

**IN THE MATTER of the PROCEEDINGS by the TRUST
TERRITORY OF THE PACIFIC ISLANDS,
Plaintiff-Appellee
for CONDEMNATION of the PROPERTY of LOJELAN KABUA,
et al., Defendants-Appellants**

Civil Appeal No. 325

Appellate Division of the High Court

Marshall Islands District

February 10, 1987

Appeal by landowners of judgment in action for condemnation by Trust Territories for the use of the United States Department of the Army. The Appellate Division of the High Court, Munson, Chief Justice, held that Trust Territory had authority to condemn land for the use of the United States Department of the Army, that such condemnations constituted a "public use," that trial court's determination as to amount of just compensation needed to be remanded, that Eminent Domain Statute did not violate due process, and that trial court erred in determining amount of interest to which property owners were entitled, and therefore the case was affirmed in part, and remanded in part.

1. Eminent Domain—Generally

Trust Territory of the Pacific Islands clearly has the power to acquire land by eminent domain. 10 TTC § 1 *et seq.*

2. Eminent Domain—Generally

Scope of Trust Territory's eminent domain power is subject to the limitation that there be payment of just compensation and that any taking be for a public use.

3. Trusteeship—Trusteeship Agreement—Generally

One of the express purposes of the Trusteeship Agreement is for the administering authority to ensure that the Trust Territory plays its part in maintaining international peace and security.

4. Eminent Domain—Generally

Trust Territory has the authority to condemn lands for the use of the United States Department of the Army when an agreement for the use of the privately owned land cannot be negotiated with the landowners.

5. Eminent Domain—Public Use

Trust Territory has no authority to condemn land unless the condemnation is for the benefit of the people of the Trust Territory.

6. Eminent Domain—Public Use

Whether a "use" is in fact a "public use" is ultimately a judicial question.

7. Eminent Domain—Public Use

Trial court properly found that Trust Territory's condemnation of land for the use of the United States Department of the Army constituted a "public use."

8. Evidence—Weight

The weighing of evidence in a condemnation proceeding is within the sole province of the fact-finder, and an appellate court must not reweigh the evidence.

9. Evidence—Expert Testimony

Trier of fact is not bound by expert testimony and may disregard the testimony of such expert witnesses if their testimony was not convincing.

10. Eminent Domain—Compensation

In condemnation proceeding, trial court's determination as to the amount of just compensation to be awarded was remanded, where there was no indication how the final award figure was reached.

11. Constitutional Law—Retroactive Effect

A constitutional provision that goes into effect after an event has taken place has only prospective effect and not retroactive effect on such event unless clearly designed to that end.

12. Eminent Domain—Generally

In the Trust Territory, landowners are afforded greater protection against condemnation than those in the United States. 10 TTC § 57.

13. Eminent Domain—Hearing

In the absence of any statutory requirement that a pre-taking hearing must take place, a landowner is only entitled to be heard on the amount of just compensation that the government owes as a result of the taking.

14. Eminent Domain—Statutory Provisions

In condemnation proceeding where use of the property was for a period of years, and not an outright taking, statutory requirement that property owner execute a quitclaim deed in favor of government was not applicable. 10 TTC § 57(c).

15. Judgments—Interest

The allowance of interest in a condemnation proceeding is a matter of individual discretion.

16. Eminent Domain—Compensation

In condemnation proceeding, where property owners would have to give up their right to challenge the validity of the taking of the property if they withdrew compensatory funds deposited with the court, property owners' rights under Trust Territory Bill of Rights were denied. 1 TTC § 4.

17. Eminent Domain—Compensation

In a condemnation proceeding, where amounts deposited for benefit of property owners were constructively unavailable, trial court on remand

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was ordered to award interest until the date the property owners were given the opportunity to withdraw the deposited funds.

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Before MUNSON, *Chief Justice*, LAURETA*, *Associate Justice*, BENSON**, *Associate Justice*

MUNSON, *Chief Justice*

On April 1, 1966, appellee, the government of the Trust Territory of the Pacific Islands (TTPI) filed Civil Action No. 294 for the condemnation of Eniwetok, Gellinam, and Omelek islands located in Kwajalein Atoll, Marshall Islands. The interest to be acquired by the appellee was for use rights for an indefinite period, with the United States Department of the Army taking immediate possession. Pursuant to 10 TTC § 57(b), the appellee deposited the sum of \$2,750 with the clerk of the court. On August 8, 1966, \$445 was deposited, and after a second amended complaint and declaration of taking were filed on May 12, 1969, the appellee deposited \$23,247 for a total of \$26,442.

