INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS CONCERNING NEGOTIATIONS RELATING TO CESSATION OF THE NUCLEAR ARMS RACE AND TO NUCLEAR DISARMAMENT

(MARSHALL ISLANDS v UNITED KINGDOM)

PRELIMINARY OBJECTIONS
OF THE UNITED KINGDOM OF GREAT BRITAIN
AND NORTHERN IRELAND

PRELIMINARY OBJECTIONS AND ANNEXES

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15 June 2015

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I. OVERVIEW OF ISSUES AND OUTLINE OF PRELIMINARY OBJECTIONS

1. The United Kingdom of Great Britain and Northern Ireland ("United Kingdom" or "UK") first learned of the Republic of the Marshall Islands' ("Marshall Islands" or "RMI") case against the UK through press reports on 24 April 2014 indicating that the RMI had filed an Application instituting proceedings in the International Court of Justice. Those reports indicated that parallel Applications had been filed simultaneously against eight other States: China, France, India, Israel, North Korea, Pakistan, Russia and the United States. The Application against the UK, in terms broadly mirrored in the other Applications, alleged a "failure to fulfil the obligation enshrined in Article VI of the [Treaty on the Non-Proliferation of Nuclear Weapons] and customary international law" by failing to pursue negotiations in good faith on effective measures relating to nuclear disarmament.[1]

2. The United Kingdom was surprised by the Marshall Islands' Application and the claims therein. The Marshall Islands had not at any point, ever, prior to the filing of its Application raised any issue with the UK, either directly or indirectly, concerning the UK's involvement in nuclear disarmament efforts. On the contrary, public statements by the Marshall Islands suggested that the Marshall Islands acknowledged that important multilateral progress towards nuclear disarmament was being made. For example, in a statement to the 2005 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons ("NPT"), the Marshall Islands noted:

> "While the Marshall Islands still suffers from the lingering consequences of radiation exposure, we are pleased to note areas where progress has been made. Today, there are fewer nuclear weapons and fewer States that possess them than there were thirty years ago. This success could not have been

[1] Application Instituting Proceedings Against the United Kingdom ("Application"), paragraph 2. Also, Memorial of the Marshall Islands ("Memorial"), paragraph 2.

achieved without long-term cooperation among many States, including between the United States and the Russian Federation. Since 1970, the NPT has been improved, updated and extended."[2]

3. In a similar vein, the Marshall Islands raised no issue whatever in any bilateral exchanges with the UK concerning UK involvement in efforts to achieve nuclear disarmament. Nor did the Marshall Islands take any issue with the UK Statement to the 2010 NPT Review Conference detailing the UK's progress on each of the "thirteen practical steps for the systematic and progressive efforts to implement Article VI" which had been set out at the 2000 NPT Review Conference.[3] In some bilateral meetings of a general nature, occasional passing reference was made by the Marshall Islands to its attempts to press the *United States* for further compensation for those affected by nuclear testing at Bikini Atoll in the 1950s, but never to issues of nuclear disarmament.

4. The silence by the Marshall Islands vis-à-vis the UK on nuclear disarmament issues comes against a backdrop of both a progressive unilateral reduction by the UK of its own nuclear arsenal, by some way the smallest of the NPT-recognised nuclear-weapon States ("NPT nuclear-weapon States"), and of active UK engagement in efforts, *inter alia*, to secure and extend nuclear-weapon-free zones around the world. The UK is a party to the Protocols to the Treaty of Tlatelolco, the Treaty of Rarotonga and the Treaty of Pelindaba, addressing, respectively, nuclear-weapon-free zones in Latin America and the Caribbean, the South Pacific, and Africa. The UK has ratified the Protocol to the Treaty on a Nuclear-Weapon-Free Zone in Central Asia and continues to engage with the States Parties to the Treaty on the Southeast Asia Nuclear-Weapon-Free Zone. The UK signed the Comprehensive Nuclear Test Ban Treaty on the first day it was opened for signature and was, alongside France, the first nuclear-weapon State to become a party to it. Beyond this, the UK is leading efforts

[2] Statement by H.E. Mr Alfred Capelle, Permanent Representative of the Marshall Islands at the 2005 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, 5 May 2005 - **Annex 1**.

[3] UK Statement to the 2010 Non-Proliferation Treaty Review Conference by Ambassador John Duncan, Ambassador for Multilateral Arms Control and Disarmament, 21 May 2010 – **Annex 2**.

to develop verification technologies to ensure that any future nuclear disarmament treaty will apply under strict and effective international control.

5. Against this background, the Marshall Islands' Application instituting proceedings against the UK alleging a breach *inter alia* of Article VI of the NPT, and of asserted parallel obligations of customary international law, came entirely out of the blue. The United Kingdom considers the allegations to be manifestly unfounded on the merits. The present pleading does not, however, address the merits of the allegations raised by the Marshall Islands but rather the admissibility of the Application and the jurisdiction of the Court to address the merits of the case. In the United Kingdom's contention, the RMI's Application is inadmissible and the Court lacks jurisdiction to hear the case. The United Kingdom accordingly submits these preliminary objections to jurisdiction and admissibility pursuant to Article 79(1) of the Rules of Court ("Rules"), within the time limit prescribed for the filing of such objections.

6. The United Kingdom advances five distinct grounds of preliminary objection. First, the United Kingdom contends that there is no justiciable "dispute" between the Marshall Islands and the United Kingdom (together "the Parties"), within the meaning of this term in Articles 36(2), 38(1) and 40(1) of the Court's Statute, Article 38(1) of the Rules, and relevant applicable customary international law and jurisprudence. In particular, relying *inter alia* on the principle set out in Article 43 of the International Law Commission's Articles on State Responsibility ("ILC Articles on State Responsibility" or "ILC Articles") and addressed in the Court's recent judgments in *Georgia v. Russia* and *Belgium v. Senegal,*[4] the United Kingdom contends that the failure by the Marshall Islands to give the United Kingdom any notice whatever of its claim renders the asserted dispute non-justiciable, with the effect of depriving the Court of jurisdiction to decide on the claims related thereto and/or making them inadmissible.

[4] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, p. 422.

7. Second, in addition or in the alternative, the United Kingdom contends that the Court lacks jurisdiction pursuant to the Optional Clause Declarations of the United Kingdom and the Marshall Islands, these Declarations being the sole basis relied upon by the Marshall Islands to found the jurisdiction of the Court. More specifically, the United Kingdom contends that the temporal limitation in the Marshall Islands' Optional Clause Declaration, excluding the Court's jurisdiction in respect of situations or facts prior to 17 September 1991, deprives the Court of jurisdiction over a substantial part of the period of the alleged breach as well as key aspects of violations that the Marshall Islands alleges against the UK, with the result that the Court lacks jurisdiction over the entirety of the Marshall Islands' claim.

8. Third, in addition or in the alternative, and distinct from the preceding ground, the United Kingdom also contends that the Marshall Islands, by its Optional Clause Declaration of 24 April 2013, accepted the compulsory jurisdiction of the Court only "for the purpose of the dispute" that it now alleges with the UK. As such disputes are excluded from the jurisdiction of the Court by operation of paragraph 1(iii) of the UK's Optional Clause Declaration, the Court has no jurisdiction to decide on the claims in question.

9. Fourth, in addition or in the alternative, having regard to the specific allegations advanced by the Marshall Islands against the United Kingdom, allegations that directly and unavoidably engage the essential interests of States not before the Court, the UK contends that the Application is inadmissible and/or that the Court lacks jurisdiction to address the claim on the ground of the absence from the proceedings of States whose essential interests are engaged by it.

10. Fifth, in addition or in the alternative, as any judgment of the Court in this claim could have no practical consequence, the Application falls outside the judicial function of the Court and the Court should therefore decline to exercise jurisdiction in any event.

11. Each of these grounds of preliminary objection to jurisdiction and admissibility is developed below (with the second and third grounds being dealt with

in the same section as they both pertain to Optional Clause Declarations). For the reasons given, the United Kingdom requests the Court to adjudge and declare that the claim brought by the Marshall Islands against the United Kingdom is inadmissible and/or that it is not within the jurisdiction of the Court and/or that the Court should decline to exercise its jurisdiction.

* * *

II. THE MARSHALL ISLANDS' CLAIM AND OTHER RELEVANT CONTEXT

12. Some brief detail of the Marshall Islands' claim against the UK and other relevant context is appropriate for purposes of the jurisdictional and admissibility objections that follow. This Part proceeds under three headings: (A) the NPT; (B) the Parties' Optional Clause Declarations; and (C) the Marshall Islands' claim against the UK.

A. The NPT

13. The NPT entered into force on 5 March 1970. The UK is an original party to the Treaty, being bound by it as a nuclear-weapon State party as of the date of its entry into force. Amongst the commitments made by all the parties to the NPT is the undertaking in Article VI, invoked by the Marshall Islands in this case, "to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control". Assuming, *arguendo*, the existence of a parallel obligation to negotiate under customary international law of similar content to Article VI of the NPT, there would be little basis on which to distinguish, as regards an original party to the NPT such as the UK, conduct relative to the claimed customary international law obligation from conduct relative to the treaty commitment assumed in Article VI of the NPT.

14. The Marshall Islands acceded to the NPT on 30 January 1995. Insofar as may be material, the NPT was in force as between the UK and the RMI as of that date.

B. The Parties' Optional Clause Declarations

15. The basis of jurisdiction relied upon by the Marshall Islands is the Parties' Optional Clause Declarations under Article 36(2) of the Statute of the Court ("Statute"). The relevant Declaration by the United Kingdom, dated 5 July 2004, states as follows:

"1. The Government of the United Kingdom of Great Britain and Northern Ireland accept as compulsory ipso facto and without special convention, on condition of reciprocity, the jurisdiction of the International Court of Justice, in conformity with paragraph 2 of Article 36 of the Statute of the Court, until such time as notice may be given to terminate the acceptance, over all disputes arising after 1 January 1974, with regard to situations or facts subsequent to the same date, other than:

(i) any dispute which the United Kingdom has agreed with the other Party or Parties thereto to settle by some other method of peaceful settlement;

(ii) any dispute with the government of another country which is or has been a Member of the Commonwealth;

(iii) any dispute in respect of which any other Party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of any other Party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court.

2. The Government of the United Kingdom also reserves the right at any time, by means of a notification addressed to the Secretary-General of the United Nations, and with effect as from the moment of such notification, either to add to, amend or withdraw any of the foregoing reservations, or any that may hereafter be added." (emphasis added)

16. For present purposes, attention is drawn to the highlighted portion of the Declaration noted above, and in particular to the phrase "has accepted the compulsory jurisdiction of the International Court of Justice only ... for the purpose of the dispute". The import and effect of this exclusion for the Marshall Islands' case is addressed in Part III.B.3 below, at paragraphs 76-82. As a preliminary matter, the

United Kingdom notes that the Marshall Islands submitted its Application instituting proceedings in this case on 24 April 2014.

17. The Marshall Islands' Optional Clause Declaration, dated 24 April 2013, states as follows:

> "1) The Government of the Republic of the Marshall Islands accepts as compulsory ipso facto and without special convention, on condition of reciprocity, the jurisdiction of the International Court of Justice, in conformity with paragraph 2 of Article 36 of the Statute of the Court, until such time as notice may be given to terminate the acceptance, **over all disputes arising after 17 September 1991, with regard to situations or facts subsequent to the same date**, other than:
>
> i) any dispute which the Republic of the Marshall Islands has agreed with the other Party or Parties thereto to settle by some other method of peaceful settlement;
> ii) any dispute in respect of which any other Party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute.
>
> 2) The Government of the Republic of the Marshall Islands also reserves the right at any time, by means of a notification addressed to the Secretary-General of the United Nations, and with effect as from the moment of such notification, to add to, amend or withdraw either of the foregoing reservations, or any that may hereafter be added." (emphasis added)

18. For present purposes, attention is drawn to the highlighted portion of the Declaration noted above, and in particular to the phrase "over all disputes arising after 17 September 1991, with regard to situations or facts subsequent to the same date". The import and effect of this exclusion for the Marshall Islands' claims is addressed in Part III.B.2 below, at paragraphs 63-75. As a preliminary matter, the UK notes that the date of 17 September 1991 is the date on which the Marshall Islands became a Member of the United Nations and thus a party to the Statute of the Court. The

relevant consideration for present purposes is the exclusion from the Court's jurisdiction that follows in the Marshall Islands' Optional Clause Declaration, namely, disputes with regard to situations or facts prior to 17 September 1991.

C. The Marshall Islands' claim against the UK

19. The Marshall Islands asserts that the United Kingdom has failed to fulfil the obligations enshrined in Article VI of the NPT and customary international law. The allegation is developed in terms of (i) a *continuing breach* by the UK of its obligations under Article VI of the NPT, (ii) a *continuing breach* by the UK of its customary international law obligation of the same content, and (iii) a *continuing breach* by the UK of its obligation to perform its international legal obligations in good faith.[5] The essence of the claims that the Marshall Islands advances in its Application and Memorial is thus that the UK is in persistent and bad faith breach of its NPT and customary international law obligations *over time*. The claims do not turn on an alleged single violation in the recent past but on an alleged continuing breach over decades. The claims are in the nature of an alleged pattern of conduct.

20. The United Kingdom recalls in passing what it stated in opening, namely, that the Marshall Islands at no stage, ever, at any time in the past raised with the UK its concerns or allegations or claims, notwithstanding this apparent apprehension of long-term bad faith conduct by the United Kingdom. This goes to the UK's objection to jurisdiction, addressed in Part III.A below, to the effect that there is no justiciable dispute between the Marshall Islands and the United Kingdom.

21. The Marshall Islands proceeds, in its Application and Memorial, to particularise its claims against the UK by way of a number of specific factual allegations. These are based on an historical review, beginning in 1952, of "The UK and the Nuclear Arms Race",[6] and a review of "The UK and Nuclear Disarmament", which opens with the allegation that "[d]uring the 1970s and 1980s, the UK repeatedly refused to enter its nuclear weapons systems into the disarmament

[5] Application, paragraph 7; Memorial, paragraph 7.
[6] Application, paragraphs 24 *et seq.*

negotiations of that time".[7] The facts on which the Marshall Islands relies in its Memorial in respect of its asserted obligations relating to nuclear disarmament begins with a review of early UN General Assembly resolutions, through to developments during the 1960s leading to the NPT, the conclusion of the NPT in 1968, and the various five yearly NPT Review Conferences, starting in 1975.[8] The allegations against the UK concerning nuclear disarmament are described in generic terms as the breach of an obligation of conduct, being the failure to pursue in good faith negotiations on nuclear disarmament, as well as the breach of an obligation of result "for which the UK shares responsibility", namely, that negotiations on nuclear disarmament have not been concluded.[9]

22. The allegation of a *shared responsibility* for a breach of Article VI of the NPT and its claimed parallel customary international law obligation runs throughout the Marshall Islands' case. In generic terms, this goes to the UK's preliminary objection, addressed in Part III.C below, based on the absence from the proceedings of States whose essential interests are engaged by the Marshall Islands' claims. The Marshall Islands' allegations go beyond the generic, however, to a range of more specific contentions that directly and individually engage the essential interests of other States. These specific contentions include claims that the UK breached Article VI of the NPT and asserted customary international law through conduct which inheres to: the conclusion of the UK–U.S. Mutual Defence Agreement;[10] UK–France cooperation including in respect of the conclusion of a bilateral Treaty for Defence and Cooperation;[11] and positions adopted by the UK in common with other NPT nuclear-weapon States in multilateral fora.[12]

23. This is only the most cursory of reviews of the claims advanced by the Marshall Islands, as is appropriate to a pleading raising objections of an exclusively preliminary nature to jurisdiction and admissibility. Three features emerge from this review, however, that are material for the preliminary objections that follow. First,

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[7] Application, paragraph 60; Memorial, paragraph 66.
[8] Memorial, Part 4, paragraph 111 *et seq.*
[9] Memorial, paragraphs 214 and 222.
[10] Memorial, paragraphs 60–61.
[11] Memorial, paragraphs 62–64.
[12] Memorial, paragraphs 76, 77, 81–92.

the Marshall Islands' claims are rooted in an alleged pattern of conduct by the UK over decades, going back at least to the 1970s and 1980s. Second, the allegations impugn the conduct of other States, both insofar as the allegations directly address engagements between the UK and other States and insofar as they pertain to conduct of the UK in common with other States. Third, an essential element of the Marshall Islands' case is that the UK shares responsibility with other States for the breaches alleged by the Marshall Islands.

* * *

III. PRELIMINARY OBJECTIONS TO JURISDICTION AND ADMISSIBILITY

24. Against the contextual background just described, the United Kingdom contends that the Marshall Islands' Application is inadmissible and/or that the Court lacks jurisdiction to hear the case on five distinct grounds:

(a) there is no justiciable "dispute" between the Parties, within the meaning of this term in the Court's Statute and Rules;

(b) the temporal limitation in the Marshall Islands' Optional Clause Declaration deprives the Court of jurisdiction;

(c) the Court lacks jurisdiction in consequence of the terms of the UK's Optional Clause Declaration which excludes jurisdiction *inter alia* in circumstances in which the party instituting proceedings accepted the compulsory jurisdiction of the Court only "for the purpose of the dispute" in question;

(d) the absence from the proceedings of States whose essential interests are engaged by the claim; and

(e) the claim falls outside the judicial function of the Court and the Court should therefore decline to exercise jurisdiction over it.

25. These grounds of objections to jurisdiction and admissibility are addressed in turn in the following sections. The second and third grounds are dealt with in the same section as they both relate to Optional Clause Declarations.

A. There is no justiciable dispute between the Marshall Islands and the United Kingdom

26. The United Kingdom contends that, on the date of the filing of the Marshall Islands' Application, there was no justiciable dispute between the UK and the Marshall Islands in relation to the UK's obligations, whether arising under the NPT or

under customary international law, to pursue negotiations in good faith on effective measures of nuclear disarmament. Consequently, the Court lacks jurisdiction to address all of the Marshall Islands' claims and/or those claims are inadmissible in their entirety.

27. This objection rests on two well-established legal principles:

(a) the conditions for the Court's jurisdiction, including the existence of a legal dispute, must be satisfied at the time of the Application; and

(b) no legal dispute can be said to exist where the State submitting the dispute has given no notice thereof to the other State.

28. The principle that jurisdiction must be assessed "on the date of the filing of the act instituting proceedings" has been affirmed repeatedly by the Court.[13] The existence of a dispute – a necessary condition for the exercise of the Court's jurisdiction in terms of Article 36(2) of the Statute of the Court – must also be determined on that date. As the Court stated in *Belgium v. Senegal*: "what matters is whether, on the date when the Application was filed, a dispute existed between the Parties ..."[14] In *Croatia v. Serbia*, the Court drew attention to the applicant State's responsibilities in this respect:

> "... it must be emphasized that a State which decides to bring proceedings before the Court should carefully ascertain that all the requisite conditions for the jurisdiction of the Court have been met at the time proceedings are instituted. If this is not done and regardless of whether these conditions later come to be fulfilled, the Court must in principle decide the question of

[13] E.g.: *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 9 at paragraph 44; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70 at paragraph 31.

[14] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, p. 422 at paragraph 54.

jurisdiction on the basis of the conditions that existed at the time of the institution of the proceedings."[15]

29. Equally important is the customary law principle that the State intending to institute proceedings must give notice to the other State. This principle is set out in Article 43 of the ILC Articles on State Responsibility in the following terms:

> *"**Article 43: Notice of claim by an injured State***
>
> 1. An injured State which invokes the responsibility of another State **shall give notice of its claim to that State**.
> 2. The injured State may specify in particular:
> (a) the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;
> (b) what form reparation should take in accordance with the provisions of Part Two." (emphasis added)

30. The United Kingdom draws attention to the highlighted language of Article 43(1) above, namely, that an injured State "shall give notice of its claim" to the State whose responsibility it invokes. Significantly, Article 48(3) of the ILC Articles extends the requirement of Article 43 to cases in which the responsibility of a State is invoked by a State other than an injured State. The principle of prior notification thus operates as a general principle in respect of claims alleging the international responsibility of States.

31. In introducing what was to become Article 43, the ILC Special Rapporteur observed that it was analogous to Article 65 of the Vienna Convention on the Law of Treaties,[16] and that it was supported by the Court's judgment in *Certain Phosphate*

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[15] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 412 at paragraph 80.

[16] Third report of the Special Rapporteur, Mr. James Crawford (52nd session of the ILC (2000), A/CN.4/507/Add.2 paragraph 235) – **Annex 3**. Article 65 of the Vienna Convention reads as follows: "1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing

Lands in Nauru.[17] In that case, Australia had argued, *inter alia*, that Nauru's claims were inadmissible because they had not been submitted within a reasonable period of time. In rejecting this objection, the Court noted:

> "The Court ... takes note of the fact that Nauru was officially informed, at the latest by letter of 4 February 1969, of the position of Australia on the subject of rehabilitation of the phosphate lands worked out before 1 July 1967. Nauru took issue with that position in writing only on 6 October 1983. In the meantime, however, as stated by Nauru and not contradicted by Australia, the question had on two occasions been raised by the President of Nauru with the competent Australian authorities. The Court considers that, given the nature of relations between Australia and Nauru, as well as the steps thus taken, Nauru's Application was not rendered inadmissible by passage of time."[18]

32. Addressing the issue of the notification of the claim, the ILC Special Rapporteur observed that "[d]espite its flexibility and its reliance on the context provided by the relations between the two States concerned, the Court does seem to have had regard to the fact that the claimant State had effectively notified the respondent State of the claim", and that the respondent State's awareness of the claim was "sufficient".[19] The Special Rapporteur concluded:

> "In the Special Rapporteur's view, this approach is correct as a matter of principle. There must be at least some minimum requirement of notification

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from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.
2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.
3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.
4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.
5. Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation."

[17] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992,* p. 240.

[18] *Id.* at paragraph 36.

[19] Third report of the Special Rapporteur, Mr. James Crawford (52nd session of the ILC (2000), A/CN.4/507/Add.2., paragraph 237 – **Annex 3**.

by one State against another of a claim of responsibility, so that the responsible State is aware of the allegation and in a position to respond to it (e.g., by ceasing the breach and offering some appropriate form of reparation). No doubt the precise form the claim takes will depend on the circumstances. But the draft articles should at least require that a State invoking responsibility should give notice thereof to the responsible State. In doing so, it would be normal to specify what conduct on its part is required by way of cessation of any continuing wrongful act, and what form any reparation sought should take."[20]

33. The prior notification requirement in Article 43 also reflects another principle of general application relevant to the issue of the Court's jurisdiction.[21] The existence of a dispute *ratione materiae*, actually rather than hypothetically, is a precondition for the Court's jurisdiction. In determining this, the Court's settled jurisprudence requires it to look beyond the assertion of the existence of a dispute by the applicant State.[22] The issue is addressed by Rosenne in the following terms:

"Whether a dispute exists or not is a matter for objective determination by the Court. It is dependent neither upon the subjective assertion by one party that a dispute exists, nor upon an equally subjective denial by a party that a dispute exists. For the purpose of this enquiry, the Court will need to be satisfied that the claim of one party is actively opposed by the other. As the Court pointed out in the *South West Africa* cases, it is not adequate simply to show that the interests of the two parties are in conflict."[23]

34. The prior notification requirement in Article 43 goes directly to the issue of the establishment of the existence of a dispute over which the Court has jurisdiction,

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[20] *Id.* at paragraph 238.
[21] Sep. Op. of Judge *ad hoc* Mampuya, *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 582 at p. 641.
[22] For example: *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996,* p. 803 at paragraph 16.
[23] Rosenne, *The Law and Practice of the International Court, 1920–2005* (4th ed., 2006), Volume II, p. 508.

as it enables the Court to undertake an objective assessment of whether the claim of the applicant State is positively opposed by the putative respondent State.

35. The text of Article 43 was adopted by the ILC with no objections or proposed amendments from any Government.[24] The Commentary to the Article explains that "the first step [by an injured State] should be to call the attention of the responsible State to the situation, and to call on it to take appropriate steps to cease the breach and to provide redress".[25]

36. The prior notification of a dispute by the intended applicant State to the intended respondent State is a common feature of compulsory dispute settlement arrangements under international law. By way of example, Article 283 of the UN Convention on the Law of the Sea ("UNCLOS") establishes an "obligation to exchange views". By Article 286 of UNCLOS, this requirement of an exchange of views is a precondition to the resort to compulsory procedures entailing binding decisions. A similar approach, in broad terms, is evident in the field of international trade, for example, under the World Trade Organisation's *Understanding on Rules and Procedures Governing the Settlement of Disputes*, which requires prior consultations before a complaining party may request the establishment of a dispute settlement panel. It is also a common feature in international investment dispute settlement.

37. The United Kingdom does not here draw direct analogies between UNCLOS, WTO or other international compulsory dispute settlement procedures and the compulsory jurisdiction of the Court pursuant to Optional Clause Declarations under Article 36(2) of the Court's Statute. The Court is *sui generis*. A proposition of general application is nonetheless apparent – namely, that a State should "not be taken entirely by surprise by the initiation of compulsory proceedings".[26] The language just quoted, which comes from the recent award of the UNCLOS Annex VII Tribunal in

[24] Summary Record of the 2682nd Meeting of the International Law Commission, UN Doc. A/CN.4/SR.2682, paragraph 38 – **Annex 4**.
[25] *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, UN Doc. A/56/10, Commentary to Article 43, paragraph 3 – **Annex 5**.
[26] *Mauritius* v. *United Kingdom*, Award of 18 March 2015 at paragraph 382 (http://www.pca-cpa.org/showpage.asp?pag_id=1429).

Mauritius v. *United Kingdom* (and appears in a part of that award where the Tribunal found against the UK), encapsulates a salutary principle of general application in the field of international dispute settlement that rests on and reflects the terms of Article 43(1) of the ILC Articles on State Responsibility.

38. The Court's recent jurisprudence, while not addressing Article 43 of the ILC Articles in terms, authoritatively endorses the requirement of the prior notification of claims as a pre-condition to the existence of a justiciable dispute over which it will have jurisdiction. The United Kingdom relies in this regard on the Court's judgments in the *Georgia v. Russia* and *Belgium v. Senegal* cases.[27]

39. In *Georgia v. Russia*, in determining whether a legal dispute existed between Georgia and Russia at the time of the filing of the Application, the Court undertook a detailed review of relevant diplomatic exchanges, documents and statements. The Court's assessment of this evidence was guided by the following observation:

> "... a dispute is more likely to be evidenced by a direct clash of positions stated by the two Parties about their respective rights and obligations in respect of the elimination of racial discrimination, in an exchange between them, but, as the Court has already noted, there are circumstances in which the existence of a dispute may be inferred from the failure to respond to a claim."[28]

40. The Court's analysis of the evidence ran to over eighty paragraphs, covering numerous instances of official Georgian and Russian practice from 1992 to 2008.[29] The Court found that most of the documents and statements before it failed to evidence the existence of a dispute, because they did not contain any "direct criticism" against the respondent, did not amount to an "allegation" against the

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[27] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p.70; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, p. 422.

[28] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70 at paragraph 37.

[29] *Id.* at paragraphs 31-113.

respondent, or were not otherwise of a character that was sufficient to found a justiciable dispute between the parties.[30]

41. Having dismissed nearly all the evidence put before it, the Court ultimately based its finding on the existence of a legal dispute between the parties on "exchanges between the Georgian and Russian representatives in the Security Council on 10 August 2008, the claims made by the Georgian President on 9 and 11 August and the response on 12 August by the Russian Foreign Minister ..."[31] Crucial to this finding was the weight attached to the fact that the Russian Foreign Minister had expressly acknowledged (and dismissed) the accusation by the Georgian President that Russia was carrying out ethnic cleansing.

42. In *Belgium v Senegal*, the Court similarly carried out a systematic review of the diplomatic exchanges that had preceded the filing of the Application in order to ascertain if the dispute had been properly notified to Senegal. The core of the Court's analysis is found in the following passages:

> "54. While it is the case that the Belgian international arrest warrant transmitted to Senegal with a request for extradition on 22 September 2005 (see paragraph 21 above) referred to violations of international humanitarian law, torture, genocide, crimes against humanity, war crimes, murder and other crimes, neither document stated or implied that Senegal had an obligation under international law to exercise its jurisdiction over those crimes if it did not extradite Mr. Habré. In terms of the Court's jurisdiction, what matters is whether, on the date when the Application was filed, a dispute existed between the Parties regarding the obligation for Senegal, under customary international law, to take measures in respect of the above-mentioned crimes attributed to Mr. Habré. In the light of the diplomatic exchanges between the Parties reviewed above (see paragraphs 21-30), the Court considers that such a dispute did not exist on that date. The only obligations referred to in the diplomatic correspondence between the Parties are those under the Convention

[30] *Id.* at paragraphs 65, 67, 77, 84, 86–87, 89 and 92.
[31] *Id.* at paragraph 113.

against Torture. It is noteworthy that even in a Note Verbale handed over to Senegal on 16 December 2008, barely two months before the date of the Application, Belgium only stated that its proposals concerning judicial co-operation were without prejudice to 'the difference of opinion existing between Belgium and Senegal regarding the application and interpretation of the obligations resulting from the relevant provisions of the [Convention against Torture]', without mentioning the prosecution or extradition in respect of other crimes. In the same Note Verbale, Belgium referred only to the crime of torture when acknowledging the amendments to the legislation and Constitution of Senegal, although those amendments were not limited to that crime. Under those circumstances, there was no reason for Senegal to address at all in its relations with Belgium the issue of the prosecution of alleged crimes of Mr. Habré under customary international law. The facts which constituted those alleged crimes may have been closely connected to the alleged acts of torture. However, the issue whether there exists an obligation for a State to prosecute crimes under customary international law that were allegedly committed by a foreign national abroad is clearly distinct from any question of compliance with that State's obligations under the Convention against Torture and raises quite different legal problems.

55. The Court concludes that, at the time of the filing of the Application, the dispute between the Parties did not relate to breaches of obligations under customary international law and that it thus has no jurisdiction to decide on Belgium's claims related thereto."[32]

43. As these passages indicate, the prior notification by an applicant State to an intended respondent State of the specifics of the claims that the applicant has in contemplation was held by the Court to be a precondition to the establishment of the Court's jurisdiction.

[32] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, p. 422 at paragraphs 54-55.

44. In the United Kingdom's submission, a number of general and important conclusions can be drawn from the Court's judgments in *Georgia v. Russia* and *Belgium v. Senegal*.

(a) A justiciable dispute cannot be said to exist between two States where one of the parties is not aware of the claim and is thus denied the opportunity to respond to it.

(b) The existence of a dispute will normally be demonstrated through evidence of a direct clash of positions over respective rights and obligations, normally shown in exchanges between the parties prior to the filing of the dispute. In some circumstances, the existence of a dispute may be inferred from a failure to respond to a claim,[33] an exception which is itself predicated on the assumption that the State failing to respond must be afforded an opportunity to do so.

(c) A claim must be notified by the State intending to institute proceedings in terms that are clear, specific and directed to the State whose responsibility will be invoked. For example, a State that gives notice of a dispute of non-compliance with certain treaty obligations will not *ipso facto* have given adequate notice of a dispute in respect of any coextensive rule of customary international law because of the "different legal problems" engaged in these two situations.[34]

(d) Even where a dispute on wider issues exists between two States, and is amply evidenced in statements and documents, the Court will still expect the existence of the dispute before it to be established through evidence that relates specifically to the terms of the dispute as submitted to it. Incidental references as part of a larger claim will not therefore suffice.[35]

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[33] *Id.* at paragraph 37.

[34] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, p. 422 at paragraph 54.

[35] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70 at paragraph 63.

45. The facts and circumstances of the Marshall Islands' claimed dispute with the United Kingdom are a world apart from those in either *Georgia v. Russia* or *Belgium v. Senegal*. In both of these cases, the applicant State was able to show multiple diplomatic exchanges with the respondent State on the subject-matter of the dispute that was subsequently brought to the Court. Even this was not always sufficient to establish a justiciable dispute in respect of every aspect of the claim that was subsequently submitted to the Court.

46. In stark contrast, in its Memorial, the Marshall Islands refers to only two statements in support of its claim of the existence of a dispute with the UK. However, neither the content of these statements nor the circumstances in which they were made provide any evidence of the existence of a dispute between the Marshall Islands and the United Kingdom on 24 April 2014, the date of the filing of the Marshall Islands' Application instituting proceedings.

