COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

# AFFAIRE DE CERTAINES TERRES À PHOSPHATES À NAURU

(NAURU c. AUSTRALIE)

EXCEPTIONS PRÉLIMINAIRES

**ARRÊT DU 26 JUIN 1992**

# 1992

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

# CASE CONCERNING CERTAIN PHOSPHATE LANDS IN NAURU

(NAURU *v.* AUSTRALIA)

PRELIMINARY OBJECTIONS

**JUDGMENT OF 26 JUNE 1992**

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# CASE CONCERNING CERTAIN PHOSPHATE LANDS IN NAURU

(NAURU *v.* AUSTRALIA)

PRELIMINARY OBJECTIONS

*Jurisdiction of the Court and admissibility.*

*Declaration of acceptance of compulsory jurisdiction excluding "any dispute in regard to which the Parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement" — Application to States alone of declarations under Article 36, paragraph 2, of Statute — Respondent's declaration and exclusion for which it provides.*

*Alleged waiver of claims prior to independence — (1) Agreement between the local authorities of a trust territory and the Administering Authority — Absence of explicit clause operating as waiver — Absence of implicit waiver — (2) Discussions in the United Nations — Significance of statements by representative of the local authorities.*

*Alleged breaches of a trusteeship agreement — "Definitive legal effect" of General Assembly resolutions terminating trusteeship agreements — Particular circumstances in which the Trusteeship over Nauru was terminated — Question of discharge said to have been given by resolution.*

*Need to determine in each case effects of passage of time with regard to the admissibility of an application.*

*Applicant's alleged inconsistency and lack of good faith — Absence of an abuse of process.*

*Mandate conferred on "His Britannic Majesty" as Sovereign of the United Kingdom, Australia and New Zealand — Trusteeship granted to Australia, New Zealand and the United Kingdom "jointly" designated as Administering Authority — Absence of international legal personality of the Administering Authority — (1) Claims based on conduct of Respondent as one of the three States making up the Administering Authority — Suing of Respondent alone a question independent of that of possible "joint and several" liability — Possibility of the Court's considering a claim of alleged breach by Respondent of its obligations under Trusteeship Agreement — (2) Fundamental principle of consent of States to Court's jurisdiction — Possibility of the Court's taking a decision without ruling on legal situation*

*of non-party States — Situation different from that with which the Court had to deal in the* Monetary Gold *case.*

*Article 40, paragraph 1, of the Statute of the Court and Article 38, paragraph 2, of the Rules of Court — Claim new in both form and substance whose examination by the Court would transform the subject of the dispute originally submitted to it.*

## JUDGMENT

*Present: President* Sir Robert JENNINGS; *Vice-President* ODA; *Judges* LACHS, AGO, SCHWEBEL, BEDJAOUI, NI, EVENSEN, TARASSOV, GUILLAUME, SHAHABUDDEEN, AGUILAR MAWDSLEY, RANJEVA; *Registrar* VALENCIA-OSPINA.

In the case concerning certain phosphate lands in Nauru,

*between*

the Republic of Nauru,

represented by

Mr. V. S. Mani, Professor of International Law, Jawaharlal Nehru University, New Delhi; former Chief Secretary and Secretary to Cabinet, Republic of Nauru,

Mr. Leo D. Keke, Presidential Counsel of the Republic of Nauru; former Minister for Justice of the Republic of Nauru; and Member of the Bar of the Republic of Nauru and of the Australian Bar,

as Co-Agents, Counsel and Advocates;

H.E. Mr. Hammer DeRoburt, G.C.M.G., O.B.E., M.P., Head Chief and Chairman of the Nauru Local Government Council; former President and Chairman of Cabinet and former Minister for External and Internal Affairs and the Phosphate Industry, Republic of Nauru,

Mr. Ian Brownlie, Q.C., Member of the English Bar; Chichele Professor of Public International Law, University of Oxford; Fellow of All Souls College, Oxford,

Mr. Barry Connell, Associate Professor of Law, Monash University, Melbourne; Member of the Australian Bar; former Chief Secretary and Secretary to Cabinet, Republic of Nauru,

Mr. James Crawford, Challis Professor of International Law and Dean of the Faculty of Law, University of Sydney; Member of the Australian Bar,

as Counsel and Advocates,

*and*

the Commonwealth of Australia,

represented by

Mr. Gavan Griffith, Q.C., Solicitor-General of Australia,

as Agent and Counsel;

H.E. Mr. Warwick Weemaes, Ambassador of Australia to the Netherlands,

as Co-Agent;

Mr. Henry Burmester, Principal Adviser in International Law, Australian Attorney-General's Department,

as Co-Agent and Counsel;

Mr. Eduardo Jiménez de Aréchaga, Professor of International Law, Montevideo,
Mr. Derek W. Bowett, Q.C., emeritus Whewell Professor of International Law, University of Cambridge,
Mr. Alain Pellet, Professor of Law, University of Paris X-Nanterre and Institute of Political Studies, Paris,
Ms Susan Kenny, of the Australian Bar,

as Counsel;

Mr. Peter Shannon, Deputy Legal Adviser, Australian Department of Foreign Affairs and Trade,
Mr. Paul Porteous, First Secretary, Australian Embassy in the Netherlands,

as Advisers,

THE COURT,

composed as above,

after deliberation,

*delivers the following Judgment:*

1. On 19 May 1989, the Government of the Republic of Nauru (hereinafter called "Nauru") filed in the Registry of the Court an Application instituting proceedings against the Commonwealth of Australia (hereinafter called "Australia") in respect of a "dispute . . . over the rehabilitation of certain phosphate lands [in Nauru] worked out before Nauruan independence". To found the jurisdiction of the Court the Application relies on the declarations made by the two States accepting the jurisdiction of the Court, as provided for in Article 36, paragraph 2, of the Statute of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was communicated forthwith by the Registrar to the Government of Australia; in accordance with paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. Time-limits for the filing of the Memorial of Nauru and the Counter-Memorial of Australia were fixed by an Order of 18 July 1989. The Memorial was filed on 20 April 1990, within the time-limit fixed for this purpose. By a letter dated 19 September 1990, the Agent of Australia informed the Registrar that, after due consideration of the Memorial of Nauru, his Government had come to the conclusion that the Court had no jurisdiction in the case and that the Application was not admissible; he consequently informed the Registrar that Australia would raise preliminary objections in accordance with the provi-

sions of Article 79 of the Rules of Court. On 16 January 1991, within the time-limit fixed for the filing of the Counter-Memorial, the Government of Australia filed Preliminary Objections submitting that the Application was inadmissible and that the Court lacked jurisdiction to hear the claims made therein. Accordingly, by an Order dated 8 February 1991, the Court, recording that by virtue of the provisions of Article 79, paragraph 3, of the Rules of Court, the proceedings on the merits were suspended, fixed a time-limit for the presentation by the Government of Nauru of a Written Statement of its Observations and Submissions on the Preliminary Objections. That statement was filed on 17 July 1991, within the prescribed time-limit, and the case became ready for hearing in respect of the preliminary objections.

