No. 07-5175

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PEOPLE OF BIKINI, BY AND THROUGH THE
KILI/BIKINI/EJIT LOCAL AND GOVERNMENT COUNCIL,

PLAINTIFFS-APPELLANTS,

v.

UNITED STATES OF AMERICA,

DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS IN 06-288C
JUDGE CHRISTINE ODELL COOK MILLER

BRIEF FOR PLAINTIFFS-APPELLANTS PEOPLE OF BIKINI

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STATEMENT OF RELATED CASES

An appeal in a related matter, *People of Bikini v. United States*, Nos. 88-1206, 88-1207, 88-1208, was previously before this Court (Smith, Nies, JJ.; Skelton, SJ). In 1988, the Bikinians' appeal was dismissed, 859 F.2d 1482, and the Court affirmed the trial court's ruling with respect to the remaining appellants, 864 F.2d 134. The pending case of *Ismael John v. United States*, 05-5176, could be directly affected by this appeal, because it presents similar Fifth Amendment claims. The docket number of that case below was No. 06-289L. In the Court of Federal Claims, the *John* case and this case were briefed separately, but were consolidated for oral argument. The trial court issued separate opinions in each case.

JURISDICTIONAL STATEMENT

The Court of Federal Claims had jurisdiction pursuant to 28 U.S.C. § 1491(a)(1), and the Fifth Amendment to the United States Constitution. Appendix (A) XX. The court entered final judgment on August 2, 2007. A0001. A timely notice of appeal was filed on September 27, 2007. This Court's jurisdiction rests on 28 U.S.C. § 1295(a)(3).

STATEMENT OF THE ISSUES

In *People of Enewetak v. United States*, 864 F.2d 134 (1988), *cert. denied*, 491 U.S. 909 (1989), this Court held that residents of the Marshall Islands could not pursue their Just Compensation Clause claims for damage to their land caused by the federal government's nuclear testing program, because Congress had recently created an "alternative provision for compensation" through the Nuclear Claims Tribunal, *id*. at 136. The Court held that judicial intervention was not appropriate "at this time" and "in advance of the exhaustion of the alternative provided." *Id*. at 136-137. The Bikinians exhausted their claims before the Tribunal, and the Tribunal awarded the Bikinians $563,315,500 for lost property and damages. Because the United States government has failed to fund the Tribunal, less than one half of one percent of that award has been paid. In 2006, the Bikinians filed suit under the Fifth Amendment based on the government's failure to provide just compensation in light of the Tribunal's decision. The questions presented are:

1. Whether the court erred in holding that the Bikinians' Just Compensation Clause claims were filed too late, and thus are barred by

the statute of limitations, and also were filed too early, and thus are unripe.

2. Whether the Bikinians have adequately alleged the taking of their claims before the Nuclear Claims Tribunal.

3. Whether the adjudication of just compensation under the Fifth Amendment is a nonjusticiable political question.

4. Whether Congress has withdrawn federal jurisdiction over the Bikinians' Just Compensation Clause claims.

STATEMENT OF THE CASE

In 2006, plaintiffs-appellants (Bikinians) brought suit in the Court of Federal Claims (Miller, J.), seeking, *inter alia*, just compensation for the deprivation of their property rights under the Fifth Amendment. Those claims arose both from the irradiation and vaporization of the Bikini Islands by the federal government's nuclear testing program, and the federal government's subsequent failure to pay damages determined by the Tribunal that Congress designated to resolve those Just Compensation Clause claims.[1] The Court of Federal Claims granted

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[1] A prior suit seeking just compensation under the Tucker Act had been dismissed in favor of proceedings before the then newly established Nuclear Claims Tribunal. *Juda v. United States*, 13 Cl. Ct. 667 (1987).

the government's motion to dismiss for lack of jurisdiction, 77 Fed. Cl. 744, holding that the claims were both unripe and time-barred, and that one of the counts failed to state a claim. The court also held that the Just Compensation Clause claims presented nonjusticiable political questions and that Congress had withdrawn federal jurisdiction over the constitutional claims.

STATEMENT OF FACTS

A. Factual Background

Bikini Atoll is part of the Marshall Islands in the central Pacific Ocean. The United States obtained control of the Marshall Islands during World War II. In 1947, the Islands became a United Nations Trust Territory administered by the United States, which gained "full powers of administration, legislation and jurisdiction" over the Islands. A0073; 61 Stat. 397 and 3301-02 (1947). As trustee, the United States had a fiduciary responsibility to promote the Bikinians' "rights and fundamental freedoms" and to protect their health, land, and resources. A0074. The government extended to Bikinians "all rights which are the normal constitutional rights of citizens under the Constitution." A0974-75.

In 1946, President Truman approved the use of Bikini Atoll for nuclear testing. The United States evacuated the Bikinians to Rongerik Atoll, promising to return them in a few months and to care for them in the interval. While on Rongerik Atoll, the Bikinians endured "starvation conditions" and were "visibly suffering from malnutrition." A0970. Food shortages continued through subsequent relocations. A0970. In the meantime, the government exploded twenty-three atomic and hydrogen bombs on Bikini, one of which vaporized three islands. A0971. The federal government initially returned the Bikinians to the Atoll in 1969, but evacuated them again in 1978 after determining that radiation levels were too high for human habitation and would remain so for thirty to sixty years. Bikini Atoll remains uninhabited. A0973.

Effective 1986, the United States and the Marshall Islands entered into a Compact of Free Association, under which the Republic of the Marshall Islands obtained limited autonomy in foreign relations.[2] In Section 177(a) of the Compact, the United States "accept[ed] the

[2] Congress approved the Compact in 1985 and President Reagan signed it into law in 1986. Pub. L. No. 239, 99th Cong., 2d Sess., Title 1.

responsibility for compensation owing to citizens of the Marshall Islands * * * for loss or damage to property and person * * * resulting from the nuclear testing program." Section 177(b) provided for a separate agreement that would ensure "the just and adequate settlement of all such claims." Congress also committed to provide $150 million to the Marshall Islands government to support the separate agreement. A0194.

The Section 177 Agreement created a Nuclear Claims Tribunal "to render final determination upon all claims past, present and future" of the Marshallese "related to the nuclear testing program." A0232. The Agreement further provided that the $150 million authorized by Congress would initiate a trust fund to support the Tribunal's operations and awards. A0226. Only $45.75 million of the Fund's principal (and any income produced) was designated for the initial payment of damage awards. A0229. Pending claims or proceedings were "terminated," and "[n]o court of the United States shall have jurisdiction to entertain such claims." A0237. The Agreement's provisions "constitute the full settlement of all claims, past, present and future" against the United States arising out of the nuclear testing

program. A0236. With respect to any new damage claim that might "arise[] or is discovered after the effective date of this Agreement" and that "could not reasonably have been identified" at that time, a request for additional funding could be submitted to Congress through a "Changed Circumstances" petition if "such injuries render the provisions of this Agreement manifestly inadequate," A0235.

B. Procedural Framework

1. The 1981 Litigation

The Bikinians, all of whom either lived on Bikini Atoll until the nuclear testing program began or are their descendants, originally filed suit in the Court of Claims in 1981. They sought compensation under the Fifth Amendment for the taking of their land and damages for the United States' breach of its fiduciary duties. A0080, 0111-15. The Claims Court held that the Bikinians could seek compensation under the Fifth Amendment and that their claims had been timely filed. *See Juda v. United States*, 6 Cl. Ct. 441 (1984).

Following adoption of the Compact, however, the court dismissed the complaint on the ground that exhaustion of the Tribunal's proceedings was required. *Juda v. United States*, 13 Cl. Ct. 667 (1987). The court explained that the Agreement's "termination" of claims

"applies to termination of proceedings, and not to extinguishment of the basic claims involved," *id.* at 686, noting that Congress had acknowledged its "obligation to compensate" and had simply "establishe[d] an alternative tribunal to provide such compensation," *id.* at 688. "As long as the obligations are recognized," the court explained, "Congress may direct fulfillment without the interposition of either a court or an administrative tribunal." *Id.* at 689.

The court declined to address the Bikinians' arguments that the Tribunal proceedings would not adequately protect their rights and were inadequately funded, calling those objections "premature." 13 Cl. Ct. at 689. "Whether the compensation * * * is adequate is dependent upon the amount and type of compensation that is ultimately provided," and thus "[t]his alternative procedure for compensation cannot be challenged judicially until it has run its course." *Ibid.*

The Bikinians appealed, but then voluntarily dismissed the appeal in exchange for $90,000,000 for "the resettlement and rehabilitation of Bikini Atoll," and the right to pursue just compensation before the Tribunal. Pub. L. No. 446, 100th Cong., 2d

Sess., Title 1; *see also* A0412; *People of Bikini v. United States*, 859 F.2d 1482 (Fed. Cir. 1988).

Shortly thereafter, this Court affirmed in a related appeal brought by the People of Enewetak. The Court acknowledged the Enewetaks' concerns with the Tribunal process, but held that judicial intervention was not appropriate "at this time" based on the "mere speculation that the alternative remedy may prove to be inadequate." *People of Enewetak v. United States*, 864 F.2d 134, 136 (1988), *cert. denied*, 491 U.S. 909 (1989). The Court noted that the government had committed "an initial sum" of $150,000,000 to resolve claims, "with additional financial obligations over fifteen years for the settlement of all claims," *id.* at 135-136, and that Congress had demonstrated its "concern that its alternative provision for compensation be adequate," *id.* at 136. The Court accordingly concluded that it need not address the adequacy of the Tribunal process "in advance of [its] exhaustion." *Id.* at 137.

