DISSENTING OPINION OF VICE-PRESIDENT ODA

1. The main purpose of this opinion is to set forth my reasons for casting a negative vote on operative parts 1 *(b)*, *(c)*, *(d)* and *(e)* of the Judgment. The Application of Nauru was, to my mind, clearly inadmissible on those counts alone. My subsidiary purpose, which can be disposed of at once, is to state that my negative vote on operative part 1 *(f)* is motivated by my belief that it is premature to close the door on the objection concerned, which I find too closely connected with the merits for present decision; this particular vote on my part does not therefore signify that I necessarily accept this objection without further examination.

2. My vote against operative part 2 resulted as the logical conclusion of my belief that so many preliminary objections ought to have been upheld.

I. *Re* Operative Parts 1 *(b)* and *(c)*: Concerning the Existence of the Claim in the Present Case

3. With regard to

> "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" (operative part 1 *(b)*),

the Court has held that

> "[i]t 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" (Judgment, para. 13);

while, as for "the preliminary objection based on the termination of the Trusteeship over Nauru by the United Nations" (operative part 1 *(c)*), the Court, "confin[ing] itself to examining the particular circumstances in which the Trusteeship for Nauru was terminated" (Judgment, para. 23), has rejected it because

> "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." (Judgment, para. 30.)

4. I am unable to concur in these views of the Court. My view is different from that of the Judgment with regard to the significance of certain developments during the Trusteeship period. I have in particular some doubts whether there really existed, towards the end of that period, any Nauruan claim for land rehabilitation, and I feel unable to entertain what the Judgment refers to, without further elaboration, as the "particular circumstances" (Judgment, paras. 23 and 30) prevailing at the termination of the Trusteeship. Hence I must proceed to a somewhat lengthy recital of the facts relating to "the negotiations which led to the Agreement of 14 November 1967, the Agreement itself, or the discussions at the United Nations" (Judgment, para. 13).

1. Negotiations between the Administering Authority and the Nauruan Authorities and their Agreement of November 1967

5. Under the Trusteeship Agreement of 1 November 1947 (*UNTS*, Vol. 10, p. 4), approved by the United Nations General Assembly, the responsibility of an Administering Authority in respect of Nauru was conferred upon Australia, New Zealand and the United Kingdom. Such an Authority is fully accountable to the United Nations for both the administration and the supervision of the territory under Trusteeship (cf. Arts. 75 and 81 of the Charter). Moreover, by Article 3 of the Agreement the three Governments constituting the Authority:

> "under[took] to administer the Territory [Nauru] in accordance with the provisions of the Charter and in such a manner as to achieve in the Territory the basic objectives of the International Trusteeship System . . .".

These basic objectives included the aim of

> "promot[ing] 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 . . ." (United Nations Charter, Art. 76, para. *(b)*).

By Article 5 of the Agreement, the Administering Authority — i.e., all three Governments — further

> "under[took] that in the discharge of its obligations under article 3 of this Agreement . . .
>
> . . . . . .
>
> 2. It [would], in accordance with its established policy:
>
> *(a)* . . . respect the rights and safeguard the interests, both present and future, of the indigenous inhabitants of the Territory [Nauru] . . .".

However, by the intervening Article 4, the Australian Government was to "continue to exercise full powers of legislation, administration and jurisdiction in and over the Territory". There was thus a delegation of powers from New Zealand and the United Kingdom, though neither was thereby absolved from responsibility: indeed the same Article 4 opens with the words: "The Administering Authority will be responsible for the peace, order, good government and defence of the Territory . . ." The 1947 Trusteeship Agreement was later supplemented and amended by agreements between the three Governments. In particular, the Agreement relating to Nauru of 26 November 1965 (*UNTS*, Vol. 598, p. 81), drafted "after consultation with the Nauruan people" (Preface to the Agreement), provided for the establishment of the Legislative Council and the Executive Council (Arts. 1-2), in which the participation of the Nauruan peoples was widely recognized. Yet the administration of the Territory was to remain in the hands of an Administrator appointed by the Government of Australia (Art. 3).

6. In the early days of the Trusteeship, before the conclusion of the tripartite 1965 Agreement, the participation of the Nauruan people in the administration or the protection of their interests was completely subordinate to the role of the Administrator, although the Nauruan Council of Chiefs, set up to advise the Administrator on Nauruan matters, was reorganized in 1950-1951, and in that year the Head Chief participated for the first time in the administration as a Native Affairs Officer. It is true that, under the 1965 Agreement, the Nauruan people's right to participate in the administration of the Territory was recognized, but it is most important to note that that right was not recognized as being independent from the administration or supervision carried out by the Administrator. The responsibilities, as well as the duties and rights, of the Administering Authority were placed under the exclusive control of the United Nations, acting through the Trusteeship Council and the General Assembly or the relevant subsidiary organs. Hence, apart from any claims to relief for any damages arising out of acts of the administering organs which might have been settled by the judicial organ of Nauru itself, any claims or disputes raised by the Nauruan people as a collectivity could only have been dealt with by the United Nations mechanism. In other words, the United Nations was responsible for supervising the behaviour of the Administrator as the plenipotentiary of the Authority, and for ensuring that he respected the rights and safeguarded the interests of the Nauruan people.