4. On 11 to 19, and 21 and 22 November 1991, public hearings were held in the course of which the Court heard the oral arguments and replies of the following:

*For Australia:* Mr. Gavan Griffith, Q.C.,
Mr. Eduardo Jiménez de Aréchaga,
Mr. Derek W. Bowett, Q.C.,
Mr. Henry Burmester,
Mr. Alain Pellet.

*For Nauru:* Mr. V. S. Mani,
H.E. Mr. Hammer DeRoburt, G.C.M.G., O.B.E., M.P.,
Mr. Leo D. Keke,
Mr. Barry Connell,
Mr. Ian Brownlie, Q.C.,
Mr. James Crawford.

During the hearings, questions were put by Members of the Court to both Parties, and replies were given either orally or in writing.

*

5. In the course of the written proceedings, the following submissions were presented by the Parties:

*On behalf of the Government of Nauru,*

in the Memorial:

> "On the basis of the evidence and legal argument presented in this Memorial, the Republic of Nauru
>
> *Requests the Court to adjudge and declare*
>
> that the Respondent State bears responsibility for breaches of the following legal obligations:
>
> *First:* the obligations set forth in Article 76 of the United Nations Charter and Articles 3 and 5 of the Trusteeship Agreement for Nauru of 1 November 1947.
>
> *Second:* the international standards generally recognized as applicable in the implementation of the principle of self-determination.
>
> *Third:* the obligation to respect the right of the Nauruan people to permanent sovereignty over their natural wealth and resources.

*Fourth:* the obligation of general international law not to exercise powers of administration in such a way as to produce a denial of justice *lato sensu.*

*Fifth:* the obligation of general international law not to exercise powers of administration in such a way as to constitute an abuse of rights.

*Sixth:* the principle of general international law that a State which is responsible for the administration of territory is under an obligation not to bring about changes in the condition of the territory which will cause irreparable damage to, or substantially prejudice, the existing or contingent legal interest of another State in respect of that territory.

*Requests the Court to adjudge and declare further*

that the Republic of Nauru has a legal entitlement to the Australian allocation of the overseas assets of the British Phosphate Commissioners which were marshalled and disposed of in accordance with the trilateral Agreement concluded on 9 February 1987.

*Requests the Court to adjudge and declare*

that the Respondent State is under a duty to make appropriate reparation in respect of the loss caused to the Republic of Nauru as a result of the breaches of its legal obligations detailed above and its failure to recognize the interest of Nauru in the overseas assets of the British Phosphate Commissioners."

*On behalf of the Government of Australia,*

in the Preliminary Objections:

"On the basis of the facts and law presented in these Preliminary Objections, the Government of Australia requests the Court to adjudge and declare that the Application by Nauru is inadmissible and that the Court lacks jurisdiction to hear the claims made by Nauru for all or any of the reasons set out in these Preliminary Objections."

*On behalf of the Government of Nauru,*

in the Written Statement of its Observations and Submissions on the Preliminary Objections:

"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."

6. In the course of the oral proceedings, the following submissions were presented by the Parties:

*On behalf of the Government of Australia,*

at the hearing of 21 November 1991:

"On the basis of the facts and law set out in its Preliminary Objections and its oral pleadings, and for all or any of the grounds and reasons set out

therein, the Government of Australia requests the Court to adjudge and declare that the claims by Nauru against Australia set out in their Application and Memorial are inadmissible and that the Court lacks jurisdiction to hear the claims."

*On behalf of the Government of Nauru,*

at the hearing of 22 November 1991:

"In consideration of its written and oral pleadings the Government of the Republic of Nauru requests the Court:

*To reject* the preliminary objections raised by Australia, and

*To adjudge and declare:*

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

*(b)* that the claims are admissible.

In the alternative, the Government of the Republic of Nauru requests the Court to declare that some or all of the Australian preliminary objections do not possess, in the circumstances of the case, an exclusively preliminary character, and in consequence, to join some or all of these objections to the merits."

* * *

7. The Court will first consider those of Australia's objections which concern the circumstances in which the dispute relating to rehabilitation of the phosphate lands worked out prior to 1 July 1967 arose between Nauru and Australia. It will then turn to the objection based on the fact that New Zealand and the United Kingdom are not parties to the proceedings. Lastly, it will rule on the objections to Nauru's submissions relating to the overseas assets of the British Phosphate Commissioners.

* *

8. The Court will begin by considering the question of its jurisdiction. In its Application, Nauru bases jurisdiction on the declarations whereby Australia and Nauru have accepted the jurisdiction of the Court under Article 36, paragraph 2, of the Statute. Those declarations were deposited with the Secretary-General of the United Nations on 17 March 1975 in the case of Australia and on 29 January 1988 in the case of Nauru. The declaration of Nauru stipulates that Nauru's acceptance of the Court's jurisdiction does not extend to "any dispute with respect to which there exists a dispute settlement mechanism under an agreement between the Republic of Nauru and another State". The declaration of Australia, for its part, specifies that it "does not apply to any dispute in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement".

9. Australia contends that as a result of the latter reservation the Court

lacks jurisdiction to deal with Nauru's Application. It recalls in that respect that Nauru, having been previously administered under a League of Nations Mandate, was placed under the Trusteeship System provided for in Chapter XII of the United Nations Charter by a Trusteeship Agreement approved by the General Assembly on 1 November 1947. That Agreement provided that the administration of Nauru was to be exercised by an Administering Authority made up of the Governments of Australia, New Zealand and the United Kingdom. Australia argues that any dispute which arose in the course of the Trusteeship between "the Administering Authority and the indigenous inhabitants" fell within the exclusive jurisdiction of the United Nations Trusteeship Council and General Assembly. Those organs, kept informed about Nauruan affairs by the Visiting Missions appointed by the Trusteeship Council, by petitions from the inhabitants, and by the reports of the Administering Authority, could make recommendations with respect to such disputes, not only to that Authority, but also to the representatives of the Nauruan people; they could also prompt negotiations with a view to settlement of such disputes. But in any event, according to Australia, any dispute of that type should be regarded as having been settled by the very fact of the termination of the Trusteeship, provided that that termination was unconditional.

10. In the present case, Australia emphasizes that the Nauru Local Government Council — an organ, created in 1951, representing the Nauruan community and which, from 1963 onwards, had been, in many respects, responsible for local administrative tasks — raised with the United Nations the question of rehabilitation of the worked-out phosphate lands from 1965 onwards. That question was discussed in subsequent years, both within the United Nations and in direct contacts. At the end of those discussions, an Agreement relating to the Nauru Island Phosphate Industry was concluded on 14 November 1967 between the Nauru Local Government Council, on the one hand, and Australia, New Zealand and the United Kingdom, on the other, the effect of which, in Australia's submission, was that Nauru waived its claims to rehabilitation of the phosphate lands. Australia maintains, moreover, that on 19 December 1967, the United Nations General Assembly terminated the Trusteeship without making any reservation relating to the administration of the Territory. In those circumstances, Australia contends that, with respect to the dispute presented in Nauru's Application, Australia and Nauru had agreed "to have recourse to some other method of peaceful settlement" within the meaning of the reservation in Australia's declaration, and that consequently the Court lacks jurisdiction to deal with that dispute.

