

January 1998

Post Trusteeship Environmental Accountability: Case of PCB Contamination on the Marshall Islands

Hyun S. Lee

Follow this and additional works at: <https://digitalcommons.du.edu/djilp>

Recommended Citation

Hyun S. Lee, Post Trusteeship Environmental Accountability: Case of PCB Contamination on the Marshall Islands, 26 Denv. J. Int'l L. & Pol'y 399 (1998).

This Article is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu,dig-commons@du.edu.

Post Trusteeship Environmental Accountability: Case of PCB Contamination on the Marshall Islands

Keywords

International Law: History, Self-Determination

POST TRUSTEESHIP ENVIRONMENTAL ACCOUNTABILITY: CASE OF PCB CONTAMINATION ON THE MARSHALL ISLANDS

HYUN S. LEE*

I. INTRODUCTION

At the conclusion of World War II, the newly formed United Nations sought to aid in the autonomous development of the newly liberated peoples in Africa and Micronesia. This entailed the establishment of a system of trusteeship states to be administered by members of the United Nations until the beneficiaries of these trusts were ready to take the reins of governance into their own hands. Along with the development of autonomous systems of government, the trustees also sought to aid in the trust territories' economic development. In doing so, the trustees were basically given free reign in administering the trust territories.

Tragically, this lack of accountability for their actions in the trust territories led to a number of haphazard environmental practices among the trustees. Subsequently, the former trust territories were left with a number of ecological disasters to deal with. Economically unable to deal with these issues by themselves, the governments of the former trust territories requested that those who created these situations be accountable. However, they were often faced with a great deal of resistance by the former trustees.

A number of these ecological issues were raised by the former trustee states with the trustees. None of these suits have actually been re-

* Washington College of Law, American University 1997, JD; University of Washington School of Law, LL.M. I would like to thank my family for their support since the beginning. I want to extend my profound thanks to: Professor Daniel Bodansky and Greg Hicks of the University of Washington School of Law for mentoring me through the LL.M. that resulted in this paper; to Bob Thiel and Andrea Mathis for peer reviewing my paper; Norm Lovelace and Holly Barker for their factual and technical assistance without whom I would have been utterly confused on the facts of what occurred; Sally Dalzell for giving me the sense of purpose and faith in the law to begin to pursue a career in environmental law; Jessie Cantor and Juni Luyombya for being there as good friends and valued colleagues; and to my friend Jodie Allen for her kind and unfaltering support during the final stages of this paper and beyond.

solved through an adjudication which would have established some sort of legal precedent on the matter. Rather, the parties have all negotiated settlements wherein the former trust territories contract away rights to further claims against the trustees. In light of the non-resolution of some of these issues, the question still exists as to whether a fiduciary relationship exists between the trustees and the former trust territories such that they are liable for ecological harm.

In 1986, the United States terminated its trustee relationship with its former trust territories by entering into the Compact of Free Association. Presently, the former portion Trust Territory of the Pacific Islands consisting of the Marshall Islands are an independent country, the Republic of the Marshall Islands. While it still retains close ties with the United States, the Republic of the Marshall Islands is an autonomous state. However, the environmental consequences of the trusteeship era still linger. The United States has agreed to compensate the RMI for the harm caused to the various atolls by atomic testing during the Cold War. Another ecological threat still remains, the more subtle threat of PCB contamination. PCB's represent a more subtle, but also harmful threat, to the people of the Republic of the Marshall Islands. It is uncertain whether the RMI can afford to pay for this clean up on their own. To its credit, the United States has cleaned up one of these PCB sites, it has not accepted legal accountability. Thus, the issue still remains whether former trustees owe a duty to their former trusts to clean up for past contamination.

II. HISTORICAL BACKGROUND

The Republic of the Marshall Islands is located in the South Pacific Ocean in the region known as Micronesia. The Marshall Islands consist of approximately "thirty-four coral islands and atolls with a total land area of approximately 180 square kilometers and a population of about 43,000."¹ It has been speculated that the Micronesian region of the Pacific Ocean was settled by human inhabitants some time between 3,000 and 5,000 B.C.² Spain claimed Micronesia in 1565.³ This year marked a pivotal point in Micronesia history. The Europeans who first colonized Micronesia entered the venture with the mentality that they were civilizing ignorant savages.⁴ This mind-set prevailed in Spanish coloni-

1. Jean Zorn, *The Republic of the Marshall Islands*, in SOUTH PACIFIC ISLANDS LEGAL SYSTEMS 102 (Michael A. Ntunmy ed., 1992).

2. *Id.* at 100.

3. *Id.*

4. The sixteenth century theologian and jurist Francisco de Vitoria stated that: [a]lthough the aborigines in question are . . . not wholly unintelligent, yet they are little short of that condition, and so are unfit to found or administer a lawful State up to the standard required by human and civil claims . . . It

alism until the end of the Spanish Empire. It can be argued to have survived even through the days of the League of Nation Mandate System and the United Nations Trusteeship System. From the date that Europeans arrived there, the Micronesian islands and its peoples would be traded back and forth from one empire to another.

By the nineteenth century, Micronesia would be visited by maritime traders from around the world.⁵ It was during the era of steam ship travel that Micronesia really became the focus of imperialist attention. This was the era where Alfred Thayer Mahan's theories of maritime empires based on re-fueling stations spread throughout the world came to life. Micronesia represented a crucial link between Europe, the Americas and Asia. This was also the time when the German Empire and the British Empire began to dispute Spain's claims to Micronesia.⁶ The lands and peoples of Micronesia were never perceived by Europe-

might, therefore, be maintained that in their own interests the sovereigns of Spain might undertake the administration of their country, providing them with prefects and governors for their towns and might even give them new lords so long as this was clearly for their benefit. I say there would be some force in this contention; for if they were all wanting in intelligence, there is no doubt that this would not only be a permissible, but also a highly proper, course to take; nay our sovereigns would be bound to take it, just as if the natives were infants.

Antony Anghie, *The Heart of My Home: Colonialism, Environmental Damage and the Nauru Case*, 34 HARV. INT'L L.J. 445, 491-92 (1993) (quoting FRANCISCO DE VITORIA, *DE INDIS ET DE IVRE BELLI REFLCETIONES* 161 [On the Indians Lately Discovered] (Ernest Nys ed. & J.P. Bate trans., The Carnegie Inst. of Washington 1917) (1696). See also TZVETAN TODOROV, *THE CONQUEST OF AMERICA: THE QUESTION OF THE OTHER* (Richard Howard trans., 1984).

5. Zorn, *supra* note 1, at 100.

6.

Britain was not overly anxious to acquire new colonies but could not at the same time permit the unopposed expansion of German influence in what was now perceived to be a vital area of the globe. A compromise had to be reached and at a Conference in Berlin in 1886 the two empires drew an arbitrary line dividing the Pacific into two great spheres of influence-the British and the German. The map drawer, who may have never seen [the region he was demarcating], ran his pen through the little stretch of 250 kilometers of water which separated Nauru from its nearest neighbor... There was nothing unusual in such map drawing activities. The great powers had grown accustomed to the idea that the rest of the world was there to be divided up for their own benefit. Portions of the world had been carved up before and this was the era when the great partition of Africa took place at the Congress of Berlin in 1885 and that continent was cut into portions shared out among the colonial powers. The welfare of the people populating the areas through which the fine pen of the cartographer ran was certainly not the most important consideration in the exercise.

CHRISTOPHER WEERAMANTRY, *NAURU, ENVIRONMENTAL DAMAGE UNDER INTERNATIONAL TRUSTEESHIP* 6 (1992).

ans thought of as independent nations with living and breathing human inhabitants with unique cultural assets worth preserving, but merely as strategic assets on a global chess board. Even in the nineteenth century, there was still the Eurocentric racist notion that had engrained itself into international law that only "only European states were fully sovereign[; and] Non European states [] existed outside the realm of the law and thus could not legally oppose the sovereign will of the European states."⁷ Given this mind set, it is not surprising the attitude of the European conquerors who conquered Micronesia, and then traded the land and the people as though they were chattel.

After Spain lost the "Spanish American War" to the United States, it sold its possessions in Micronesia to the German Empire for \$4.5 million in 1886.⁸ German occupation of Micronesian Islands only lasted until World War I.⁹ Once World War I began, Japan declared war on Germany and annexed German possessions in Micronesia, including the Marshall Islands.¹⁰ At the end of World War I, the League of Nations created a system of mandates out of the former territories of the German and Ottoman Empires.

The League of Nations established a number of basic principles to guide its members in the administration of the Mandate Territories. One of the most fundamental of the guiding principles of the League of Nations was that the administrators of a Mandate were in the position of maintaining a trust. In Article XXII of the Covenant of the League of Nations it proclaimed,

[t]o those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.¹¹

Thus those members of the League of Nations that accepted a Mandate made a covenant with each other and the inhabitants of the Mandate that the interests of the inhabitants of the Mandate were to be considered a sacred trust. The League of Nations Mandate System, where states entrusted with a Mandatory were to act on behalf of the

7. Anghie, *supra* note 4, at 493-94 (citing THOMAS LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 1 (1895)).

8. CARL HEINE, MICRONESIA AT THE CROSS ROADS 13 (1974).

9. RON CROCOMBE, ET AL., POLITICS IN MICRONESIA 84 (1983).

10. HEINE, *supra* note 8, at 14.

11. LEAGUE OF NATIONS COVENANT art. 22, para. 1.

League of Nations, was the first time that international accountability was implemented.¹²

The League of Nations divided the former German and Ottoman territories into three classes of Mandates: Class A Mandates,¹³ Class B Mandates¹⁴ and Class C Mandates.¹⁵ In 1920, Japan was granted the Class C Mandate of the "former German Pacific Islands," including the *Marshall Islands*.¹⁶ Under the Japanese mandate, the Marshall Islands were subjected to intense economic development as a result of large-scale Japanese immigration.¹⁷ By 1935, Japan had begun constructing military bases on its Class C Mandates.¹⁸ Subsequently, by the beginning of World War II when Japan left the League of Nations, the majority of the population in the Marshall Islands Class C Mandate was Japanese.¹⁹

Believing the December 7, 1941 surprise attack on Pearl Harbor had been launched from the Marshall Islands, the United States entered World War II "determined that Micronesia would never again pose a security threat to the United States."²⁰ After a long and bloody engagement in the Pacific, the United States ended World War II with the detonation two nuclear bombs over Hiroshima and Nagasaki. At the end of the hostilities, the United States replaced the Japanese Empire's military presence in Micronesia as the regional power. On a global scale, the United States had a tremendous amount of influence in shaping the post war global reality. Subsequently, the United States made it a priority to neutralize Micronesia as a strategic threat to the United States.