7. The idea of a possible rehabilitation of the worked-out phosphate lands was raised for the first time at the negotiations held between the Delegation of the Nauru Local Government Council (NLGC), of which the leader was Head Chief DeRoburt, and Australian officials representing the Administering Authority (Australia, New Zealand and the United Kingdom), negotiations which took place in Canberra from 31 May to 10 June 1965 (Nauru, "Record of Negotiations, 31 May-10 June 1965,

between the Delegation of Nauru Local Government Council and Australian Officials Representing Administering Authority" (contained in Memorial of Nauru (hereinafter referred to as NM), Vol. 3, as Annex 2)) before the participation of the Nauruan people was widely recognized by the Agreement of November 1965. In these negotiations a paper on "Rehabilitation of Nauru (Financial and Technical Requirements)" (which had apparently been prepared by the NLGC) was submitted, some passages of which read as follows:

> "In view of the lack of any other suitable alternative the Council [NLGC] has decided that it is in the best interests of the Nauruan people to remain on Nauru. The only question at issue, therefore, is how their island home can be preserved.
>
> . . . . . .
>
> As a start, the CSIRO [Commonwealth Scientific and Industrial Research Organization] should be approached to advise on the technical requirements for rehabilitation and the most efficient means of restoring the land. The Water Resources Council should be invited to assist in measuring the water resources of Nauru. These are all matters of detail but clearly decisions as to how rehabilitation can best be accomplished must await these surveys." (NM, Vol. 3, Ann. 2, "Record of Negotiations", Ann. F, pp. 166 and 169.)

In the "Summary of Conclusions" of these negotiations it was stated:

> "*3. Rehabilitation of Nauru*
>
> The Nauruan delegation stated that it considered that there was a responsibility on the partner governments to restore at their cost the land that had been mined, since they had had the benefit of the phosphate. The Australian delegation was not able on behalf of the partner governments to take any commitment regarding responsibility for any rehabilitation proposals the objectives and costs of which were unknown and the effectiveness of which was uncertain." (*Ibid.*, Ann. L, pp. 195-196.)

8. The demand of the Nauruan people for the rehabilitation of the worked-out phosphate lands at the 1965 Canberra meetings and its denial by Australia on behalf of the Administering Authority, which took the view that the problem should be settled by means of a resettlement of the people on another island instead of by land rehabilitation, was repeated in the 1966 talks between the delegation representing the Nauru Local Government Council and the Joint Delegation of Officials, representing the Administering Authority, that were held at Canberra from 14 June to 1 July 1966 (Nauru Phosphate Industry, "Record of Discussions held in Canberra, 14 June-1 July 1966" (contained in NM, Vol. 3, as Annex 4)). At

the fifth session, on 20 June, Head Chief DeRoburt read out a statement which in part ran:

> "The Nauruan people are prepared to take over the responsibility for restoration of any land mined *after* we receive the full economic benefit from the phosphate.
>
> . . . . . .
>
> It is consistent with the principles involved that each of the three partner Governments should bear this cost in proportion to the benefits they have already derived from the use of cheap phosphate obtained at well below the world price." (NM, Vol. 3, p. 356.)

The agreed Minutes on Future Arrangements for the Phosphate Industry signed by Mr. DeRoburt and the Joint Delegation on 1 July 1966, the last day of the meetings, read as follows:

> "*Relationship of rehabilitation or resettlement costs to financial arrangements for the phosphate industry*
>
> The Nauruan view was that rehabilitation of Nauru was a matter of primary concern for the Nauruan people. They indicated that they were pursuing the rehabilitation proposals in the absence of any acceptable proposal for resettlement. They said that they should receive the full financial benefit from the phosphate industry so that there would be funds available to rehabilitate the whole of the Island. The Joint Delegation [the Administering Authority] explained that the benefits to be received by the Nauruan community from the proposed phosphate arrangement would, it was envisaged, be adequate to provide for the present and long-term security of the Nauruan community including an adequate continuing income when the phosphate has been exhausted and when the costs of any resettlement or rehabilitation have been met. The Joint Delegation said they would be prepared to consider that, within the framework of a long-term agreement, arrangements be made for an agreed payment into the long-term investment fund, from which the costs or part of the costs of rehabilitation could be met." (*Ibid.*, p. 407.)

9. At the Canberra meetings in May-June 1965, as mentioned in paragraph 7 above, the representatives of Nauru and the Australian delegation had agreed to establish an expert committee to investigate the feasibility of the rehabilitation as suggested by the people of Nauru. A part of the "Summary of Conclusions", which was quoted in paragraph 7 above (Annex L refers), continued as follows:

"It was agreed to establish at the earliest practicable date an independent technical committee of experts to examine the question of rehabilitation, the cost to be met by the Administering Authority. The terms of reference of the Committee are attached." (NM, Vol. 3, p. 196.)

The terms of reference of the Committee of Experts thus proposed were the following:

"The Committee is to examine:

(a) whether it would be technically feasible to refill the mined phosphate areas with suitable soil and/or other materials from external sources or to take other steps in order to render them usable for habitation purposes and/or cultivation of any kind;

(b) effective and reasonable ways of undertaking such restoration, including possible sources of material suitable for refilling;

(c) estimated costs of any practicable methods of achieving restoration in any effective degree." (*Ibid.*, p. 197.)

