IN THE SUPREME COURT OF THE
FEDERATED STATES OF MICRONESIA
APPELLATE DIVISION

HON. PAUL E. McILRATH, Secretary FSM Department of Justice, and HON. IESKE K. IEHSI, Secretary of Foreign Affairs, Petitioners, v. HON. ANDON L. AMARAICH, Chief Justice of the Supreme Court of the Federated States of Micronesia, Respondent.	)	APPEAL CASE NO. P9-2002 ORDER DENYING PETITION AND MEMORANDUM

PER CURIAM:

The petitioners seek a writ of prohibition[1] directed to Chief Justice Andon L. Amaraich's September 24, 2002 order in Civil Action No. 2002-023 ("the underlying case") in the FSM Supreme Court trial division. Appellate Procedure Rule 21(b) provides that when an application has been made for a writ of mandamus or prohibition directed to a judge of this court,

> [t]he remaining article XI, section 3 justice(s) of the Federated States of Micronesia Supreme Court, acting as the appellate division, are eligible to consider the petition. If the remaining fulltime justice(s) are of the opinion that the writ clearly should not be granted,

[1]The petitioners have also filed a rule to show cause directed to Chief Justice Amaraich. A petition for a writ of prohibition and the provisions of Appellate Procedure Rule 21, which makes no mention of a rule to show cause, are, taken together, an adequate vehicle by which the relief sought may be achieved. We disregard that portion of the petition which seeks a rule to show cause.

> they shall deny the petition. Otherwise, they shall order that an answer be filed.

For the reasons that follow, we are of the opinion that the writ clearly should not be granted, and deny the petition.

I. Background

The defendants in the underlying case are the Republic of Korea and the First Secretary of the Korean Embassy, Ki Hoon Chin. A June 20, 2002 diplomatic note from the South Korean Embassy in Suva, Fiji, directed to the FSM Department of Foreign Affairs asserted that these two defendants had diplomatic immunity. Citing Kosrae v. M/V Voea Lomipeau, 9 FSM Intrm. 366, 373 (Kos. 2000), the trial court concluded that whether the defendants enjoyed diplomatic immunity was for the executive branch to determine, and on September 24, 2002, entered an order which, at page 4, provided that "IT IS HEREBY ORDERED that the FSM Secretary of External Affairs and FSM Secretary of Justice, jointly and/or in cooperation, file an amicus brief in this matter [on the issue of the diplomatic immunity] within sixty (60) days of the date of entry of this order." Neither the FSM Secretary of Foreign Affairs[2] nor the FSM Secretary of Justice are parties in the underlying case.

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[2]The Department of External Affairs was renamed Department of Foreign Affairs. Pub. L. No. 10-55, § 1(1)(c) (1997) (to be codified at 2 F.S.M.C. 203(1)(c)).

Exhibit 3 to the petition is a November 21, 2002 letter from the Department of Justice to Chief Justice Amaraich which states as follows: "please be advised that the Department of Justice and Department of Foreign Affairs has [sic] determined that Defendant Korea and Defendant Chin are entitled to absolute immunity from the present suit filed against them and are entitled to be immediately dismissed as defendants to the same." The letter cites the Vienna Convention on Diplomatic Relations and 11 F.S.M.C. 603 in support of the legal opinion it sets out.

By submitting the letter, the Department of Foreign Affairs followed the procedure discussed in Kosrae v. M/V Voea Lomipeau, 9 FSM Intrm. 366, 373 (Kos. 2000). In that case, the court noted that in the United States, prior to 1976 when the Foreign Sovereign Immunities Act eliminated the State Department's role in resolving foreign sovereign immunity questions, the accepted procedure was for the State Department to determine whether a party would be accorded foreign sovereign immunity. Id. Once this determination was made, the attorney general, acting at the State Department's instance, would make a suggestion on the record to that effect, and this suggestion would then be recognized by the court. Id. In the absence of an FSM equivalent to the Foreign Sovereign Immunities Act, the Voea Lomipeau court concluded that the foregoing procedure should be followed in the FSM. Id. at 373-74.

The trial court accepted the Department of Justice's November 21st letter as a suggestion on the record in the underlying case and acted accordingly. The trial court then properly gave notice of the suggestion to the plaintiff and afforded him an opportunity to be heard. Then, on April 10, 2003, it dismissed the underlying case on the ground of the defendants' diplomatic immunity.

