INTERNATIONAL COURT OF JUSTICE

CERTAIN PHOSPHATE LANDS IN NAURU

(NAURU v AUSTRALIA)

COUNTER-MEMORIAL

OF THE

GOVERNMENT OF AUSTRALIA

29 MARCH 1993

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List of Abbreviations used in this Counter-Memorial

BPC	British Phosphate Commissioners
CR	Verbatim Record of Oral Hearings before the International Court
CSIRO	Commonwealth Scientific and Industrial Research Organisation
NLGC	Nauru Local Government Council
NM	Nauru Memorial

INTRODUCTION

Section I: What this case is about: the essence of the Nauruan claim

1. The issue in this case is whether Australia is responsible for the rehabilitation of phosphate lands on Nauru mined prior to 1 July 1967. The area mined prior to that date comprised approximately one-third of the phosphate lands. In effect, therefore, as Nauru concedes, responsibility for rehabilitation of two-thirds of the phosphate lands is a matter for Nauru alone (NM, para.207; CR 91/19 p.47). The phosphate lands themselves comprise according to one Nauruan statement sixty seven per cent of Nauru (Letter from President of Nauru, 6 October 1983, Annex 78, Vol.4, NM) or 1700 hectares out of an area of 2200 hectares (NM, para.207).

2. That responsibility for rehabilitation is the issue in dispute is clear from what Nauru itself says; from what the Court has said; and from what the facts themselves show.

3. The Application which instituted these proceedings alleges "a dispute ... over rehabilitation of certain phosphate lands [in Nauru] worked out before Nauruan independence" (Application, p.4; also paras.40, 41, 42). Nauru claims that Australia has legal responsibility to rehabilitate, or to provide the financial means for the rehabilitation of, Nauruan lands mined for phosphate prior to 1 July 1967 (Application, paras.45-49; NM, para.621; Oral Pleading Preliminary Objections, CR 91/18 p.10-11, 17, 21).

4. Nauru contends that rehabilitation was the only matter on which the Partner Governments and the Nauru Local Government Council (NLGC) could not agree prior to Nauruan independence. Since then the diplomatic correspondence and other actions leading to these proceedings have proceeded on the basis that responsibility for rehabilitation was the sole matter of disagreement between the parties. Thus, in the 1983 letter from the President of Nauru to the Australian Prime Minister, the President referred only to the rehabilitation of worked-out phosphate lands (Annex 78, Vol.4, NM). It was this claim that Australia rejected (Annex 79, Vol.4, NM). Indeed, it was the rehabilitation issue which led Nauru to establish a Commission of Inquiry in 1986. The Commission was asked to inquire into the nature and extent of responsibility for rehabilitation of phosphate lands worked out prior to independence (Annex 80, No.4, Vol.4, NM). Nauru has itself said that the institution of these proceedings was "a consequence of Australia's failure to respond to the findings of [the Commission's] report" (Annex 80, No.28, Vol.4, NM; see also CR 91/20 p.61).

5. The Court has also recognised that this case is solely about rehabilitation (see particularly paras.21 and 30 of the Preliminary Objections judgment, *ICJ Reports 1992*, pp.250, 253). It was only given the "particular circumstances of the case" that any rights that Nauru might have had in connection with rehabilitation of the lands remained unaffected by the termination of the Trusteeship Agreement.

6. The facts themselves also point to rehabilitation being the only issue in dispute. The issue of responsibility for rehabilitation was debated throughout the negotiation of the Canberra Agreement in 1967, and in the United Nations discussions in the years immediately preceding independence. It is this claim which the Court has decided was not on the facts waived by Nauru during those negotiations and discussions.

7. One consequence of the fact that rehabilitation is the only issue in dispute is that it limits the matters which can be dealt with in these proceedings. Thus, this case is not about whether Australia and the other States making up the Administering Authority paid Nauru a sufficient amount in the form of royalties for the phosphate during the period the British Phosphate Commissioners (BPC) mined the area. Nor does the Nauruan claim for rehabilitation entitle the Court to re-open the terms of the Canberra Agreement which transferred the phosphate industry to Nauru in order to determine its fairness. Nor can Nauru invite the Court to examine the royalties paid through the Mandate and Trusteeship periods and pronounce on their adequacy. Nor is this case about whether Nauru can afford to undertake rehabilitation. Nauru says that it has adequate funds to do this if it wishes (CR 91/19 p.53). So the issues become:

1. Was there a legal duty to rehabilitate? (If not, the matter ends there.)

2. If so, was this duty fulfilled *either*:

   (a) by the general provision of funds, actual and prospective, made for the Nauruans under the Canberra Agreement?

   or

   (b) was a specific earmarking of funds for this purpose required, irrespective of the magnitude of funds available under the Canberra Agreement?

3. If there was a duty, and if it was not fulfilled, what share of the responsibility should attach to Australia?

8. The essence of the Nauruan complaint is that there was an independent duty to rehabilitate which the Administering Authority failed to meet, because the Administering Authority did not carry out a rehabilitation program, nor establish a fund specifically committed to rehabilitation. In fact, given the shortness of time between the Nauruan decision to stay on the island and independence, rehabilitation by the Partner Governments themselves was not possible. Instead, but without conceding any duty to rehabilitate, the Administering Authority transferred various substantial funds and the whole phosphate industry to be used as Nauru saw fit, including the task of rehabilitation if the Nauruans so decided. It was the income from these funds and the industry which left Nauru in the position to be able to say today that it could carry out a rehabilitation program, if it so chose. So the funds were in fact adequate. Nauru's complaint is not that it was left unprovided for, but that neither BPC nor the Administering Authority gave it a fund *specifically designated* for rehabilitation so as to comply with that specific obligation.

Section II: Definition of rehabilitation

9. As already indicated, rehabilitation is the central issue. But what does rehabilitation involve? Views differ over time. The Davey Committee report in 1966 defined the issue in these terms:

> "Referred to in the past variously as 'restoring', 'resoiling', 'regenerating', 'rehabilitating', etc, the question apparently had as its objective some program of orderly treatment of those parts of the island denuded of their topsoil and phosphate. This would provide fertile areas of land suitable for the growing of coconuts, pandanus, tomano and other trees, and, in general, make for a more congenial environment for the Nauruans when the phosphate deposits were exhausted." (Annex 3, Vol.3, NM, p.211)

10. This reflects the fact that during the Trusteeship, rehabilitation was largely understood as consisting of destroying the limestone pinnacles and covering the remaining solid limestone with imported soil. At the time this would have required an enormous expenditure. The Committee had therefore thought rehabilitation to be impracticable.

11. Much more recently a Nauruan Commission of Inquiry, established in 1987, thought that rehabilitation meant:

> "(a) returning the land to its former state - or as near to the former state as is reasonably practicable - and this includes revegetation. This concept usually relates to grasslands or forest of low commercial value;
>
> or
>
> (b) reforming the land to a shape and condition suitable for a nominated land use." (Republic of Nauru, Commission of Inquiry into the Rehabilitation of Worked-Out Phosphate Lands of Nauru Report, p. 1133.)

12. The Commission's Report shows that the second had become a possibility only because of the great increase in technical and scientific knowledge since 1967. Not surprisingly, the Commission adopted it for the purposes of its inquiry. (Australia has at no time acknowledged as true the factual findings of the Commission nor the competence of the Commission to make findings as to the responsibility of Australia. It continues to reserve its position in this regard.)

13. The 1987 Commission did not consider that a specific portion of the mined-out land could be rehabilitated independently of the rest of the phosphate lands. It considered that any rehabilitation program should be part of a long term process of the implementation of a land use development policy for Nauru. These recommendations do not seem to have been heeded by Nauru in its submissions in this case or in any actions of the Nauruan Government. Further, Nauru has not adopted the same view of what is called for in a rehabilitation program. Although treating the report as authoritative, Nauru has defined "rehabilitation" more narrowly than the Commission. Thus, in its oral pleadings at the Preliminary Objections stage, it was said that rehabilitation was:

> "The process carried out to the point prior to implementation of a planned land use... In other words, rehabilitation would be reforming or returning the mined out lands to a suitable state to allow for a more congenial environment for the Nauruans when the phosphate deposits will be exhausted." (CR 91/19 p.10)

In other words, for the purposes of this case, rehabilitation is seen by Nauru as the preparation of the land for some as yet unidentified planned land use.

14. It is important when considering the existence of any alleged duty to rehabilitate to understand what the duty might embrace. The Nauruan claim necessarily depends on a showing that any rehabilitation sought by it was practicable during the trusteeship and is practicable today. Australia denies that rehabilitation was practicable at any time and thus cannot conceive of a legal duty to undertake something which is impractical.

Section III: Outline of this Counter-Memorial

15. In its Memorial, Nauru refers to a very wide set of facts, covering the whole administration of Nauru under both the Mandate and Trusteeship. Much of this material in Australia's view is irrelevant. Nevertheless, the Nauruan claim that there is a duty to rehabilitate does depend on certain facts relating to the administration of Nauru under Trusteeship, and the negotiation of the 1967 Agreement whereby the phosphate industry was transferred to Nauru.

16. The claim for rehabilitation can be considered only by way of a comprehensive examination of the circumstances surrounding the decisions of the Administering Authority in agreement with the Nauruan people to abandon resettlement, to transfer the phosphate industry on the terms set out in the Canberra Agreement, and to grant independence on the terms agreed, including transfer of responsibility for all Trust Funds. Although the Court was provided with an extensive analysis of the facts at the Preliminary Objections stage, Australia considers it appropriate to set out again for the benefit of the Court the salient facts and historical background. However, Australia has not reproduced as part of this Counter-Memorial the documentary annexes provided as part of the Preliminary Objections. Instead, this Counter-Memorial will provide references to those documentary annexes as appropriate.

17. Because this case is so fact-dependent, the first part of this Counter-Memorial is devoted to an objective presentation of the relevant facts. This is in contrast to the somewhat coloured and prejudicial portrayal of the facts given by Nauru in its Memorial and the inferences drawn from them. This first Part also notes some occasions where the Nauruan contentions on the facts are not accepted. So far as that Part does not directly contradict the Nauruan contentions, it is not, however, to be deemed an admission of those facts. Australia reserves its position in this regard.

18. The Counter-Memorial then turns to examine in detail the legal issues raised by the various Nauruan allegations of breach of a duty to rehabilitate. It first examines the alleged bases for the rehabilitation claim arising under the Trusteeship Agreement and general international law. It then deals with the various extraneous claims of breaches of international law made by Nauru that are unrelated to the claim for rehabilitation.

19. The Counter-Memorial concludes with a separate and wholly subsidiary Part on the Remedial Position. The formal submissions request the Court to reject the Nauruan claims.

PART I

HISTORICAL AND FACTUAL BACKGROUND

CHAPTER 1

AN HISTORICAL OVERVIEW OF THE PRE-TRUSTEESHIP PERIOD

Section I: The period of German administration

20. Nauru first came under European control in 1888. On 16 April 1888 the German Government placed Nauru within the Protectorate of the Marshall Islands (NM, para.10-12). Nauru seeks to contrast the German administration of the island with that of the mandatory powers who assumed control as a result of World War I. It points, in particular, to the supposed recognition by German law of indigenous land rights (NM, para.13-16) and the requirement to compensate for damage to mined land (NM, paras.22-27).

21. When the German representative surrendered to Australian forces in 1914 the population of Nauru was reported to be "30 Germans, 1700 natives and 500 Chinese" (109 BFSP 632-3). The phosphate industry was in its infancy, the first shipment taking place in 1907.

22. The interests of the island population were given little consideration by the German administration. In 1888, the Imperial German Government granted the Jaluit Gesellschaft a concession which included the right to exploit guano (phosphate) on the Marshall Islands and Nauru. Phosphate was not, however, discovered on Nauru until 1900. In the same year, the Jaluit Gesellschaft transferred its right to exploit the phosphate to the Pacific Islands Company, which later became the Pacific Phosphate Company, in return for financial benefits for itself.

23. The discovery of the phosphate gave land on the plateau of Nauru its economic significance. It was to provide the basis for more than a subsistence economy. Viviani summed up the position concerning the inhabitants as follows:

> "In the agreements between the German Government, the Jaluit Gesellschaft, and the Pacific Phosphate Company, only two clauses referred to the inhabitants of the island; one made it necessary for the mining company to give notice of commencement of operations so as to allow 'the necessary measures required in the interests of the natives' to be taken. The other allowed the Gesellschaft to assist the company in 'any claims by the natives of the Island against the

> Company'. Concern for the Nauruans was marked by its paucity, emphasising that the phosphate concession was based, if not on conquest, then on the island's occupation.
>
> Although the company's manager did not negotiate directly with the Nauruans, a royalty of 1/2d per ton of phosphate shipped was paid by the company to individual landowners and further sums were paid for the lease of land mined and in compensation for trees destroyed. In the six years from 1908 to 1913, when approximately 630,000 tons were shipped, Nauruan landowners received less than £1,320 on a commodity which was worth about 30s per ton - a total of £945,000. The payment of royalty had an interesting side effect, for land on the plateau, formerly considered almost worthless, became the subject of argument between individual landowners. The disputes over ownership arose because of the looseness of inheritance rules and were further complicated because the administration had ordered the return of land seized in the ten-years' war to its rightful owners." (N Viviani, *Nauru* (1970) p.34-5.)

24. The coming of European administrative control removed warfare as a means whereby land resources were adjusted to major changes in population. And with such control went a diminution of the authority of the traditional inhabitants over their land. This was a phenomenon applicable not just in Nauru, but throughout the Pacific, as well as in Australia and New Zealand. See R Crocombe (ed), *Land Tenure in the Pacific* (1971) p.8-12. In Australia, for example, minerals generally belonged exclusively to the Crown. The German law applicable at the time similarly took phosphate out of the landowner's control, (NM, para.24), although the German administration, like that of the mandatory powers, continued to recognise the interests of individual landowners in particular areas of land. Payments were made to the landowner under German law just as similar payments continued under the mandate administration (see paras.40 to 44 below). The German administration was not, as the Nauruan Memorial suggests (NM, para.26), more solicitous for the interests of the Nauruans than was that of the subsequent mandate powers. While the mining law of Germany applicable generally to the African and South Pacific protectorates may have purported to place some obligation on mine operators to "immediately and permanently" restore mined land (NM, para.25), the reality is that no rehabilitation took place under German administration, whatever the formal terms of law might have suggested. Indeed, the German administration

showed little, or no concern for the Nauruans in the few years it controlled phosphate mining. Under the Mandate the economic return to the Nauruans increased significantly (see para.43 below).