This action involved a lengthy procedural history that resulted in a second condemnation action being filed by the appellee on May 2, 1978. The second action, Civil Action No. 20-78, was filed while Civil Action No. 294 was pending,

* United States District Court Judge, District of the Northern Mariana Islands, designated as Temporary Associate Justice by the United States Secretary of the Interior.

** Associate Justice, Federated States of Micronesia Supreme Court, designated as Temporary Associate Justice by the United States Secretary of the Interior.

and sought to condemn an exclusive use interest of the same property as in Civil Action No. 294. Instead of an indefinite time period, the length of time for the use was set from May 2, 1978 to December 31, 1981, with the appellee acquiring an option to renew every five years. Appellee deposited an additional \$21,750 with the clerk of the court. On July 26, 1978, appellee moved to amend the interest sought in Civil Action No. 294 to a leasehold interest for the period of April 2, 1966 through May 2, 1978. The trial court granted the motion and the two actions were consolidated for the purpose of trial. On July 29, 1978, pursuant to a stipulation filed between the parties and an order by the trial court, appellants withdrew \$44,997 from the total amount of \$48,192 which the appellee had deposited with the court.

The trial court, in its Memorandum Opinion entered March 28, 1979, held that the appellee, acting as an agent for the United States, took the islands for a "public use" pursuant to 10 TTC § 54. The court found that the fair value for the use of the three islands was:

For the period April 1, 1966 to May 2, 1978:

Gellinam	\$ 7,250
Omelek	18,125
Eniwetok	29,000
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	\$54,375

For the period May 2, 1978 to December 31, 1981:

Gellinam	\$11,000
Omelek	27,500
Eniwetok	44,000
	<hr/>
	\$82,500

On July 17, 1979, the trial court entered a judgment for the appellants awarding the above-stated amounts, less the

amount that the appellants had withdrawn, and awarded interest of three percent per annum pursuant to 10 TTC § 57(b), on the deposited amounts until withdrawn by the appellants. The landowners appealed.

The issues presented for review are:

1. Does the TTPI have the authority to condemn the islands for the use of the United States Department of the Army;

2. Did the trial court err in finding that the condemnations of the islands for the use of the United States Department of the Army constitute a "public use";

3. Did the trial court err in its determination of the amount of just compensation to which appellants were entitled;

4. Does the Trust Territory's Eminent Domain Statute, 10 TTC § 57, violate due process because:

(a) it does not provide for a pre-taking hearing; or

(b) it requires appellants to execute a quitclaim deed prior to withdrawing deposited funds;

5. Did the trial court err in determining the amount of interest to which the appellants were entitled.

[1, 2] Relative to the first issue, the TTPI clearly has the power to acquire land by eminent domain.¹ This authority is codified in 10 TTC § 1 *et seq.*, and has been judicially upheld in *Ngiralois v. T.T.P.I.*, 4 T.T.R. 517, 520 (App. Div. 1969). The scope of the TTPI's eminent domain power is subject to the limitation that there be payment of just compensation and that any taking be for a public use. *Ngiralois*, 4 T.T.R. at 521. The trial court noted that

¹ "Eminent domain" has been defined by statute as "the right of the central government . . . to condemn property for public use or purposes and to appropriate the ownership and possession of such property for such public use upon paying the owner a just compensation to be ascertained according to the law." 10 TTC § 3(1).

[i]t is conceded by the Trust Territory Government that it is condemning the islands solely for the use of the United States Department of the Army in carrying out its responsibilities in the operation of the Kwajalein Missile Range, a component of the weapon testing systems of the Department of the Defense of the United States Government.

We first consider whether the TTPI has the authority to condemn the islands for the use of the United States Department of the Army. A document entitled "Land Agreement Trust Territory of the Pacific Islands"² (here-within referred to as Agreement), dated September 15, 1955, between the Secretary of the Navy, acting on behalf of the Department of the Army, and the Secretary of the Interior³ provided the TTPI with the authority to condemn lands for the use of the United States.

