FILED
JAN 1 7 2012
PALAU SUPREME COURT
11:33am CLERK

IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

CIVIL APPEAL No. 11-003
Civil Case No. 09-251

ORAKIBLAI CLAN, BLIUB CLAN, SOWEI CLAN, NGERBUUCH CLAN, OCHEDARUCHEI CLAN, NGEUDEL CLAN, OKEDERAOL CLAN, BOSAOL CLAN, SECHEDUI CLAN, NGERUOSECH CLAN, IBELKUNGEL CLAN, and UES PEDRO, DEC., through her Representative, UCHERBELAU ABEL K. SUZUKI,

Appellants,

v.

GOVERNMENT OF THE UNITED STATES OF AMERICA and GOVERNMENT OF JAPAN,

Appellees.

OPINION

Decided: January 17th, 2012

Counsel for Appellants: Brien Sers Nicholas, Yukiwo P. Dengokl

Counsel for Appellees: William L. Ridpath, Mariano W. Carlos

BEFORE: ALEXANDRA F. FOSTER, Associate Justice; KATHERINE A. MARAMAN, Part-Time Associate Justice; and HONORA E. REMENGESAU RUDIMCH, Associate Justice Pro Tem.

Appeal from the Trial Division, the Honorable ARTHUR NGIRAKLSONG, Chief Justice, presiding.

PER CURIAM:

Appellants, owners of land in the State of Angaur, seek review of the Trial Division's Opinion and Order dismissing all of their claims against the United States and Japan.[1] They contend that the Trial Division erred in dismissing all of their claims against the United States and Japan on the grounds of sovereign immunity and statute of limitations. We **AFFIRM** the Trial Division for the reasons stated in the Trial Division's January 5, 2011 Opinion and Order incorporated by reference and attached as Exhibit A.

SO ORDERED, this 17th day of January 2012.

ALEXANDRA F. FOSTER
Associate Justice

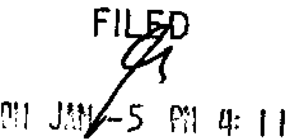
KATHERINE A. MARAMAN
Part-Time Associate Justice

HONORA E. REMENGESAU RUDIMCH
Associate Justice Pro Tem

[1] Appellants request oral argument. After reviewing the briefs and record, the Court finds this case appropriate for submission without oral argument. ROP R. App. P. 34(a) ("The Appellate Division on its own motion may order a case submitted on briefs without oral argument.").

IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

ORAKIBLAI CLAN, BLIUB CLAN, SOWEI CLAN, NGERBUUCH CLAN, OCHEDARUCHEI CLAN, NGEUDEL CLAN, OKEDERAOL CLAN, BOSAOL CLAN, SECHEDUI CLAN, NGERUOSECH CLAN, IBELKUNGEL CLAN, and UES PEDRO, DEC., through her Representative, UCHERBELAU ABEL K. SUZUKI, Appellants, v. GOVERNMENT OF THE UNITED STATES OF AMERICA and GOVERNMENT OF JAPAN, Appellees.	CIVIL APPEAL No. 11-003 Civil Case No. 09-251 **EXHIBIT A**



IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
TRIAL DIVISION

ORAKIBLAI CLAN, BLIUB CLAN, SOWEI CLAN, NGERBUUCH CLAN, OCHEDARUCHEI CLAN, NGEUDEL CLAN, OKEDERAOL CLAN, BOSAOL CLAN, SECHEDUI CLAN, NGERUOSECH CLAN, IBELKUNGEL CLAN, and UES PEDRO, deceased, through her Representative, LORENZO PEDRO, Plaintiffs,	CIVIL ACTION NO. 09-251
v.	**OPINION AND ORDER**
GOVERNMENT OF THE UNITED STATES OF AMERICA and GOVERNMENT OF JAPAN, Defendants.	

On December 1, 2009, the plaintiffs, land owners in Angaur, filed a complaint against defendants United States and Japan alleging various wrongs relating to the mining of phosphate ores on Angaur prior to and during the 1950s. The plaintiffs present twelve causes of action against the defendants alleging generally various breaches of duties, breach of contract, quasi-contract, and unconstitutional takings. They seek relief in the form of accounting, specific performance, compensatory damages, and restitution.[1]

[1] The plaintiffs title their causes of action as follows: unjust enrichment and disgorgement against the United States and Japan for mining activities after World War II (Count I); unjust enrichment and disgorgement by Japan for mining activities before World War II (Count II); "accounting" by the United States and Japan as to the value of the ores mined from the plaintiffs' lands after World War II (Count III);

Thereafter, the defendants filed separate motions to dismiss. After extensive briefing, the court held a hearing on the defendants' motions on November 3, 2010. For the reasons set forth below, the court grants both motions to dismiss, and dismisses this action in its entirety.

I. BACKGROUND

The relevant facts occurred long, long ago, but largely are without dispute. Where disputed, the Court credits the plaintiffs' version of events for purposes of the pending motions.

Japan purchased the right to mine phosphate ore on Angaur in 1914 when it took over administration of Palau pursuant to a League of Nations mandate. (*See* Compl. ¶ 10; Pls.' Br. in Opp. to Japan's Mot. at 19-20.) Japan mined phosphate ore on Angaur without any compensation to the Angaur people from that time until its defeat in World War II. (*See* Compl. ¶¶ 11-12; Pls.' Br. in Opp. to Japan's Mot. at 20.) Although the amount of phosphate ore mined before World War II was substantial, the exact amount need not be determined at this juncture.