11. The Court does not consider it necessary to enter at this point into the details of the arguments thus advanced. Declarations made pursuant to Article 36, paragraph 2, of the Statute of the Court can only relate to disputes between States. The declaration of Australia only covers that type of dispute; it is made expressly "in relation to any other State accepting the same obligation . . .". In these circumstances, the question that arises in this case is whether Australia and the Republic of Nauru did or

did not, after 31 January 1968, when Nauru acceded to independence, conclude an agreement whereby the two States undertook to settle their dispute relating to rehabilitation of the phosphate lands by resorting to an agreed procedure other than recourse to the Court. No such agreement has been pleaded or shown to exist. That question has therefore to be answered in the negative. The Court thus considers that the objection raised by Australia on the basis of the above-mentioned reservation must be rejected.

*

12. Australia's second objection is that the Nauruan authorities, even before acceding to independence, waived all claims relating to rehabilitation of the phosphate lands. This objection contains two branches. In the first place, the waiver, it is said, was the implicit but necessary result of the above-mentioned Agreement of 14 November 1967. It is also said to have resulted from the statements made in the United Nations in the autumn of 1967 by the Nauruan Head Chief on the occasion of the termination of the Trusteeship. In the view of Australia, Nauru may not go back on that two-fold waiver and its claim should accordingly be rejected as inadmissible.

13. The Court does not deem it necessary to enter into the various questions of law that are raised by the foregoing argument and, in particular, to consider whether any waiver by the Nauruan authorities prior to accession to independence is opposable to the Republic of Nauru. It will suffice to note that in fact those authorities did not at any time effect a clear and unequivocal waiver of their claims, whether one takes into consideration the negotiations which led to the Agreement of 14 November 1967, the Agreement itself, or the discussions at the United Nations.

14. The Parties are at one in recognizing that the Agreement of 14 November 1967 laid down the conditions under which the property in the capital assets of the phosphate industry on Nauru was to pass to the local authorities and the ways in which the phosphate would, in future, be worked and sold. They also recognize that that Agreement did not contain any express provision relating to rehabilitation of the phosphate lands previously worked out. However, the Parties disagree as to the significance of that silence. Australia maintains that "the Agreement did represent a comprehensive settlement of all claims by Nauru in relation to the phosphate industry", including rehabilitation of the lands, and that the Agreement was accordingly tantamount to a waiver by Nauru of its previous claims in that regard. Nauru, on the contrary, contends that the absence of any reference to that matter in the Agreement cannot be interpreted as implying a waiver.

15. The Court notes that during the discussions with the Administering Authority the delegation of the Nauru Local Government Council maintained, as early as June 1965, that "there was a responsibility on the Part-

ner Governments to restore at their cost the land that had been mined". In June 1966 the delegation restated that position, noting that costs had been estimated at 91 million Australian dollars and proposing that those costs should be shared by the three Governments in proportion to the benefits they had previously derived from the mining of the phosphate. It concluded by adding that Nauru would be prepared to assume responsibility for the restoration of any land mined subsequently if "the full economic benefit from the phosphate" was made available to the Nauruans at a future time. No agreement was reached on that subject in 1966 and the discussions resumed in April 1967. The Administering Authority then proposed the insertion into the future agreement of a provision to the effect that:

> "The Partner Governments consider that the proposed financial arrangements on phosphate cover the future needs of the Nauruan community including rehabilitation or resettlement."

During the meeting held on 16 May 1967, the delegation of the Administering Authority asked

> "would the Nauruans press their argument despite any financial arrangements made, that the Partner Governments had a responsibility on rehabilitation?"

The summary record of the discussions goes on to say that

> "*During the following discussion* it emerged that the Nauruans would still maintain their claim on the Partner Governments in respect of rehabilitation of areas mined in the past, even if the Partner Governments did not press for the withdrawal of the claim in a formal manner such as in an agreement."

There is no trace of any subsequent discussion of this question in the documents before the Court.

16. The Court notes that the Agreement of 14 November 1967 contains no clause by which the Nauruan authorities expressly waived their earlier claims. Furthermore, in the view of the Court, the text of the Agreement, read as a whole, cannot, regard being had to the circumstances set out in paragraph 15 above, be construed as implying such a waiver. The first branch of the Australian argument must be rejected.

17. Australia maintains further that the Nauruan authorities also waived their claims to rehabilitation of the lands during the debates at the United Nations that led, in the autumn of 1967, to the termination of the Trusteeship over Nauru and to its independence. Australia relies chiefly upon a statement made in the Fourth Committee of the United Nations General Assembly on 6 December 1967, by the Nauruan Head Chief, Mr. DeRoburt, in which he said:

> "[the island had the] good fortune [to possess] large deposits of high-grade phosphate. That economic base, of course, presented its own problems. One which worried the Nauruans derived from the fact that land from which phosphate had been mined would be totally unusable. Consequently, although it would be an expensive operation, that land would have to be rehabilitated and steps were already being taken to build up funds to be used for that purpose. That phosphate was a wasting asset was, in itself, a problem; in about twenty-five years' time the supply would be exhausted. The revenue which Nauru had received in the past and would receive during the next twenty-five years would, however, make it possible to solve the problem. Already some of the revenue was being allocated to development projects . . . In addition, a much larger proportion of its income was being placed in a long-term investment fund, so that, whatever happened, future generations would be provided for. In short, the Nauruans wanted independence and were confident that they had the resources with which to sustain it."

Australia argues that this statement amounted to an undertaking by the Nauruan authorities to finance any rehabilitation of lands worked out in the past from revenue deriving from future exploitation, and that it consequently constituted a waiver of any claim against the Administering Authority.

18. In order to ascertain the significance of this statement, it needs to be placed in context. As early as 1965, the Nauru Local Government Council had submitted to a Visiting Mission appointed by the United Nations Trusteeship Council a memorandum indicating that the soil on the island "must be fully rehabilitated". Then at its thirty-third session, in the spring of 1966, the Trusteeship Council noted a statement made by the representative of the people of Nauru that:

> "the responsibility for rehabilitating the Island, in so far as it is the Administering Authority's, remains with the Administering Authority. If it should turn out that Nauru gets its own independence in January 1968, from then on the responsibility will be ours. A rough assessment of the portions of responsibility for this rehabilitation exercise then is this: one-third is the responsibility of the Administering Authority and two-thirds is the responsibility of the Nauruan people."

In the spring of 1967, the representative of the people of Nauru again emphasized before the Trusteeship Council, at its thirty-fourth session, that "the Administering Authority should accept responsibility for the rehabilitation of the lands already mined".

19. Lastly, on 22 November 1967, the Trusteeship Council met to consider the request by Australia, New Zealand and the United Kingdom for the termination of Nauru's Trusteeship to enable the territory to accede to

independence on 31 January 1968. At that meeting, Head Chief DeRoburt stated that:

> "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."

The Trusteeship Council then adopted a draft resolution recommending the termination of the Trusteeship. Its report was submitted to the Fourth Committee of the General Assembly and it was during the proceedings of the Fourth Committee that Head Chief DeRoburt made the statement quoted above which Australia contends amounted to a waiver.