47. In the first of these statements relied upon by the Marshall Islands, made on 26 September 2013 at the UN High Level Meeting on Nuclear Disarmament, the Minister of Foreign Affairs of the Marshall Islands urged "all nuclear weapon states to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament".[36] The statement did not specifically mention the United Kingdom, and could not in any way be viewed by the UK as invoking its responsibility under international law for any breach of the NPT or of customary international law. Furthermore, and crucially, urging States to intensify efforts in a certain direction neither entails nor implies that those States are not complying with international law. The Marshall Islands' Memorial also quotes from this statement selectively, omitting to refer to the sentence which precedes the one it cites, viz: "Disarmament comes with political will – and we affirm and welcome bilateral progress in this regard, including between the United States and Russia".[37]

[36] Memorial, paragraph 98 and Annex 71.
[37] Memorial, Annex 71.

48. The second statement relied upon by the Marshall Islands was made just over two months before the filing of the Application before the Court. It was made at a conference at which the United Kingdom was not present.[38] The Marshall Islands took no steps to bring this statement to the attention of the United Kingdom.

49. As noted by the ILC Special Rapporteur on State Responsibility,[39] it may suffice for the purposes of Article 43 that a respondent State is aware of the claim. In the present case, however, it is clear both that the United Kingdom was not in any way aware of the claim and that the Marshall Islands failed to take even the minimum steps required to make the UK aware of it. On the occasion of the UN High Level Meeting on Nuclear Disarmament, where the Marshall Islands made the first of the statements mentioned above, a ministerial representative of the UK Government was present. However, the official statement made by the UK on that occasion contains no reference to the Marshall Islands' statement.[40] It is inconceivable that a serious allegation about UK compliance with the nuclear regime would have attracted no comment from a UK Minister at a meeting devoted precisely to those issues. The reality is that the Marshall Islands' statement could not possibly have been understood by anyone as invoking the responsibility of the UK for a breach of international law, and thus as requiring a response.

50. The Marshall Islands has had other opportunities to notify the UK of its claimed dispute with the UK. In 2010, on the occasion of the NPT Review Conference, the UK gave a detailed statement about its progress on each of the thirteen steps on the implementation of Article VI which had been set out at the 2000 NPT Review Conference;[41] the Marshall Islands did not raise any issue with it. In September 2013, the UK's FCO Minister of State, the Rt. Hon Hugo Swire MP, visited the Marshall Islands over a period of two days during the 44th Pacific Islands forum meeting, when the UK and the Marshall Islands co-hosted an event on climate

[38] Memorial, paragraph 100.
[39] See *supra* paragraph 32.
[40] Statement on behalf of France, the UK and the US by Minister Alistair Burt, Parliamentary Under Secretary of State, United Kingdom of Great Britain and Northern Ireland, at the UN General Assembly High Level Meeting on Nuclear Disarmament, 26 September 2013 – **Annex 6**.
[41] UK Statement to the 2010 Non-Proliferation Treaty Review Conference by Ambassador John Duncan, Ambassador for Multilateral Arms Control and Disarmament, 21 May 2010 – **Annex 2**.

change. On 26 February 2014, only a few weeks before the filing of the Application that commenced these proceedings, the newly designated UK Ambassador visited the Marshall Islands to present his credentials. During his visit, the Ambassador had meetings with the President and the Foreign Minister of the Marshall Islands, as well as other ministers. On none of these occasions was the Marshall Islands' claim, or any of the issues behind it, raised.

51. The Marshall Islands is not assisted by the contention that it has *locus standi* not only on the grounds that it is "an injured State within the definition provided by Article 42 (b)(ii)", but also by virtue of the *erga omnes* nature of the claimed obligation to negotiate.[42] As noted above, however, by effect of Article 48(3) of the ILC Articles, the prior notification requirement applies equally to States other than injured States as it does to injured States. The critical issue is that the State whose international responsibility is invoked must be notified of the claim and afforded an opportunity to respond.

52. The Marshall Islands is evidently sensitive to these shortcomings as it attempts to establish that the UK was on notice of its claims. However, its attempts to show that the United Kingdom has opposed the Marshall Islands' claims rest on generic and irrelevant assertions.[43] At the point at which its Application instituting proceedings was filed with the Court, the Marshall Islands had not taken even the most basic steps to notify its claim to, or any aspect of its apparent dispute or even disagreement with, the United Kingdom. There was no conflict of legal positions between the Marshall Islands and the United Kingdom. Particularly in a case where the basis for the claim is the allegation that an obligation to negotiate in good faith has been breached, it is remarkable that proceedings were instituted without making any attempt to give any prior notice of the claims.

53. In the United Kingdom's contention, the failure of the Marshall Islands in any way to notify the United Kingdom of its claims renders the claimed dispute non-

[42] Memorial, paragraph 103.
[43] Memorial, paragraph 101.

justiciable. The Court accordingly lacks jurisdiction to address the claims and/or they are inadmissible.

B. The Marshall Islands' claim is excluded in consequence of the Optional Clause Declarations of the Parties

54. In addition or in the alternative to the objection set out above that there is no justiciable dispute between the Marshall Islands and the United Kingdom, the UK submits that the Marshall Islands' claim is excluded in consequence of the Optional Clause Declarations of the Parties. The UK advances two submissions under this heading: first, that the temporal limitation in the Marshall Islands' Optional Clause Declaration, excluding the Court's jurisdiction in respect of situations or facts prior to 17 September 1991, deprives the Court of jurisdiction over the entirety of the Marshall Islands' claim; second, and distinct from the preceding, that the Court lacks jurisdiction as the Marshall Islands, by its Optional Clause Declaration of 24 April 2013, accepted the compulsory jurisdiction of the Court only "for the purpose of the dispute" that it now alleges with the UK. Following some brief further contextual discussion of the Parties' Optional Clause Declarations, these submissions are developed in turn below.

(1) The Parties' Optional Clause Declarations

55. The UK and RMI Optional Clause Declarations are set out and briefly addressed at paragraphs 15–18 above. The relevant part of the UK Optional Clause Declaration that is germane for present purposes is the exclusion at paragraph 1(iii) of the Declaration, which states as follows:

> "[The UK accepts the compulsory jurisdiction of the Court over all disputes other than] any dispute in respect of which any other Party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of any other Party to the dispute

was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court."

56. The Marshall Islands Optional Clause Declaration is dated 24 April 2013. The relevant part of the Declaration that is germane for present purposes is the acceptance therein of the compulsory jurisdiction of the Court

> "over all disputes arising after 17 September 1991, with regard to situations or facts subsequent to the same date".

57. As the Court has repeatedly said, "one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction".[44] In the present case, the sole basis of jurisdiction advanced by the Marshall Islands is the respective Optional Clause Declarations of the Parties. It is uncontroversial that the Court will only have jurisdiction in respect of matters engaged by the common ground of these two Declarations.

58. Before turning to the grounds of objection on which the United Kingdom relies, two preliminary observations are warranted.

59. First, the Marshall Islands' Optional Clause Declaration is dated 24 April 2013. The Marshall Islands' Application instituting proceedings against the United Kingdom is dated exactly, to the day, 12 months later, i.e., 24 April 2014.

60. The UK is the only NPT nuclear-weapon State to have accepted the compulsory jurisdiction of the Court under Article 36(2) of the Statute. The UK is the only one of the 9 putative respondents of the Marshall Islands' Applications instituting proceedings of 24 April 2014 that is both bound by Article VI of the NPT and in respect of whom the Marshall Islands could have had any (however remote) informed hope of sustaining a case before the Court. Although this is a circumstantial appreciation, it is evident beyond any reasonable contention that the Marshall Islands'

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[44] For example, *East Timor (Portugal* v. *Australia), Judgment, I.C.J Reports 1995*, p.90 at paragraph 26, and the cases cited therein.

Optional Clause Declaration was aimed specifically at proceedings initiated 12 months later against the United Kingdom. Any other claim by the Marshall Islands would be disingenuous.

61. Second, as the extract from the UK's Optional Clause Declaration set out at paragraph 55 above indicates, the UK Declaration includes a commonly used 12-months anti-ambush clause which excludes the Court's jurisdiction in the case of disputes "where the acceptance of the Court's compulsory jurisdiction on behalf of any other Party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court".

62. On the issue of the calculation of the 12-month period, the United Kingdom observes that it is standard practice in international litigation to begin the calculation of time periods the day *after* a notice is received. The reason for this is to avoid disputes about the exact time of the day of receipt of the notice when the clock begins to run for purposes of the calculation of time periods.[45] Were this practice to be applied to the calculation of the 12-month time period in the UK Optional Clause Declaration, the Marshall Islands' Application instituting proceedings against the UK would fall short of the 12-month period by one day, i.e., the 12-month period from the filing of the Marshall Islands' Optional Clause Declaration dated 24 April 2013 would have begun to run from 25 April 2013 and expired on 25 April 2014, one day after the filing of the Marshall Islands' Application instituting proceedings. The UK is content to rest its objections to jurisdiction and admissibility on the grounds developed elsewhere in this pleading, which engage considerations of greater moment and principle than the technicality of whether the Marshall Islands' Application was filed a day early. The issue of the timing of the Marshall Islands' Application is touched upon nonetheless as it goes to an appreciation of the questionable character of the Marshall Islands' claim against the UK.

[45] This standard practice in respect of the calculation of time periods is reflected in numerous international instruments – e.g. Article 2(6) of the UNCITRAL Arbitration Rules of 2010 ("For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day *following the day when the notice is received.*") and the 1972 Council of Europe *European Convention on the Calculation of Time Limits* (cited here for illustration purposes only as the UK is not a party to it and it self-evidently does not apply to these proceedings).

(2) The Court lacks jurisdiction in consequence of the ratione temporis *exclusion in the Marshall Islands' Optional Clause Declaration*

63. It is well-established that, as a consequence of the condition of reciprocity provided for in Article 36(2) of the Statute, any limitation *ratione temporis* contained in the Optional Clause Declaration of one of the parties to a dispute "holds good as between the Parties" and that consequently "jurisdiction is conferred on the Court only to the extent to which the two Declarations coincide in conferring it".[46] On this basis, by reference to the temporal limitation in the Marshall Islands' Optional Clause Declaration, the potential jurisdiction of the Court in the present case is restricted to "... disputes arising after 17 September 1991, with regard to situations or facts subsequent to the same date".

64. The United Kingdom submits that, if (which, for the reasons set out above, is denied) there is a justiciable dispute between the United Kingdom and the Marshall Islands, it is not a dispute that is properly amenable to adjudication by the Court simply by reference to situations or facts subsequent to 17 September 1991 but rather is a dispute that turns on the alleged continuous conduct of the United Kingdom stretching from the entry into force of the NPT on 5 March 1970 until the present. This being the case, following the settled jurisprudence of the Court, as a material component of the dispute falls outside the Court's jurisdiction *ratione temporis*, the Marshall Islands' claim against the UK falls outside the jurisdiction of the Court *in toto*.

65. As noted in Part II.C above (paragraphs 19–23), the Marshall Islands' claim against the UK alleges a continuous breach by the UK in the nature of a bad faith pattern of conduct going back at least to the 1970s and 1980s. Given this, the critical question for purposes of evaluating the UK's objection to jurisdiction under the present heading is whether the "situations or facts" to which the Court would have to have regard in the exercise of its judicial function properly require an appreciation of

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[46] *Case Concerning Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999,* p. 124 at paragraph 30.

situations or facts prior to the date from which, pursuant to the applicable Optional Declaration Clauses, the Court can exercise its jurisdiction (hereafter referred to, for ease of reference, as the "critical date"). Both the Court and the Permanent Court before it have consistently stated that the relevant situations or facts in this context are those which must be considered as being "the source of the dispute" or its "real cause".[47]

66. The essence of the Marshall Islands' case is that Article VI of the NPT and customary international law impose on the United Kingdom an obligation to pursue in good faith and to conclude negotiations to cease the nuclear arms race and to achieve nuclear disarmament in all its aspects and that the United Kingdom is in continuing breach of this obligation.[48]

67. By reference to the Marshall Islands' Memorial, the "source" or "real cause" of the alleged dispute is alleged conduct of the United Kingdom relative to Article VI of the NPT, which entered into force on 5 March 1970, over 20 years before the critical date in this case. The veracity of this proposition that the "situations or facts" of this dispute date back to the commencement of the United Kingdom's obligation under Article VI is amply demonstrated by the fact that:

(a) the Marshall Islands' central allegation against the United Kingdom is that it is in *continuing breach* of its obligations under the NPT and customary international law;[49]

(b) the Marshall Islands' Memorial contains a repeated refrain that the United Kingdom has failed to comply with its obligations in the 45 years since the NPT entered into force[50] and that the purpose of the Application is to "ensure

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[47] *Electricity Company of Sofia and Bulgaria Judgment,* 1939 PCIJ, Series A/B No. 77 at p. 82, approved and applied by the ICJ in *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6 at p. 35, and *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 6 at paragraph 44.
[48] Memorial, paragraph 7.
[49] Memorial, paragraph 7.
[50] Memorial, paragraphs 6, 213, 221.

that the legal obligations undertaken 45 years ago by the UK in the context of the NPT do indeed deliver the promised result";[51] and

(c) the Marshall Islands recites and relies upon numerous examples of the United Kingdom's approach to nuclear weapons and disarmament, dating back to the entry into force of the NPT. The United Kingdom does not, in this regard, in this pleading, enter into any discussion of the merits of these allegations, but notes simply, by way of example, that the Memorial asserts *inter alia* that:

i. the Royal Navy has maintained unbroken nuclear weapons patrols since 1968;[52]

ii. the Mutual Defence Agreement, originally concluded by the UK and the United States in 1958, and most recently extended in 2014, is a breach of Article VI of the NPT;[53]

iii. during the 1970s and 1980s the UK repeatedly refused to enter its nuclear weapon systems into the disarmament negotiations of the time;[54]

iv. the UK refused to allow its nuclear weapons to be included in the negotiations on reductions to nuclear arsenals following the end of the Cold War;[55] and

v. Mrs Thatcher sought and received assurances from the United States that the supply of Trident missiles to the UK would not be affected by any future arms control agreement between the US and Russia.[56]

68. While the Marshall Islands also refers to and relies upon more recent allegations against the United Kingdom, these situations or facts merely constitute, in

[51] Memorial, paragraph 10.
[52] Memorial, paragraph 35.
[53] Memorial, paragraph 61.
[54] Memorial, paragraph 66.
[55] Memorial, paragraph 69.
[56] Memorial, paragraph 70.

the context of the Marshall Islands' allegations against the UK, a continuation of a prior course of conduct on which the Marshall Islands relies to establish a violation by the United Kingdom of its continuing obligations under the NPT and customary international law. It is clear from the jurisprudence of both the Court and the Permanent Court that an applicant State cannot evade the effects of a temporal restriction on the Court's jurisdiction simply by pointing to conduct occurring after the critical date.

69. In *Phosphates in Morocco*, the Permanent Court rejected Italy's contentions that the temporal reservation was not triggered because (i) certain acts which, it was alleged, represented unlawful acts *per se* were accomplished after the critical date, (ii) these acts, taken in conjunction with earlier acts to which they were closely linked, constituted as a whole a single, continuing and progressive illegal act which was not fully accomplished until after the crucial date, and/or (iii) the earlier acts gave rise to a breach of international law which continued to exist after the critical date. In so concluding, the Permanent Court emphasised that:

> "... it would be impossible to admit the existence of such a relationship between a dispute and subsequent factors which either presume the existence or are merely the confirmation or development of earlier situations or facts constituting the real causes of the dispute."[57]

70. In the present case, it is clear that the more recent situations or facts relied upon by the Marshall Islands to sustain its claim are precisely caught by this description.

71. The Court adopted the same approach in *Certain Property (Liechtenstein* v. *Germany)*. The issue in that case was whether the dispute related to events occurring in the 1990s, namely the decisions of the German courts in the *Pieter van Laer Painting* case, or whether the "source" or "real cause" of the dispute was the Decrees of 1945, under which the painting in question had been confiscated, and the

[57] *Phosphates in Morocco, Judgment, Preliminary Objections*, 1938 PCIJ, Series A/B No. 74 at p. 24.

Settlement Convention of 1952, which the German courts held deprived them of jurisdiction to hear the case. The Court considered that:

> "... the present dispute could only relate to the events that transpired in the 1990s if, as argued by Liechtenstein, in this period, Germany either departed from a previous common position that the Settlement Convention did not apply to Liechtenstein property, or if German courts, by applying their earlier case law under the Settlement Convention for the first time to Liechtenstein property, applied that Convention 'to a new situation' after the critical date."[58]

72. Applying this analysis to the present case, the Marshall Islands cannot establish that the United Kingdom's recent conduct departs from a previous position that it had adopted, nor that it represents a new situation arising after 17 September 1991, i.e. the critical date for present purposes. On the contrary, the whole thrust and logic of the Marshall Islands' case is that the United Kingdom has, since 1970, consistently failed to comply with its obligations arising from the NPT.

73. In assessing whether a temporal reservation to jurisdiction applies, the claim must be looked at as a whole. In circumstances where a claim is, on its face, based upon an alleged continuous course of conduct, it is not permissible for an applicant State to disavow its reliance on earlier conduct in order to characterise the dispute as arising after the critical date. The (then) Federal Republic of Yugoslavia's ("FRY") attempt to do precisely that was firmly rejected by the Court in its Provisional Measures Order in the *Legality of Use of Force* case. In that case, the Court focused on the first part of the reservation – the date on which the dispute had arisen – but the analysis is equally applicable to establishing the date of the "situations or facts" of a dispute. The critical date in the FRY reservation was 25 April 1999. The Court noted that it was established that the bombings in question began on 24 March 1999 and had been conducted continuously over a period extending beyond 25 April 1999. In those circumstances, the Court had no doubt that the legal dispute arose between the FRY

[58] *Certain Property (Liechtenstein v. Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 6 at paragraph 48.

and the NATO respondent States well before the critical date and that the FRY could not rely on each individual air attack as giving rise to a separate dispute.[59]

74. In the present case, the claimed dispute relates to a continuing obligation of the United Kingdom dating back to 5 March 1970. The Marshall Islands cannot evade the effect of their temporal reservation by suggesting that the later allegations give rise to a separate dispute.

75. In summary, the United Kingdom submits that the "source" or the "real cause" of the alleged dispute arose well before 17 September 1991 and that the Court accordingly lacks jurisdiction *ratione temporis* in respect of the entire dispute.

(3) The Court lacks jurisdiction as the Marshall Islands' acceptance of the Court's compulsory jurisdiction was only for the purposes of the present dispute

76. The Marshall Islands' Optional Clause Declaration was deposited with the Secretary-General of the United Nations on 24 April 2013. The present Application was filed with the Court on 24 April 2014. As noted above, this cannot be attributed to a mere coincidence of timing. On the contrary, it is the clearest possible indication that the Marshall Islands accepted the compulsory jurisdiction of the Court "for the purpose of" enabling it to bring the present claim against the United Kingdom, within the meaning of this phrase in the reservation in paragraph 1(iii) of the United Kingdom's Optional Clause Declaration.

77. The appropriate principles for the interpretation of Optional Clause declarations and reservations were restated by the Court in *Fisheries Jurisdiction (Spain v Canada)*.[60] In particular, the Court found, *inter alia*, as follows:

(a) Conditions or reservations do not derogate from a wider acceptance already given, but operate to define the parameters of the State's acceptance of the

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[59] *Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999,* p.124 at paragraphs 28-29.

[60] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998,* p. 432 at paragraphs 44–56.

compulsory jurisdiction of the Court. There is therefore no reason to interpret them restrictively.

(b) Every declaration and reservation must be interpreted "as it stands", having regard to the words actually used.

(c) The Court should not base itself on a purely grammatical interpretation of the text but must seek the interpretation which is in harmony with a natural and reasonable way of reading the text:

i. since a declaration under Article 36(2) of the Statute is a unilaterally drafted instrument, the Court may place emphasis on the intention of the depositing State;

ii. the intention of a reserving State may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read and from evidence regarding the circumstances of its preparation and the purposes intended to be served.

78. Applying these principles to the present case, the United Kingdom submits that the jurisdiction of the Court is excluded by operation of the "for the purpose of" reservation in the UK's Optional Clause Declaration. The natural and reasonable interpretation of the language used is supported by the drafting history of the UK's Declaration and reservation.

79. The United Kingdom first entered a reservation in these terms in 1957, as a reaction to concerns raised by the *Right of Passage* case, in which Portugal launched proceedings against India just three days after depositing an Optional Clause Declaration phrased in general terms with the United Nations Secretary-General.[61] As the UK Secretary of State for Foreign Affairs stated in Parliament, the wording of the new reservation sought to prevent an "ambush":

[61] M Wood, *"The United Kingdom's Acceptance of the Compulsory Jurisdiction of the International Court"* in *Festskrift til Carl August Fleischer* (eds. O Fauchald/H Jakhelln/A Syse) (2006) at pp. 632ff.

"... I am advised that when our standing acceptance was originally deposited, it was only intended to compel us to appear before the Court at the instance of countries which had likewise deposited a standing acceptance of the Court's compulsory jurisdiction.

Accordingly, one of our new reservations, which was intended to meet this point, specifically excludes disputes in which the other party has accepted the compulsory jurisdiction of the Court only for the purposes of that particular dispute."[62]

80. The United Kingdom submits that the present case falls within both the language and the spirit of the "for the purpose of" reservation. The Marshall Islands cannot rely on the fact that its Optional Clause Declaration is expressed in general terms and could potentially lead to claims being filed against the RMI in the future. The same could have been said of the Portuguese Declaration in the *Right of Passage* case, but it is clear that reliance on such a general declaration fell within the mischief that the reservation was designed to avoid.

81. The United Kingdom contended in its Preliminary Objections to the Court's jurisdiction in *Legality of Use of Force (Yugoslavia v United Kingdom)* as follows:[63]

"Although it is ostensibly couched in general terms, the FRY declaration was in reality deposited for the purpose of the present dispute. That is clear from the attempt to accept the jurisdiction of the Court with regard to the military action by the United Kingdom and other Respondents while excluding from the jurisdiction of the Court the FRY actions to which that was a response, **as well as from the delay of only three days between the deposit of the declaration and the filing of the Application in the present case.**" (emphasis added)

[62] Selwyn Lloyd, House of Commons Debate, 8 November 1957, Cols 472-475 – **Annex 7.**
[63] Preliminary Objections of the United Kingdom of 20 June 2000 at paragraph 4.27.

82. In the present case, although the Marshall Islands delayed the filing of their Application until a date exactly 12 months after it had deposited its Declaration, the alacrity with which the Application was filed is just as clear a betrayal of the Marshall Islands' true purpose in accepting the Court's compulsory jurisdiction. The United Kingdom accordingly submits that the Court lacks jurisdiction in the present case in consequence of the "for the purpose of" reservation in the United Kingdom's Optional Clause Declaration.

C. The Marshall Islands' claim is excluded in consequence of the absence from the proceedings of States whose essential interests are engaged by the claim

83. In addition or in the alternative to the preceding grounds of preliminary objection to jurisdiction and admissibility, the United Kingdom contends that the specific allegations advanced against the UK by the Marshall Islands are such that they directly and unavoidably engage the interests of States which are not before the Court. In consequence, the Marshall Islands' Application is inadmissible and/or the Court lacks jurisdiction to address the claim in the absence of these essential parties.

84. This objection to admissibility and/or jurisdiction rests on the principle enunciated in the *Monetary Gold* case. As a matter of simple logic, the United Kingdom cannot conduct, still less conclude, nuclear disarmament negotiations on its own. Moreover, it is evident from a closer analysis of the specific allegations of breach made against the UK that other NPT nuclear-weapon States (i) have taken and are taking positions that are identical to – or, for present purposes, bear no material difference from – the position of the UK on various conferences, initiatives and resolutions regarding nuclear disarmament (as is evident, *inter alia*, from joint statements by the UK, the US and France, and by the five permanent members of the Security Council on several occasions), and/or (ii) are counterparties to the agreements or specific examples of cooperation which are alleged to constitute specific violations by the UK of its obligations under Article VI of the NPT or customary law. The Court cannot, in consequence, rule on the conduct of the United Kingdom without concurrently necessarily and inevitably evaluating the lawfulness of the conduct of other States. It follows that a determination by the Court of whether the United Kingdom is in breach of its obligations would not only affect the legal

interests of other NPT nuclear-weapon States but that those interests would "form the very subject matter" of the decision[64] and/or that the decision would inevitably imply "an evaluation of the lawfulness of the conduct of another State which is not a party to the case".[65]

85. Before turning to this issue, two preliminary observations are warranted. First, the United Kingdom notes that the Marshall Islands has a long-standing dispute with the *United States* over claimed U.S. responsibility for and compensation in respect of radiation-related health issues among Marshall Islanders. This dispute is reflected in legal proceedings before U.S. domestic courts, in diplomatic exchanges in the international arena, and in RMI political engagement with the U.S. Administration and Congress in Washington D.C. These claims relate to the effects of the U.S. nuclear testing programme in the Marshall Islands between 30 June 1946 and 18 August 1958. As is apparent from publicly available U.S. Congressional documents, in September 2000, the Marshall Islands submitted a "Changed Circumstances" request to the United States Congress "seeking additional compensation and remedies for injuries and losses to the people of the Marshall Islands arising from the U.S. nuclear testing program at Enewetak and Bikini atolls from 1946 to 1958".[66] Against this background, press reports citing Marshall Islands officials and political figures suggest that "the filing of the cases [before the International Court of Justice] was driven by a long-held frustration with the United States over its denial of responsibility for radiation health issues among islanders".[67]

86. Second, as noted in opening, in parallel with its Application instituting proceedings against the United Kingdom, the Marshall Islands filed eight other broadly similar Applications instituting proceedings, one against each of China, France, India, Israel, North Korea, Pakistan, Russia and the United States. The Marshall Islands also initiated proceedings in parallel, and on broadly similar

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[64] *Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question), Judgment I.C.J. Reports 1954,* p.19 at p. 32.
[65] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995,* p. 90 at paragraph 29.
[66] *Report Evaluating the Request of the Government of the Republic of the Marshall Islands Presented to the Congress of the United States of America*, November 2004 – **Annex 8.**
[67] Kyodo News/PacNews report, 11 August 2014, citing Annette Note and Abacca Maddison, respectively the deputy chief of mission at the Marshall Islands' embassy in Japan and a former Marshall Islands senator – **Annex 9.**

grounds, against the United States in the United States District Court for the Northern District of California.

87. The implication of these parallel filings, which is reflected also in the detail of the Marshall Islands' claim against the UK, is that the Marshall Islands considers that the allegations it is pursuing give rise to a shared responsibility on the part of the NPT nuclear-weapon States and other States that possess or are said to possess nuclear weapons (collectively referred to herein as "nuclear-weapon States").

88. The United Kingdom is the only State amongst those States against which the Marshall Islands filed Applications that is both a party to the NPT and has a current Optional Clause Declaration. It is accordingly perhaps not far from the mark to suggest that the United Kingdom is the litigation foil for the Marshall Islands' frustration with the United States and that, to the extent that the Marshall Islands has genuine concerns or grievances to air, these are directed more widely than at the United Kingdom and are properly addressed in the context of the ongoing NPT review process.

89. What the United Kingdom here refers to, for ease of reference, as the *Monetary Gold* principle is the principle that the Court can only exercise jurisdiction over a State with its consent. The origin of the principle is usually taken to be the *Monetary Gold* case although it is also evident in earlier jurisprudence.[68] In the *Monetary Gold* case, the Court held that it did not have jurisdiction over Italy's claim to the gold on the basis that:

> "... the Application centres around a claim by Italy against Albania, a claim to indemnification for an alleged wrong. Italy believes that she possesses a right against Albania for the redress of an international wrong which, according to Italy, Albania has committed against her. In order, therefore, to determine

[68] E.g. the PCIJ in its Advisory Opinion on *Eastern Carelia* (PCIJ, Series B, No. 5) declined jurisdiction on the basis that the requested opinion related to an actual dispute with Russia, which was not a Member of the League of Nations and had not submitted to the court, and that: "It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement." (p. 27).

whether Italy is entitled to receive the gold, it is necessary to determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay compensation to her; and, if so, to determine the amount of compensation …

The Court cannot decide such a dispute without the consent of Albania … To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent.

… In the present case, Albania's legal interests would not only be affected by a decision, but would form the very subject matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorising proceedings to be continued in the absence of Albania."[69]

90. In the present case, the Marshall Islands claim, in broad terms, that the United Kingdom has violated and continues to violate its international obligations under Article VI of the NPT and under customary international law by:

(a) failing to pursue in good faith and to bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control;

(b) taking actions to improve qualitatively its nuclear weapons system and to maintain it for the indefinite future;

(c) failing to pursue negotiations that would end the nuclear arms race;

(d) modernising, updating and upgrading its nuclear weapons capacity and maintaining its declared nuclear weapons policy; and

[69] *Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question), Judgment I.C.J. Reports 1954,* p. 19 at p. 32.

(e) effectively preventing the great majority of non-nuclear-weapon States parties to the NPT from fulfilling their obligations under Article VI.[70]

91. The United Kingdom submits that the Court cannot determine whether the United Kingdom is in breach of these obligations without inevitably also determining that other nuclear-weapon States are also in breach of their obligations.

92. In relation to the alleged breach of the obligation to negotiate an end to the nuclear arms race and/or general nuclear disarmament, the United Kingdom cannot conduct, still less conclude, nuclear disarmament negotiations by itself. The requirement for all States to comply with their obligation to pursue negotiations in good faith in relation to nuclear disarmament, has been repeatedly emphasised by the Security Council.[71] The Marshall Islands acknowledges this in its discussion of the nature of the obligation to negotiate at paragraph 176 of its Memorial, in which it (rightly) emphasises that:

- the essence of negotiations is communication and discussion;

- negotiations are discussions held with a view to reaching a mutually acceptable settlement of some matter in issue between two (or more) States;

- negotiations require a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party.

93. However, although Article VI of the NPT requires all the States parties to pursue negotiations in good faith, in practical terms the steps towards nuclear disarmament must necessarily be undertaken and fulfilled by the nuclear-weapon States. The Marshall Islands' claim is therefore not based on the relationship between the United Kingdom and the Marshall Islands but on the relationship between the United Kingdom and the other nuclear-weapon States collectively. This is evident

[70] Memorial, paragraph 239.
[71] See, for instance, Resolution 984 (1995) and Resolution 1887 (2009).

from the fact that the Marshall Islands filed materially identical Applications against all the nuclear-weapon States. The legal interests of those other 8 States consequently "form the very subject matter" of the Marshall Islands' claim against the United Kingdom.

94. In this sense, the allegations made by the Marshall Islands are very different from those which were at issue in the *Nauru* case. Nauru alleged that Australia was responsible for certain breaches of the Trusteeship Agreement under which Nauru was administered. Australia contended that the Court could not determine its responsibility without simultaneously determining the international responsibility of the UK and New Zealand, who were jointly designated as the Administering Authority. In practical terms, however, the administration was undertaken solely by Australia, and Nauru's claim was therefore based solely on the conduct of Australia towards Nauru. The Court was therefore able to distinguish the rights and interests of the United Kingdom and New Zealand, which would only arise if, for example, Australia claimed that they were jointly and severally liable for any damages awarded to Nauru:

> "... the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, **the only object** of Nauru's claim ... In the present case, a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia."[72] (emphasis added)

95. In the present case, the United Kingdom is not, in any real sense, the only object of the Marshall Islands' claim. The Marshall Islands does not allege that it has been caused harm by reason of the United Kingdom's conduct towards itself but by reason of the United Kingdom's conduct vis-à-vis the other nuclear-weapon States.

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[72] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240 at p. 261.

For this reason, the conduct and obligations of the other nuclear-weapon States lie at the very heart of the Marshall Islands' claim and the Court cannot consider and evaluate the United Kingdom's conduct of nuclear disarmament negotiations in isolation from that of the other nuclear-weapon States.

96. The same conclusion is reached by applying the analysis of the Chamber in *Land, Island and Maritime Frontier Dispute (El Salvador* v. *Honduras).* The Court there held that it did not follow from El Salvador's claim that there was a regime of condominium in the Gulf of Fonseca that Nicaragua had an interest which formed the very subject matter of the decision. In reaching this decision, the Chamber focused on the concept of opposability:

> "If Nicaragua is permitted to intervene, the Judgment to be given by the Chamber will not declare, as between Nicaragua and the other two States, that Nicaragua does or does not possess rights under a condominium in the waters of the Gulf ... but merely that, as between El Salvador and Honduras, the regime of condominium declared by the Central American Court is or is not opposable to Honduras."[73]

97. In the present case, the Marshall Islands manifestly does not seek a decision of the Court regarding the United Kingdom's obligations under the NPT and/or customary international law which is merely opposable to itself. A decision which required the United Kingdom to pursue negotiations on nuclear disarmament solely with the Marshall Islands would be pointless. What the Marshall Islands seeks – as evidenced by its nine applications before the Court – is an order which requires the nuclear-weapon States to negotiate and conclude negotiations *inter se*.