2. Post-Agreement Proceedings

a. Changed Circumstances Petition

In 2000, the Marshall Islands government submitted a Changed Circumstances petition to Congress seeking additional funding for the Tribunal based on the scientific determination that tolerable radiation

levels for habitability had changed significantly since 1978. In January 2005, the State Department recommended that Congress reject the request. Congress has not appropriated any funds in response to the petition. A0474, A0880.

b. Litigation Before the Nuclear Claims Tribunal

In 1993, the Bikinians sought relief from the Tribunal for the loss of use of Bikini Atoll and other damages. In adjudicating the claim, the Tribunal "follow[ed] rules and procedures that closely resemble those used by legal systems in the United States." Dick Thornburgh et al., *The Nuclear Claims Tribunal of the Republic of the Marshall Islands* (Jan. 2003) (Thornburgh Report).[3] In March 2001, the Tribunal determined that the Bikinians were entitled to $563,315,500 in compensation, including $278,000,000 for the past and future loss of their land. A0648-50.[4]

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[3] This report, prepared by former U.S. Attorney General Dick Thornburgh, is a public document, *see* S. Hrg. 109-178 at 26, 98, and is available at http://www.bikiniatoll.com/ThornburgReport.pdf.

[4] That amount reflected an offset for payments previously made by the United States. A0682. The amount of that award is similar to amounts the United States has paid to persons injured by nuclear tests in Nevada, Thornburgh Report at 3, and to other significant awards reviewed by this Court, s*ee, e.g.*, *Glendale Fed. Bank v. United States*, 378 F.3d 1308, 1311 (Fed. Cir. 2004), *cert. denied*, 544 U.S. 904 (2005).

Because of its limited funds, the Tribunal paid only $1,491,809 (0.25% of the award) in 2002, explaining that "the Nuclear Claims Fund is insufficient to make more than a token payment." A0693, A0695, A0986-987. The Tribunal made a second payment of $787,370.40 in February 2003. A0878, A0987. No payments have been made since then. In October 2006, the Fund had approximately $1 million remaining. [http://www.nuclearclaimstribunal.com/piawards.html]. In January 2003, former United States Attorney General Richard Thornburgh reported that [t]he $150 million trust fund "is manifestly inadequate to fairly compensate the inhabitants of the Marshall Islands for the damages they suffered." Thornburgh Report at 3.

3. The Current Litigation

In 2006, the Bikinians filed this action in the Court of Federal Claims. The complaint alleged in Count I that the government's persistent failure to fund the Tribunal's award to the Bikinians constituted a taking of their claims before the Tribunal. Count V of the

complaint sought just compensation for the taking of Bikini Atoll. A0993, A0996.[5]

The court dismissed the Just Compensation Clause claims for lack of jurisdiction. A0065. The court first held that Count I was barred by the Tucker Act's six-year statute of limitations, 28 U.S.C. § 2501, because the Bikinians could not "establish a taking until [they] can show that Congress no longer is considering their [Changed Circumstances] petition," and "no government act has taken place within the last six years that relates to the asserted taking." A0031. The court further explained that the deficiencies in the Tribunal's funding "were known to plaintiffs in 1986." A0032.

The court dismissed Count V as unripe. Because "Congress has not acted in the seven years after the Changed Circumstances Request was first submitted," the court concluded that "litigation on this issue is still premature." A0033. The court reasoned that, because "Congress has not yet exercised its option to 'authorize and appropriate funds[,]

[5] Four counts of the complaint raised breach of implied contract claims. *See* A0993-97. The Bikinians do not seek review of the court's dismissal of those claims.

[t]he court is in no position to find that the alternative procedure * * * has run its course." A0033.

The court also held that Count I failed to state a claim. The court reasoned that "no acts on the part of the Government are alleged that could entitle plaintiffs to additional funds," and the Bikinians "have alleged no affirmative government act that deprives them of any property interest in additional funding from the United States." A0040-41.

The court ruled, in the alternative, that the Bikinians' Just Compensation Clause claims posed nonjusticiable political questions, reasoning that "[j]udicial resolution of complex issues of fact" involved in the claim "would run counter to the final resolution of all plaintiffs' claims in the Section 177 Agreement." The court further expressed concern that the Bikinians' claims "call for an examination of the terms of the 'international compact between two governments,'" which the court feared would "impinge on the conduct of foreign affairs." A0064-65.

Finally, the court held that Congress had withdrawn all federal jurisdiction to hear the Fifth Amendment Just Compensation Clause

claim pleaded in Count I. The court declined to address the issue as to Count V. A0054.

SUMMARY OF ARGUMENT

1. The Bikinians' Just Compensation Clause claims were timely filed. Both claims accrued when, following the Bikinians' exhaustion of the Tribunal proceedings required by this Court, the United States failed to pay the just compensation determined by the Tribunal. The trial court's holding that the claims were both too late and too early misunderstands the essence of the constitutional injury. The claims were not too late because the Fifth Amendment proscribes not takings, but *uncompensated* takings, and that failure to compensate adequately is what occurred within the six years preceding the complaint. Neither were the claims filed prematurely. Congress's theoretical capacity to appropriate more funds in an amount and at a time of its own choosing – a possibility that exists in every Fifth Amendment case – does not render Just Compensation Clause claims unripe for review. The Constitution's command of just compensation demands timely compensation, not compensation at Congress's leisure.

2. Count I properly states a Just Compensation Clause claim. Congress's five-year failure to appropriate funds for compensation has destroyed the value of the Bikinians' claims before the Tribunal. The Government's inaction – its failure to compensate – is the very essence of a Fifth Amendment violation.

3. The Bikinians' Just Compensation Clause claims are justiciable. Determining the amount of compensation justly due for a taking is a quintessential judicial function and one that the Constitution specifically assigns to the courts and withdraws from the Political Branches. Calculating the value of the Bikinians' lost land and ordering the government to comply with the Constitution are measures that fall squarely within the judicial ken. The Constitution also charges the courts with interpreting and applying federal law, which includes the construction of international treaties and agreements. Nothing more is required here.

4. Federal courts retain jurisdiction to hear the Bikinians' constitutional claims consistent with the Agreement. Adjudicating Just Compensation Clause claims falls squarely within the jurisdiction granted to the federal courts not only by the Tucker Act, but also by the

Fifth Amendment, which the Supreme Court has repeatedly held creates a cause of action for compensation rooted in the Constitution itself. Nothing in the Section 177 Agreement changed that, as indicated by both this Court's and the Court of Federal Claims' earlier decisions postponing – not foreclosing – constitutional review until exhaustion of the Tribunal process. And it would be contrary to established principles of statutory construction to treat the Act's ambiguous language as attempting to accomplish the constitutionally suspect end of foreclosing all judicial review of federal constitutional claims.[6]

ARGUMENT

In 1978, the Bikinians learned that the government had rendered their land uninhabitable for decades. Three years later, the Bikinians sought just compensation under the Fifth Amendment for the taking of

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6 Under Federal Rule of Civil Procedure 12(b)(1), when a motion challenges the facial sufficiency of the complaint's jurisdictional allegations, the allegations of the complaint must be taken as true. *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993), *cert. denied*, 512 U.S. 1235 (1994). On motions to dismiss, this Court reviews jurisdictional holdings *de novo*. *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1238 (Fed. Cir. 2002).

their land. There is no dispute that a taking occurred, and the United States acknowledged twenty years ago its responsibility to provide just compensation. Nevertheless, for the last quarter century, the federal government has taken the Bikinians on a procedural odyssey, repeatedly switching forums for their claims and postponing again and again the payment of fair compensation that is required by the Constitution. As demanded by both the government and the courts, the Bikinians diligently sought relief from the judiciary, then from an administrative tribunal, then from Congress, and then again from the courts, only to be told this year by the Court of Federal Claims that their claims were both too early and too late. The Fifth Amendment is not a shell game. The Bikinians have done everything that the federal judiciary, the Congress, and the Executive Branch have asked of them to vindicate their fundamental right to just compensation. The time has come for their claim to be heard.

I. THE BIKINIANS TIMELY FILED THEIR CLAIMS FOR JUST COMPENSATION.

A. The Complaint Was Not Filed Too Late.

1. Decisions of this Court and the Court of Federal Claims compelled the Bikinians to present their Just Compensation Clause

claims to the Nuclear Claims Tribunal for determination under the expectation that just and adequate compensation would be available in that forum. *People of Enewetak v. United States*, 864 F.2d 134, 135 (1988), *cert. denied*, 491 U.S. 909 (1989); *Juda v. United States*, 13 Cl. Ct. 667, 688-689 (1987). That expectation went unmet. The forced diversion of both the Bikinians' pre-existing Just Compensation Clause claim and their newly created claim for relief from the Tribunal into a forum whose funding has proven "manifestly inadequate," Thornburgh Report at 3, amounted to an unconstitutional taking of those claims without just compensation. Count I of the complaint seeks compensation for that taking.

Because both this Court and the Court of Federal Claims had held that the Tribunal process must be exhausted before the Bikinians could challenge its inadequacy, *see Enewetak* and *Juda,* the earliest time that their Just Compensation Clause claim could have been filed was after the Tribunal's award in March 2001. But even at that point, the filing of a claim might have been premature. That is because "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County Reg'l Planning*

Comm'n. v. Hamilton Bank, 473 U.S. 172, 194 (1985). That denial of just compensation was not manifested until the Tribunal's announcement in February 2002 that the Bikinians would be provided less than one half of one percent of the compensation justly due to them.