At the end of World War II, the United Nations replaced the League of Nations. It replaced the League of Nations Mandate System

12. CHARMIAN TOUSSAINT, *THE TRUSTEESHIP SYSTEM OF THE UNITED NATIONS* 11-12 (1956).

13. Class A Mandates consisted of former Turkish territories (Lebanon, Transjordan, Syria, Iraq and Palestine) which were autonomous but subject to assistance by a mandatory power "until such time as they are able to stand alone." Francis B. Sayre, *Legal Problems Arising from the United Nations Trusteeship System*, 42 AM. J. INT'L. L. 263, 264 (1948) (citing LEAGUE OF NATIONS COVENANT art. 22, para. 4).

14. Class B Mandates were former German territories in Central Africa "not yet ready for self government." *Id.* at 264.

15. Class C Mandates included South West African as well as all of the German Pacific colonies: those territories which the Allies doubted would ever be able to stand alone. *Id.* (citing LEAGUE OF NATIONS COVENANT art. 22, para 6).

16. See Larry Wentworth, *The International Status and Personality of Micronesian Political Entities*, 16 ILSA J. INT'L. L. 1, 3 (1993).

17. *Id.* at 4.

18. *Id.*

19. *Id.*

20. *Id.* (citing JOHN MCNEIL, *THE STRATEGIC TRUST TERRITORY IN INTERNATIONAL LAW* 25 (1976)).

with the International Trusteeship System. As in the League of Nations Covenant, the nation states that accepted a UN Trusteeship accepted a sacred trust to promote the well being of the inhabitants of the Trust. It recognized the need to respect the cultures of the peoples of the Trusts. The U.N. Charter recognizes that the interests of the inhabitants of the newly created Trust territories are "paramount." It also requires the members of the United Nations who accept the Trusteeship responsibility to acknowledge the acceptance of a "sacred trust obligation" whose beneficiaries are the Trust Territory's inhabitants. This system should have been the means to achieve the noble aspiration of self determination originally articulated in the League of Nations. The United Nations Trusteeship System should have served to give life to the noble spirit of the United Nations Charter and to create an avenue to achieve those noble aspirations articulated decades before in the League of Nations.

In light of the newly emerging Cold War and the heavy price paid in World War II, national security and strategic interests prevailed instead. Within the United Nations Charter, there was a provision that permitted the creation of "Strategic Trusts."²¹ "The administering authority of a strategic trust was able to exercise more control over the territory than a non-strategic trust. The Trusteeship Agreement that the United States negotiated with the United Nations Security Council allowed the United States to deploy its military forces in Micronesia, establish military bases, and to close off areas for security purposes."²² This device granted the Trustee a great deal of latitude in the administration of the Trust Territory.²³

The terms of the Trusteeship and the Strategic Trust would be governed by the individual Trusteeship Agreement. In its relationship with the Marshall Islands, the United States had extensive powers in administering the Trusts.²⁴ Article 3 of the Trusteeship Agreement

21. "There may be designated, in any trusteeship agreement, a strategic area or areas which may include part or all of the trust territory to which the agreement applies, without prejudice to any special agreement or agreements made under Article 43." U.N. CHARTER art. 82.

22. Wentworth, *supra* note 16, at 7.

23. As the U. N. 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.

U.N. CHARTER art. 84.

24.

In discharging its obligations under Article 76(a) and Article 84 of the Char-

stated that,

[t]he administering authority shall have full powers of administration, legislation and jurisdiction over the territory subject to the provisions of this agreement, and may apply to the trust territory, subject to any modification which the administering authority may consider desirable, such of the laws of the United States as it may deem appropriate to local conditions and requirements.²⁵

The United States had ultimate authority over the terms of the agreement in that it had to approve any modifications to the Trusteeship agreement.²⁶ In the end, the United States had near complete dominion over how it would administer the Trust territories placed in its care. The United States had the entire area comprising the Marshall Islands, the Carolina islands and the Marianas, composing an area of 846 square miles designated a "Strategic Trust."²⁷ The United States used several atolls in the Marshall Islands as "Ground Zero" for thermonuclear detonation experimentation. The very first of these hydrogen bomb experiments took place on Bikini Atoll in the Marshall Islands in 1946.²⁸ The experiments that took place in 1946 were referred to as "Operation Crossroads."²⁹ The following year on December 2,

ter, the Administering Authority shall ensure that the Trust Territory shall play its part, in accordance with the Charter of United Nations, in the maintenance of international peace and security. To this end, the administering power 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 obligation towards the Security Council undertaken in this regard by the Administering Authority as well as for the local defense and maintenance of law and order within the Trust Territory.

Trusteeship Agreement For the Former Japanese Mandated Islands, 1947, 8 U.N.T.S. 189, 192.

25. *Id.* at art. III.

26. "The terms of the present Agreement shall not be altered, amended or terminated without the consent of the Administering Authority." *Id.* art. XV.

27. Emanuel Margolis, *The Hydrogen Bomb Experiments and International Law*, 64 YALE L.J. 629, 630 (1955).

28. *Id.*

29.

The first test, code named Able, took place on July 1, 1946. The Army Air Force dropped the atomic bomb from a B-29 Superfortress at an altitude of 30,000 feet. The bomb was detonated 519 feet above the Bikini Lagoon's surface, which contained the Navy's target fleet of ninety-five ships. The explosion was enormous and created the now familiar mushroom cloud, which climbed to 20,000 feet. The bomb released explosive energy equivalent to 23,000 tons of TNT. As a result of the Able bomb, five target ships sank.

The second test, code named Baker, took place on July 25, 1946, about three

1947, the Atomic Energy Commission announced that Enewetak Atoll would be the "proving ground" for future atomic weapons tests.³⁰ The Atomic Energy Commission justified its choice of Enewetak Atoll and the resettlement of its inhabitants, on the basis that it had the fewest inhabitants and "it [was] isolated and there [were] hundreds of miles of open seas in the direction in which winds might carry radioactive particles."³¹ Operation Crossroads forced the evacuation of the Bikinians from their ancestral homes to Kili Island.³²

In 1954, the Marshallese people made an urgent plea to the United Nations to stop the next round of hydrogen bomb experiments. In their petition, the Marshallese people described the subject of their petition as a "Complaint regarding the explosion of lethal weapons within our home islands."³³ In this petition, the Marshallese emphatically stated that:

[W]e, the Marshallese people feel that we must follow the dictates of our consciences to bring forth this urgent plea to the United Nations, which has pledged itself to safeguard the life, liberty and the general

weeks after the Able test. The bomb was suspended at a depth of 90 feet below the Bikini lagoon surface. Once detonated, the explosion created an enormous dome of water that rose nearly a mile into the sky. The explosion also created an underwater shockwave and gigantic waves that caused severe damage to many target ships and the islands . . . Despite warnings, the Baker test went ahead as scheduled. As [predicted, *sic*] all target ship, as well as the Bikini lagoon, were heavily contaminated by radioactive materials.

Major Timothy J. Saviano, Book Review, *Operation Crossroads the Atomic Tests at Bikini Atoll*, 145 MIL. L. REV. 193, 194 (1994).

30. Margolis, *supra* note 27, at 631.

31. *Id.* (quoting The Atomic Energy Commission Press Release No. 70, Dec. 1, 1947).

32.

[T]o stage the testing of atomic bombs at Bikini, the United States had to uproot 167 islanders from their homeland. In return, they were promised that the United States would care for them during the testing and then return to Bikini Atoll. Unfortunately as [Jonathan M. Weisgall] noted [in his book *Operation Crossroads—the Atomic Tests at Bikini Atoll*] the islanders became 'nuclear nomads' as the United states moved them several times.

Although the Bikinians were fisherman, they were eventually resettled on Kili, a small island that had neither a lagoon nor sheltered fishing ground. In 1952, conditions became so bad on Kili that the United States had to air-drop emergency rations on the islands. Because of the radiation levels at Bikini, the islanders were not allowed to return home until 1969. On their return they were shocked to see how much the Atoll had been destroyed or damaged by the bombs.

Saviano, *supra* note 29, at 195.

33. Petition from the Marshalese People concerning the Pacific Islands, U.N. Doc. No. T/Pet.10/28 (1954)[hereinafter *Petition*].

well being of the people of the Trust Territory, of which the Marshallese people are a part.

The Marshallese people are not only fearful of the danger to their persons from these deadly weapons in case of another miscalculation, but they are also very concerned for the increasing number of people who are being removed from their land.

Land means a great deal to the Marshallese. It means more than just a place where you can plant your food crops and build your houses; or a place where you can bury your dead. . . It is the very life of the people. Take away their land and their spirits go also.

The Marshall Islands are all low coral atolls with land area where food plants can be cultivated quite limited, even for today's population of about eleven- thousand people. But the population is growing rapidly; the time when this number will be doubled is not far off.

The Japanese had taken away the best portions of the following atolls; Jaluit, Kwajalein, Enewetak, Mills, Malcelap and Wetje to be fortified as part of their preparation for the last war, World War II. So far, only Imedj Island on Jaluit Atoll has been returned to its former owners.