Appellants urge that the Agreement does not govern in this case. Appellants cite an opinion in a prior appeal of this case,⁴ wherein this court expressed concern over whether the TTPI was acting within its taking authority:

[T]he government exercises a sovereign function when it employs the power of eminent domain. Yet, in meeting the obligations assigned to it under the Inter-Agency Agreement it acts ostensibly not as a sovereign, but as an agent in the procurement of land for a purpose having no clear relationship to the government functions it was created to perform.

² Referred to in the trial court's opinion and both parties' appellate briefs as an "Inter-Agency Agreement."

³ The Secretary of the Interior has been delegated the authority to enter into such an agreement.

Article 2 of the Trusteeship Agreement designates the United States as the administering authority of the Trust Territory. The United States Congress granted the President of the United States the authority to designate the responsible agency for the administration of the Trust Territory. *See* 48 U.S.C. § 14. Pursuant to Executive Order 11021, the President designated the Secretary of Interior to carry out this responsibility.

⁴ *TTPI v. Kabua*, Civil Appeal No. 208 (June 19, 1978) (orders of dismissals and disqualification vacated and the matter remanded to the trial division for further proceedings).

The appellate court concluded that,

[a]ny such determination of the effect and validity of an eminent domain proceeding pursuant to the Inter-Agency Agreement is a matter that should be made in the first instance by the Trial Court.

The trial court found that the TTPI could act as an agent for the United States under the terms of the Agreement and condemn lands needed for the use of the Department of the Army. We agree.

Provision No. 2 of the Agreement states that certain lands in the Trust Territory "shall be made available under a use and occupancy agreement . . . for such a period of time as the [Department of the Army may require] and provided always that such use be consistent with the purposes of the Trusteeship Agreement."

Article 5 of the Trusteeship Agreement states:

In discharging its obligations under Article 76(a)⁵ and Article 84⁶ of the Charter, the administering authority shall ensure that the trust territory shall play its part, in accordance with the Charter of the United Nations, in the maintenance of international peace and security. To this end the administering authority shall be entitled:

1. *to establish naval, military and air bases and to erect fortifications in the trust territory;*
2. to station and employ armed forces in the territory; and
3. *to make use of volunteer forces, facilities, and assistance from the trust territory* in carrying out the obligations towards the Secu-

⁵ Article 76 of the United Nations Charter states:

The basic objectives of the trusteeship system, in according with the Purposes of the United Nations laid down in Article 1 of the present Charter shall be:

a. to further international peace and security; . . .

⁶ Article 84 of the United Nations Charter states:

It shall be the duty of the administering authority to ensure that the trust territory shall play its part in the maintenance of international peace and security. To this end *the administering authority may make use of* volunteer forces, facilities, and *assistance from the trust territory* in carrying out the obligations towards the Security Council undertaken in this regard by the administering authority, as well as for local defense and the maintenance of law and order within the trust territory. (Emphasis added.)

rity Council undertaken in this regard by the administering authority, as well as for the local defense and the maintenance of law and order within the trust territory. (Emphasis added.)

[3, 4] One of the express purposes of the Trusteeship Agreement is for the administering authority to ensure that the Trust Territory plays its part in maintaining international peace and security. The condemnation of the lands by the TTPI for the use of the United States Department of the Army to provide military bases is one means of assistance that is reasonably designed to ensure international peace and security.

Provision No. 3 of the Agreement states:

In any instance where an agreement for the use of privately owned land cannot be negotiated, it shall be the responsibility of the Government of the Trust Territory to acquire such land or interest therein as may be required and to thereafter make the same available for use upon receipt of fair and just compensation.

This provision means that the TTPI has the authority to condemn lands for the use of the Department of the Army when an agreement for the use of the privately owned land cannot be negotiated with the landowners.

[5] Appellants claim that the TTPI has no authority to condemn lands unless the condemnation is for the benefit of the people of the Trust Territory. We agree, and this is exactly what happened in this case. Trust Territory citizens derived a benefit from the presence of military bases since such presence ensures international peace and security and at the same time the administering authority through the Trust Territory Government fulfilled the obligations imposed on it by Article 5 of the Trusteeship Agreement. Specifically, the administering authority made use of the assistance from the Trust Territory Government's power of eminent domain to establish the military bases that are the subject of this opinion.

