COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE DE CERTAINES TERRES À PHOSPHATES À NAURU

(NAURU c. AUSTRALIE)

VOLUME II

Exceptions préliminaires de l'Australie ; exposé écrit de Nauru

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L'affaire de *Certaines terres à phosphates à Nauru (Nauru c. Australie)*, inscrite au rôle général de la Cour sous le numéro 80 le 19 mai 1989, a fait l'objet d'un arrêt rendu le 26 juin 1992 (*Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, p. 240). Elle en a été rayée par ordonnance de la Cour du 13 septembre 1993, à la suite du désistement par accord des Parties (*Certaines terres à phosphates à Nauru (Nauru c. Australie), C.I.J. Recueil 1993*, p. 322).

Les pièces de procédure relatives à cette affaire sont publiées dans l'ordre suivant :

Volume I. Requête introductive d'instance de Nauru ; mémoire de Nauru.
Volume II. Exceptions préliminaires de l'Australie ; exposé écrit de Nauru sur les exceptions préliminaires.
Volume III. Contre-mémoire de l'Australie ; procédure orale sur les exceptions préliminaires ; réponses écrites aux questions ; choix de correspondance ; document présenté à la Cour.

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En vue de faciliter l'utilisation de l'ouvrage, outre sa pagination continue habituelle, le présent volume comporte, en tant que de besoin, entre crochets sur le bord intérieur des pages, l'indication de la pagination originale des pièces reproduites et occasionnellement, entre parenthèses, la pagination du document original.

S'agissant des renvois du Greffe, les chiffres romains gras indiquent le volume de la présente édition ; s'ils sont immédiatement suivis par une référence de page, cette référence renvoie à la nouvelle pagination du volume concerné. En revanche, les numéros de page qui sont précédés de l'indication d'une pièce de procédure visent la pagination originale de ladite pièce et renvoient donc à la pagination entre crochets de la pièce mentionnée.

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La Haye, 2003.

The case concerning *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, entered on the Court's General List on 19 May 1989 under Number 80, was the subject of a Judgment delivered on 26 June 1992 (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240). The case was removed from the List by an Order of 13 September 1993, following discontinuance by agreement of the Parties (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), I.C.J. Reports 1993*, p. 322).

The pleadings in the case are being published in the following order :

Volume I. Application instituting proceedings of Nauru; Memorial of Nauru.
Volume II. Preliminary objections of Australia; written statement of Nauru on the preliminary objections.
Volume III. Counter-Memorial of Australia; oral arguments on the preliminary objections; written replies to questions; selection of correspondence; document submitted to the Court.

*

Regarding the reproduction of case files, the Court has decided that henceforth, irrespective of the stage at which a case has terminated, publication should be confined to the written proceedings and oral arguments in the case, together with those documents, annexes and correspondence considered essential to illustrate its decision. The Court has also specifically requested that, whenever technically feasible, the volumes should consist of facsimile versions of the documents submitted to it, in the form in which they were produced by the parties.

Accordingly, certain documents reproduced in the present volume have been photographed from their original presentation.

For ease of use, in addition to the normal continuous pagination, wherever necessary this volume also contains, between square brackets on the inner margin of the pages, the original pagination of the pleadings reproduced and occasionally, within parentheses, the pagination of the original document.

In references by the Registry, bold Roman numerals are used to refer to Volumes of this edition; if they are immediately followed by a page reference, this relates to the new pagination of the Volume in question. On the other hand, the page numbers which are preceded by a reference to one of the pleadings relate to the original pagination of that pleading and accordingly refer to the bracketed pagination of the document in question.

In the case of the oral arguments, the original pagination is preceded by the number of the verbatim records as issued in a provisional duplicated form and carrying the reference CR 91/-- and it is also to the corresponding pagination between square brackets on the inner margin of the pages that one should refer for all cross-references.

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The Hague, 2003.

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R.S. Leydin	1954-1958
J.P. White	1958-1962
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Note on Sources

The following works are cited frequently in this *Written Statement*, and copies of them have been lodged with the Registrar of the Court for convenient reference:

B. Macdonald, *In Pursuit of the Sacred Trust*, New Zealand Institute of International Affairs, Occasional Paper No. 3, 1988

Republic of Nauru, Commission of Inquiry into the Rehabilitation of Worked-Out Phosphate Lands of Nauru (Chair: Professor C.G. Weeramantry), *Report*, 10 vols., 1988

M. Williams & B. Macdonald, *The Phosphateers*, Melbourne University Press, Carlton, 1985

N. Viviani, *Nauru. Phosphate and Political Progress*, Australian National University Press, Canberra, 1970

INTRODUCTION

1. On 8 February 1991 the Court made an Order fixing 19 July 1991 as the time-limit "within which the Republic of Nauru may present a written statement of its observations and submissions on the preliminary objections raised by the Commonwealth of Australia".

2. This *Written Statement* of the Republic of Nauru is presented in accordance with the Order of the Court.

3. It has not been found necessary to furnish any new annexes at this stage, and the single appendix has been included in this volume.

PART I

AUSTRALIA'S APPROACH TO THE FACTS

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AUSTRALIA'S APPROACH TO THE FACTS

Section 1. Introduction

4. Nauru relies on the factual and historical account it has already presented in Part One of its *Memorial*. None of the material advanced by Australia in Chapter 1 of its *Preliminary Objections* alters either the direction or the weight of that factual material. In some ways, it strengthens it. There are, however, variations of emphasis and certain implications drawn by Australia as to which some comment is called for on the part of the Applicant State. These are the subject of consideration in this Part.

Section 2. Australia and the Administration of Nauru

5. When Imperial Germany was defeated in the First World War, Mr W.M. Hughes, the Australian Prime Minister, along with the then Australian Government, was anxious to annex Nauru for the sole purpose of the exploitation of the known reserves of phosphatic rock to assist the development of agriculture in Australia. The New Zealand fears of annexation of Nauru by Australia drove its Prime Minister, Mr W.F. Massey, to suggest a Mandate including itself and the United Kingdom. In the result, as described in the Nauru *Memorial* (vol. 1, chapter 2, section 1), Nauru became a Class "C" Mandate to be administered as "an integral portion" of the territory of the Mandatory. Throughout the course of both the Mandate and the Trusteeship, Australia was to appoint the Administrator and to administer Nauru through a department of the Australian Government. The history is recorded in a number of places including by B. Macdonald, *In Pursuit of the Sacred Trust: Trusteeship and Independence in Nauru*, New Zealand Institute of International Affairs, Occasional Paper No. 3, Wellington, 1988, pp.5-18, especially at p.13.

Whose "integral portion"?

6. Australia makes some point of emphasising the tripartite nature of the Mandate (*Preliminary Objections*, para. 24) and of the British Phosphate Commissioners (id., para. 30). The reality over the years was far different, as the

Nauru *Memorial* has recounted (vol 1, chapters 2 & 3). Indeed Toussaint, in her study of the Trusteeship System, comments that by the time the Mandate for Nauru entered into force, Australian had become the administering authority and was thus the actual Mandatory: C.E. Toussaint, *The Trusteeship System of the United Nations*, London, 1956, p.205.

7. There was some concern shown by both the United Kingdom and New Zealand at the maintenance of their position as partners in the early history of the British Phosphate Commissioners (see M. Williams & B. MacDonald, *The Phosphateers: A History of The British Phosphate Commissioners and the Christmas Island Phosphate Commission*, Melbourne, 1985, pp.159, 160) but the following points illustrate the increasing dominance of Australia in relation to mining on Nauru.

(a) Australia called for increasing tonnages of phosphate for its own agriculture (Viviani, *Nauru*, Table 8, pp.186-7).

(b) After the early dominance of the British Commissioner, Mr Dickinson, the British Phosphate Commissioners set up its headquarters in Melbourne, the centre of the phosphate trade. Mr Harold Gaze, General Manager up to 1954, was stationed in Melbourne with excellent contacts with the Australian Government and its departments.

(c) The Administrator remained an Australian civil servant appointed by the Australian government throughout the Mandate and the Trusteeship.

(d) The Administrator, certainly from 1923 onwards, reported directly to the Australian Government through the Australian Department responsible for administering its Territories.

(e) Every annual report to the League of Nations, and later to the General Assembly of the United Nations, was presented by Australia, and orally dealt with in the Permanent Mandates Commission of the League of Nations and the Trusteeship Council of the United Nations by the Australian delegation.

(f) Australian defence forces played the leading roles in both wars in seeking to defend the territory and eventually in restoring civilian rule and order.

(g) In the 1950s and 1960s, it was Australia which was instrumental in reporting on the feasibility of Nauruan rehabilitation through its instrumentality, the Commonwealth Scientific and Industrial Research Organisation, and then through the Davey Committee (*Preliminary Objections*, vol. 1, paras. 69-72 [CSIRO]; Nauru *Memorial*, vol. 1, paras. 178-88 [Davey Committee]).

(h) Australian currency was the legal currency of Nauru and imports came almost exclusively from Australia.

(i) Australia had exclusive authority to enact laws for Nauru, ever since it took over the administration of the Territory. By this power to enact laws, Australia established and operated, for the duration of its administration, a system of monopoly over the phosphate industry: see Nauru *Memorial*, vol. 1, paras. 512-15 for elaboration on this point.

(j) The Nauru Act 1965 which established a Legislative Council on Nauru was exclusively Australian legislation, as was the Nauru Independence Act 1967.

(k) The other former partner governments conceded that the actual responsibility for administration of the Territory was vested in Australia (see, e.g., the statement by Mr Shaw of the United Kingdom: United Nations Trusteeship Council, *Official Records*, 13th Special Session, 1323rd meeting, p.4, para. 30).

8. In short, throughout the post-1945 period, Australia treated Nauru as "an integral portion" of its own territory, in contradistinction to the position of either the United Kingdom or New Zealand.

The Lands Ordinances 1921 and 1927

9. Australia has reserved its position with respect to the Lands Ordinances (*Preliminary Objections*, para. 38), but argues that any breach of obligation was not simply that of Australia alone but must be related also to the other two governments.

10. However, these Australian Ordinances were basic to the Australian administration throughout the period until November 1967 (Nauru *Memorial*, paras. 97-100). The Ordinances were administered throughout by Australian administrators. Under the 1927 Ordinance, the hold of the British Phosphate Commissioners over the land was drawn tighter (Nauru *Memorial*, para. 90). Any rights the landowner might have had under the 1921 Ordinance to stay mining were withdrawn in favour of the control of mining in the hands of the British Phosphate Commissioners (Nauru *Memorial*, para. 91). The "lease" which was granted under the Ordinance was in effect an act of expropriation, in that when land was handed back to the landowners by the British Phosphate Commissioners it was a worthless shell of what had earlier been conveyed (Nauru *Memorial*, para. 98).

11. In this context, the Australian case seems to be that the royalty payments in some way represented effective compensation (*Preliminary Objections*, paras. 39, 40, 47, 58, 49). This has no factual basis, nor can it disguise the devastation wrought by Australia in quest of cost price phosphate (see Nauru *Memorial*, vol. 1, Appendix 2, pp.289-311). The framework set out by the Land Ordinances provided a cloak of domestic legality to an administration of exploitation in Nauru under the guise of the Trust. As W. J. Hudson commented:

> "the Australian interest was almost solely to exploit. The administration's aim was set at a decent minimum; no imaginative effort was applied to the fate of the few thousand islanders whose home was literally shipped overseas."
>
> (Hudson, *Australia and the Colonial Question at the United Nations*, Sydney, 1970, p.14, quoted in Macdonald, *In Pursuit of the Sacred Trust*, p.18.)

Section 3. The Transactions Leading to Independence

12. Australia states (*Preliminary Objections*, para. 29) that the control of the British Phosphate Commissioners over phosphates was changed by the 1967 Agreement relating to the Nauru Island Phosphate Industry (Nauru *Memorial*, Annex 6). It is true that the 1967 Agreement eventually brought about Nauruan control of the industry, but it also maintained evident advantages to Australia in that it secured security of supply (para. 5(1)) and fixed the price (para. 6) and the rate of supply (para. 5(2)). The Agreement also spelt out the obligations of Nauru in relation to payment for the assets of the British Phosphate Commissioners on the island (Part III). The Agreement had an initial three year term, but was to continue in force thereafter. The law applicable to the Agreement was that of the Australian Capital Territory. The Agreement, signed a little more than two months before independence, represented clearly that Australia would maintain an element of control over the phosphate industry in Nauru in ensuing years, in areas considered important by it.

13. What is most significant is that there was no mention in any part of the 1967 Agreement of rehabilitation. During the negotiations a desperate attempt was made to have the Nauruan claim to rehabilitation withdrawn (*Preliminary Objections*, p.47), but this the Nauruan delegation steadfastly refused to do (see Nauru *Memorial*, paras. 592-602).

14. In a carefully phrased paragraph, (*Preliminary Objections*, para. 59), Australia puts a series of propositions designed to lead to what it considers to be the apparently irresistible argument that the 1967 Agreement was the culminating point of negotiations between the two sides, representing an overall settlement leading to termination of the Trusteeship. But the history between 1945 and 1968 gives no support to the propositions formulated by Australia (see Nauru *Memorial*, Part I, Chapter 4).

15. Some salient matters need to be recounted. In the view of the Australian administration and the British Phosphate Commissioners, rehabilitation, even if possible, was going to be expensive and therefore clearly detrimental to the cheap subsidised phosphate policy that had attracted them to Nauru in the first place. Phosphate mining on the islands of Nauru and Banaba (Ocean Island) was similar, in that the phosphatic rock was gouged out from between pillars of coral limestone (coral pinnacles) which were left when the mining was complete (see Nauru *Memorial*, vol. 2, Photographs 2, 5 and 7). In the case of Banaba, the twin island (see Nauru *Memorial*, vol. 2, Map 1), the Banabans, who belonged to the British Crown Colony of the Gilbert and Ellice Islands (as it then was), were resettled on the Fijian island of Rabi. Fiji, at that time, was also a colony of the United Kingdom.

16. Resettlement, the Banaban solution, whilst attractive to the British Phosphate Commissioners, was not seen as necessary by the Australian administration in the early 1950s, though it had been contemplated by Mr Halligan, the Secretary of the Australian Territories Department, who later became a British Phosphate Commissioner (see Nauru *Memorial*, para. 166). Before 1940, Australia had responded to the Permanent Mandates Commission that the rim around the island would be land enough for the Nauruans (Permanent Mandates Commission, *Minutes*, 31st Session, 1937, p.50). However, with the increasing phosphate requirements of the Australian farmers in the post-war period (see Nauru *Memorial*, vol. 1, Table 1.4, p.274), and the increase in the Nauruan population (which doubled between 1950 and 1967) (Nauru *Memorial*, para. 221), it became clear that the island was likely to be worked-out at a much earlier period than was first estimated, and that the rim was not going to be sufficient to accommodate the needs of the increasing Nauruan population. Resettlement, therefore, became increasingly attractive to the Australian administration.

17. But Nauru was not a colony but a Trust Territory, and any substantial movement of people by Australia would have required the concurrence of the United Nations and, accordingly, the support of the greater proportion of the indigenous inhabitants. This put Nauru in a different category from Banaba.

18. There was a further difficulty, glossed over by Australia when discussing the "long term solution" *(Preliminary Objections*, para. 60). Resettlement was simply a *quid pro quo* for depriving the Nauruan community of suitable and productive living space as a consequence of the devastation of their land (cf. Nauru *Memorial*, para. 177). It was also, perhaps, a way of avoiding the issue of rehabilitation. But Nauru would, at that point, still have remained under Trusteeship. Resettlement would not have granted to Australia or the British Phosphate Commissioners any further title to the land than that which they could claim under the Trusteeship. By the act of resettlement, Nauru was not to be annexed to Australia. As a self-determination unit, the Nauruan community could still seek control in Nauru both politically, through independence, and economically, in respect of the phosphate industry.

19. Furthermore, resettlement was designed essentially to ease pressure by providing alternative living space with employment possibilities – a replacement for lost lands (Nauru *Memorial*, para. 177). It was never envisaged that all Nauruans would take up the offer. Many would stay, and it was understood that Nauru would always remain a spiritual home for those resettled. Clearly, no matter how extensive the arrangements for resettlement, it was a separate consideration from both independence and economic control of the phosphate industry. Whatever happened with resettlement, Nauru would remain under Trusteeship until independence.

20. For that reason the 1960 proposal of permanent residence and citizenship "after the European manner" (Nauru *Memorial*, para. 167; *Preliminary Objections*, para. 61) was doomed to failure, for it was effectively an attempt to break up the Nauruan identity and their strong personal and spiritual relationship with the island. This is explained in the statement of the Head Chief, Mr Hammer DeRoburt, discussing the resettlement issue (Nauru *Memorial*, vol. 1, Appendix 1, paras. 18-23, especially para. 22).

21. Rehabilitation was always the preferred option to resettlement so far as the Nauruan community was concerned (see Nauru *Memorial*, vol.1, Appendix 1, paras. 18, 19). The Nauruan concern about rehabilitation arose as soon as it was

noticed how catastrophically the land was affected by mining. Hence the attempts, as early as 1925, to limit its scope, although without success (Nauru *Memorial*, paras. 523-527). It was not long before the Permanent Mandates Commission was seeking some sort of an answer from Australia as to what was to be done with the land (Permanent Mandates Commission, *Minutes*, 15th Session, 1929, p.42; 25th Session, 1934, p.51; 27th Session, 1935, p.35; 31st Session, 1937, p.51; 34th Session, 1938, p.20).

22. When the pressure began to be applied both by the Nauruans and the Trusteeship Council, the British Phosphate Commissioners and Australia were at pains to assert the complete economic impracticability of restoration. The Banabans had by this time been resettled, and this seemed to Australia to be the way out in the case of the Nauruans as well. Whatever resettlement might cost, it would be less than restoration and no doubt, in the end, it could be financed like everything else out of phosphate returns. The 1953 Report by an Australian government organisation, the Commonwealth Scientific and Industrial Research Organisation, with limited terms of reference, strongly resisted restoration (*Preliminary Objections*, paras. 69-72). Faced with this Report, and with the view forcefully articulated by the Australian administration and the British Phosphate Commissioners that any rehabilitation would be too costly (Nauru *Memorial*, vol. 1, Appendix 1, para. 23), the Nauruan community was eventually moved to explore the possibility of resettlement.

23. But the resettlement alternative was, after careful consideration, rejected by the Nauruans (Nauru *Memorial*, paras. 159-74). This was not done capriciously, but for the sound reason that a community so united and stable required a situation that would preserve their national identity. The Head Chief has expressed it in these terms:

> "So far as Curtis Island was concerned, we were not seeking full sovereign independence, but anything which did not preserve and maintain our separate identity was quite unacceptable."
>
> (Nauru *Memorial*, vol. 1, Appendix 1, para. 21.)

24. The resettlement proposal was rejected because Australia failed to accommodate this legitimate concern of the Nauruan community. The alternative was rehabilitation or restoration of the worked-out phosphate lands. It was, as it were, the reverse side of the coin, and there was only one coin. This was recognised by the Nauruan community and the Australian administration,

though in the latter case with some trepidation (Nauru *Memorial*, vol. 1, Appendix 1, para. 23, p.256; see also id., para. 177; and the statement by Mr Warwick Smith, cited id., para. 175). It immediately led to two further pieces of advice sought by the Australian administration. The first was an estimate by the British Phosphate Commissioners of the cost of rehabilitation associated with resoiling with imported soil (*Preliminary Objections*, para. 73). The second consisted of a revaluation by the Australian Commonwealth Scientific and Industrial Research Organisation of its earlier 1953 study. Both the estimate and the revised study predictably stressed what they saw as the vast expense and impracticability of the operation. Further letters from the British Phosphate Commissioners on shipping costs and the possibility of a pilot project were no more encouraging (*Preliminary Objections*, paras. 76-7).

25. It was in this particular climate that, with the Nauruans holding to their position requiring rehabilitation, and the United Nations General Assembly calling for immediate steps to be taken towards rehabilitation (Resolution 2111(XX), 21 December 1966; Nauru *Memorial*, vol. 4, Annex 15), the Davey Committee was appointed by the Australian administration with the agreement of the Nauru Local Government Council to investigate the feasibility of rehabilitation. The Report (Nauru *Memorial*, vol. 3, Annex 3) was submitted in June 1966 – eighteen months before independence.

26. While the Nauru Local Government Council rejected the Report because it fell short of recommending full restoration, nevertheless it was appreciated that the Davey Committee had broken new ground. It had demonstrated that there were practical possibilities, denied previously by the Australian administration, for rehabilitation (Nauru *Memorial*, paras. 189, 190). The Report raised expectations that Australia would pursue a course leading to rehabilitation of already worked-out areas, particularly as the Nauru Local Government Council, realising the needs of Australia and New Zealand for continuity of mining and security of supply, had declared that the responsibility for rehabilitation *in respect of post-independence mining* would lie with Nauru (Nauru *Memorial*, vol. 1, Appendix 1, para. 25).

27. But the Nauru Local Government Council was to be disappointed. In reality, the setting up of the Davey Committee by Australia was simply to pacify the Nauru Local Government Council and in some way to appear to respond to General Assembly Resolution 2111(XX). Australia had stood out against any

significant expenditure on restoration and was very luke-warm about the Committee recommendations (Nauru *Memorial*, para. 176).

28. At the same time as disclaiming any responsibility for damage Australian policy, adopted in 1955 without consultation with the Nauruan community, was to accelerate mining. This had the effect of wreaking greater damage on the island in the period leading up to independence (Nauru *Memorial*, paras. 302-4). The increased export from Nauru was particularly noticeable after 1960 when it was clear independence was looming as an issue (N. Viviani, *Nauru: Phosphate and Political Progress*, Canberra, 1970, Table 8 p.187; Williams & Macdonald, *The Phosphateers*, Appendices V & VI; *Preliminary Objections*, vol. II, Annex 26, Appendix A, Table A1). In 1967, for example, nearly 500,000 tons more than in the previous year were mined, and the whole of this additional amount was exported to Australia.

29. In 1967, yet another attempt was made by Australia to secure the Nauruan withdrawal of its claim to rehabilitation. The summary records of the Nauru Talks in 1967 record the request by the Australian Secretary and leader of the Joint Delegation (Mr Warwick Smith) in the following terms:

> "As part of the total arrangement the Joint Delegation would like to see the Nauruans withdraw their claims in respect of rehabilitation."
>
> (Nauru *Memorial*, vol. 3, Annex 5, p.471.)

30. During the protracted Nauru Talks, the Nauruan insistence on the rehabilitation claim was maintained. This has been chronicled in the Nauru *Memorial*, paras. 593-602. Nauru maintained its claim separately throughout and rejected the view that it should be deemed part of the settlement of the affairs of the phosphate industry. This is clear from the earlier debates in the United Nations and the Statement of the Head Chief, Mr Hammer DeRoburt, at the 34th Session of the Trusteeship Council (Nauru *Memorial*, paras. 603-14).

31. While the draft proposals of the Joint Delegation at the Nauru Talks referred to rehabilitation (Nauru *Memorial*, para. 598), it is significant that that clause was dropped, with the result that when the Nauru Island Phosphate Agreement was concluded on 14 November 1967 it was silent on the question of rehabilitation (*Memorial*, para. 602). It was silent because, as both sides knew, there had been no agreement on the issue of rehabilitation – a fact made known later to the Trusteeship Council by the Head Chief, Mr Hammer DeRoburt.

32. Against this background, it is remarkable that Australia, somewhat lamely, attempts to demonstrate a change of heart by Nauru through the speech of Mr DeRoburt in the Fourth Committee of the United Nations General Assembly (*Preliminary Objections*, para. 125). The implication contained in the last sentence of para. 59 of the *Preliminary Objections*, that the phosphate agreement and the political settlement leading on to independence carried with it a waiver or renunciation of the rehabilitation claim, is dependent on nothing other than an over-strained and out of context interpretation of some words spoken by the Head Chief to the Fourth Committee.

33. The lack of legal substance to the Australian argument is analysed later in this *Written Statement* (paras. 166-80). Given the history of the Nauruan rehabilitation claim both before and after the speech (Nauru *Memorial*, paras. 615-18), it is remarkable that it should be relied on as a waiver in fact.

Section 4. The Nauruan Approach to Rehabilitation

34. In its *Preliminary Objections*, paras. 404, 405 and 406, Australia makes some perfunctory remarks implying that Nauru has not acted consistently in respect of its claim, and that it has not acted in good faith. There is little or no evidence offered in support of these remarks. It is submitted by Australia (id., para. 404) that the present proceedings are nothing more than a guise for Nauru seeking "additional monetary resources", "despite having been provided with adequate financial resources". The allegation is tendentious and simply avoids the issues at stake. The legal aspects of this matter are considered further in paragraphs 392-429 below. At this point, certain issues of fact are examined by way of reply.

35. There is inherent in paragraphs 404-6 of the *Preliminary Objections*, the implication that Nauru has exhibited all the faults of a misspent youth in not controlling or running its affairs properly. This has no bearing on the matters in issue. The Court is requested by Nauru to adjudge and determine the legal basis of its rehabilitation claim against Australia. The rather extravagant paper (*Preliminary Objections*, Annex 26) produced at the request of the Australian Department of Foreign Affairs and Trade, and from which much of the comment seems to spring, is replied to in Chapter 2 and in an Appendix to this *Written Statement*. Two points are simply made here.

36. First, whether or not Nauru had adequate resources at independence is not the issue. Nauru then became an independent State (with a certain patrimony and an obligation to care for its people for the future). The extent of its physical or other resources at that time has no bearing on the question whether Australia's failure to rehabilitate the mined-out phosphate lands was a breach of the trusteeship obligation. This is tantamount to claiming that a trustee could defend a claim for breach of trust on the basis that, despite its defalcations, the beneficiary still has enough money to survive!

37. Secondly, the Agreement relating to the Nauru Island Phosphate Industry 1967 required Nauru to maintain a very high level of mining in the years following independence (Nauru *Memorial*, vol. 3, Annex 6; 1967 Agreement, para. 5(2)). Nauru did so, and fulfilled Australian requirements of reliability and quantity of supply. At the same time, however, this committed Nauru through mining to significant levels of damage to its lands. This was to be the continuing price of Australian "generosity".

38. More specifically, Australia submits that Nauru has done nothing itself to advance its own cause in respect of rehabilitation. As evidence of this, Australia mentions the Rehabilitation Fund which it says now has money sufficient to carry out rehabilitation, but none of which has been expended.

39. This Fund, which Australia states was established prior to independence, was established by an Australian Ordinance in 1968, the Nauru Phosphate Royalties (Payment and Investment) Ordinance 1968. This Ordinance commenced operation just five days before independence. It was simply an Ordinance, such as the Nauru Phosphate Royalties Trust Ordinance 1968, made in preparation for the handing over of administration on 31 January 1968, and the Nauruan community played a significant role in the formulation of these ordinances on the eve of independence. The Rehabilitation Fund as a statutory fund did not exist before 25 January 1968.

40. Section 7 of the Ordinance reads:

> "(1) A Fund is hereby established to be known as the Nauru Rehabilitation Fund.
>
> (2) Moneys standing to the credit of the Nauru Rehabilitation Fund shall not be expended otherwise than for the purpose of restoring

or improving the parts of the Island of Nauru that have been affected by mining for phosphate.

(3) ..."

41. Section 7(2) of the Ordinance is a clear statutory requirement that moneys standing to the credit of the Nauru Rehabilitation Fund can be expended on no other purpose than rehabilitation of mined-out lands. By reason of Article 85 of the Constitution of Nauru, the Nauru Phosphate Royalties (Payment and Investment) Ordinance 1968, commencing but five days before independence, continued in force after independence. Moneys henceforth were paid into the Rehabilitation Fund in accordance with section 11(4)(vi) of the Ordinance. Article 83(2) of the Constitution makes it clear that moneys paid into the Rehabilitation Fund are only to be expended by the Government of Nauru on lands mined after 1 July 1967.

42. The administration of this Fund was placed under the statutory Nauru Phosphate Royalties Trust. This body was set up under the Nauru Phosphate Royalties Trust Ordinance 1968, an Ordinance promulgated at the same time as the Payment and Investment Ordinance referred to above. The Trust Ordinance continued in force by reason of the transitional provision in Article 85 of the Constitution of Nauru. A separate fund account is maintained for the Rehabilitation Fund in accordance with section 24 of the Nauru Phosphate Royalties Trust Ordinance. The Fund is augmented from time to time by payments made to the Trust based on a statutory formula for each tonne of phosphate shipped from Nauru, as also by returns on investments of moneys from the Fund.

43. Since independence, the Trust through a careful investment policy has accumulated a sum approximating A$260 million. Instead of applauding this endeavour, Australia attacks this as in some way indicating bad faith because no part of this money has yet been expended, even though it is clear that the money is in a public Trust Fund and reserved for the purpose of restoring or improving lands affected by mining since 1 July 1967.

44. In accumulating a fund against the day when major financial commitments were to be made, it was prudent to ensure, as Nauru has done, that such a fund should be able to stand annual payments from it that will not diminish the fund to any great extent over the term of the rehabilitation project. Whatever specific methods may be adopted by way of rehabilitation, the time

involved could be anything up to two generations (Commission of Inquiry, *Report*, vol. 5, p.1140). The Australian delegation at the Nauru Talks 1967, itself supported the view that a substantial period of time would be involved in the planning and implementation of rehabilitation (*Memorial*, Annexes vol. 3, Annex 5, pp.87-8). There Mr Reseigh (Australia) indicated that a great deal of the cost element depended upon timing and, by implication, careful planning. This tends to support the Nauruan Government policy with respect to the Rehabilitation Fund, particularly when it is taken into account that the Rehabilitation Fund was built up after independence.

45. But Nauru has not simply stood still, since independence, in respect to rehabilitation. In fact, it has acted consistently, as the following account demonstrates.

46. Upon independence, the Head Chief, Mr Hammer DeRoburt, as Chairman of the transitional Council of State, made it clear that Nauru was expecting Australia and the other former partner governments to rehabilitate the lands mined before 1 July 1967 (see Nauru *Memorial*, vol. 4, Annex 69).

47. On 5 December 1968, Mr Hammer DeRoburt, now the President of Nauru, sought through the Minister of External Affairs of Australia assistance for the construction of an airstrip to international specifications as part of the rehabilitation efforts (Nauru *Memorial*, vol. 4, Annex 76). This approach was consistent with the statement Mr DeRoburt had made in the Trusteeship Council (above, para. 31) and was made against the background of the recommendations of the Davey Committee. The Davey Committee, it will be recalled, had recommended the airstrip not only to enhance communications but as a useful catchment area for the storage of water. On 4 February 1969 the Minister of External Affairs of Australia, Mr Hasluck, replied (Nauru *Memorial*, vol. 4, Annex 77) that Australia and the other partner governments did not accept the responsibility for rehabilitation, and that the terms of the 1967 settlement were sufficiently generous for Nauru to cope with rehabilitation and development. Australia thereby refused to assist financially.

48. Nauru, which was at that time called upon to pay A$21,000,000 to the British Phosphate Commissioners for the depreciated cost of the capital infrastructure of the phosphate industry works on Nauru, was in no financial position to undertake such a major task as an airstrip and a water storage plant on mined-out lands. At the same time, it was recognised that in such an isolated

locality, air transport was a necessity to establish communications with the outside world and that the project should not be delayed by many years. The Nauru Government, therefore, had to take the second best decision of gradually carrying out major reconstruction of the old Second World War airstrip which was located on the southern coastal rim. This has had the effect of depriving Nauru of substantial residential land. (See Nauru *Memorial*, vol. 2, Map 2 and Photograph 8.)

49. In 1983, the President of Nauru, Mr Hammer DeRoburt, wrote to the Australian Prime Minister (Nauru *Memorial*, vol. 4, Annex 78), following two earlier contacts by the President of Nauru with the earlier Whitlam Labour Government, raising the rehabilitation issue, but to no avail (Nauru *Memorial*, vol. 1, Appendix 1, para. 30). By 1983, it was clear that the rehabilitation issue with Australia had assumed more urgency, due to the projected end of mining in twelve to fifteen years and the continued need for the use of the "plateau" living space with the rise in population. Time factors such as those mentioned in Mr Reseigh's comments (Nauru *Memorial*, vol. 3, Annex 5, p.88) were beginning to assume importance.