For security reasons, Kawajalein Island is being kept for the military use. Bikini and Enewetak were taken away for atomic bomb tests and their inhabitants were moved to Kili Island and Ujelang Atoll respectively. Because Rongelab and Uterik are now radio-active, their inhabitants are being kept on Kwajalein for an indeterminate length of time. "Where next?" is the big question which looms large in all of our minds.³⁴

Tragically, the hydrogen bomb experiments continued. Subsequently, the Marshallese islands of Rongelap and Utrik were irradiated and its people were deprived of their ancestral homes. Beginning in the late 50's, the Micronesians began to exercise some influence on the administration of the Trust Territories. The Congress of the Marshall Islands created in 1949, was reorganized into a new unicameral legislature in 1958, giving special seats to the traditional chiefs known as Iroij laplap.³⁵ In 1965, the Congress of Micronesia was established as a territory wide bicameral legislative body.³⁶ In 1967, it established the Political Status Commission to negotiate with the United States about

34. *Id.*

35. Zorn, *supra* note 1, at 100.

36. *Id.*

administration of the Trust Territory.³⁷ This resulted in the establishment by the Nijitela (the Marshallese Legislature) of their own separate Political Status Commission to negotiate with the United States about the administration of the Marshall Islands.³⁸

The first substantive steps towards Marshallese independence began in 1977 with the convening of the Marshall Islands Constitutional Convention.³⁹ This led to the Hilo Principles in 1978, establishing free association as the basis for future relations with the United States.⁴⁰ The Marshallese eventually adopted their own Constitution in 1979.⁴¹ The principles of free association established in 1978 led to fruition in 1982 with the signing of the Compact of Free Association, ending the Trust territory relationship between the United States and Micronesia.

Presently, the days of the Trusteeship System are over. The Marshallese have a nation of their own, the Republic of the Marshall Islands. Their relationship with the United States is one of "free association," governed by the Compact of Free Association.⁴² With the ratification of this document, almost forty years of U.S. administration of the Marshall Islands as a Trust Territory ended.⁴³ Although the official Trust relationship between the United States and the Marshallese is over, the legacy of the past still lingers today. To its credit, the United States has accepted financial accountability for some of its actions in the past.

III. THE PROBLEM OF PCB CONTAMINATION

A. *The Leaking Transformers*

During the Trust administration, the United States Department of

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Cf.* Territories and Insular Possessions, 48 USC 1681 (1998), et seq.

43.

The Compact of Free Association set forth in title II of this joint resolution between the United States and the Government of the Marshall Islands of the Palau is hereby approved, and Congress hereby consents to the subsidiary agreements as set forth . . . [on April 9, 1986, as they relate to such Government. Subject to the provisions of this joint resolution, the resident is authorized to agree, in accordance with section 411 of the Compact, to an effective date for and thereafter to implement such Compact, having taken into account any procedures with respect for termination of the Trusteeship Agreement.

Id. at Title I, § 101.

Defense and the Department of Interior, the two agencies mandated by the United States government with the administration of the Marshall Islands, brought electrical transformers to the Marshall Islands to develop a power system.⁴⁴ Polychlorinated Biphenyls (PCBs) were used in transformers as insulation because of their longevity, their durability, non flammable nature and stability.⁴⁵ Under United States law, as of 1977 PCB's were no longer permitted to be imported or manufactured in the United States.⁴⁶ When these, PCB carrying, transformers were brought to the Marshall Islands is unclear. However, the threat they represented to the Marshallese people was.

Some of these hazardous transformers were buried and abandoned on atolls in the Marshall Islands.⁴⁷ A number of the sites where used transformers had been abandoned were discovered to be leaking PCBs into the soil and water.⁴⁸ It is unclear how many of these PCB sites exist undiscovered. A number of transformer sites were found on Jauit, Ebi, Enewetak and Bikini Atoll, with the largest being on Majuro.⁴⁹ The E.P.A. tested the soil these transformer sites for P.C.B. contamination. The results varied from no PCB contamination of the soil to some PCB contamination of the soil.⁵⁰ The sizes of the PCB carrying transformers varied from smaller 30 to 50 gallon containers to larger 1,000 gallon containers.⁵¹ Consequently, the magnitude of contamination or potential for contamination varied from site to site. At one site in Jaluit, the E.P.A. dealt with the problem of PCB contamination using a method of treatment known as cement fixation, where cement was poured into the soil to immobilize future PCB seepage movement.⁵² At a site in Majuro, the PCB concentration was not terribly high but action was still required. Thus, E.P.A. capped the contaminated site with a 40 by

44. *Marshall Islands Seek Superfund Money to Clean Up PCBs Left by US Government*, BNA INT'L ENVTL. DAILY, Sept. 8, 1993. [hereinafter Marshall Islands].

45. THEO COLBURN ET AL., *OUR STOLEN FUTURE* 89 (1996).

46.

(2)(A) . . . no person may manufacture, process, or distribute in commerce or use any polychlorinated biphenyl in any manner other than in a totally enclosed manner. . . (C) For the purposes of this paragraph, the term 'totally enclosed manner' means any manner which will ensure that any exposure of human beings or the environment to a polychlorinated biphenyl will be insignificant as determined by the Administrator by rule.

15 U.S.C. § 2605 2(A) & (C) (1998).

47. *Marshall Islands Seek Superfund money to Clean UP PCBs Left by U.S. Government*, BNA INT'L ENVIRONMENTAL DAILY (Sept. 8, 1993).

48. Telephone Interview with Holly Barker, Spokeswoman, Embassy of the Republic of the Marshall Islands [hereinafter Barker].

49. Telephone Interview with Norm Lovelace, Director, Pacific Insular Area Programs, U.S. Environmental Protection Agency, Region IX [hereinafter Lovelace].

50. *Id.*

51. *Id.*

52. *Id.*

60 foot concrete slab.⁵³ Generally, any transformer at a PCB site that had a concentration of higher than 500 parts per million of PCB in it was treated and shipped off island to the United States for disposal at a licensed disposal facility.⁵⁴ Throughout the clean up process of the known transformer sites, the E.P.A. encountered administrative difficulties in that a number of the problematic transformers had been from one site to another. Subsequently, the E.P.A. had to re-identify and re-assess the site before beginning the removal process.⁵⁵

Unlike the long and complex process involved in a standard Superfund clean up,⁵⁶ the E.P.A. was able to move relatively quickly by designating the clean up as an emergency removal.⁵⁷ Throughout the clean up process, the E.P.A. consulted with the government of the RMI in a cooperative agreement. The first major transformer sites were cleaned up by the United States Environmental Protection Agency.⁵⁸ According to Norm Lovelace of E.P.A. Region IX, this was done as a good faith measure, not as a legal obligation.⁵⁹ One of the reasons for the relatively quick and efficient clean up of these PCB contaminated sites was the informal, but personal, relationships between the various actors from the Marshallese government and the United States. By avoiding the various formalities in official proceedings, the people involved were able to devote important time and resources to cleaning up the PCB contamination.⁶⁰ The United States E.P.A. has also taken measures to instruct local authorities on how to deal with future clean ups.⁶¹ However, the issue of liability in the context of future disposal of newly discovered PCB contamination is still unresolved.⁶² Holly Barker, a spokesperson from the Republic of the Marshall Islands Embassy in Washington, D.C., stated that new leaking transformers are uncovered after every major storm blows through the islands.⁶³ Another batch of transformers was discovered recently on Kawajalein Atoll.⁶⁴ Thus, the problem of PCB contamination still exists as a very real threat to the human environment in the Marshall Islands.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Cf.* 42 U.S.C. § 9601 (1998), et seq.

57. Lovelace, *supra* note 49.

58. Telephone Interview with Jorelik Tibon, Republic of the Marshall Islands Environmental Protection Agency.

59. Lovelace, *supra* note 49.

60. Barker, *supra* note 48.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

B. The Harm Caused by PCBs

The true potential for harm the presence of these abandoned transformers represent to the Marshallese people cannot be understood without some understanding of the nature of PCB's. PCB's, while harmful in nature, do not kill instantaneously like cyanide. Rather, their effects are felt in a more subtle and less easily detectable manner. Dioxins, such as PCB's:

[A]ffect the thyroid system in diverse, complex, and as yet incompletely understood ways. Some analyses indicate they may mimic or block normal hormone action perhaps by binding to the thyroid receptor. Other data suggest they may even increase the number of receptors present to receive the hormone signals. They also seem to act particularly on T4, the form of thyroid hormone that is critical to prenatal brain development.⁶⁵

As a hormone mimic or block, PCB's will disrupt biological development at a cellular level. Normally:

[h]ormones and their receptors fit together with a "lock and key" mechanism. Under normal conditions, a natural hormone binds to its receptor and activates genes in [a cell's] nucleus to produce the appropriate biological response. Hormone mimics can also bind to the receptor and induce a response, but prevent natural hormones from attaching to the receptor. Certain synthetic chemicals released into the environment can behave like hormone mimics and hormone blockers, contributing to disruption of cellular activity. The compound that outnumbers or completely out competes for receptor sites determine the response by the cell.⁶⁶

Thus a hormone mimicker or blocker will manifest itself in the form of damaged reproductive systems, altered nervous system and brains, and impaired immune systems.⁶⁷

The threat of PCB's is not isolated to the disruption of cellular development. Rather, as one of the most persistent of dioxins, it has a tendency to effect an entire eco system. PCBs move up through the food chain, beginning in soil that is absorbed by plants then consumed by a herbivore that is then eaten by an organism higher on the food chain and eventually working its way to human consumption. By the time it is consumed by a human being, the concentration level of PCB in the fat cells will have increased dramatically.

65. Colborn, *supra* note 45, at 187.

66. *Id.* at 72.

67. *See id.* at 172.

C. PCB Contamination on the Marshall Islands

During its trip up the food chain, each organism acquired through consumption all the PCBs stored in the fat cells of its meal.⁶⁸ Subsequently, PCBs will manifest themselves in the soil, the ground water, the surface waters, the vegetation, the animal life and human life wherever it is present. In a small eco system such as the atolls of the Marshall Islands, where there is little escape for this persistent substance, the level of exposure concentration in the environment will be higher. Thus, the Marshallese will be subject to more exposure pathways through which PCBs can enter their bodies. Therefore, a more thorough remediation will have to be effected in contaminated areas.

