

**THE NUCLEAR CLAIMS TRIBUNAL
OF THE REPUBLIC OF THE MARSHALL ISLANDS:**

**AN INDEPENDENT EXAMINATION AND ASSESSMENT
OF ITS DECISION-MAKING PROCESSES**

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I. Executive Summary

In June 2002 the Republic of the Marshall Islands (the "RMI") retained Kirkpatrick & Lockhart LLP to undertake an independent examination and assessment of the processes used by the Marshall Islands Nuclear Claims Tribunal to adjudicate claims that had been filed with the Tribunal seeking compensation for personal injuries and property damage suffered as a consequence of the U.S. nuclear tests that took place in the Marshall Islands during the middle of the twentieth century. This report represents the results of that examination and assessment.

In brief, we have concluded that:

1. The Nuclear Claims Tribunal has fulfilled the basic functions contemplated by the U.S. Congress and the Marshall Islands legislature, the Nitijela, when the United States and the RMI entered into their Compact of Free Association in 1986 and the Nitijela passed the Nuclear Claims Tribunal Act in 1987.
2. In general, the Members and Officers of the Tribunal appear to have been qualified to perform their respective functions and have had access to the resources they needed to do so.
3. The Tribunal has conducted its business in an orderly manner, following rules and procedures that closely resemble those used by legal systems in the United States.
4. The Tribunal's processes for resolving personal injury claims were modeled after similar processes used in the United States and elsewhere in the world to compensate people who have been adversely affected by nuclear tests and mass torts. Indeed, the compensation standards that the Tribunal used to resolve personal injury claims are similar to those that the U.S. Congress established

when it enacted the Radiation Exposure Compensation Act (the so-called "Downwinders' Act") in 1990.

5. The Tribunal has employed more traditional adversary processes to adjudicate the property damage claims that have been presented to it. These property damage claims have been asserted through class action vehicles similar in format to those used in the United States. The litigation of these class actions has been characterized by the kind of legal briefing, expert reports, and motion practice that would be found in many U.S. court proceedings. Although the dollar amounts of these class action awards in the aggregate seem large, the processes that led to those awards seem fair and reasonable.
6. There is some evidence that the Nitijela occasionally sought to influence the Tribunal's work, particularly in successfully expanding the range of persons eligible to receive personal injury awards. In the end, however, it appears that any such interference had no more than a modest impact on the total dollar amount of the Tribunal's awards.
7. Although early Members of the Tribunal may have had a different view, the Tribunal never felt that its ability to render awards should be limited by the initial amount of the trust fund established in 1986 by Section 177 of the Compact of Free Association. We understand that both the Tribunal and the claimants before it regarded the initial \$150 million trust fund as an arbitrary figure established through the political process that was never intended to approximate either the total damages suffered by the people of the Marshall Islands as a result of the U.S. nuclear testing program or the compensation to which they should ultimately be

entitled. Whether Congress intended otherwise is a political issue upon which we express no opinion. We note, however, that the U.S. Government has already approved compensation claims of more than \$562 million under the Downwinders' Act by persons injured as a result of nuclear tests in Nevada that were much smaller in number and magnitude than the tests conducted in the Marshall Islands. Based on our examination and analysis of the Tribunal's processes, and our understanding of the dollar magnitude of the awards that resulted from those processes, it is our judgment that the \$150 million trust fund initially established in 1986 is manifestly inadequate to fairly compensate the inhabitants of the Marshall Islands for the damages they suffered as a result of the dozens of U.S. nuclear tests that took place in their homeland.

II. The Methodology for Our Examination and Assessment

In general, we have conducted our examination and assessment by interviewing witnesses, reviewing documents, and analyzing relevant laws and other legal authorities.

We interviewed the two current members of the Tribunal, the key officers of the Tribunal, a past chairman of the Tribunal, attorneys who have litigated claims before the Tribunal, and certain officials of the Marshall Islands and of local governments within the Marshall Islands. Because of the large distances involved, we chose to interview many witnesses by telephone. Overall, we discussed the Tribunal and its operations with more than twenty people. The names of those people are listed on Appendix A to this report.

We also reviewed representative files of the Tribunal. During the course of our investigation we received, on a confidential basis, almost a dozen compact disks that contained copies of the Tribunal's files for more than 6,500 personal injury claims. We also received

copies of many of the voluminous papers filed with the Tribunal in connection with the various property damage class actions litigated before it. As we will describe below, we examined a random sample of the personal injury claim files. Similarly, while we did not read all the papers filed in the property damage class actions, we tried to become generally familiar with those papers and gave specific attention to certain legal memoranda and expert reports that we considered significant. In addition, we viewed videotaped portions of certain Tribunal hearings, primarily to acquaint ourselves with the general manner in which those hearings were conducted.

Our analysis has included a review of the laws establishing the Nuclear Claims Tribunal, the rules and procedures of the Tribunal itself, the Tribunal's annual reports, and other official reports concerning the Tribunal, including a report on the status of the Marshall Islands Nuclear Claims Trust Fund that was published by the U.S. General Accounting Office in September 1992.¹ We also reached out, with little success, to certain U.S. Government officials and to Congressional staff members in an effort to obtain their perspectives on the Tribunal.

Finally, we consulted various secondary sources, including newspaper and journal articles and information on the RMI website, to obtain general information about the Marshall Islands and the U.S. Government's nuclear testing program there.

Although we were invited to do so by the President of the Marshall Islands and by Members and Officers of the Tribunal, we decided not to visit the Marshall Islands. We reached this decision because we determined that we could more economically undertake our examination and assessment without the significant time and expense associated with such a visit.

¹ U.S. General Accounting Office, Marshall Islands: Status of the Nuclear Claims Trust Fund (GAO/NSIAD 92-229) (September 1992).

III. General Background to Our Examination and Analysis

The work of the Tribunal cannot be properly understood without understanding the history of the U.S. nuclear testing program in the Marshall Islands and the legal actions that led to the Tribunal's creation.

A. The U.S. Nuclear Testing Program in the Marshall Islands

The Marshall Islands consist of thirty-four low-lying atolls and single islands in the Pacific Ocean that are located approximately 2,100 miles southwest of Honolulu, Hawaii. During the period from June 30, 1946 to August 18, 1958, the United States detonated sixty-seven atmospheric nuclear devices in the Marshall Islands. The total yield of those sixty-seven tests was 108 megatons, the equivalent of more than 7,000 Hiroshima bombs.² The nuclear tests destroyed large portions of at least two atolls -- Bikini and Enewetak. Portions of these atolls were actually vaporized. Other land areas and the lagoons they surrounded were heavily damaged and contaminated with radiation. Adjoining atolls in the Marshall Islands were also contaminated with radiation carried by winds and rain.

The U.S. military gave the code name "Operation Crossroads" to the first phase of its nuclear testing program in the Marshall Islands. After deciding that Bikini and Enewetak were the most attractive sites for its nuclear tests, the U.S. Navy obliged the residents of those atolls to move to other parts of the Marshall Islands. In March 1946 the U.S. Navy moved the Bikini islanders from their atoll to Rongerik, an island 140 miles away. In December 1947 the U.S. Navy relocated the people of Enewetak to the nearby atoll of Ujelang.

Between 1946 and 1958, the United States detonated twenty-three nuclear devices on or above Bikini, forty-three more devices on or above Enewetak, and another device approximately eighty-five miles from Enewetak. One of the first of these tests in 1946, the so-called "Baker"

² <http://nuclearclaimstribunal.com/text.htm>

shot left 500,000 tons of radioactive mud in the Bikini atoll lagoon.³ The most powerful of the nuclear tests during Operation Crossroads was the “Bravo” shot in 1954. The Bravo shot involved a hydrogen bomb that was 1,000 times as powerful as the atomic bomb dropped on Hiroshima. Fallout from the Bravo shot covered an area of 50,000 square miles. The Bravo shot vaporized several small islands and parts of others in Bikini and left a one-mile circular hole in Bikini's reef. The destructive effects of the Bravo shot were intensified by the fact that there was a shift in wind direction that sent the 20-mile-high cloud of radioactive particles from the blast 240 miles eastward across Bikini and several inhabited atolls in the Marshalls, including Rongelap and Utrik. We understand that there is some evidence that U.S. officials received, but neglected to act upon, warnings before the Bravo shot that wind patterns were changing and might send fallout in the direction of these inhabited islands.

In 1958 President Eisenhower declared a moratorium on U.S. atmospheric nuclear testing. In 1967 a U.S. blue-ribbon committee reviewed the results of a radiological survey of Bikini and declared the atoll “once again safe for human habitation.” In August 1968 President Johnson announced that Bikini was safe for the islanders to return and he ordered the atoll to be rehabilitated. The Bikinians returned to the atoll in 1969 to assist in the resettlement project. The Department of the Interior began construction of forty homes. Bikini Island and Eneu, a nearby island, were bulldozed and their topsoil was turned over to reduce radiation.

In 1975 more advanced and accurate radiological testing revealed that Bikini's interior was, in fact, too radioactive for habitation and that some wells there were contaminated with radioactive plutonium. In 1978 U.S. scientists concluded that the Bikinians’ alarmingly high

³ Jonathan M. Weisgall, *The Nuclear Nomads of Bikini*, 39 *Foreign Policy* 74, 83-84 (1980). Much of the information in this paragraph and the following two paragraphs is taken from the same article.

levels of internal radiation were caused by their consumption of locally grown foods planted as part of the Bikini rehabilitation program. As a result, in August 1978 the Bikinians were removed from their atoll for a second time. Today Bikini remains largely uninhabited.

The people of Enewetak were exiled to Ujelang for thirty-three years, during which time they suffered from malnutrition and other hardships.⁴ Between 1977 and 1980 the United States conducted an extensive cleanup, rehabilitation and resettlement effort on Enewetak.⁵ However, a large percentage of the landmass of Enewetak remains contaminated by radiation, limiting habitation to the southern half of the atoll. The cleanup also left a radioactive waste site on the Enewetak island of Runit.⁶

B. The Damages Claims Filed by Marshall Islands Residents in U.S. Courts

Almost twenty-five years after the last of the U.S. nuclear tests in the Marshall Islands, residents of several atolls filed substantial damages claims against the United States in U.S. courts. In 1981 and 1982 petitions on behalf of approximately 5,000 inhabitants of the Marshall Islands were filed in the United States Court of Claims for damages that ranged from \$450 million to \$600 million.⁷ These cases included: (1) claims by inhabitants of Bikini (*Juda v. United States*, 6 Cl. Ct. 441 (1984)); (2) claims by inhabitants of Enewetak (*Peter v. United States*, 6 Cl. Ct. 768 (1984)); and (3) claims by inhabitants of other atolls and islands that had not been used as atomic test sites, but who alleged that they had suffered damages as a result of

⁴ Enewetak Presentation by Davor Pevec on September 2000 at 6.

⁵ *Id.* (citing U.S. DOE, “Enewetak Radiological Support Project, Final Report,” NVO-213, September 1982, and Defense Nuclear Agency, “The Radiological Cleanup of Enewetak Atoll,” 1981).

⁶ *Id.* at 8.

⁷ These cases were transferred to the United States Claims Court on October 1, 1982, pursuant to section 403(d) of the Federal Courts Improvement Act of 1982. 28 U.S.C. § 171, note (1982). *See Juda v. United States*, 6 Cl. Ct. 441, 443-44 (1984).

radiological fallout and contamination caused by the nuclear testing program (*Nitol v. United States*, 7 Cl. Ct. 405 (1985)).⁸

Initially, these legal claims against the United States met with partial success. In the *Juda* case, the Court of Claims denied the U.S. Government's motion to dismiss, holding that the inhabitants of Bikini had stated legally cognizable claims against the Government for "takings" of their property in violation of the Fifth Amendment and for breaches of an implied-in-fact contract in 1946 that imposed upon the United States certain fiduciary obligations to the people of Bikini.⁹ The Court of Claims also held that the inhabitants of Bikini had stated claims within the court's jurisdiction, that the United States had waived sovereign immunity with respect to those claims, and that the Bikini islanders' claims were not barred by any statute of limitations.¹⁰

In the *Peter* case, the Court of Claims also denied the U.S. Government's motion to dismiss, holding that the Enewetak plaintiffs had stated claims within the jurisdiction of the Court of Claims for breach of an implied-in-fact contract that imposed fiduciary obligations on the United States.¹¹ On the other hand, the Court of Claims held that the property "takings" claims of the Enewetak plaintiffs were time-barred and that certain of their other claims were without merit.¹²

In the *Nitol* series of cases, the Court of Claims denied the U.S. Government's motion to dismiss the plaintiffs' property "taking" claims, but did dismiss their other claims.¹³

⁸ Twelve cases were consolidated under the lead case *Nitol v. United States*, 7 Cl. Ct. 405 (1985).

⁹ See *Juda v. United States*, 6 Cl. Ct. 441 (1984).

¹⁰ *Id.*

¹¹ See *Peter v. United States*, 6 Cl. Ct. 768 (1984).

¹² *Id.*

¹³ See *Nitol v. United States*, 7 Cl. Ct. 405 (1985).

C. The Compact of Free Association Between the RMI and the United States

For approximately forty years after World War II, the United States had administrative responsibility over the Marshall Islands in its role as Trustee for the United Nations Trust Territory of the Pacific Islands. Under the United Nations Trust Agreement, the United States had “full powers of administration, legislation and jurisdiction” over the Marshall Islands and was obligated to promote the political, economic, social and educational advancement of the Islands' inhabitants, to protect their health, and to protect them “against the loss of their lands and resources.”¹⁴ It was during this Trusteeship period that the United States conducted most of its nuclear tests at Bikini and Enewetak.

In 1986, the United States and the RMI entered into a Compact of Free Association (the “Compact”) that recognized the RMI as a sovereign nation.¹⁵ The Compact was negotiated and agreed to by the Governments of the United States and the Marshall Islands, and approved by a plebiscite in the Marshall Islands and by a vote of the U.S. Congress.¹⁶

Pursuant to the Compact, the United States and the RMI entered into fourteen agreements pursuant to which the United States agreed to provide significant economic assistance and other aid to the RMI and the RMI agreed that the United States could maintain military bases and installations on the Marshall Islands.¹⁷ According to the Congressional Research Service, the

¹⁴ See Trusteeship Agreement for the Former Japanese Mandated Islands, 61 Stat. 3301, T.I.A.S. No. 1665 (1947), App. 277, Arts. III, VI.

¹⁵ The Compact has the force and effect of a statute under the laws of the United States. *Juda*, 13 Cl. Ct. at 673.

¹⁶ Pub. L. No. 99-239, 99 Stat. 1770 (1986). The Federated States of Micronesia also obtained their independence from the United States as part of this same Compact.

¹⁷ Pursuant to the Compact, the Marshall Islands receive direct annual transfers of financial aid and discretionary federal program assistance and services (such as preventive health services, Head Start and Pell Grants, and Job Training programs). CRS Report for Congress, *The Marshall Islands and Micronesia: Negotiations with the United States for Renewing Provisions of the Compact of Free Association* (December 1, 2000).