The second issue is whether the trial court erred in finding that the appellee's condemnation of the islands for the use of the United States Department of the Army constituted a "public use."

[6, 7] The term "public use" is incapable of a precise and comprehensive definition of universal application. Although it is defined in 10 TTC § 3(2) as any use determined by the High Commissioner to be a public use, it is well recognized that whether the use was in fact a public use is ultimately a judicial question. *Rindge Co. v. Los Angeles County*, 262 U.S. 700, 43 S. Ct. 689 (1923); *Ngiralois v. TTPI*, 4 T.T.R. 517, 522 (App. Div. 1969). Appellants urge that there is no public use of the condemned islands by the United States Department of the Army, that there is no relationship between the condemnation of these islands and the defense of Trust Territory inhabitants, and claim that because the land is not a military base and is being used for research and development purposes, there is no Micronesian public use. The trial court found that

Kwajalein Missile Base is in fact a military base, and the three islands condemned in these Actions are just an extension of the missile testing efforts of the United States Army and the United States Air Force. Not only does the Missile Range receive missiles from Vandenberg Air Force Base in California, but it also launches missiles from Kwajalein Atoll. The fact that it is primarily a research facility does not alter the fact that it is a military base within the scope and intent of Article V of the Trusteeship Agreement.

We agree. The provisions of the United Nations Charter and the Trusteeship Agreement do not make the distinction between a military base that supports a research facility and a military base that does not. All that is required is that the TTPI's exercise of eminent domain power be rationally related to a conceivable public purpose. See *Hawaii Housing Authority v. Midkiff*, 104 S. Ct. 2862 (1985); *Berman v. Parker*, 348 U.S. 26 (1954). In this case, the

public purpose is the maintenance of international peace and security as provided for in both the United Nations Charter and the Trusteeship Agreement. The TTPI's condemnation of the land for the use of the United States Department of the Army as an extension of Kwajalein Missile Base was therefore a public use and the trial court's finding was not erroneous.

[8, 9] We turn next to the issue of just compensation. "The weighing of the evidence in a condemnation proceeding is within the sole purpose of the fact-finder, and it is not for this court to reweigh the evidence." *United States v. 131.68 Acres of Land*, 695 F.2d 872, 877 (5th Cir. 1983). The trial judge noted the difficulty of determining a fair and just value of the interest taken:

The islands are relatively small, far out in the Pacific Ocean, and which are subject to the land tenure system which has controlled the use of land in the Marshall Islands for many years. This system is basically feudal in nature, and the buying and selling of land between private individuals is an infrequent occurrence.

Thus, the trial court recognized that there was no free market in the Marshall Islands from which to determine the value of the use of the lands. Both sides offered expert testimony and exhibits regarding the value of the use of the condemned lands. The two experts did not agree with each other as to which method of valuation the court should consider for determining how much compensation should be awarded for the use of the property taken. The trial court scrutinized both experts' methods by detailing the respective faults of each. It is well established that the trier of fact is not bound by expert testimony and may disregard the testimony of such expert witnesses if their testimony was not convincing. 5 Nichols, *The Law of Eminent Domain*, § 18.46 (3d ed. 1981); see *Welch v. TVA*, 108 F.2d 95 (6th Cir. 1939); *State v. Thurman*, 231 So. 2d 692 (La. App. 1970).

The trial judge, however, did not expressly reject either expert's testimony, but found that neither expert's method of valuation would result in a fair and just amount of compensation for the exclusive use of the lands. The trial judge stated that

[i]n this case we do not have an outright taking but only the exclusive use of the property from 1966 to 1981. On December 31, 1981, the property reverts to the landowners. The fair value of the loss of these three islands must be determined and not the value or gain to the condemnor. *United States v. Causby*, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206.

In essence, this means that the landowners of these three islands should be put in as good a pecuniary position as they would have been in if their property had not been taken for the approximate fifteen (15) year period from 1966 to 1981. *United States v. Miller*, 317 U.S. 369, 63 S. Ct. 276, 87 L. Ed. 336.

