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# Juda v. United States: An Atoll's Legal Odyssey

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# *JUDA V. UNITED STATES*: AN ATOLL'S LEGAL ODYSSEY

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## INTRODUCTION

Shortly after World War II, the United Nations and the United Nations Trusteeship Council[1] gained authority over territories that were not self-governed.[2] The United Nations Charter established the International Trusteeship System to encourage self-government and independence for these territories.[3] Prior to World War II, a League of Nations mandate[4] gave Japan control over Micronesia, which includes the Marshall Islands.[5] During World War II, however, the United States assumed military control over Micronesia;[6] the Marshall Islands became a United States Trust Territory on April 2, 1947.[7] A joint resolution of the United States Congress, enacted on July 18, 1947, accepted the "Trusteeship Agreement For The Former Japanese Man-

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1. U.N. CHARTER art. 85; *see id.* (creating the United Nations Trusteeship Council to assist the United Nations General Assembly to execute its functions concerning all non-strategic trusts).

2. *Id.* arts. 75-85. The United Nations Charter establishes the international trusteeship system. *Id.*

3. *Id.* art. 76(b). Chapter XII of the United Nations Charter addresses the goals of the International Trustee System. *Id.*; *see* Hirayasu, *The Process of Self-Determination and Micronesia's Future Political Status Under International Law*, 9 U. HAW. L. REV. 487, 494 (1987) (stating that article 76(b) requires an administering authority to direct the trust territory towards self-government or independence). The expressed will of the inhabitants, and territorial circumstances determine whether the emphasis is toward self-government or independence. *Id.*

4. Mandate for the Former German Possessions in the Pacific Ocean Lying of the Equator [Mandate for the Former German Possession], 2 LEAGUE OF NATIONS O.J. 87 (1921).

5. *See generally* Hirayasu, *supra* note 3, at 491-93 (examining the Japanese control of Micronesia under the League of Nations mandate). Micronesia is the collective name for thousands of islands located in the western Pacific Ocean. *See id.* at 487 (stating that Micronesia includes more than 2100 islands). The Marshall Islands are one of the three significant archipelagos that comprise Micronesia. Weisgall, *Micronesia And The Nuclear Pacific Since Hiroshima*, 5 SAIS REV. 41, 42 (1985) [hereinafter *Nuclear Pacific*]. Bikini Atoll is one of the atolls located in the Marshall Islands. Weisgall, *The Nuclear Nomads Of Bikini*, 39 FOREIGN POL'Y 74, 74 (1980).

6. Hirayasu, *supra* note 3, at 490.

7. S.C. RES. 21, 2 U.N. SCOR (124th mtg.) at 16 (1947); *see* Juda v. United States, 6 Cl. Ct. 441, 444 (1984) [hereinafter *Juda I*] (stating the United States was recognized as the administering authority through an agreement of the United Nations Security Council and approval of Congress).

dated Islands" (Trusteeship Agreement).[8]

The Trusteeship Agreement required the United States, as "administering authority,"[9] to protect the land, resources, and health of Micronesia's inhabitants.[10] Prior to the Trusteeship Agreement, however, and later in violation of its obligations therein, the United States moved the inhabitants of Bikini Atoll,[11] part of the Marshall Islands,[12] and commenced nuclear weapons tests on July 1, 1946.[13] Twelve years of bombardment followed, causing enormous destruction to Bikini Atoll.[14] The tests vaporized several islands, gouged a mile long hole in the barrier reef, contaminated the soil to a depth of two feet, and rendered the Atoll uninhabitable.[15]

The Bikinian plight did not end with the loss of the Atoll. After several relocations,[16] approximately fifty percent of the Bikinian population remains in refuge on Kili Island.[17] In 1968, the Johnson adminis-

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8. Trusteeship Agreement For The Former Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665.

9. *Id.* art. 2, at 3303. Article two designates the United States of America as the administering authority of the trust territory. *Id.*

10. *Id.* art. 6, §§ 2 & 3, at 3303, at 6. The language of the Trusteeship Agreement expressly required the United States to protect the inhabitants of the Marshall Islands. *Id.*

11. *See* WEBSTER'S NEW INTERNATIONAL DICTIONARY 138 (defining an atoll as a coral reef consisting of a chain of closely spaced coral islets surrounding a shallow lagoon). An atoll may vary in diameter from less than a mile to 80 miles or more. *Id.*

12. *Compare Juda I*, 6 Cl. Ct. at 443 (setting forth the claims of the inhabitants of Bikini Atoll) *with* Peter v. United States, 6 Cl. Ct. 768 (1984) (setting forth the claims of the people of the Enewetak, another Marshall Islands atoll). The inhabitants of Enewetak were also moved in order to facilitate United States nuclear testing. *See* D. MCHENRY, MICRONESIA: TRUST BETRAYED 58 (1975) (explaining how the importance of "Eniwetok" as an atomic testing site required the removal of its inhabitants).

13. *To Approve The Compact Of Free Association: Hearings Before The Senate Committee on Energy and Natural Resources*, 98th Cong., 2d sess. 298, 304 (1984) (statement of Jonathan M. Weisgall, Legal Counsel to the People of Bikini) [hereinafter *Hearings*].

14. *Id.* at 308.

15. *Id.* at 308-09; *see* Consolidated Brief of Appellants at 6, People of Bikini, Enewetak, Rongelap, Utrik and Other Marshall Islands Atolls v. The United States, (Fed. Cir. 1988) (Nos. 88-1206, 88-1207, 88-1208) [hereinafter Consolidated Brief] (asserting that at least three islands were vaporized); *see also* Comment, *Bravo's Fallout: International Law and Nuclear Pollution in the Pacific*, 14 N.C. CEN. L.J. 172, 184 (1983-1984) [hereinafter *Bravo's Fallout*] (explaining that complete restoration of the Bikini Atoll is impossible). Several islands of the Atoll have vanished as a result of the testing. *Id.* In addition, the destruction of part of the reef has allowed sharks to enter the lagoon. *Id.*

16. *See Juda I*, 6 Cl. Ct. at 447 (examining the numerous location of the Bikinians); *see also* Sager, *Paradise Lost*, THE WASH. POST MAG., Aug. 23, 1987, at 14, 19 [hereinafter *Paradise Lost*] (referring to the short Bikinian stay on the Rongerik Atoll and Kwajalein Island before being settled on Kili).

17. *Juda I*, 6 Cl. Ct. at 447. In 1985, approximately 650 Bikinians lived on Kili. Maxa, *Nuclear Nomads*, WASHINGTONIAN, June 1985, at 123, 126 [hereinafter *Nu-*

tration authorized a small resettlement of the Atoll.[18] In 1978, however, upon discovery of the continued existence of dangerous radiation levels the United States government removed the repatriated inhabitants.[19] On March 16, 1981, after 35 years of exile, the Bikinians filed suit in the United States Court of Claims.[20] On October 1, 1982, pursuant to the Federal Courts Improvement Act,[21] the case, *Juda v. United States* (*Juda I*) was transferred to the newly created United States Claims Court.[22] The complaint focused on two alternate takings clause theories and on allegations of breach of an implied-in-fact contract.[23]

The Claims Court suspended the case until April 1983, to prevent interference with negotiations between the United States and the nascent Republic of the Marshall Islands.[24] After lifting the suspension, the Claims Court rejected the government's motion to dismiss the case for lack of jurisdiction on October 5, 1984.[25] Subsequent to this decision, however, the United States government and the Republic of the Marshall Islands finalized a Compact of Free Association (Compact).[26] Because of the new Compact, the Claims Court granted an amended motion to dismiss for lack of subject matter jurisdiction on November 10, 1987.[27] The court held that the Compact implicitly amended the Tucker Act[28] that vests the United States Claims Court with jurisdic-

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*clear Nomads*]. In 1985, 200 Bikinians lived on Ejit. *Id.* The remaining 410 Bikinians were scattered throughout the Marshall Islands. *Id.*

18. *Juda I*, 6 Cl. Ct. at 447.

19. *Id.* at 447-48.

20. *Id.* at 443, 446.

21. Federal Courts Improvement Act of 1982, 28 U.S.C. § 1295 (1982).

22. *Juda I*, 6 Cl. Ct. at 444.

23. *Id.* at 449.

24. Juda v. United States, 13 Cl. Ct. 667 (1987), *appeal dismissed*, People of Bikini, 859 F.2d 1482 (Fed. Cir. 1988), *aff'd sub nom.*, People of Enewetak v. United States, 864 F.2d 134 (Fed. Cir.), *cert. denied*, No. 88-1466 (U.S. June 19, 1989) (WESTLAW, SCT database, 1989 WL 66054) [hereinafter *Juda II*].

25. *Id.* at 458. The factual allegations of the December 21, 1981 amended complaint are taken as true for purposes of the government motion to dismiss. *Id.* at 446; Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

26. Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986); *see* Hills, *Compact of Free Association for Micronesia: Constitutional and International Law Issues*, 18 INT'L LAW. 583, 584-602 (1984) (elaborating various government viewpoints on the legal issues surrounding the Compact).

27. *Juda II*, 13 Cl. Ct. at 690.

28. Tucker Act, 28 U.S.C. § 1491(a)(1) (1982). The Tucker Act vests the United States Claims Court with jurisdiction over claims based on the Constitution, an Act of Congress, an Executive Regulation, or any express or implied contract with the United States. *Id.* The Claims Court has reiterated the same elements for its jurisdiction. Truckee-Carson Irrigation Dist. v. United States, 14 Cl. Ct. 361, 369 (1988); *Juda I*, 6 Cl. Ct. at 453; Pub. Serv. Co. of Colo. v. United States, 2 Cl. Ct. 380, 383 (1983).

tion. As a consequence, the court found that the United States had withdrawn its consent to be sued on these issues.[29]

The legacy of American nuclear testing requires immediate action in order to fulfill the goals enumerated in the Trusteeship Agreement.[30] This case-comment examines the efforts of the Bikinians to obtain adequate compensation for their forty year odyssey and analyzes the impact of the Claims Court decision in *Juda v. United States* (*Juda II*)[31] on these endeavors. As indicated in the preceding parenthetical, there are two related Claims Court decisions bearing the name *Juda*.[32] The legal analysis of the *Juda II* decision is the primary concern of this case-comment.[33] Some of the legal issues and factual circumstances of *Juda I*, however, will be discussed.[34] Part I focuses on the factual circumstances that gave rise to the Bikinian claims. Part II reviews the legal background of *Juda I* and *Juda II*,[35] including the Trusteeship Agreement, the Bikinian claims, and the Compact of Free Association. Part III summarizes the Claims Court analysis in *Juda II*.[36] Part IV examines the Claims Court legal analysis in *Juda II*, that the Court of Appeals for the Federal Circuit adopted,[37] and upon which the United States Supreme Court denied certiorari.[38] In addition, Part IV considers alternative interpretations of the applicable law. Part V presents alternatives to the dismissal of the case and explores the potential for settlement of all claims arising from United States nuclear testing.

## I. THE FACTS OF *JUDA V. UNITED STATES*

On March 16, 1981, the dispossessed Bikinian community filed suit against the United States government.[39] Two international agree-

29. *Juda II*, 13 Cl. Ct. at 690.

30. Trusteeship Agreement For The Former Japanese Mandated Islands, July 18, 1947, art. 6, 61 Stat. 3301, 3302, T.I.A.S. No. 1665, at 3.

31. *Juda II*, 13 Cl. Ct. at 667.

32. *Juda I*, 6 Cl. Ct. at 441; *Juda II*, 13 Cl. Ct. at 667. The first official report of the case, *Juda I*, held that the Bikinians had cognizable claims under the Tucker Act and denied the government's motion to dismiss. *Juda I*, 6 Cl. Ct. at 458. In *Juda II*, the Claims Court held that the Compact of Free Association amended the Tucker Act, thereby, removing the consent of the United States to be sued. *Juda II*, 13 Cl. Ct. at 690.

33. *Juda II*, 13 Cl. Ct. at 667.

34. *Juda I*, 6 Cl. Ct. at 441.

35. *Id.*; *Juda II*, 13 Cl. Ct. at 667.

36. *Juda II*, 13 Cl. Ct. at 667.

37. People of Enewetak v. United States, 864 F.2d 134 (Fed. Cir. 1988).

38. People of Enewetak v. United States, No. 88-1466 (U.S. June 19, 1989) (WESTLAW, SCT database, 1989 WL 66054).

39. *Juda I*, 6 Cl. Ct. at 446.

ments,[40] numerous motions,[41] and several claims exhibit the complicated factual circumstances relating to the Bikinians.[42] These factual issues can be divided into two historic periods: first, mandate to trusteeship and exile, and, second, Bikinian claims and the Compact.

### A. From Mandate to Trusteeship and Exile

#### *1. From Japanese Mandate to American Testing Site*

After World War I, a League of Nations mandate granted Japan control of Micronesia.[43] As a result of World War II, the relationship between Japan and the United States toward Micronesia changed. At the end of World War II, the United States controlled the area.[44] Little doubt existed that the United States would remain in control.[45] During the early post-war period, however, considerable debate among the leaders of the United States focused on whether to annex Micronesia or

40. Trusteeship Agreement For The Former Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665; Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986) (codified at 48 U.S.C. § 1681) (West Supp. 1986)).

41. *Juda II*, 13 Cl. Ct. at 669-70; *see id.* (discussing the defendant's numerous motions to dismiss).

42. *See Id.* at 668-70 (examining the involved background of this case). The factual circumstances and legal arguments of the Bikinian case can be contrasted with those of two related cases. *Compare Juda I*, 6 Cl. Ct. at 452, 458 (holding that both the takings clause and implied-in-fact contract claims were within the jurisdiction of the court) *with* Peter v. United States, 6 Cl. Ct. 768, 779 (1984) (holding that the inhabitants of Enewetak Atoll, moved for the purpose of nuclear testing, had stated a breach of an implied-in-fact contract claim within the Tucker Act jurisdiction of the court) *and* Nitol v. United States, 7 Cl. Ct. 405, 414-15 (1985) (holding that citizens of the Marshall Islands possessing various ownership rights of the several islands contaminated with nuclear fallout, stated takings clause claims within the Tucker Act jurisdiction of the court).

43. Mandate for the Former German Possessions, *supra* note 4, at 87; *see* Hirayasu, *supra* note 3, at 490 (stating that Japan gained political control over Micronesia, including the Marshall Islands); *see also* T. Yanaihara, Pacific Islands Under Japanese Mandate 259-66 (1940) (examining the Japanese administration of Micronesia under the League of Nations mandate).

During this period, Japan administered Micronesia as a Class C Mandate. Hirayasu, *supra* note 3, at 493. Class C mandates were intended to be administered as integral parts of the administering power's territory. This type of administration was tacitly accepted with the manning of Japanese troops on Bikini. *Paradise Lost*, *supra* note 16, at 14. *See generally*, R. Chowdhuri, International Mandates And Trusteeships Systems; A Comparative Study (1955) (examining and comparing the mandate and trusteeship systems).

44. Hirayasu, *supra* note 3, at 490; *see Nuclear Nomads*, *supra* note 17, at 75 (stating that the Bikinians have effectively become wards of the United States).

45. *Juda II*, 13 Cl. Ct. at 671; Plaintiffs' Response To Defendant's Additional Brief Of Issues Posed By The Court, at 3, Juda v. United States, 13 Cl. Ct. 667 (No. 172-81L) (1987) [hereinafter Plaintiffs' Response].

place it under the international administration of the United Nations.[46] During the same period, the Atomic Energy Commission advocated, as did others, continued nuclear testing.[47] The continuation of nuclear testing necessitated a suitable site.[48] The Joint Chiefs of Staff considered an optimal site to provide minimal hazard and a low risk of contamination to the United States.[49] The United States chose Bikini because it met this standard.[50]

The United States promptly instructed the Bikinians to leave their atoll.[51] On March 7, 1946, the United States moved the 167 inhabi-

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46. *Nuclear Pacific*, *supra* note 5, at 42; *see id.* (examining the post-World War II debate between military and diplomatic leaders over the future status of Micronesia and the principles set forth in the Atlantic Charter). The debate consisted of both moral and emotional appeals. *Id.* Admiral Ernest King expressed his support for annexation because "These atolls, these island harbors will have been paid for by the sacrifice of American blood." N.Y. Times, April 5, 1945, at 4. Secretary of State Cordell Hull, on the other hand, based his support of no territorial aggrandizement and the establishment of an international trusteeship system on the principles of the Atlantic Charter and the Cairo Declaration. *Nuclear Pacific*, *supra* note 5, at 42-43. The United Nations resolved this disagreement with the establishment of a trusteeship system. *Juda II*, 13 Cl. Ct. at 671. The Atlantic Charter principles provided a framework to help the United Nations in creating the trusteeship system. Hills, *supra* note 26, at 589.