Section II: The Mandate period

A. 1914 CAPITULATION

25. The Australian Government's direct involvement with Nauru commenced in 1914 when Australian forces took action against Nauru at the request of the British Imperial Government. The German Government representative on Nauru surrendered on 9 September 1914. The island was included in the capitulation of German Pacific possessions dated 17 September 1914. An Administrator was appointed for the island by the High Commissioner for the Western Pacific on 27 October 1914 following instructions from the United Kingdom Secretary of State for the Colonies (109 BFSP 651). A civil administration under the jurisdiction of the High Commissioner was established on 1 January 1915 but, in accordance with the terms of the capitulation, local laws and customs were continued as far as practicable for the time being.

26. This indirect Australian involvement was put on a different basis with the grant of the Mandate and the conclusion of the 1919 Agreement between the United Kingdom, Australia and New Zealand.

B. GRANT OF MANDATE OVER NAURU

27. Mandates were created pursuant to Article 22 of the League of Nations Covenant, in order to administer territories formerly governed by the defeated powers, and which, on past practice, might have been annexed by the victorious States. The feature of the mandate system was that the territories would not be in the ownership of any State, but were entrusted to "Mandatory States" to administer on behalf of the League. (The Mandates system is summarised in the *South West Africa, (Preliminary Objections), Judgment, ICJ Reports 1962* at p.329; see also Murray, *The United Nations Trusteeship System* (1957) Ch.1.) As part of the arrangements agreed on during negotiations on the Treaty of Peace with Germany signed at Versailles on 28 June 1919, a Mandate was conferred on His Britannic Majesty in relation to Nauru. It was also agreed that this would be a "C" class Mandate. The allocation of Mandates was effected by the Allied Supreme Council in May 1919, before the Versailles Treaty was

signed. (Quincy Wright, *Mandates under the League of Nations* (1930) p.43; Duncan Hall, *Mandates, Dependencies and Trusteeship* (1948) pp.145-7.)

28. As is well known, Article 22 recognised three classes of Mandate, which have come to be referred to as "A" "B" and "C" class Mandates. The "A" Mandates are referred to in Article 22.4 as:

> "certain communities formerly belonging to the Turkish Empire [which] have reached a stage of development where their existence as independent nations can be recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory."

The "B" Mandates refer to less developed territories (Art.22.5):

> "other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals; the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives other than for police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League."

29. This last requirement of equal trade opportunities became known as "the open door". The "C" class mandates were created at the insistence of the British Empire delegates at the Peace Conference to avoid the open door for immigration and trade for certain territories adjacent to Dominions (Quincy Wright, *Mandates under the League of Nations* (1930) pp.37,47; Duncan Hall, *Mandates, Dependencies and Trusteeship*, (1948) p.113); Charles Rousseau, *Droit international public*, Vol.II, (1974) p.383. The "C" Mandates are described as follows (Art.22.6):

> "There are territories such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the

> Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards abovementioned in the interests of the indigenous population."

30. The "open door" policy applicable to "A" or "B" class Mandates did not apply to "C" class Mandates. This latter category, with its exclusion of the "open door" and right of administration as "integral portions" of the territory of the Mandatory power, was thus significantly different from the other classes of Mandate.

31. The actual terms of the Mandate over Nauru, in elaboration of Article 22 of the Covenant, were adopted by the Council of the League of Nations on 17 December 1920 (for text see Annex 27, Vol.4, NM). The Mandate confirmed that it was a Mandate granted to "His Britannic Majesty". Australia was not mentioned. Its involvement came as a result of the 1919 Agreement (see para.48 below). The terms of the Mandate dealt with a number of specific issues, such as the slave trade and traffic in arms and ammunition (Art.3), military training (Art.4), freedom of conscience and admission of missionaries (Art.5). The Mandatory was given "full power of administration and legislation over the territory subject to the present Mandate as an integral portion of his territory" (Art.2). The Mandatory was to "promote to the utmost the material and moral well-being and the social progress of the inhabitants" of Nauru. The Mandate also contained provision for any dispute between the Mandatory and another Member of the League to be referred to the Permanent Court of International Justice if it could not be settled by negotiation (Art.7).

32. The Mandate was undertaken on the basis that it would be exercised "on behalf of the League of Nations" (3rd preambular paragraph), and the Mandatory undertook to make annual reports to the Council of the League (Art.6). The Administrator in September 1921 in fact provided a report to the Council of the League on the pre-mandate period which provided information about the island since 1915. The first annual report was made to the Council in March 1922 covering the period 17 December 1920 to 31 December 1921. The 1923 Agreement which amended the 1919 Agreement makes clear that such reports would be "transmitted by the Administrator through the Contracting Government by which he has been appointed to His Majesty's Government in London for presentation to the Council on behalf of the British Empire as Mandatory" (clause 4) (for text of 1923 Agreement see Annex 28, Vol.4, NM).

33. The Mandate was not a Mandate granted to Australia. Although Australia provided the administration for Nauru and was otherwise involved in decisions concerning the island, it did so solely in its capacity as the designated representative of the three Contracting Governments to the Nauru Island Agreement 1919. The 1919 Agreement created an administrative framework to implement the Mandate granted to His Britannic Majesty. In accordance with the Agreement, Australia consulted with the United Kingdom and New Zealand on all major matters.

34. The right of the Mandatory to administer mandate territories such as Nauru as "an integral portion of their own territory" is of particular significance. Whatever the motives of the mandatory powers in accepting the Mandate, the fact is that "C" class mandates were able to be administered under the same laws and administrative practices followed in the territory of the Administering States. The Administering Authority was given "full power of administration and legislation" (Art.2 of Mandate) over the territory as an integral portion of its territory. The standards applicable to the "C" class mandate of Nauru differed as a matter of law from those applicable to more advanced dependent territories. Moreover, the "material and moral well being and the social progress of the inhabitants" which the Mandatory was to promote, if relevant, does not fall to be judged by some ideal 1990's standard of disinterest. It falls to be judged by the standards and practices applied within the Administering Party at the time.

C. ADMINISTRATION UNDER THE MANDATE

35. Detailed reports on the administration of Nauru during the Mandate were supplied annually to the League of Nations. (Copies of these reports, as well as of the reports during the Trusteeship period, were made available to the Court prior to the Preliminary Objections hearing and remain with the Court.) The reports included information on Ordinances made for the Territory, and, from the 1923 report onwards, contained financial accounts of BPC. The reports were structured around the questionnaire issued by the League for "C" class Mandates.

36. The first Administrator, an Australian nominee in accordance with the 1919 Agreement, remained in office until June 1927 when he was replaced by another Australian nominee, with the concurrence of the British and New Zealand Governments. This same procedure occurred on other occasions when appointment of a new Administrator was necessary.

37. A Nauruan Advisory Council was established in July 1927. It consisted of the Head Chief and Deputy Head Chief and the Chiefs of each of the fourteen districts. This Council advised the Administration in relation to a wide range of matters of concern to the Nauruan people. While the Administrator reported directly to the Australian Government as the appointing Government, the other two Governments party to the 1919 Agreement were kept fully informed of all major administrative decisions.

38. The views of the Nauruan people themselves as to the situation under the Mandate, whereby it was all three Governments that were responsible for their welfare, is reflected in the following statement by the Head Chief reported in the 1932 annual report on the Administration of Nauru to the League of Nations.

> "We Nauruans are very proud of our island and our governmental institutions, and we are very grateful to the League of Nations for enabling us to work out our destiny under wise and beneficient rule. We know that, until such time as we are able to stand by ourselves amid the strenuous conditions of the modern world, we may rely upon the protecting and sympathetic arms of the powerful nations of Great Britain, Australia and New Zealand. We have full confidence in the Mandatory system of control, and we will ever be grateful for the opportunities made available to us by the League of Nations of gaining knowledge in educational matters and in local government procedure." (p.20)

39. Because the Nauruan claims do not relate to the period of the Mandate (para.240 below), it is unnecessary to provide a detailed account in this Counter-Memorial of the Australian administration of Nauru during this period, although the role of BPC and the concession is considered in Section III. This Counter-Memorial also briefly addresses Nauruan allegations concerning the Lands Ordinances and the benefits derived during the mandate period from phosphate mining in the following paragraphs.

40. The *Nauruan Memorial (paras.80-100 and 521-541)* deals with the phosphate mining in Nauru during the Mandate and the role of the BPC by focussing on the Lands Ordinances of 1921 and 1927. The 1921 Lands Ordinance was, at the time, a significant step forward: the royalty was increased from the 1/2d per ton which had operated under the German regime to 3d. The consent of Nauruan landowners was obtained to the royalty rates provided for in the 1921 Ordinance, and it was agreed that those rates should apply for a six

year period only. Accordingly, royalty rates were reviewed in 1927 and further increases in payments to Nauruans agreed (Annex 2 to Preliminary Objections).

41. The royalty agreement of 1927 was concluded between the Nauruan landowners and the British Phosphate Commissioners (whose role is discussed at para.50 below) and was implemented by the 1927 Lands Ordinance. The report on Nauru submitted in 1927 by the Administering Authority to the League of Nations records that representatives of the Nauruan landowners conveyed to the Administrator the following message:

> "We would like to place on record an expression of our complete satisfaction with the terms of the agreement recently entered into with the British Phosphate Commissioners and our appreciation of the care which was taken by the Administration in safeguarding the interests of the Nauruan landowners." (1927 Report, p.29)

The agreement reached in 1927 was intended to last 20 years. The formula provided for five yearly reviews based on fob price (see cl.4(b) of 1927 Lands Ordinance, Annex 36, Vol.4, NM).

42. Subsequent reductions in the price of phosphate, however, necessitated further revision, as the parties to the royalty agreement had not contemplated a fall in royalties. Agreement was reached in 1938 on revised rates for the 1937-1947 and 1947-1967 periods (see 1939 Lands Ordinance, Annex 38, Vol.4, NM). The 1938 annual report by the Administering Authority to the League indicates the situation surrounding the 1938 negotiations and what was agreed in consequence. Relevant passages read:

> "In 1927, the price of phosphate fob Nauru was 23s per ton. In 1932 (the end of the first period of five years) the price of phosphate had risen to 24s.6d per ton, and the royalty paid to the individual landowner was accordingly increased from 4d to 4 3/8d per ton and payment was made at that rate until 1937, when the second review under the Agreement was due. In June, 1937, the price of phosphate had fallen to 14s per ton. If the terms of the Agreement were followed the royalty would be reduced from 4 3/8d. per ton to 1 3/4d per ton. This decrease in the rate was considered by all parties to be inequitable and negotiations were commenced between the Administrator, the British Phosphate Commissioners and the Chiefs

representing the Nauruan landowners with the object of finding a basis acceptable to all parties for variation of the Agreement.

After lengthy negotiations an Interim Agreement was signed on 7th December, 1938, whereby the parties concerned agreed to the following variations in the Agreement:

> 1. The present Agreement to be extended until the 30th June, 1947:
>
> 2. The following alterations in the terms of the Agreement to have effect from 1st July, 1937, and to continue in force until 30th June, 1947:
>
> 1 1/2d per ton to be paid to the Administrator to be used solely for the benefit of the Nauruan people (no variation).
>
> 2 1/2d per ton (instead of 2d as at present) to be paid to the Administrator to be held in trust for the landowner(s) and invested for a period of twenty years at compound interest.
>
> 4d per ton to be paid to the Nauruan landowner(s) (instead of 1 3/4d per ton that would be payable if the present Agreement were not altered). The rate of 4d to be reviewed at the end of five years from 1st July, 1937, and if the fob price of phosphate is then in excess of 14s per ton, the royalty of 4d per ton to be increased by 1/4d per ton for every 1s. per ton by which the fob price of phosphate exceeds 14s per ton. The rate of royalty not to exceed 6d per ton at any time."

43. As to the position in relation to financial benefits for the Nauruans from phosphate mining during the Mandate period, the position has been summarised as follows:

> "In the nineteen years in which the BPC worked the phosphate up to World War II Nauruan royalties rose from 1/2d per ton in 1920 to 8d per ton in 1939. Of this 8d a ton, half was a cash payment, one quarter was spent on works and education for the Nauruan community and one quarter was held in trust for landowners. The total royalty paid to Nauruans in 1939 was 5.1 per cent of the fob price of Nauru phosphate. Another 4.1 per cent of the value of the phosphate was paid

by the BPC for administration costs and about half of this was spent solely for Nauruans." (N Viviani, *Nauru* (1970) p.72.)

44. Each of the Ordinances were made as a result of negotiation and agreement with the Nauruan landowners. Payment for phosphate was made to the individual landowners as well as to a trust fund invested for the landowners. And the rate of royalties paid was regularly reviewed, both during the Mandate period and subsequently. Individual landowners did not, it is true, have a veto over use of phosphate land for mining but this legal regime was commonplace at the time, both in the Pacific and in Australia and New Zealand. In this regard, Nauruan landowners were in the same position as their Australian counterparts. Nauruans did not complain during the Mandate period of expropriation or make any complaint as to the adequacy of the royalty return.

45. The Mandate system was affected by the outbreak of World War II, and Nauru was not immune from this. In December 1940 German raiders shelled the phosphate plant and sank several British and allied merchant vessels owned by or under charter to the BPC. There was no further German action, and phosphate continued to be shipped, although at a reduced rate. In August 1942 Nauru was occupied by Japanese forces. The Australian Administrator and remaining officials were executed. Many Nauruans were deported to Truk. In September 1945 the allied forces retook the island, which reverted to civilian administration in November 1945. Phosphate exports did not resume until 1947 when repairs to the phosphate works and port facilities had been undertaken. The Nauruans on Truk returned on 31 January 1946. The Nauruans suffered greatly during this period. (No allegations by Nauru against Australia relate to the period of Japanese occupation.)

Section III: The 1919 Agreement and the BPC concession

A. HISTORY OF THE CONCESSION

46. The BPC concession on Nauru derived from two sources: its succession to the concessionary rights of the Pacific Phosphate Company in 1920 and the terms of the 1919 Nauru Agreement concluded between the United Kingdom, Australia and New Zealand.