Until a remediation takes place those lands that have absorbed the leaking transformer PCBs will be potentially harmful to human health. Thus, the Marshallese will be deprived of the use of land that is particularly valuable given the small amount of land that comprises their nation. The Marshallese recognize that their population is growing and that this will be problematic in light of the geographic reality that the Republic of the Marshall Islands is made up of a number of small atolls. As articulated in their 1954 petition to the U.N.,

[I]and means a great deal to the Marshallese. It means more than just a place where you can plant your food crops and build your houses; or a place where you can bury your dead. . .It is the very life of the people. Take away their land and their spirits go also.⁶⁹

The PCB contamination of their lands will not only physically impair the ability to efficiently utilize their lands, depriving them of valuable land that could be used for farming or housing, but it may also strike at the heart of their culture. To people who have lived on small delicate atolls dating back thousands of years, the deprivation of the use of certain lands may have significantly detrimental cultural effects.

The potential for harm from these PCB leaking transformers is clear. The source of this pollution is also clear. These transformers were brought to the Marshall Islands by the United States to develop a power system on the islands. There was no malevolent intent on the part of the United States in this action. In all likelihood, the United States was acting quite benevolently in aiding in the development of an energy infra structure on the Marshall Islands. However, the fact of the matter is that in the process of developing this energy infra structure, the United States government left behind a number of transformers that have leaked their hazardous contents. While the United States

68. *See id.* at 87-109.

69. *Petition, supra* note 33.

Government has taken measures to clean up the first PCB site, it has acknowledged no liability. It has also been speculated that there are other sites in the Marshall Islands with aging transformers that may begin or have already started to leak their hazardous contents into the soil or waters of the Marshall Islands. The question that remains to be resolved is whether there is a future duty on the part of the United States government that brought these transformers to the Marshall Islands, or by any of the other Trustees who polluted the Trust they were administering, to rehabilitate their former Trust. Answering this question will entail an examination of the provisions of the UN Charter establishing the Trusteeship System, the terms of the Trusteeship Agreement between the United States and the UN Security Council, other international agreements such as the Stockholm Declaration and the UNCED Declarations, International Custom and actions that may be the basis for establishing a new custom of international affairs.

IV. INTERNATIONAL LAW

A. International Environmental Law

The general body of International environmental law is unclear on whether liability attaches to a state that causes injury to another state through past actions that are not violations of international law nor international custom. Generally, most international environmental agreements are prospective in nature. They seek to prevent present and future environmental harm. All discussions of international environmental harm and liability begin with the Trail Smelter case between the United States and Canada.⁷⁰ The Trail Smelter Arbitration involved claims brought by the United States against Canada for damage to U.S. residents' property by sulfur dioxide emissions from a Canadian smelting operation in British Columbia. The Trail Smelter Arbitration tribunal ruled that:

[u]nder the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another State or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.⁷¹

This ruling became, what is known today, as the "Polluter Pays"

70. Trail Smelter Arbitration (U.S. v. Canada), 3 U.N. REP. INT'L ARBITRATION AWARDS 1911 (1941).

71. *Id.* at 1965.

principle in international environmental law. Some international legal scholars have suggested that the Trail Smelter Arbitration ruling stands for the proposition that liability should not be based on fault, but something closer to strict liability.⁷²

B. Strict Liability Based Regime

International agreements have established the imposition of absolute liability for harm resulting from certain activities such as space activities.⁷³ The Convention on International Liability for Damage Caused by Space Objects provides that "[a] launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft in flight."⁷⁴ This imposition of absolute liability is rooted in the traditional notion that parties engaging in potentially ultra hazardous activities should be absolutely liable for any harm. It stands as recognition that with the great advances in technology within the last fifty years, human beings have begun to engage in activities that entail the use of materials that are more potentially harmful and volatile.⁷⁵ Applied to the facts of the PCB contamination on the Marshall Islands, the importation of transformers for the purpose of developing a power system for the Marshallese cannot reasonably be considered an ultra hazardous activity that would carry strict liability consequences with it.

C. Wrongfulness Based Liability Regime

The World Commission on Environment and Development has advocated a liability scheme based on wrongfulness rather than one based on strict liability.⁷⁶ In Article 21 of the Brundtland Report, it states that "[a] state is responsible under international law for a breach of an international obligation relating to the use of a natural resources or the prevention or abatement of an environmental interference."⁷⁷ Under this wrongfulness based approach, the responsible state would

72. Constance O'Keefe, *Transboundary Pollution and the Strict Liability Issue: The Work of the International Law Commission on the Topic of International Liability for Consequences Arising Out of Acts Not Prohibited by International Law*, 18 DENV. J. INT'L L. & POL'Y 145, 175-76 (1990) (quoting Goldie, *Liability for Damage and the Progressive Development of International Law*, 14 INT'L & COMP. L. Q. 1189, 1227 (1965)).

73. Convention on International Liability for the Damage Caused by Space Objects, Mar. 29, 1972, 961 U.N.T.S. 187, T.I.A.S. No. 7762 [hereinafter Convention].

74. *Id.* art II.

75. O'Keefe, *supra* note 72, at 187-89.

76. *Id.* at 192.

77. *Id.* at 191 (quoting WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, EXPERTS GROUP ON ENVIRONMENTAL LAW REPORT, ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT, LEGAL PRINCIPLES AND RECOMMENDATIONS 32 (1986)).

be required to, "a. cease the internationally wrongful act; b. as far as possible re-establish the situation which would have existed if the internationally wrongful act had not taken place; c. provide compensation for the harm which results from the internationally wrongful act; d. where appropriate, give satisfaction for the internationally wrongful act."⁷⁸

Applied to the facts surrounding the PCB contamination of the Marshall Islands, it is uncertain whether, at the time of their importation, the United States was even aware of the potential harm that PCBs could cause. Nor is it clear whether anyone knew at the time of the importation of the transformers that PCBs were a toxic substance. It is entirely possible that the transformers were perceived as being beneficial goods that were being imported for the benefit of the Marshallese. Therefore, it is uncertain, based on the scientific knowledge at the time, whether the United States could be found to have been negligent in importing the PCB carrying substances into the Marshall Islands. Thus, a reasonable argument could be formulated that the United States did not act negligently in importing PCB laden transformers to the Trust Territories and cannot be found liable under a wrongfulness based liability scheme.

Therefore, it is unlikely that the United States could be held liable for the clean up of the PCB contamination of the Marshall Islands based on a strictly state to state analysis of transboundary environmental harm.

In the case of the Marshall Islands and the other former Trust Territories of the Pacific Islands, there was not a state to state relationship between them and the United States. Rather, it was a special one in which the United States, due to its position as a pre-eminent world power, enjoyed special privileges in its administration of the Trust Territory of the Pacific Islands. In this relationship, the inhabitants of the Trust Territory were dependent on the United States as the administrator of the trust to act in good faith. The United Nations Charter which created the International Trusteeship System and granted the United States the administration of the former Japanese Mandated Islands, also imposed a fiduciary duty upon the United States to administer the trust for the ultimate benefit of these inhabitants. In administering the trust territory, the United States had full powers of administration, legislation and jurisdiction.⁷⁹ As a result of the unequal nature of this relationship, it can be argued that the fiduciary obligation imposed a higher standard and longer enduring duty of care upon the United States in its administration of its Trust Territories.

78. *Id.*

79. Convention, *supra* note 24, art. III.

V. THE UN CHARTER & THE INTERNATIONAL TRUSTEESHIP SYSTEM

A. The International Trusteeship System

The United Nations International Trusteeship System was created to replace the former League of Nations Mandate System. The International Trusteeship System was one in which member states of the United Nations were entrusted with the administration of territories inhabited by people who had not achieved self governance.⁸⁰ In Article 73 of the United Nations Charter, "the member states who assumed the responsibility of administering a trust acknowledged was a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of th[e] territories. . . ." ⁸¹ The roots of this principle of the sacred trust can be traced to the writings of Edmund Burke 1783 where he stated that the trusteeship principle in colonialism was one in which there must be a degree of accountability by the trustees for their actions.⁸² This regulatory element of colonialism was also embedded in the League of Nations Mandate System where it stated that "there should be applied the principle that the well-being and development of peoples [colonies and territories of the defeated nations from World War I not yet able to govern themselves] for a sacred trust of civilization."⁸³ The notion of this sacred trust was one of the corner stones of the International Trusteeship System.

The International Trusteeship System was established by the United Nations to administer and supervise those territories placed under the system by individual agreement.⁸⁴ The "basic objectives" of the International Trusteeship System echoed those Purposes of the United Nations stated in Article I.⁸⁵ The "basic objectives" of the International Trusteeship System were:

- a. to further international peace and security;
- b. to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peo-

80. U.N. CHARTER art. 73.

81. U.N. CHARTER art. 73.

82. TOUSSAINT, *supra* note 12, at 6 (citing HANSARD, PARLIAMENTARY HISTORY vol. 123 (1783)).

83. *Id.* at 10 (1956) (quoting LEAGUE OF NATIONS COVENANT art. 22, para. 2).

84. U.N. CHARTER art. 75.

85. U.N. CHARTER art. 76.

ples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;

c. to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and

d. to ensure equal treatment in social, economic, and commercial matters for all members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions [in the trusteeship agreements].⁸⁶

In looking at the express language of Article 76, it appears that the objectives of the International Trusteeship System was to primarily benefit the international community rather than the Trust territories' inhabitants.⁸⁷ However, when looked at from the broader perspective of Chapter XI and Chapter XII, including the article 73 provisions on "Non Self Governing territories," it becomes apparent that the well being of the inhabitants of the trust territories is indeed a priority.⁸⁸

B. Comparison to League of Nations Mandate System

Unlike the League of Nations Mandate System, the Trusteeship System was not limited by geography nor to defeated parties of the most recent war.⁸⁹ The International Trusteeship System had a broader scope of parties that could be placed underneath its supervision than its predecessor, the League of Nations Mandate system. Whereas the League of Nations Mandate System applied to former territories of defeated states from World War I and those peoples not able to govern themselves,⁹⁰ the International Trusteeship System had a much broader scope. Under the International Trusteeship System, trust territories could be territories held under a mandate, territories formerly belonging to defeated states of World War II and states voluntarily placed under the trusteeship by the administering state.⁹¹ The International Trusteeship could not accept as a trust territory a nation already a member of the United Nations.⁹² The terms under which the territory

86. *Id.*

87. TOUSSAINT, *supra* note 12, at 55.

88. *Id.* at 53.