Accordingly, the Bikinians' complaint was timely. At the time it was filed, only five years had elapsed since the award was issued, and only four years had passed since the Tribunal had demonstrated its incapacity to pay anything other than token, and thus constitutionally inadequate, compensation. A0695, A0987. By the time the complaint was filed in April 2006, no payments had been made for more than three years. A0986-87. The Fifth Amendment demands that "just compensation, not inadequate compensation," be paid, *Jacobs v. United States*, 290 U.S. 13, 16 (1933). The complaint was filed when just and adequate compensation had been denied and thus the taking without just compensation had been "complete[d]." *Williamson*, 473 U.S. at 172.

2. The Court of Federal Claims held (A0032), however, that Count I was time-barred because the Bikinians were already aware in 1986 of the Tribunal's potential shortcomings, and nothing changed in that respect in the six years preceding the filing of the complaint.

It is true that the Bikinians had long been concerned about the adequacy of the Tribunal process, but that does not alter the timeliness of the complaint. This Court was equally aware of the Agreement's terms and potential limitations at the time of the Tribunal's formation, but nevertheless held that a challenge to the Tribunal process on those grounds was premature. *See Enewetak*, 864 F.2d at 135-137; A0298, A0315. The core of this Court's decision in *Enewetak*, and the trial court's decision in *Juda*, was that, *notwithstanding the Agreement and the Tribunal's apparent design*, neither the Court nor the parties could presume in advance that Congress would abandon its admitted "responsibility for the just compensation" of the Bikinians, *id*. at 135. *See id.* at 136 ("[W]e are unpersuaded that judicial intervention is appropriate at this time on the *mere speculation* that the alternative remedy may prove to be inadequate.") (emphasis added); *Juda*, 13 Cl. Ct. at 689 (calling plaintiffs' concerns about the adequacy of the Tribunal's procedures and funding "premature" because "[w]hether the compensation, in the alternative procedures * * * is adequate is dependent upon the amount and type of compensation that ultimately is provided through those procedures"). Indeed, this Court looked

beyond the terms of the Agreement for other evidence of Congress's "concern that its alternative provision for compensation be adequate." *Enewetak*, 864 F.2d at 136 (considering separate congressional appropriation for Bikinians' Resettlement Trust Fund).

Accordingly, the Bikinians' earlier concerns about the inadequacy of the Tribunal have no bearing on jurisdiction. Under *Enewetak* and *Juda*, the Bikinians had no judicial avenue for challenging the insufficiency of the Tribunal process until after the Tribunal completed its decisionmaking process and entered an award in their favor, and the government failed to pay the compensation that was due. Put another way, under this Court's decision in *Enewetak*, the Bikinians' claim under the Fifth Amendment "did not and could not accrue until [they] w[ere] denied just compensation." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999). Where "Congress has deliberately given an administrative body the function of deciding all or part of the claimant's entitlement, *i.e.*, where Congress has interposed an administrative tribunal between the claimant and the court," the claim does not accrue until those administrative remedies have been exhausted and "the executive body has acted * * * or declines to act."

Friedman v. United States, 310 F.2d 381, 385 (Ct. Cl. 1962), *cert. denied*, 373 U.S. 932 (1963).[7]

Accordingly, the Tribunal's decision became final and the constitutional injury arose in February 2002, when the Tribunal paid only token compensation and announced its inability to make any more substantial payments. Because the Bikinians sued within six years of the conclusion of a mandatory administrative proceeding and within six years of the denial of just and adequate compensation, the action was timely.

3. The trial court also reasoned that Congress's "lack of action" could not be "considered a taking of any interest." A0031. But the Bikinians do not challenge a congressional taking; they challenge the

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[7] *See Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 16-18 (1984) (takings claim arose after a specially designated commission's award fell short of the market value of the lost property); *Dames & Moore v. Regan*, 453 U.S. 654, 691 (1981) (Powell, J., concurring & dissenting in part) ("[P]arties whose valid claims are not adjudicated or not fully paid [by the claims tribunal] may bring a 'taking' claim against the United States in the Court of Claims"); *Crown Coat Front Co. v. United States*, 386 U.S. 503, 517-518 (1967) (claim accrued when mandatory administrative proceedings ended); *Ballam v. United States*, 806 F.2d 1017, 1023 (Fed. Cir. 1986) (claim did not accrue "before the Army Engineers had been informed of the claim and ruled upon it," because "[a] suit would have been premature before demand and refusal"), *cert. denied*, 481 U.S. 1014 (1987); *Behring Int'l, Inc. v. Imperial Iranian Air Force*, 699 F.2d 657, 665 n.5 (3d Cir. 1983) (if Iran-United States Claims Tribunal does not "make [plaintiffs] whole," taking claim must be addressed by court).

denial of just compensation for a taking. A0993. The Bikinians' first claim for relief under the Fifth Amendment objects not to the congressional creation of a right to seek relief before the Tribunal or to the forced diversion of their claims to the Tribunal process, but to the subsequent congressional action that rendered those claims essentially worthless by paying only "inadequate compensation," *Jacobs*, 290 U.S. at 16.

Thus, governmental inaction is the constitutional injury. "When the government repudiates [its] duty * * * by denying just compensation in fact * * *, it violates the Constitution." *Del Monte Dunes*, 526 U.S. at 717. Because the Fifth Amendment requires that payment of just compensation be made "within a reasonable time after the compensation is finally determined," *Cherokee Nation v. Southern Kansas Ry.*, 135 U.S. 641, 660 (1890), the relevant governmental act – the government's repudiation of its constitutional duty – was Congress's failure to pay within a reasonable time period. That governmental act occurred within six years of the filing of the complaint.

The fundamental flaw in the trial court's decision is that it leaves no time when the Bikinians could have filed a timely suit to vindicate

the taking of their claims before the Tribunal. This Court barred the filing of any claim until after the Tribunal issued its award – a process that consumed nearly a decade of the Bikinians' time and resources. A0985-86. Yet, under the trial court's decision, any lawsuit filed after the Tribunal's decision – even one filed the next day – would have been untimely because the Bikinians were already aware of the funding shortfall in 1986, and the resulting inaction – the failure to pay – would not satisfy the court's insistence upon a new "government act." A0031. "The Takings Clause is not so quixotic." *Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001).

4. Finally, the trial court's conclusion that Count I does not "differ substantively from the breach of contract claims in *Juda*," and therefore that the claim is untimely, is wrong. Count I alleges a taking of the Bikinians' claims before the Tribunal through the failure to fund the award in 2001. By contrast, the contract claims in *Juda* alleged breaches of implied-in-fact contracts arising in 1946. Each claim is entirely independent of the other. [8]

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[8] For the same reasons, Count V – seeking just compensation for the taking of the Bikini Atoll – was also timely filed, as that claim did not accrue until just compensation for the taking was denied in 2002. Indeed, the Court of Federal

B. The Complaint Was Not Filed Too Early.

1. Count V of the complaint seeks just compensation for the taking of Bikini Atoll. A0997. As with Count I, the taking of the Bikinians' claims before the Tribunal, the violation of the Fifth Amendment in Count V occurred when Congress's failed to provide just compensation following the Tribunal's determination of the Bikinians' claim. The government's failure to provide just compensation is final because both the right to payment and the failure to pay have been established. The United States formally acknowledged its responsibility to provide just compensation in Section 177(a) of the Compact. Moreover, the government's chosen forum – the Tribunal – determined the amount of compensation due in March 2001. The administrative process prescribed by the Compact, exhaustion of which was directed by this Court in *Enewetak*, has thus been completed. No further Tribunal proceedings are available.

Claims did not dismiss that claim as time-barred. To be sure, the trial court had previously found that the Bikinians' right to seek compensation under the Tucker Act accrued in 1979, when the Bikinians were required to leave the Atoll for decades. *Juda*, 6 Cl. Ct. 441, 451 (1984). But Congress effectively suspended or tolled the Bikinians' claim for just compensation by admitting liability for compensation and interposing a new procedural route for determining just compensation that the Bikinians were required to exhaust.

Congress's failure to provide just compensation is also final for purposes of judicial review. In 2002, the Tribunal announced that the lack of congressional funding permitted only a nominal payment to the Bikinians. No payments at all were made in the three years preceding the filing of the complaint. That extraordinary delay makes the Just Compensation Clause claim ripe. The Fifth Amendment requires that just compensation be provided "within a reasonable period of time," *Cherokee Nation*, 135 U.S. at 660. Indeed, to hold that "takings claim could be kept at bay from year to year," while the plaintiff and the court wait for a Congress that has shown no interest in the matter to appropriate funds would "stultify the Fifth Amendment's guarantee." *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 741 (1997). The Supreme Court has rejected as "anomalous" the contention that the Fifth Amendment would permit just compensation to "be indefinitely postponed until the Congress made some other provision for the determination of the amount payable," where the government had already "taken possession of the property and was enjoying the advantages of its use." *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 491 (1931). Likewise here, the government and the public

have benefited for decades from the destruction of the Bikinians' land. Nothing in ripeness law supports indefinitely postponing the Bikinians' just compensation unless and until Congress feels moved to act (which may never happen).