On July 18, 1947, after the Allied victory in World War II, the United Nations Security Council entered into a trusteeship agreement ("the Trusteeship Agreement") with the United States placing Palau (including Angaur) within the Trust Territory of the Pacific Islands ("Trust Territory" or "TTPI") under the care of the United States. (*See* Compl. ¶ 38.) A series of mining agreements ("the Angaur Mining Agreements") were then entered into permitting the Phosphate Mining Company of Tokyo, Ltd. ("PMC"),

---

"accounting" by Japan as to the value of the ores mined from the plaintiffs' land before World War II (Count IV); breach of fiduciary duties by the United States as trustee (Count V); breach of fiduciary duties by Japan (Count VI); specific performance by the United States and Japan of the conditions in the applicable mining agreements (Count VII); breach of contract by the United States and Japan related to the mining agreements (Count VIII); negligence by the United States (Count IX); "detrimental reliance by the plaintiffs" (Count X); "5th Amendment Taking by the United States" (Count XI); and "return of plaintiff's land and loss of use" (Count XII).

a corporation controlled by the government of Japan, to continue to mine phosphate ore on Angaur in exchange for compensation to be paid into a trust fund held for the benefit of the Angaur people. (*See* Pls.' Br. in Opp. to Japan's Mot. at 6.) The first such mining agreement was executed on December 12, 1949, and included representatives of the Angaur clans as signatories. (*See* Compl. ¶ 14; Pls.' Br. in Opp. to Japan's Mot. at 6-7.) The mining agreement was amended and extended (both in time and in the area to be mined) on July 16, 1950, November 7, 1951, April 25, 1952, November 21, 1952, August 5, 1953, February 26, 1954, and then for a final time on December 21, 1954. (*See* Compl. ¶¶ 15, 17, 21, 23, 25, 27, 29; Pls.' Br. in Opp. to Japan's Mot. at 8-13.) Starting with the November 7, 1951 Memorandum Agreement, the Angaur clans were no longer included as signatories, and the High Commissioner for the Trust Territory acted on behalf of the Angaur people. (*See* Pls.' Br. in Opp. to Japan's Mot. at 14.)

A separate agreement, the Angaur Mining Trust Agreement, executed on July 16, 1950, established a trust fund for the receipt of payments for the phosphate mining. (*See* Pls.' Br. in Opp. to U.S. Mot. Ex. B at Art. 1.) The Agreement named the High Commissioner of the Trust Territory as trustee and authorized the creation of a board to manage the fund under the supervision of the High Commissioner. (*See id.* at Art. 2.) The beneficiaries under the Agreement were the phosphate owners of Angaur (recipients of a 2/3 share of the income), the non-phosphate owners of Angaur (recipients of a 3/15 share), and the Municipality of Angaur (recipient of a 2/15 share). (*See id.* at Art. 4 & page 21.) Representatives for the High Commissioner and eighteen clans of Angaur signed the Angaur Mining Trust Agreement.

Each of the Angaur Mining Agreements required PMC to backfill the mines after completion of the mining. Pursuant to the November 7, 1951 agreement, the government of Japan was to either post a cash bond payable to the High Commissioner of the Trust Territory or guarantee full performance of the mining

contracts, including the backfilling provisions. (*See* Compl. ¶ 20.) Japan executed multiple guarantees to that effect. (*See* Compl. ¶¶ 33-34; Pls.' Br. in Opp. to Japan's Mot. at 14.) The December 21, 1954 final mining agreement required all backfilling to be completed within two months of April 30, 1955, the termination date of the mining operations. (*See* Compl. ¶ 30; Pls.' Br. in Opp. to Japan's Mot. at 13.)

According to the plaintiffs, PMC substantially failed to backfill the mines or otherwise return them to usable condition, and they remain unusable and pitted to this day. (*See id.*) The Trust Territory did not seek to enforce Japan's guarantee that it would ensure compliance with all contract terms, including the backfilling provisions. (*See* Compl. ¶ 35.) The limited backfilling that was done employed limestone which rendered the land useless for agricultural purposes. (*See* Compl. ¶ 50.) The rest of the unfilled land remains open pits and craters, some of which are filled with lakes contaminated by salt. (*See* Compl. ¶ 52.)

II. STANDARD OF REVIEW

The defendants bring their motions to dismiss pursuant to ROP Rules of Civil Procedure 12(b)(1), arguing lack of subject matter jurisdiction, and 12(b)(6), arguing that the plaintiffs have failed to state a claim upon which relief may be granted. "In considering a motion to dismiss under Rule 12(b)(6), all allegations in the complaint are accepted as true, and the Court's inquiry is limited to whether the allegations are sufficient to make out a valid claim." *Temengil v. Palau Nat'l Comm. Corp.*, 13 ROP 224 (Tr. Div. 2007) (citing *Baules v. Nakamura*, 6 ROP Intrm. 317, 317 (Tr. Div. 1996)). The court may consider only the complaint, documents attached to the complaint or incorporated by reference in the pleadings, and public records. 2 *Moore's Federal Practice* § 12.34[2]. In considering challenges to subject matter under Rule 12(b)(1), the court may consider other evidence and make findings of fact necessary to rule on the question of subject matter jurisdiction, to the extent the jurisdictional facts are not intertwined with the

merits. *Id.* § 12.30[2]. Further, ROP Rule of Civil procedure 12(h)(3) provides that "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

"Interpretations of comparable United States federal rules are used for guidance when construing our rules." *Gibbons v. Seventh Koror State Legislature*, 11 ROP 97, 103 (2004) (citing *Scott v. ROP*, 10 ROP 92, 95 n.3 (2003)).[2] In the absence of statutory or customary law applicable to the case, the court looks to common law as expressed in the restatements of law and as understood and applied in the United States. *See* 1 PNC § 303.

III. DISCUSSION

Japan and the United States assert several theories as to why the complaint should be dismissed, including waiver of claims by the plaintiffs, sovereign immunity, nonjusticiability, and the statute of limitations. As discussed below, the court addresses the defendants' arguments that the plaintiffs' claims are barred by the doctrine of sovereign immunity and the statute of limitations. The court finds these points dispositive as to all of the plaintiffs claims, and they are addressed in turn.

A. SOVEREIGN IMMUNITY

The United States and Japan argue that the plaintiffs claims are barred by the doctrine of sovereign immunity. And, in general, "a state . . . is immune from the jurisdiction of the courts of another state." *See*

---

[2] The plaintiffs attached dozens of documents to their opposition briefs, including letters and articles, in what appears to be an attempt at substantiating arguments raised in their briefs. For instance, the plaintiffs point to a 1947 newspaper article from the Canberra Times for support in arguing that the mining of their lands was important for the survival of post-war Japan. (*See* Pls.' Br. in Opp. to U.S. Mot. at 48 n.51.) Such materials are generally inappropriate for consideration on a motion to dismiss (and they are not relevant to the question of jurisdiction), and the plaintiffs do not explain how the materials fall into the limited category of items that may be considered by the court at this point.