20. The Court cannot share this view. The statement referred to by Australia (set out in paragraph 17 above) deals with two distinct problems, namely, on the one hand, rehabilitation of the phosphate lands, and, on the other, the future depletion of the deposits. On the first point, which is the only one of interest here to the Court, Head Chief DeRoburt confined himself to stating that measures had already been taken to set aside funds for rehabilitation of the lands. Notwithstanding some ambiguity in the wording, the statement did not imply any departure from the point of view expressed clearly and repeatedly by the representatives of the Nauruan people before various organs of the United Nations and, in particular, before the Trusteeship Council on 22 November 1967.

21. The Court concludes that the Nauruan local authorities did not, before independence, waive their claim relating to rehabilitation of the phosphate lands worked out prior to 1 July 1967. The second objection raised by Australia must in consequence be rejected.

*

22. Australia's third objection is that Nauru's claim is

> "inadmissible on the ground that termination of the Trusteeship by the United Nations precludes allegations of breaches of the Trusteeship Agreement from now being examined by the Court".

Australia observes that "all the Nauruan allegations of breaches of obligations" relate to "the administration of the territory" placed under Trusteeship. Australia adds 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 General Assembly"; that when the General Assembly terminates a trust, "the whole system of administrative supervision [comes] to an end"; and that

> "in the absence of an express reservation recording a breach and an outstanding responsibility on the Administering Authority, termination is conclusive and operates as a complete discharge from all further responsibility".

According to Australia, Nauru therefore cannot now request the Court:

> "to undertake the task of exploring again the performance of the Trusteeship in order to overrule and contradict the conclusions and decisions taken by the competent United Nations organs in the exercise of their functions of supervision of the trusteeship system".

23. The Court notes that, by resolution 2347 (XXII) of 19 December 1967, the General Assembly of the United Nations resolved

> "in agreement with the Administering Authority, that the Trusteeship Agreement for the Territory of Nauru . . . shall cease to be in force upon the accession of Nauru to independence on 31 January 1968".

Such a resolution had "definitive legal effect" (*Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 32). Consequently, the Trusteeship Agreement was "terminated" on that date and "is no longer in force" (*ibid.*, p. 37). In the light of these considerations, it might be possible to question the admissibility of an action brought against the Administering Authority on the basis of the alleged failure by it to comply with its obligations with respect to the administration of the Territory. However, the Court does not consider it necessary to enter into this debate and will confine itself to examining the particular circumstances in which the Trusteeship for Nauru was terminated.

24. It is to be recalled in this respect that from 1965 to 1967 the question of rehabilitation of the worked-out lands was on several occasions discussed in the various competent United Nations bodies, namely, the Trusteeship Council, the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, the Fourth Committee of the General Assembly and the General Assembly itself.

25. The Nauru Local Government Council, in 1965, submitted to a United Nations Visiting Mission appointed by the Trusteeship Council a memorandum on the subject. The Mission stated in its report that, its

members not being "experts in the matter", it was unable to make any recommendation. The Trusteeship Council confined itself to taking note of that report on 29 June 1965. But the General Assembly, on 21 December 1965, requested that

> "immediate steps be taken by the Administering Authority towards restoring the island of Nauru for habitation by the Nauruan people as a sovereign nation" (resolution 2111 (XX)).

26. In agreement with the local authorities, the Administering Authority then commissioned a study by a Committee of Experts, which became known as the Davey Committee, on the possibilities of rehabilitating the phosphate lands. The Trusteeship Council, at its thirty-third session, in the spring of 1966, recalled resolution 2111 (XX) and noted that the study was being prepared. As for the General Assembly, on 20 December 1966, it again recommended that

> "the administering authority . . . take immediate steps, irrespective of the cost involved, towards restoring the island of Nauru for habitation by the Nauruan people as a sovereign nation" (resolution 2226 (XXI)).

27. In May 1967, the report by the Davey Committee was distributed to the members of the Trusteeship Council. A number of members of the Council raised the question of rehabilitation of the lands. The representative of France said he regretted that "no agreement had been reached between the Administering Authority and the Nauruan people" on the question. Liberia subsequently submitted to the Council a draft resolution stressing that it was the responsibility of the Administering Authority to restore the lands at its expense. That draft was not adopted, but the Council, "regretting that differences continue to exist on the question of rehabilitation", expressed the "earnest hope that it will be possible to find a solution to the satisfaction of both parties".

28. During the discussions in the Trusteeship Council in November 1967 with a view to termination of the Trusteeship, Head Chief DeRoburt, as indicated in paragraph 19 above, reserved his position on rehabilitation, expressly placing 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". The representative of the USSR stated that he was certain "that the legitimate demands of the Nauruan people . . . for the rehabilitation of the land would be fully met". The representatives of the Administering Authority, while indicating that the agreements concluded were financially favourable to Nauru, made no reference in their statements to the question of rehabilitation.

During the discussions in the Fourth Committee, following the statement by Head Chief DeRoburt mentioned in paragraph 17 above, the representative of the USSR again referred to the problem and the representative of India recalled that

"With regard to the question of responsibility for the rehabilitation of the mined areas of the island, there was still a considerable difference of opinion between the Nauruans and the Administering Authority."

The representative of India further expressed the hope that an equitable agreement would be concluded in this respect. Again, the representatives of the Administering Authority did not react.

29. The final resolution of the General Assembly of 19 December 1967, by which it decided, in agreement with the Administering Authority, to terminate the Trusteeship, does not, unlike the earlier resolutions, contain any provision inviting the Administering Authority to rehabilitate the lands. The resolution however recalls those earlier resolutions in its preamble.

30. The facts set out above show that, when, on the recommendation of the Trusteeship Council, the General Assembly terminated the Trusteeship over Nauru in agreement with the Administering Authority, everyone was aware of subsisting differences of opinion between the Nauru Local Government Council and the Administering Authority with regard to rehabilitation of the phosphate lands worked out before 1 July 1967. Accordingly, though General Assembly resolution 2347 (XXII) did not expressly reserve any rights which Nauru might have had in that regard, the Court cannot view that resolution as giving a discharge to the Administering Authority with respect to such rights. In the opinion of the Court, the rights Nauru might have had in connection with rehabilitation of the lands remained unaffected. Regard being had to the particular circumstances of the case, Australia's third objection must in consequence be rejected.

*

31. Australia's fourth objection stresses that Nauru achieved independence on 31 January 1968 and that, as regards rehabilitation of the lands, it was not until December 1988 that that State formally "raised with Australia and the other former Administering Powers its position". Australia therefore contends that Nauru's claim is inadmissible on the ground that it has not been submitted within a reasonable time. Nauru's delay in making its claim is alleged to be all the more prejudicial to Australia because the documentation relating to the Mandate and the Trusteeship may have been lost or dispersed in the interval, and because developments in the law during the interval render it more difficult to determine the legal obligations incumbent on the Administering Powers at the time of the alleged breaches of those obligations.

32. The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay

down any specific time-limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible.