United States lobbying in the interest of national security directly resulted in the division of the trust territories into strategic and nonstrategic. *Id.* Security Council supervision, combined with a veto to protect American interests, allowed the United States to exercise effective control over the Micronesian trusteeship, and, thus, eliminate the need for annexation. *See* D. MCHENRY, *supra* note 12, at 5-6 (asserting that the strategic trust designation allowed the United States absolute control over Micronesia). The strategic trust for Micronesia was the only one ever created. *Id.* Furthermore, this trust was the only instance the United States assumed responsibility for a foreign territory under an international organization. *Juda II*, 13 Cl. Ct. at 671.

47. *Hearings*, *supra* note 13, at 301. In 1948, the Commission indicated its opinion that American preeminence in nuclear weapons required observation of full scale tests. *Id.* The highly destructive nature of nuclear weapons easily explains the desire of the United States for preeminence in this field. *Cf. Nuclear Pacific*, *supra* note 5, at 41 (explaining that in a period of three days the United States brought a swift end to the Pacific War through the use of two nuclear weapons against Japan).

48. *Hearings*, *supra* note 13, at 302; *see Juda I*, 6 Cl. Ct. at 446-47 (noting that the Joint Chiefs of Staff formed a committee to plan a series of atomic tests and to choose the site for the tests).

49. W. SHURCLIFF, BOMBS AT BIKINI: THE OFFICIAL REPORT OF OPERATION CROSSROADS 15 (1947). To avoid potential contamination to the United States, the site had to be located a considerable distance from the United States, with little or no population and a relatively stable climate. *Nuclear Pacific*, *supra* note 5, at 43. Furthermore, the site needed a waterway suitable for anchoring target ships. *Id.*

50. *Nuclear Pacific*, *supra* note 5, at 43. The choice of Bikini took only sixty days. *Juda I*, 6 Cl. Ct. at 446-47.

51. *Id.* at 447; *Cf. Paradise Lost*, *supra* note 16, at 14 (discussing some of the conversations that transpired between military officials and the Bikinians). On Sunday, February 10, 1946, Commodore Ben Wyatt, the American military governor of the Marshall Islands, compared the Bikinians to the children of Israel, informed them on the power of the atomic bomb, and generally extolled the intent of the American scien-

tants of Bikini to the Rongerik Atoll.[52] The first United States nuclear test at Bikini took place on July 1, 1946.[53] Twelve years of nuclear weapons use in the Marshall Islands followed, making the move off the Atoll indefinite.[54]

### 2. *American Strategic Trust Over Micronesia and Bikinian Exile*

After the World War II, the United Nations was given sole responsibility for granting all international trusteeships under the International Trusteeship System.[55] A trusteeship agreement under the International Trusteeship System must be implemented pursuant to Article 79 of the United Nations Charter (Charter).[56] Article 79 requires that the participating countries agree to all of the terms of the trusteeship and that trusteeship approval comply with pertinent articles of the Charter.[57] In addition, the Charter requires that the Security Council exercise all United Nations functions concerning strategic trusts.[58] A trust territory is considered strategic primarily due to security concerns.[59] On April 2, 1947, the Security Council granted Micronesia, a territory qualifying under the United Nations Charter,[60] to the United States as a strategic

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tists. Weisgall, *supra* note 5, at 77. Surrounded with images of United States power and wealth the Bikinians agreed to sacrifice their Atoll for mankind. *Id.* Jonathan Weisgall, counsel for the Bikinians, noted, however, that the Bikinian decision resulted less from naivety than awe of the United States victory over Japan. *Id.*

52. *See* Weisgall, *supra* note 5, at 80 (explaining the significant differences between Bikini and Rongerik). Rongerik has seventy-five percent less land than Bikini, inferior coconut palms, and toxic fish. *Id.* Near starvation conditions prevailed on Rongerik. *Id.*

53. *Paradise Lost*, *supra* note 16, at 14.

54. *Id.* The Bikinians have been unable to permanently return home over the past forty-three years, despite the fact that nuclear testing terminated over thirty years ago in 1958. *Juda I*, 6 Cl. Ct. at 446-47.

55. U.N. CHARTER art. 75. Chapter XII of the Charter establishes the International Trusteeship System. *Id.* arts. 75-85.

56. U.N. CHARTER art. 79.

57. *Id.* Article 79 requires compliance with Articles 83 and 85 of the Charter. *Id.*

58. *Id.* art. 83.

59. R. CHOWDHURI, *supra* note 43, at 11. It was not surprising that the United States considered Micronesia a security risk because Japan had used it as a staging ground for the attack on Pearl Harbor. *Nuclear Pacific*, *supra* note 5, at 41. Moreover, Admiral Nimitz maintained that United States security ultimately depended on controlling the Pacific Ocean and particularly Micronesia. R. CHOWDHURI, *supra* note 43, at 119-20 (quoting THE FORRESTAL DIARIES 214 (1951)).

60. *Id.* art. 77. A trusteeship agreement applied to territories: (1) held in mandate; (2) detached from enemy states due to World War II; or (3) placed voluntarily under the trusteeship system. *Id.* As a consequence of World War I, Japan gained control over Micronesia under a League of Nations mandate. Mandate for the Former German Possessions, *supra* note 2, at 87. As a result of World War II, Micronesia was detached from Japan. *Nuclear Pacific*, *supra* note 5, at 42.

trust.[61] Congressional approval of the trusteeship on July 18, 1947, a year after the first nuclear test on Bikini, bound the United States to the terms of the agreement while formally making the Marshall Islands part of a United Nations trusteeship.[62]

Article 4 of the Trusteeship Agreement assigned several requirements to the United States.[63] The United States must act in accordance with the United Nations Charter, the objectives of the International Trusteeship System, and the provisions of the Trusteeship Agreement.[64] In addition, Article 6 requires the United States to protect the lands, resources, and health of the inhabitants.[65] Through Congressional and Presidential approval of these requirements the Trusteeship Agreement received the weight of domestic law.[66]

Unfortunately, however, years of American guardianship, pursuant to the Trusteeship Agreement, negatively affected the Bikinians.[67] On July 22, 1958, the final nuclear weapon test on Bikini Atoll took

61. S.C. RES. 21, 2 U.N. SCOR (124th mtg.) at 16 (1947); *see* U.N. CHARTER art. 82 (allowing the establishment of a strategic area or areas within part or all of a trust territory).

62. Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665; *see* Hills, *supra* note 26, at 589-92 (discussing the political background of the Trusteeship System and the Micronesian Trust).

63. Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, art. 4, 61 Stat. 3301, 3302, T.I.A.S. No. 1665, at 2.

64. *Id.*

65. *Id.* art. 6, §§ 2 & 3 at 3302-03; *see Bravo's Fallout*, *supra* note 15, at 186 (explaining that land is the basis of Micronesian culture, and that its alienation is next to impossible). The creation of a "fee simple subject to radiation subsequent" appears to be one of a few ways to acquire land in Micronesia, where torturous negotiations and extensive litigation are the norm. *Id.*

66. Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665.

67. *Juda II*, 13 Cl. Ct. at 668; *see id.* (stating that in 1981 and 1982, 5,000 inhabitants of the Marshall Islands filed petitions claiming damages from the United States nuclear testing program). Some benefits have resulted, however, from United States control over the Micronesian Trust. Hills, *supra* note 26, at 583. The trusteeship has fostered Micronesian self-government, resulting in the division of the trust into various political entities; the Commonwealth of Northern Mariana Islands, the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau. *Id.* The nuclear testing program saved the United States billions of dollars in defense spending and incorporated atomic energy as a crucial element of defense planning. *Hearings*, *supra* note 13, at 305-07. Reflecting upon the success of the Alamogordo nuclear test, Winston Churchill concluded that the atomic bomb effectively counteracted Russian superiority. *Id.* at 300 (quoting A. BRYANT, TRIUMPH IN THE WEST: BASED ON THE PERSONAL DIARIES OF FIELD MARSHALL LORD ALAN BROOKE 363-64 (1959)); *see* Hills, *supra* note 26, at 585 n.10 (explaining that the relocation of various inhabitants of the Marshall Islands is minimized in light of the millions displaced during World War II and its value to international security). *But see Bravo's Fallout*, *supra* note 15, at 189-90 (acknowledging that, although many benefits resulted from the testing, the Marshallese bore a disproportionate share of the costs of those benefits).

place.[68] The atomic testing of the previous twelve years caused enormous destruction.[69] The testing completely destroyed several islands.[70] An underwater test in 1946 deposited 500,000 tons of radioactive mud on the lagoon floor.[71] The greatest damage, however, resulted from the Bravo hydrogen bomb test on March 1, 1954.[72] This weapon[73] vaporized the test island, parts of other islands,[74] and tore a mile-wide hole in the barrier reef.[75] Absent this destructive hydrogen bomb test, it is likely that the Bikinians would have returned to their native island.[76]

### B. CLAIMS, COMPACT, DISMISSAL

#### *1. The Bikinian Claims*

The Bikinians were not beneficiaries of the Trusteeship.[77] The Bikinian plight deteriorated after the United States removed them from Bikini to Rongerik Atoll in 1946.[78] Unable to support themselves on the scarce and toxic resources of the Rongerik Atoll, it was neces-

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68. *Compare Juda I*, 6 Cl. Ct. at 447 (stating that twenty-three nuclear weapons tests occurred at Bikini from June 30, 1946 to July 22, 1958), *with* Peter v. United States, 6 Cl. Ct. 768, 771 (1984) (explaining that from April 1948 to August 1958, Enewetak Atoll was the site of forty-three atomic tests). The factual circumstances of testing on Enewetak are similar to those of Bikini. *Id.* at 770-73. The one major distinction, however, is that from May 1977 to April 1980, the United States undertook a radiological clean-up of Enewetak allowing the Enewetak people to return home. *Id.* at 773. Unfortunately, however, the Enewetak people are restricted to the southern islands because several of the northern islands remain uninhabitable. Consolidated Brief, *supra* note 15, at 7.

69. *Juda I*, 6 Cl. Ct. at 447.

70. *Id.*

71. *Bravo's Fallout*, *supra* note 15, at 183. In 1947, scientists discovered that the once clear waters were almost opaque. *Bravo's Fallout*, *supra* note 15, at 183.

72. *Hearings*, *supra* note 13, at 308.

73. *See Hearings*, *supra* note 13, at 307-09 (recounting the background to America's first hydrogen bomb test). Apparently, the Atomic Energy Commission did not test this new weapon on the continental United States because of its potentially grave risk. *Id.* at 307. This weapon had the explosive force of a 1000 Hiroshima bombs. *Id.*

74. *Paradise Lost*, *supra* note 16, at 14, 19. The fireball of this hydrogen bomb test was visible for a minute on the Rongerik Atoll, located 125 miles from Bikini. *Hearings*, *supra* note 13, at 309.

75. *Hearings*, *supra* note 13, at 308; *see also* D. MCHENRY, *supra* note 12, at 59 (explaining that the destruction of the reef has allowed sharks to enter the sheltered fishing areas).

76. *Paradise Lost*, *supra* note 16, at 19.

77. *Id.* Starvation, abandonment of their boats to subsist on dollars, and several relocations resulting in the Bikinians being scattered throughout the Pacific, have eroded their culture. *Id.*

78. Trumbull, *An Island People Still Exiled by Nuclear Age*, U.S. NEWS & WORLD REP., Oct. 18, 1982, 48, 49 [hereinafter *Exiled by Nuclear Age*].

sary for the United States to move the Bikinians to the Kwajalein Atoll.[79] After their temporary stay on Kwajalein Atoll, the Bikinians were relocated to Kili Island in September 1948.[80] Since this time, Kili has remained the Bikinians' primary refuge.[81]

Kili, however, is an inhospitable place.[82] Tiny, compared to Bikini, Kili has no lagoon, sheltered fishing area, or protected anchorage.[83] In 1968, President Johnson announced that the Bikinians could return to Bikini because the Atomic Energy Committee had concluded that the island was safe for habitation.[84] As a result, many Bikinians relocated to Bikini Atoll despite the health risks.[85] By the early 1970's, approximately 150 Bikinians had returned to their islands.[86]

For several years Bikinians once again lived on the atoll. In 1978, however, the United States government conducted several radiological studies of Bikini.[87] The studies concluded that the Bikinians probably ingested the greatest amount of radiation of any population in history.[88] Once again, the United States removed the Bikinians and relocated them to Ejit Island and Kili.[89]

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79. Consolidated Brief, *supra* note 15, at 6.

80. *Nuclear Pacific*, *supra* note 5, at 44.

81. *Hearings*, *supra* note 13, at 291; *see Nuclear Nomads*, *supra* note 17, at 175 (stating that 200 Bikinians also live on Ejit Island).

82. *See infra* note 83 (describing Kili Island).

83. Weisgall, *supra* note 5, at 82. Kili is located 475 miles south of Bikini. D. MCHENRY, *supra* note 12, at 58. Inaccessible by boat five months a year because of pounding surf, Kili is a 200 acre speck of land in the middle of the Pacific. *Nuclear Nomads*, *supra* note 17, at 175. Unaccustomed to struggling with the surf for fish, Bikinians have become increasingly dependant on outside assistance. D. MCHENRY, *supra* note 12, at 58.

Dependance and boredom characterize the Bikinian experience on Kili. *Paradise Lost*, *supra* note 16, at 19. Cans of United States salmon, Coke bottles, Pampers, and trash accumulate on the shore. *Id.* Sailing for pleasure or subsistence is no longer possible. *Id.* On Kili, the children's previous cultural learning process is replaced with billiards, basketball, Casio organs, videos, rock music, and cars. *Id.* The Bikinian boredom and dependency can be summed up in one word, Jumbo. *Id.* Jumbo is the favorite pastime of Kili's temporary inhabitants. *Id.* It consists of four 2.5 mile car trips on the perimeter road for one U.S. dollar. *Id.* Jumbo allows the Bikinians to forget time and pain, while dreaming of going home. *Id.* Bikinians rely on United States food, fuel, and medicine for survival. *Nuclear Nomads*, *supra* note 17, at 175. In essence, the Bikinians are "wards of the United States." Weisgall, *supra* note 5, at 75.

84. *Hearings*, *supra* note 13, at 315.

85. *Id.*

86. Consolidated Brief of Appellee at 5, People of Bikini, Enewetak, Rongelap, Utrik and other Marshall Islands Atolls v. United States, (Fed. Cir. 4/15/88) (Nos. 88-1206, 88-1207, 88-1208) [hereinafter Appellee's Brief].

87. *Exiled by Nuclear Age*, *supra* note 78, at 49; *see* Weisgall, *supra* note 5, at 88 (stating that a radiological survey was conducted as part of a settlement to a suit brought in 1975).

88. Appellee's Brief, *supra* note 86, at 5; Weisgall, *supra* note 5, at 89-90.

89. Weisgall, *supra* note 5, at 90. Bikini has remained uninhabited since 1978. *Id.*

On March 16, 1981, after thirty-five years of exile, near starvation, three relocations, and one aborted return, the Bikinians filed suit in the United States Court of Claims.[90] The court suspended *Juda I* to avoid interfering with negotiations between the United States and the Republic of the Marshall Islands for the Compact of Free Association (Compact).[91] The Claims Court rejected the political question argument of the United States and reinstated the proceedings on April 13, 1983.[92] The United States argued that the statute of limitations had expired.[93] The United States also asserted that the court did not have jurisdiction over the contract and takings issues.[94] On October 5, 1984, the Claims

90. *Juda I*, 6 Cl. Ct. at 446. This case was transferred to the United States Claims Court on October 1, 1982, in accordance with section 403(d) of the Federal Courts Improvement Act of 1982. 28 U.S.C. § 1295 (1982); *Juda I*, 6 Cl. Ct. at 444; *see* Miller, *The New United States Claims Court*, 32 CLEV. ST. L. REV. 7, 7-13 (1983-84) (discussing the Federal Courts Improvement Act of 1982 and the jurisdiction of the Claims Court); *see also infra* notes 136-57 and accompanying text (discussing the Bikinian claims).