The Committee was asked to report its findings to the Nauru Legislative Council and the Administering Authority by 30 June 1966. The Nauru Lands Rehabilitation Committee, which was thus proposed at the 1965 Canberra Meetings, was established towards the end of 1965 with Mr. G. I. Davey, Consulting Engineer in Sydney, and two other members (one of whom was the soils and land expert of the FAO). The Committee drew up a report in June 1966 and submitted it to the Australian Government and the Nauru Legislative Council (Territory of Nauru, "Report by Committee Appointed to Investigate the Possibilities of Rehabilitation of Mined Phosphate Land, 1966" (contained in NM, Vol. 3, as Annex 3)).

"*Section Two — Summary of Conclusions*

(a) The Committee . . . has reached the following conclusions:

(i) that while it would be technically feasible (within the narrow definition of that expression) to refill the mined phosphate areas of Nauru with suitable soil and/or other materials from external sources, the very many practical considerations involved rule out such an undertaking as impracticable;

. . . . . .

Section Ten — Conclusions and Recommendations

The Committee has concluded that any proposal to resoil the whole of the worked-out phosphate area is unrealistic and presents

serious technical difficulties because of the natural slope existing on the island. In fact it would not be in the best interest of the Nauruans to resoil large portions of the land as they are of far greater value as absorption areas for water collection." (NM, Vol. 3, pp. 215 and 255.)

10. Upon the completion of a report of the Davey Committee, discussions between the delegation representing the Nauru Local Government Council and the Joint Delegation of Officials representing the Administering Authority were held at Canberra from 12 April to 16 June 1967 ("Nauru Talks 1967, Summary Records of Discussions and Related Papers" (contained in NM, Vol. 3, as Annex 5)). On 19 April, Mr. DeRoburt read a statement (NM, Vol. 3, p. 498), in which a reference was made to the request of the Nauruan people, as follows:

"For all these reasons the Nauruans feel that the Partner Governments can and should meet the costs of rehabilitating the land already mined. The fact that no money was set aside for this purpose in the past does not alter the responsibility for rehabilitation. Hence the Nauruans can accept a long-term agreement in which they will accept responsibility for rehabilitating lands mined in the *future* (provided that they receive the full economic benefits from mining the phosphate) but they are not prepared to accept responsibility for rehabilitating lands mined in the past. We strongly believe that our views on this matter are morally and logically correct, but the Partner Governments have made no attempt to refute our arguments." (*Ibid.*, p. 558.)

On that same day, the Delegate of Australia stated that:

"the partner Governments would study the paper. Each side naturally felt that their own position was correct; as long as resettlement was a concrete proposal offering a solution this had been preferred by the partner Governments." (*Ibid.*, p. 498.)

The next day, 20 April, Mr. DeRoburt stated:

"As the island was to be a permanent home for the Nauruan people, rehabilitation is needed. The Nauruans could not talk about details under a cloud of denial of broad principles. The land must be rehabilitated. Once agreement on broad principles was reached technical details could be discussed." (*Ibid.*, p. 497.)

The problem of rehabilitation was again taken up on 16 May. The Summary Record of that date shows that

"27. *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.

The Nauruan Delegation described how they arrived at their view on rehabilitation needs; and referred to the report of the committee of inquiry as to various levels and costs of soil replacement.

The Joint Delegation said that it did not regard the Nauruan choice of the highest level for which the committee gave figures, but which the committee did not recommend, as being realistic.

The Nauruan Delegation disagreed.

28. *The Secretary* [the representative of Australia] discussed the problem of re-settlement which also involved individual motives for moving, apart from the rehabilitation question, and stated that the Governments of Australia and New Zealand could offer rights of immigration to those countries for Nauruans." (NM, Vol. 3, pp. 466-467.)

On 15 June 1967, the final day of the 1967 discussions between the Nauru Local Government Council and the Delegate of Australia, the "Nauruan Phosphate Agreement — Heads of Agreement" was signed by both parties in confirmation of an arrangement for the future operation of the phosphate industry in Nauru, in which it is stated that:

"Representatives of the Nauru Local Government Council and the Partner Governments have agreed on arrangements for the future operation of the phosphate industry on Nauru. A definitive agreement will be drawn up later in 1967 incorporating provisions to give effect to the undertakings set out below and appropriate action will be taken in due course to effect necessary legislative changes. Nevertheless both parties will from now on act in conformity with the intention of these Heads of Agreement." (*Ibid.*, p. 420.)

It is to be noted that no reference was made in this document to the rehabilitation of worked-out lands.

11. Following on these Heads of Agreement, an "Agreement relating to the Nauru Island Phosphate Industry 1967" was signed on 14 November 1967 in Canberra by the Head Chief representing the Nauru Local Government Council, and by the Minister of State for Territories of Australia and the High Commissioners of New Zealand and the United Kingdom representing the three respective Governments which constituted the Administering Authority (text contained in NM, Vol. 3, as Annex 6, and Preliminary Objections of Australia, Vol. II, p. 69). This Agree-

ment, known as the Canberra Agreement, contained detailed provisions grouped under the headings of "Preliminary" (Part I), "Supply of Phosphate" (Part II), "Capital Assets" (Part III), "Management Arrangements" (Part IV), "Financial Arrangements" (Part V) and "General" (Part VI), as well as three schedules; it did not contain any provisions concerning the responsibility of Australia for the rehabilitation of worked-out lands.