50. Nauru had already carried out some preliminary planning with the establishment from the time of independence of a Department of Island Development and Industry. The Department's task was to plan and explore development possibilities amongst which was rehabilitation of the "topside" plateau. Matters such as transport, communications, geology, water storage and desalination were the subject of consideration. Also, immediately following independence, the Nauru Phosphate Corporation, mindful of the need to conserve the overburden (the topsoil removed before mining commences) on the mine-sites (Nauru *Memorial*, vol. 2, Photograph 6), stockpiled this soil for use as top-soil following restoration. This practice, which had not been pursued by the former British Phosphate Commissioners, continues, and a valuable and substantial stock-pile has now been assembled. It currently stands at some 272,000 cubic metres.

51. When in 1984 the Australian Prime Minister rejected the request of the President of Nauru to undertake rehabilitation of pre-independence mining, he repeated the earlier reply that the former partner governments remained convinced that "the terms of the settlement with the Government of Nauru were sufficiently generous to enable it to meet its needs for rehabilitation and development". Significantly, the Australian Prime Minister also added:

> "The former partner governments agreed at that time that it was a requirement of termination of the trusteeship agreement that they were entirely cleared of any onus or financial responsibility for the rehabilitation of Nauru".
>
> (Nauru *Memorial*, vol. 4, Annex 79.)

52. Whatever the former partner governments may have decided amongst themselves, the view expressed by the Australian Prime Minister was not conveyed to any official organ of the United Nations at the time. Nor was it ever conveyed to the Nauruans themselves, who had consistently followed a course that the rehabilitation dispute should be dealt with as a separate issue to independence, as pointed out by Mr Hammer DeRoburt in his speech to the Trusteeship Council in 1967 (Nauru *Memorial*, para. 609).

53. The assertion contained in the Australian Prime Minister's letter had not previously been made. Its emergence now was a contributing factor in the decision of the Nauruan Government to set up an independent Commission of Inquiry, chaired by Professor C.G. Weeramantry (as he then was), to investigate the responsibility for rehabilitation of mined-out lands and to explore the economic and practical feasibility of rehabilitation. The Commission was set up in December 1986, and the Australian Government was immediately informed of it by a Diplomatic Note (Nauru *Memorial*, vol. 4, Annex 80, No. 1).

54. The Nauru government entertained the hope expressed in the Diplomatic Note that Australia would assist this endeavour by granting access to documentation held by Australia and further that Australia would participate in the proceedings of the Commission. Australia, however, did not grant access to the Australian Archives, except for the open access period granted to its own citizens (Nauru *Memorial*, vol. 4, Annex 80, No. 15). In relation to participation, the Australian Minister for Foreign Affairs stated that the Australian Government was examining the Nauruan request for Australian assistance in the Commission of Inquiry, and would shortly advise the extent to which it would assist (Nauru *Memorial*, vol. 4, Annex 80, No. 13). In fact Australia never answered this request but was content to state that "it would not be bound by the findings of the Commission of Inquiry" (Nauru *Memorial*, vol. 4, Annex 80, No.15).

55. The Commission of Inquiry sat throughout 1987 and compiled its Report in ten volumes in 1988. The Report was presented to the President of Nauru on

29 November 1988, and was tabled in the Nauruan Parliament on 20 December 1988. On that day, a copy of the Report was sent together with a Diplomatic Note carefully explaining the position taken by the Nauruan government following the receipt of the recommendations contained in the Report of the Commission of Inquiry to the Australian High Commission in Nauru (Nauru *Memorial*, vol. 4, Annex 80, No. 24). Copies of the Report of the Commission of Inquiry into the Rehabilitation of the Worked-Out Phosphate Lands of Nauru have been deposited in the Library of the Court.

56. Some of the principal conclusions of the Report of the Commission of Inquiry were :

(1) that the failure to restore the lands mined-out prior to 1 July 1967 to usable condition, or to compensate the Nauruans for the loss of use of their lands, was a violation of international law and the relevant agreements;

(2) that there was no agreed or just settlement which exonerated the former Partner Governments from the responsibility to rehabilitate the lands;

(3) that a cost-feasible plan of rehabilitation of all the worked-out lands on Nauru can be developed.

57. These conclusions were conveyed to the Australian Government, together with a copy of the Report, with the further call to Australia to accept its responsibilities accordingly.

58. Nauru commenced proceedings by Application to the International Court of Justice in The Hague on 19 May 1989, a copy of which was conveyed to Australia by Diplomatic Note (Nauru *Memorial*, vol. 4, Annex 80, No. 28).

59. One of the recommendations of the Report of the Commission of Inquiry was to carry out a pilot project, designed by Mr R.H. Challen, a civil engineer and one of the members of the Commission of Inquiry. The pilot project should cover a number of areas of mined-out land (Commission of Inquiry, *Report*, vol. 5, p.1386). This is a complex operation requiring identification and purchase of major equipment, suitable arrangements made with original landowners and a careful assessment of results. The equipment has been purchased and shipped to Nauru, and the project has commenced.

60. Nauru has consistently and with concern applied itself to the rehabilitation question over many years. To submit, as Australia has done, that the Nauruan claim is made without good faith and shows a lack of consistency, is wholly unfounded in fact, given the history of the matter, and Australia's role in it. That claim is also unfounded in law, as is demonstrated in paragraphs 392-429 below.

61. Comment has already been made with respect to para. 405 of the *Preliminary Objections*, but, in the second sentence of that paragraph, mention is made of the fact that as the Rehabilitation Fund now stands it has within it "more than the estimated cost of rehabilitation of the whole island". It must be emphasised here that no specification has been made in the Nauruan claim of "the estimated cost". The Nauruan claim is for a declaration by the Court that Australia bears responsibility for breaches of certain legal obligations, that Nauru has a legal entitlement to the allocation of the overseas assets of the British Phosphate Commissioners upon their dissolution in 1987, and that Australia as a consequence should make appropriate reparation in respect of the losses caused to the Republic of Nauru (*Memorial*, Submissions, p.250). The question of reparation is dealt with in more detail in the *Memorial*, para. 621. Nauru there states that "it is appropriate that the parties be given the opportunity to discuss the form and precise quantum of reparation in the light of the Judgment of the Court." It adheres to this position. At this stage, accordingly, there is no specified or agreed quantum.

62. In any event, to suggest that the Nauru Rehabilitation Fund contains sufficient funds to finance the whole of the operation of rehabilitation of the island is irrelevant. The Rehabilitation Fund exists to finance the rehabilitation of lands mined subsequently to the coming into force of the 1967 Agreement. The possibility that the Fund may contain more money than may be needed for that purpose is simply beside the point.

PART II

THE SOCIAL AND ECONOMIC SITUATION ON NAURU: RESPONSE TO AUSTRALIAN ASSERTIONS

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Section 1. Introduction

63. In its *Preliminary Objections* (Chapter 2 and Annex 26) Australia presents in an argumentative and tendentious way its assessment of the Nauruan economic situation. It is submitted by Nauru that this issue is irrelevant. But in any event Nauru rejects both the substance of the argument and the prejudicial purpose for which it is apparently placed before the Court.

64. In answer to Annex 26, Nauru places before the Court, in rebuttal, an Appendix compiled by Mr K. E. Walker. Mr Walker's qualifications are set out in Appendix 2 of the Nauru *Memorial* (vol. 1 at pp.261-2). In the Appendix to this *Written Statement*, Mr Walker comments upon the Australian Annex 26, a paper produced by the Australian Centre for International Economics. That paper concludes (*Preliminary Objections*, vol. II, Annexes p.174) that since independence "evidence suggests that the phosphate income has not always been well spent", and that "rehabilitation does not in itself guarantee the economic future of the island". In response, Mr Walker points out that the first conclusion "necessarily relies heavily on unacceptable value judgments", and that the second conclusion, whilst true, takes no regard of the fact that "rehabilitation is an essential pre-condition for the economic future of the island".

65. The Applicant State takes this opportunity to reiterate that the issues apparently raised by Australia in Annex 26 of the Preliminary Objections – to the extent that they are relevant at all – go to the merits of the claim. But since those issues were raised in what is *ex facie* a set of *Preliminary Objections*, a preliminary response is made now by Nauru to avoid any inference that might be drawn from silence.

Section 2. The British Phosphate Commissioners

66. The history of the British Phosphate Commissioners on Nauru, as recounted by Australia in Chapter 2 of its *Preliminary Objections*, consistently

ignores the reality that the British Phosphate Commissioners, representing the three governments, were not just concessionaires, but were agents put in place to carry out the real purpose of the 1919 Agreement, namely, phosphate mining. (See *Nauru Memorial*, vol. 1, chapter 2; Macdonald, *The Sacred Trust*, pp.8-18.)

67. In relation to phosphate mining, the 1919 Nauru Island Agreement (Article 6) purported to confer title to the phosphate deposits on the British Phosphate Commissioners. The Nauruans were not consulted as to the terms of the Agreement, nor is there any indication that their interests were taken into account.

68. The Pacific Phosphate Company assigned its rights, whatever they might have been, in the phosphate of Nauru and Ocean Island (Banaba) together with its assets on the two islands, to the three Governments for a sum of 3.5 million pounds (*Memorial*, vol. 4, Annex 45). The assets, thus purchased, were assigned by indenture to the British Phosphate Commissioners (*Memorial*, vol. 4, Annex 46). The cost (3.5 million pounds) paid to the Pacific Phosphate Company was regarded as an advance to the British Phosphate Commissioners by the three Governments, and was expected to be repaid (and was in fact repaid) with interest over 50 years from the sale of phosphate rock. In other words, like the industrial and island administrative costs, these sums were, in fact, to be paid out of receipts derived from the mining of phosphate rock. Nauruan assets thus paid the bill of the three Governments (see Nauru Island Agreement 1919, Article 11).

69. In its *Preliminary Objections*, para. 33, Australia asserts that the 1921 and 1927 Lands Ordinances prescribed the mode of leasing to the British Phosphate Commissioners. But the Ordinances did far more than that: they set out in detail the means by which British Phosphate Commissioners gained access to the phosphate on terms which stripped the Nauruan landowners of any bargaining power (see Nauru *Memorial*, paras. 97-8). The Ordinances, enacted by Australia as the authority with legislative power over Nauru, thus put the British Phosphate Commissioners effectively in the position of controlling all phosphate land, and important areas of non-phosphate land as well.

70. The arrangements made in the Nauru Island Agreement 1919 relating to the administration and the setting up of the British Phosphate Commissioners illustrate the interplay between the three Partner Governments, the British Phosphate Commissioners and the Australian administration. The whole history

of phosphate exploitation in Nauru between 1920 and 1967 has a strong governmental base, with Australia both as the main beneficiary and the sole governmental authority for the island.

71. The British Phosphate Commissioners constituted *the* source of revenue for Nauru. Everything in the Administration, even the salary of the Administrator, was to be financed from the earnings derived from the mining of phosphate rock. The charter of the British Phosphate Commissioners was to produce and market that phosphate rock at a price as close to the actual costs of mining as possible. It was inevitable that the British Phosphate Commissioners would be concerned to keep costs to a minimum and would brook no interference, particularly if it had as its object an interest of the inhabitants that could affect mining or mining costs. The Griffiths incident, involving an unsuccessful proposal to limit the depth of mining in the interests of the Nauruans, is an excellent example. In that case the Australian Government quickly intervened to protect the British Phosphate Commissioners against the Administrator (Nauru *Memorial*, paras. 523-30).

Section 3. The Rights Enjoyed By The British Phosphate Commissioners

72. Australia argues (*Preliminary Objections*, para. 136) that account should be taken of the "valuable rights" enjoyed by the British Phosphate Commissioners under the concession, which were given away in 1967 without compensation. This is, of course, a matter relating to the merits of the case, and one which the Court is not called on to deal with at this stage. Nauru reserves its position in respect of this issue.

73. However, so far as this concerns the future "right" to mine by the British Phosphate Commissioners and its so-called concession, Mr Walker, who was present at and a participant in the negotiations for the 1967 Agreement, notes in the Appendix (below, para. A15) that this was not a matter even raised with, let alone put in argument to, the Nauruan representatives at the time. It was never raised as a matter of argument in the Trusteeship Council. As Mr Walker states: "The Nauruan people long regarded the phosphate as being theirs as a matter of right." This was a consistently held view (see the paper entitled "The Law of Land Holding In Nauru" by B. Dowiyogo (now President of Nauru), Nauru *Memorial*, vol. 4, Annex 74, p.492).

74. The matter of "concessionary compensation" for "rights lost" (*Preliminary Objections*, para. 136) was never addressed by either side in negotiations on the future of the phosphate industry on Nauru nor was it ventilated in the Trusteeship Council debates. If it had been raised, it would have been dismissed out of hand. The Administering Authority would have been seeking compensation from a Trust Territory from which it had derived substantial profit through the activities of a monopoly mining enterprise. At the same time as taking those profits, the enterprise had progressively made the land mined unusable to the point where all parties were seeking to resettle the "protected" indigenous inhabitants. It was not a tenable argument then, and it is no more attractive now. It also ignores arguments based on the Nauruan law of land ownership and on the right of the Nauruan people at international law to permanent sovereignty over their natural wealth and resources.

75. As noted already, the whole question of the acquisition of "rights" by the British Phosphate Commissioners from the Pacific Phosphate Company relating to the phosphate rock mining on Nauru is a matter in issue between the parties. It is one which the Court is not required to deal with in this phase of the proceedings.

Section 4. Distribution of Benefits From Pre-1967 Phosphate Mining

76. It is true that the mining of phosphate rock on Nauru moved the island community from an isolated subsistence economy to part of an international economy (*Preliminary Objections*, para. 141). Much is made of this point by Australia, as though this in some way meets arguments respecting breach of trusteeship obligations. It would have been odd in the extreme had the Nauruan community not received any benefits at all from a large-scale industrial activity carried on on its territory. What is at stake is whether Australia has breached certain international legal obligations and is thereby under a duty to make reparation for loss, particularly the loss occasioned by the long-term damage wrought on the island by a miner acting with the consent and active encouragement of Australia as the governmental authority in place on the Island.

77. The phosphate island, Christmas Island, situated in the Indian Ocean, is an Australian external territory. Members of the British Phosphate Commissioners, acting in their capacity as members of the Christmas Island Phosphate Commission, were responsible for the phosphate mining on the island. During the 1960s and early 1970s phosphate mining there was seen to be

environmentally damaging to forests and certain wildlife. Pressure was applied in Australia to desist from mining. The members of the Commission bowed to the pressure and carried out conservation and restorative measures (Williams & Macdonald, *The Phosphateers*, pp.532-3). Such restoration, during the same time period, was not considered appropriate to protect Nauru, a Trust Territory, and the interests of the Nauruans, the beneficiaries of the Trust.

78. In respect of employment policy on the island, Australia stated that because of other benefits Nauruans "did not find it necessary to seek employment" in the industry (*Preliminary Objections*, paras. 143, 144). The British Phosphate Commissioners had always a very stratified view of employment policy. Management and senior tradesmen were European (mostly Australian). Cheap skilled labour was imported from Hong Kong, as was ordinary labour from the 1920s to 1950. From 1950 recruitment of labourers was undertaken from the Gilbert and Ellice Islands colony of the United Kingdom.

79. For reasons of control and ease of production, labour would not normally be recruited from the island where mining was being undertaken (Viviani, *Nauru*, p.36). This allowed comparative freedom to ship out the recalcitrant, unruly, rebellious or unproductive worker who was simply under contract. Despite this policy the British Phosphate Commissioners and Australian Administration in Nauru had recurring difficulties with Chinese labour. The introduction of Gilbert and Ellice Islanders after the War had "a salutary effect on the productivity and behaviour of the remaining Chinese" (Williams & Macdonald, *The Phosphateers*, p.405). The British Phosphate Commissioners did not have the same ease of dealing with the Nauruans. While a few were employed, there was some reluctance to employ them. The Nauruans naturally wanted to progress in the industry through to management level, but when employed were always placed in the area of skilled or semi-skilled workers (Viviani, *Nauru*, p.90). This may be compared with the present situation where the senior management positions of General Manager and Assistant General Manager are held by Nauruans, and a number of managerial positions are also filled by Nauruans.

80. During the early 1960s, the British Phosphate Commissioners were under pressure to produce more revenue to the United Kingdom for development in the Gilbert and Ellice Islands. At the same time, increased royalties were being sought in Nauru and the Trusteeship Council was pressing the Australian administration on resettlement. Questions were being raised whether

resettlement should be a charge against the cost of production, yet another attack on Nauruan assets (Macdonald, *In Pursuit of the Sacred Trust*, p.45).

81. In this climate, the Prime Minister of New Zealand, Mr Keith Holyoake, had stated in 1963 to Mr Paul Hasluck, the Minister for External Affairs of Australia, that "the main object of the whole exercise is to secure the supply of cheap phosphate to Australia and New Zealand" (Ministerial Talks, 12 June 1963, Records of the New Zealand Ministry of Agriculture and Fisheries, National Archives, Wellington, 1964/91A, cited in Macdonald, *In Pursuit of the Sacred Trust*, p.45). The original philosophy conceived by Mr Hughes, legislated for by Australia in the Nauru Island Agreement Act 1919 (Cth) and applied by the Australian administration, was maintained throughout. In accordance with its charter, the British Phosphate Commissioners strenuously sought to keep costs down. It organised a relatively cheap labour policy, fought hard against the demands of the Australian waterfront unions for white crews (Williams & Macdonald, *The Phosphateers*, pp.369-72), exercised concern over increasing costs of administration in Nauru and taxes in Ocean Island (Banaba), and sought to ensure that the Trusteeship Council (like its predecessor, the Permanent Mandates Commission) should not have too much information, and, in particular, its detailed island accounts, disclosed to it. The pattern of the British Phosphate Commissioners was of a tight mercantilist group pursuing their chartered aim to provide the cheapest possible phosphate to Australia and New Zealand. They provided no golden egg to Nauru or to the Nauruan community. It was a governmental organisation set up to subsidise the farmers of Australia and New Zealand and thus to assist their production and growth, at the expense of the Nauruan Community.

82. Australia mentions (*Preliminary Objections*, para. 142) that on occasion resources were directed by the British Phosphate Commissioners to assist in Nauruan housing projects or other public projects when the administration could not respond to the need. This was so, but the British Phosphate Commissioners did not do this gratuitously. Each project was costed and paid for out of the proceeds of mining (e.g. post-war housing: Viviani, *Nauru*, p.90). In other words, Nauruan assets paid for everything. Australia made sure, fulfilling Mr Hughes' prophecy, that Nauru did not cost the Australian tax-payer a cent. The benefits over-all were to be Australian, not Nauruan.

Section 5. The Economic Situation at Independence

83. Australia (*Preliminary Objections*, paras. 146-51) states that Nauru was in 1968 potentially a very rich State because it now had control of its phosphate. This has no relevance to the issues involved in the present claim. Nevertheless some matters need to be kept in mind in respect of the situation faced by Nauru.

(i) The island is very small, and when mined out, four-fifths will be uninhabitable unless substantial restoration is carried out (Nauru *Memorial*, vol. 2, photograph 1).

(ii) Supplies of phosphate rock represent a wasting asset. To talk of a *per capita* income in a particular year or a chosen set of years is a misleading statistic. With the end of primary mining in a few years, the *per capita* income figure will be measurably reduced.

(iii) Nauru, through its Nauru Phosphate Royalties Trust, has a substantial investment programme, and given the vagaries of the world's investment markets it has performed creditably. It hardly merits the gratuitous remarks of Australia that Nauru "should be a community of essentially retired persons – with no necessity to work – living on the substantial income from the phosphate resources" (*Preliminary Objections*, para. 151). Nauru is demographically a young and expanding community (Nauru *Memorial*, para. 222) with its hopes firmly set on the future and with the desire to play a progressive role in the Pacific.

(iv) The argument presented in Annex 26 of the Preliminary Objections is hardly germane to the subject. The Nauruan claim concerns breach of obligations under the Trust. There is no Nauruan claim "that it was left with inadequate resources at the time of independence" (*Preliminary Objections*, para. 151). That is a complete irrelevance.

Section 6. Conclusion

84. Australia in Chapter 2 of its *Preliminary Objections* (para. 142) has itself demonstrated the close entanglement of the Australian administration with the British Phosphate Commissioners. The British Phosphate Commissioners were never a completely separate entity. They were part and parcel of the scheme of things.

85. On the subject of the economy of Nauru the *Preliminary Objections* (and especially its Annex 26) deals inappropriately and gratuitously with matters which are of no relevance to this case. Whatever the reasons Australia may have for placing this material before the Court, it does nothing to support the Australian case. The same can be said *a fortiori* of volume 3 of the *Preliminary Objections*, which simply consists of one article produced in full from a popular magazine, apparently written by a journalist in relation to whom there is no evidence of any particular expertise concerning the Island. There is no evidential material produced by Australia which in any way demonstrates that Nauru has acted inconsistently or exhibited a lack of good faith. The legal grounds for rejecting those assertions are dealt with in further detail below (see below, paras. 392-429).

PART III

ISSUES OF JURISDICTION STRICTO SENSU

PART III

ISSUES OF JURISDICTION STRICTO SENSU

CHAPTER 1

THE ALLEGED AGREEMENT TO SETTLE DISPUTES BY DIRECT NEGOTIATION

Section 1. The Australian Argument

86. In its *Preliminary Objections*, paras. 276-91, Australia presents a jurisdictional objection on the basis of the reservation to Australia's acceptance of the Court's jurisdiction which excludes:

> "any dispute in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement".

87. The legal significance of this formulation will be examined below in Chapter 2, and the conclusion offered there is that the reservation does not extend to direct negotiation. However, on the hypothesis that the reservation could so extend, the question to be addressed in the present chapter is whether, on the facts, there was an agreement to settle the Nauruan claim by direct negotiations as contended by the Respondent State (*Preliminary Objections*, paras. 278-83).

Section 2. Confusions in the Australian Position

88. The Australian position contains significant elements of confusion, and these result in a series of essentially conflicting propositions, which can be summarised as follows:

(a) Nauru agreed to settle its claim by direct negotiation during the continuance of the Trusteeship (*Preliminary Objections*, paras. 278-83).

(b) There was a "comprehensive settlement" between Nauru and the Respondent State signed on 14 November 1967 (ibid., paras. 10, 15, 280-3).

(c) There was an absence of agreement on the rehabilitation of worked out phosphate lands in the period 1964-1967 but there was an express waiver by the Head Chief, Mr Hammer DeRoburt, on 6 December 1967 (ibid., paras. 125, 251-54, 268, 273-4).

(d) Irrespective of the factual assertions involved in the above propositions, there was a settlement of the issue of rehabilitation by the organs of the United Nations (ibid., paras. 267-71, 284-91).

89. These very marked elements of confusion provide strong indications that the assertion that there was "an agreement to the settlement of disputes by direct negotiation" is not supported by reliable evidence. The four propositions relate to questions of fact but the Australian Government has made no attempt to reconcile these inconsistent factual assertions. Thus it is impossible to reconcile the existence of "a comprehensive settlement" (the Canberra Agreement of 1967) with "an agreement to the settlement of disputes by direct negotiation" (*Preliminary Objections*, para. 283). Likewise it is impossible to reconcile the idea of a "comprehensive settlement" in the Canberra Agreement with the proposition that there was a waiver of the claim by the Head Chief in December 1967. It is also difficult to reconcile the assertion that there was an agreement (of some kind) with the proposition that the Trusteeship Council and General Assembly had "final authority to resolve any disputes remaining unsettled" (*Preliminary Objections*, para. 286).

Section 3. There is no Evidence of an Agreement to Negotiate as an Exclusive Method of Dispute Settlement

90. The Government of Nauru contends that there is no evidence of any agreement to resort to negotiation as an exclusive method of dispute settlement, and that no such agreement was ever made. The Australian Government has

produced no particulars of such agreement. No clues are provided as to its form or even the date on which it was made.

91. The agreement alleged does not form part of the Canberra Agreement of 1967, and this is accepted by the Australian Government (*Preliminary Objections*, para. 280). If it is suggested that such an agreement were concluded as an ancillary aspect of the negotiations of 1967 no documents to prove this are introduced.

92. The principal argument presented by Australia is to the effect that the Canberra Agreement of 1967 constituted "a comprehensive settlement of all claims by Nauru in relation to the phosphate industry" (*Preliminary Objections*, para. 282). This assertion contradicts the argument (ibid., para. 283) that there was an agreement to settle disputes by negotiation. Nor did the 1967 Agreement explicitly or by necessary implication state that it constituted "a comprehensive settlement of all claims" by Nauru in relation to phosphate industry, including that of rehabilitation. In view of the nature and prominence of the rehabilitation claim for Nauru, such a stipulation was not only imperative but would normally have been expected; its absence only means that there was no agreement of any sort and that the 1967 Agreement intended to deal with matters it expressly dealt with, namely transfer of ownership of the phosphate industry and arrangements for its operations.

93. The evidence of the dealings between the Nauru Local Government Council and the Administering Authority in the period immediately prior to independence reveals that the issue of rehabilitation remained unresolved and was left on one side: see the Nauru *Memorial*, paras. 585-602.

94. Similarly, in the various contacts, whether formal or informal, between the two sides since independence there is no single reference to an agreed procedure, and no proposals for direct negotiation have been made by the Australian Government at any time. Australia has in fact always refused to negotiate.

95. The relevant United Nations records in the period preceding independence contain no reference to an agreement to negotiate.

Section 4. The Relevance of United Nations Resolutions

96. In its *Preliminary Objections* (paras. 284-91) Australia alleges that, at the termination of the Trusteeship, Nauru agreed to settlement "of all issues between it and the Administering Authority, by resolution of the Trusteeship Council and General Assembly". It is difficult to see how this can relate to the Australian reservation which is based upon the consent of the Parties "to some other method of peaceful settlement".

97. The authority of the Trusteeship Council and the General Assembly in relation to the settlement of legal disputes will be examined in Part IV, Chapter 3 of this *Written Statement*. For present purposes it is sufficient to indicate that there is no reason to suppose that the authority of the General Assembly to terminate the Trusteeship derived, or could derive, from the consent of the Parties.

98. In any event neither Nauru nor Australia at any time called upon the General Assembly to resolve the rehabilitation dispute.

99. The fact that the Trusteeship Council encouraged negotiations between Nauruan representatives and the Administering Authority (cf. *Preliminary Objections*, paras. 278-9) does not take matters much further. These developments do not provide any indication that disputes which might remain unresolved at the time of independence could only be resolved by negotiation, much less do they establish the existence of an agreement between the Parties to settle disputes exclusively by negotiation.

Section 5. The Actions and Statements of the Nauruan Representatives before Independence

100. In the context of the argument based upon the alleged agreement to negotiate, Australia makes the following statement:

> "The Republic of Nauru bases its case on being entitled to invoke the actions and statements of the representatives of the Nauruan people, before independence. Clearly, they must also be bound by their actions and statements at that time."
>
> (*Preliminary Objections*, para. 290.)

101. In response to this Australian contention it is necessary to provide certain elements of clarification. It is not unusual for international tribunals to accept the relevance and validity of pre-independence transactions when the nature of the issues and the history of the dispute militate in favour of such acceptance. This is particularly appropriate when both Parties recognise the relevance and validity of the pre-independence transactions : see, for example, the Judgment in the *Temple Case (Merits)*, I.C.J. Reports 1962, p.16.

102. In the present proceedings both Parties recognise the continuity and sequence of the relations between the Nauruan representatives, on the one side, and the Administering Authority on the other, in the years leading up to independence in 1967. In the passage set forth above (para. 100) the Australian Government unequivocally recognises this continuity.

103. In particular, the very nature of the preliminary objections, and the arguments based on an alleged pre-independence settlement or an alleged agreement to negotiate, could only have any validity on the supposition that the constitutive facts of the legal dispute prior to independence have been duly recognised in principle by the Respondent State as a legal dispute persisting at the time of independence, in subsequent diplomatic exchanges, and in the course of these written pleadings. Except on this premiss, the plea to the jurisdiction which is the subject of this chapter would not have been presented to the Court.

Section 6. Conclusion

104. On the evidence there was no agreement to negotiate as an exclusive method of the settlement of disputes. In particular, the conduct of the Australian Government contradicts this position. Australia has always rejected Nauruan initiatives leading toward negotiations. Nauru has always been willing to settle outstanding issues by negotiation.

105. In any event the alleged agreement could not refer to the claim concerning the overseas assets of the British Phosphate Commissioners (*Memorial*, paras. 469-84): see below, Part V.

106. The questions of an alleged express waiver and an alleged prior settlement of the dispute raised in the *Preliminary Objections* will be addressed in Part IV, Chapters 2 & 3 of this *Written Statement*.

PART III

CHAPTER 2

THE PHRASE "SOME OTHER METHOD OF PEACEFUL SETTLEMENT"

Section 1. The Ordinary Meaning of the Reservation

107. The reservation invoked by the Respondent State excludes "any dispute in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement". In the view of the Government of Nauru the ordinary meaning of this phrase would involve methods of the same type as recourse to judicial settlement, that is to say, other formal third party settlement procedures leading to a legally binding decision. Such "other methods of peaceful settlement" would include arbitration and certain forms of conciliation, which involve established procedures which are capable of finally resolving the dispute.

108. The terms "recourse" and "peaceful settlement" connote established legal procedures which lead to a definitive resolution of the dispute. This is reinforced by the word "other" in the phrase "some other method of peaceful settlement". This sets up an "other method" as an alternative to recourse to the Court, which indicates that the "other" method would have the same consequences, and be of broadly the same kind, as recourse to the Court, i.e., that it would involve some satisfactory and conclusive procedure for bringing the dispute to an end.

109. It follows that diplomatic negotiation and procedures of non-binding conciliation or mediation do not fall within the relevant class.

Section 2. In any Case the Reservation can only have a Contingent Operation

110. In the alternative the Government of Nauru submits that, even if the reservation includes resort to negotiation, it can only operate contingently and thus can have effect to prevent the exercise of jurisdiction only if arbitration has been tried in good faith but without success or if the Applicant State, against whom the reservation is invoked, has consistently refused to negotiate.

111. On this view of the reservation the Australian Government, having consistently refused to negotiate, cannot rely upon it to exclude the jurisdiction of the Court. The evidence of the Australian attitude in this respect is reviewed in Part IV, Chapter 1.

Section 3. The Temporal Application of the Reservation

112. In the further alternative, and on the hypothesis that the reservation includes resort to arbitration, the formulation cannot apply to the transactions between the Nauruan representatives and the Administering Authority prior to independence. The retrospective application of the reservation cannot involve reference to a period in which Nauru could not have been a party to the system of compulsory jurisdiction.

113. This view of the matter is based exclusively on the logic of jurisdictional instruments and the system of the Optional Clause. This position is entirely compatible with the argument (see Chapter 1 above, paras. 100-103) that the constitutive facts of the legal dispute prior to independence have been recognised by the Respondent State as a legal dispute persisting at the time of independence.

Section 4. The Reservation in relation to Article 79, paragraph 7 of the Rules of Court

114. In the submission of the Government of Nauru the application of the Australian reservation is intimately related to the evidence as to the overall development of the dispute. Consequently, the objection based upon this reservation does not possess, in the circumstances of the case, an exclusively preliminary character : see the Judgment in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, I.C.J. Reports 1984, pp.425-6, para. 76; I.C.J. Reports 1986, pp.29-38, paras. 37-56.

Section 5. There was no Agreement in Fact

115. By way of a postscript to the present Chapter the Government of Nauru wishes to reaffirm its position that no agreement to settle the dispute concerning rehabilitation was *in fact* made. Apart from the other evidence available, it is to be presumed that a State in the position of Nauru would be unlikely to make an

agreement to settle the rehabilitation dispute exclusively by negotiation. This would have amounted to allowing the Respondent State to determine the outcome by the expedient of refusing to negotiate.