1 *Restatement (Third) of the Foreign Relations Law of the United States* § 451 (1987). The courts of Palau recognize sovereign immunity as a common law doctrine. *See Becheserrak v. ROP*, 7 ROP Intrm. 111, 113-14 (1998) ("'Because the defense of sovereign immunity is part of the common law 'as generally understood and applied in the United States', the defense is available to the appellee here, to the extent that it is not otherwise waived by statute."); *Tell v. Rengiil*, 4 ROP Intrm. 224, 227 (1994) ("The government is immune from lawsuits except to the extent it consents to be sued, and the terms of that consent define a court's jurisdiction to entertain the suit." (citing *United States v. Mitchell*, 100 S.Ct. 1349, 1351 (1980)). The party raising a claim against the government bears the burden of demonstrating that the government has waived immunity. *See Giraked v. Estate of Rechucher*, 12 ROP 133 (2005) (citing *Becheserrak v. ROP*, 8 ROP Intrm. 147, 147 (2000)).

The court first addresses the plaintiffs' claims against the United States. The plaintiffs bring this action against the United States as the successor to the Trust Territory under the Compact of Free Association between the United States and Palau. The Compact became effective October 1, 1994. Section 174 of the Compact concerns sovereign immunity for both Palau and the United States, and specifies the limited circumstances under which the nations agree to waive sovereign immunity:

> Section 174. Except as otherwise provided in this Compact and its related agreements:
>
> (a) The Government of Palau shall be immune from the jurisdiction of the courts of the United States, and the Government of the United States shall be immune from the jurisdiction of the courts of Palau.
>
> (b) The Government of the United States accepts responsibility for and shall pay [certain specified unpaid money judgments, settled claims currently pending, etc.]
>
> . . . .

(c) Any claim not referred to in Section 174(b) and arising from an act or omission of the Government of the Trust Territory of the Pacific Islands or the Government of the United States prior to the effective date of this Compact shall be adjudicated in the same manner as a claim adjudicated according to Section 174(d). In any claim against the Government of the Trust Territory of the Pacific Islands, the Government of the United States shall stand in the place of the Government of the Trust Territory of the Pacific Islands. A judgment on any claim referred to in Section 174(b) or this subsection, not otherwise satisfied by the Government of the United States, may be presented for certification to the United States Court of Appeals for the Federal Circuit, or its successor court, which shall have jurisdiction therefor, notwithstanding the provisions of 28 U.S.C. 1502, and which court's decisions shall be reviewable as provided by the laws of the United States. The United States Court of Appeals for the Federal Circuit shall certify such judgment, and order payment thereof, unless it finds, after a hearing, that such judgment is manifestly erroneous as to law or fact, or manifestly excessive. In either of such cases the United States Court of Appeals for the Federal Circuit shall have jurisdiction to modify such judgment.

(d) The Government of Palau, shall not be immune from the jurisdiction of the courts of the United States, and the Government of the United States shall not be immune from the jurisdiction of the courts of Palau in any case in which the action is based on a commercial activity of the defendant Government carried out where the action is brought, or in a case in which damages are sought for personal injury or death or damage to or loss of property occurring where the action is brought. This subsection shall apply only to actions based on commercial activities entered into or injuries or losses suffered on or after the effective date of this Compact.

Here, the claims against the United States are based on section 174(c) wherein the United States agrees to "stand in the place of the Government of the Trust Territory of the Pacific Islands" for any claim against the Trust Territory. (*See e.g.*, Pls.' Br. in Opp. to U.S. Mot. at 44-45; Compl. ¶¶ 5, 47.) The United States argues that under section 174(c), a claim against the United States as placeholder for the Trust Territory can go forward only if (1) the case as alleged could have been brought against the Trust

Territory in the courts of Palau prior to the effective date of the Compact, and (2) the case falls within an exception to the general grant of immunity as provided for in the Compact.[3]

As to the former, the United States contends that the plaintiffs' claims could not have been brought against the Trust Territory because 14 PNC § 501(a) limits this court's jurisdiction over claims against the Trust Territory to those accruing after September 23, 1967. Specifically, 14 PNC § 501(a) provides that this court shall have jurisdiction over "the following claims [that] may be brought against the government of the Trust Territory or the Republic." Sections 501(a)(2) and (a)(3) address the types of claims that may be brought:

> (2) any other civil action or claim accruing on or after September 23, 1967, against the government of the Trust Territory or Republic founded upon any law of this jurisdiction or any regulation issued under such law, or upon any express or implied contract with the

---

[3] Though not directly addressed by the parties, it appears that structure of section 174 bars the plaintiffs claims against the United States because all of the injuries and losses at issue were realized decades before the Compact came into existence. As noted, the plaintiffs bring this action against the United States under section 174(c) based on "acts or omissions" of the Trust Territory "prior to the effective date of this Compact." (Pls.' Br. in Opp. to U.S. Mot. at 44-45.) Also as noted, all of the acts giving rise to the plaintiffs' claims occurred in or before the 1950s. Section 174(c) then states that such claims "shall be adjudicated in the same manner as a claim adjudicated according to Section 174(d)."

Section 174(d) is the express waiver of sovereign immunity necessary for claims against the United States to proceed. Section 174(d) waives immunity "in any case in which the action is based on a commercial activity of the defendant Government carried out where the action is brought, or in a case in which damages are sought for personal injury or death or damage to or loss of property occurring where the action is brought." The plaintiffs assert that their claims are based on "commercial activities" and seek damages for personal injuries and damage to or loss of property in Palau.

However, it appears that if sections 174(c) and 174(d) are to be read in harmony, the waiver of immunity would apply only for "injuries or losses suffered *on or after* the effective date of this Compact," regardless of when the government acts giving rise to the claim occurred. In other words, the United States waives sovereign immunity for cases based on its acts or omissions, and those of the Trust Territory, occurring prior to October 1, 1994, but only if those acts or omissions resulted in injuries or losses suffered on or after October 1, 1994. *See Giraked*, 12 ROP at 145-46 (agreeing that sovereign immunity is waived under 174(c) for acts occurring *prior* to the Compact, which resulted in injuries occurring *after* the Compact, as provided in 174(d)).

government of the Trust Territory or Republic, or for liquidated or unliquidated damages in cases not sounding in tort.