98. The inextricable link between the United Kingdom and other nuclear-weapon States is even more evident when the detail of the Marshall Islands' allegations is considered. A number of factual allegations are raised in the Memorial, in particular it is asserted that:

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[73] *Land, Island and Maritime Frontier Dispute (El Salvador* v. *Honduras), Application to Intervene, Judgment. I.C.J. Reports 1990,* p. 92 at p. 122.

(a) the renewal of the UK-US Mutual Defence Agreement ("MDA") is a breach of Article VI because it is directed towards the continuation and enhancement of the UK's nuclear capability;[74]

(b) the development of a successor nuclear warhead is being facilitated by research conducted jointly by the UK and France. In 2010, the UK and France concluded a bilateral Treaty for Defence and Security Cooperation and cooperation between the UK and France on nuclear warhead research was subsequently extended under an agreement concluded between Prime Minister Cameron and President Hollande on 31 January 2014;[75]

(c) the UK voted against the UN General Assembly Resolution A/RES/67/56, which established an Open Ended Working Group ("OEWG") to develop proposals for progressing multilateral nuclear disarmament negotiations.[76] In a joint statement with the US and France, on 6 November 2012, the UK stated that it was unable to support this Resolution, the establishment of the OEWG or any outcome it might produce;[77]

(d) in a Joint Statement issued at the conclusion of the Conference of the P5 Nuclear Weapon States in London in February 2015, the P5 "reaffirmed that a step-by-step approach to nuclear disarmament that promotes international stability, peace and undiminished and increased security for all remains the only realistic and practical route to achieving a world without nuclear weapons";[78]

(e) the UK has always voted against the UN General Assembly's Resolution on "Follow-up to the advisory opinion … on the Legality of the Threat or Use of Nuclear Weapons";[79]

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[74] Memorial, paragraph 61.
[75] Memorial, paragraphs 62–64.
[76] Memorial, paragraph 76.
[77] Memorial, paragraph 77.
[78] Memorial, paragraph 81.
[79] Memorial, paragraph 82.

(f) the UK has officially expressed opposition to the proposed Nuclear Weapons Convention, submitted by Costa Rica;[80]

(g) the UK, in a joint statement with the US and France at the UN General Assembly High-Level Meeting on Nuclear Disarmament in September 2013, welcomed the increased enthusiasm around the nuclear disarmament debate but expressed regret that energy was being directed towards initiatives such as the High Level Meeting and the OEWG;[81]

(h) the UK has voted against UN General Assembly Resolutions following up the High Level Meetings in 2013 and 2014;[82]

99. These allegations need only to be stated to demonstrate that the allegations against the UK cannot be ring-fenced from the obligations and conduct of other nuclear-weapon States – and in particular those of France and the US. In particular:

(a) if the entry into the MDA constitutes a breach by the UK, it must follow that an equivalent breach has been committed by the US. The same must follow with respect to the agreements and cooperation with France;

(b) if the Joint Statements made by the UK on behalf of the US and France, in November 2012 and September 2013 and the statement made on behalf of the P5 in February 2015 constitute a breach of the UK's obligations, they must necessarily also engage the responsibility of those other States;

(c) if the allegations regarding the UK's voting record in the UN General Assembly are sustained, that must also hold true for other nuclear-weapon States which have followed the same voting pattern; and

[80] Memorial, paragraphs 83–89.
[81] Memorial, paragraph 90.
[82] Memorial, paragraph 91.

(d) similarly, if the United Kingdom's attitude towards the proposed Nuclear Weapons Convention is a violation of its obligations, then it must follow that other nuclear-weapon States which have adopted similar or less constructive approaches must also be in breach of their obligations under the NPT and/or the claimed rules of customary international law.

100. As the Court has recognised, for example in *Land and Maritime Boundary (Cameroon* v. *Nigeria)*[83] in circumstances where the interests of third parties may be directly or indirectly affected by a judgment of the Court, the protection afforded by Article 59 of the Court's Statute will not always be sufficient. In the present case, to the extent that the position of the UK in respect of these allegations mirrors that of other nuclear-weapon States, it would be illusory to suggest that the rights and interests of those third States are effectively protected by Article 59 of the Statute.

101. For these reasons, the United Kingdom submits that the interests of other nuclear-weapon States do "form the very subject matter" of the Marshall Islands' claim against it and that consequently the claim falls four-square within the principle laid down in the *Monetary Gold* case.

102. In any event, the jurisprudence of the Court indicates that the strict application of the "very subject matter" threshold enunciated in the *Monetary Gold* case should be, and has been, relaxed. In particular:

(a) a number of strong dissenting opinions in the *Nauru* case highlighted a concern that the approach of the majority was unduly restrictive. The President of the Court, Sir Robert Jennings considered that it was "surely manifest" that the legal interests of New Zealand and the UK would form the very subject matter of any decision in Nauru's case against Australia. In particular, he emphasised that if it were to be determined on the merits either that Australia's obligations were joint and several or that Australia was only liable for a proportion of the alleged damage, the Court would unavoidably

[83] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002,* p. 303 at paragraph 238.

and simultaneously be making a decision in respect of the legal interests of those States.[84] Judge Ago highlighted the inconsistency between the acknowledgment in the judgment that a determination by the Court of Australia's legal responsibility "might well have implications for the legal situation" of the other States and the assertion that "no finding in respect of that legal situation" would be required. In his view, a ruling on the claims against Australia would inevitably affect the legal rights and obligations of the UK and New Zealand.[85] Similarly, Judge Schwebel stated that, "[w]hat is dispositive is whether the determination of the legal rights of the present party **effectively determines** the legal rights of the absent party"[86] (emphasis added) and considered that a judgment on the responsibility of Australia would be tantamount to a judgment against New Zealand and the United Kingdom, in relation to which the protection given by Article 59 would be notional rather than real.[87]

(b) In the *East Timor* case[88] the Court held that, "Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would **imply an evaluation of the lawfulness of the conduct of another State** which is not a party to the case" (emphasis added). This statement constitutes a significant restatement of the "very subject matter" threshold and, in the United Kingdom's submission, encapsulates the criticisms of the dissenting Judges in the *Nauru* case.

(c) This interpretation of the scope of the *Monetary Gold* principle is supported by the approach of the Court to applications by third States to intervene, pursuant to Article 62 of the Statute, in maritime delimitations. In *Continental Shelf Case (Tunisia* v. *Libya)*, the Court rejected Malta's application to intervene on the basis that Malta could not establish a legal interest which was directly in issue in the proceedings. However, the Court emphasised that its

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[84] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240 at pp. 301-302.
[85] *Id.* at p. 328.
[86] *Id.* at p. 331.
[87] *Id.* at p. 342.
[88] *East Timor (Portugal* v. *Australia) Judgment, I.C.J. Reports 1995*, p. 90 at paragraph 28.

jurisdiction was limited to that conferred upon it by the parties and that it could therefore make no conclusions with respect to the rights or claims of other States which were not parties to the case.[89] The Court consequently did not fix the terminal point of the delimitation line as that would depend upon the delimitation to be agreed with Malta.[90] A similar approach has been adopted in other cases, e.g., in *Continental Shelf (Libya* v. *Malta)*[91], *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*[92] and *Land and Maritime Boundary (Cameroon* v. *Nigeria).*[93] In all of these cases, although the Court was able to exercise jurisdiction insofar as the dispute concerned only the parties before it, there was a clear recognition that it could not properly make determinations that would potentially trespass upon the rights or interests of third States that were not party to the proceedings. In this context it does not appear to have been necessary to establish that a determination of the third State's rights is a logical or temporal prerequisite to the delimitation between the parties. Indeed, in *Tunisia* v. *Libya, Libya* v. *Malta* and *Cameroon* v. *Nigeria* the legal interests or rights of the third States do not appear to have been identified with precision.

103. In light of these authorities, the United Kingdom submits that the rights and legal interests of third States constitute the "very subject matter" of the Marshall Islands' claim against it and, *a fortiori,* that a decision of the Court in this case would necessarily "imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case". Consequently, in accordance with the *Monetary*

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[89] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application to Intervene, Judgment, I.C.J. Reports 1981,* p. 3 at paragraph 35.

[90] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982,* p. 18 at paragraph 133.C.3.

[91] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I. C.J. Reports 1985,* p. 13 at paragraph 21: "...the decision of the Court must be confined to the area in which, as the Court has been informed by Italy, that State has no claims to continental shelf rights."

[92] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001,* p. 40 at paragraph 221: "[The Court] cannot fix the boundary's southernmost point, since its definitive location is dependent upon the limits of the respective maritime zones of Saudi Arabia and of the Parties..."

[93] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002,* p. 303 at paragraph 238; "The jurisdiction of the Court is founded on the consent of the parties. The Court cannot therefore decide upon legal rights of third States not parties to the proceedings..."

Gold principle, the claim is inadmissible and/or the Court cannot exercise jurisdiction in relation thereto.

D. The Marshall Islands' claim falls outside the judicial function of the Court and the Court should therefore decline to exercise jurisdiction over the claim

104. As the Court observed in the *Northern Cameroons* case, "[t]here are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore ... The Court itself, and not the parties, must be the guardian of the Court's judicial integrity".[94] It follows, therefore, that even if the Court finds that it has jurisdiction in a particular case, it may decline to exercise that jurisdiction if it considers that to do so would be incompatible with its judicial function. The concept of judicial integrity has, in particular, led the Court to decline to exercise its jurisdiction in circumstances where it would not be in a position to "render a judgment that is capable of effective application".[95]

105. The seeds of this principle of effective application are evident in the judgment of the Permanent Court in the *Interpretation of the Greco-Bulgarian Agreement of December 9th 1927* case.[96] Two questions had been submitted to the Permanent Court: first whether there was a dispute between the parties within the meaning of Article 8 of the Agreement and secondly, if so, what was the nature of the pecuniary obligations arising out of the Agreement. The Permanent Court answered the first question in the negative and resisted the parties' requests that it should nonetheless provide an answer to the second question. It held that the second question was conditional upon an affirmative answer being given to the first question and that "to ignore this condition at the request of the Parties would be in effect to allow the two interested Governments to submit a question for the advisory opinion of the Court".

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[94] *Case Concerning the Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963,* p. 15 at p. 29.
[95] *Id.* at p. 33.
[96] PCIJ, Series A/B, No. 45, p. 68 at p. 87.

106. The proper scope of the Court's function was raised in particularly clear relief in the *Northern Cameroons* case. Cameroon sought a declaration that the United Kingdom had failed to respect certain obligations arising under the Trusteeship Agreement as a result, in particular, of the organisation of the plebiscite which had led to the Northern Cameroons joining the Federation of Nigeria. The Trusteeship Agreement had been terminated by a General Assembly Resolution, which came into effect shortly after the Cameroon's application was filed with the Court. Cameroon acknowledged that the effect of the General Assembly Resolution could not be reversed by the Court and did not seek any order for restitution or reparation. Cameroon maintained, however, that the Court could and should give a declaratory judgment to the effect that prior to its termination, the United Kingdom had breached the provisions of the Trusteeship Agreement. In rejecting Cameroon's application, the Court emphasised that:

(a) it would be impossible for the Court to render an effective judgment, given that the decisions of the General Assembly would not be reversed and the territory of the Northern Cameroons would not be joined to the Republic of Cameroon;

(b) in accordance with Article 59 of the Statute, the judgment would not be binding on Nigeria or any other State or on any organ of the United Nations;

(c) the Court could only pronounce judgment in relation to concrete cases in which there was, at the time of adjudication, an actual controversy involving a conflict of legal interests between the parties;

(d) the Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations;

(e) the Court may, in an appropriate case, make a declaratory judgment. In deciding whether or not it is appropriate to do so, the Court will consider whether its judgment will have any continuing applicability or "forward reach";

(f) although the Court is not generally concerned with the aftermath of its judgment, there is a difference between, on the one hand, a consideration of the manner or likelihood of compliance with its judgment and, on the other, a consideration of whether the judgment "would be susceptible of any compliance or execution whatever, at any time in the future";

(g) it is not the function of the Court merely to provide a basis for political action. When the Court adjudicates on the merits of a dispute, one or other or both parties should, as a matter of fact, be in a position to take some retroactive or prospective action or avoidance of action which would constitute compliance with the Court's judgment.[97]

107. The principles enunciated in *Northern Cameroons* were applied by the Court in the *Nuclear Tests* cases. The Court concluded that France's declarations regarding the effective cessation of nuclear tests caused the dispute between the parties to disappear. In holding that the proceedings should not continue, the Court again focussed on the proper scope of its judicial functions:

> "It does not enter into the adjudicatory functions of the Court to deal with issues *in abstracto,* once it has reached the conclusion that the merits of the case no longer fall to be determined. The object of the claim having disappeared, there is nothing on which to give judgment."[98]

108. The principle has also been approved by Judge Schwebel in his dissenting opinions in the *Lockerbie* cases.[99] Judge Schwebel considered that, in view of the

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[97] *Case Concerning the Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963,* p. 15 at pp. 33-38.

[98] *Nuclear Tests (Australia* v. *France) Judgment, I.C.J. Reports 1974*, p. 253 at paragraph 59; *Nuclear Tests (New Zealand* v. *France) Judgment I.C.J. Reports 1974*, p. 457 at paragraph 62.

[99] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 9 at p. 70, and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 115 at p. 161.

adoption by the Security Council of Resolutions 748 (1992) and 883 (1993), any judgment of the Court could have no lawful effect on the rights and obligations of the parties and would therefore not be within the proper judicial function of the Court.

109. In the present case, the Marshall Islands requests the Court (i) to declare that the United Kingdom is in breach of its obligations under the NPT and customary international law, and (ii) to order the United Kingdom to "take all steps necessary to comply with its obligations under Article VI of the [NPT] and under customary international law *within one year of the Judgment*, including the pursuit, by initiation if necessary, of negotiations in good faith aimed at the conclusion of a convention on nuclear disarmament in all its aspects under strict and effective control".[100] The United Kingdom submits that any such declarations or orders would have no practical consequence and would therefore not be within the proper judicial function of the Court.

110. As set out above, the United Kingdom cannot conduct negotiations on its own, still less can it successfully conclude negotiations by itself. It is an obligation that, as a matter of logic, requires the participation of at least one other State and, as a matter of practice, requires the participation of *at least* all other nuclear-weapon States. This basic fact is clearly acknowledged by the Marshall Islands, which has, of course, sought the same order in each of its nine applications against nuclear-weapon States.

111. In the present case, any declaration or order by the Court would, in accordance with the *Monetary Gold* principle, necessarily have to be limited in its scope to the United Kingdom. The consequences of this are as follows:

(a) the Court cannot in any practical sense order the United Kingdom to enter into or conclude disarmament negotiations in the future. Such an Order would be entirely dependent upon the conduct of third States which would, in accordance with Article 59 of the Statute, not be bound by the Order. The Order would consequently not be "susceptible of any compliance";

[100] Memorial, paragraphs 239–240.

(b) the United Kingdom is not in a position, on its own, to take any retroactive or prospective action in order to comply with a judgment of the Court. In this regard, it is noted that the Marshall Islands (rightly) does not seek any reparation from the United Kingdom;

(c) a declaration to the effect that the United Kingdom is under an obligation to conduct and conclude disarmament negotiations in the future would add nothing to any obligation which is currently imposed by the NPT;

(d) a declaration limited to the allegations that the United Kingdom has breached its obligations in the past would not have any "continuing applicability" or "forward reach" and thus, in accordance with the approach of the Court in the *Northern Cameroons* case, this is not an appropriate case for granting such declaratory relief.

112. For these reasons, it is submitted that the principle laid down in the *Northern Cameroons* case is directly engaged in the present case. Moreover, the present case is not simply a situation – as was the position in the *Northern Cameroons* case and the *Nuclear Tests* cases – where an application has been rendered moot by reason of an event subsequent to the filing of the Application. On the contrary, it must have been clear from before the time when the RMI's Application was filed that any judgment of the Court in this matter would have no practical consequence and that the Application is therefore hopelessly misconceived. On this basis, if, contrary to the above, the Court concludes that the Application is otherwise admissible and within the scope of its jurisdiction, the Court should nevertheless decline to exercise its jurisdiction in the present case.

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IV. SUMMARY AND REQUEST FOR RELIEF

113. In summary of the foregoing, the United Kingdom's objections to jurisdiction and admissibility, in addition or in the alternative, are as follows:

(a) In consequence of the failure by the Marshall Islands to give the United Kingdom any notice whatever of its claim, there is no justiciable dispute between the Marshall Islands and the United Kingdom with the consequence that the Court lacks jurisdiction to address the claims and/or the claims are inadmissible.

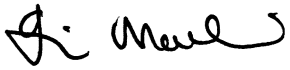
(b) The Court lacks jurisdiction in consequence of the temporal restriction in the Marshall Islands' Optional Clause Declaration which, by depriving the Court of jurisdiction in respect of a substantial part of the period of the breaches alleged by the Marshall Islands, has the effect of depriving the Court of jurisdiction over the entirety of the Marshall Islands' claim.

(c) The Court lacks jurisdiction in consequence of the provision in the UK's Optional Clause Declaration excluding jurisdiction over any dispute in respect of which the other Party has accepted the compulsory jurisdiction of the Court only "for the purpose of the dispute".

(d) The Application is inadmissible and/or the Court lacks jurisdiction on the ground of the absence before the Court of other essential parties whose interests are directly and unavoidably engaged by the allegations advanced by the Marshall Islands.

(e) In any event, the Court should decline to exercise its jurisdiction in this matter on the ground that any judgment it may give will have no practical consequence and the matter therefore falls outside the proper judicial function of the Court.

114. For the reasons set out in this pleading, the United Kingdom requests the Court to adjudge and declare that the claim brought by the Marshall Islands is inadmissible and/or that the Court lacks jurisdiction to address the claim.



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Iain Macleod

Agent of the United Kingdom

of Great Britain and Northern Ireland **15 June 2015**

LIST OF ANNEXES

The Annexes to the United Kingdom's Preliminary Objections are set out below and numbered in the order in which they are referred to in the text.

Annex 1 Statement by H.E. Mr Alfred Capelle, Permanent Representative of the Marshall Islands at the 2005 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, 5 May 2005. *http://www.un.org/en/conf/npt/2005/statements/npt05marshall%20islands.pdf*

Annex 2 UK Statement to the 2010 Non-Proliferation Treaty Review Conference by Ambassador John Duncan, Ambassador for Multilateral Arms Control and Disarmament, 21 May 2010. *http://www.un.org/en/conf/npt/2010/statements/pdf/uk_en.pdf*

Annex 3 Third report of the Special Rapporteur, Mr. James Crawford (52nd session of the ILC (2000), A/CN.4/507/Add.2 paragraph 235).

Annex 4 Summary Record of the 2682nd Meeting of the International Law Commission, UN Doc. A/CN.4/SR.2682, paragraph 38.

Annex 5 *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, UN Doc. A/56/10, Commentary to Article 43, paragraph 3.

Annex 6 Statement on behalf of France, the UK and the US by Minister Alistair Burt, Parliamentary Under Secretary of State, United Kingdom of Great Britain and Northern Ireland, at the UN General Assembly High Level Meeting on Nuclear Disarmament, 26 September 2013. *http://www.un.org/en/ga/68/meetings/nucleardisarmament/pdf/GB_en.pdf*

Annex 7 Selwyn Lloyd, HC Deb 8 November 1957, Cols 472-475

Annex 8 Report Evaluating the Request of the Government of the Republic of the Marshall Islands Presented to the Congress of the United States of America, November 2004.
http://2001-2009.state.gov/p/eap/rls/rpt/40422.htm

Annex 9 "*Marshall Islands seeks support for ICJ cases against nuclear state*", Kyodo News/PacNews report, 11 August 2014.
http://www.islandsbusiness.com/news/marshall-islands/5994/marshall-islands-seeks-support-for-icj-cases-again/

INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS CONCERNING NEGOTIATIONS RELATING TO CESSATION OF THE NUCLEAR ARMS RACE AND TO NUCLEAR DISARMAMENT

(MARSHALL ISLANDS *v.* UNITED KINGDOM)

ANNEXES

TO

PRELIMINARY OBJECTIONS

OF THE

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

15 June 2015

[Check against delivery]

REPUBLIC OF THE MARSHALL ISLANDS

Statement by H.E. Mr. Alfred Capelle, Permanent Representative

At the 2005 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons

5 May 2005

Thank you, Mr. President.

I have the honor to speak on behalf of the Republic of the Marshall Islands. We associate ourselves with the statement delivered on behalf of the Pacific Islands Forum group earlier this week. As a region of the world where three global powers have tested nuclear weapons, I believe our island nations have a unique and credible voice on the importance and urgency of non-proliferation.

Mr. President,

At the outset, my delegation would like to congratulate you on your election as President of the 2005 Review Conference. We are hopeful that with your dedication and skills, this Conference will have a successful outcome. Our small delegation stands ready to participate and contribute towards a successful and substantive outcome.

The Marshall Islands has actively participated in the last two Review Conferences. Both Conferences concluded on an optimistic note and renewed hopes for more productive efforts in implementing the provisions of the NPT.

Mr. President,

My delegation shares the views expressed by the Director-General of the IAEA, Dr. Mohamed ElBaradei, that the core of the NPT can be summed up in two words: "security and development". Security for all by reducing and ultimately eliminating the nuclear threat, and development for all through advanced technology. My delegation acknowledges both the development priorities and security concerns of States parties. I would like to expand on this notion somewhat, however, by emphasizing issues of human rights. For most people in the world, security means healthy land, resources and body – not the presence of weapons. Global leaders do not have the right to take the security of others away so they can feel more secure themselves.

More than any other nation in the world, the Marshall Islands understands what nuclear war means. We experienced nuclear war in our country sixty-seven times – more radiation was released in the Marshall Islands than any other location on this planet. Needless to say, we are still suffering from the adverse consequences of nuclear weapons testing in the name of global security.

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Non-proliferation of weapons in the world is a critical goal of our nation because the non-proliferation of weapons also means the non-proliferation of the illness, forced relocation, environmental degradation, and profound disturbances of social, cultural, economic, and political systems. Unfortunately, we know this in the Marshall Islands because of our first-hand experiences with the effects of nuclear weapons. The nuclear era has affected us so profoundly in the Marshall Islands that it has even affected our language: our people had to develop new words after the atmospheric testing of nuclear weapons because we did not have words in our language to describe the gross abnormalities in our environment, our animals, and our bodies that began to appear after our exposure to radiation. Mr. President, the Marshall Islands would not wish this same fate on any other nations or peoples, this is why as a nation we have devoted ourselves to nuclear non-proliferation.

Mr. President,

My delegation calls on the United Nations to address the damage in its Trust Territory of the Pacific Islands (TTPI) from when the U.N. administrator detonated nuclear weapons. The termination of the trust territory relationship that my country once had with this austere body was based on the former administrator's reports that the damages and injuries from the testing program were minor, and limited in scope. We now know from declassified documents that this is not the case, and we urge this Conference to recommend to our former administrator that it fully address all damages and injuries resulting from the sixty-seven atmospheric atomic and thermonuclear weapons detonated on our islands. My delegation will push strongly for the inclusion of such language in the final report of this Conference.

The Marshall Islands welcomes the call by the Pacific Islands Forum leaders in 2004 for the United States to live up to its full obligations to provide fair and adequate compensation, including the full and final restoration of affected areas to economic productivity, and to ensure the safe resettlement of displaced populations. In addition, we also urge the nations that tested nuclear weapons in French Polynesia and Kiribati to take full responsibility for the impacts of their activities on the local people and our region's environment.

Mr. President,

While the Marshall Islands still suffers from the lingering consequences of radiation exposure, we are pleased to note areas where progress has been made. Today, there are fewer nuclear weapons and fewer States that possess them than there were thirty years ago. This success could not have been achieved without long-term cooperation among many States, including between the United States and the Russian Federation. Since 1970, the NPT has been improved, updated and extended.

I am also pleased to announce that my country has recently signed a Safeguards Agreement and Additional Protocol with the IAEA. The Marshall Islands also recognizes the importance of the Proliferation Security Initiative (PSI); the provisions of Security

Council Resolution 1540 (2004); and the Global Threat Reduction Initiative (GTRI) jointly coordinated by the United States and Russia.

Mr. President,

The Heads of State from the Pacific Islands have maintained their strong communal interest in the reduction and eventual elimination of nuclear weapons, and keeping the Pacific region free of environmental pollution. The Marshall Islands applauds the efforts of the Pacific Islands Forum to work with nuclear shipping States on the key issues of prevention, response, liability and compensation. The Marshall Islands remains concerned that the present international arrangements for liability and compensation do not adequately address the risks posed by the shipment of radioactive materials. We continue to seek assurances from the shipping States that in the event of an incident involving these shipments, the region will not be left to carry the resulting loss unsupported.

The 2000 NPT Review Conference took note of the concerns of Small Island Developing States and other coastal States with regard to the transportation of radioactive materials by sea. The 2005 Mauritius Strategy for the sustainable development of SIDS emphasized the need for the "further development and strengthening of international regulatory regimes" for such transport. My delegation welcomes opportunities to make progress on this issue, in cooperation with other SIDS.

Mr. President,

We recognize the right of NPT States parties to the development, research, production and use of nuclear energy for peaceful purposes. However, we are concerned about the use of this provision of the NPT (Article IV) as a justification for developing uranium enrichment and reprocessing capabilities which could be utilized for nuclear weapons production and proliferation. We join others in favoring restraints on the use of modern technologies for purposes that may be in contravention of non-proliferation commitments under the Treaty.

Mr. President,

The Marshall Islands shares the view that global security and proliferation challenges are as politically and technically complex now as they were during the Cold War. We have seen new and deadly forms of terrorism, black markets for nuclear materials, and instances in which States cheat on and even announce their withdrawal from the NPT. These are but some of the challenges we are facing in this month's Conference that pose a serious threat to the integrity of the NPT. We hope that States parties will unite and take this opportunity to take concrete steps to ensure that the Treaty truly serves its purpose.

Finally, Mr. President, I would like to raise the issue of education. As the former President of the College of the Marshall Islands, I established a Nuclear Institute program

to help Marshallese students and citizens understand more about our nation's collision with the Cold War. I believe that we have an obligation to improve citizens' understanding about nuclear weapons and their effects – particularly in areas where citizens have been adversely impacted by these weapons. I look forward to working with any other parties that might be interested in exploring issues related to education.

Thank you, Mr. President.

United Kingdom
Permanent Representation
to the
Conference on Disarmament

UK Statement
to the 2010 Non-Proliferation Treaty Review Conference

by
Ambassador John Duncan

Ambassador for Multilateral Arms Control and Disarmament

NEW YORK, 19 May 2010

Please check against delivery

UK progress towards the "13 practical steps for the systematic and progressive efforts to implement Article VI"

The Final Document of the 2000 Review Conference set out thirteen practical steps for the systematic and progressive efforts to implement Article VI of the NPT. The following table sets out the UK's progress to date against the Thirteen Steps towards nuclear disarmament.

1. The importance and urgency of signatures and ratifications, without delay and without conditions and in accordance with constitutional processes, to achieve the early entry into force of the Comprehensive Nuclear Test Ban Treaty.	The UK signed the Comprehensive Test Ban Treaty in 1996 and ratified it in 1998. We have called on those that have not yet done so to sign and ratify the treaty without delay.
2. A moratorium on nuclear weapon test explosions or any other nuclear explosions pending entry into force of that Treaty.	The UK has a voluntary moratorium in place; we have not carried out any nuclear weapon test explosion or any other nuclear explosion since 1991
3. The necessity of negotiations in the Conference on Disarmament on a non-discriminatory, multilateral and internationally and effectively verifiable treaty banning the production of fissile material for nuclear weapons or other nuclear explosive devices in accordance with the statement of the Special Coordinator in 1995 and the mandate contained therein, taking into consideration both nuclear disarmament and nuclear non-proliferation objectives. The Conference on Disarmament is urged to agree on a programme of work which includes the immediate commencement of negotiations on such a treaty with a view to their conclusion within five years.	The UK regards a Fissile Material Cut-Off Treaty as a priority, and has repeatedly called for the immediate start of negotiations at the Conference on Disarmament on the basis of the programme of work (CD/1864) adopted by consensus in 2009. The UK has a voluntary moratorium on the production of fissile material for nuclear weapons or other nuclear explosive devices, and has not produced fissile material for nuclear weapons or other nuclear explosive devices since 1995.
4. The necessity of establishing in the Conference on Disarmament an appropriate subsidiary body with a mandate to deal with nuclear disarmament. The Conference on Disarmament is urged to agree on a programme of work which includes the immediate establishment of such a body.	The UK supported the establishment of a working group on nuclear disarmament as part of the programme of work (CD/1864) adopted by consensus at the Conference on Disarmament in 2009 and calls upon the Conference on Disarmament to agree a programme of work for 2010 on that basis.
5. The principle of irreversibility to apply to nuclear disarmament, nuclear and other related arms control and reduction measures.	The UK has not reversed any of its nuclear disarmament measures and has reduced to a single delivery system, single warhead design, and single launch platform.
6. An unequivocal undertaking by the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament to which all States parties are committed under Article VI.	The UK has set out its unequivocal commitment to the goal of a world without nuclear weapons in national statements and multilateral declarations (including the 2009 L'Aquila G8 statement and UNSCR resolution 1887).
7. The early entry into force and full implementation of START II and the conclusion of START III as soon as possible while preserving and strengthening the ABM Treaty as a cornerstone of strategic stability and as a basis for further reductions of strategic offensive weapons, in accordance with its provisions.	Not applicable to the UK

8. The completion and implementation of the Trilateral Initiative between the United States of America, Russian Federation and the International Atomic Energy Agency.	Not applicable to the UK
9. Steps by all the nuclear-weapon States leading to nuclear disarmament in a way that promotes international stability, and based on the principle of undiminished security for all:	The UK hosted a conference in September 2009 for the P5 to discuss confidence building measures towards nuclear disarmament. The conference brought together nuclear weapons scientists as well as senior policy makers from the nuclear-weapon States for the first time to consider the confidence-building, verification and compliance challenges associated with achieving further progress towards disarmament and non-proliferation, and steps to address those challenges. The UK has also sponsored independent academic research into the conditions for a world without nuclear weapons and global security in a world with low numbers of nuclear weapons.
i) Further efforts by the nuclear-weapon States to reduce their nuclear arsenals unilaterally	The UK has reduced the number of operationally available warheads to fewer than 160. The explosive power of the UK's nuclear arsenal has been reduced by around 75% since the end of the Cold War.
ii) Increased transparency by the nuclear-weapon States with regard to the nuclear weapons capabilities and the implementation of agreements pursuant to Article VI and as a voluntary confidence-building measure to support further progress on nuclear disarmament.	The UK is transparent about its fissile materials holdings and operationally available warhead numbers. We have produced historical records of our defence holdings of both plutonium and highly enriched uranium.
iii) The further reduction of non-strategic nuclear weapons, based on unilateral initiatives and as an integral part of the nuclear arms reduction and disarmament process	The UK does not possess any non-strategic nuclear weapons.
iv) Concrete agreed measures to further reduce the operational status of nuclear weapons systems	The UK has significantly reduced the operational status of our nuclear weapons system. Normally only one Vanguard class submarine is on deterrent patrol at any one time. All of the UK's nuclear weapons are held on several days' notice to fire and are not targeted at any state.
v) A diminishing role for nuclear weapons in security policies to minimize the risk that these weapons ever be used and to facilitate the process of their total elimination	The UK has publicly stated that "we would only ever contemplate using nuclear weapons in extreme circumstances of self-defence or in defence of our allies". The UK's nuclear weapons are not designed for military use during conflict but instead to deter and prevent nuclear blackmail and acts of aggression against our vital interests that cannot be countered by other means. The UK stated its policy on negative security assurances in a formal letter to the Secretary-General of the UN in 1995 (noted in UN Security Council Resolution 984). In addition to this, the UK has signed and ratified the Nuclear Weapon Free Zone protocols in respect of Latin America and the Caribbean (Treaty of Tlatelolco), South Pacific (Treaty of Rarotonga) and Africa (Treaty of Pelindaba), giving treaty-based negative security assurances to almost one hundred countries.

vi) The engagement as soon as appropriate of all the nuclear-weapon States in the process leading to the total elimination of their nuclear weapons	The UK supports multilateral disarmament and has stated that we stand ready to include our nuclear arsenal in broader multilateral negotiations when it will be useful to do so.
10. Arrangements by all nuclear-weapon States to place, as soon as practicable, fissile material designated by each of them as no longer required for military purposes under IAEA or other relevant international verification and arrangements for the disposition of such material for peaceful purposes, to ensure that such material remains permanently outside of military programmes.	The UK has declared 4.4 tons of fissile material surplus to defence requirements, including 0.3 tonnes of weapons-grade plutonium, has placed this material under European Atomic Energy Community (EURATOM) safeguards and made it liable to inspection by the International Atomic Energy Agency. The UK also announced in 1998 that it would cease exercising its right to withdraw fissile material from safeguarded stocks for nuclear weapons.
11. Reaffirmation that the ultimate objective of the efforts of States in the disarmament process is general and complete disarmament under effective international control.	The UK subscribes to this principle and has a strong record of fulfilling its non-nuclear/general disarmament commitments.
12. Regular reports, within the framework of the NPT strengthened review process, by all States parties on the implementation of Article VI and paragraph 4 (c) of the 1995 Decision on "Principles and Objectives for Nuclear Non-Proliferation and Disarmament", and recalling the Advisory Opinion of the International Court of Justice of 8 July 1996.	The 2006 White Paper sets out the UK's nuclear doctrine and current posture. The UK provides regular reports in our national statements to NPT PrepComs and RevCons.
13. The further development of the verification capabilities that will be required to provide assurance of compliance with nuclear disarmament agreements for the achievement and maintenance of a nuclear-weapon-free world.	The UK is conducting research in this area at the Atomic Weapons Establishment through a trilateral project with Norway and VERTIC (a verification NGO) on the technical and non-technical aspects of verifying nuclear warhead dismantlement. Work includes warhead authentication, monitored storage, chain of custody issues and ensuring access to nuclear sites without compromising national security.