Marshall Islands received \$1.1 billion in U.S. aid between 1987 and 1999.¹⁸ On a per capita basis, the Marshall Islands are among the largest recipients of U.S. assistance worldwide.

As one part of the Compact, the RMI agreed to "espouse" and dismiss the private damages claims that had been asserted by certain of its residents against the U.S. Government in the Court of Claims. In return, the U.S. Government agreed, pursuant to Section 177 of the Compact, to establish a trust fund that could be used by the RMI to compensate Marshallese citizens who had been injured or damaged by the U.S. nuclear testing program.

D. Section 177 of the Compact

Section 177 of the Compact established a \$150 million Nuclear Claims Trust Fund (the "Trust Fund") to compensate the inhabitants of the Marshall Islands for the personal injuries and property damages caused by the U.S. nuclear testing program.¹⁹ Section 177 also authorized a

¹⁸ *Id.*

¹⁹ Section 177 in its entirety provides:

(a) The Government of the United States accepts the responsibility for compensation owing to citizens of the Marshall Islands, or the Federated States of Micronesia (or Palau) for loss or damage to property and person of the citizens of the Marshall Islands, or the Federated States of Micronesia, resulting from the nuclear testing program which the Government of the United States conducted in the Northern Marshall Islands between June 30, 1946, and August 18, 1958.

(b) The Government of the United States and the Government of the Marshall Islands shall set forth in a separate agreement provisions for the just and adequate settlement of all such claims which have arisen in regard to the Marshall Islands and its citizens and which have not as yet been compensated or which in the future may arise, for the continued administration by the Government of the United States of direct radiation related medical surveillance and treatment programs and radiological monitoring activities and for such additional programs and activities as may be mutually agreed, and for the assumption by the Government of the Marshall Islands of responsibility for enforcement of limitations on the utilization of affected areas developed in cooperation with the Government of the United States and for the assistance by the Government of the United States in the exercise of such responsibility as may be mutually agreed. This separate agreement shall come into effect simultaneously with this Compact and shall remain in effect in accordance with its own terms.

separate agreement between the United States and the RMI to provide for the settlement of all such claims and for the establishment of an independent Nuclear Claims Tribunal (the “Tribunal”) to process those claims.²⁰ The Tribunal was given “jurisdiction to render final determination upon all claims past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based on, arise out of, or are in any way related to the Nuclear Testing Program . . .”²¹

The \$150 million initially given to the Trust Fund was intended to generate, through return on its investment, a total of \$270 million for disbursement over a 15-year period "as a means to address past, present, and future consequences of the Nuclear Testing Program."²² Much of the Trust Fund was allocated directly to Local Distribution Authorities (the "LDAs") for the benefit of inhabitants of Bikini, Enewetak, Rongelap and Utrik. The Section 177 Agreement allocated \$75 million of the Trust Fund to the Bikini LDA for payment of claims arising out of the Nuclear Testing Program for loss or damage to property and persons of Bikini.²³ This amount was to be disbursed in quarterly amounts of \$1.25 million over a 15-year period.²⁴ The

(c) The Government of the United States shall provide to the Government of the Marshall Islands, on a grant basis, the amount of \$150 million to be paid and distributed in accordance with the separate agreement referred to in this Section, and shall provide the services and programs set forth in this separate agreement, the language of which is incorporated into this Compact.

²⁰ 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 (the "Section 177 Agreement"). The Section 177 Agreement provided that "[i]n the exercise of its jurisdiction, the Claims Tribunal shall be independent of the legislative and executive powers of the Government of the Marshall Islands." Article IV, Section 1(b). The Section 177 Agreement, in its entirety, is attached to this report as Appendix B.

²¹ Section 177 Agreement, Article IV, Section 1(a).

²² *Id.* at Article I, Section 2.

²³ *Id.* at Article II, Section 2.

²⁴ *Id.*

177 Agreement also allocated \$48.75 million to the Enewetak LDA, to be disbursed in quarterly amounts of \$812,500 over a 15-year period;²⁵ \$37.5 million to the Rongelap LDA, to be disbursed in quarterly amounts of \$625,000 over a 15-year period;²⁶ and \$22.5 million to the Utrik LDA, to be disbursed in quarterly amounts of \$375,000 over a 15-year period.²⁷

In addition to these direct payments to LDAs, the Section 177 Agreement allocated \$30 million of the Trust Fund to the Government of the Marshall Islands, to be disbursed in annual amounts of \$2 million each over a 15-year period, to pay for technical assistance from the United States Public Health Service and other agencies of the U.S. Government.²⁸ This technical assistance was to help establish a health care system, health care programs and other services to address the consequences of the Nuclear Testing Program.²⁹ The Section 177 Agreement also allocated \$3 million to the Government of the Marshall Islands to pay for medical surveillance and radiological monitoring activities, to be disbursed in average annual amounts of \$1 million over a three-year period.³⁰ At the request of the Tribunal, the Office of the Chief Secretary initiated a medical diagnostic program using Section 1(e) funds in early 1990.³¹

After making these allocations to LDAs and the RMI Government, the Section 177 Agreement allocated \$500,000 per year of the remaining \$48 million of the Trust Fund to an Operations Fund to cover the expenses of the Tribunal during the term of its existence, to be disbursed annually in quarterly amounts of \$125,000.³² This left only \$45.75 million of the

²⁵ *Id.* at Article II, Section 3.

²⁶ *Id.* at Article II, Section 4.

²⁷ *Id.* at Article II, Section 5.

²⁸ *Id.* at Article II, Section 1(a).

²⁹ *Id.*

³⁰ *Id.* at Article II, Section 1(e).

³¹ 1992 Annual Report at 20.

³² Section 177 Agreement, Article II, Section 6.

original \$150 million for a Claims Fund from which the Tribunal could draw for "payment of monetary awards made by the Claims Tribunal."³³

E. Dismissal of the Class Actions Filed by Marshall Islands Residents in U.S. Courts

The U.S. Government put forth the Compact and the Section 177 Agreement as a new basis for seeking dismissal of the class action claims that had been filed against it by the Marshallese. The Claims Court agreed, in large part because the Compact had authorized the establishment of the Nuclear Claims Tribunal to hear those claims.

According to the Court of Claims, "in none of these cases, has Congress abolished plaintiffs' claims. The Compact recognizes the United States obligations to compensate for damages from the nuclear testing program and the Section 177 Agreement establishes an alternative tribunal to provide such compensation."³⁴ This reasoning of the Court of Claims was subsequently affirmed by the U.S. Court of Appeals for the Federal Circuit.³⁵

Counsel for the plaintiffs have subsequently maintained that both the Court of Claims and the Federal Circuit left open the possibility that they could return to U.S. courts to litigate their damages claims against the U.S. Government *if* the plaintiffs did not receive reasonably adequate compensation from the Nuclear Claims Tribunal and the Trust Fund. In support of this position, plaintiffs' counsel have relied upon the following language from the opinion of the Federal Circuit: "Congress intended the alternative procedure to be utilized, and we are unpersuaded that

³³ *Id.* at Article II, Section 6(c).

³⁴ *Juda v. United States*, 13 Cl. Ct. 667, 688 (1987).

³⁵ *See People of Enewetak v. United States*, 864 F.2d 134 (Fed. Cir. 1988) (affirming the decisions in the *Peter* and *Nitol* cases, and adopting the analysis set forth in *Juda v. United States*, 13 Cl. Ct. 667 (1987)).

judicial intervention is appropriate at this time on the mere speculation that the alternative remedy may prove to be inadequate.”³⁶

IV. An Overview of the Nuclear Claims Tribunal

In 1987, pursuant to the Section 177 Agreement,³⁷ the Marshall Islands legislature, the Nitijela, passed the Nuclear Claims Tribunal Act (the “Act”), formally establishing the Nuclear Claims Tribunal.³⁸ The Act states: “It is the express intent of the Nitijela that this Chapter be interpreted so as to comply with the requirements for the establishment of a claims tribunal as set forth in the Section 177 Agreement.”³⁹

A. The Duties of the Tribunal

The Act charges the Tribunal with two general areas of responsibility. First, the Tribunal has jurisdiction to render final determinations and to award compensation on claims for loss or damage to persons or property resulting from the U.S. nuclear weapons testing program in the Marshall Islands. Second, the Tribunal has authority to monitor and resolve disputes concerning the uses and distributions of Trust Fund monies by the LDAs. We have focused our examination and analysis on the Tribunal's processes for deciding personal injury and property damage claims. We have not spent any significant time on the Tribunal's oversight of LDAs, because those activities would not result in additional claims on the Trust Fund.

³⁶ *People of Enewetak v. United States*, 864 F.2d 134, 136 (emphasis added).

³⁷ “The Government of the Marshall Islands, prior to the first anniversary of the effective date of this Agreement, shall establish a Claims Tribunal, in accordance with its constitutional processes...” Section 177 Agreement, Article IV, Section 1(a).

³⁸ 42 MIRC Ch 1, § 1 *et seq.* References to the Act throughout this report are to Title 42, Chapter 1 of the March 1994 version of the Marshall Islands Revised Code (“MIRC”).

³⁹ *Id.* at § 7.

B. The Powers of the Tribunal

Like the Section 177 Agreement, the Act provides that the Tribunal is to be independent of the legislative and executive branches of the RMI Government.⁴⁰ The powers of the Tribunal, set forth in the Act, include: (1) issuing orders, making rules, and promulgating procedural regulations; (2) providing funds for the operation of Special Tribunals appointed by the Tribunal to consider specific claims and disputes; (3) establishing and providing funds for the operation of the Tribunal offices; (4) establishing and authorizing distributions from the Operating Fund; (5) establishing and authorizing payments out of the Claims Fund for monetary awards; (6) issuing orders requiring the Defender of the Fund to investigate the administration and distribution of Trust Fund monies by LDAs; (7) issuing orders suspending any or all distributions by an LDA; and (8) establishing and funding LDAs as appropriate and necessary to carry out the intent of the Act.⁴¹

⁴⁰ *Id.* at § 6(2).

⁴¹ *Id.* at § 6(4).

C. The Tribunal's Personnel

1. The Members of the Tribunal

Under the Act, the Tribunal consists of three members, a Chairman and two other members, each of whom is appointed by the RMI Cabinet, upon recommendation of the Judicial Service Commission and subject to the approval of the Nitijela.⁴² The Members of the Tribunal are appointed for three-year terms, without limitation on their re-appointment for successive terms.⁴³ The Chairman and at least one other Member of the Tribunal must vote on all decisions. A decision of the Tribunal must be agreed upon by a majority of its voting members.⁴⁴

The Chairman has administrative supervisory power over the Tribunal and its officers and employees. The Chairman has discretion to convene the Tribunal⁴⁵ and must prepare and submit an annual or supplemental budget to the Tribunal for approval, after consultation with the Tribunal's Financial Officer.⁴⁶ The Act requires the Chairman to remain in residence in the RMI during the duration of his term, but allows other Members of the Tribunal to reside elsewhere.⁴⁷ The Chairman, on behalf of the Tribunal, must give a report to the Nitijela annually, at the beginning of each regular session, concerning the functions and expenditures of the Tribunal.⁴⁸

The Act provides that the Members of the Tribunal may be removed from office only by the Cabinet and only because of a clear failure or inability faithfully to discharge the duties of

⁴² *Id.* at § 10(1).

⁴³ *Id.* at § 10(6).

⁴⁴ *Id.* at § 10(12).

⁴⁵ *Id.* at § 10(10).

⁴⁶ *Id.* at § 10(2).

⁴⁷ *Id.* at § 10(5).

⁴⁸ *See* the Tribunal's most recent Annual Report, for 2001, which is attached to this report as Appendix C.

office or for the commission of treason, bribery, or other high crimes or abuses inconsistent with the authority of office.⁴⁹

Under the Act, all claims, with a few exceptions,⁵⁰ are initially handled by a “Special Tribunal.” A Special Tribunal is composed of a single Member of the Tribunal, who is appointed by the Chairman of the Tribunal.⁵¹ A Special Tribunal enjoys all the powers of the Tribunal, except when expressly limited by the Act.⁵² Furthermore, a Special Tribunal, as authorized by the Tribunal and with the approval of the Cabinet, may employ such aides and procure such facilities and equipment as are reasonably required to carry out its duties.⁵³ A Special Tribunal can refer a claim back to the full Tribunal, which is the procedure that was followed regarding the property damage class actions.⁵⁴

2. The Officers of the Tribunal

The Tribunal is staffed with several officers, including a Public Advocate, a Defender of the Fund, a Financial Officer, and a Clerk.⁵⁵ These officers are nominated by the Chairman of

⁴⁹ 42 MIRC Ch 1, § 10(8).

⁵⁰ The Act provides that all claims except for the following are initially handled by a Special Tribunal: (1) claims challenging the fairness and equity of proposed or active LDA distribution schemes; (2) claims enforcing an agreement between the Government and a Local Government Council for the implementation of Section 177; and (3) claims challenging the Government of the Marshall Islands administration of funds provided for health and radiological surveillance. 42 MIRC Ch 1, §§ 11(1), 24, 28 & 29.

⁵¹ *Id.* at § 11(2).

⁵² *Id.* at § 11(3).

⁵³ *Id.* at § 11(5).

⁵⁴ *Id.* at § 17 (“All claims under this Section shall be decided by the Special Tribunal . . . provided the Special Tribunal may at its own discretion refer the matter to the Tribunal upon certification by the Special Tribunal that the claim involves a matter of public importance.”). On March 23, 1994, Chairman deBrum issued a notice of intent to transfer the Enewetak class action to the full Tribunal. A certificate and order of transfer was issued on April 25, 1995.

⁵⁵ *Id.* at, § 16. The Act also provides for an Office of Mediation, but we understand that a Mediation Officer has never been appointed by the Tribunal. Under the Act, the Mediation Officer, as well as any assistant mediators appointed by the Mediation Officer, is to accept appointments by a Special Tribunal to mediate claims, endeavoring to effect amicable

the Tribunal, after which they must appear before the Tribunal, present evidence of their qualifications and submit to questioning before being appointed.⁵⁶ All Tribunal officers are appointed by the Tribunal for two-year terms.⁵⁷ Officers must remain in residence in the RMI for the duration of their terms and can only be removed for good cause.⁵⁸

a. Office of the Public Advocate

The Office of the Public Advocate consists of the Public Advocate and “such Associate Public Advocates as required.”⁵⁹ The Public Advocate’s duties consist of: (1) advising and assisting all claimants in the filing, preparation, and presentation of claims; (2) advising Special Tribunals about the selection of group representatives when required; and (3) representing absent and unidentified claimants, upon order of the Tribunal or a Special Tribunal.⁶⁰ The Act provides that “[a]s authorized by the Tribunal, the Public Advocate may employ such aides and procure such facilities and equipment as reasonably necessary to carry out the duties of his office.”⁶¹

b. Office of the Defender of the Fund

The Office of the Defender of the Fund consists of the Defender of the Fund and “such Associate Defenders as required.”⁶² The Defender's duties include, when appropriate, defending claims against the Trust Fund by asserting one or more of the following defenses: (1) the claimant has not suffered the alleged loss or damage to person or property; (2) the claimant’s loss or damage is not in any way related to the Nuclear Testing Program; (3) the claimant has failed to exhaust his remedies before an LDA that has jurisdiction over his claims; (4) the claimant has

settlements. *Id.* at § 16(2). The Act provides that the Mediation Officer must be familiar with the customary law and traditional practice of the RMI. *Id.* at § 16(1).