(3) civil actions against the government of the Trust Territory or Republic on claims for money damages, accruing on or after September 23, 1967, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the government of the Trust Territory or Republic, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

In response, the plaintiffs contend that (1) 14 PNC § 501 cannot limit this court's jurisdiction because this court's jurisdiction is established by the Palau Constitution; and (2) the Trust Territory was never "sovereign" and therefore did not have sovereign immunity.

Article X, Section 5 of the Palau Constitution provides generally that "[t]he judicial power shall extend to all matters in law and equity." While it may be argued that the OEK's use of jurisdictional language in 14 PNC § 501 "was perhaps misadvised given the broad jurisdictional grant of Article X, Section 5 of the Constitution," *see Taro v. ROP*, 12 ROP 175, 176 n.1 (Tr. Div. 2004) (quoting *Tell*, 4 ROP Intrm. at 227), this court has recognized 14 PNC § 501 as a limited waiver of sovereign immunity under the circumstances specified by that section. *See Tell*, 4 ROP Intrm. at 227 ("In Palau the OEK has provided consent to sue the national government under certain circumstances enumerated in 14 PNC §§ 501 . . . ."); *see also Micronesian Yachts Co. v. Foreign Investment Bd.*, 5 ROP Intrm. 305, 310 (Tr. Div. 1995) (noting that "14 PNC § 501 is a waiver of sovereign immunity"). Further, the court has recognized that the Compact provides no new causes of action. *See Giraked*, 12 ROP at 145-46 (citing *Nahnken of Nett v. United States*, 6 FSM Intrm. 508, 526 (Pon. 1994)). Thus, a plaintiff "must rely on and satisfy the requirements for a theory of recovery to redress the injury it is asserting. And the

government's waiver of sovereign immunity must be explicit and unequivocal as to the particular type of claim." *Id.* at 146.

In *Giraked v. Estate of Rechucher*, appellant Rechucher filed a third-party complaint against the United States, standing in the place of the Trust Territory under Compact § 174(c), alleging that the Trust Territory was negligent in failing to ascertain whether it had good title to certain land before deeding the land. Rechucher contended that 14 PNC § 501(a) provided an explicit waiver of sovereign immunity for his claims of negligence and quasi-contract against the government. The Court disagreed, finding that because a private person could not be liable to Rechucher for the conduct at issue, § 501(a)(3) did not provide a waiver of immunity for his negligence claim. The Court also rejected Rechucher's quasi-contract theory, finding that the waiver of immunity for contract claims found in § 501(a)(2) did not cover applied-in-law contracts. *Id.* at 147. Thus, because Rechucher's claims did not fit into the limited waiver of sovereign immunity of the Trust Territory provided in 14 PNC § 501(a), the plaintiff had no viable claim against the United States.

Accordingly, the United States correctly points out that the plaintiffs claims accrued in the 1950s at the latest (the court addresses the plaintiffs' arguments that the violations are "continuing" in the next section). Thus, because § 501(a) waives immunity only for claims for money damages against the Trust Territory that accrued on or after September 23, 1967, the plaintiffs claims are untimely. Sections 501 through 503 speak directly to the immunity of the Republic and the Trust Territory. While the plaintiffs argue that § 501, and its predecessor 6 TTC § 251, pertain only to the jurisdiction of the High Court of the Trust Territory and "could not have been a waiver of sovereign immunity," such a reading ignores the language and purpose of the statutes, as noted by previous cases. The cases cited by plaintiffs do not

speak to the provisions of § 501 relevant to the defendants' motions to dismiss. For instance, in *Lonno v. Trust Territory*, 1 FSM Intrm. 53 (Kosrae 1982), the Trust Territory argued that the Supreme Court of the Federated States of Micronesia lacked jurisdiction over the plaintiffs' claims because actions against the Trust Territory are within the exclusive jurisdiction of the High Court of the Trust Territory under 6 TTR § 251. The court ultimately rejected this position in light of several factors, including the newly enacted Compact of Free Association between the FSM and the United States. However, the court specifically noted that there was no argument that the plaintiffs claims fell outside the purview of 6 TTR § 251, which, like 501(a), authorizes civil actions based on any law, or express or implied contract, and actions for loss of property caused by an act or omission of an employee of the government. 1 FSM Intrm. at 55 n.4.[4]

As for Japan, the plaintiffs contend that (1) Japan was not "sovereign" for a period of time after World War II and cannot claim sovereign immunity for its mining activities during that time; and (2) Japan's involvement in the mining amounts to "commercial activity," for which the defense of sovereign immunity does not apply. As to the first argument, the plaintiffs point out that following World War II, Japan was under the control of the Allied Powers. The plaintiffs rely on *Morgan Guarantee Trust Co. v. Republic of Palau*, 924 F.2d 1237 (2d Cir. 1991), which held that since the Republic of Palau was, at that time,

---

[4] In one paragraph of the complaint, the plaintiffs allege that claims against the United States are also based on "commercial activities . . . relative to the mining of phosphate ores." (Compl. ¶ 48.) The plaintiffs do not further explain this assertion except to state that the "Angaur Mining Agreement and the Angaur Mining Trust Agreement were clearly for commercial activity, i.e., for the mining buying, and selling of 'commercially acceptable phosphate ore" and that this "had a direct effect in the United States" because it saved the United States money. (Pls.' Br. in Opp. to U.S. Mot. 47-48.) This is insufficient on many levels. Importantly, the commercial activity exception applies only when the actions of the foreign state are the type of actions by which a private party engages in trade and traffic and commerce. *See Saudi Arabia v. Nelson*, 113 S.Ct. 1471, 1479 (1993). A state's authorizing, conditioning, and taxing activity does not generally fall into this category, and the plaintiffs otherwise fail to carry their burden in showing waiver of immunity on this point.