PART IV

AUSTRALIAN ARGUMENTS RELATING TO ADMISSIBILITY

PART IV

AUSTRALIAN ARGUMENTS RELATING TO ADMISSIBILITY

CHAPTER 1

DELAY OR PRESCRIPTION

Section 1. Analysis of the Legal Elements

116. The Australian Government presents an argument based upon extinctive prescription, in the following terms:

> "...Australia would nevertheless submit that the Court should decline to hear the claims on the ground that the passage of time makes it inappropriate for the Court to hear them, and that it should in the exercise of its discretion determine that more than a reasonable amount of time has elapsed in which to bring the claims".
>
> (*Preliminary Objections*, para. 381.)

This objection appears to be presented as a ground of inadmissibility.

117. The objection is expressly based upon a rule of extinctive prescription in general international law (*Preliminary Objections*, paras. 382-6). The existence of such a rule is perhaps rather more problematical than appears from the account in the *Preliminary Objections*. Thus Charles Rousseau provides a substantial list of references in a passage entitled "Doctrine hostile à l'admission de la prescription extinctive": *Droit international public*, Tome V, Paris, 1983, pp.179-80, para. 174 (citing Anzilotti, among others). Another distinguished French lawyer, Roger Pinto, has also adopted a very cautious attitude toward extinctive prescription: *Recueil des Cours*, Hague Academy, vol. 87 (1955, I), pp.440-8.

118. However, the Government of Nauru does not wish to enter upon a doctrinal dispute. There is general agreement that *in certain conditions* delay on

the part of a claimant State may render a claim inadmissible. There is more difficulty in determining what these conditions are. Both the jurisprudence and the legal literature draw certain distinctions the most common and incisive of which are as follows:

A. THE LAPSE OF TIME AS SUCH DOES NOT BAR CLAIMS

119. The *Preliminary Objections* (paras. 382-3) conveys the impression that the lapse of time *per se* may bar a claim. This is not a correct view of the law, and it is not a position supported by legal authority. The standard authorities require one or more superadded conditions for a claim to be barred, usually in the form of some element of culpability on the part of the claimant or unfairness to the respondent.

120. Thus Oppenheim states the position as follows:

> "The principle of extinctive prescription, that is, the bar of claims by lapse of time, is recognised by International Law. It has been applied by arbitration tribunals in a number of cases. However, it is desirable that the application of the principle should remain flexible and that no attempt should be made to establish fixed time limits. Delay in the prosecution of a claim once notified to the defendant State is not so likely to prove fatal to the success of the claim as delay in its original notification, as one of the main justifications of the principle is to avoid the embarrassment of the defendant by reason of his inability to obtain evidence in regard to a claim of which he only becomes aware when it is already stale; and a protest at the time of the occurrence of the delinquency has been held to prevent time from running against the claim for its redress."
>
> (*International Law*, vol. I, 8th edn. by Hersch Lauterpacht, London, 1955, pp.349-50; quoted in Whiteman (ed.), *Digest of International Law*, Washington, 1963, vol. 2, p.1062.)

121. The tendency of the jurisprudence is not to adopt the view that lapse of time *as such* bars a claim. The Australian Government has quoted from the decision in the *Stevenson Case* (*Preliminary Objections*, para. 383), and it may assist the Court if the passage quoted is accompanied by the passage by which it is followed. The passage quoted in the *Preliminary Objections* is as follows:

> "When a claim is internationally presented for the first time after a long lapse of time, there arise both a presumption and a fact. The presumption, more or less strong according to the attending circumstances, is that there is some lack of honesty in the claim, either that there was never a basis for it or that it has been paid. The fact is that by the delay in making the claim the opposing party – in

> this case the Government – is prevented from accumulating the evidence on its part which would oppose the claim, and on this fact arises another presumption that it could have been adduced. In such a case the delay of the claimant, if it did not establish the presumption just referred to, would work injustice and inequity in its relation to the respondent Government."

122. The passage which immediately follows it, but which is not quoted in the *Preliminary Objections*, is as follows:

> "This case presents neither of these features. When first produced before the Mixed Commission of 1869, the claim for $13,277.60 for injuries to the Rio de Oro estate was alleged to be of date February 1859, as was also the claim for $77,645 on account of the La Corona, Mapirito, and San Jáime estate. The claim of the Bucural estate for $43,660.80 was laid as happening in 1863 and the claim of the San Jacinto estate for $1,260 was laid in 1869, March 6. So that the earliest claim was about ten years old, the next in order only six years, while the last claim was so late as to have been in fact subsequent to the convention establishing that Commission. Here was placed before the Government a careful list, in number and character, of the losses suffered, and the different estates on which each separate claim rested, with the dates on which the different claims arose. This gave the respondent Government an opportunity to acquaint itself with the facts and to obtain counterproofs if found available or important. Since the withdrawal of this claim from the Mixed Commission of 1869 there can be no just allegation of laches properly chargeable to either the claimant or the claimant Government. The delay has been either in the inability or the unwillingness of Venezuela to respond to this claim. The occasion of this unwillingness and the reasons why it was placed on the list of "unrecognized" claims are properly matters for proof and consideration before this Commission, but it would be evident injustice to refuse the claimant a hearing when the delay was apparently occasioned by the respondent Government."
>
> (Reports of International Arbitral Awards, vol. IX, pp.386-7.)

123. The Australian Government asserts that "analogies can be drawn from domestic law in order to assist the Court to determine an appropriate limitation period": *Preliminary Objections*, para. 386. It may be doubted whether such analogies can have any significance in the relations of States: see, for example, Pinto, *Recueil des Cours*, vol. 87 (1955, I), p.447, para. 67. The vicissitudes of international relations do not justify recourse to rigorous time limits, especially in the relations between small States and more powerful States. Unless the delay is unreasonable, claims will be accepted after long periods, as in the *Stevenson* Case, which related to claims originating between 44 and 34 years earlier.

124. In his major treatise, Charles Rousseau presents the following observations by way of conclusion:

> "Il convient pour finir de présenter deux observations.
>
> 1) Lorsque la prescription est rejetée, c'est non parce qu'elle n'existe pas en droit international, mais parce que les raisons de l'appliquer manquent en l'espèce....
>
> 2) Les décisions arbitrales écartent généralement la prescription dans les cas où le retard concerne non la présentation de la réclamation, mais son renouvellement...
>
> Les décisions estiment que la réclamation n'est pas prescrite compte tenu du fait qu'elle a déjà été présentée une première fois et que la raison de son non-renouvellement ne doit pas nécessairement être cherchée dans la négligence de l'Etat réclamant."
>
> (*Droit international public*, Tome V, Paris, 1983, pp.181-2.)

B. DELAY MAY CONSTITUTE IMPLIED WAIVER

125. It is generally accepted that delay may in the circumstances of the particular case constitute an implied waiver of the claim. This involves no more than the application of the principles of consent and renunciation to the law of international claims. There must be adequate proof of the intention to waive the claim, and lapse of time will not normally constitute such proof.

C. THERE IS A PRESUMPTION AGAINST EXTINCTION OF A CLAIM BY LAPSE OF TIME SUBSEQUENT TO NOTIFICATION OF THE CLAIM TO THE RESPONDENT STATE

126. The authorities reveal that the principal element in the concept of "undue delay" or "prescription" is delay in the original notification of the claim to the Respondent State. Once a claim has been notified or presented to the authorities of another State there is a strong presumption against the existence of undue delay: see the *Daylight Case*, (1927) Reports of International Arbitral Awards, vol. IV, p.164 at p.169; *Tagliaferro Case*, ibid., p.592 at p.593.

127. This position has very strong support in the legal literature. Thus Witenberg and Desrioux expressed the position:

"Enfin, si le retard se produit après que l'Etat demandeur a présenté diplomatiquement la réclamation à l'Etat défendeur, la prescription est alors catégoriquement repoussée."

(*L'Organisation Judiciaire: La Procédure et La Sentence Internationales*, Paris, 1937, p.142, para. 36.)

128. The eighth edition of Oppenheim by Sir Hersch Lauterpacht makes the same point in a different way:

"Delay in the prosecution of a claim once notified to the defendant State is not so likely to prove fatal to the success of the claim as delay in its original notification, as one of the main justifications of the principle is to avoid the embarrassment of the defendant by reason of his inability to obtain evidence in regard to a claim of which he only becomes aware when it is already stale; and a protest at the time of the occurrence of the delinquency has been held to prevent time from running against the claim for its redress."

(Oppenheim, *International Law*, 8th edn. by Sir Hersch Lauterpacht, London, 1955, pp.349-50.)

129. The same opinion may be found in the major treatise of Charles Rousseau:

"Les décisions estiment que la réclamation n'est pas prescrite compte tenu du fait qu'elle a déjà été présentée une première fois et que la raison de son non-renouvellement ne doit pas nécessairement être cherchée dans la négligence de l'Etat réclamant."

(*Droit international public*, Tome V, Paris, 1983, p.182.)

130. Other relevant citations include the following: Borchard, *The Diplomatic Protection of Citizens Abroad*, New York, 1925, p.831; Ralston, *The Law and Procedure of International Tribunals*, rev. edn., Stanford, 1926, pp.379-82, paras. 688-94; Cheng, *General Principles of Law*, London, 1953, pp.384-6; Whiteman (ed.), *Digest of International Law*, Washington, 1963, vol. 2, p.1062 (quoting Oppenheim, above, para. 128).

D. THERE IS A PRESUMPTION AGAINST EXTINCTION OF A CLAIM BY LAPSE OF TIME WHEN IN THE CIRCUMSTANCES THE RESPONDENT STATE HAS NOT SUFFERED ANY PROCEDURAL DISADVANTAGE

131. This principle, which emerges clearly from the decisions of arbitral tribunals, is related to the principle (Principle C above) but is treated in the legal sources to some extent as a distinct principle of procedural equity. Apart from the element of notification (examined above), the most significant question of procedural fairness concerns the availability of evidence to allow a Respondent State adequate means of defence. This element was referred to by Umpire Plumley in the *Stevenson Case*, Reports of International Arbitral Awards, vol. IX, p.385, and also in the Award in the *Ambatielos Case*, Commission of Arbitration, 1956, p.13.

132. However, when circumstances indicate that no procedural disadvantage existed in fact, then there can be no legal basis for barring the claim. There is considerable authority for the proposition that the notification of a claim *per se* excludes the principle of extinctive prescription: see the *Tagliaferro Case*, Reports of International Arbitral Awards, vol. IV, p.592 at p.593; and the *Giacopini Case*, ibid., p.594 at p.595.

133. In like manner a claim cannot be barred if the Respondent State had a contemporary record of the facts, or may reasonably be expected to possess records relevant to the claim: see Ralston, *The Law and Procedure of International Tribunals*, rev. edn., Stanford, 1926, pp.380-1, para. 691; King, (1934) 15 *British Year Book of International Law*, p.90. Nor will prescription apply if the relevant facts are admitted or are otherwise indisputable: see the *Williams Case*, Reports of International Arbitral Awards, vol. IV, p.4181 at pp.4197-8.

E. A RELEVANT FACTOR IN JUDICIAL DECISION IS THE CONDUCT OF THE RESPONDENT STATE

134. The dilatoriness or prevarication of the Respondent State is a factor excluding the extinction of a claim on the grounds of prescription. This is a logical corollary of the principle based upon the procedural disadvantage to the Respondent State (above). Thus Borchard observes:

> "[W]here... the dilatoriness of the defendant government is responsible for the delay in prosecution or payment, the claim having been seasonably brought to its attention, the claim is not considered as barred by prescription."
>
> (*The Diplomatic Protection of Citizens Abroad*, New York, 1925, p.831 (references omitted).)

The same point of principle appears in other authorities: see Ralston, *The Law and Procedure of International Tribunals*, rev. edn., Stanford, 1926, pp. 381-2, paras. 693-4; Cheng, *General Principles of Law*, London, 1953, p.384.

Section 2. There has been no Implied Waiver of the Claim

135. On the evidence there has been no implied waiver of the claim on the part of the Republic of Nauru. Moreover, the Respondent State does not rely on any waiver or abandonment of the claim since independence. According to the evidence the claim was notified to the Australian Government prior to independence and communicated to that Government at the highest level on various occasions subsequent to independence. This evidence is reviewed below.

Section 3. There has been no Delay in Notification of the Claim concerning Rehabilitation

136. The Australian Government has argued that the claim by Nauru has not been made within a reasonable time (*Preliminary Objections*, paras. 381, 398). The argument focuses upon the means by which a claim is pursued or enforced, whereas the principle of prescription relates to the notification of claims. The persistent refusal of the Australian Government to enter upon negotiations has created a situation in which it was reasonable that Nauru should have recourse to a lawful and normal alternative means of settlement.

137. The claim of the Nauruan community to rehabilitation of the worked out phosphate lands has been a major feature of the political and historical record since 1964, when the option of resettlement on another island was finally laid aside (Nauru *Memorial*, paras. 567-80). The negotiations between the Nauru Local Government Council and the Australian Government in the years 1965 to 1967 related to three major questions: political independence, control of the phosphate industry, and responsibility for rehabilitation of the worked out phosphate lands.

138. The Nauruan delegation participating in the talks consistently distinguished between the obligation to rehabilitate the phosphate lands mined out *before 1 July 1967* and the responsibility of the Republic to rehabilitate land mined out *subsequently*. This remained the position of the Nauruan representatives in the period immediately prior to independence on 31 January 1968. It was, for example, reflected in an amendment to the Nauru Constitution made shortly after independence: see the *Memorial*, paras. 615-8.

139. At the 1323rd Meeting of the Trusteeship Council, Head Chief Mr. Hammer DeRoburt referred to the as yet unresolved issue of rehabilitation in these words:

> "20. On all those matters, full agreement had been reached between the Administering Authority and the representatives of the Nauruan people. There was one subject, however, on which there was still a difference of opinion – responsibility for the rehabilitation of phosphate lands. The Nauruan people fully accepted responsibility in respect of land mined subsequently to 1 July 1967, since under the new agreement they were receiving the net proceeds of the sale of phosphate. Prior to that date, however, they had not received the net proceeds and it was therefore their contention that the three Governments should bear responsibility for the rehabilitation of land mined prior to 1 July 1967. *That was not an issue relevant to the termination of the Trusteeship Agreement, nor did the Nauruans wish to make it a matter for United Nations discussion. He merely wished to place on record that the Nauruan Government would continue to seek what was, in the opinion of the Nauruan people, a just settlement of their claims.*"
>
> (Trusteeship Council *Official Records*, 13th Special Session, 22 November 1967, p.3 (emphasis added).)

140. This unequivocal statement to the effect that the rehabilitation issue had not been the subject of agreement was not contradicted by any delegation in the Trusteeship Council.

141. A remarkable aspect of the *Preliminary Objections* is the attempt to establish that the Head Chief, Mr Hammer DeRoburt, gave an express waiver of the claim relating to rehabilitation, and did so on 6 December 1967. This contention has no basis and the question of an alleged waiver is examined in Chapter 2 of this Part (see paras. 162-87 below). For present purposes it is to be noted that the Australian argument involves a recognition that the issue remained open after the Canberra talks of 1967.

A. THE ATTITUDE OF UNITED NATIONS ORGANS

142. That rehabilitation was a major issue connected with independence and that it remained unresolved at the time of independence were both matters of public record in the official records of the Trusteeship Council, the Committee of Twenty-Four, and the Fourth Committee of the General Assembly (Nauru *Memorial*, paras. 603-14).

B. THE TALKS LEADING TO THE NAURU ISLAND PHOSPHATE INDUSTRY AGREEMENT OF 1967

143. The final round of talks between the Nauruan representatives and "the Joint Delegation of Partner Governments" took place in Canberra between 12 April and 14 June 1967. The agenda was the "future arrangements for the phosphate industry". During these talks the Nauruan Delegation expressly repudiated the idea that the Nauruans had accepted responsibility for rehabilitation (Nauru *Memorial*, paras. 593-601). The Joint Delegation was left in no doubt about the prominence in the minds of the Nauruan representatives of the question of rehabilitation.

144. Neither the Heads of Agreement resulting from the 1967 talks (*Memorial*, vol. 3, Annex 5, p.420) nor the text of the Nauru Island Phosphate Industry Agreement of 14 November 1967 (ibid., Annex 6) contained any reference to the issue of rehabilitation.

C. AFFIRMATION OF THE CLAIM AFTER INDEPENDENCE

145. In the view of the Nauruan Delegation taking part in the Canberra talks in April-June 1967 the question of rehabilitation remained unresolved. This is clear from the position of the Head Chief expressed in the Trusteeship Council on 22 November 1967 (see above, para. 139).

146. Consistently with this position, at the time of independence the Head Chief stated that:

> "We hold it against Britain, Australia and New Zealand to recognise that it is their responsibility to rehabilitate one third of the island."
>
> (See Nauru *Memorial*, paras. 615-17.)

D. Diplomatic and Other Official Contacts in the Period 1968 to 1989

147. After independence the issue of rehabilitation remained very much in view. Late in 1968 the President of Nauru, Mr Hammer DeRoburt, addressed a request for the holding of talks on the ways and means of constructing a new airstrip "as a rehabilitation project" to the Australian Minister of External Affairs (Letter dated 5 December 1968; Nauru *Memorial*, vol. 4, Annex 76).

148. The Australian response, in a letter dated 4 February 1969, showed a keen sensitivity to the issue of rehabilitation and dealt with it in a formal context:

> "I have consulted the New Zealand and British Governments on your proposal. You will recall that the Partner Governments, in the talks preceding the termination of the Trusteeship Agreement, did not accept responsibility for the rehabilitation of mined-out phosphate lands. The Partner Governments remain convinced that the terms of the settlement with Your Excellency's Government were sufficiently generous to enable it to meet its needs for rehabilitation and development. In the circumstances, therefore, you will understand that the Partner Governments are not able to agree to your proposal."
>
> (*Memorial*, vol. 4, Annex 77.)

149. It was not only the Australian side which understood the continuity with the pre-independence developments as the statement of the Head Chief, Mr Hammer DeRoburt, appended to the *Memorial*, shows (*Memorial*, Appendix 1, paras. 27-31). This statement also recalls that the issue of rehabilitation was raised at the highest level in 1973 and 1974. In the words of the then President of Nauru:

> "On a State Visit to Canberra in 1973, I raised with the then Prime Minister, the Honourable E.G. Whitlam, the question of rehabilitation as a matter of concern. Again, when Senator Willesee, the Acting Minister of Foreign Affairs in the Whitlam Government in Australia, visited Nauru in 1974, I raised the matter with him but to no avail. A subsequent approach to the Australian Prime Minister, the Honourable R.J.L. Hawke, in 1983 met with a similar response. At that point, my Government, well understanding that primary mining of phosphate was within a few years of completion, decided that an independent study of the rehabilitation problem should be set-up, and so the Commission of Inquiry was later launched."
>
> (ibid., para. 30.)

150. The Australian response to the President's initiative of 1983 (*Memorial*, vol. 4, Annex 78) took the form of a letter from the Prime Minister, Mr Hawke, dated 14 March 1984. This letter contains the statement:

> "After careful consideration of your request, in consultation with my Ministers concerned, I wish to inform you that Australia stands by the position it took in 1967 when together with New Zealand and the United Kingdom it rejected a similar request for rehabilitation assistance. The former partner governments agreed at that time that it was a requirement of termination of the trusteeship agreement that they were entirely cleared of any onus or financial responsibility for the rehabilitation of Nauru."
>
> (ibid., Annex 79.)

151. This passage clearly assumes the existence of a legal issue which had subsisted after independence. A legal argument is proposed – the effect of the termination of the Trusteeship Agreement – but there is a clear recognition that a dispute exists. Such recognition can also be found in the Australian Note dated 3 February 1988 (*Memorial*, vol. 4, Annex 80, No. 20).

152. The *Preliminary Objections* presents an argument to the effect that the "previous claims by Nauru have not asserted a legal claim and, hence, do not preclude an argument based on delay" (p. 158, heading to Section II). This argument involves a confession, in that its basis is that a claim was made but (it is asserted) they did not involve "any claim of legal right" (*Preliminary Objections*, para. 393). In particular it is alleged:

> "From 1968 until 1983 Nauru made no formal statement or demand to Australia in relation to its present claims. No assertion of a legal entitlement was made. In particular, no assertion based on breach of the Trusteeship Agreement was made."
>
> (ibid., para. 389.)

153. This argument is misconceived. The fundamental question is whether reasonable notice was given of the existence of the claim concerned. This issue is one of procedural equity and it is substance rather than form which counts. The Australian response to the various initiatives on the part of Nauru has not involved any element of surprise. The Australian response has been to plead that there had been a settlement in 1967. There could not have been any element of surprise.

154. The Nauruan initiatives were of a diplomatic character and included personal letters from the President of Nauru to the Australian Prime Minister. The purpose was to initiate negotiations. It would not be normal in such a context to parade a legal argument, much less to set forth the causes of action. Given the history of Nauruan-Australian relations, the reference to the question of rehabilitation would be perfectly clear to all concerned. The Australian responses to Nauruan requests did not take the form of requests for further information, because none was needed. Nor do the Australian documents complain of any break in continuity. Throughout the period from independence until the present proceedings the Australian Government was well aware of the Nauruan position on rehabilitation.

Section 4. Australia has not Suffered any Disadvantage

155. The Respondent State claims that it faces prejudice in meeting the Nauruan claim, and, in particular, difficulties arising from "the dispersal or loss of critical evidence and the difficulty of assembling relevant material that dates not just to 1968 but goes back to the start of at least the Trusteeship period in 1947" (*Preliminary Objections*, para. 395).

156. In the submission of the Government of Nauru this assertion has no basis in fact. A significant proportion of the relevant documents are official records of the League of Nations or organs of the United Nations. The records of the Nauruan-Australian talks of the period 1965 to 1967 were in Australian possession from the start. Other documents exist in the Australian Archives.

157. Indeed, in the circumstances of this case it is Australia which has the advantage because, at the time of independence and at all material times, the Australian Government has had exclusive access to certain material evidence and could choose to what extent, if at all, Nauru could have notice of this evidence. It is at present Nauru which has outstanding requests to Australia for assistance in these matters: see the *Memorial*, paras. 662-8.

Section 5. The Conduct of the Respondent State

158. The passage of time since the first occasion on which Nauruan representatives pressed the claim concerning rehabilitation is due to the refusal of Australia to respond in a constructive way to the Nauruan approaches. There

is strong evidence that Australia had taken a mistaken view of the legal position, especially in relation to the Nauru Island Agreement of 1919 (see the *Memorial*, paras. 325-31). In particular, the attitude of the Australian Government has always reflected the position adopted by the Solicitor-General in 1965 (ibid., paras. 329-31).

159. Whatever the reasons for Australian complacency and intransigence in face of the Nauruan claim, this complacency, and the resultant delay in recourse to a settlement procedure, cannot in fairness be allowed to prejudice the position of Nauru.

Section 6. The Relevance of Article 79, paragraph 7 of the Rules of Court

160. In the submission of the Government of Nauru the Australian argument based on extinctive prescription is closely related to the evidence concerning the overall development of the dispute and the general conduct of the Respondent State both before and after independence. Consequently, in accordance with Article 79, paragraph 7 of the Rules of Court, the objection based upon lapse of time does not possess, in the circumstances of the case, an exclusively preliminary character: see the Judgments in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, I.C.J. Reports 1984, pp.425-6, para. 76; I.C.J. Reports 1986, pp.29-38, paras. 37-56.

Section 7. Conclusion

161. In conclusion the following elements may be given emphasis:

(a) There has been no failure to give notification of the substance of the Nauruan claim.

(b) The existence of "delay" of any kind relates to the persistent refusal of Australia to negotiate or to propose third party settlement. As Umpire Plumley said in the *Stevenson Case* (above, para. 131):

> "The delay has been either in the inability or the unwillingness of Venezuela to respond to this claim".

(c) The Australian argument based on the alleged agreement to have recourse to negotiation is incompatible with the allegation of unreasonable delay.

(d) Australia does not rely on any waiver or abandonment of the claim since independence.

(e) There has been no inequitable treatment of the Respondent State. To the contrary the Australian Government has had the advantage in respect of control of and access to key sources of evidence.

(f) The objection based upon "delay" does not apply to the claim relating to the overseas assets of the British Phosphate Commissioners, and the Australian objection is not related to this claim.

PART IV

CHAPTER 2

WAIVER

Section 1. The Australian Argument

162. The Respondent State does not rely on any allegation of the waiver or abandonment of the claim since the independence of Nauru. Moreover, major aspects of the *Preliminary Objections* involve the arguments, presented separately, that the Canberra Agreement of 14 November 1967 constituted a "comprehensive settlement" of all outstanding issues and, further, that there was a settlement of the issue of rehabilitation by the organs of the United Nations. Such arguments, together with the contention that Nauru had agreed to settle its claim by separate negotiation, are incompatible with the assertion that the Nauruan representatives had waived the claim concerning rehabilitation.

163. Against this unpromising background, it is a matter of surprise to find that an argument based on the allegation of a waiver before independence appears in the *Preliminary Objections*. However, the argument is introduced in a low key and is presented within the penumbra of other arguments.

164. The allegation of the waiver appears in two passages in the *Preliminary Objections*, at para. 125, and again at paras. 247-75. The evidence relied on consists exclusively of a passage in the address by the Head Chief, Mr Hammer DeRoburt in the Fourth Committee of the General Assembly on 6 December 1967, and the construction which the Australian Government seeks to place upon the words used.

165. The context of the argument is the recognition in the *Preliminary Objections* that a legal dispute concerning rehabilitation existed at the time of independence, the nature and modalities of which related in part to events prior to independence. The contingency of a waiver or renunciation of the claim is a

modality of such a dispute, and the argument based on a waiver effective after the independence of Nauru constitutes recognition that, but for the alleged waiver, a legal dispute would subsist after the independence of Nauru.

Section 2. There was no Waiver in Fact

166. The assertion that a waiver existed rests exclusively upon a single passage in the speech delivered by the Head Chief of Nauru, Mr Hammer DeRoburt, in the Fourth Committee on 6 December 1967. The passage is quoted in the *Preliminary Objections*, para. 251 and the words alleged to constitute a waiver of the claim are as follows:

> "The revenue which Nauru had received in the past and would receive in the next twenty-five years would, however, make it possible to solve the problem".
>
> (For the entire passage in its context see Nauru *Memorial*, paras. 609-12.)

167. The Australian Government has failed to provide any particulars of the waiver alleged, beyond an assertion that the words used constitute a waiver. The context – "the problem" referred to – was the general economic prospect for Nauru after independence in the light of the eventual exhaustion of the phosphate deposits. The context was not an appraisal of the legal agenda at the time of independence. Consequently, the words used and the context cannot be relied upon as producing an *express* waiver (and it is significant that the Australian Government avoids the epithet "express").

168. In the absence of the indicia of an express waiver, the Australian Government has the burden of establishing that the *conduct* of the Nauruan representatives generally in the material period constituted an *implied* waiver. It is, in any event, well recognised that the renunciation of legal rights is not to be presumed, as the opinions of the following authorities bear witness:

* Guggenheim, *Traité de droit international*, Genève, 1953, p.144; 2nd edn, 1967, vol. I, p.281;

* Suy, *Les Actes Juridiques Unilatéraux en droit international public*, Paris, 1962, pp.159-64;

* Fitzmaurice, (1953) 30 *British Year Book of International Law* pp.44-5 (also in Fitzmaurice, *The Law* and *Procedure of the International Court of Justice*, Cambridge, 1986, vol. I, pp.174-5);

* Rousseau, *Droit international public*, Paris, Tome V, 1983, p.182, para. 176.

169. In the absence of an express waiver, a transaction normally accompanied by some degree of formality, and at least evidence of some *quid pro quo* or *causa*, it is incumbent upon the Respondent State to demonstrate that the conduct of the claimant *as a whole* gave unequivocal indications of the renunciation of the claim.

170. The evidence clearly indicates the absence of any such renunciation. No contemporary Australian source refers to the existence of a waiver, express or otherwise. The relevant General Assembly resolutions referred to the duty of rehabilitation and the resolution granting independence (Resolution 2347(XXII)) recalled the two earlier resolutions which contained prominent references to rehabilitation: see the Nauru *Memorial*, para. 613.

171. As to the conduct of the Nauruan representatives in the period leading up to independence, the key steps are as follows:

172. (a) During the talks of 1967 the Nauruan Delegation formulated its position on responsibility for rehabilitation very clearly and maintained this position throughout the talks. The Australian Government has not invoked the records of the 1967 talks to support the waiver hypothesis. (The relevant material is reviewed in the Nauru *Memorial*, paras. 593-602.)

173. (b) The Nauru Island Phosphate Industry Agreement was signed on 14 November 1967. This was in effect the result of the talks. If an express waiver had been decided upon as an aspect of the bargaining process, it was this juncture at which such a waiver would have surfaced. And it would have emerged in the form of a clause in the Agreement. It is contrary to good sense and normal practice to suppose that, *after* the conclusion of the talks and the end of the process of negotiation, the Nauruan side should choose to make a renunciation casually and in response to no initiative

which would provide a rational basis for such a radical shift from a long held position.

174. (c) During the important debate in the Trusteeship Council on the issue of Nauruan independence the Head Chief made a very clear statement of the Nauruan position on the rehabilitation of phosphate lands. The context was the scope of the agreement with the Administering Authority and the purpose of the statement was "to place on record that the Nauruan Government would continue to seek what was, in the opinion of the Nauruan people, a just settlement of their claims" (see the *Memorial*, para. 609). This statement was made on 22 November 1967, shortly after the signing of the 1967 Agreement, and it specifically addresses the rehabilitation issue. Unless expressly withdrawn (and this did not occur) such a reservation of rights would continue to have effect even if it were not repeated on every occasion on which Nauruan representatives addressed organs of the United Nations.

175. (d) On 6 December 1967 the Head Chief addressed the Fourth Committee of the General Assembly, and it is a passage from this speech which is relied upon by the Respondent State as a waiver. In the circumstances the presumption is that the Head Chief had no intention to vary or weaken, much less to resile from, the clear and forceful statement presented to the Trusteeship Council on 22 November. Nor was his statement in the Fourth Committee referred to or understood by other delegations as constituting a waiver.

176. (e) At the time of independence Mr Hammer DeRoburt, now the President of Nauru, immediately re-affirmed the claim relating to rehabilitation (see the references in the *Memorial*, paras. 615-17).

177. In the submission of the Government of Nauru the pattern of conduct in the critical period from April 1967 until January 1968 does not provide any basis for the contention of the Respondent State that Mr Hammer DeRoburt waived the claim, more or less in passing, during his address on 6 December 1967. In particular, there is no reasonable basis on which the Court could infer that the words used on 6 December were intended to supplant the very lucid and formal affirmation of 22 November.

178. To this the Government of Nauru would add a further submission. Even if, *which is not admitted*, the words used by the Head Chief on 6 December could be construed as being in some degree out of line with the overall pattern of conduct from April 1967 until January 1968, superficial inconsistencies cannot derogate from the general weight and consistency of the evidence as to the position of the Party involved.

179. This submission on the law can be supported by reference to the policy adopted by the Court in the *Anglo-Norwegian Fisheries Case*, in which the Court said:

> ".... it is impossible to rely upon a few words taken from a single note to draw the conclusion that the Norwegian Government had abandoned a position which its earlier official documents had clearly indicated."
>
> (I.C.J. Reports 1951, p.138.)

180. In his chronicle of the jurisprudence of the Court Sir Gerald Fitzmaurice, writing with reference to the rubric of "admissions", formulated the principle that "too much account should not be taken of superficial contradictions and inconsistencies" (see the passages cited in paragraph 168 above). In support of this Sir Gerald quotes the Court's judgment in the *Anglo-Norwegian Fisheries Case*:

> "The Court considers that too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in the Norwegian practice."
>
> (I.C.J. Reports 1951, p.138.)

Section 3. The Nuclear Tests Cases are Irrelevant

181. The Australian Government contends that as a consequence of the alleged waiver no dispute existed between Nauru and Australia and that therefore the claim is without object (*Preliminary Objections*, paras. 273-5). In support of this contention passages are quoted from the Judgment in the *Nuclear Tests Cases*.

