGE TO THE RULE OF LAW IN MICRONESIA 29-31 (1988) (report to the International Commission of Jurists); *see also* Letter from Richard T. Montoya, Ass't Sec'y for Territorial and Int'l Affairs, United States Dep't of Interior, to President Salii (Nov. 6, 1988) (declining Salii's request for the United States to underwrite "political education," but offering a $250,000 advance on future funds).

135. W. BUTLER, G. EDWARDS & M. KIRBY, *supra* note 134, at 30-31.

The furloughed workers formed a committee demanding ratification of the Compact.[136] The Olbiil Era Kelulau (OEK) (the legislative body of Palau), under threats of violence from an armed mob, approved legislation calling for two new referenda: one to amend the constitution to allow for simple majority approval of the Compact, the second to vote on the Compact.[137] On August 4, 1987, 73.3% of Palauan voters favored an amendment to the Palau Constitution which would alter the majority required to approve the Compact from 75% to a simple majority.[138] As a result, a seventh Compact plebiscite was held on August 21, 1987, and it attained a nearly identical affirmative vote.[139]

Three supporters of the Palau Constitution, led by Ibedul Gibbons, a traditional chief, challenged the constitutional amendment and Compact approval process.[140] But before the case could be heard, Ibedul Gibbons and President Salii signed a "Memorandum of Understanding," which resulted in dismissal of the suit.[141] Essentially, the memorandum gave the Palauan President the right to cede lands to the United States, but only with the approval of the traditional council of chiefs.[142]

Within two days of the dismissal, a group of Palauan women elders filed a new suit to challenge the Compact approval.[143] A wave of violence and threats directed at those plaintiffs and the court ensued.[144] Following these incidents, police officers drove to the plaintiffs' homes and secured signatures on a Stipulation of Dismissal.[145] Although Judge Robert A. Hefner of Palau's Supreme Court accepted the dismissal on September 9, 1987,[146] in his opinion he observed that "the Dismissal

136. *Id.* at 31-32 & n.2.

137. *Id.* at 32-35.

138. *Report of the United Nations Visiting Mission to Observe the Plebiscite in Palau, August 1987,* 54 U.N. TCOR Supp. (No. 3) at 3, U.N. Doc. T/1920 (1987).

139. *Id.* at 8.

140. *See* Merep v. Salii, No. 139-87 (Palau Sup. Ct., Trial Div., filed 1987) (dismissed per stipulation, Aug. 28, 1987), *discussed in* Fritz v. Salii, No. 161-87, slip op. at 5 (Palau Sup. Ct., Trial Div., April 22, 1988), *aff'd,* App. No. 8-88 (Palau Sup. Ct., App. Div., Aug. 29, 1988); *see also* Recent Developments, 29 HARV. INT'L L.J. 149, 156 & n.42 (1988) (discussing *Merep*).

141. *Fritz v. Salii,* No. 161-87, slip op. at 5, 8-10 (reviewing court file in *Merep*); Recent Developments, *supra* note 140, at 156 & n.43.

142. Recent Developments, *supra* note 140, at 156 n.43. However, the Salii-Gibbons agreement may be of questionable legal validity. *See id.* (citing 2 PAC. NEWS BULL. 1 (1987)).

143. *See* W. BUTLER, G. EDWARDS & M. KIRBY, *supra* note 134, at 39.

144. *See id.* at 39-42 (describing power outage in Palau's capital city, Koror, threats to the plaintiffs, murder of the main plaintiff's father, fire-bombing of the main plaintiff's house, shots fired at the homes of a plaintiff and the speaker of the House, and mobs that surrounded the court demanding the dismissal of the case).

145. *Id.* at 42.

146. *See* Ngirmang v. Salii, No. 161-87, (Palau Sup. Ct., Trial Div., filed Aug. 31, 1987), *withdrawn,* (Palau Sup. Ct., Trial Div., mem. op. Sept. 9, 1987), *reinstated sub nom.* Fritz v. Salii, No. 161-87, (Palau Sup. Ct., Trial Div., Mar. 31, 1988), *aff'd,* App. No. 8-88 (Palau Sup. Ct., App. Div., Aug. 29, 1988).

signed by Plaintiffs may not be voluntary. There are indications that the Dismissal was brought about by intimidation through the use of violence."[147]

On November 30, 1987, the Reagan administration formally asked Congress to enact the Compact.[148] With the constitutionality of Palau's approval still in doubt, however, the U.S. Congress was reluctant to give its final imprimatur.[149]

The original plaintiffs in *Ngirmang v. Salii* later decided to petition to reinstate their challenge to the Augnst 21 vote approving the Compact.[150] In April 1988, the lower court set aside the dismissal and ruled for the plaintiffs, holding that the August 4, 1987 referendum on the constitutional amendment was "null, void and of no effect";[151] consequently, the August 21 vote was insufficient to approve the Compact. That decision was affirmed by the Appellate Division of Palau's Supreme Court on August 28, 1988,[152] eight days after President Salii died at home from a gunshot wound, in a possible suicide.[153] Thus, the legislature failed to circumvent the constitutional requirement of a 75% voter approval of the Compact.

In the wake of the sixth rejection of the Compact in Palau, U.S. congressional efforts to pass a "Palau Bill" as a signal of American approval of the Compact stalled.[154] Rather than concede to military

147. Ngirmang v. Salii, No. 161-87, mem. op. at 1-2.

148. *End-of-Session Tempest Leaves Palau Twisting,* CONG. Q. WEEKLY REP., Nov. 26, 1988, at 3399 (recounting history of Palau independence legislation in Congress).

149. *See* N.Y. Times, Oct. 13, 1987, at A19, col. 1.

150. *See* Fritz v. Salii, No. 161-87, slip op. at 6-7.

151. *Id.* at 33.

152. Fritz v. Salii, App. No. 8-88, slip op. at 25-26 (Palau Sup. Ct., App. Div., Aug. 29, 1988). The court again made note of the intent of the drafters "to provide a rigid bar to harmful substances being introduced into Palau." *Id.* at 3 & n.2. The court's narrow ruling left open the possibility of amending the Palau Constitution to ease approval of the Compact. *See* Letter from J. Edward Fox, Ass't Sec'y for Leg. Affairs, U.S. Dep't of State, to Hon. J. Bennett Johnson, Chairman of the Senate Comm. on Energy and Natural Resources (Sept. 14, 1988) (interpreting the Palau Supreme Court Appellate Division's ruling in *Fritz v. Salii* to permit amendment of Palau's Constitution in order to approve the Compact as drafted).

153. N.Y. Times, Aug. 21, 1988, at 23, col. 1. Apparently, Salii had received a series of bad news reports. For one, he had just learned that the General Accounting Office was pursuing an investigation into corruption charges against him. *See* Wash. Post, Sept. 6, 1988, at A26, col. 1. Salii had also just learned that a federal court had ruled that Palau must repay a $45 million debt on the IPSECO power plant. *Id.*

In addition, Salii had been deeply troubled over the stalled Compact approval process. In February of 1988, while Compact opponents prepared their legal challenge, Salii wrote U.S. Secretary of State George Shultz decrying the "turmoil which affects Palau as our people wait from day to day in wonder, frustration and consternation that the wishes of an overwhelming majority are held captive by the few who, for whatever motivation, would prolong our torment." *See Hearings on H.R.J. Res. 479, Compact of Free Association, supra* note 21, at 109 (statement of Hon. Lazarus E. Salii, President, Republic of Palau).

154. *See generally End-of-Session Tempest Leaves Palau Twisting,* CONG. Q. WEEKLY REP., Nov. 26, 1988, at 3398.

restrictions in Palau, U.S. officials in the executive branch continued to urge Palauan approval of the Compact as written.[155]

In November 1988, Palauans elected as their president Ngiratkel Etpison,[156] who while campaigning had declared his strong support for the Compact of Free Association with the United States.[157] After taking office in January, however, Etpison signaled his approval of a unified position adopted by the leadership of Palau's OEK, stating that conflicts between the Palau Constitution and the Compact must be resolved with changes to the Compact, not to Palau's Constitution.[158]

In the face of a U.S. government adamant about maintaining unchallengeable rights of transit for nuclear vessels and eminent domain for military bases, however,[159] the Palauan resolve to change the Compact quickly disintegrated, and instead Palau held a seventh vote on the Compact of Free Association on February 6, 1990. This vote once again failed to achieve the required three-quarters majority, and, significantly, support for the Compact dropped from 73% of votes cast (during the August 1987 referendum) to just over 60%.[160] Nevertheless, a U.S. State Department official again indicated that the United States would not renegotiate the Compact to eliminate the provisions in conflict with Palau's Constitution.[161]

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155. *See, e.g.,* Letter from James D. Berg, Dir. Office of Freely Assoc. State Affairs, U.S. Dep't of State, to the Hon. Thomas Remengesau, Pres. of the Republic of Palau (Sept. 22, 1988) (expressing United States readiness to implement the Compact promptly upon approval).

156. L.A. Times, Nov. 12, 1988, at 11, col. 1. The margin of Etpison's victory was only 31 votes out of 9,000 total ballots cast. *Id.*

157. *Id.*; *see also* L.A. Times, Feb. 12, 1989, at 29, col. 1 (stating that Etpison "pledged to push for domestic self-rule while allowing the United States to continue to control Palau's defense and foreign policies").

158. *See* Position Statement on the Future Political Status of Palau, 3d Olbiil Era Kelalau (Jan. 16, 1989); *see also* Letter from Hon. Ngiratkel Etpison, Pres. of the Republic of Palau, to the Hon. Shiro Kyota, House Speaker (Jan. 17, 1989) (transmitting a bill for an act to create a commission on the future of relations with the United States, which would adhere to the Position Statement adopted by the OEK).

159. *See Palau Compact of Free Association Implementation Act: Hearing on H.R.J. Res. 175 Before the Senate Comm. on Energy and Natural Resources,* 101st Cong., 1st Sess. 30 (1989) (statement of Philip E. Barringer, Ass't Sec'y of Defense for Int'l Security Affairs, Dep't of Defense). Mr. Barringer expressed Defense Department approval of the Compact, indicating that it serves "U.S. national security interests" because:

1. It provides for denial of Palauan territory to unfriendly forces;

2. It ensures freedom of operation for U.S. nuclear-propelled and U.S. nuclear-armed ships and aircraft in Palauan territorial waters and airspace;

3. It preserves U.S. policy of neither confirming nor denying the presence or absence of nuclear weapons at a specific location;

4. It preserves the U.S. right to establish and use defense sites in Palau. *Id.*

160. *Report of the United Nations Visiting Mission to Observe the Plebiscite in Palau, Trust Territory of the Pacific Islands, February 1990,* 57 U.N. TCOR Supp. (No. 1) at 10, U.N. Doc. T/1942 (1990); *see also* L.A. Times, Feb. 11, 1990, at 10, col. 3.

161. *See South Pacific: Another "No" to U.S. Terms in Palau?,* Inter Press Service, Feb. 9, 1990

II
UNITED STATES VIOLATION OF THE TERMS OF TRUSTEESHIP AGREEMENT

A major objective of the trusteeship system, as set forth in article 76 of the U.N. Charter, is "to further international peace and security."[162] But the United States also claims certain exceptional military rights in Palau under the Trusteeship Agreement of 1947, the agreement that established the basis for the legal relationship between the United States and Palau. Article 5 of that agreement authorizes the United States to establish bases, erect fortifications, station and employ armed forces, and make use of volunteer forces and facilities in the territory.[163] After submitting the first draft of the agreement to the Security Council, the U.S. Representative declared that the "purpose is to defend the security of these islands in a manner that will contribute to the building up of genuine, effective and enforceable collective security for all Members of the United Nations."[164]

When the United States acquired these security rights, however, it also accepted a range of obligations to the trust territories. Under article 6 of the Trusteeship Agreement, the United States is responsible for promoting the economic, political, social, and educational advancement of the inhabitants.[165] Although the Trusteeship Agreement offers scant criteria upon which to evaluate U.S. performance in Palau,[166] the U.N. Security Council could monitor and enforce U.S. performance using

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(LEXIS, Nexis library, Inpres file) (quoting a U.S. State Department official as saying that "the offer [of the Free Association] remains valid and we hope that . . . we could conclude the deal").

162. U.N. CHARTER art. 76(a).

163. *See* Trusteeship Agreement, *supra* note 9, art. 5. Judge McNair described the mandate and trusteeship systems as follows:

> The Mandates System (and the 'corresponding principles' of the International Trusteeship System) is a new institution—a new relationship between territory and its inhabitants on the one hand and the government which represents them internationally on the other. . . . The doctrine of sovereignty has no application to this new system. Sovereignty over a Mandated Territory is in abeyance; if and when the inhabitants of the Territory obtain recognition as an independent State . . . sovereignty will revive and vest in the new State. What matters . . . is not where sovereignty lies, but what are the rights and duties of the Mandatory in regard to the area of territory being administered by it. The answer to that question depends on the international agreements creating the system and the rules of law which they attract. Its essence is that the Mandatory acquires only a limited title to the territory entrusted to it, and that the measure of its powers is what is necessary for the purpose of carrying out the Mandate.

International Status of South-West Africa, 1950 I.C.J. 128, 150 (July 11, 1950) (McNair, J., separate op.).