89. *Id.* at 3.

90. LEAGUE OF NATIONS COVENANT art. 22.

91. U.N. CHARTER art. 77, para. 1.

92. U.N. CHARTER art. 78.

would be placed under the International Trusteeship System and how it would be administered were to be specified in the individual Trusteeship Agreements.⁹³

C. The Trusteeship Agreements

The Trusteeship Agreements were to specify "the terms under which the trust territory will be administered and designate the authority which will exercise the administration of the trust territory."⁹⁴ The terms of the Trusteeship Agreement were to be agreed upon "by the states directly concerned, including the mandatory power in the case of territories held under Mandate," and approved by the United Nations Security Council and General Assembly.⁹⁵ In essence, the Trusteeship Agreement was to be the legal foundation for the administering authority's administration of the trust territory.⁹⁶ However, should a conflict arise between the individual trusteeship agreement and the United Nations Charter, the terms of the Charter will prevail.⁹⁷

Within each trusteeship agreement, the administering authority may designate a strategic area(s) that could include "part or all of the trust territory."⁹⁸ The terms of the trusteeship agreement leading to the designation of the strategic trust were to be approved by the United Nations Security Council.⁹⁹ The basic objectives of article 76 of the United Nations Charter referring to the International Trusteeship System were applicable to strategic trusts as well.¹⁰⁰ Under article 84 of the United Nations Charter, the administering authority had the duty to ensure that the trust territory was to contribute to the maintenance of international peace and security.¹⁰¹ This entailed the authorization of the administering authority to "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."¹⁰² The designation of a strategic area permitted the administering authority broader discretion in the administration of the trust territory.

93. U.N. CHARTER art. 77, para. 2.

94. U.N. CHARTER art. 81.

95. U.N. CHARTER art. 79.

96. TOUSSAINT, *supra* note 12, at 95.

97. U.N. CHARTER art. 103.

98. U.N. CHARTER art. 82.

99. U.N. CHARTER art. 83.

100. *Id.*

101. U.N. CHARTER art. 84.

102. *Id.*

D. The Role of the Trusteeship Council

The United Nations Trusteeship Council was the primary mechanism to assist the United Nations General Assembly in the supervision of the administering of the trust territories.¹⁰³ The Trusteeship Council was to consist of member states administering trusts, the fifteen permanent members of the Security Council and members of the United Nations elected to the council.¹⁰⁴ The elected members of the Trusteeship Council were to act as a balancing factor to ensure an equal number of UN member states that were administering trusts and not administering trusts were represented on the Trusteeship Council.¹⁰⁵

One of the major functions of the Trusteeship Council was to "formulate a questionnaire on the political, economic, social, and educational advancement of the inhabitants of each trust territory."¹⁰⁶ In carrying out this function to evaluate the administering authority's administration of the trust territory, the Trusteeship Council was to

consider reports submitted by the administering authority; accept petitions and examine them in consultation with the administering authority; provide for periodic to the respective trust territories at times agreed upon with the administering authority; and take these and other actions in conformity with the terms of the trusteeship agreements.¹⁰⁷

In that respect, the UN Trusteeship Council can be contrasted with the League of Nations Mandate System which did not avail itself of inspections of mandates because it would offend the sovereignty of the administering authority.¹⁰⁸ Thus the UN Trusteeship Council served as an information intermediary between interested parties and the U.N. General Assembly. Based on the information collected and submitted under Article 87, the Trusteeship Council was to submit recommendations to the U.N. General Assembly.¹⁰⁹ In this role, the Trusteeship Council limited to making non binding recommendations to members.¹¹⁰ Subsequently, the effectiveness of the UN Trusteeship Council was reliant upon the good faith practices of the administering authorities.¹¹¹

103. U.N. CHARTER art. 85.

104. U.N. CHARTER art. 86.

105. *Id.*

106. *Id.*

107. U.N. CHARTER art. 87.

108. TOUSSAINT, *supra* note 12, at 180.

109. *Id.* at 152.

110. *Id.* at 174.

111. *Id.*

VI. STATE OF LAW DURING THE TRUSTEESHIP

Pursuant to Article Three of the "Trusteeship Agreement for the Former Japanese Mandated Islands," "[t]he Administering authority shall have full powers of administration, legislation and jurisdiction over the Territory."¹¹² Although officially sovereignty lay elsewhere, this Trusteeship Agreement had the practical effect of granting the United States sovereign authority over the trust territory.¹¹³ By designating the Trust Territory a Strategic Trust, the United States was responsible to the Security Council, where the United States had veto power, for its administration of the Trust Territory.¹¹⁴

The United States agency mandated with administering the Trust Territory of the Pacific Islands was the United States Department of Interior.¹¹⁵ The executive authority in the Trust Territory was vested in the High Commissioner who was appointed by the President with advice and consent of the Senate.¹¹⁶ Legislative authority was vested in the Congress of Micronesia who were elected by the citizens of the Trust territory.¹¹⁷ However the Congress of Micronesia was curtailed in its legislative authority in that it could not enact legislation that was "inconsistent with the laws of the United States applicable to the trust Territory, treaties or international agreements of the United states, Executive Orders of the President or orders of the Secretary of Interior."¹¹⁸ Furthermore, any legislation enacted by the Congress of Micronesia could be vetoed by the High Commissioner. However this veto could be overridden by two thirds of the majority of both houses of the Congress of Micronesia (Senate and House of Representatives), subject to the ultimate veto of the United States Secretary of Interior.¹¹⁹ Although the United States exercised direct control of areas of regulation such as foreign affairs, "the daily administration of the islands has largely shifted into the hands of the local government. The Territory operates under its own comprehensive legal code. Inhabitants of the islands are citizens of the Territory, not of the United States."¹²⁰ However, other Courts have found that as a result of its veto authority, "the United States exercises a maximum degree of control which is inconsistent

112. Convention, *supra* note 24, art. III.

113. *People of Saipan v. U.S. Dep't of Interior*, 356 F. Supp. 645, 653 (D. Haw. 1973).

114. *Id.* (citing U.N. CHARTER art. 27).

115. *Id.* (construing Exec. Order No. 11021, 27 Fed. Reg. 4409 (1962)).

116. *Id.* at 655 (quoting 48 U.S.C. § 1681 (a) (Supp. 1973)).

117. *Id.* (citing Department of Interior Order No. 2918, pt. III §§ 1,2,5,7 and 8 (Dec. 27, 1968)).

118. *Id.* (citing Department of Interior Order No. 2918, pt. III §§ 2 (Dec. 27, 1968)).

119. *Id.* (citing Department of Interior Order No. 2918, pt. III § 13 (Dec. 27, 1968)).

120. *Porter v. United States*, 496 F.2d 583, 588 (Ct. Cl. 1974), *cert. denied*, 420 U.S. 1004 (1975).

with the assertion that the Trust territory is a foreign country. . .there does not appear to be have been any significant delegation of authority to the citizens of the Trust Territory."¹²¹

While the Trust Territory did have its own legislature that enacted its own legislation. This was subject to U.S. approval. Although the United States exercised full powers of administration, legislation and jurisdiction over the Trust Territory,¹²² federal legislation did not automatically apply there.¹²³ Congress was required to "manifest an intention to include the Trust Territory within the coverage of a given statute before the courts will apply its provisions to claims arising there."¹²⁴ A number of U.S. laws have been ruled to have applicability in the Trust Territories through the definition of the term "State"¹²⁵ and "United States"¹²⁶ to include the Trust Territory of the Pacific Islands. In these statutes, the act specifically includes the Trust territory of the Pacific Islands as being within the scope of the legislation. Thus, certain U.S. laws do have extraterritorial application in regulating U.S. activities abroad. However, it is unclear whether U.S. environmental regulatory standards applied to the disposal of the PCB leaking transformers in the Marshall islands. While the Solid Waste Disposal Act does not include the former Trust territories within its definition "states,"¹²⁷ the Toxic Substances Control Act does include "any other territory or possession of the United States"¹²⁸ within its definition of "State." The Comprehensive Environmental Response Compensation and Liability Act also includes "any other territory or possession over which the United states has jurisdiction" within its scope.¹²⁹ Thus it can be argued that the former trust territories fall within the scope of the statute through its use of the "any other territory" language.

The RMI has argued that section 105 (h) of the Energy Policy Act of 1992 mandates the United States use money from the Superfund to clean up the PCB contamination there. Section 105 (h) of the Energy Policy Act states that "the programs and services of the Environmental protection Agency regarding PCBS shall, to the extent applicable, as

121. *People of Saipan v. U.S. Dep't of Interior*, 356 F. Supp. 645, 655 (D. Haw. 1973).

122. *Convention*, *supra* note 24, art. III.

123. *See People of Enewetak v. Laird*, 353 F. Supp. 811, 814 (D. Haw. 1973).

124. *Id.*

125. *See id.* (citing *inter alia* 42 U.S.C. § 4571; 41 U.S.C. § 48(b); 42 U.S.C. § 247(b); 47 U.S.C. § 397; 42 U.S.C. § 4402(3); 42 U.S.C. § 2949; 20 U.S.C. § 1401; 42 USC 300(a); 7 U.S.C. § 135 et seq.; 33 U.S.C. § 1362; 42 USC § 229(b); 42 U.S.C. § 3890; 20 U.S.C. § 403; 42 U.S.C. 298(b); 20 U.S.C. § 807; 20 U.S.C. § 807; 33 U.S.C. § 1169; 42 U.S.C. § 4601).