*

12. I have thus followed the developments in which the demands of the Nauruan people for the rehabilitation of worked-out lands were presented in the talks between the Administering Authority and their representatives. It is extremely important to note that the Canberra Agreement reached by both parties (on the one hand, Australia, New Zealand and the United Kingdom; on the other, the Nauru Local Government Council) on 14 November 1967, just on the eve of the independence of Nauru, to arrange for the future operation, after independence, of the phosphate industry, did not make any mention of the issue of rehabilitation. Counsel for Nauru explained at the hearings that rehabilitation was not mentioned in the 1967 Agreement on the understanding that the issue would be dealt with separately. In fact that issue was not dealt with separately, and no suggestion seems to have been made by the Nauruan authorities to deal with this issue independently of that Agreement.

13. The Court states in this respect as follows:

> "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 . . ." (Judgment, para. 16.)

I am unconvinced by this reasoning, for it seems to me that, on the contrary, it was imperative for the Nauruans to reserve the claim to rehabilitation in this crucial document, drawn up at a critical date, if it were not to be held abandoned. The link between the future exploitation of the phosphates and the effect of previous exploitation was too close for it to be seriously argued that a reference to the claim would have been out of place. The fact that the issue of rehabilitation was not mentioned at all cannot, therefore, be dismissed as irrelevant. Hence, while it is literally true that the *text* of the Agreement cannot be construed to imply a waiver, the *silence* of the Agreement remains, in my view, open to that conclusion.

2. Discussions within the United Nations System

14. The presentation by the Nauruan people of their demand for rehabilitation and the subsequent rejection of that demand by the Administering Authority, as well as the work of the Davey Committee to assess the feasibility of rehabilitation, were all problems which were dealt with within the United Nations Trusteeship System. The Trusteeship Council and the General Assembly paid due attention to those discussions between the Nauruan people and the Administering Authority, but were not in a position to intervene in order to take up the demands of the Nauruan people or to determine any violation by the Administering Authority of its obligation under the Trusteeship System.

15. In 1965 the Trusteeship Council, at its thirty-second session (28 May to 30 June 1965; meetings 1245 to 1270), took note of the work of the 1965 Canberra discussions and stated:

> "[t]he Council looks forward to the report of the [Davey Committee]; it requests the FAO to consider favourably the invitation to make available a representative to serve on this committee" (United Nations, *Official Records of the General Assembly, Twentieth Session, Supplement No. 4* (A/6004), *Report of the Trusteeship Council 1964-1965*, p. 50, para. 431).

Several months later, the United Nations General Assembly in its resolution 2111 (XX) of 21 December 1965 stated as follows:

> "*The General Assembly,*
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> . . . . . .
>
> *Noting* that . . . the Administering Authority and representatives of the Nauruan people, in June 1965 at the Canberra Conference, pursued further the question of a future home for the Nauruan people which would preserve their national identity,
>
> . . . . . .
>
> 4. . . . *requests* 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."

Compare Judgment, paragraph 25.

16. In 1966 the Trusteeship Council at its thirty-third session (27 May to 26 July 1966; meetings 1271 to 1296) dealt with the question of rehabilitation of the lands of Nauru. The Davey Committee had just completed its report by that time; yet the Trusteeship Council apparently did not have time to examine it at this session. The Trusteeship Council reported in its "conclusions and recommendations" of this session, as follows:

"The Council recalls that the General Assembly, by its resolution 2111 (XX), 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 and notes that an investigation into the feasibility of restoring the worked-out land has been carried out by [the Davey Committee].

The Council notes the statement of 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.'

The Council recalls that at its thirty-second session the Special Representative gave the Council some details which outlined the magnitude and cost of replenishment of the worked-out phosphate land. It also noted that the 1962 Visiting Mission remarked that no one who had seen the wasteland pinnacles could believe that cultivable land could be established thereon, except at prohibitive expense.

The Council . . . recommends that [the report of the Davey Committee] be studied as soon as possible during the course of conversations between the Administering Authority and the delegates of the people of Nauru." (United Nations, *Official Records of the General Assembly, Twenty-first Session, Supplement No. 4* (A/6304), *Report of the Trusteeship Council 1965-1966*, p. 43, para. 408.)

Some months later, the United Nations General Assembly, in its resolution 2226 (XXI) of 20 December 1966, simply pursued the line which had been adopted in the previous year, apparently unaware as yet of the report of the Davey Committee, which the Trusteeship Council had not an opportunity to examine in the session of that year:

"*The General Assembly,*

. . . . . .

3. *Recommends* . . . that the Administering Authority should . . . take immediate steps, irrespective of the cost involved, towards restoring the island of Nauru for habitation by the Nauruan people as a sovereign nation."

Compare Judgment, paragraphs 18 and 26.