182. In the submission of the Government of Nauru this argument lacks substance and adds nothing to the argument based on the existence of an alleged waiver. In the present case "the object of the claim" has not disappeared (cf. the *Nuclear Tests Cases*, I.C.J. Reports 1974, pp.271-2). The Respondent State has not expressed any willingness to settle the claim specified in the Application and *Memorial*. There is no act or transaction equivalent to the statements made by the French Government. Such an act or transaction could only have the legal effect contended for if it removed the basis for the relief sought. In the present case the alleged waiver forms part of the merits of the case and represents an issue which can be resolved in the ordinary way as an aspect of the merits. As the *Nuclear Tests Cases* shows, the disappearance of the object of the claim involves precisely that: it has remedial consequences lying outside the question going to the merits.

Section 4. The Objection based on Alleged Waiver does not possess an Exclusively Preliminary Character

183. The preliminary objection based on an alleged waiver raises questions directly related to the issues of merits and the examination of a variety of transactions and the conduct of the Parties in general. Consequently the objection does not possess, in the circumstances of the case, an exclusively preliminary character for the purposes of Article 79, paragraph 7 of the Rules of Court.

Section 5. Conclusion

184. In the submission of the Government of Nauru the Nauruan representatives did not waive the claim concerning rehabilitation at any time prior to independence. It may be noted that the Respondent State has not relied on any allegation of a waiver since the independence of Nauru.

185. The allegation that the words used by the Head Chief, Mr Hammer DeRoburt, on 6 December 1967 constituted a waiver cannot be justified for the following reasons:

(a) There is no basis for the view that the statement on 6 December constituted a formal waiver, and consequently waiver could only be proved on the basis of inference from the conduct of the Nauruan representatives generally in the relevant period.

(b) The statement made by the Head Chief on 22 November 1967 addressed the issue of rehabilitation directly and in formal terms: there could be no reasonable inference that the words used on 6 December involved a change of position on such a crucial question.

(c) The words used on 6 December 1967 do not in any event refer to Australian responsibility for rehabilitation but to the long term economic prognosis for Nauru.

(d) Other delegations attending the Fourth Committee meetings at the 22nd Session of the General Assembly did not construe Mr Hammer DeRoburt's statement as a waiver of the claim to rehabilitation.

(e) The pattern of conduct by the Nauruan representatives in the critical period from April 1967 until the arrival of independence is completely incompatible with the Australian allegation of a waiver.

186. The Nauruan position was expressed by Mr Hammer DeRoburt in the Trusteeship Council on 22 November 1967 in the following words:

> "20. On all those matters, full agreement had been reached between the Administering Authority and the representatives of the Nauruan people. There was one subject, however, on which there was still a difference of opinion – responsibility for the rehabilitation of phosphate lands. The Nauruan people fully accepted responsibility in respect of land mined subsequently to 1 July 1967, since under the new agreement they were receiving the net proceeds of the sale of phosphate. Prior to that date, however they had not received the net proceeds and it was therefore their contention that the three Governments should bear responsibility for the rehabilitation of land mined prior to 1 July 1967. That was not an issue relevant to the termination of the Trusteeship Agreement, nor did the Nauruans wish to make it a matter for United Nations discussion. He merely wished to place on record that the Nauruan Government would continue to seek what was, in the opinion of the Nauruan people, a just settlement of their claims".
>
> (Trusteeship Council, *Official Records*, 13th Special Session, 22 November 1967, p.3.)

187. This clear statement on an important issue of principle was not contradicted by any delegation. The statement formed part of the debate leading to the adoption of Resolution 2149(S-XIII) entitled "The Future of Nauru" (*Memorial*, vol. 4, Annex 19). This resolution laid the foundation for the

action by the General Assembly involving termination of the Trusteeship. The statement of the Head Chief constituted a definitive version of the Nauruan position, consistent with the Nauruan stance during the talks of 1967, and it was not retracted subsequently.

PART IV

CHAPTER 3

PRIOR SETTLEMENT OF THE DISPUTE

Section 1. The Australian Argument

188. The *Preliminary Objections* presents the argument that the claim of Nauru is inadmissible on the specific ground that the Agreement relating to the Nauru Island Phosphate Industry of 1967 (the "Canberra Agreement") represented "a comprehensive settlement of all claims by Nauru in relation to the phosphate industry" (*Preliminary Objections*, para. 282; and see also para. 10).

189. The evidential basis of this argument is extraordinarily weak and this weakness is heralded by the contradictions between the various factual hypotheses proposed in the *Preliminary Objections*. Thus the "comprehensive settlement" hypothesis lies uneasily alongside the "agreement to settle by negotiation" hypothesis (see Part III, Chapter 1, above), and also the "waiver" hypothesis (see this Part, Chapter 2, above). This latter contradiction stands out in paragraph 125 of the *Preliminary Objections*, in which the "comprehensive settlement" has been overridden by the allegation of a waiver. In the words of paragraph 125:

> "Every major political and phosphate goal, bar one, that the Nauruan leaders had set themselves they had achieved. The exception – the rehabilitation of the phosphate lands worked out to June 1967 – was one which neither they nor the Partner Governments could agree upon in the extended negotiations in the period 1964-1967. Both sides stated, and restated, their positions to each other in Canberra and New York until on 6 December 1967 Head Chief DeRoburt, with his eyes set on independence and conscious of the distance the Partner Governments had come in the negotiations, waived the claim by acknowledging that 'the revenue which Nauru had received in the past and would receive during the next 25 years would however make it possible to solve this problem'. The subsequent change of heart, post 31 January 1968, does not invalidate that renunciation."

Section 2. The Argument from Silence

190. In the submission of the Government of Nauru there is a complete lack of evidence that the Canberra Agreement of 1967 involved a renunciation of the Nauruan claim relating to rehabilitation. Indeed, the Australian Government offers what is essentially an argument from silence. The *Preliminary Objections* recognises that the Agreement was silent on the issue (paras. 280-2). The Australian argument is that the silence of the Agreement is to be construed as a renunciation on the part of Nauru, not as a reflection of a lack of agreement on the particular issue. Such a sequence is extremely unlikely both as a matter of legal logic and of political experience.

191. As the Australian Government recognises: "The silence of the Agreement on the issue is a clear sign of the recognition that the two sides could not agree on an express provision..." (*Preliminary Objections*, para. 280). In such a case the normal inference would be that the issue had been left aside. It is certain that there is no basis in law for an implication of a renunciation.

192. Moreover, as a matter of principle, there is no presumption of a renunciation of rights (see the authorities indicated in Chapter 2 of this Part, para. 168), and the general pattern of conduct on the part of Nauru militates strongly against the likelihood of an implied waiver (see Chapter 2, above, paras. 169-80).

Section 3. The Canberra Agreement of 14 November 1967

193. It is common ground that the Agreement (*Memorial*, vol. 3, Annex 6) contains no provision relating to responsibility for rehabilitation. The reason for this is fairly obvious, given the objectives of the Agreement. The objectives were to establish arrangements "for the future operation of the phosphate industry on Nauru" and this is stated in the preamble. This recital is based upon the first paragraph of the Heads of Agreement concluded in Canberra on 15 June 1967 (*Memorial*, vol. 3, Annex 5, pp.419-25).

194. The contents of the Agreement related exclusively to the future operation of the industry. The provisions have a coherent set of purposes and no part of the Agreement is devoted to any claims or liabilities relating to the previous period of mining operations. In such a milieu a renunciation of claims would not

be *ejusdem generis*. It is difficult to envisage a process of implication which has no corresponding area of express provisions in which to operate. The process of implication requires a community of intention and meaning and a resultant association.

195. It is also common ground that there was no renunciation during the talks at which the Canberra Agreement was prepared. In the *Preliminary Objections* Australia expressly recognises this in several passages. Thus it is stated (*Preliminary Objections*, para. 125) that the issue of rehabilitation was one which neither the Nauruan leaders nor the Partner Governments "could agree upon in the extended negotiations in the period 1964-1967". Again, in paragraph 280, it is accepted that "rehabilitation was not expressly dealt with in the Agreement".

196. The documentary record of the 1967 talks demonstrates that the Nauruans adhered to their position on rehabilitation (see the *Memorial*, paras. 592-602). Moreover, an attempt by the Australian Government to include a clause approximate to a renunciation in the draft was unsuccessful (ibid., para. 598). The Nauruan position was reaffirmed by Mr Hammer DeRoburt in the Trusteeship Council on 22 November 1967, shortly after the conclusion of the Canberra Agreement.

Section 4. Conclusion

197. At the end of the day the Australian Government has failed to offer a single document in support of its contention that there was a "comprehensive settlement" in 1967. The documentary record indicates the contrary. There is nothing on the face of the Canberra Agreement of 1967 which suggests that it was such a settlement. Many issues concerning Nauru were left aside, and the trilateral Agreement of 9 February 1987 (terminating the 1919 Agreement) (*Memorial*, vol. 4, Annex 31) provides evidence of this.

198. Further evidence that the Canberra Agreement had a limited significance is provided by General Assembly Resolution 2347(XXII) adopted on 19 December 1967, which involved the decision to terminate the Trusteeship Agreement. This Resolution records an agreement between the Nauruan people and the Administering Authority to the effect that Nauru should accede to independence on 31 January 1968 (see the operative part, para. 1). In this context the Resolution states that "the Administering Authority has complied with the request of the representatives of the Nauruan people *for full and*

unqualified independence" (emphasis added). In its preamble the resolution recalls the previous resolutions of 1965 and 1966 both of which make prominent reference to the issue of rehabilitation (Nauru *Memorial*, paras. 613-14).

199. In particular the preamble refers to General Assembly Resolution 1514(XV) of 14 December 1960 which contains the significant Declaration on the Granting of Independence to Colonial Countries and Peoples. In the operative part of the Declaration paragraph 5 provides as follows:

> "5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom."

200. In the light of this provision, and its key phrase "without any conditions or reservations", it is to be presumed that the General Assembly and its Fourth Committee would not have countenanced the view that Nauru was to attain independence on the basis of an implied renunciation of all rights not expressly acknowledged by the Partner Governments in the Canberra Agreement.

PART IV

CHAPTER 4

TERMINATION OF TRUSTEESHIP

Section 1. Introduction

201. In the *Preliminary Objections*, paras. 213-75, Australia argues that the Nauruan claim is inadmissible because "the termination of the Trusteeship by the United Nations precludes allegations of breaches of the Trusteeship Agreement from now being examined by the Court" (id., para. 213). According to the Australian submission, this is either because the Trusteeship Council and the General Assembly had *exclusive* jurisdiction to determine issues relating to the Trusteeship Agreement (id., paras. 224-30), or because the termination of a Trusteeship Agreement necessarily settled "all legal issues relating to Trusteeship Obligations" (id., paras. 231-75).

Section 2. The Objection based on the Effects of Termination does not Possess An Exclusively Preliminary Character

202. As will be argued below (paras. 212-243), the legal consequences of the relevant General Assembly resolutions, and especially Resolution 2347(XXII), can only be determined after a full analysis of the circumstances leading to independence, of the Nauruan and Australian positions on the various issues in dispute, and of the negotiations which preceded independence – negotiations which, as Australia elsewhere concedes (see *Preliminary Objections*, paras. 278ff.), were capable of having continuing legal consequences. The General Assembly did not expressly resolve the Nauruan claim relating to the issue of rehabilitation, since a resolution of that claim was not necessary to resolve the immediate question of Nauruan independence, and the General Assembly was not asked to resolve it. The legal consequences of Resolution 2347(XXII) are accordingly bound up with the whole complex of transactions which arose in the

crucial pre-independence period, and which are central to the Nauruan claim on the merits.

203. In these circumstances the issue of the legal consequences of General Assembly Resolution 2347(XXII) should not be subjected to a summary resolution of the kind sought by Australia. Moreover it is not an issue of jurisdiction *stricto sensu*, such as ought to be determined at a preliminary stage. For these reasons it is submitted that the question does not possess, in the circumstances of the case, an exclusively preliminary character.

Section 3. The Nauruan Claim Survived the Termination of the Trusteeship: Summary of Arguments

204. In the alternative, it is submitted that the claim which is the subject of the present proceedings survived the termination of the Agreement and was not extinguished, or authoritatively determined in a way adverse to Nauru, by the General Assembly. The bases for this submission, which are developed in the following Sections, are as follows:

(a) The General Assembly and the Trusteeship Council did not have exclusive authority to determine legal issues arising from the Trusteeship Agreement (see Section 4, paras. 205-11 below).

(b) The termination of the Trusteeship did not automatically extinguish all legal claims arising from the administration of the Trust Territory, but only those which it was necessary to deal with in order to give effect to the self-determination of the territory or which were actually presented for decision (see Section 5, paras. 212-34 below).

(c) The General Assembly did not intend or purport to terminate rights vested in the Nauruan people under the Trusteeship Agreement and associated rules of international law (see Section 6, paras. 235-7 below).

(d) Even if express recognition by the competent United Nations organ was required to preserve Nauru's rights, there was such recognition here (see Section 7, paras. 238-42 below).

These issues will be dealt with in turn.

Section 4. The General Assembly and the Trusteeship Council did not have Exclusive Authority to Determine Legal Issues Arising from the Trusteeship Agreement

205. Australia argues that "the competence to determine any alleged breach of the Trusteeship Agreement and Article 76 of the Charter rested exclusively with the Trusteeship Council and the General Assembly" (*Preliminary Objections*, para. 224). It does so notwithstanding its concession (id., paras. 217-8) that the obligations arising under the Trusteeship Agreement and related rules are legal obligations which are in principle justiciable.

206. The exclusive competence of the political organs of the United Nations to determine legal questions is not to be presumed. After all, the Court is "the principal judicial organ of the United Nations" under Article 92 of the Charter. Not even the Security Council's "primary authority" over matters of international peace and security excludes the jurisdiction of the International Court to determine legal issues relating to the use of force: see e.g. *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States), Jurisdiction and Admissibility*, I.C.J. Reports 1984, p.392 at pp.431-6; *Merits*, I.C.J. Reports 1986, p.14 at p.26. Neither Chapters XII and XIII of the Charter nor the Trusteeship Agreements conferred "primary", let alone exclusive, authority on the Trusteeship Council or the General Assembly.

207. It has been doubted whether the political organs of the United Nations have the power "to settle legal disputes" as such. (Cf. H. Lauterpacht, *The Development of International Law by the International Court*, London, 1958, 325-9.) Article 96 of the Charter, and Article 36(3) of the Court's Statute, imply that legal disputes are subject to authoritative determination through the judicial process, and especially through this Court, the principal judicial organ of the United Nations. What the political organs of the United Nations can do is to create new legal and factual situations, thereby producing the result that the investigation of the legal *status quo ante* becomes wholly hypothetical, and no longer capable of affecting present legal rights. That is what happened in the *Northern Cameroons Case*: it certainly has not happened in the present case.

208. The Court in the *Namibia Opinion* rejected the argument that the matter of compliance with a mandate agreement was exclusively a matter for the General Assembly. This was despite the apparently restrictive language of the request for the advisory opinion, which referred only to the *consequences* of the

relevant Security Council resolution. See I.C.J. Reports 1971, p.6 at pp.45, 47, 50, 52. On the Court's treatment of this issue see also Judge Petrén, id., at p.129; Judge Onyeama, at pp. 143-5; Judge Dillard, at pp.151-2. That position applies equally to a Trusteeship Agreement.

209. If compliance with a Trusteeship Agreement was exclusively a matter for the political organs of the United Nations, then the legal position of a Trust Territory would be weaker than that of a non-self-governing territory under Chapter XI, which cannot be correct. In fact the Court has frequently dealt with legal issues arising from mandated, trust and non-self-governing territories, even where those issues involved politically charged controversies or difficult questions of appreciation. On the occasions when it has refused to decide such issues (the *Northern Cameroons Case* and the *South West Africa Cases (Second Phase)*), it did so for distinct and limited reasons, reasons which did not imply that the political organs of the United Nations had exclusive competence over legal issues. In fact the implication was precisely the opposite.

210. Australia relies on the absence of a compromissory clause in the Trusteeship Agreement for Nauru to argue that, at least in this case, only the political organs of the United Nations were competent to adjudicate upon or deal with legal issues arising from the Agreement (*Preliminary Objections*, para. 230). In principle the existence of an international legal obligation is independent of the jurisdiction of any international court or tribunal with respect to that obligation. Moreover many of the cases before the Court under Chapters XII and XIII involved territories in respect of which there was no compromissory clause. The Australian argument is another of the many unsuccessful attempts by administering powers to treat territories which had been Class "C" mandates as a form of disguised annexation: see further *Namibia Opinion*, I.C.J. Reports 1971, p.6 at p.32.

211. For these reasons the argument that the Trusteeship Council and the General Assembly had exclusive authority over legal disputes is untenable.

Section 5. Termination of the Trusteeship did not Extinguish the Nauruan Claim either by Operation of Law or Otherwise

212. Australia argues (*Preliminary Objections*, paras. 231-66) that the General Assembly by its resolution settled "all the legal issues" that had arisen or could have arisen with respect to the Trusteeship Agreement and related rules of

international law. For this proposition it relies in particular on the decision of the Court in the *Northern Cameroons Case*, I.C.J. Reports 1963, p.15.

213. But this proposition was not adopted by the Court in the *Northern Cameroons Case*. That case relates only to legal claims necessarily and intrinsically involved in the decision as to the mode of implementation of self-determination, or legal claims expressly presented to the relevant United Nations bodies for decision. Both situations existed in the *Northern Cameroons Case*. Neither exists here.

214. Furthermore the issue presented by the Republic of Cameroon in that case could not be dealt with by the Court, within the limits of its judicial power, because that issue was a completely abstract one, and because, within the United Nations system of self-determination, the Republic of Cameroon could assert no right that was inconsistent with the primary right of the people of the Trust Territory to self-determination. Again, as will be seen, neither situation exists here.

215. For these reasons, which are elaborated more fully below, the Australian argument is without substance.

A. There is no Rule that "All Legal Claims" arising from a Trusteeship Agreement lapse on the Termination of the Agreement

216. It has long been recognized that a Trusteeship Agreement has two aspects, the aspect of a treaty and the aspect of a regime for the administration of territory in the interests of the people of the territory, a regime of Trusteeship.

217. If the relevant category for the purposes of the survival of rights is the category of treaties, then the general principle is that the termination of a treaty does not terminate rights acquired under it: cf. *South West Africa Cases (Preliminary Objections)*, I.C.J. Reports 1962, p.319.

218. If the relevant category for the purposes of the survival of rights is the category of trusteeship regimes, then the general principle is that rights acquired under such a regime survive the dissolution of the treaty which created it, if that is necessary in order to protect the interests of the beneficiary: cf. *International Status of South West Africa*, I.C.J. Reports 1950, p.128.

219. On either basis, then, any right or legitimate claim of the people of Nauru under the Trusteeship must be presumed to have survived the termination of the Trusteeship Agreement. Such a right or claim could have been extinguished only if duly terminated by the competent authority, or if such termination was the necessary consequence of acts lawfully performed by such an authority.

220. The Court in the *Northern Cameroons Case* did not decide that all legal claims arising from a Trusteeship Agreement were terminated, by operation of law, on the termination of the agreement. It was concerned with a specific situation, clearly presented for its decision – viz., the future of the people of the Trust Territory, and in particular the validity of the plebiscites that had been held. As the Court said, "the termination of the Trusteeship Agreement was a legal effect of the conclusions in paragraphs 2 and 3 of resolution 1608(XV)", which paragraphs explicitly addressed those issues (I.C.J. Reports 1963, p.15 at p.32).

221. The Court in its judgment noted that the Republic of Cameroon had raised its plea of nullity of the plebiscites before the General Assembly, and construed paras. 2 and 3 of Resolution 1608(XV) as a specific rejection of this plea. The Court's holding on termination of the Trusteeship is confined to this issue. In the present case, at the suggestion of the Nauruan representative and without any demur from Australia, the competent United Nations organs refrained from dealing with the rehabilitation issue, and treated that issue as distinct from the question of independence and termination of the Trusteeship. Accordingly termination of the Trusteeship can operate as a bar only to reopening the question of political status, and not in relation to other outstanding issues.

222. It is true that the Court did state that rights and privileges granted to other United Nations members or their nationals came to an end (id., at p.34). But that comment related only to the exercise of those rights *subsequent* to the termination of the Trusteeship. This was axiomatic, since clearly those rights were only conferred for the duration of the Trusteeship. The Court did not need to decide whether the right to claim reparation for breaches of those rights and privileges which had already occurred would have survived the termination of the Agreement. Both Judge Wellington Koo and Judge Fitzmaurice thought that had such rights existed under the Trusteeship Agreement, they would have survived: id., at pp.55, 120. The Court itself left the issue open: id., at p.35.

223. Nor was the Court concerned with the question whether a right or claim vested in the people of the Trust Territory would have survived the termination of the Trusteeship Agreement. In the circumstances this was not surprising, since the people concerned were to become part of another State and *ex hypothesi* would lack any separate legal personality as a basis for maintaining such a claim.

224. The Court also expressed the view that "the Republic of Cameroon would not have had a right after 1 June 1961, when the Trusteeship Agreement was terminated and the Trust itself came to an end, to ask the Court to adjudicate upon questions affecting the rights of the inhabitants of the former Trust Territory and the general interest in the successful functioning of the Trusteeship System" (id., at p.36). But again this was not because of any general rule that "all legal issues" arising from the Trust were *ipso jure* terminated, but because any right of the Applicant State to bring proceedings was part of the whole "system of protection" established by the Agreement and by Chapters XII and XIII of the Charter. The Applicant State's right was not personal or individual, but was a right related to the "general interest", as Judge Wellington Koo stressed (id., at pp.46, 55). That right terminated with the termination of the other aspects of the system of supervision.

225. By contrast the rights of the people of the territory concerned were the very object and purpose of the system, and not merely an aspect of its supervision. As the Court held in the *International Status of South West Africa Case*, I.C.J. Reports 1950, p.128, there was no reason why those substantive and personal rights should be regarded as terminated with the termination of the system of supervision. This would only occur if (as was the case in the *Northern Cameroons Case*) the people who were the beneficiaries had themselves elected to abandon any separate status and identity -- in which case the right would terminate because the bearer of the right ceased to exist – or if the right was expressly terminated by a competent authority.

226. To summarize, the effect of the General Assembly Resolution extended only to the legal questions necessarily inherent in the termination of the Trusteeship, or actually raised for decision in that connection. The present legal claim of the Republic of Nauru falls into neither of these categories.

227. If there was an automatic termination of all legal claims by operation of law, the possibility of claims by an independent Namibia arising out of the

former South African administration would be excluded – yet it is widely recognized (including by the General Assembly and the Security Council) that those claims survived and enured to the benefit of the newly independent State of Namibia. On the Walvis Bay dispute, see Security Council Resolution 432 (1978). On the dispute over uranium mining in Namibia see United Nations Council for Namibia, Decree No. 1 for the Protection of the Natural Resources of Namibia, 27 September 1974 (Nauru *Memorial*, vol. 4, Annex 21).

A. THE NAURUAN CLAIM DID NOT HAVE TO BE RESOLVED IN ORDER TO TERMINATE THE TRUSTEESHIP

228. In the *Northern Cameroons* Case, the question before the Court had to be resolved by the General Assembly before the termination of the Agreement, for two reasons. First, the necessary result of the General Assembly's decision was the creation of a territorial right in a third State (Nigeria). The decision was effectively irreversible, and certainly irreversible without Nigeria's participation and consent. Secondly, the decision had the immediate and necessary effect of extinguishing the legal entity, the people of the Trust Territory, in whom the primary Trusteeship right was vested, or to whom the primary obligation was owed. That people having ceased to exist, any rights vested in them also ceased. Neither of these problems existed in the present case.

C. THE NAURUAN CLAIM WAS NOT PRESENTED TO THE UNITED NATIONS FOR DECISION IN THE CONTEXT OF THE TERMINATION OF THE TRUSTEESHIP

229. There is a presumption that the exercise of the powers of the General Assembly under the United Nations Charter does not involve the settlement of legal disputes circumstantially connected with actions taken, unless the action concerned is the precise subject-matter of the legal dispute. Not even courts are recognized as having authority to decide issues which are not presented before them for decision by the parties, and that principle would apply *a fortiori*, in respect of disputes over legal rights, to the General Assembly.

230. In the *Northern Cameroons Case*, the issue of the terms and outcome of the plebiscite held in the Northern Cameroons was squarely before the General Assembly, and was the principal focus of its Resolution 1608(XV). The Republic of Cameroon had expressly raised this issue before the General Assembly, as the Court noted (I.C.J. Reports 1963, p.15 at p.32).

231. By contrast, the Nauruan representative expressly stated before the United Nations in 1967 that the issue of rehabilitation was not a matter "relevant to the termination of the Trusteeship Agreement, nor did the Nauruans wish to make it a matter for United Nations discussion". It was a separate issue to be taken up after independence – as in fact it was. See Nauru *Memorial*, paras. 603-12, esp. para. 609, for the relevant passages from the debates.

D. THE NAURUAN CLAIM IS NOT ABSTRACT OR MERELY HISTORICAL IN CHARACTER

232. The Court in the *Northern Cameroons Case* did not deny that the issue presented before it involved a legal issue: it was simply that, as between the parties to that case, no remedy of any kind – that is to say, no relief which it was in the power of the parties to give or the Court to require – could be awarded. Because the Applicant State did not claim that there was anything the United Kingdom could do to give effect to a judgment of the Court, whether by the payment of reparation or any other act, the issue before the Court was "remote from reality" (I.C.J. Reports 1963, at p.33); the Court could not render "a judgment capable of effective application" (ibid.), one capable of affecting "existing legal rights or obligations" (p.34). See also at pp.37-8.

233. Again, and self-evidently, the position is quite different here. In the present case Nauru does not seek to redefine its political and territorial status. Its claim encompasses breaches of obligations by the Respondent State under the Trusteeship Agreement and under general international law, *inter alia*, with respect to the right of the Nauruan people to permanent sovereignty over their natural wealth and resources, and having as the primary object the rehabilitation of their lands mined before independence. Satisfaction of the Nauruan claim is not a matter "remote from reality". On the contrary the Court is in a position to render a judgment capable of effective application, one capable of affecting existing rights and obligations.

E. THE NAURUAN CLAIM IS FULLY CONSISTENT WITH THE PRIMARY RIGHT OF THE NAURUAN PEOPLE TO SELF-DETERMINATION, THE ISSUE ADDRESSED IN RESOLUTION 2347(XXII)

234. In the *Northern Cameroons Case*, there was a considerable tension between the Applicant State's claim that there had been a breach of the Trusteeship Agreement, and its acceptance of the General Assembly's conclusion that the plebiscite was a valid expression of the people's views. As

the Court pointed out, since it had not been asked "to review that conclusion of the General Assembly, a decision by the Court, for example that the Administering Authority had violated the Trusteeship Agreement, would not establish a causal connection between the violation and the result of the plebiscite": I.C.J. Reports 1963, p.15 at p.33, and see also Judge Fitzmaurice at pp.99-100. By contrast the present claim can be seen as a further consequence of the Nauruan people's right to self-determination, just as its survival after the termination of the Trusteeship was a consequence of the expressed wish of the Nauruan representatives to leave the question to be resolved separately.

Section 6. The General Assembly did not Intend or Purport to Terminate Rights Vested in the Nauruan People

235. The rehabilitation issue in 1967 derived from and was asserted on the basis of the rights of the Nauruan people. The presumption must be that, even if they had authority to do so, the relevant United Nations bodies would not seek to determine a claim which was not logically or necessarily involved in the conferral of Nauruan independence (i.e. a claim which was not in law or in the event a prerequisite to independence) and which could be left to be resolved by the parties by negotiation or other appropriate means in accordance with international law.

236. Resolution 2347(XXII) does not purport to terminate, or adjudicate upon, the Nauruans' claim. This is especially clear in the light of that Resolution's reference to the earlier resolutions on the issue (Resolutions 2111(XX) and 2226(XXI)), resolutions which called for the rehabilitation of the lands.

237. The Nauru *Memorial* (paras. 605-8, 610) sets out examples of the support for the Nauruan position by some United Nations members (e.g. Liberia, the Soviet Union). While these statements were made in the Trusteeship Council, there are also statements of delegations in the debates in the Fourth Committee of the General Assembly, made subsequent to Head Chief Mr Hammer DeRoburt's statement of 6 December 1967, which were supportive of the Nauruan position on rehabilitation: see e.g. the Soviet Union, General Assembly, *Official Records*, Fourth Committee, 1740th Meeting, 6 December 1967, p.401 at p.402, para. 22; India, id., 7 December 1967, p.406, para. 5 (also reproduced in the *Preliminary Objections*, vol. II, Annex 30, pp.254ff, at pp.263, 266). Having regard to these contemporary and firmly held views, it is quite clear that the

relevant resolutions would not have been unanimously passed if they had involved or been thought to involve the termination of the Nauruans' claim with respect to rehabilitation.

Section 7. Even if Express Recognition by the Competent U.N. Organ was Required to Preserve the Right, there was Such Recognition Here

238. There is no authority for a general rule requiring express recognition by the competent organs of the United Nations as a precondition to the continuation of the rights of the people concerned. But even if express recognition by the relevant political organ was required, it is submitted that there was sufficient recognition of that right here, having regard to the proceedings of the Trusteeship Council, the Committee of Twenty-Four, and the General Assembly itself, and to the approach they had taken to the issue in the years leading to independence.

239. In particular there was ample recognition of the Nauruan claim, by reason of:

(a) the terms of General Assembly Resolutions 2111(XX) and 2226(XXI);

(b) the reaffirmation of those resolutions in United Nations General Assembly Resolution 2347(XXII);

(c) the Resolution of the Committee of Twenty-Four of 27 September 1967.

See the Nauru *Memorial*, paras. 586-7, 604-8, 610, 613-4 for details.

240. It should be stressed that the right is not created by the decision of the political organ: it exists by reason of the relevant rules of international law as they apply in the circumstances of the case. Thus the most that could be required in the case of termination would be recognition of the claim in question as a subsisting claim, and there is ample evidence of such recognition here.

241. Moreover, United Nations resolutions are, like treaties, to be interpreted in the context of the relevant principles of general international law. In the present case the relevant principle is the principle of self-determination,

including the rule, stated in paragraph 5 of General Assembly Resolution 1514(XV), that the independence of Trust and Non-Self-Governing Territories is to occur "without any conditions or reservations, in accordance with their freely expressed will and desire... in order to enable them to enjoy complete independence" (see above, para. 199, for the full text of paragraph 5). The role of United Nations organs was to give effect to that principle, and they should be presumed, in the absence of clear evidence to the contrary, to have done so. There is no such evidence here.

242. It should be stressed again that the Nauruan position in respect of this issue was well known to delegations participating in the proceedings of the Trusteeship Council and the General Assembly: see above, para. 237. No delegation (not even the Australian) contradicted the Nauruan representative's reservation with respect to the issue of rehabilitation.

Section 8. Conclusion

243. For these reasons, it is submitted that the Nauruan claim survived the termination of the Trusteeship Agreement and the independence of Nauru.

PART IV

CHAPTER 5

JOINDER OR CONSENT OF THIRD PARTIES

Section 1. Introduction and Summary of Arguments

244. In the *Preliminary Objections*, Australia argues that Nauru's Application is inadmissible because the Court "cannot determine the Nauruan claims against Australia in the absence of the other Governments that formed the Administering Authority for Nauru" (para. 318). The following arguments are used by Australia in support of its submission:

(a) that there was a "joint" responsibility of the three Partner Governments for the administration of Nauru, and that (applying domestic law analogies) the consequence is that no particular State is liable individually for any breach (paras. 342-6); and

(b) that the other two States are "indispensable parties" to the proceedings, within the principle of the *Case concerning Monetary Gold Removed from Rome in 1943*, I.C.J. Reports 1954, p.32 (hereafter referred to as the *Monetary Gold Case*), either because any decision adverse to Australia would imply a right of recourse against those States (*Preliminary Objections*, paras. 347-8), or because any such decision would imply that those States are also legally responsible, and they have not consented to a determination of that issue (id., paras. 349-66).