2. The trial court, however, held that the claim was not ripe because Congress still has the "option to 'authorize and appropriate funds,'" and Congress may yet "consider the Changed Circumstances Request." A0033. Perhaps, but the obligation to provide just compensation is a constitutional command, not an "option" that Congress can satisfy at its leisure. *See Suitum; Russian Fleet; Cherokee Nation.*

Equally erroneous is the trial court's assertion that it "is in no position to find that the alternative procedure * * * has run its course" due to the pendency of the Changed Circumstances petition. A0033. The Changed Circumstances provision in the Section 177 Agreement does not set forth an administrative procedure to be exhausted, nor is it a provision for appeals from the Tribunal's decisions. Rather, it provides a mechanism for applying directly to Congress for additional funds based on unknown and unforeseeable developments. A0235.

Moreover, there is no "course" for a Changed Circumstances petition to "run" other than the submission itself. There are no attendant agency proceedings, and Congress may ignore the petition forever. [9]

Furthermore, the possibility that Congress might compensate the Bikinians directly is common to all Just Compensation Clause claims. With or without a petition, Congress always has the power to provide just compensation through a direct appropriation. *See Lynch v. United States*, 292 U.S. 571, 582 (1934) ("Congress may direct [the] fulfillment [of its Fifth Amendment obligations] without the interposition of either a court or an administrative tribunal."). The trial court's ripeness analysis would allow Congress to nullify the United States' Fifth Amendment obligations simply by ignoring property owners' requests for just compensation.

3. At bottom, the trial court's decision fundamentally misunderstands the purpose of the ripeness doctrine. Ripeness "prevent[s] the courts, through avoidance of premature adjudication,

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[9] The trial court's decision rested on the erroneous assumption that the Changed Circumstances petition addressed the funding gap between the Tribunal's award and money in the Fund. The petition, in fact, predated the Tribunal's award by a year, and it seeks further compensation based on new evidence about the extent of radiological cleanup needed on the Islands. A0474, A0501-03.

from entangling themselves in abstract disagreements over administrative policies," and "protect[s] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-149 (1967); *see also Maritrans Inc. v. United States*, 342 F.3d 1344, 1360 (Fed. Cir. 2003). In the takings context in particular, the ripeness doctrine provides the government with a reasonable opportunity to determine whether to take land and, if so, how much compensation is due. *Williamson*, 473 U.S. at 190-195.

Those ripeness concerns have no application here. There is nothing uncertain or abstract about the (i) loss and destruction of the Bikinians' land, (ii) the Bikinians' entitlement to compensation, which Congress acknowledged in the Compact, or (iii) the amount of compensation owed, as finally determined almost *seven years ago* by the administrative process to which Congress subscribed. No further administrative proceedings are available, and the Tribunal itself has virtually no funds left to pay any claim. A0988. The court, in short, failed to understand that ripeness focuses on the concreteness of the injury suffered by the plaintiff, *Ciba-Geigy v. EPA*, 46 F.3d 1208, 1210

(D.C. Cir. 1995), not the timing of the defendant's obligation to pay after that harm has been completed and the amount of loss determined.

In any event, the trial court's desire for "action" by Congress has been satisfied. A0033. Eight years have passed since the Changed Circumstances petition was submitted, and five years since even a token payment of compensation was made. The lack of any legislative response over that lengthy period of time amounts to a constructive refusal to pay compensation and a denial of the Changed Circumstances petition. *See Cherokee Nation*, 135 U.S. at 660 ("[F]ailing to pay [an award] within a *reasonable time* after the compensation is finally determined" will render the agency taking the land "a trespasser") (emphasis added); *cf. Palazzolo*, 533 U.S. at 626 ("[F]ederal ripeness rules do not require the submission of further and futile applications.").[10]

In short, the Bikinians' Just Compensation Clause claims are ripe because no more administrative proceedings or concrete setting is needed to determine what the government owes or that the token

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[10] *See also Groome Resource Ltd. v. Jefferson Parish*, 234 F.3d 192, 199-200 (5th Cir. 2000) (failure to act on permit application for 95 days results in constructive denial because the "unjustified and indeterminate delay had the same effect" as a denial).

payment made by the Tribunal is inadequate. The constitutional violation has occurred, and nothing in ripeness doctrine requires plaintiffs, whose claims have been adjudicated in the forum of the government's choice and design, to stand for decades, hat in hand, waiting to be told "no."[11]

II. COUNT I STATES A VALID JUST COMPENSATION CLAUSE CLAIM.

Count I of the complaint properly alleges a Fifth Amendment takings claim based on the government's failure to pay adequate compensation or, put another way, the decision to pay only inadequate compensation. This Court has held on many occasions that government inaction may violate the Fifth Amendment's Just Compensation Clause. *See, e.g.*, *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1351 (Fed. Cir. 2004) ("extraordinary delay" in granting permits gives rise to taking), *cert. denied*, 543 U.S. 1188 (2005); *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1349-1350 (Fed. Cir. 2002) (same), *cert. denied*, 538 U.S. 906 (2003). Indeed, because the very essence of a Fifth

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[11] Ironically, the Court of Federal Claims held that the pendency of the Changed Circumstances petition meant that the takings claim in Count I was filed too late, not too early. A0031. In any event, that claim is also ripe for review, for all of the reasons that Count V is ripe.

Amendment violation is the failure to pay just compensation, *see, e.g., Williamson, supra*, the constitutional prohibition itself is framed in terms of governmental inaction, rather than action.

Accordingly, the Court of Federal Claims' holding that Count I fails to state a Just Compensation Clause claim because the Bikinians did not plead an "affirmative government act that deprive[d] them of any property interest in additional funding," A0041, is wrong, for all of the reasons discussed in Point I, *supra*. The government acknowledged a duty to compensate in the Compact, created a forum to determine compensation, and compelled the courts to divert the Bikinians' existing constitutional claims into the Tribunal. Having done all of that, Congress did not even provide nominal, let alone just, compensation for the enormous losses suffered by the Bikinians.

The trial court's reliance on *D.R. Smalley & Sons, Inc. v. United States*, 372 F.2d 505 (Ct. Cl.), *cert. denied*, 389 U.S. 835 (1967), is misplaced. That decision addressed whether an alleged taking by the State of Ohio could be transformed into a taking by the United States simply because the latter provided funding for the highway project. *Id.* at 506, 508. That case had nothing to do with the denial of just

compensation and, in any event, did not purport to adopt an "affirmative act" requirement for all Just Compensation Clause claims. Nor is it relevant that Congress did not expressly "guarantee plaintiffs additional funding," A0041, because a taking can occur without a breach of promise. *Seaboard Air Line Ry. v. United States*, 261 U.S. 299, 304 (1923) (Fifth Amendment claim exists regardless of whether there was a "promise to pay"). The Bikinians have alleged a property interest in their claims before the Tribunal, and government conduct that destroys almost all of the value of their property interest. No more is required.

III. THE CLAIMS FOR JUST COMPENSATION ARE JUSTICIABLE.

A. Adjudicating The Bikinians' Just Compensation Clause Claims Is A Quintessential Judicial Function.

Under the Constitution's separation of powers, "it is emphatically the province and duty of the judicial department to say what the law is" and to apply the Constitution's commands to individual cases. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The Fifth Amendment is no exception. In fact, adjudicating Just Compensation Clause claims – and, in particular, determining just compensation under the

Constitution – is a core judicial function. *See United States v. New River Collieries Co.*, 262 U.S. 341, 343-344 (1923) ("The ascertainment of compensation is a judicial function."); *Langenegger v. United States*, 756 F.2d 1565, 1569 (Fed. Cir.), *cert. denied*, 474 U.S. 824 (1985).

Indeed, the issue is so quintessentially judicial that the Constitution precludes congressional displacement of the court's role. "It does not rest with [Congress] to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry." *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 327 (1893); *see Kohl v. United States*, 91 U.S. 367, 376 (1875) ("It is quite immaterial that Congress has not enacted that the compensation shall be ascertained in a judicial proceeding. That ascertainment is in its nature at least quasi judicial.").[12] The duty to determine Fifth Amendment rights, moreover, extends to "alien friend[s]" as much as to citizens. *See Russian Volunteer Fleet*, 282 U.S. at 492.

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[12] *See also Gulf Power Co. v. United States*, 187 F.3d 1324, 1333 (11th Cir. 1999) ("[I]t is ultimately the responsibility of the judicial branch to ensure that the compensation awarded for a taking satisfies the constitutional standard of just compensation.").

The interpretation of treaties likewise falls squarely within the judicial province. Treaties are part of the law of the United States, U.S. Const. Art. VI, cl. 2, and, consequently, "determining their meaning as a matter of federal law" is a judicial responsibility, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2684 (2006) (Vienna Convention); *see also Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986) ("[T]he courts have the authority to construe treaties and executive agreements."); *Cummins Inc. v. United States*, 454 F.3d 1361, 1366 (Fed. Cir. 2006). Courts likewise routinely interpret international agreements, like the Section 177 Agreement at issue here.[13]

Despite the inherently judicial character of the Bikinians' Fifth Amendment claim for just compensation, the trial court held that the issue was a non-justiciable political question because it might "impinge on the conduct of foreign affairs," A0065, and would require the resolution of "complex issues of fact to determine whether the [Tribunal]'s award constitutes just compensation and whether the

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[13] *See, e.g.*, *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 177-187 (1993); *United States v. Alvarez-Machain*, 504 U.S. 655, 663-670 (1992).

United States is obligated to pay just compensation," A0064. That was wrong.