33. In the present case, it was well known, at the time when Nauru gained its independence, that the question of rehabilitation of the phosphate lands had not been settled. On the day of declaring independence, 31 January 1968, the Nauruan Head Chief, Mr. DeRoburt, stated, according to press reports, that

> "We hold it against Britain, Australia and New Zealand to recognize that it is their responsibility to rehabilitate one third of the island."

On 5 December 1968 the President of Nauru wrote to the Minister for External Affairs of Australia indicating his desire to examine a specific rehabilitation scheme for the building of a new airstrip. The Australian Minister replied on 4 February 1969 as follows:

> "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."

34. This letter did not elicit any immediate reaction. Five years later, on the occasion of a State visit to Canberra, the President of Nauru raised the question of rehabilitation with the Prime Minister of Australia. In 1974 he brought up the matter a second time, without success, on the occasion of the visit to Nauru of the Australian Acting Minister for External Affairs.

35. It was only on 6 October 1983 that the President of Nauru wrote to the Prime Minister of Australia requesting him to "seek a sympathetic reconsideration of Nauru's position". That request was declined by Australia on 14 March 1984. Then, on 3 December 1986, Nauru set up a three-member Commission of Inquiry to study the question and informed the three former Administering Governments of the establishment of that Commission. Those Governments maintained their position and, following a series of exchanges of letters, Nauru applied to the Court on 19 May 1989.

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

Application was not rendered inadmissible by passage of time. Nevertheless, it will be for the Court, in due time, to ensure that Nauru's delay in seising it will in no way cause prejudice to Australia with regard to both the establishment of the facts and the determination of the content of the applicable law.

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37. Australia's fifth objection is that "Nauru has failed to act consistently and in good faith in relation to rehabilitation" and that therefore "the Court in exercise of its discretion, and in order to uphold judicial propriety should . . . decline to hear the Nauruan claims".

38. The Court considers that the Application by Nauru has been properly submitted in the framework of the remedies open to it. At the present stage, the Court is not called upon to weigh the possible consequences of the conduct of Nauru with respect to the merits of the case. It need merely note that such conduct does not amount to an abuse of process. Australia's objection on this point must also be rejected.

* *

39. The Court will now consider the objection by Australia based on the fact that New Zealand and the United Kingdom are not parties to the proceedings. Australia recalls that the League of Nations Mandate relating to Nauru was conferred in 1920 upon "His Britannic Majesty" as Sovereign of the United Kingdom as well as of Australia and New Zealand. That Mandate was exercised under arrangements agreed on by the three States. Subsequently a Trusteeship over the Territory was granted in 1947 by the United Nations to the same three Governments, "jointly" designated as Administering Authority. Consequently, according to Australia:

> "the claim of Nauru is, in substance, not a claim against Australia itself but a claim against the Administering Authority in relation to Nauru".

The Court, it is argued, could therefore not pass upon the responsibility of the Respondent without adjudicating upon the responsibility of New Zealand and the United Kingdom; these two States are in reality "parties to the dispute"; but they are not parties to the proceedings. Australia accordingly contends that

> "the claims [of Nauru] are inadmissible and the Court lacks jurisdiction as any judgment on the question of breach of the Trusteeship Agreement would involve the responsibility of third States that have not consented to the Court's jurisdiction in the present case".

40. In order to assess the validity of this objection, the Court will first refer to the Mandate and Trusteeship régimes and the way in which they applied to Nauru.

41. The Mandate system, instituted by virtue of Article 22 of the Covenant of the League of Nations, was conceived for the benefit of the territories "which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world". In accordance with the same Article 22, "the well-being and development of such peoples form a sacred trust of civilisation". Thus the Mandate "was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object — a sacred trust of civilization" (*International Status of South West Africa, I.C.J. Reports 1950*, p. 132). This " 'trust' had to be exercised for the benefit of the peoples concerned, who were admitted to have interests of their own" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971*, pp. 28-29, para. 46).

42. It is in that context that the Council of the League of Nations granted to His Britannic Majesty, on 17 December 1920, "full power of administration and legislation over the territory subject to the ... Mandate as an integral portion of his territory". An Agreement concluded between "His Majesty's Government in London, His Majesty's Government of the Commonwealth of Australia, and His Majesty's Government of the Dominion of New Zealand" on 2 July 1919 and amended on 30 May 1923 laid down the conditions "for the exercise of the said Mandate and for the mining of the phosphate deposits on the said island". This exploitation was entrusted to an enterprise managed by three "British Phosphate Commissioners" appointed by the three Governments. Article 1 of the amended Agreement provided that

> "The Administration of the Island shall be vested in an Administrator. The first Administrator shall be appointed for a term of five years by the Australian Government; and thereafter the Administrator shall be appointed in such manner as the three Governments decide."

It was further provided that

> "All Ordinances made by the Administrator shall be subject to confirmation or disallowance in the name of His Majesty, whose pleasure in respect of such confirmation or disallowance shall be signified by one of His Majesty's Principal Secretaries of State, or by the Governor-General of the Commonwealth of Australia ... or by the Governor-General of the Dominion of New Zealand ... according as the Administrator shall have been appointed by His Majesty's Government in London, or by the Government of the Commonwealth of Australia, or by the Government of the Dominion of New Zealand, as the case may be."

The text added:

> "The Administrator shall conform to such instructions as he shall from time to time receive from the Contracting Government by which he has been appointed."

Provision was made finally for a system whereby decisions taken by the Administrator were communicated to the three Governments concerned.

43. As a matter of fact, the Administrator was at all times appointed by the Australian Government and was accordingly under the instructions of that Government. His "ordinances, proclamations and regulations" were subject to confirmation or rejection by the Governor-General of Australia. The other Governments, in accordance with the Agreement, received such decisions for information only.

44. On the demise of the League of Nations and with the birth of the United Nations, provisions comparable to those of the Covenant were incorporated into the Charter of the United Nations as it relates to the Trusteeship System therein established. In this connection, Article 76 of the Charter provides that:

> "The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:
>
> . . . . . .
>
> *(b)* to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement".

45. The system of administration applied in Nauru at the time of the League of Nations was maintained in essence when the Mandate was replaced by a Trusteeship. The Trusteeship Agreement for the Territory of Nauru, approved by the United Nations General Assembly on 1 November 1947, provided in Article 2 that:

> "The Governments of Australia, New Zealand and the United Kingdom (hereinafter called 'the Administering Authority') are hereby designated as the joint Authority which will exercise the administration of the Territory."

It added in Article 4 that:

> "The Administering Authority will be responsible for the peace, order, good government and defence of the Territory, and for this purpose, in pursuance of an Agreement made by the Governments of

Australia, New Zealand and the United Kingdom, the Government of Australia will, on behalf of the Administering Authority and except and until otherwise agreed by the Governments of Australia, New Zealand and the United Kingdom, continue to exercise full powers of legislation, administration and jurisdiction in and over the Territory."