164. 2 U.N. SCOR (113th mtg.) at 410 (1947) (statement of Warren R. Austin, U.S. Rep. to the United Nations).

165. *See* Trusteeship Agreement, *supra* note 9, art 6.

166. *See, e.g.*, H. NUFER, *supra* note 22 (sociological evaluation of U.S. administration of the trust territories over the first three decades against the goals set forth in article 6 of the Trusteeship Agreement).

these objectives.[167]

Of the four responsibilities, the obligation to promote political development toward self-government is the most crucial to self-determination.[168] But each of the other responsibilities, and particularly the obligation to promote economic development toward self-sufficiency, is also essential to self-determination. Therefore, the next two Sections of this Comment briefly examine economic and political development in Palau as each relates to U.S. performance under the Trusteeship Agreement and Palau's right to self-determination.

A. Economic Advancement Under U.S. Administration

The Trusteeship Agreement includes basic criteria for an assessment of the requisite economic development. Under the agreement, the United States is responsible for fostering economic self-sufficiency through such measures as the development of fisheries, agriculture, and industries; the United States is also responsible for protecting the inhabitants against the loss of land and resources.[169]

U.S. administration of Palau has been characterized by two approaches to economic policy, neither of which advances the goals of the Trusteeship Agreement. In the early years, the United States neglected economic development. A 1959 U.N. Visiting Mission report on territory-wide economic problems attributed slow development to an inadequate commitment of funds.[170] The Kennedy administration, in contrast, created the full-blown Pacific welfare states. While a welfare

167. MacDonald, *Termination of the Strategic Trusteeship: Free Association, the United Nations and International Law*, 7 BROOKLYN J. INT'L L. 235, 253 (1981). The Trusteeship Agreement offers scant criteria upon which to evaluate U.S. performance in this regard. An evaluation might take the following form:

> [I]n determining whether the United States, as administering authority, had met its obligations, an examination of the political, economic, social and educational advancement of the people of the territory and their progress toward self-government or independence might be appropriate matters of inquiry. Similarly, the basis for discussion might focus upon the more specific obligations undertaken in Article 6 of the Trusteeship Agreement.

Id.

168. *Id.*

169. Article 6 states that the administering authority shall

> [p]romote the economic advancement and self-sufficiency of the inhabitants, and to this end shall regulate the use of natural resources; encourage the development of fisheries, agriculture, and industries; protect the inhabitants against the loss of their lands and resources; and improve the means of transportation and communication.

Trusteeship Agreement, *supra* note 9, art. 6, § 2.

170. *See United Nations Visiting Mission Report on the Trust Territory of the Pacific Islands*, 24 U.N. TCOR Supp. (No. 3), U.N. Doc. T/1447 (1959). The conclusions of the visiting mission are characterized by statements such as, "the most important factor in the relatively slow development of the territory's economy is lack of adequate funds . . . . [P]ractically every programme in the educational, social and economic fields had to be curtailed or postponed for lack of funds." *Id.* at 14. *See generally* D. NEVIN, *supra* note 20, at 76-84 (describing economic hardship in Micronesia following World War II).

state necessarily connotes the influx of funds, it does not necessarily "foster economic self-sufficiency." A classified report commissioned by President Kennedy, only portions of which have been publicly released, outlines a strategy for furthering American interests in Micronesia, in part by intentionally fostering economic dependence on the United States.[171] Although observers debate whether economic dependence in Micronesia resulted from deliberate policy decisions in Washington,[172] there is general agreement that Micronesia is economically dependent and that economic development programs have failed.[173] By implication,

171. *See U.S. Government Survey Mission to the Trust Territory of the Pacific Islands: Report to the President* (A. Solomon, Oct. 9, 1963) (confidential version). "[T]he 2,100 islands of Micronesia are, and will remain in the now foreseeable future, a deficit area to be subsidized by the United States . . . granted that this subsidy can be justified as 'strategic rental' . . . ." *Id.* at S5-S6. In a similar vein, this report spoke openly of a strategy to "capture and control" the "political forces" in the trust territories. *Id.* at 11. The overriding purpose of U.S. administration of the islands was seen as the "need to retain control of Micronesia for security reasons." *Id.* at 10. In the report, economic dependence on the United States was viewed as essential to the maintenance of political control. *Id.* at 41-43, 74-75. It is also of interest that the report identified future President Salii as a potential political ally. *Id.* at 30.

172. U.S. government officials deny any intention to bind Micronesia to the United States or to follow the recommendations of the Solomon Report. *See* D. NEVIN, *supra* note 20, at 126-27. But some researchers point to a consistent pattern in American policy towards Micronesia that predictably resulted in dependence rather than self-sufficiency. *See, e.g., A Micronesian Dependency: A Simple Matter of Pragmatics,* in MICRONESIA AS STRATEGIC COLONY *passim* (C. Lutz ed. 1984) (collection of papers on impact of U.S. policy on Micronesian health and culture).

The United States received numerous warnings about the growing economic dependency of Micronesia. The 1964 U.N. Visiting Mission warned of a "danger of a top-heavy structure . . . disproportionate to the productive base." *Report of the United Nations Visiting Mission to the Trust Territory of the Pacific Islands, 1964,* 31 U.N. TCOR Supp. (No. 2) at 21, U.N. Doc. T/1628 (1964). Even the U.S. Representative to the Trusteeship Council acknowledged Micronesia's economic slide in a statement made at the United Nations in 1969:

> Economic development is almost nonexistent in the trust territory. Our efforts to date have been directed toward controlling and regulating existing businesses. Positive and forward-looking steps to utilize the resources of the islands and the sea surrounding them have yet to be taken. . . . The disparity between value of commodities imported into the trust territory and that of exports continues to widen from year to year at an unacceptable rate.

61 DEP'T ST. BULL. 231, Sept. 8, 1969.

In 1970, the warnings took on greater urgency as the U.N. Visiting Mission reported that "the basic infrastructure is still in a lamentable state," including stagnant agriculture and an increasing trade imbalance. *Report of the United Nations Visiting Mission to the Trust Territory of the Pacific Islands, 1970,* 37 U.N. TCOR Supp. (No. 2) at 70-71, U.N. Doc. T/1713 (1970). In 1976, the U.N. Visiting Mission again warned that the policies in Micronesia were undermining progress toward self-sufficiency. *Report of the United Nations Visiting Mission to the Trust Territory of the Pacific Islands 1976,* 43 U.N. TCOR Supp. (No. 3) at 41, U.N. Doc. T/1774 (1976); *see also* D. NEVIN, *supra* note 20, at 184-211.

173. *See* Hills, *What Went Wrong? Micronesia—Our Sacred Trust,* THE CENTER MAGAZINE 21 (Sept./Oct. 1980). Hills, now with the U.S. State Department's Office of Freely Associated States and a strong defender of the U.S. role in Palau, acknowledged the "disrepair and ruin" that befell much of the infrastructure of Palau's economy after the Americans took over the administration from the Japanese. *Id.* at 22. In 1984, Ambassador Zeder made a similar admission in testimony before a U.S. House Subcommittee:

> I would have to say, in the area of economic development that our record isn't very good. I don't know whether that was because we didn't try hard enough or whether it was

the United States has violated its obligation to promote self-sufficiency for Palau under the Trusteeship Agreement.

Statistics from Palau confirm its dependent status. For example, in 1987, government payrolls accounted for 68% of all regular employment in Palau.[174] In addition, Palau has burdened its stagnant economy with debts arising from ill-advised investments and financial mismanagement. At the end of fiscal year 1988, Palau owed $7 million on various loans and accounts payable.[175] And in August 1988, a U.S. district court ruled that Palau must repay $44 million to guarantors of two loans for the construction of a power plant.[176]

A 1989 U.S. General Accounting Office report concluded that

> Palau's economy is characterized by a small production base and a weak production capacity, primarily due to limited natural resources, the lack of skilled manpower, and the absence of production-based economic development strategies.[177]

When the United States created a welfare state marked by a dramatic rise in consumerism, instead of addressing the fundamental weaknesses in Palau's economy, it cemented Palau's dependency.[178] Inadequate efforts and foreseeably negative results have characterized U.S. policy in Palau,

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because we addressed the problems out there not necessarily from a standpoint of self-sufficiency for economic development, but rather from a standpoint of human needs.

Compact Interior & Insular Affairs Subcomm. Hearing, supra note 25, at 15 (testimony of Ambassador Zeder); *see also* Peoples, *Dependence in Micronesian Economy,* 5 AM. ETHNOLOGIST 535 (1978) (describing Micronesian dependence on wages earned by U.S. government employees and how this dependency, while raising the standard of living, has resulted in economic stagnation).

174. GAO, ISSUES ASSOCIATED WITH PALAU'S TRANSITION TO SELF-GOVERNMENT 10, GAO/NSIAD-89-182 (1989) [hereinafter GAO REPORT].

175. *Id.* at 29.

176. *Id.* The U.S. government had supported the power plant deal, *id.* at 80, even though no feasibility study had been conducted to determine whether the plant was compatible with Palau's infrastructure or whether the plant's capacity exceeded power needs. *Id.* at 33. Scandals erupted over the financing of the power plant. San Jose Mercury News, Nov. 29, 1987, at 1A, col. 4. Congressional inquiries yielded conflicting evidence on whether the U.S. government actively encouraged Palauans to incur indebtedness to build the power plant. *See Compact of Free Association: Hearing on S.J. Res. 231 Before the Senate Comm. on Energy and Natural Resources,* 100th Cong., 2d Sess. 99-100, 109-11 (1988) (containing State Department documents regarding how the United States viewed Palau's purchase of the power plant).

177. GAO Report, *supra* note 174, at 10. The GAO also concluded that Palau may not even have the ability to successfully manage money that would be obtained under the Compact to stimulate economic development. *Id.* at 5. The GAO found no significant improvement in financial management of technical assistance grants over the six-year span since a 1983 GAO report had reached the same conclusion. *Id.* at 24.

178. *See generally* Harwood, *Our Island Empire: Infected by the Disease of Modernity,* Wash. Post, April 22, 1979, at C1, col. 1 (describing the decline in subsistence living and the rise in U.S. government programs); Butterfield, *The Improbable Welfare State,* N.Y. Times, Nov. 27, 1977, Magazine, at 55; *see also* Kluge, *Palau Isn't Sure Whether 'Paradise' is There—or Here,* SMITHSONIAN, Sept. 1986, at 44 (economic stagnation and preoccupation with things foreign characterize Palau as it faces new Compact approval elections).

and constitute a failure to promote economic self-sufficiency as required by the Trusteeship Agreement.

B. Palau's Political Development Under Trusteeship

Pursuant to the Trusteeship Agreement, the United States undertook to promote political development in Micronesia. This obligation implicates the central issue of how the trust territories would be internally governed and how they would conduct relations with the international community. Article 6 of the Trusteeship Agreement provides that

> [t]he Administering Authority shall . . . [f]oster the development of such political institutions as are suited to the Trust Territory and shall promote the development of the inhabitants . . . toward self-government or independence as may be appropriate to the particular circumstances of the Trust Territory and its peoples and the freely expressed wishes of the peoples concerned . . . .[179]

This language, adopted from article 76 of the U.N. Charter, represented a compromise struck in 1947 between those delegations to the United Nations Conference advocating the goal of full independence and those believing greater flexibility was required.[180] The Soviet Union initially exerted pressure to require that all trusteeships end with a grant of full independence to the trust territory.[181]

The American delegation agreed that independence could be a potential option for trust territories but only "for those peoples who aspired to it and were capable of assuming the responsibilities involved."[182] The U.S. Representative to the Security Council, Senator Warren R. Austin, explained:

> [T]he United States feels that it must record its opposition, not to the principle of independence, to which no people could be more consecrated than the people of the United States, but to the idea that in this case independence could possibly be achieved in the foreseeable future. To be free and independent, a community of people must have acquired at least some of the attributes of a sovereign State.[183]

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179. Trusteeship Agreement, *supra* note 9, art. 6.

180. Sayre, *Legal Problems Arising from the United Nations Trusteeship System*, 42 AM. J. INT'L L. 263, 280 (1948). The United Kingdom held the view that independence was not a "universal coequal alternative goal for all territories." 1 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 740 (1963). The Security Council and the Trusteeship Council have heard recurring accusations, primarily from the Soviet representative, that the United States never offered independence as an option to the trust territories, including Palau. *See, e.g.*, 54 U.N. TCOR (1644th Mtg.) at 36-40, U.N. Doc. T/PV 1644 (1987); 51 U.N. TCOR at 20-21, U.N. Doc. T/1862 (1984); 40 U.N. SCOR Special Supp. (No. 1) at 26-27, U.N. Doc. S/17334 (1985); U.N. GAOR (1278th mtg.) at 42-50, U.N. Doc. A/AC.109/PV1278 (1985).

181. *See* 1(2) U.N. GAOR (62d plen. mtg.) at 1277 (1946).

182. Bunche, *Trusteeship and Non-Self-Governing Territories in the Charter of the United Nations*, 13 DEP'T ST. BULL. 1037, 1039 (1945).

183. 2 U.N. SCOR (116th mtg.) at 474 (1947).