17. In 1967 the Trusteeship Council, at its thirty-fourth session (29 May to 30 June 1967; meetings 1297 to 1322), dealt with the question of rehabilitation, having sight of the report of the Davey Committee for the first time. The Trusteeship Council was at that time composed of eight member States (Australia, New Zealand, the United Kingdom and the United

States as Administering Authorities; China, France and the USSR as Permanent Members of the Security Council; and Liberia as the only elected member). In his opening statement to that session, Mr. DeRoburt, as Adviser to the Special Representatives for the Trust Territories of Nauru and New Guinea in the Australian Delegation, stated:

> "18. Mr. DeRoburt...
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> . . . . . .
>
> 21. The only important point on which there was still disagreement with the partner Governments was the question of the rehabilitation of worked-out land. The Nauruans felt that the partner Governments should agree to assume responsibility for rehabilitating land worked before 1 July 1967, leaving to the Nauruans the responsibility for land worked after that date. The Nauruans would in that way be assuming two-thirds of the responsibility and the partner Governments one-third." (United Nations, *Official Records of the Trusteeship Council, Thirty-fourth Session*, 1313th meeting, para. 21.)

This statement by Mr. DeRoburt was described in the Trusteeship Council Report in slightly different terms:

> "Although the Nauru Local Government Council worked in a climate of understanding at Canberra with the Administering Authority, the only divergent views which seemed to appear not reconcilable was *[sic]* the question of the rehabilitation of the mined lands. The Nauru Local Government Council maintained that the Administering Authority should accept responsibility for the rehabilitation of the lands already mined, while the Nauru Local Government Council would be responsible for rehabilitation of lands mined from 1 July 1967." (United Nations, *Official Records of the General Assembly, Twenty-second Session, Supplement No. 4* (A/6704), *Report of the Trusteeship Council 1966-1967*, pp. 47-48, para. 386.)

In general debates, all eight States members of the Council expressed views concerning the forthcoming independence of Nauru, but only a few of them showed some sympathy to the Nauruan people's wish for rehabilitation. As one example, the delegate of France

> "welcomed Head Chief DeRoburt's statement that the Nauruan leaders were endeavouring to create work that could at least partially replace phosphate extraction. It regretted, however, that agreement had not yet been possible on the question of rehabilitating the worked-out land. Nevertheless, the situation was generally satisfactory in a Territory which had been wisely administered by Australia,

and his delegation was sure that the Nauruans would soon be able to take a final decision on their future in total freedom and in complete conformity with their aspirations." (United Nations, *Official Records of the Trusteeship Council, Thirty-fourth Session*, 1316th meeting, para. 9.)

The Council's Report stated in "Conclusions and Recommendations" on the "future of the Nauruans" that:

"[t]he Council, recalling its observations adopted at its thirty-third session with regard to the resettlement of the Nauruans, notes the statement of the Head Chief Hammer DeRoburt that the Nauruans have abandoned the idea of resettlement and intend to remain on the Island. However, the Council notes the statement of the Administering Authority that it remains ready to consider any Nauruan proposal concerning future resettlement." (United Nations, *Official Records of the General Assembly, Twenty-second Session, Supplement No. 4* (A/6704), *Report of the Trusteeship Council 1966-1967*, p. 43, para. 332.)

Compare Judgment, paragraphs 18 and 27.

18. The Trusteeship Council, which closed this session a few weeks after the signing of the Heads of Agreement by the Nauru Local Government Council and the Delegate of Australia on 15 June, in its "Conclusions and Recommendations" on Economic Advancement, "note[d] with satisfaction" that that Agreement was reached in the sense that "the ownership, control and management of the phosphate industry will [thereby] be transferred to the Nauruans by 1 July 1970" and that "transitional arrangements provide for a substantial increase in phosphate royalties and for the increased participation of the Nauruans in the operation of the industry" (*ibid.*, p. 49, para. 403). The Council's Report continued to state:

"The Council also notes that the report of the [Davey Committee] ... concluded, *inter alia*, that 'while it would be technically feasible (within the narrow definition of that expression) to refill the mined phosphate areas of Nauru with suitable soil and/or other materials from external sources, the very many practical considerations involved rule out such an undertaking as impracticable'. At the same time the report provides alternative means of treating the mined land. The Council further notes that the Nauruans have voiced strong reservations to this report and, *inter alia*, stated that the Nauru Local Government Council believes that the land already worked should be restored by the Administering Authority to its original condition. The Council notes further the statement of the Administering Authority that the financial arrangements agreed upon with respect to phosphate took into consideration all future needs of the Nauruan people, including possible rehabilitation of land already worked.

The Council, regretting that differences continue to exist on the

question of rehabilitation, expresses earnest hope that it will be possible to find a solution to the satisfaction of both parties." (United Nations, *Official Records of the General Assembly, Twenty-second Session, Supplement No. 4* (A/6704), *Report of the Trusteeship Council 1966-1967*, p. 49, para. 403.)

The Trusteeship Council did not advance any conclusion or recommendation regarding the alleged responsibility to be borne by Australia, New Zealand and the United Kingdom with regard to the rehabilitation of the worked-out phosphate lands. At the meetings (after the adoption of the above-mentioned "Conclusions and Recommendations"), Liberia, which was the sole elected member of the Council, introduced a draft resolution (T/L.1132) in which the Trusteeship Council would

"4. *Recommend[s]* that the Administering Authority should take immediate steps towards restoring the island of Nauru for habitation by the Nauruan people as a sovereign nation." (United Nations, *Official Records of the Trusteeship Council, Thirty-fourth Session*, 1320th meeting, para. 8; text in United Nations, *Official Records of the Trusteeship Council, Thirty-fourth Session*, agenda item 4, Annexes.)