46. Under the régime thus established, the Agreements of 2 July 1919 and 30 May 1923 remained in force and the Administrator continued to be appointed in fact by Australia. The provisions of those Agreements relating to the administration of the Territory were not abrogated until 26 November 1965 by a new Agreement reached between the three Governments, providing for the establishment of a Legislative Council, an Executive Council and Nauruan Courts of Justice. It specified in Article 3 that the "administration of the Territory" was to be vested in "an Administrator appointed by the Government of the Commonwealth of Australia". It provided that the Administrator, the Governor-General of Australia and the Parliament of Australia were to have certain powers. The agreement to establish these new arrangements was implemented by appropriate legislative and other steps taken by Australia. The arrangements continued to apply until Nauru attained independence.

47. In these circumstances, the Court notes that the three Governments mentioned in the Trusteeship Agreement constituted, in the very terms of that Agreement, "the Administering Authority" for Nauru; that this Authority did not have an international legal personality distinct from those of the States thus designated; and that, of those States, Australia played a very special role established by the Trusteeship Agreement of 1947, by the Agreements of 1919, 1923 and 1965, and by practice.

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48. Australia's preliminary objection in this respect appears to contain two branches, the first of which can be dealt with briefly. It is first contended by Australia that, in so far as Nauru's claims are based on the conduct of Australia as one of the three States making up the Administering Authority under the Trusteeship Agreement, the nature of the responsibility in that respect is such that a claim may only be brought against the three States jointly, and not against one of them individually. In this connection, Australia has raised the question whether the liability of the three States would be "joint and several" *(solidaire)*, so that any one of the three would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering Authority, and not merely a one-third or some other proportionate share. This is a question which the Court must reserve for the merits; but it is independent of the question whether Australia can be sued alone. The Court does not consider that any reason has been shown why a claim brought against only one of the

three States should be declared inadmissible *in limine litis* merely because that claim raises questions of the administration of the Territory, which was shared with two other States. It cannot be denied that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and there is nothing in the character of that Agreement which debars the Court from considering a claim of a breach of those obligations by Australia.

49. Secondly, Australia argues that, since together with itself, New Zealand and the United Kingdom made up the Administering Authority, any decision of the Court as to the alleged breach by Australia of its obligations under the Trusteeship Agreement would necessarily involve a finding as to the discharge by those two other States of their obligations in that respect, which would be contrary to the fundamental principle that the jurisdiction of the Court derives solely from the consent of States. The question that arises is accordingly whether, given the régime thus described, the Court may, without the consent of New Zealand and the United Kingdom, deal with an Application brought against Australia alone.

50. The Court has had to consider questions of this kind on previous occasions. In the case concerning the *Monetary Gold Removed from Rome in 1943 (Preliminary Question)*, the first submission in the Italian Application was worded as follows:

> "(1) that the Governments of the French Republic, Great Britain and Northern Ireland and the United States of America should deliver to Italy any share of the monetary gold that might be due to Albania under Part III of the Paris Act of January 14th, 1946, in partial satisfaction for the damage caused to Italy by the Albanian law of January 13th, 1945" (*I.C.J. Reports 1954*, p. 22).

In its Judgment of 15 June 1954 the Court, noting that only France, Italy, the United Kingdom and the United States of America were parties to the proceedings, found that

> "To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent." (*Ibid.*, p. 32.)

Noting that Albania had chosen not to intervene, the Court stated:

> "In the present case, Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania." *(Ibid.)*

51. Subsequently, in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* the Court observed as follows:

> "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' (*I.C.J. Reports 1954*, p. 32). 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 (paragraph 74, above) 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." (Judgment of 26 November 1984, *I.C.J. Reports 1984*, p. 431, para. 88.)

52. That jurisprudence was applied by a Chamber of the Court in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* by a Judgment given on 13 September 1990, which examined whether the legal interests asserted by Nicaragua in support of an application for permission to intervene in the case did or did not form "part of 'the very subject-matter of the decision' " to be taken or whether they were only affected by that decision (*I.C.J. Reports 1990*, p. 116, para. 56).

53. National courts, for their part, have more often than not the necessary power to order *proprio motu* the joinder of third parties who may be affected by the decision to be rendered; that solution makes it possible to settle a dispute in the presence of all the parties concerned. But on the international plane the Court has no such power. Its jurisdiction depends on the consent of States and, consequently, the Court may not compel a State to appear before it, even by way of intervention.

54. A State, however, which is not a party to a case is free to apply for

permission to intervene in accordance with Article 62 of the Statute, which provides that

> "Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene."

But the absence of such a request in no way precludes the Court from adjudicating upon the claims submitted to it, provided that the legal interests of the third State which may possibly be affected do not form the very subject-matter of the decision that is applied for. Where the Court is so entitled to act, the interests of the third State which is not a party to the case are protected by Article 59 of the Statute of the Court, which provides that "The decision of the Court has no binding force except between the parties and in respect of that particular case."

55. In the present case, the interests of New Zealand and the United Kingdom do not constitute the very subject-matter of the judgment to be rendered on the merits of Nauru's Application and the situation is in that respect different from that with which the Court had to deal in the *Monetary Gold* case. In the latter case, the determination of Albania's responsibility was a prerequisite for a decision to be taken on Italy's claims. In the present case, the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, the only object of Nauru's claim. Australia, moreover, recognizes that in this case there would not be a determination of the possible responsibility of New Zealand and the United Kingdom *previous* to the determination of Australia's responsibility. It nonetheless asserts that there would be a *simultaneous* determination of the responsibility of all three States and argues that, so far as concerns New Zealand and the United Kingdom, such a determination would be equally precluded by the fundamental reasons underlying the *Monetary Gold* decision. The Court cannot accept this contention. In the *Monetary Gold* case the link between, on the one hand, the necessary findings regarding Albania's alleged responsibility and, on the other, the decision requested of the Court regarding the allocation of the gold, was not purely temporal but also logical; as the Court explained,

> "In order . . . to determine whether Italy is entitled to receive the gold, it is necessary to determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay compensation to her." (*I.C.J. Reports 1954*, p. 32.)

In the present case, a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for

the Court's decision on Nauru's claims against Australia. Accordingly, the Court cannot decline to exercise its jurisdiction.

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56. The Court must however emphasize that its ruling in the present Judgment on this objection of Australia does not in any way prejudge the merits. The present Judgment does not settle the question whether reparation would be due from Australia, if found responsible, for the whole or only for part of the damage Nauru alleges it has suffered, regard being had to the characteristics of the Mandate and Trusteeship Systems outlined above and, in particular, the special role played by Australia in the administration of the Territory. These questions are to be dealt with at the merits stage.

57. For the reasons given, the Court considers that the fact that New Zealand and the United Kingdom are not parties to the case is no bar to the proceedings brought by Nauru against Australia. The objection put forward in this respect by Australia must be rejected.

* *

58. Finally, the Court will examine the objections addressed by Australia to the claim by Nauru concerning the overseas assets of the British Phosphate Commissioners. At the end of its Memorial on the merits, Nauru requests the Court to adjudge and declare that

> "the Republic of Nauru has a legal entitlement to the Australian allocation of the overseas assets of the British Phosphate Commissioners which were marshalled and disposed of in accordance with the trilateral Agreement concluded on 9 February 1987"

and

> "the Respondent State is under a duty to make appropriate reparation in respect of the loss caused to the Republic of Nauru as a result of ... its failure to recognize the interest of Nauru in the overseas assets of the British Phosphate Commissioners".