⁵⁶ *Id.* at § 14(3).

⁵⁷ *Id.* at § 14(3).

⁵⁸ *Id.* at § 14(2), (7).

⁵⁹ *Id.* at § 17(1).

⁶⁰ *Id.* at § 17(1).

⁶¹ *Id.* at § 17(4).

⁶² *Id.* at § 18(1).

been unreasonably denied compensation or inadequately compensated by an LDA that has jurisdiction over his claim; and (5) any other defense deemed proper by the Defender of the Fund.⁶³ The Defender's duties also include undertaking investigations ordered by the Tribunal or a Special Tribunal and moving for, arguing for, or arguing against the creation of class actions.⁶⁴ The Act provides that, like the Public Advocate, “[a]s authorized by the Tribunal, the Defender of the Fund may employ such aides and procure such facilities and equipment as reasonably required to carry out the duties of his office.”⁶⁵

c. Financial Office

The Act provides that the Financial Officer shall, “in accordance with generally accepted accounting principles, maintain the fiscal integrity of the Operating Fund.”⁶⁶ The Tribunal Financial Officer is also charged with maintaining the fiscal integrity of the Claims Fund.⁶⁷ The duties and responsibilities of the Financial Officer include: (1) disbursing payments from the Operating Fund and ensuring that all payments are in furtherance of Tribunal purposes; (2) filing written quarterly reports with the Chairman setting forth all requests for payments from the Operating Fund, the status of such requests, and the Operating Fund’s balance; (3) disbursing payments from the Claims Fund; and (4) filing written quarterly reports with the Chairman setting forth all requests for payment from the Claims Fund, the status of such requests, and the Claims Fund’s balance. The Financial Officer also has a fiduciary obligation to invest the monies in the Operating and Claims Funds.⁶⁸

⁶³ *Id.*
⁶⁴ *Id.*
⁶⁵ *Id.* at § 18(2).
⁶⁶ *Id.* at § 15(1).
⁶⁷ *Id.* at § 15(2).
⁶⁸ *Id.* at § 15(3).

d. Clerk

The Tribunal's Clerk and the Clerk's staff operate under the direction of the Chairman.⁶⁹

The Clerk's duties include: (1) receiving documents and forwarding copies to the responsible Officer or Tribunal Member; (2) maintaining files on all claims and making such files available for public inspection; (3) assisting the Tribunal and any Special Tribunal in all administrative matters; (4) assisting the Public Advocate in informing claimants and their representatives of the procedures and provisions for making and prosecuting claims; and (5) performing such other functions as are required by the Tribunal.⁷⁰

D. The Tribunal's Physical Facilities

The Tribunal is located on the island of Majuro, where the RMI Government is headquartered. The Tribunal's offices are housed in an office building in which it leases space. These offices include a law library as well as a small conference room (approximately 400-500 square feet) in which Tribunal hearings often take place. The Members of the Tribunal sit at the head of a large table in that conference room and the representatives of the parties sit on either side. This hearing room is equipped with an overhead projector for exhibits.

For larger hearings, where public attendance is anticipated, the Tribunal occasionally rents a larger conference room at a local hotel. That room is set up like a traditional courtroom, with the Members of the Tribunal seated behind a high bench, the parties and counsel seated at separate tables facing them and witnesses seated at a witness stand in front of the bench.

⁶⁹ *Id.* at § 19(1).

⁷⁰ *Id.* at § 19(2).

V. The Tribunal's Regulations Governing Practice and Procedure

Pursuant to authority provided by the Act, the Nuclear Claims Tribunal has promulgated Regulations Governing Practice and Procedure (the “Regulations”) before the Tribunal.⁷¹ These Regulations are similar in many respects to the procedural rules followed by U.S. courts and administrative agencies. In general, individual personal injury claims are handled by an administrative review process that allows for appeals by disappointed claimants to a Special Tribunal or to the full Tribunal. More formal complaints, including class action claims, are litigated before the Tribunal using rules and procedures typical of an adversary process.

A. Filing of Claims by Individual Claimants

Chapter 2 of the Tribunal's Regulations sets forth the procedures for submitting claims before the Tribunal. Eligible claimants are limited to citizens or nationals of the RMI alleging loss or damage to person or property as a result of the U.S. Nuclear Testing Program. The Government of the RMI can also submit claims for loss or damage to its property.

B. Initial Review of Individual Claims

After a claim is filed with the Tribunal Clerk,⁷² the Defender of the Fund reviews that claim “[w]ithin a reasonable period of time . . .”⁷³ After the Defender of the Fund has reviewed a claim, he notifies the claimant that: (1) further information is required before the claim’s validity can be ascertained; (2) the claim has been admitted; or (3) the claim has been rejected in part or in whole. Written notice of a rejection includes a statement of reasons for the rejection of the claim.⁷⁴ The Defender of the Fund’s written rejection of a claim serves as his answer to the claim in any subsequent proceedings before the Tribunal. The Defender of the Fund may amend

⁷¹ The Tribunal's Regulations, in their entirety, are attached to this report as Appendix D.

⁷² The procedure for filing and pursuing claims is set forth in Sections 201-208 of the Tribunal's Regulations.

⁷³ Section 209(a) of the Tribunal's Regulations.

⁷⁴ *Id.* at Section 209.

or supplement his rejection before any dispute regarding that claim is heard by the Tribunal. If the Defender of the Fund rejects a claim, the claimant may challenge, in whole or in part, the Defender's decision by filing a challenge with a Special Tribunal or the full Tribunal.⁷⁵

C. Public Notice of Certain Claims, Including Class Actions

The Nuclear Claims Tribunal Act requires the Tribunal to give public notice of certain claims, including: (1) claims for damage to or loss of land (42 MIRC § 23(10)); (2) class actions (42 MIRC § 22(11)); (3) complaints challenging the fairness and equity of proposed or active distribution schemes (42 MIRC § 24); (4) claims challenging the administration of a distribution scheme (42 MIRC § 25); (5) complaints challenging an LDA's determination that an individual is not a recipient under its distribution scheme (42 MIRC § 26(9)); and (6) complaints challenging an LDA's assignment of future proceeds from the Trust Fund (42 MIRC § 27).⁷⁶ The Tribunal's Regulations set forth the methods and requirements for giving public notice, which include publication in a newspaper of general circulation, radio broadcasts, or posting of written notice in a public place.⁷⁷

D. Procedures for Service of Certain Documents in Litigated Actions

When a matter is litigated before the Tribunal, the Act requires that “[e]very document filed with the Clerk shall be served on all parties or their representatives.”⁷⁸ Chapter 5 of the Tribunal's Regulations sets forth rules for service of complaints and other documents. The Tribunal's rules for service are similar to those in the Federal Rules of Civil Procedure used in the United States. The methods of making service include personal service, service by mail,

⁷⁵ *Id.*
⁷⁶ *Id.* at Section 303.
⁷⁷ *Id.* at Section 302.
⁷⁸ 42 MIRC Ch 1, § 22(3).

service by publication, and service by radio broadcast.⁷⁹ The Tribunal's Regulations also enumerate specific rules for service of complaints and other documents on LDAs, service of an LDA's answer to a complaint, service on the Defender of the Fund or the Public Advocate, service on the RMI Government, and service on Local Government Councils.⁸⁰

E. Discovery

The Tribunal's Regulations provide for discovery in litigated actions. To reduce the cost of prosecuting claims or complaints, parties are permitted to inspect “all relevant physical, documentary, or demonstrative evidence which is in the custody, or under the control, of any other party.”⁸¹ Parties must also disclose the identity of witnesses to opposing parties, who are permitted to depose such witnesses.⁸² The Tribunal's Regulations require that parties promptly make available all relevant evidence (*e.g.*, documentary materials, reports by expert witnesses, medical records and photographs) to all other parties, when so requested.⁸³ Like the Federal Rules of Civil Procedure, the Regulations provide for sanctions if “at any time the Tribunal . . . determine(s) that a party or other person has unjustifiably resisted discovery . . .”⁸⁴ Sanctions include: (1) monetary sanctions, including the costs and expenses incurred by the petitioner in bringing the petition; (2) denial of claimed compensation, in whole or in part, or dismissal of a complaint with prejudice; and/or (3) a contempt citation and referral to the Marshall Islands High Court.⁸⁵

⁷⁹ Section 501 of the Tribunal's Regulations.

⁸⁰ *Id.* at Section 502.

⁸¹ *Id.* at Section 600.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

F. Rules of Evidence in Tribunal Hearings

The Tribunal's Regulations set forth the procedures for Hearings and Pre-Hearing conferences before the Tribunal.⁸⁶ Pursuant to the Act, the Tribunal is not bound by legal rules of evidence.⁸⁷ Generally the Tribunal can receive “any evidence that is of a type commonly relied upon by reasonably prudent people in the conduct of their affairs.”⁸⁸ All relevant and material evidence, not otherwise privileged, may be offered in evidence.⁸⁹ The weight given to a particular piece of evidence is to be determined by its reliability and probative value.⁹⁰ All persons are deemed competent to testify, unless the Tribunal determines that they are prevented by mental or physical infirmity from understanding the questions put to them or from giving rational answers to those questions.⁹¹ The Tribunal's Regulations permit a party to conduct direct and cross-examination of witnesses, as is required for a full and true disclosure of the facts.⁹² Expert witness testimony may be offered by any party and may be independently sought by the Tribunal if it concludes that such assistance is needed.⁹³

G. Tribunal Decisions

The Act requires the Tribunal to render written decisions in all cases litigated before it “[w]ithin a reasonable time after the hearing is closed.”⁹⁴ These decisions are filed with the Clerk of the Tribunal and are deemed to be public records unless a file is ordered sealed by the Tribunal.⁹⁵

⁸⁶ *Id.* at Section 700-02.

⁸⁷ *Id.* at Section 1000 (citing 42 MIRC Ch 1, § 31(g)(i)).

⁸⁸ *Id.*

⁸⁹ *Id.* at Section 1001 (citing 42 MIRC Ch 1, § 31(g)).

⁹⁰ *Id.* at Section 1000 (citing 42 MIRC Ch 1, § 31(g)(ii)).

⁹¹ *Id.* at Section 1003.

⁹² *Id.*

⁹³ *Id.* at Section 1004.

⁹⁴ *Id.* at Section 704.

⁹⁵ *Id.*

H. Appeals to the RMI Supreme Court

The Act provides that appeals of final determinations by the Tribunal may be heard by the RMI Supreme Court at its discretion.⁹⁶ We understand that relatively few Tribunal decisions have been appealed to the Supreme Court, although several such matters are discussed in the Tribunal's Annual Reports. *See, e.g.*, the 2001 Annual Report (Appendix C) at 10.

VI. The Tribunal's Early History

The Tribunal's early history was marked by controversy, tension and periodic inactivity as members of the Nitijela quarreled with the first Members of the Tribunal about how the Tribunal should conduct its business.⁹⁷

After the Tribunal was formally established by the Nuclear Claims Tribunal Act in 1987, Bruce Piggott of Australia became the Tribunal's first Chairman. Before joining the Tribunal in 1988, Chairman Piggott served as president of the UN Association in Tasmania from 1945 to 1962 and as president of the Law Society of Tasmania from 1960 to 1962.⁹⁸ Piggott also served as vice-president of the International Bar Association from 1961 to 1964⁹⁹ and as chairman of the Tasmanian Law Reform Commission in the 1970s and 1980s.¹⁰⁰

Chairman Piggott wanted the Tribunal to adopt a workers compensation-like system, in which awards would be mechanically and systematically determined in an administrative manner. Chairman Piggott opposed a system in which claims would be litigated on a case-by-case basis because, in his view, such a system would result in much of the Trust Fund going to

⁹⁶ 42 MIRC Ch 1 § 6(3).

⁹⁷ *See* 1993 Annual Report at ES-1.

⁹⁸ Michael Kirby, *Reform Advocate Had a Global Perspective*, *The Australian* (Australia), June 6, 2000, at 17.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

attorneys rather than to deserving claimants. Chairman Piggott predicted that the Tribunal's work could be concluded within a few years, during which the Tribunal would allocate all of the Trust Fund monies authorized under the Section 177 Agreement.

Members of the Nitijela and other political leaders within the Marshall Islands disagreed with Chairman Piggott's approach. In their view, the Tribunal should give each claimant a full and fair hearing to determine the just compensation to which he/she was entitled. Attorneys in the Marshall Islands and counsel who had represented residents of Bikini, Enewetak and other atolls before the U.S. Court of Claims also argued that, without their assistance, many residents of the Marshall Islands would not receive just compensation. A consensus also developed that the \$150 million provided by the United States in 1986 should not be regarded as a limitation on that compensation.

The disputes between the Nitijela and the Tribunal came to a head in 1990, when the terms of the initial Members of the Tribunal came up for renewal. According to the Tribunal's 1991 Annual Report, "1990 proved to be a difficult year, with much of the Tribunal's energies expended on dealing with the consequences of several disputes concerning its independence."¹⁰¹ Legislation had been proposed in the Nitijela: (1) to provide for the removal of Tribunal Members from office by simple majority resolution of the Nitijela (rather than by the Cabinet); (2) to request the Tribunal to expedite the resolution of claims of certain individuals; and (3) to prevent the Tribunal from subtracting from compensation awards.¹⁰²

This initial period of conflict between the Tribunal and the Nitijela resulted in "a severe loss of momentum in the process of assessing damages and awarding compensation . . ." ¹⁰³ It

¹⁰¹ 1991 Annual Report at 1.

¹⁰² *Id.* at 2.

¹⁰³ *Id.* at 1.

also led to the departure of the Tribunal's first Members. In 1990 Chairman Piggott and Tribunal Member Paul Devens resigned from the Tribunal. The third Member of the Tribunal, Philip Bird, left to take a position with the Marshall Islands High Court. As a result, the RMI Cabinet had to recruit and appoint three new Members of the Tribunal. According to the 1993 Annual Report, the Tribunal thereafter regained momentum by focusing its attention on how to deal with personal injury compensation claims.¹⁰⁴

VII. The Tribunal's Approach to Personal Injury Claims

From the beginning of its existence, development of an effective program for compensation of personal injuries was a priority of the Tribunal's work.¹⁰⁵

A. The Search for an Appropriate Compensation System

In general, there was a consensus that compensation decisions needed to be made expeditiously, before more victims of the U.S. Nuclear Testing Program died. There was also a consensus in favor of an administrative mechanism that rested on certain presumptions regarding the causal link between the Nuclear Testing Program and various medical conditions. As the Tribunal subsequently stated, in a different context, in 1996:

The (Act) establishes an administrative framework for the consideration of personal injury claims . . . The underlying basis for this approach was the need for an efficient, simple, and cost-effective payment program, and a recognition of the difficulties of proof of causation associated with injuries due to exposures to low levels of ionizing radiation.¹⁰⁶

¹⁰⁴ 1993 Annual Report at 2-3.