126. *See id.* (citing *inter alia* 33 U.S.C. § 1163; 42 U.S.C. § 2949; 22 U.S.C. § 2127; 33 U.S.C. § 1161; 15 U.S.C. § 633; 16 U.S.C. § 633; 16 U.S.C. § 951).

127. 42 U.S.C. § 6903(31) (1988).

128. 15 U.S.C. § 2602(13) (1988).

129. 42 U.S.C. § 9601(27) (1988).

appropriate, and in accordance with applicable laws be construed to be made available to such islands."¹³⁰ Since the enactment of this provision, the United States Environmental Protection Agency has cleaned up a number of the PCB sites using Superfund money. The United States has stated that the remediation of the PCB sites was not an acceptance of liability, but merely acts of good neighborliness.

VII. FIDUCIARY DUTIES OF THE INTERNATIONAL TRUSTEESHIP'S

Article 75 of the United Nations Charter established the International Trusteeship System mandated with the development of the trust territories.¹³¹ The major objectives of the International Trusteeship System were "to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self government or independence."¹³² The U.N. Charter required the members that accepted the administration of a trust to recognize that "the interests of the inhabitants of these territories are paramount"¹³³ and to accept that responsibility as "a sacred trust the obligation [of which] to promote to the utmost. . . the well-being of the inhabitants of these territories."¹³⁴ Thus the United States as the administrator of the former Trust Territory of the Pacific Islands, of which the Republic of the Marshall Islands was formerly a member, accepted the obligation to promote the interests of the Marshallese. This principle was never in dispute.

Unlike the Former League of Nations Mandates which were to be administered as integral portions of the controlling state, implying a lesser duty to the Mandate's inhabitants,¹³⁵ article 73 of the UN Charter obligates the Trustee to make the interests of the inhabitants of the Trust Territory paramount.¹³⁶ This obligation is clearly indicative of the existence of a fiduciary duty of loyalty between the administering trustee to the inhabitants of the trust territory.¹³⁷

The existence of a fiduciary duty commands the trustee to "act for the benefit of the other while subordinating one's personal interest."¹³⁸

130. The Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2781.

131. U.N. CHARTER art. 75.

132. U.N. CHARTER art. 76.

133. U.N. CHARTER art. 73.

134. *Id.*

135. Ramon E. Reyes, *Nauru v. Australia: The International Fiduciary Duty and the Settlement of Nauru's Claims for Rehabilitation of its Phosphate Lands*, 16 N.Y.L. SCH. J. INT'L & COMP. L. 1, 40 (1996) (citing Ellen M. Fitzgerald, *Note: Nauru v. Australia: A Sacred Trust Betrayed?*, 6 CONN J. INT'L L. 209, 215 (1990)).

136. Reyes, *supra* note 135, at 37(citing U.N. CHARTER art. 73).

137. *Id.* at 39.

138. *Id.* at 35 (citing BLACK'S LAW DICTIONARY 626 (6th ed. 1990)).

This duty commands the trustee "not [to] exert or pressure on the beneficiary, [not] deal with the subject matter of the trust as to benefit himself or prejudice the beneficiary, or take advantage of the relationship."¹³⁹ Thus, the United States was bound by this fiduciary duty in its administration of the Trust Territory of the Pacific Islands. Despite the permissibility provided for in the UN Charter articles establishing Strategic Trusts¹⁴⁰, the United States was clearly acting outside the scope of its duty by detonating hydrogen bombs on the trust itself, irradiating it and making it unusable for some time. However, it is unclear whether the fiduciary duty extends so far as to require the trustee to rehabilitate lands contaminated during the trust administration after the trust has been terminated.

In resolving this issue, it will be useful to look at how other legal systems view a trust in establishing the parameters of a trustee's duties. Legal cultures such as "the civil law, the Judaeo-Christian tradition, Islamic law, socialist law, African customary law and the non theistic traditions of Asia and South Asia,"¹⁴¹ "have recognized that each generation is a trustee or steward of the natural environment for the benefit of generations yet unborn."¹⁴² Under United States law, the Ninth Circuit ruled that the inhabitants of a trust can sue to enforce their treaty rights.¹⁴³ During the trusteeship period, the Trusteeship Agreements clearly created substantive rights and duties.¹⁴⁴

VIII. TRUSTS

A. U.S. Trusts

1. Commonlaw Trusts

Under U.S. commonlaw principles, a fiduciary relationship is one in which a party entrusted with property is legally bound to maintain property for the benefit of another.¹⁴⁵ In a trusteeship there is the settlor who intentionally created trust, the trustee is the maintainer of the

139. *Id.* (citing BLACK'S LAW DICTIONARY 626 (6th ed. 1990)).

140. U.N. CHARTER arts. 83-84.

141. WEERAMANTRY, *supra* note 6, at 338 (citing E.B. WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY AND INTERGENERATIONAL EQUITY 18-19 (1989)).

142. *Id.*

143. *People of Saipan v. U.S. Dep't. of Interior*, 502 F.2d 90, 96 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975).

144. Michael W. Leslie, *International Fiduciary Duty: Australia's Trusteeship Over Nauru*, 8 B.U. INT'L L. J. 397, 408 (1990).

145. GEORGE T. BOGERT, TRUSTS §1.1 (6th ed. 1987).

trust, the trust property itself and the beneficiary for whose benefit the trust property is held by the trustee.¹⁴⁶ The beneficiary is required to place a great deal of trust in the trustee because the trustee has greater control over the trust than the beneficiary.¹⁴⁷ Consequently, the trustee owes a duty of loyalty to the beneficiary wherein he must act with strict honesty¹⁴⁸ and must act solely in the interests of the beneficiary when maintaining the trust.¹⁴⁹

2. U.S. Trust Relationship with Native American Peoples

Historically, the United States has exercised a trusteeship relationship with the Native American peoples of North America. This relationship has been characterized as one in which a "domestic dependent nations" exists within the boundaries of a sovereign state.¹⁵⁰ All native peoples in the United States, including those in Hawaii and Alaska suffered a "common loss of land and resources to an immigrant majority population with colonialist impulses."¹⁵¹ In the relationship between the United States and the Cherokee Nation, the Cherokee were placed under the protection of the United States which also had the exclusive right to regulate trade with them and "manag[ed] all their affairs as [it] thought proper."¹⁵² It is a relationship in which the Cherokee are "so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands [by foreign nations], or to form a political connection with them, would be considered by all as an invasion of [United States] territory."¹⁵³ It has been characterized by Chief Justice Marshall of the U.S. Supreme Court in 1831 as one that "resembles that of ward to his guardian."¹⁵⁴

The trust relationship between the Native American peoples and the United States is one in which the United States provides has a fiduciary duty to "protect the tribes' property, treaty rights and way of life."¹⁵⁵ This trust relationship is one of the fundamental principles underlying the relations between the United States and the Native American peoples.¹⁵⁶ It represents an enforceable legal acknowledgment by

146. *Id.* at §1.1.

147. *Id.* at §1.2.

148. *Id.* at §1.2.

149. *Id.* at § 95, at 340.

150. *Cherokee Nation v. U.S.*, 30 U.S. 1, 17 (1831).

151. Mary Christina Woods, *Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 ENVTL. L. 733, 742 (1995).

152. *Cherokee Nation*, 30 U.S. at 17.

153. *Id.*

154. *Id.*

155. Woods, *supra* note 151, at 735.

156. *See id.* at 743.

the United States that it has taken what once belonged to the Native American peoples and now agrees to protect what they still retain.¹⁵⁷ It stands as a judicially created doctrine and "stands independent of treaties and inures to the benefit of all tribes, treaty and non treaty alike."¹⁵⁸ It binds federal agencies to deal with the tribes in "the most exacting fiduciary standards" when carrying out their various statutory mandates.¹⁵⁹ Federal agencies are bound not to, "abrogate or extinguish the trust relationship, or violate the treaty rights, though courts still allow Congress such plenary power. Absent a direct conflict between an applicable statutory provision and the trust responsibility, a federal agency must implement its program in a manner that protects tribal lands and resources."¹⁶⁰

Within the United States, the trusteeship relationship between the United States and the Native American peoples is an enforceable one with substantive obligations. Tragically, the United States government has been unable to significantly deter the ecological degradation that has severely damaged tribal lands and resources to such a degree that it is uncertain whether these cultures will ever be able to recover from this harm.¹⁶¹ Looking at the Northwestern United States as an example, mismanagement of the Columbia River by the state and federal government have led to the devastation of the salmon population and the subsequent desolation of the fisheries for which the local Native American peoples were dependent on for their economic and cultural survival. In that respect, the United States can be said to have failed in its trusteeship obligations to "protect tribal lands, resources and native way of life from the intrusions of the majority society."¹⁶² Applied to the principles of commonlaw trusts, the United States can reasonably be argued to have been negligent in its management of the body of the trust.

B. The Civil Law System

Under the Civil Law System, which has its roots in Ancient Roman

157. See Woods, *supra* note 151, at 742 (citing *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)); *United States v. Mitchell*, 463 U.S. 206, 244-248 (1983); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256-257 (D.D.C. 1973) (mem), *modified on other grounds*, 360 F. Supp. 669 (D.D.C. 1973), *rev'd in part on other grounds*, 499 F.2d 1095 (D.C. Cir. 1974), *cert denied*, 420 U.S. 962 (1975); *Northern Cheyenne Tribe v. Hodel*, 12 Indian L. Rep. (Am. Indian Law. Training Program) 3065, 3070-3071 (D. Mont.) (May 28, 1985).

158. *Id.* at 742.

159. *Id.* at 743 (quoting *Seminole Nation*, 316 U.S. at 297; *Pyramid Lake Paiute Tribe of Indians*, 354 F. Supp. at 256).

160. *Id.* at 744.

161. *Id.* at 745.