On this basis, Austin further characterized the U.S. position as acceptance of the principle of independence for the trust territories but only a qualified acceptance of the Soviet Union's proposed language.[184]

At the same meeting, the United States affirmed its pledge "to carry out the spirit and the letter of the principles and policies of the Charter of the United Nations," in administering the trusteeship.[185] In a worldwide radio broadcast, Secretary of State Edward Stettinius explained that this pledge meant

> the realization of human rights and freedoms for dependent peoples, including the right to independence or another form of self-government, such as federation—whichever the people of the area may choose—*when they are prepared and able to assume the responsibilities of national freedom* . . . .[186]

Disagreement exists over whether and to what extent the promise of "self-government or independence" effected a guarantee to the people of the trust territories the right to determine their own political status. A 1981 U.N. study prepared by Aurelio Cristescu equates the language contained in article 76 of the U.N. Charter (and repeated in the Trusteeship Agreement), with the right to self-determination.[187] Conversely, other commentators found that the very same language signified a *denial* of a "commitment on the part of the States administering trust or non-trust dependent territories to offer full 'external' self-determination to the inhabitants of those territories."[188] In either case, the United States failed to express wholehearted commitment to full self-determination for Palau.

Whether or not the United States became obligated to offer full external self-determination under the U.N. Charter and the Trusteeship Agreement, the language of these two sources of conventional law, and the U.S. interpretation of the language, bound the United States to guarantee the people of the trust territory the right of self-government. The right of self-government in the U.N. Charter and Trusteeship

184. *See id.* at 475. The United States also proposed alternative objectives. For example, the United States suggested "local autonomy within a larger association," and "assimilation," describing both as valid forms of self-government, "provided that the people of the territory concerned have attained a degree of political autonomy and reached a stage of political development which will enable them to make a free and considered choice." F.B. Sayre, representing the United States in the Fourth Committee, U.S. Mission Press Release No. 244, at 1-2 (Oct. 2, 1947), *quoted in* Sayre, *supra* note 180, at 281.

185. *See* 2 U.N. SCOR (116th mtg.) at 482 (1987) (statement of Warren R. Austin, U.S. Rep. to the United Nations).

186. *See* 1 M. WHITEMAN, *supra* note 180, at 738 (emphasis added).

187. *See* Cristescu, *The Right to Self-Determination* 3, U.N. Doc. E/CN.4/Sub.2/404/Rev.1, U.N. Sales No. E. 80.XIV.3 (1981).

188. *See, e.g.*, M. POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE 10-11 (1982).

Agreement, even as interpreted by the U.S. officials, guarantees at a minimum that capable peoples can choose their own form of government.

Moreover, the United States has accepted, at least implicitly, that Palau is ready to choose its political status. U.S. acceptance is demonstrated by (1) its commencement of negotiations over Palau's future political status, (2) its recognition of Palau's adoption of a Constitution, and (3) its conclusion of negotiations and scheduling of the first plebiscites on the Compact. Because the United States will not allow Palauans to freely choose their own form of government despite their readiness, the United States is in violation of its treaty obligations.

C. Termination of the Trusteeship

The United States apparently also intends to violate the termination requirements under the Trusteeship Agreement. On November 3, 1986, President Reagan issued Proclamation 5564, which declared the termination of trusteeship in the Northern Marianas, the Marshall Islands, and the Federated States of Micronesia.[189] President Reagan took these actions without consulting the other party to the Trusteeship Agreement—the U.N. Security Council. The United States apparently plans to use the same procedures to terminate the trusteeship in Palau.[190]

The U.S. decision to circumvent the U.N. Security Council may itself be a violation of the Trusteeship Agreement. The action is also a reversal of a well-established U.S. position on the procedures for termination. Over the course of the trusteeship, and particularly in the years of Compact negotiations, Palauans have repeatedly called for U N. involvement and oversight.[191] U.S. disregard for the procedural requirements of trusteeship is a clear sigual·that Palauans effectively have no place to turn to ensure that their rights under the Trusteeship Agreement and international law are respected.

When the Trusteeship Agreement was first negotiated, the U.S. delegate indicated his understanding that termination would require Security

189. *See* Proclamation No. 5564, 3 C.F.R. 146 (1986), 48 U.S.C. § 1681 note (1988).

190. *See Compact of Free Association: Hearing on S.J. Res. 231 Before the Senate Comm. on Energy and Natural Resources,* 100th Cong., 2d Sess. 74-75 (1988) (testimony of James D. Berg, Dir. Office of Freely Assoc. State Affairs, U.S. Dep't of State).

191. *See, e.g., Report of the Trusteeship Council to the Security Council on the Trust Territory of the Pacific Islands,* 44 SCOR Spec. Supp. (No. 1) at 16, U.N. Doc. S/20843 (1989) (K. Nakamura, Palau Vice-President and Special Representative of the Administering Authority, appealing to the Trusteeship Council to ensure U.S. compliance with terms of the Trusteeship Agreement); *Petition From Mr. Santo Olikong, Speaker, House of Delegates, Second Olbiil Era Kelulau,* 2 U.N. Doc. T/PET.10/731 (1988) (Palau's Speaker of the House appeals to the Trusteeship Council and Security Council to provide seeurity personnel, along with the United States, for pending elections); *Report of the United Nations Visiting Mission to the Trust Territory of the Pacific Islands, 1982,* 50 TCOR Supp. (No. 2) at 21-28, U.N. Doc. T/1850 (U.N. Mission receives a range of complaints and requests from Palauans).

Council approval.[192] This apparently remained the U.S. position until the termination of the trusteeship drew near.[193] The United States then chose to rely on a State Department legal opinion which concluded that the Security Council had entrusted all its functions under the trusteeship to the Trusteeship Council.[194]

Concern over a potential Soviet Union veto in the Security Council may have motivated this change in official U.S. policy. Soviet representatives to the United Nations have accused the United States of acts contrary to U.N. Declarations on decolonization, and of "depriving the people of Micronesia of their freedom and independence."[195] The Soviets also charged the United States with "attempting to present its annexation of the Trust Territory to the United Nations as a *fait accompli*."[196]

The termination issue is somewhat unclear because neither the U.N. Charter nor the Trusteeship Agreement sets forth specific procedures for termination of trusteeships. According to article 79 of the Charter, however, "[t]he terms of trusteeship . . . including any alteration or amendment, shall be agreed upon by the states directly concerned . . . and shall be approved as provided for in Articles 83 and 85."[197] Article 83 applies to strategic trusts and provides that all functions of the United Nations for these areas, including approval of terms and "their alteration or amendments, shall be exercised by the Security Council."[198]

International scholars usually view the Trusteeship Agreement as bilateral, with the United States and the U.N. Security Council as parties.[199] And, the U.S. Representative to the Security Council explicitly

192. *See* 2 U.N. SCOR (116th mtg.) at 476 (1947) (statement of Warren R. Austin, U.S. Rep. to the United Nations). At the meeting, Ambassador Austin stated that "no amendment or termination [of the Trusteeship Agreement] can take place without the approval of the Security Council." *Id.*

193. *See* Letter from Roger S. Clark to Editor-in-Chief, 81 AM. J. INT'L L. 927, 932 & n.16 (1987) [hereinafter Clark Letter].

194. *Cf.* OFFICE OF FREELY ASSOCIATED STATE AFFAIRS, U.S. DEPARTMENT OF STATE, EVOLUTION OF THE FORMER TRUST TERRITORY OF THE PACIFIC ISLANDS 6 (Oct. 25, 1988) (background paper; update available, TRUST TERRITORY OF THE PACIFIC ISLANDS AND FREELY ASSOCIATED STATES, June 13, 1990) (U.S. complied with Trusteeship Council resolution on termination, terminating all trusteeships except Palau).

195. *See, e.g.*, 40 U.N. SCOR (1595th mtg.) Special Supp. (No. 1) at 27, U.N. Doc. S/17334 (1985) (Soviet Union voicing its objection to the U.S. procedures for termination of the trusteeship).

196. *Id.* at 26. American officials have voiced their concern over Soviet "troublemaking" within the United Nations. *See Hearings on H.R.J. Res. 479, Compact of Free Association, supra* note 21, at 74-75 (testimony of James D. Berg) ("[A]s long as the Compact for Palau doesn't enter into force, the position of the United States is subject to intense [Soviet] criticism . . . . They will continne to criticize us, they will continue to call us colonizers as long as the Trusteeship is in effect . . . .").

197. U.N. CHARTER art. 79.

198. U.N. CHARTER art. 83, para. 1.

199. *See* H. CHIU, THE CAPACITY OF INTERNATIONAL ORGANIZATIONS TO CONCLUDE TREATIES, AND THE SPECIAL LEGAL ASPECTS OF THE TREATIES SO CONCLUDED 159-68 (1966); MacDonald, *supra* note 167, at 256; Parry, *The Legal Nature of the Trusteeship Agreements*, 27 BRIT. Y.B. INT'L L. 164 (1950).

stated immediately after the drafting of the agreement that the U.S. government accepted this view.[200] It follows that the U.N. Security Council, as a party to the agreement, is the appropriate body to determine whether the objectives of trusteeship have been sufficiently met to approve the termination.[201]

In a 1981 article, J. Ross MacDonald examined a range of methods for terminating a trusteeship.[202] He rejected unilateral termination by the United States, based on an interpretation of the ordinary meaning of the language in the U.N. Charter.[203] According to MacDonald, the Trusteeship Council's consent would not be sufficient to fulfill the responsibilities of the United Nations on security matters like those implicated in the designation of the strategic trusteeship.[204] He therefore concluded that "the only lawful way to terminate the trusteeship is by action of both the United Nations Security Council and the United States."[205]

Professor Clark also persuasively argnes that the U.N. Charter requires approval by the Security Council to terminate trusteeship.[206] In his view, the lack of Security Council approval rendered invalid the United States' termination of its trusteeship over the Northern Mariana Islands, the Marshall Islands, and the Federated States of Micronesia.[207] Thus, Clark concludes that "the powers of the Security Council and the Trusteeship Council under the trusteeship provisions of the Charter continue, not only as to Palau, but in respect of the other entities as well."[208]

As compelling as Clark's reasoning may be, legal reality may ultimately dictate a contrary resolution of the problem. Termination of the

200. "The United States wishes to record its view that the draft trusteeship agreement is in the nature of a bilateral contract between the United States, on the one hand, and the Security Council on the other." 2 U.N. SCOR (116th mtg.) at 476 (1947).

201. The question of whether termination of trusteeship requires Security Council action has existed since the creation of the Trust Territory of the Pacific. *See* Sayre, *supra* note 180, at 289-90 (identifying the absence of explicit provisions for the termination of trusteeship and predicting that the development of procedures will be a major problem). The International Court of Justice in International Status of South-West Africa, 1950 I.C.J. 128 (July 11, 1950), unanimously held that any modification by the Union of South Africa of the political status of the territory of South-West Africa required the consent of the United Nations. *Id.* at 144. In his separate opinion, Judge Read observed that "[a]ny legal position, or system of legal relationships, can be brought to an end by the consent of all persons having legal rights and interests which might be affected by their termination." *Id.* at 167; *see also* Marston, *Termination of Trusteeship,* 18 INT'L & COMP. L.Q. 1, 18-19 (1969) (arguing that the U.N. General Assembly may terminate a trusteeship agreement for material breach).

202. *See* MacDonald, *supra* note 167, at 255-63.

203. *See id.* at 258-60.

204. *See id.* at 260-63.

205. *Id.* at 263.

206. *See generally* Clark Letter, *supra* note 193.

207. *See id.*

208. *Id.* at 934.

trusteeship without U.N. Security Council approval, though technically a violation of the Trusteeship Agreement, would not prevent the new states from being welcomed into the international community. MacDonald posited that "in the event of strong support in the Security Council and General Assembly, the technical fact of nontermination would not be controlling."[209] He offered the following explanation:

> States generally make their assessments of legal consequences on the basis of facts. If States generally concluded that the trust territory was self-governing and that the people of Micronesia had validly exercised their right to self-determination there would be a strong presumption in the international community to look to the reality over the form."[210]

Given the votes in the Trusteeship Council, which is composed of the five permanent Security Council members, we can assume that the U.S. position has majority support in the Security Council.[211] Although the General Assembly may be more hostile to the concept of free association as defined by the United States, the peoples in the territories generally favor termination. Therefore, the General Assembly, in its now strongly anticolonial tradition, would likely accede to the termination of trusteeship in the Marshall Islands and the Federated States of Micronesia. Palau, however, poses a more difficult problem because the freely expressed wishes of the people conflict with the U.S. terms for termination.

Though the Trusteeship Agreement did not require the United States to guarantee Micronesians complete independence, it did bind the United States to certain duties vis-à-vis the population of the trust territories. The United States has failed to perform in the areas of economic and political development and is guilty of a significant procedural violation by seeking to terminate trusteeship without U.N. Security Council approval.

III
THE UNITED STATES HAS VIOLATED CUSTOMARY INTERNATIONAL LAW BY DENYING PALAUANS THEIR RIGHT OF SELF-DETERMINATION

We have determined that conventional law, as expressed in the U.N.

209. MacDonald, *supra* note 167, at 268.

210. *Id.*

211. *See* T.C. Res. 2183, 53 U.N. TCOR Supp. (No. 3) at 14-15, U.N. Doc T/1901 (1986). The United Kingdom, France, and the United States voted in favor of the resolution; the Soviet Union voted against it, and China did not participate. In 1987 and 1988, the Trusteeship Council reaffirmed its support of the termination of trusteeship with identical three-to-one votes. *See* 54 U.N. TCOR (1640th mtg.) at 8, U.N. Doc. T/PV.1640 (1987); 55 U.N. TCOR (1657th mtg.) at 18, U.N. Doc. T/PV.1657 (1988). China joined the majority in a 1989 vote reaffirming the 1986 resolution. *See* 56 U.N. TCOR (1671st mtg.) at 31, U.N. Doc. T/PV.1671 (1989).