¹⁰⁵ See, e.g., 1991 Annual Report at 6; see also www.nuclearclaimstribunal.com/hist.htm.

¹⁰⁶ *In the Matter of the People of Enewetak, et al.*, NCT No. 23-0902, Decision and Order, September 23, 1996, at 2.

The Tribunal initiated scientific radiological studies and sought expert medical advice in order to design such an administrative framework.¹⁰⁷

The Tribunal also looked to other countries for compensation systems that might be appropriate models for such a system in the Marshall Islands. In 1990 the U.S. Congress had passed the Radiation Exposure Compensation Act, also known as the “Downwinders’ Act,” which established a presumptive program of compensation for specified diseases suffered by U.S. civilians who were physically present in any area affected by the atmospheric nuclear tests conducted in Nevada between January 1951 and October 1958 or during July 1962.¹⁰⁸ Even though there were significant differences between the nuclear testing programs conducted in the Marshall Islands and in Nevada, the Tribunal decided that the compensation methodology of the Downwinders’ Act was a reasonable starting point for a similar system for the Marshall Islands.¹⁰⁹

In August 1991 the Tribunal began to implement its personal injury compensation program.¹¹⁰ Initially, the Tribunal’s program required claimants to demonstrate: (1) residency in the Marshall Islands during the years of nuclear testing (between July 1, 1946 and August 19, 1958), from which the Tribunal presumed exposure to radiation from that testing;¹¹¹ and (2) manifestation of a radiogenic medical condition (as enumerated on a schedule of presumed

¹⁰⁷

Id.

¹⁰⁸ 1996 Annual Report at 3.

¹⁰⁹ The “affected area” in the Marshall Islands was much larger than that defined in the Downwinders’ Act. Moreover, the total yield of the tests in the Marshall Islands (108,496 kilotons) was approximately 99 times that of the atmospheric tests in Nevada (1,096 kilotons).

Id.

¹¹⁰ See www.nuclearclaimstribunal.com/hist.htm.

¹¹¹ As discussed below, in 1994 the Nitijela expanded the Tribunal's personal injury compensation program to include unborn children of mothers who resided in the Marshall Islands during the nuclear testing period. See Section X (C), *infra*.

conditions), from which the Tribunal conclusively presumed personal injury caused by the claimant's exposure to radiation from the testing program.¹¹²

B. The Tribunal's Schedule of Presumed Medical Conditions

The medical conditions presumed to be caused by exposure to radiation from the Nuclear Testing Program are listed on a Schedule in the Tribunal's Regulations.¹¹³ In 1991 the Tribunal adopted a list of twenty-five such conditions, including: (1) conditions identified in U.S. statutes and regulations that entitled U.S. citizens or military veterans to possible compensation due to exposure to radiation, and (2) conditions for which there was credible evidence showing a significant statistical relationship between exposures to ionizing radiation and the subsequent development of disease.¹¹⁴ In determining which conditions to include on its Schedule, the Tribunal studied the findings and views of: (1) the Radiation Effects Research Foundation in Japan, particularly its Life Span Study of atomic bomb survivors; (2) the 1990 Report of the Committee on Biological Effects of Ionizing Radiation by the National Research Council of the National Academy of Science; and (3) Dr. Robert Miller, an expert in the field of radiation health effects.¹¹⁵

Pursuant to the Act, the Tribunal is obligated to review the Schedule of presumed medical conditions annually.¹¹⁶ The annual review process allows the Tribunal to take into account any further scientific or medical developments that relate to diseases caused by exposure to radiation from nuclear explosions. As a result of the annual review process, the Tribunal has

¹¹² 1994 Annual Report at 4.

¹¹³ Section 220 of the Tribunal's Regulations. A list of these presumed medical conditions can be found in Appendix C (the 2001 Annual Report) at 17.

¹¹⁴ 1992 Annual Report at 34 (citing the Radiation Exposure Compensation Act of 1990, as amended, 42 U.S.C. § 2210 note, and the Radiation-Exposed Veterans Compensation Act of 1988, 38 U.S.C. § 101 *et seq.*).

¹¹⁵ *Id.*

¹¹⁶ 42 MIRC Ch 1, § 23(13).

amended the Schedule on at least three occasions since 1991 to add ten additional medical conditions (primarily different forms of cancer) to the list of conditions presumed to be caused by exposure to radiation during the Nuclear Testing Program.¹¹⁷ The Tribunal has been sensitive to the fact that some cancers, *e.g.*, bronchial cancer, may be caused by smoking or other environmental factors unrelated to the Nuclear Testing Program. The Tribunal has attempted to make appropriate adjustments by trying to establish different compensation standards for smokers and non-smokers.¹¹⁸

As part of its review of the Schedule of presumed medical conditions, the Tribunal has sent representatives to Japan to consult with experts involved in continuing research concerning the survivors of the Hiroshima and Nagasaki nuclear bombs and to Helsinki, Finland to attend a meeting of the International Nuclear Law Association.¹¹⁹

As we will discuss below, the fact that a claimant's medical condition is not on the Schedule of presumed medical conditions does not prevent him/her from filing a personal injury compensation claim, but requires him/her to demonstrate, to the Tribunal's satisfaction, that there is, in fact, a causal link between that medical condition and exposure to radiation from the U.S. Nuclear Testing Program.

C. The Tribunal's Procedure for Handling Personal Injury Claims

Although the personal injury compensation program adopted by the Tribunal relies upon presumptions and does not require each claimant to prove a specific causal link between his or her exposure to radiation from the nuclear testing program and the claimant's individual injuries, it differs from the workers compensation-like system promoted by Chairman Piggott. While the Tribunal has enumerated a list of compensable medical conditions with fixed amounts of

¹¹⁷ 1993 Annual Report at 3-4; 1996 Annual Report at 6; and 1998 Annual Report at 4.

¹¹⁸ 2000 Annual Report at 20.

¹¹⁹ 1992 Annual Report at 35.

monetary awards, each award must ultimately be reviewed and approved by a Special Tribunal or by the full Tribunal.¹²⁰

1. The Claims Process

The personal injury claims process begins when a claimant files a "Claim Form" with the Tribunal's Clerk.¹²¹ The claimant normally provides medical records that are evaluated by medical professionals of the Office of Medical Diagnostics, who prepare a report. The Defender of the Fund reviews the Claim Form and the medical report by the Office of Medical Diagnostics to determine whether the Defender will admit the claim, seek additional information from the claimant or reject the claim.¹²² Claims normally will be "admitted" by the Defender if the evidence in the claim file reasonably establishes that the claimant was present in the Marshall Islands during the nuclear testing period and has a medical condition on the Schedule of presumed medical conditions.

Claims designated by the Defender as "admitted" are forwarded by the Tribunal's Clerk to the Chairman of the Tribunal for assignment to a Special Tribunal, which is responsible for independently reviewing the entire claim file in order to determine whether the file is complete and whether the amount of compensation recommended by the Defender is appropriate.¹²³ The Defender's recommendation is almost always accepted by the Special Tribunal. Claims subject to an outstanding request for additional information are held in "abeyance" pending receipt of the requested information.¹²⁴

¹²⁰ See Chapter 2 of the Nuclear Claims Tribunal Regulations Governing Practice and Procedure for a full discussion of the process for filing and handling such claims.

¹²¹ A sample "Claim Form" is attached to this report as Appendix E.

¹²² 1992 Annual Report at 37.

¹²³ *Id.*

¹²⁴ *Id.* at 37-38.

2. Challenges to Claim Denials

Claimants whose claims are rejected by the Defender of the Fund have the right to challenge that rejection and to have a Special Tribunal decide their claims. This usually occurs when a claimant seeks compensation for a medical condition not on the Schedule of presumed medical conditions. A disappointed claimant has the opportunity to present to the Special Tribunal evidence of his/her injury and proof that the injury was the result of the Nuclear Testing Program.¹²⁵ The Public Advocate is available to assist claimants, at no cost, in pursuing these “challenge claims.”¹²⁶

In general, to prevail on a challenge claim a claimant must demonstrate, by a preponderance of the evidence, that "a significant statistical relationship exists between the claimant's estimated level and type of exposure to radiation and the subsequent development of the claimed condition in human populations."¹²⁷ We understand that there have been approximately twenty such challenge claims since the inception of the Tribunal and that the Public Advocate has prevailed on approximately one-half of those challenge claims.

If a challenge claim is rejected, the claimant can appeal the Special Tribunal’s ruling to the full Tribunal or pursue a discretionary appeal to the Marshall Islands Supreme Court.

D. The Tribunal's Procedure for Paying Personal Injury Compensation Awards

Claimants who demonstrate that they have developed a compensable medical condition are entitled to "full compensation," which the Tribunal's regulations define to be "fair, equal and reasonable compensation for similarly-situated claimants."¹²⁸ In general, this means that each

¹²⁵

Id.

¹²⁶

Id.

¹²⁷

Section 221 of the Tribunal's Regulations.

¹²⁸

Id. at Section 230.

claimant is awarded a specific dollar award designated for each medical condition on the Schedule of presumed medical conditions.

By adopting a compensation system that entitles each claimant to "full compensation" and to his/her "day in court," the Tribunal implicitly recognized that the total dollar amount of its awards might exceed the amount of money available in the Claims Fund. Accordingly, the Tribunal's compensation program provided that persons receiving awards would not receive the full dollar value of those awards at the time the awards were made, but would receive instead an initial partial payment and additional pro rata payments each year, until the Tribunal's funds were exhausted or the claimant had received his/her full award.¹²⁹

At first, the Tribunal's initial award to each claimant was equal to twenty percent (20%) of that claimant's full compensation award. In October 1991 the Tribunal concluded that additional annual pro rata payments of five percent (5%) of each award were reasonable and fiscally prudent. The Tribunal's decision reflected a balance between the desire to pay each recipient as much of his/her award as possible and the need to retain sufficient funds to pay future claimants proportionate shares of their individual compensation awards.

In October 1992 the Tribunal conducted another analysis of its claims history and payment projections to determine whether an additional annual pro rata payment was warranted, and, if so, in what amount. Based on an analytical framework identical to that underlying the 1991 pro rata payment determination, but using updated information, the Tribunal increased the annual pro rata payments to eight percent (8%) of each award. Once again, the Tribunal reiterated the need to "balance the interest of existing recipients to receive full payment of their

¹²⁹ Article II, Section 7(b) of the Section 177 Agreement requires that "[a]ll monetary awards made by the Claims Tribunal . . . shall be paid on an annual pro rata basis from available funds until all such awards are paid in full."

award as soon as possible and the interest of future recipients to receive payment in an amount proportionately equal to that received by those paid previously.”¹³⁰

The annual pro rata payment rate was reduced to seven percent (7%) in 1993 and then increased to ten percent (10%) in 1994.¹³¹ In 1996 a two percent (2%) annual pro rata payment was made, bringing the total cumulative payment to fifty-seven percent (57%) for all awards made through September 30, 1996.¹³²

For the first five years of the Tribunal's personal injury compensation program, initial payment of awards was made in an amount equal to the cumulative percentage payout received by awardees in prior years. Therefore, persons who received awards during the sixth year of the compensation program received initial payments of their awards that were equal in percentage to the cumulative percentage of awards paid (in initial payments and annual pro rata payments) to all earlier awardees.¹³³

By 1997 the Tribunal recognized that, because of the previous commitments of Trust Funds to earlier awardees, it could no longer continue its practice of paying each new awardee an initial payment equal in percentage to the cumulative percentage received by all previous awardees. Therefore, starting in 1997, the Tribunal limited initial award payments to twenty-five percent (25%) of each new award.¹³⁴

For such claimants, the Tribunal authorized annual pro rata payments of five percent (5%) in 1997 and ten percent (10%) in 1998, bringing their cumulative total payout to forty

¹³⁰ 1993 Annual Report at 5.

¹³¹ *Id.* at 5.

¹³² 1997 Annual Report at 6.

¹³³ *Id.* at 5-6.

¹³⁴ *Id.*

percent (40%).¹³⁵ Claimants who received initial awards between October 1, 1997, and September 30, 1998, received a twenty-five percent (25%) initial payment and a fifteen percent (15%) annual payment in October 1998, for the same cumulative payout of forty percent (40%).¹³⁶

In October 1999, five percent (5%) annual payments were made to claimants who received awards between October 1996 and September 1998, bringing their respective cumulative totals to forty-five percent (45%).¹³⁷ Claimants who received initial awards between October 1998 and September 1999 received a twenty-five percent (25%) initial payment and a twenty percent (20%) annual payment in October 1999 to achieve the same forty-five percent (45%) total payment.¹³⁸

In October 2000, a three percent (3%) payment was made to awardees who had previously received sixty-three percent (63%) of their awards, bringing their cumulative total to sixty-six percent (66%).¹³⁹ A five percent (5%) payment was made to awardees who had previously received forty-five percent (45%) of their awards and a twenty-five percent (25%) payment to awardees who had previously received twenty-five percent (25%) of their awards.¹⁴⁰

On October 3, 2001, the Tribunal issued a Statement of Determination regarding the 2001 annual pro rata payments. This Statement noted that the fifteenth anniversary of the effective date of the Section 177 Agreement marked “the end of the distribution regime under which the Tribunal was allocated a set amount to make payment of awards . . . on a pro rated basis. While this prorationing allowed at least some payment to be made to all those who received a personal

¹³⁵ 1998 Annual Report at 5.

¹³⁶ *Id.*

¹³⁷ 1999 Annual Report at 4.

¹³⁸ *Id.*

¹³⁹ 2000 Annual Report at 3.

¹⁴⁰ *Id.*

injury award, it also had the unjust result of stretching payment out over a period of years so that many have passed away before receiving full payment.”¹⁴¹ The Tribunal continued: “In order to address this injustice, the Tribunal this year will make an unprecedented distribution which will pay off 50% of the unpaid balances of personal injury awards. While this will have the effect of significantly reducing the corpus of the Nuclear Claims Fund, the Tribunal has determined that payment in this manner most effectively addresses the effects of the Nuclear Testing Program with the remaining funds available to it.”¹⁴² Accordingly, awardees who had previously been paid a cumulative total of sixty-six percent (66%) of their awards received a seventeen percent (17%) payment in October 2001; those who had previously been paid fifty percent (50%) of their awards received an additional twenty-five percent (25%); and those who had received an initial twenty-five percent (25%) payment of their awards during the previous year were paid an additional thirty-seven point five percent (37.5%) of their awards.¹⁴³ For personal injury awards made beginning October 23, 2001, the Tribunal determined that the initial payment would be equal to fifty percent (50%) of each claimant's award.¹⁴⁴ Thus, persons who have received personal injury awards from the Tribunal since 1991 have received from fifty percent (50%) to eighty-three percent (83%) of their total awards.

VIII. The Tribunal's Approach to Property Damage Claims

Although Members of the Tribunal always recognized that they would need a method to deal with property damage claims, the Tribunal did not devote much attention to that subject in its early years. By 1992 the Tribunal and those with an interest in property damage claims had

¹⁴¹ 2001 Annual Report at 8.