162. *Id.* at 742.

Law, there exists the *mandatum*.¹⁶³ In a *mandatum*, there is a mandatory, who like a trustee, "is entrusted with the goods of a principal and is under a legal duty to account faithfully and honestly in regard to his custody of those goods."¹⁶⁴ Another similarity to the modern trust is that "the mandatory. . . may not benefit from the mandate except to the extent that [the terms of the mandate] specifically entitles him to such advantage."¹⁶⁵ Within the French legal system, where there is no distinction legal and equitable estates, the closest legal device to the commonlaw trust is the *tutelle*.¹⁶⁶ A *tutelle* is a legal institution used to provide an unemancipated child who has lost both parents with a *tuteur* (guardian or tutor).¹⁶⁷ The *tutelle* who is entrusted with custody of the unemancipated child "is responsible for the child's maintenance, education, estate and all 'acts of law.'"¹⁶⁸ Unlike a commonlaw trust, the *tutelle* has a built in oversight component referred to as a *conseil de famille* (family council).¹⁶⁹

C. Non European Legal Systems

Besides the European legal societies, other legal cultures have also embraced devices similar to the commonlaw trust. In each of these trust like devices there is a recognition that individual actions do not take place in a complete vacuum and thus consideration must be given to one's actions on the greater whole.

In Islamic law, there is a trust like device known as the *wakf*. The historical roots of the *wakf* are said to date back to Mohammad when he mandated his followers to "[i]mmobilize [their property] in such a way that it cannot be sold or made the subject of gift or inheritance, and distribute the revenues among the poor."¹⁷⁰ Subsequently, *wakfs* are used to maintain public charities or "side step the strict scheme of succession prescribed by the Shari'a that often left a testator unable to make the adequate provisions for his surviving family."¹⁷¹ In a *wakf*, the "*mutawalli*" acts in a similar fashion to the commonlaw trustee "to take charge of the property, maintain it, pay taxes and collect rent, but he cannot alienate the land."¹⁷² Hindu law also places a high value on the

163. See WEERAMANTRY, *supra* note 6, at 151.

164. *Id.*

165. *Id.*

166. Leslie, *supra* note 144, at 11.

167. *Id.* at 411 (citing MAURICE SHELDON AMOS, AMOS AND WALTON'S INTRODUCTION TO FRENCH LAW 82 (1963)).

168. *Id.* at 411 (citing AMOS, *supra* note 167, at 84).

169. *Id.* (citing AMOS, *supra* note 167).

170. *Id.* at 413 (citing 6 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 109 (R. David et al eds., 1972)).

171. Leslie, *supra* note 144, at 413.

172. *Id.*

maintenance of trusts. Violations of trusts in Hindu legal culture called for the severest of sanctions and punishments.¹⁷³ In African customary law, the chief acted as trustee over the land that his people dwelled on.¹⁷⁴ Moreover, the chief "could not alienate any part of the tribal territory without the consent or [sic] the people nor could he even make grants or perpetual loans without the approval of the public assembly."¹⁷⁵

Thus, there is evidence that the enforceability of a trust, or legal devices that are akin to commonlaw trusts, is something that has been accepted and implemented in several legal cultures. There is a definite recognition that a party entrusted with a trust has a strong and substantive duty to the beneficiaries of that trust. Moreover, violations of the duty to that trust are severely punished in some legal cultures. It is apparent that the fiduciary relationship exists between the current trustee and the beneficiary. However, it is unclear whether a fiduciary relationship exists between the trustee of a trust and the descendants of the beneficiaries of the trust. In the case of the PCB contamination in the Marshall Islands, it can be argued that the abandonment of the transformers was, not a violation of the fiduciary duty in a self dealing sense, but an example of mismanagement of the trust. Thus, it can be argued that equity demands that the obligations of the trustee cannot terminate until the body of the trust is rehabilitated to a condition before the contamination that resulted from the trustee's administration.

IX. INTERNATIONAL EQUITY ARGUMENTS

It can be argued that as a matter of intergenerational equity, the United States's duties should be extended to entail the clean up of the PCB contamination. Intergenerational equity is a principle developed by Edith Weiss Brown in "the Conservation of Equality Principle." It states that:

[e]ach generation should maintain the quality of the planet so that it is passed on in no worse condition than the generation received it, and each generation is entitled to an environmental quality comparable to that enjoyed by previous generations.¹⁷⁶

In the case of the Marshall Islands, the United States should have

173. See WEERAMANTRY, *supra* note 6, at 152.

174. *Id.* at 151.

175. *Id.*

176. Lawrence E. Susskind, *Environmental Diplomacy, Negotiating More Effective Global Agreements*, 54 (1994) (citing EDITH WEISS BROWN, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY (1989)).

maintained the quality of the trust so that when it was returned to the Marshallese, they would be able to enjoy a comparable degree of environmental quality to that of their ancestors. In this case, they could not. First, the United States had irradiated a number of the Marshallese atolls during the hydrogen bomb experiments in the 50's and second, because of the abandonment of PCB leaking transformers on the atolls. In the latter case, the United States should be required to take action, pursuant to its acceptance of the sacred trust, to remediate the PCB contaminated lands.

The harm done to the Marshall Islands by the PCB leaking transformers of such a nature that it is uncertain whether the Marshallese will ever be able to use those lands as they once had. Moreover, it is uncertain whether those Marshallese who have absorbed PCBs into their bodies will ever be the same. The greater tragedy is that the biological impacts of the PCBs will not be felt by the generation that first absorbed into their bodies, but the following generation. Thus, it is to them, this faceless next generation, that the United States owes a duty to rehabilitate the ancestral lands of the Marshallese people.

The existence of this duty to the following generations of the beneficiaries of the trust has been stated and echoed implicitly in several international agreements. In 1972 the United Nations declared in Principle One of the Stockholm Declaration on the Human Environment that, "[m]an has the fundamental right to freedom, equality and adequate conditions of life, an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations."¹⁷⁷

The United States is bound by the Stockholm Declaration's language requiring parties "to protect and improve the environment for present and future generations."¹⁷⁸ By denying its responsibility to rehabilitate the PCB contaminated lands, the United States will have failed in its duty as a steward to the next generation of Marshallese.

X. INTERNATIONAL DEVELOPMENTS

More recently, similar sentiments were expressed at the United Nations Conference on Environment and Development ("UNCED") in Rio de Janeiro, Brazil in 1992. More specifically, one of the key provisions of UNCED was expressed in Principle 2 where states agreed to ensure that "activities within their jurisdiction or control do not cause

177. Report of the U.N. Conference on the Human Environment from the U.N. Conference in Stockholm, Sweden U.N. Doc. A/CONF.48/14, *reprinted in* 11 I.L.M. 1416 (1972).

178. *Id.*

damage to the environment of other States."¹⁷⁹ In this case, the United States government brought the transformers to the Trust Territory with the intention of developing an energy infra structure there. It is unclear whether they were brought to the Trust Territory at a time when people were aware of the harm that PCBs caused. It is apparent that the transformers were brought to the Trust territory for the benefit of the local population. The area of contention can properly be focused on the disposal of the transformers after their use. Apparently, a number of these were simply abandoned and have been discovered only within the last decade. It is the Trust Territory government's disposal practices with these transformers that have led to the potential problems the Marshallese and other former Trust Territory nations may face. The decision to bring the transformers to the Marshall Islands was clearly within the jurisdiction of the United States government. Furthermore, the United States was the generator and the arranger for the delivery of these problematic substances to the Marshall Islands. Were these activities to have taken place in the United States with the same resulting harm, the United States government, or the agency in charge of these activities, would have been liable for the costs of clean up under section 120 on Federal facilities liability of the Comprehensive Environmental Response Compensation and Liability Act.¹⁸⁰ At the time some of these problematic transformers were brought to the Marshall Islands, no official action by the Trust Territory government could have occurred without some degree of approval from the United States Department of Interior. Therefore, the United States can be argued to be legally obligated to rehabilitate those PCB contaminated lands. As a matter of equity, the United States, as the former steward of those islands, can be said to have a continuing duty to return those islands to its people in the state they were in before the trusteeship began. Thus, the fiduciary obligations of the trusteeship should endure until those contaminated lands are rehabilitated.

The International Court of Justice has acknowledged the existence of equity as a legal concept and that it "is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it."¹⁸¹ Therefore, future generations may be able "to point a finger at the period of administration under the partner governments as a period when the rights of generations of [Marshallese] were jeopardised [sic] for the sake of the immediate advantage of the trustees."¹⁸² Thus, it can be argued that the United States should be

179. United Nations Conference on Environment & Development: Rio Declaration on Environment and Development, U.N. Doc. A/Conf.151/5 (1992), *reprinted in* 31 I.L.M. 874 (1992).

180. *Cf.* 42 U.S.C. § 9620.

181. *See* WEERAMANTRY, *supra* note 6, at 338.

182. *Id.*

required to rehabilitate the PCB contaminated lands as a matter of equity.

XI. INTERNATIONAL CUSTOM

A. General

It remains to be seen whether there is a basis in customary law to obligate the United States to rehabilitate these lands. The first steps in the establishment of international legal precedent where former Trustees accept accountability for ecological harm done to the Trust Territory during the Trusteeship period may have been established in the 1986 Compact of Free Associations Provisions on the hydrogen bomb experiments of the 50's and in the recent Australia -Nauru Settlement. In determining whether these acts do indeed establish international legal precedent, requires an examination of whether there is

a point of legislative or expository behavior [that] crystallize[s] into a customary rule which states feel bound to follow themselves and which they wish to see applied to other states. This involves the recognition that a state is acquiescing in the practice (state practice) and has accepted the particular practice on the basis of a legal obligation (*opinio juris*) and not merely of comity or goodwill to other states.¹⁸³

Furthermore, there is a requirement of repetition of act for there to be a basis for the establishment of custom.¹⁸⁴ However this notion has begun to change and the emphasis on repetition has shifted to "the number of states taking part in a practice."¹⁸⁵ Thus acknowledging that:

[t]he number of state taking part in a practice is much more important than the number of separate acts of which the practice is composed, or the time over which it is spread; a single act involving fifty States provides stronger proof that a custom is accepted by the international community than ten separate acts involving ten separate pairs of States.¹⁸⁶

183. James Cameron, *The Status of the Precautionary Principle in International Law*, in INTERPRETING THE PRECAUTIONARY PRINCIPLE 262 (Tim O'Riordan & James Cameron eds., 1994).