91. *Juda I*, 6 Cl. Ct. at 445. All fourteen cases the Marshallese brought that arose from the United States nuclear testing program were suspended to prevent interference with the Compact negotiations. *Juda II*, 13 Cl. Ct. at 669. Eventually, the Compact was finalized in 1986. Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986)). The Compact is an international agreement seeking to replace the Trusteeship Agreement while comprehensively redefining the relations between the two nations. Appellee's Brief, *supra* note 86, at 2. *See generally* Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986)) (recounting the two nations' actions leading to the enactment of the Compact). The Compact enables the United States to retain authority over Micronesian security and defense. *Nuclear Pacific*, *supra* note 5, at 49. The new Micronesian states, however, may engage in self-government and foreign affairs as long as compliance with United States defense responsibilities occurs. *Id.*

92. *See* Consolidated Brief, *supra* note 15, at 3 (asserting that the court rejected the political question contention of the government because money claims were the "grist of judicial mills"). *But see Juda I*, 6 Cl. Ct. at 446 (stating that the political question and espousal issues were not decided because these issues were not fully briefed and Compact ratification had not run its course). At this time, the United States reserved the right to raise these issues if a change in facts made their disposition feasible. *Juda II*, 13 Cl. Ct. at 669. Oral argument was heard on the defendant's motion to dismiss on August 2, 1983. *Id.*

93. *Juda I*, 6 Cl. Ct. at 450; *see* 28 U.S.C. § 2501 (1982) (stating that there is a six year statute of limitations on claims falling within the jurisdiction of the Claims Court).

94. *Juda I*, 6 Cl. Ct. at 452. The government argued, first, that all of the claims were based in tort, and, second, that an implied-in-fact contract trust obligation did not exist because the United States acted as a sovereign. *Id.* The government contended that the contract claim was not within the Tucker Act. *Id*; *see also* Tucker Act, 28 U.S.C. § 1491 (a)(1) (1982) (describing the contract jurisdiction of the Claims Court). The court has jurisdiction over cases involving any express or implied contract with the United States or liquidated or unliquidated damages in cases not based in tort. *Id.* Furthermore, the government argued that the fifth amendment to the United States Constitution did not apply because Congress had not passed an enabling act extending the Constitution to the Marshall Islands. *Juda I*, 6 Cl. Ct. at 445; *see* Tucker Act, 28

Court denied the United States government's motions to dismiss and held that the claims were not time barred.[95]

The court rejected the statute of limitation arguments of the United States on all of the claims.[96] In considering the takings clause claims, the court held that the removal of the Bikinians from Bikini in 1978 constituted a new and separate taking for purposes of the statute of limitations.[97] The court also explained that the statute of limitations is inapplicable on the implied-in-fact contract claim because numerous breaches occurred after the termination date of March 16, 1975.[98]

The Claims Court held that it had jurisdiction over the Bikinian claims.[99] The court applied the United States Bill of Rights[100] to the Bikinians, thereby, upholding their takings clause claims.[101] In addition, the United States government's broad attack on the breach of implied-in-fact contract claim did not persuade the court to dismiss this Bikinian claim.[102] The court found that the facts demonstrated elements of a contract claim, not a tort claim.[103] The court concluded that: first, sovereign immunity remained waived pursuant to the Tucker Act;[104] second, as an express contract involving different parties, the Trusteeship Agreement, did not preempt the implied-in-fact contract;[105] and, third, that the sovereign act defense was not applicable.[106] The court denied the motion to dismiss and ordered the United States to submit its answer to the causes of action in the complaint.[107]

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U.S.C. § 1491 (a)(1) (1982) (granting jurisdiction to the Claims Court for claims against the United States based on the Constitution). Moreover, under the Tucker Act, claims can be based upon any act of Congress, or executive regulation. *Id.*

95. *Juda I*, 6 Cl. Ct. at 458.

96. *Juda I*, 6 Cl. Ct. at 450-51.

97. *Id.* at 450; *see* 28 U.S.C. § 2501 (1982) (declaring a six year statute of limitations for Claims Court cases). If the removal of August 1978, from Bikini was a new taking, then the plaintiffs' had until July 31, 1984 to file their claims. *Id.* Plaintiff's filed their claim on March 16, 1981, thereby, meeting the requirements of the statute of limitations. *Juda I*, 6 Cl. Ct. at 449.

98. *Juda I*, 6 Cl. Ct. at 451.

99. *Juda II*, 13 Cl. Ct. at 669.

100. U.S. CONST. amend. I-X.

101. *Juda I*, 6 Cl. Ct. at 458. The court noted that the United States had granted benefits to the Bikinians that a foreign citizen could not achieve, tacitly extending the Bill of Rights to the Bikinians. *Id.*; *Cf.* Porter v. United States, 496 F.2d 583, 591 (Ct. Cl. 1974) *cert. denied* 420 U.S. 1004 (1975) (indicating that the takings clause applies to territories upon a showing that the United States has unlawfully taken the land).

102. *Juda I*, 6 Cl. Ct. at 451-55; *see id.* (examining and rejecting the various defenses of the government).

103. *Id.* at 451-53.

104. *Id.*

105. *Juda I*, 6 Cl. Ct. at 454.

106. *Id.* at 454-55.

107. *Id.* at 458.

*2. Developments With the Compact*

While the case proceeded, developments on the Compact of Free Association continued unabated.[108] After the United States and the Republic of the Marshall Islands signed the Compact and the requisite Marshall Islands plebiscite ratified it,[109] the Reagan administration submitted it to Congress on March 30, 1984.[110] On January 14, 1986, following extensive congressional action, President Reagan signed the final version of the Compact.[111] Subsequently, the United States filed a motion to dismiss the Bikinian case, asserting that the complaint raised a non-justiciable political question.[112] Later, the United States filed an amended motion to dismiss, arguing that the Compact deprived the court of its subject matter jurisdiction.[113] At the close of arguments, the court ordered the parties to submit briefs on two issues:[114] first, whether the Compact and the Section 177 Agreement, for execution of the nuclear testing claims settlement[115] were in effect and operative;[116] and, second, whether Congress had effectively withdrawn the consent

108. Hills, *supra* note 26, at 584; *see Juda II*, 13 Cl. Ct. at 673 (examining developments of the Compact).

109. Compact of Free Association Act of 1985, Pub. L. No. 99-239, §§ 411, 412, 99 Stat. 1770, 1827 (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986)); Sections 411 and 412 of the Compact required approval of the Marshall Islands plebiscite to make the Compact effective. *Id.* Fifty-eight percent of the Marshall Islands plebiscite voted in favor of the Compact. Hirayasu, *supra* note 3, at 508. Ninety percent of the Bikinians, however, voted against the Compact. *Hearings*, *supra* note 13, at 288 (statement of Jonathan M. Weisgall, Counsel on behalf of the People of Bikini). The Bikinians felt that the Compact, primarily the Section 177 Agreement, inadequately addressed their claims. *Id.*

110. Hills, *supra* note 26, at 584.

111. *Juda II*, 13 Cl. Ct. at 673.

112. *Id.* at 669; Appellee's Brief, *supra* note 86, at 4.

113. *Juda II*, 13 Cl. Ct. at 670; The United States argued that the Section 177 Agreement of the Compact of Free Association removed the Claim Court's jurisdiction. *Id.* Pursuant to section 177 of the Compact, the two governments negotiated a separate agreement. "Agreement between the Government of the United States and the Government of the Marshall Islands for the Implementation of Section 177 of the Compact of Free Association," *reprinted in* THE PRESIDENT'S PERSONAL REPRESENTATIVE FOR MICRONESIAN STATUS NEGOTIATIONS, COMPILATION OF AGREEMENTS BETWEEN THE GOVERNMENT OF THE UNITED STATES AND THE FREELY ASSOCIATED STATE OF THE REPUBLIC OF THE MARSHALL ISLANDS at 1 (1987) [hereinafter Section 177 Agreement]. The agreement was to act as the final settlement of all Marshallese claims resulting from nuclear testing. *Id.* Oral argument on these issues was held on April 23, 1987. *Juda II*, 13 Cl. Ct. at 670.

114. *Juda II*, 13 Cl. Ct. at 670.

115. Section 177 Agreement, *supra* note 113, at 1. A final settlement of all claims of the Marshallese required the execution of an agreement. Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 177, 99 Stat. 1770, 1812 (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986)).

116. *Juda II*, 13 Cl. Ct. at 670.

of the United States to be sued in the United States Claims Court for these claims.[117]

On November 10, 1987, the Claims Court granted the defendant's motion to dismiss for lack of subject matter jurisdiction.[118] In a memorandum of decision, the court held that the Section 177 Agreement implicitly amended the Tucker Act jurisdiction of the court.[119] This conclusion effectively removed consent of the United States to be sued on the Bikinian claims.[120]

## II. THE LEGAL BACKGROUND TO JUDA

The legal issues in *Juda II*[121] result from tension between two distinct international agreements: the Trusteeship Agreement and the Compact. This tension gave rise to the Bikinian claims against the United States.[122] The Trusteeship Agreement established a trusteeship for the former Japanese Mandated Islands that came under American administration during World War II.[123] The United States and several Micronesian states entered into the Compact to terminate the trusteeship and establish greater sovereignty and self-determination.[124]

### A. THE TRUSTEESHIP AGREEMENT

The strategic trust created for Micronesia is the only binding agreement in which the United States assumed responsibility for a foreign

117. *Id.*; Consolidated Brief, *supra* note 15, at 4-5. A full settlement of the Bikinian's claims required an effective Section 177 Agreement combined with congressional intent to withdraw the consent of the United States to be sued. *Juda II*, 13 Cl. Ct. at 683. If this combination occurs, it effectively removes the jurisdiction of the court over these claims. *See* Tucker Act, 28 U.S.C. § 1491 (1982) (granting United States consent to be sued on a number of issues).

118. *Juda II*, 13 Cl. Ct. at 670.

119. *Id.* at 690.

120. *Juda II*, 13 Cl. Ct. at 690; Consolidated Brief, *supra* note 15, at 5; Appellee's Brief *supra* note 86, at 4; *see* Section 177 Agreement, *supra* note 113, art. X, at 12 (stating the termination of all claims arising from the United States nuclear testing program). All pending cases were dismissed and no court of the United States was given jurisdiction to entertain these claims. Section 177 Agreement, *supra* note 113, art. XII, at 13.

121. *Juda II*, 13 Cl. Ct. at 667.

122. *Juda I*, 6 Cl. Ct. at 443-44; *Juda II*, 13 Cl. Ct. at 668-69.

123. Trusteeship Agreement For The Former Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665.

124. Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986)); Hirayasu, *supra* note 3, at 498; *see* Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 170 (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986)) (stating that the governments of the Federated States of Micronesia and the Republic of the Marshall Islands have approved the Compact).

territory under the supervision of an international organization.[125] The Trusteeship Agreement that the United States and the United Nations Security Council entered into dictated the rights and responsibilities of the United States as "administering authority."[126] According to the agreement, the United States must comply not only with the provisions therein, but also with the United Nations Charter and the objectives of the International Trusteeship System.[127] Applicability of the Compact and its Section 177 Agreement directly relate to the termination of the Trusteeship Agreement.[128] The plaintiffs asserted that the Compact is ineffective until the Security Council terminates the Trusteeship Agree-

125. *Juda II*, 13 Cl. Ct. at 671. The Micronesian Trust was the only strategic trust ever created. Hirayasu, *supra* note 3, at 487. Furthermore, it was also the last remaining trust territory. *Id.*

126. Trusteeship Agreement For The Former Japanese Mandated Islands, July 18, 1947, arts. 2-6, 61 Stat. 3301-03, T.I.A.S. No. 1665, at 2-3; *see Juda II*, 13 Cl. Ct. at 671 (stating that the agreement is a treaty between the United States and the United Nations Security Council, similar to a bilateral contract). *But see* H. NICHOLAS, THE UNITED NATIONS: AS A POLITICAL INSTITUTION 152 (5th ed. 1981) (asserting that the agreement is not between the administering power and the United Nations, but among the states directly concerned). A treaty is similar to a contract. Whitney v. Robertson, 124 U.S. 190, 194 (1888). Over a hundred years ago the Supreme Court recognized that treaties were contracts between nations. *Id.*

The trusteeship agreement has been recognized as a treaty. Peter v. United States, 6 Cl. Ct. 768, 779 (1984). The United States Constitution provides that treaties made under United States authority are the supreme law of the land and binding on the courts. U.S. CONST. art. VI., cl. 2.

In keeping with the political question doctrine established in *Baker v. Carr*, policy considerations reflected in a treaty are beyond court review. Baker v. Carr, 369 U.S. 186, 211 (1962). Interpreting international treaties and enforcing the domestic rights they create, however, is the domain of the judiciary. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES, § 113.1 (1986); *see* United States v. Decker, 600 F.2d 733, 737 (9th Cir.), *cert. denied*, 444 U.S. 855 (1979) (citing numerous Supreme Court precedents for this proposition). The final authority for interpreting the applicability of an international agreement for domestic law purposes rests with the courts. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 325.2 (1986).

127. Trusteeship Agreement For The Former Japanese Mandated Islands, July 18, 1947, art. 4, 61 Stat. 3301, 3302, T.I.A.S. No. 1665, at 2; *see* U.N. CHARTER, arts. 75-85 (establishing the international trusteeship system). Chapter XII (articles 75-85) enumerates the objectives of the trusteeship system and the territories to which it is applicable. *Id.* The Trusteeship Agreement requirement and the function of the Security Council respecting strategic trusts are also set forth in Chapter XII. *Id.* Article 83 establishes the preeminence of the Security Council over strategic trusteeship agreements and their amendment or alteration. *Id.* art. 83. This is extremely important in determining the effectiveness of a trusteeship. *Juda II*, 13 Cl. Ct. at 678-79.

128. *Juda II*, 13 Cl. Ct. at 678; *see id.* (arguing that the Compact is not currently in force). All the parties in *Juda II* recognized that the political status of free association and the protective relationship of the trusteeship are inconsistent and mutually exclusive. *Id.* at 677-78. The court had to decide whether the United States could terminate the Trusteeship Agreement unilaterally. *Id.* at 678.

ment.[129] Consequently, the Claims Court examined the applicable United Nations Charter provisions extensively.[130]

The United Nations Charter provides the international guidelines for trusteeships.[131] Article 79 of the Charter prescribes that all states "directly concerned" with the Trusteeship Agreement must approve the agreement and all amendments.[132] Under Article 83, the Security Council has jurisdiction over all strategic trusts,[133] including the power to terminate them.[134] Before proceeding to an examination of the Compact's legal impact on the trusteeship, however, it is necessary to discuss the Bikinian claims.[135]

## B. BIKINIAN CLAIMS

### *1. Implied-in-Fact Contract*

The Bikinians claim[136] that the United States breached its fiduciary obligations under an implied-in-fact contract created in 1946.[137] Under

129. *Juda II*, 13 Cl. Ct. at 678. The Trusteeship Agreement requires the administering authority to discharge its obligations in accordance with the Charter of the United Nations. Trusteeship Agreement For The Former Japanese Mandated Islands, July 18, 1947, art.4, 61 Stat. 3301, 3302, T.I.A.S. No. 1665, at 2.

130. *Juda II*, 13 Cl. Ct. at 671.

131. U.N. CHARTER arts. 79, 82, 83.

132. U.N. CHARTER art. 79; *see* H. NICHOLAS, *supra* note 126, at 152 (discussing the various interpretations of the phrase "directly concerned"). The United States, for instance, regards itself as the only state directly concerned with the Micronesian Trust. *Id.* On the other hand, the Soviet interpretation purports that the clause includes all members of the Security Council. *Id.* A different viewpoint stresses that this meant "neighboring power." *Id.* Although the language of article 72 implies a role for all states involved, the United States considered itself the only State responsible for the former Pacific Japanese mandate. *Id.*

133. U.N. CHARTER art. 83, § 1.

134. *Id.* art. 83. Article 82 states that any trusteeship agreement may designate a strategic area or areas. *Id.*; *see* Consolidated Brief, *supra* note 15, at 8 (asserting that the designation of Micronesia as a strategic trust was an attempt to preserve United States freedom of action). Article 83 designates that the Security Council must oversee the alteration, amendment, and termination of a strategic trusteeship. U.N. CHARTER art. 83, para. 1.