The meeting was strongly admonished by Australia concerning the alleged failure of Liberia "to take account of the very detailed information on conditions in Nauru that had already been submitted to the Council" (*ibid.*, para. 38). Liberia's draft resolution was rejected by five votes to two (Liberia and the USSR) with one abstention (China) (*ibid.*, para. 43). Compare Judgment, paragraph 27.

19. The Trusteeship Council met for two days on 22 and 23 November 1967 to hold its thirteenth special session (meeting 1323), that is, one week after the Nauru Island Phosphate Industry Agreement of November 1967 was signed and a couple of months before the date of Nauru's independence, to deal mainly with a letter from Australia concerning the future of the Trust Territory of Nauru (T/1669). The record of the meeting shows the following:

"7. Mr. Shaw (Australia)

. . . . . .

13. . . . Australia was proud to have fulfilled its obligations under [the 1947 Trusteeship Agreement] and under the Charter of the United Nations.

. . . . . .

16. Mr. DeRoburt (Special Adviser to the Australian delegation)

. . . . . .

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." (United Nations, *Official Records of the Trusteeship Council, Thirteenth Special Session*, 1323rd meeting, p. 1.)

The Delegate of Liberia introduced a draft resolution (T/L.1134) which lacked any provision concerning the rehabilitation of worked-out lands similar to what had been contained in that country's own draft resolution at the previous session of that Council (*ibid.*, p. 7, para. 57). This draft new resolution, orally amended on minor points, was put to the vote without any discussion and unanimously adopted by the Council as Trusteeship Council resolution 2149 (S-XIII), entitled "The Future of Nauru", which reads:

"*The Trusteeship Council,*

. . . . . .

1. *Notes* the formal announcement by the Administering Authority that, following the resumed talks between representatives of the Nauruan people and of the Administering Authority, it has been agreed that Nauru should accede to independence on 31 January 1968;

2. *Welcomes* the statements made in the Trusteeship Council by representatives of the Governments of Australia, New Zealand and the United Kingdom of Great Britain and Northern Ireland as the Administering Authority, and by the representatives of the Nauruan people, that the Administering Authority has agreed to meet the request of the representatives of the Nauruan people for full and unqualified independence;

3. *Recommends* that the General Assembly at its twenty-second session resolve, in agreement with the Administering Authority, that the Trusteeship Agreement for the Territory of Nauru approved by the General Assembly on 1 November 1947 shall cease to be in force upon the accession of Nauru to independence on 31 January 1968."

While Mr. DeRoburt, as stated above, wished to place on record his view (which was not acceptable to Australia) that the Nauruan people would continue to press its claim to rehabilitation, no official position was taken

by the Trusteeship Council except for its acknowledgment of the termination of the Trusteeship of Nauru on 31 January 1968. Compare Judgment, paragraphs 19 and 28.

20. The United Nations, which had encouraged the independence of all the Trusteeship territories, certainly welcomed the willingness of the Administering Authority to promote the independence of Nauru. In the Fourth Committee (Trusteeship and Non-self-governing Territories) of the United Nations General Assembly at its twenty-second session in 1967, the following exchange took place on 6 December 1967:

> "8. Mr. Rogers (Australia)
>
> . . . . . .
>
> 12. . . . Australian administrative control would cease when that Constitution came into force. Thereafter, Nauru would join that company of nations which had acceded to independence under the guidance and with the assistance of the Trusteeship Council, in accordance with the provisions and objectives of the United Nations Charter. At that time, too, the obligations assumed by the Administering Authority under the Trusteeship Agreement approved by the General Assembly on 1 November 1947 would be discharged. The Australian delegation requested the Committee to recommend to the Assembly that the Trusteeship Agreement should cease to be in force on 31 January 1968. In conclusion, he paid a tribute to Mr. Hammer DeRoburt, Head Chief of Nauru, who had amply demonstrated his devotion to the cause of his people and who would appreciate the opportunity to address the Committee, if it so wished.
>
> *With the agreement of the Committee, Head Chief Hammer DeRoburt of Nauru spoke as a member of the Australian delegation.*
>
> . . . . . .
>
> 13. Mr. DeRoburt (Australia)
>
> . . . . . .
>
> 20. One [problem] which worried the Nauruans derived from the fact that land from which phosphate had been mined would be totally unusable. Consequently, althouth *[sic]* 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, so that Nauru would have substantial alternative sources of work and of income long before the phosphate had been used up. 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." (United Nations, *Official Records of the General Assembly, Twenty-second Session, Fourth Committee*, 1739th meeting, p. 394.)

After the statements by the delegates of Australia and Mr. DeRoburt, the Delegate of Australia introduced a draft resolution on the question of the Trust Territory of Nauru (A/C.4/L.879). The draft resolution, like the one adopted by the Trusteeship Council a few weeks before, did not contain any provision concerning the alleged claim of the Nauruan people as to Australia's responsibility for the rehabilitation of worked-out lands. This draft resolution of the General Assembly was also different from the General Assembly resolutions of previous years, in that the issue of rehabilitation was not mentioned at all, even though it is true that "[t]he resolution . . . recalls those earlier resolutions in its preamble" (Judgment, para. 29). When that draft was discussed, certain delegates made statements, some of which I quote as being relevant to the present issue:

"28. [The Delegate of the United Kingdom] . . . was happy to note that it had been possible to meet the wishes of the Nauruans in a satisfactory manner.