47. On 21 January 1888, prior to the establishment of a Protectorate, the Imperial Government of Germany had granted to the German firm, Jaluit Gesellschaft, the right, *inter alia*, to exploit guano deposits in the Marshall

Islands and Nauru (p.87, Ch.4, Vol.1, Part I, 1988 Nauru Commission of Inquiry into the Rehabilitation of the Worked-out Phosphate Islands of Nauru). The original 1888 Jaluit concession, to run to 1906, was assigned in 1900 to the Pacific Islands Company which, in turn, was taken over by the Pacific Phosphate Company (formed with both British and German capital). In 1905 this concession, including the "exclusive right of exploiting" the phosphate deposits, was continued for a period of 94 years beginning on 1 April 1906, thus extending the rights under the concession to the year 2000 (Annex 43, Vol.4, NM). The Pacific Phosphate Company also took over the extended Jaluit concession in 1906 with the consent of the Imperial German Government (Annex 44, Vol.4, NM).

48. On 2 July 1919 the Governments of the United Kingdom, Australia and New Zealand concluded the Nauru Island Agreement to make provision for the administration of the island and the mining of phosphate (Annex 26, Vol.4, NM). The two preambular paragraphs read:

> "Whereas a Mandate for the administration of the Island of Nauru has been conferred by the Allied and Associated powers upon the British Empire and such Mandate will come into operation on the coming into force of the Treaty of Peace with Germany, and
>
> Whereas it is necessary to make provision for the exercise of the said Mandate and for the mining of the phosphate deposits on the island."

The Agreement then dealt with the administration and set up a Board of Commissioners to be responsible for mining. Articles 6, 7 and 9 dealt with title and rights to phosphate.

> "Article 6
>
> The title to the phosphate deposits on the island of Nauru and to all land, buildings, plant and equipment on the island used in connexion with the working of the deposits, shall be vested in the Commissioners.
>
> Article 7
>
> Any right, title or interest which the Pacific Phosphate Company or any person may have in the said deposits, land, buildings, plant and equipment (so far as such right, title and interest is not dealt with by

the Treaty of Peace) shall be converted into a claim for compensation at fair valuation.

Article 9

The deposits shall be worked and sold under the direction, management, and control of the Commissioners subject to the terms of this Agreement.

..."

49. On 25 June 1920 by an Agreement between King George V and Others and the Pacific Phosphate Company, the Governments of the United Kingdom, Australia and New Zealand bought out the Company (Annex 45, Vol.4, NM). The five page preamble to the Agreement gave a history of the Nauru (and Ocean Island) concession and the 1919 Nauru Agreement. Under Article 1 the Company agreed to sell and transfer to the three Governments "all the right title and interest of the Company in the guano phosphate deposits in and upon [Ocean and Nauru] Islands ... including:

"(b) The full benefits of the Marshall Islands Concession and the German Agreements so far only as the same relate to the Island of Nauru and all the right title and interest of the Company in such Concession and Agreements so far as the same respectively relate to the said Island of Nauru for the whole of the residue of the period for which such concession is granted but subject to the covenants stipulations and conditions therein and in the said agreements contained.

(c) The full benefits of all leases tenancies and other rights to or over lands in the said Islands under land deeds or leases made between native landowners of the said Islands and the Company and belonging to the Company and registered in the Office of the Resident Commissioner for the Gilbert and Ellice Islands Colony at Ocean Island aforesaid and in the office of the Civil Administrator at Nauru for all the respective unexpired residues of the terms of years thereby created and for all the estate and interest of the Company in the same premises subject to the payments and royalties thereby reserved and the covenants and conditions therein contained."

The agreed price was 3.5 million pounds. By an Indenture dated 31 December 1920 (Annex 46, Vol.4, NM) the Company and the three Governments passed to the Board of Commissioners established by the 1919 Agreement "the whole of the undertaking and assets of the Company on ... the Island of Nauru".

50. The BPC operated throughout the period from 1920 until 1967 as a separate body, distinct from the Administration on Nauru. Whilst established by the three Governments, the BPC was treated throughout its life on Nauru as a commercial entity. Under the supervision of the Administrator the BPC negotiated directly with the Nauruans over the royalties to be paid to the Nauruans for most of the mandate and trusteeship period. Only in the few years leading up to independence did the Partner Governments become active participants in the consultations and negotiations concerning the future of the phosphate industry. During the Trusteeship financial information on the BPC operations was nevertheless provided to the United Nations. (This is discussed in paragraphs 108 to 119 below.)

B. THE 1919 AGREEMENT

51. The 1919 Agreement dealt with two issues:

(a) the administration of Nauru; and

(b) phosphate mining on Nauru.

For the purposes of administration, an Administrator was appointed with power to make Ordinances for the peace, order and good government of the Island. The initial appointment, by agreement of the three Governments, was to be made by Australia for a term of five years and thereafter "in such manner as the three Governments decide" (Art.1). It was also provided that "all expenses of the administration" so far as not met by other revenues, were to be defrayed out of the proceeds of the phosphates (Art.2).

52. The 1919 Agreement was amended in 1923 to clarify the relationship between the Administrator and the three Governments. This Agreement in effect required the Administrator to refer Ordinances, and be answerable, to the Contracting Government by which he was appointed (for text see Annex 28, Vol.4, NM). However, the Administrator was to provide copies of any ordinances, proclamations and regulations to the other two Contracting Governments. He was also to supply "such other information regarding the administration of the Island as either of the other Contracting Governments shall

require" (Art.3). In 1965 these administrative arrangements were altered by further agreement, pursuant to which Legislative and Executive Councils were established (for text see Annex 30, Vol.4, NM; also para.68 below).

53. The Board of Commissioners which was to be responsible for phosphate mining was comprised of three members, one appointed by each Government party to the Agreement (Art.3). Each Government retained control over its appointee as his appointment was during the pleasure of that Government (Art.4). As already noted, under the Agreement title to phosphate deposits vested in them; and the entire interest of the previous owner of the phosphate concession on Nauru, the Pacific Phosphate Company, was converted to a claim for compensation (Arts.6 and 7).

54. The Commissioners (who were known as the British Phosphate Commissioners, and commonly called BPC) were required to work and dispose of the phosphate:

> "for the purposes of the agricultural requirements of the United Kingdom, Australia and New Zealand, so far as those requirements extend" (Art.9).

The proportion in which each Government could secure phosphates was set out in Article 14. Approval of all three Commissioners was necessary before phosphate could be sold or supplied to any country other than United Kingdom, New Zealand and Australia (Art.10).

55. The Agreement also dealt with the pricing of phosphate (Art.11). This required phosphate to be:

> "supplied to the United Kingdom, Australia and New Zealand at the same fob price, to be fixed by the Commissioners on a basis which will cover working expenses, cost of management, contribution to Administrative expenses, interest on capital, a sinking fund for the redemption of capital and for other purposes unanimously agreed on by the Commissioners and other charges."

At the time they were concluded, the 1919 and 1923 Agreements were regarded as *inter se* arrangements between members of the British Empire. This represented the then perceived unity of the Imperial Crown on which the Mandate (and the consequent responsibility for the administration of Nauru) had

been conferred. The agreements were not registered with the League of Nations as treaties.

56. The 1919 Agreement as amended continued to govern the operation of the BPC until 1967 when control of the phosphates passed to Nauru pursuant to agreement with Australia, the United Kingdom and New Zealand.

C. THE RESULTANT POSITION

57. The actions of the BPC were principally those of a commercial trading company. The BPC acquired a commercial concern from the Pacific Phosphate Company and succeeded to its entitlement to mine phosphates. The Phosphate Company was, in turn, the successor to the rights of the German Jaluit Gesellschaft when it obtained those rights by assignment in 1900. Neither the concession to mine phosphates nor its acquisition were unlawful. By acquiring by transfer the previously existing rights of the Company to mine phosphate, the BPC did not engage in expropriation. Nor did the actions of the three Partner Governments amount to expropriation. They took over a concession of a kind that was not uncommon in the then colonial situation throughout the world (see NM, paras.86, 98, 515).

58. Like any other commercial concern, the BPC had certain identifiable commercial objects, in particular to sell phosphate at a price (subject to certain requirements) to meet the agricultural requirements of the United Kingdom, Australia and New Zealand (Arts.9, 10 and 11 of the 1919 Agreement, set out above). Any phosphates not required by the three governments were to be sold at the best price obtainable (Art.11). The position of the three Governments under the 1919 Agreement is comparable to that of the owners of a private trading concern who create that concern for some particular trading purpose. In the same way, the three Partner Governments created the BPC as a largely commercial entity to supply phosphate to their domestic markets. Whether or not the Administration ever took an independent position, opposed to the vital interests of the BPC, is immaterial (cf NM, para.541) unless Nauru can also show that by reason of some particular acts the Administration was in fact in breach of a relevant international obligation. This Nauru does not do.

59. Nauru also sets out at some length the politics of the making of the Lands Ordinances (NM, paras.522 to 538), but the relevance of this is not clear. Under the original German concession the right to mine phosphate was given absolutely to the concession owner. The payments under the Lands Ordinances

were a recognition that the Nauruan people should be provided with some greater benefits from phosphate mining than would otherwise have been provided. Whether royalties were payable under the terms of the 1919 Agreement was debated within Australian government circles (see NM, paras.327-331, 369). The fact was, however, that royalties were paid at an increasing rate throughout the Mandate and Trusteeship and Nauru thereby received significant economic benefit from the phosphate mining (see paras.87 to 107 below).

60. The relationship of the 1919 Agreement and the concession to the Partner Governments' obligations under the Trusteeship is considered below (at paras.285 to 290). The nature of the reports on the BPC made by the Administering Authority to the United Nations is also examined (paras.108 to 119). It is contended that there was no incompatibility between the 1919 Agreement and the Trusteeship.

CHAPTER 2: NAURU UNDER TRUSTEESHIP

Section I: Political and administrative advancement

61. The political and administrative system, which was progressively modified until the advent of independence in January 1968, is described in the annual reports of the Administering Authority to the United Nations, in the reports of the Trusteeship Council and in the six reports of the United Nations Visiting Missions. Broadly speaking the territorial Administration was headed by an Administrator, appointed by the Australian Government with the concurrence of the United Kingdom and New Zealand Governments. The Administrator controlled a number of Departments mostly staffed by Nauruans.

62. Before World War II the Administration was advised by the Nauruan Council of Chiefs. This body, which was based on Nauruan custom, was revived after the war. In 1951 it was replaced by the Nauru Local Government Council (NLGC) consisting of nine Councillors elected for four years by all Nauruans over 21. One Councillor was chosen as Head Chief. The Council advised on Nauruan matters and maintained peace, order and good government among the Nauruans.

63. A description of the powers of the Council and its activities is available in the annual reports of the Administering Authority (which have previously been made available to the Court) and in the six reports of the United Nations Visiting Missions (see Annexes 7 to 12, Vol.4, NM). For instance, the 1959 Visiting Mission described its powers as follows:

> "The Council may advise the Administration on any matter affecting Nauruans, including the enactment of new ordinances, and has the power, subject to approval of the Administrator, to make rules, not inconsistent with the legislation of the Territory, for regulating the conduct of its business and for the peace, order and welfare of the Nauruans. It may also organise, finance, and engage in any business or enterprise and provide or co-operate with the Administration in providing any public or social service." (para.26)

As the social and economic development of Nauru progressed, so did demands for political advancement. The first direct Nauruan participation in the work of the Trusteeship Council occurred in 1961. A Nauruan representative attended each session of the Council when the report on Nauru was considered as adviser

to the Special Representative of the Administering Authority. This continued until independence.

64. The powers and functions of the NLGC were enlarged in 1963. As the 1965 United Nations Visiting Mission said, this enlargement represented "an advance in the political development of the Council and the Nauruan people" (para.13, Annex 12, Vol.4, NM). Elections to the Council were held in December 1951, 1955, 1959, 1963 and 1967. In 1955 Councillor Hammer DeRoburt was elected as Head Chief, a position he retained until the abolition of the Council in 1992.

65. As well, consistent with the obligations under the Trusteeship Agreement, Nauruans were increasingly employed in the Administration and assumed senior positions. The last report of the Administering Authority (1966-1968) sets out their employment at independence.

66. The 1962 Visiting Mission considered the time had come for a Legislative Council, but recognised that before this occurred there should be full consultation with the Nauruan people. Subsequently, the Nauruans, having rejected resettlement, pressed in 1964 for such a Council as a transitional step leading to independence in 1967. Between October 1964 and February 1965 Australian policies toward Nauru underwent a fundamental change. This followed these Nauruan representations, discussions at the United Nations and changes in personnel. In essence, the Australian Government decided to propose to the Governments of the United Kingdom and New Zealand that further discussions proceed with the Nauruans with the object of establishing in 1965 a Legislative Council with majority Nauruan representation, self determination in about 1970, increased royalties and an offer of an eventual partnership in the phosphate industry in which the Nauruans would receive not less than an equal share of the financial benefit.

67. From 7-9 April 1965 officials from the three Partner Governments met to work out an agreed approach which, following the formal agreement of the three Governments, comprised:

- an early offer of a Legislative Council in 1965 with wide powers in internal affairs (but excluding defence, external affairs and the phosphate industry) and an Administrator's Council;

- consultation with the Nauruans in 2 or 3 years on the possibility of further movement towards greater Nauruan executive responsibility;

- resumption of royalties discussions with an offer of a higher rate than that refused in July/August 1964;

- negotiations on the phosphate industry including some form of partnership; and

- the concept of resettlement be kept alive both in international discussion and elsewhere.

68. As a result of discussions in Canberra in June 1965 with Nauruan representatives it was agreed that a Legislative Council and Executive Council were to be established. The former was to have an elected Nauruan majority and wide powers excluding only defence, external affairs and the phosphate industry. An Advisory Committee was established consisting of Nauruan representatives (Head Chief Hammer DeRoburt and Councillor Bernicke with Mr K E Walker as adviser) and Australian officials to advise on the establishment of the proposed Legislative and Executive Councils. The recommendations of the Committee were approved by the NLGC and the Partner Governments. Before legislation could be introduced into the Australian Parliament to provide for the new arrangements, however, it was necessary for amendments to be made to the Nauru Agreements of 1919 and 1923 between the Partner Governments which provided for the administration of Nauru. These amendments were effected in the Nauru Agreement signed in Canberra on 26 November 1965 by the three Partner Governments (Annex 30, Vol.4, NM). Subsequently, legislation was introduced in the Australian Parliament in early December 1965. On 18 December Act 115 of 1965 to provide for the Government of the Territory of Nauru received assent (Annex 39, Vol.4, NM). The Legislative and Executive Councils commenced to operate in 1966.