135. *Juda II*, 13 Cl. Ct. 667, 677 (1987). The Claims Court felt review of the changing conditions that apply to the Bikinians and their claims was necessary to put the issues of Section 177 Agreement effectiveness in perspective. *Id.*

136. *Juda II*, 13 Cl. Ct. at 669. This case was dismissed, partially due to the attempt of the United States to redress the claims of the Bikinians through the Compact of Free Association. *Id.* at 683; *see* Section 177 Agreement, art. X, *supra* note 113, at 12 (asserting that the Agreement constitutes a full settlement of all Marshallese claims). Article X (Espousal Article) of the Section 177 Agreement states all claims relating to nuclear testing shall be terminated in the courts of the Marshall Islands. *Id.* art. X. Article XII (Termination Article) purports to terminate all such claims in the United States courts. *Id.* art. XII, at 13.

137. *Juda I*, 6 Cl. Ct. at 451. By its very nature parties do not express the implied-

the Tucker Act,[138] the Claims Court has jurisdiction over all claims against the United States based upon an implied-in-fact contract to which the government is a party.[139] Language in the Trusteeship Agreement[140] and subsequent agreements between the United States and the Bikinians[141] gave rise to conduct sufficient to show that the parties fulfilled the requirements of an implied-in-fact contract.[142]

Several other considerations impact on the implied-in-fact jurisdiction of the Claims Court. The Claims Court does not have jurisdiction over cases sounding primarily in tort.[143] An implied-in-fact contract claim, however, may contain elements of tort[144] without the Tucker Act being an automatic bar.[145] Express contracts supersede implied-in-fact

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in-fact contract. *Id.* It is implied from facts and circumstances demonstrating a mutual intent of parties to contract. *Id.* A party may not allege an implied contract when an enforceable contract exists between the parties, resulting in a conflict, relating to the same subject matter. 17 C.J.S. *Contracts* § 5 (1963).

138. Tucker Act, 28 U.S.C. § 1491(a)(1) (1982).

139. *Id.* Congress waived the sovereign immunity of the United States over implied-in-fact contracts. *Id.*; *Juda I*, 6 Cl. Ct. at 453.

140. Trusteeship Agreement For The Former Japanese Mandated Islands, July 18, 1947, art. 6, 61 Stat. 3301, 3302-03, T.I.A.S. No. 1665, at 3 (stating that the administering authority shall promote the economic advancement of the inhabitants and protect against the loss of land and resources). The Agreement requires the United States to protect the health of the inhabitants. *Id.* at 3303, at 3.

141. *See Juda I*, 6 Cl. Ct. at 448-49 (examining several agreements that arguably create implied-in-fact fiduciary obligations of the United States for its trusteeship over the Marshall Islands). On November 22, 1956, the Trust Territory Government (TTG), established under the Trusteeship Agreement and the Bikini Alabs (family heads) executed an "Agreement in Principle Regarding Use of Bikini Atoll." *Id.* at 448. The agreement stated that the Trust Territory Government and/or the United States government shall have full-use rights to Bikini Atoll as long as necessary. *Id.*

On June 20, 1957, the TTG and the United States entered into the "Use and Occupancy Agreement for Land in the Trust Territory of the Pacific Islands Under the Administrative Responsibility of the Department of the Interior." *Id.* This agreement grants the United States government the exclusive right to occupy Bikini for an indefinite period. *Id.* Furthermore, this agreement required the United States to comply with the Trusteeship Agreement regarding the use of the Bikini Atoll. *Id.* at 449.

142. *Juda I*, 6 Cl. Ct. at 452. Implied-in-fact contracts and express contracts maintain the same offer and acceptance requirements of lack of ambiguity and mutuality of intent. *Id.* The contracts differ only on evidentiary grounds. *Id.*; *see also* Fincke v. United States 675 F.2d 289, 295 (Ct. Cl. 1982) (asserting that an implied-in-fact contract requires an inferred meeting of the minds based on the conduct and understanding of the parties). Both an implied-in-fact contract and an express contract require the representative to possess actual authority to bind the government. *Juda I*, 6 Cl. Ct. at 452; *see* Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947) (stating that parties entering contracts with the government have the burden of proof regarding the scope of authority of the government's representatives).

143. Tucker Act, 28 U.S.C. § 1491 (a)(1) (1982).

144. *Id.*; *see Juda I*, 6 Cl. Ct. at 453 (examining the relationship of the implied-in-fact contract claim to a tort claim).

145. *Juda I*, 6 Cl. Ct. at 453. Actions alleging both a breach of contract and a tort may not automatically be barred under the Tucker Act. *Id.*; Tucker Act, 28 U.S.C. §

contracts when between the same parties and pertaining to the same matter.[146] Here, no express contract exists between the same parties on the same matter.[147] Although an express bilateral contract was created when the United States entered into the Trusteeship Agreement with the United Nations Security Council, that agreement does not preclude the implied-in-fact contract between the United States and the Bikinians.[148] The United States sought to settle these claims through an express revocation of its willingness to be sued in the Compact.[149] Unlike the contract claims, the Bikinian takings claims are based on United States constitutional precepts.[150]

### 2. *Takings Claims*

Takings clause claims are based on a fundamental principle of United States constitutional governance.[151] The takings clause of the fifth amendment provides that the United States government shall not take private property without "just compensation."[152] The Claims Court is endowed with jurisdiction on all constitutional claims against the United States.[153]

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1491(a)(1) (1982).

146. *Juda I*, 6 Cl. Ct. at 454.

147. *Id.*

148. *Juda I*, 6 Cl. Ct. at 454.

149. Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 103(g)(1), 99 Stat. 1770, 1782 (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986)).

150. U.S. CONST. amend. V.

151. *Id.*

152. *Id.* The takings clause of the fifth amendment provides that private property shall not be taken for public use, absent just compensation. *Id.* Just compensation is the "full and exact equivalent of the property taken." Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893). The market value of the property represents the general standard of compensation. United States v. Miller, 317 U.S. 369, 374 (1943); United States *ex. rel.* TVA v. Powelson, 319 U.S. 266, 285 (1943).

153. Tucker Act, 28 U.S.C. § 1491 (a)(1) (1982). Article III of the United States Constitution grants Congress the power to establish courts of inferior jurisdiction. U.S. CONST. art. III, § 1. In 1933, the Supreme Court concluded that the United States Court of Claims, predecessor to the Claims Court, was an Article I court. Williams v. United States, 289 U.S. 553, 581 (1933). Article I courts derive their power from the Congress, whereas Article III courts derive their power from the judicial article of the Constitution. *Id.* Congress, however, statutorily declared the Court of Claims an Article III court in 1953. 67 Stat. 226, § 1 (1953)(current version at 28 U.S.C. § 171 (1982)). In 1962, the Supreme Court agreed to this classification. Glidden Co. v. Zdanok, 370 U.S. 530, 584 (1962).

The Federal Courts Improvement Act of 1982 replaced the jurisdiction of Court of Claims with the United States Claims Court and the Court of Appeals for the Federal Circuit. Federal Courts Improvement Act, 28 U.S.C. § 1295 (1982); *see* Miller, *supra* note 90, at 7-13 (discussing the Federal Courts Improvement Act and the jurisdiction of the Claims Court). The new Claims Court was declared an Article I court in the 1982 Act. 28 U.S.C. § 171 (1982) (original version at 67 Stat. 226, § 1 (1953)).

The Bikinians brought two alternative takings claims against the United States, asserting that the United States government took their property without just compensation.[154] The first claim consisted of two separate temporary takings, respectively occurring on March 7, 1946[155] and January 24, 1979.[156] Alternatively, the Bikinians claimed a single temporary taking began on March 7, 1946.[157]

The fifth amendment of the Constitution protects American citizens from uncompensated takings.[158] The Claims Court, however, defined the key question on this issue to be whether the Bikinians were protected under the United States Bill of Rights.[159] The Bikinians resided in a United Nations trusteeship, neither a territory nor possession of the United States.[160] If the Bill of Rights extends to the Bikinians, they fall within the jurisdiction of the Claims Court.[161] The government argued that absent an act of Congress granting constitutional protection to the Bikinians, the Bill of Rights, of which the just compensation clause is a part, does not protect them.[162] Absent an act of Congress, however, the United States Court of Claims, predecessor to the Claims Court, applied the just compensation clause to government takings outside United States sovereign territory.[163] The Claims Court indicated that judicial settlement of these claims was precluded if the Compact and the Section 177 Agreement were effective.[164]

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154. *Juda I*, 6 Cl. Ct. at 449.

155. *Id.* This temporary taking ended January 24, 1979 when the United States deeded back the Islands. *Id.*

156. *Id.* The second temporary taking began just prior to the time that the Department of Interior reported that Bikini could not be inhabited for 30 to 60 years. *Id.* at 448-49.

157. *Id.* at 449.

158. U.S. CONST. amend. V; *see Juda I*, 6 Cl. Ct. at 449 (stating that Congress may apply constitutional provisions to United States territories); *see also* CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA—ANALYSIS AND INTERPRETATION, 1308 (1987) (stating that the Constitution limits the federal government power of eminent domain).

159. *Juda I*, 6 Cl. Ct. at 456. The Bill of Rights provides fundamental safeguards for citizens of the United States. *Id.* The court phrases the issue as whether these rights protect citizens of the United Nations Trust Territory. *Id.*

160. *Juda I*, 6 Cl. Ct. at 456-57.

161. *Id.*; *see* Tucker Act, 28 U.S.C. § 1491 (a)(1) (1982) (stating that the Claims Court has jurisdiction over all claims against the United States based upon the Constitution).

162. *Juda I*, 6 Cl. Ct. at 456; *see id.* (examining the United States government's contention that, absent enabling legislation, the Bill of Rights does not apply to the Trust Territory inhabitants). *But see* Fleming v. United States, 352 F.2d 533, 536 (Ct. Cl. 1965) (accepting the takings argument of the plaintiffs, inhabitants of Saipan, but rejecting to hold in their favor due to the lack of clear title to the property).

163. Porter v. United States, 496 F.2d 583, 591 (Ct. Cl. 1974). In *Porter*, the court held that the Constitution may extend to Micronesia absent congressional action. *Id.*

164. *Juda I*, 13 Cl. Ct. at 683.

### C. COMPACT OF FREE ASSOCIATION

The Compact of Free Association[165] defines a new relationship between the United States and the Republic of the Marshall Islands.[166] Whereas the Trusteeship sought to promote self-government and independence,[167] the Compact sought to transform this relationship into one of freely associated, but equally sovereign states.[168] Nevertheless, the Claims Court questioned the effectiveness of both the settlement of the nuclear testing claims and the Compact.[169]

Several provisions in the Compact help determine its effectiveness. Section 101(b) of the Compact prescribes the effective dates of the Compact and the Section 177 Agreement.[170] In addition, section 101(b) requires the consideration of United Nations procedures for termination of the Trusteeship.[171] Accordingly, the Trusteeship must be properly terminated prior to implementation of the Compact.[172]

Acknowledging United States responsibility for claims arising from the American nuclear testing program, Congress included provisions

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165. Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986)). The preamble of the Compact briefly discusses the evolution of United States relations with Micronesia and the Marshall Islands. *Id.* at 1770.

166. Hills, *supra* note 26, at 584; *see id.* (asserting that the Micronesian Government will conduct their own foreign and internal affairs while the United States retains control over security and defense matters).

167. Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665.

168. Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770, 1770 (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986)).

169. *Juda II*, 13 Cl. Ct. at 670. The court required the parties to submit additional briefs to determine if these claims had been settled. *Id.*

170. Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 101(b), 99 Stat. 1770, 1773 (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986)). Section 101(b) of the Compact requires the President to authorize an effective date, in accordance with section 411, for implementation of the Compact. *Id.* Section 411 requires the United States to act in fulfillment of its responsibilities as administering authority under the Trusteeship Agreement to bring the Compact into effect. *Id.* § 411, at 1827. One responsibility is to uphold the provisions in the United Nations Charter. Trusteeship Agreement for The Former Japanese Mandated Islands, July 18, 1947, art. 4, 61 Stat. 3301, 3302, T.I.A.S. No. 1665, at 2. One provision of the United Nations Charter directly referred to in the Trusteeship Agreement is article 83. *Id.* at 3302-03, at 2. Article 83 provides that the Security Council will carry out all United Nations functions for strategic trusts. U.N. CHARTER art. 83, para. 2. Termination is one such function, and because the Security Council has not completed it, the Compact is not in effect under section 411. Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 411, 99 Stat. 1770, 1827 (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986)).

171. Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 101(b), 99 Stat. 1770, 1773 (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986)).

172. *See supra* notes 170-71 and accompanying text (describing what the President must do to implement the Compact).

for an agreement separate from the Compact.[173] This agreement became known as the Section 177 Agreement; its purpose was to provide just and adequate settlement of all claims under section 177 of the Compact.[174] The United States government provided $150 million to fund the provisions of the Section 177 Agreement.[175]

The Compact and the Section 177 Agreement, however, are tied through section 103(g) of the Compact that is the espousal provision of this international agreement.[176] Espousal is a widely recognized principle of international law. It is the ability of a nation to set forth and, thereby, settle the claims its citizens possess against other nations.[177] Subsection 1 of 103(g) reflects the congressional intent for the agreement to act as the full and final settlement of claims arising under articles X and XI of the Section 177 Agreement.[178] Article X of the Section 177 Agreement (espousal article) addresses the Republic of the Marshall Islands espousal of the Bikinian Claims and purports to terminate all claims against the United States in Marshallese courts arising from the nuclear testing program.[179] Article XI of the Agreement establishes a procedure to indemnify the United States from nuclear testing claims.[180] Article XII of the agreement (termination article) terminates all the claims in Articles X and XI and removes the jurisdiction of all United States courts on these claims.[181] Subsection 2 of section 103(g) of the Compact ties the jurisdictional limitations of the termination article of the Section 177 Agreement to the objective of the espousal article and it may not be implemented separately.[182] When

173. Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 177, 99 Stat. 1770, 1812 (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986)). The Compact requires the United States Government and the Marshallese Government to set forth a separate agreement for settlement of the Marshallese Nuclear Testing Claims. *Id.*

174. Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 103(g), 99 Stat. 1770, 1782 (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986)); Section 177 Agreement, *supra* note 113, art. I, § 1, at 2.

175. Section 177 Agreement, *supra* note 113, art. I, § 1, at 2.

176. Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 103(g), 99 Stat. 1770, 1782 (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986)).

177. 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1241 (1970).

178. *Id.* The espousal article addresses the Republic of the Marshall Island espousal of the Bikinian claims. Section 177 Agreement, art. X, *supra* note 113, at 12. The termination article provides that all Bikinian claims are terminated in United States courts. *Id.* art. XII, at 13. Both provisions addressed the Bikinian claims arising from American nuclear tests. *Id.* art. X and XII.

179. Section 177 Agreement, *supra* note 113, art. X, at 12.

180. *Id.* art. XI, at 12-13.

181. *Id.* art. XII, at 13.

182. Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 103(g), 99 Stat. 1770, 1782 (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986)). Congress specifically intended the jurisdictional limitations of the termination article of the Sec-

implementing the Section 177 Agreement, the United States intended to provide for a full settlement of all claims.[183] Another interpretation, however, is possible if the Section 177 Agreement is read in conjunction with the language of section 103(g) that ties the termination article to the espousal article.[184] In fact, this agreement and its interpretation are the focus of *Juda II*.[185] Given the various interpretations of the Compact and the interaction of this agreement with the Bikinian claims and the Trusteeship Agreement, judicial disposition of this case proved onerous.

## III. THE CLAIMS COURT ANALYSIS IN JUDA

In *Juda II*, the Claims Court granted the United States motion to dismiss the Bikinian claims for lack of subject matter jurisdiction.[186] In reaching this decision, the court found the Compact and the Section 177 Agreement effective; it concluded that Congress had withdrawn United States consent to be sued.[187] Whether the Trusteeship Agreement remained in effect played a significant role in the Claims Court decision on the effectiveness of the Compact and the Section 177 Agreement.[188]

### A. EFFECT OF TRUSTEESHIP

Prior to discussing the dismissal, the court examined the effectiveness of the Trusteeship Agreement.[189] The court immediately established that termination of the Trusteeship Agreement and implementation of

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tion 177 Agreement to solely and exclusively accomplish the objective of the espousal article. *Id.* Furthermore, the termination article is to act as clarification of the effect of the espousal article. *Id.* Finally, the termination article was not intended to be construed or implemented separately from the espousal article. *Id.*

183. Section 177 Agreement, *supra* note 113, art. X, at 12. Section 1 of the espousal article is titled *Full Settlement of All Claims*. *Id.* This provision claims to constitute full settlement of all claims arising from the nuclear testing. *Id.* After a purported full settlement of these international claims, the termination article terminates all claims of this nature and withdraws jurisdiction from the courts. *Id.* art. XII, at 13.