After considering all of the testimony and exhibits, the trial judge determined the total fair value for the exclusive use rights taken. The trial judge found that each island was different and would have a different value. Eniwetok was of greatest value since it had "large trees, good topsoil and an abundance of birds." Gellinam was of least value since it was more barren, "with little topsoil, few trees, but with some birds." Omelek's value fell between the value of the two other islands since it had some trees and birds and a shallow well for water. The trial judge also noted that each island "has an extensive reef area which supports sea life."

[10] While it is reasonable to conclude that the trial judge relied on relevant evidence to arrive at a fair value, he did not indicate in his judgment how the final award figure was reached. We find that the award needs further amplification and the case must be remanded to the trial court for further clarification of what method was used to arrive at the final award.

[11] Appellants further submit that the trial court erred in not applying standards of valuation set forth in Article II, Section 5 of the Marshall Islands Constitution. The effective date of the Marshall Islands Constitution was May 1, 1979, thirteen years after the 1966 taking. Additionally, the trial court's March 28, 1977 Memorandum Opinion was issued prior to the effective date of the Constitution. A constitutional provision that goes into effect after an event has taken place has only prospective effect and not retroactive effect on such event unless clearly designed to that end. 16 Am. Jur. 2d Constitutional Law § 65.

The next issue raised is twofold: Does the eminent domain statute, 10 TTC § 57, violate due process⁷ because:

(a) it does not provide for a pre-taking hearing; or

(b) it requires appellants to execute a quitclaim deed prior to withdrawing deposited funds.

With respect to the pre-taking hearing issue, 10 TTC § 57 provides in part that:

[i]n the event the government desires to enter into immediate possession of the property, the government shall file a declaration of taking and pay a sum of money which is considered to be fair value of the property to the clerk of courts Payment to the clerk of courts in accordance with this section shall entitle the government to take immediate possession of the land.

In the United States,

the government may exercise its eminent domain power consistently with the Fifth Amendment by physically seizing property without any prior notice, hearing, or compensation.

United States v. 131.68 Acres of Land, 695 F.2d 872, 876 (5th Cir. 1983) (quoting *Stringer v. United States*, 471 F.2d 381, 383 (5th Cir. 1973), *cert. denied*, 93 S. Ct. 2775 (1973)), *cert. denied*, 104 S. Ct. 77 (1983). There is no

⁷ 1 TTC § 4 provides: "No person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States constitutional requirement that the condemners give actual notice to property owners that their property might be subject to condemnation proceedings or to conduct hearings on the issue of the taking. *Id.*

[12, 13] In the Trust Territory, landowners are afforded greater protection than those in the United States. 10 TTC § 57 requires some affirmative action on the part of the government before property can be taken. Further, 10 TTC § 51 and 10 TTC § 53 require that the government serve upon the landowner notice that his property is being condemned and to appear in the proceedings. While the Trust Territory Code provides only for notice of a hearing with respect to determining the fair value of the land, *see* 10 TTC §§ 52–54, there is no statutory requirement that there be a pre-taking hearing. In the absence of any statutory requirement that a pre-taking hearing must take place, a landowner is only entitled to be heard on the amount of just compensation that the government owes as a result of the taking. 27 Am. Jur. 2d Eminent Domain § 399.

Appellants rely on Article II, § 5(4) of the Marshall Islands Constitution,⁸ which requires that a pre-taking hearing be conducted. As discussed earlier in this opinion, that constitutional provision does not apply retroactively to the taking in this case.

Appellants also urge that 10 TTC § 57(c) violates due process as provided for in 1 TTC § 4, because it requires the appellants to execute a quitclaim deed prior to withdrawing deposited funds. 10 TTC § 57(c) provides:

In the event the government desires to enter into immediate possession of the property, the government shall file a declaration of taking and pay a sum of money which is considered to be the fair value of the property to the clerk of courts. In addition to the

⁸ Article II, § 5(4) of the Marshall Islands Constitution states:

Before any land right or other form of private property is taken, there must be a determination by the High Court that such taking is lawful and an order by the High Court providing for prompt and just compensation.

requirement set out in section 53 of this chapter, the summons shall state the following:

...

(c) That the defendant may at any time claim and receive the money which has been deposited with the clerk of courts upon the execution of a quitclaim deed in favor of the plaintiff.