B. The Payment Of Just Compensation Would Not Involve Foreign Policy Judgments.

Contrary to the Court of Claims' approach, a claim does not become a political question just because it arises in a context that potentially implicates or could "impinge[]" upon foreign relations (A0065). As the Supreme Court explained, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker v. Carr*, 369 U.S. 186, 211 (1962). Indeed, the Constitution commands the federal judiciary to entertain the claims of foreign governments and foreign ambassadors. U.S. Const. Art. III, § 2. Courts, moreover, have a "virtually unflagging obligation to exercise the jurisdiction given them," *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

Accordingly, only when the particular issue presented for resolution requires courts to take a position on matters that are constitutionally assigned to the Political Branches may courts decline to exercise their assigned jurisdiction on political question grounds. "The doctrine * * * is one of 'political questions,' not one of 'political cases,'"

and "courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." *Department of Commerce v. Montana*, 503 U.S. 442, 456-457 (1992). The adjudication of the Bikinians' Just Compensation Clause claims does not pose any such political question. Indeed, "[t]he courts have traditionally considered land taking claims, and the Constitution does not provide for a foreign affairs exception." *Langenegger*, 756 F.2d at 1569. The trial court's contrary holding is wrong for three reasons.

1. The Bikinians Are Not Foreigners.

The trial court's starting premise was wrong. At the time of the Agreement's negotiation and adoption, the Bikinians were not foreign strangers to the United States. To the contrary, they were wards of the United States' trusteeship in territory that was occupied and controlled by the United States. A0072-76.[14] Even now, the Marshall Islands remain in close political association with the United States. A0980. Marshallese citizens serve in all branches of the United States armed

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[14] *See* 131 Cong. Rec. H 11838 (daily ed. Dec. 11, 1985) (Rep. Seiberling) (noting "the unique relationship of the United States to the Marshall Islanders under the U.N. trusteeship agreement").

forces, and are currently serving in Iraq and Afghanistan.[15] The Marshallese do not need a visa to enter the United States, A0980, and, like the States, receive federal funding for Head Start programs and Pell Grants, Thornburgh Report at 9 n.17. If the political question doctrine does not bar courts from addressing the treatment of detained foreign enemy combatants in a time of war when they are held on "territory over which the United States exercises exclusive jurisdiction and control," *Rasul v. Bush*, 542 U.S. 466, 476 (2004), then neither should it bar the more humble question of just compensation when the United States destroys the property of its dependents.

2. No Foreign Policy Issues Need To Be Resolved.

As the Supreme Court's decision in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), demonstrates, the political question doctrine focuses on the substance of the particular issue presented for decision, not the political repercussions of the case. In *Dames & Moore*, the Supreme Court addressed the President's authority, during a time of national emergency, to nullify property interests in Iranian property, to order property in the United States to be released to Iran, and to suspend

[15] *See* Testimony of C. Steven McGann, Acting Deputy Assistant Secretary for East Asian and Pacific Affairs, July 25, 2007

pending claims against Iran. *Id.* at 660, 662. The Court issued its decision concerning the President's power to "respon[d] to international crises," *id.* at 669, moreover, at a time when the question had its greatest sensitivity for relations between Iran and the United States, *id.* at 665, 667. The Court acknowledged that, "in affairs between nations, outstanding claims by nationals of one country [can be] sources of friction between the two sovereigns," and that "international agreements settling claims by nationals of one state against the government of another are established international practice." *Id.* at 679. The issues decided in *Dames & Moore* thus had profound implications for the Executive Department's inherently political decision to recognize a foreign government, and a ruling adverse to the President's powers would have largely unraveled an acutely sensitive international agreement negotiated as part of freeing American hostages.

The Supreme Court nevertheless perceived no political question barrier to its determination of whether the President had the statutory and constitutional power to implement the commitments he had made to the Iranian government. That is because, while the case was

politically volatile, the questions presented for judicial resolution were ones of statutory and constitutional interpretation, and thus were consummately judicial, not political, questions. *Id.* at 678-688.

Likewise, in *Japan Whaling*, the Supreme Court discerned no justiciability barrier to adjudicating the terms of an international treaty that could have resulted in the imposition of sanctions on a foreign government. Because the answer to the question of the treaty's scope entailed the routine interpretation of a treaty's terms, rather than "policy choices and value determinations constitutionally committed for resolution" to another branch, no political question was raised. 478 U.S. at 230. "One of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." *Ibid.*; *see Langenegger,* 756 F.2d at 1569 (holding that Americans' claims against the government of El Salvador for a taking of property in El Salvador were justiciable; claims did not "require a judicial determination of El

Salvador's sovereignty" or "question the executive's authority to undertake any action").[16]

The trial court's finding that the Bikinians' claim for just compensation is nonjusticiable cannot be reconciled with *Dames & Moore, Japan Whaling,* and, in particular, *Langenegger*'s holding that there is no "foreign affairs exception" to the courts' traditional adjudication of Fifth Amendment claims. The Bikinians' just compensation claim does not require questioning the United States' recognition two decades ago of the Republic of the Marshall Islands. Nor does the claim undermine the validity of the Compact or the Section 177 Agreement. Moreover, unlike the plaintiff in *Dames & Moore*, 453 U.S. at 666, the Bikinians do not seek to enjoin Executive Branch action. Payment of just compensation likewise will not adversely affect continuing relations with the Marshall Islands, whereas the relief sought in *Dames & Moore* directly threatened ties with Iran.

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[16] *See also Chang v. United States*, 859 F.2d 893, 896 n.3 (Fed. Cir. 1988) (allegation that sanctions imposed on Libya effected a taking were justiciable as long as the suit did not seek to examine the President's "motives and justifications" for declaring an emergency); *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 934-935 (D.C. Cir. 1988) (challenge to United States' support of Nicaraguan contras, and request for injunctive and declaratory relief, justiciable).

The central purpose of the Fifth Amendment's guarantee of just compensation is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see Monongahela*, 148 U.S. at 325 (Fifth Amendment "prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him"). That is all the Bikinians seek as well, and that determination would not entail any political judgments or contest any foreign policy decisions. Rather, all the Bikinians argue is that the cost of those political decisions – decisions made to advance the interests and security of the United States as a whole – should be borne by the public as a whole, and not just by a few hundred displaced Bikinians.

That foundational question of whether, "in all fairness and justice," the costs of the United States' nuclear testing program and its dealings with the Marshall Islands should be borne by the Bikinians or the United States is fully amenable to judicial resolution. That is why

the Supreme Court in *Dames & Moore* found "no jurisdictional obstacle" to a Tucker Act suit for just compensation for the takings of private property that the President's actions had caused. 453 U.S. at 689-690. And that is why Justice Powell stressed that "[t]he Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts." *Id.* at 691 (Powell, J., concurring & dissenting in part).

The trial court's attempt to distinguish *Dames & Moore* on the ground that the plaintiff there was a United States citizen fails. A0062. The political question doctrine turns upon the questions raised in litigation, not on who raises them. *See Baker,* 369 U.S. at 215 n.43 (whether a claim brought by an Indian Tribe was a political question turned upon content of the claim, not identity of the plaintiff).[17] Nor does the Bikinians' status have any bearing on the fairness and justice of forcing a handful of displaced persons to bear alone the cost of

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[17] *See also Citizens Living in Nicaragua*, 859 F.2d at 934 ("Reliance on this doctrine should not depend on what type of party raises an issue."); *accord* U.S. Const. Art. III, § 2 (federal judiciary has jurisdiction over claims brought by foreign governments and foreign ambassadors); *Rasul*, *supra* (adjudicating claims brought by foreign enemy combatants); *Russian Fleet*, 282 U.S. at 489-491 (adjudicating takings claim of foreign national).

promoting the United States' national security and diplomatic relations. *Russian Fleet*, 282 U.S. at 491 (denying compensation to foreign national would be "anomalous").[18]

3. Exercising Jurisdiction Is Consistent With *Belmont* And *Pink*.

Finally, the trial court's reliance (A0063) on *United States v. Belmont*, 301 U.S. 324 (1937), and *United States v. Pink*, 315 U.S. 203 (1942), is misplaced. Both of those cases involved challenges to the terms on which the United States had recognized the Soviet Union and, in particular, to the United States' agreement to collect, as assignee of the Soviet government, property in the United States that the Soviet regime had nationalized. *See Pink*, 315 U.S. at 210-211; *Belmont*, 301 U.S. at 325. The Supreme Court held in both cases that challenges to the United States' recovery of property were non-justiciable because they sought to limit the President's power to recognize foreign governments. *See Pink*, 315 U.S. at 229; *Belmont*, 301 U.S. at 330.

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[18] The trial court's holding that the Bikinians "participated in * * * the negotiation of the Compact through their representatives," A0062, has no bearing on the political question analysis. The same was true in *Dames & Moore*: the agreement there was negotiated by the American corporation's duly elected President.

Those cases offer no support for the judgment here. First, in *Belmont*, the party challenging the United States' actions was a mere custodian of the property being collected, not its owner. 301 U.S. at 332. "[N]o question under the Fifth Amendment [was] involved," *ibid.*, and the Court expressly left open whether the owner could bring a takings claim, *id.* at 330.