. . . . . .

30. The Administering Authority had discharged its obligations faithfully and well, . . .

. . . . . .

35. [The Delegate of China] . . . congratulated the Administering Authority . . . on having faithfully fulfilled the Agreement and for having promoted the economic and social progress of Nauru and prepared the people of the Territory for self-government." (United Nations, *Official Records of the General Assembly, Twenty-second Session, Fourth Committee*, 1739th meeting, pp. 396, 397.)

"17. [The Delegate of USSR] . . . had . . . listened with great interest to the statement made by Head Chief Hammer DeRoburt . . . from which he understood that no conditions or reservations would be attached to independence.

. . . . . .

24. [The Delegate of the Philippines] congratulated the joint Administering Authority, in particular the Government of Australia, on the successful accomplishment of its obligations under the Charter of the United Nations and the Trusteeship Agreement for Nauru." (*Ibid.*, 1740th meeting, pp. 401, 402.)

"5. [The Delegate of India] . . . With regard to the question of responsibility for the rehabilitation of the mined areas of the island,

there was still considerable difference of opinion between the Nauruans and the Administering Authority. Head Chief DeRoburt maintained that the three Governments forming the Administering Authority should defray the cost of that rehabilitation. The Indian Delegation shared that view . . . and hoped that a just agreement would be reached on the subject.

. . . . . .

9. [The Delegate of France] expressed his delegation's satisfaction at the agreement reached between the Administering Authority and the representatives of the people of Nauru. Through that agreement the people of Nauru were gaining independence in accordance with their wishes. He congratulated the Government of Australia on the successful fulfilment of the obligations that it had assumed under the Trusteeship Agreement, and the people of Nauru on their forthcoming independence." (United Nations, *Official Records of the General Assembly, Twenty-second Session, Fourth Committee*, 1741st meeting, p. 406.)

The draft resolution, as amended and further orally revised (in manners not directly relevant to the present problem), was unanimously adopted by the Fourth Committee on 7 December 1967 and was then sent to the Plenary Meeting (*ibid.*, p. 407). Compare Judgment, paragraphs 17 and 28.

21. The General Assembly, acting on the basis of this Fourth Committee recommendation, unanimously adopted on 19 December 1967 General Assembly resolution 2347 (XXII), "Question of the Trust Territory of Nauru", in which it was stated that:

"*The General Assembly,*

. . . . . .

1. *Notes* the formal announcement by the Administering Authority that, following the resumed talks between representatives of the Nauruan people and of the Administering Authority, it was agreed that Nauru should accede to independence on 31 January 1968;

2. *Welcomes* the statement made in the Fourth Committee by the representatives of the Governments of Australia, New Zealand and the United Kingdom of Great Britain and Northern Ireland as the Administering Authority that the Administering Authority has complied with the request of the representatives of the Nauruan people for full and unqualified independence;

3. *Resolves accordingly*, in agreement with the Administering Authority, that the Trusteeship Agreement for the Territory of Nauru approved by the General Assembly on 1 November 1947 shall cease to be in force upon the accession of Nauru to independence on 31 January 1968".

The responsibility of the Administering Authority, as well as the rights and duties of the Administrator in Nauru, were now to be completely terminated, as is implicit in this United Nations General Assembly resolution, as of 31 January 1968, when Nauru gained independence. Compare Judgment, paragraphs 23 and 29.

22. In the Trusteeship Council's Report to cover the year 1967-1968, which was submitted to the United Nations General Assembly at its twenty-third session in 1968, a simple account was given of Nauru's accession to independence on 31 January 1968 (United Nations, *Official Records of the General Assembly, Twenty-third Session, Supplement No. 4* (A/7204), *Report of the Trusteeship Council 1967-1968*, p. 41, paras. 355-357).

*

23. Reciting the above development within the United Nations in a somewhat fragmentary manner, the Judgment refers to Australia's contention that Mr. DeRoburt's statement of 6 December 1967 at the Fourth Committee of the General Assembly "amounted to a waiver" and goes so far as to state that:

> "[t]he Court cannot share this view . . . 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." (Judgment, para. 20.)

The Judgment refers to the statements made by the representatives of the USSR and India, and states that "the representatives of the Administering Authority did not react" (Judgment, para. 28). Bearing in mind that the statements were themselves made by those representatives in reaction to the draft resolution introduced by Australia, one is not surprised that Australia "did not react". It seems to me that the Judgment has placed too much emphasis on the failure of Australia to react to the comments of these delegates and interprets these particular developments in the United Nations as having more importance than they actually possess. Besides, if it is possible to place such a construction on silence at this point in the story, I fail to see why the silence of the 1967 Canberra Agreement between, on the one hand, Australia, New Zealand and the United Kingdom and, on the other, the Nauru Local Government Council (see para. 11 above) may not bear even greater weight.

24. The Court states:

> "[General Assembly resolution 2347 (XXII) of 19 December 1967] had 'definitive legal effect' . . . Consequently, the Trusteeship Agreement was 'terminated' on that date and 'is no longer in force' . . . 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." (Judgment, para. 23.)

I totally fail to understand this reasoning and also what the Court has in mind by speaking of "the particular circumstances in which the Trusteeship for Nauru was terminated". The Court eventually holds that

> "when ... the General Assembly terminated the Trusteeship over Nauru ..., 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 view 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." (Judgment, para. 30.)