still under the control of the Trust Territory of the Pacific Islands, it was not a foreign sovereign within the meaning of the Foreign Sovereign Immunities Act ("FSIA") and the court therefore lacked jurisdiction. However, this court is unable to make the leap between the situation in *Morgan Guarantee Trust Co.* and the allegations in this case. In fact, the Reporters' Notes to the definition of "state" (in the international law sense) in the *Restatement (Third) of the Foreign Relations Law of the United States*, specifically distinguish nations under miliary occupation from those under United Nations trusteeships. According to the Notes, Japan retained its statehood following World War II. *See* 1 *Restatement (Third) of the Foreign Relations Law of the United States* § 201 n.3, 4. Moreover, the plaintiffs are suing Japan as it exists today, and they provide no authority suggesting Japan cannot invoke sovereign immunity because of its defeat in World War II. *See generally Republic of Austria v. Altmann*, 124 S.Ct. 2240, 2252 (2004) (discussing nature of immunity and noting that the principal of foreign sovereign immunity "reflects current political realities and relationships, and aims to give foreign states and their instrumentalities some *present* 'protection from the inconvenience of suit as a gesture of comity.'" (quoting *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003)).

Moving on, the plaintiffs hang their hat on the restrictive theory of immunity expressed in the *Restatement (Third) of the Foreign Relations Law of the United States* § 451, which provides that "[u]nder international law, a state or state instrumentality is immune from the jurisdiction of the courts of another state, except with respect to claims arising out of activities of the kind that may be carried out by private persons." The *Restatement* clarifies that "commercial activities" fall into the category under which immunity does not apply. *See* 1 *Restatement (Third) of the Foreign Relations Law of the United States* § 451 cmt. (a); *see also id.* § 453 ("Under international law, a state is not immune from the

jurisdiction of the courts of another state with respect to claims arising out of commercial activity."). With this, the plaintiffs contend that Japan's mining of phosphate ore (operating through the PMC) was commercial activity for which Japan may be held liable.

Japan contends that the restrictive theory of immunity (as opposed to absolute immunity) is relatively new to the international law scene, and that this court should not give the theory retroactive effect for claims based on acts that occurred so long ago. However, though there is some support for Japan's position, the U.S. Supreme Court recently rejected a similar argument in *Republic of Austria v. Altmann*, 124 S.Ct. 2240. Though the Court's holding was limited to the conclusion that FSIA could apply to alleged conduct occurring before its enactment, FSIA embraces the restrictive theory, and the Court's discussion concerned the general principals and purposes of foreign sovereign immunity. *See* 1 PNC §§ 303. However, a drawn-out discussion on whether Japan engaged in "commercial activities" so that it may be barred from asserting sovereign immunity under the restrictive theory is not necessary where, as here, "other legal principals, applicable to past conduct," may serve to protect nations relying on immunity from suit. *See Altmann*, 124 S.Ct. at 2261-62 (Breyer, J., concurring). Along these lines, Japan points to the statute of limitations, which the parties thoroughly address in their briefs, and which this court concludes bars all of the plaintiffs' claims.

B. STATUTE OF LIMITATIONS

Both defendants contend that all of the plaintiffs' claims are barred by the applicable statute of limitations. The Palau National Code specifies that aside from certain land and tort claims, "[a]ll actions

. . . shall be commenced within six years after the cause of action accrues." *See* 14 PNC § 405.[5] As noted by the Appellate Division, statutes of limitations "reflect a sound public policy that promotes the peace and welfare of society and compel the settlement of claims within a reasonable period after their origin." *Techemding Clan v. Mariur*, 3 ROP Intrm. 116, 119-20 (1992) (citing 51 Am. Jur. 2d *Limitations of Actions* §§ 17-18); *see also Trust Territory v. Konou*, 8 TTR 522 (1986) ("In applying the statutes of limitations, we recognize the effect may be to close of litigation of formerly meritorious claims. While statutes of limitations are intended to be somewhat mechanical in their application, they represent a considered policy decision on the part of the legislature that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" (quoting *United States v. Kubrick*, 444 U.S. 111, 117 (1979)). Here, it is undisputed that the plaintiffs' complaint was filed more than 50 years after all mining and backfilling was to be completed under the last mining agreement. *See generally* 51 Am. Jur.

---

[5] The United States contends that, under the Compact and its related agreements, U.S. law applies to bar actions filed more than six years after the right of action accrues. *See* 28 U.S.C. § 2401(a). This appears to be correct in light of provisions for enforcement of a judgment and waiver of immunity. Compact § 462(f) provides that an agreement on "Federal Programs and Services, Concluded Pursuant to Article II of Title Two and Section 232 of the Compact of Free Association" ("Federal Programs and Services Agreement") shall govern consistent with the Compact. Compact § 174(c) limits enforcement of judgments under that section, noting that "the United States Court of Appeals for the Federal Circuit shall certify judgments presented to it, and order payment thereof, unless if finds, after a hearing, that such judgment is manifestly erroneous as to law or fact." Relatedly, the Federal Programs and Services Agreement specifies that "Any judgment presented for certification to the United States Court of Appeals for the Federal Circuit pursuant to Section 174 of the Compact of Free Association shall be deemed manifestly erroneous as to law if the claim upon which such judgment is based would have been barred by the statute of limitations if such claim had been brought in a court of the United States." In other words, if the court finds that judgment presented for certification is based on a claim that, had it been brought in the U.S. Courts, would have been barred by the applicable statute of limitations, that judgment is unenforceable against the United States. *See Alep v. United States*, 6 FSM Intrm. 214 (Chk. 1993) (finding that 28 U.S.C. § 2401 worked to bar claims against the United States based on language identical to that in the Compact and Federal Programs and Services Agreement at issue in this case).

However, resolution of this issue is not critical inasmuch as the relevant statute of limitations under both U.S. and Palau law is, at most, six years from the time the cause of action accrues.

2d *Limitations on Actions* § 410 ("If the facts alleged in a complaint show that the action is barred by the statute of limitations, the complaint is subject to a motion to dismiss; . . . the complaint fails to state a cause of action upon which relief may be granted.").