II. Whether Issue is Moot

In a November 21, 2002 letter, the two departments offered their unequivocal legal opinion that the defendants in the underlying case enjoyed absolute sovereign immunity. Absent compelling reasons to the contrary, form must ever subserve substance. A thing is what it is regardless of what someone chooses to call it.[3] *See, e.g.*, Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 466, 470 (Pon. 2001) (motion to alter or amend a judgment when no final order or judgment has been entered is really a Rule 54 motion for reconsideration); Powerk v. American Int'l Co. Micronesia, 8 FSM Intrm. 436, 438 (Chk. 1998) (opposition to removal petition, regardless of how styled, is actually a motion to remand); Elwise v. Bonneville Constr. Co., 6 FSM Intrm. 570, 572

[3]Shakespeare gave famous expression to this truth when he wrote, "What's in a name? That which we call a rose/By any other name would smell as sweet." William Shakespeare, Romeo and Juliet act 2, sc. 2. Gertrude Stein's tautological reduction of Shakespeare's insight was a "[r]ose is a rose is a rose is a rose." Gertrude Stein, Sacred Emily.

(Pon. 1994) (filed stipulation to extend time to respond to a motion will be treated as a motion for enlargement of time); Stephen v. Chuuk, 11 FSM Intrm. 36, 43 (Chk. S. Ct. Tr. 2002) (when there is no judgment in the case but only an interlocutory order confirming a partial settlement, a motion for relief from judgment is properly characterized as motion to reconsider an interlocutory order). Viewed in this light, the November 21, 2002 letter is the functional equivalent of the amicus curiae brief required by the September 24, 2002 order – it stated a legal opinion based on certain facts and cited points and authorities to support that opinion. Thus, in following the procedure set out in M/V Voea Lomipeau, the letter also complied with the September 24, 2002 order. No further compliance with the September 24, 2002 order was required.

When any relief that a court would grant would be ineffective, then the court must deem the dispute moot. Berman v. FSM Supreme Court (II), 7 FSM Intrm. 11, 16 (App. 1995). The mootness doctrine precludes a court from addressing the dispute's merits when the court can no longer grant any relief which would have any practical effect. United States v. City of Buffalo, 457 F. Supp. 612, 619 (W.D.N.Y. 1978). Since we conclude that the November 21st letter constitutes compliance with the September 24th order, the petitioners' central claim is rendered moot. DiMauro v. Pavia, 492

F. Supp. 1051, 1068 (D. Conn. 1979) (holding that a claim to have estate assets distributed was moot where the assets had in fact been distributed), *aff'd*, 614 F.2d 1286 (2d Cir. 1979).

In the usual case, this conclusion would preclude the consideration of any of the petition's issues because the FSM Supreme Court lacks jurisdiction over, and cannot decide, a moot case. (The Constitution requires that there be a case or a dispute.) A case or dispute becomes moot when the parties lack a legally cognizable interest in the outcome. FSM v. Louis, 9 FSM Intrm. 474, 482 (App. 2000). An exception to the mootness doctrine exists when there is a situation in which an otherwise moot case may have a continuing effect on future events, including future litigation. Id. at 483. When it appears that the problem will arise again, and would otherwise be incapable of review, a court may still have jurisdiction under this exception to the mootness doctrine. Udot Municipality v. FSM, 10 FSM Intrm. 354, 358 (Chk. 2001); Udot Municipality v. FSM, 9 FSM Intrm. 560, 562 (Chk. 2000). Since the petition also raises questions about the mechanics of the judicially announced procedure under Voea Lomipeau for determining sovereign immunity questions, and since this issue may arise again, we think it appropriate to speak briefly to this issue.

III. The Procedure to Resolve Immunity Issues

The petitioners challenge the September 24, 2002 order on two

grounds. They contend that the decision to file an amicus curiae brief is a discretionary act which the court cannot order them to perform because to do so violates the separation of powers doctrine. Further, they urge that the court lacks jurisdiction over them for purposes of the September 24, 2002 order because they are not parties to the underlying case.

The petitioners assert that the September 24, 2002 order violated the separation of powers doctrine because they cannot be ordered to perform the discretionary act of filing an amicus curiae brief on the foreign sovereign immunity question presented in the underlying case. In this contention lies a paradox.