¹⁴² *Id.*

¹⁴³ *Id.* at 8-9.

¹⁴⁴ *Id.* at 9.

decided that the most appropriate way to deal with such claims was through a series of class actions. During the ten years that followed, the Tribunal and the counsel before it have slowly worked through the complex legal and factual issues presented by four such class actions, including class actions on behalf of the owners of property on Enewetak, Bikini, Rongelap and Utrik.

The Tribunal has issued property damage awards in two of those class actions. On April 13, 2000, the Tribunal issued an award to the Enewetak plaintiffs totaling \$324,949,311. Less than a year later, on March 5, 2001, the Tribunal issued an award to the Bikini plaintiffs totaling \$561,315,500. We understand that the Tribunal is in the process of completing work on its awards in the Rongelap and Utrik cases. Obviously, the Enewetak and Bikini property damage awards, by themselves, are far larger than any amount the Trust Fund could satisfy. We understand that the claimants in those cases have only received a very small percentage of those awards.

Even the decisions in the Rongelap and Utrik class actions will not close the book on property damage claims filed with the Tribunal. Property owners on other islands and atolls have also filed individual property damage claims, some of which have been pending for many years. We understand that the Tribunal does not yet have a plan for how to deal with those claims, which are likely to be far less in aggregate dollar value than the claims of property owners on the four atolls most directly affected by the U.S. Nuclear Testing Program.

A. Property Damage Claims in the Tribunal's Early Years

As soon as the Act was passed, the Tribunal became responsible for deciding claims for existing and prospective loss or damage to property.¹⁴⁵ Indeed, the Tribunal's Claims Forms

¹⁴⁵ 42 MIRC Ch 1, § 5(a).

were designed to gather information about property damages as well as personal injuries.¹⁴⁶ As previously noted, however, the early Members of the Tribunal decided that personal injury claims should take priority.

This decision seems quite reasonable given the urgency of treating and compensating those who had been personally injured before they passed away.¹⁴⁷ Furthermore, it is our understanding that the early Members of the Tribunal recognized that the property damage claims were likely to be more difficult to handle and might result in damage awards that would rapidly deplete the Trust Fund, leaving little to compensate individuals who had suffered serious personal injury or death. There also was no available administrative template, like the Downwinders' Act, for dealing with property damage claims.¹⁴⁸

Furthermore, as the Tribunal subsequently stated in 1996, the considerations that encouraged the Tribunal to use an administrative approach to deal with personal injury claims did not necessarily apply to property damage claims. The administrative framework for personal injury claims reflected "the need for an efficient, simple, and cost-effective payment program, and a recognition of the difficulties of proof of causation associated with injuries due to exposures to low levels of ionizing radiation."¹⁴⁹ By contrast, the Tribunal determined that property damage claims were more suited to adjudication in a traditional adversarial manner. The Tribunal noted that liability and causation were not issues for the property damage claims,

¹⁴⁶ See the Claim Form attached to this report as Appendix E.

¹⁴⁷ Indeed, even though the Tribunal gave personal injury awards priority over property damage claims, more than forty percent (40%) of the 1,747 individuals to whom the Tribunal made personal injury awards prior to December 31, 2001, had died prior to receiving full payment of those awards. 2001 Annual Report at 8.

¹⁴⁸ For example, the Downwinders' Act only provided compensation to persons who suffered personal injury, not to property owners who might have claimed damage as a result of the U.S. Government's Nuclear Testing Program.

¹⁴⁹ *In the Matter of the People of Enewetak, et al.*, NCT No. 23-0902, Decision and Order, September 23, 1996, at 2.

because there would be no dispute that the U.S. Nuclear Testing Program caused the damage to the land. Instead, the issues in dispute would be the determination and measure of damages.¹⁵⁰

Even if property damage claims were more amenable to an adversarial approach, it was not immediately clear whether property damage claims would be litigated on an individual basis or would be considered on a collective basis through the use of class action vehicles. We understand that the Nitijela addressed this issue many years ago and made clear its preference that the Tribunal decide property damage claims on a class-wide basis. Although we do not know why the Nitijela expressed this preference, witnesses we interviewed suggested that class action treatment is consistent with the collective approach to property and with the overlapping layers of property rights that are part of the culture and history of the Marshall Islands. In addition, class action treatment offered some advantages that are familiar to U.S. litigants, including economies of scale and uniformity of treatment. Furthermore, it was understandable that the parties and counsel who had brought property damage claims against the United States in the U.S. Court of Claims would prefer the same class action vehicles they had used in that court, particularly if there was a possibility they would seek to return to that court if they could not obtain all the relief they sought from the Nuclear Claims Tribunal.

B. The Enewetak Class Action

The first class action filed before the Tribunal was on behalf of the Enewetak community. The Enewetak suit was filed on July 16, 1990. The Tribunal did not render its final award in favor of the Enewetak community until almost ten years later, on April 13, 2000. During the intervening ten years, counsel litigated many complex issues before the Tribunal, laying some of the groundwork for the class actions that followed. In the words of the Tribunal, "[t]he complexity of these issues, and the decision to deal with them in an adjudicatory, rather than

¹⁵⁰ *Id.* at 2-3.

administrative matter, has required much time and effort in moving toward the resolution of the land claims."¹⁵¹

In the paragraphs that follow, we will provide a brief chronology of the Enewetak class action litigation that will describe the processes the Tribunal used, not only in that class action, but in the other property damage class actions that followed. Those processes have relied heavily on motions practice, briefing, pretrial discovery techniques and expert reports that are similar to what might be found in many class actions litigated in U.S. courts.

1. A Brief Chronology of the Enewetak Class Action

Very little transpired in the Enewetak class action during the first 20 months after the case was filed. As mentioned above, 1990 and 1991 were years of controversy and transition for the Tribunal. This was also a time when most Tribunal efforts were devoted to the design of an administrative mechanism for processing personal injury claims.

More attention was focused on the Enewetak class action beginning in 1992. Beginning in March 1992 the Tribunal held a series of prehearing and status conferences in the Enewetak action in an effort to identify issues and to set ground rules for the litigation of the case. The Tribunal issued prehearing orders after these conferences in March, June, and October of 1992. Public notice of the class action was given on July 27, 1992.¹⁵² In December 1992 the claimants filed a preliminary statement of issues, to which the Defender of the Fund responded in March 1993.

Additional status conferences occurred in September and December 1994 and in February 1995. By February 1995, the Tribunal and the parties had turned their attention to pretrial discovery and to the filing of motions and prehearing statements. On June 2, 1995, the Defender

¹⁵¹ *Id.* at 2-3.

¹⁵² 1992 Annual Report at 40.

of the Fund filed his first substantive motion, seeking to limit the categories of damages the claimants might be awarded and the valuation of those damages. After full briefing and argument by both sides, the Tribunal issued an Order on July 27, 1995, granting some of the relief sought by the Defender of the Fund, but denying most of his motion seeking to limit the claimants' damages.

In the fall of 1995 the parties turned their attention to the subject of claimants' attorneys fees. After additional briefing and a hearing on December 7, 1995, the Tribunal held that the claimants could not recover, as damages, fees they had paid to attorneys who represented them during the negotiation of the Compact. The following fall, after additional briefing, the Tribunal rejected the claimants' motion to reserve fifty percent of the Claims Fund for property damage awards.

The parties engaged in additional discovery during 1996 relating to the claimants' alleged damages for loss of use of their property during the time they had been removed from Enewetak. In January 1997 the Tribunal held hearings on the loss of use issue. That hearing focused on the joint appraisal report that had previously been submitted to the Tribunal in May 1996. To help determine the amount of damages for loss of use, the Tribunal had authorized the claimants and the Defender of the Fund to retain real estate appraisers. The appraisers offered a joint report, which the Tribunal authorized "in the interest of efficiency and economy in the determinations."¹⁵³

In the eighteen months that followed the January 1997 hearings, the parties submitted extensive briefs to the Tribunal on several issues relating to claimants' damages for loss of use, including possible setoffs for the value of the property they used during their years on Ujelang.

¹⁵³ *In the Matter of the People of Enewetak, et al.*, NCT No. 23-0902, Memorandum Decision and Order, April 15, 2000, at 6 n.14.

By late 1998 the parties had moved on to issues related to the costs required to restore Enewetak to habitable condition. In this stage of the litigation, the parties focused on the restoration work required to satisfy various radiation standards. In 1999 the parties and the Tribunal shifted their attention to the claimants' request for damages to compensate the Enewetak people for the hardships and other consequential damages they suffered as a result of their forced relocation from their homeland. In April 1999 the Tribunal held several days of hearings during which the Tribunal heard testimony on rehabilitation and hardship damages. Witnesses during this hearing included cultural anthropologists and members of the Enewetak community.

Later in 1999 the parties battled over a number of other issues, including how to value and set off other compensation the Enewetak people may have already received for their damages from sources other than the Trust Fund.

2. The Tribunal's Decision in the Enewetak Class Action

On April 13, 2000, the Tribunal issued a 34-page Memorandum of Decision and Order in the Enewetak class action (the "Enewetak Decision"). The Enewetak Decision addressed each of the three categories of damages sought by the Enewetak claimants: (1) the loss of use of their property; (2) the costs to restore and remediate their property; and (3) the hardships suffered by the Enewetak people during their period of forced relocation.

a. Damages for Loss of Use

The Tribunal held that the Enewetak claimants were entitled to damages of almost \$200 million to compensate them for the loss of use of their land for a period of almost 79 years.¹⁵⁴

The Tribunal separated the loss of use claim into two components: (1) past loss, beginning on December 12, 1947 and running until the effective date of valuation in 1996; and (2) future loss, beginning on the date of valuation and continuing until "such time in the future as

¹⁵⁴ *Id.* at 6-12 & 33.

the affected property is returned to the people of Enewetak in usable condition, determined by the parties to be 30 years from the effective date of the valuation or May 17, 2026."¹⁵⁵

The Tribunal looked to the experts' appraisal reports to determine the amount of damage for loss of use.¹⁵⁶ The Tribunal accepted the appraisers' methodology for determining the amount of acreage lost, the time period of loss, and the rental value of the acreage lost.¹⁵⁷ For future loss of use, the appraisers utilized an income capitalization approach, in which a single year's income was converted into "an indication of present value by dividing the most current stabilized income by an appropriate rate of return."¹⁵⁸ Based on the appraisers' findings, the Tribunal awarded the Enewetak claimants \$149,000,000 for past lost use, and \$50,154,811 for future lost use.

b. Restoration Damages

The Tribunal held that the Enewetak claimants were entitled to recover more than \$91 million to clean up and restore their land to an acceptable condition.¹⁵⁹

First, the Tribunal held that, under prevailing American legal standards, the Enewetak people were entitled to recover the cost of restoring Enewetak to an acceptable condition, rather than be limited to a measure of damages equal to the value of their land before and after the nuclear testing program.¹⁶⁰ The Tribunal reached this decision because the cost of restoration was disproportionate to the difference in value before and after the injury to the land and because

¹⁵⁵ *Id.* at 6.

¹⁵⁶ *See* Section X(C)(2)(c)(i) *infra* for additional discussion of the parties' selection and use of appraisers.

¹⁵⁷ *See In the Matter of the People of Enewetak, et al.*, NCT No. 23-0902, Memorandum Decision and Order, April 15, 2000, at 6-11.

¹⁵⁸ *Id.* at 11 (citing *Appraisal Report of the Loss of Value in Enewetak Atoll, Republic of the Marshall Islands*, jointly prepared by The Hallstrom Group, Inc. and Raymond A. Leshner & Co., Ltd. at p. 28).

¹⁵⁹ *Id.* at 27.

¹⁶⁰ *Id.* at 13-14.

cultural considerations made the difference in market value an inadequate measure of the claimants' damages.¹⁶¹ The Tribunal took the position that radiation standards established by the U.S. Environmental Protection Agency should be used in determining how much effort would be needed to restore the contaminated portions of Enewetak to an acceptable condition.¹⁶²

After considering numerous restoration proposals that had been submitted by the parties, the Tribunal awarded the claimants the following restoration damages: \$22,500,000 for soil removal; \$15,500,000 for potassium treatment of the remaining soil; \$31,500,000 to dispose of the removed soil (by building a causeway between islands within the Enewetak atoll); \$10,000,000 for the clean-up of the residual radioactive plutonium on the island of Runit resulting from the Fig and Quince nuclear tests in 1958; \$4,510,000 for necessary surveys; and \$17,700,000 for soil rehabilitation and revegetation.¹⁶³

c. Hardship Damages

The Tribunal held that the Enewetak claimants were also entitled to recover more than \$34 million as damages for the hardships they suffered during their relocation to Ujelang.

The Tribunal based its decision on the testimony it had heard at hearings in January 1997 and April 1999.¹⁶⁴ The Tribunal rejected the Defender's argument that damages for hardship could be addressed through the Tribunal's personal injury program.¹⁶⁵ The Tribunal stated: "These damages, which were suffered on a community wide basis differ from those typically addressed in the personal injury program, which are basically radiogenic diseases, linked to

¹⁶¹ *Id.*

¹⁶² *Id.* at 16-17.

¹⁶³ *Id.* at 18-27.

¹⁶⁴ *Id.* at 28-30 (citing *Ien Entaan im jerata: Times of Suffering and Ill Fortune: An Overview of Daily Life on Ujelang and Enewetak since 1946*, Laurence M. Carucci, Ph. D. and Mary H. Maifeld, M.A., R.D., A Report Submitted to the Marshall Islands Nuclear Claims Tribunal in behalf of the People of Enewetak, March 1999).

¹⁶⁵ *Id.* at 30-31 (citing Defender's Motion to Limit Categories of Damage).

exposure to radiation from the testing program. The injuries at issue here (hardship) are those arising out of the relocation to Ujelang and the hardships endured there by the people because of its remoteness and lack of adequate resources to support the population sent there.”¹⁶⁶

The Tribunal adopted the approach suggested by the claimants for quantification of these damages, by awarding an annual amount for each person from Enewetak who lived on Ujelang during each of the thirty-three years between 1947 and 1980.¹⁶⁷ The Tribunal noted that the relative hardships suffered on Ujelang varied with time, with 1956-1972 being the period of greatest suffering.¹⁶⁸ For this period, the Tribunal awarded an annual per person amount of \$4,500. For the remaining seventeen years, preceding and following this period, the annual per person amount was \$3,000.¹⁶⁹ Based on the annual population of Enewetak persons on Ujelang from 1947 until their return to Enewetak in 1980, the Tribunal calculated total hardship damages of \$34,084,500.¹⁷⁰

C. The Other Class Actions

Other similar property damage class actions were filed after the Enewetak class action. In October 1991 class actions were filed on behalf of residents of Rongelap and Utrik. On September 13, 1993, a class action was also filed by members of the Bikini community.

As indicated above, these three class actions followed processes similar to those used to litigate and decide the Enewetak class action. Only the Bikini class action has reached the end of that process. On March 5, 2001, the Tribunal awarded the Bikini community total damages of

¹⁶⁶ *Id.* at 31.