Second, in both cases, the federal government's actions disposed of disputes between American nationals and the *foreign government*, arising out of a Soviet nationalization decree, which had been "one of the barriers to recognition of the Soviet regime." *Pink*, 315 U.S. at 227. Resolution of "all outstanding problems" that the United States and its nationals have with a foreign government is, the Supreme Court explained, "a political rather than a judicial question," implicating "the delicate problems of foreign relations." *Id.* at 229. Indeed, in *Dames & Moore*, the Supreme Court cited *Pink* as establishing that claims "by nationals of one country *against the government of another country*" can be "sources of friction between the two sovereigns" that may be settled through international agreements. 453 U.S. at 679 (emphasis added). When, as in *Pink*, the dispute arises from a conflict between an

American national and a foreign government, relief could not be granted without breaching the United States' commitments to the foreign government and the terms of their recognition. *Pink*, 315 U.S. at 230 ("Recognition and the Litvinov Assignment were interdependent. We would usurp the executive function if we held that that decision was not final and conclusive in the courts."); *id.* at 222-223 (governmental decisions that validate foreign government's acts are political questions).

Here, by contrast, the claims at issue were made by wards and dependents of the United States *against the United States*. Those claims were not an irritant to the Marshall Islands government or an "obstacle" to the United States' recognition of a new government. *Pink*, 315 U.S. at 219. How the United States attempts to dispose of claims leveled against *itself* by its own dependents – to whom it bore fiduciary obligations – is a question of domestic policy, not foreign policy.

Finally, unlike *Belmont* and *Pink*, nothing about this case challenges the United States' recognition of foreign governments or the terms of such recognition. The Political Branches' foreign policy

decisions are not being challenged, and hence there is no political question.

C. The Interpretation Of An International Agreement Is A Judicial Question, Not A Political Question.

The trial court's concern that the Bikinians' claims would entail the resolution of "complex issues of fact" (A0064) likewise does not give rise to a political question. Whether a question is political turns not upon its complexity, but on its content. Political questions are "controversies which revolve around policy choices and value determinations" concerning "matters not legal in nature." *Japan Whaling*, 478 U.S. at 230. There is nothing political or non-justiciable about calculating the value of lost land or lost choses in action and determining whether just compensation has been paid. Those claims are "legal in nature," *ibid.*, and courts make those types of calculations every day in takings cases. The question in this case, at bottom, is not a dispute over "policy choices," *ibid.*, but over who should bear the cost of those policy choices: the Bikinians alone or, "in all fairness and justice, * * * the public as a whole," *Armstrong*, 364 U.S. at 49.

In any event, the court's assumption that such calculations would be required is erroneous. First, in the Compact, the United States

admitted and accepted its responsibility to compensate the Bikinians for their property losses, and chose to have the amount of its liability – the value of the Bikinians' claims – determined by the Tribunal. The Tribunal has now made that calculation. Nothing in the Bikinians' claims requires revisiting the Tribunal's judgment. Quite the opposite, their claim accepts the Tribunal's determination and, having derailed the Bikinians' earlier attempt to obtain a judicial determination of just compensation in favor of a Tribunal proceeding, *see Juda*, 13 Cl. Ct. 667, the United States is estopped from denying a judicial forum now on the ground that the Tribunal's determination should be disregarded. *See San Carlos Irrigation & Drainage Dist. v. United States*, 111 F.3d 1557, 1568 (Fed. Cir. 1997) ("[W]here a party successfully urges a particular position in a legal proceeding, it is estopped from taking a contrary position in a subsequent proceeding where its interests have changed.") (citations omitted); *see also New Hampshire v. Maine*, 532 U.S. 742, 749 (2001).

The trial court stressed that the case would entail "examination of the terms of the international compact between the two governments." A0064. Perhaps, but that is a commonplace judicial task. If the

judiciary is suited to the task of examining the Vienna Convention, *Sanchez-Llamas*; *see also Medellin v. Texas*, No. 06-984 (S. Ct.) (argued Oct. 10, 2007), the Warsaw Convention, *see Olympic Airways v. Husain*, 540 U.S. 644 (2004), the International Convention for the Regulation of Whaling, *see Japan Whaling*, and the hostage-release agreement between Iran and the United States, *see Dames & Moore*, then it is equally suited to the task of interpreting the Section 177 Agreement.

The court also expressed concern that entertaining the Bikinians' claims would "run counter to the final resolution of all plaintiffs' claims embodied in the Compact and the Section 177 Agreement." A0063. But that reasoning assumes an (erroneous) answer on the merits concerning the scope of the Agreement. The court, in other words, undertook the very interpretive task it claimed to eschew, by making a decision on the merits of the Agreement's scope that "reflects the *exercise* of judicial review, rather than the *abstention* from judicial review that would be appropriate in the case of a true political question." *Montana*, 503 U.S. at 458.

In any event, the court's concern is misplaced. The Compact and Agreement were not themselves the "final settlement" of the Bikinians'

claims. Rather, they set in place a mechanism – the Tribunal proceeding – for finally determining those claims. Both this Court and the trial court indicated that constitutional challenges to the outcome of that process could be brought following the conclusion of those proceedings. *Enewetak*, 864 F.2d at 136-137; *Juda*, 13 Cl. Ct. at 689. That is all the Bikinians seek to do.[19]

Finally, the court's concern (A0062) that Congress might act independently to redress a taking by appropriating additional funds has no bearing on justiciability. That possibility exists in every takings case. *If* Congress passed such an appropriation, the Bikinians' claims might be mooted. But the mere potential – unrealized in fact – of a congressional response does not render the claim non-justiciable.

IV. THE COURT OF FEDERAL CLAIMS HAD JURISDICTION OVER THE BIKINIANS' JUST COMPENSATION CLAUSE CLAIMS.

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[19] The trial court's reliance (A0063) on Chief Judge Wald's concurring opinion in *Antolok v. United States*, 873 F.2d 369 (D.C. Cir. 1989), was misplaced. The *Antolok* plaintiffs challenged the adequacy of the Republic of the Marshall Islands' representation of them and of the initial $150,000,000 appropriation. Chief Judge Wald found those arguments to be nonjusticiable because the plaintiffs' dispute was primarily with their government, not with the United States. *Id.* at 392. The *Antolok* plaintiffs also sought a final determination of their claims by the court, rather than the Tribunal. *Id.* at 372. The Bikinians' claim, by contrast, accepts the Tribunal's determination of the validity of their claim and their value. Their complaint is with the conduct of the United States following that determination.

A. The Constitution And Federal Law Provide Federal Court Jurisdiction Over The Bikinians' Just Compensation Clause Claims.

The Court of Federal Claims held that the Section 177 Agreement withdrew jurisdiction over the Bikinians' claims for just compensation. A0052-53. That was incorrect. The Agreement did no such thing, nor could it have, because Congress has no power to foreclose all review of constitutional claims.

. Adjudicating constitutional claims for just compensation falls squarely within the long-established jurisdiction of the federal courts. The Tucker Act vests the Court of Federal Claims with jurisdiction over claims against the United States founded upon the Constitution, including Fifth Amendment claims for just compensation, *see, e.g., United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 (1985).

Furthermore, even if there were no Tucker Act, the Constitution itself would require a judicial forum for the Fifth Amendment takings claim. As both the Supreme Court and this Court have repeatedly held, the Fifth Amendment's assurance of just compensation is "self-executing." *See First English Evangelical Lutheran Church v. County of*

Los Angeles, 482 U.S. 304, 315 (1987); *United States v. Clarke*, 445 U.S. 253, 257 (1980); *Hair v. United States*, 350 F.3d 1253, 1257 (Fed. Cir. 2003). As a result, "[s]tatutory recognition [i]s not necessary," *Jacobs*, 290 U.S. at 16, nor is a congressional "promise to pay," *Seaboard*, 261 U.S. at 304. The suit "rest[s] upon the Fifth Amendment" itself, which Congress is powerless to change. *First English*, 482 U.S. at 315; *see id.* at 316 ("[This] Court has repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution."); *Baltimore & Ohio R.R. Co. v. United States*, 298 U.S. 349, 364-365 (1936) (foreclosing altogether "an investigation by judicial machinery * * * [is] in violation of the constitution of the United States"); *Broughton Lumber Co. v. Yeutter*, 939 F.2d 1547, 1556 (Fed. Cir. 1991). Indeed, prior to the passage of the Tucker Act, the Supreme Court concluded that the circuit courts had jurisdiction to hear takings suits where no alternative avenue for appropriate relief had been provided, notwithstanding the absence of statutory jurisdiction. *See Kohl v. United States*, 91 U.S. 367, 376 (1875).[20]

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[20] *See also Baltimore & Ohio R.R.*, 298 U.S. at 364 ("Congress has no power to make final determination of just compensation or to prescribe what constitutes due process of law for its ascertainment."); *cf. Duke Power Co. v. Carolina Envt'l Study*

To be sure, Congress may create alternative compensation schemes for Fifth Amendment takings, like the Tribunal, but the courts remain available to remedy any shortfall because "[t]he just compensation clause may not be evaded or impaired by any form of legislation." *Baltimore & Ohio R.R.*, 298 U.S. at 368. In particular, "Congress may not directly or through any legislative agency finally determine the amount [of just compensation] that is safeguarded to" the owner of taken property by the Fifth Amendment. *Ibid.* In *Kirby Forest Industries*, for example, the Supreme Court recognized that a specially designated commission's award fell short of the Constitution's measure of just compensation and that the shortfall gave rise to a Just Compensation Clause claim in federal court. 467 U.S. at 16-18.

That same rule applies to shortfalls in the compensation awarded by international tribunals. *See, e.g., Dames & Moore*, 453 U.S. at 691 (Powell, J., concurring & dissenting in part) ("[P]arties whose valid claims are not adjudicated or not fully paid [by a claims tribunal] may bring a 'taking' claim against the United States in the Court of

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Group., Inc., 438 U.S. 59, 71 n.15 (1978) (takings jurisdiction would lie in the district courts where Congress capped the recovery available under the Tucker Act).