184. MICHAEL AKEHURST, CUSTOM AS A SOURCE OF INTERNATIONAL LAW 14 (1976).

185. *Id.*

186. *Id.*

B. The Beginning of Custom with the Nuclear Settlement

The very first steps in the establishment of a body of international customary law that requires trustees to be accountable for ecological harm during their stewardship may have been taken with the Compact of Free Association between the United States and the inhabitants of the former trust territories. While the Marshallese may never be put back in the situation had the United States never detonated hydrogen bombs on their lands, the United States has made an attempt to financially compensate them for past harm. In Section 177 of the Compact of Free Association, it states that:

[T]he Government of the United States accepts the responsibility for compensation owing to citizens of the Marshall Islands, or the Federated States of Micronesia (or Palau) for loss or damage to property and person of the citizens of the Marshall Islands, or the Federated States of Micronesia, resulting from the nuclear testing program which the Government of the United States conducted in the Northern Marshall Islands between June 30, 1946 and August 18, 1958.¹⁸⁷

In doing so, the United States agreed to establish a multi million dollar fund to pay financial compensation to those parties who claimed injury as a result of the nuclear testing program.¹⁸⁸ Furthermore, the United States agreed, at the request of the Government of the Marshall Islands, "to provide special medical care and logistical support thereto for the remaining 174 members of the population of Rongelap and Utrik who were exposed to radiation resulting from "Bravo" test."¹⁸⁹ In the specific case of Rongelap, the United States has agreed to, "take such steps (if any) as may be necessary to overcome the effects of such fallout [from a 1954 thermonuclear test] on the habitability of Rongelap Island, and to restore Rongelap Island, if necessary, so that it can be safely be inhabited."¹⁹⁰ However, section 177(i)(1) does begin with the phrase "because the Rongelap people remain unconvinced that it is safe to continue to live on Rongelap Island,"¹⁹¹ and every required action is a

187. *Id.* at § 177.

188.

In approving the Compact, the Congress understands and intends that the peoples of Bikini, Enewetak, Rongelap, and Utrik, who were affected by the United States nuclear weapons testing program in the Marshall Islands, will receive the amounts of \$75,000,000 (Bikini); \$48,750,000 (Enewetak), \$37,500,000 (Rongelap) and \$22,500,000 (Utrik), respectively, which amounts shall be paid out of proceeds from the funds established [under other articles of the Compact of Free association].

Id. at § 177(a).

189. *Id.* at § 177(h)(1)

190. *Id.* at § 177 (i)(1).

191. *Id.*

qualified one (contingent on a review of findings of habitability), there appears to be a patronizing air to the language of this specific provision to the Marshallese living on Rongelap. Ultimately, the United States has accepted some measure of accountability for the harm done and has taken steps to begin to remediate the situation.

C. Nauru v. Australia Settlement

Recently, the Island nation of the Republic of Nauru brought a lawsuit against Australia claiming that "it suffered damage as a result of Australia's violation of its rights under both the relevant United Nations Trusteeship provisions and several general principles of international law including self-determination, permanent sovereignty over natural resources, and abuse of rights."¹⁹² One of Nauru's greatest natural resources was an abundant supply of rich phosphate deposits.¹⁹³ Due to its value as a fertilizer, Australia mined out approximately one third of the island during its administration of Nauru as a U.N. Trusteeship.¹⁹⁴

The primary focus of the Republic of Nauru's suit against Australia was that it "had suffered loss first as a result of the failure of the partner governments [Great Britain, New Zealand and Australia] to rehabilitate the lands mined prior to [the date when Nauru gained control over the phosphate mining industry], and second because of the manner in which the phosphates had been exploited."¹⁹⁵ More specifically, the Republic of Nauru asserted that Australia first, "abused its authority over the territory and people of Nauru;"¹⁹⁶ second, "Australia violated the solemn duties of a predecessor state that is entrusted with the task of administering or preparing a territory whose title is to be transferred;"¹⁹⁷ and "[f]inally, . . . Australia violated customary international law principles prohibiting unjust enrichment."¹⁹⁸ In its claim for relief, the Republic of Nauru "requests that the ICJ adjudicate and declare that Australia has incurred an international legal responsibility and is bound to make restitution or other appropriate reparation to Nauru for the damage and prejudice suffered."¹⁹⁹

Australia responded to the Republic of Nauru's claims with a num-

192. Anghie, *supra* note 4, at 445-446.

193. *Id.* at 446.

194. *Id.*

195. *Id.* at 453 (citing Memorial of Nauru (*Nauru v. Austl.*), 1990 I.C.J. 89, 309 (Apr. 1990)).

196. *Id.* at 462.

197. *Id.*

198. *Id.* at 463.

199. *Id.* (quoting Memorial of Nauru (*Nauru v. Austl.*), 1989 I.C.J. 32 (May 19) (Application Instituting Proceedings)).

ber of assertions. As a matter of jurisdiction Australia asserted that only the UN general assembly and Trusteeship council were competent to rule on the case and the ICJ lacked jurisdiction to hear the matter.²⁰⁰ As to the merits of the case, Australia's official responses to the Republic of Nauru's claims on the matter could not be disclosed to the public until the case had reached that phase of the adjudication.²⁰¹ However, based on public statements made by Australia on the matter of rehabilitation, it can be discerned that their official position was "that the phosphate agreement Nauruans the economic benefit of the phosphate industry, that the partner governments gave up their mining concession without compensation, and that as a result, Nauruans had a means to provide for rehabilitation."²⁰²

In 1993 Australia and the Republic of Nauru settled their claims before the International Court of Justice could rule on the matter. It is of significant interest to note that the International Court of Justice ruled that it did have jurisdiction to hear the case.²⁰³ Subsequently, it can then be argued that the International Court of justice may also have jurisdiction to hear a similar case in the context of toxic contamination brought by former Trust Territories of the Pacific Islands against the United States. While *Nauru v. Australia* was a case involving self dealing on the part of the administering authority and thus distinguishable from the case of the PCB contamination of the Marshall Islands, both suits sought ecological rehabilitation of lands harmed during the trusteeship period. Had the *Nauru v. Australia* case been actually litigated, historic legal precedent may have been established on the subject of post trusteeship environmental liability.

In the settlement agreement between Australia and Nauru over Australia's phosphate mining,²⁰⁴ Australia, "agreed to pay Nauru \$107 million (Australian) 'in an effort to assist the Republic of Nauru in its preparations for post phosphate future.' However the Settlement Agreement explicitly states that the settlement payments are 'made without prejudice to Australia's long-standing position that bears no re-

200. *Id.* at 464.

201. *Id.*

202. *Id.* (citing Australian Dep't of Foreign Affairs and Trade, *Nauru: International Court of Justice Action Against Australia Backgrounder*, 13 AUSTL. Y.B. INT'L L. 409, 410 (1992)).

203. Case Concerning Certain Phosphate Lands in Nauru (*Nauru v. Austl.*), 1992 I.C.J. 240 (June 26).

204.

A brief look at the island [of Nauru] shows that pre-independence mining left much of the island covered with former strip-mining sites. Because of the nature of phosphate mining, these sites are not simply open pits, but rather fields of rock pinnacles standing several meters high, making the mined portions of the island unusable for virtually anything.

Leslie, *supra* note 144, at 415.

sponsibility for the rehabilitation of the phosphate lands."²⁰⁵

Despite the presence of this "no responsibility" provision, the agreement can be viewed "as a tacit acknowledgment of some responsibility by Australia for the massive environmental and economic damage perpetrated on the island of Nauru."²⁰⁶ This settlement alone may not signal the emergence of a new trend in international customary law, but in the context of other agreements it may. In light of the U.S. Compact of Free Association in regards to nuclear rehabilitation of hydrogen bomb experiment lands there does appear to be a growing, albeit a reluctant, trend for former Trustees to take responsibility for their actions.

XII. CONCLUSION

Typically, the former Trustees have negotiated settlements with the inhabitants of the former trusts. It can be reasonably argued that this is done out of fear that if the merits of the case were litigated, the case might result in official international legal precedent that officially obligates Trustees to take responsibility for their past acts. Presently, the former Trustees are attempting to pre-empt this type of precedent by negotiating settlements with waivers of liability provisions in them. However, the truth of the matter is quite apparent. The former Trustees are remediating the ecological harm done under their administration out of a sense of apprehension of litigation and the potential establishment of legal precedent. Thus, this is a trend in and of itself. It is a new trend where the negotiation of settlements entailing voluntary remediation is indeed the beginning of a custom of former trustees accepting some accountability for ecological harm. This may be the basis for an argument requiring the United States to rehabilitate newly discovered PCB contaminated lands.

Further strengthening this argument, the express text of the U.N. Charter and the Trusteeship Agreement with the United Nations clearly state the existence of a trust relationship. The trusts were created to help the inhabitants of the former Mandate territories, not as a justification to exploit them. History has shown that a number of the trustees exploited their trusts for their own economic or strategic benefit. In this case, the transformers were brought to the Marshall Islands to help the development of the Marshallese. However, the unintended residue of energy development has been toxic PCB contamination of the soil and waters, thus making some of the lands unusable. Until the PCB contaminated lands are rehabilitated, the Marshallese will be deprived of lands that were of reasonable use before the trusteeship be-

205. Reyes, *supra* note 135, at 32.

206. *Id.*

gan. Thus the clear language of the UN Charter, the Trusteeship Agreements are proof of the existence of a fiduciary relationship and equity demands that this relationship cannot end until the harm caused during the trust is repaired.