¹⁶⁷ *Id.* The population numbers were based on data collected by Dr. Carucci, as explained in his testimony.

¹⁶⁸ *Id.* at 32.

¹⁶⁹ *Id.*

¹⁷⁰ As a result of amendment in May 2000 and August 2000, to include additional restoration costs and prejudgment interest, the total dollar amount of the award in the Enewetak class action was increased to \$385,894,500.

\$563,315,500. This award reflected \$278,000,000 in damages for loss of use, \$251,500,000 for the cost of restoring Bikini to an acceptable condition, and \$33,815,500 for hardship damages. The fact that the Bikini award is significantly larger than the Enewetak award is not surprising given the nature of the nuclear testing that occurred at Bikini and the fact that the inhabitants of Bikini have still not been able to return to their homeland.

D. Property Damage Claims that Fall Outside the Existing Class Actions

In 1992 the Tribunal's view was that findings from the class action suits might establish a basis for establishing an administrative system for processing other property claims: “[t]he types of compensable injuries to property and the approach to measuring the extent and value of such damage will be, for the most part, resolved in one or two complex adjudications and then applied on a more administrative basis to individual claims arising from other atolls and islands.”¹⁷¹ Ten years later, with two class actions still pending, it seems unclear whether the Tribunal will use an administrative mechanism or other class action vehicles to decide any remaining property damage claims.

IX. Issues We Considered in Examining and Analyzing the Tribunal's Processes

As part of our examination and analysis of the Tribunal's processes, we attempted to understand and to critique the Tribunal and its awards. In general, we considered the following issues:

- A. Whether the Tribunal's Members and Officers have been adequately qualified and have had access to adequate resources to perform their designated roles.
- B. Whether the Tribunal has adopted and has followed reasonable procedures.

¹⁷¹ 1992 Annual Report at 40. The Tribunal elected to give priority to the class actions over any individual property damage claims. 1993 Annual Report at 5.

- C. Whether the Tribunal's independence has been compromised by the Nitijela or by other political forces in the Marshall Islands.
- D. Whether the Tribunal has mismanaged the Trust Fund or otherwise acted improperly by making cumulative awards that exceeded the \$150 million the U.S. Government originally provided for the Trust Fund.

X. Our Findings

Based upon our interviews, document review and other investigations, we have made the following findings:

A. The Tribunal Has Been Staffed by Qualified People Who Have Had Access to Adequate Resources

We have been impressed by the intelligence, dedication and judgment of the Tribunal personnel we interviewed and have learned nothing that leads us to question their qualifications or integrity. In general, it is our view that the Members and Officers of the Tribunal have dealt creatively and compassionately with a mix of complex and novel issues for which there were no ready precedents or guidelines. We have no reason to suspect Tribunal personnel did not have adequate resources to perform their tasks or that there was an imbalance of resources among participants before the Tribunal that might have led to a bias in the Tribunal's awards.

1. Tribunal Members

After a relatively high rate of turnover in its early years,¹⁷² the Tribunal had relatively stable membership from 1993 until 2002. During most of this period, the Tribunal's Members included Chairman Oscar deBrum, Judge James H. Plasman and Judge Gregory J. Danz.

Chairman deBrum, who passed away last August, was a distinguished and widely respected leader of the Marshall Islands. Chairman deBrum had worked with the U.S. Navy

¹⁷² Since the Tribunal's inception in 1987, it has had nine Members. Prior to 1996, there were several periods when the Commission had fewer than the required three members.

after World War II, helping to assess the damages done to the Marshall Islands.¹⁷³ In the early 1960s, Mr. deBrum was appointed Assistant District Administrator of the Marshall Islands and he became one of the Trust Territory's first Micronesian district administrators.¹⁷⁴ Later, Mr. deBrum played a major role in the Marshall Islands' sovereignty movement.¹⁷⁵ After the Marshall Islands became an independent Republic, Mr. deBrum became the RMI's Chief Secretary and a roving Ambassador before becoming chairman of the Tribunal in 1994.¹⁷⁶

Mr. Plasman, who became Acting Chairman of the Tribunal after Chairman deBrum's death, and Mr. Danz are experienced attorneys who were trained in U.S. law schools and have significant knowledge of the people and legal systems of the Marshall Islands. We understand that the RMI Government is currently searching for a replacement for former Chairman deBrum.

Historically, Members of the Tribunal have had previous experience or training that qualified them to serve on the Tribunal. For example, Chairman Piggott led several important commissions and associations in Tasmania. Chairman Sebastian Aloom, another U.S.-trained attorney, previously served as Chief Counsel to the Atomic Safety and Licensing Board of the U.S. Nuclear Regulatory Commission. Acting Chairman Plasman and other Members of the Tribunal have received training as administrative law judges at the National Conference of Judges in Reno, Nevada.

Although the Act requires that only the Chairman permanently reside in Majuro,¹⁷⁷ the fact that other Members of the Tribunal have resided outside the Marshall Islands during their terms of office does not appear to have affected their performance or the performance of the

¹⁷³ Pacific Beat: Reflections on Oscar deBrum's 50 Years of Public Service (Radio Australia radio broadcast, July 23, 2002)(audio file available www.yokwe.net).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *See* 42 MIRC Ch 1, § 10(5).

Tribunal.¹⁷⁸ Non-resident Members of the Tribunal travel to the Marshall Islands when the Tribunal is in session, often for weeks at a time. They are able to attend to Tribunal business when they are away from the Marshall Islands by means of modern communication, including e-mail, fax and overnight courier.

Members of the Tribunal do not have the same level of support as many federal or state judges in the United States. For instance, Tribunal Members do not have law clerks, but must do their own research and must write their own opinions (often on their own personal computers). On the other hand, Members have access to the Tribunal's law library and to computerized methods of legal research, including Westlaw. They also have the benefit of legal arguments made by the counsel who appear before the Tribunal and the substantive knowledge of experts retained by the Tribunal or by parties before the Tribunal.

During the initial years of the Tribunal, its Members considered the creation of a panel of experts to decide and render opinions regarding scientific issues. Ultimately, the Tribunal decided that its Members could decide all issues, including medical and scientific ones. Nevertheless, Tribunal Members have sought and have had access to medical and scientific expertise, including the advice of medical diagnosticians who review and critique the medical records submitted by persons making personal injury claims. Tribunal Members called upon the knowledge and experience of medical and scientific experts when the Tribunal designed its personal injury compensation system and again during its annual reviews of its Schedule of presumed medical conditions. For the class action property damage claims, the Members of the Tribunal have had the benefit of numerous expert witnesses retained by plaintiffs' counsel and by the Defender of the Fund.

¹⁷⁸ Although both Judge Plasman and Judge Danz now reside in Wisconsin, they previously lived for many years in the Marshall Islands.

2. Tribunal Officers

Bill Graham has been the Tribunal's **Public Advocate** since 1988. During much of his tenure, Mr. Graham has been assisted by two Associate Public Advocates, Mary Note and Tieta Thomas. It is our impression that the Office of Public Advocate is adequately staffed and has had access to adequate resources.

The Public Advocate need not be (and currently is not) an attorney, but often serves as an advocate for claimants in the same manner that an attorney would do so. When a claimant seeks to file a personal injury claim with the Tribunal Clerk, the Office of the Public Advocate may help him/her gather and organize appropriate evidence in support of that claim (*e.g.*, medical records or death certificates). The Public Advocate usually represents claimants who seek to challenge denials by the Defender of the Fund, but has no obligation to pursue challenge claims that he views as lacking merit.

The Public Advocate retains outside legal counsel on a part-time basis. This legal counsel, who is located in the same building as the Tribunal, has access to Westlaw (via the Internet), and performs any legal research the Public Advocate needs. Outside legal counsel also represents any claimants who appeal their cases to the Marshall Islands Supreme Court.

Interviews of Tribunal personnel and a review of a random sample of personal injury claims files suggest that the Public Advocate has fulfilled his statutory duties in an able and satisfactory manner. The Public Advocate's staff appears to be competent and adequately qualified. We were informed that there were a couple of incidents when employees in the Office of the Public Advocate were terminated for inappropriate conduct (such as for soliciting successful claimants for money). However, it appears that these were isolated incidents that have not affected the reputation for integrity of the Public Advocate and his office.

Philip A. Okney has been the **Defender of the Fund** since 1994. He has been assisted by an Associate Defender, Tarjo A. Kabua,¹⁷⁹ and an Assistant Defender, Kester Albert.

It is our impression that the Office of the Defender of the Fund is also adequately staffed and has had access to adequate resources. Initially, we were concerned that the Defender's time and resources might have been stretched too thin since his Office has responsibility for reviewing personal injury compensation claims and for defending the property damage class actions, in which he must face outside counsel for the class plaintiffs. Our concerns were relieved to some extent when we learned that the Defender has retained outside counsel to help him handle the property damage class action claims. The Defender also informed us that he believed that he had adequate time and resources to litigate the property damage class actions.

From 1994 to 2000 the Defender retained Dennis McPhillip, a former Attorney General of the Marshall Islands, to assist him. The Defender selected Mr. McPhillip because of his familiarity with the Marshall Islands, its people, and the issues before the Tribunal. Mr. McPhillip, who is located in Los Angeles, has access to many resources, including law libraries in California. In addition, from 1997 until 1998, Mr. McPhillip assisted in interviewing prospective expert witnesses who were also located in California.

In 2000 the Defender also consulted Don Jose, an attorney in Pennsylvania, who served as a high-ranking official in the U.S. Department of Justice's Torts Division before entering private practice. According to the Defender, Mr. Jose directed the Defender's Office to case law relating to many of the central issues in the property damage class actions.

Additional resources available to the Defender have included the University of Hawaii law library, which contains a room with valuable materials on the Pacific Islands. The Defender

¹⁷⁹ Ms. Kabua is an attorney who, in 1992, took a five-year leave of absence from the Tribunal to earn her law degree from the University of South Wales in Australia.

and Associate Defender have used that library when they have traveled through Honolulu. The Defender has also studied claims tribunals in other small island nations that have dealt with land claims, including a New Zealand commission for land claims.

Our interviews, a review of a random sample of personal injury claim files, and a review of select portions of records in the property damage class actions suggest that the Defender of the Fund has fulfilled his statutory duties effectively, serving as an adequate adversary to the Public Advocate or to the attorneys representing the plaintiffs in the property damage class actions. Unlike those counsel and the Public Advocate, the Defender does not have a “client” as such to represent. Instead, the Defender represents the Claims Fund itself, by trying to ensure, among other things, that there are adequate funds for future claimants entitled to compensation. One person we interviewed described the Defender’s role as "assisting the Tribunal to reach the truth." Persons we interviewed describe the current Defender as an individual who is highly committed to his job and who vigorously defends the Fund, contesting claimants on both procedural and substantive issues.

3. Tribunal Facilities and Financial Resources

Members and employees of the Tribunal as well as attorneys who have litigated before the Tribunal report that the Tribunal's physical facilities are adequate for its functions.

Although the Tribunal operates under a fiscally conservative budget, it seems to have access to adequate financial resources to ensure that claims are processed in an effective manner. The Tribunal does not depend on the RMI Government for its funding. The Tribunal's operations are paid for out of the Operating Fund that exists within the Trust Fund.¹⁸⁰ Requests for disbursements from the Operating Fund are reviewed by the Chairman of the Tribunal, who

¹⁸⁰ We understand that a number of years ago a former Finance Officer was convicted of improperly using Tribunal funds, but that this defalcation was considered a rare event that was properly investigated and prosecuted.

asks the other Members of the Tribunal for their views. Decisions on funding issues generally are made on a consensus basis. Once a funding request is approved, the Tribunal's Financial Officer is responsible for disbursing the proper payments from the Operating Fund.¹⁸¹

The Public Advocate, the Defender of the Fund and counsel for the property damage class action claimants have often approached the Tribunal to obtain funding to hire experts on complex factual issues. We understand that the Tribunal has generally approved all such requests. Although the Tribunal does not necessarily provide equal funding to both sides of an issue, if one party retains an expert, the Tribunal will usually ensure that the opposing party retains a comparable expert. We understand that from time to time the Tribunal has asked counsel before it to negotiate for lower hourly rates for their experts, but no one we interviewed could recall an incident in which the Tribunal had denied a party's request for funding of an expert.

B. The Tribunal's Procedures Have Been Reasonable

As we have previously discussed, the Tribunal has employed two rather different sets of procedures for handling personal injury and property damage claims. Both sets of procedures seem reasonable given the nature of the issues presented by the personal injury and property damage claims and the Tribunal's role in addressing those issues. In different respects, both sets of procedures have relied, in part, upon presumptions and adversary processes. Many of these mechanisms resemble those used by U.S. courts and administrative agencies.

1. The Tribunal's Procedures for Handling Personal Injury Claims

As discussed above, the Tribunal generally uses an administrative approach to handle personal injury claims. This administrative approach rests upon certain presumptions about the causal link between residence in the Marshall Islands and exposure to radiation from the Nuclear

¹⁸¹ See 42 MIRC Ch 1, § 15(2).

Testing Program and between exposure to such radiation and certain medical conditions. In general, once a claimant presents satisfactory evidence that these presumptions have been met, the Defender of the Fund will admit his/her claim and the Tribunal will grant that claimant an award.

a. The Administrative Process Used to Handle Personal Injury Claims

The administrative process for reviewing personal injury claims seems to be well designed and effectively implemented. After a claim is filed with the Clerk of the Tribunal, the Office of the Defender of the Fund systematically reviews the evidence presented by the claimant and any other information received from the Office of Medical Diagnostics. The Assistant Defender begins by creating a file for each claim and by reviewing each claim to ensure that it is complete and legible. The Assistant Defender then makes a preliminary determination whether the claim should be admitted or denied. The Tribunal's diagnostician is available to the Assistant Defender to assist in this process. The Assistant Defender's evaluation process does not entail a review of every medical record, but focuses on whether a presumed causal link exists between the claimant's diagnosed medical condition and the Nuclear Testing Program. In general, this issue is resolved by making reference to the Schedule of presumed medical conditions in the Tribunal's Regulations.

The Assistant Defender also reviews claims for incomplete or false information, including fraudulent information. The Defender's Office maintains a complete list of all medical practitioners in the Marshall Islands (dating back to the 1950s) that have been licensed to practice by the Marshall Islands or the United States. When, in reviewing a claim, the Defender's Office encounters a doctor's name not on its list, the claim is held until the doctor's name and qualifications are verified. If the relevant doctor is located outside of the Marshall

Islands, the Defender will attempt to follow up with relevant sources of information in that locale.

The Tribunal diagnostician will inform the Defender's Office of any suspicious elements of a claim that emerge from his/her review of the claimant's medical records. In the event the Defender's Office discovers a potentially incomplete or fraudulent claim, the Defender will consult the Public Advocate. According to people we interviewed, fraudulent claims are not a “significant” problem. We understand that less than a dozen of the more than 6,000 personal injury claims filed with the Tribunal have been “questioned” as potentially fraudulent. Incomplete claims may be resubmitted by the Public Advocate.