In response, the plaintiffs do not contend that their claims fall outside the six-year statute of limitations, or that their claims accrued within the six years prior to the filing of the complaint. Instead, they argue that the statute of limitations is not an effective bar under the circumstances of this case. First, the plaintiffs argue that the Angaur Mining Agreements and the Angaur Mining Trust Agreement have never been terminated and continue to this day. It is somewhat unclear what the plaintiffs mean by their statement that the Angaur Mining Agreements remain in operation when the final act required under the agreements—backfilling the mines—was to be completed by June 30, 1955. And, to the extent that the Angaur Mining Agreements are somehow still "in effect," the plaintiffs do not explain why that would work to toll the statute of limitations applicable to the plaintiffs' claims when the alleged violations giving rise to the claims occurred decades ago. The plaintiffs' reliance on language in the "Withdrawal and Release of Land Claim" documents from 1962 (attached to their opposition brief) is misplaced. (*See* Pls.' Br. in Opp. to U.S. Mot. Ex. D.) While the release documents state in relevant part that no provision shall be construed as altering the mining agreements and the mining trust agreement (and supplementary agreements or amendments), this is not an affirmative statement on the status of those agreements. The language speaks only to the scope of the Withdrawal and Release of Land Claim documents.

The plaintiffs next argue that Japan's failure to properly backfill the mines, and the United States' failure to ensure Japan backfilled the mines, amounts to a continuing violation, which has tolled the statute of limitations through the present day. The plaintiffs provide no analysis in support of this assertion except

to note that the "'continuing violations doctrine' has been recognized by the courts to toll any statute of limitations." (Pls.' Br. in Opp. to Japan's Mot. at 57-58; Pls.' Br. in Opp. to U.S. Mot. at 35-36.) As a general matter, the continuing violations doctrine focuses on affirmative actions by a defendant. It is not occasioned by continual ill effects from an original violation. *See Wies-Buy Servs., Inc. v. Paglia*, 411 F.3d 415, 422-23 (3rd Cir. 2005) (discussing application of statute of limitations to bar claims for breach of fiduciary duties); *Brown Park Estates–Fairfield Development v. United States*, 127 F.3d 1448, 1456 (Fed. Cir. 1997) (noting that a claim based upon a single distinct event, which may have continued ill effects later on, is not a continuing claim). Here, the acts alleged in the complaint as giving rise to the plaintiffs' claims occurred long ago. Without more, there are no grounds for concluding that the violations alleged are "continuing."

Next, the plaintiffs propose that the United States and Japan are barred from asserting statutes of limitations defenses. According to the plaintiffs, a trustee may not invoke the statute of limitations in defense of a claim brought by the beneficiary of the trust. The plaintiffs point to three relationships that give rise to liability and bar the statute of limitations defenses: (1) the Trust Territory's role as trustee for the plaintiffs under the Trusteeship Agreement with the United Nations; (2) Japan's role as trustee of Palau under the League of Nations mandate; and (3) the Trust Territory's role as trustee for the plaintiffs under an "express trust" created by the Angaur Mining Agreements.

The plaintiffs' argument that the Trusteeship Agreement somehow bars defendants from asserting a statute of limitations defense has previously been rejected by the courts. In fact, the High Court of the Trust Territory has repeatedly held "that statutes of limitations bar recovery where Trust Territory citizens wait too long to file a claim against the government." *Konou*, 8 TTR at 527; *see also id.* at 528 (holding

that the Trusteeship Agreement "does not create a trust capable of judicial enforcement" and "is no[t a] classical trust that would prevent the appellants from asserting statutes of limitations as a defense"); *see also* *Lobok v. Trust Territory of the Pacific Islands*, 8 TTR 554, 555 (1986) (same; applying statute of limitations to a claim against the Trust Territory for breach of trust under the Trusteeship Agreement); *Royse v. Trust Territory of the Pacific Islands*, 8 TTR 189 (1981) (approving the trial court's finding that "the Trusteeship Agreement does not preclude enactment of a statute of limitations or the application of such a statute against the inhabitants of Micronesia"); *Castro v. Trust Territory of the Pacific Islands*, 8 TTR 194 (1981) (finding plaintiff's claim against the Trust Territory barred by statute of limitations even though plaintiff pled breach of Trust Territory's fiduciary duty under Trusteeship Agreement).[6]

Next, the court rejects the plaintiffs' (brief) argument that Japan is barred from invoking the statute of limitations based on its relationship with Palau before World War II. The plaintiffs argue that "at all times relevant herein prior to World War II, [Japan] was a 'Trustee' of a 'sacred trust' formed as a result of the Mandated Islands [i.e. Micronesia] being put under her control by the League of Nations." They go on to argue that, like the United States under the Trusteeship Agreement, the trust relationship created by the mandate is the type that bars a statute of limitations claim. (Pls.' Br. in Opp. to Japan's Mot. at 59-60.) Importantly, however, Japan withdrew from the League of Nations on March 27, 1935, thereby terminating any duties it may have had under the mandate. Any argument that the discontinued mandate of the long

[6] Plaintiffs cite *Ogarto v. Johnston*, 8 TTR 62, 79 (App. Div. 1979) for the proposition that the Trust Territory cannot assert the statute of limitations as a defense. However, the *Ogarto* decision, to the extent it found that the United Nations trusteeship was sufficient to defeat the assertion of the statute of limitations, has been implicitly overruled by more recent decisions finding otherwise (such as *Konou* and *Royse*). Moreover, the *Ogarto* plaintiffs' claim was denied on the merits so the court's very brief statute of limitations discussion was not outcome-determinative.

defunct League of Nations somehow continues to toll the statute of limitations for actions that occurred decades ago is without support. Even putting aside this fatal fact, there is no reason to distinguish the League of Nations mandate from the Trusteeship Agreement with regard to the running of the statute of limitations. Like the United Nations Trusteeship Agreement, the League of Nations mandate created a broad international trusteeship, which is similar in some respects, but not the same, as a legal trusteeship. *See Kazuo v. Republic of Palau*, 1 ROP Intrm. 154, 163 (1984) ("Trusteeship under the [United Nations] Charter is essentially the same institution as the [League of Nations] mandates."); *see also* the Covenant of the League of Nations, Arts. 22, 23(b).[7] Contrary to the plaintiffs' protestations, the language of the Covenant of the League of Nations did not reveal an intention to create a legally enforceable fiduciary relationship.