184. Plaintiffs' Response, *supra* note 45, at 45-50; *see* Consolidated Brief, *supra* note 15, at 20-32 (asserting that ineffective espousal or other deficiency in the espousal article would negate the termination article due to the linkage to section 103(g)(2)). In fact, much of the plaintiffs' argument centers on this contention. *Id.*

185. Consolidated Brief, *supra* note 15, at 14; *see Juda II*, 13 Cl. Ct. at 683-87 (examining the Section 177 Agreement extensively).

186. *Juda II*, 13 Cl. Ct. at 690.

187. *Id.* at 686.

188. *Id.* at 677-82. According to the court, the Compact dismisses the plaintiffs' claims, even though the Trusteeship Agreement remains in force. *Id.* at 682-90.

189. *Id.* at 677-82.

the Compact were separate issues.[190] In direct contradiction to section 101(b) of the Compact, the Claims Court decision decoupled the Trusteeship Agreement from the Compact.[191] The court determined that Trusteeship termination was a question of law within the purview of the court.[192]

In addition, the Claims Court examined the United Nations Charter provisions specifically applicable to the trusteeship system and the Trusteeship Agreement.[193] The court also examined the stated positions of the United States government concerning trusteeship termination.[194] Finally, the court reviewed legislative history to determine whether the United States intended to comply with its treaty obligations to the United Nations.[195]

After examining Article 83 of the United Nations Charter, the court held that the above inquiries required United Nations Security Council consent to legally terminate the Trusteeship, and that such consent had not been given.[196] According to the court, under both the United Nations Charter and the Trusteeship Agreement, the Trusteeship was still in de jure (legal) effect.[197] The court held that effectiveness of the Compact and the Section 177 Agreement depended on an additional finding of de facto (actual) termination of the Trusteeship.[198] Relying

190. *Id.* at 678. *But see* Plaintiffs' Response, *supra* note 45, at 39-41 (asserting that Congress intended prior or simultaneous termination of the Trusteeship to effectuate the Compact). Section 101(b) clearly requires effective trusteeship termination before the Compact may come into effect. Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 101(b), 99 Stat. 1770, 1773 (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986)).

191. Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 101(b), 99 Stat. 1770, 1773 (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986)).

192. *Juda II*, 13 Cl. Ct. at 678.

193. *Id.* at 678, 680-81. The court examined article 83 of the United Nations Charter which reserves the powers for alteration and amendment of strategic trusteeship agreements to the United Nations Security Council. *Id.*

194. *Id.* at 679. From 1947 until March 1986, representatives of the United States consistently acknowledged the necessity of receiving United Nations Security Council approval for termination of a strategic trusteeship. *Id.* Writers have also recognized the role of the Security Council in this arrangement. Hirayasu, *supra* note 3, at 488; *Bravo's Fallout*, *supra* note 15, at 188.

195. *Id.* at 681. After examining various congressional action pertaining to the Compact, the court concluded that the United States intended to abide with the United Nations Charter provisions governing trusteeship termination. *Id.*

196. *Id.* at 678. Although not explicitly stating that termination of strategic trusteeships requires Security Council action, the court found that article 83(1) specifically delegates all functions related to strategic areas to the Security Council. *Id.* at 678-79; *see supra* notes 130-37 and accompanying text (discussing Article 83 and related passages).

197. *Juda II*, 13 Cl. Ct. at 673.

198. *Id.* at 682. Although the Trusteeship was in effect de jure, the effectiveness of the Compact remained unresolved. *Id.*

on a decision of the District Court for the Southern District of New York, *Morgan Guaranty Trust Co. v. Republic of Palau*,[199] the court in *Juda II* concluded that actual termination of a trusteeship may occur prior to legal termination.[200] The court then proceeded to examine whether the Compact and the Section 177 Agreement terminated the Bikinian claims.[201]

### B. EFFECT OF THE COMPACT ON BIKINIAN CLAIMS

The Claims Court, after rejecting various assertions of the plaintiffs regarding Compact effectiveness, found the Compact in force based on its analysis of the applicable provisions.[202] The court further concluded that the Section 177 Agreement[203] governed the settlement of all claims arising from United States nuclear testing in Micronesia.[204] Effectiveness of the Agreement, however, depended on the interaction of several clauses in the Compact and the Section 177 Agreement.[205]

As indicated above, two provisions of the Section 177 Agreement

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199. Morgan Guaranty Trust Co. v. Republic of Palau, 639 F. Supp. 706 (S.D.N.Y. 1986).

200. *Juda II*, 13 Cl. Ct. at 682; *see* Morgan Guaranty Trust Co. v. Republic of Palau, 639 F. Supp. 706, 714-16 (S.D.N.Y. 1986) (examining the international status of Palau, part of the trusteeship). In *Morgan Guaranty Trust Co.*, the court concluded that ignoring Palau's substantial exercise of sovereignty (de facto termination) while holding to "formalist indicia of international independence" (de jure termination) would foreclose the de facto sovereignty concept. *Id.* at 716. The court, adopting language of the Second Circuit Court of Appeals held that Palau was an independent entity, unless, of course, form was to govern over substance. *Id.* (*citing Murarka v. Bachrach Bros.*, 215 F.2d 547, 552 (2d Cir. 1954)). The District Court felt that the de jure approach eclipsed the de facto reality of the new political situation established through the Compact. *Id.* at 713.

201. *Juda II*, 13 Cl. Ct. at 682.

202. *Id.* at 682-83. The Compact and the Section 177 Agreement went into force on October 21, 1986. *Id.* From the perspective of the United States government, this was the most probable date of Compact effectiveness under section 411. Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 411, 99 Stat. 1770, 1827 (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986)). After little discussion, the court held that the Section 177 Agreement was in effect. *Juda II*, 13 Cl. Ct. at 683.

203. Section 177 Agreement, *supra* note 113, at 1.

204. *Juda II*, 13 Cl. Ct. at 684; *see id.* at 683 (stating the agreement has the "force and effect of law"). The Claims Court relied on the language in section 103(g), asserting that the Section 177 Agreement is intended as a final settlement. *Id.* In addition, Congress intended that the full and final settlement of all nuclear-related claims lie in section 177 and the corresponding agreement. Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 103 (g)(1), 99 Stat. 1770, 1782 (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986)).

205. *Juda II*, 13 Cl. Ct. at 683. In the court's view, effectiveness turned on several Compact provisions, section 103(g)(1) and (2), section 177, and section 471(c); and the espousal and termination articles of the Section 177 Agreement). *Id.* at 683. The Claims Court proceeded to determine whether the court could continue to hear plaintiffs' claims. *Id.* at 683-86.

were of particular importance to the Claims Court decision. The espousal article addresses the Republic of the Marshall Island's espousal of the Bikinian claims.[206] The termination article provides that all Bikinian claims are terminated in all United States courts.[207] The court stated that section 103(g) of the Compact[208] clearly linked the espousal article with the termination article, thereby, terminating the Bikinian claims.[209]

Under international law, espousal of the Bikinian claims must be valid before the Republic of the Marshall Islands can settle them.[210] After a lengthy discussion of the legislative history,[211] the Claims Court held that section 103(g)(2) did not require an adequate espousal of the Bikinian claims under the espousal article.[212] This led the Claims

206. Section 177 Agreement, *supra* note 113, art. X, § 1, at 12. Section two of the espousal article purports to terminate all claims against the United States that are proceeding in Marshallese Courts. *Id.* art. X, § 2, at 12.

207. *Id.* art. XII, at 13.

208. Compact Of Free Association Act of 1985, Pub. L. No. 99-239, § 103 (g)(1), 99 Stat. 1770, 1782 (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986)). Section 103(g)(1) states that Section 177 and the Section 177 Agreement are intended as a "full and final" settlement of all claims listed in articles X and XI of that Agreement. *Id.*

209. *Juda II*, 13 Cl. Ct. at 684; *see* Section 177 Agreement, *supra* note 113, art. X, at 12 (stating that the agreement is a full settlement of all claims against United States entities arising from the nuclear testing program). Section 2 of the espousal article, in the Section 177 Agreement terminates all legal proceedings in Marshallese courts based on these claims. *Id.* The termination article states that all claims articulated in the espousal article are terminated and that no United States court shall have jurisdiction to entertain such claims. *Id.* art. XII, at 13. This language, if effective, completely dismisses all plaintiffs' claims and actions, thereby removing any judicial remedy. *Juda II*, 13 Cl. Ct. at 686-87.

210. 6 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 802 (1943); *see* M. WHITEMAN, *supra* note 177, at 1233 (examining the position of the United States on espousal). According to Assistant Secretary of State Dutton, the internationally accepted view is that a state cannot seek compensation for individuals who were not its nationals at the time of their loss. M. WHITEMAN, *supra* note 177, at 1233 (quoting a letter of Secretary Dutton).

211. *Juda II*, 13 Cl. Ct. at 684-85; *see id.* (examining the legislative history to determine the impact of section 103(g)(2)). The original House of Representatives version of section 103(g)(2), expressly provided that the termination article would not divest the claims if the courts determine the invalidity of the espousal article or espousal generally. *Id.* at 685. This version, however, was not utilized. *Id.* In the opinion of the Claims Court, the final version of section 103 (g)(2) expressly eliminated all judicial consideration of the espousal article. *Id.* at 685. The Claims Court held that section 103(g)(2) merely clarifies section 103(g)(1) and is subject to Congress' intent that espousal is valid and effective. *Id.*

212. *Juda II*, 13 Cl. Ct. at 684-86. In effect, this adopted the government position that section 103(g)(2) clarifies section 103(g)(1) and does not require judicial inquiry into the validity of the espousal article. *Id.* at 684; *see id.* at 684 (expressing the government assertion that the first sentence in section 103 (g)(2) explicitly states that section 177 is ratified and approved in furtherance of congressional intent, as enunciated in section 103(g)(1)). The Claims Courts expressly held that the termination arti-

Court to conclude that the jurisdictional divesting language of the termination article was effective.[213] Having reached this conclusion, the court avoided lengthy discussion regarding the ability of the Marshall Islands to validly espouse the Bikinian claims[214] because it found that jurisdiction divestment under the termination article did not depend upon valid espousal.[215] Instead, the court addressed other challenges to the termination article divestment.[216]

The Claims Court examined the constitutionality of the procedures established to resolve the claims.[217] The court rejected the argument that a blank withdrawal of access to any judicial forum for Bikinian claims was an unconstitutional exercise of legislative power.[218] Furthermore, the court rejected plaintiffs' case law on this proposition[219] as

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cle was not dependant upon a judicial determination of espousal validity under the espousal article. *Id.* at 686.

213. *Juda II*, 13 Cl. Ct. at 686.

214. *Id.* at 684-86.

215. *Id.* at 686. *But see id.* at 685-86 (acknowledging that valid claim espousal is derived from recognized international law concepts involving the continuity of nationality). The court asserted that, although the United States accepts the espousal doctrine it was inapplicable to the facts of the case. *Id.*

216. *Id.* at 687-89. This followed the courts examination of the Tucker Act. *Id.* at 686-87. The court stated that the Tucker Act's dual nature encompassed both a grant of jurisdiction and a waiver of sovereign immunity. *Id.* at 686; United States v. Mitchell, 463 U.S. 206, 212 (1983) (examining this dual nature); *see Juda II*, 13 Cl. Ct. at 686-89 (examining the nature of the Tucker Act and holding that the Act creates a waiver of sovereign immunity for those claims in which it grants Claims Court jurisdiction). The Claims Court asserted that both of plaintiffs' claims involve public rights and are subject to the public rights doctrine. *Id.* at 686-87. The public rights doctrine recognizes that as part of its sovereign immunity, the United States government can put conditions on its consent to be sued. *Id.* at 687; *see also* Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 67-76. (1982) (examining the development of the public rights doctrine out of sovereign immunity and separation of powers).

217. *Juda II*, 13 Cl. Ct. at 687-89; *see id.* (examining the two major constitutional challenges to the claims settlement). The plaintiffs first argued that this settlement was an unconstitutional exercise of legislative power, and in fact a taking itself. *Id.* at 687. The plaintiffs next argued that an alternative settlement, while acceptable, only remains so if it provides a reasonable, certain, and adequate means for compensation at the time of taking. *Id.* at 689; *see* The Regional Rail Reorganization Act Cases, 419 U.S. 102, 125 (1974) (quoting *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U.S. 641, 658 (1890)) (citing the same prerequisites for acceptable alternative settlement).

218. *Juda II* 13 Cl. Ct. at 688-89. The court held that when the United States creates a right against itself it is under no obligation to provide a judicial remedy as long as an obligation is recognized and alternative fulfillment is provided. *Id.* The court relies on two cases for this proposition. *Id.* In *United States v. Babcock*, the Supreme Court held that the United States is under no obligation to provide a judicial remedy when it creates rights against itself. United States v. Babcock 250 U.S. 328, 331 (1919) (citing numerous authority). In *Lynch v. United States*, the Supreme Court held that as long as Congress recognizes its contractual responsibility, it may indicate alternative fulfillment. Lynch v. United States, 292 U.S. 571, 582 (1934).

219. *Juda II*, 13 Cl. Ct. at 687-88; *see* Plaintiffs' Response, *supra* note 45, at 51-55

inapposite and contradictory to the claims presented in the case.[220] Consequently, the court restricted plaintiffs' case law to their factual circumstances.[221]

The plaintiffs argued that alternative compensation[222] must be addressed at the time of the taking.[223] In addition, the plaintiffs asserted that compensation must be reasonable, certain, and adequate at the time of the taking to be constitutional.[224] The Claims Court responded that the settlement procedure provides for reasonable and certain compensation.[225] The court stated that the third constitutional requirement, adequate compensation, could not be determined presently.[226] The court considered these arguments premature because the settlement procedure was incomplete.[227]

According to the court, section 103(g)(2) allows the Bikinian claims

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(asserting that the rule of *United States v. Klein* and *Battaglia v. General Motors Corp.* is that jurisdictional statutes are constitutionally limited and Congress may not create obstacles to constitutional rights and obligations); Plaintiffs' Memorandum In Opposition To Defendant's Amended Motion To Dismiss at 20-25, Juda v. United States, 13 Cl. Ct. 667 (1987) (No. 172-81L) [hereinafter Plaintiffs' Opposition] (listing cases in support of this claim).

220. *Juda II*, 13 Cl. Ct. at 687. The court rejected the rule of *United States v. Klein*, restricting it to its facts. *Id.* The court also rejected plaintiffs' proposition that Congress can not enact jurisdictional standards that prevent constitutional rights vindications. *Id.* at 688. In *Battaglia v. General Motors Corp.*, the Second Circuit Court of Appeals held that although Congress has the power to restrict inferior court jurisdiction, it must not do so to exact an uncompensated taking of private property. 169 F.2d at 257; *see* Graham & Foster v. Goodcell, 282 U.S. 409, 431 (1931) (asserting that Congress, even if it had authority to dispense with a substantive right, could not accomplish that result through a blanket denial of remedy against the United States). The Claims Court, however, distinguished *Battaglia*, rejecting its application to these facts. *Juda II*, 13 Cl. Ct. at 688.

221. *Juda II*, 13 Cl. Ct. at 687-88.

222. Section 177 Agreement, *supra* note 113, art. I, § 1, at 1. The $150 million claims settlement fund is for all Marshallese claims arising from the United States Testing Program. *Id*; *see id.* art. II, at 3-7 (listing disbursement amounts). The Bikinians are not the only Marshallese with nuclear testing claims against the United States. *Juda I*, 6 Cl. Ct. at 443. As many as 5,000 claims have been filed by the Marshallese, all of which would be compensated from this fund. *Id.*

223. Consolidated Brief, *supra* note 15, at 45.

224. *Juda II*, 13 Cl. Ct. at 689; *see* The Regional Rail Reorganization Act Cases, 419 U.S. 102, 124-25 (1974) (requiring that alternative compensation be reasonable, certain, and adequate at the time of taking). The plaintiffs assert that Congress cannot extinguish their claims unless it meets these just compensation requirements. *Juda II*, 13 Cl. Ct. at 689. The plaintiffs further contend that before they are subjected to the claims settlement provision, they must have the opportunity to prove it unconstitutional. *Id.* at 689.