Appellants urge that the only procedure that they could use to withdraw funds deposited with the court was to execute a quitclaim deed in favor of the TTPI. They argue that the result would be a conveyance to the TTPI of their fee simple interest in the islands, an interest in excess of what the TTPI sought to condemn. Appellants claim that the effect of this requirement prevented the landowners from seeking to withdraw deposited funds.

[14] We hold that the quitclaim deed requirement is not applicable to the taking in this case. As the trial court correctly noted, this was not an outright taking, but simply an exclusive use of the property from 1966 to 1981. 10 TTC § 57(c), read on its face, applies only to a taking in fee simple. The statute requires that the government pay a sum of money "which is considered to be the fair value of the property." It would be unreasonable to require the government to pay for the fair value of the property when the taking was merely for the use of the land.

[15] The final issue reviewed is whether the trial court erred in determining the amount of interest to which appellants are entitled. The allowance of interest is a matter of individual discretion. 3 Nichols, *Law of Eminent Domain*, § 8.63, fn. 18.1.

The praecipe and summons for the condemnation of the lands, both filed on April 22, 1966, as well as the first amended complaint and second amended complaint served on the appellants, all stated:

That you may, jointly, at any time claim and receive the money

which has been deposited with the Clerk of Courts upon the execution of an agreement granting unto the Plaintiff the use of the property for the term as requested by the Plaintiff in the Complaint filed herein.

[16] In order for the appellants to withdraw funds deposited with the court, they would have to give up their right to challenge the validity of the taking of the property. Appellants would still retain the right to seek additional funds beyond the amounts deposited with the court for the value of the property. Failure to execute the agreement as stated in the praecipe and summons meant that the appellants were effectively denied access to deposited funds rightfully theirs. That denial violated appellants' right to receive just compensation as embodied in the Trust Territory Bill of Rights, 1 TTC § 4. Accordingly, this case is remanded to the trial court to determine the interest that is just and fair for the period appellants did not have access to the deposited funds and the trial court's award.

[17] Normally, deposited funds act as a set-off on the final award to prevent the accrual of interest thereon. However, since the amounts deposited were constructively unavailable to the appellants, the trial court on remand shall determine the interest at a fair and just rate on the final award of each civil action from the date of taking until June 29, 1978, the date that appellants were given the opportunity to withdraw the deposited funds⁹ and until the judgment is satisfied. As of June 29, 1978, any amount on deposit that became available to the appellants shall be

⁹ The statutory or legal rate is only a *prima facie* basis of calculation, and is not controlling if a different rate is essential to meet the requirements of just compensation. Nichols, *Eminent Domain*, § 3.63[3]. The determination of interest at a proper and reasonable rate is an element of just compensation and is properly a question of fact to be determined by the trial court. *United States v. 100 Acres of Land*, 468 F.2d 1261. The trial court is reminded that the statutory rate "cannot be viewed as a ceiling on the rate of interest allowable in computing just compensation with respect to a deficiency. It will, of course, operate as a floor." *United States v. Blankinship*, 543 F.2d 1272.

used to set off the final award figure for the calculation of interest up to March 28, 1979. The interest awarded by the trial court with respect to the funds on deposit after June 29, 1978, which the trial court stated shall earn interest in the manner prescribed by 10 TTC § 57(b),¹⁰ is affirmed. Since the total amount deposited was \$48,192 and the appellants elected to withdraw \$44,997 from this total amount, a balance of \$3,195 remained.

The final award in each civil action, less their respective set-offs, shall earn interest until the judgment is satisfied at a fair and just rate to be determined by the trial court on remand.

Accordingly, the judgment of the trial court is affirmed as to issues Nos. 1 and 2 and remanded to the trial court as to issues Nos. 3 and 5. Issue No. 4 is not applicable to the facts of this case.

Regarding issue No. 3, this case is remanded to the trial court to clarify how the final award was determined.

Relative to issue No. 5, the case is remanded to the trial court to determine the appropriate rate of interest on the following:

1. \$54,375 in Civil Action No. 294, which was the trial court's award from the date of taking, April 1, 1966, until July 29, 1978.

2. \$27,933 in Civil Action No. 294, from July 29, 1978, until the judgment is satisfied. This figure was the trial court's award less the amount deposited with the court from the date the deposit became available to the appellants.