245. It is submitted that, in the circumstances of the present case, Australia is properly sued alone. The bases for this submission, which is developed in the following Sections, are as follows:

(a) Neither New Zealand nor the United Kingdom are "indispensable parties" within the meaning of the *Monetary Gold* principle, as developed

in the consistent jurisprudence of the Court (see below, Section 3, paras. 249-65);

(b) Municipal law analogies on this issue are of little relevance; but in any event the most appropriate analogies support the Nauruan position (see below, Section 4, paras. 266-82);

(c) There is no requirement, arising from the regime for the administration of Nauru as a Trust Territory and opposable to Nauru, that it bring proceedings against all three States together (see below, Section 5, paras. 283-96);

(d) The Nauruan claim is admissible even if, in consequence, Australia may have a right of recourse against the other two States (see below, Section 6, paras. 297-309);

(e) Alternatively, even if the normal requirement for enforcing a liability of several States acting together is to join all the affected States, in the circumstances of the administration of Nauru, the claim is properly brought against Australia alone (see below, Section 7, paras. 310-316);

(f) The proper administration of international justice dictates that the present proceedings should be declared admissible, with a view to obtaining a decision on the merits of the Nauruan claim (see below, Section 8, paras. 317-21).

Before expanding on these arguments, some comment is necessary on the issues which the Court has to decide at this stage.

Section 2. The Issue before the Court at the Present Stage of the Proceedings

246. It is submitted that the only issue presented for the Court at this stage is whether the case can proceed against Australia alone. The extent of Australia's liability in respect of Nauru's claim is a matter going to the merits of that claim.

247. The jurisdiction of an international court over a claim and the quantum of any liability in respect of the claim are distinct issues, both in logic and in law. This is the case, whatever the substantive test for liability may be in the case of conduct participated in by more than one State. So much is conceded by

Australia in its *Preliminary Objections* (para. 320); see also id., para. 318, where it is stated that "the only appropriate course for the Court is to examine in detail the facts of this particular case", a task obviously better suited to the Merits phase.

248. Since the question of the extent or quantum of liability is a matter of the merits of the claim, only the "indispensable parties" issue properly arises in the present phase of the proceedings.

Section 3. The Scope of the Alleged "Indispensable Parties" Rule in International Law

249. There is no "indispensable parties" rule in international law. If such a rule does exist, it is limited to the situation where the legal rights of another State would form the very subject matter of the decision, as they did in the *Monetary Gold Case*, I.C.J. Reports 1954, p.32. That is not the situation here.

250. The Court unanimously rejected the "indispensable parties" argument in the *Case concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)* I.C.J. Reports 1984, p.392. In that case, the Nicaraguan Application directly implicated third States, in particular Honduras, in the activities it complained of. The United States argued that for the Court to decide on the merits of the Nicaraguan claim against the United States "would necessarily involve the determination of the attendant international responsibility of those third States" (*United States Counter Memorial* (1984) para. 437), and "would necessarily involve the adjudication of the rights of those third States with respect to measures taken to protect themselves against unlawful uses of force" (id., para. 438). It also argued that:

> "The Court cannot adjudicate the unlawfulness of United States assistance to third States in the region without passing judgment as to whether those States are engaged, or are planning to engage, in the lawful exercise of their inherent right of individual and collective self-defence against Nicaragua..."
>
> (id., para. 443.)

251. Without seeking to deny the potential implications of any decision on the merits, the Court unanimously rejected these arguments. It stated:

> "There is no doubt that in appropriate circumstances the Court will decline, as it did in the *Case concerning Monetary Gold Removed from Rome in 1943*, to exercise the jurisdiction conferred upon it where the legal interests of a State not party to the proceedings 'would not only be affected by a decision, but would form the very subject-matter of the decision'. Where however claims of a legal nature are made by an Applicant against a Respondent in proceedings before the Court, and made the subject of submissions, the Court has in principle merely to decide upon those submissions, with binding force for the parties only, and no other State, in accordance with Article 59 of the Statute. As the Court has already indicated, other States which consider that they may be affected are free to institute separate proceedings, or to employ the procedure of intervention. There is no trace, either in the Statute or in the practice of international tribunals, of an 'indispensable parties' rule of the kind argued for by the United States, which would only be conceivable in parallel to a power, which the Court does not possess, to direct that a third State be made a party to proceedings. The circumstances of the *Monetary Gold* case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction; and none of the States referred to can be regarded as in the same position as Albania in that case, so as to be truly indispensable to the pursuance of the proceedings."
>
> (I.C.J. Reports 1984, p.392 at p.431.)

252. On this particular issue the Court was unanimous: see also the brief observations in the separate opinion of Judge Ruda (id., p.457) and in the dissenting opinion of Judge Schwebel (id., p.562). See also the Court's decision on the *Merits*, I.C.J. Reports 1986, p.14 at p.36, where the Court stated that:

> "If the Court found that no armed attack had occurred, then not only would action by the United States in purported exercise of the right of collective self-defence prove to be unjustified, but so also would any action which El Salvador might take or might have taken on the asserted ground of individual self-defence."
>
> (I.C.J. Reports 1986, p.14, at p.36.)

This was a major reason why the Court held that non-parties to the case were "affected by the decision", within the meaning of the United States multilateral treaty reservation. But it went on to exercise jurisdiction over the case relying on other sources of law, despite the relatively direct effect of its decision on third parties.

253. This is consistent with the Court's approach in other cases where third parties were more or less directly involved, as the following analysis demonstrates.

254. In the *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta), Application to Intervene*, I.C.J. Reports 1984, p.3, Italy sought permission to intervene in the proceedings, so as to avoid the Court's delimitation decision trenching on Italian rights and interests in its adjoining continental shelf. In rejecting the Italian application, the Court said...

> "it must be conceded that, if the Court were fully enlightened as to the claims and contentions of Italy, it might be in a better position to give the Parties such indications as would enable them to delimit their areas of continental shelf 'without difficulty', in accordance with Article I of the Special Agreement, even though sufficient information as to Italy's claims for the purpose of safeguarding its rights has been given to the Court during the proceedings on the admissibility of the Italian Application. But the question is not whether the participation of Italy may be useful or even necessary to the Court; it is whether, assuming Italy's non-participation, a legal interest of Italy is *en cause* or is likely to be affected by the decision. In the absence in the Court's procedures of any system of compulsory intervention, whereby a third State could be cited by the Court to come in as party, it must be open to the Court, and indeed its duty, to give the fullest decision it may in the circumstances of each case, unless of course, as in the case of the *Monetary Gold Removed from Rome in 1943*, the legal interests of the third State 'would not only be affected by a decision, but would form the very subject matter of a decision' (I.C.J. Reports 1954, p.32), which is not the case here."
>
> (I.C.J. Reports 1984, p.3 at p.26. Cf. the *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application to Intervene*, I.C.J. Reports 1981, p.3 at p.19.)

255. The strength of this finding was emphasized, for example, by Judge Oda in his dissenting opinion, where he noted that...

> "what is really disputed between Libya and Malta relates to titles to submarine areas. The claims concerned are thus of a territorial nature and as such are made *erga omnes*... [T]he interest which a third State may have in claiming a title to an area cannot escape any effect resulting from what is determined by the Court in so far as that title is attributed to any of the litigant States in the principal case. As already mentioned, Article 59 of the Statute may not be accepted as guaranteeing that a decision of the Court in a case regarding the title *erga omnes* will not affect a claim by a third State to the same title."
>
> (I.C.J. Reports 1984, p.3 at pp.109-10. See also the dissenting opinions of Judges Sette-Camara (at p.87), Ago (at p.128), Schwebel (at pp.134-5), Jennings (at pp.149-50, 157-60). It should be noted that none of these judges decided the case on the basis of the *Monetary Gold* principle. For the Court's eventual treatment of Italy's substantive claims see I.C.J. Reports 1985, p.13 at pp.25-8.)

256. In the *Case concerning the Frontier Dispute (Burkina Faso v. Republic of Mali)* I.C.J. Reports 1986, p.554, one issue was the extent of the Chamber's competence to delimit a boundary which might involve a tripoint between the two parties and a third State, Niger. On this point the Chamber stated that:

> "The Chamber also considers that its jurisdiction is not restricted simply because the end-point of the frontier lies on the frontier of a third State not a party to the proceedings. The rights of the neighbouring State, Niger, are in any event safeguarded by the operation of Article 59 of the Statute of the Court... The Parties could at any time have concluded an agreement for the delimitation of the frontier, according to whatever perception they may have had of it, and an agreement of that kind, although legally binding upon them by virtue of the principle *pacta sunt servanda*, would not be opposable to Niger. A judicial decision... merely substitutes for the solution stemming directly from their shared intention, the solution arrived at by a court under a mandate which they have given it. In both instances, the solution only has legal and binding effect as between the States which have accepted it, either directly or as a consequence of having accepted the court's jurisdiction to decide the case... At most, the Chamber should consider whether, in this case, considerations related to the need to safeguard the interests of the third State concerned require it to refrain from exercising its jurisdiction to determine the whole course of the line..."
>
> (I.C.J. Reports 1986, p.554, at pp.577-8.)

257. In the event, the Chamber concluded that it was...

> "required, not to fix a tripoint, which would necessitate the consent of all the States concerned, but to ascertain, in the light of the evidence which the Parties have made available to it, how far the frontier which they inherited from the colonial power extends. Certainly such a finding implies, as a logical corollary, both that the territory of a third State lies beyond the end-point, and that the parties have exclusive sovereign rights up to that point. However this is no more than a twofold presumption which underlies any boundary situation. this presumption remains in principle irrebuttable in the judicial context of a given case, in the sense that neither of the disputant parties, having contended that it possesses a common frontier with the other as far as a specific point, can change its position to rely on the alleged existence of sovereignty pertaining to a third State; but this presumption does not thereby create a ground of opposability outside that context and against the third State. Indeed, this is the whole point of... Article 59 of the Statute. It is true that in a given case it may be clear from the record that the legal interests of a third State 'would not only be affected by a

> decision, but would form the very subject-matter of the decision' (*Monetary Gold Removed from Rome in 1943*, I.C.J. Reports 1954, p.32) so that the Court has to use its power 'to refuse to exercise its jurisdiction' (I.C.J. Reports 1984, p.431, para. 88). However that is not the case here."
>
> (I.C.J. Reports 1986, p.554 at p.579.)

258. In the *Case concerning Border and Transborder Armed Actions (Nicaragua v. Honduras) Jurisdiction and Admissibility*, I.C.J. Reports 1988, p.69, the Court rejected a Honduran argument that...

> "the 'procedural situation' created by Nicaragua's splitting-up of the overall conflict into separate disputes is contrary to the requirements of good faith and the proper functioning of international justice."
>
> (I.C.J. Reports 1988, p.69 at p.91.)

259. According to the Court, it could not be accepted that...

> "once the Court has given judgment in a case involving certain allegations of fact, and made findings in that respect, no new procedure can be commenced in which those, as well as other, facts might have to be considered. In any event, it is for the Parties to establish the facts in the present case taking account of the usual rules of evidence, without it being possible to rely on considerations of *res judicata* in another case not involving the same parties (see Article 59 of the Statute)... The Court is not unaware of the difficulties that may arise where particular aspects of a complex general situation are brought before the Court for separate decision. Nevertheless, as the Court observed in the case concerning *United States Diplomatic and Consular Staff in Tehran*, 'no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important' (I.C.J. Reports 1980, p.19, para. 36)."
>
> (I.C.J. Reports 1988, p.69 at p.92. See also the Separate Opinion of Judge Schwebel: id., at p.131.)

260. In the *Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras), Application by Nicaragua for Permission to Intervene* (I.C.J. Reports 1990, p.92), Nicaragua sought to intervene in the proceedings. It argued *inter alia* that its legal interest in the subject-matter of the case, so far as it related to the Gulf of Fonseca and adjacent waters, was such that the Court could not, under the *Monetary Gold* principle, proceed to decide the case in Nicaragua's absence (id., at p.114). The Chamber, while allowing Nicaragua to

intervene to a limited extent and in respect of one aspect of the case before it, rejected that particular argument. It said:

> "[W]hile the Chamber is thus satisfied that Nicaragua has a legal interest which may be affected by the decision of the Chamber on the question whether or not the waters of the Gulf of Fonseca are subject to a condominium or a 'community of interests' of the three riparian States, it cannot accept the contention of Nicaragua that the legal interest of Nicaragua 'would form the very subject matter of the decision' in the sense in which that phrase was used in the case concerning *Monetary Gold Removed from Rome in 1943* to describe the interests of Albania... So far as the condominium is concerned, the essential question in issue between the Parties is not the intrinsic validity of the 1917 Judgement of the Central American Court of Justice as between the parties to the proceedings in that Court, but the opposability to Honduras, which was not such a party, either of that Judgement itself or of the régime declared by the Judgement. Honduras, while rejecting the opposability to itself of the 1917 Judgement, does not ask the Chamber to declare it invalid. 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 beyond its agreed delimitation with Honduras, 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. It is true that a decision of the Chamber rejecting El Salvador's contentions, and finding that there is no condominium in the waters of the Gulf which is opposable to Honduras, would be tantamount to a finding that there is no condominium at all. Similarly, a finding that there is no such 'community of interests' as is claimed by Honduras, between El Salvador and Honduras in their capacity as riparian States of the Gulf, would be tantamount to a finding that there is no such 'community of interests' in the Gulf at all. In either event, such a decision would therefore evidently affect an interest of a legal nature of Nicaragua; but even so that interest would not be the 'very subject matter of the decision' in the way that the interests of Albania were in the case concerning *Monetary Gold Removed from Rome in 1943*. As explained above... it follows from this that the question whether the Chamber would have power to take a decision on those questions, without the participation of Nicaragua in the proceedings, does not arise; but that the conditions of an intervention by Nicaragua in this aspect of the case are nevertheless clearly fulfilled."

(I.C.J. Reports 1990, p.92 at p.122. See also id., at pp.130-1.)

261. This can be contrasted with the *Monetary Gold Case*. In that case the right of the Respondent States to transfer to Italy monetary gold admittedly owned by Albania, and due to it under Part III of the Paris Act of 14 January 1946, depended on two matters. The first was the responsibility of Albania to Italy by reason of the Albanian law of 13 January 1945. The second was the right or power of the Respondent Governments to transfer property to which Albania

was entitled to Italy, so as to satisfy the liabilities of Albania to Italy. Both matters required that the legal rights or liabilities of Albania be determined in a form which was binding upon it. Since under the Statute that could only be done in proceedings to which Albania was a party, the Court had no alternative but to decline to exercise its jurisdiction: I.C.J. Reports 1954, p.18 at pp.33-4; cf. id., p.35 (President McNair), p.38 (Judge Read). See the analysis of the case by the Chamber of the Court in the *Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras), Application by Nicaragua for Permission to Intervene* I.C.J. Reports 1990, p.92 at pp.114-16; and see also Rosenne, *The Law and Practice of the International Court*, 2nd rev edn., Dordrecht, 1985, pp.143-8.

262. It is clear that the present case is quite unlike the *Monetary Gold Case*. The legal rights or property of the United Kingdom and New Zealand are not the subject matter of the present claim. No legal right or responsibility of either State would be determined by the Court in this case, both by virtue of Article 59 of the Statute and because the focus of the claim is on the acts and omissions of Australia and of Australian officials responsible for the administration of Nauru. Accordingly the determination of the liability of a third State to one of the parties is not a precondition to the determination of the case, as it was in *Monetary Gold*. If one applies the test of jurisdictional competence applied by the Chamber in the *Case concerning the Frontier Dispute (Burkina Faso v. Republic of Mali)* I.C.J. Reports 1986, p.554 (above, paras. 256-7), in the present case, there is nothing analogous to the determination of a tripoint involving the sovereign rights of a third State or States. There could be no legal objection from any third State to Australia reaching an agreement with Nauru for Australia to assist, financially or materially, in the rehabilitation of the phosphate lands worked out before independence, even though that agreement was based on an admission of responsibility by Australia for a breach of trust in its capacity as one of the partner Governments. It follows that there can be no objection to the Court reaching the same conclusion, as between the parties, in the present proceedings.

263. The *Monetary Gold Case* was a case of conditional liability, in the sense that any right or duty that the three Respondent States may have had to transfer the gold to Italy was contingent or conditional upon a determination of Albania's legal liability to Italy. But not all situations of conditional liability would require joinder of the third party. For example one State might undertake, vis-a-vis another, that it will assume responsibility for a particular liability (such as the

repayment of a loan by a third State) if the liability is not met by a specified date. This would be a treaty of guarantee. It would contradict the purposes of such a treaty if the guarantor could oppose judicial proceedings against it on the basis that an adverse determination would inevitably reflect upon the original creditor State: see Ress, "Guarantee Treaties", in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Amsterdam, 1984, vol. 7, p.117.

264. As a procedural matter the absence of the United Kingdom and New Zealand in no way prevents the Court from effectively hearing and dealing with the present case. There is, for example, no indication that relevant evidence is not available to the Court by reason of the non-participation in the proceedings of any other State.

265. It is submitted, therefore, that the case is properly constituted and may proceed against Australia as the sole Respondent State. The joinder of other States in the proceedings is not required.

Section 4. The Relevance of Municipal Law Analogies to the Question Whether Australia is Properly Sued Alone

266. Australia argues that "[t]he position at international law concerning the absence of any authority which would support the Nauruan contentions on liability is not essentially different from the position in domestic legal systems" (*Preliminary Objections*, para. 309). In particular it argues that "as a general principle of law, the liability of a partner is joint, and not several, with other partners in relation to contracts into which he has entered as agent for the firm" (id., para. 342). The suggestion is that Australia's liability here is similarly "joint", and that on the municipal law analogy this requires the joinder of the other two States.

267. The cases relied on in this context in the *Preliminary Objections* (para. 344) involved private law partnerships suing or being sued in tribunals with jurisdiction over private parties as well as States. Those cases have no application to proceedings before the International Court of Justice. The Court's jurisdiction is exclusive to States, and is dependent upon consent. There is no reason to think that international law follows municipal law in attributing to the joint action of States the consequences that may flow from partnerships between private parties under municipal law, especially since private parties are

amenable to the jurisdiction of municipal courts in whose territory they (or persons acting as their agents) carry on business.

268. As the Court noted in the *Nicaragua Case*, a general power of joinder of parties is the necessary corollary of an "indispensable parties" rule: I.C.J. Reports 1984, p.392 at p.431 (above, para. 251), and the Court has no such power. Cf. also *Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras), Application by Nicaragua for Permission to Intervene* I.C.J. Reports 1990, p.92 at p.135. The essential point is that municipal law analogies are only relevant in international law if the structure of the situation which is the subject of the analogy is the same, or very similar. This may be the case is some areas (e.g. the idea of international trusteeship), but in the area of international adjudicatory jurisdiction the position is different. National court systems have general jurisdiction over the subjects of their law; that is the basis for their power of joinder. The International Court has no general jurisdiction, and no power of joinder of parties. Its jurisdiction is particular, and dependent on consent. This point was made, for example, by Judge Jiménez de Aréchega in the *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta), Application to Intervene*, I.C.J. Reports 1984, p.3, 69. See also L. Damrosch, "Multilateral Disputes" in L. Damrosch (ed.), *The International Court of Justice at a Crossroads*, Dobbs Ferry, N.Y., 1987, p.376 at pp.378-80.

269. For these reasons it is submitted that municipal law analogies, including cases involving private parties in mixed arbitral tribunals, are of limited value in the present context. But in any event, if it is sought to rely on municipal law analogies it is important to use the most appropriate analogies, the ones which most closely correspond to the situation under discussion.

270. At common law, the liability of co-trustees is joint and several, not joint, so that the beneficiary has the right to sue any individual trustee for the whole amount of the damage: Glanville Williams, *Joint Obligations*, London, 1949, p.159 and cases there cited. The reliance in the *Preliminary Objections* on cases which involve partnerships rather than trusts ignores the point that the Nauruan claim is essentially based on an international form of trusteeship.

271. Even the partnership analogy, duly explored, points in the opposite direction to that suggested in the *Preliminary Objections*. In the common law, for example, the liability of partners in relation to torts or civil wrongs, and in relation to breach of trust, is joint and several: 35 *Halsbury's Laws of England*,

4th edn., 1981, paras. 67-8; *Lindley & Banks on Partnership*, 16th edn., London, 1990, pp.324-5; *Blyth v. Fladgate* [1891] 1 Ch. 337, 353; *Liquidators of Imperial Mercantile Credit Association v. Coleman* L.R. 6 H.L. 189 (1873), and authorities there cited. The reliance in the *Preliminary Objections* on cases involving contracts ignores the point that the Nauruan claim is based on civil wrongs done by trustees to the beneficiary of the trust.

272. Another possible analogy relates to partnerships which have been wound up. The liability of partners prior to the dissolution of the partnership continues in relation to acts imputable to the partnership: it does not lapse when the partnership lapses. See e.g. *Lindley & Banks on Partnership*, 16th edn., London, 1990, pp.348, 645; *Daniels Trucking Inc. v. Rogers* 643 P. 2d 1108 (Kan. App. 1982). Thus even after the capacity of trustee ceases the liability remains. There is also some authority for the proposition that the *joint* liability of partners (e.g. in contract) becomes a joint and several liability upon the dissolution of the partnership: see *Simpson & Co. v. Fleck* (1833) 3 Men. 213; *Stoltenhof's Estate v. Howard* (1907) 24 S.C. 693, both South African cases. Cases cited for the contrary proposition (e.g. *Reed v. Ramey* 80 N.E. 2d 250 (Ohio Ct of App, 1947), cited in 68 *Corpus Juris Secundum* s.352; *Ault v. Goodrich* (1828) 4 Russ. 430, cited in 35 *Halsbury's Laws of England* 4th edn., 1981, para. 187) are concerned rather with the continuing liability of partners after dissolution of the partnership than with the issue of joinder, or with whether the liability is also several: cf. *United States v. Ristine* 111 F. Supp. 168 (1952); *Austin P Keller Construction Co v. Drew Agency Inc.* 361 N.W. 2d 79 (Minn. App. 1985).

273. A broader survey of comparative law materials supports the view that, if there is a general principle of law here, it is that liability for wrongful acts committed by more than one defendant is concurrent rather than joint, if by "joint liability" is meant an inseparable liability requiring to be enforced in a single action against all the debtors. Thus Weir, in his review of "Complex Liabilities" for the *International Encyclopedia of Comparative Law*, points out the diversity of municipal law regimes dealing with multiple debtors in contract or tort. He points out, for example, that two distinct forms of "solidarity" have been developed in both France and Switzerland. (See *International Encyclopedia of Comparative Law*, Vol XI, *Torts*, A. Tunc, Chief Editor, Chapter 12, A. Weir, "Complex Liabilities", 1983, p.41.) But he goes on to conclude that:

> "It is the very general rule that if a tortfeasor's behaviour is held to be a cause of the victim's harm, the tortfeasor is liable to pay for all of the harm so caused,

> notwithstanding that there was a concurrent cause of that harm and that another is responsible for that cause... In other words, the liability of a tortfeasor is not affected vis-a-vis the victim by the consideration that another is concurrently liable."
>
> (Id., p.43.)

274. In response to the question whether account is to be taken of debtors not before the court, Weir concludes that:

> "It is extremely inconvenient, and may be unjust, to try to do so. In those jurisdictions where a contribution claim may be raised only in the victim's suit, only those present can be considered, and this is the practice elsewhere also, other wrongdoers remaining liable to claimants who are underpaid and contributors who have overpaid."
>
> (Id, p.72 (references omitted).)

275. In the same volume of the *Encylopedia*, Professor Honoré, writing on "Causation and Remoteness of Damage", concludes that...

> "Most legal systems have special provisions which make those who participate in joint action liable in solidum for the harm done by all, within the limits of the common purpose, whatever the nature and extent of the contributions of the various agents. GERMAN law will serve as an example: by that, if several have by an unlawful act committed jointly (*gemeinschaftlich begangene unerlaubte Handlung*) caused damage, each is liable for the whole damage."
>
> (Id., p.7-123 (references omitted).)

276. Honoré also states, in his treatment of the relevance of third parties, that...

> "Sometimes the contribution of the third person is such that the harm to the injured party is regarded as not being caused by the tortfeasor's conduct or as being for some other reason too remote... More often the contribution of the third person is not such as to exonerate the tortfeasor entirely. The conduct of the tortfeasor and the conduct or state of the third person are each concurrent causes of the harm. In that case it is traditionally held in nearly all systems that, if the harm is indivisible, the tortfeasor is liable *in solidum*. Thus, the FRENCH Court of Cassation holds that a tortfeasor who has caused damage to another by his fault must make good the consequences without being able to rely, as against the injured party, on the coexistent fault of a third person, even as a partial exoneration from his responsibility."

(Honoré, "Conduct and State of Third Persons", id, p.7-189 (references omitted). See also Lawson & Markesinis, *Tortious Liability for Unintentional Harm in the Common Law and the Civil Law*, Cambridge, 1982, pp.128-31; Markesinis, *The German Law of Torts*, Oxford, 1986, pp.523-4.)

277. This position was relied on by the United States in the *Case concerning the Aerial Incident of 27 July 1955 (United States v Bulgaria)*. In its Memorial in that case the United States argued that:

"It is true that the Statutes and Rules of this Court do not, nor, as far as can be seen, does the jurisprudence of this Court, deal specifically with the problems of the apportionment of liability between joint tortfeasors. But the application, if need be, of Article 38, 1(c) and (d) of the Statute, provides adequate authority, for it appears that in all civilized countries the rule is substantially the same. An aggrieved plaintiff may sue any or all joint tortfeasors, jointly or severally, although he may collect from them, or any one or more of them, only the full amount of his damage. The relationship between the joint tortfeasors themselves is a separate problem."

(United States Memorial, *Aerial Incident of 27 July 1955, Pleadings...*, pp.229-30. The United States went on to demonstrate, by a survey of comparative materials similar to that undertaken here, that "[t]he law that liability of joint tortfeasors is both joint and several appears universal": id., p.230, and for the comparative survey see id., pp.230-33. The Court did not need to deal with the issue as the Case was discontinued.)

278. It should be stressed again that the issue at this stage of the proceedings is not the measure of damages, but the question whether the action can proceed at all. As explained in paras. 202-204 above, the issue for the Court at the present phase is whether all States which have engaged in some degree of common conduct need to be joined in an action brought, in circumstances such as the present, against one of those States. But here again the comparative law experience contradicts the position taken in the *Preliminary Objections*.

279. The history of the "indispensable parties" rule in major legal systems demonstrates that it is better treated as a conclusion to an inquiry whether a court can properly exercise judicial power in the circumstances of a case before it rather than as an independent and preliminary rule of procedure. The point was made by the United States Supreme Court in the leading case:

"Whether a person is 'indispensable', that is, whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of particular litigation... Assuming the existence of a person who should be joined if

> feasible, the only further question arises when joinder is not possible and the court must decide whether to dismiss or to proceed without him.... To say that a court 'must' dismiss in the absence of an indispensable party and that it 'cannot proceed' without him puts the matter the wrong way around: a court does not know whether a particular person is 'indispensable' until it has examined the situation to determine whether it can proceed without him."
>
> (*Provident Tradesmen's Bank & Trust Co v. Patterson* 390 U.S. 102 (1968) at pp.118-19 (*per curiam*). On the development of United States doctrine towards this position see also Reed, "Compulsory Joinder of Parties in Civil Actions" (1957) 55 *Michigan LR* 327, 483; G.C. Hazard Jr., "Indispensable Party: The Historical Origin of a Procedural Phantom" (1961) 61 *Columbia LR* 1254.)

Under this approach, a court should seek to do justice between the parties as far as it can.

280. The same conclusion emerges from the extensive comparative study conducted by Dr Cohn for the International Encyclopedia of Comparative Law. He concludes that:

> "The concept of compulsory plurality includes a hard core of cases, which are fairly easily definable and which by their nature would as a rule not be adequately served by the rules on permissive plurality. This category consists of two different groups of cases, i.e., first those in which it is a requirement of substantive law that a right not be exercised otherwise than by or against all concerned, and secondly those in which the binding force of a judgment necessarily affects directly more than one party... Experience in the COMMON LAW countries has furthermore shown that even in the case of the two groups which can be readily enough defined the statutory definitions do not always operate satisfactorily in practice and that even in these cases there is occasionally a clear need to grant exemption from the requirement of joining all those who, according to a strict rule of law, ought to be joined. It may therefore be expected that in this field a growing sphere will have to be left to judicial discretion guided either by pragmatic rules or by more or less flexible precedents."
>
> (International Encyclopedia of Comparative Law, Vol XVI, *Civil Procedure*, M. Cappelletti, Chief Editor, Chapter 5, E.J. Cohn, "Parties", 1976, p.45.)

281. It should be noted that even in legal systems which include an "indispensable parties" rule, that rule frequently has exceptions in cases where the "indispensable party" is not amenable to the jurisdiction of the court, or

where (as under the "complete diversity" rule under the United States Constitution) to join that party would involve the loss of the Court's jurisdiction.[1]

282. The present case involves a claim for breach of trust, or alternatively for a civil wrong, made against the State which was a principal party to the Trusteeship and which was responsible through its own officials and by its own laws for the administration of the Trust Territory. The partnership arrangement between the three States has been dissolved. The proper use of analogies in these circumstances dictates that the case should be permitted to proceed.

Section 5. There Was No Special Legal Regime Requiring the Joinder of the Other Partner Governments

283. The involvement of the United Kingdom and New Zealand in the British Phosphate Commissioners, and in the administration of Nauru, did not create a special legal regime requiring the joinder of all three States in any proceedings arising out of the Trusteeship.

284. The "Administering Authority" was not a separate legal entity, in the way that an international organization is an entity separate from its members. It was simply a legal description for a particular arrangement involving a degree of participation on the part of the other two States, a device for associating the United Kingdom and New Zealand in the administration of Nauru. In fact that association, though initially intended to be substantial, was nominal and consultative only.

285. The *Preliminary Objections* denies that Australia was under any obligation to comply with the Trusteeship Agreement, attributing that obligation to a "Partnership" constituting the Administering Authority (para. 321). But there is no general principle of law that a "partnership" constitutes a separate legal entity, and there is no evidence of any intention on the part of the United Nations to constitute or recognize as a separate legal entity an "Administering Authority" somehow separate and distinct from the States which were involved. The liability of an "Administering Authority" is nothing more than the liability of a State for its acts and omissions in that capacity.

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[1] In England, joinder of a joint contractor is not required if that person is out of the jurisdiction: Glanville Williams, *Joint Obligations*, London, 1949, p.53 and cases there cited. In French law joinder can be ordered notwithstanding problems of venue, but is not available in cases where the court has no jurisdiction over the person to be joined: Cohn, op. cit., p.39.

286. If the "Administering Authority" was a separate legal entity in the case of Nauru, this must have been so with all other Trusteeship Agreements: the term "administering authority" is used in Chapters XII and XIII of the Charter to apply indifferently to a single administering authority and an administering authority consisting of two or more States, or of an international organization. But if that was so then it is difficult to see how there could be any question of the liability of a State after it had ceased to be an administering authority through the termination or expiry of the relevant treaty. It would, for example, be difficult if not impossible to justify the United Nations' position on South Africa's continued liability for certain actions in Namibia prior to its independence: see above, para. 227. These would be claims against a separate "Authority" which had ceased to exist.

287. The Australian reliance on the International Tin Council case in the House of Lords (*Rayner (J.H.) (Mincing Lane) Ltd. v. Department of Trade; Maclaine Watson v. Department of Trade* [1990] A.C. 418) is misplaced (see *Preliminary Objections*, para. 314). That case was concerned with the questions (1) whether certain contractual obligations had been entered into by the International Tin Council as a separate legal entity, and (2) whether any liability the Member States may have owed by reason of the Sixth International Tin Agreement could be enforced by the creditors in the English courts. The House of Lords held that only the Council was a party to the contracts, and that any liabilities Member States might have had were unenforceable in English law because they derived directly from an unimplemented treaty. The House of Lords did not have to decide – and on their view of the effect of the Sixth International Tin Agreement did not have jurisdiction to decide – whether under the Agreement there was a right of recourse as between the Member States. The present case, by contrast, arises at the international, not the municipal level, and concerns the acts and omissions of a State which acted directly through its own officials and organs, rather than indirectly in its capacity as a shareholder or stakeholder in some separate corporate entity.