225. *Juda II*, 13 Cl. Ct. at 689.

226. *Id.*

227. *Id. But see* Cherokee Nation v. Southern Kansas Ry. Co., 135 U.S. 641, 659 (1890) (stating that property owners are entitled to reasonable, certain, and adequate compensation prior to obstruction of their interest).

to be dismissed absent valid espousal of the Republic of the Marshall Islands.[228] The court found precedent supporting the proposition that Congress may withdraw government consent for suit,[229] and that the termination article of the Section 177 Agreement is an effective form of withdrawal.[230] Additionally, the court addressed the plaintiffs' constitutional challenge to the Section 177 settlement procedures.[231] The court rejected the unconstitutional legislative exercise argument[232] and the just alternative compensation argument.[233] Finally, the court held that the Section 177 Agreement settled the Bikinian claims, warranting dismissal of this case.[234] The question now turns to whether an alternative approach was possible.

## IV. ANALYSIS OF THE CLAIMS COURT DECISION

In *Juda II*, the Claims Court holding that the effectiveness of the Section 177 Agreement necessitated the dismissal of the Bikinian claims[235] is erroneous for two reasons. First, the Compact and the Section 177 Agreement are not currently in effect.[236] Second, even if these agreements were in effect, they would not dismiss the plaintiffs claims due to the unconstitutionality of such an action.[237] The questionable nature of these issues made dismissal of this case an inadequate resolution.

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228. *Juda II*, 13 Cl. Ct. at 685-86.

229. *Id.* at 689-90.

230. *Id.*

231. *Id.* at 687-89.

232. *Id.* at 687-88.

233. *Id.* at 688-89.

234. *Id.* at 690. The court held that the termination article of the Section 177 Agreement implicitly amended the Tucker Act jurisdiction of the Claims Court, thereby, withdrawing consent of the United States to be sued. *Id.*

235. *Id.*

236. Consolidated Brief, *supra* note 15, at 20. The Claims Court refused to effectuate the language of the Compact relating to espousal under the espousal article. *See* Plaintiffs' Response, *supra* note 45, at 1 (stating that the Trusteeship Agreement has not ended and that Congress did not intend the Compact to take effect until the Trusteeship Agreement had terminated).

237. *See* Consolidated Brief, *supra* note 15, at 32 (asserting that dismissal would be an unconstitutional foreclosure on plaintiffs' taking claims without adequate provisions for alternative remedies).

## A. THE COMPACT AND THE SECTION 177 AGREEMENT ARE NOT IN EFFECT

### *1. The Compact Can Not Be Effective Absent Application of the Trusteeship Agreement*

After an extensive discussion of the relevant United Nations Charter provisions and the Trusteeship Agreement,[238] the Claims Court held the Agreement between the United Nations Security Council and the United States in de jure effect under international law.[239] The dichotomous result of the court's opinion, creating both a de jure and a de facto effect,[240] allowed the Trusteeship Agreement to terminate absent the required Security Council action.[241] This conclusion erroneously assumed that the Trusteeship Agreement was not relevant to the effectiveness of the Compact.[242]

This result contradicts the express language of the United Nations Charter and the Compact.[243] The United Nations Charter, made appli-

238. *Juda II*, 13 Cl. Ct. at 678-82.

239. *Id.* at 682.

240. *Id.* at 672.

241. *Id.* Both the Trusteeship Agreement and the Compact gave the United Nations Security Council governing authority over the strategic trust. Trusteeship Agreement For The Former Japanese Mandated Islands, July 18, 1947, art. 4, 61 Stat. 3301, 3302, T.I.A.S. No. 1665, at 2; Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 411, 99 Stat. 1770, 1827 (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986)); *see* Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 411, 99 Stat. 1770, 1827 (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986)) (stating that the Compact will come into effect upon mutual agreement with the United States acting in fulfillment of the administering authority's responsibility). Section 101(b) of the Compact requires that the United Nations procedures for trusteeship termination be "taken into account." *Id.* at 1773. One responsibility of the United States was to follow the precepts of the United Nations Charter which requires Security Council action to terminate the trust. U.N. CHARTER art. 83, para. 1. *But see Juda II*, 13 Cl. Ct. at 682 (stating that whether the Trusteeship Agreement is formally terminated under United Nations procedures is an issue for the International Court of Justice [ICJ] to decide). The ICJ may give an advisory opinion on any legal matter to any entity authorized to make a request under the United Nations Charter. Statute of The International Court of Justice, June 26, 1945, art. 65, para. 1, 59 Stat. 1055, T.S. No. 993.

242. *Juda II*, 13 Cl. Ct. at 682; *see id.* (finding the issue of Compact effectiveness unresolved despite the Claims Court holding that the Trusteeship Agreement was not terminated de jure).

243. *See supra* note 241 and accompanying text (discussing the language in the Compact and the Charter). According to the Claims Court, all approvals for Compact termination had been given and all the steps necessary for Compact effectiveness had been completed. *Juda II*, 13 Cl. Ct. at 682. The Claims Court overlooked the necessary agreement of the Security Council to terminate the Trusteeship, pursuant to both the United Nations Charter, and the Trusteeship Agreement. U.N. CHARTER art. 83. Only the Security Council has the power to alter, amend, or approve strategic trusteeship

cable in the Trusteeship Agreement,[244] reserves all strategic trust functions of the United Nations to the Security Council.[245] Moreover, section 101(b) of the Compact requires the United States to consider United Nations trusteeship procedures.[246] Section 411 of the Compact requires the United States to act in fulfillment of its trusteeship responsibilities.[247]

The Claims Court recognized that trusteeship and free association are incompatible.[248] Any attempt to make the Compact effective with-

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agreements. *Id.* The United States claimed that it could not obtain the requisite Security Council action due to the recalcitrance of the Soviet Union. *Juda II*, 13 Cl. Ct. at 682.

244. Trusteeship Agreement For The Former Japanese Mandated Islands, July 18, 1947, art. 4, 61 Stat. 3301, 3302, T.I.A.S. No. 1665, at 2.

245. U.N. CHARTER art. 83, para. 1. This article gives the Security Council authority over all functions of the United Nations relating to strategic areas. *Id.* This power includes the approval, alteration, or amendment of trusteeship agreement terms. *Id.* The plaintiffs contended that these powers included approval of termination. Plaintiffs' Response, *supra* note 45, at 11. Although termination is not included, the case law indicates that the Security Council's powers are vast and that the "including" language of article 83(1) is not limited to the powers enumerated. Federal Land Bank v. Bismarck Lumber Co., 314 U.S. 95, 99-100 (1941) (citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 189 (1941)); Puerto Rico Maritime Shipping Auth. v. Interstate Commerce Comm'n, 645 F.2d 1102, 1112 n.6 (D.C. Cir. 1981) (citing *Certified Color Mfg. Ass'n v. Mathews*, 543 F.2d 284, 296 (D.C. Cir. 1976)). The Claims Court recognized the necessity of United Nations Security Council action for termination. *Juda II*, 13 Cl. Ct. at 678 (citing *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180 (1982)). The court relied on *Sumitomo Shoji America, Inc. v. Avagliano* for the proposition that the phrase "including any alteration or amendment", if given its obvious meaning, includes termination of the agreement. *Id.*

246. Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 101(b), 99 Stat. 1770, 1773 (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986)). The Trusteeship Agreement requires the United States to act in accordance with the United Nations Charter in fulfilling its obligations. Trusteeship Agreement For The Former Japanese Mandated Islands, July 18, 1947, art. 4, 61 Stat. 3301, 3302, T.I.A.S. No. 1665, at 2. Trusteeship termination requires Security Council action under article 83(1). U.N. CHARTER art. 83, para. 1. Absent Security Council action to terminate the trusteeship, sections 101(b) and 411 of the Compact bar compact effectiveness because United States administering responsibilities require action in accordance with article 83(1) of the United Nations Charter. Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 101(b), 99 Stat. 1770, 1773, (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986)); *see id.* (authorizing presidential action subject to United Nations procedures) *and id.* § 411 at 1827 (requiring that the United States act according to its responsibilities as trust administrator).

247. Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 411, 99 Stat. 1770, 1827 (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986)). After taking into account any procedures of the United Nations for trusteeship agreements, the President may reach an effective date for the Compact and implement it at such time. *Id.* Section 411 states that the Compact will enter into effect upon mutual agreement of the countries, with the United States acting in fulfillment of its administering authority. *Id.* § 411, at 1827; *see supra* note 241 (discussing the requirements of section 411).

248. *Juda II*, 13 Cl. Ct. at 677-78.

out Security Council approval of Trusteeship termination would fail according to the effective date language of the Compact provisions.[249] On November 3, 1986, President Reagan, absent Security Council termination of the Trusteeship, proclaimed the Trusteeship no longer in effect.[250] According to the President termination became effective on October 21, 1986.[251] Without Security Council approval of termination, these provisions preclude the effectiveness of the Compact, and, hence, preclude the dismissal provisions of the Section 177 Agreement.[252]

For the court to hold otherwise leads to the conclusion that Congress passed a statute that is inconsistent with a treaty.[253] Applicable case law requires reconciliation of inconsistencies between a statute and treaty to the greatest extent possible.[254] A statute may alter an existing treaty if the courts find clear intent on the part of Congress.[255] In this case, the Compact, a product of legislative compromise, can be interpreted in various ways.[256] Furthermore, the inconsistency of key passages and the legislative history of the statute leave the Compact ambiguous. Thus, the clear intent requirement is not met, and the Compact is ineffective without trusteeship termination.[257]

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249. Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 101(b), 99 Stat. 1770, 1773 (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986)). The plaintiffs asserted that congressional intent was for the Compact to take effect only after trusteeship termination. Plaintiffs' Response, *supra* note 45, at 38-43. Apparently, the executive branch represented to Congress that trusteeship termination and free association would occur simultaneously. *Id.* at 39. Defendant's linkage of these agreements indicates that the Compact is not in effect because effective termination has not taken place. *Id.* at 41.

250. Proclamation No. 5564, 3 C.F.R. 146 (1986).

251. *Id.*

252. *See supra* notes 243-49 and accompanying text (examining various Compact, Trusteeship Agreement, and United Nations Charter provisions).

253. Plaintiffs' Response, *supra* note 45, at 41.

254. United States v. Vetco, Inc., 691 F.2d 1281, 1286 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981); *see* United States v. Lee Yen Tai, 185 U.S. 213, 222 (1902) (applying the principle of statutory construction that requires reconciliation of statutes to the greatest extent possible to a treaty between China and the United States).

255. Cook v. United States, 288 U.S. 102, 120 (1933) (asserting that a later statute will not be considered to have abrogated or modified a treaty unless Congress makes this result expressly clear). A statute's purpose to override a treaty, or a part thereof, must appear "clearly and distinctly" in its wording. United States v. Payne, 264 U.S. 446, 448 (1924); United States v. Lee Yen Tai, 185 U.S. 213, 221 (1902).

256. *Compare* Consolidated Brief, *supra* note 15, at 20-29 (arguing that section 103(g)(2) of the Compact links the espousal article and the termination article of the Section 177 Agreement) *with* Appellee's Brief, *supra* note 86, at 26-32 (asserting that section 103(g)(2) of Compact does not require the espousal article and the termination article of the Section 177 Agreement to be linked).

257. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(a) (1986); *see id.* (examining the relationship between an act of Congress and an international agreement, and noting the clear intent standard). Acts of Congress supersede early international agreements as United States law if that purpose is clear

*2. Section 103(g) Linkage of Espousal and Termination Articles of the Section 177 Agreement*

Espousal is the ability of a nation to set forth and, thereby, settle the claims its citizens possess against other nations.[258] If the espousal of these claims did not comply with international law, the Republic of the Marshall Islands could not settle these claims with the United States.[259] Thus, dismissal pursuant to claims settlement would be ineffective.

As the plaintiffs argued, section 103(g)(2) links the espousal and termination articles of the Section 177 Agreement, thereby, requiring espousal validity for dismissal of the claims.[260] In fact, the linkage of these provisions is a direct result of Claims Court questioning on the propriety of dismissal absent proper espousal.[261] Furthermore, these articles require a court determination on the validity of the Republic of the Marshall Islands espousal of these claims.[262] The language of section 103(g)(2) and the applicable legislative history make it clear that espousal validity is necessary to effectuate dismissal under the termination Article.[263]

The clear meaning of section 103(g) of the Compact shows the linkage of the espousal and termination articles of the Section 177 Agreement.[264] The extent of this linkage, however, is ambiguous.[265] It

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or if the act or provision cannot be fairly reconciled. *Id.*

258. M. WHITEMAN, *supra* note 177, at 1241; G. HACKWORTH, *supra* note 210, at 802.

259. G. HACKWORTH, *supra* note 210, at 802.

260. Plaintiffs' Response, *supra* note 45, at 45-50; Consolidated Brief, *supra* note 15, at 21-22.

261. Plaintiffs' Opposition, *supra* note 219, at 7. The Claims Court pointed out that the termination article alone would apparently strip Claims Court jurisdiction, despite espousal validity under the espousal article. *Id.* Congress recognized serious constitutional questions on the validity of the Section 177 Agreement. 131 CONG. REC. S15607-8 (daily ed. Nov. 14, 1985) (statement of Sen. Metzenbaum); 131 CONG. REC. H6345 (daily ed. July 25, 1985) (statement of Rep. Bryant). The plaintiffs successfully lobbied Congress to link the espousal and termination articles of the Section 177 Agreement, through section 103(g). Plaintiffs' Response, *supra* note 45, at 45; Plaintiffs' Opposition, *supra* note 219, at 7. If Marshall Islands espousal was invalid under international law, then a flat withdrawal of jurisdiction might be unconstitutional. 131 CONG. REC. S15607-8 (daily ed. Nov. 14, 1985) (statement of Sen. Metzenbaum); H.R. REP. NO. 188, 99th Cong., 1st Sess., pt. 2, at 34 (1985).

262. Plaintiffs' Response, *supra* note 45, at 44-47; Consolidated Brief, *supra* note 15, at 16-22.

263. 131 CONG. REC. H11829 (daily ed. Dec. 11, 1985) (statement of Rep. Seiberling); H.R. REP. NO. 188, 99th Cong., 1st Sess., pt. 2, at 34 (1985).

264. Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 103(g)(1), (2), 99 Stat. 1770, 1782 (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986)). Section 103(g)(2) indicates that the explicit understanding and intent of Congress was for the jurisdictional limitations of the termination article to be enacted "solely and

is clear that this agreement intended to constitute the full and final settlement of all nuclear testing claims.[266] The existence of preconditions for a full and final settlement was a central legal issue of this case.[267] Except for the linkage language of section 103(g)(2), no other provisions in the Compact or in the Section 177 Agreement exist to prevent termination of the claims once the Trusteeship is terminated.[268]

The parties in *Juda II* agreed that Congressional intent indicated that the Section 177 Agreement was to provide a full settlement.[269] The parties, however, disagreed on whether Congress required the courts to determine the validity of espousal before implementing the termination article.[270] Determining the actual meaning of section 103(g)(2) is necessary to resolve this issue.[271]

The language of section 103(g)(2) is clear. The second sentence of Section 103(g)(2) indicates qualification on approval of the Compact settlement.[272] Congress intended the jurisdictional and claim divestment of the termination article to achieve the objective of the espousal article and to serve as a clarification of the effect of the espousal article. Congress stated that the termination article could not be construed or implemented separately from the espousal article.[273] The objectives of the espousal article include Republic of Marshall Islands espousal

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exclusively" to achieve the objective of the espousal article. *Id.* In addition, the termination article was enacted as a clarification of espousal article effect and was not to be construed or implemented independently from the espousal article. *Id.*

265. *Id.*; *see supra* note 264 and accompanying text (citing the relevant language); Plaintiffs' Opposition, *supra* note 219, at 7 (examining the differing opinions of the Bikinians and the United States government over the impact of section 103(g)(2) of the Compact).

266. Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 103(g)(1), 99 Stat. 1770, 1782 (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986)). Other provisions also intend this to constitute a full and final settlement of these claims. Section 177 Agreement, *supra* note 113, art. X, § 1, at 12.

267. *Juda II*, 13 Cl. Ct. at 684; Section 177 Agreement, *supra* note 113, art. X, § 1, at 12; Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 103 (g)(2), 99 Stat. 1770, 1773 (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986)).

268. Section 177 Agreement, *supra* note 113, at 1; Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986)).

269. *Juda II*, 13 Cl. Ct. at 684.

270. *Id.*

271. *Id.*

272. Consolidated Brief, *supra* note 15, at 21. The plain language of section 103(g)(2) of the Compact indicates that the settlement approval of Congress is qualified. *Id.*

273. Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 103 (g)(2), 99 Stat. 1770, 1782 (1986) (codified at 48 U.S.C. § 1681 (West Supp. 1986)); *see* Consolidated Brief, *supra* note 15, at 20 (reiterating the qualifications on the Section 177 Agreement).

and termination of Bikinian claims against the United States.[274] Without adequate espousal under international law, an effect to these objectives may not be given, and dismissal of the Bikinian claims cannot occur.[275] Therefore, the dismissal of plaintiffs' claims pursuant to the termination article, does not clarify the espousal article absent adequate espousal of the Republic of the Marshall Islands and cannot be effected separately from the espousal article.[276]

The legislative history of the Compact and the Section 177 Agreement further support the conclusion that dismissal of the Bikinian claims would not occur absent the validity of the Republic of the Marshall Islands' espousal of these claims.[277] Congress had serious questions regarding the constitutionality of the Section 177 Agreement because it denied people under a United States Trusteeship access to United States courts.[278] In response, the House of Representatives added its version of Section 103(g)(2) to the Compact.[279] This provision explicitly provided that the termination article would not divest jurisdiction if a United States court of competent jurisdiction held the espousal article invalid as a matter of international law or for any other reason.[280] The Senate version of the Compact did not have a similar provision.[281]

In lieu of a House-Senate conference, members of both the House and the Senate compromised over the course of several meetings in December 1985.[282] The House rejected the Senate decision to adopt the espousal and termination articles from the Senate version of the Section 177 Agreement without change.[283] The Senate agreed to modify

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274. Section 177 Agreement, *supra* note 113, art. X, at 342.

275. G. HACKWORTH, *supra* note 210, at 802.

276. Consolidated Brief, *supra* note 15, at 22. The second sentence of section 103(g)(2) of the Compact provides continuing jurisdiction if the Republic of the Marshall Islands espousal was not valid and effective. *Id.* This is supported by the fact that, section 103(g)(2) and articles X, XI, and XII of the Section 177 Agreement form a coherent design for jurisdiction in the event espousal is invalid. *Id.* at 21.

277. 131 CONG. REC. S15607 (daily ed. Nov. 14, 1985) (statement of Sen. Metzenbaum); H.R. Rep. No. 188, 99th Cong., 1st Sess., pt. 2, at 34 (1985).

278. 131 CONG. REC. S15606-8 (daily ed. Nov. 14, 1985) (statements of Senators Simon, Metzenbaum, Matsunaga, Kerry, and Kennedy); 131 CONG. REC. H6345 (daily ed. July 25, 1985) (statement of Rep. Bryant).

279. 131 CONG. REC. H6369 (daily ed. July 25, 1985); *see* H.R. REP. NO. 188, 99th Cong., 1st sess., pt. 1, at 34 (1985) (explaining that section 2 of 103(g) of the Compact provides that if a United States court determines espousal invalid, the termination article will not bar judicial consideration).

280. 131 CONG. REC. H6369 (daily ed. July 25, 1985); Consolidated Brief, *supra* note 15, at 25-27.

281. 131 CONG. REC. S15610 (daily ed. Nov. 14, 1985).

282. *Id.*; *Juda II*, 13 Cl. Ct. at 685.

283. 131 CONG. REC. H11789-828 (daily ed. Dec. 11, 1985). The Senate version

these articles through section 103(g) of the Compact;[284] however, they deleted all language referring to judicial consideration of the espousal article.[285]

The statements of the sponsoring members of Congress on the passage of legislation are significant sources for determining Congressional intent.[286] The court, tacitly adopting the arguments of the government, found that Congress intended effective Republic of the Marshall Islands espousal, eliminating judicial consideration of the espousal article.[287] The court based its decision on contradictory statements of various Senators and Representatives and the lack of explicit language in the compromise bill on judicial consideration of the espousal article.[288] The interpretations of legislative co-sponsors, however, carry more weight.[289]

Case law indicates that considerable weight is given to the views of Representative Seiberling, House floor manager of the bill and Compact co-sponsor.[290] Following the House Interior Committee interpreta-

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did not address the Section 177 Agreement at all. *Id.* at 11789. The House version added the language that became law. *Id.* at 11810-11.

284. 131 CONG. REC. S17653 (daily ed. Dec. 13, 1985) (statements of Sen. Dole and Sen. Byrd).

285. *Juda II*, 13 Cl. Ct. at 685.

286. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951).

287. *Juda II*, 13 Cl. Ct. at 685.

288. *Id.*

289. *See infra* note 290 and accompanying text (discussing the weight given to legislative pronouncements).

290. *See* Simpson v. United States, 435 U.S. 6, 13 (1978) (stating that the remarks of a legislative sponsor are crucial when other history is lacking); Lewis v. United States, 445 U.S. 55, 63-64 (1980) (explaining that the statements of sponsors and floor managers of a bill are entitled to weight); *see also* Brock v. Pierce County, 476 U.S. 253, 263 (1986) (asserting that statements of individual legislators are evidence of Congressional intent when consistent with statutory language and legislative history). In the instant situation the statutory language is ambiguous and the legislative history is limited, therefore, the statements of Representative Seiberling are entitled to consideration. Simpson v. United States, 435 U.S. 6, 13 (1978). As chairman of the House Interior Subcommittee on Public Lands and National Parks, the principal subcommittee involved with the Compact, Representative Seiberling chaired 13 of 26 House hearings on the Compact, one exclusively devoted to the Section 177 Agreement. Consolidated Reply Brief of Appellants at 4, People of Bikini, Enewetak, Rongelap, Utrik, and Other Marshall Islands Atolls v. The United States, Nos. 88-1206 to -1208 (Fed. Cir. 7/29/88) [hereinafter Consolidated Reply]. Representative Seiberling was also leader of the House negotiating team for the Compact compromise. *Id.*

Therefore, Representative Seiberling's interpretations are considered authoritative. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951). The judiciary must look to the sponsors of legislation when questioning its meaning. *See* In re Grand Jury Investigation of Cuisinarts, Inc., 665 F.2d 24, 34 (2d Cir. 1981), *cert. denied*, 460 U.S. 1068 (1983) (reiterating that a floor manager's statutory interpretations are authoritative). Debate from the House in which the section of the bill originated is more persuasive. Steiner v. Mitchell, 350 U.S. 247, 254 (1956). *But see*

tion,[291] Representative Seiberling presented the compromise bill to the House, explaining that if the espousal article was valid, espousal would be successful and all claims would therefore be non-justiciable.[292] According to Representative Seiberling, if the espousal article was invalid on international legal or other grounds the Bikinian claims would remain justiciable regardless of the termination article.[293] Recognizing that the House-Senate compromise changed the language to some extent, Representative Seiberling reassured Congress that the new version was effectively the same.[294] The clear intention of the House,[295] the Interior Committee, and Representative Seiberling was for the termination article to turn on valid espousal.[296]

In view of the language of section 103(g)(2) and Congressional in-

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Appellee's Brief, *supra* note 86, at 31 (asserting that plaintiffs' reliance on a single floor statement cannot prevail over the plain language in section 103(g)).

The defendant, as appellee, relied on *United States v. James* to show that fragments of legislative history do not expressly constitute clear Congressional intent. United States v. James, 478 U.S. 597 (1986); *see* Gemsco v. Walling, 324 U.S. 244, 260 (1945) (holding that ambiguous legislative history cannot override the facially express meaning of a statute). *Id.* The government asserted that the views of individual members cannot overcome statutory language which is facially clear. Appellee's Brief, *supra* note 86, at 31 n.29. This statutory language, however, is not as clear as the defendant/appellee contended. *See* Plaintiffs' Opposition, *supra* note 219, at 7 (examining the ambiguity of the statutory language). In fact, the cornerstone of this litigation, whether the Section 177 Agreement terminates the Bikinian cases is built upon competing interpretations of the statutory language. *Id.* at 6-7.

291. H.R. REP. NO. 188, 99th Cong., 1st Sess., pt. 2, at 34 (1985). The House Interior Committee explained that its version of section 103(g)(2) was to ensure that the termination article would not act as a bar to Bikinian claims if the courts determined that the espousal article was invalid. *Id.*

292. 131 CONG. REC. H11829 (daily ed. Dec. 11, 1985) (statement of Rep. Seiberling) (asserting that if a court finds the espousal article invalid, for any reason, the compromise language is the same as the House language). Under these circumstances, the termination article would be ineffective. *Id.*

293. *Id.*

294. *Id*; *Juda II*, 13 Cl. Ct. at 685.

295. 131 CONG. REC. H11828-38 (daily ed. Dec. 11, 1985). No house member challenged Representative Seiberling's contention that if the espousal article was defective, the termination article would be inoperative. *Id.* Representative Solarz, however, stated that the Compact settled the Marshallese claims for $150 million. *Id.* at 1186 (statement of Representative Solarz). Both sides of this litigation made forceful arguments on what Congress "clearly intended." *Compare* Consolidated Brief, *supra* note 15, at 29 (stating that Congress approved the Compact without hearing a single challenge to Chairman Seiberling's explanation) *with* Appellee's Brief, *supra* note 86, at 32 (stating that Congressman Lagomarsino, a Compact sponsor, in retrospect, confirmed that Congressional intent for section 103(g)(2) was a rejection of earlier versions). It is important to note that this contradiction to Chairman Seiberling was in the following Congress and should be viewed as a retrospective comment. Consolidated Reply, *supra* note 290, at 5. Furthermore, Representative Lagomarsino, in the midst debate over the Compact, remained silent when the opportunity to challenge Chairman Seiberling's assertion was present. 131 CONG. REC. H11828-38 (daily ed. Dec. 11, 1985).

296. *Id.* at 11829.

tent, the Claims Court erred in dismissing the claims without determining whether espousal of the Republic of the Marshall Islands was valid.[297] The procedure for divestment of plaintiffs' claims turns on principles of international law, particularly espousal.[298] Valid espousal requires continuity of nationality.[299] Continuity of nationality mandates that individuals with espousal claims must hold the claims continuously and be nationals of the asserting state from the date the claims arose to the date they were discovered.[300] When the claims in this case arose, the plaintiffs were not citizens of the Republic of the Marshall Islands or any state because no state existed.[301] There was, therefore, no continuity of nationality. In fact, however, the plaintiffs recognized the United States as their governing authority pursuant to the Trusteeship Agreement.[302] The rules of international law are directly applicable for determining the status of international entities. The continuity of nationality requirement for espousal is recognized specifically for situations where state creation or succession could change domestic claims into international ones.[303] Section 103(g) of the Compact requires judi-

297. *Juda II*, 13 Cl. Ct. at 685-86.

298. 131 CONG. REC. H11829 (daily ed. Dec. 11, 1985); *see* The Paquete Habana, 175 U.S. 677, 700 (1900) (holding that international law is part of United States law and that courts of appropriate jurisdiction must determine and interpret international law); *see also* Dayton v. Czechoslovak Socialist Republic, 834 F.2d 203, 206-07 (D.C. Cir. 1987) (citing a letter of an assistant Secretary of State, reiterating that espousal is an established principle of international law). The executive and legislative branches realized that the issue of espousal could turn on judicial determination. Section 177 Agreement, *supra* note 113, art. XI, at 12-3. The indemnity provision of the Section 177 Agreement, Article XI is indicative of this recognition. *Id.* The article requires the Republic of the Marshall Islands to indemnify the United States from the $150 million Marshallese claims fund if a successful suit is brought against the United States. *Id.*

299. M. WHITEMAN, *supra* note 177, at 1241.

300. *Id.*; G. HACKWORTH, *supra* note 210, at 815.

301. *Juda II*, 13 Cl. Ct. at 672. After a referendum on March 1, 1979, the Republic of the Marshall Islands inaugurated a parliamentary constitutional government on May 1, 1979. U.S. DEP'T OF STATE, TRUST TERRITORY OF THE PACIFIC ISLANDS, POLITICAL CHRONOLOGY 18-9 (1986); *see* U.S. DEP'T OF STATE, EVOLUTION OF THE FORMER TRUST TERRITORY OF THE PACIFIC ISLANDS 2 (Feb. 1989) (indicating that constitutional governments came into power in both the Republic of Marshall Islands and the Federated States for Micronesia in 1979). The Claims Court found that the Bikinians could not have been citizens of the Republic of the Marshall Islands for purposes of continuity of nationality. *Juda II*, 13 Cl. Ct. at 686. The court recognized that since the 1960s, the Republic of the Marshall Islands was a *statu nascendi*, or government evolving into a state, and that the plaintiffs are only now its citizens. *Id.* at 677. The Republic of the Marshall Islands was not in existence and the Bikinians were not its citizens when these claims arose and ripened. *Id.* at 686.

302. Trusteeship Agreement For The Former Japanese Mandated Islands, July 18, 1947, art. 3, 61 Stat. 3301, 3302, T.I.A.S. No. 1665, at 2. The Trusteeship Agreement provided that the United States would have full powers of administration, legislation, and jurisdiction. *Id.*

303. Consolidated Brief, *supra* note 15, at 57; Plaintiffs' Opposition, *supra* note

cial determination on the validity of espousal in the Section 177 Agreement.[304] Because espousal is invalid, the court should not have dismissed these claims.[305] Furthermore, there are constitutional problems that preclude the effectiveness of the termination article of the Section 177 Agreement.

### B. CONSTITUTIONAL GROUNDS PREVENT THE EFFECTIVENESS OF THE TERMINATION ARTICLE

Although the court rejected the plaintiffs' argument that the termination article did not bar Marshallese claims, the plaintiffs further argued that this article was ineffective on constitutional grounds.[306] First, a blanket denial of jurisdiction on takings and breach of contract claims is an unconstitutional exercise of legislative power that constitutes an uncompensated taking.[307] Second, the alternative forum that the Section 177 Agreement provides is insufficient according to constitutional standards.[308] These alternate constitutional challenges prohibited a dismissal of the complaint.

#### *1. Unconstitutional Exercise of Legislative Authority*

The termination article of the Section 177 Agreement is a categorical withdrawal of jurisdiction from all courts of the United States on all claims that arise from the United States nuclear testing program in the Marshall Islands.[309] The government can not disavow United States obligations originating under the Constitution.[310] The parties, however, agreed that Congress can control lower federal court jurisdiction under

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219, at 9. A letter to former Representative Udall expresses the diplomatic necessity for continuity of nationality succinctly, "[A] state does not have the right to ask another state to pay compensation to it for losses or damages sustained by persons who were not its citizens at the time of loss or damage." Letter From Assistant Secretary of State Dentin to Representative Udall (Dec. 15, 1961), *quoted in* M. WHITEMAN, *supra* note 177, at 1233; *see also* 1 D. O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW 538 (1967) (explaining that a domestic injury to a national of a foreign state is not transformed into an international wrong through a nationality change resulting from state succession).

304. 131 CONG. REC. H11829 (daily ed. Dec. 11, 1985).

305. *See supra* notes 297-304 and accompanying text (discussing espousal validity).

306. *Juda II*, 13 Cl. Ct. at 687-89.

307. *Id.* at 687.

308. *Id.* at 689.

309. Section 177 Agreement, *supra* note 113, art. XII, at 13.

310. Lynch v. United States, 292 U.S. 571, 579 (1934). Contract claims against the United States are protected under the fifth amendment. *Id.* at 579; *see* Perry v. United States, 294 U.S. 330, 352 (1935) (asserting that as the United States enters contracts it acquires rights and responsibilities similar to private individuals).

article III of the Constitution.[311] The question is whether congressional regulation of inferior court jurisdiction can divest constitutionally protected claims.[312]

Even advocates of broad congressional power over jurisdiction concede that Congress cannot use a jurisdictional pretext to prevent the vindication of a constitutional rights claims,[313] such as the takings claims in this case. Clear precedent mandates that Congress not act in opposition to the Constitution.[314] Thus, under the guise of jurisdictional restraint, Congress cannot achieve unconstitutional results.[315] Therefore, the termination article of the Section 177 Agreement must be held constitutionally violative.