3. \$82,500 in Civil Action No. 20-78, which was the trial court's award from the date of taking, May 2, 1978, until July 29, 1978.

¹⁰ 10 TTC § 57(b) provides:

That a sum of money which is considered to be the fair value of the property [be] paid to the clerk of courts, which sum shall draw interest at the rate of three percent per annum from the date of the summons until claimed by the defendant or ordered paid to the defendant by the court. . . .

4. \$57,555 in Civil Action No. 20-78, from July 29, 1978 until the judgment is satisfied. This figure was the trial court's award less the amount deposited with the court from the date the deposit became available to the appellants. IT IS SO ORDERED.

RICHARD H. BENSON, *Temporary Associate Justice*, dissenting and concurring.

I respectfully dissent from the court's conclusion that the Trust Territory of the Pacific Islands had the authority to condemn for the use of the United States. I briefly set out my reasons.

The trial court held, "[I]t is concluded that the Trust Territory Government can act as an agent for the United States Government. The Inter-Agency Agreement is the direction and authority from the Secretary of the Interior to the High Commissioner to condemn lands needed by the United States Government." Memorandum Opinion of March 28, 1979, p. 5-6.

A majority of this court affirms that holding. "The trial court found that the TTPI could act as an agent for the United States under the terms of the Agreement and condemn lands needed for the use of the Department of the Army. We agree." Opinion, p. 6.

The reasoning of this court begins with the point that the Trust Territory of the Pacific Islands has the power to acquire land by eminent domain. That point is not challenged in this appeal.

The court then proceeds to the heart of this appeal by discussing whether this power of eminent domain may be used to condemn land for the use of the United States. The majority states that the Land Agreement Trust Territory of the Pacific Islands (called Inter-Agency Agreement by the trial court) gives such authority to the Trust Territory of the Pacific Islands, providing, as recited in the Agree-

ment, that the use is consistent with the Trust Agreement. The majority finds that consistency because Article 5 of the Trusteeship Agreement permits the administering authority to establish bases.

I cannot agree that the right to take property against the wishes of the citizens of the Trust Territory is found in Article 5(1) of the Trusteeship Agreement. The article only permits the administering authority to establish bases. The right to condemn has to be implied. There exists no express grant.

I believe the implication is unwarranted for two principal reasons:

1. A primary rule of construction dictates that the particular provision in question be construed in connection with the entire document. 2A N. Singer, *Sutherland Statutory Construction* Sec. 46.05 (4th Ed. 1984); 76 Am. Jur. 2d Trusts Sec. 17 (1975). In focusing on Article 5(1) [and on 5(3) which is discussed later in this opinion] the majority fails to consider other provisions of the Charter and of the Trusteeship Agreement which are at odds with the implication drawn.

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self government recognize the principle that *the interests of the inhabitants of these territories are paramount*. . . . Article 73, Charter of the United Nations. (Emphasis added.)

In discharging its obligations under Article 76(b) of the Charter, the administering authority shall: . . . 2 . . . *protect the inhabitants against the loss of their lands and resources*. . . . Article 6, Trusteeship Agreement. (Emphasis added.)

2. The parties to the Trusteeship Agreement are the United Nations and the United States. It was drafted by the United States. *Temengil v. Trust Territory*, 33 Fair Empl. Prac. Cas. (BNA) 1027, 1032 (D.N.M.I. 1983). The

Trusteeship Agreement is variously called a "bi-lateral contract" [*Porter v. United States*, 496 F.2d 583, 587, 204 Ct. Cl. 335, 361 (1974, *cert. denied*, 420 U.S. 1004 (1975))], a treaty [*People of Saipan v. United States Department of Interior*, 502 F.2d 90, 96, 97 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975)] and its trust character emphasized [*Gale v. Andrus*, 642 F.2d 826, 830 (D.C. Cir. 1980)].

Whether contract, treaty, or trust, similar rules of construction govern when attempting to determine the meaning of a provision. 74 Am. Jur. 2d Treaties Sec. 21 (1974); 76 Am. Jur. 2d Trusts Sec. 17 (1975). It is the general rule that doubtful language of a written document is construed against the party who drafted the document. RESTATEMENT (SECOND) OF CONTRACTS Sec. 206 (1981); 3 A. Corbin, *Contracts* Sec. 559 (1960); 17 Am. Jur. 2d Contracts Sec. 276 (1964). The majority fails to apply this rule of construction.