69. After the future of the phosphate industry was settled in 1966 and 1967 attention again reverted to political advancement. This time the focus was independence. A Working Party on political matters was set up on 15 June 1967. It comprised Professor Davidson,[1] as the Nauruan representative, and Australian officials. It met eight times. The two delegations met in formal session as part of the 1967 negotiations on 23 August and Head Chief DeRoburt read a statement

[1] Professor Davidson was constitutional adviser to the Nauruans.. He was Professor of Pacific History at the Australian National University and was earlier involved as constitutional adviser to Western Samoa.

in which he again rejected associated status, but indicated a willingness to discuss full independence and a treaty relationship with Australia, although such a treaty would not have the all embracing character of that earlier proposed by the Partner Governments. He affirmed that there should be no encroachment on Nauruan sovereignty.

70. On 18 October 1967 the Nauruan delegation was informed by Mr Barnes, the Minister for Territories, that the Partner Governments agreed to meet the Nauruan request for full independence. The other points conveyed related to the timing of independence, the transition arrangements and the termination of the Trusteeship Agreement. On 24 October 1967, with the agreement of Head Chief DeRoburt, Mr Barnes made a lengthy statement in the House of Representatives in Canberra announcing the decision (Annex 8 to Preliminary Objections). It incorporated a joint statement subscribed to by the representatives who took part in the talks. The text read in part:

> "Discussions on the constitutional future of the island of Nauru have been proceeding between representatives of the Nauruan people and of the three Governments - Britain, New Zealand and Australia - which are at present responsible under United Nations Trusteeship, for the administration of the island. ... The conclusions reached in those discussions are recorded in a joint statement subscribed to by the representatives who took part in the talks. The text of the statement is:
>
> > "Discussions between representatives of the Nauruan people and representatives of the Governments of Australia, Britain and New Zealand on the constitutional future of Nauru were recently resumed.
> >
> > At the earlier discussions held in June this year proposals by the Nauruan delegation seeking the agreement of the partner governments to Nauru becoming an independent state on 31st January, 1968 were considered. At that time the Governments agreed that it was appropriate that basic changes should be made in the government of Nauru but they put forward for consideration alternative arrangements under which Australia would exercise responsibilities for external affairs and defence but which would otherwise give the Nauruans full autonomy.

...

The position of the Nauruan delegation was, however, that the nature of the future links between Nauru and the three countries which were now the Administering Authority should be determined by agreement after independence had been attained. The primary objective of the Nauruan delegation was the attainment for Nauru of full and unfettered sovereignty.

The partner governments responded that they would respect the views put forward by the Nauruan Delegation. The partner Governments were therefore agreeable to meet the request of the Nauruan delegation for full and unqualified independence.

The date on which Nauru will become independent requires consideration in the light of the steps that are necessary to enable the change to be made. The partner Governments have agreed to take the necessary steps to seek from the present United Nations General Assembly a resolution for the termination of the trusteeship agreement upon independence being achieved.

...

The agreement that has been reached is an historic one and is of far reaching importance to the Nauruan people. The choice of full independence is theirs. We wish them well. If after independence the Nauruan Government wishes to continue close links with Australia, as forecast by the Nauruan delegation at these talks, the Australian Government will be ready to respond and to consider sympathetically any requests that may be made for assistance.

...."

From October 1967 to January 1968 most Nauruan and Australian energies went into the transitional administrative arrangements, the establishment and deliberations of a Constitutional Convention to draft and approve the permanent constitution and elections for the Legislative Assembly.

71. On 10 November 1967, after short debates in both the Australian House of Representatives (26 October) and the Senate (2 November), the *Nauru Independence Act 1967* was adopted. It provided, *inter alia*, that "on and after Nauru Independence Day, Australia shall not exercise any power of legislation, administration or jurisdiction in and over Nauru" (Annex 40, Vol.4, NM).

Section II: Social advancement

72. In the immediate postwar period the major effort of the BPC went into reconstruction of the phosphate installations. It was not until 1949 that phosphate production substantially increased and only in 1950 did exports surpass the prewar level of 932,100 tons in 1939. The extent of the devastation wrought by the war was described in the report of the first (1950) United Nations Visiting Mission (Annex 7 to Preliminary Objections):

> "11. ... Nauru was one of the Territories hardest hit by the last war. All buildings and installations on the island were destroyed without exception ....
>
> 12. The problems of material rehabilitation facing the Australian authorities after their reoccupation of the island must have been considerable, especially as there were shortages of building material and labour, not only in Nauru, but also in Australia itself and other territories under its control. Even now, when facilities have been largely restored, much of the effort of the Administration is still concentrated on reconstruction.
>
> 13. The problems involved in restoring the morale of the Nauruan community have been no less considerable, but here also a large measure of success has been achieved. The Nauruan population is once again rapidly increasing. Nauruans are once again planning for the future... ."

73. The Administration, in co-operation with the BPC, restored the Island's social infrastructure. This included the construction in the late 1940s of 250 new houses for the Nauruans. This was funded by the BPC in additional royalty payable over fifteen years to the Administration (Visiting Mission Report 1950, p.14). Once the devastation of war was overcome, attention turned to social advancement.

74. Social progress, particularly in education and health, may be measured from the annual reports on the administration of the Territory made by the Administering Authority to the United Nations and by noting the comments of the six United Nations Visiting Missions.

75. At 30 January 1968 the total Nauruan population was 3,065 (1607 males, 1458 females) compared with 1369 at 31 December 1946; ie the population had more than doubled. At independence 1549 were in the age bracket 0-14 and 1051 between 5 and 14. At 30 January 1968, 1191 Nauruan pupils were being educated both in co-educational Administration and Sacred Heart Mission Schools at primary and secondary levels. Education, in accordance with Nauruan wishes, was compulsory for Nauruan children from 6 to the end of the school year in which they attained 16. For European children it was between 6 and 15. Secondary school courses, which involved four years' study, led to the Intermediate Examination conducted by the University and Schools Examination Board of the State of Victoria in Australia. The 1966-68 Administration report (p.39) noted that a system of scholarships and other forms of assistance provided secondary, technical and higher education and vocational training at overseas institutions, mainly in Australia, for children who reached the required standard. At 30 June 1967 there were 105 students and trainees studying overseas, of whom 77 were financed by the Administration and 28 were financed privately. Two were studying in Papua and New Guinea and the rest in Australia. Approved training establishments included universities, technical colleges, secondary schools and other institutions which provided vocational training such as nursing, dressmaking and hairdressing.

76. The 1965 United Nations Visiting Mission, the last before independence, commented, *inter alia*, on the educational system in these terms (paras.54-57, Annex 12, Vol.4, NM).

> "54. The Mission visited most of the schools on the island and was very favourably impressed with the standards maintained, the facilities provided and the quality of teachers, buildings and equipment.
>
> 55. The educational system provides for free, compulsory education and, in so far as the indigenous people of the Trust Territory are concerned, has as its objectives: (a) the provision of the means by which each child shall have the opportunity at all relevant ages of obtaining an education comparable in syllabus, content

and standards with that available in Australia; (b) the attainment of a literate population with graduates in the arts, sciences and trades sufficient to meet the future needs of the Nauruans.

56. The extent of the achievement of these objectives may be gauged by the following figures:

Nauruan students in Australia	
(a) At universities	5
(b) At technical colleges	4
(c) In teacher-training colleges	3
(d) Nurses in training	2
(e) At secondary schools (58 scholarships, 7 private)	65
	79
Nauruan students in Nauru	
(a) At primary schools	791
(b) At secondary schools	251
(c) At the teacher-training centre	15
(d) Enrolled in adult education class	73
	1,130

57. In considering these figures it must be remembered that over half the Nauruan population is under twenty years of age and that the 118 Chinese and Pacific Islands children at school only remain for short periods in Nauru."

77. A similar picture is shown in the reports on the Department of Public Health. It maintained a general hospital at which all treatment was free. (The 1965 United Nations Visiting Mission commended "the excellent services it provided to the community", para 80). The BPC in addition maintained a well equipped hospital for their employees. The Administration bore the cost of sending patients in need of specialist care, not available on Nauru, to Australia for treatment. In addition measures were undertaken on environmental sanitation, immunisation and health education. Nutrition was a special priority. The last (1966-68) Administration report noted (p.36) that the Nauruan diet showed considerable improvement, attributable to the greater diversity of food available, the general advancement in social and economic conditions and the

effects of health education; and that no cases of vitamin deficiency were seen during the period under review.

78. Some nine years before, the 1959 United Nations Visiting Mission had commented (para.62, Annex 10, Vol.4, NM) that:

> "on the whole, the Mission was very favourably impressed by the medical facilities provided and the measures taken by the Administration to care for the health of the people, as well as its program for the training of Nauruan men and women to assume eventual responsibility in all sections of the public health field."

79. At 30 January 1968, nine years later, this last point of greater Nauruan responsibility was illustrated by the fact that 96 Nauruans were employed in public health of whom six were medical practitioners, 36 were nurses (men and women) and 10 were nursing aides.

80. Throughout the Trusteeship, the United Nations expressed satisfaction with the Administering Authority. Thus in 1961 the Report of the Trusteeship Council:

> "notes with satisfaction the progress made in the Territory during the year under review in various fields, through the efforts of both the Administering Authority and the Nauruan people, particularly in the field of public health, social security and welfare services." (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 16th Session*, Suppl. No.4 (A/4818), Part II, Ch.VI, para.1.)

81. Similarly, in the final 1967 Trusteeship Council Report on Nauru, it is said:

> "The Council notes that relations between the Administering Authority and the representatives of the Nauruan people continue to be cordial; that economic, social and educational conditions continue to be satisfactory; and that commendable progress has been made in the Territory." (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 22nd Session*, Suppl. No.4 (A/6704) Part II, para.310; Annex 28 to Preliminary Objections.)

CHAPTER 3

PUBLIC FINANCE AND ROYALTIES UNDER THE TRUSTEESHIP

Section I: Public finance

82. The Nauruan Memorial refers to the system of public finance on Nauru and the fact that Australia did not contribute any funds of its own to provide for the administration of Nauru (NM, paras.364-373). It fails to mention that the Nauruan community was not called upon to pay income tax at any stage during the Trusteeship. Nauru alleges that the system of public finance administered by Australia during the Trusteeship involved a failure to exercise the degree and form of governmental authority in Nauru appropriate to the fulfilment of the obligation of trusteeship (para:365). The legal basis of this contention is examined in Part II, Chapter 4 below. The following paragraphs provide information on the system of public finance which show that there is absolutely no basis for Nauru's complaints concerning that system. One important feature of that system, as mentioned already, was the fact that the Nauruan people were not at any time subject to income tax.

83. To assist its annual review of Nauruan administration the Administering Authority regularly gave the Trusteeship Council information on the source of funding for the Territory administration. In the Trusteeship Council report for 1958-9, the position was summarised thus:

> "All expenses of the Administration are met by the British Phosphate Commissioners, out of the proceeds of phosphate sales, if not provided for by other revenue. Further revenue is obtained from import duties, postal services and other sundry items. There is no direct taxation, although the Nauru Local Government Council has certain powers to levy taxes which it has not yet exercised." (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 14th Session*, Suppl. No.4 (A/4100 p.160.)

84. This position remained generally true for the whole of the Trusteeship period. In the early years of the Trusteeship some concern was expressed that certain public expenditure was charged against the Nauruan Royalty Trust Fund. There were also suggestions that the capitation tax should be replaced by an income tax. Under this tax, each male person between 16 and 60 was required to

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pay an annual tax: for Nauruans, 15 shillings, for Chinese, 20 shillings and for Europeans, 40 shillings.

85. The Administering Authority responded to these concerns. The capitation tax was abolished in 1951 to the satisfaction of the Trusteeship Council (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 17th Session*, Suppl No.4 (A/2150) p.261. No substitute tax was imposed. And in March 1952, there were a number of changes made to public finance as a result of which only certain Local Government Council expenditure was to be met from the Nauru Royalty Trust Fund. From 1 July 1952, the BPC were required to pay to the administration a sum equal to the whole estimated annual expenditure of the administration, to the extent not met by other revenues. This took the place of the previous 1s royalty on each ton of phosphate exported (a royalty separate from royalties paid to or for the benefit of the Nauruans). At the same time, education and some other administration expenses previously paid out of the Nauru Royalty Trust Fund were to be charged to the Administration Account (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 9th Session*, Suppl. No.4 (A/2680) p.272). The Trust Fund was then made available for expenditure by the Local Government Council, subject to the approval of the Administration.

86. The financial arrangements introduced in 1952 led some members of the Trusteeship Council to express concern that BPC would acquire too much influence over the budget for the Territory. In its 1957 Report the Council suggested that the Administering Authority might review the position (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 12th Session*, Suppl. No.4 (A/3595) p.202). The Administering Authority informed the Trusteeship Council that it had considered the possibility of changing the system, but considered the system was in the Territory's best interest (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 13th Session*, Suppl. No.4 (A/3822) p.98). The Council did not pursue the issue. Attention instead was given to the issue of royalties.

Section II: Royalties and trust funds

87. As Nauru itself recognises (NM, paras.371-372), a major issue in trusteeship discussions was the rates of royalty paid for the benefit of the Nauruans rather than the public finance system itself. Throughout the 20 year period from 1947 to 1967, the BPC paid royalties to Nauruans, which were substantially increased from time to time. Thus, adjustments were made in 1947,

1950, 1953, 1957, 1960, 1964, 1966 and 1967 following negotiations between the Nauruans and the BPC. In the three years preceding independence, rates became increasingly a matter directly dealt with by the Partner Governments and the NLGC representatives. Royalty payments were made in addition to adjustments needed to meet administration costs. The latter, under Article 2 of the 1919 Nauru Agreement, were to be defrayed out of the proceeds of the sales of the phosphate so far as they were not met by other revenue.