Claims").[21] In a closely analogous case, the D.C. Circuit held that Congress could not withdraw jurisdiction over a constitutional challenge to a statute that precluded any review of a commission's awards to Micronesian nationals for losses they sustained during World War II. "'[T]here cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law.'" *Ralpho v. Bell*, 569 F.2d 607, 618-619 (D.C. Cir. 1977) (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 669 n.5 (1974)). Indeed, it would be "daring to suggest that Congress, though subject to the checks and balances of the Constitution, may create a subordinate body free from those constraints." *Id.* at 620; *see First English*, 482 U.S. at 321 (once government has effected a taking, "no subsequent action by the government can relieve it of the duty to provide compensation"). It would be equally daring – and wrong – to

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[21] *See Behring*, 699 F.2d at 665 n.5 (if claims tribunal does not "make [plaintiffs] whole," takings claim could be addressed in federal court); c*f. McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 590 (9th Cir. 1983) (equitable remedies against the inadequacy of tribunal not warranted because the "availability of redress in the Claims Court satisfies the constitutional requirement of an adequate provision for compensation"), *cert. denied*, 469 U.S. 880 (1984).

declare the Tribunal's proceedings to be completely immunized from constitutional review.[22]

B. The Agreement Preserved Constitutional Jurisdiction Over Claims Arising From The Tribunal's Operation.

The Court of Federal Claims held that the Section 177 Agreement had withdrawn all federal jurisdiction to adjudicate whether the government took without just compensation the Bikinians' claims before the Tribunal (Count I).[23] A0052-53. The complete preclusion of judicial review of a constitutional claim would be an extraordinary legislative measure, and one of grave constitutional infirmity, if that is what the statutory text commanded. This statute does not.

1. Constitutionally Dubious Readings Of Text Must Be Avoided.

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[22] *See also Bartlett v. Bowen*, 816 F.2d 695, 703 (D.C. Cir.) ("[A] statutory provision precluding *all* judicial review of constitutional issues * * * would be [an] unconstitutional infringement of due process."), *opinion reinstated and grant of rehearing en banc vacated*, 824 F.2d 1240 (1987); *Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir.) ("[W]hile Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as * * * to take private property without just compensation"), *cert. denied*, 335 U.S. 887 (1948).

[23] The court did not address whether jurisdiction over the taking of Bikini Atoll (Count V) had been withdrawn. A0054. The court also mistakenly read Count I as alleging only the taking of "implied-in-fact contract claims." A0052. That Count, however, alleges that *all* of the Bikinians' claims before the Tribunal were taken without just compensation, including the Fifth Amendment claims.

The starting point in reading the Agreement is the "elementary" rule that "every reasonable construction must be resorted to[] in order to save a statute from unconstitutionality." *Gonzales v. Carhart*, 127 S. Ct. 1610, 1631 (2007). Accordingly, "[w]hen deciding which of two plausible statutory constructions to adopt, * * * [i]f one of them would raise a multitude of constitutional problems, the other should prevail." *Clark v. Martinez*, 543 U.S. 371, 380-381 (2005); *see also INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) ("[I]if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems."); *Paice LLC v. Toyota Motor Corp.*, 504 F.3d 1293, 1315 n.16 (Fed. Cir. 2007).

Because the Fifth Amendment itself requires judicial relief for takings claims, reading the Agreement to preclude all federal court jurisdiction over the Bikinians' claims would raise a profoundly "serious constitutional question." *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986). Indeed, in *Blanchette v. Connecticut General Insurance Corporations*, 419 U.S. 102 (1974), the Supreme Court refused to read a statute as repealing a Tucker Act

takings remedy because it had "grave doubts whether the Rail Act would be constitutional if a Tucker Act remedy were not available as compensation for any unconstitutional erosion not compensated under the Act itself." *Id*. at 134; *see also Weinberger v. Salfi*, 422 U.S. 749, 762 (1975) (same); *Johnson v. Robison*, 415 U.S. 361, 366 (1974) ("Such a construction would, of course, raise serious questions concerning the constitutionality" of the law).

Because of its constitutional consequences, courts enforce a "strong presumption" against the preclusion of judicial review, *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975), which can only be overcome by "clear and convincing evidence," *Califano v. Sanders*, 430 U.S. 99, 109 (1977).[24] There is no clear and convincing evidence in the Agreement of an intent to withdraw jurisdiction over constitutional claims arising from the Tribunal process itself.

2. The Text Does Not Specifically Address Claims Arising From The Tribunal Process.

24 *See also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984) (only where congressional intent is "unambiguous" will repeal of Tucker Act jurisdiction over takings claims be found); *Blanchette*, 419 U.S. at 133 (ambiguity requires that statute be read to preserve, not withdraw, jurisdiction); *Holley v. United States*, 124 F.3d 1462, 1467 (Fed. Cir. 1997).

Article X of the Section 177 Agreement provides that the Agreement's provisions "constitute[] the full settlement of all claims, past, present, and future" of the Marshallese "which are based upon, arise out of, or are in any way related to the Nuclear Testing Program * * * which may be pending or which may be filed in any court or other judicial or administrative forum." A0236. Article XII of the Agreement further provides that "[a]ll claims described in Articles X and XI of this Agreement shall be terminated," that "[n]o court of the United States shall have jurisdiction to entertain such claims, and any such claims pending in the courts of the United States shall be dismissed." A0237. That text is most fairly read as requiring that all claims be brought before the Tribunal as an initial matter, but it is not "clear and convincing evidence" of an intent to foreclose all constitutional challenges to the adequacy of the Tribunal's processes and awards.

First, the withdrawal of jurisdiction in Article XII is limited to claims that are "based upon, arising out of, or in any way related to the nuclear testing program." That text does not naturally, let alone "clearly and convincingly," encompass constitutional claims that independently arise through the operation of the Tribunal process. It

does not logically embrace, for example, claims that would arise if the Tribunal's processes had denied the Bikinians basic due process (such as an unbiased decisionmaker, *Tumey v. Ohio*, 273 U.S. 510 (1927)), or if the United States had withdrawn funding for the Tribunal's operations in the middle of the proceedings. Likewise, here, Count I seeks relief for the United States' failure to pay the compensation ordered by the Tribunal in 2002, not for any activity that arose out of the government's nuclear testing program a half century earlier.

Second, the withdrawal of jurisdiction in Article XII is expressly limited to "claims described in Article X and XI." It is Article IV, however, and not Article X and XI that creates the Tribunal and defines the "final determinations" it is expected to render. Article IV, moreover, vests the Tribunal with authority not only to determine claims arising from the nuclear testing program, but also to resolve "disputes arising from distributions under Article II and III." The withdrawal of jurisdiction in Article XII pointedly does *not* include the Tribunal's resolution of claims arising from the distribution of awards. Accordingly, when Article IV and Article XII are read together, the language of the Agreement is silent about federal jurisdiction over

claims arising from the Tribunal's proceedings in general, and its structure indicates that disputes over problems arising from the payment – or non-payment – of funds in particular were to be differentiated from claims arising from the nuclear testing program. Moreover, the contrary reading – that the Article X claims "related to the nuclear testing program" encompasses claims related to the Tribunal's processes and decisions – would make the Tribunal the final adjudicator of its own compliance with the Constitution's commands, which would be contrary to the most elementary constitutional command. *See Marbury*, 5 U.S. at 177.

Third, the Agreement's withdrawal of jurisdiction speaks only to claims that were "terminated" by the Agreement's creation of the Tribunal. As a matter of ordinary usage, only existing claims can be "terminated." *See, e.g., Webster's Third New Int'l Dictionary* 2359 (1971) (defining "terminate" as "to bring to an ending or conclusion or cause to come to an end"). In addition, the withdrawal of jurisdiction in the second sentence of Article XII applies only to "such claims" as have been terminated. Article XII's language thus is designed primarily to ensure that all claims pending in court at the time of the Agreement are

"terminated" and the claimants then channeled into the Tribunal process, as an initial matter, for determination of their claims.[25] The text does not take the next and necessary step of declaring that any constitutional challenges to the Tribunal process that might arise in the future are peremptorily terminated or foreclosed from judicial review.

Fourth, the Agreement charged the Tribunal only with making a "final determination" of the Bikinians' claims for compensation, not with enforcing the United States' compliance with its awards or its constitutional obligations following such a determination. Art. IV, § 1(a). The Agreement, in fact, denied the Tribunal any jurisdiction over the United States and its officers. *Ibid.* The power to "determine[e]" claims extends only to "settl[ing] or decid[ing] by choice of alternatives or possibilities" the amount (if any) owed, *Black's Law Dictionary* 450 (6th ed. 1990), not to enforcing the judgment, *ibid.*; *see Young Engineers, Inc. v. International Trade Comm'n*, 721 F.2d 1305, 1312 (Fed. Cir. 1983) ("determination" in statute "means only the conclusion that there is a violation or no violation," and does not include

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[25] The reference in Article XII to "future" claims serves to ensure prospectively that future claims are steered to the Tribunal for initial determination.

the issuance of "remedy orders"). Thus, the Tribunal process was designed only to determine the validity and value of claims, not to address the constitutional consequences of the United States' failure to comply with the Tribunal's determinations.[26]

In *Monsanto*, the Supreme Court held that a Just Compensation Clause claim under the Tucker Act remained available following exhaustion of an administrative remedy, even though the statute creating the procedure provided that any party that failed to comply with the administrative decision would "forfeit [its] right to compensation." 467 U.S. at 1018. The Supreme Court explained that, "absent a clearly expressed congressional intention to the contrary," "it is the duty of the courts" to read the Tucker Act and other statutes establishing administrative procedures for Just Compensation Clause claims as "capable of co-existence." *Ibid*. Likewise here, the Agreement

[26] Nor did the initial allocation of $45.75 million to the Tribunal for the payment of monetary awards, A0229, cap the United States' financial obligation. That reading would be inconsistent with (i) this Court's understanding that the payment was only an "initial sum," 864 F.2d at 135, (ii) the government's statements to this Court that the adequacy of the Tribunal's awards could not be pre-determined, and (iii) the United States' unequivocal acceptance of responsibility for compensation in Section 177(a).

and the Constitution's command of a judicial forum for Just Compensation Clause claims must be read as capable of co-existence.