Charter and the Trusteeship Agreement, guaranteed to Palauans the right to self-determination. Regardless of the status of the right in conventional law, the United States is obligated to observe this right under customary international law. In the latter half of the twentieth century, self-determination emerged as a binding norm of customary international law. As we will see, the United States has become bound by that norm since it has evinced the requisite opinio juris through repeated acknowledgments of the right.

A. Emergence of the Customary Norm of Self-Determination

1. The Role of Custom in International Law

With the exception of conventional treaty law, the customary practice of states[212]—known as customary international law—is the most significant source of binding rules among states.[213] The Statute of the International Court of Justice ("I.C.J.") lists "international custom" as a source of the law the I.C.J. shall apply in adjudicating disputes, and describes it as "evidence of a general practice accepted as law."[214]

Before a principle of international law can become a binding norm of customary international law, states must generally act in conformance therewith, and the state in question must separately acknowledge the obligatory nature of that custom.[215] The acknowledgment of a legal obligation is called opinio juris.[216] According to Ian Brownlie, once the proponent of custom has established that a general practice exists, opinio juris may be presumed, and the opponent has the burden of proving its absence.[217]

2. The Customary Norm of Self-Determination

The emergence of a right to self-determination commenced as early

212. In international law parlance, countries are referred to as "states," and national laws as "municipal laws."

213. M. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 4-5 (1988).

214. Statute of the International Court of Justice, art. 38(1)(b), *appended to* U.N. Charter, *reprinted in* 1985 U.N.Y.B. 1379 (1945) [hereinafter ICJ Statute]. The following sources can be evidence of the existence of customary international law: (1) diplomatic correspondence; (2) government policy statements and official press releases; (3) executive decisions and practices; (4) state legislation; (5) international and national judicial decisions; (6) recitals in treaties and other international instruments; (7) the practice of international organs; and (8) United Nations General Assembly resolutions. I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 5 (3d ed. 1979).

215. North Sea Continental Shelf Cases (W. Ger. v. Den.; W. Ger. v. Neth.) 1969 I.C.J. 3, 44 (Feb. 20, 1969); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102(2) & comment c (1987); I. BROWNLIE, *supra* note 214, at 8; Tunkin, *Remarks on the Juridical Nature of Customary Norms of International Law*, 49 CALIF. L. REV. 419 (1961).

216. M. JANIS, *supra* note 213, at 40.

217. *See* I. BROWNLIE, *supra* note 214, at 8.

as 1776 with the signing of the Declaration of Independence,[218] which included the principle that governments derive their authority from the consent of the governed.[219] Other early sources include the French and Russian Revolutions and the Latin American independence movements in the nineteenth and twentieth centuries.[220] In addition, Woodrow Wilson made self-determination one of his major foreign policy objectives.[221] The Wilsonian conception of self-determination, however, focused mostly on the rights of ethnic, linguistic, and cultural minorities.[222]

With the prominent inclusion of self-determination in the U.N. Charter, the principle gained new stature. Article 1 of the Charter refers to the principle of self-determination, implying that it is a prerequisite for developing "friendly relations among nations," one of the four purposes of the United Nations.[223] The same "self-determination" language is then repeated in article 55.[224] When article 1 and article 55 are read in conjunction with article 56, which provides that "[a]ll Members pledge themselves to take joint and separate action" to achieve the purposes of the organization,[225] a binding obligation may be inferred.

As a result of this new binding stature of the obligation, jurists for the first time began to ascribe the force of law to self-determination.[226] The late justice of the I.C.J. Sir Hersch Lauterpacht interpreted these Charter provisions to impart to the signatories a legal duty to respect the human rights and fundamental freedoms set forth in the Charter.[227] Because the founding states unanimously approved the U.N. Charter, some commentators thought the repercussions went even further. Louis

218. The Declaration of Independence (U.S. 1776).

219. *Id.* para. 2.

220. *See* Weissbrodt & O'Toole, *The Development of International Human Rights Law,* in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948-1988: HUMAN RIGHTS, THE UNITED NATIONS AND AMNESTY INTERNATIONAL 17, 21-22 (1988).

221. Woodrow Wilson articulated strong support for a concept that he called "the right to self-determination," whose contours differed significantly from the right as it subsequently emerged in international law. *See generally* Pomerance, *The United States and Self-Determination: Perspectives on the Wilsonian Conception,* 70 AM. J. INT'L L. 1 (1976).

222. Murphy, *Self-Determination: United States Perspectives,* in SELF-DETERMINATION: NATIONAL, REGIONAL AND GLOBAL DIMENSIONS 43, 44 (Y. Alexander & R. Friedlander eds. 1980).

223. *See* U.N. CHARTER art. 1, para. 2 (setting forth the goal that states hold "respect for the principle of equal rights and self-determination of peoples").

224. U.N. CHARTER art. 55.

225. U.N. CHARTER art. 56.

226. *See, e.g.,* Cristescu, *supra* note 187, at 2-3.

227. E. LAUTERPACHT, HUMAN RIGHTS 148 (1950) ("There is a mandatory obligation implied in the provision of Article 55 that the United Nations 'shall promote respect for, and observance of human rights and fundamental freedoms' or, in the terms of Article 13, the Assembly shall make recommendations for the purpose of assisting the realization of human rights and freedoms. There is a distinct element of legal duty in the undertaking expressed in Article 56.").

Sohn, for example, found that the rights set forth in the Charter have the character of peremptory norms and therefore prevail over other international agreements or domestic laws.[228]

Calling the Charter provisions customary law is not the only possible viewpoint; the arguments against attributing to the U.N. Charter's self-determination provision the force of binding law also have merit. Self-determination is not defined in the U.N. Charter, and no working definition of the principle had emerged in practice by 1947. Moreover, self-determination is never mentioned in chapter XI of the Charter, which deals with non-self-governing territories. Finally, the principle of self-determination is not mentioned in chapter XII, which created the trusteeship system under which Palau is governed.

Some commentators cite the failure of the U.N. Charter to include explicitly (and define) self-determination among the obligations of the administering authorities as evidence that the Charter provides no right to "external" self-determination.[229] One commentator takes this reasoning further by concluding that the Charter language does not adequately describe any human rights or attendant obligations to make the obligations binding on states.[230]

Though the U.N. Charter may not, of itself, imbue the principle of self-determination with the force of law, it evinces the emergence of a general principle; other subsequent developments provide the requisite conforming practice and opinio juris.[231] For example, in the years following the founding of the United Nations, the world witnessed a period of historic decolonization. Between 1947 and 1970, over fifty former colonies joined the international order as independent states.[232] This trend is striking evidence of state practice favoring self-determination. In addition, the new states added their voices and votes to the process of norm creation, and the new states overwhelmingly supported the right of self-determination.

During the same period, the United Nations passed a series of reso-

228. *See* Sohn, *The Shaping of International Law,* 8 GA. J. INT'L & COMP. L. 1, 13 (1978).

229. *See* Lord Cranborne, Doc. 1208, II/16(1), 8 U.N.C.I.O. Docs. 155-59 (1945); J. GUTTERIDGE, THE UNITED NATIONS IN A CHANGING WORLD 50-51 (1969); *see also* M. POMERANCE, *supra* note 188, at 9-10; Gross, *Their Right of Self Determination in International Law,* in NEW STATES IN THE MODERN WORLD 136-39 (M. Kilson ed. 1975).

230. *See* H. KELSEN, THE LAW OF THE UNITED NATIONS 29 (1951).

231. For a discussion of the requirements for the establishment of a customary international norm, see *supra* text accompanying notes 213-17.

232. NEW STATES IN THE MODERN WORLD at IX (M. Kilson ed. 1975); *see also* Lauterpacht, *Some Concepts of Human Rights,* 11 HOWARD L.J. 264, 272 (1965). In his discussion of the new era of decolonialism, Lauterpacht states that the mandate and trusteeship systems "revealed the emergence of the principle that territories and peoples are not mere chattels to be acquired and disposed of by and for the benefit of the proprietary state, but are instead the heritage of those who dwell within them." *Id.* at 271.

lutions and other covenants supporting this right. For many international lawyers, self-determination finally became a legal right when it was included in the International Covenants on Human Rights approved in 1966.[233] General Assembly Resolution 1514, the Declaration on the Granting of Independence to Colonial Countries and Peoples, marked another watershed in the emergence of a binding right of self-determination when it was adopted in December 1960. The vote was 89 to 0, with the United States and 8 other countries abstaining.[234]

Although the United States abstained in the vote on Resolution 1514, it cited narrow grounds for its decision. James J. Wadsworth, the U.S. Representative to the United Nations from September 1960 to January 1961, expressed his "wish to be in a position" to support the declaration, and denounced colonialism as "the denial of the right of self-determination."[235] Furthermore, in a subsequent intervention following the vote, Representative Wadsworth expressed U.S. support for the "underlying purpose" of Resolution 1514.[236] He then explained that the United States had abstained only because the language could be interpreted to require the immediate grant of independence to dependent people, and thus it could "preclude even legitimate measures for the maintenance of law and order."[237] In essence, the United States supported the right of self-determination as long as the right did not require independence without adequate preparation, and as long as it did not prevent administering authorities from performing their responsibilities in the interim.

Resolution 1514 has been hailed as "momentous and historic."[238] Its passage and U.N. practice led Rosalyn Higgins to conclude in 1963 that self-determination "ha[d] developed into an international legal right."[239] Other writers, however, persisted in their refusal to accept self-

233. *See* International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; *see also* V. VAN DYKE, HUMAN RIGHTS, THE UNITED STATES AND WORLD COMMUNITY 78 (1970). It is noteworthy that the United States and most other members of the Atlantic community had voted against including that article in the Covenants during the crucial vote in 1955. *See id.* For other international lawyers, legitimacy to the right of self-determination came with the widespread ratification of these Human Rights Covenants. *See* J. GUTTERIDGE, *supra* note 229, at 71 n.47.

234. *See* G.A. Res. 1514, 15 U.N. GAOR (947th plen. mtg.) at 1273-74, U.N. Doc. A/PV.947 (1960).

235. *See id.* at 1158.

236. *Id.* at 1238.

237. *Id.*

238. Gros Espiell, *The Right to Self-Determination: Implementation of United Nations Resolutions* 8, U.N. Doc. E/CN.4/Sub.2/405/Rev.1 (1980).

239. *See* R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 103 (1963).

determination as a full-fledged legal right.[240]

Resolution 1514 is therefore best viewed as a very influential instrument, but not in itself a legally binding one. As Higgins observed, although U.N. Resolutions can be persuasive evidence of norm-creation, the extent of their normative character may be controverted.[241] Regardless of Resolution 1514's independent legal significance, however, its passage reinforced expectations consistent with the principle of self-determination. When these expectations are coupled with state practice, the principle of self-determination becomes a right.

The ambiguous U.S. position toward self-determination, as evidenced by the debates over Resolution 1514, became clearer in 1970, when the United States joined in the unanimous passage of General Assembly Resolution 2625.[242] The United States helped draft, endorsed, and voted to approve Resolution 2625, the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations.[243] Resolution 2625 embodied a definitive statement on the right of self-determination. According to Special Rapporteur Cristescu, Resolution 2625 further codified the principle of equal rights and self-determination of peoples.[244]

Resolution 2625 declares that:

> By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.[245]

This language provides a more precise definition of the right of self-determination. Resolution 2625 clarifies that the "selves" involved are peoples, not states, and that determination expressly applies to the choice of political status. Thus, the choice of political status must allow a people to freely pursue their economic, social, and cultural development.

Resolution 2625 further provides that "[e]very State has the duty to

240. Michla Pomerance, for example, downplayed the significance of Resolution 1514, calling it of "questionable legal credentials" and not well-grounded in the U.N. Charter. *See* M. POMERANCE, *supra* note 188, at 12.

241. R. HIGGINS, *supra* note 239, at 5-7.

242. G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc A/8028 (1970).

243. In congressional testimony, the U.S. State Department office that negotiated the Compact explicitly recognized the legal authority of U.N. General Assembly Resolutions on non-self-governing peoples and cited Resolution 2625 as "perhaps the most authoritative" source. *See Compact Interior & Insular Affairs Subcomm. Hearing, supra* note 25, at 98-99 (responses by Office of Micronesian Status Negotiations to Subcommittee questions).

244. *See* Cristescu, *supra* note 187, at 10.