STATE RESPONSIBILITY

[Agenda item 3]

DOCUMENT A/CN.4/507 and Add. 1–4*

Third report on State responsibility, by Mr. James Crawford, Special Rapporteur

[*Original: English*]
[*15 March, 15 June, 10 and 18 July and 4 August 2000*]

CONTENTS

* Incorporating A/CN.4/507/Add.1/Corr.1, A/CN.4/507/Add.2/Corr.1 and 2 and A/CN.4/507/Add.3/Corr.1.

LIST OF TABLES

230. The Special Rapporteur has already foreshadowed that former article 40 (new art. 40 bis) should be placed at the beginning of this part.[439] If, as has been suggested, proposed article 40 bis is subdivided into two or three articles, they should be distributed as appropriate within the part. In what follows, the focus will be on the "injured State" as that term is proposed to be defined in article 40 bis.

231. In the first place, evidently, each injured State on its oWN account is entitled to invoke responsibility.[440] However a number of issues arise as to the modalities of and limits upon such invocation, and these are candidates for inclusion in a first general chapter of this part.[441] They include the following:

(*a*) The right of the injured State to elect the form of reparation (e.g. to prefer compensation to restitution);

(*b*) Minimum formal requirements for the invocation of responsibility (e.g. a demand in writing);

(*c*) Questions associated with the admissibility of claims (e.g. exhaustion of local remedies, nationality of claims);

(*d*) Limits on the rights of the injured State as concerns reparation (e.g. the *non ultra petita* rule, the rule against double recovery);

(*e*) Loss of the right to invoke responsibility.

These are dealt with in turn.

1. The right of the injured State to elect the form of reparation

232. In general, an injured State is entitled to elect as between the available forms of reparation. Thus it may prefer compensation to the possibility of restitution, as Germany did in the *Chorzów Factory* case,[442] or as Finland eventually chose to do in its settlement of the case concerning the *Great Belt*.[443] Or it may content itself with declaratory relief, generally or in relation to a particular aspect of its claim. In the first reading text, the right to elect as between the forms of reparation was accepted. It was reflected in the formula "The injured State has the right ...". That formula is not proposed for the various articles which embody the principle of full reparation. For reasons given above, these should be expressed in terms of the obligation(s) of the responsible State.[444] But in any event it is desirable to spell out the right of election expressly, the more so since the position of third States interested in (but not specifically injured by) the breach will be affected by any valid election of one remedy rather than another by an injured State.

233. The question whether there are any limitations on the right of election of the injured State has already been referred to.[445] There are certainly cases where a State could not, as it were, pocket the compensation and walk away from an unresolved situation, especially one involving the life or liberty of individuals or the entitlement of a people to their territory or to self-determination. However, such situations on analysis seem to concern questions of cessation, or of the continuing performance of obligations, and not questions of reparation properly so called. Reparation is concerned with the wiping out of *past* injury and harm. Insofar as there are continuing obligations the performance of which are not simply matters for the two States concerned, those States may not be able to resolve the situation by a settlement, just as an injured State may not be able on its own to absolve the responsible State from its continuing obligations. These refinements can, however, be reflected in the language of the text and referred to in the commentary. By analogy with article 29 (Consent), it is sufficient to refer to a "valid" election by an injured State in favour of one of the forms of reparation rather than another, leaving the conditions of validity to be determined by general international law. Under the draft articles, such an election should be given effect.

2. Formal requirements for the invocation of responsibility

234. Although the secondary legal relationship of responsibility may arise by operation of law on the commission of an internationally wrongful act, in practice it is necessary for any other interested State(s) to respond, if they wish to seek cessation or reparation. Responses can take a variety of forms, from an unofficial and confidential reminder of the need to fulfil the obligation, through formal protest, consultations, etc. Moreover, the failure of an injured State which has notice of a breach to respond may have legal consequences, including even the eventual loss of the right to invoke responsibility by waiver or extinctive prescription.

235. There is an analogy with article 65 of the 1969 Vienna Convention, which provides that:

> 1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.
>
> 2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

[439] See paragraphs 9 and 117–119 above.

[440] See paragraphs 102 and 107 above. See paragraphs 279-281 below for consideration of cases where responsibility is invoked by more than one injured State in respect of the same act.

[441] The 1969 Vienna Convention deals with analogous issues separately in relation to each particular subject. For example, the procedure regarding reservations is dealt with in article 23, following the articles dealing with the formulation of reservations and their legal effect. Part V, section 1, brings together a number of provisions dealing with the invocation of grounds for invalidity, suspension or termination of a treaty (see, for example, articles 44 (Separability of treaty provisions) and 45 (Loss of a right to invoke a ground for invalidating ... a treaty)). Further issues of procedure are dealt with in section 4 of the same part, and section 5 deals with the consequences of such invocation.

[442] See paragraph 23 and footnote 47 above.

[443] See paragraphs 136–137 and footnote 254 above; and for the terms of the settlement, Koskenniemi, "L'affaire du passage par le Grand-Belt", especially pp. 940–947.

[444] See paragraphs 25–26 above.

[445] See paragraph 134 above.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

236. Care needs to be taken not to overformalize the procedure, or to imply that the normal consequence of the non-performance of an obligation is the lodging of a statement of claim. In many cases quiet diplomacy may be more effective in ensuring performance, and even reparation. Nonetheless an injured or interested State is entitled to respond to the breach and the first step should be to call the attention of the responsible State to the situation, and to call on it to take appropriate steps to cease the breach and to provide redress.

237. It is not the function of the draft articles to specify in detail the form which an invocation of responsibility should take. In practice claims of responsibility are raised at different levels of government, depending on their seriousness and on the general relations between the States concerned. Moreover, ICJ has sometimes been satisfied with rather informal modes of invocation. For example, in the case concerning *Certain Phosphate Lands in Nauru*, Australia argued that Nauru's claim was inadmissible because "it ha[d] not been submitted within a reasonable time".[446] That raised two issues: first, when the claim had actually been submitted; secondly, whether the lapse of time before its submission (or, indeed, the subsequent lapse of time before Nauru had done anything effective to pursue its claim) was fatal. The Court dismissed the objection. It referred to the fact that the claim had been raised, and not settled, prior to Nauru's independence in 1968, and to "press reports" that the claim had been mentioned by the Nauruan Head Chief on the day of declaring independence, as well as, inferentially, in subsequent correspondence and discussions with Australian ministers. However the Court also noted that:

> It was only on 6 October 1983 that the President of Nauru wrote to the Prime Minister of Australia requesting him to "seek a sympathetic reconsideration of Nauru's position".[447]

The Court summarized the communications between the parties as follows:

> The Court ... takes note of the fact that Nauru was officially informed, at the latest by letter of 4 February 1969, of the position of Australia on the subject of rehabilitation of the phosphate lands worked out before 1 July 1967. Nauru took issue with that position in writing only on 6 October 1983. In the meantime, however, as stated by Nauru and not contradicted by Australia, the question had on two occasions been raised by the President of Nauru with the competent Australian authorities. The Court considers that, given the nature of relations between Australia and Nauru, as well as the steps thus taken, Nauru's Application was not rendered inadmissible by passage of time.[448]

It seems from this passage that the Court did not attach much significance to formalities. It was sufficient that the respondent State was aware of the claim as a result of communications from the claimant, even if the evidence of those communications took the form of press reports of speeches or meetings rather than of formal diplomatic correspondence. But despite its flexibility and its reliance on the context provided by the relations between the two States concerned, the Court does seem to have had regard to the fact that the claimant State had effectively notified the respondent State of the claim.

238. In the Special Rapporteur's view, this approach is correct as a matter of principle. There must be at least some minimum requirement of notification by one State against another of a claim of responsibility, so that the responsible State is aware of the allegation and in a position to respond to it (e.g. by ceasing the breach and offering some appropriate form of reparation). No doubt the precise form the claim takes will depend on the circumstances. But the draft articles should at least require that a State invoking responsibility should give notice thereof to the responsible State. In doing so, it would be normal to specify what conduct on its part is required by way of cessation of any continuing wrongful act, and what form any reparation sought should take. In addition, since the normal mode of inter-State communication is in writing, it seems appropriate to require that the notice of claim be in writing.[449]

3. Certain questions as to the admissibility of claims

239. If a State having protested at a breach is not satisfied by any response made by the responsible State, it is entitled to invoke the responsibility of that State by seeking such measures of cessation, reparation, etc. as are provided for in part two. Presumably the draft articles should say so, by analogy with articles 23, paragraphs 2–4, and 65, of the 1969 Vienna Convention. The question is whether any provision in part two bis should address issues of the admissibility of claims of responsibility.

240. In general the draft articles are not concerned with questions of the jurisdiction of international courts and tribunals, or of the conditions for the admissibility of cases. Rather they define the conditions for establishing the international responsibility of States, and for the invocation of that responsibility by States. Thus it is not the function of the draft articles to deal with such questions as the requirement for exhausting other means of peaceful settlement before commencing proceedings, or such doctrines as *lis alibi pendens* or *electa una via* as they may affect the jurisdiction of one international tribunal over another.[450] By

[446] *I.C.J. Reports 1992* (see footnote 307 above), p. 253, para. 31.

[447] Ibid., p. 254, para. 35.

[448] Ibid., pp. 254–255, para. 36.

[449] See the 1969 Vienna Convention, arts. 23 (reservations, express acceptances of reservations and objections to reservations "must be formulated in writing"), and 67 (notification of invalidity, termination or withdrawal from a treaty must be in writing).

[450] For a discussion of the range of considerations affecting jurisdiction and admissibility of international claims before courts, see Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale: étude des notions fondamentales de procédure et des moyens de leur mise en œuvre*; Fitzmaurice, *The Law and Procedure of the International Court of Justice*, especially vol. II, chap. VII,

(*Continued on next page*)

Document:-

A/CN.4/SR.2682

Summary record of the 2682nd meeting

Topic:

State responsibility

Extract from the Yearbook of the International Law Commission:-

2001, vol. I

change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation."

37. The Drafting Committee had amended the title of the article in order to reflect its content more faithfully. It had taken the view that the definition of the injured State, although not expressly defined in the text, was inferred from the content of the article. The new title "Invocation of responsibility by an injured State", which was that of former article 44, was more fitting for article 43.

38. Bearing in mind the new title of article 43, the Drafting Committee had amended that of article 44 to read: "Notice of claim by an injured State", which also reflected more closely the content of the provision and would be more in line with article 45 [22] (Admissibility of claims). It had maintained paragraph 1 as it stood, since it had not prompted any objections or proposed amendments by Governments, other than one comment on the meaning of "invocation", which had already been answered. The Committee had studied the suggestion by a Government that all the remedies available to an injured State should be listed in paragraph 2. It had added the words "in accordance with the provisions of Part Two" at the end of subparagraph (*b*) to make it quite clear that an injured State had all the remedies provided for in Part Two. The Committee had also considered a proposal to expand paragraph 2 by adding another subparagraph on the nature and characteristics of the claim. Nevertheless, in the light of the view expressed during previous discussions that the article should be as flexible as possible, it had believed that it would be unnecessary to elaborate on the characteristics of the claim in the body of the text, but that that could be done in the commentary.

39. As for article 45 [22], the Drafting Committee had studied a proposal by a Government that the words "by an injured State" should be inserted in the *chapeau* after the words "it may not be invoked". It had decided not to do so, for those words would be inconsistent with the scope of the article, which applied to both injured States and States other than the injured State which were entitled to invoke responsibility. With regard to subparagraph (*a*), it had first examined a proposal by a Government to return to the rule on nationality of claims contained in article 22 adopted on first reading. It had also taken note of the fact that the issue of nationality essentially related to the admissibility of claims and had decided that, as the new subparagraph (*a*) introduced some flexibility, it would not be appropriate to revert to the previous text. It had then considered the comment of one Government that the "nationality of claims" was an unfamiliar concept in French legal terminology and that the expression should be redrafted to refer to an applicable rule relating to nationality in the context of the exercise of diplomatic protection. The Committee had decided to retain the text as it stood, even in the French version. It had recalled that the term "nationality of claims" had been used in 1949 by ICJ in the advisory opinion that it had delivered in French and English in the *Reparation for Injuries* case, with the French text being the official text. The Committee had also noted that the nationality of claims rule did not apply only in the field of diplomatic protection. The Committee had made no amendments to subparagraph (*b*), since Governments had generally endorsed it.

40. The title of article 46 (Loss of the right to invoke responsibility) had presented problems for some Drafting Committee members who would have preferred the word "renunciation" to the word "loss" (of a right) in English. The Committee had made that change in the French version, but had retained the English title as it stood, since it considered the word "loss" better than the word "renunciation".

41. With regard to subparagraph (*a*), the Drafting Committee had examined the proposals by some Governments to exclude the ability to waive a claim arising from a breach of a peremptory norm or an *erga omnes* obligation. It had felt that, in the context of chapter V of Part One (Circumstances precluding wrongfulness), the word "validly" referred to both the procedural and the substantive validity of the waiver of the claim. In that article, the Committee had been unable to settle the question of the circumstances in which a claim relating to a breach of an obligation under a peremptory norm could be waived, for the reasons already explained when introducing article 42, paragraph 2. The Committee had likewise considered a suggestion by one Government that the word "validly" should be deleted, since it was redundant. It had thought it essential to uphold the principle that a claim had been validly renounced, in order to take account of situations in which an injured State might waive its claim under duress or coercion, because such renunciation should not be regarded as a sufficient waiver. The Committee had also studied the proposal from one Government to delete the words "in an unequivocal manner", which might hamper the application of the article. It had noted that the expression was not strictly necessary and that the adverb "validly" rendered the idea adequately. It had therefore deleted the expression and agreed to explain the point in the commentary. The Committee had maintained subparagraph (*b*) without any changes, since no Government had submitted any comments on it.

42. Taking its cue from a proposal by the French Government, the Drafting Committee had amended the title of article 47 to read: "Plurality of injured States", which was, in its opinion, more consistent with the content of the article itself. The article had been generally accepted by Governments. The Committee had wondered whether the article should specify that States could invoke responsibility collectively and separately. It had, however, found that the word "separately" had been expressly included in the text to show that States could invoke responsibility individually and that it went without saying that injured States could act together. In such circumstances, however, each State would be acting in its own right and not on behalf of any group or community. The provision did not deal with the issue of joint actions, which was governed by a separate body of law. That point could be explained in the commentary.

43. The Drafting Committee had amended the title of article 48 to read: "Plurality of responsible States". In paragraph 1, it had first looked into the question raised by a Government whether the article recognized the principle of joint and several responsibility. It had noted that the general rule in international law was that a State bore responsibility for the wrongful acts it had committed and that article 48 reflected the rule well. The commentary would clearly explain that that provision must not be

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Report of the Commission to the General Assembly on the work of its fifty-third session

UNITED NATIONS
New York and Geneva, 2007

considered for that purpose as making up a community of States of a functional character.

(12) *Subparagraph* (b) (i) stipulates that a State is injured if it is "specially affected" by the violation of a collective obligation. The term "specially affected" is taken from article 60, paragraph (2) (*b*), of the 1969 Vienna Convention. Even in cases where the legal effects of an internationally wrongful act extend by implication to the whole group of States bound by the obligation or to the international community as a whole, the wrongful act may have particular adverse effects on one State or on a small number of States. For example a case of pollution of the high seas in breach of article 194 of the United Nations Convention on the Law of the Sea may particularly impact on one or several States whose beaches may be polluted by toxic residues or whose coastal fisheries may be closed. In that case, independently of any general interest of the States parties to the Convention in the preservation of the marine environment, those coastal States parties should be considered as injured by the breach. Like article 60, paragraph (2) (*b*), of the 1969 Vienna Convention, subparagraph (*b*) (i) does not define the nature or extent of the special impact that a State must have sustained in order to be considered "injured". This will have to be assessed on a case-by-case basis, having regard to the object and purpose of the primary obligation breached and the facts of each case. For a State to be considered injured, it must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed.

(13) In contrast, *subparagraph* (b) (ii) deals with a special category of obligations, the breach of which must be considered as affecting *per se* every other State to which the obligation is owed. Article 60, paragraph 2 (*c*), of the 1969 Vienna Convention recognizes an analogous category of treaties, viz. those "of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations". Examples include a disarmament treaty,[674] a nuclear-free zone treaty, or any other treaty where each party's performance is effectively conditioned upon and requires the performance of each of the others. Under article 60, paragraph 2 (*c*), any State party to such a treaty may terminate or suspend it in its relations not merely with the responsible State but generally in its relations with all the other parties.

(14) Essentially, the same considerations apply to obligations of this character for the purposes of State responsibility. The other States parties may have no interest in the termination or suspension of such obligations as distinct from continued performance, and they must all be considered as individually entitled to react to a breach. This is so whether or not any one of them is particularly affected; indeed they may all be equally affected, and none may have suffered quantifiable damage for the purposes of article 36. They may nonetheless have a strong interest in cessation and in other aspects of reparation, in particular restitution. For example, if one State party to the Antarctic Treaty claims sovereignty over an unclaimed area of Antarctica contrary to article 4 of that Treaty, the other States parties should be considered as injured thereby and as entitled to seek cessation, restitution (in the form of the annulment of the claim) and assurances of non-repetition in accordance with Part Two.

(15) The articles deal with obligations arising under international law from whatever source and are not confined to treaty obligations. In practice, interdependent obligations covered by subparagraph (*b*) (ii) will usually arise under treaties establishing particular regimes. Even under such treaties it may not be the case that just any breach of the obligation has the effect of undermining the performance of all the other States involved, and it is desirable that this subparagraph be narrow in its scope. Accordingly, a State is only considered injured under subparagraph (*b*) (ii) if the breach is of such a character as radically to affect the enjoyment of the rights or the performance of the obligations of all the other States to which the obligation is owed.

Article 43. Notice of claim by an injured State

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.

2. The injured State may specify in particular:

(*a*) the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;

(*b*) what form reparation should take in accordance with the provisions of Part Two.

Commentary

(1) Article 43 concerns the modalities to be observed by an injured State in invoking the responsibility of another State. The article applies to the injured State as defined in article 42, but States invoking responsibility under article 48 must also comply with its requirements.[675]

(2) Although State responsibility arises by operation of law on the commission of an internationally wrongful act by a State, in practice it is necessary for an injured State and/or other interested State(s) to respond, if they wish to seek cessation or reparation. Responses can take a variety of forms, from an unofficial and confidential reminder of the need to fulfil the obligation through formal protest, consultations, etc. Moreover, the failure of an injured State which has notice of a breach to respond may have legal consequences, including even the eventual loss of the right to invoke responsibility by waiver or acquiescence: this is dealt with in article 45.

(3) Article 43 requires an injured State which wishes to invoke the responsibility of another State to give notice of its claim to that State. It is analogous to article 65 of the 1969 Vienna Convention. Notice under article 43 need not

[674] The example given in the commentary of the Commission to what became article 60: *Yearbook... 1966*, vol. II, p. 255, document A/6309/Rev.1, para. (8).

[675] See article 48, paragraph (3), and commentary.

be in writing, nor is it a condition for the operation of the obligation to provide reparation. Moreover, the requirement of notification of the claim does not imply that the normal consequence of the non-performance of an international obligation is the lodging of a statement of claim. Nonetheless, an injured or interested State is entitled to respond to the breach and the first step should be to call the attention of the responsible State to the situation, and to call on it to take appropriate steps to cease the breach and to provide redress.

(4) It is not the function of the articles to specify in detail the form which an invocation of responsibility should take. In practice, claims of responsibility are raised at different levels of government, depending on their seriousness and on the general relations between the States concerned. In the *Certain Phosphate Lands in Nauru* case, Australia argued that Nauru's claim was inadmissible because it had "not been submitted within a reasonable time".[676] The Court referred to the fact that the claim had been raised, and not settled, prior to Nauru's independence in 1968, and to press reports that the claim had been mentioned by the new President of Nauru in his independence day speech, as well as, inferentially, in subsequent correspondence and discussions with Australian Ministers. However, the Court also noted that:

> It was only on 6 October 1983 that the President of Nauru wrote to the Prime Minister of Australia requesting him to "seek a sympathetic reconsideration of Nauru's position".[677]

The Court summarized the communications between the parties as follows:

> The Court ... takes note of the fact that Nauru was officially informed, at the latest by letter of 4 February 1969, of the position of Australia on the subject of rehabilitation of the phosphate lands worked out before 1 July 1967. Nauru took issue with that position in writing only on 6 October 1983. In the meantime, however, as stated by Nauru and not contradicted by Australia, the question had on two occasions been raised by the President of Nauru with the competent Australian authorities. The Court considers that, given the nature of relations between Australia and Nauru, as well as the steps thus taken, Nauru's Application was not rendered inadmissible by passage of time.[678]

In the circumstances, it was sufficient that the respondent State was aware of the claim as a result of communications from the claimant, even if the evidence of those communications took the form of press reports of speeches or meetings rather than of formal diplomatic correspondence.

(5) When giving notice of a claim, an injured or interested State will normally specify what conduct in its view is required of the responsible State by way of cessation of any continuing wrongful act, and what form any reparation should take. Thus, *paragraph 2* (a) provides that the injured State may indicate to the responsible State what should be done in order to cease the wrongful act, if it is continuing. This indication is not, as such, binding on the responsible State. The injured State can only require the responsible State to comply with its obligations, and the legal consequences of an internationally wrongful act are not for the injured State to stipulate or define. But it may be helpful to the responsible State to know what would satisfy the injured State; this may facilitate the resolution of the dispute.

(6) *Paragraph 2* (b) deals with the question of the election of the form of reparation by the injured State. In general, an injured State is entitled to elect as between the available forms of reparation. Thus, it may prefer compensation to the possibility of restitution, as Germany did in the *Factory at Chorzów* case,[679] or as Finland eventually chose to do in its settlement of the *Passage through the Great Belt* case.[680] Or it may content itself with declaratory relief, generally or in relation to a particular aspect of its claim. On the other hand, there are cases where a State may not, as it were, pocket compensation and walk away from an unresolved situation, for example one involving the life or liberty of individuals or the entitlement of a people to their territory or to self-determination. In particular, insofar as there are continuing obligations the performance of which are not simply matters for the two States concerned, those States may not be able to resolve the situation by a settlement, just as an injured State may not be able on its own to absolve the responsible State from its continuing obligations to a larger group of States or to the international community as a whole.

(7) In the light of these limitations on the capacity of the injured State to elect the preferred form of reparation, article 43 does not set forth the right of election in an absolute form. Instead, it provides guidance to an injured State as to what sort of information it may include in its notification of the claim or in subsequent communications.

Article 44. Admissibility of claims

The responsibility of a State may not be invoked if:

(*a*) the claim is not brought in accordance with any applicable rule relating to the nationality of claims;

(*b*) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

Commentary

(1) The present articles are not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the conditions for the admissibility of cases brought before such courts or tribunals. Rather, they define the conditions for establishing the international responsibility of a State and for the invocation of

[676] *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 253, para. 31.

[677] *Ibid.*, p. 254, para. 35.

[678] *Ibid.*, pp. 254–255, para. 36.

[679] As PCIJ noted in the *Factory at Chorzów, Jurisdiction* (see footnote 34 above), by that stage of the dispute, Germany was no longer seeking on behalf of the German companies concerned the return of the factory in question or of its contents (p. 17).

[680] In the *Passage through the Great Belt (Finland v. Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 12, ICJ did not accept Denmark's argument as to the impossibility of restitution if, on the merits, it was found that the construction of the bridge across the Great Belt would result in a violation of Denmark's international obligations. For the terms of the eventual settlement, see M. Koskenniemi, "L'affaire du passage par le Grand-Belt", *Annuaire français de droit international*, vol. 38 (1992), p. 905, at p. 940.

United Nations General Assembly High Level Meeting on Nuclear Disarmament
Statement on behalf of France, the United Kingdom and the United States
by Minister Alistair Burt
Parliamentary Under Secretary of State
United Kingdom of Great Britain and Northern Ireland
26 September 2013

Mr President,

I am taking the floor on behalf of the governments of France and the United States, and my own government, the United Kingdom.

Step-by-Step Process

Mr President, Our three nations would like to see this High Level Meeting (HLM) reflect the principle enshrined in the Nuclear Non-Proliferation Treaty (NPT) that the undertaking of effective nuclear disarmament measures is a shared responsibility of all States Parties. Nuclear weapon states and non-nuclear weapon states must cooperate to create the conditions and environment in which the goal of disarmament and non-proliferation can be pursued with respect to the principles of irreversibility, verifiability, and transparency.

We share the view that a strong and effective non-proliferation regime is an essential condition for achieving disarmament, while progress towards disarmament enhances confidence in non-proliferation efforts. Success in halting the proliferation of nuclear weapons is among the international conditions that will further step by step progress toward the ultimate goal of nuclear disarmament.

For our countries, a practical step-by-step process is the only way to make real progress in our disarmament efforts while upholding global security and stability – there are no shortcuts. There is no other way to achieve a world without nuclear weapons outside of methodical and steady progress. Following this process, we are seeking to advance negotiation of an Fissile Material Cut-Off Treaty and entry into force of the Comprehensive Test Ban Treaty (CTBT). All NPT States Parties concur that the next priority step toward nuclear disarmament in the multilateral context is an FMCT.

Shared Responsibility

Mr President, We cannot consider disarmament in isolation from our other efforts to combat global dangers presented by Weapons of Mass Destruction, which include proliferation and terrorism.

We are committed to strengthening all three pillars of the NPT: disarmament, non-proliferation, and the peaceful uses of nuclear energy. They are important in their own right, and complementary. All states should contribute to disarmament, not only through the pursuit of disarmament steps themselves, but also by helping to create the conditions for disarmament.

In order to uphold the integrity of the non-proliferation regime, we must address the issue of non-compliance by a few states with their obligations, while recognizing the right of compliant NPT parties to the peaceful uses of nuclear energy.

Initiatives and Next Steps

Mr President, Our three nations are breaking new ground by engaging in high-priority, regularized dialogue among nuclear weapons states on disarmament-related issues to an unprecedented extent.

We wish to recall the unprecedented progress and efforts made by the nuclear-weapon States in nuclear arms reduction, disarmament, confidence-building and transparency, and note with satisfaction that stocks of nuclear weapons are now at far lower levels than at any time in the past half-century.

On Start, when fully implemented, the Treaty between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms (the New START Treaty) will result in the lowest number of deployed nuclear weapons in the United States and Russia since the 1950s. We believe it to be a significant step in the implementation of Article VI of the NPT, and by promoting mutual trust, openness, predictability, and cooperation can help build a stronger basis for addressing the threats of nuclear proliferation and nuclear terrorism.

We recall and welcome the reductions by my own country (the UK) in the numbers of warheads and missiles on board its nuclear deterrent submarines which will reduce the requirement for operationally available warheads to no more than 120 and a reduction in our overall nuclear weapon stockpile to no more than 180.

We also welcome the achievement by France of its objectives resulting in the reduction by one-third of the number of nuclear weapons, missiles and aircraft of the airborne component and leading to an arsenal totaling today fewer than 300 nuclear weapons.

We continue to meet at all appropriate levels on nuclear issues to further promote dialogue and mutual confidence to advance our NPT-related goals. We intend to report to the Third Session of the Preparatory Committee in 2014 as we have done in previous meetings, and as set out in Action 5 of the 2010 NPT Action Plan.

Comprehensive Nuclear Test Ban Treaty

Mr President, The entry into force of the CTBT remains a top priority. We are convinced that the national security of all states will be enhanced when the CTBT enters into force. Pending its entry into force we continue to call on all states to uphold their national moratoria on nuclear weapons test explosions and all other nuclear explosions and we encourage the remaining Annex 2 states, and all other states, to move forward toward ratification without waiting for similar action by other states.

Support for a Fissile Materials Cutoff Treaty

Mr President, This High Level Meeting provides an opportunity to reaffirm the objective of beginning negotiations on an FMCT within the Conference on Disarmament on the basis of CD/1299 and the

mandate contained therein. We are profoundly disappointed that the Conference continues to be prevented from agreeing on a comprehensive program of work, and continue to support the immediate start of negotiations on an FMCT. In this vein, We hope that the Governmental Group of Experts (GGE) to be convened in 2014 and 2015 will help spur negotiation on an FMCT in the CD.

Other Approaches to Nuclear Disarmament

Finally, Mr President, a few words on the other approaches to Nuclear Disarmament.

We fully understand the serious consequences of nuclear weapon use and will continue to give the highest priority to avoiding such a contingency. Our efforts in disarmament, non-proliferation, and nuclear security are aimed at avoiding the use of nuclear weapons.

We believe that there are already sufficient forums, specified by the UN Special Session on Disarmament in 1978, for discussion on these issues, including: the UNGA First Committee, the UN Disarmament Commission, and the Conference on Disarmament. And while we are encouraged by the increased energy and enthusiasm around the nuclear disarmament debate, we regret that this energy is being directed toward initiatives such as this High-Level Meeting, the humanitarian consequences campaign, the Open-Ended Working Group and the push for a Nuclear Weapons Convention.

We strongly believe that this energy would have much better effect if channeled toward existing processes, helping to tackle blockages and making progress in the practical, step-by-step approach that includes all states that possess nuclear weapons. This includes taking steps to implement the NPT Action Plan that was agreed by consensus in 2010. This roadmap of actions offers the best route for making progress on multilateral nuclear disarmament. We remain committed to this comprehensive, step-by-step approach to nuclear disarmament and will carry on working with civil society and all UN member states toward this end.

Mr President, There is no path to a world without nuclear weapons other than daily hard work on concrete steps toward that end. This requires a broad improvement in the international security environment and the steady pursuit of practical steps, with each step building on the last. We remain concerned that these efforts will shift the focus away from the serious threats posed by the non-compliance and proliferation challenges facing us.

Thank you, Mr President.




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Preamble, Friday, 8th November, 1957

[465]

The House met at Eleven o'clock

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PRAYERS

[Mr. SPEAKER in the Chair]

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NEW WRIT

For Leicester, South-East, in the room of Captain the right honourable Charles Waterhouse, M.C. (Manor of Northstead).-[Mr. Edward Heath.]