The Associate Defender reviews each claim the Assistant Defender recommends be admitted and the Defender of the Fund reviews each claim he recommends be denied.

b. The Adversarial Mechanism for Dealing With Novel or Disputed Claims

If the Defender denies a claim and the claimant decides to challenge that denial, a more traditionally adversarial mechanism begins in which the Defender of the Fund resists what he believes to be unmeritorious claims, the claimant (usually with the assistance of the Public Advocate) contests that denial, and Members of the Tribunal serve as neutral decision makers who must resolve their dispute. As we have previously discussed, it appears that only twenty such "challenge claims" have been made, but the availability of this mechanism tends to ensure that meritorious claimants are justly compensated and any improper claims are winnowed out.

c. Information We Learned From Our Interviews and Analysis

The people we interviewed told us that the Tribunal's procedures for processing personal injury claims have been effective and are well respected in the Marshall Islands, although many claimants have apparently been surprised that the Tribunal's claims process is so formal and that they cannot automatically receive an award just by filing a claim.

To satisfy ourselves that the Tribunal's procedures for processing personal injury claims have been implemented in the manner described to us, we reviewed a random sample of the personal injury claim files contained on the computer disks we received, on a confidential basis, from the Tribunal.¹⁸² Our random sample consisted of 242 of the 6,517 claim files on those disks.¹⁸³

These personal injury claim files fell into three categories: (1) files for 67 claims that had resulted in awards; (2) files for 40 claims that were still pending; and (3) files for 135 claims that had been denied. We reviewed these claim files for completeness and consistency with the procedures described to us in our interviews.¹⁸⁴

The files for claims that resulted in awards were complete, in that they contained the necessary forms, documentation of the claimants' medical condition, and relevant correspondence between the Tribunal and the claimants. Most of these files contained a significant number of medical records. The reasons for and the amounts of the awards corresponded to the Tribunal's Regulations and the claimants' medical conditions. Some of the award files we sampled indicated that claims were initially declined but subsequently approved due to an amendment to the Schedule of presumed medical conditions, further medical

¹⁸² We have agreed to preserve the confidentiality of the information contained in those personal injury claim files. See the letter from Dick Thornburgh to The Honorable James H. Plasman dated September 16, 2002, a copy of which is attached as Appendix F.

¹⁸³ The 242 claims we sampled represent a random sample with a 5% error limit and a confidence level of 90%. We chose our random sample through a service called "Research Randomizer," an Internet-based resource offered to students and researchers conducting random assignments and random sampling. "Research Randomizer" generates random numbers by using the JavaScript programming language, an adaptation of a program called "Central Randomizer" by Paul Houle. The program allows the user to select an error limit and a confidence level for his/her sample.

¹⁸⁴ We reviewed files for "completeness" by comparing their contents to checklists we prepared after discussions with Tribunal officials. Copies of those checklists are attached to this report as Appendix G.

documentation, or an error discovered by the Tribunal. These matters were well documented and clearly explained by the Tribunal to the claimants. The correspondence between the Tribunal and the claimants documented an often lengthy and thorough process.

The files for claims that were rejected generally had less documentation than the files for claims that led to awards. Fewer files were complete and the medical records were generally less extensive. There was a significant amount of correspondence between the Tribunal and the claimants regarding the reasons for the denials of their claims. Common reasons cited for denials were: (1) the claimant's medical condition was not on the Schedule of presumed medical conditions and a causal link with the Nuclear Testing Program had not been established; or (2) insufficient medical documentation. Claimants were given information about how and when to challenge the rejection of their claims.

Files for pending claims were the least complete. Often these files contained nothing more than a Claim Form. Many of these claims were filed over five years ago yet did not contain any notification from the Tribunal informing the claimant of the status of his/her claim. A few of these files pertained to individual property damage claims that have been subsumed by the property damage class actions, but most related to stale personal injury claims. Some pending claim files had varying amounts of documentation and medical records, but less than those relating to files for awards or rejected claims. We understand that efforts will be made to reduce the number of long pending claims, many of which will probably be rejected for lack of adequate documentation.

2. The Tribunal's Procedures for Handling Property Damage Claims

As discussed above, the Tribunal has relied upon several class actions to resolve property damage claims. These class actions rest upon the presumption that all property damage suffered by residents of Bikini, Enewetak and the other Marshall Island atolls was caused by the U.S.

Nuclear Testing Program. This seems to be a reasonable presumption as there has been no suggestion that the property damage to these atolls resulted from any other causes. As a result, the class actions have focused on the nature and the dollar value of the property damage the claimants have suffered.

In general, our review suggested that the procedures and the rules of evidence followed by the Tribunal in handling the property damage class actions closely resembled those used by many U.S. courts and administrative agencies. Furthermore, although we have not reviewed all of the papers filed in the property damage class actions, even a random review of those documents reveals that the papers prepared by counsel for the claimants and by the Defender of the Fund are of a type and quality we would expect to find in many well-litigated class actions in U.S. courts.

What primarily distinguishes the property damage class actions before the Tribunal from analogous class actions in U.S. courts is that, in the United States, these class actions probably would have been settled long before a judge, jury or tribunal decided their merits. In the cases before the Tribunal, however, there was no one who had such settlement authority since the Defender of the Fund did not have access to sufficient money in the Trust Fund to settle the cases nor did he have authority to bind anyone else -- either the RMI or the United States -- to any settlement he might have negotiated.

As a result, the Defender of the Fund was placed in the difficult position of litigating against damages claims that he almost certainly knew would be granted in large measure. Given his circumstances, we have been struck by the dogged manner in which the Defender contested the claimants' positions on several points and by the Defender's success in achieving some favorable rulings from the Tribunal. Given that the Defender had no human "client" to whom he

needed to report for these purposes, we must admire the conscientious manner in which the Defender and his staff performed the Defender's statutory duty to defend the Trust Fund.

a. The Tribunal's Rules and Procedures Resemble Those Used by Many U.S. Courts and Administrative Agencies

The Tribunal's rules and procedures resemble those used in many federal and state courts in the United States. The Tribunal's rules of evidence are similar to those used before many administrative agencies in the United States.

i. The Tribunal's Class Action Rules Resemble U.S. Class Action Rules

Like the Federal Rules of Civil Procedure that apply in U.S. courts, the Tribunal's enabling Act makes specific provision for the use of class actions “[w]hen a question of law or fact presented by a claim [is] of common or general interest to a group of individuals or when the parties are numerous and it is impractical to involve them all directly in the dispute resolution process”¹⁸⁵

Both the Nuclear Claims Tribunal Act and the Federal Rules of Civil Procedure (the "Federal Rules") provide for class actions when there are common questions of law or fact, when the parties are numerous, and when it is impracticable for all parties to litigate their claims separately.¹⁸⁶ Similarly, both the Act and the Federal Rules provide that all members of a class may be bound by the resolution of class claims, but only after members of the class have been given proper notice and the opportunity to "opt out" of the class.¹⁸⁷ There seems to be no

¹⁸⁵ 42 MIRC Ch 1, § 22(8). *See also* 42 MIRC Ch 1, § 23(2) (“ . . . Whenever a claim is made by an individual under this Section and there are other individuals who have potential claims for loss or damage to the same or other property located on the same atoll, the Defender of the Fund shall be permitted to join all such potential claimants or in the alternative to join them as a class”). *Compare to* Fed. R. Civ. P. 23.

¹⁸⁶ *Id.*

¹⁸⁷ Compare Sections 302 and 303 of the Tribunal's Regulations to Fed. R. Civ. P. 23(c)(2).

question that the property damage class actions before the Tribunal were properly filed as class actions and that proper notice was given to the members of each class.¹⁸⁸

ii. The Tribunal's Discovery and Other Pretrial Rules Are Similar to Those Used by U.S. Courts and Administrative Agencies

Like the Federal Rules, the Tribunal's Regulations provide for pretrial discovery and for an exchange of information by the parties before the Tribunal:

In order to reduce the cost of prosecuting claims or complaints, it is the intent of the Tribunal that each party be permitted to, among other things, inspect all relevant physical, documentary, or demonstrative evidence which is in the custody, or under the control, of any other party. It is also intended that any party who so requests be apprised of the identity of every witness another party intends to call, and that any party will be permitted (at its own expense) to depose such witnesses . . .

To accomplish the above, it shall be mandatory that every party promptly make available all relevant documentary materials, reports by expert witness [sic], medical records, photographs, and any other relevant evidence under the party's control, to all other parties when so requested. Each party shall, in a timely manner, disclose the identity of all witness [sic], provide a brief summary of the testimony of each witness, and allow inspection of property whether real or personal.

Moreover, it is expected that the parties will complete discovery cooperatively and in an informal manner. It is also expected that the parties will stipulate to all material facts which are not in dispute, and will do so prior to any hearing in which such facts may be relevant.¹⁸⁹

Like the Federal Rules, Section 607 of the Tribunal's Regulations provides for sanctions against parties who do not cooperate in the discovery process.¹⁹⁰ We understand that sanctions have never been an issue in the property damage class actions since counsel for the parties

¹⁸⁸ Although Section 201(b) of the Tribunal's Regulations appears to require that each member of the class file an individual claim form, we understand that this filing requirement was overturned by an amendment to the Nuclear Claims Tribunal Act in September 1989. Since the effective date of that amendment, the Act has provided that members of a class are not required to file individual claims while they remain members of the class. 42 MIRC Ch 1, § 22(9)(c). We also understand that the Tribunal has not insisted that class members file such claim forms.

¹⁸⁹ Section 600 of the Tribunal's Regulations.

¹⁹⁰ Compare to Fed. R. Civ. P. 37.

generally cooperated in providing pretrial discovery to one another. Most of this discovery was limited to information about witness identities and expert reports.

Like the Federal Rules, the Tribunal's Regulations also provide for one or more pre-hearing conferences to identify the issues that need to be litigated and the witnesses who will be called, to resolve evidentiary issues, to reach stipulations among the parties, and to expedite the litigation process in other ways.¹⁹¹ We understand that the Tribunal frequently used pre-hearing conferences for these purposes. The Tribunal's general approach was to fashion pre-trial procedures that fit the unique features of the property damage class actions. In so doing, the Tribunal attempted to encourage cooperation and agreement between the parties, rather than to interpret and apply detailed rules.

iii. The Tribunal's Hearing Procedures and Rules of Evidence Resemble Those Used in Administrative Proceedings in the United States

Section 31 of the Act sets forth the rules governing hearings before the Tribunal.¹⁹² Many of these rules are similar to those used by administrative agencies in the United States.

The Act provides Members of the Tribunal with considerable discretion as to how to conduct hearings. For example, the Act states: “[t]he decision maker shall have full discretion, subject to rules and regulations promulgated by the Tribunal, to conduct the hearing in such a manner as will enable him to ascertain all the facts in the dispute.”¹⁹³ The Act also provides that the decision maker shall not be bound by the legal rules of evidence.¹⁹⁴ The decision maker, at his own initiative or at the request of a party, may compel the production of evidence or the

¹⁹¹ Compare Section 701 of the Tribunal's Regulations to Fed. R. Civ. P. 16(a).

¹⁹² These rules are found in the section of the Act dealing with "binding arbitrations." 42 MIRC Ch 1, § 31. See 42 MIRC § 17 ("All claims [seeking compensation for loss or damage to person or property as a result of the Nuclear Testing Program] shall be decided by the Special Tribunal through the decision process set forth in Section 31 of this Act . . .").

¹⁹³ 42 MIRC Ch 1, § 31(e).

¹⁹⁴ *Id.* at § 31(g)(i).

presence of witnesses to give testimony, and exclude any witness.¹⁹⁵ The decision maker may also request the assistance and opinions of outside experts.¹⁹⁶

The Tribunal's Regulations provide more specific rules for the conduct of hearings, many of which are similar to the rules of administrative agencies in the United States. In general, the Regulations prescribe how the Tribunal shall receive evidence, how witnesses shall be sworn, examined and cross-examined, how objections and arguments may be made by counsel, and how motions shall be presented.¹⁹⁷ Our review of videotaped excerpts from two hearings suggests that the Tribunal has followed these rules.

As is true of many administrative bodies, the Tribunal's hearings were conducted in a manner that was less formal than one would normally find in a U.S. courtroom. For instance, the rules of evidence that applied to these proceedings were relaxed. Objections were seldom made, even to leading questions or to evidence that lacked evidentiary foundation. According to a Member of the Tribunal, there was less interest in procedural rigor than in ensuring that all relevant evidence was made available to the Tribunal in an efficient manner. Tribunal Members assumed that they could decide how much weight to accord each piece of evidence.

b. The Pleadings, Motions, Expert Reports and Other Papers Filed by the Parties Resemble Those We Would Expect in a Proceeding Before a U.S. Court or Administrative Agency

Having reviewed many of the pleadings, motions, expert reports and other papers filed by the parties in the property damage class actions, it is our view that these documents were of high quality, similar to what one would find in many U.S. and state courts. This impression was

¹⁹⁵ *Id.* at § 31(g)(iii)-(v).

¹⁹⁶ *Id.* at § 31 (g)(vi).

¹⁹⁷ Section 702 of the Tribunal's Regulations. *See also* Section 1003(c).

shared by Members of the Tribunal, who complimented the quality and helpfulness of the papers filed by counsel for the parties.

c. The Tribunal Heavily Relied Upon U.S. Legal Authorities in Reaching Its Decisions on Damages Issues

The Tribunal relied heavily on the Nuclear Claims Tribunal Act and upon U.S. legal authorities in deciding upon the damages to award in the property damage class actions.

The Section 177 Agreement provides that “[i]n determining any legal issue, the Claims Tribunal may have reference to the laws of the Marshall Islands, including traditional law, to international law and, in the absence of domestic or international law, to the laws of the United States.”¹⁹⁸ We understand that, because the Tribunal and the parties seldom found relevant Marshall Islands law (other than the Act) or international law, they relied heavily on U.S. law in deciding what damages to award. Of course, this reliance on U.S. authorities probably reflects the U.S. legal training of a number of the Tribunal Members and of the attorneys who appeared before them.

We note that the Tribunal's reliance on U.S. law was not limited to the property damage class actions. As the Tribunal noted in the Bikini decision: “The Tribunal has referenced U.S. law in a variety of contexts in the past. It has modeled its personal injury compensation program on the ‘Downwinders Program.’”¹⁹⁹ Therefore, it is not surprising that on other issues, *e.g.*, in setting radiation clean-up standards, the Tribunal also followed U.S. models, such as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

¹⁹⁸ Section 177 Agreement, Article IV, Section 3.

¹⁹⁹ *In the Matter of the People of Bikini, et al.*, NCT No. 23-04134, Memorandum Decision and Order, March 5, 2001, at 34-35.

In deciding the Enewetak claim, the Tribunal frequently applied many other aspects of U.S. law to decide what categories of damages were compensable and how they should be quantified.