245. G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 123, U.N. Doc. A/8028 (1970).

promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples,"[246] and establishes that each state has the duty to assist the United Nations in order "[t]o bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned."[247]

The United States publicly endorsed Resolution 2625 in a State Department release, one month before the Resolution was adopted.[248] Richard H. Gimer, the U.S. Alternative Representative to the General Assembly, stated that "the United States is pleased now to observe that it considers the declaration . . . to be an objective statement of relevant charter principles rather than a partisan product."[249] He also explicitly recognized the General Assembly's role under article 13 of the U.N. Charter in "encouraging the progressive development of international law."[250] Most importantly, Gimer expressly validated the Resolution's statement of the right of self-determination: "[T]he United States is glad that the declaration recognizes the right of self-determination as belonging to 'all peoples.' "[251] Moreover, the United States explicitly recognized that this right of self-determination applied to the U.S.-administered Trust Territory of the Pacific.[252]

The U.S. government's strong support for the right of self-determination, as defined in the Declaration on Principles of Friendly Relations, contrasts with the earlier U.S. position in regard to Resolution 1514. The difference can be explained in that the major U.S. objection to Resolution 1514 concerned an implied demand that all dependent peoples be given full independence.[253] In contrast, "[t]he establishment of a sovereign and independent State" was only one of the possible outcomes of the process of self-determination under Resolution 2625.[254] Other possible outcomes included "free association or integration with an independent

246. *Id.* at 123-24.

247. *Id.* at 124.

248. *See* Gimer, *Declaration on Principles of Friendly Relations* (Sept. 24, 1970), 63 DEP'T ST. BULL. 623 (1970).

249. *Id.*

250. *Id.*

251. *Id.* at 625.

252. *Id.* at 626. The United States position was that

> [i]n the context of dependent territories, United States administration of the Trust Territory of the Pacific Islands and the other non-self-governing territories for which the United States has been responsible has been based on the view that the future of these territories is not something that can be determined in New York nor in Washington alone. Needless to say, the self-determination text does not alter in any way United States responsibilities for dependent areas under its administration under our Constitution, the U.N. Charter, or international agreements to which the United States is a party.

Id.

253. *See supra* text accompanying note 237.

254. *See* G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 124, U.N. Doc. A/8028 (1970).

State" as well as "any other political status freely determined."[255]

The U.S. vote in support of Resolution 2625 and official statements in support thereof evince the opinio juris sufficient to find that the United States joined the majority of states in fully recognizing the right of self-determination. In *Nicaragua v. United States,* the International Court of Justice stated that "*opinio juris* may, though with all due caution, be deduced, *inter alia,* from the attitude of the Parties and of States toward certain General Assembly resolutions."[256] The Court specifically relied on Resolution 2625 in holding that the United States was bound by the customary norm against the use of force.[257] In accordance with the terms of Resolution 2625, the United States is similarly obligated to respect the right of peoples freely to choose their political status and direct their economic, social, and cultural development.[258]

The content of the right of self-determination has been further defined since the passage of Resolution 2625. In 1974, the United Nations appointed Special Rapporteur Hector Gros Espiell to study the legal effect of U.N. Resolutions relating to the right of self-determination of peoples under colonial and alien domination. The Special Rapporteur unequivocally found a modern right of self-determination[259] and cited with approval New Zealand's definition of the right. That formulation provides:

> The concept of 'the right to self-determination' has been interpreted by the New Zealand Government as a responsibility to grant to the peoples of dependent territories that measure of independence which they consider best suited to their needs.
>
> Implicit in the 'right to self-determination', in this country's view, is the right of a people to be free from economic exploitation or political domination by another country and to have full and permanent sovereignty over natural resources. Recognizing that self-determination

255. *Id.*

256. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 89 (June 27, 1986) [hereinafter Nicaragua case].

257. The International Court of Justice, in the merits phase of the Nicaragua case, indicated that in regard to the United States, an expression of opinio juris can be deduced specifically from U.S. consent to the text of such instruments as Resolution 2625 and the Helsinki Accords. Nicaragua case, *supra* note 257, at 89. According to the court, "[t]he effect of consent to the text of such resolutions cannot be understood as merely that of 'a reiteration or elucidation' of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution . . . ." *Id.*

258. *See supra* text accompanying notes 242-43. This definition of the right of self-determination had already gained approval due to its earlier inclusion in the two International Covenants on Human Rights completed in 1966. *See supra* note 233 and accompanying text. Although this right does not necessarily require complete independence, many U.N. member states clearly prefer that option. *See* Murphy, *supra* note 222, at 51.

259. *See Implementation of United Nations Resolutions Relating to the Right of Peoples Under Colonial and Alien Domination to Self-Determination* (H. Gros Espiell, Special Rapporteur), at 201-02, U.N. Doc. E/CN.4/Sub.2/405 (vol. I) (1978).

> includes political, economic, and social factors, a country should have the freedom to establish its own constitution and political status, to control its resources, to establish its own trade relations, and to protect its own cultural and social values by controlling its own educational system.[260]

The same essential points are succinctly stated in the Final Act of the Conference on Security and Co-operation in Europe:

> By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.[261]

Ambassador Wadsworth also gave some definition to the right of self-determination in several of his remarks during the debates preceding the adoption of U.N. Declaration 1514. He stated that colonialism "is the denial of the right of self-determination—whether by suppressing free expression or by withholding necessary educational, economic and social development"[262]—thereby implying an affirmative duty to promote development as part of the right of self-determination. He followed with the assertion that "free elections" involving a choice of alternatives are "the essence of the principle of self-determination" as provided in the U.N. Charter.[263]

The right of self-determination is now both well-defined and nearly universally accepted. A growing number of writers, in fact, now argue that the right of self-determination has become a peremptory norm of international law, or *jus cogens*; that is, it has become "a norm thought to be so fundamental that it invalidates rules consented to by states in treaties or custom."[264] In a context in which self-determination is viewed as a basic human right, Ian Brownlie[265] and others[266] have found that the self-determination of peoples, like the prohibition against genocide and the protection of human rights, is a peremptory norm. But

260. *Id.* at 47 n.2.

261. *Declaration of Principles Guiding Relations Between Participating States, Conference on Security and Co-operation in Europe: Final Act, Art. VIII,* 14 I.L.M. 1292 (1975), *reprinted in* 70 AM. J. INT'L L. 417, 420 (1976).

262. 15 U.N. GAOR (937th plen. mtg.) at 1158, U.N. Doc. A/PV.937 (1960).

263. *Id.* at 1159. Ambassador Wadsworth elaborated by adding a common sense conclusion that "the administering authority must trust in the people's wisdom and put their destiny in their own hands." *Id.* at 1160.

264. M. JANIS, *supra* note 213, at 53. As an example, the prohibition against genocide is widely accepted as *jus cogens.* Judge Tanaka, in his dissenting opinion in the South West Africa Cases (Ethiopa v. S. Afr.; Liberia v. S. Afr.), 1966 I.C.J. 4, 298 (July 18, 1966), also concludes that the protection of human rights is *jus cogens.*

265. I. BROWNLIE, *supra* note 214, at 82-83.

266. *E.g.,* Barcelona Traction, Light & Power Co., (Belg. v. Spain) 1970 I.C.J. 4, 304 (Feb. 5, 1970) (Ammoun, J., separate op.).

whether or not the principle of self-determination is *jus cogens,* it is a norm that is nearly universally accepted. Since the United States has recognized this norm, it is therefore bound by a people's exercise of its right of self-determination.

B. The Process for Negotiation and Approval of the Compact of Free Association Violates Palauans' Right of Self-Determination

Whether the U.S. negotiations and approval process regarding the Compact of Free Association violate the Palauans' right of self-determination hinges on a question of choice. Does the process allow Palauans freely to determine their political status and pursue their political, economic, and cultural development? Precisely because the United States has severely limited Palauans' free choice on matters crucial to sovereignty, U.S. actions violate Palauans' right of self-determination.

Throughout the history of trusteeship, including the negotiations on the future political status of the trust territories, the United States has insisted on retaining extensive military prerogatives in Palau and elsewhere in Micronesia.[267] Without question, the United Nations granted the United States significant power to fortify Micronesia and engage in strategic operations there. Article 84 of the U.N. Charter allows the administering authority of a strategic trust to make use of "facilities, and assistance from the trust territory" for the maintenance of interuational peace and security, as well as for local defense.[268]

During the drafting of article 84, the members of the Five Power Group on Trusteeship debated the "question of fortifications."[269] The United States intervened to support the proposed langnage because "it would give a right to the Administering Authority for the full use of the military resources of the territory. In so doing, it would remove some of the limitations which had been imposed on former mandates."[270] At no time did any participant advocate a complete abolition of limitations on

267. B. ALDRIDGE & C. MYERS, *supra* note 25, at 23-39; *see also Hearings on H.R.J. Res. 479, Compact of Free Association, supra* note 21, at 61-63 (statement of Karl D. Jackson) (describing "geopolitical context" of Palau Compact and U.S. defense interests); *The Compact of Free Association Between the United States and Palau: Hearings on H.J. Res. 626 Before the House Comm. on Foreign Affairs and Subcomm. on Asian and Pacific Affairs,* 99th Cong., 2d Sess. at 95-100 (1986) (statement of Philip E. Barringer, Ass't Sec'y of Defense for Int'l Security Affairs, Dep't of Defense) ("The Compact with Palau is very clearly in the strategic interest of the United States.").

The Supreme Court of Palau in Fritz v. Salii, App. No. 8-88, slip op. at 20 (Palau Sup. Ct., App. Div., Aug. 29, 1988), described the Compact in terms of a "quid pro quo" arrangement, with Palau offering "access to and nse of portions of Palauan territory on land and sea for United States military strategic purposes," in exchange for money. *Id.* The court observed that the defense provisions also benefit Palau but are "primarily of military strategic importance to American interests." *Id.*

268. U.N. CHARTER art. 84, para. 1.

269. 1(2) U.N. GAOR Annex 18, at 269-70, U.N. Doc A/C.4/40 (1947).

270. *Id.* at 270.

the proprietary state's military, but the implication was that the United States would exercise extensive military authority in the region.[271] Indeed, the practice of states under the mandate system[272] had, at times, included the exercise of broad military prerogatives.[273] The legal rationale for U.S. insistence on a defense veto under the Compact over the foreign and (to some degree) internal affairs of Palau is generally based on these historical circumstances underlying the strategic trust designation.[274]

International law, however, confers on neither the United Nations nor a proprietary state the power to establish military policies that contravene the freely expressed wishes of a people in core matters of sovereignty; to permit otherwise would eviscerate the right of self-determination. At the core of sovereignty is control over land, natural resources, and foreign relations.[275] Along with a permanent population, this control is essential to statehood. The Palauans have freely and clearly expressed their interest in keeping nuclear technology and attendant waste by-products out of their islands and water. In addition, the Palauans chose to deprive foreign governments of the right to condemn precious land in their territory. Since these expressed interests lie at the core of the Palauans' right of self-determination, the United States cannot claim privileges in Palau that are in conflict with these interests.

In the late 1970s, before and during the drafting of the original Compact of Free Association, the United States declared to the Micronesians its intention to retain military authority in Micronesia. In 1979, the United States informed Palau's Constitutional Commission that denying the United States the benefits of the power of eminent domain would "close the door to a political relationship of free association."[276] In the first round of political status negotiations with the

271. The Egyptian representative proposed an amendment to article 84 to place the administering authority's powers with respect to military "facilities and assistance" under the control of the Security Council. *See id.* at 272. In response, the U.S. representative asserted that while obligations in regard to the maintenance of international peace and security were already under Security Council control, the Security Council should not be involved in the administering authority's second role—local defense and the law-and-order function within the Trust Territory. *See id.* The proposed Egyptian amendment was defeated in Committee by a vote of 26 to 2. *Id.* at 273.

272. For a discussion of the mandate system, see *supra* note 163.

273. For example, in the years following World War I, Japan had a broad military mandate in Micronesia. *See generally* T. YANAIHARA, PACIFIC ISLANDS UNDER JAPANESE MANDATE 22-23, 27 (1940).

274. *See* Hills, *Compact of Free Association for Micronesia: Constitutional and International Law Issues,* 18 INT'L LAW. 583, 606 (1984); *supra* text accompanying notes 162-64.

275. *Resolution On Permanent Sovereignty Over Natural Resources,* G.A. Res. 1803, 17 U.N. GAOR Supp. (No. 17) at 15, U.N. Doc. A/5217 (1963), *reprinted in* 2 I.L.M. 223 (1963).

276. *See* REPORT TO THE PALAU LEGISLATURE, PALAU CONSTITUTIONAL DRAFTING COMMISSION, (1979), *quoted in* Gibbons v. Salii, App. No. 8-86, slip op. at 22, 35-36 (Palau Sup. Ct., App. Div., Sept. 17, 1987).

Reagan administration, the Micronesians were again reminded of the extent of U.S. strategic interests in their region. U.S. officials stated that the long-term security of the United States required U.S. military bases in Micronesia, the right of denial to unfriendly nations, and "assured rights of access, transit and overflight throughout the Micronesian area."[277] The U.S. view of its strategic interests in Palau persisted throughout the course of Compact negotiations and the ensuing plebiscites.[278]

U.S. intransigence on matters it considers strategic priorities is tantamount to making the Micronesians' self-determination conditional on their forfeiture of control over national security and a significant amount of internal authority. Because self-determination is not a conditional right, attaching material conditions to the exercise of such a right violates international norms.

In defending itself against allegations that its strategic imperative denies Palauans choice in matters central to sovereignty, the United States has asserted that the trust territories were offered complete independence and therefore had not faced an illegally restricted choice.[279] But the records of negotiations on the future of Palau and the other trust territories contain scant evidence of U.S. offers to grant independence to Micronesia. And given the progressive dependence of Palau's economy on U.S. aid, Palau was in effect foreclosed from choosing the independence option.