288. The different roles and responsibilities of the three States in respect of the administration of Nauru are evident from even a cursory reading of the various legal instruments:

289. (a) Under the Nauru Island Agreement of 2 July 1919 between the three States (Nauru *Memorial*, vol. 4, Annex 26), the

administration of the Island was vested in an "Administrator" appointed by the Australian Government for a term of 5 years (Art. 1), and thereafter as agreed between the parties.

290. (b) Under the League of Nations Mandate for Nauru of 17 December 1920 (Nauru *Memorial*, vol. 4, Annex 27), the Mandate was conferred upon "His Britannic Majesty", and the Mandatory was given "full power of administration and legislation over the territory subject to the present Mandate as an integral portion of his territory" (Article 2). At that time, and at all times prior to Nauruan independence, this "full power" was in fact vested in the Commonwealth of Australia under arrangements which could not be changed without Australian consent. Nauru was administered as an integral part of Australian territory, as distinct from the territory of any other State.

291. (c) The primary role of Australia in the administration of Nauru was strengthened by the Supplementary Agreement concerning Nauru of 30 May 1923 (Nauru *Memorial*, vol. 4, Annex 28). Under that Agreement, ordinances made by the Administrator were subject to disallowance by the appointing Government only (Article 1). Copies of ordinances, proclamations and regulations were to be forwarded to the other two parties, but only "for their information" (Article 3). The Administrator was required to conform to the instructions of the appointing Government (Article 2), and not to the instructions of the other two Governments. Australia was the appointing Government throughout the whole period of the administration of Nauru, from 1919 until independence in 1968.

292. (d) That Nauru had been administered by Australia was recognized in the Trusteeship Agreement for the Territory of Nauru of 1 November 1947 (Nauru *Memorial*, vol. 4, Annex 29), which provided that the Government of Australia would continue to exercise "full powers of legislation, administration and jurisdiction in and over the Territory" on behalf of the Administering Authority unless otherwise agreed (Article 4). It was never otherwise agreed.

293. (e) Under the Agreement between the three Partner Governments relating to Nauru of 26 November 1965 (Nauru *Memorial*, vol. 4, Annex 30), a Nauruan Legislative Council was established, but "without affecting the powers of the Commonwealth Parliament to make laws for the Government of the Territory" (Article 1(2.)). The Australian Governor-General had the power to disallow any Ordinance made by the Legislative Council (Article 1(5.)). The administration of the Island was vested in "an Administrator appointed by the Government of the Commonwealth of Australia" (Article 3), thus ending even the theoretical possibility that the parties might have agreed, under the 1923 Supplementary Agreement, on an Administrator appointed by some other Government. Appeals from the Nauruan courts went to the High Court of Australia (Article 5(4.)). Australia reserved the right to make "such other provisions in relation to the government of the Territory *as the Government of Australia deems necessary or convenient*" (Article 6, emphasis added). Article 1 of the 1919 Agreement, and the whole of the 1923 Agreement, were terminated (Article 7), thereby terminating the duty of the Administrator to "supply, through the Contracting Government by which he has been appointed such other information regarding the administration of the Island as either of the other Contracting Governments shall require" (1923 Agreement, Article 3).

294. The reason for associating the United Kingdom and New Zealand in the administration of Nauru was the concern felt at the potential consequences of exclusive Australian control, including, to some degree at least, the adverse consequences for the Nauruans. See Nauru *Memorial*, paras. 80-9, 107-10; Macdonald, *In Pursuit of the Sacred Trust*, pp.4-18. It would be curious if the addition of other States in the administration of the territory made Australia *less* accountable for these adverse consequences.

295. The three States in the 1987 Agreement themselves envisaged separate proceedings being brought against one or other of them, in respect of the actions of the Commissioners or former Commissioners of the British Phosphate Commission as such: Agreement to Terminate the Nauru Island Agreement 1919, 9 February 1987, Article 3; Nauru *Memorial*, vol. 4, Annex 31. This provision does not in terms relate to acts done by the Administrator, or by one of the Governments, in the exercise of governmental authority over Nauru

(whether or not the present claim is properly described as "arising out of the actions of the Commissioners or former Commissioners as such": see below, para. 306). But the Commissioners were much more analogous to a commercial partnership than was the arrangement for the administration of Nauru. If, as envisaged by the 1987 Agreement, a system of joint and several liability applied to the acts of the Commissioners after the dissolution of the partnership, this must be true, *a fortiori*, in the case of a claim against Australia in respect of its administration of Nauru under the Mandate and Trusteeship.

296. For these reasons, it is clear that there was no arrangement opposable to Nauru which required, or which now requires, the joinder of any other State in proceedings against Australia arising out of its administration of Nauru.

Section 6. The Nauruan Application is Admissible even if, in consequence, Australia may have a Right of Recourse against the other Two States

297. Australia argues that the *Monetary Gold* principle applies here because a decision adverse to it would necessarily imply that Australia has a right of recourse against the United Kingdom and New Zealand (*Preliminary Objections*, paras. 352-3). It is submitted, first, that this issue does not arise at the present stage of the proceedings; secondly, that a decision adverse to Australia in the present proceedings would not necessarily entail that it has such a right of recourse; thirdly, even if a decision in the present case did carry that implication or entailment, nonetheless the present proceedings are admissible; and finally that any right of recourse Australia may have against New Zealand or the United Kingdom is governed by arrangements between those States to which Nauru is not a party and which are not opposable to it.

A. The Implications of a Decision adverse to Australia do not Possess, in the Circumstances, an Exclusively Preliminary Character

298. It was submitted above (paras. 246-8) that the extent and basis of Australia's liability in the present case is a matter for determination on the merits. It follows that whether in this respect the non-joinder of the United Kingdom and New Zealand calls for the application of the *Monetary Gold* principle (by reason that the Court's decision necessarily implies that Australia has a right of recourse against those States) is a question which in the circumstances of this case does not possess an exclusively preliminary character. For example, that issue would not arise if the Court held Australia not to be

liable at all, or if it held Australia to be liable on a basis or for a reason which (quite apart from Article 59 of the Statute) did not apply to the other States.

299. This point is made even by critics of the Court's consistent approach to the indispensable parties issue. For example Damrosch concludes that...

> "In exceptional cases it may be appropriate for the Court to decline to rule on certain issues if an absent third state's rights or obligations are inextricably bound up with the claims or defences of the parties. This decision is best made on a case-by-case basis at the merits phase, rather than on the basis of fragmentary information available on preliminary objections."
>
> (Damrosch, "Multilateral Disputes" in *The International Court of Justice at a Crossroads*, Dobbs Ferry, N.Y., 1987, p.376 at p.400.)

B. IN ANY EVENT, A DECISION AGAINST AUSTRALIA WOULD NOT DETERMINE THAT IT HAD A RIGHT OF RECOURSE AGAINST ANOTHER STATE OR STATES

300. In any event, a decision of the Court against Australia would not determine the issue whether Australia had a right of recourse against the United Kingdom and New Zealand (*Preliminary Objections*, paras. 352-3). The existence and extent of a right of recourse between States jointly participating in wrongful activity is a separate issue from the liability of one of those States to a third party injured by the activity. The United Kingdom and New Zealand may well have defences to an Australian claim: the existence and extent of any such defences is a matter to be determined in separate proceedings. As the Chamber pointed out in the *Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras), Application by Nicaragua for Permission to Intervene*, I.C.J. Reports 1990, p.92 at p.134, "[a] case with a new party, and new issues to be decided, would be a new case."

301. Thus the possible liability of the United Kingdom and New Zealand in a "recourse" action by Australia is not a reason for applying the *Monetary Gold* principle in this case.

C. THE PROCEEDINGS ARE ADMISSIBLE EVEN IF AS A RESULT AUSTRALIA HAS A RIGHT OF RECOURSE AGAINST ANOTHER STATE OR STATES

302. Alternatively, even if the Court's decision in this case carried the necessary implication that Australia had a *prima facie* right of recourse against

the United Kingdom and New Zealand, that should not prevent the Court from exercising its jurisdiction in the present proceedings.

303. It has already been seen that the Court has not allowed itself to be deterred from the due administration of international justice by any "logical corollary" of its findings *inter partes*, on the basis that Article 59 of the Statute is sufficient to protect third parties (*Case concerning the Frontier Dispute (Burkina Faso v. Republic of Mali)* I.C.J. Reports 1986, p.554 at p.578; above, para. 257). Similarly, the fact that a finding as between the parties would be "tantamount" to a finding in respect of the legal position of a third party would not have prevented the Court from exercising jurisdiction in the *Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras. Application by Nicaragua for Permission to Intervene)* I.C.J. Reports 1990, p.92 at p.122; above, para. 260).

304. As the survey of comparative law materials in paras. 273-281 above reveals, the generally accepted rules for liability proceed on the basis that a victim should not be denied a remedy against one wrongdoer merely because other wrongdoers who may have been involved are not amenable to justice. Similar considerations apply here. As between Nauru and Australia, the burden of seeking contribution for the wrong done to Nauru should be cast on Australia – which was, and is, in a position to take appropriate action to assert whatever rights it may have.

D. ANY RIGHT OF RECOURSE AUSTRALIA MAY HAVE AGAINST NEW ZEALAND OR THE UNITED KINGDOM IS GOVERNED BY ARRANGEMENTS WHICH ARE NOT OPPOSABLE TO NAURU AND MAY NOT BE RELIED ON IN THE PRESENT PROCEEDINGS

305. Finally, it is submitted that Australia may not rely, in the present proceedings, on any arrangement it may have made, or on any regime of recourse that may exist, as between Australia and third States. Such an arrangement, or such a regime, is *res inter alios acta* so far as Nauru is concerned, and is not opposable to it.

306. The provisions of the 1987 Agreement, which relate to recourse as between the three States in respect of claims arising from the acts of the British Phosphate Commissioners as such, have been referred to in para. 295 above. The Court is of course not called on in the present proceedings to decide whether the Nauruan claim is one "arising out of the actions of the

Commissioners or former Commissioners as such", within the meaning of Article 3 of the 1987 Agreement. The point is, however, that the arrangements for recourse as between the three States are either implicit in the relationship established by treaties such as the 1965 Agreement (above, para. 293) or are expressly set out in the 1987 Agreement. Nauru is not a party to, and is not bound by, these agreements or arrangements.

307. The diplomatic correspondence between Nauru and the parties to the 1987 Agreement relating to the conclusion of that Agreement is set out in the Nauru *Memorial*, vol. 4, Annex 80, Nos. 7-18. It amounted to a clear, if tacit, refusal on the part of Australia to consult Nauru about the winding up of the British Phosphate Commissioners, or the disposal of the assets. That was treated by all the parties to the 1987 Agreement as a matter which did not concern Nauru and as to which it had no legitimate right or interest. (It may be noted, however, that the New Zealand telex of 23 January 1987 did state that New Zealand would "take the interests of the Pacific region into account in its utilisation of the residual assets of the BPC": id., Annex 80, Nos. 9, 17.)

308. Australia cannot have it both ways. It cannot on the one hand deny that Nauru has any legitimate interest in the dissolution of the British Phosphate Commissioners and the disposition of their assets, while on the other hand arguing that Nauru's claim is inadmissible because it impacts on arrangements for recourse as between the three States, such as the arrangements made in the 1987 Agreement.

309. The fact that the Court does not have jurisdiction in the present proceedings to interpret the 1987 Agreement *inter partes* does not, of course, mean that the Agreement is irrelevant. It is on its face inconsistent with the Australian thesis of inseverable liability. Concluded comparatively recently, it reveals both the link between the 1919 Agreement and the assets of the British Phosphate Commissioners and the currency of issues relating to the pre-independence administration of Nauru. See further below paras. 335, 371.

Section 7. In the Circumstances, the Proceedings are Properly Brought Against Australia Alone

310. Alternatively, and even if under other circumstances of joint action by a group of States it was held to be necessary, in order to proceed against any one of them, to join all the others in the litigation, it is submitted that in the

circumstances of the administration of Nauru, the claim is properly brought against Australia alone. Whatever the case may be with a group of States each contributing a part only to an overall loss or injury, a State whose acts are the sole or principal cause of the injury, or which is the principal wrongdoer, can be sued alone.

311. Australia was the effective governing authority, and was recognized as such by all concerned, including the United Nations. The acts, decisions and negotiations which form the basis of Nauru's claim were all made or carried out by Australia and by Australian officials: see above, para. 288 for an analysis of the treaty provisions.

312. Constitutionally, Nauru was at all times an Australian external territory, governed by Australian officials under executive powers applicable to a Crown colony, and (after 1965) under Australian legislation (the Nauru Act 1965 (Cth); Nauru *Memorial*, vol. 4, Annex 39). No legislation was passed for or governing authority exercised over the Trust Territory of Nauru by the United Kingdom or New Zealand. See Nauru *Memorial*, vol. 1, Part IV, Chapter 3, and paras. 641-3.

313. All the relevant negotiations with respect to Nauru in the period 1964-1967, and all the legal acts required to bring Nauru to independence, were carried out by Australian officials under Australian governmental authority, and by Australian legislation. The role of the United Kingdom and New Zealand was consultative only. It is a fiction to say that "the Administrator was responsible to all three Governments" (*Preliminary Objections*, para. 341). In fact only the Australian Government gave instructions to the Administrator, and legally (as a matter of the administrative or public law of the territory) only the Australian Government was competent to give the Administrator instructions. Complaints which the United Kingdom or New Zealand may have had about the Administrator would have had to be made through the diplomatic channel to the Australian Government, which possessed the sole effective decisional power, as the 1919 Agreement and subsequent changes to it reflect.

314. Even the earlier limited rights of the United Kingdom and New Zealand with respect to the administration of Nauru were substantially eliminated by the 1965 Agreement, which was as between the three Partner Governments the governing instrument in the crucial pre-independence period: see above, para. 288.

315. It is thus not true to say that New Zealand and the United Kingdom "in no relevant sense acted differently from Australia" (*Preliminary Objections*, para. 359). No United Kingdom or New Zealand official exercised governing authority over Nauru as Administrator or otherwise. No United Kingdom or New Zealand legislation formed part of the law of Nauru. Both the terms on which and the modalities by which Nauru achieved independence were the result of Australia's acts – a conclusion which is not affected by the fact that there was consultation with the other two Governments from time to time about those issues. See further above paras. 6-8.

316. It is true that, on principles of agency recognized in the Trusteeship Agreement, there is a real possibility that the United Kingdom and New Zealand might also be legally liable to Nauru in respect of the acts of Australia complained of. Whether that liability exists, how far it extends, and whether there are any separate defences to any claim that might be brought by Nauru, are matters for determination in any subsequent proceedings that may be brought. They do not affect the issue of Australian liability.

Section 8. The Proper Administration of International Justice Requires Rejection of the Australian Argument

317. The Court could not play its proper role in the administration of international justice if a State could immunize itself from jurisdiction by associating itself with others in the commission of some wrong. Thus the principle of discrete or concurrent liability corresponds with the normal or common-sense approach to issues of international responsibility.

318. The Australian theory of liability would make States effectively immune from international proceedings against them in respect of their own acts, provided those acts were performed jointly with or on behalf of another State or States. In fact the Court, confronted with such cases, has always dealt with the issue before it on its merits, except where the rights of another State were (as in the *Monetary Gold Case*) the very subject matter of the dispute. See above, paras. 206-216. In any situation short of *Monetary Gold*, "the appropriate remedy to protect the interests of third parties in pending contentious proceedings" who do not wish to rely solely on Article 59 is for them to intervene: cf. Judge Sette-Camara, *Continental Shelf (Libyan Arab Jamahiriya v. Malta), Application to Intervene*, I.C.J. Reports 1984, p.3, at p.89.

319. This is borne out, for example, by the *Corfu Channel Case*, I.C.J. Reports 1949, p.1. There the Court held that Albania was liable for the damage done to United Kingdom ships by mines laid in Albanian territory, although the mines were not laid by Albania itself. There was evidence in that case that the mines were laid by two Yugoslav mine-sweepers (cf. id., pp.16-17). After noting that Yugoslavia was not a party to the case, the Court commented that the only question it had to decide was whether Albania was liable under international law for the damage (id., p.17). It held that Albania was so liable, on the basis that it had means of knowing about the presence of the mines, and went on to assess the full amount of the British loss (id., p.23; and see *Corfu Channel Case (Assessment of Compensation)*, I.C.J. Reports 1949, p.244). Thus the Court held Albania fully liable for the loss. This point was stressed in the dissent of Judge Azevedo, who stated that:

> "The victim retains the right to submit a claim against one only of the responsible parties, *in solidum*, in accordance with the choice which is always left to the discretion of the victim, in the purely economic field; whereas a criminal judge cannot, in principle, pronounce an accomplice or a principal guilty without at the same time establishing the guilt of the main author or actual perpetrator of the offence."
>
> (I.C.J. Reports 1949, p.1 at p.92.)

320. In its *Preliminary Objections* (para. 345) Australia refers to the "hypothetical situation" of a compromissory clause in the Trusteeship Agreement. But such a compromissory clause could never have been availed on by Nauru, since by definition it would have been terminated prior to (or at the point of) Nauru's becoming independent. In any event the "hypothetical situation" probably could not have arisen, since the Court held in 1966 that no proceedings could be brought by third States alleging non-compliance with the basic obligation contained in a Mandate: *South West Africa Cases (Second Phase)*, I.C.J. Reports 1966, p.6. Such third States, it held, lacked any interest "specifically juridical in character": id., at p.34. There is no reason to think that the Court in that case would have treated any differently obligations arising under a Trusteeship Agreement. But plainly it cannot be said that Nauru had no interest "specifically juridical in character": the people of Nauru were the beneficiary of the Trusteeship, and not mere bystanders. After independence, Nauru, representing its people, must be able to seek redress against any State it can show to have been in breach of its obligations – obligations owed to the Nauruan people, and not, or not only, to other States.

321. A more relevant "hypothetical situation" would be to assume that Nauru had succeeded in negotiating some redress from the United Kingdom and New Zealand, on a "without prejudice" basis. Despite this it must follow from the Australian argument that the Court would have no jurisdiction to determine the extent of Australian liability. In fact the position of those non-parties is fully protected by the Statute and the Rules of Court.

Section 9. Incompetence of the Court to Determine Jurisdictional Issues affecting the United Kingdom or New Zealand in these Proceedings

322. Finally, it is necessary to enter a reservation on one point. The Australian argument consistently assumes (1) that the consent of the United Kingdom and New Zealand is essential to the present proceedings, and (2) that they have not consented: see *Preliminary Objections*, paras. 349, 355. For the reasons given already, the first of these assumptions is unfounded. So far as the second assumption is concerned, both States are parties to the Statute and have declarations in force under the Optional Clause, and it is not conceded that they have not consented. The central point is that the Court is not competent in the present proceedings to interpret any provisions in the Optional Clause Declarations of the United Kingdom and New Zealand that they might have sought to rely on, if they were parties to proceedings commenced by Nauru – or, for that matter, if they were parties to proceedings commenced by Australia.

Section 10. Conclusion

323. For these reasons, it is submitted that the present case is properly constituted as to parties, and may properly proceed against the Respondent State alone, leaving it up to that State to take such action as may be available to it to seek from the other two States any redress to which it may be entitled.

PART V

THE OVERSEAS ASSETS OF THE BRITISH PHOSPHATE COMMISSIONERS

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THE OVERSEAS ASSETS OF THE BRITISH PHOSPHATE COMMISSIONERS

CHAPTER 1

The Difference Concerning Unlawful Disposal of the Overseas Assets Constitutes a Legal Dispute

324. Australia first of all takes the point that "there has been no formal claim by Nauru to these assets nor any discussions or negotiations in relation to the claim to these assets" (*Preliminary Objections*, para. 369).

325. There is no requirement either in general international law or in the Statute of the Court that a claim should be a "formal claim", and the Australian Government cites no authorities to support its view. In its practice the Court has not shown any fondness for formalism and this precisely in the context of jurisdictional questions: see the *Corfu Channel Case (Competence)*, I.C.J. Reports 1948, pp.27-8; *Northern Cameroons Case*, I.C.J. Reports 1963, pp.27-8; Hersch Lauterpacht, *The Development of International Law by the International Court of Justice*, London, 1958, pp.200-8.

326. The Australian Government also contends that there is no "legal dispute" between Australia and Nauru "in relation to the claim by Nauru for certain of the overseas assets of the British Phosphate Commissioners" (*Preliminary Objections*, para. 368, and see also para. 372).

327. The diplomatic correspondence presented in the *Memorial* (paras. 471-7) clearly reveals the existence of "a disagreement on a point of law or fact" between Nauru and Australia in accordance with the succinct definition of the Permanent Court in the *Mavrommatis Palestine Concessions Case*, P.C.I.J., Series A, No. 2, p.11.

328. The practice of the Court is based upon determining the substance of things and not their superficial appearance or form. Thus in the *Northern Cameroons Case* the Court referred to "the opposing views of the Parties" as revealing "the existence of a dispute in the sense recognised by the jurisprudence of the Court and its predecessor..." (I.C.J. Reports 1963, p.27). Similarly, in its Advisory Opinion in the *Headquarters Agreement* case (I.C.J. Reports 1988, p.27) the Court referred to the *South West Africa* cases (I.C.J. Reports 1962, p.328) and observed that: "The Court found that the opposing attitudes of the parties clearly established the existence of a dispute". In the present case the exchange of letters of 1987 (see below, 335-41) establishes "the opposing attitudes of the parties" in the most straightforward way.

329. The existence of a dispute is not conditioned by the fact that the Nauruan letters did not set forth "any legal basis for the claim" (*Preliminary Objections*, para. 370). The expression of view by Nauru is unequivocal, and both sides were aware of the background and the precise history of the issues relating to the phosphate industry.

330. Nor can the issue be affected by the fact that the claim relating to the overseas assets was raised "in 1987 at the earliest" (*Preliminary Objections*, para. 371). In the opinion of the Nauru Government at the material time the whole family of issues concerning the phosphate industry remained unsettled. It is thus astonishing to find that the Australian Government claims to be surprised that Nauru reacted to the disposal of the assets in 1987. It was natural that Nauru would react when it discovered the intentions of the former "Partner Governments" in respect of assets in which Nauru had an evident interest. The reaction was entirely congruent with the general attitude of Nauru in face of Australian reluctance to take Nauruan claim seriously.

331. In relation to the diplomatic correspondence of 1987 the Australian Government asserts that:

> "The reference to leaving the matter to be pursued at another time or place (letter of 23 July; Nauru *Memorial*, para. 476) does not indicate that any 'positive opposition' to the claim had yet emerged between Nauru and Australia so as to constitute a dispute ..."
>
> (*Preliminary Objections*, para. 372.)

332. The passage concerned, allowing for the normal level of courtesy maintained between the two parties, indicates unequivocally the non-acceptance by Nauru of the key proposition in Mr Hayden's letter of 15 June 1987. The President of Nauru makes clear that he does not accept "your statement that the residual assets of the British Phosphate Commissioners were not derived in part from its Nauru operations" (letter dated 23 July 1987). The President's further statement that the matter would not be pursued "here" but at another place and time cannot, in ordinary usage, be taken as a qualification of his rejection of Mr Hayden's statement.

333. This correspondence was precipitated by the news that the Partner Governments were planning the disposal of the assets. In the view of Nauru the existence of a Nauruan interest in the assets was a matter of common knowledge among officials. The disposal of the assets constituted a further development of the existing dispute concerning Australian responsibility for breaches of legal duty in the period of Trusteeship.

334. The origin of the British Phosphate Commissioners assets is recognised in the leading history of the phosphate industry, which contains the following passage:

> "Except for the original purchase price and the accumulated surplus re-invested with the Commissioners in 1950, the Commissioners had been able to finance all developments from within the industry."
>
> (Williams & Macdonald, *The Phosphateers*, Melbourne, 1985, p.504.)

335. The Government of Nauru was alerted to the proposed winding up of the British Phosphate Commissioners by press reports and a note was sent to the Australian Government requesting information and requesting consultation "in matters relating to the disbursement of the assets of the B.P.C." (*Memorial*, Annex 80, No.4; Note dated 5 January 1987). In reply the Australian Government confirmed "that arrangements for the winding up are in hand and that it is proposed that the partner governments, including the Australian Government, sign an agreement shortly to bring this about" (Note dated 20 January 1987; *Memorial*, Annex 80, No.7).

336. In response the Nauru Government dispatched a note of which the significant passages are as follows:

"The Department of External Affairs of the Republic of Nauru presents its compliments to the Australian High Commission and has the honour to acknowledge with thanks the High Commission's Note No.3/87 dated 20 January 1987 in respect of the Department's query concerning the earlier press reports on the winding up of the British Phosphate Commissioners.

The Department of External Affairs has the further honour to note that an agreement will be signed shortly among the three partner governments to facilitate winding-up of the affairs of the British Phosphate Commissioners. The Department expresses regret that the three partner governments are contemplating the winding-up of the British Phosphate Commissioners and distribution of their funds at the present juncture, when Nauru has set in motion an independent and impartial Commission of Inquiry into the question of rehabilitation and restoration of the phosphate lands worked-out by British Phosphate Commissioners and others during the periods before the independence of Nauru.

In view of the above, the Department of External Affairs requests the three partner governments of Australia, New Zealand and the United Kingdom to be good enough at least to keep the funds of the British Phosphate Commissioners intact without disbursement, until the conclusion of the task of the said Commission of Inquiry.

The Department further requests the three partner governments that the office records and other documents of the British Phosphate Commissioners may kindly be kept preserved and that the said Commission of Inquiry be permitted to have access to and use of these records and documents, in so far as they may be relevant and useful for the fulfilment of the mandate of the said Commission."

(Note dated 30 January 1987; *Memorial*, Annex 80, No.11.)

337. This note of 30 January 1987 did not receive a response and in due course the President of Nauru, Mr Hammer DeRoburt, wrote to the Australian Minister of Foreign Affairs, the Honourable W.G. Hayden, in the following terms:

"I have read with some interest of the recent visit to Australia of Sir Geoffrey Howe, the British Foreign Secretary. From news reports it appears that he and you have discussed amongst other things matters of regional Pacific interest.

It occurred to me, therefore, a most opportune moment to raise with you a matter of great concern to my government. We were concerned to learn by your Diplomatic Note in January, along with Notes from the United Kingdom and New Zealand, that the assets of the British Phosphate Commissioners were about to be wound up by an agreement then shortly to be signed. As you are, no doubt, aware my government voiced that concern by a further Diplomatic Note to you dated 30 January 1987. This was sent in similar terms to both the other partner governments in the former Trust. So far there has been no reply to this Note.

> My government takes the strong view that such assets, whose ultimate derivation largely arises from the very soil of Nauru Island, should be directed towards assistance in its rehabilitation, particularly to that one-third which was mined prior to Independence.
>
> The Note to you and other governments, however, was by way of an interim measure merely moving you to withhold distribution of assets until the report of the present independent Commission of Inquiry in the Rehabilitation of the Worked-Out Phosphate Lands of Nauru has been completed and published. My government is, of course, optimistic that your Australian government will participate in such inquiry and make such submissions to it as it deems fit.
>
> The whole rehabilitation question is a most vexing problem. On this question, there appears to be a number of intangibles, and it is the belief of my government that irrevocable stances should not be assumed by the various governments at the outset. For that reason, we look forward to a report from the Commission which we hope will be both constructive and illuminating. To achieve that desirable end, my government would seek from the Australian government whatever assistance it can render this valuable inquiry. I naturally look forward to your favourable reply."
>
> (*Preliminary Objections*, vol. II, Annex 13.)

338. This letter from the President involves a clear affirmation of an interest in the British Phosphate Commissioners' assets and a linking of the question of the disbursement of the assets with the issue of rehabilitation.

339. The nature of the dispute was given further confirmation as a result of the exchange of letters with which the sequence of correspondence ended. The President's letter of 4 May 1987 drew the following response from the Australian Minister of Foreign Affairs:

> "I refer to your letter dated 4 May regarding the disposal of the assets of the British Phosphate Commissioners.
>
> The agreement signed on 9 February 1987 which completed the wind up process followed termination of the British Phosphate Commissioners's functions in 1981. The British Phosphate Commissioners and the partner governments have discharged fairly all outstanding obligations. The residual assets of the British Phosphate Commissioners were not derived from its Nauru operations.
>
> Australian parliamentary practice requires that monies accruing to the Government are credited to consolidated revenue for allocation in accordance

with normal budgetary procedures. That course was followed in the case of the British Phosphate Commissioners residual assets.

The Australian Government is carefully examining Nauru's request for Australia to assist in the Commission of Inquiry. We expect shortly to be in a position to advise the extent to which Australia will be able to meet that request."

(Letter dated 15 June 1987; *Memorial*, Annex 80, No.13.)

340. To this the President of Nauru replied on 23 July 1987 as follows:

"I refer to your letter dated 15th June 1987 relating to the matter of the disposal of assets of the British Phosphate Commissioners.

I am sure, taking into account my Government's knowledge of the manner of accumulation of surplus funds by the British Phosphate Commissioners, that you would not be surprised if I were to say that I find it difficult to accept your statement that the residual assets of the British Phosphate Commissioners were not derived in part from its Nauru operations. I shall not, however, pursue that here but leave it perhaps for another place and another time.

On the question of your Government's assistance to the Inquiry, I look forward to a reply shortly. Permit me to comment, however, that in reply to the Chairman of the Inquiry, the partner governments' British Phosphate Commissioners have refused access to its records. In the interests of truth and a free inquiry, it seems to me that access to such information is vital. I am sure that your Government and those of the other partners would appreciate that. I would be grateful if the matter could be addressed. It was, as you would be aware, a matter raised by Diplomatic Note 30 of January 1987 by my Department of External Affairs and addressed to your High Commission in Nauru."

(*Memorial*, Annex 80/No.14.)

341. In the submission of the Government of Nauru this correspondence clearly confirms the existence of a dispute concerning the legal interest of Nauru in the British Phosphate Commissioners assets. The nature of the issue as one of legal entitlement emerges with sufficient clarity.

342. There is one final point. The Australian Government is concerned to demonstrate the lack of a "legal basis" for the claim relating to the overseas assets of the British Phosphate Commissioners (*Preliminary Objections*, para. 367). Moreover, Australia contends that this claim is divorced from the claim relating to rehabilitation and is a "new claim" (id., para. 374).

343. The reality is otherwise. The Nauruan leadership was always aware of the problem of rehabilitation. As soon as Nauruans were allowed access to independent professional expertise (in 1964), their entitlements could be expressed in a wider framework. In any event, the apparatus of Visiting Missions had made the Trusteeship system very much a part of Nauruan thinking.

344. The documentary record shows that the Nauruan leadership was well aware of the legal framework within which Australian responsibility arose. Thus, in the course of the 1966 talks, the Nauruan delegation made the following formal statement:

> "The Nauruan people have consistently claimed that it is the fundamental responsibility of the Administering Authority to restore the mined phosphate lands to their original condition. *This responsibility stems in part from the obligation that the Administering Authority has under the U.N. Trusteeship system to safeguard the future of the Nauruan People.* It also stems from the very large profits from past mining activity that the Administering Authority has chosen to distribute to phosphate consumers in Australia, New Zealand and the United Kingdom (by not charging world prices) instead of returning them to the Nauruan people as their due entitlement."
>
> (*Memorial*, vol. 3, Annex 4, p.52; Session of 20 June 1966, section B, para. 1. (emphasis added).)

345. This section of the statement has the heading "The Responsibility for Rehabilitating Nauru". The Nauruan Delegation was led by the Head Chief, Mr Hammer DeRoburt, and included two other members of the Nauru Local Government Council. Given the strong elements of continuity in the political life of Nauru, there can be no doubt that the leaders, both before and after independence, were well aware of the legal basis of their claim. In this context the claim to the overseas assets was part of a consistent and long established pattern.