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ATOMIC ENERGY ESTABLISHMENT, WINDSCALE (ACCIDENT)

The Prime Minister (Mr. Harold Macmillan): With permission, I will make a statement on the accident at Windscale. I have now had the opportunity of assessing the Report of Sir William Penney's Committee. This Report was made to the Atomic Energy Authority to assist them in discharging their responsibility for the management of the Windscale Establishment. I am anxious to give the House and the country the fullest possible information about the accident and the measures taken to deal with its consequences. For this purpose, a White Paper has been presented to Parliament and will be available today. It contains a less technical version, prepared by Sir William Penney's Committee, of their Report on the cause of the accident and the measures taken to deal with it. The White Paper also contains the Committee's Report on the measures taken to protect those employed at the plant and the general public, together with the comments thereon of a special independent Committee set up by the Medical Research Council. I informed the House on 29th October that I had asked for these comments. This accident occurred during a routine maintenance operation, which is described in the While Paper. It was, of course, a serious matter, and caused disturbance to a large number of people. Hon. Members will, however, wish to consider this matter in a proper perspective. In the last twelve years, we in Britain have built up this new industry without a single [466]serious injury caused by radiation, and there is no evidence that this accident has done any significant harm to any person, animal or property. That this was so is due to the Atomic Energy Authority's general care for health and safety, to the general effectiveness of the safeguards built into the Windscale piles, and to the courage, energy and resourcefulness of those at the installation after the accident. I believe the House will wish to join me in paying tribute not only to their efforts, but also to the quiet confidence and absence of alarm of the general population in the Windscale area. What is important now is that the lessons to be learned from the accident should be fully digested and applied; on the one hand, to do all that is possible to ensure that there will never again be a similar occurrence; and, on the other, to see how the organisation of the Authority can be improved in the light of the Windscale experience. To this end Sir Alexander Fleck has, at my request, agreed to evaluate the technical data derived from the accident and to recommend what measures are needed to remedy the deficiencies in organisation to which the Authority have called my attention. The terms of reference and constitution of three committees, of which he will be the Chairman, are set out in the White Paper. Lastly, I can give the House the reassurance that the accident at Windscale has no bearing on the safety of the nuclear power stations being built for the Electricity Authorities. The reasons for this are fully set out in a separate Annex to the White Paper.

Mr. Gaitskell: I agree with the Prime Minister that it is fortunate that this accident did not have more serious consequences, and I would wish on behalf of my right hon. and hon. Friends to join with him in paying our tribute to the care taken by the Authority and to the bearing of the population in the area. I think the House will wish to study the Report before engaging in any detailed discussions this morning, and I would only ask one question. I understand that Sir Alexander Fleck is to be chairman of three committees. Does the Prime Minister envisage that these committees will produce reports, and, if so, will the reports be published?

[467]

The Prime Minister: I am sure that the committees will produce reports. I will certainly carefully consider the question of their publication.

Mr. Grimond: Is it not a remarkable fact that no significant harm has, apparently, been done to any person, animal or property either by this accident or any other accident in the industry? Nevertheless, presumably there was some slight damage caused to a considerable number of people, and I wonder whether the right hon. Gentleman can make any statement about their position in regard to compensation. Has anything been decided as to compensation payable?

The Prime Minister: Yes, Sir; of course, the Authority will accept responsibility.

Mr. Robens: In view of the tremendous importance of the export value of atomic power stations to this country, does the White Paper underline, in perhaps greater detail, what I understood the right hon. Gentleman to say this morning, that there could be no possibility of an accident of this character from the atomic power stations we are building at the present time?

The Prime Minister: I thought that that was a very important point, and I am grateful to the right hon. Gentleman for underlining it again. I have had prepared a technical appreciation which sets out, in a separate annex to the White Paper, the reasons why this type of military installation, which this is, has no connection whatever with the civil nuclear power stations where accidents of this type could not occur because of the entirely different character of the two processes.

Mr. Harold Davies: I apologise to the right hon. Gentleman for missing just the first few phrases of his statement. Is it not correct that an unusual experiment was taking place at Windscale and that the people who understood it and knew what was happening were not anywhere near the place and had to be sent for? In view of this, in order to assuage public opinion if anything like this should happen in the future, will the right hon.[468]Gentleman consider setting up a completely independent committee of worthy scientific and other people who could be called on to investigate and give the public facts as well as those which are given by official representatives and scientists of the Government?

The Prime Minister: I can deal with both parts of that supplementary question. The accident occurred during a routine maintenance operation. The particular operation is called a Wigner release. I have asked Sir William Penney to try to describe, in part of the White Paper, in language which might be understood, precisely what this operation is. It is one which is done at intervals. There was no particular or special experimentation for either civil or military purposes being done at the time of this release. I think that all this will really be easier to understand when hon. Members have had an opportunity of reading the White Paper, which is quite long and really tries to give as complete a picture as we can of all the relevant facts. With regard to the second part of the hon. Gentleman's question, I am very grateful, as, I am sure, is the whole House and the country, to Sir Alexander Fleck for undertaking this work. On almost every aspect of it, he is the most suitable man, but I must frankly state that, on the purely highly technical atomic aspects of it, I have chosen Sir Alexander because I think that he has sufficient scientific knowledge of a general character. One of the difficulties of meeting the point made by the hon. Gentleman is that all the people who really are the experts in this are, in one way or another, employed under the Atomic Energy Authority.

BILL PRESENTED

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PUBLIC WORKS LOANS

Bill to grant money for the purpose of certain local loans out of the Local Loans Fund, and for other purposes relating to local loans, presented by Mr. Powell; read the First time; to be read a Second time upon Monday next and to be printed. [Bill 7.]

ORDERS OF THE DAY

QUEEN'S SPEECH

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DEBATE ON THE ADDRESS

[FOURTH DAY]

Order read for resuming adjourned debate on Question [5th November]: That an humble Address be presented to Her Majesty, as follows: Most Gracious Sovereign, We, Your Majesty's most dutiful and loyal subjects, the Commons of the United Kingdom of Great Britain and Northern Ireland, in Parliament assembled, beg leave to offer our humble thanks to Your Majesty for the Gracious Speech which Your Majesty has addressed to both Houses of Parliament.-[Lady Tweedsmuir.]

Question again proposed.

11.15 a.m.

The Secretary of State for Foreign Affairs (Mr. Selwyn Lloyd): In the Gracious Speech, Her Majesty referred, first, to the visit which the President of the Italian Republic is to pay to this country next May. I think that one of the most satisfactory developments in the post-war era has been the steady improvement in our relations with Italy. We are firm friends, and our two Governments work closely together with mutual confidence and understanding. We look forward very much to the visit of the President as setting the seal upon this relationship. Several references were made also in earlier speeches to the second paragraph in the Gracious Speech referring to the visit paid by Her Majesty the Queen and Prince Philip to Canada and the United States. I was not present in Canada, but I had the honour of attending Her Majesty in the United States and I was, therefore, able to witness at first hand the warmth of the welcome she received. I feel that I should just say to the House, of my own knowledge, that the visit was an outstanding success and a great personal triumph for Her Majesty and His Royal Highness, and I believe that it was a notable

contribution to good relations between our two countries for wihch we should all be deeply grateful. During her visit Her Majesty the Queen went to the United Nations and addressed a crowded General Assembly[470] there. I want to begin by saying something about the United Nations. In the speech which I made there during the General Debate, I referred to the Secretary-General's introduction to the Annual Report on the Work of the Organisation, June, 1956-June, 1957. In that introduction, there is a passage dealing with the rôle of the United Nations, which deserves careful study by us all. It is a very fair assessment of the way in which the United Nations is developing and should develop. The Secretary-General points out what the United Nations is not, that the Charter does not endow it with the attributes of a super-State or of a body active outside the framework of decisions of member Governments. The General Assembly is not a parliament of elected individual members, and the limits within which its power can develop are set by the balance of the forces in the world and the facts of international life at any particular time. It cannot be transformed-I am dealing with the Secretary-General's views-into a world authority enforcing the law upon the nations. He goes on to say that it is an instrument of negotiation among, and to some extent for, Governments. It is a means of concerting action by Governments in support of the goals of the Charter. The greatest need today is to blunt the edges of conflict among the nations and not to sharpen them. If properly used, the United Nations, in the Secretary-General's view, can serve diplomacy of reconciliation better than any other available instrument. His view is that, in spite of temporary developments in the opposite direction under the influence of acute tension, the tendency in the United Nations is to wear away or break down differences and thus help towards solutions. On the difficult topic of one vote for one nation irrespective of size or strength, and consequently, upon the topic of responsibility or irresponsibility, Mr. Hammarskjöld confines himself to saying that the two-thirds rule, which applies to all major decisions of the General Assembly, should serve as a reasonable assurance. He wisely points out that enforcement action by the United Nations under Chapter VII has not been constitutionally transferred to the General[471]Assembly by the "Uniting for Peace" resolution. He contends that the processes of debate and vote are an essential part of the work of the United Nations, but he adds that, if it is accepted that the primary value of the United Nations is to serve as an instrument of negotiation, voting victories are likely to be illusory unless they are steps in the direction of winning lasting consent to a peaceful and just settlement of the questions at issue. He points that there is plenty of scope in the United Nations for adjustment and negotiation, quite apart from its public proceedings. He refers to the innovations, so far as the practices of the United Nations are concerned, which have been witnessed this year. One of these with which we all are familiar is the United Nations Emergency Force. He considers that the exploration of such opportunities and the evolution of emphasis and practice is a more urgent task than formal constitutional changes. I have gone at some length into these views of the Secretary-General because I believe that these opinions are extremely wise and they form a realistic doctrine round which opinion of all sorts can rally at a time when there has been some uncertainty in many peoples' minds about the United Nations. I do not think that we can accept the view that the United Nations should never be criticised, but we have to steer a middle course between believing in its complete infallibility and automatic condemnation of it. I think that those views of the Secretary-General do provide a sound doctrine. The basic point is that the primary purpose in the mind of everyone taking part in meetings of the United Nations should be to serve what Mr. Hammerskjöld describes as the diplomacy of reconciliation. If these are the purposes behind the debates they will help and not hinder. I am not blaming or criticising any one country, but too often there are discussions in which it is quite obvious that the sole purpose of the participants is propaganda in the cold war or in some other dispute between nations. If there is a genuine desire to find common ground I think that the debates serve a useful purpose. I think that the General Assembly came extremely well[472]out of the debate on the Syrian complaint against Turkey. In that case the Communist bloc did try to use that debate for cold war propaganda purposes, but they failed because the general feeling of the Assembly, including that of many Asian and African members, was against giving the affair a cold war slant. The offer to mediate by Saudi Arabia called the bluff of those who wished only to make trouble, and eventually the debate fizzled out, but with, I think, a real lessening of tension, although I think that reconciliation may still be some time off. Connected with the United Nations there is another matter about which I should like to say a word, and that is with regard to the International Court of justice-the optional Clause of the Statute of the International Court. Questions on that were put down to me by the hon. and learned Gentleman the Member for Leicester, North-East (Sir L. Ungoed-Thomas) which were not reached last week, and I think that it might be best if I dealt with them in a speech rather than by Question and Answer. The optional Clause is concerned with the compulsory jurisdiction of the International Court. Very few countries have accepted that Clause unconditionally. I think that they are in fact three-Haiti, Nicaragua and Paraguay. Others, about a dozen, have accepted subject only to reciprocity-China, Colombia, Denmark, the Dominican Republic, Honduras, Liechtenstein, Norway, Panama, Philippines, Sweden, Switzerland and Uruguay. A further fifteen or so have accepted with specific reservations varying in their extent-Netherlands, Luxembourg, Australia, Canada, Salvador, France, Israel, Liberia, Mexico, Pakistan. Portugal, South Africa, the United Kingdom, and the

United States. Finally, there are over fifty countries which have not accepted the optional Clause at all. Great Britain has always been in the category accepting with reservations. When our declaration was first made in 1929 it was limited to future disputes, it was conditioned by reciprocity, and there was a further condition reserving the right to require the suspension of any proceedings started before the Court in respect of any dispute which had been submitted to the Council of the League of Nations.[473] In addition, there were three specific reservations. The first was in respect of disputes in regard to which the parties had agreed to have recourse to some other methods of peaceful settlement; secondly, disputes with other members of the Commonwealth, and thirdly disputes "with regard to questions which, by international law, fall exclusively within the jurisdiction of the United Kingdom." When I examined the position earlier this year, I became aware, I confess for the first time, of two matters which seemed to me to be quite unacceptable from our point of view. The first arose from the fact that a country can accept the compulsory jurisdiction of the Court ad hoc for the purpose of a particular case or dispute. It can thus take another country to the Court in that case, another country which has given a standing acceptance of the Court's compulsory jurisdiction, but when that particular case is over the first country is again immune from proceedings related to any other dispute because it only accepted the jurisdiction of the Court for a particular case. I do not think that that can possibly be described as accepting the jurisdiction of the Court on a basis of reciprocity. I am advised that when our standing acceptance was originally deposited, it was only intended to compel us to appear before the Court at the instance of countries which had likewise deposited a standing acceptance of the Court's compulsory jurisdiction. Accordingly, one of our new reservations, which was intended to meet this point, specifically excludes disputes in which the other party has accepted the compulsory jurisdiction of the Court only for the purposes of that particular dispute. It also excludes, for basically similar reasons, any case where the other party to the dispute has entered a standing acceptance of the Court's compulsory jurisdiction only a comparatively short time before bringing the matter before the Court, namely, if the acceptance was made less than twelve months before the matter is brought before the Court. I do not seek to shirk any point upon this, but an example which comes to one's mind is a matter like nuclear tests. I think that it is agreed between us that there should not be unilateral cessation of tests. [HON. MEMBERS: "No."] I think[474]that it was agreed between us all that there should not be unilateral cessation of tests by this country alone.

Mr. Hugh Gaitskell (Leeds, South): What we have proposed and urged upon the Government is that there should be a suspension of tests by us for a limited period in the hope that during that period full international agreement could be reached.

Mr. Lloyd: I said "cessation". Perhaps I wrongly used the word but I think that it was agreed that there should not be unilateral cessation of tests, although there might be suspension for a limited time. I was dealing with the question of cessation. It means that therefore an Iron Curtain country could say for the purpose of some dispute regarding tests that they would accept the jurisdiction of the Court and take us to the Court and get a temporary injunction. The Court might sit down for a year or two in litigation; and when the case had been decided one way or another, that Iron Curtain country could get away from the jurisdiction of the Court-it would no longer be subject to it-and we could not take similar action with regard to it should we so desire. I think that is a quite intolerable position which cannot be defended on the basis of reciprocity at all. The second matter deals with disputes about questions affecting our national security. The United States has made a reservation excluding disputes with regard to matters essentially within the domestic jurisdiction of the United States as determined by the United States. France has a similar reservation, and I think that India, before she withdrew from the jurisdiction of the Court last year, had a similar reservation. In a recent case between France and Norway, Norway asserted that the principle of reciprocity gave the Norwegian Government the same right as France to pronounce whether a dispute concerned matters within her domestic jurisdiction or not. I think that in matters of national security we have to reserve our position when other countries do. When every country of the Soviet bloc does so and when our principal allies do so, we also reserve our position.[475] Action was accordingly taken by Her Majesty's Government on 18th April. The Secretary-General circulated our document to all the member States in May and we also communicated with the Registrar of the International Court. We followed the same procedure as on the last occasion in 1955 when a change in our reservations had been made. We have no wish to weaken respect for the Court. We believe in it and we believe in the principle behind the Court, but there must be reciprocity. I think that has always been regarded as a fundamental principle, and that is the way in which we must approach our acceptance of its jurisdiction.

Sir Lynn Ungoed-Thomas (Leicester, North-East): Does the Foreign Secretary suggest that the United States reservation to which he has referred is identical with the one which this Government have made? That is the tendency of his speech. Does he really suggest that a matter like the legality or illegality of the exclusion of shipping, for instance, for the purpose of hydrogen bomb tests is a matter entirely for domestic jurisdiction?

Report Evaluating the Request of the Government of the Republic of the Marshall Islands Presented to the Congress of the United States of America

Regarding Changed Circumstances Arising From U.S. Nuclear Testing in the Marshall Islands Pursuant to Article IX of the Nuclear Claims Settlement Approved by Congress in Public Law 99-239

November 2004

Released by the Bureau of East Asian and Pacific Affairs
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Executive Summary

Background: In 1986, in section 177 of the Compact of Free Association between the United States and the Marshall Islands, the Government of the United States accepted responsibility for compensation owing to citizens of the Marshall Islands for loss or damage to property and person of the citizens of the Marshall Islands resulting from the nuclear testing programs which the United States Government conducted in the Northern Marshall Islands between June 30, 1946 and August 18, 1958, and the two governments agreed to set forth in a separate agreement provisions for the just and adequate settlement of all such claims.

The Compact and the separate agreement (the "Section 177 Settlement Agreement") entered into effect on the same day, October 21, 1986. The two governments agreed that the Section 177 Settlement Agreement, incorporated by reference into the Compact, "constitutes the full settlement of all claims, past, present, and future, of the Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program, and which are against the United States, its agents, employees, contractors and citizens and nationals, and of all claims for equitable or any other relief in connection with such claims including any of those claims which may be pending or which may be filed in any court or other judicial or administrative forum" (Article X (1)).

As part of this full settlement, the two parties agreed that the U.S. would give the Government of the Marshall Islands $150 million to create a nuclear claims trust fund. The U.S Government has no role in the Tribunal's decisions regarding the distribution of the trust fund among claimants or in the administration of the trust fund.

Article IX of the Section 177 Settlement Agreement provided that "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 RMI may request that the U.S. Government provide for such injuries by submitting such a request to the U.S. Congress. Article IX explicitly states that it is understood that it does not commit the Congress to authorize and appropriate funds.

Citing Article IX of the Section 177 Settlement Agreement, the Republic of the Marshall Islands (RMI) submitted a "Changed Circumstances" request to the United States Congress in September 2000, asserting, and seeking additional compensation and remedies for, injuries and losses to the people of the Marshall Islands arising from the U.S. nuclear testing program at Enewetak and Bikini atolls from 1946 to 1958.

Through its request, the RMI seeks over $3 billion in additional compensation and assistance, above and beyond monies provided in the Section 177 Settlement Agreement, to pay for an enhanced national health care system, Tribunal awards for personal injury claims, loss of land use and hardship, and atoll rehabilitation, as well as new money for occupational safety, nuclear stewardship, and nuclear education.

Exposure: The facts regarding radioactive fallout do not support a request under the "changed circumstances" provision of the section 177 settlement agreement. In its request, the RMI asserts that a far wider area of the Marshall Islands than the northerly atolls and islands that are the focus of the section 177 settlement agreement was exposed to dangerous levels of radioactivity. The weight of expert scientific evidence indicates that the present impact of radioactive fallout on the Marshall Islands is limited to the more northerly atolls and islands. Although some islands may never be suitable for communities or food gathering and should remain off limits, most historically inhabited islands in the northern atolls could be resettled under specific conditions. The section 177 settlement agreement recognized that, within the northern atolls, some islands would be more habitable than others. In the section 177 settlement agreement, the Government of the Marshall Islands took responsibility for controlling the use of areas in the Marshall Islands affected by the nuclear program.

Health care: Through its request, the RMI seeks enhanced primary, secondary and tertiary health care systems, integrated with existing RMI health services, to serve the entire RMI population for fifty years. The RMI estimates operating costs at $45 million a year for those fifty years, not including travel and housing costs, and requests $50 million to cover estimated capital costs.

As part of the Section 177 Settlement Agreement, $2 million per year for 15 years was provided from the trust fund to provide medical care to the populations of the four nuclear-affected atolls (Bikini, Enewetak, Rongelap, and Utrik). The Section 177 Health Care Program, originally designed for the people of the four atolls, serves 13,460 enrollees. Funding under the Section 177 Settlement Agreement ended in 2001 in accordance with the terms of that agreement. In addition, Congress mandated in the Compact of Free Association Act of 1985 continued special medical care for the remaining members of the population of Rongelap and Utrik exposed to radiation from the 1954 thermonuclear Bravo test. The U.S. Department of Energy and its predecessors have provided that special medical care continuously for 49 years. In its request, the RMI seeks an enhanced medical care system not limited to the individuals affected by the U.S. testing program. There is no basis for the RMI request for medical care for the entire RMI population under the "changed circumstances" provision of the Section 177 Settlement Agreement.

Furthermore, because the RMI request was submitted in September 2000, it does not take into account the role of the amended Compact of Free Association that took effect on May 1, 2004. Under the amended Compact, RMI Government health sector expenditures will total $15.9 million in FY 2005 and are estimated to be $16.5 million in FY 2006, $16.6 million in FY 2007 and $16.8 in FY 2008. Under the amended Compact, U.S. funds will cover approximately two-thirds of these expenditures.

Personal Injury Claims:The RMI seeks $26.9 million to pay personal injury awards already approved by the Nuclear Claims Tribunal (NCT) in excess of the trust fund.

The U.S. Government played no role in establishment of the NCT's award eligibility criteria, which embrace persons and compensable conditions not recognized under U.S. radiation injury compensation programs. Nor has the U.S. Government played any role in fund management or the investment decisions affecting the proceeds generated by the trust fund. The mixed earnings record of the trust fund is not attributable to the U.S. nuclear testing program and does not provide a basis for a funding request under the "changed circumstances" provision of the Section 177 Settlement Agreement.

Loss of Land Use and Hardship: All losses and damage to property arose before the Section 177 Settlement Agreement entered into force. There are no losses or damage to property that "could not reasonably have been identified." The facts regarding loss and damage to property do not support a funding request under the "changed circumstances" provision of the Section 177 Settlement

Agreement. The Nuclear Claims Tribunal awarded Enewetak roughly $244 million for loss of land use and $30 million for hardship. The Tribunal awarded Bikini approximately $278 million for loss of land use and $33 million for hardship. Additional claims are pending for Utrik and Rongelap. In making these awards, the Tribunal exceeded the amount of money provided through the Settlement Agreement for loss or damage to property. The United States played no role in evaluating the Bikini and Enewetak claims or in the Tribunal's judgments on them. Nor, as noted above, has the Government of the United States played any role in fund management or the investment decisions affecting the proceeds generated by the trust fund. The mixed earnings record of the trust fund is not attributable to the U.S. nuclear testing program and does not provide a basis for a funding request under the "changed circumstances" provision of the Section 177 Settlement Agreement.

Atoll Rehabilitation: The Nuclear Claims Tribunal considered strategies estimated to cost from $217 million to $1.4 billion for Bikini and a similar range of options for Enewetak. The Tribunal awarded $251 million to Bikini on March 5, 2001 and $91 million to Enewetak on April 13, 2000 "to restore [them] to a safe and productive state." In making these awards, the Tribunal exceeded the amount of money provided through the Settlement Agreement. There is no "changed circumstance" on which an additional funding request can legitimately be made under Article IX of the Section 177 Settlement Agreement.

An important element underlying the RMI request is the assertion that the United States Government has adopted stricter standards for domestic nuclear cleanup activities in the United States since the 1986 settlement agreement was reached. The current dose limit used by the U.S. Government to protect the public from all sources of radiation is 1 millisievert (mSv) per year. The sievert is a unit of radiation dose which describes the effectiveness of various types of radiation to produce biological effects. A millisievert is one thousandth of a sievert. The current U.S. dose limit has been used to guide cleanup decisions in the RMI before and after the Compact was enacted. Extensive monitoring of individuals on Marshall Islands atolls where cleanup has been effected indicates actual radiation doses are below 0.15 mSv, the value advocated by the Tribunal. RMI cleanup decisions to date have conferred a degree of protection that exceeds all existing U.S. federal agency guidelines as well as the Tribunal's desired standard.

Occupational Safety, Nuclear Stewardship and Education: In its request, the RMI contends that the Section 177 Settlement Agreement does not include important occupational safety, nuclear stewardship or nuclear education programs. These are all programs that the parties could have chosen to include in the full settlement, but they chose not to. They do not constitute "changed circumstances" on which a funding request can legitimately be made under the Section 177 Settlement Agreement. To the extent the Government of the Republic of the Marshall Islands considers these programs are needed, they should be included in the RMI budget, and they could then be considered by the Joint Economic Management and Financial Accountability Committee for possible coverage under a sector grant under the amended Compact.

Report Evaluating the Request of the Government of the Republic of the Marshall Islands Regarding Changed Circumstances Arising from U.S. Nuclear Testing

1. Legal Framework

The Compact of Free Association (the Compact), together with its related agreements, including the 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 Settlement Agreement), was signed by the governments of the United States and the Marshall Islands on June 25, 1983. The Compact, including the Section 177 Settlement Agreement which was incorporated by reference, was approved by Joint Resolution of the United States Congress on January 14, 1986 (PL99-239, 99 Stat. 1770), and the Compact and its related agreements took effect between the United States and the Republic of the Marshall Islands on October 21, 1986.

1.1 Section 177 of the Compact

As it relates to the Marshall Islands, Section 177 of the Compact of Free Association dealt with:

"loss or damage to property and person of the citizens of the Marshall Islands, . . . 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."

Specifically, Section 177 provided that 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.... This separate agreement shall come into effect simultaneously with this Compact and shall remain in effect in accordance with its own terms."

1.2 The Section 177 Settlement Agreement

1.2.1. Full Settlement of All Claims

Article X Section 1 of the Section 177 Settlement Agreement is entitled "Full Settlement of All Claims" and states:

"This Agreement constitutes the full settlement of all claims, past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program, and which are against the United States, its agents, employees, contractors and citizens and nationals, and of all claims for equitable or any other relief in connection with such claims including any of those claims which may be pending or which may be filed in any court or other judicial or administrative forum, including the courts of the Marshall Islands and the courts of the United States and its political subdivisions."

1.2.2 Changed Circumstances

Article IX of the Section 177 Settlement Agreement is entitled "Changed Circumstances" and states:

"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."

Citing this provision of the Section 177 Settlement Agreement, the Government of the Republic of the Marshall Islands submitted a request to the United States Congress in September of 2000.

In March of 2002, Congress transmitted the request of the Republic of the Marshall Islands to the President for evaluation by the appropriate agencies.

This document is the Administration's evaluation of the request submitted by the Government of the Republic of the Marshall Islands and of whether the request contains the elements mutually agreed to in Article IX of the Section 177 Settlement Agreement as being necessary for submission of a request to Congress for its consideration under that Article.

In order to be the subject of a request to Congress under Article IX of the Section 177 Settlement Agreement, an injury:

1. must be loss or damage to property and person of the citizens of the Marshall Islands;
2. must result from the Nuclear Testing Program;
3. must arise or be discovered after the effective date of the Agreement (October 21, 1986);
4. must be injuries that were not and could not reasonably have been identified as of the effective date of the Agreement (October 21, 1986); and
5. such injuries must render the provisions of the Section 177 Settlement Agreement manifestly inadequate.

If these five conditions are met, the Government of the Marshall Islands may request the Government of the United States to provide for such injuries by submitting such a request to the United States Congress for its consideration, in which case the settlement agreement explicitly provides that it "is understood that this Article does not commit the Congress of the United States to authorize and appropriate funds".

1.2.3. Other Elements of the Section 177 Settlement Agreement

Government of the Marshall Islands Responsible for Providing Medical and Health Care:

The Preamble to the Section 177 Settlement Agreement states that the Government of the United States and the Government of the Marshall Islands agree to the terms of the Agreement, inter alia, "(i) n fulfillment of the provisions of Section 177 of the Compact relating to the nuclear testing program" and "[i]n recognition of the authority and responsibility of the Government of the Marshall Islands to provide medical and health care to all of the people of the Marshall Islands".

In Fulfillment of U.S. Government Obligations, $150 million to the Government of the Marshall Islands to Create An Independent Nuclear Claims Fund:

"In fulfillment" of its obligations under Section 177 of the Compact, the United States Government provided to the Marshall Islands Government $150,000,000 to create an independent nuclear claims fund, the proceeds from which were to be distributed in accordance with the Section 177 Settlement Agreement.

Distribution for Health, Medical Surveillance, Radiological Monitoring, and for Atoll Claims for Loss or Damage to Property and Person:

Article II, Distribution of Annual Proceeds, requires disbursement to the RMI Government from the proceeds of the Fund fixed amounts for health ($2 million annually for 15 years), medical surveillance and radiological monitoring ($1 million annually for the Agreement's first three years); and disbursement to four atoll authorities of the following amounts in payment of claims for loss or damage to property and person: $75 million for Bikini, $48.75 million for Enewetak, $37.5 million for Rongelap and $22.5 million for Utrik. These disbursements were to be made in 80 quarterly payments over 15

years. Section 6 of this Article obliges the governments of the four atolls, in order to provide long-term means to address the consequences of the nuclear testing program, to establish individual trust funds "with all or a portion" of the proceeds received under Section 177 to "provide a perpetual source of income" for the peoples of the atolls (article II, section 6, sentence 2). The subsidiary agreement empowers the government of each of the four atolls to decide whether these funds should "be distributed, placed in trust or otherwise invested."

The $30 million ($2 million annually for 15 years) for health care provided under Article II, Section 1(a) and mentioned in the previous paragraph, was in addition to the amounts provided to the four atolls as their share as constituent governments of the Marshall Islands under Compact sections 216(a)(2), $1,791,000 annually for nationwide health and medical programs, including referrals, and 221(b), $10,000,000 annually for education and health care. Article II, section 1(d) provides for a U.S. Department of Agriculture supplemental food program.

Government of the Marshall Islands to Establish a Claims Tribunal:

Article IV of the Section 177 Settlement Agreement requires the Marshall Islands Government to establish a claims tribunal to render final determination upon all claims of the Government and people of the Marshall Islands related to the nuclear testing program and upon all disputes arising from distributions of the nuclear claims fund. Under Article II, Section 6(c), $45.75 million is to be available "for whole or partial payment" of monetary awards, to be disbursed in annual amounts of up to $2.25 million during the first 3 years and in annual amounts of up to $3.25 million during the next 12 years. The overall, net personal injury compensation totaled $63,127,000 dollars as of December 31, 1997. This represented 1,685 awards to or on behalf of 1,549 individuals.

2. Historical Background

2.1 The U.S. Nuclear Testing Program, 1946-58

The United States carried out sixty-six underwater, surface and atmospheric nuclear tests at Bikini and Enewetak atolls in the northern Marshall Islands between 1946 and 1958, and an additional shot 100 kilometers west of Bikini. The people of Bikini (population at the time 167) and Enewetak (population at the time 145) atolls were relocated to atolls outside the testing area prior to testing.

Among these tests, the world's second hydrogen bomb test, code-named Bravo, was carried out at Bikini Atoll on February 28, 1954. (The first was at Enewetak.) The energy yield of the bomb exceeded predictions, and sudden wind changes sent a cloud of radioactive debris unexpectedly over populated land areas. Consequently, radioactive debris fell on the populations of Rongelap (86 people at the time) and Utrik (157 people at the time) for 2-3 days before these inhabitants were evacuated to Kwajalein Atoll for medical care.

Appendix A provides a complete list of all 67 U.S. nuclear tests conducted in the Marshall Islands.

2.2 Explanation of Atoll Populations

Local atoll governments are responsible for maintaining census records for their respective atolls and qualifying individuals as "persons of the atoll." Criteria for qualification as a "person of the atoll" vary by jurisdiction, but in general relate to traditional and historical factors based on blood lineage, land rights, marriage and extended family.

Below is a comparison of actual populations of the atolls in 1954 and "persons of the atolls" as of June 1996, according to local atoll governments:

1954 1996

Bikini 167 2,191
Enewetak 145 1,561
Rongelap 86 4,384
Utrik 167 2,783

Total 565 10,919

2.3 U.S. Compensation and Assistance

U.S. compensation and assistance to the RMI for nuclear testing totaled approximately $236,273,000 for the people of Bikini atoll; $146,157,300 for the people of Enewetak atoll; $93,301,000 for the people of Rongelap atoll; and $44,190,000 for the people of Utrik atoll.

Among major components of this compensation and assistance:

-- The Department of the Interior made nuclear claims compensation payments totaling $183,750,000 to Bikini, Enewetak, Rongelap and Utrik atolls.
-- The Department of Energy and its predecessor agencies have provided radiation-related health care for the Rongelap and Utrik survivors of the 1954 thermonuclear Bravo test, and radiological environmental characterization and monitoring of the four nuclear-affected atolls for fiscal years 1954 - 2002 totaling $137,395,000.
-- The U.S. Congress appropriated $20,000,000 in fiscal year 1977 military construction funds for the clean-up and rehabilitation of Enewetak atoll and directed the Department of Defense to draw upon other needed resources, without reimbursement for materials, equipment and support forces.

Appendix B provides a detailed accounting of U.S. nuclear testing-related compensation and assistance, including funds from the 177 Settlement Agreement, presented in 2003 dollars.