The Tribunal started with the basic proposition that, under the Act, the claimants were entitled to an award that "fully compensated" them for their losses.²⁰⁰ In determining that compensation, the Act required the Tribunal to consider, among other things, the amount of property owned, the nature of the ownership interest, and the extent of the loss or damage.²⁰¹ In determining the claimants' losses, the Tribunal was guided by Section 929 of the Restatement (Second) Torts, which applies to harm to land from past invasions,²⁰² and to relevant portions of the Marshall Islands and U.S. Constitutions, which provide for just compensation when property is taken for a governmental purpose.²⁰³

i. Compensation for Claimants' Loss of Use of Their Land

After determining that there had not been a permanent taking of the claimants' land, the Tribunal decided that the appropriate standard for determining the claimants' losses was to calculate the damages they had suffered as a consequence of their loss of use of that land.²⁰⁴

²⁰⁰ *In the Matter of the People of Enewetak, et al.*, NCT No. 23-0902, Memorandum Decision and Order, April 15, 2000, at 3 (citing 42 MIRC 123(17)(b)(iii)(emphasis added).

²⁰¹ 42 MIRC 123(15).

²⁰² Restatement (Second) Torts § 929 states:

(1) If one is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for

(a) the difference between the value of the land before the harm and after the harm, or at his election in an appropriate case, the cost of restoration that has been or may be reasonably incurred,

(b) the loss of use of the land, and

(c) the discomfort and annoyance to him as an occupant.

In the Matter of the People of Enewetak, et al., NCT No. 23-0902, Memorandum Decision and Order, April 15, 2000, at 3 (quoting Restatement (Second) Torts § 929).

²⁰³ *Id.* at 3 (citing U.S. CONST. amend. V.; MAR. CONST. Art. II, § 5).

²⁰⁴ *Id.* at 5.

Relying on the U.S. Supreme Court decision in *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949), the Tribunal held that the proper measure of compensation for claimants' loss of use was “the rental that probably could have been obtained.”²⁰⁵ For this purpose, the Tribunal looked to a joint appraisal report that estimated the rental value “that probably could have been obtained” for Enewetak.

The joint appraisal report was prepared by two sets of appraisers, the Hallstrom Group, Inc. (“Hallstrom Group”), which was retained by the claimants, and Raymond A. Leshner & Co., Ltd. (“Leshner”), which was retained by the Defender of the Fund. The Hallstrom Group is an independent professional service organization based in Honolulu that provides a wide scope of real estate consulting services throughout the State of Hawaii, with an emphasis on valuation studies.²⁰⁶ The principals and associates of the Hallstrom Group are associated with the Appraisal Institute, a nationally recognized appraisal and real estate counseling organization.²⁰⁷ Leshner, which is also based in Honolulu, is a full service real estate appraisal and counseling company that serves the entire Pacific Basin, including Hawaii, Micronesia and the South Pacific.²⁰⁸ Leshner claims expertise in “all property types and land tenure systems,” including improved and unimproved, leasehold and fee simple, resort, residential, commercial, industrial, agricultural, plantation, water rights, and special purpose properties.²⁰⁹

The joint report submitted to the Tribunal by the Hallstrom Group and Leshner was thirty pages in length, to which were attached 200 pages of exhibits that included background

²⁰⁵ *Id.* at 5-6 (quoting *Kimball*, 338 U.S. at 1).

²⁰⁶ *See* Statement of Professional Background and Services submitted by the Hallstrom Group, Inc., a copy of which is attached to this report as Appendix H.

²⁰⁷ *Id.*

²⁰⁸ *See* “An Introduction to Raymond A. Leshner & Co., Ltd.,” a copy of which is attached to this report as Appendix I.

²⁰⁹ *Id.*

information, photographs, charts describing the characteristics and uses of land on Enewetak, and analyses of documented land transactions. We are not qualified to review or critique the appraisal methods used by the Hallstrom Group or Leshner, or the results of their analysis, but observe that their joint report appears to be the kind of thorough and professional work product we would expect from well-qualified experts asked to calculate damages in a matter of significant importance.

ii. Compensation for Costs of Restoration

In deciding how to calculate the appropriate amount to compensate claimants for the costs of restoring their land, the Tribunal once again relied upon the Restatement (Second) of Torts. The Tribunal noted that under Section 929(1)(a) of that Restatement, an injured party who suffers damage to land is entitled to compensation for “the difference between the land before the harm and after the harm, or *at his election* in an appropriate case, the cost of restoration that has been or may be reasonably incurred.”²¹⁰ The Tribunal relied upon several sources of U.S. law to support its conclusion that the claimants were entitled to recover their costs of restoration, including:

1. U.S. case law that supports the legal principle that awarding an injured property owner the costs of restoration is especially appropriate when there is a “personal reason” for the repairs;²¹¹
2. U.S. case law that supports the legal principle that diminution in market value is not an appropriate measure of damages if that measure does not adequately capture the value of the land;²¹² and

²¹⁰ *Id.* (quoting Restatement (Second) Torts § 929(1)(a)) (emphasis supplied).

²¹¹ *Id.* at 13-14 (citing *Heninger v. Dunn*, 162 Cal. Rptr. 104 (Cal. App. 1980); and *Orndorff v. Christiana Community Builders*, 217 Cal. App. 3d 683 (Cal. App. 1980)).

3. U.S. environmental statutes, including CERCLA, that support a claimant's right to recover the claimant's costs of restoration.²¹³

In determining the appropriate measure of restoration damages, the Tribunal looked to current U.S. standards, as specified by the U.S. Environmental Protection Agency in a document entitled “Establishment of Cleanup Levels for CERCLA Sites with Radioactive Contamination.”²¹⁴ The Tribunal decided to use U.S. cleanup standards to determine restoration costs because it is the position of the International Atomic Energy Agency (IAEA), which operates under the auspices of the United Nations,²¹⁵ that the criteria for radiation protection of populations who live outside the national borders of the source of radioactivity should be at least as stringent as those for the population within the country of release.²¹⁶

iii. Compensation for Claimants' Hardship Damages

The Tribunal also relied upon the Restatement (Second) of Torts in awarding the Enewetak claimants damages for the hardships they suffered while exiled on Ujelang.²¹⁷ As noted previously, the Tribunal awarded annual per capita amounts ranging from \$3,000 to \$4,500 to each Enewetak person who had been forced to move to Ujelang between 1947 and 1980.

iv. The Effects of Compound Interest

²¹² *Id.* at 14 (citing *Trinity Church v. John Hancock Mutual Life Insurance Co.*, 502 N.E.2d 532 (Mass. 1987); *Denoyer v. Lamb*, 490 N.E.2d 615 (Ohio App. 1984); and *Feather River Lumber Co. v. United States*, 30 F.2d 642, 644 (9th Cir. 1929).

²¹³ *Id.* at 15.

²¹⁴ *Id.* at 17.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* at 32 (quoting Restatement (Second) of Torts § 912).

Significant portions of the awards in the property damage class actions reflect the compounding of interest on the claimants' damages over a period of decades.²¹⁸ We have not tried to isolate the interest component of each damage award, but note that the dollar value of the Enewetak award increased by approximately \$38 million (or ten percent) in little more than 18 months as a result of accumulated interest due on the loss of use and restoration portions of that award.²¹⁹

C. The Tribunal's Independence Has Not Been Compromised

The Nuclear Claims Tribunal Act provides: “In the exercise of their jurisdiction the Tribunal, and the Special Tribunal . . . shall be independent of the legislative and executive powers of the Government.”²²⁰ As noted earlier, one focus of our examination has been the Tribunal's independence from local political influence by the Nitijela, the RMI's legislative body. Based on the interviews we have conducted, it appears that, although there was significant conflict between Tribunal Members and the Nitijela during the Tribunal's early years, with minor exceptions, the Tribunal has operated with a reasonable degree of independence from the Nitijela during the past ten years, when the Tribunal has issued the vast majority of its personal injury awards and all of its property damage awards.

As a legal matter, the Tribunal is not and cannot be completely independent of the Nitijela. The Tribunal is a creature of the Nitijela, since the Nitijela passed the legislation that created the Tribunal and can amend the Act that governs the Tribunal's activities. Furthermore, the Chairman of the Tribunal gives regular reports to the Nitijela about the Tribunal's activities

²¹⁸ In calculating the loss of use component of the property damage award in the Enewetak case, the appraisers increased the lost rental proceeds by an interest component tied to the U.S. Treasury bond rate. In the Matter of the People of Enewetak, et al., NCT No. 23-0902, Memorandum Decision and Order, April 15, 2000, at 8.

²¹⁹ 2001 Annual Report at 5.

²²⁰ 42 MIRC Ch 1, § 16(2).

and expenditures. The key issue, we believe, is not whether the Tribunal is legally independent of the Nitijela, but whether the Tribunal generally acts independently when exercising the jurisdiction given to it by the Nitijela. The information we have gathered suggests that it does.

For instance, it does not appear that the Nitijela has tried to control which medical conditions are listed on the Schedule of presumed medical conditions that is part of the Tribunal's Regulations. We understand that, at various times, members of the Nitijela have asked to meet with Members of the Tribunal to inquire about why certain medical conditions were not listed on that Schedule. We have been told that, in each instance, the member of the Nitijela accepted the Tribunal's explanation. For example, we understand that a high-ranking member of the Nitijela once asked a Member of the Tribunal why diabetes was not on the Schedule of presumed medical conditions. The Member explained that there was not sufficient medical and scientific data to establish a causal link between the Nuclear Testing Program and diabetes. We have been told that the Nitijela member accepted this explanation and did not pursue the issue further.

We are aware of only one instance in which the Nitijela used its legislative power to redefine the Tribunal's criteria for making personal injury awards. This occurred in 1994, when the Nitijela insisted that the Tribunal include within its presumption of causation so-called "underage" claimants, *i.e.*, claimants who were never physically present in the Marshall Islands at any time during the Nuclear Testing Program, but whose biological mothers were present during the testing period (1946-1958).²²¹ The Nitijela's view was that such claimants might have suffered presumed medical conditions, including certain forms of cancer, because of radiation-induced genetic damage transmitted by parents who had been exposed to radiation from the

²²¹ 1994 Annual Report at 3-4.

nuclear testing program. Although the Nitijela could not cite significant scientific evidence to support this view, it enacted legislation that required the Tribunal to include such "underage" claimants within the class of persons who were presumably exposed to radiation from the Nuclear Testing Program and therefore eligible to file personal injury claims.²²²

Members of the Tribunal and its Officers, including both the Public Advocate and the Defender of the Fund, opposed this legislation, arguing that current scientific evidence did not adequately establish that radioactive contamination could have second-generation effects. Tribunal personnel were also concerned that expanding the definition of eligible claimants to include "underage" persons would significantly increase the total number of claimants seeking compensation from the Claims Fund, resulting in proportionately smaller awards for claimants who, in the view of the Tribunal, were more deserving.

After the Nitijela passed the "underage" legislation, the Tribunal sought a formal opinion from the RMI Attorney General that the Nitijela's action was void because it violated the independence accorded to the Tribunal by the Nuclear Claims Tribunal Act. The Attorney General did not render such an opinion. Rather than challenge the Nitijela before the Supreme Court of the Marshall Islands, the Tribunal reluctantly agreed to accept the Nitijela's change to the Tribunal's presumption of causation. On the other hand, the Tribunal also decided that awards to "underage" claimants would be reduced by fifty percent (50%) to prevent "dilution of the fund . . . thus leaving proportionately more money for payment of all awards."²²³ Although some members of the Nitijela criticized the Tribunal for making this fifty percent reduction, the Nitijela has never taken steps to change the Tribunal's policy in this regard.

²²² *Id.* at 4.

²²³ *Id.* at 4-5.

Some people we interviewed viewed the Nitijela's legislation on the "underage" issue to be an unwarranted intrusion upon the Tribunal's independence and a "wart" on the Tribunal's history. In their view, the Tribunal should have done more to resist a change in compensation policy that was dictated by politics rather than by science. Others characterized the Nitijela's action as a "legitimate exercise of discretion," not political interference, and suggest that a reasonable compromise was reached through the fifty percent adjustment of awards to "underage" claimants. In either case, it does not seem to us that this isolated legislation had any significant effect on the Tribunal's awards. We understand that including "underage" claimants has increased the dollar value of personal injury awards by less than ten percent (10%), or about \$6 million.²²⁴ Of more importance to us is that the Nitijela seems not to have exerted any influence over the Tribunal's treatment of the property damage class actions, in which much more significant issues and many more dollars were at stake.

D. The Tribunal Has Not Mismanaged the Trust Fund or Acted Improperly by Making Cumulative Awards That Greatly Exceed the Dollar Amounts Available From the Trust Fund

As a result of the compensation systems adopted by the Tribunal, in which every claimant was entitled to "full compensation" and to his or her "day in court," the Tribunal has, to date, made awards that far exceed the amounts provided by the U.S. Government under the Section 177 Agreement, with future large property damage awards still on the horizon.

By the end of 2000, the Tribunal had awarded \$73,179,750 for personal injuries to, or on behalf of, 1,708 individuals and \$386 million in the Enewetak class action alone for property

²²⁴ As of August 2000, the Tribunal had awarded \$72,634,750 in compensation for personal injury claims, of which \$6,018,750 was awarded to "underage" claimants. 2000 Annual Report at 20-22.

damage claims.²²⁵ Thus, the total amount of all compensation awarded by the Tribunal through 2000 had exceeded the available funds in the Trust Fund by a substantial amount. During 2001 the Tribunal awarded an additional \$2,872,000 for personal injuries, bringing the total amount of personal injury awards to \$76,051,750.²²⁶ On March 5, 2001, the Tribunal issued its decision in the Bikini class action, awarding the claimants in that class action \$563,315,500.²²⁷

By 2000 the RMI Government concluded that the Trust Fund had become "manifestly inadequate" to provide the compensation promised under the Section 177 Agreement. As a result, on September 11, 2000, the RMI Government filed a petition with the U.S. Congress seeking additional compensation from the United States under the "Changed Circumstances" provision of the Section 177 Agreement.²²⁸

XI. Conclusion

The Changed Circumstances petition raises political and diplomatic considerations that are beyond the scope of this report and about which we express no opinion. However, based upon our examination and assessment, it is our view that the personal injury and property damage awards rendered thus far by the Nuclear Claims Tribunal were the result of reasonable, fair and orderly processes that are entitled to respect. Given that those processes have resulted in awards that greatly exceed the Trust Fund's remaining corpus, it is our view that the \$150 million

²²⁵ 2000 Annual Report at 1.

²²⁶ 2001 Annual Report at 8.

²²⁷ *Id.* at 3-4.

²²⁸ The "Changed Circumstances" provision provides: "If loss or damage to property and person of the citizens of the Marshall Islands, resulting from the Nuclear Testing Program, arises or is discovered after the effective date of this Agreement, and such injuries were not and could not reasonably have been identified as of the effective date of this Agreement, and if such injuries render the provisions of this Agreement manifestly inadequate, the Government of the Marshall Islands may request that the Government of the United States provide for such injuries by submitting such a request to the Congress of the United States for its consideration. It is understood that this Article does not commit the Congress of the United States to authorize and appropriate funds." Section 177 Agreement, Article IX.

initially provided by the U.S. Government for the Trust Fund has proven to be manifestly inadequate to fairly compensate the inhabitants of the Marshall Islands for the damages they suffered as a result of the U.S. nuclear testing program that took place in their homeland between 1946 and 1958.