Notably, this Court in *Enewetak* left open the opportunity for judicial review following the Tribunal process, *see* 864 F.2d at 136 (judicial review not appropriate "at this time"), as did the D.C. Circuit in *Antolok*, 873 F.2d at 378 ("If there is an uncompensated or inadequately compensated taking, then plaintiffs' remedy is in the Claims Court"), and the trial court in *Juda*, 13 Cl. Ct. at 689 (challenge to Tribunal's processes "premature"). If the statutory text were as clear and convincing as the Constitution demands for a withdrawal of jurisdiction, surely at least one court would have noticed. And in the absence of such clarity, jurisdiction to enforce the Fifth Amendment remains exactly where the Constitution leaves it: with the federal judiciary. *See*, *e.g.*, *Jacobs*, 290 U.S. at 16.

3. No Precedent Supports Withdrawal of Jurisdiction.

The Court of Federal Claims concluded that the withdrawal of jurisdiction was not constitutionally troublesome because *Lynch v. United States*, *supra*, permits Congress to abolish all review of Just Compensation Clause claims. A0052. But *Lynch* did the opposite,

holding that a statute that canceled insurance contracts did not limit Tucker Act jurisdiction. 292 U.S. at 583 ("Congress did not aim at the remedy."). To the extent the decision broadly implied that Congress could withdraw jurisdiction over constitutional claims, *id.* at 581-582, that language was dicta – and dicta that has been repudiated by subsequent precedent. In *Blanchette*, the Supreme Court, while citing to *Lynch*, expressed "grave doubts" concerning the constitutionality of an Act that withdrew jurisdiction over claims for just compensation. *Id.* at 134. The Court stressed "the general principle that the courts, not the legislature, are ultimately entrusted with assuring compliance with the Constitution's commands. *Id.* at 151 n.39; *see also Jacobs*, 290 U.S. at 16.

Lynch, moreover, involved the review of contract claims against the United States, 292 U.S. at 582, which ordinarily are not Fifth Amendment claims. *See id.* at 579 ("When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."); *see also Hughes Commc'ns. Galaxy, Inc. v. United States*, 271 F.3d 1060, 1070 (Fed. Cir. 2001). *Lynch* thus provides no authority

for the trial court's holding that jurisdiction over Just Compensation Clause claims can constitutionally be withdrawn, and does not speak to the question of whether statutes should be construed to avoid such a constitutional quagmire in the first place.[27]

The trial court's reliance on *Gold Bondholders Protective Council, Inc. v. United States*, 676 F.2d 643 (Ct. Cl.), *cert. denied*, 459 U.S. 968 (1982), fares no better. That case also concerned jurisdiction over contract, rather than takings, claims. *Id.* at 311-312. In any event, more recent decisions of the Supreme Court and this Court have made clear that withdrawing jurisdiction over constitutional claims is impermissible or, at a minimum, sufficiently constitutionally troublesome to require construing a statute to avoid such a result. *See, e.g.*, *First English*, 482 U.S. at 315; *Hair*, 350 F.3d at 1257 (1977); *cf. Acceptance Ins. Cos. v. United States*, 503 F.3d 1328, 1336 (Fed. Cir. 2007) ("unambiguous congressional intent" needed "to displace the

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[27] The sole precedent cited in *Lynch* for the suggestion that Congress might be able to withdraw jurisdiction over takings claims was *Schillinger v. United States*, 155 U.S. 163 (1894), which held that Congress had not waived sovereign immunity for patent infringement suits. Patent infringement claims, however, are torts, not Fifth Amendment takings, as *Schillinger* recognized, *id.* at 168. *See also Zoltek Corp. v. United States*, 442 F.3d 1345, 1352-1353 (Fed. Cir. 2006), *cert. denied*, 127 S. Ct. 2936 (2007).

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Tucker Act's waiver of sovereign immunity."); *Nyeholt v. Secretary of Veterans Affairs*, 298 F.3d 1350, 1355 (Fed. Cir. 2002) (silence in jurisdictional provision should be construed to preserve judicial review of constitutional questions), *cert. denied*, 537 U.S. 1109 (2003).

C. Because Of The United States' Trust Responsibilities, The Agreement Must Be Construed In Favor Of The Bikinians.

Ambiguity in the scope of the Agreement's withdrawal of jurisdiction must be construed "most strongly against the drafter" of the Agreement, particularly when, as here, the drafter is the federal government, with its "vast economic resources and stronger bargaining position in contract negotiations." *United States v. Seckinger*, 397 U.S. 203, 210, 216 (1970); *see Interstate General Gov't Contractors, Inc. v. Stone*, 980 F.2d 1433, 1434 (Fed. Cir. 1992).

That principle applies with particular force when, as here, the drafter bore fiduciary responsibilities towards the other contracting party. *See, e.g.*, *Chickasaw Nation v. United States*, 534 U.S. 84, 99 (2001)); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) ("'rooted in the unique trust relationship between the United States and the Indians'" is the canon that "statutes are to be construed liberally in

favor of the Indians, with ambiguous provisions interpreted to their benefit.").

Courts apply that rule of construction both to enforce the fiduciary obligations of the trustee and to compensate for the parties' unequal bargaining power. *See, e.g.*, *Antoine v. Washington*, 420 U.S. 194, 200 (1975) ("'The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith.'"); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174-175 (1973) (same).

Accordingly, as Trustee for the Bikinians at the time it drafted the Compact and Agreement, the United States was "something more than a mere contracting party," and was laboring under a "distinctive obligation of trust" towards the "dependent and sometimes exploited people" of Bikini. *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942). The terms of the Agreement accordingly must be read with the presumption of "congressional intent to assist its wards to overcome the disadvantages our country has placed upon them," *Chickasaw*

Nation, 534 U.S. at 99, not to deny them any meaningful relief for the taking of their land.

Finally, in determining whether the Agreement deprives the Bikinians of any judicial review of their constitutional claims, the language of the Agreement must be read in light of the beneficial purpose of such arrangements. "[T]reaties are solemn engagements" that Nations enter into "not only to avoid war and secure a lasting and perpetual peace," but also "to promote a friendly feeling between the people of the two countries." *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902). The Agreement accordingly "should be interpreted in that broad and liberal spirit which is calculated to make for the existence of a perpetual amity" between the United States and the Marshall Islands, *ibid.*, and "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people," *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943), rather than as an artfully configured device for conclusively depriving the Bikinians of any opportunity for meaningful compensation. *See United States v. Stuart*, 489 U.S. 353, 368 (1989) ("[W]here a provision of a treaty fairly admits of two constructions, one restricting, the other

enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred.'"); *see generally Eastern Airlines v. Floyd*, 499 U.S. 530, 535 (1991) ("Treaties are construed more liberally than private agreements.").

In short, the United States acknowledged in the Compact its solemn responsibility to compensate the Bikinians for the tremendous losses they have suffered. In their briefs to this Court in *Enewetak*, the government acknowledged the "continuing moral and humanitarian obligation on the part of the United States to compensate any victims." A0360. The government also assured the Court that the Agreement would provide "continuous funding" for compensation, and constituted a viable "comprehensive, long-term compensation plan" for the Marshallese, A0359, A0363, with Congress standing by to "provide any assistance required" for new claims, A0360. This Court apparently "was persuaded by defendant's argument," A0037, and dismissed the claims for compensation on the understanding that the Agreement provided "in perpetuity, a means to address past, present and future consequences" of the government's nuclear testing program, *Enewetak*, 864 F.2d at 136. Experience has now shown that the promise was an

empty one. *See Reich v. Collins*, 513 U.S. 106, 111 (1994) (for government to hold out "clear and certain postdeprivation remedy," then declare after it is too late that "no such remedy exists," is an improper "bait and switch"). The Bikinians want nothing more than their day in court to seek the compensation that the federal government and the Constitution have long promised. "[G]reat nations, like great men, should keep their word." *CIA v. Sims*, 471 U.S. 159, 175 n.20 (1985) (quoting *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting)).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Federal Claims dismissing Counts I and V of the Amended Complaint should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B)

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure (FRAP), the undersigned certifies that this brief complies with the type-volume limitations of FRAP 32(a)(7)(B).

1. Exclusive of the exempted portions identified in FRAP 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b), the brief contains 13,874 words. (The undersigned is relying on the word-count utility in Microsoft Word 2003, the word-processing system used to prepare the brief, consistent with Federal Rule of Appellate Procedure 32(a)(7)(C)(i).)
2. The brief was produced with Microsoft Word 2003 software in Century Schoolbook 14-point typeface.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief for Appellants was served by first class, postage pre-paid U.S mail on this 21st day of December 2007, upon the parties listed below:

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