2.3.1 Bikini

The Congress appropriated $90,000,000 over a five-year period for the clean-up and resettlement of Bikini, which was added to $20,000,000 appropriated in 1985. The Congress based its further appropriation on section 103(l) of the Compact Act. Moreover, the Congress designed and intended this appropriation, in the words of the then Ranking Minority Member of the Committee on Energy and Natural Resources, Senator James A. McClure, on the floor of the Senate on September 8, 1988:

...to fulfill both the moral and legal commitment of the U.S. Government to the people of Bikini contained in section 103(l) of the Compact Act... and in article VI of the Compact Section 177 Agreement... and ... to provide for the full and final settlement of all claims arising from the Nuclear Testing Program. ...There are those who may incorrectly argue that this appropriation is made outside of the Section 177 Agreement and therefore Congress did not intend for Section 177 to provide a final settlement. The opposite is true. ... It is intended that these funds will be deposited in the existing resettlement trust fund - of approximately $20 million - and that the terms of that trust will be modified to provide that the corpus and income from the trust may be used for the rehabilitation and resettlement of Bikini Atoll and that up to $2 million per year may be used for projects on Kili and Ejit. Following rehabilitation and resettlement, these funds will no longer be available to Kili and Ejit, and any funds remaining in the trust, not identified for future needs, shall be deposited in the U.S. Treasury. It is anticipated that these future needs... will include: first, maintenance of the resettlement infrastructure until the Bikinians are prepared to assume that task; second, training the Bikinians for the operations and maintenance of the infrastructure; ... Once this objective is reasonably met, then all funds in the trust shall revert to the United States. The people of Bikini will then need to rely on other funds, such as the other $75 million provided pursuant to [the Section 177 Settlement Agreement, article II, section 2], ... in the context of the Section 177 Agreement the Bikinians will have accepted this trust arrangement as full and final discharge of all United States obligations... related to their relocation from Bikini,... and no further appropriations will be required in order, finally, to have fulfilled the United States commitments to the Bikini people, except as provided under article IX of the Section 177 Agreement.

From the inception of Congressional funding of the separate Resettlement Trust Fund for the People of Bikini, the U.S. Government has had as its full-fledged partner the people and local government of Bikini. As the then- Chairman of the Committee on Energy and Natural Resources, the Honorable J. Bennett Johnston, said on the floor of the Senate on September 8, 1988:

The work of the Bikini Atoll Rehabilitation Committee (BARC)... provided the information needed to quantify the obligation of the United States Government to clean up and resettle Bikini. It was from the BARC information that this $90 million appropriation was developed. ... [L]anguage was specifically included in the statute to rebut any indication that enactment of the Compact did not constitute a full and final settlement and a complete and absolute bar to either continued or further litigation. The analysis... set forth in the record at the time of passage is clear: ... '[A]dditional ex gratia' - and I want to emphasize the words ' ex gratia ' - 'assistance will be available in the future if circumstances warrant and this provision in no manner lessens the concern which we have for the population of the affected atolls.' ... These funds are provided to the Bikinians so that they, and not the United States Government, will be responsible for the management and the decisions involved in returning to their homeland. ... It is the responsibility of the people of Bikini to... expend these funds so that they meet the objectives of rehabilitation and resettlement and provide for limited future needs. ... All decisions and responsibilities for rehabilitation and resettlement of Bikini rest with the people of Bikini.

While having a limited, on-island presence in their home atoll -- about 25 persons -- principally connected with a commercial dive program owned by the atoll government, most Bikinians live in Majuro Atoll, including Ejit Island (about 1,000), or elsewhere in the Marshall Islands (about 1,100), principally Ebeye and Kili Islands and Lae Atoll.

A September 1996 International Atomic Energy Agency report on radiological conditions at Bikini concluded that:

(1) Bikini Island should not be permanently resettled under the present radiological conditions without remedial measures if inhabitants were going to eat entirely locally produced foodstuffs;
(2) the diet of the peoples of the Marshall Islands, including the people of Bikini, contained and would continue to contain a substantial proportion of radionuclide-free, imported food;
(3) provided certain remedial measures were taken, especially continued potassium fertilization, Bikini Island could be permanently reinhabited; and
(4) should such remedial steps be taken, radiation doses for people living on Bikini Island would be acceptable in terms of international standards and their health would be adequately protected against radiation exposure due to the atoll's residual radioactive materials.

2.3.2 Enewetak

This atoll was the site of forty-three of the sixty-seven nuclear tests conducted by the U.S. Government in the northern Marshall Islands from 1946 to 1958. Five islands were partially or completely destroyed; the remaining islands in the atoll's northern half, including Enjebi and Runit, were contaminated by radioactivity. The atoll's southern islands of Enewetak and Medren were mostly covered by concrete and asphalt as they were used for various facilities required by the nuclear testing program. As a result, the entire atoll was devastated and nearly all vegetation destroyed.

In order to permit the people of Enewetak to begin their return home, from 1977 to 1980, the U.S. Government undertook a resettlement program which included clean-up of some affected islands and

revegetation. Radiation-contaminated soil from this clean-up was placed in a nuclear test-created crater on the north of Runit Island and the crater was capped by a concrete dome.

Section 103(k) of the Compact Act and the subsidiary agreement implementing it established an ex gratia trust fund for the Enewetak community from Enjebi and credited to the fund the amount of $7,500,000, which the U.S. Government transferred to the Marshall Islands Government. Under article I, section 4, of this subsidiary agreement, if the people of Enewetak from Enjebi resettle their island by October 21, 2011, the people will receive from the fund such amounts as will be necessary to re-establish their community and to replant their island appropriately. However, under section 5, if they do not resettle by this date, then the fund manager will distribute the fund to the people for their resettlement at some other location. Whichever route the people of Enewetak from Enjebi take, prior to and during the distribution of the fund's corpus, they may receive at least quarterly the interest earned by the fund (section 6).

The Enewetak resettlement program has included revegetating portions of the atoll. Crops of coconut, pandanus, breadfruit, taro, bananas and lime have been planted since 1979. The planting continues as a part of the Department of the Interior-funded Enewetak Food and Agriculture Program, the funding level of which has been approximately $1,091,000 annually since fiscal year 1986. Due to a growing population, the crops are not the only food source for the people of Enewetak; they also import food. The situation is exacerbated by having less than one-third of the atoll's land useable for food production. For as long as the people of Enewetak need substantial amounts of off-island food, as recommended by the U.S. Department of Energy-Lawrence Livermore Laboratory's environmental assessment program, there will be a need for some supplemental support in this area, such as that provided by the United States Department of Agriculture's food program, and the Department of the Interior-funded agricultural program. This need will remain constant even if local food production increases significantly above current levels.

2.3.3 Rongelap

In 1994, the National Research Council issued its report on "Radiological Assessments for the Resettlement of Rongelap in the Republic of the Marshall Islands." On the basis of its review, the committee made the following recommendations:

(1) a local-food-only diet [should be] limited to food gathered on the southern islands of Rongelap Atoll.
(2) the returning population [should] restrict the quantities of some local foods in their diet. A modest supplementary food program would help the returning Rongelap people to obtain the necessary quantities of imported food.
(3) the upper layer of soil [should be removed] from the village and on each houseplot [and] ...a layer of crushed coral [added] around the houses and to common areas of congregation throughout the village.
(4) the application of potassium chloride as fertilizer, and for remediation of agricultural areas.

A $45 million agreement to assist the people of Rongelap with resettlement was signed on September 19, 1996. After years of studies and negotiations involving the Departments of the Interior and Energy, independent scientists, Congressional committees and representatives of the Rongelap people, the Congress set forth the general parameters for a final settlement in section 116(d) of Public Law 104-134 (April 26, 1996). In August 1996, after nearly three years of negotiations with Rongelap Atoll Local Government representatives, the Department of the Interior reached a settlement that the September 1996 agreement embodies. The agreement's terms constitute, in accordance with section 116(d) of Public Law 104-134, "a full and final settlement of all obligations of the United States to assist in the resettlement of Rongelap Atoll" pursuant to section 103(l) of the Compact Act. The agreement requires the building of sufficient homes after construction of dock, water, electric, school, and local government facilities; property will be surveyed, and cemeteries located.

The agreement provided $39,740,000 for the resettlement of Rongelap Island, the fund then having $18,127,000 available. The balance of $19,630,000 was provided by the Department of the Interior through a reprogramming of surplus appropriations authorized by the Congress. The remaining amount, $1,983,000, was included in the fiscal year 1997 Department of the Interior appropriations. The balance of the settlement funding was derived from interest earnings on the trust fund. The agreement further provided that $8,000,000 be available as grants from the Department of the Interior and that the balance be placed in the trust fund.

Of the approximately 86 persons on Rongelap Island and surrounding islands in 1954, forty-five were still alive in September 2002. Compared to the people of Enewetak and Utrik, the people of Rongelap are less likely to live in their home islands, with about 800 Rongelapese in Majuro Atoll and 1400 on islands in Kwajalein Atoll. However, the people and government of Rongelap have expressed their commitment to rehabilitate and resettle their home island. On June 25, 1998, Rongelap Atoll Local Government and its contractor, Pacific International, Inc., signed a master contract for Phase I of Rongelap Island's resettlement. Phase I includes establishment of a base camp, the construction of essential infrastructure and completion of the remediation recommendations of the independent scientific management team.

Substantial progress has been made, including construction of: a paved runway and terminal building; expanded dock, dock apron and warehouses; desalination plant, with water now available throughout the island; buildings to house a whole body counter (to detect internal deposition of cesium-137), bio-assay monitoring equipment and a dispensary, which are now operating; barracks to house twenty resident contract workers and guest quarters being used to support a nascent ecotourism industry; a sewage treatment facility that is now operating; and a community center and town hall. The village church has been rehabilitated and potassium treatment remediation for agricultural areas has been instituted. The road system is being expanded with additional roads being paved, which further prevents plutonium contamination.

2.3.4 Utrik

The 167 residents of Utrik were evacuated in 1954 to Kwajalein for medical examinations and surveillance at the U.S. military hospital there. Within months, they were returned to Utrik. The people of Utrik today number around 2,783, of whom about 1,200 live in Utrik Atoll. Of the remaining 1,800, approximately 1,250 live in Majuro Atoll and 450 on Ebeye Island. About 100 Utrikese live in Honolulu or the mainland United States.

The Compact Act did not include an authorization for resettlement for the people of Utrik. Other than monitoring of environmental conditions on their islands, the people of Utrik have the least significant rehabilitation problems and have achieved the highest level of resettlement among the four nuclear-affected atolls.

1. The Nuclear Claims Fund

In fulfillment of its obligations under Section 177 of the Compact, the United States Government provided to the Government of the Marshall Islands $150,000,000 to create an independent nuclear claims fund, the proceeds from which were to be distributed in accordance with the Section 177 Settlement Agreement. Section 177 Settlement Agreement provisions governing distributions from the fund are described in section 1.2 above.

2.3.5 The Nuclear Claims Tribunal

The Section 177 Settlement Agreement mandated establishment of the RMI Nuclear Claims Tribunal (NCT). The RMI parliament created the NCT in 1988. The NCT has jurisdiction "to render final determination upon all claims past, present and future" related to the US nuclear testing program (177 Settlement Agreement, Article IV, section 1(a)). The NCT consists of three judges, including the Chairperson, a Defender of the Fund, a Public Advocate and eleven other staff members.

The United States has played no role in evaluating claims presented to the NTC, nor in the Tribunal's judgments on them. The 177 Settlement Agreement provided a lump sum settlement of $150 million. Beyond the broad divisions by Atoll, it did not specify how the Tribunal was to divide the proceeds it received among individual claimants. The Section 177 Agreement provides only 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."

The NCT has somewhat patterned its approach to personal injury claims after similar U.S. statutory programs for U.S. civilian and military personnel deemed harmed by the U.S. testing program. For example, the NCT awards compensation from $125,000 for leukemia, ovarian cancer, etc., to $12,500 for benign tumors. In the United States, there are three programs that compensate persons affected by radiation produced by the government during nuclear testing or weapons production. For example, "Downwinders" in the United States with leukemia received $50,000 from the Department of Justice, while U.S. onsite participants who observed weapons tests received $75,000 for leukemia.

Although the scientific community has thus far not proven transference of nuclear effects to the second generation in humans, the NCT provides biological children of a mother who was physically present at the time of the testing 50% of amounts offered first generation claimants.

Although the Section 177 Settlement Agreement and scientific data recognize the four populated northern atolls as having been affected by the testing program, the settlement agreement and the scientific data do not support such a finding for the mid atolls or other areas of the Marshall Islands. Nevertheless, the NCT awards damages to persons from throughout the Marshall Islands.

Appendices C and D provide an overview of the criteria and award amounts in RMI and U.S. radiation compensation programs.

3. Exposure of Marshallese to ionizing radiation and the health effects: The state of scientific knowledge

3.1.1 Extent of radioactive contamination across the northern atolls and islands in 1975

From July through November 1978, Tipton and Melbaum, under a U.S. Government contract, conducted an aerial radiological survey of eleven atolls and two islands within the northern Marshall Islands. Contamination from all tests, measured from the level of radioactive cesium-137 in the soil on parts of Bikini, northern Rongelap, Rongerik, Allinginae and Utrik Atolls were consistent with what might be expected from the Bravo fallout pattern. Contamination levels on Ailuk, Likiep, Wotho and Ujelang Atolls and at Mejit and Jemo islands were consistent with cesium-137 activity, due to worldwide fallout, observed within the United States and at other locations in the central Pacific including Majuro, Ponape, Truk, Palau, and Guam. These latter four atolls and two islands, therefore, did not appear to have received any significant direct contamination from the Bravo event or the other tests conducted at Bikini and Enewetak Atolls.

3.1.2 The Nationwide Radiological Survey

The Nationwide Radiological Survey (NWRS) of the Marshall Islands, completed in 1994, is the only comprehensive radiological study of the RMI. It includes a detailed analysis of 432 of the RMI's

approximately 1,200 islands. In addition to the NWRS and Tipton-Meibaum studies, other radiological examinations of the Marshall Islands include, for the past twenty years under a congressionally mandated environmental monitoring program, periodic detailed assessments of the four nuclear-affected atolls performed by the U.S. Department of Energy.

The Government of the RMI commissioned the NWRS, with funding provided by the U.S. Department of the Interior under the Compact of Free Association. The RMI Government also appointed an international scientific advisory panel to provide guidance to NWRS investigators, monitor the integrity of their work, and advise the RMI Government on the conduct and results of the survey. The NWRS survey team established a radiological laboratory in Majuro to support their study.

The NWRS mission was fourfold:

-- to map the geographic extent of radioactivity throughout RMI;
-- to assess radiological conditions on Bikini, Enewetak, Rongelap, and Utrik atolls;
-- to advise on the risks associated with radiation exposure;
-- to educate the Marshallese public about any residual presence and possible risks of nuclear testing-related radiation.

NWRS assessments proceeded from the following:

-- The most significant long-term source of environmental radioactivity is radioactive cesium located in the top 12 inches of soil and ingested by consuming local food crops that take up the cesium from the soil.
-- Radioactive cesium becomes non-radioactive over time. By 2002, more than 70 percent of the amount originally deposited as a result of nuclear testing was no longer radioactive.

The NWRS examined surface soil for plutonium and similar substances that could still be harmful if ingested or inhaled in sufficient quantity. In order to estimate the amount of radiation to which different groups of potentially affected Marshallese may have been exposed, the NWRS carefully examined and factored into its assessments the housing, work, and diet attributes of different groups of Marshallese throughout the potentially affected area, as well as how these attributes may have changed over time.

With this information, the NWRS was able to estimate total exposure from the end of the U.S. nuclear testing program in 1958 through 1994 and an annual dose for 1994. The NWRS report provided estimates for the annual dose at each location along with natural background and global fallout levels.

The NWRS calculated total dose from external and internal sources of whole body exposure to radioactive cesium and summed these to estimate the total dose that could be received in a year. The dose is expressed in sieverts (Sv), a unit which accounts for the effectiveness of various types of radiation to produce biological effects. The Sv replaced the more familiar rem unit and is 100 times larger, meaning that 1 Sv equals 100 rem. A whole body dose below 1 mSv (one thousandth of a Sv or 100 mrem) per year was used to identify islands suitable for resettled communities or for food gathering. Where the total dose exceeded 1 mSv per year above natural background levels, environmental cleanup or protective agricultural practices would be required to make these areas habitable or suitable for food gathering.

NWRS dose estimates need to be considered in the context of all sources of radiation in the environment. The total environmental radiation in the Marshall Islands is the sum of local nuclear fallout, natural background radiation, manmade sources, and global nuclear fallout. The natural background annual radiation dose in the northern Marshall Islands is about 2.4 mSv, of which 2 mSv is from eating fish. (In comparison, the U.S. average annual dose is about 3.0 mSv, of which 2 mSv per year is from radon. Radon is virtually absent in atoll environments.)

NWRS estimated that the range of the total annual dose from worldwide nuclear fallout in the Marshall Islands is 0.01-0.05 mSv. The NWRS summary report Figure 9 (below) shows the annual exposure level for each surveyed location against the natural background dose and global fallout dose. In Figure 9, the estimated annual dose is based on a traditional Marshallese diet comprising 75% local foods and 25% rice. The total dose could be much lower in many locations if the community adhered to a contemporary diet that included no more than 20% local foods.

Conclusions of the NWRS Survey

NWRS concluded that the level of fallout radioactivity increases with increasing latitude. In the RMI's southernmost atolls and islands, from 4 to 9 degrees N, just south of Kwajalein Atoll, fallout levels were nearly constant and about the same as fallout from global nuclear weapons testing. Relatively little fallout radioactivity reached as far south as Kwajalein Atoll. From 9 to 10.5 degrees N, the mid-level atolls, the NWRS determined that the residual radioactivity does "not pose any measurable health hazard." Mid-level atolls are: Ailuk, Jemo, Kwajalein, Likiep, Mejit, Ujelang, Wotho, and Wotje. North of the mid-level atolls, the levels of radioactivity increased rapidly to the latitude of Bikini Atoll. The northernmost atolls are: Bikini, Ailinginae, Enewetak, Rongelap, Rongerik, and Utrik. NWRS concluded that some of the islands on Bikini, Enewetak and Rongelap Atolls would require limited remediation to support a traditional Marshallese lifestyle.

NWRS conducted a special, Department of the Interior-funded study of Rongelap to validate the recommended remedial actions needed for resettlement and to support a traditional lifestyle on contaminated atolls and islands. In 1994, independent Rongelap Island assessments were reported by NWRS, U.S. National Research Council, DOE Lawrence Livermore National Laboratory, and an independent advisor from the United Kingdom. All of the independent assessments stressed the importance of minimizing radiation exposures and damage to the environment. All agreed that limited soil removal and potassium fertilization were appropriate measures to minimize damage to the environment.

Although, as noted above, a traditional Marshallese diet consists of 75% local foods and 25% imported rice and a contemporary diet includes no more than 20% local foods, scientific advisors to the Nuclear Claims Tribunal have urged adoption of radiation dose limits based on a diet of 100% local foods and a high caloric intake. All Rongelap assessors agreed that it was unlikely people would revert to a traditional diet. Traditional foods were, at the time of the survey, about 20% of the typical diet. This is due in part to the availability of commodities provided by the U.S. Department of Agriculture.

NWRS measurements of fallout radioactivity are in close agreement with U.S. Department of Energy estimates above 1 micro Roentgen per hour. The Roentgen is a unit of radiation exposure in air, as opposed to exposure in body tissues, and is reported for specific intervals in time. A micro Roentgen is one millionth of a Roentgen. Below 1 micro Roentgen per hour, the DOE estimates were generally higher than NWRS estimates.

The U.S. Departments of State and Energy, in 1999 testimony before the House Resources Committee, affirmed the suitability of Bikini, Enewetak, Rongelap, and Utrik islands for resettlement under the specific conditions recommended by NWRS. The U.S. National Academy of Sciences affirmed that conclusion for Rongelap, as did the International Atomic Energy Agency for Bikini.

The NWRS Scientific Advisory Panel in 1994 concluded that the study had been comprehensive, sound and successful. The panelists stated that then- current levels of radioactive contamination of the territory of the Marshall Islands "pose no risk of adverse health effects to the present generation of Marshallese", and assessed "the risk of hereditary diseases to the future generations of Marshallese to be no greater than the background risk of such diseases characteristic of any human population." The panelists acknowledged that remedial actions would be required for specific atolls and islands if they were to be inhabited or used for food gathering.

In Resolution 151, the RMI Legislature, the Nitijela, formally declared that the RMI Government "does not accept" the NWRS findings as "valid or accurate" on the stated grounds (among others) of incompleteness, lack of credibility of some of the report's authors, and disagreement with the NWRS conclusions. The NWRS Scientific Advisory Panel responded to Resolution 151 in a Letter to the Editor of the Marshall Islands Journal defending NWRS as comprehensive and scientifically sound.

The NWRS findings are reported in a scientifically peer-reviewed article in Health Physics (July 1997), the official journal of the Health Physics Society, and the full report has been available on the internet for many years. The Executive Summary of the NWRS Report is reprinted in Appendix E.

3.1.3 Exposure to radioactive iodine

In addition to assessing the health effects of radioactive cesium, it is also important to consider the acute, short-term impact of radioactive iodine on the thyroid gland of people present on specific atolls and islands at particular times. For this reason, the NWRS was supplemented with a specific thyroid disease study that is discussed in section 3.2 below. However, it is not necessary to consider the impact of radioactive iodine in order to reach conclusions about the habitability of specific RMI locations or their suitability for food gathering because virtually all of the radioactive iodines convert to a non radioactive form, disappearing naturally within a few days to weeks.

3.1.4 Exposure to radioactive "tracer" materials

RMI officials have expressed concern that materials included in weapons tests to evaluate yields and physical processes in the devices, so-called tracer materials, pose a health risk. Information about tracers and their fate was not available to the NWRS. In 2001, the Lawrence Livermore National Laboratory completed an analysis of possible toxic chemical levels associated with U.S. weapons tests. The analysis found that none of the radioactive or toxic chemicals, including thallium, were introduced into the atoll environment in amounts large enough to pose any public health risk.

3.1.5 Contemporary observations on actual exposures

In support of planned resettlement by the Rongelap community and at the request of Enewetak's and Utrik's resettled communities, the U.S. Department of Energy has for decades been analyzing the urine of construction and agricultural workers exposed to plutonium in soil dust and of island residents exposed to radioactive cesium by ingesting locally grown foods. In recent years, Marshallese technicians trained at the Lawrence Livermore National Laboratory have been performing radioactive cesium monitoring using non invasive DOE-provided whole body counting equipment installed at Enewetak and Rongelap islands and, beginning in July 2003, the RMI capital of Majuro. Plutonium bioassay measurements performed by Lawrence Livermore are based on the most accurate, costly, and advanced mass spectrometry accelerator technology, enabling detection of levels far below those possible using methods commercially available.

The annual observed dose for plutonium and cesium combined is less than 0.1 mSv (0.001 mrem). This dose level is less than the 15 mSv per year (0.15 mrem) NCT standard. Urine test results to date show that the estimated 70-year cumulative dose, the lifetime dose, from plutonium is less than 0.1 mSv (10 mrem), and the vast majority of the cesium doses are less than .01 mSv (1 mrem) per year. When measurements of radioactive cesium exceeded 1 mrem, it generally was attributable to individual food-gathering practices on the more northerly, uninhabited nuclear-contaminated islands.

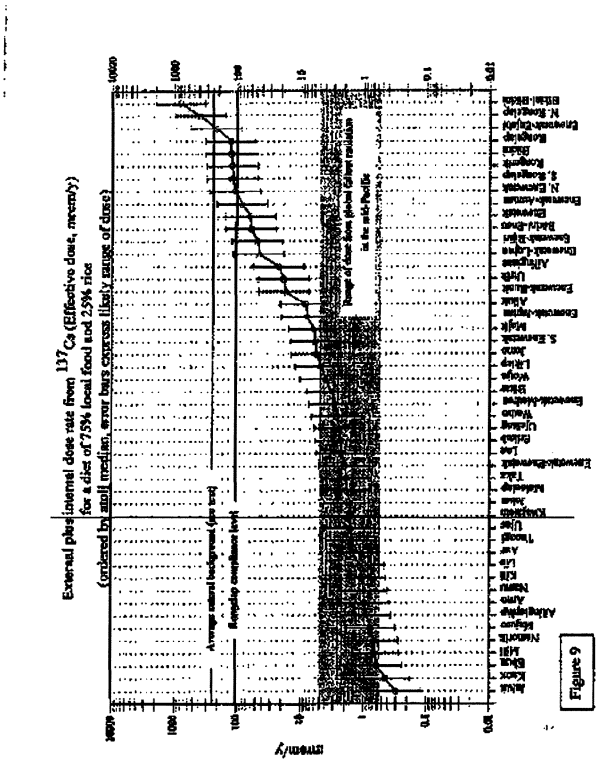
All of the DOE/Lawrence Livermore cesium and plutonium test results are routinely provided to the tested individuals and (on a de-identified basis) to the RMI and Enewetak and Rongelap local government communities. The data are also publicly available (on a de-identified basis to protect individual privacy) on Lawrence Livermore National Laboratory's website (http://en-env.llnl.gov/rmi/).

3.2 Marshall Islanders and thyroid cancer

The fallout of radioactive iodine resulted in acute exposure of people residing on Rongelap and Utrik at the time of the February 28, 1954, test designated Castle Bravo. Fallout occurred over a matter of hours; all exposed individuals were relocated within 48 hours after the test, and almost all of the radioactive materials were nonradioactive within 2 months. The effects of the thyroid exposure on affected individuals appears to have peaked in the 1970s. Recently, a group of scientists who conducted the Marshall Islands thyroid disease study (MITDS) as an outgrowth of NWRS reported on their observations from 1991 through 2000. In general, Marshallese have low rates for problems of the thyroid gland other than cancer.

NWRS Summary Report Figure 9 [below]:

NWRS Summary Report Figure 9



MITDS physicians examined about 7,200 Marshallese and found 68 thyroid cancers. These were distributed among three groups of people: those alive at the time of the thermonuclear Bravo test, those born after Bravo but before the 1958 end of the U.S. nuclear testing program, and those born after weapons tests ended. Overall, the proportion of thyroid cancers in each age group increased with age, as expected. Among those alive at the time of Bravo the rate was 1.5%; among people born after Bravo but before the end of testing the rate was 0.6%; and the rate was 0.5% for people born after testing. This indicated that the natural rate of thyroid cancer was about 0.5%. Those alive at the time of Bravo had a rate three times larger than the normal Marshallese rate.

Given the higher rate among those alive at the time of Bravo, the scientists wanted to know if the rates depended on where people lived relative to Bikini Atoll. If there were a clear decline in the cancer rate with distance from Bikini, then it could be used as evidence that fallout from Bravo was the reason. If there were no clear decline with distance, then there may be other factors common to the Marshallese that might explain the high thyroid cancer rate. The distance analysis included about 3,500 people. The thyroid cancer rate was not clearly associated with distance from Bikini. The MITDS group proposed to continue the study with medical examination of the people born between 1950 to 1958 (born after Bravo but before the end of testing) every two years.

3.3 The Health Effects of Ionizing Radiation

The RMI contends that the risk from exposure to one unit of low-level ionizing radiation continuously over a lifetime to the entire body was assessed to be nine times greater in 1988 than the radiation protection community assessed it to be in 1972. They also suggest that the original average dose estimates may have been too low by one half. Therefore, the RMI asserts, the harm would be much greater than thought when the Compact was signed. The RMI bases its underestimation claim on major changes in the lifetime risk estimate for a unit of ionizing radiation, and the "incremental" changes seen in radiation protection standards over time.

The RMI attributes the "major changes in lifetime risk estimates" to the National Research Council, Committee on the Biological Effects of Ionizing Radiation (BEIR V) report in 1990. This report was preceded by BEIR I and BEIR III in 1972 and 1980, respectively. The RMI cites a U.S. Department of Energy publication "Closing the Circle on the Splitting of the Atom" that contained a table portraying the evolution of health protection standards for nuclear workers with an entry for 1990: "The National Academy of Sciences BEIR V report asserts that radiation is almost nine times as damaging as estimated in BEIR I." The BEIR V report does not make any such statement.

Estimates are an expression of complex mathematical models used to explain observed facts, and these models are continuously refined. For example, today scientists would not use the model thought best in 1972. There have been major changes in thinking about biology and the mathematical models used to mirror the observations in radiation-exposed people. Therefore, the estimated lifetime risk from a given amount of ionizing radiation has changed. BEIR V analysts concluded that their new estimate would actually represent about a two-fold to four-fold increase since the 1980 BEIR III report. BEIR III analysts estimated that the risk in 1980 was about half the 1972 estimate. There are neither published data nor official comments to support the RMI assertion of a nine-fold change in risk from BEIR I to BEIR V. BEIR V estimates are about three-fold increase of cancer other than leukemia and perhaps four-fold for leukemia compared with BEIR III.

The RMI also asserts that the large decline in the public protection standard for ionizing radiation, occurring over the 30-year period since BEIR I, is an indicator of growing knowledge of the greatly increased danger of ionizing radiation. The decline in the standard has been from 5 mSv to 1 mSv per year rather than from 5 mSv to 0.15 mSv as given by RMI, and the decrease from 1.7 mSv (used to guide cleanup in the Marshall Islands) to 1 mSv is 40%. The RMI compares public protection standards to proposed 1994 EPA cleanup guidelines for sites formerly used for nuclear research and development. This comparison is inappropriate and yields an incorrect calculation of the magnitude of change in standards and the risk of exposure to ionizing radiation.

RMI has asked whether the true external whole body dose to Marshallese was twice what was thought due to "flaws in the dose estimation done by the Department of Energy." Although it is impossible ever to know the true external whole body doses to individuals, average doses can be estimated retrospectively with a reasonably high degree of confidence. The following table compares estimates made by independent experts of external dose for Marshallese exposed to Bravo test fallout, with emphasis on Rongelap.

Table 1. Comparison of Whole-Body Dose (rad) from BRAVO fallout by various reports and investigators.

	Sondheus and Bond (1955)	Breslin and Cassidy (1955)	JCAE (1957)	Peterson (1981)	Lessard et al. (1985)	Behling et al. (2000)
Location						
Rongelap	175	180 R	170	110	190	410
Ailinginae	69	60 R	75	24	110	215

The estimates by Breslin and Cassidy are either in roentgen (R) or dose to air (r); estimates in whole body dose (rad) would be approximately 0.88 times the reported values.

Behling and his co-authors estimated an average dose about twice that of the other investigators. This is the basis for the RMI's question as to whether or not external doses could be twice those previously reported. In his 2000 report, Behling started with the estimates made by Sondhaus and Bond in 1956, and increased them by making new assumptions about types of radioactivity, durations of exposure, and people's location relative to fallout. Estimates of average external dose by various investigators for the Rongelap population were in the range of 170 to 190 rad with the exception of Peterson who estimated 110 rad, Bresin and Cassidy that can be interpreted to be about 130 rad, and Behling et al. who estimated 410 rad (4.1 Gy). The weight of expert opinion remains in favor of an average external dose about one half those estimated by Behling.

4. Summary of the Request from the Republic of the Marshall Islands

In its "changed circumstances" request, the RMI seeks the following:

Personal Injury Claims	
1. Funds to meet unpaid claims already approved by the Nuclear Claims Tribunal in excess of the amounts provided for this purpose through the trust fund	$26.9 million
Medical	
2. $50 million capital for infrastructure and $45 million per year for 50 years for a "section 177 health program" for those exposed to radiation AND awardees of personal injury claims.	$2,300.0 million
Property – Loss of Use	
3. Enewetak award already decided by the NCT for loss of use ($244 million) and hardship ($33,814,500), plus interest at 7%.	$277.8 million
4. Bikini atoll award already decided by the NCT for loss of use ($278 million) and hardship ($33,814,500) plus interest at 7%.	$311.8Million
5. Utrik atoll claim in preparation.	
6. Rongelap/Rongerik atoll claim under review by NCT.	
Property – Rehabilitation	
7. Enewetak award already decided by the NCT for rehabilitation above the $10 million trust fund already provided (plus interest at 7%).	$107.8 million
8. Bikini atoll application pending before the NCT.	$251.5 million
9. Utrik atoll claim in preparation.	
10. Rongelap/Rongerik atoll claim in preparation.	>$100 million
Occupational Safety	
11. Request a program for workers involved in remediation/cleanup projects.	
Medical Surveillance/Monitoring	
12. Request a radiation exposure monitoring and surveillance program for at least 50 years for the entire RMI.	
Community Education and Development	
13. Requests a program to educate RMI citizens in radiation-related fields and build capacity to undertake research about the "consequences of the U.S. nuclear testing program."	
Nuclear Stewardship	
14. Requests a program for communities to safely contain radiation near waste storage areas.	