88. The first postwar agreement concluded on 23 May 1947 between the Nauruan landowners, the Administration and the BPC provided that the following royalties should be paid: 6d for the landowner, 3d to the Nauruan Royalty Trust for the benefit of all Nauruans, 2d for the Landowners Investment Fund and 2d for the new Long Term Community Investment Fund (Report of the Administering Authority for the period 1 July 1948 to 30 June 1949, pp.34-35). This was a total of 13d compared to 8d paid at the start of World War II.

89. The royalties paid to or for Nauruans during Trusteeship were paid in the following ways:

a. *The Nauru Landowners' Royalty Trust Fund.* This was established in 1927 by agreement with the Nauruans. Royalties were paid into the fund every six months on behalf of the landowner whose land was being worked and invested by the Administration for 20 years. Until the mid 1950s only interest on matured investment was paid to the landowners and the capital reinvested. From 1955 the investment period was reduced to 15 years and the capital was also distributed along with the interest as the investment matured. At 30 June 1967 the total amount invested in the fund was $A3,022,607 (in 1993 values, $A21 million).[2]

b. *Royalty paid direct to landowners.* Individual landowners were paid a cash royalty at the rate agreed from time to time. For the year ended 30 June 1967 an amount of $A701,954 was paid (in 1993 values, $A4.9 million).

[2] In order for values from 1967 to reflect 1993 values using the Australian GDP deflator, they need to be multiplied by seven. This is the method used in this Counter-Memorial.

c. *The Nauru Royalty Trust Fund*, instituted in 1927, provided additional funds for amenities and services to the Nauruans. It was mainly used from the 1950s on to fund the activities of the NLGC and some educational activities. During the year ended 30 June 1967 payments amounted to $A307,774 (in 1993 values, $A2.1 million).

d. *The Nauruan Community Long Term Investment Fund*, was established in 1947 to provide for the economic future of the Nauruan people when the phosphate was exhausted. At 30 June 1967 the fund amounted to $A6,241,719 (in 1993 values $A43.4 million).

90. Paragraph 124 of Volume 1 of the Nauruan Memorial says that:

> "rather less than 50% of the Royalties 'paid to Nauruans' were paid direct to the landowner; in the subsequent fifteen years that figure was reduced to about 20%. The remainder of the moneys paid by way of royalty 'to Nauruans' were paid to funds invested and controlled by the Australian Administration."

It must be emphasised that those funds were invested for the benefit of the Nauruan people. This reflected the wishes of the United Nations who supported the various royalty increases, but indicated their preference that the benefits go principally to the Nauruan Long Term Investment Fund, not to the individual landowners (see eg United Nations, *Report of Trusteeship Council, General Assembly Official Records, 11th Session*, Suppl. No.4 (A/3170) p.334). The Funds were continued by the Nauruan Government after independence.

91. The relevance to the various Nauruan claims of the amount paid in royalties is discussed below in Part II. A brief review of what actually occurred throughout the trusteeship is provided here.

92. Royalty rates rose significantly in the few years before independence. This reflected a changing appreciation by the United Nations, Nauru and the Administering Authority of what was an appropriate basis for the calculation of royalties. The experience of Nauru in relation to the phosphate concession was no different from that elsewhere in the world at this time in relation to many other mining concessions. This period saw the start of a world wide era of renegotiation, and in some cases nationalisation, of foreign mining concessions.

The legal significance of this situation is developed later on in this Counter-Memorial.

93. Apart from the period immediately before independence, a review of the royalties paid for Nauruans during the Trusteeship discloses a gradual increase particularly in payments to the Nauruan Community Long Term Investment Fund. In 1948 the total royalties paid were 1s1d. This increased in 1950 to 1s.4d, 1955 to 1s.6d, 1958 to 1s.7d, 1959 to 2s.7d, 1961 to 3s.7d, 1963 to 3s.8d, 1965 13s.6d, 1966 17s.6d, and 1967, $4.50.[3]

94. As total export tonnage increased from the early 1960s from roughly 1.2 m tons to 1.6 m tons, and the life of the phosphate mining industry was gradually reduced, the Administering Authority ensured that the royalty payments by BPC increased. The United Nations itself welcomed this gradual increase.

95. In the early 1950s, the Administering Authority stated that royalties were established having regard chiefly to the current and future needs of the Nauruan population. They were not calculated simply as a percentage of the export price of phosphates. That is, the basis for royalties payments was not the price at which phosphates were sold, but the needs of the Nauruan people: see United Nations, *Report of Trusteeship Council, General Assembly Official Records, 7th Session*, Suppl. No.4 (A/2150) p.261. In subsequent years, the Trusteeship Council and Visiting Missions expressed some sympathy with the Nauruan wish to receive higher rates of royalties, although it made no specific recommendations to that effect.

96. Thus, the Council's Report for 1955:

> "notes that the efficient development of the phosphate deposits is of basic importance to the Territory's economy and that the policy adopted by the Administering Authority has resulted in relative prosperity for the Island and its inhabitants. The Council nevertheless emphasises the need for ensuring that the Nauruans receive the maximum benefits from the exploitation of the Island's resources." (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 10th Session*, Suppl. No.4 (A/2933) p.224.)

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[3] In 1966 Australia adopted decimal currency whereby one pound became the equivalent of two dollars.

97. In 1956 the Visiting Mission indicated that the desire for higher royalties "deserves sympathy and consideration" and that a "spirit of understanding and appreciation should always guide the adjustment of royalty rates" (Annex 9, vol.4, NM, paras.87 and 89). The Visiting Mission and Trusteeship Council were then concerned that royalties be applied to building up an adequate fund to meet the cost of plans for the future well-being of the community. Australia agreed with this view (United Nations, *Trusteeship Council Official Records, 18th Session*, Doc.T/SR.717, p.133-4).

98. The phosphate return received by Nauruans was fully disclosed. In 1956 the Special Representative for the Administering Authority said:

> "The annual report showed the quantity of phosphate exported from Nauru, the fob price paid for it - from which, as the Guatemalan representative had demonstrated (717th meeting), the sale price per ton could easily be calculated - the royalties paid per ton, and other figures which together indicated that part of the value per ton which the Nauruans received in direct or indirect benefits. The remainder was accounted for entirely by operating expenses, which were not all recorded in the annual report, and it was the details of those expenses which the Administering Authority did not feel called upon to reveal. Such information could not reveal profits, for there were none; the phosphate was sold at cost and the cost was the sum of the benefits received by the Nauruans and the working expenses.
>
> To decide whether the Nauruans were getting substantial benefits from the phosphate industry it was necessary to assess the benefits they received in the form of employment, free education, free health services, free housing subject to cost only of maintenance, land rents, direct royalty payments, deferred royalty payments, trust funds and direct financing of almost the entire cost of the Territorial government and the local government administration." (*United Nations, Trusteeship Council Official Records, 18th Session*, Doc.T/SR.720)

99. In 1957 Australia estimated that one-fifth of the cost of phosphate went directly or indirectly to Nauruans themselves (837th meeting, TC). In 1958 India estimated that the figure was 19%, almost the same as the Australian estimate of the previous year. Between 1959 and 1961 the Trusteeship Council sought more comprehensive information, so that it might better assess the equitableness of the royalty rates. As a result, additional information on royalty negotiations was

given to it by the Administering Authority. At the same time, royalty rates were increased, a fact commended by the Council which also expressed the view that those increases should be applied to the Long Term Investment Fund.

100. In its 1959 Report the Council concluded:

> "The Council notes with satisfaction that, consequent on an agreement reached in 1958 between the Nauru Local Government Council and the British Phosphate Commissioners, increases in the royalty and acreage payments were made retrospective from 1 July 1957 and that, in accordance with the policy endorsed at its twenty-second session, the proceeds were applied mainly to the Nauruan Community Long-Term Investment Fund.
>
> The Council, noting that general discussions on royalty rates were held in Canberra in April 1959, between the British Phosphate Commissioners and representatives of the Nauruan community and of the Department of Territories, hopes that the outcome of the discussions will be satisfactory to the Nauruans, commends the Administering Authority for directly associating representatives of the Nauruan community in a matter which so closely affects their well-being and requests the Administering Authority to inform it of the results of the discussions and to provide it with more comprehensive information on the operations of the British Phosphate Commissioners." (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 14th Session*, Suppl. No.4 (A/4100) p.160.)

101. And in 1960, the Council said:

> "The Council commends the Administering Authority for the increase in the royalty rate paid direct to landowners.
>
> The Council notes the statement of the Administering Authority that the general review of royalty rates begun last year has reached the stage where the submissions of the British Phosphate Commissioners and of the Nauru Local Government Council are now being examined. The Council requests the Administering Authority to furnish it with appropriate information regarding the views submitted by the two parties in order that it may reach a better understanding of the matter.

> The Council reiterates the view that any increases resulting from this review should be applied mainly to the Nauruan Community Long-Term Investment Fund.
>
> The Council, believing that the information provided to it concerning the operations of the British Phosphate Commissioners in Nauru does not enable it to express a considered opinion on the equitableness of the royalty rates being paid, reiterates its recommendation on this subject adopted at its twenty-fourth session that the Administering Authority provide it with more comprehensive information." (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 15th Session*, Suppl. No.4 (A/4404) p.155.)

102. The 1962 Visiting Mission carefully examined the royalties and increases in benefits received by Nauru (see Annex 11, NM). The Report concluded that "since the Trusteeship was concluded the percentage benefit to the Nauruans against the value of phosphate at the point of exports has risen from just under 4 per cent to 24 per cent (para.111). They commented further that "the current benefits enjoyed by the Nauruans (to the value of 24 per cent of the export value of the phosphate) are substantial" (para.114). The 1962 Trusteeship Council report said:

> "Noting from the report of the Visiting Mission that the rate of royalty derived by the Nauruan people from the phosphate has been increasing over the years, the Council takes note of the statement of the special representative of the Administering Authority that the matter of increasing returns from the phosphate operations is a matter for continuing negotiation between the Nauruans, the British Phosphate Commissioners and the government of the Territory. The Council is confident that as a result of those negotiations, fair and adequate benefits for the Nauruans will be arrived at." (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 17th Session*, Suppl. No.4 (A/5204) p.41)

103. The 1963 Trusteeship Council Report adopted a similarly restrained approach. In that year, Chief DeRoburt had complained about the unfairness of the royalty return even though the Administering Authority had pointed out that 24% of the phosphate return was received by the Nauruans. The Council did no more than note Chief DeRobert's complaint together with the Administering Authority's response, although it did raise the possibility of some local Nauruan

equity in the BPC (United Nations, *Report of Trusteeship Council, General Assembly Official Records 18th Session*, Suppl. No.4 (A/5504) p.28). This reflected the growing interest in such issues and in doctrines like permanent sovereignty over natural resources. Consistently with this, from 1963 onwards, the pace of change in Nauru quickened. Royalties were again substantially increased and ultimately the whole phosphate industry was transferred to Nauru. This is covered in more detail elsewhere in this Counter-Memorial (see Part I, Chapter 5). It underlines the continually evolving position in Nauru. It is incorrect to suggest as Nauru does that the BPC was inflexible and the Administering Authority not mindful of the interests of the Nauruan people.

104. In 1965 the Nauruan leaders again complained to the Visiting Mission about the adequacy of royalty rates, a fact simply noted by the Mission which expressed the hope:

> "that the two parties will come to an agreement about increased royalties, and believes there would be great advantage if the major part of any such increases were to be placed in the Nauruan Community Long Term Investment Fund, where it would serve to help assure the future of the entire Nauruan community." (para.49, Annex 12, NM.)

105. Again, however, the Trusteeship Council in 1965 acknowledged the significant increases in royalty rates resulting from the 1965 negotiations. The Council adopted conclusions and recommendations that can only be described as positive and which endorsed the position of the Administering Authority. Thus the recommendation recorded that the Council "welcomes" the notable increase; and also "looks forward" to a report; "hopes" further negotiations will resolve a problem and "believes" every effort will be made to find a solution in conformity with the interests of the Nauruan. This is not a statement which indicated that the supervisory body was concerned with the adequacy of the reports made by the Administrative Authority or with its discharge of the trusteeship obligations in general. The full recommendation reads as follows:

> "The Council notes that at the Canberra Conference it was agreed to increase the phosphate royalty rates for 1964-65 to 13s.6d and for 1965-66 to 17s.6d; to fix for 1965-66 an extraction rate of 2 million tons of phosphate; to establish at the earliest practicable date an independent technical committee of experts to examine the question of rehabilitating the worked-out mining land on Nauru; and to discuss the

future arrangements for the operation of the mining industry which would include some form of joint enterprise.

The Council, noting the recommendation of the 1965 Visiting Mission that account should be taken of the Nauruans' desire for more favourable terms in the apportionment of profits from the exploitation of the phosphates, welcomes the notable increase in royalty rates.

Noting the agreement on a slightly higher extraction rate for 1965-66, without prejudice to the Nauruan position in any subsequent negotiation, the Council urges that agreement should be reached between the representatives of the Nauruan people and the Administering Authority on an extraction rate for future years on a basis that will safeguard the future interests of the Nauruan people.

With regard to the future arrangements for the operation of the mining industry, the Council hopes that this problem will also be resolved to the full satisfaction of the Nauruan people.

The Council looks forward to the report of the expert committee on the question of the rehabilitation of the worked-out mining land; it requests the FAO to consider favourably the invitation to make available a representative to serve on this committee.

The Council notes that in relation to the ownership of phosphates at Nauru, the representatives of the Nauruans maintained their position that the British Phosphate Commissioners could not validly work the phosphate on Nauru without the agreement of the Nauruan people, while the Australian delegation restated the view of the Partner Governments that the rights were legally vested in the British Phosphate Commissioners. The Council hopes that the forthcoming negotiations between the representatives of the Nauruan people and the Administering Authority will resolve this problem. The Council believes that every effort will be made to adopt a solution in conformity with the interests of the Nauruan people." (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 20th Session*, Suppl. No.4 (A/6004) pp.49-50.)

106. The supervisory function of the Trusteeship Council is emphasised by the character of its recommendations throughout the reporting period. Thus, where

the Council recommended higher royalty payments, it also usually recommended that any such increases should be placed in the Long Term Investment Fund. Australia concurred with this view. In 1958, for instance, the Council endorsed the policy of the Administering Authority that any increase should apply mainly to the Nauruan Community Long Term Investment Fund (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 13th Session*, Suppl. No.4 (A/3822) para.62). The 1965 Visiting Mission adopted a similar approach (para.49). The United Nations recognised the need to make adequate provision for the long term future of Nauru, as did the Administering Authority.