In a 1980 article, Professor Clark examined the first draft of the Compact and explored whether that agreement conformed with decolonization norms developed by the United Nations.[280] Clark used various criteria for evaluating the role of the administering authority of the strategic trust, including criteria derived from General Assembly Resolutions 1514 and 1541.[281] Clark concluded that, although the terms of the Marianas Commonwealth fell short, "[t]he Free Association agreements contemplated for the remainder of the Trust Territory probably

277. *See* OFFICE FOR MICRONESIAN STATUS NEGOTIATIONS, DEP'T OF STATE, SUMMARY RECORD OF THE SIXTH ROUND OF RENEWED POLITICAL STATUS NEGOTIATIONS BETWEEN THE UNITED STATES AND THE REPUBLIC OF PALAU, THE FEDERATED STATES OF MICRONESIA, THE REPUBLIC OF THE MARSHALL ISLANDS, OCTOBER 3-9, 1981, A2-1 (1983) (statement of Noel C. Koch, Principal Deputy Ass't Sec'y of Defense).

278. *See generally supra* text accompanying notes 20-25, 118-20.

279. *See, e.g., Report of the Trusteeship Council to the Security Council on the Trust Territory of the Pacific Islands,* 44 U.N. SCOR Special Supp. (No. 1) at 27, U.N. Doc. S/20843 (1989) ("[T]he Administering Authority had consistently recognized that the Compact of Free Association was not the only political option open to Palau. Independence and commonwealth status had both been included on the ballot at various times.").

280. *See* Clark, *supra* note 39, at 66-83.

281. *See id.*

conform to the requirements of the relevant United Nations norms."[282] Clark based his conclusion on the earlier draft's grant to the Micronesians of freedom to modify their status unilaterally.[283]

The ensuing negotiations that yielded the existing version of Palau's Compact made the agreements "much more onerous for the Micronesians," in Professor Clark's view.[284] According to Clark, the propriety of the Compact changed as a result of the provisions that made U.S. "denial rights" permanent unless terminated by mutual agreement.[285] Professor Clark decided that the Compact was now "contrary to the decolonization norms of the United Nations and just plain unconscionable."[286]

Attorney David Isenberg, a former legal intern at the Defense Department, differs with Clark.[287] Although Isenberg acknowledged the potential problem with mutual security agreements that cannot be unilaterally terminated,[288] he pointed to a number of factors that in his view assure the legal validity of the Compact: (1) the territorial government has the "acknowledged capacity to exercise self-determination on future status questions";[289] (2) the agreements were approved under constitutional processes; (3) the U.N. plebiscites followed large educational programs; and (4) the inhabitants understood the effect of the agreements.[290] He also cited precedents exemplifying what he called "political alliances which restrict the parties' capacity to enter into other alliances, or to individually take policy positions in conflict with their common interests."[291]

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282. *Id.* at 84. Clark concludes that the Marianas Covenant does not satisfy any of the tests that apply to resolution of the political status of a trust territory. According to Clark, the Covenant fails to meet standards for self-determination, particularly those of Resolution 1541 and other G.A. resolutions, which require that the peoples concerned must be free to modify their status. *See id.* at 75-78. For instance, the Covenant fails as an example of "integration with an independent State" because "[t]he inhabitants of the Marianas are not represented in the United States legislature; they may not vote for President; they may be affected by federal legislation which could not be made applicable to the states." *Id.* at 76.

283. *See id.* at 72-73.

284. Clark, *Free Association—A Critical View*, in PROCEEDINGS: CONFERENCE ON THE FUTURE POLITICAL STATUS OF THE UNITED STATES VIRGIN ISLANDS 1, 8-9 & n.13 (P. Leary ed. 1989).

285. *Id.* at 11-13.

286. *Id.* at 5.

287. *See* Comment, *Reconciling Independence and Security: The Long Term Status of the Trust Territory of the Pacific Islands*, 4 UCLA PAC. BASIN L.J. 210 (1985) (authored by David Isenberg).

288. *See id.* at 228 ("Significantly, the United States indicates that it expects the relationship to continue so long as it desires. The Micronesian states' ultimate status may well pivot on this fact's legal impact.").

289. *Id.* at 224.

290. *Id.*

291. *Id.* at 232-33. In response, Clark primarily distinguished the precedents cited by Isenberg, pointing out that Isenberg's precedents are all either unilaterally terminable or predate the emergence of modern U.N. decolonization norms. *See* Clark, *supra* note 284, at 13-16.

The issues raised in the Clark-Isenberg exchange potentially call into question the legality of each of the four arrangements made by the United States with former trust territory entities. In the case of the Marshall Islands Compact, for example, it can be argued that as "unconscionable" as the terms may appear to outsiders,[292] the arrangement represents the freely expressed choice of the people concerned.[293] International law recognizes the capacity of states *in statu nascendi*[294] to make legally binding arrangements with existing states. According to Brownlie, "once statehood is firmly established, it is justifiable, both legally and practically, to assume the retroactive validation of the legal order during a period prior to general recognition as a state."[295] In other words, the Marshallese, as people of an emerging state, were free to grant to other states any rights they wished to grant.

In the case of Palau, the freely expressed choice of the people resulted in a constitution that clashed with U.S. strategic interests. Unlike the Marshallese, the Palauans adopted a constitution that included provisions on matters central to the sovereiguty of Palau, and the United States found the provisions objectionable.[296] The United States subsequently ignored the freely expressed wishes of the Palauan people by insisting upon the maintainance of the nuclear transit and eminent domain rights denied it under the constitution.

The portions of the Palau Constitution that the United States find objectionable embrace the Palauans' decisions on such vital issues as: (1) the use of scarce land; (2) environmental health and safety and the choice not to accept both the risks and benefits of nuclear technology; (3) national security and military defense needs; (4) foreign relations and the potential effect that situating nuclear weapons bases in Palau would have on relations with potential allies and trading partners; and (5) domestic security and the significant forfeiture of police power that nuclear weapons would inevitably involve.

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292. Professor Clark concludes that the right of strategic denial granted to the United States in perpetuity under the latest agreements with all three Compact states causes each of the agreements to fail under U.N. standards. *Cf.* 53 U.N. TCOR (1604th plen. mtg.) at 39-42, U.N. Doc. T/PV.1604 (1986).

293. Professor Prince, in his 1989 article, examines whether free association represents the freely expressed choice of the electorate in the trust territories. *See* Prince, *supra* note 13, at 55-59. Though Prince gives credence to Clark's concerns, he ultimately sides with those who find free association legal under existing law norms. *See id.* at 56. He indicates, however, that the Security Council should encourage "adjustments" to the terms of free association to require that the right of strategic denial be periodically renegotiable. *See id.* at 59.

294. *In statu nascendi* refers to a government evolving into statehood under the Trusteeship Agreement. *See* J. CRAWFORD, CREATION OF STATES IN INTERNATIONAL LAW 391-96 (1979); *cf. infra* note 299 (describing Palau's status as *in statu nascendi*, and not as a U.S. territory or as property under U.S. sovereignty).

295. I. BROWNLIE, *supra* note 214, at 82.

296. *See supra* text accompanying notes 58-82.

Although Palauans could theoretically still freely choose to reverse their earlier choice and grant the constitutionally withdrawn military rights to the United States on a quid pro quo basis, free choice cannot be adequately demonstrated where the United States has placed impossible conditions on Palau: The United States refused to terminate the trusteeship except on terms contrary to the Palau Constitution. The difficulty of demonstrating that a decision to accede to U.S. demands would genuinely be free choice is compounded in Palau because the Republic is so thoroughly dependent on U.S. aid. Thus, even if approved, the Compact would not satisfy the free choice requirement inherent in the Palauans' right of self-determination under international law.

C. *The Compact of Free Association, Even if Approved, Would Be Void or Voidable Under the International Law of Treaties*

1. *The Vienna Convention Governs the Validity of the Compact*

The Trusteeship Agreement has the nature and force of a treaty;[297] treaties can and generally do create obligations that are binding on the parties under international law.[298] Because the legal relationship between Palau and the United States is governed by international law, it differs from a traditional bilateral relationship between a protecting power and a nonsovereign protectorate.[299] Performance under the Trusteeship Agreement and any Compact of Free Association or other agree-

297. *See, e.g.*, H. KELSEN, *supra* note 230, at 332 ("These trusteeship agreements are treaties concluded by the United Nations on the one hand, and the states competent to dispose of these territories on the other hand."). An analogy to the former United Nations Mandate system is useful. The International Court of Justice in the *South West Africa Cases* ruled on the question of the legal force of the Mandate; a majority of the court held that "the Mandate, in fact and in law, is an international agreement having the character of a treaty or convention." South West Africa Cases (Ethiopia v. S. Afr.; Liberia v. S. Afr.), 1962 I.C.J. 319, 330 (Dec. 21, 1962).

298. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 comment f (1987).

299. The territorial clause of the U.S. Constitution gives Congress certain authority over "the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2. At no time could this provision govern the relationship between Palau and the United States: Palau has never been a territory or property of the United States and has never been under U.S. sovereignty. United States. v. Covington, 783 F.2d 1052, 1055 (9th Cir. 1985); People of Saipan v. United States Dep't of Interior, 502 F.2d 90, 95 (9th Cir. 1974).

Since the 1960s, Palau and the rest of the trust territory has been *in statu nascendi*. Juda v. United States, 13 Cl. Ct. 667, 677 (1987); *see* J. CRAWFORD, *supra* note 294, at 391-96. Therefore, negotiations with the United Nations and with the peoples of the emerging states are analogous to treaty negotiations under international law.

Under U.S. law, the President exercises the primary authority to negotiate the changes in political status of the trust territories under the treaty-making power. *See* U.S. CONST. art. II, § 2, cl. 2; United States v. Pink, 315 U.S. 203, 229-30 (1942); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936). Because the trust territories are not territories but more like foreign entities, U.S. legislative authority derives solely from the "necessary and proper clause." *See* U.S. CONST. art. I, § 18, cl. 8; Missouri v. Holland, 252 U.S. 416, 432 (1920). For a general discussion of the territorial clause issne, see Hills, *supra* note 274, at 587-88, 592-97.

ment for termination of trusteeship must conform with international law norms, including the law of treaties.

The Vienna Convention on the Law of Treaties,[300] also called the Treaty on Treaties, came into force in 1980.[301] To date, the United States still has not ratified the Convention; however, under official U.S. policy, the convention is regarded as "the authoritative guide to current treaty law and practice."[302] Under the Vienna Convention, a treaty is void if it: (1) conflicts with a peremptory norm of general international law;[303] or (2) is procured by coercion of a state.[304] In addition, a treaty is *voidable* if the treaty is procured through corruption of its representative.[305]

These sections of the Convention on invalidity of treaties are vital to the law of treaties and have significant legal weight.[306] However, because a number of the participants at the Vienna Convention, including many of the Western powers, expressed reservations about these provisions,[307] the extent to which they apply to the Compact of Free Association requires analysis.

2. *The Validity of the Compact Under the Vienna Convention*

A strict application of the Vienna Convention's rules governing the voidability of treaties to Palau's Compact with the United States would threaten the validity of that agreement. There are three bases for finding the Compact, even if now approved constitutionally, void or voidable under the law of treaties: (1) the Compact violates a rule of *jus cogens,* namely Palau's right of self-determination; (2) the Compact was procured through coercion; and (3) the Compact was procured through the corruption of a state representative.

a. *Violation of the Right of Self-Determination*

We have seen that there is growing authority for defining the right of self-determination as *jus cogens,* along with other basic human

300. Vienna Convention on the Law of Treaties, *adopted* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

301. *See Summary Records of the 1586th Meeting,* [1980] 1 Y.B. INT'L L. COMM'N 5, U.N. Doc. A/CN.4/SER.A/1980.

302. Vienna Convention on the Law of Treaties: Message from the President of the United States, 7 WEEKLY COMP. PRES. DOC. 1556 (Nov. 21, 1971).

303. Vienna Convention, *supra* note 300, art. 53.

304. *Id.* art. 52.

305. *Id.* art. 50.

306. Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts,* 28 VA. J. INT'L L. 281, 368 (1988).

307. *See* Nahlik, *The Grounds of Invalidity and Termination of Treaties,* 65 AM. J. INT'L L. 736, 737 (1971); *see also* Frankowska, *supra* note 306, at 293-95.

rights.[308] This view, however, is not universally accepted.[309] While drafting article 53 (then article 37), the International Law Commission, a U.N. advisory group of jurists, considered listing specific *jus cogens* norms whose violation would void a treaty.[310] In the draft commentaries, self-determination was among the half dozen suggested rules of *jus cogens*.[311] The Commission eventually decided against including any such examples, but its deliberations nearly three decades ago demonstrate early suggestion of the peremptory nature of self-determination.

To qualify as *jus cogens,* according to the terms of article 53, a norm must be "accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted."[312] The U.S. delegate to the Conference on the Law of Treaties interpreted the language to mean that "a rule of international law was ouly *jus cogens* if it was universal in character and endorsed by the international community as a whole."[313] Recent world events support a conclusion that self-determination, for most people heretofore populating territories, has developed into a peremptory norm.[314] Admittedly, in international jurisprudence, the concept of *jus cogens* in general, and specifically of self-determination as *jus cogens,* is still nascent.[315] But a sufficient body of opinion exists for an international tribunal to rule that the right of self-determination is *jus cogens*. Therefore, the Compact could be voided under article 53, as a violation of Palau's right of self-determination.