Our Constitution commits to the executive branch the conduct of foreign affairs, FSM Const. art. X, § 2(b), just as it vests the judicial power in the Supreme Court and such other courts as may be established by statute, id. art. XI, § 1. Although these powers are categorically assigned, they are not in their exercise subject to the same degree of precision, and the case at hand illustrates this. The sovereign immunity issue, inescapably a part of foreign affairs, is under discussion only because it has been offered as a defense in a lawsuit before the judicial branch.

Inter-branch comity is the means by which these parallel, if not competing, concerns are recognized and integrated. In this case, this comity manifests itself in the judicial branch's

deference to the executive branch on the issue of foreign sovereign immunity. As discussed above, the means by which this comity is recognized was set out in the Voea Lomipeau. Some mechanism must be available to implement this procedure, and the trial court's September 24, 2002 order accomplished this. We are disinclined to view the language of the September 24, 2002 order that "ordered" the Department of Foreign Affairs to file the amicus curiae brief as transforming comity into a coercion that divested the Department of Foreign Affairs of its discretion, as the petitioners claim.

All that the September 24, 2002 order required was that the Department of Foreign Affairs file an amicus curiae brief. As we read the operative language of the order, it did not require the Department of Foreign Affairs to decide the issue at hand one way or another, or for that matter render any opinion at all. What it did do, however, was elicit interaction – and we think a minimal degree of interaction, given the issue at hand – between the two branches involved so that the executive branch's position, or even lack of one, would become known to the judicial branch.

Based on the order's language, the Department of Foreign Affairs would have been free to take the approach it apparently took in Voea Lomipeau. We say "apparently," because as later reported in Kosrae v. Kingdom of Tonga, 9 FSM Intrm. 522, 523 (Kos. 2000), the Department of Foreign Affairs did not respond to the

court's request for an opinion on the sovereign immunity question. The court was left to surmise that the Department of Foreign Affairs had no opinion on the question, and the court then decided the issue. We see nothing in the September 24, 2002 order's language that would have prevented the Department of Foreign Affairs from doing essentially the same thing here, which is to say it would have been free to take no position on the matter and let the court decide the question.

However, the requirement of an amicus curiae brief gave certainty and recognition to the principles of the comity relationship by informing the Department of Foreign Affairs of the judicial branch's need for it to state its position, or alternatively to state that it had none. This is in contrast to Voea Lomipeau, where the Department of Foreign Affairs did not respond when invited, and the court was left to its own devices in deciding the question. A more interactive, more precise relationship between the two branches involved should prevail than was ultimately the case in Voea Lomipeau. Foreign relations should not be a matter of guesswork by either branch.

Inter-branch comity is a two-way street. Just as the trial court in its September 24, 2002 order recognized that the question of the foreign sovereign immunity putatively enjoyed by the defendants in the underlying case was appropriately decided by the

Department of Foreign Affairs as part of the executive branch, so the executive branch should participate in this process by giving its opinion on the matter, even if this means stating that it has no opinion. The trial court's September 24, 2002 order secured this participation. A meaningful procedure must, after all, involve meaningful participation. While a request or invitation may secure meaningful participation if the person or entity to whom it is directed so chooses, this will not be the case if the election is made to ignore the request. A minimally onerous order like the one the trial court entered on September 24, 2002, insures that the procedure recommended in Voea Lomipeau is a meaningful one, and also provides certainty for all involved in the important issue at hand. At the same time, it preserves the Department of Foreign Affairs's determination of the important issue of foreign sovereign immunity.

What we find surprising is that after receipt of the Korean Embassy's diplomatic note, the Department of Foreign Affairs, either alone or in conjunction with the Department of Justice, did not promptly and voluntarily, long before the trial court ordered it, file its determination that the defendants were immune from suit. It would seem, that as a matter of comity among sovereign nations, this is what Korea would have expected the FSM Department of Foreign Affairs to do once it had received the diplomatic note.

The September 24, 2002 order does not violate the separation of powers doctrine. To the contrary, the September 24, 2002 order explicitly recognized inter-branch comity with respect to the sovereign immunity question raised in the underlying case.

Because this petition is moot and the underlying case has been dismissed, we decline to consider the general question of whether the court has jurisdiction to order a non-party to file an amicus brief. We leave that question to another time.

IV. CONCLUSION

Accordingly, we deny the petition for a writ of prohibition as moot.

SO ORDERED the __th day of April, 2003.

_____/s/_____
Martin Yinug
Associate Justice

_____/s/_____
Dennis K. Yamase
Associate Justice

Entered this __th day of April, 2003.

_____/s/_____
Kohsak M. Keller
Chief Clerk of Court