107. As an examination of the 1967 phosphate settlement and the financial position of Nauru indicates, the well-being of the Nauruan people was carefully ensured.

Section III: Reporting to the United Nations on BPC

108. Closely related to United Nations consideration of public finance and royalties was the issue of the role of the BPC. Nauru has alleged that Australia, on behalf of the Administering Authority, failed to supply adequate information on the phosphate industry to the United Nations (NM, paras.284, 314-321, 334-354). This allegation is discussed in Part II Chapter 4. The facts relating to it are set out below.

109. The United Nations was fully cognisant of the financial position concerning the phosphate industry both before and at the time of the termination of the Trusteeship. Throughout the reporting period Australia, as indicated above, provided information on the quantum of royalties and the funds to which they were paid, as well as information on the moneys contributed by BPC to the cost of administration of Nauru. This was set out in detail in each of the annual reports of the Administration to the Trusteeship Council. The accounts of BPC were annexed each year to those reports. The records of the Trusteeship Council show that the Council regularly examined the information provided as part of its consideration of the adequacy and distribution of the royalties. The Trusteeship Council annual reports regularly note the volume of phosphate exported, its value and the royalty payments. Visiting Missions also considered these questions: see for instance, the detailed examination of financial information in the 1962 Visiting Mission Report, paragraphs 96-115; reproduced in Annex 11, Vol.4, NM.

110. From time to time, prior to 1963, the Trusteeship Council called for greater information on the royalty question (see paras.95 to 103 above) and their concern to have adequate financial information is an excellent illustration of the effectiveness of the supervisory machinery of the United Nations in relation to the trusteeship system. As a result of those calls by the Trusteeship Council, the Administering Authority sought to provide increased information. Further, on the Council's recommendation, regular annual consultations between Nauruan representatives and the BPC were commenced and the Nauruan delegation was given access to professional advisers; and in accordance with calls for sympathetic consideration of Nauruan demands for higher royalties, the royalty rates were gradually increased. Moreover, Nauru concedes that the Council did not repeat its recommendations for greater information after 1963 (NM, para.353). This fact presumably meant that the need had been met, by the appropriate response of the Administering Authority. Certainly, the reports of the Council contain no finding that the Administering Authority was acting contrary to its obligations.

111. Further, the Trusteeship Council's early concern about the sufficiency of information, and the adequacy of royalty rates was later replaced with a concern about the negotiating process. In later years, the Trusteeship Council was primarily concerned that Nauruan representatives be given reasonable opportunity to be involved in the setting of royalty rates and in decisions involving the phosphate industry.

112. Thus the 1962 Visiting Mission recommended annual meetings between representatives of the BPC and Nauruan elected representatives. The first such meeting took place in November 1963. The Trusteeship Council in its 1964 Report expressed the view that:

> "The Council is confident that this initial contact between the representatives of the Nauruan Local Government Council and the British Phosphate Commissioners will lead to a mutual understanding and a better and closer co-operation between the parties concerned... . The Council reiterates its belief that further consultations between representatives of the British Phosphate Commissioners and the Nauruan elected representatives will be instrumental in ensuring the equitable sharing of the proceeds of phosphate mining." (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 19th Session*, Suppl. No.4 (A/5804) para.249.)

In subsequent years there were of course detailed negotiations between Nauruan representatives and Partner Governments over phosphate mining issues, including royalty rates. A description of these are set out in Chapter 5 below.

113. The Nauruan Memorial purports to set out the attitude of the Australian representative in 1953, 1956 and 1958 as to the provision of information concerning the accounts of BPC (paras.543-545). However, these statements are quoted in isolation and fail to disclose the quantity of significant information on BPC activities in fact provided to the Trusteeship Council by the Administering Authority. In each Annual Report the balance sheet and accounts of BPC were included. This indicated the fob price paid for phosphate and the volume of phosphate exported from Nauru. What the accounts did not detail was the cost of BPC's operations on Nauru as distinct from those on Ocean Island, also conducted by BPC. It was this that prompted the Trusteeship Council in 1954 to request the Administering Authority to make every effort to provide information concerning the separate financial operations of the BPC in respect of Nauru in its next annual report. This followed an Australian statement that there were no separate BPC accounts in relation to Nauru.

114. In 1955 the Council adopted the following recommendation:

> "The Council recalls its previous recommendations to the effect that the Administering Authority should make available to it separate financial accounts in respect of the operations of the British Phosphate Commissioners in Nauru. The Council takes note of the replies to these recommendations given by the Administering Authority indicating the difficulties which it perceives in complying with them, and expresses the desire that the Administering Authority in its next and subsequent reports will provide the Council with the fullest information feasible on the phosphate operation in the Island." (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 10th Session*, Suppl. No.4 (A/2933) p.225.)

115. In response, the Administering Authority submitted additional information on the phosphate mining operations. This prompted a recommendation in 1957 as follows:

> "The Council, noting that proposals made by the Nauru Local Government Council to increase the royalty rates on phosphate are now being considered, noting further that the Administering Authority

is currently submitting information on the operations of the British Phosphate Commissioners, considering on the other hand that full information on the operations of the British Phosphate Commissioners as specifically related to the island of Nauru would be of great assistance to the Council for its assessment of the question, recommends that the Administering Authority submit such information to the fullest extent feasible." (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 12th Session* Suppl. No.4 (A/3595) p.202.)

116. *The position of the Administering Authority was as follows:*

"With regard to the subsidiary question of whether the Trusteeship Council received sufficient information about the operations of the British Phosphate Commissioners, the Administering Authority's position was clear. The Council was fully entitled to information concerning the quantity of phosphate produced on the island and its destination and value, and that information was submitted to the Council. It was to be found in appendix VII and appendix XIII of the annual report. The Administering Authority felt that in providing that information it was fully complying with Article 5 of the Trusteeship Agreement. The British Phosphate Commissioners operated not only in Nauru but also in Ocean Island and Christmas Island, which were not the concern of the Trusteeship Council, and it would be impracticable to present completely separate information relating to Nauru phosphate alone. The Administering Authority could not emphasise enough its belief that the Council did not need such information and the disclosure of confidential accounts of the Commissioners in order to perform its task effectively. The royalty rates paid to or for the direct benefit of the Nauruans were in no way dependent on or influenced by the prices received for phosphate." (United Nations, *Trusteeship Council Records, 18th Session*, T/SR 714, p.112).

117. As Appendix 2 to the Nauruan Memorial makes clear, separate accounts for Nauru and Ocean Island operations have never been published by BPC. See Vol.I, NM, pp.268-279. As Nauru notes, in the confidential BPC reports, Ocean Island and Nauru accounts are presented on a combined basis (Vol.I, NM, p.268). The respective tonnages exported from the two islands were, however,

available. The Australian Government reserves its position on the accuracy of the attempt by Mr Walker for Nauru to estimate a separate fob price for Nauru phosphate (see Appendix 2, NM, pp.279-288).

118. Between 1959 and 1960 the Council again called for more comprehensive information on the BPC. On each occasion the Administering Authority stated that it would include information in its Report on the operations of BPC to the fullest extent possible. In the 1959 Report the special representative of the Administering Authority noted that BPC:

> "were responsible for development of the phosphate industry in other areas as well, much of their expenditure was in the form of common costs which it was not possible to break down without a complex and largely hypothetical system of costing analysis. The important thing was that the Nauruans were deriving substantive and increasing benefits from the operation of the phosphate industry." (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 14th Session*, Suppl. No.4 (A/4100) para.94.)

119. As already noted, the Trusteeship Council was principally concerned in the 1959-1961 period to have more information concerning BPC financial operations to assess whether the Nauruans were receiving an equitable share of benefits. After 1962 these calls needed to be made no longer as provision was made for regular consultations between BPC and the NLGC. As the Council said in 1964:

> "further consultations between representatives of the British Phosphate Commissioners and the Nauruan elected representatives will be instrumental in ensuring the equitable sharing of the proceeds of phosphate mining." (*United Nations, Report of Trusteeship Council, General Assembly Official Records, 19th Session*, Suppl. No.4 (A/5804) p.249.)

From 1965 to 1967 detailed negotiations took place on the future administration of the phosphate industry, which resulted in agreement on significantly higher royalties. These were reported to the United Nations and are examined in detail in Chapter 5 below.

CHAPTER 4

THE PROPOSALS FOR RESETTLEMENT AND REHABILITATION

120. Throughout the Trusteeship the Administering Authority was conscious of the need to address the long term future of Nauru, given that the phosphate deposits would one day be exhausted. A number of means to achieve this were considered. Initially this took the form of consideration of resettlement proposals, with United Nations endorsement and encouragement. At the same time, examination of the possibility of rehabilitation was also undertaken. When resettlement was rejected by Nauru a further examination of rehabilitation occurred. Alternative means to secure the Nauruans' future were adopted in the phosphate settlement. This ensured a viable and wealthy community at the time of independence as part of the comprehensive phosphate settlement. The significance of these events is examined below: see Part II, Chapter 2 and following. This Chapter examines the efforts of the Administering Authority in relation to resettlement and rehabilitation, and United Nations attitudes thereto.

Section I: Consideration of resettlement by the Partner Governments and the United Nations

121. Resettlement, as the long term solution to the problems which would be faced in the future by those living on a worked out island, was recognised as desirable by the Partner Governments, the Nauruans and the United Nations at an early stage. The 1953 United Nations Visiting Mission report said (para.13, Annex 8, Vol.4, NM) that "the Mission, without wanting to be dogmatic, is of the opinion that resettlement in some other location, as expressed by the Nauruans themselves, may be the only permanent and definite solution". In the following years a number of possible sites in and near Papua New Guinea were investigated by the Administering Authority, but none could meet the three requirements considered necessary: employment opportunities enabling the Nauruans to maintain their standard of living; a community which would accept the Nauruans; and willingness on the part of the Nauruans to mix with the existing people.

122. Having regard to Parts II and III of this Counter-Memorial, it is appropriate to deal with the question of United Nations consideration of resettlement of Nauruans and rehabilitation of the island together. Concern with resettlement and the rehabilitation of Nauru has a long history of consideration

in the Trusteeship Council, where the choice between resettlement or rehabilitation was regularly debated. This issue is dealt with in the Nauruan Memorial at paragraphs 561-591. The story of consideration of rehabilitation by the Partner Governments is set out in detail in paragraphs 142 to 170 of this Counter-Memorial.

123. The question of rehabilitation or resettlement was first raised in 1949, at which time Australia indicated that financial provision was being made for the time when the phosphate deposits would be exhausted in 70 years (United Nations, *Trusteeship Council Official Records, 5th Session*, T/SR.7). This took the form of the introduction of a component in the royalties, when adjusted in 1947, for a long term investment fund that could be used whether the Nauruans remained on Nauru or moved to another island.

124. The 1950 Visiting Mission commented that resettlement may offer the *only long term solution unless research reveals some alternative livelihood* (United Nations, *Trusteeship Council Official Records, 8th Session*, Suppl. No.3 (T/898) para.58; reproduced in Annex 7, Vol.4, NM). This was a widely shared view at the time. The issue of resettlement and rehabilitation was raised in discussion in the Trusteeship Council in 1951, 1952 and 1953 and concern expressed for the future of the island.

125. This was not because the working-out of the phosphate lands would deprive the Nauruans of land which was economically essential for their existence. On the contrary, the phosphate lands were - apart from their value as mineral deposits - of minimal economic relevance. The basic problem was rather that, given the increasing population and rising expectations as regards living standards, it was not thought likely that the island could accommodate the Nauruans long-term - whether or not the worked-out phosphate lands could be restored to some form of productive, agricultural use.

126. In 1951 the Trusteeship Council expressed the view that it "considers it advisable that studies of a technical nature should be carried out in order to determine the possibility of making use of worked-out phosphate land" (United Nations, *General Assembly Official Records, 6th Session*, Suppl. No.4 (A/1856) p.229). Yet the 1953 Visiting Mission said it "saw no other alternative to the resettlement of the population elsewhere" (United Nations, *Trusteeship Council Official Records, 12th Session*, Suppl. No.2, para.13; reproduced in Annex 8, Vol.4, NM). The Council itself in 1953 recommended that the Administering Authority formulate plans for resettlement in consultation with Nauruans; it

further recommended that the Administering Authority give consideration to the views of the Visiting Mission regarding the establishment of a capital fund for resettlement (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 8th Session*, Suppl. No.4 (A/2427) p.113). In 1954 this issue of rehabilitation or resettlement was again the subject of considerable discussion and the Council noted that the Administering Authority was studying plans for gradual resettlement (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 9th Session*, Suppl. No.4 (A/2680) p.265).

127. In 1955 the Council heard that Australia had investigated the possibility of resettlement on Woodlark Island, Papua New Guinea and that the search continued for suitable islands. The Council also suggested further consideration be given to the possibility of rehabilitation (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 10th Session*, Suppl. No.4 (A/2933) p.220). Australia also informed the Council that an expert study (by the CSIRO) had found that resoiling was "a practical impossibility". This report is Annex 14 to the Preliminary Objections and is discussed in more detail in paragraphs 142 to 146 below. Australia indicated that a need for resettlement was a consequence of improved living standards and likely population pressures, not phosphate mining itself (United Nations, *Trusteeship Council Official Records, 16th Session*, Doc.T/SR.613).

128. The 1956 Visiting Mission concluded on the basis of the CSIRO study that there was no practical possibility of the widespread utilisation of worked out phosphate land for agriculture, that it believed "there [was] no alternative to resettlement after the phosphate deposits [were] exhausted" (United Nations, *Trusteeship Council Official Records, 18th Session*, Suppl. No.4, para.51; reproduced in Annex 9, Vol.4, NM). The Council that year also recommended that the search for a site continue and supported a Visiting Mission recommendation that a standing joint body be created "so that there would be continuous consultations with Nauruan people, who would thus realise their share of responsibility for solving the problems of the future of the Nauruan community to a greater degree" (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 11th Session*, Suppl. No.4 (A/3170), p.325). Australia confirmed to the Council what it had already told the Visiting Mission, namely that the Administering Authority would bear the cost of any resettlement: in its report the Council "welcome[d] the assurance given by the Administering Authority that whatever funds will be needed for the possible

resettlement of the Nauruans, these funds will be forthcoming as and when required" (p.325).