I would rather consider that as the General Assembly resolution did not expressly reserve any rights which Nauru might have had in that regard, that resolution gave a discharge to the Administering Authority with respect to such rights.

25. All claims arising from the implementation of the Trusteeship could have been settled only under the United Nations mechanism. No legal dispute within the meaning of Article 36, paragraph 2, of the Statute could possibly have existed at that time with regard to the administration of Nauru under the United Nations Trusteeship on the eve of Nauru's independence, as no sovereign State was in a position to put forward a claim based on a purported breach of the obligations entered into by Australia, New Zealand and the United Kingdom, as the Administering Authority, during the Trusteeship period. A question, however, might have been raised if there was indeed any dispute outstanding between the independent State of Nauru and Australia, New Zealand and the United Kingdom at the time of Nauru's accession to independence. However, no claim to the rehabilitation of worked-out phosphate lands addressed to the Administering Authority of the Trusteeship by the people of Nauru was taken over by the State of Nauru at the time of independence in 1968. No United Nations document under which Nauru gained independence showed any evidence of a transfer of the claim or of the creation of a fresh claim for the independent State of Nauru.

II. *Re* Operative Parts 1 *(d)* and *(e)*: Delay in the Presentation of Nauru's Claim and the Question of Nauru's Good Faith

26. With regard to "the preliminary objection based on the effect of the passage of time on the admissibility of Nauru's Application" (operative part 1 *(d)*), the Court stated that

> "[i]n the present case, it was well known, at the time when Nauru gained its independence, that the question of the rehabilitation of the phosphate lands had not been settled" (Judgment, para. 33),

and further stated that

> "[t]he 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 . . . [I]t 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." (Judgment, para. 36.)

With regard to "the preliminary objection based on Nauru's alleged lack of good faith" (operative part 1 *(e)*),

> "[t]he 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." (Judgment, para. 38.)

* *

27. As I have stated above, I hold the view that, by the time of the independence of Nauru, the claim of the Nauruan people to the rehabilitation of lands was no longer viable. I should add, in view of what the Court states, that it was well known at the time of independence that the claim of the Nauruan people had ceased to exist. The Judgment quotes Mr. DeRoburt as stating on the day of independence that

> "We hold it against Britain, Australia and New Zealand to recognize that it is their responsibility to rehabilitate one third of the island." (See Judgment, para. 33.)

But this quotation is extracted simply from press reports based on sources unknown. So far as I am aware, no official document of Nauru, published at independence, asserted any claim based on a purported failure of Australia to rehabilitate the worked-out phosphate lands. The Constitution of

Nauru (contained in the Memorial of Nauru, Vol. 4, as Annex 42), which became effective on the date of the independence, provided:

> "83. 1. Except as otherwise provided by law, the right to mine phosphate is vested in the Republic of Nauru.
> 2. Nothing in this Constitution makes the Government of Nauru responsible for the rehabilitation of land from which phosphate was mined before the first day of July, One thousand nine hundred and sixty-seven."

This cannot be interpreted as indicating that Nauru had put forward any claim against Australia (or, for that matter, any third person) but simply meant that the Government of Nauru declined, vis-à-vis the people, to be held *constitutionally* responsible for the rehabilitation of land from which phosphate had been mined during the Trusteeship period. But, as is well known, absence of *constitutional* responsibility does not exclude the possibility of responsibility on other legal grounds, including voluntary assumption or proven liability. At all events, no claim to the rehabilitation of worked-out phosphate lands was in fact put forward by Nauru against Australia at the time of independence.

28. If, merely for the sake of argument, there did exist, at the time of independence, a claim of Nauru (as an independent State) against Australia, for the rehabilitation of the worked-out phosphate lands, then, according to the record, it was asserted at the very earliest during the talks which Nauru held with Australia in 1983. One cannot conceive that the claim which Nauru presented in its Application of 1989 or, even earlier, in its negotiations with Australia in 1983, could have been based on elements other than those which Nauru might have wished to have taken over in 1968. The fact that Nauru kept silent for more than 15 years on the subject of the alleged claim makes it inappropriate for the Court to entertain it and, if only on grounds of judicial propriety, the Court should therefore find that the Application is inadmissible.

29. In addition, the fact is that Nauru has been fully responsible for the mining of phosphate since its independence yet has not taken any steps towards the rehabilitation of the lands it has itself worked. To my mind, equity requires the conclusion that Nauru, by this conduct, combined with lack of due diligence, has disqualified itself from pursuing any allegation of Australian responsibility for the rehabilitation of lands which Australia worked during the Trusteeship period. For Nauru to bring a claim now can only lead one to doubt its good faith.

*

30. By saying that the Application of Nauru in the present case should be rejected as inadmissible, I am not denying the importance of the preser-

vation of an environment from any damage that may be caused by the development or exploitation of resources, particularly in the developing regions of the world. In the light of the natural and social situation in which Nauru as a relatively new independent State is placed, and the particular relations between Australia and Nauru since the time of the League of Nations, I personally am second to none in hoping that some measures may well be considered by Australia for promoting the rehabilitation of the worked-out lands in parallel with the effort to be made by the State of Nauru itself in that direction.

(Signed) Shigeru ODA.