5. Health Care

Health care services for the Marshall Islands population include:

– The RMI Ministry of Health provides health care for the general Marshallese population of approximately 55,000 through two major hospitals and 58 dispensaries serving the outer atolls. The RMI spends approximately 33% of its annual health care budget on off-island medical referrals. The RMI's per capita health expenditure is USD $147 a year.

– The Section 177 Health Care Program, mandated by Congress to provide health care for the people of the atolls of Bikini, Enewetak, Rongelap, and Utrik affected by consequences of the nuclear testing program, their descendents and others identified as having been so effected, currently serves 13,460 enrollees. The per capita annual expenditure is about USD $65.

– The Department of Energy's Special Medical Program was mandated by Congress in 1954 to provide medical surveillance and care for radiation-related illnesses among the people of Rongelap and Utrik atolls exposed to fallout from nuclear test Bravo in 1954. DOE patients are also in the more limited 177 Health Care Program. In FY02, the per patient annual health expenditure was USD $12,000.

Through its "changed circumstances" request, the RMI now seeks U.S.-standard primary, secondary and tertiary health care systems, integrated with existing RMI health services, to serve the entire RMI population for fifty years. The RMI estimates operating costs at $43,102,644 a year, not including travel and housing costs. This equals approximately $780 per Marshallese per year. In addition, the RMI requests $50,000,000 to cover estimated capital costs.

The RMI request does not address the role of the amended Compact of Free Association in which support for the RMI health sector is designated a high priority for use of U.S. assistance. RMI Government health sector expenditures, which are heavily subsidized by the health sector grant under the amended Compact, will total $15.9 million in FY 2005 and are estimated to be $16.5 million in FY 2006, $16.6 million in FY 2007 and $16.8 in
FY 2008.

5.1 The Republic of the Marshall Islands Health Sector

The World Health Organization provides the following health indicators for the Marshall Islands in 2000. For comparison, corresponding indicators are provided for the Federated States of Micronesia, also a U.S. freely associated state; Samoa, another Pacific island country with approximately the RMI'S level of per capita income; and the United States.

	RMI	FSM	Samoa	U.S.
Life expectancy at birth (years)				
Total population	62.7	66.5	68.2	77.3
Males	61.1	64.9	66.8	74.6
Females	64.6	68.1	69.7	79.8
Child mortality (per 1000)				
(probability of dying under age five)				
Males	48	63	27	9
Females	37	51	21	7
Adult mortality (per 1000)				
(probability of dying between 15 and 59)				
Males	340	211	235	140
Females	266	176	203	83
Life expectancy lost due to poor health (%)				
Males	11.7	12.2	11.3	9.9
Females	13.8	14.2	13.5	10.7
Health Expenditure				

Total as % of GDP	9.8	7.8	5.8	13.9
Per capita (US$)	190	172	74	4887

The RMI health care system is administered and subsidized by the Marshallese Government through the Ministry of Health. The Minister of Health is an elected member of the Nitijela or RMI parliament. Within the Ministry, the Secretary of Health oversees the day-to-day operations of four major departments: Primary Health Care, Kwajalein Atoll Health Care, Majuro Hospital, and Administration and Finance.

RMI has two major hospitals, located in the major urban centers of Majuro and Ebeye. Built in 1986, the Majuro Hospital has 103 inpatient beds, an emergency room, and a dental clinic. The structure itself is largely constructed with specially coated cardboard paneling. The Ministry of Health believes the hospital's functional life will soon end and would like to replace it as soon as possible. A new Ebeye Hospital opened in 2002, to replace the 25-inpatient bed facility that was in serious disrepair.

The outer island atolls are served by 58 dispensaries. Currently, each is run by a health assistant, who usually is high school educated with basic health training. These dispensaries are linked to Majuro Hospital by short-wave radio. Patients who cannot be treated locally on the outer island atolls are referred to the Ebeye or Majuro hospital. Those who cannot be treated there are referred for treatment overseas in Honolulu or the Philippines. Some also are sent to the USAKA hospital on Kwajalein. The RMI spends approximately 33% of its annual health budget on off-island medical referrals.

Funding for Ministry of Health operations comes from Compact money, the RMI Government's general fund, U.S. funds for primary health care and public health, and other grants. User fees are charged for health services, but the fee is nominal, $5 per visit for outpatient services, and $5 per day for inpatients. These user fees generate approximately 1% of the RMI's health budget.

The RMI's universal health care system (the Marshall Islands Health Plan) is a social security type system that insures and provides for every Marshallese resident. The Social Security Act of 1990 required employees to contribute 8.5% of their salary, with 3.5% going to the health insurance fund and 5% to a retirement fund. The Act required employers to match these contributions. These rates later were increased to 9.5%, with 2.5% going to the health fund and 7% going to the retirement fund. The health insurance fund is used to pay for medical supplies for the Ebeye and Majuro hospitals and outer island dispensaries, and referrals to Honolulu, the Philippines and USAKA.

5.2 The Section 177 Health Care Program

Article II, Section 1(a) of the Section 177 Subsidiary Agreement directed that the Fund Manager disburse $2,000,000 annually to the Marshall Islands Government to fund the Four-Atoll Healthcare Program. Over the first 15 years of the Compact, the Federal funds allocated under this subsection were to total $30,000,000, with a $4,000,000 extension until October 1, 2003. These funds were in addition to the amounts provided to the four atolls as their share as constituent atoll governments of the Republic of the Marshall Islands under Compact sections 218(a)(2), $1,791,000 annually for nationwide health and medical programs, including referrals, and 221(b), $10,000,000 annually for education and health care. These latter monies have been a major funding source for health care services provided by the RMI Ministry of Health, described in section 5.3 below.

The Section 177 Health Care Program has been managed since 1987 by Trinity Health International, a Michigan-based nonprofit health care organization. The 177 Program employs 15 staff in the Marshall Islands, including a Marshallese citizen Administrator, a U.S. citizen Assistant Administrator and Chief Financial Officer, two non-Marshallese physicians and nine health assistants. Four of the health assistants are stationed, respectively, on the atolls of Enewetak and Utrik and on the islands of Kili and and Mejatto. In Honolulu, the 177 Program operates an office that coordinates tertiary care referrals and conducts utilization reviews of all active cases. One Marshallese employee staffs the office.

Through the 177 Program, Trinity provides primary care, including immunizations, to persons directly affected by the nuclear testing program and their descendents at clinics built in the early 1990's on Majuro, Ejit, Mejatto, Kili, Enewetak and Utrik. Trinity conducts quarterly missions to each of the four nuclear-affected atolls, recording over 24,950 patient encounters from 1987 to 2002. During the same period, Trinity recorded over 67,900 patient encounters in Majuro. Trinity also conducts specialized missions to each of the outer atoll clinics, to provide ophthalmology, ENT, pediatric, urology, women's health, audiology, dental and other services to persons directly affected by the nuclear testing program and their descendents.

Since assuming responsibility for the 177 Program, Trinity has continued to develop its infrastructure and human resources. In addition to construction of its six clinics noted above, this has included:

-- between the late 1980's and 2001, installation and upgrading of a radio communication system linking Majuro with each of the outer atolls;
-- in 2002, new generators purchased and installed on Mejatto, Enewetak and Utrik;
-- training provided to health assistants on Majuro and each of the outer atolls to improve assessment and treatment skills;
-- development and training of Majuro-based personnel to operate a computer database to track patients and strategic health and planning information;
-- establishment of a medical resources library at the program's Majuro clinic and, in conjunction with the RMI's Majuro Hospital, a pharmaceutical formulary.

According to a July 2002 Trinity Health International report on the 177 Program, new births and marriages have produced a five-fold increase in enrollment between 1990 and 2002, from 2,625 to 13,460. An enrollment audit was initiated in 2002. By the time Trinity's report was released, two atolls had been audited and 684 ineligible or deceased enrollees removed from the program's rolls. The enrollment of ineligible persons remains a concern.

In its July 2000 report, Trinity emphasizes that "the Section 177 Program is fully integrated in the RMI healthcare system and has an impact not only on the population it serves but on services of the Ministry of Health and other healthcare providers." For instance, the 177 Program:

-- employs the outer atoll dispensary staff that performs much of the RMI's public health care work;
-- deploys physicians to the Majuro Hospital who provide training
programs and direct patient care benefiting all Marshallese patients;
-- maintains outer atoll clinic dispensaries, communications links with Majuro, and generators that support provision of health care to entire outer atoll communities;
-- pays the Majuro Hospital $260,200 a year for secondary care for
services to the 177 Program caseload, augmenting total hospital resources
serving the Marshallese population as a whole;
-- through its U.S. management firm, has obtained donations of equipment and volunteer physicians for the Majuro Hospital, as well as critical parts for equipment repairs;
-- pays travel and per diem for family planning and community health coordinators who participate in 177 Program missions, and treats all residents of the effected atolls, whether 177-eligible or not.

5.3 The Department of Energy Special Medical Program

The Department of Energy has administered the Congressionally-mandated Marshall Islands Special Medical Program for the Bravo-exposed populations of Rongelap and Utrik Atolls continuously for the past 49 years. The Compact of Free Association Act of 1985 extended continuing special medical care for surviving special medical program patients. The Compact Act provided:

Notwithstanding any other provision of law, upon the request of the Government of the Marshall Islands, the President (either through an appropriate department or agency of the United States or by contract with a United States firm) shall continue to provide special medical care and logistical support thereto for the remaining 174 members of the population of Rongelap and Utrik who were exposed to radiation resulting from the 1954 United States thermonuclear "Bravo" test, pursuant to Public Laws 95-134 and 96-205.

This program continues through section 103(f)(1) of the Compact of Free Association Amendments Act of 2003, PL 108-188.

Participation in the special medical care program is voluntary. At the end of FY2003, 195 individuals are enrolled in the program. One hundred eleven of these are the remaining survivors of the original 253 people and 12 unborn children present on Rongelap and Utrik Islands at the time of the 1954 Bravo test. There are also 85 Marshallese volunteers, of approximately the same age and gender distribution as the Bravo-exposed patients, not present at Rongelap or Utrik at the time of the Bravo test. The volunteers serve as a normal reference group for establishing typical patterns of illness and disease among the Rongelap and Utrik people. Although the additional volunteers were previously provided only an annual medical examination and local on-island treatment or referral to the Section 177 Health Care Program, today the entire DOE patient population receives the same medical care services.

The DOE medical program administers annual cancer-oriented comprehensive health examinations as the most effective means of fulfilling its congressional mandate. Advice is provided on decreasing risk factors for cancer.

Results of these examinations indicate that the DOE patient population of the special medical program caseload, including survivors and volunteers, is at greater risk of developing certain endocrine problems, such as thyroid disease, than the general population. For exposed individuals, specialists administer annual thyroid function blood tests and thyroid examinations.

Referrals to Majuro, Kwajalein, and Honolulu are the responsibility of a DOE-funded logistics contractor in Honolulu. DOE patients who require tertiary medical services not available in the RMI are transported to Honolulu, Hawaii and treated at the Straub Clinic. When patients with general medical problems not associated with Bravo-related radiation exposure are identified among DOE patients, they are referred to the 177 Health Care Program. DOE assists in providing emergency care for patients with any life-threatening condition. Emergency care is coordinated with the 177 Health Care Program and RMI national health care program.

From 1954 to June 1998, Brookhaven National Laboratory supported the Special Medical Program.The Brookhaven program was a ship-based medical examination program. The ship visited the Rongelap and Utrik Islands twice a year through 1995. Physicians examined the exposed population and conducted a general sick-call for the island residents. Brookhaven sponsored resident physicians in the Marshall Islands for a one or two year appointment. The resident physician program ended in 1986, when the Compact of Free Association Act was enacted. From 1995 to 1998, Brookhaven operated a land-based medical program.

Since 1998, medical services under DOE's Special Medical Care Program have been delivered by Honolulu-based Pacific Health Research Institute (PHRI) and based on year-round, on-island primary and secondary care to survivors and volunteers residing in the RMI and annual physical examinations to patients living in Hawaii and the continental United States. PHRI clinics are located on Kwajalein Island and in Majuro, where local Marshallese physicians and nurse supervisory personnel can see patients daily. A full-time Chief of Clinical Operations oversees the program from Majuro. Program managers coordinate closely with the 177 Health Care Program and the RMI national health care system to leverage assets and ensure continuity of patient care. Physicians at Honolulu's Straub Clinic and Hospital, Kaiser-Permanente, Wahiawa General Hospital, and the University of Hawaii School of Medicine support the work of the program's Marshallese physicians and nurses.

6. Personal Injury Claims

6.1. The Nuclear Claims Tribunal

The Section 177 Settlement Agreement provided a lump sum settlement and the governments agreed on division of the proceeds from the settlement among various purposes. The Section 177 Settlement Agreement does not prescribe criteria on which the Nuclear Claims Tribunal is to base compensation awards, and the NCT is not required to adhere to standards that would be applied under U.S. law. Among others, the NCT has made awards for the following categories of claims:

-- The NCT awards damages to persons from throughout the Marshall Islands, assuming the effects of the U.S. nuclear testing to have gone beyond the four populated northern atolls that are the subject of the Section 177 Settlement Agreement.

– The scientific community has not found transferance of nuclear effects to the second generation in humans. However, the Tribunal has awarded the biological children of a mother who was physically present at the time of the testing 50% of amounts offered first generation claimants.

– The NCT has awarded some amount less than $2 million for other conditions not recognized by the United States as radiogenic but deemed radiogenic by the Tribunal; those conditions include benign salivary and parathyroid gland tumors, hyperparathyroidism, hypothyroidism for individuals not on Rongelap in March 1954, and unexplained "bone marrow failure."

Most U.S. radiation-related compensation programs require proof of a minimal level of exposure at a particular age relative to the date of diagnosis to qualify for compensation. The four northerly RMI atolls are those that were exposed and affected by the U.S. testing program. There is no similar basis for recognizing the claims of children of exposed parents or those of individuals located south of ten degrees north latitude at the time of testing.

Part of the RMI request is for $26.9 million to pay personal injury awards already approved by the Tribunal in excess of the trust fund. The United States Government has played no role in the management of the fund, nor in the investment decisions affecting the proceeds generated by the Trust Fund. The mixed earnings record of the Trust Fund is not attributable to the U.S. nuclear testing program and does not provide a basis for a "changed circumstances" funding request under the Article IX of the Section 177 Settlement Agreement.

7. Loss of Land Use and Hardship

7.1 Nuclear Claims Tribunal Awards

Loss of Land Use: In its loss of use judgments, the Tribunal reasoned that, because the United States never intended to permanently preclude Bikinians or Enewetakese from returning to their home atolls, this constituted a "temporary taking". The Tribunal relied on expert appraisal witnesses to arrive at fair rental values of the land for the periods of denied use, and offset compensation previously paid to claimants.

The Nuclear Claims Tribunal made loss of land use awards to Enewetak of $244 million on April 13, 2000 and $278 million to Bikini on March 5, 2001.

Hardship: In its Enewetak judgment, the NCT explained its reasoning in evaluating hardship claims:

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 ... The injuries at issue here are those arising out of relocation to Ujelang and the hardships endured there by the people because of its remoteness and lack of adequate resources ... The damages are a consequence of the loss of their land and their relocation attendant to that loss ... The Tribunal will adopt the approach suggested by claimants for quantification of these damages, by paying an annual amount for each person on Ujelang for each of thirty three years between 1947 and 1980 the years the people of Enewetak were on Ujelang.

On this basis, the NCT determined that the damages for hardship during the relocation to Ujelang amounted to $30,084,500. Applying the same procedure to relocation of Bikinians to Rongerik and Kili, the NCT made a hardship award of $33,614,500 to Bikini.

7.1 Comment

All losses and damage to property arose before the Section 177 Settlement Agreement entered into force. The Section 177 Settlement Agreement recognizes that there would be an indefinite period during which some of the affected atolls and islands would be uninhabitable or unusable and that in some cases the land would never be useable. The loss of land use and hardshipclaims deemed compensable by the NCT do not involve losses or damage to property that "could not reasonably have been identified." The facts regarding loss and damage to property do not support a funding request under the "changed circumstances" provision of the Section 177 Settlement Agreement.

In making its awards, the Tribunal exceeded the amount of money provided through the settlement agreement for loss or damage to property. The Government of the United States played no role in fund management or the investment decisions affecting the proceeds generated by the Trust Fund. The mixed earnings record of the Trust Fund is not attributable to the nuclear program and does not provide a basis for a funding request under Article IX of the Section 177 Settlement Agreement.

8. Atoll Rehabilitation

8.1 Nuclear Claims Tribunal Awards

The NCT accepted the position of the IAEA that "... policies and criteria for radiation protection of populations outside national borders from releases of radioactive substances should be at least as stringent as those for the population within the country of release." The NCT adopted current U.S. standards and considered numerous alternative strategies and approaches to how these standards could be met. These included removal of contaminated soil, application of potassium to reduce plant intake of cesium and phytoremediation, the use of plants to uptake the radioactive contaminants from the soil, and soil washing.

The NCT considered strategies costing from $217.7 million to $1.4 billion for Bikini and a similar range of options for Enewetak. The NCT awarded $251,500,000 to Bikini on March 5, 2001, and $91,710,000 to Enewetak on April 13, 2000, "to restore [them] to a safe and productive state."

8.2 Cleanup Standards

There are multiple U.S. federal standards applied to various cleanups that cover a wide range of doses but in general, they tend to control doses to as far below the 1 mSv per year limit as is practical. However, the International Commission on Radiological Protection (ICRP-82) and the International Nuclear Safety Advisory Group (INSAG) to the International Atomic Energy Agency have established basic principles of radiation protection and safety on which their policy on intervention, the Basic Safety Standard, is based.

Decisions on whether to intervene, and how, depend on the circumstances of individual cases. Quantitative criteria used in determining whether and when an intervention should be undertaken are called intervention levels or action levels.

There are no agreed international guidelines on intervention levels for chronic exposure to radioactive residues from events such as nuclear weapons testing. However, guidance established in the Basic Safety Standard for other situations indicates intervention levels that might be appropriate in the aftermath of nuclear weapons testing.

Intervention levels are determined based on the expected dose to be avoided by a specific remedial action such as soil scraping, topping with crushed coral, or potassium fertilization of food crops. Internationally agreed guidance on generic levels applicable to any intervention situation, especially for chronic exposure situations, has been established by the IAEA.

Intervention can be expected in almost all cases where doses approach levels at which the likelihood of deleterious health effects is very high. Intervention would be unlikely when the annual effective dose does not exceed about 10 mSv in any year. An annual dose of less than 1 mSv is generally accepted as the dose limit for the public.

Doses from natural background radiation provide a useful reference for comparison. In general, people receive a background dose from natural radiation sources in the range of 1 to 20 mSv, in certain locations 100 mSv. Most people receive a few mSv per year and annual doses of 10 mSv are unusual, but doses in excess of 100 mSv do occur in some places. The Marshall Islands natural background dose is 2.4 mSv. About 2 mSv of the 2.4 mSv natural background dose is acquired by eating fresh fish.

In situations such as those in the Northern Marshall Islands, generic guidance for rehabilitation of areas of chronic exposure is available. An annual effective dose of up to 10 mSv (1 rem) can be used as a robust and pragmatic action level in areas of chronic exposure. Doses below this level require careful consideration. However, areas where such levels are observed generally would be declared safe without further remediation.

A process of balancing human and environmental protection determines the form, scale and duration of the intervention. Provided that the principles set out in the Basic Safety Standards have been applied, a situation in which chronic exposures produce dose rates of less than 10 mSv per year would normally be acceptable but may not be practical due to public perceptions.

1. **Radiological remediation and current radiological condition of the Four Atolls**

Radiation protection principles have always been applied in making cleanup decisions for the northern Marshall Islands -- Bikini, Enewetak, Rongelap and Utrik atolls. A brief history of cleanup activities and current radiation exposure levels are provided below. Radiation exposure differs from radiation dose in that exposure does not include information about the effectiveness of the radiation to cause biological effects.

Bikini Island: Following a 1967 IAEA radiological survey that determined that Bikini and Eneu Islands could be readied for reoccupation, President Lyndon Johnson announced that Bikini Atoll was safe for habitation. About 500 tons of radioactively contaminated debris had been removed. Agricultural areas of Bikini and Eneu Islands were prepared for use and coconut trees, pandanus and breadfruit were planted in 1969. Additional radiological surveys were conducted in the 1960's and 1970's. House building commenced following the cleanup, with some Bikini families moving back to Bikini Island by 1970. A 1975 survey sampled local food crops that had by then produced enough fruit to analyze. Dose predictions based on sample data showed that, when food crops matured, the resulting

whole body dose would exceed then-existing U.S. federal guidelines. In August 1978, Trust Territory officials moved the people to Kili Island, where many remain. Further remedial actions have been taken on Bikini and Eneu islands. The outer islands, Nam, Enidrik, Aerokoj, and Aomen, had small communities or were food-gathering locations. Aside from Bikini and Eneu, only Nam would be suitable for a resettled community and only after remediation. Most of the small islands lack resources, such as water supplies and infrastructure.

The Bikini Atoll Rehabilitation Committee in 1984 set an action level of 1.7 mSv per year based on U.S. Federal Radiation Protection Standards. The Committee reported that Eneu Island could be used without restriction; Bikini Island could be settled provided that settlers consumed only imported foods and drank cistern water for 50 years (until 2054). A 1994 radiation dose assessment reported that the estimated maximum annual dose at Bikini Island would be 4 mSv if Bikinians were to resettle in 1999, take no remedial measures, and continue to use imported foods. This annual dose could be reduced to 0.4 mSv with limited soil scraping of the top 15 inches in housing and village areas, crop fertilization, and adding some imported foods to the diet. The IAEA in 1998 reported directly to the Bikini people that Bikini Island was suitable for permanent resettlement if the remedial actions used on Rongelap Island were applied on Bikini. An ongoing limited environmental monitoring program was recommended.

Enewetak: In its 1957 radiological survey, the Atomic Energy Commission stated that Bikini and Eneu islands could be readied, and President Lyndon Johnson announced that Bikini Atoll was safe for habitation. A 1973 radiological assessment concluded that living patterns in the northern half of the atoll, including Enjebi Island, would result in exposures exceeding U.S. federal guidelines. The southern half, including Enewetak Island, was determined to be safe for habitation and agriculture. A three-year cleanup began in 1977 that included removing about 6,000 cubic yards of radioactively contaminated debris, such as plutonium-contaminated soil, from Enjebi and various other islands. Contaminated soil was placed in a concrete structure on Runit Island where it remains quarantined.

The standard for cleanup was based on a maximum plutonium contamination of the soil at a concentration of 400 pCi per gram of soil. (A pico Curie, one-trillionth of a Curie, is the usual measure of the number of nuclear disintegrations per second in a specific quantity of material.) Conservatively, this level was equivalent to the current maximum permissible exposure in air. It was customary to set the levels at 10 percent of maximum (40 pCi per gram of soil) to provide a wide margin of safety. Below this level, no soil removal was deemed required. Later, when 1977 EPA guidelines were issued, the upper limit for agricultural use was set at 80 pCi per gram of soil and 160 pCi per gram of soil for food gathering land. The EPA guidance was roughly equivalent to a lifetime risk of approximately 14 cancer deaths per 100,000 persons exposed or to a probability of one cancer every twenty-one hundred years assuming that the population size of Enewetak Island remained constant

As the cleanup concluded, 116 homes had been built to accommodate the returning population. Shortly thereafter, about 100 people returned to Ujelang because of shortages of locally grown food. Resettlement would require an ample supply of coconuts for drinking and efforts to plant trees on northern islands strictly for a source of water in periods of drought; planting of about 22,000 trees began in 1979.

From resettlement in 1980 through 1996, the average dose to the population was 0.015 mSv per year; others could receive up to 0.05 mSv by eating mostly local foods. The Nationwide Radiological Survey in 1994 found that the annual dose from radioactive cesium in the soil was 0.06 mSv.

Enewetak Island residents have available on-island monitoring of internal depositions of radioactive cesium, through whole body counting at the Enewetak Health Physics Laboratory established by the U.S. Department of Energy. For 2001, the average dose from radioactive cesium via food sources was less than 0.001 mSv per year, compared to a natural background annual dose of 1.4 mSv. Therefore, the typical total radiation dose is below 0.15 mSv per year. The Enewetak people have made no decision about resettling the other traditional residential islands such as Enjebi, Japtan, and Madren.

In 1999, a scientist representing Enewetak Atoll testified before Congress that, if all the islands of the atoll were resettled in 2000, with no further remedial actions, nine people would experience a serious health problem over the next 1,000 years.

Rongelap: Rongelap atoll resettlement plans were based on an action level of 1 mSv per year from exposure to soil and diet, not including natural background, both for persons consuming a traditional Rongelap diet and those consuming local and imported traditional foods. The natural background annual radiation dose is about 2.4 mSv. The Rongelap resettlement action level was originally 1 mSv predicated on U.S. federal radiation exposure guidance at that time. It was determined that the actual exposure would be less than the resettlement action level.

Following radiological surveys, soil was removed in areas with high doses, and crushed coral topping was applied in the village and service areas. A potassium fertilizer regime was initiated to achieve a new lower dose standard for Rongelap of 0.01 mSv for the service and village areas.

There is a whole body counting facility on Rongelap Island. For the year 2001, among those counted, the average dose was 0.005 mSv. For the three-year period 1999-2001, the measured average annual dose for resettlement workers on Rongelap, from radioactive cesium via all food sources, was less than 0.001 mSv. The intake of plutonium and other similar long-lived substances in soil was measured among the construction and agricultural workers who have the greatest potential for intake of dust. No worker had an internal exposure greater than global fallout from nuclear testing. Because there is no large permanent population on Rongelap Island at this time, it is not possible to estimate what the actual range of dose would be for people with different dietary preferences, but it would be below 0.15 mSv. Radiological conditions on other islands of Rongelap Atoll vary and, depending on projected uses, different action levels apply.

Utrik: Radiological conditions dictated no formal environmental remediation of Utrik Atoll. The NWRS estimated in 1994 that the total annual dose from radioactive cesium in the soil and radiation from diet and soil would be about 0.20 mSv, assuming a traditional diet on each of the islands. A 1999 Lawrence Livermore National Laboratory dose assessment found that the maximum annual dose rate from all environmental sources, with a diet including imported foods, would be 0.038 mSv. Eating mostly local foods would result in a dose of about 0.098 mSv. Whole body counting for the Utrik people is now available, with the installation of a whole body counting facility in Majuro in July 2003. This facility will permit Utrikese to monitor their internal cesium levels, and to confirm that their traditional and contemporary food choices are safe.

8.4 Comment

An important element underlying the RMI request for Atoll Rehabilitation is the assertion that the United States Government has adopted stricter standards for domestic nuclear cleanup activities in the United States since the 1986 settlement agreement was reached. The current dose limit used by the U.S. Government to protect the public from all sources of radiation is 1 mSv per year. The current dose limit has been used to guide cleanup decisions in the RMI before and after the Compact was enacted. Extensive monitoring of individuals on atolls where cleanup has been effected indicates actual doses are below the NCT standard of 0.15 mSv per year. Cleanup decisions to date have conferred a degree of protection that exceeds all existing U.S. federal agency guidelines as well as the Tribunal's desired standard. There is no "changed circumstance" on which a funding request can legitimately be made under Article IX of the Section 177 Settlement Agreement.

9. Occupational Safety

In its request, the Republic of the Marshall Islands states that "Section 177 does not include an occupational safety program for Marshallese and other workers involved in environmental remediation or cleanup programs. As a result, Marshallese and other workers are exposed to occupational sources of radiation. Medical screening of past and present radiation workers is greatly needed to reduce the risk of further illness and claims." These are programs that the parties could have chosen to include in the full settlement, but they chose not to. The desirability of such programs does not constitute "changed circumstances" on which a funding request can legitimately be made under the Section 177 Settlement Agreement. To the extent the Government of the Republic of the Marshall Islands considers these programs are needed, they should be included in the RMI budget, and they could then be considered by the Joint Economic Management and Financial Accountability Committee for possible coverage under a sector grant under the amended Compact.

10. Nuclear Stewardship

10.1 RMI Request

In its request, the Republic of the Marshall Islands states that "Section 177 does not provide programs for communities to develop strategies for safely containing radiation and living near radioactive waste storage areas."

10.2 Runit Dome

The 43 nuclear tests conducted at Enewetak Atoll by the United States between 1948 and 1958 produced close-in fallout that contaminated the islands and lagoon of the atoll with radioactive fission and activation products, and unfissioned nuclear fuel. In 1972, the U.S. Government announced that it would conduct a cleanup and restoration operation to return the atoll to the Enewetak people. The radiological cleanup was conducted between 1977 and 1980 and focused on reducing the concentration of transuranium elements in soils on some of the islands that might eventually be used for residence or for subsistence agriculture. The cleanup plan called for relocating soil and some other contaminated debris to Runit Island on the eastern perimeter of the Atoll. Some of the contaminated soil was mixed with cement and the mixture placed below the water level in the Cactus Crater formed by a nuclear explosion in 1958. The remainder of the contaminated material was mixed with concrete and placed above ground over the crater in the shape of a dome. A concrete cap was constructed over the dome of soil.

Concern has been expressed by the people of Enewetak over the possible aquatic impacts from the radionuclides entombed in the crater. A National Academy of Sciences committee examined the dome and concluded that the containment structure and its contents present no credible health hazard to the people of Enewetak, either now or in the future. The committee suggested that "at least part of the radioactivity contained in the structure is available for transport to the groundwater and subsequently to the lagoon and it is important to determine whether this pathway may be a significant one." Therefore, a surveillance program was started in 1980, in conjunction with other research efforts, to study the radionuclides in samples of fish, groundwater, and lagoon seawater. Data collected support the finding of the National Academy committee that any fear that this structure contains amounts of activity whose release would cause damage to the environment that will result in greater effect on human health is unfounded. Indeed, research has shown that the land area adjacent to the dome has a different radiological "signature" than is found in the dome. This suggests that there had been no seepage from the dome up to the time samples were collected in 2000.

10.3 Comment

Kurt Campbell, Deputy Assistant Secretary of Defense, testified before the House Resources Committee on May 11, 1999:

...As part of the U.S. Government's acceptance of responsibility 'for compensation owing to citizens of the Marshall Islands...for loss or damage ... resulting from the nuclear testing program...conducted...between June 30, 1946, and August 18, 1958,' the Department of Defense participated in the clean up of Enewetak Atoll. Contaminated matter was deposited in Cactus Crater on Runit Island, and the Army Corps of Engineers constructed a concrete dome over the crater for containment. Pursuant to the terms of the Compact of Free Association, the Republic of the Marshall Islands bears full responsibility for maintaining and monitoring the dome and Runit Island.

Appearing at the same session, Allen Stayman, Director of the Office of Insular Affairs at the Department of the Interior, testified:

...Perhaps the most significant, bilateral issue outstanding is the condition of Runit Island, a responsibility that the Enewetak Government claims still rests with the U.S. Departments of Defense or

Energy. The Federal position is that, although either or both Federal departments have occasionally sent personnel to inspect the condition of the Runit dome, this has been ex gratia. As article VII, sentence one, of the Section 177 Subsidiary Agreement states:

'The Government of the United States is relieved of and has no responsibility for, and the Government of the Marshall Islands, . . . shall have and exercise responsibility for, controlling the utilization of areas in the Marshall Islands affected by the Nuclear Testing Program.'

This remains the Administration's position.

The parties could have chosen to include long-term stewardship programs, including monitoring, in the full settlement, but they chose not to. The Administration agrees that such programs might be desirable. At a June 14, 2001 meeting, the Departments of Energy and the Interior agreed with the RMI on the "need [for] long-term stewardship programs for sites in the RMI with long-lived wastes, including monitoring of the Runit dome to ensure its integrity." However, the desirability of such programs does not constitute "changed circumstances" on which a funding request can legitimately be made under the Section 177 Settlement Agreement. The Government of the Republic of the Marshall Islands could include such programs in the RMI budget and they could then be considered by the Joint Economic Management and Financial Accountability Committee for possible coverage under a sector grant under the amended Compact.