129. Investigation of possible islands off Papua and New Guinea continued in 1957 and 1958. In 1959 the Visiting Mission, in light of failure to find suitable islands, recommended that "earnest consideration should be given to (the Nauruan community's) gradual integration into the metropolitan territory of one of the three Administering Authorities" (United Nations, *Trusteeship Council Official Records, 24th Session*, Suppl. No.4, para.24; reproduced in Annex 10, Vol.4, NM). The Council recommended that efforts continue to find a concrete solution. An attempt by India and Paraguay to seek inclusion of a recommendation in the Council Report that further examination be made of the possibility of rehabilitation was rejected 7:6 (United Nations, *Trusteeship Council Official Records, 24th Session* Doc.T/SR.1013).

130. On 12 October 1960 the Partner Governments, following discussions between themselves, offered permanent residence and citizenship in Australia, New Zealand or the United Kingdom to any Nauruans who wished "to transfer to those countries and are likely to be able to adapt themselves to life there" (Annex 4 to Preliminary Objections). It was envisaged that the transfer should take place gradually over a period of 30 or more years and that some material assistance to that end would be given. On 15 December 1960, the NLGC rejected the offer on the grounds that it did not afford them a new homeland and that, by its very nature, the proposal would lead to the assimilation of the Nauruans into the metropolitan communities where they settled. The NLGC instead asked for another island in a temperate zone (Appendix A, Annex I, 1962 UN Visiting Mission report, reproduced in Annex 11, Vol.4, NM).

131. The issue was again raised in 1960 in the Trusteeship Council, which recommended that rehabilitation issues be kept under active consideration (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 15th Session*, Suppl. No.4 (A/4404) para.61). Australia indicated at the time, however, that the CSIRO had informed them that there were no new developments that would lead them to alter the conclusions concerning rehabilitation previously reached.

132. In 1961 Australia provided details of the proposal endorsed by the three administering Governments to allow Nauruans to resettle in their countries referred to in paragraph 130. It was noted by the Council that the Nauruans were not yet prepared to accept those proposals as they "hope[d] that a place may be

found where they could continue to live as a separate community and retain their identity as Nauruans" (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 16th Session*, Suppl. No.4 (A/4818) Ch.VI para.18). The Council also called on the Administering Authority to obtain further technical advice on rehabilitation and to consider the establishment of a pilot project to assess the technical and economic feasibility of rehabilitation "bearing in mind the possibility that some Nauruans may decide to remain on the island in the event of the resettlement of the community elsewhere" (para.18). It appears that no pilot project was undertaken at this time. The 1962 Visiting Mission said:

> "settlement ... in a new home is unavoidable ... [N]o one who has seen the wasteland of coral pinnacles can believe that cultivable land could be established over the top of it except at prohibitive expense. Even a layman can see that, and it is to be noted that the suggestion for rehabilitation of the land has never come from anyone who has visited the island." (United Nations, *Trusteeship Council Official Records, 29th Session*, Suppl. No.2, para.65; reproduced in Annex 11, Vol.4, NM.)

133. The 1962 Visiting Mission concluded that, instead of looking for an island, a single community centre in Australia close to some centre of population might have been appropriate.

134. The 1962 Trusteeship Council report also said the time had come for specific and detailed plans for resettlement.

135. In early 1962 two Nauruan Councillors, one of whom was Head Chief Hammer DeRoburt, inspected islands in the Torres Strait and Fraser Island, which is close to Maryborough on the east coast of Queensland. In August 1963, the Australian Government following investigations from its specially appointed Director of Nauruan Resettlement and consultations with the United Kingdom and New Zealand Governments, offered the Nauruans Curtis Island close to Gladstone on the Queensland coast, with extended local government powers. This offer was ultimately rejected because the proposed political arrangements were unsatisfactory to the Nauruans. The Australian Government, for its part, had made it clear as early as April 1962 that for constitutional reasons any surrender of Australian sovereignty over any mainland or island location in Australia which might be identified for resettlement by Nauruans would raise grave difficulties.

136. While Australia was sympathetic to the Nauruan desire to retain their identity, it was not, however, able for constitutional reasons to cede part of one of its constituent states to form an independent nation, which would have been separated by only a very narrow channel from the Australian mainland. In the hope, nevertheless, that resettlement on Curtis Island on the terms proposed might be possible, Australia commenced negotiations to purchase land on Curtis Island.

137. At this time too the Nauruan Resettlement Sub-Committee of the NLGC submitted its first proposals which would involve the creation of a sovereign Nauruan nation related to Australia by a treaty of friendship. (This was still premised on resettlement outside Nauru.)

138. In 1963 Australia indicated to the Trusteeship Council that Curtis and Fraser Islands off the coast of Queensland had been investigated by Nauruans and found suitable, subject to agreement with Nauruans on the future form of government. Australia indicated, however, that it did not consider Fraser Island offered economic prospects and there were problems of water supply. Australia also indicated that although it could accept resettlement of Nauruans as a group on the islands, it could not relinquish sovereignty over the islands. DeRoburt, as an adviser to the Special Representative of Nauru, indicated that he did not think Nauruans would go back on the basic decision that they be resettled elsewhere (United Nations, *Trusteeship Council Official Records, 30th Session*, T/SR.1205).

139. Australia set out details of a resettlement scheme based on Curtis Island in its 1964 Report to the Trusteeship Council. The proposal would enable the Nauruans to manage their own affairs, the island constituting a distinct local government area. The Administering Authority would provide all the money necessary for resettlement. (For details see United Nations, *Trusteeship Council Official Records, 31st Session*, Doc.T/SR.1232.) But this proposal was rejected by Nauruan representatives in July 1964. This was due to the inability to agree on the degree of control to be accorded the Nauruan community.

140. In July and August 1964 discussions took place in Canberra between Australian officials led by the Secretary for Territories, and the NLGC, led by Head Chief DeRoburt, on the issues of resettlement, royalties, Nauruan independence by 1967, the rate of extraction and the ownership of phosphate (Annex 5 to Preliminary Objections). Dr Helen Hughes, an economist at the Australian National University, was present as an adviser to the Nauruans on

royalties. Little agreement was reached. On 20 August 1964, Mr Barnes, the Australian Minister for Territories issued a comprehensive statement which, *inter alia*, set out the differing positions of the Administering Authority and the NLGC on Curtis Island (Annex 6 to Preliminary Objections). Relevant extracts read:

> "For some years past it had been accepted by the Nauruan people, the Australian Government and the United Nations Trusteeship Council that resettlement of the Nauruans in another place was essential for a satisfactory solution to the problems which would confront them, when the phosphate deposits were exhausted before the end of the century, if they remained on Nauru. The Island was remote and small and would ultimately consist largely of worked out phosphate land: the population was expanding and was accustomed to high standards of living based on the phosphate industry. After inspection of a number of possible locations, proposals had been worked out in some detail for resettlement on Curtis Island. Under these proposals the Nauruans would be given the freehold of Curtis Island. Pastoral, agricultural, fishing and commercial activities would be established, and the entire costs of resettlement including housing and community services such as electricity, water and sewerage etc would be met out of funds provided by the Governments of Australia, New Zealand and the United Kingdom. It was estimated that the cost would be in the region of 10 million pounds.
>
> ...
>
> In the discussions the Nauruan representatives said that they held firmly to the view that the Australian Government's proposal would not secure the future of the Nauruans as a separate people but on the contrary would result in their absorption in the Australian community as Australian citizens.
>
> ...
>
> Moreover after further considering the difficulties of finding a place for resettlement that would meet enough of their requirements to be acceptable to the Nauruan people their Council had now formed the view that they should no longer expect the Australian Government to

be responsible for Nauruan resettlement and that the Nauruan people should stay on Nauru and not resettle at all.

The Australian representatives noted these views and said that the Commonwealth Government would consider them in the light of all the circumstances including the obligations placed on the Administering Authority by the United Nations Trusteeship Agreement and the recommendations made concerning resettlement and related matters by the United Nations Trusteeship Council. However, the Government would continue with its investigations and negotiations with a view to the successful achievement of the resettlement of the Nauruan people.

...

Mr Barnes said that the Trusteeship Agreement for Nauru was administered jointly by the Governments of the United Kingdom, New Zealand, and Australia. The Australian Government would need to consult these Governments regarding the decision of the Nauruan people not to persevere with resettlement. The three Governments would consider the position in the light of their obligations under the Trusteeship Agreement... ."

141. In April 1965 Australia announced that, in view of the clear attitude of Nauru, the particular resettlement proposals involving Curtis Island should be dropped and resettlement as a serious option lapsed at this point. However, the Trusteeship Council in June 1965 nevertheless endorsed the view of the 1965 Visiting Mission that the idea of resettlement should not be abandoned, while reaffirming the right of the people of Nauru to self-government or independence (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 20th Session*, Suppl. No.4 (A/6004) para.324). Among the conclusions and recommendations of the Council were the following:

"The Council notes that, as the Administering Authority was unable to satisfy fully the Nauruans' conditions that they be able to resettle as an independent people and that they should have territorial sovereignty in their new place of residence, and as the offer of Australian citizenship was unacceptable to the Nauruans, they decided not to proceed with the proposal for resettlement on Curtis Island and the Australian Government has discontinued action on this proposal.

> It further notes that at the 1965 Canberra Conference the representatives of the Nauruan people and the Australian Government agreed that the Administering Authority in cooperation with Nauruan representatives would actively pursue any proposals that might give promise of enabling the Nauruan people to resettle on a basis acceptable to them and one which would preserve their national identity.
>
> The Council endorses the view of the 1965 Visiting Mission to Nauru that the question of the future of the Nauruan people has been closely bound up with their search for an alternative homeland and that the idea of resettlement should not be abandoned, but that a further effort to find a basis of agreement would be desirable."

Hence, as late as 1965 resettlement was still a solution that had not been entirely abandoned by the United Nations.

Section II: Rehabilitation

A. THE REHABILITATION INVESTIGATIONS

1. The CSIRO inquiry

142. The possibility of regenerating the worked out phosphate lands was raised in the post war years by the United Nations, the Administering Authority and the Nauruans.

143. The Trusteeship Council, at its 8th session (1951), recommended that it considered it "advisable that studies of a technical nature should be carried out in order to determine the possibility of making use of worked-out phosphate land" (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 6th Session*, Suppl. No.4 (A/1856), p.229). Such an inquiry was subsequently initiated by the Australian Government in 1953 when it commissioned to that end the Commonwealth Scientific and Industrial Research Organisation (CSIRO) to report in particular on:

(a) the area and location of land suitable for agricultural purposes;

(b) the crop or animal production systems which might be followed to make the best use of the land, having regard to the environment and the

settlement pattern of the island and with due regard to self-sufficiency and commercial farming;

(c) the physical and economic possibilities of regenerating worked-out phosphate land so as to make it useful for agricultural purposes in the future; and

(d) recommended research and experimental agricultural projects which might be undertaken.

144. The report (Annex 14 to Preliminary Objections) ran to 23 pages and encompassed the geography, population, food supplies (past and present), land use, climate, soils, problems of increasing the area of land suitable for agriculture and possible agricultural systems with special reference to self sufficiency. The last two sections contained estimates of human population that might be supported and made five recommendations concerning improvement of agriculture. The CSIRO report estimated that, even applying the most favourable assumptions concerning the contribution of the phosphate lands to agriculture, the island could support a population of no more than 3,000 at a somewhat primitive level. That is, even if the worked-out land could be put to some form of agricultural use, it was doubtful that the island would be able to support Nauru's growing population in any event.

145. With regard to rehabilitation of the worked-out phosphate lands, the report found as follows:

> "Phosphate has been extracted from about 25 per cent of the available area, and at the present rate of extraction, the whole area will have been worked-over within the next half century. The authors were specifically requested to investigate the possibility of regenerating these worked out areas so as to make them useful agricultural lands for the future but as a result of this examination have formed the opinion that the regeneration of this land is a practical impossibility.
>
> The old German workings (pre World War 1) were inspected most carefully. These have now been abandoned for about forty years. It is true that they have now a partial cover of vegetation but this vegetation appears to have rooted in small unextracted pockets of phosphate, and consist essentially of the same three or four species which at present dominate the phosphate lands. There is no sign of any

appreciable weathering on the exposed coral pinnacles, as might well have been anticipated from the presence of protruding coral on the unworked phosphate lands.

It would be possible to level this worked out land with the aid of explosives and heavy crushing equipment, and it would be possible to import soil, eg as backloading from the mainland, but there is no certainty that the soil would stay on the surface and not be washed down into the crushed coral. Even if the plateau were to be resurfaced and maintained in this manner, there would still be the question of an adequate water supply to supplement rainfall. It is believed that any such scheme would be fraught with so much uncertainty as to final success, and would be so expensive that it may be ruled out at once as a practical proposition for the widescale utilisation of these lands. (p.12)

...

No practical possibility whatsoever is seen of widescale utilisation of worked out phosphate lands for agriculture. Although it is possible that some better use can be made of these lands than at present there will always be the limitation imposed by dependence upon an erratic rainfall." (p.13)

146. The report was brought to the attention of the Trusteeship Council and was referred to from time to time in its proceedings. In 1959/60, both orally and in writing, the CSIRO confirmed that in its view there had been no developments of any sort which would cause it to alter its 1954 conclusions (Annexes 15 and 16 to Preliminary Objections). Dr Phillis, one of the two authors of the CSIRO report, said on 1 November 1960 that "he sees no hope of regenerating the worked out phosphate land on the Island, and even if the phosphate was replaced with soil the fact that the Island was subject to very severe drought and that fresh water reserves were very limited (as ascertained since 1953) agriculture would not be possible" (Annex 16 to Preliminary Objections). This conclusion was transmitted to the Trusteeship Council.

2. BPC estimates

147. On 5 October 1964 the BPC, in response to a Department of Territories' request of 14 September 1964, sent a memorandum which covered an estimate

of the cost of restoring the worked-out areas after the pinnacles had been levelled by blasting, on the basis of shipping soil from the closest proximity to the ports where phosphate was presently discharged by ships employed in the trade (Annexes 17 and 18 to Preliminary Objections). The reason for approaching the BPC and thus reactivating the subject was that, in announcing their rejection of resettlement proposals, the NLGC had requested that their worked out phosphate lands should be restored by backfilling with soil from Australia. Head Chief Hammer DeRoburt was quoted in the BPC's memorandum as saying that it was intended to plant coconuts on the restored mined areas with a view to maintaining the growing population of Nauru after the phosphate deposits were worked-out.