If the nature of the Trusteeship Agreement as a trust is emphasized, "[c]ertainly one of the prime objectives of a trustee is to be scrupulously fair and frank with those for whom he is acting." *Ngodrii v. TTPI*, 2 T.T.R. 142, 146 (1960). The majority's holding in finding the power of eminent domain for the benefit of the administering authority implied in the Trusteeship Agreement does not comport with the high obligation of the trustee toward the beneficiaries.

If the character of the Trusteeship Agreement as a treaty is considered, the language of the U.S. Supreme Court in construing ambiguous provisions of Indian treaties is an appropriate analogy. "Doubtful expressions are to be resolved in favor of the weak and the defenseless people who are the wards of the nation, dependent upon its protection and good faith." *Carpenter v. Shaw*, 280 U.S. 363, 50 S. Ct. 121, 74 L. Ed. 478, 481 (1930).

The rule of construction that doubtful language is construed against the drafter applies with added force in this case in which the citizens of the Trust Territory are not parties to the Trusteeship Agreement, nor were their views consulted in its drafting.

While I agree that the Land Agreement purports to give authority to the Trust Territory of the Pacific Islands to condemn for the United States, it cannot accomplish its purpose if the administering authority [the United States] does not itself have that power to condemn. The authority of the agent cannot exceed that of the principal. *American Standard Credit v. National Cement Co.*, 643 F.2d 248, 267 (5th Cir. 1981); 2A C.J.S. Agency Sec. 144 (1972); 3 Am. Jur. 2d Agency Sec. 71 (1986).

The court lastly finds authority for this taking in the Article 5(3) of the Trusteeship Agreement which permits the administering authority [the United States] to make use of "assistance from the trust territory." The court's view is that the condemnation by the Trust Territory of the Pacific Islands was such authorized assistance. There is an unaddressed difficulty with this position.

The provision states that the administering authority may "make use of *volunteer* forces, facilities and assistance from the trust territory." (Emphasis added.) I cannot reconcile this language with the act of taking property by condemnation.

The final point the majority makes is that the condemnation benefited the citizens of the Trust Territory because the presence of the bases ensures international peace and security. This point derives from Article 5 of the Trusteeship Agreement which is quoted in pertinent part on page 587 of the opinion. There are two weaknesses in this point.

First, the Article says that "trust territory shall play its part, *in accordance with the Charter of the United Nations*, in the maintenance of international peace and secu-

rity.” (Emphasis added.) The term “international peace and security” is used some thirty times in the Charter. From its repeated use it is clear that it means *collective* security measures under the Security Council. The establishment of a base by one power does not come within this meaning.

Article 84 of the Charter of the United Nations supports this reading. It states:

It shall be the duty of the administering authority to ensure that the trust territory shall play its part in the maintenance of international peace and security. To this end the administering authority may make use of volunteer forces, facilities, and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken in this regard by the administering authority, as well as for local defense and the maintenance of law and order within the trust territory.

The wording of Article 5 does present difficulty in interpretation. However that difficulty is resolved without analysis by the majority in favor of the United States and adversely to the beneficiaries of the trust.

The second weakness of this point is that it tends to merge two different matters. Whether there was a benefit to the citizens of the Trust Territory is an issue that might be raised if the Trust Territory of the Pacific Islands were condemning, as an aspect of its sovereign power, for a public use. But that is not the basis of the trial court’s holding or of the holding of the majority of this court. The basis of the holding is that the Trust Territory of the Pacific Islands was acting as agent of the United States.

I believe the judgment should be reversed and the action dismissed on the ground that the Trust Territory of the Pacific Islands cannot condemn for the United States. Had that view prevailed, it would be unnecessary to reach issues 3, 4 and 5 raised in this appeal.

They are reached, however, and I concur in the opinion of the court as to the holdings on issues 3, 4, and 5.

The passage of time has given rise to an additional problem in this case. Since the matter was submitted for decision after oral argument the Trusteeship Agreement was terminated. This presents the court with the question of its own continuing authority. The majority apparently finds such authority. I cannot assume the court has continuing jurisdiction. The matter warrants briefing and argument.