The final trusteeship asserted by the plaintiffs is an "express trust" purportedly created under the Angaur Mining Agreements. The plaintiffs contend that the trust relationship between the Trust Territory and the plaintiffs "is akin to the same trust relationship as between the United States and the Indian Tribes." (Pls.' Br. in Opp. to U.S. Mot at 19-20; *see also* Compl. ¶ 18.)

It is true that "direct or express trusts, so long as they continue between the trustee and the beneficiary, are not subject to the statute of limitations; and thus, the statute of limitations does not apply to cases involving an express and continuing trust until the trustee openly repudiates the trust." 76 Am. Jur.

---

[7] Even the plaintiffs equate the relationship formed by the League of Nations mandate system to a United Nations trusteeship, undermining the Court's willingness to treat the mandate differently than the trusteeship. (*See* Pls.' Br. in Opp. to Japan Mot. at 16 ("Japan knew or should have known that as a Trustee under the League of Nations, she was duty bound and morally obligated to act as a fiduciary to the Plaintiffs no different than the United States as herein-below discussed [as a Trustee under the United Nations Trusteeship Agreement]."))

2d *Trusts* § 652. The High Court of the Trust Territory recognized this exception when rejecting previous claims asserting that the Trusteeship Agreement created an "express trust." *See e.g., Konou*, 8 TTR at 527-28; *Royse*, 8 TTR at 191 (quoting 76 Am. Jur. 2d *Trusts*)).

The plaintiffs point to *United States v. Mitchell*, 463 U.S. 206, 25 (1983), in arguing that "where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such money or properties." (Pls. Br. in Opp. to U.S. Mot. at 37.) In *Mitchell*, the U.S. Supreme Court determined that the plaintiff could pursue a cause of action for breach of fiduciary duties against the United States related to mismanagement of timberlands in a reservation. First, the Court clarified that the United States consented to be sued under the Tucker Act for claims founded on statutes that create substantive rights for monetary damages against the United States. Next, the Court found that a general trust relationship existed between the government and the Indians under the specific statutes and regulations giving "the Federal Government full responsibility to manage Indian resources for the benefit of the Indians," and based on the historical relationship between the U.S. government and the Indians. 463 U.S. at 225-26; *see also Cheyenne-Arapaho Tribes of Oklahoma v. United States*, 966 F.2d 583 589 (10th Cir. 1992) (citing *Mitchell*, and noting "the existence of a fiduciary relationship when statutes and regulations give the Federal Government a pervasive role in management of Indian properties").[8]

---

[8] In arguing this point, the plaintiffs state that "a suit by the United States as Trustee on behalf of an Indian Tribe is not subject to state delay-based defenses." (Pls.' Br. in Opp. to U.S. Mot. 37.) For support they cite *Oneida Indian Nation of New York v. New York*, 691 F.2d 1070 10-83-84 (2d Cir. 192). However, it is not apparent how *Oneida Indian Nation* is relevant to this case where the suit is brought *against* the United States. This point was explicitly recognized in *Cato v. United States*, which the plaintiffs cite to repeatedly in their opposition brief. *See* 70 F.3d 1103 (9th Cir. 1995) (rejecting analogy to *Oneida Indian Nation*, noting that "the circumstances under which an action *by* the United States can be brought

Here, the plaintiffs rely on the November 7, 1951 Memorandum Agreement as the basis for the "express trust."[9] (*See e.g.* Compl. ¶ 18; Pl.'s Br. in Opp. to U.S. Mot. at 14-15, 19.) Whereas the first two mining agreements—the original December 21, 1949 agreement and its July 16, 1950 amendment—were executed by representatives for the Angaur clans, the November 7, 1951 agreement was executed by the High Commissioner on the clans' behalf: "As signator to this agreement, the High Commissioner will act in his capacity as trustee for the people and the lands of Angaur and the Trust Territory in the belief that their interests can best be served by the implementation of this agreement." (Compl. Ex. B (November 7, 1951 Angaur Mining Agreement ¶ 1).)

Aside from general references to the agreements, the plaintiffs do not identify exactly which aspects of the agreements qualify as "specific obligations" sufficient to establish the type of trust relationship between plaintiffs and the Trust Territory referred to in *Mitchell*. (*See e.g.* Pl.'s Br. in Opp. to U.S. Mot. at 14-15, 19.) The plaintiffs' position on this point is further undermined inasmuch as the language used in the agreement specified that the High Commissioner's signing of the mining agreement was "in his

---

sheds no light on circumstances under which an action *against* the United States can be brought."). The plaintiffs do not further explain their position on this point, and the court is not inclined to presume arguments on a party's behalf.

[9] The plaintiffs generally assert that authority for the alleged express trust comes from the Angaur Mining Agreements themselves, specifically the November 7, 1951 agreement, and not the Angaur Mining Trust Agreement. (*See, e.g.*, Pls.' Br. in Opp. to U.S. Mot. at 19 ("The United States' trust violations under the Trusteeship Agreement carried on further to the more 'express trust' created pursuant to the mining agreements hereinabove discussed, *specifically the November 7th, 1951 Memorandum Agreement.*") (emphasis added)); (*id.* at 9 ("Pursuant to [the November 7, 1951] Memorandum Agreement, they all agreed amongst themselves to and did create a[n] 'express trust' with Plaintiffs as the 'Beneficiaries' and the High Commissioner of the Trust Territory as the 'Trustee.'"); (*id.* at 14 ("[An] express trust in favor of the Plaintiffs and their lands was indeed created under the November 7th, 1951 Memorandum Agreement.")). The plaintiffs' arguments, however, are at times internally inconsistent, see *id.* at 9 ("Without belaboring the obvious, the authority to have created such a[n] 'express trust' lies in the creation of the Angaur Trust Fund in the original Angaur Mining Agreement of December 21st, 1949.").

capacity as a trustee" under the United Nations Trusteeship Agreement.[10] (*See* Compl. Ex. B.); *see generally Temengil v. Trust Territory of Pacific Islands*, 881 F.2d 647, 653 (9th Cir. 1989) ("The Trust Territory government is constrained by the Trusteeship Agreement."). As discussed, courts have held that the Trusteeship Agreement "does not create a trust capable of judicial enforcement." *Konou*, 8 TTR at 528. Moreover, because the plaintiffs have no "express trust" relationship with the defendants—they sue the United States as the successor to the Trust Territory under the limited waiver of sovereign immunity provided by Compact § 174(c)—any analogy to the trust relationship between the United States and Native American tribes is dubious. *See e.g., Seminole Nation v. United States*, 316 U.S. 286 (1942) (discussing historical relationship, including treaties and trusts, between the government of the United States and Native Americans).