59. The British Phosphate Commissioners were established by Article 3 of the Agreement of 2 July 1919 between the United Kingdom, Australia and New Zealand (see paragraph 42 above); that Article provided for the establishment of a body called "Board of Commissioners", composed of three members, one to be appointed by each of the Partner Governments. Article 6 provided that the

> "title to the phosphate deposits ... and to all land, buildings, plant, and equipment on the island used in connection with the working of the deposits shall be vested in the Commissioners";

Article 9 provided on the one hand that the deposits would "be worked and sold under the direction, management, and control of the Commis-

sioners" and, on the other, that it would be the duty of the latter "to dispose of the phosphates for the purpose of the agricultural requirements of the United Kingdom, Australia and New Zealand, so far as those requirements extend"; and, although in accordance with Articles 10 and 11, the sale of phosphates to third States and at market prices was to be exceptional — it being mandatory for priority sales to the three Partner Governments to be at a price close to the cost price —, Article 12 provided that any surplus funds accumulated as a result of sales to third States or otherwise would

> "be credited by the Commissioners to the three Governments . . . and held by the Commissioners in trust for the three Governments to such uses as those Governments may direct . . .".

60. The British Phosphate Commissioners conducted their activities on Nauru, in accordance with the Agreement of 2 July 1919, under the Mandate and then under the Trusteeship. The Agreement concluded on 14 November 1967 between the Nauru Local Government Council, on the one hand, and the Governments of Australia, New Zealand and the United Kingdom, on the other (see paragraph 10 above), provided for the sale to Nauru, by the Partner Governments, of the capital assets of the phosphate industry on the island, which had been vested in the Commissioners on behalf of those Governments (Arts. 7-11); the Agreement also provided for the transfer to Nauru of the management and supervision of phosphate operations on the island (Arts. 12-15). The assets of the British Phosphate Commissioners on Nauru were transferred to the Government of Nauru in 1970, after the final payment therefor had been made and the British Phosphate Commissioners thereupon terminated their activities on Nauru. Following the entry into force of an Agreement of 9 June 1981 between New Zealand and Australia, which put an end to the functions that the Commissioners exercised on Christmas Island, Australia, New Zealand and the United Kingdom decided to wind up the affairs of the British Phosphate Commissioners and to divide among themselves the remaining assets and liabilities of the Commissioners: to that end, they concluded on 9 February 1987 an Agreement to "terminate the Nauru Island Agreement [of] 1919".

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61. During 1987, there were various exchanges of correspondence between the Parties concerning the winding up of the affairs of the British Phosphate Commissioners. Having requested and obtained confirmation of the intention of the Partner Governments to proceed with the disposal of the assets of the Commissioners, and having asked to be consulted, the Department of External Affairs of Nauru, on 30 January 1987, addressed a Note to the Australian High Commission, in which it requested the said Governments

> "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 . . . Commission of Inquiry (into rehabilitation set up by Nauru on 3 December 1986) [and] that the office records and other documents of the . . . 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".

After the conclusion of the Tripartite Agreement of 9 February 1987, the President of Nauru addressed, on 4 May 1987, a letter to the Australian Minister for Foreign Affairs in which, among other things, he stated that:

> "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."

By a letter of 15 June 1987, the Australian Minister for Foreign Affairs replied in the following terms:

> "The BPC and the Partner Governments have discharged fairly all outstanding obligations. The residual assets of the BPC were not derived from its Nauru operations."

Lastly, a further letter addressed on 23 July 1987 to the Australian Minister for Foreign Affairs by the President of Nauru contained the following passage:

> "I am sure, taking into account my Government's knowledge of the manner of accumulation of surplus funds by the BPC, 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 BPC 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."

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62. Australia asserts that Nauru's claim concerning the overseas assets of the British Phosphate Commissioners is inadmissible and that the Court has no jurisdiction in relation to that claim, on the grounds that: the claim is a new one; Nauru has not established that the claim arises out of a "legal dispute" between the Parties, within the meaning of Article 36, paragraph 2, of the Statute of the Court; Nauru cannot claim any legal title to the assets in question and has not proven a legal interest capable of justifying its claim in this regard; and each of the objections raised by Australia concerning the other claims by Nauru also applies to the claim relating to the overseas assets.

63. The Court will first deal with the Australian objection based on its contention that the Nauruan claim is a new one. Australia maintains that the claim in question is inadmissible on the ground that it appeared for the first time in the Nauruan Memorial; that Nauru has not proved the existence of any real link between that claim, on the one hand, and its claims relating to the alleged failure to observe the Trusteeship Agreement and to the rehabilitation of the phosphate lands, on the other; and that the claim in question seeks to transform the dispute brought before the Court into a dispute that would be of a different nature. Nauru, for its part, argues that its claim concerning the overseas assets of the British Phosphate Commissioners does not constitute a new basis of claim and that, even if it were formally so, the Court could nevertheless entertain it; that the claim is closely related to the matrix of fact and law concerning the management of the phosphate industry during the period from 1919 until independence; and that the claim is "implicit" in the claims relating to the violations of the Trusteeship Agreement and "consequential on" them.

64. The Court notes in the first place that no reference to the disposal of the overseas assets of the British Phosphate Commissioners appears in Nauru's Application, either as an independent claim or in relation to the claim for reparation submitted, and that the Application nowhere mentions the Agreement of 9 February 1987, notwithstanding the statement contained in the letter of the President of Nauru dated 23 July 1987 that he was leaving the matter "perhaps for another place and another time" (see paragraph 61 above). On the other hand, the Court notes that, after reiterating the claims previously made in its Application, Nauru adds, at the end of its Memorial, the following submission:

> "Requests the Court to adjudge and declare *further*
>
> that the Republic of Nauru has a legal entitlement to the Australian allocation of the overseas assets of the British Phosphate Commissioners . . ." (Emphasis added.)

This submission is presented separately, in the form of a distinct paragraph.

65. Consequently, the Court notes that, from a formal point of view, the claim relating to the overseas assets of the British Phosphate Commissioners, as presented in the Nauruan Memorial, is a new claim in relation to the claims presented in the Application. Nevertheless, as the Permanent Court of International Justice pointed out in the *Mavrommatis Palestine Concessions* case:

> "The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law." (*P.C.I.J., Series A, No. 2*, p. 34; cf. also *Northern Cameroon, I.C.J. Reports 1963*, p. 28.)

The Court will therefore consider whether, although formally a new

claim, the claim in question can be considered as included in the original claim in substance.

66. It appears to the Court difficult to deny that links may exist between the claim made in the Memorial and the general context of the Application. What is more, Australia has acknowledged before the Court that the "assets distributed in 1987 were derived from a number of sources" and that "some of [them] may have been derived from the proceeds of sale of Nauruan phosphate"; and Nauru, in its Application, has alleged that the phosphate industry on the island was carried on in such a way that the real benefit went to the three States — principally Australia —, that exploitation of the phosphate had resulted in the devastation of the land and that inadequate royalties had been paid to the Nauruan people. Moreover, the Court also notes that the diplomatic correspondence exchanged by the Parties in 1987 (see paragraph 61 above) indicates that the Nauruan Government considered that there was a link between its claim for rehabilitation of the worked-out lands and the disposal of the overseas assets of the British Phosphate Commissioners.