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308. *See supra* text accompanying notes 265-67.

309. *See supra* notes 229-30 and accompanying text.

310. *Report of the International Law Commission to the General Assembly,* 18 U.N. GAOR Supp. (No. 9) at 11-12, U.N. Doc. A/5509 (1963), *reprinted in* [1963] 2 Y.B. INT'L L. COMM'N 187, 198-99, U.N. Doc. A/CN.4/SER.A/1963/Add.1.

311. In addition to self-determination and other "norms protecting human rights," the Commission considered the following: norms against international crimes, rules for the suppression of slave trade, piracy, and genocide, and the U.N. Charter prohibitions against the use of force. *Id., reprinted in* [1964] 2 Y.B. INT'L L. COMM'N at 199.

312. Vienna Convention, *supra* note 300, art. 53.

313. *United Nations Conference on the Law of Treaties,* 1st Sess. (52d mtg.) at 295, U.N. Doc. A/Conf.39/11 (1969).

314. The most recent examples include the independence of Namibia from South Africa and the disintegration of Soviet domination of Eastern Europe.

315. In a 1974 survey of the World Court's opinions, Professor Sztucki identified six mentions of *jus cogens* or peremptory norms, all in separate or dissenting opinions. *See* J. SZTUCKI, JUS COGENS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: A CRITICAL APPRAISAL 12-16 (1974). More recently, in the Nicaragua case, *supra* note 257, at 90, the International Court of Justice cited references by states and jurists to *jus cogens* to support its conclusion that the prohibition against the use of force is a rule of customary international law. Judge Ammoun asserted in his separate opinion in Barcelona Traction, Light, & Power Co. (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5, 1970), that the right of self-determination is *jus cogens, id.* at 304, and elsewhere extolled "the imperative right of peoples to self-determination," *see* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 75 (June 21, 1971) (separate opinion of Ammoun, J.).

b. The Use of Coercion

The second basis for finding the Compact void is coercion of the state by threat or use of force. Although little case law exists on the Vienna Convention's invalidation articles, it is widely accepted that article 52 outlaws the use of force to obtain consent to a treaty's obligations.[316] Thus, arguments could be predicated on the force implicit in the U.S. military presence in Palau and the Pacific region generally. However, since U.S. atomic testing ended in the Pacific, the U.S. presence in the area generally has not been regarded as coercive.

A more significant argument is predicated on interpreting the "threat or use of force" to encompass economic coercion. As previously discussed, the United States bears much of the responsibility for Palau's extreme economic dependence. This Comment earlier concluded that this dependency, coupled with U.S. intransigence in negotiating the security provisions of the Compact, violates the Palauans' right of self-determination.[317] The question arises whether U.S. use of its economic leverage in Palau to gain nuclear transit and eminent domain rights constitutes a "use of force" under article 52.

The participants in the Vienna Conference debated but failed to agree that "economic coercion" falls within the ambit of the prohibition against such a use of force. The United States figured prominently among the delegations opposed to allowing a claim of economic coercion to invalidate a treaty.[318] It became apparent, however, that the majority of the participants favored broadening the definition of force to include economic coercion;[319] the treaty itself leaves "force" undefined. Nevertheless, the history of the drafting of the Vienna Convention strongly implied that interpretation of "the threat or use of force" in article 52 would eventually ripen to encompass the threat or use of economic coercion.

The principle embodied in article 52 has undergone a steady development and expansion. Traditional customary law did not even include the concept that force would vitiate consent.[320] This principle against invalidation of treaties began to erode in 1949, when the International Law Commission undertook to draft a code of treaty law. In his first Report on the Law of Treaties, Special Rapporteur Sir Hersch Lauterpacht concluded that international law had changed to the point

316. Frankowska, *supra* note 306, at 369.

317. *See supra* text accompanying notes 170-78, 182-88.

318. *See United Nations Conference on the Law of Treaties,* 1st Sess. (52d mtg.) at 292, U.N. Doc. A/Conf.39/11 (1969).

319. *See id.*

320. At one time, even a treaty signed under threat or use of force was valid and enforceable. *See Second Report on the Law of Treaties,* [1963] 2 Y.B. INT'L L. COMM'N 36, 51, U.N. Doc. A/CN.4/SER.A/1963/ADD.1.

that a treaty secured by coercive means would be invalid if the International Court of Justice so declared.[321]

Sir Gerald Fitzmaurice, Lauterpacht's successor as Special Rapporteur of the International Law Commission, no longer found a decision by the International Court of Justice necessary in order for a treaty to be invalidated on the grounds of coercion.[322] But Fitzmaurice, concerned about a potentially destabilizing expansion of the principle, insisted that "[t]he case must evidently be confined to the use or threat of *physical* force, since there are all too numerous ways in which a State might allege that it had been induced to enter into a treaty by pressure of *some* kind (for example, economic)."[323]

Fitzmaurice's concern must be viewed in light of an already coalescing movement to include economic coercion in the U.N. Charter's article 2(4) prohibition against the threat or use of force. This concept first gained widespread recognition through incorporation into articles 15 and 16 of the Charter of the Organization of American States.[324] The principles are now set forth in articles 18 and 19 following a Protocol of Amendment.[325] This document entered into force for the United States on February 27, 1970.

In a 1963 report, the International Law Commission's fourth Special Rapporteur, Sir Humphrey Waldock, spelled out the pitfalls of allowing economic pressure to be construed as coercion for the purposes of invalidating a treaty. Waldock asserted:

> [I]f "coercion" were to be regarded as extending to other forms of pressure upon a State, to political or economic pressure, the door to the evasion of treaty obligations might be opened very wide; for these forms of "coercion" are much less capable of definition and much more liable to subjective appreciations. Moreover, the operation of political and economic pressures is part of the normal working of the relations between States, and international law does not yet seem to contain the criteria necessary for formulating distinctions between the legitimate and illegitimate uses of such forms of pressure as a means of securing consent to treaties.[326]

Waldock then concluded that "it would be unsafe *in the present state of international law* to extend the notion of 'coercion' beyond the illegal use

321. *See Report on the Law of Treaties,* [1953] 2 Y.B. INT'L L. COMM'N 90, 147, U.N. Doc. A/CN.4/SER.A/1953.

322. *See Law of Treaties,* [1958] 2 Y.B. INT'L L. COMM'N 20, 38, U.N. Doc. A/CN.4/SER.A/1958/Add.1.

323. *Id.* (emphasis in original).

324. 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3.

325. 21 U.S.T. 607, T.I.A.S. No. 6847.

326. *Second Report on the Law of Treaties,* [1963] 2 Y.B. INT'L COMM'N 36, 52, U.N. Doc. A/CN.4/SER.A/1963/ADD.1.

or threat of force."[327] His carefully chosen words reveal that he contemplated the development of international law eventually to include both economic and physical coercion as grounds to invalidate a treaty.[328]

The fifteenth session of the International Law Commission, also held in 1963, included extensive discussion during the drafting of then-article 12 (later article 52) of the kinds of coercion that could vitiate consent to be bound to treaty obligations.[329] The delegates agreed in the final language that "the threat or use of force" could include economic and political coercion.[330]

Even as the draft code of the Law of Treaties took shape, a prohibition against the use of economic pressures in relations between states increasingly gained the character of a general principle of law within the meaning of article 38 of the Statute of the International Court of Justice.[331] In 1965, The U.N. General Assembly approved Resolution 2131 (with one abstention and no dissenting votes), which condemns "armed intervention *and all other forms of interference* or attempted threats against the personality of the State or against its *political, economic and cultural elements.*"[332] The Resolution further declares that "[n]o State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereigu rights or to secure from it advantages of any kind."[333] The Resolution attests to the developing practice among states to refrain from and to condemn economic as well as armed intervention.

In 1968, at the 48th meeting of the International Law Commission, nineteen states introduced a joint amendment to the Law of Treaties[334] on the grounds that "[e]conomic and political pressure was contrary to the right of political and economic self-determination."[335] Opponents of the "nineteen-amendment" raised a number of objections: (1) " 'political and economic pressure' had not yet been adequately defined and established in law to be included in the convention as a ground for invalidat-

327. *Id.* (emphasis added).

328. *See* Brosche, *The Arab Oil Embargo and the United States Pressure Against Chile: Economic and Political Coercion and the Charter of the United Nations,* in ECONOMIC COERCION AND THE NEW INTERNATIONAL ECONOMIC ORDER 285, 310 (R. Lillich ed. 1976) [hereinafter ECONOMIC COERCION] (characterizing Waldock's approach as an "open-ended formulation").

329. *See Summary Records of the 15th Session,* [1963] 1 Y.B. INT'L L. COMM'N 53, 212-13, U.N. Doc. A/CN.4/SER.A/1963.

330. *See id.* at 212-13, 312-13.

331. ICJ Statute, *supra* note 214, art. 38.

332. G.A. Res. 2131, 20 U.N. GAOR. Supp. (No. 14) at 11-12, U.N. Doc. A/6014 (1965) (emphasis added).

333. *Id.*

334. *United Nations Conference on the Law of Treaties,* 1st Sess. (48th mtg.) at 269, U.N. Doc. A/Conf.39/11 (1969).

335. *Id.* at 269-70.

ing a treaty";[336] (2) extending the definition of the "threat or use of force" to include "all forms of pressure exerted by one State on another, and not just the threat or use of armed force" would make the scope "so wide as to make it a serious danger to the stability of treaty relations";[337] and (3) allowing a treaty to be voided on the grounds of economic coercion potentially creates a de facto contractual incapacity for any lesser economic entity.[338]

The U.S. delegate, speaking against the nineteen-state amendment, offered a variation of the major arguments of the amendment's opponents. According to the United States, "the concept of 'economic or political pressure' . . . was so lacking in juridically acceptable content as to cast grave doubts on any article containing it."[339] On a more practical level, the United States predicted that the amendment would hurt the poorer countries because "[i]nvestors would regard the amendment as increasing their risks and would raise the cost of their investments."[340]

A strong majority of the delegations at the Vienna Conference supported the nineteen-state amendment, but the dozen states opposing it included most of the world's economic powers. It is noteworthy that the amendment's opponents universally condemned the use of economic pressure to force acceptance of a repugnant agreement, and the United Kingdom even acknowledged that cases might exist "where flagrant economic or political pressure amounting to coercion could justify condemnation of a treaty."[341]

In the end, the majority did not press for a vote. The Afghani delegate explained that the sponsors of the amendment "did not wish to take advantage of their majority to impose their point of view on the minority, but they did ask it to try to understand their position and not to demand that they sacrifice their interests because the minority was powerful."[342]

The issue was resolved through the adoption of a Draft Declaration on the Prohibition of the Threat or Use of Economic or Political Coercion in Concluding a Treaty, which condemns "the threat or use of pressure in any form, military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of principles of sovereign equality of States and freedom of consent."[343] The declaration forms part of the Final Act of the

336. *Id.* at 272 (Japan).
337. *Id.* at 275 (Netherlands).
338. *Id.* at 277 (Uruguay).
339. *Id.* at 292 (United States).
340. *Id.*
341. *Id.* at 283 (United Kingdom).
342. *Id.* at 293 (Afghanistan).
343. *United Nations Conference on the Law of Treaties: Reports of the Committee of the Whole* 95, 173, U.N. Doc. A/CONF.39/11/Add.2 (1969).

Conference on the Law of Treaties and is itself evidence of the development of customary international law on the question of economic coercion and the validity of treaties.

More recent evidence of the force and vitality of a principle barring the use of economic coercion is found in the influential Declaration on Principles of International Law Regarding Friendly Nations, adopted by acclamation in 1970.[344] Declaration 2625 provides that "[n]o State may use or encourage the use of economic . . . measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind."[345]

This language and the language of other documents which are indicia of norm creation[346] can be interpreted as creating a distinction between economic pressure applied to gain political advantages or constrain the exercise of sovereign rights, and economic pressure applied for merely economic reasons.[347] Under such a formulation, the standard of proof is great,[348] but one can nonetheless argue that actions like the Arab oil embargo of 1973 violated the U.N. Charter's article 2, paragraph 4 bar against the use of force.[349]

With current trends favoring those who would interpret the prohibition against force to include economic coercion,[350] a test case arising under the Law of Treaties might bring significant results. A challenge to Palau's obligations under the Compact of Free Association between Palau and the United States could be the case to signal the new view of article 52.

In Palau, the evidence of economic coercion provides a textbook answer for the minority opposed to the recognition of economic coercion as a grounds for voiding a treaty. The greater power, after assuming an obligation to foster the protectorate's self-sufficiency, instead allows a progressive dependence to develop. During negotiations over future political status, the greater power declares its interests nounegotiable even in the face of the freely expressed contrary wishes of the protector-

344. G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970).

345. *Id.* at 123.

346. *See, e.g., Charter of Economic Rights and Duties of States,* G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 55, U.N. Doc. A/9631 (1974); *Permanent Sovereignty Over Natural Resources,* G.A. Res. 3171, 28 U.N. GAOR Supp. (No. 30) at 53, U.N. Doc. A/9030 (1973).