Regardless, even assuming that the Trust Territory stepped into a trust position similar to that recognized by the Court in *Mitchell*, the statute of limitations would still run given that any express trust between the Trust Territory and the plaintiffs was unambiguously terminated when the Trust Territory ceased to exist. An express trust does not eviscerate the statute of limitations as a defense—it merely tolls the limitations period while the trust is in existence. 76 Am. Jur. 2d *Trusts* § 654. The plaintiffs do not point to any authority under which the United States is obligated as a trustee *under the mining*

[10] As noted, the language of the Memorandum Agreement reads in part: "the High Commissioner will act in his capacity as trustee for the people *and* the lands of Angaur and the Trust Territory." (Compl. Ex. B (emphasis added).) In their opposition brief, the plaintiffs argue that, by using the word "and," the Memorandum Agreement distinguishes the High Commissioner as the "trustee" for the plaintiffs, in addition to being a trustee for the Trust Territory under the Trusteeship Agreement. (Pls.' Br. in Opp. to U.S. Mot. at 9 n.9.) However, such a reading ignores the sentence structure—the language specifically states that the High Commissioner "will act in his capacity as trustee," and his capacity to act as trustee comes from the United Nations Trusteeship Agreement.

agreements—the purported "express trust" was between the Trust Territory (through the High Commissioner as specified in the November 7, 1951 Memorandum Agreement) and the plaintiffs. (*See e.g.*, Compl. ¶¶ 18, 42.)[11] As discussed, all events necessary to give rise to the plaintiffs claims occurred decades ago, and any tolling of the statute of limitations based on the trust relationship between the plaintiffs and the Trust Territory ended (at the latest) when the trusteeship expressly ended. *See* 76 Am. Jur. 2d *Trusts* §§ 654, 656, 658; *Hopeland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1578-79 (Fed. Cir. 1988) (noting the general rule that the statute of limitations does not run against a beneficiary in favor of a trustee until the trust is repudiated and the fiduciary relationship ends, but finding that the statute of limitations ran when "all the events which would fix the alleged liability of the government had taken place when the trust was expressly terminated").[12]

This conclusion also works to bar the plaintiffs related claims against Japan. The plaintiffs state that, as a participant to the agreements through which the Trust Territory breached its duties under the express trust, Japan knowingly assisted in the Trust Territory's breach of its fiduciary duties and is therefore equally liable for those breaches. (*See* Pls.' Br. in Opp. to Japan Mot. at 58-60.) The plaintiffs further contend that the statute of limitations is inoperative for those parties, such as Japan, who aid and abet in

---

[11] That a representative for the Supreme Commander of Allied Powers signed the document does somehow add the United States as a distinct party to the alleged "express trust."

[12] Also, even assuming that the Trust Territory had the duty to attempt to compel PMC (or Japan) to properly backfill the mines, at some point the Trust Territory lost the ability to enforce the Angaur Mining Agreements because the time for filing claims expired—likely in 1961, but definitely more than six years before the complaint was filed in this action. As a general matter, trustees are not required to press stale or unwinnable claims on behalf of their beneficiaries. *See Restatement (Second) of Trusts* § 177 cmt. c (1959) ("It is not the duty of the trustee to bring an action to enforce a claim which is a part of the trust property if it is reasonable not to bring such an action, owing . . . to the probability that the action would be unsuccessful . . . .").

the breach of fiduciary duty. The court need not resolve whether Japan could be liable under these circumstances, because, as discussed, (1) no express trust sufficient to toll the statute of limitations existed, and (2) even assuming otherwise, the cause of action accrued decades ago, and any tolling of the statute of limitations based the express trust theory ended (at the latest) when the trust was terminated.

The plaintiffs raise one final argument against the running of the statute of limitations with regard to the United States. Plaintiffs argue that because the Trust Territory was only a quasi-sovereign (as distinguished from a full sovereign like the United States), any limitations-based defenses are not applicable to claims arising from misdeeds of the Trust Territory. (*See* Pls.' Br. in Opp. to U.S. Mot. at 38-39.) However, the Trust Territory's status as a quasi-sovereign (as opposed to a full sovereign or a private party) does not impact the running of the statute of limitations in its favor, and the plaintiffs fail to provide citation for their contention that the United States waived any delay-based defenses when it stepped into the shoes of the Trust Territory via the Compact of Free Association.

In sum, statute of limitations requires, in relevant part, that "*[a]ll actions* . . . be commenced within six years after the cause of action accrues." 14 PNC § 405 (emphasis added). Here, all of the plaintiffs claims accrued more than 50 years ago. On its face and in application, the statute of limitations bars claims for breach of contract, quasi-contract, negligence, takings, and any associated legal or equitable remedies. The plaintiffs argument that claims based on breach of trust are shielded from the operation of the statute of limitations, is rejected for the reasons discussed.

IV. CONCLUSION

The defendants' motions to dismiss are granted. While the plaintiffs may certainly have legitimate grievances stemming from the mining of phosphate decades ago, this court is no longer an available forum

for their claims. The plaintiffs waited too long to seek relief through the courts. Under the applicable law, all of the plaintiffs' claims, as alleged in the complaint, are barred by the doctrine of sovereign immunity and the statute of limitations. This case is therefore dismissed with prejudice pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

So ordered, this 5 day of January 2011

Arthur Ngiraklsong
Chief Justice