67. The Court, however, is of the view that, for the claim relating to the overseas assets of the British Phosphate Commissioners to be held to have been, as a matter of substance, included in the original claim, it is not sufficient that there should be links between them of a general nature. An additional claim must have been implicit in the application (*Temple of Preah Vihear, Merits, I.C.J. Reports 1962*, p. 36) or must arise "directly out of the question which is the subject-matter of that Application" (*Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, I.C.J. Reports 1974*, p. 203, para. 72). The Court considers that these criteria are not satisfied in the present case.

68. Moreover, while not seeking in any way to prejudge the question whether there existed, on the date of the filing of the Application, a dispute of a legal nature between the Parties as to the disposal of the overseas assets of the British Phosphate Commissioners, the Court is convinced that, if it had to entertain such a dispute on the merits, the subject of the dispute on which it would ultimately have to pass would be necessarily distinct from the subject of the dispute originally submitted to it in the Application. To settle the dispute on the overseas assets of the British Phosphate Commissioners the Court would have to consider a number of questions that appear to it to be extraneous to the original claim, such as the precise make-up and origin of the whole of these overseas assets; and the resolution of an issue of this kind would lead it to consider the activities conducted by the Commissioners not only, *ratione temporis*, after 1 July 1967, but also, *ratione loci*, outside Nauru (on Ocean Island (Banaba) and Christmas Island) and, *ratione materiae*, in fields other than the exploitation of the phosphate (for example, shipping).

69. Article 40, paragraph 1, of the Statute of the Court provides that the "subject of the dispute" must be indicated in the Application; and Ar-

ticle 38, paragraph 2, of the Rules of Court requires "the precise nature of the claim" to be specified in the Application. These provisions are so essential from the point of view of legal security and the good administration of justice that they were already, in substance, part of the text of the Statute of the Permanent Court of International Justice, adopted in 1920 (Art. 40, first paragraph), and of the text of the first Rules of that Court, adopted in 1922 (Art. 35, second paragraph), respectively. On several occasions the Permanent Court had to indicate the precise significance of these texts. Thus, in its Order of 4 February 1933 in the case concerning the *Prince von Pless Administration (Preliminary Objection)*, it stated that:

> "under Article 40 of the Statute, it is the Application which sets out the subject of the dispute, and the Case, though it may elucidate the terms of the Application, must not go beyond the limits of the claim as set out therein . . ." (*P.C.I.J., Series A/B, No. 52*, p. 14).

In the case concerning the *Société commerciale de Belgique*, the Permanent Court stated:

> "It is to be observed that the liberty accorded to the parties to amend their submissions up to the end of the oral proceedings must be construed reasonably and without infringing the terms of Article 40 of the Statute and Article 32, paragraph 2, of the Rules which provide that the Application must indicate the subject of the dispute.... it is clear that the Court cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character. A practice of this kind would be calculated to prejudice the interests of third States to which, under Article 40, paragraph 2, of the Statute, all applications must be communicated in order that they may be in a position to avail themselves of the right of intervention provided for in Articles 62 and 63 of the Statute." (*P.C.I.J., Series A/B, No. 78*, p. 173; cf. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, I.C.J. Reports 1984*, p. 427, para. 80.)

70. In the light of the foregoing, the Court concludes that the Nauruan claim relating to the overseas assets of the British Phosphate Commissioners is inadmissible inasmuch as it constitutes, both in form and in substance, a new claim, and the subject of the dispute originally submitted to the Court would be transformed if it entertained that claim.

71. The preliminary objection raised by Australia on this point is therefore well founded. It follows that it is not necessary for the Court to consider here the other objections of Australia with regard to the submissions of Nauru concerning the overseas assets of the British Phosphate Commissioners.

* * *

72. For these reasons,

THE COURT,

(1) (a) *rejects*, unanimously, the preliminary objection based on the reservation made by Australia in its declaration of acceptance of the compulsory jurisdiction of the Court;

(b) *rejects*, by twelve votes to one, the preliminary objection based on the alleged waiver by Nauru, prior to accession to independence, of all claims concerning the rehabilitation of the phosphate lands worked out prior to 1 July 1967;

IN FAVOUR: *President* Sir Robert Jennings; *Judges* Lachs, Ago, Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Ranjeva;

AGAINST: *Vice-President* Oda;

(c) *rejects*, by twelve votes to one, the preliminary objection based on the termination of the Trusteeship over Nauru by the United Nations;

IN FAVOUR: *President* Sir Robert Jennings; *Judges* Lachs, Ago, Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Ranjeva;

AGAINST: *Vice-President* Oda;

(d) *rejects*, by twelve votes to one, the preliminary objection based on the effect of the passage of time on the admissibility of Nauru's Application;

IN FAVOUR: *President* Sir Robert Jennings; *Judges* Lachs, Ago, Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Ranjeva;

AGAINST: *Vice-President* Oda;

(e) *rejects*, by twelve votes to one, the preliminary objection based on Nauru's alleged lack of good faith;

IN FAVOUR: *President* Sir Robert Jennings; *Judges* Lachs, Ago, Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Ranjeva;

AGAINST: *Vice-President* Oda;

(f) *rejects*, by nine votes to four, the preliminary objection based on the fact that New Zealand and the United Kingdom are not parties to the proceedings;

IN FAVOUR: *Judges* Lachs, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Ranjeva;

AGAINST: *President* Sir Robert Jennings; *Vice-President* Oda; *Judges* Ago, Schwebel;

(g) *upholds*, unanimously, the preliminary objection based on the claim concerning the overseas assets of the British Phosphate Commissioners being a new one;

(2) *finds*, by nine votes to four, that, on the basis of Article 36, paragraph 2, of the Statute of the Court, it has jurisdiction to entertain the Application filed by the Republic of Nauru on 19 May 1989 and that the said Application is admissible;

IN FAVOUR: *Judges* Lachs, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Ranjeva;

AGAINST: *President* Sir Robert Jennings; *Vice-President* Oda; *Judges* Ago, Schwebel;

(3) *finds*, unanimously, that the claim concerning the overseas assets of the British Phosphate Commissioners, made by Nauru in its Memorial of 20 April 1990, is inadmissible.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twenty-sixth day of June, one thousand nine hundred and ninety-two, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of Nauru and the Government of the Commonwealth of Australia, respectively.

*(Signed)* R. Y. JENNINGS,
President.

*(Signed)* Eduardo VALENCIA-OSPINA,
Registrar.

Judge SHAHABUDDEEN appends a separate opinion to the Judgment of the Court.

President Sir Robert JENNINGS, Vice-President ODA, Judges AGO and SCHWEBEL append dissenting opinions to the Judgment of the Court.

*(Initialled)* R.Y.J.

*(Initialled)* E.V.O.