PART V

CHAPTER 2

The Claim concerning the Overseas Assets does not Constitute a New Basis of Claim

346. The Australian Government's fondness for arguments depending upon formalism is illustrated in the following passage of the *Preliminary Objections* (para. 373):

> "This claim is further precluded from determination, even if a dispute were held to exist, for the following reasons. An Application is required by Article 38 of the Rules of the Court to "specify the precise nature of the claim". The Nauruan Application contained no reference to the claim to the assets of the British Phosphate Commissioners. It is not permissible for Nauru, when lodging its Memorial, to add a completely new basis of claim that is unrelated to the original claim of failure to rehabilitate ..."

347. This complaint lacks substance. The Government of Nauru expressly reserved "the right to supplement or to amend" its Application (see paragraph 51 thereof). Whilst there are no doubt certain constraints upon the process of amendment of the claim specified in an Application, the Australian Government has failed to refer to any principle which would preclude the Court from exercising its competence in respect of the unlawful disposal of the overseas assets of British Phosphate Commissioners

348. The passage from the *Preliminary Objections* quoted in para. 346 above misdescribes the Nauruan claim and thus refers to "the original failure to rehabilitate". In reality the Nauruan claim, as presented both in the Application and in the *Memorial*, are based upon a set of inter-connected breaches of legal obligations arising in connection with the Trusteeship Agreement. The "failure to rehabilitate" is only one, albeit a major, consequence of the inter-connected matrix of breaches of legal obligations. The claim of Nauru reflect the

substantial failures of the Administering Authority in respect of the duties of Trusteeship.

349. The claim relating to unlawful disposal of the overseas assets of the British Phosphate Commissioners is closely related to, and forms a ramification of, the matrix of facts and law concerning the management of the phosphate industry in the period from 1919 until independence.

350. The practice of the Court has established that a sufficiently close relationship between an Application and a subsequent submission justifies the exercise of jurisdiction. In the *Temple Case (Merits)* Cambodia in its final submissions had asked the Court to order restitution of sculptures and other objects removed from the Temple by the Thai authorities in 1954. The Court found no difficulty in making a determination of this request in spite of the fact that this claim had not appeared in the Application. In this respect the Court observed:

> "As regards the fifth Submission of Cambodia concerning restitution, the Court considers that the request made in it does not represent any extension of Cambodia's original claim (in which case it would have been irreceivable at the stage at which it was first advanced). Rather is it, like the fourth Submission, implicit in, and consequential on the claim of sovereignty itself ..."
>
> (I.C.J. Reports 1962, p.36.)

351. In the *Fisheries Jurisdiction Case (Merits) (Federal Republic of Germany v Iceland)* the Court had to deal with the same type of question. The relevant passages in the Judgment are as follows:

> "71. By the fourth submission in its Memorial, maintained in the oral proceedings, the Federal Republic of Germany raised the question of compensation for alleged acts of harassment of its fishing vessels by Icelandic coastal patrol boats; the submission reads as follows:
>
> 'That the acts of interference by Icelandic coastal patrol boats with fishing vessels registered in the Federal Republic of Germany or with their fishing operations by the threat or use of force are unlawful under international law, and that Iceland is under an obligation to make compensation therefor to the Federal Republic of Germany.'
>
> 72. The Court cannot accept the view that it would lack jurisdiction to deal with this submission. The matter raised therein is part of the controversy between the Parties, and constitutes a dispute relating to Iceland's extension of its fisheries jurisdiction. The submission is one based on facts subsequent to the filing of the Application, but arising directly out of the question which is the subject-matter of

> that Application. As such it falls within the scope of the Court's jurisdiction defined in the compromissory clause of the Exchange of Notes of 19 July 1961."
>
> (I.C.J. Reports 1974, p.203.)

352. Whilst the Court refers to the circumstance that the submission was based on facts subsequent to the filing of the Application, there is no reason to assume that this was a necessary, as opposed to a sufficient, condition for the existence of jurisdiction. The important, and necessary, condition appears to have been the existence of a relationship with the subject-matter of the Application.

353. In the *Fisheries Jurisdiction* case in a Separate Opinion Judge Waldock expressed support for the approach of the majority of the Court to the claim concerning acts of harassment (I.C.J. Reports 1974, pp.231-2).

354. The Australian Government invokes the decision in the case of *Military and Paramilitary Activities in Nicaragua (Jurisdiction)*, I.C.J. Reports 1984, p.392 at p.427 (*Preliminary Objections*, para. 374). This decision, it is contended by Australia, establishes that it is permissible to add to a ground of jurisdiction but not "to add to the substantive claims made".

355. A careful perusal of the relevant passages in the Judgment of the Court in the *Military and Paramilitary Activities* case (I.C.J. Reports 1984, paras. 77-83) reveals that the views expressed by the Court do not assist the Australian argument.

356. There are two key passages in the Judgment. The first deals with the point concerning "an additional ground of jurisdiction" and is as follows:

> "The Court considers that the fact that the 1956 Treaty was not invoked in the Application as a title of jurisdiction does not in itself constitute a bar to reliance being placed upon it in the Memorial. Since the Court must always be satisfied that it has jurisdiction before proceeding to examine the merits of a case, it is certainly desirable that 'the legal grounds upon which the jurisdiction of the Court is said to be based' should be indicated at an early stage in the proceedings, and Article 38 of the Rules of Court therefore provides for these to be specified 'as far as possible' in the application. An additional ground of jurisdiction may however be brought to the Court's attention later, and the Court may take it into account provided the Applicant makes it clear that it intends to proceed upon that basis (*Certain Norwegian Loans*, I.C.J. Reports 1957, p.25), and provided also that the result is not to transform the dispute brought before the Court by the application into another dispute which is different in character (*Société Commerciale de*

Belgique, PCIJ, Series A/B, No. 78, p.173). Both these conditions are satisfied in the present case."

(I.C.J. Reports 1984, pp.426-7, para. 80.)

357. The second passage from the Judgment is of particular relevance for present purposes, and in it the Court is clearly referring not only to the issue of jurisdiction but also to matters of substance:

"Taking into account these Articles of the Treaty of 1956, particularly the provision in, inter alia, Article XIX, for the freedom of commerce and navigation, and the references in the Preamble to peace and friendship, there can be no doubt that, in the circumstances in which Nicaragua brought its Application to the Court, and on the basis of the facts there asserted, there is a dispute between the Parties, inter alia, as to the 'interpretation or application' of the Treaty. That dispute is also clearly one which is not 'satisfactorily adjusted by diplomacy' within the meaning of Article XXIV of the 1956 Treaty (cf *United States Diplomatic and Consular Staff in Tehran*, I.C.J. Reports 1980, pp.26-28, paras. 50 to 54). In view of the Court, it does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty. The United States was well aware that Nicaragua alleged that its conduct was a breach of international obligations before the present case was instituted: and it is now aware that specific articles of the 1956 Treaty are alleged to have been violated. It would make no sense to require Nicaragua now to institute fresh proceedings based on the Treaty, which it would be fully entitled to do. As the Permanent Court observed, 'the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the party concerned' (Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, PCIJ Series A, No. 6, p.14). Accordingly, the Court finds that, to the extent that the claims in Nicaragua's Application constitute a dispute as to the interpretation or the application of the Articles of the Treaty of 1956 described in paragraph 82 above, the Court has jurisdiction under that Treaty to entertain such claims."

(I.C.J. Reports 1984, pp.428-9, para. 83.)

358. This passage contains three propositions each of which militates against the Australian contention that no jurisdiction exists in relation to the claim concerning the overseas assets:

First: there must be evidence of a dispute in relation to the subject matter involved.
Secondly: the issue must have been ventilated before the proceedings were begun.

Thirdly: defects of form cannot be allowed to defeat considerations of practical convenience.

359. In the present case, it is submitted that "it would make no sense to require" Nauru "now to institute fresh proceedings" based upon Article 38(2) of the Statute. The decision of the Court in the Jurisdiction Phase of the *Military and Paramilitary Activities Case* had significant consequences for the Merits Phase, as the Judgment on the Merits demonstrates (I.C.J. Reports 1986, pp.135-42, paras. 270-82). The *Dispositif* contains four findings based upon the Treaty of 1956 (ibid., pp.146-50, para. 292), and it is mistaken to explain the two decisions of 1984 and 1986 exclusively in terms of grounds of jurisdiction.

360. In the light of the considerations set forth above, the claim relating to the overseas assets does not constitute a completely new basis of claim and in the circumstances there is no obstacle to the exercise of the Court's jurisdiction in this respect.

PART V

CHAPTER 3

Jurisdiction Exists even if the Issue relating to the Overseas Assets Constitutes a New Basis of Claim

361. The primary contention advanced by Nauru rests upon the proposition that the claim concerning the overseas assets of British Phosphate Commissioners does not constitute a new basis of claim (see above, Chapter 2). In the alternative the Government of Nauru submits that, even if this claim does constitute in some sense a new claim, there would still be no obstacle to the exercise of jurisdiction in respect of the subject matter.

362. The basis for this submission in the alternative is to be found in the reasoning of the Court in the *Military and Paramilitary Activities (Jurisdiction) Case*. In the passage quoted in para. 357 above, the Court insisted on the importance of the three factors, listed in para. 358 above. The third factor is that defects of form cannot be allowed to defeat considerations of practical convenience.

363. In the context of the third factor, the position adopted by the Court in the *Military and Paramilitary Activities (Jurisdiction) Case* is applicable even if, in a formal sense, "a new basis of claim" is involved. As the Court said in 1984: "It would make no sense to require [the claimant State] now to institute fresh proceedings" based upon the relevant compromissory clause (in that case) and the same logic applies in the present proceedings based upon Article 36(2) of the Statute.

364. Two other factors favour the exercise of jurisdiction in the circumstances of the present case. In the first place, even if a new basis of claim were involved, the subject matter is closely related to the parent claim both in terms of the legal relationships involved and in terms of the matrix of documentary and other evidence.

365. Secondly, there is no public policy which would indicate a refusal to exercise jurisdiction. In particular, there is no question of Australia being taken by surprise. Australia was given clear notice of the existence of Nauru's legal interest in the extended correspondence of 1987. See above, paras. 335-41.

366. In this series the letter of 4 May 1987 from the President of Nauru to the Australian Minister of Foreign Affairs, Mr Hayden, stands out. The President expresses the position of Nauru with firmness and links the question of the assets of British Phosphate Commissioners with other issues, including that of rehabilitation. In the President's words:

> "My government takes the strong view that such assets, whose ultimate derivation largely arises from the very soil of Nauru Island, should be directed towards assistance in its rehabilitation, particularly to that one-third which was mined prior to Independence."

367. This evidence supports the view that, even if the basis of claim is "new" in a formal sense, it is intimately linked with the grouping of issues arising out of the breaches of the Trusteeship Agreement associated with the management of the phosphate industry.

368. In conclusion it may be pointed out that the exercise of jurisdiction over the claim concerning the overseas assets of British Phosphate Commissioners will not cause any prejudice to the Respondent, a factor given emphasis by the Court in the *Barcelona Traction Case* (*Preliminary Objections*), I.C.J. Reports 1964, p.25, precisely in relation to the modification of submissions. It was the general policy of the Permanent Court to adopt a liberal policy toward the modification of submissions in cases instituted by application: see the *Chorzów Factory case (Merits)*, P.C.I.J., Ser. A, No. 17, pp.25-9; *Prince von Pless case*, P.C.I.J., Ser. A/B, No. 52, pp.13-14; *Société Commerciale de Belgique case*, P.C.I.J., No. 78, p.173. There appears to be no change in circumstances which would justify a departure from this policy by the present Court.

PART V

CHAPTER 4

The Legal Interest of Nauru in the Overseas Assets of the British Phosphate Commissioners

Section 1. The Australian Argument

369. As a question of admissibility the Australian Government contends that Nauru lacks any legal interest in the overseas assets of British Phosphate Commissioners (*Preliminary Objections*, para. 375). The basis for this is the allegation that "the assets did not belong to Nauru and were freely disposable by the Partner Governments" (ibid.).

370. The position of the Government of Nauru is as follows:

(a) The question of legal interest is not, in the circumstances of this case, an exclusively preliminary question and should be joined to the merits.

(b) On the evidence there is a sufficient legal interest to render the claim to a part of the assets admissible.

Section 2. The Nature of the Legal Interest of Nauru

371. In its *Preliminary Objections* (para. 375), Australia asserts the lack of any legal interest by Nauru in the assets of the British Phosphate Commissioners, which, Australia informed Nauru, amounted to A$57.9 million upon the termination of the 1919 Nauru Island Agreement in 1987 (*Memorial*, vol. 4, Annex 31). Nauru has, of course, in this action limited itself to a claim on the Australian allocation which on termination of the 1919 Agreement became 47.5% of the net surplus rather than 42% in the original Agreement (Agreement

between Australia, New Zealand and the United Kingdom, 9 February 1987, Article 1(1); *Memorial*, vol. 4, Annex 31).

372. The 1919 Agreement was central to the administration of Nauru under both the Mandate and Trusteeship. Within that administration the British Phosphate Commissioners, an agency created by the partner governments, played a major role and was the fiscus of the island. It operated in tandem with the administration. Any power to accumulate and deal with assets was subject first to the Mandate and thereafter to the Trusteeship Agreement (*Memorial*, para. 481).

373. The funds accumulated by the British Phosphate Commissioners which were distributed amongst the three partner governments under the 1987 termination agreement arose from the operations of the British Phosphate Commissioners in mining phosphate on the three islands, Nauru, Banaba and Christmas Island. From time to time, the British Phosphate Commissioners profited from its operations even though it supplied phosphate at cost price, paid the administration of Nauru, provided interest on capital and a sinking fund for the redemption of capital, all out of the proceeds of the mining of phosphate. Profits came about by reason of sales to other countries, or by other means or circumstances. (1987 Agreement, Article 12). In addition there was always a substantial contingency fund which represented a net surplus asset.

374. When the Nauru Phosphate Corporation took over from the British Phosphate Commissioners in 1969, there was a substantial surplus in British Phosphate Commissioners funds the greater proportion of which was derived from Nauru operations. Apart from the profit and contingency fund surplus there was the property known as Phosphate House in Collins Street, Melbourne, Australia, and a fleet of vessels. British Phosphate Commissioners assets both liquid and in the form of property in 1969 were brought about substantially through the operation of mining on Nauru.

375. Accumulations by the British Phosphate Commissioners were made pursuant to Articles 11 and 12 of the 1919 Agreement. These accumulations were held in trust by the Commissioners for possible later distribution to the three partner governments. The fact that assets, accumulated substantially as a result of Nauru operations, later increased in value through trust investment by the Commissioners would not prevent, in itself, a claim to the increased value of the assets by Nauru. Any asset of the British Phosphate Commissioners which

had as its source the operations of the phosphate industry on Nauru would fall within the subject of the claim.

376. The data contained in the previous paragraphs is, it is submitted, sufficient in law to establish the existence of a Nauruan legal interest at the admissibility phase and on the assumption that the question of legal interest is not postponed to the merits phase. The evidence available is sufficient to prove that the phosphate mining on Nauru prior to independence was a substantial source of the accumulated assets.

377. Nauru has thus demonstrated a legally protected interest in an identifiable body of assets at a specific time in 1987. As a matter of admissibility there is no need to specify particular assets or indicate a precise percentage of the value of the assets to which Nauru is entitled. In respect of this type of claim no more is required of Nauru.

378. President Jennings has expressed the legal position as follows:

> "In international law, no less than in domestic law, a plaintiff must be able to point to some rule that gives him a cause of action. It is not enough to be able to show that the respondent has acted illegally. This requirement is most important to the whole law of State responsibility, whether of the traditional kind or in relation to human rights. This is why an applicant State must, for example, satisfy the rule of nationality of claims in a claim in the traditional law, in order to show not only that the respondent State has acted unlawfully but, that it has thereby injured some legally protected interest possessed by the applicant; that it has, in other words, a cause of action. Consequently, the applicant has *locus standi* in a court otherwise having jurisdiction only where there is an issue of fact or law between the particular parties in the sense that it affects a legal interest vested in the applicant. *It is not sufficient merely to show some breach of a legal obligation on the part of the respondent*; it must be some obligation that touches a legally protected interest of the applicant. All this, of course, is a legal truism; but it is one of the highest importance and also one which is sometimes forgotten...."
>
> (*Recueil des Cours*, Hague Academy, vol.121 (1967, II), p.507 (emphasis added).)

379. The passage italicised is quoted with approval by Judge Mbaye, as he then was, in his lectures on "L'intérêt pour agir devant la Cour internationale de justice" (*Recueil des Cours*, Hague Academy, vol. 209 (1988, II), p.302). In so far as Judge Mbaye indicated that the view of President Jennings might be open to question, this involved asking whether the view expressed a too narrow conception of *locus standi* (ibid., pp.302-41).

380. It is often stated that the concept of legal interest is not confined to purely material interests: see former President Jiménez de Aréchaga, *Recueil des Cours*, Hague Academy, vol.159 (1978, I), pp.267-8. Against this background the legal interest of Nauru satisfies the more cautious criterion set forth by President Jennings and obviously falls within the more liberal definitions offered by other authorities.

381. In any event the key may be found in the normal definition of a "legal dispute". As Hudson put the matter:

> "A dispute is *legal* if it relates to a claim of a right conferred by law; in this connection, possibly to a claim of a right conferred by international law."
>
> (*The Permanent Court of International Justice 1920-1942*, New York, 2nd rev. edn., 1943, p.455.)

382. A similar approach appears in the standard work by Dr Rosenne:

> "... it seems that the applicant State must be able to show some direct concern in the outcome of the case, it must itself be a real and not merely a theoretical party to the dispute, even if that concern cannot be neatly reduced to precise categories of protection of the rights or of the interest of that State".
>
> (*The Law and Practice of the International Court*, 2nd rev. edn., Dordrecht, 1985, p.519.)

Section 3. Joinder to the Merits

383. Although the issue of *locus standi* is sometimes exclusively preliminary in character the actual circumstances of the particular case may dictate a different outcome, as happened in the *Barcelona Traction* case (*Preliminary Objections*), I.C.J. Reports 1964, pp.44-6). In relation to the preliminary objection which raised the issue of *jus standi*, the Court made the following determination:

> "The third Objection involves a number of closely interwoven strands of mixed law, fact and status, to a degree such that the Court could not pronounce upon it at this stage in full confidence that it was in possession of all the elements that might have a bearing on its decision. The existence of this situation received an implicit recognition from the Parties, by the extent to which, even at this stage, they went into questions of merits, in the course of their written and oral pleadings. Moreover, it was particularly on behalf of the Respondent that it was sought to justify the process of discussing questions of merits, as involving matters

> pertinent to or connected with the third and fourth Objections, which the Respondent had itself advanced.
>
> The Court is not called upon to specify which particular points, relative to the questions of fact and law involved by the third Objection, it considers an examination of the merits might help to clarify, or for what reason it might do so. The Court will therefore content itself by saying that it decides to join this objection to the merits because – to quote the Permanent Court in the *Pajzs, Csáky, Esterházy* case (PCIJ, Series A/B, No.66, at p.9) – "...the ... proceedings on the merits ... will place the Court in a better position to adjudicate with a full knowledge of the facts"; and because 'the questions raised by ... these objections and those arising ... on the merits are too intimately related and too closely interconnected for the Court to be able to adjudicate upon the former without prejudging the latter'."
>
> (*ibid.*, p.46.)

384. In the view of the Government of Nauru the factors indicated by the Court in this passage are applicable in relation to the claim concerning the assets of the British Phosphate Commissioners. Consequently, it is appropriate to apply Article 79, paragraph 7 of the Rules of Court to this question.

Section 4. Documentary Evidence

385. It was indicated in the *Memorial* (paras. 662-69) that Nauru has been largely unsuccessful in gaining access to documents held by Australia and consequently the Government of Nauru reserved its position on the production of documents (*Memorial*, para. 663). In this context, it will no doubt be necessary for Nauru to seek to obtain evidence of the full extent of the British Phosphate Commissioners assets after the present phase of these proceedings is completed and in the event that the Court sees fit to uphold the Nauru positions concerning jurisdiction and admissibility. Until those issues are decided, it would be premature to seek to obtain that evidence; but on the other hand Nauru should not be prejudiced at this stage by Australian failure to disclose obviously relevant material.

386. In particular, Nauru will seek to obtain from Australia full documentation relating to the accounts of the British Phosphate Commissioners from 1968 to 1987, and documents relating to the termination of the 1919 Agreement and the disposal of the assets in accordance with the tripartite Agreement of 1987.

Section 5. The Principle of Consent to Jurisdiction is not an Impediment to Admissibility

387. In its *Preliminary Objections* (para. 379), Australia presents further arguments as to admissibility and jurisdiction in the following passage:

> "In any event, even if Nauru were held to have a legal interest, the claim would remain inadmissible and the Court would lack jurisdiction for the more general reasons articulated in relation to the other Nauruan claims. In particular, Nauru cannot avoid the fact that its claim directly implicates the rights and interests of the other two Governments party to the 1987 Agreement."

388. The Government of Nauru has already explained the considerations on the basis of which the *Monetary Gold* principle is not applicable to the present proceedings (see above, paras. 249-322), and those considerations are equally relevant in the present context. The Nauruan claim with respect to the assets of British Phosphate Commissioners relates only to the proportion of the assets held by Australia. This proportion is precisely quantified in the 1987 Agreement.

389. Not only is the *Monetary Gold* principle not applicable to the circumstances of the present case but, if it were, the consequences would be contrary to a reasonable conception of the administration of justice. It is contrary to good sense that a Respondent State which had, jointly with one or more other States, seized property claimed by an Applicant and subsequently divided the proceeds, could prevent the Court adjudicating upon the Applicant's share of the property by relying on the wrongdoing of other States.

Section 6. Other Issues of Admissibility

390. Even if the Court were to find that the claim in respect of the overseas assets was in some sense a new basis of claim, such a claim cannot be met by objections of delay, prior settlement, or recourse to negotiation as an exclusive method of dispute settlement.

391. At the same time the position of Nauru is that such preliminary objections are not applicable in any event: see above, paras. 361-68.

PART VI

ISSUES OF JUDICIAL PROPRIETY

PART VI

ISSUES OF JUDICIAL PROPRIETY

Section 1. The Australian Argument

392. In its *Preliminary Objections* (paras. 400-7), Australia invokes "the principle of good faith in international law" and makes the following allegation of fact: "By its conduct since independence and given the circumstances in which the claim is brought, Nauru can be regarded as not acting in good faith" (para. 401).

393. This allegation is completely baseless as a matter of fact (see above, paras. 34-62). For present purposes it is necessary to address the peculiarities of the legal argument. In the first place Australia employs the principle of good faith as the basis of an argument that judicial propriety requires that the Court "should... decline to hear the Nauruan claims" (para. 407). No authority is cited to support the entirely novel suggestion that a breach of the principle of good faith may justify the dismissal of a claim as an issue of propriety.

394. The conditions which are to be fulfilled in order for the Court to exercise its discretion to dismiss a claim on the basis of propriety will be reviewed below. Breach of the principle of good faith is not among them, and this is hardly surprising. The question of good faith goes to issues of merits, whereas the concept of judicial propriety involves radical circumstances which operate *in limine* and which dictate that there is no basis for the exercise of the judicial function. Moreover, judicial propriety involves discretion and, as Dr Rosenne points out, this is "doubtless to be sparingly used": *The Law and Practice of the International Court*, 2nd rev. edn., Dordrecht, 1985, p.308.

395. There is no basis in the exiguous pleading offered by the Australian Government for the exercise of a discretion with the radical effects normally associated with propriety. The facts alleged fall into two categories. The first such category (*Preliminary Objections*, paras. 401-3) involves allegations of inconsistency in the conduct of Nauru since independence. The second category (paras. 404-7) relates to allegations that Nauru is not genuinely interested in rehabilitation.

396. The first of these categories consists of subject-matter which is essentially part of the merits and therefore does not in the circumstances possess "an exclusively preliminary character". The Australian pleading in this respect involves an argument on the merits which, properly described, does not have a preliminary character at all.

397. The second category of allegations is irrelevant to the case and is also objectionable on other grounds (see below, paras. 404-6).

Section 2. Nauru has Always Acted in Good Faith

398. As a matter of evidence, the Australian Government is required to satisfy a high standard of proof in order to establish the allegations of bad faith in accordance with appropriate standards in these matters. There is a presumption of regularity in the conduct of international relations, and bad faith must be proved beyond reasonable doubt.

399. The assertion of an absence of good faith takes two forms, the first of which relates to the "consistency" of the conduct of Nauru and this allegation would (if substantiated) be relevant, but only at the merits stage of these proceedings.

400. In any case the allegation of inconsistency is not justified by the evidence. The *Preliminary Objections* (para. 403) makes no effort to provide adequate particulars of the alleged lack of "consistency". The relevant passage consists of a series of mere assertions: "Yet, it is contended, Nauru has not done this. While it may have continued sporadically to seek additional compensation for rehabilitation since independence, its conduct has been such that the claims it now makes based on legal grounds should be rejected by this Court as not made in good faith."

401. The precise context is the evidence concerning the ways in which the nature of the Nauruan claim was reaffirmed in the period after independence. The relevant materials are reviewed in Chapter 1 of Part IV of this *Written Statement* (paras. 145-54). The Australian Government does not come up to any minimal standard of proof on the issue of "consistency". Indeed, the issue of "consistency" is not even properly identified.

402. The Government of Nauru might reasonably expect that the issues of prescription and waiver raised in the *Preliminary Objections* would involve the evaluation of evidence as to conduct, and that consistency would be an element in such evaluation. But to describe such a question in terms of an absence of "good faith" is eccentric and inappropriate. These issues are not properly classified as questions of good faith.

403. What remains is the second category of Australian allegations relating to the interest of Nauru in rehabilitation. In fact Nauru has undertaken a series of measures with a view to the long-term rehabilitation of the land mined since 1967. These are fully described in Part I (above, paras. 34-62), and it is sufficient here to provide a summary by way of memorandum. The principal measures are as follows:

(a) A substantial sum has been set aside in a Rehabilitation Fund expressly created as a sinking fund contingent upon an eventual rehabilitation programme.

(b) A lengthy and detailed study of the feasibility of rehabilitation has been conducted.

(c) The "overburden" from land mined has been retained and stored as a contribution to the process of rehabilitation.

(d) Technical trials to discover the best methods of rehabilitation are being carried out currently.

Section 3. "Good Faith" in relation to Rehabilitation: the Lack of Propriety and Irrelevance of the Australian Allegation

404. In three passages of the *Preliminary Objections* (paras. 404-6), a series of allegations are made which impugn Nauru's motives for bringing the case. These allegations both generally and in detail are untrue and irrelevant.

405. The facts that the problem of rehabilitation has not been solved, or tackled in accordance with a particular *modus operandi*, are irrelevant to the propriety of these proceedings. The Nauruan claim reflects a legal entitlement and were articulated before independence. It is also a strange assertion (*Preliminary Objections*, para. 406) to say (in effect) that the claimant should

have expended funds in respect of overall rehabilitation as a precondition of pursuing a claim in respect of the responsibilities incumbent upon the Respondent State.

406. It is also irrelevant to assert that "Nauru is a wealthy country or at least had the potential to be so if it had properly managed the potential wealth it inherited at the time of independence" (ibid., para. 404 *in fine*). This assertion is examined as to its economic implications in chapter 2 of Part I of these observations. For present purposes it is sufficient to point out that such an assertion is not only irrelevant but unusual in proceedings before the Court.

407. It must come as a surprise for any Applicant State to see the proposition that legal responsibility is contingent upon the relative affluence of the Parties. It may be noted that the Court has not shown any favour toward "economic disparity" arguments in the context of maritime delimitation: see the *Tunisia-Libya case*, I.C.J. Reports 1982, pp.77-8, paras. 106-7; *Libya-Malta case*, I.C.J. Reports 1985, p.41, para. 50. If economic factors are irrelevant as elements in delimitation, they are even more certainly irrelevant in the context of State responsibility.

Section 4. Good Faith in relation to the Principle Allegans Contraria Non Est Audiendus

408. The Australian Government attempts to give substance to the principle of good faith in terms of legal specifics by reference to two legal principles, that of consistency and the doctrine of "clean hands" (*Preliminary Objections*, para. 402). These references are inevitably academic in character because the principle of good faith governs the performance of obligations but does not create them. As the Court observed in the *Border and Transborder Armed Actions case*: "it is not in itself a source of obligation where none would otherwise exist" (I.C.J. Reports 1988, pp. 105-6, para. 94).

409. By parity of reasoning the principle should not provide a condition of the justiciability of an otherwise perfectly valid claim. This would be the more unjustifiable when, as in the Australian pleadings, the reference is in fact to two specialised and sophisticated ramifications of good faith. The first of these is the principle of consistency in the form of the maxim: *allegans contraria non est audiendus*. This is the version provided in Cheng (*General Principles of Law as Applied by International Courts and Tribunals*, London, 1953, p.141).

410. Professor Cheng's excellent work is the principal source cited in the *Preliminary Objections*. His examination (op. cit., pp.141-9) reveals that the maxim functions as an umbrella for a variety of principles. Neither Cheng nor any other authority links the concept of consistency with the question of judicial propriety. In fact the examples to be found in Cheng involve issues exclusively of merits, and related matters of evidence which the writer classifies as examples of "admissions" or "equitable estoppel". The subject-matter offered by Cheng refers neither to issues of the admissibility of claims nor to judicial propriety.

411. The only other source cited in this context in the *Preliminary Objections* (para. 402) is Martin, *L'Estoppel en droit international public*, Paris, 1979, pp.194-210. This work refers to the presentation of Cheng, and the examples produced are of the same type as those employed by Cheng.

412. In sum, the Australian Government has failed to indicate any link between the principle of good faith and the issue of judicial propriety. Indeed, the precise material referred to (by Cheng and Martin) is related to good faith in very indirect and academic forms, if at all. It is perfectly possible to ventilate the problems relating to admissions and estoppel without the involvement of the category of "good faith". To associate these technical questions of proof and merits with the radical concept (when it is applicable) of judicial propriety is illogical and inappropriate.

413. In any case the *Preliminary Objections* fails to provide the particulars of the alleged inconsistency on the part of Nauru which justifies barring its claim.

Section 5. The Doctrine of "Clean Hands"

414. The Australian pleading follows the invocation of "the principle of good faith" with a similarly terse and undeveloped invocation of the doctrine of "clean hands" which the *Preliminary Objections* (para. 402) describes as "another specific principle forming part of the more general principle of good faith that is applicable in international law as in other legal systems..."

415. As in the case of the principle of good faith the Australian Government fails to provide any, or any adequate, particulars of the alleged conduct on the part of Nauru which would bar its claim. The *Preliminary Objections* (para. 403) simply asserts that the doctrine of "clean hands" requires "a state to act

consistently and in a way that is not contrary to the claims that it might assert". Thus the requirement of consistency and the doctrine of "cleans hands" are equated.

416. This equation is contrary to legal principle. The Government of Nauru reserves the right to explain its position more fully in the oral hearings if this becomes necessary in view of Australian persistence in inappropriate allegations of bad faith. For present purposes it will suffice to point out that the doctrine of "clean hands" has been applied in cases in which the particular arbitral tribunal considered that the *illegal conduct* (not the "inconsistency") of the claimant (as an individual) had rendered the claim inadmissible. The type of conduct in question would typically involve hostile activity directed against the Respondent State or interference in its internal affairs: see Rousseau, *Droit international public*, Tome V, Paris, 1983, pp.170-1, para. 156. As Rousseau points out, caution is needed in determining the content of the concept of "clean hands", and it is not to be confused with alleged negligence in pursuing a claim as a form of extinctive prescription: id., p.171, para. 157.

417. In any event two forms of the "clean hands" doctrine as recognised in the literature do not have any application in the present proceedings. In the first place, a major element of the doctrine relates to the duty of the individual, whose cause has been taken up by the State of his or her nationality, *and who is a resident of the Respondent State*, to avoid breaches of the domestic law of that State: see Borchard, *Diplomatic Protection of Citizens Abroad*, New York, 1925, pp.713 et seq.; Witenberg & Desrioux, *L'Organisation judiciaire, la procédure et la sentence internationales*, Paris, 1937, p.159, para. 63.