11. Nuclear Education

In its request, the Republic of the Marshall Islands states that Compact Section 177 provides no means to educate Marshallese citizens in radiation- related fields or to build local capacity to undertake research, archive relevant information, or educate the public about the consequences of the U.S. Nuclear Testing Program in the Marshall Islands.

The parties could have chosen to include nuclear education in the full settlement, but they chose not to. The Administration agrees that nuclear education is desirable. However, the desirability of such education does not constitute a "changed circumstance" on which a funding request can legitimately be made under the Section 177 Settlement Agreement. The Government of the Republic of the Marshall Islands could include nuclear education in the RMI budget and it could then be considered by the Joint Economic Management and Financial Accountability Committee for possible coverage under a sector grant under the amended Compact.

Appendix A – Chronology of U.S. Nuclear Testing in the Marshall Islands

No.	Date	Site	Type	Yield (kt.)	Operation	Test
1	6/30/1946	Bikini	Airdrop	21.0	CROSSROADS	ABLE
2	7/24/1946	Bikini	Underwater	21.0	CROSSROADS	BAKER
3	4/14/1948	Enewetak	Tower	37.0	SANDSTONE	XRAY
4	4/30/1948	Enewetak	Tower	49.0	SANDSTONE	YOKE
5	5/14/1948	Enewetak	Tower	18.0	SANDSTONE	ZEBRA
6	4/7/1951	Enewetak	Tower	81.0	GREENHOUSE	DOG
7	4/20/1951	Enewetak	Tower	47.0	GREENHOUSE	EASY
8	5/8/1951	Enewetak	Tower	225.0	GREENHOUSE	GEORGE
9	5/24/1951	Enewetak	Tower	45.5	GREENHOUSE	ITEM
10	10/31/1952	Enewetak	Surface	10400.0	IVY	MIKE
11	11/15/1952	Enewetak	Air Drop	500.0	IVY	KING
12	2/28/1954	Bikini	Surface	15000.0	CASTLE	BRAVO
13	3/26/1954	Bikini	Barge	11000.0	CASTLE	ROMEO
14	4/6/1954	Bikini	Surface	110.0	CASTLE	KOON
15	4/25/1954	Bikini	Barge	6900.0	CASTLE	UNION
16	5/4/1954	Bikini	Barge	13500.0	CASTLE	YANKEE
17	5/13/1954	Enewetak	Barge	1690.0	CASTLE	NECTAR
18	5/2/1956	Bikini	Air Drop	3800.0	REDWING	CHEROKE
19	5/4/1956	Enewetak	Surface	40.0	REDWING	LACROSSE
20	5/27/1956	Bikini	Surface	3500.0	REDWING	ZUNI
21	5/27/1956	Enewetak	Tower	0.2	REDWING	YUMA
22	5/30/1956	Enewetak	Tower	14.9	REDWING	ERIE
23	6/6/1956	Enewetak	Surface	13.7	REDWING	SEMINOLE
24	6/11/1956	Bikini	Barge	365.0	REDWING	FLATHEAD
25	6/11/1956	Enewetak	Tower	8.0	REDWING	BLACKFOOT
26	6/13/1956	Enewetak	Tower	1.5	REDWING	KICKAPOO
27	6/16/1956	Enewetak	Air Drop	1.7	REDWING	OSAGE
28	6/21/1956	Enewetak	Tower	15.2	REDWING	INCA
29	6/25/1956	Bikini	Barge	1100.0	REDWING	DAKOTA
30	7/2/1956	Enewetak	Tower	360.0	REDWING	MOHAWK
31	7/8/1956	Enewetak	Barge	1850.0	REDWING	APACHE
32	7/10/1956	Bikini	Barge	4500.0	REDWING	NAVAJO
33	7/20/1956	Bikini	Barge	5000.0	REDWING	TEWA
34	7/21/1956	Enewetak	Barge	250.0	REDWING	HURON
35	4/28/1958	Near Enewetak	Balloon	1.7	HARDTACK	YUCCA
36	5/5/1958	Enewetak	Surface	18.0	HARDTACK	CACTUS
37	5/11/1958	Bikini	Barge	1360.0	HARDTACK	FIR
38	5/11/1958	Enewetak	Barge	81.0	HARDTACK	BUTTERNUT
39	5/12/1958	Enewetak	Surface	1370.0	HARDTACK	KOA
40	5/16/1958	Enewetak	Underwater	9.0	HARDTACK	WAHOO
41	5/20/1958	Enewetak	Barge	5.9	HARDTACK	HOLLY
42	5/21/1958	Bikini	Barge	25.1	HARDTACK	NUTMEG
43	5/26/1958	Enewetak	Barge	330.0	HARDTACK	YELLOWWD
44	5/28/1958	Enewetak	Barge	57.0	HARDTACK	MAGNOLIA
45	5/30/1958	Enewetak	Barge	11.6	HARDTACK	TOBACCO
46	5/31/1958	Bikini	Barge	92.0	HARDTACK	SYCAMORE
47	6/2/1958	Enewetak	Barge	15.0	HARDTACK	ROSE
48	6/8/1958	Enewetak	Underwater	8.0	HARDTACK	UMBRELLA
49	6/10/1958	Bikini	Barge	213.0	HARDTACK	MAPLE
50	6/14/1958	Bikini	Barge	319.0	HARDTACK	ASPEN
51	6/14/1958	Enewetak	Barge	1450.0	HARDTACK	WALNUT
52	6/18/1958	Enewetak	Barge	11.0	HARDTACK	LINDEN
53	6/27/1958	Bikini	Barge	412.0	HARDTACK	REDWOOD
54	6/27/1958	Enewetak	Barge	880.0	HARDTACK	ELDER
55	6/28/1958	Enewetak	Barge	8900.0	HARDTACK	OAK
56	6/29/1958	Bikini	Barge	14.0	HARDTACK	HICKORY
57	7/1/1958	Enewetak	Barge	5.2	HARDTACK	SEQUOIA
58	7/2/1958	Bikini	Barge	220.0	HARDTACK	CEDAR
59	7/5/1958	Enewetak	Barge	397.0	HARDTACK	DOGWOOD
60	7/12/1958	Bikini	Barge	9300.0	HARDTACK	POPLAR
61	7/14/1958	Enewetak	Barge	Low	HARDTACK	SCAEVOLA
62	7/1/1958	Enewetak	Barge	255.0	HARDTACK	PISONIA

63	7/22/1958	Bikini	Barge		65.0	HARDTACK	JUNIPER
64	7/22/1958	Enewetak	Barge		202.0	HARDTACK	OLIVE
65	7/26/1958	Enewetak	Barge		2000.0	HARDTACK	PINE
66	8/5/1958	Enewetak	Surface	Fizz		HARDTACK	QUINCE
67	8/18/1958	Enewetak	Surface		0.02	HARDTACK	FIG

Sources: U.S. Department of Energy, United States Nuclear Tests: July 1945 through September 1992. Document No. DOE/NV-209 (Rev. 14), December 1994. RMI Nuclear Claims Tribunal. Annual Report to the Nitijela for the Calendar Year 1996. Majuro: 1997. for the Calendar Year 1998. Majuro: 1997.

Appendix B: Estimates of U.S. Nuclear Testing-Related Assistance and Compensation

Total: $531,931,000
(Total estimated '03 funds: $837,390,000 - based on U.S. Department of Commerce, Bureau of Labor Statistics' Inflation Calculator. Inflation calculations are low/conservative due to use of final year of funding for calculation of multi-year program/payout entries.)

Bikini Projects
Year Amount USG Source/Purpose

1964 $2,000,000 Defense/Settlement for use of Bikini

1954-02 $37,342,450 Radiological monitoring

1970-75 $2,881,000 Interior/Rehabilitation and Resettlement

1975 $3,000,000 Interior (P.L.94-34)/Establish Trust Fund

1976 Interior (P.L.95-348)
$6,000,000 /Resettlement-Kili
$3,000,000 /Addition to trust fund

1978 $35,000 Interior/Feeding program

1979-84 $1,754,000 Agriculture/Surplus food program[2]

1980 $1,400,000 Interior (P.L. 97-257)/ex gratia payment

1981 $400,000 Energy/Health plan for treatment of radiation exposure

1982 $20,600,000 Interior (P.L. 97-527)/Bikini Resettlement Trust Fund

1982 $400,000 Interior/Bikini Atoll Rehabilitation Committee

1984 $264,000 Interior/Bikini Atoll Rehabilitation Committee

1984 $1,000,000 Energy (P.L. 97-257) Four Atoll Health Program

1985-94 Agriculture/Surplus food program

1985 $1,914,000 Interior/Bikini Atoll Rehabilitation Committee

1986 $1,964,000 Interior/Bikini Atoll Rehabilitation Committee

1987 $75,000,000 Interior (P.L. 99-239)/Nuclear Claims Compensation

1988 $2,300,000 Interior/Bikini Conception Plan

1989 $5,000,000 Interior (P.L. 100-466)/Bikini Resettlement Trust Fund

1990 $22,000,000 Interior (P.L. 100-466)/Bikini Resettlement Trust Fund

1991 $21,000,000 Interior (P.L. 100-466)/Bikini Resettlement Trust Fund

1992 $21,000,000 Interior (P.L. 100-466)/Bikini Resettlement Trust Fund

1993 $21,000,000 Interior (P.L. 100-466)/Bikini Resettlement Trust Fund

Total $238,273,000 ($399,610,000 in '03 funds)

Enewetak Projects

Year Amount USG Source/Purpose

1958 $175,000 Interior/TTPI/Enewetak atoll use rights

1969 $1,020,000 Interior/Funds transfer to TTPI for the people of Enewetak

1954-02 $24,828,300 Radiological monitoring

1970-94 Agriculture/Surplus Commodity Food Program

1977 $20,000,000 Defense/DNA (P.L.94-367)/ Radiological Clean-up and Rehabilitation Project

1978 $12,400,000 Interior/TTPI/Enewetak Rehabilitation and Resettlement Program

1980 $1,475,000 Interior/TTPI/Enewetak Rehabilitation and Resettlement Program

1980 $3,820,000 Interior/TTPI/Enewetak Agriculture/Support

1981 $1,345,000 Interior/TTPI/Enewetak Agriculture/Support

1982 $818,000 Interior/TTPI/Enewetak Agriculture/Support

1983 $800,000 Interior/TTPI/Enewetak Agriculture/Support

1984 $800,000 Interior/TTPI/Enewetak Agriculture/Support

1984 $1,000,000 Energy (P.L. 97-257)/Four Atoll Health Program

1985 $662,000 Interior/TTPI/Enewetak Agriculture/Support

1986 $818,000 Interior/TTPI/Enewetak Agriculture/Support

1986 $818,000 Interior/TTPI/Enewetak Agriculture/Support

1986 $46,750,000 Interior (P.L. 99-239)/Nuclear Claims Compensation[7]

1986 $2,750,000 Interior (P.L. 99-349)/Enjebi Resettlement Community Trust Fund

1987 $2,250,000 Interior (P.L. 99-591) Enjebi Resettlement Community Trust Fund

1987 $900,000 Interior/Enewetak Agriculture/Support

1988 $2,500,000 Interior (P.L. 99-349)/Enjebi Resettlement Community Trust Fund

1988 $1,100,000 Interior/Enewetak Agriculture/Support

1989 $1,100,000 Interior/Enewetak Agriculture/Support

1989 $2,500,000 Interior (P.L. 99-591)/Enjebi Resettlement Community Trust Fund

1990 $1,100,000 Interior/Enewetak Agriculture/Support

1991 $1,094,000 Interior/Enewetak Agriculture/Support

1992 $1,094,000 Interior/Enewetak Agriculture/Support

1993 $1,091,000 Interior/Enewetak Agriculture/Support

1994 $1,091,000 Interior/Enewetak Agriculture/Support

1995 $1,089,000 Interior/Enewetak Agriculture/Support

1996 $1,091,000 Interior/Enewetak Agriculture/Support

1997 $1,091,000 Interior/Enewetak Agriculture/Support

1998 $1,191,000 Interior/Enewetak Agriculture/Support

1999 $1,576,000 Interior/Enewetak Agriculture/Support

2000 $1,191,000 Interior/Enewetak Agriculture/Support

2001 $1,388,000 Interior/Enewetak

Agriculture/Support

Total $146,167,000 ($273,370,000 in '03 funds)

Rongelap Projects

Section 103(i) of the Compact of Free Association Act of 1985 acknowledges the U.S. Government's responsibility to "restore Rongelap Island ... so that it can be safely inhabited." Moreover, in this section of the Compact Act, the Congress authorized "[s]uch sums as are necessary ... as to steps needed to restore the habitability of Rongelap Island ... to be made available to the Government of the Marshall Islands."

Year Amount USG Source/Purpose

Trust Fund

1954-02 55,174,000 Radiological and health monitoring.

1992 1,975,000 This figure includes $493,700 from the FY 1992 Department of the Interior and Related Agencies Appropriations Act (PL 102-154) to be spent for improving the living conditions of the Rongalapese on Majatto.

1993 1,983,000

1994 1,983,000

1995 783,000 Interior/In addition to the $1,200,000 appropriated in FY 1995 (PL 102-332) so that the Rongelap Atoll Local Government (RALGov) Council could hire a competent counsel, an experienced city manager to put RALGov's Administration in order, especially its financial records, and build democratic institutions.

1995 5,000,000 Defense

Total $68,898,000 (Plus $5,000,000 in potential earnings) ($71,440,000 in '03 funds)

Grants

1996 6,403,000

20,000,000 Reprogrammed in 1996

Total $28,403,000 ($31,160,000 in '03 funds)

Utrik Projects

Year Amount USG Source/Purpose

1954-02 $20,590,000 Radiological and health monitoring.

1970-94 Energy/radiological and health monitoring

1970-94 Agriculture/Surplus Commodity Food Program

1984 $1,000,000 Energy (P.L. 97-257)/Four Atoll Health Program

1985 $22,500,000 Interior (P.L. 99-239)/Nuclear Claims Compensation

Total $44,190,000 ($61,810,000 '03 funds)

Appendix C: Descriptions of Federal Radiation Exposure Programs

DEPARTMENT OF JUSTICE (RADIATION EXPOSURE COMPENSATION ACT)

On October 15, 1990, Congress passed the Radiation Exposure Compensation Act (the "Act"), 42 U.S.C. • 2210 note (1994), providing for compassionate payments to individuals who contracted certain cancers and other serious diseases as a result of their exposure to radiation released during above-ground nuclear weapons tests or as a result of their exposure to radiation during employment in underground uranium mines. Implementing regulations were issued by the Department of Justice and published in the Federal Register on April 10, 1992, establishing procedures to resolve claims in a reliable, objective, and non-adversarial manner, with little administrative cost to the United States or to the person filing the claim. Revisions to the regulations, published in the Federal Register on March 22, 1999, served to greater assist claimants in establishing entitlement to an award.

On July 10, 2000, P.L. 106-245, the "Radiation Exposure Compensation Act Amendments of 2000," was enacted. Some of the widespread changes include new claimant populations, additional compensable diseases, lower radiation exposure thresholds, modified medical documentation requirements, and removal of certain disease restrictions. There are now five categories of claimants: uranium miners, uranium millers, ore transporters, downwinders, and onsite participants. Each category requires similar eligibility criteria: exposure to radiation and existence of a compensable disease.

Uranium Miners: RECA 2000 specifies a payment of $100,000 to eligible individuals employed in an above-ground or underground uranium mine located in Colorado, New Mexico, Arizona, Wyoming, South Dakota, Washington, Utah, Idaho, North Dakota, Oregon, and Texas at any time during the period beginning on January 1, 1942, and ending on December 31, 1971. Additional mining states may be included for compensation upon application.

A. Exposure. The claimant must have been exposed to 40 or more working level months (WLMs) of radiation while employed in a uranium mine.

B. Disease. Compensable diseases include primary lung cancer and certain non-malignant respiratory diseases.

Uranium Millers: RECA 2000 specifies a payment of $100,000 to eligible individuals employed in an uranium mill located in Colorado, New Mexico, Arizona, Wyoming, South Dakota, Washington, Utah, Idaho, North Dakota, Oregon, and Texas at any time during the period beginning on January 1, 1942, and ending on December 31, 1971.

A. Exposure. The claimant must have worked for at least one year during the relevant time period.

B. Disease. Compensable diseases include primary lung cancer, certain non-malignant respiratory diseases, renal cancer, and other chronic renal disease including nephritis and kidney tubal tissue injury.

Ore Transporters: RECA 2000 specifies a payment of $100,000 to eligible individuals employed in the transport of uranium ore or vanadium-uranium ore from mines or mills located in Colorado, New Mexico, Arizona, Wyoming, South Dakota, Washington, Utah, Idaho, North Dakota, Oregon, and Texas at any time during the period beginning on January 1, 1942, and ending on December 31, 1971.

A. Exposure. The claimant must have worked for at least one year during the relevant time period.

B. Disease. Compensable diseases include primary lung cancer, certain non-malignant respiratory diseases, renal cancer, and other chronic renal disease including nephritis and kidney tubal tissue injury.

Downwinders: The Act specifies a payment of $50,000 to an individual who was physically present in one of the affected areas downwind of the Nevada Test Site during a period of atmospheric nuclear testing, and later contracted a specified compensable disease.

A. Exposure. The claimant must have lived or worked downwind of atmospheric nuclear tests in certain counties in Utah, Nevada and Arizona for a period of at least two years during the period beginning on January 21, 1951, and ending on October 31, 1958, or, for the period beginning on June 30, 1962, and ending on July 31, 1962. The designated affected areas are: in the State of Utah, the counties of Beaver, Garfield, Iron, Kane, Millard, Piute, San Juan, Sevier, Washington, and Wayne; in the State of Nevada, the counties of Eureka, Lander, Lincoln, Nye, White Pine, and that portion of Clark County that consists of townships 13 through 16 at ranges 63 through 71; and in the State of Arizona, the counties of Apache, Coconino, Gila, Navajo, and Yavapai.

B. Disease. After such period of physical presence, the claimant contracted one of the following specified diseases: leukemia (other than chronic lymphocytic leukemia), lung cancer, multiple myeloma, lymphomas (other than Hodgkin's disease), and primary cancer of the thyroid, male or female breast, esophagus, stomach, pharynx, small intestine, pancreas, bile ducts, gall bladder, salivary gland, urinary bladder, brain, colon, ovary, or liver (except if cirrhosis or hepatitis B is indicated).

Onsite Participants: The Act specifies a payment of $75,000 to individuals who participated onsite in a test involving the atmospheric detonation of a nuclear device, and later developed a specified compensable disease.

A. Exposure. The claimant must have been present "onsite" above or within the official boundaries of the Nevada, Pacific, Trinity, or South Atlantic Test Sites at any time during a period of atmospheric nuclear testing and must have "participated" during that time in the atmospheric detonation of a nuclear device.

B. Disease. After the onsite participation, the claimant contracted one of the following specified diseases: leukemia (other than chronic lymphocytic leukemia), lung cancer, multiple myeloma, lymphomas (other than Hodgkin's disease), and primary cancer of the thyroid, male or female breast, esophagus, stomach, pharynx, small intestine, pancreas, bile ducts, gall bladder, salivary gland, urinary bladder, brain, colon, ovary, or liver (except if cirrhosis or hepatitis B is indicated).

VETERANS ADMINISTRATION

Presumptive Program: Veterans who participated in nuclear tests by the U.S. including certain underground tests at Amchitka Island, Alaska, prior to January 1, 1974, or who served with the U.S. occupation forces in Hiroshima or Nagasaki, Japan, between August 1945 and July 1946, or who were prisoners of war in Japan, or some who served at the gaseous diffusion plants listed above are eligible for compensation for cancers specified in federal law. The 21 types of cancer covered under the presumptive program are: all forms of leukemia except chronic lymphocytic leukemia; cancer of the thyroid, bone, brain, breast, colon, lung, ovary, pharynx, esophagus, stomach, small intestine, pancreas, bile ducts, gall bladder, salivary gland and urinary tract (kidneys, renal pelvis, ureter, urinary bladder and urethra); lymphomas (except Hodgkin's disease); multiple myeloma; primary liver cancer; and bronchio-alveolar carcinoma (a rare lung cancer).

Non-presumptive Program: For radiation-related diseases not covered in the presumptive program, regulations provide for consideration of disability compensation claims from veterans exposed to radiation during military service. Under the non-presumptive program, additional factors must be considered to determine service-connection, including amount of radiation exposure, duration of exposure and elapsed time between exposure and onset of disease.

VA regulations define all cancers as potentially radiogenic, as well as certain other non-malignant conditions, such as posterior subcapsular cataracts; non-malignant thyroid nodular disease; parathyroid adenoma; and tumors of the brain and central nervous system.

DEPARTMENT OF ENERGY:

Public Law 106-398; 114 Stat. 1654A-394); 42 U.S.C. 7384 et seq.) is amended as follows: (1) Certain leukemia as specified cancer.--Section 3621(17) (114 Stat. 1654A-502; 42 U.S.C. 7384l(17)), as amended by section 2403 of the Supplemental Appropriations Act, 2001 (Public Law 107-20; 115 Stat. 175), is further amended by adding at the end the following new subparagraph: ``(D) Leukemia (other than chronic lymphocytic leukemia), if initial occupational exposure occurred before 21 years of age and onset occurred more than two years after initial occupational exposure."

"...based on the radiation dose received by the employee (or a group of employees performing similar work) at such facility and the upper 99 per-cent confidence interval of the probability of causation in the radioepidemiological tables published under section 7(b) of the Orphan Drug Act (42 20U.S.C. 241 note), as such tables may be updated under section 7(b)(3) of such Act from time to time..."

Data Required to Estimate Probability of Causation:
Sec. 81.5 Use of Personal and Medical Information. Determining probability of causation may require the use of the following personal and medical information provided to DOL by claimants under DOL regulations 20 CFR part 30:
(a) Year of birth.
(b) Cancer diagnosis (by ICD-9 code) for primary and secondary cancers.
(c) Date of cancer diagnosis.
(d) Gender.
(e) Race/ethnicity (if the claim is for skin cancer or a secondary cancer for which skin cancer is a likely primary cancer).
(f) Smoking history (if the claim is for lung cancer or a secondary cancer for which lung cancer is a likely primary cancer).
(g) This information will include annual dose estimates for each year in which a dose was incurred, together with uncertainty distributions associated with each dose estimate. Dose estimates will be distinguished by type of radiation (low linear energy transfer (LET), protons, neutrons, alpha, low-energy x-ray) and by dose rate (acute or chronic) for external and internal radiation dose.

Appendix D: Table of Radiation Compensation Programs:
RMI Nuclear Claims Tribunal, U.S. Veterans Administration (VA), U.S. Department of Justice (DOJ) and the U.S. Department of Energy (DOE)

	VA	DOJ	DOE	NCT
Tumors of the salivary gland (malignant)		$50,000	$150,000	$50,000
Cancer of the pharynx		$50,000	$150,000	$100,000
Cancer of the esophagus		$50,000	$150,000	$125,000
Cancer of the stomach		$50,000	$150,000	$125,000
Cancer of the small intestine		$50,000	$150,000	$125,000
Cancer of the colon		$50,000	$150,000	$75,000
Cancer of the cecum		$50,000	$150,000	$76,000
Cancer of the rectum		$50,000	$150,000	$75,000
Cancer of the liver (except if cirrhosis or hepatitis B is indicated)		$50,000	$150,000	$125,000
Cancer of the bile ducts		$50,000	$150,000	$125,000
Cancer of the gall bladder		$50,000	$150,000	$125,000
Cancer of the pancreas		$50,000	$150,000	$125,000
Bronchial cancer (including cancer of the lung and pulmonary system)		$100,000	$150,000	$37,500
Cancer of the bone			$150,000	$125,000
Non-melanoma skin cancer in individuals who were diagnosed as having suffered beta burns)				$37,500
Cancer of the breast (not recurrent or requires lumpectomy)		$50,000	$150,000	$75,000
Cancer of the breast (recurrent or requires mastectomy)		$50,000	$150,000	$100,000
Cancer of the ovary		$50,000	$150,000	$125,000
Cancer of the urinary tract		$50,000	$150,000	$75,000
Cancer of the kidney		$50,000	$150,000	$75,000
Tumors of the brain, including schwannomas (excluding other benign neural tumors)		$50,000	$150,000	$125,000
Cancer of the central nervous system				$125,000
Cancer of the thyroid (recurrent)		$50,000	$150,000	$75,000
Cancer of the thyroid (non-recurrent)		$50,000	$150,000	$50,000

Tumors of the parathyroid gland (malignant)				$50,000
Lymphomas (except Hodgkin disease)		$50,000	$150,000	$100,000
Multiple myeloma		$50,000	$150,000	$125,000
Leukemia (other than chronic lymphocytic leukemia)		$50,000	$150,000	$125,000
Tumors of the salivary gland (benign and requiring surgery)				$37,500
Tumors of the salivary gland (benign and not requiring surgery)				$12,500
Non-malignant thyroid nodular disease (unless limited to occult nodules – total thyroidectomy)				$50,000
Non-malignant thyroid nodular disease (unless limited to occult nodules – partial thyroidectomy)				$37,500
Non-malignant thyroid nodular disease (unless limited to occult nodules – not requiring thyroidectomy)				$12,500
Parathyroid adenoma				
Meningioma				$100,000
Non-malignant brain and central nervous system tumors				
Radiation sickness diagnosed between June 30, 1946 and August 18, 1958, inclusive)				$12,500
Beta burns diagnosed between June 30, 1946 and August 18, 1958, inclusive)				$12,500
Unexplained hyperparathyroidism				$12,500
Unexplained hypothyroidism (unless thyroiditis indicated)				$37,500
Severe growth retardation due to thyroid damage				$100,000
Severe mental retardation (provided born between May and September 1954, inclusive, and mother was present on Rongelap or Utirik Atolls at any time in March 1954)				$100,000
Unexplained bone marrow failure				$125,000
Chronic kidney disease		$100,000		
Chronic respiratory disease		$100,000		

The U.S. Veterans Administration (VA) pursuant to the Radiation Exposed Veterans Compensation Act provides compensation to veterans and their survivors proportional to disability and family considerations. Although it is not possible to assign a lump-sum payment it is unlikely that a veteran would receive more than $35,000 per year in wages in addition to VA provided medical care under the Veterans Health Reform Act. Veterans who worked at one of the Department of Energy Gaseous Diffusion Plants are also eligible for lump sum payments in addition to any VA compensation.

The U.S. Department of Justice (DOJ) Radiation Exposure Compensation Act Amendments of 2000 updated the original program that provides radiation compensation as a lump-sum payment. Uranium miners, millers and ore transporters are covered as well as people living downwind of the Nevada Test Site. Uranium workers receiving a DOJ payment are also eligible, under certain circumstances to receive additional $50,000 compensation from the U.S. Department of Energy compensation program.

The U.S. Department of Energy (DOE) Employees Occupational Illness Compensation Program Act provides compensation to workers diagnosed with radiation-related cancer if: the employee developed cancer after working at a facility of the Department of Energy. Federal employees, contractors, and subcontractors are eligible. The employee's cancer is judged to be "at least as likely as not related to that employment" in accordance with guidelines issued by the Department of Health and Human Services. The worker or surviving family member receive a lump-sum payment, exposed people who are living are also eligible for workers compensation from their respective state agency to cover medical costs and lost wages.

The Nuclear Claims Tribunal (NCT) was established as an independent entity within the Republic of the Marshall Islands to adjudicate claims of radiation illness and loss of use of land. Lump-sum awards are made to people with specified conditions but are paid out periodically over a number of years. The RMI Government gave the NCT full authority to determine what medical conditions it would consider radiation-related. The NCT makes awards without testing the likelihood of exposure.

Appendix E: Executive Summary Included in "Findings of the Nationwide Radiological Study of the RMI"

Summary Report, prepared for the Cabinet of the Government of the RMI, December 1994, by Dr. Steve Simon, Study Director

For a five-year period (1989-1994), the RMI Government has undertaken an assessment of radiological conditions throughout the nation. This scientific work was performed in accordance with the Section 177 Agreement which dedicated funding for radiological monitoring activities. The RMI Nationwide Radiological Study has measured radiation in the environment and gathered samples of food crops, soil and water at all of atolls and at every island of significant size. These samples were subsequently analyzed at the environmental radiation laboratory in Majuro. The Study has also reviewed previous scientific information about the nuclear tests, consulted with the international scientific community, met with outer island communities and their leaders, conducted the specialized work of the Rongelap Resettlement Project, and examined the health effects of radiation exposure, especially thyroid disease.

The Study has determined the levels of radioactivity retained in the environment at locations throughout the country. The radioactive element cesium is the largest contributor to radiation exposure, partly because it enters the food crops through the roots of plants. At most locations in the Marshall Islands, the amount of cesium is about the same, or only slightly higher, than it would be at other tropical locations throughout the world. The Study found evidence of local radioactive fallout in the northern portion of Kwajalein Atoll and at Wotje Atoll and at islands and atolls north of these locations.

From the present levels of radiation in the environment, the Study is able to estimate the cumulative radiation that an individual might have received from the environment since the end of the testing program in 1958.

The Study has also estimated the exposure levels that would be encountered by people living at different locations throughout the country. The radiation dose than an individual might receive is the sum of the external dose received directly from the environment and internal dose coming from food and drink. From these calculations, the Study has determined that the use of some of the islands in the four atolls should be restricted: Bikini, Enewetak, Rongelap and Rongerik. While other atolls and islands received fallout from the nuclear tests, the amount of radioactivity remaining in the environment has diminished to levels that are not of concern. However, the present measurements cannot eliminate the possibility that exposure to radioisotopes of iodine may have been of radiological concern. Therefore, a special study of thyroid disease throughout the Marshall Islands has been implemented and should be completed.

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Marshall Islands seeks support for ICJ cases against nuclear state

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MAJURO, Marshall Islands — The Marshall Islands is looking to civil society and the international community for support in its lawsuits against nuclear weapons states at the International Court of Justice, according to dignitaries from the islands visiting Hiroshima and Nagasaki for the 69th anniversary of the atomic bombings of the cities.

"We are trying to get support from the general public and from all the organizations that are against nuclear weapons," said Annette Note, deputy chief of mission at the Marshall Islands Embassy in Japan in a recent interview with Kyodo News.

On April 24, the Pacific island nation brought nine cases to the ICJ, one each against the five recognized nuclear weapons states – the United States, Britain, France, Russia and China -- as well as India, Pakistan, Israel and North Korea, for their alleged failure to fulfill obligations to pursue the elimination of nuclear weapons under the Nuclear Non-Proliferation Treaty.

The Marshall Islands, where the United States conducted 67 nuclear tests between 1946 and 1958, claims the nine countries have failed to honor the NPT's call to "pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control."

India, Pakistan and Israel are not members of the NPT and North Korea withdrew from the regime in 2003. Israel has not admitted to possessing nuclear weapons but is suspected of doing so, while India, Pakistan and North Korea have conducted nuclear weapons tests.

Asked if any governments have come out in support of the country's cause, Note said, "Right now we haven't really gotten any positive response...but we've been getting support from individual organizations in India, Norway, Britain, Japan, Russia. It gives us hope."

Note represented the Marshall Islands at Hiroshima's annual ceremony marking the Aug. 6 bombing and Nagasaki's Aug. 9 ceremony.

According to Note and Abacca Maddison, a former Marshall Islands senator, the filing of the cases was driven by a long-held frustration with the United States over its denial of responsibility for radiation-related health issues among islanders.

"In Japanese, they have 'hibakusha.' In Marshallese, we have 'ribomb,'" Maddison said of people affected by radiation.

In March, the Marshall Islands marked 60 years since Castle Bravo, the U.S. hydrogen bomb test believed to have spread fallout across the island nation. Note's and Maddison's families are from Bikini Atoll and Rongelap Atoll, respectively, which along with Enewetak Atoll and Utirik Atoll were the heaviest hit by the Bravo fallout.

"They're saying only one bomb affected the islands, when there were 67 atomic and hydrogen bombs," Maddison said. Many of the islets are still too contaminated to inhabit safely.

Maddison visited Hiroshima and Nagasaki to attend a convention of the Japan Council against A and H Bombs, one of the largest antinuclear activist groups in Japan.

The two dignitaries said they were calling on people to sign an online petition at nuclearzero.org to garner support for the Marshall Islands' cases at the ICJ.

"If we're not going to get a lot of support from countries, then individual people can help. That's if we have a lot of numbers," Maddison said. "The planet Earth is ours. It doesn't belong to only nine countries."

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