Congress can not constitutionally deprive jurisdiction without validly extinguishing the claims that gave rise to jurisdiction.[316] Two cases are dispositive of this proposition with regard to the plaintiffs' constitutional claims: *Battaglia v. General Motors Corp.*[317] and *United States*

311. Plaintiffs' Opposition, *supra* note 219, at 18; *see* U.S. CONST. art. III, cl. 1 (stating that United States judicial power is held in one "Supreme Court" and in the inferior courts that Congress will establish). The dimensions of congressional power to regulate "inferior courts," is a constant source of debate in the legal community. *Compare* Sager, *The Supreme Court, 1980 Term—Forward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 26 (1981) (asserting that although the lower federal courts are not protected with a constitutional grant of jurisdiction, they are also not without defense from congressional attack) *and Id.* at 70 (insisting that congressional authority over inferior federal jurisdiction does not extend to restricting access for "disfavored constitutional claims") *with* Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1031 (1982) (arguing that the ability of Congress to create lower federal courts with restricted jurisdiction is based on a compromise of the constitutional framers). According to Bator, that compromise was based on the agreement that Congress was the branch "best suited" for an institutional decision based on changing circumstances. *Id.*

312. Consolidated Brief, *supra* note 15, at 33 (questioning whether Congress can indirectly achieve what it could not achieve directly, namely, termination of the Bikinians constitutionally based claims); Plaintiffs' Opposition, *supra* note 219, at 19 (asserting that congressional regulation of jurisdiction cannot be utilized to accomplish that which Congress could not have done originally).

313. Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 910, n.35 (1984); *see id.* (stating that almost all commentators agree that Congress, if allowed to withdraw jurisdiction on a class of cases, cannot orchestrate cases or require court decisions in disregard of the Constitution).

314. Williams v. Rhodes, 393 U.S. 23, 29 (1968). The granted powers of Congress are subject to constitutional limitation. *Id.*

315. Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948); United States v. Klein, 80 U.S. (13 Wall.) 128, 146-47 (1871); Plaintiffs' Opposition, *supra* note 219, at 19.

316. Battaglia v. General Motors Corp., 169 F.2d at 257.

317. *Id.* at 254.

*v. Klein.*[318] The Claims Court held these cases inapplicable on the basis of factual differences.[319] Both cases, however, were cited for the breadth of their interrelated holdings.[320] In *Battaglia*, the Court of Appeals for the Second Circuit held that Congress cannot rescind the power of courts to hear a category of claims unless it can validly extinguish those claims.[321] In *Klein*, the Supreme Court held that Congress cannot withdraw jurisdiction for an unconstitutional goal.[322] These cases, considered together, underscore the proposition that without an adequate alternative resolution of these constitutional claims their dismissal would be an unconstitutional taking.[323]

The Claims Court recognized the congressional ability to establish adequate alternative resolution when it indicated that Congress could establish constitutional alternative compensation.[324] The court, however, erroneously separated the idea of a forum from the constitutionality of the compensation.[325] The claims involved here are constitutional claims.[326] Therefore, without a constitutionally appropriate alternative forum for compensation, Congress cannot validly dismiss these claims.[327] Furthermore, a court cannot uphold the blanket dismissal of

318. United States v. Klein, 80 U.S. at 128.

319. *Juda II*, 13 Cl. Ct. at 687. The court states that *Klein* was inappropriate because it did not involve a complete withdrawal of the consent to sue of the substitution of an alternative compensation procedure. *Id.* The Claims Court distinguished *Battaglia* on the grounds that it did not involve a congressional withdrawal of consent to sue the United States and that the case involved only private parties. *Id.* at 688.

320. Consolidated Brief, *supra* note 15, at 36-7.

321. Battaglia v. General Motors Corp., 169 F.2d at 257. Though Congress has the power to give, withhold, and restrict the jurisdiction of lower courts, it cannot exercise that power to deprive life, liberty, or property without due process of law, or to take property without just compensation. *Id.* Given the broad sweep of the *Battaglia* pronouncement and its Supreme Court precedent, it seems unlikely that the Court intended to confine it solely to the facts of the case. The *Battaglia* court relied on *Graham & Foster v. Goodcell. Id. Graham & Foster* stands for the proposition that even if Congress possessed the power to dispense with this substantive right, it could not do so through a blanket denial of remedy against the United States. Graham & Foster v. Goodcell, 282 U.S. 409, 439 (1931).

322. Klein v. United States, 80 U.S. at 146-47. *Klein* stressed that the congressional withholding of appellate jurisdiction in order to restrain judicial review is an unconstitutional exercise of power. *Id.* at 146-47.

323. *Juda II*, 13 Cl. Ct. at 687. A claim can be taken for the purposes of just compensation. Shanghai Power Co. v. United States, 4 Cl. Ct. 237, 244-46 (1983), *aff'd mem.*, 765 F.2d 159 (Fed. Cir. 1985), *cert. denied*, 474 U.S. 909 (1985). In *Shanghai*, the Claims Court held that a lost claim, once extinguished by an executive settlement, constituted property. *Id.* at 241.

324. *Juda II*, 13 Cl. Ct. at 689. Here, the alternative forum is the Claims Tribunal. *Id.* The Section 177 Agreement established that the Tribunal administer the fund that provides for compensation of the nuclear testing claims. *Id.*

325. *Id.* at 688-89.

326. *Juda II*, 13 Cl. Ct. at 669.

327. Williams v. Rhodes, 393 U.S. 23, 29 (1968). Congress may not utilize consti-

pending cases if such a result would violate due process, just compensation, or other constitutional provisions.[328]

### 2. *The Alternative Forum Is Not Constitutional*

The constitutional test for alternative compensation provides that when the state takes property for public use, there must be reasonable, certain, and adequate means for acquiring compensation at the time of the taking.[329] The settlement based on the Section 177 Agreement[330] and the Claims Tribunal established[331] therein do not pass this test.[332] The court asserted that it could not rule on the adequacy prong of the constitutional test until the plaintiffs availed themselves to the Claims Tribunal.[333] This is an incorrect result because it directly contradicts the constitutional requirement that the means of compensation be adequate at the time of taking.[334]

This alternative forum fails the constitutional test. Existing case law requires the exhaustion of all other procedures before attempting resolution in the courts.[335] Congress cannot, however, force this require-

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tutionally granted powers in ways that violate other constitutional provisions. *Id.*; *see* Consolidated Brief, *supra* note 15, at 39-40 (stating that the alternative procedure is irrelevant unless it provides just compensation).

328. Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir.) *cert. denied*, 335 U.S. 887 (1948); United States v. Klein, 80 U.S. (13 Wall.) 128, 145-48 (1871).

329. The Regional Rail Reorganization Act Cases, 419 U.S. 102, 124-25 (1974); Cherokee Nation v. Southern Kansas Railroad Co., 135 U.S. 641, 659 (1890).

330. Section 177 Agreement, *supra* note 113, art. II, § 2, at 4. The settlement provides the Bikinians with $75 million as compensation for the losses sustained under the nuclear testing program. *Id.* Congress will disburse the fund over a fifteen year period. *Id.*

331. *Id.* The Claims Tribunal was established in the Section 177 Agreement to dispense the money set aside for the settlement of claims arising from the nuclear testing program. *Id.* $45.75 million is available to the Claims Tribunal for monetary awards. *Id.* art. II, § 6, at 5. There is a cap on the annual awards to prevent early exhaustion of the funds. *Id.*

332. The Regional Rail Reorganization Act Cases, 419 U.S. at 124-25; *see Juda II*, 13 Cl. Ct. at 689 (stating that the assertions of plaintiffs on the constitutionality of the termination article are premature). The Claims Court stated that it could not yet determine whether the settlement was "adequate." *Id.* The Claims Court fails to realize that these constitutionally protected claims were "taken" upon the effectiveness of the section 177 settlement. The Regional Rail Reorganization Act Cases, 419 U.S. at 124-27. To ensure the constitutionality of the alternative, the court must look to the time of the taking when determining the adequacy of compensation. *Id.* This alternative compensation was not "adequate" at the time of taking, therefore, it can not be constitutional. *Id.*

333. *Juda II*, 13 Cl. Ct. at 689.

334. The Regional Rail Reorganization Act Cases, 419 U.S. at 124-25 (quoting *Cherokee Nation v. Southern Kansas Railroad Co.*, 135 U.S. 641, 659 (1890)).

335. Consolidated Brief, *supra* note 15, at 49. In these cases, resort to a judicial forum had always been retained as long as the procedure was capable of providing

ment upon the Bikinians because the forum is constitutionally defective.[336] Consequently, the Section 177 Agreement blanket removal of jurisdiction and the alternative remedy are both inadequate.[337] The court, however, held that the plaintiffs should resort to the alternative forum.[338] Because this result is mistaken, the Claims Court erred in dismissing the plaintiffs' case. After this latest obstacle in dealing with the United States, the Bikinians would finally receive some compensation.

### C. SUBSEQUENT DEVELOPMENTS AND THE FEDERAL CIRCUIT DECISION

On September 27, 1988, President Reagan signed into law the Compact of Free Association Act of 1988.[339] The Act provides that upon voluntary dismissal of the Bikinian appeal to the Federal Circuit, payments for a $90 million Resettlement Trust Fund would begin.[340] This fund is intended to rehabilitate Bikini Atoll and resettle the Bikinian people.[341] On September 30, 1988, the Bikinians filed an unopposed motion to dismiss pursuant to the prerequisites set forth in the Compact of Free Association Act of 1988 for trust fund installments.[342] On October 19, 1988, the Court of Appeals for the Federal Circuit granted the motion, ordering the appeal dismissed with prejudice.[343]

Although the Bikinian appeal was dismissed, the remaining appel-

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meaningful relief. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1020 (1984); Dames & Moore v. Regan, 453 U.S. 654, 689-90 (1981); The Regional Rail Reorganization Act Cases, 419 U.S. at 148. In the preceding cases, meaningful relief was possible through the courts, while in the Bikinian's situation a judicial forum is unavailable. *Juda II*, 13 Cl. Ct. at 690.

336. The Regional Rail Reorganization Act Cases, 419 U.S. at 124-25. This is an unconstitutional forum, and, therefore, adequate assurances of just compensation are lacking. *Id.* at 124.

337. *See supra* notes 306-30 and accompanying text (examining the constitutional deficiencies of the Section 177 Agreement and the alternative forum).

338. *Juda II*, 13 Cl. Ct. at 689.

339. Compact of Free Association Act of 1988, Pub. L. No. 100-446, 102 Stat. 1798 (1988).

340. *Id.* The 1988 act provides for installments in the Resettlement Trust Fund to be carried out over a five year period. *Id.* The first installment for $5 million was dispersed on October 1, 1988. *Id.*; *see* Appellant People of Bikini's Unopposed Motion to Dismiss Appeal at 1-2, People of Bikini, Enewetak, Rongelap, Utrik and other Marshall Islands Atolls v. United States, (Fed. Cir. 1988) (No. 88-1206, 1207, 1208) [hereinafter People of Bikini's Motion to Dismiss] (reiterating the conditions of the Resettlement Trust Fund).

341. Compact of Free Association Act of 1988, Pub. L. No. 100-446, 102 Stat. 1798 (1988).

342. People of Bikini's Motion to Dismiss, *supra* note 340, at 1.

343. People of Bikini v. United States, 859 F.2d 1482, 1483 (Fed. Cir. 1988).

lants proceeded with the suit.[344] Adopting the analysis of the Claims Court in *Juda II*, the Court of Appeals for the Federal Circuit affirmed the Claims Court decisions remaining on appeal.[345] On June 19, 1989, the Supreme Court denied certiorari to the remaining appellants.[346] The fact that the Bikinians were no longer parties to the suit did not remedy misapplication of the provisions and legislative history of the Compact.

## V. RECOMMENDATIONS

The United States Claims Court decision and the affirmation of that decision were erroneous. Building upon faulty analysis, the Claims Court concluded that the Section 177 Agreement amended its Tucker Act jurisdiction, and, subsequently, the court dismissed the complaint.[347] Prior to the denial of certiorari, the Supreme Court was in the best position to reconcile this inequity.

The Supreme Court could have reversed and remanded the Court of Appeals decision with the instructions that consistent with the language and history of the Compact, section 103(g)(2) requires the courts to determine the validity of Republic of the Marshall Islands espousal before dismissing the claims. Under recognized principles of international law,[348] the Republic of the Marshall Islands espousal is inadequate, and the remaining parties should proceed with their suit. In the event the Supreme Court did not require valid espousal, constitutional prerequisites would have necessitated the rejection of the Claims Court dismissal as an unconstitutional exercise of legislative power.[349] Furthermore, the Supreme Court could have ruled that the Section 177 claims settlement provision was ineffective and insufficient as an alternative forum.[350]

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344. People of Enewetak v. United States, 864 F.2d 134 (Fed. Cir. 1988). The cases of the remaining appellants were dismissed below for lack of subject matter jurisdiction. *Id.* at 135. The remaining appellants were consolidated from Peter v. United States, 13 Cl. Ct. 691 (1987); and Nitol v. United States, 13 Cl. Ct. 690 (Fed. Cir. 1987). People of Enewetak v. United States, 864 F.2d 134, 135 (Fed. Cir. 1988).

345. People of Enewetak v. United States, 864 F.2d 134, 137 (Fed. Cir. 1988).

346. People of Enewetak v. United States, No. 88-1466 (U.S. June 19, 1989) (WESTLAW, SCT database, 1989 WL 66054).

347. *Juda II*, 13 Cl. Ct. at 690; *see supra* notes 235-338 and accompanying text (stating that the analysis of the Claims Court is faulty because the Compact and the Section 177 Agreement are not in effect and that dismissal is unconstitutional).

348. *See supra* notes 258-305 and accompanying text (discussing the requirements for valid espousal under international law).

349. *See supra* notes 329-38 and accompanying text (stating that Congressional action cannot dismiss these claims without constitutionally adequate compensation).

350. *See id.* (asserting that the alternative forum is unconstitutional because it fails

In light of the decision of the Supreme Court not to grant certiorari, the legislative branch must act to alleviate the burden placed on the Marshallese. Congress must amend the Compact to explicitly state that section 103(g)(2) requires judicial determination of espousal validity. In addition, while the Bikinians have received funds to clean their atoll, other damages remain unsettled. Congress could simply settle the claims of the Bikinians and the other Marshallese with monetary compensation and alleviate the constitutional problems arising from the Claims Tribunal.

## CONCLUSION

After a forty year odyssey, enabling the United States to save billions on defense, the Claims Court dismissal of the Bikinian claims makes these people just one of many groups vying for a share of United States Government settlement funds.[351] While Congress subsequently enacted legislation to provide the Bikinians with funds to clean up their atoll, the erroneous legal conclusions of the Claims Court, the Federal Circuit's affirmation of them, and the Supreme Court's denial of certiorari remain. On a larger scale, these decisions have unjustifiably removed the courts as an avenue for settlement of thousands of claims arising from United States nuclear testing in Micronesia.[352] The legal issues involved in *Juda I* and *Juda II*, though complicated, are clear when the Compact is given its obvious meaning. Dismissal of these claims and the subsequent affirmation of *Juda II* on appeal perpetuates the history of United States neglect and abuse of the Bikinians and other Marshallese who sacrificed their islands for the benefit of a superpower. The legal conclusions in *Juda II* are erroneous. The Congress must act if the United States is to rectify its past treatment of the Bikinians.

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to provide adequate compensation).

351. Section 177 Agreement, *supra* note 113, art. II, § 6, at 5. The claims adjudication funds, will provide $45.75 million over fifteen years for claims arising from the nuclear testing program. *Id.*

352. *Juda II*, 13 Cl. Ct. at 689-90. The Claims Court decision removed the consent of the United States to suits on these issues. *Id.* at 690. In 1981 and 1982, fourteen petitions representing 5000 Marshall Islands inhabitants were filed. *Id.* at 668.