347. Brosche, *supra* note 328, at 307; *see also* Bowett, *International Law and Economic Coercion,* in ECONOMIC COERCION AND THE NEW INTERNATIONAL ECONOMIC ORDER 89, 93 (R. Lillich ed. 1976).

348. *See* Editorial Comment, *Political and Economic Coercion in Contemporary International Law,* 79 AM. J. INT'L L. 405, 411 (1985) (authored by Tom J. Farer).

349. *See, e.g.,* J. STONE, CONFLICT THROUGH CONSENSUS 64 (1977); Paust & Blaustein, *The Arab Oil Weapon—A Threat to International Peace,* 68 AM. J. INT'L L. 410, 415 (1974) (explaining how and when article 2, paragraph 4 of the U.N. Charter is violated).

350. *See* Brosche, *supra* note 328, at 312.

ate's people. The greater power then withholds from the dependent territory both sovereignty and a needed economic infusion pending approval of its nonnegotiable terms.

The facts surrounding the Compact negotiations in Palau offer a clear example of the kind of economic coercion condemned by the Vienna Conference.[351] Here, economic coercion is easily distinguished from typical negotiations between states, even where one state has overwhelmingly superior bargaining power. Seldom will the disparity of size and wealth between states be so great, and seldom will the greater power have such a deeply entrenched interest in using its economic advantage to maintain its rights and privileges within the borders of the lesser state. Moreover, the peculiar economic dependence of Palau on the United States, which arose and worsened even as the United States was under a legal obligation to promote Palauan self-sufficiency, makes this example of economic coercion unusually flagrant.

c. *Corruption of a State Representative*

A third threat to the validity of the Compact under the Law of Treaties arises over questions of corruption. According to article 50 of the Vienna Convention, a treaty is also voidable if "consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State."[352] In Palau, the strongest evidence of corruption that might invalidate Palau's consent to be bound is connected with former President Lazarus Salii, now deceased.[353] But allegations that U.S. involvement in Palau's political processes exceeded the bounds of fair play surfaced even before Palau

351. Professor Prince recently addressed the implications of possible economic coercion in Palau. *See* Prince, *supra* note 13, at 66-67. The issue, in Prince's words, is "whether the United States stepped across the line from fair but hard bargaining to the use of economic coercion." *Id.* at 66. Prince suggests putting the issue on the agenda for Security Council consideration and concludes that "the question can only be resolved through a carefully conducted factual investigation." *Id.* at 67.

352. Vienna Convention, *supra* note 300, art. 50. According to Ian Sinclair, no state has ever invoked corruption as grounds for invalidating treaty obligations. *See* I. SINCLAIR, VIENNA CONVENTION OF THE LAW OF TREATIES 174-75 (1984). In the absence of jurisprudence on the provision, the International Law Commission's commentary offers scant material for workable legal standards. However, according to the Commission, "only acts calculated to exercise a substantial influence on the disposition of the representative to conclude the treaty may be invoked." *United Nations Conference on the Law of Treaties: Draft Articles on the Law of Treaties with Commentaries* 7, 65, U.N. Doc. A/CONF.39/11/Add.2 (1969). Such acts would be distinguished from "a small courtesy or favour." *Id.*

353. Salii, about whom questions later arose, *see infra* note 356, was intimately involved with negotiations for the Compact beginning as early as 1967, when he chaired the Micronesian Political Status Commission. D. MCHENRY, *supra* note 42, at 89. As previously noted, Salii had come to the attention of American officials as a potential political ally in the effort to secure agreements favorable to U.S. interests in Micronesia. *See U.S. Government Survey Mission to the Trust Territory of the Pacific Islands: Report to the President* (A. Solomon, Oct. 9, 1963) (confidential version). Salii's

became a Republic and elected its first president.[354] For example, when Haruo Remeliik reversed his opposition to the Compact after being elected Palau's first president, some suspected bribery.[355] Evidence of large-scale corruption, however, only came to light during the Salii presidency.[356]

In connection with the 1988 power plant scandal involving the British company International Power Systems Co., Ltd. (IPSECO),[357] Congress eventually learned that the British contractor had paid $1 million to Palauan and other officials.[358] Salii received two separate payments of $100,000 each while he was Palau's Compact and trade negotiator with "full authority to represent, negotiate and commit Palau to [Compact] agreements."[359] He reportedly then convinced the U.S. Compact negotiator, Ambassador Fred M. Zeder II, to pledge to the guarantor banks that Compact funds could be used to pay for the power plant.[360]

The bribes paid to Lazarus Salii were sufficiently tied to passage of the Compact to taint Salii's subsequent role as a negotiator and leading proponent of the passage of the Compact. Salii's advocacy of the Compact eventually also included direct pressure on government workers.[361] As is true of any elected political leader, Salii undoubtedly had the power to deliver the votes of those Palauans who trusted his representation of their interests during negotiations.[362] As the facts subsequently revealed, this trust was misplaced.[363]

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career is summarized in a 1990 book on the political relationship between Palau and the United States. *See* B. ALDRIDGE & C. MYERS, *supra* note 25, at 42-43.

354. One writer, for example, alleged that the United States gave direct cash payments to pro-American opponents of Palau's antinuclear Constitution, and that CIA operatives did door-to-door canvassing. *See* Arakawa, *Palau's Constitutional Struggle: Micronesia Strives for a Nuclear-Free Future,* 12 AMPO: JAPAN-ASIA Q. REV., No. 3, at 15-16 (1980).

355. B. ALDRIDGE & C. MYERS, *supra* note 25, at 81.

356. Official investigations followed reports of corruption made in the popular press. *See, e.g.,* San Jose Mercury News, Nov. 29, 1987, at 1A, col. 4; San Jose Mercury News, Mar. 3, 1988, at 1A, col. 1; McGrory, *Arms and the Women,* Wash. Post, Jan. 26, 1988, at A2, col. 5; Anderson, *Widespread Corruption in Palau,* Oakland Tribune, May 19, 1988, at A11, col. 2; Anderson, *Trouble in Palau,* Wash. Post, May 15, 1988, at B7, col. 1.

357. *See supra* note 176 and accompanying text.

358. *See* Statement of De Lugo, *supra* note 15, at 17.

359. GAO Report, *supra* note 174, at 91. In addition to the direct payments to Salii, IPSECO paid $250,000 to Salii's brother, then-Speaker of Palau's House of Delegates, *id.* at 93, and $50,000 to a Palau businessman described as a "close political ally" of Salii, statement of De Lugo, *supra* note 15, at 5.

360. Statement of De Lugo, *supra* note 15, at 5.

361. *See* Guam Tribune, Dec. 9, 1986, at 4, col. 3.

362. *See Hearings on H.R.J. Res. 479, Compact of Free Association, supra* note 21, at 149 (statement of Speaker Santos Olikong) ("Many of our people do not read the amendments. Many of our people do not have the power of language. So they rely on the people that have that in them, people like us, people like the executive branch and the judiciary branch.").

363. Investigators unearthed other examples of corrupt dealings in Palau, many, but not all,

Under the terms of article 50, the corruption alleged must be attributable to the state seeking to enforce the treaty, here the United States. According to Ian Sinclair, "it is not enough, under Article 50, merely to establish that the representative has been corrupted; it must be shown that the corruption has been effected directly or indirectly by the other negotiating State."[364] However, it has been suggested that it is sufficient that the corruption comes from an agent of the state that seeks to enforce the treaty, as long as the act is imputable to the state.[365]

Some observers of corruption in Palau attribute the corruption directly to the U.S. government.[366] Corruption is seen as implicit in the promise of large sums of money to Palau under the front-loaded payment schedule of the Compact.[367] There is evidence that U.S. officials used the promise of Compact-tied largesse to gain support from Palau's leaders.[368]

Allegations of large-scale direct corruption of Palauan officials by U.S. officials, however, have not been confirmed. The public record currently does not hold enough evidence of corruption sufficiently imputable to the United States to sustain a claim under article 50 of the Vienna Convention. Nevertheless, more proof may come to light with time, since not all available evidence of corruption has been sufficiently

related to Salii's activities. For example, $90,000 in government funds was used to lease and renovate a house occupied by Salii. *See* GAO Report, *supra* note 174, Supp. at 29-32.

364. I. SINCLAIR, *supra* note 352, at 175 (citing Elias, *Problems Concerning the Validity of Treaties,* 134 RECUEIL DES COURS 377-78 (1971)).

365. *See id.* at 175-76 (citing P. REUTER, INTRODUCTION AU DROIT DES TRAITÉS 171 (1972)).

366. A presidential candidate, Mr. Roman Tmetuchl, "accused Washington of foisting a 'grossly overpriced' power generator on the country in collusion with two former presidents in order to bring pressure on Palau to change the nuclear-free provision in the constitution." Financial Times, Nov. 3, 1988, at 6, col. 3. In 1986, ACLU lawyers representing three men appealing convictions for the assassination of President Remeliik told the press that there was sufficient basis to raise questions concerning U.S. motives "to weaken Palau" with the power plant contract "in order to make it more likely to accept the defense compact [sic]." Wash. Post, Nov. 30, 1986, at A18, col. 1.

367. Title II provides for United States economic assistance to Palau. Compact of Free Ass'n, *supra* note 1, tit. II, art. I. Included under grant assistance is a series of annual outlays to pay for government operations during the first 15 years following the termination of the trusteeship. *See id.* § 211. In addition, large one-time grants for capital improvements will be provided in the first year or two of the Compact. *See id.* §§ 211-212. The total grant assistance for the first year comes to approximately $140 million. *See id.* §§ 211-213. The largest single item budgeted for the first year is a trust fund of $66 million to provide interest income of $15 million annually after 15 years of the Compact. *See id.* § 211. The second-year grants total approximately $30 million. *See id.* tit. II, art. I; *see also Hearings on H.R.J. Res. 626, Compact of Free Association, supra* note 120, at 67 (testimony of Ambassador Zeder).

368. Ambassador Zeder described the funds available under the Compact in a 1986 letter to Salii extolling the financial rewards of Compact approval. *See* Letter from Fred M. Zeder II to President Lazarus Salii (Nov. 28, 1986). Zeder's conclusion that the Compact would be worth approximately three times more to Palau than funding under trusteeship ($420 million versus $150 million) proved to be a gross mistake or misrepresentation. The GAO made its own calculations and concluded that "compact funding is now less generous than we project Palau would receive if trusteeship funding were continued for the next 15 years." GAO Report, *supra* note 174, at 53.

investigated.[369] The United Nations has not yet engaged in factfinding commensurate with the efforts of the United States government (notably the GAO) to date. Under these circumstances, the United States should be aware that corruption in Palau could still pose a threat to the validity of the Compact.

On balance, the record of U.S.-Palau Compact negotiations and the tortured and still unfinished approval process render the Compact an agreement of questionable validity. Palau can raise several challenges under the Law of Treaties and point to the cumulative failings of the United States as administering authority. In its dealings with Palau, the United States has crossed what Sir Hersch Lauterpacht called "the line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right."[370] It has thereby exposed itself to legal sanction. A state, according to Lauterpacht, "may not be acting illegally by declining to act upon a recommendation or series of recommendations on the same subject. But in doing so it acts at its peril when a point is reached when the cumulative effect of persistent disregard of the articulated opinion of the [United Nations] is such as to foster the conviction that the State in question has become guilty of disloyalty to the Principles and Purposes of the Charter."[371] By ignoring Palauans' right to self-determination, by using its economic leverage coercively, and by allowing—or worse, participating in—the corruption of Palauan officials to secure passage of the Compact, the United States has demonstrated significant disloyalty to fundamental principles of international law and the U.N. Charter.

CONCLUSION

By an accident of history and geography, when Palau was liberated from Japanese Mandate along with much of Micronesia, it soon became part of the world's only strategic trust. This arrangement eventually placed U.S. strategic interests at odds with the Palauans' right of self-determination.

Under contemporary international law, a conflict between a people's right of self-determination and a military power's strategic interest can have only one legally correct outcome: Palauans' right of self-determina-

369. A GAO investigator told the press that the GAO investigators had "more leads about corruption in Palau than they have time to follow." Anderson, *Trouble in Palau,* Wash. Post, May 15, 1988, at B7, col. 1.

370. Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa, 1955 I.C.J. 67, 115 (June 7, 1955).

371. *Id.*

tion trumps the U.S. determination to project its nuclear force throughout Micronesia.

Throughout the world, the United States negotiates with sovereign states to establish military bases or make port calls by nuclear vessels within the territory of the foreign sovereign. These arrangements are made under the law of the host nation. In Palau, the desired military privileges violate the Palauan Constitution, and the United States should respect that source of law as it would the constitution of any other sovereign.

The Trusteeship Agreement with the United Nations did not guarantee nuclear transit rights to the United States, nor did it guarantee the United States access to Micronesian land in perpetuity. But the agreement, read in conjunction with customary international law, does command respect for the freely expressed wishes of Palauans in matters central to their sovereiguty—control of their territory and protection of their environment. These wishes cannot be subverted by the threat of economic abandonment if U.S. strategic interests are not satisfied.

To secure legally the military rights it seeks in Palau, the United States must first fulfill its obligations under the Trusteeship Agreement and customary international law. It must guarantee Palauans the right of self-determination without conditions, and then gain approval from the U.N. Security Council for termination of the Trusteeship. The United States could then open negotiations on securing nuclear transit rights and military facilities with the sovereign state of the Republic of Palau.