418. The second category which appears in the literature consists of conduct on the part of the claimant which is contrary to public international law: see Rousseau, op. cit., V, pp.173-77, paras. 163-9; Borchard, op. cit., pp.713 et seq.; Witenberg & Desrioux., op. cit., p.160, para. 64.

419. The foregoing observations on the doctrine of "clean hands" have rested on the hypothesis that this forms a part of general international law, or at least that certain elements have that status. The reality is different and the subject is very controversial: see the studies of Salmon, *Annuaire français de droit international*, 1964, pp.225-66; and Miaja de la Muela, *Mélanges Andrassy*, La Haye, 1968, pp.189-213.

420. The amorphousness and intangibility of the subject is well reflected by the conclusion offered by Rousseau after a careful analysis of the sources:

> "170. Conclusion. - On voit par cette analyse qu'il est difficile de considérer la conduite irrégulière du réclamant comme un obstacle constant et absolu à la recevabilité des réclamations internationales. On pourrait être tenté d'établir à cet égard une distinction entre la violation de la loi interne et la violation du droit international, mais une telle construction serait artificielle, car, même dans ce domaine, les Commissions ont fait droit à des requêtes de particuliers ayant manifestement manqué au devoir de neutralité qui s'imposait à l'Etat auquel ils ressortissaient.
>
> Pour toutes ces raisons, il n'est pas possible de considérer la théorie des mains propres comme une institution du droit coutumier général, à la différence des autres causes d'irrecevabilité à l'étude desquelles on arrive maintenant."
>
> (*Droit international public*, Tome V, Paris, 1983, p.177.)

421. In the submission of the Government of Nauru there is no basis for the barring of Nauru's claim to be derived from the doctrine of "clean hands". Even on the assumption that this doctrine has crystallised sufficiently, there is no evidence of illegal conduct on the part of Nauru.

422. There is a further consideration which can be expressed quite briefly. In its *Memorial*, Nauru found it necessary to present documentary evidence concerning failures on the part of the Administering Authority to report fully and fairly on the financial aspects of the production and disposal of the phosphate deposits: see the *Memorial*, paras. 320-63, 542-60.

423. The Australian Government has not seen fit to deal with these important matters in its *Preliminary Objections*, preferring to rely on the formal proviso as to "the facts and law on which the preliminary objections are based" (para. 1). This way of proceeding is, of course, unobjectionable as such. However, until the phase is reached at which the Respondent State sees fit to seek to refute these serious complaints involving the good faith of the Australian Government, it is surely inappropriate for the Respondent State to invoke a doctrine of "clean hands".

424. Such an appeal to the doctrine is even more incongruous when the complaints relate to the discharge of the duties of the Administering authority of a territory under Trusteeship.

Section 6. The Conditions Requiring the Court to take Exceptional Measures to maintain Judicial Integrity are not Present

425. Whilst it is probably impossible to determine in advance the occasions on which the Court might feel bound to avoid exercising its judicial function on grounds of propriety, existing experience indicates two situations in which the relevant discretion may be exercised.

426. (a) The case in which it is logically impossible to decide a legal issue without breach of a fundamental principle of judicial procedure. Thus in the *Monetary Gold* case the Court found that the second Italian claim depended upon the first, that is, the claim between Italy and Albania. This latter claim could not be decided without a breach of the principle *audiatur et altera pars*: see I.C.J. Reports 1954, pp.33-4; Rosenne, *The Law and Practice of the International Court*, 2nd rev. edn., Dordrecht, 1985, pp.308-9, 310.

427. (b) The Court will not adjudicate on the merits of an issue which lacks, or has ceased to have, the quality of being "an actual controversy involving a conflict of legal interests between the parties": see the *Northern Cameroons Case*, I.C.J. Reports 1963, pp.33-4, 37-8.

428. The circumstances giving rise to the Nauruan claim in the present proceedings bear no relation to the two situations outlined above. In the submission of the Nauruan Government, the evidence offered in the *Memorial* provides the evidence for this. However, and as an alternative submission, any issue of propriety could only be resolved in accordance with normal standards of judicial procedure after an examination of the merits.

Section 7. Conclusion

429. The Court is respectfully requested to reject the Australian contentions based upon judicial propriety on the following grounds:

(a) There is no evidence of bad faith on the part of Nauru.

(b) The contentions relating to rehabilitation (*Preliminary Objections*, paras. 404-6) are irrelevant.

(c) The arguments relating to the principle of good faith have no bearing upon admissibility and (*a fortiori*) no bearing upon judicial propriety. The principle of good faith does not create obligations. It governs "the way in which existing obligations are carried out or existing rights exercised" (Thirlway, (1989) 60 *British Year Book of International Law* p.21).

(d) The principle *allegans contraria non est audiendus* has no connection with the issue of judicial propriety.

(e) The doctrine of "clean hands" has no application to the present proceedings.

(f) The conditions which would justify the Court in barring claims on grounds of judicial propriety are not applicable here.

(g) This section of the Australian argument is concerned with thinly disguised issues of merits.

CONCLUSION

1. The dispute has existed since before the independence of Nauru

430. When the option of resettlement of a substantial part of the population was rejected, the question of rehabilitation, and the issue of responsibility for funding rehabilitation, became a more explicit part of the agenda in the years before independence in January 1968. Consequently, rehabilitation appears as a major issue in the negotiations between the Nauruan community and the Partner Governments in the period 1964 to 1967.

431. There is thus a continuity in the history of the dispute concerning responsibility for rehabilitation. This continuity is evident from the documentary record. The reaffirmation of the existence of the dispute over rehabilitation by the President of Nauru at the time of independence is symptomatic of this continuity in the history of a dispute which had crystallised before independence: see the *Memorial*, pp.230-1.

2. Australia recognises that the dispute has existed since before independence

432. In the *Preliminary Objections* the Respondent State clearly accepts the essential continuity of the history of the dispute since before independence. The very nature of several of the preliminary objections assumes this continuity. Thus the arguments based on an alleged pre-independence settlement or an alleged agreement to settle the dispute exclusively by negotiation could only be valid on the basis that the constitutive facts of the legal dispute prior to independence have been recognised by the Respondent State as a legal dispute which (subject to the considerations supposed to support the preliminary objections) *persisted at the time of independence*.

433. The recognition of this continuity is inherent in the logic of various preliminary objections deployed by Australia. It is also given explicit form in the

text of the *Preliminary Objections*. The relevant passages from the Australian pleading include the following:

434. (a) "273. In respect, in particular, to the crucial rehabilitation issue, these inherent limitations on the judicial function apply with particular force. As the Court has said, it 'has first to examine a question which it finds to be essentially preliminary, namely the existence of a dispute' (I.C.J. Reports 1974, at p.260) between Nauru and Australia. It is submitted that such a dispute was settled and disappeared when Nauru waived its claim before the Fourth Committee of the General Assembly. And certainly the claim disappeared when the General Assembly terminated the Trusteeship Agreement, thereby acquitting the Administering Authority of any further responsibility, and without reserving the question of responsibility for rehabilitation.

274. As has been said by this Court in the Nuclear Tests case:

> 'the Court, as a court of law, is called upon to resolve existing disputes between States. Thus the existence of a dispute is the primary condition for the court to exercise its judicial function' (*I.C.J. Reports, 1974 at pp.270-271*).

The Court added:

> 'the dispute having disappeared, the claim advanced...no longer has any object. It follows that any further finding would have no "raison d'etre"... The Court can exercise its jurisdiction in contentious proceedings only when a dispute genuinely exists between the parties. In refraining from further action in this case the Court is therefore merely acting in accordance with the proper interpretation of its judicial function... The object of the claim having clearly disappeared, there is nothing on which to give judgment' (at pp.271-272).

In accordance with these considerations the Court held that, in the circumstances of that case, the claim "no longer has any object and that the Court is therefore not called upon to give a decision thereon" (at p.272).

275. The same conclusion applies here."

435. (b) "289. According to the Australian declaration accepting the jurisdiction of the Court it is necessary that the parties to the dispute have agreed to have recourse to "some other method of settlement". In this case, the Nauruan agreement to the method of settlement involving the Trusteeship Council and the General Assembly results from the fact that the representatives of the Nauruan people, freely and of their own

accord, participated in the debates of the Trusteeship Council and of the Fourth Committee of the General Assembly, accepted these fora for their claims, raising and discussing the very questions which are now the subject-matter of the dispute brought to the Court. These representatives consented to and did not oppose resolution 2347(XXII). All this constituted agreement by conduct.

290. The Republic of Nauru bases its case on being entitled to invoke actions and statements of the representatives of the Nauruan people, before independence. Clearly, they must also be bound by their actions and statements at that time.

291. Nor can Nauru be heard to say that it was not in a position to participate fully as an independent nation in the United Nations consideration of the issues raised by its claim. It was a third party beneficiary of the trusteeship system and must, therefore, be bound by and taken to have agreed to the method of settlement provided for through the United Nations organs."

436. (c) "377. Nauru can show no legal interest in such assets, which belonged to an instrumentality of the three Partner Governments and in relation to which Nauru had no legal or other entitlement. Nauru simply asserts that the 1987 Agreement constitutes "an unequivocal recognition of the Nauruan interest" in the BPC assets (para.482, Nauru *Memorial*). It asserts that the reference in the Agreement to the BPC had the consequence of referring also "to the legal concomitant of the existence of the Commissioners and the administration of Nauru during the currency of the Trusteeship" (para.481, Nauru *Memorial*). Yet, even if this were so, it does not establish an adequate Nauruan interest in the particular claim to the 1987 assets. Unlike the Nauruan claims in relation to the performance of the Trusteeship Agreement, in relation to which Australia concedes that Nauru has a legal interest, there is no similar basis for a claim to the 1987 assets."

437. (d) "391. Even if the 1983 letter represents a relevant raising of the Nauruan claims it is still 16 years after agreement was reached on independence and the termination of the Trusteeship and, more particularly, on the terms of the settlement of all the phosphate industry issues. This in Australia's view is a delay that is fatal to the present Nauruan claim.

392. But, more importantly in Australia's view, it is not until December 1988 that Nauru can be said to have formally raised with Australia and the other former Administering Powers its position that responsibility for rehabilitation of phosphate lands worked-out prior to 1 July 1967 remained the responsibility of the three former Partner Governments as a matter of law. That is 21 years from when the matter was last considered by the United Nations and, in the view of Australia and the other Partner Governments, settled.

393. Nauru in its Notes of 20 December 1988 to the three Partner Governments refers to the position "which has been consistently taken by the Government of Nauru since independence, and which was taken by the elected representatives of the Nauruan people before independence" (Annex 80, Nos.22, 23 and 24, Vol.4, Nauruan Memorial). Yet, as the diplomatic record shows, whatever Nauru considers its position, the fact is that Nauru did nothing to assert any claim of legal right against the Partner Governments for more than 21 years after the matter was considered definitively in the United Nations. After that date the Partner Governments could legitimately have assumed that the Nauruan claim was settled definitively by termination of the Trusteeship Agreement with the approval of the supervisory authority. To now allow Nauru to reactivate a stale claim can only work severe prejudice to Australia. The Court should exercise its discretion to decline to hear the claims. Further, this failure by Nauru to pursue this claim for such a lengthy period indicates that Nauru itself considered the claim to have been settled.

394. This is particularly so given that Nauru failed throughout the United Nations consideration of the issue to enunciate any claim based on an alleged breach of international law. The relevant United Nations supervisory body pronounced on the matter now the subject of a claim and itself failed to make any findings of breach of law or suggest that there was any outstanding legal issue as between Australia and Nauru concerning compliance with the Trusteeship Agreement. As a result of the passage of time since 1968 Australia legitimately could have assumed that it was not liable as a matter of law in relation to its past actions some twenty years after its involvement in Nauru came to an end."

438. The consequence is that Australia has waived any question of admissibility relating to the fact that the elements of the dispute arose prior to the independence of Nauru. In the submission of Nauru, whilst the Court has a power to raise legal issues *proprio motu*, in the context of admissibility this power should only be exercised if important considerations of international public order so require. In the present proceedings it is impossible to discern any considerations which would justify the re-examination of a question on which the parties have a common view.

439. However, if the question were to be examined by the Court, in the submission of the Nauruan Government all the pertinent considerations of legal principle militate in favour of the recognition of the existence of a legal dispute between Australia and Nauru which persisted after independence.

440. In the circumstances of the Trusteeship there was a continuity in the legal personality of the Nauruan people as a beneficiary of the Trusteeship regime and as a person of international law after independence. This is a position accepted expressly by Australia in the *Preliminary Objections*, in particular in paras. 290-1, 377 (for the texts of which see paras. 435-6 above).

441. In any event, given the *erga omnes* character of the legal principles invoked by Nauru, any Member of the United Nations, and any State with the capacity to become a party to the Statute of the Court, has a sufficient legal interest in the subject-matter of the dispute.

442. The twelve judges forming the majority of the Court in the *Barcelona Traction Case* expressed the matter in the following passages:

> "33. When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute or unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.
>
> 34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p.23); others are conferred by international instruments of a universal or quasi-universal character.
>
> 35. Obligations the performance of which is the subject of diplomatic protection are not of the same category..."
>
> (I.C.J. Reports 1970, p.32.)

443. This position, based upon the special character of obligations *erga omnes*, is accepted in the *Third Restatement of the Law (Foreign Relations Law of the United States)*, American Law Institute, St. Paul, Minn., 1987, vol. 2, para. 902, p.349.

444. It may be recalled that in the *Northern Cameroons Case* the Court did not regard the issue of temporality as a major contingency and it was not allowed to intrude upon the careful reasoning of the Judgment: see, in particular, I.C.J. Reports 1963, at pp.35-6.

3. There has been no delay, waiver or prior settlement of the dispute

445. The Australian objections based upon the legal categories of delay, waiver and prior settlement, have no justification in fact.

4. The Nauruan claim survived the termination of the Trusteeship

446. The Nauruan claim has survived the termination of the Trusteeship. The considerations which justify this position (which are sufficient severally) are as follows:

(a) The General Assembly and the Trusteeship Council did not have exclusive authority to determine legal issues arising from the Trusteeship Agreement.

(b) The termination of the Trusteeship did not automatically extinguish all legal claims arising from the administration of the Trust Territory, but only those which it was necessary to deal with in order to give immediate effect to the self-determination of the Territory or which were actually presented for decision.

(c) The General Assembly did not intend or purport to terminate rights vested in the Nauruan people under the Trusteeship Agreement and associated rules of international law.

(d) Even if express recognition by the competent United Nations organ was required to preserve Nauru's rights, there was such recognition here.

5. The joinder or consent of third parties is not a condition of admissibility

447. In the circumstances of the present case Australia is properly sued alone. This legal conclusion is justified by the following considerations, each of which is a sufficient justification:

(a) Neither New Zealand nor the United Kingdom is an "indispensable party" within the meaning of *Monetary Gold* principle, as developed in the consistent jurisprudence of the Court.

(b) Municipal law analogies on this issue are of little relevance; but in any event the most appropriate analogies support the Nauruan position.

(c) There is no requirement, arising from the regime for the administration of Nauru as a Trust Territory and opposable to Nauru, that it bring proceedings against all three States together.

(d) The Nauruan claim is admissible even if, in consequence, Australia may have a right of recourse against the other two States.

(e) Alternatively, even if the normal requirement for enforcing a liability of several States acting together is to join all the affected States, in the circumstances of the administration of Nauru, the claim is properly brought against Australia alone.

(f) The proper administration of international justice dictates that the present proceedings should be declared admissible, with a view to obtaining a decision on the merits of the Nauruan claim.

6. The claim relating to the overseas assets of the British Phosphate Commissioners is admissible.

448. The claim relating to Nauru's lawful interest in the overseas assets of the BPC which were wrongfully disposed of in 1987 is admissible for the following reasons:

(a) The claim arises from a legal dispute the existence and general character of which is confirmed in the documentary record, including the diplomatic correspondence.

(b) The claim does not involve a new basis of claim, being intrinsically a part of Nauru's general claim, and there is no objection to the exercise of the Court's jurisdiction.

(c) Jurisdiction exists even if the claim to the overseas assets involves a new basis of claim.

(d) There is sufficient evidence available to establish the legal interest of Nauru in the overseas assets for the purposes of this phase of the case.

7. There was no agreement to settle the dispute exclusively by negotiation

449. On the evidence there was no agreement to settle the dispute exclusively by means of negotiation and therefore there is no objection to the exercise of jurisdiction on the basis of the reservation invoked by the Respondent State.

450. In any case, on a proper construction of the reservation, negotiation does not constitute "some other method of peaceful settlement".

8. There is no basis for the Australian contentions relating to judicial propriety

451. There is no basis of any kind for the Australian contentions relating to considerations of judicial propriety. The following considerations indicate the baselessness and irrelevance of the factors invoked in the *Preliminary Objections*:

(a) There is no evidence of bad faith on the part of Nauru.

(b) The contentions relating to rehabilitation (*Preliminary Objections*, paras. 404-6) are irrelevant.

(c) The arguments relating to the principle of good faith have no bearing upon admissibility and (*a fortiori*) no bearing upon judicial propriety.

(d) The principle *allegans contraria non est audiendus* has no connection with the issue of judicial propriety.

(e) The doctrine of "clean hands" has no application to the present proceedings.

(f) None of the conditions which would justify the Court in barring claims on grounds of judicial propriety are applicable.

452. The Government of Nauru considers that the casual manner in which issues of propriety are raised in the *Preliminary Objections* is unusual and inappropriate in the context of proceedings before this Court.

SUBMISSIONS

In consideration of the foregoing the Government of Nauru requests the Court:

To reject the preliminary objections of Australia, and

To adjudge and declare:

(a) that the Court has jurisdiction in respect of the claim presented in the *Memorial* of Nauru, and

(b) that the claim is admissible.

(Signed) V.S. MANI

L.D. KEKE

Co-Agents of the Government of the Republic of Nauru

8 July 1991

APPENDIX

RESPONSE TO ANNEX 26 OF THE AUSTRALIAN PRELIMINARY OBJECTIONS

by K.E. Walker

A. Introduction

A1. The *Preliminary Objections*, Annex 26, vol. II, p.173 contains a paper, entitled "An Examination of Nauru's Rock Phosphate Income". The paper was commissioned by the Australian Department of Foreign Affairs and Trade from a private research firm based in Canberra, Australia, called the Centre for International Economics (hereafter "C.I.E.").

A2. The stated purpose of this paper "is to examine Nauru's phosphate income and its use both before and after independence". Two major conclusions are suggested by C.I.E.:

> "...evidence suggests that the phosphate income has not always been well spent. Educational and health standards have fallen and large sums of money have been wasted on items such as a national airline." (p.174)
>
> "Rehabilitation has come to be seen as an important element of Nauru's economic future (section 5). However rehabilitation does not in itself guarantee the economic future of the island. The future will be largely determined by Nauru's ability to attract foreign direct investment." (p.174)

A3. While these matters will be discussed in more detail below, it should be noted that the first conclusion necessarily relies heavily on unacceptable value judgments that are, in any case, quite irrelevant to the overall case before the Court. The second conclusion is trite. Of course, "rehabilitation does not in itself guarantee the economic future of the island". But rehabilitation is an

essential *pre-condition* for the economic future of the island. Without it land will be inadequate to accommodate population growth and the increased economic activity which will help attract the foreign investment proposed by C.I.E.

B. Phosphate Income Before Independence

A4. The C.I.E. paper notes that in the years prior to independence the phosphate industry was overwhelmingly the source of finance to meet Nauru's administration costs. This represented a significant saving to the Australian taxpayer though at the same time it added to the cost of Nauru phosphate rock. Not surprisingly, a significant proportion of total government spending on Nauru was devoted to education and health. This, in part, reflects the absence of spending on defence, social services, shipping and airlines etc. that occur in a number of countries.

A5. Figure 2 (p.176) illustrates the small amount of phosphate income paid to Nauruan landowners (and to Nauru Trust Funds) in the years before 1965-66. From 1966-67 to independence, increasing sums of money were paid to landowners (and to Trust Funds) as a result of agreements reached between the Nauru Local Government Council (N.L.G.C.) and the partner governments. It is of significance that the N.L.G.C. decided to allocate most of the increase in royalties in these years to the Trust Funds whereas much smaller increases occurred in direct payments to landowners.

A6. When discussing the economic development of Nauru and the contribution made by the phosphate industry, the point is made that despite having a high per capita income and benefiting from government spending on Nauru "some have argued that the returns to the Nauruans could have been higher" (p.182). Several comments can be made regarding these considerations. Firstly, the per capita national income figure given in Table 3 of US$2130 in 1966-67 is in fact A$2130 (see Table B1 on p.204) and the correct figure is US$1902 using the C.I.E. exchange rate quoted at the top of p.204. Similarly the average income in the five years before independence is quoted in Table 5 as US$1174 whereas it is actually A$1174 (see Table B1). However it must be realised that of the A$2130 in 1966-67 A$1354 represents payments to Trust Funds which did not contribute to a higher standard of living on Nauru in the year in which payments were received. Indeed these Trust Funds were not available for very many years; most of the Trust Funds are still not available to

the Nauruan Community since they are intended to provide income once the phosphate industry ceases to meet the needs of the Community. In terms of standards of living the relevant income per capita figure in 1966-67 was A$776 not A$2130.

A7. Secondly, not merely did "some argue that the returns to the Nauruans should have been higher", but the partner governments agreed in 1967 that Nauru phosphate should be purchased by them at A$11 per ton being the agreed world price of A$12 per ton less a management fee of A$1 paid to the British Phosphate Commissioners (B.P.C.) while they managed the industry on Nauru. This management fee was not paid in cash but instead the phosphate was sold at A$11 per ton.

A8. Apart from anything else this agreement confirms the existence of a world price -- something hitherto denied. It should be noted that Australia purchased phosphate rock from sources as geographically diverse as Morocco, Senegal, Togo, Makatea (French Polynesia) and Florida. Phosphate rock is traded throughout the world and there is a world price that takes account of quality, etc. As demonstrated in the Nauru *Memorial*, vol. 1, pp.294-5, for the period under review the Makatea f.o.b. price is the most relevant indicator for Nauru phosphate rock because it was traded internationally, it was of comparable quality and it was sourced geographically close to Nauru.

A9. C.I.E. then proceed to argue that, even if there is a world price, it should not be assumed that Nauru would have sold the same quantity of phosphate rock as was sold at the lower price actually charged by the B.P.C. The argument here revolves around the elasticity of demand for phosphate rock.

A10. While fertiliser consumption can, and does, fluctuate from year to year, in part due to variations in seasonal weather conditions, the fact remains that most Australian soils are phosphorus deficient and many rural industries are dependent on the continued application of phosphatic fertilisers. Single superphosphate is still the most common phosphatic fertiliser in use in Australia in 1991, because it provides both phosphorus and sulphur. It should be noted that Australia's pastoral land requires continued application of sulphur. In the years prior to 1967, the period covered by the analysis of the B.P.C. costs and prices, single superphosphate was very much the fertiliser of choice in Australia. This was largely for technical reasons and reflected the need to use phosphatic

fertilisers as an important input in many rural industries. This dependence on phosphatic fertilisers clearly resulted in a relative lack of sensitivity of demand to price changes. It should be noted that Nauru phosphate rock is particularly well suited to the manufacture of single superphosphate.

A11. A second factor contributing to demand insensitivity to price is the fact that the cost of fertilisers is a very small proportion of total farm costs. Thus in 1989/90 total fertiliser costs were 5.5% of farm input costs in Australia. Phosphatic fertilisers would account for less than 5% of farm input costs. It is very likely that these fertilisers would have accounted for an even smaller percentage of farm input costs in the years before 1967, since fertiliser prices were much lower twenty years ago than they are today. Thus the market price of single superphosphate averaged $16.20 per tonne in 1970/71 compared with $165.80 in 1989/90.

A12. Some evidence of the reaction of consumption to price can be obtained from Table 1, which shows that in the ten years ending 1969/70 the total acreage fertilised by phosphatic fertilisers rose from 18.70 million hectares to 28.1 million hectares. The usage of phosphatic fertilisers rose from 2.25 million tonnes to 3.70 million tonnes. Imports of phosphate rock from Nauru rose from 1.03 million tonnes to 1.48 million tonnes while the f.o.b. price of Nauru phosphate rock increased from $4.69 per ton to $11.00 per ton. Clearly the higher price for Nauru phosphate rock had little if any impact on Australian demand, and it is significant that, throughout the negotiations that resulted in the higher price, the B.P.C., through the partner governments, sought the agreement of Nauru to increase production tonnages. This wish for increased tonnages, despite higher Nauru prices, shows that the B.P.C. did not believe that these price increases would result in lower demand. In fact, as the Table shows, overall demand rose steadily throughout the period.

A13. Given these factors, there is every reason to expect that the price elasticity of demand for Nauru fertiliser is very low and that it is a legitimate procedure to prepare estimates on the basis that Nauru phosphate could be sold at the world price without having any, or any significant, impact on demand.

C. Income at Independence

A14. In Section 3 of its paper, C.I.E. considers what it regards as the "two financial legacies" Nauru received at independence. The first of these was "funds saved on behalf of the Nauruans before independence" (p.185). This gives the clear impression that somebody else did the saving "on behalf of the Nauruans ". The fact is that the Nauruan people saved the money themselves from the royalties paid by the B.P.C. It was the Nauru Local Government Council that set aside the funds in the Trust Funds. The Trust Funds existed at independence, but they existed because of Nauruan decisions to forego a portion of cash royalties.

A15. The second "financial legacy" that Nauru is considered to have received "was the capitalised value of the right to mine phosphate" (p.185). It is stated that at independence "...the Partner Governments gave this asset to Nauru" (p.186). Again there is a clear implication which is that the right to mine belonged to somebody other than the Nauruan people. Not even the partner governments attempted to put this argument to Nauruan representatives in the negotiations prior to independence. The Nauruan people long regarded the phosphate as being theirs as a matter of right. In their view, it had been taken from them by the colonial powers and at independence they simply obtained what had been rightfully theirs. But even if it were conceded that the B.P.C. would have had certain entitlements to mine under Nauruan law up to independence, in the absence of the 1967 Agreement, those entitlements would have been without prejudice to the Nauruan Government's right to tax the proceeds of mining in the public interest. The proposition that the Nauruan people were "given" the capitalised right to mine begs the question, under the guise of an economic valuation.

D. Phosphate Income after Independence

A16. Section 4 of the C.I.E. paper deals with phosphate income after independence. After quoting figures of the broad distribution of phosphate income in selected years since independence and of the distribution of royalties in each of the five years ended June 1982 (together with the current value of the Trust Funds as at 30 June 1989) the paper turns to a major theme: that successive governments on Nauru have mis-spent the money they have had at

their disposal. The "proof" of this is that "... the largest items of government expenditure are Air Nauru and debt servicing ... items such as health and education have become relatively small components of government expenditure" (p.190).

A17. The main concern expressed about Air Nauru is that it is expensive and accounts for a high proportion of government spending. The fact is that Nauru is a small, isolated island in the vast reaches of the Pacific and that there is very little likelihood that an external airline would provide air services to Nauru on a normal commercial basis. Air services could conceivably be provided on a contract basis or even on a charter basis. But on whatever basis they were provided, it is inevitable that their provision would be a costly exercise.

A18. It should also be noted that until recent years, Air Nauru operated to a number of Pacific island countries, mainly at the request of those countries. Table A7 in the C.I.E. paper shows that government expenditure on Air Nauru has fallen in recent years while revenue has increased.

A19. Considerable attention is given to the small proportion of government spending on health and education. Of course, percentages can be misleading, especially international comparisons when one country (Nauru) has a high percentage of spending on air services that do not appear to the same extent in other countries. Mention is made of crude death rates but UN figures show that in the period 1985-1990 the average life expectancy at birth on Nauru was 68 years compared with 60 years for all island developing countries, 68 years for small island developing countries, 49 years for least developed countries and 59 years for all developing countries. See: United Nations Conference on Trade and Development, "Problems of Island Developing Countries and Proposals for Concrete Action", Doc. TD/B/AC.46-2, 25 April 1990, Table 2, p.21.

A20. There is no doubt that Nauru, like many other countries, would prefer to avoid external debt but, given annual fluctuations in phosphate revenue (see Table A6, p.201), it is not surprising that the Government has had to have recourse to borrowed funds. What is unclear in the C.I.E. analysis is its relevance to the case before the Court.

E. Rehabilitation and Economic Future

A21. The final section of the C.I.E. paper deals with rehabilitation and the economic future of Nauru. The paper very briefly comments on earlier studies of the feasibility of rehabilitating mined land. It refers to the 1987 Nauru Commission of Inquiry estimates of the cost of rehabilitating mined phosphate land as being $127,000 per hectare, which is equivalent to $215.9 million for 1700 hectares. It notes that this amount is within the $242.0 million in the Nauru Rehabilitation Fund as at 30 June 1989. The Report then concludes that this "would also seem to bear out Australia's contention that Nauru was left in a position to finance rehabilitation from its own resources" (p.195).

A22. This conclusion is quite unfounded. The amount of money currently in the Nauru Rehabilitation Fund is entirely beside the point. Australia contributed nothing to the Fund. It did not exist until independence and its existence is due to the discipline of the Nauruan people and the Government of Nauru whereby funds were set aside from phosphate earnings in order to establish this Fund and to ensure that each year the Fund received a royalty per tonne of phosphate sold.

F. Evaluation of 1966 Working Party Report of Financial Arrangements

A23. The Preliminary Objections of the Government of Australia make reference (vol. 1, pp.61-2) to studies that were carried out in 1966 into financial and commercial arrangements in various parts of the world where mining exists and into the rate of profitability of a selection of Australian mining companies. The results of these studies are given in vol. 2, pp.39-55.

A24. This Working Party was established in the context of discussions whereby the B.P.C. remained the mining operator on Nauru and received payment for providing this service. The partner governments approached this question by examining arrangements in a number of relevant countries whereas the Nauru Local Government Council adopted the approach of assessing a Management Fee based on profitability. It is noted on page 62 of vol. 1 "that the Nauruan suggestion has been that a return of 15% on shareholders funds was an appropriate measure of the management fee payable to the B.P.C.".

A25. In the event this approach was abandoned, because the Nauru Local Government Council decided against continued B.P.C. involvement in the phosphate industry on Nauru, preferring instead to have Nauruan management of the industry. The partner governments proposed that the B.P.C. should continue to operate the industry (without special remuneration). This was rejected by the N.L.G.C. who in turn proposed that the B.P.C. should remain on Nauru only for as long as it took Nauru to pay for capital assets of the B.P.C. located on Nauru.

A26. When this proposal was accepted, N.L.G.C. representatives said that the B.P.C. should receive some remuneration while managing the industry, and a figure of A$1 per ton was agreed. It had earlier been agreed that the world price of A$12 per ton was the appropriate f.o.b. price for Nauru phosphate. The partner governments said they would prefer to see the f.o.b. price reduced to A$11 per ton rather than it remain at A$12 per ton and the B.P.C. receive a payment of A$1 per ton. This was agreed to by the N.L.G.C. The price returned to A$12 per ton once Nauru assumed control over the industry.

A27. In para. 140 (p.62 of vol. 1) the quite unwarranted statement is made:

> "What the report highlighted, however, was that there was certainly no practice which would suggest that a State has a right to take over a concession completely without the payment of any compensation..."

(It may be noted in passing that the so-called "concession" was not compatible with the normal requirements of a concession which implies a contractual bargain. There was no bargain as the B.P.C.'s rights were conferred by the Administration under the 1919 Agreement and the Lands Ordinances.)

A28. The issue of compensation for the "take over" of the "concession" was never addressed by the Working Party, which was concerned with ongoing situations involving a government, a mining operator and landowners.

A29. At no stage was the question of what happens when a State takes over from a mining operator ever considered by the Working Party and it is not legitimate to draw any "conclusions" on this issue from the Working Party Report.

A30. Moreover, as has been noted earlier, at no stage did the partner governments even propose that they should be compensated for the loss of the "so-called" concession when Nauru took over the operation of the phosphate industry.

27 June 1991