148. This 1964 study by BPC looked separately at the cost of levelling the pinnacles and of unloading and transporting soil to the area to be reclaimed. It envisaged blasting pinnacles at a height one third above their base to rough fill the space between and crushing sufficient limestone to level and compact the area. It estimated this would cost 11,400 pounds per acre or a total of 40 million pounds for the total phosphate area, estimated at 3500 acres (1400 hectares). In relation to replacement with soil the conclusion was that it would be economically impossible to replace the whole of the phosphate mined with soil from an outside source. This would require 90 million tons, which would mean backloading 3.75 million tons of soil a year for 25 years. The conclusion was that "the cost of procuring, shipping and landing such a quantity of soil at an estimated 3 pounds 18 shillings and 2d per ton would be beyond consideration". Nevertheless, it estimated the total cost of procuring and shipping soil and discharging and spreading it over the whole phosphate area at 88 million pounds. Levelling the pinnacles would be 40 million pounds. In total, therefore, for levelling and resoiling the whole of the area able to be mined, a sum of 128 million pounds was estimated. BPC envisaged that this process would occur over 25 years. In today's values, this represents about $A1.8 billion in total. The Nauruans were given a copy of this letter.

149. On 14 December 1964 CSIRO advice was also sought on the Nauruan request (Annex 19 to Preliminary Objections). On 18 January 1965 it replied (Annex 20 to Preliminary Objections):

> "The proposal to level out limestone pinnacles and cover the worked-out areas with four feet of imported soil is of such high cost that it

could not possibly be justified on any grounds for the likely return that would accrue from such investment.

With the variable rainfall pattern at Nauru we are very doubtful if coconut palms could be grown on areas treated in that way at higher altitudes where the roots of the coconut palms could not tap the water table. Also, the population that could be supported by coconut planting would be very small in relation to the size of the investment. In addition there is obviously no point in reclaiming worked-out phosphate areas at very high expense until the narrow strip of coastal plains surrounding the island is intensively used for agriculture.

Because of the variability of the rainfall, the lack of suitable underground water for irrigation and the isolated location of Nauru Island, we are unable to foresee any type of agriculture at a reasonable cost that could possibly give the Nauruan population a standard of living appreciably above the subsistence level.

The phosphate areas apparently have never been productive lands and it appears that vegetation regeneration on worked-out areas is virtually nil. Fresh water supplies for domestic and garden use appear to be a major problem on the island. A thought that has occurred to us is that the mined areas consist of inert coral and phosphate which apparently behave in a similar manner to no-fines concrete. Would it be feasible and economic to seal some of these areas with bitumen or cement, firstly to give catchments for gathering rainfall and secondly to store water for domestic and garden use? If this is feasible the water could be initially used for domestic and garden use by the present relatively large population and when mining is completed, for small scale intensive irrigation for food crop production by Nauruans. Importation of soil of only one foot depth may be worth considering for these small, intensively gardened areas. You might consider that this suggestion belongs in the crazy field, but we consider it far less crazy than the proposal to resoil the major part of the island.

If the Nauruans wish to foresee a reasonable standard of living in the future, we do not consider there is any reasonable alternative to resettlement in another location."

150. The BPC later commented (letter of 10 February 1965, Annex 23 to Preliminary Objections) that the CSIRO suggestion to seal worked out phosphate land for water catchment purposes appeared impracticable.

151. On 20 January 1965 the BPC had, at the request of the Department of Territories, made an estimate of the cost of shipping soil from Fauro, an island in the Solomons (Annex 21 to Preliminary Objections). The exercise, which BPC stressed was hypothetical, concluded (p.2) that:

> "the governing factor in freight cost is the rate of discharge at Nauru which would have to be carried out with ships gear, that the use of medium sized bulk carriers might be most favourable and that the cost of procuring and shipping soil from an island such as Fauro would be much the same as from normal discharging ports in Australia and New Zealand."

152. A further BPC letter (Annex 25 to Preliminary Objections), dated 2 April 1965, to the Department of Territories on the cost of a pilot project in regenerating the worked out phosphate land was discouraging in that it concluded that a pilot operation would yield little information in the way of establishing cost. It read:

> "Our estimate of 36,570 pounds per acre (see our letter dated 5 October 1964) was based on a large scale operation fully equipped to obtain, receive, load, discharge, land and distribute the soil including the laying of a special set of moorings at Nauru. It assumed the availability of suitable soil and of course the necessary labour force was taken into account.
>
> In operating a Pilot scheme none of these factors would pertain. Assuming that suitable soil could be obtained close to, say, Melbourne or Geelong (130,000 tons would be required for 20 acres) it would need to be carted by road vehicle, dumped on wharf, loaded by grabs and discharged at Nauru with makeshift equipment into barges not suitable for carrying bulk material. Adequate shore discharge facilities do not exist at the Island to off load the soil from the barges and ships would need to moor at existing berths to the exclusion of ships discharging general cargo and/or loading phosphate. Turn around would thus be slowed down which would reduce the effective supply of phosphate and add to freight costs.

> Not in any respect could existing plant and labour handle such a project efficiently. To attempt it on these lines would amount to attacking a mammoth project on a knife and fork basis and the cost could be expected to be as much as two or three times more than the estimated cost of 36,570 pounds per acre which is based on a thoroughly planned and mechanised operation. In such circumstances it seems to us that a pilot operation would yield little in the way of establishing cost - indeed unless ways (unknown to us) can be found of greatly reducing our present estimates cost will in any case defeat the purpose of the exercise."

Today, this estimate of 36,570 pounds is the equivalent of $A512,000 per acre. (There are 2.47 acres to a hectare.)

3. The Davey Committee

153. By May 1965 the Department of Territories concluded that its own investigations had established that the cost of rehabilitation would be so high as to be uneconomic and that there were serious doubts about any worthwhile results for agriculture due chiefly to probable loss of soil through the porous coral base and the erratic rainfall. It also noted that the Monsanto Company in the United States had cooperated with the University of Tennessee in recent years in experiments on the use of mined phosphate land and that the Company had commented that:

> "where the phosphatic material is right at the surface of the ground and practically all the soil is removed leaving only exposed bare rock ... This type of mined over land has insufficient soil left to relevel and the only way of putting this land into its former condition would be to move soil in by trucks from some other location. This we consider as uneconomical and unrealistic as the cost would be more than the possible value of the land for agricultural purposes" (Annex G to the 1965 Record of Negotiations, reproduced in Annex 2, Vol.3, NM).

154. On 10 June 1965, Mr Warwick Smith and Head Chief DeRoburt, in discussions in Canberra on the future of Nauru, signed a summary of conclusions which included the following section on rehabilitation (Annex L to the 1965 Record of Discussions, Annex 2, Vol.3, NM):

> "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.
>
> 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."

About the same time the 1965 United Nations Visiting Mission to Nauru published its report which, while it did not touch on rehabilitation in its conclusions, included (Annex II) a NLGC memorandum on the rehabilitation of worked-out phosphate lands (Annex 12, Vol.4, NM).

155. By the end of 1965 the members of the technical committee were appointed. The individual members were mutually acceptable to the NLGC and the Administering Authority. They comprised:

Mr G E Davey	Consulting Engineer
(Chairman)	Sydney, NSW
Prof J N Lewis	Prof of Agricultural Economics
	University of New England
	Armidale, NSW
Mr W F Van Beers	Soil and Land Classification Officer,
	FAO, ROME

156. The Committee's terms of reference, as set out in the report, were to examine:

> "(i) 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;
>
> (ii) effective and reasonable ways of undertaking such restoration, including possible sources of material suitable for refilling;

(iii) estimated costs of any practicable methods of achieving restoration in any effective degree.

The terms of reference also instructed the Committee, assuming it appeared to be feasible to achieve restoration along the lines referred to in the paragraph above, to:

(i) investigate the water resources of Nauru;

(ii) examine fully the possibility of growing in the areas to be restored, trees, vegetables and other plants of a utilitarian kind, having regard both to what was done in this way in the past and what might be most useful to the Nauruan people in the future."

157. The Committee's 68 page report (reproduced as Annex 3, Vol.3, NM) was submitted in June 1966 to the Australian Government and the NLGC. It comprised 10 sections and 7 appendices and was the result of submissions and consultations with the NLGC, the Australian Government, BPC and others as well as a 10 day visit to Nauru. The first conclusion (Section 2) was as follows:

"(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;"

158. The Davey report provided information on "technically feasible methods of treating worked areas, the costs and benefits of alternative treatments and the implications of such actions" (p.8). It sought to "outline a set of measures for the treatment of worked-out phosphate areas which would be reasonable in terms of the costs involved and the contributions which would be made towards a sound and flourishing economy". (p.8)

159. Section seven of the report contained an examination of the Nauruan economy after exhaustion of the phosphate. It pointed to the ability of Nauru to sustain a high per capita income based on income return from phosphate royalties.

160. Section eight examined possibilities for treatment of mined areas. It considered five alternative land treatments, recognising that the end use desired and costs would largely determine the choice of alternatives. It ruled out

complete refilling by imported soil as not a practicable alternative. It examined levelling of pinnacles and resoiling part or all of the worked-out areas using local and imported soil. Appendix III to the report gave detailed cost estimates. Depending on the soil depth, costs of from $94-240 million were estimated for levelling and resoiling (p.53 of report). This is equivalent to $A658 million to 1.68 billion today. The Committee pointed, however, to problems caused by the slope of the land which would require special anti-erosion measures.

161. The Committee examined two particular projects: construction of a new airstrip and construction of a water catchment and storage. If the two projects were carried out together their cost would be respectively $A8 million and $A18 million. This is equivalent to $A56 million and $A126 million today.

162. Finally, the Committee examined revegetation of exposed pinnacle areas. This would involve accelerating revegetation artificially such as by hand planting. However, an accurate assessment of benefits could only be obtained after experimental work.

163. Having examined possible options, the Committee considered likely benefits. It considered that "direct benefits (from resoiling) in the form of additional agricultural production would be relatively very small" (p.37). It concluded:

> "the direct agricultural and residential benefits from resoiling the worked out phosphate areas would be small in relation to the costs involved. No future land use would offset more than a fraction of the capital costs of resoiling land with imported soil. It would therefore be unreasonable to incur expenditures of the magnitude involved in resoiling the whole of the phosphate lands unless extremely high values were placed on the achievement of intangible objectives ... The Committee concludes, therefore, that even if resoiling of the whole of the worked-out areas with imported soil were technically feasible ... it would not make a contribution to economic and social life on Nauru commensurate with the costs involved" (p.39).

164. The Committee considered it would be possible to use the thin cover of soil on the remaining undeveloped phosphate lands as part of landscaping associated with levelling 600-700 acres for residential use (p.40). And levelling without any resoiling of the remaining area could be undertaken at a cost of $10.8 million (p.41). This is equivalent to $A70 million today.

165. Its conclusions were that a number of facilities could be constructed, at a total cost of $A31 million (today, $A217 million), which would provide a basis for the useful development of the island. These included a water supply, airport, treatment of some 500 acres so that the land would be available for public purposes and minor revegetation of the remaining area. It also recommended that steps be taken as soon as possible to plan the land use of the island completely.

4. Reception of the Davey report

166. On 20 June 1966, discussions were held between the Partner Governments and the Nauruans about the future of the phosphate industry. Whatever prospects existed for accepting and implementing the conclusions of the Davey Report were destroyed by the Nauruans themselves. Head Chief DeRoburt submitted a 20 page statement on the Davey Committee's report which commended certain parts, and condemned those parts which did not support the Nauruan case on rehabilitation (Annex 11 to the 1966 Record of Negotiations, reproduced in Annex 4, Vol.3, NM). The latter approach predominated, with such section headings as "Signs of undue bias in the Committee's report", "Assertions unsupported by the report" and "Factual inaccuracies in the Report". Among the 17 conclusions were that the Committee had:

- confirmed the judgment of the NLGC that it was "technically feasible to refill mined phosphate areas with suitable soil and/or other materials from external sources".

- confirmed that given a water supply and improved communications the Nauruans would enjoy a very satisfactory level of living on the island.

- gone beyond its terms of reference when it presumed to pronounce that complete re-soiling was technically feasible but "impracticable".

- commended the proposal to build an airstrip designed as a catchment area for water.

- made a serious error of judgment in considering only the facilities needed to support a population of 10,000 by the turn of the century.

167. On 28 June 1966 Mr Warwick Smith replied in a joint delegation statement (Annex 16 to the 1966 Record of Negotiations, reproduced in

Annex 4, Vol.3, NM). He stressed that the Partner Governments had not yet considered in detail either the Davey Committee's report or the Nauruan statement. The Committee's report, he said, followed two offers of resettlement, both declined by the NLGC. He then traversed parts of the Nauruan comments, deprecated attacks on the Committee's integrity and proposed a joint detailed examination.

168. On 1 July 1966 Head Chief DeRoburt and Mr Warwick Smith signed another agreed minute which contained a lengthy paragraph on the relationship of rehabilitation and resettlement costs to financial arrangements for the phosphate industry (Annex 19 to the 1966 Record of Negotiations, reproduced in Annex 4, Vol.3, NM). Nauru linked the issue of rehabilitation to future financial arrangements. The statement read:

> "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 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. It was agreed that the report of the Committee on Rehabilitation should be examined by the Working Party" (emphasis added).

169. The Working Party was chaired by Mr C E Reseigh, a senior officer of the Australian Department of Territories, and included two Nauruans and their financial adviser. Its report (Annex 7 to Preliminary Objections) noted that agreement could not be reached regarding consideration of the Davey Committee findings. Head Chief DeRoburt criticised the failure of the Department of Territories to present a detailed critique of the Davey report

similar to the Nauruan critique, repeated the Nauruan view that rehabilitation was the responsibility of the Partner Governments and said how they financed that responsibility was up to them. Mr Reseigh emphasised (para.15) that the Australian Government was not saying that it did not take any responsibility for meeting the cost of rehabilitation, but that it would do this by ensuring that the payments to the Nauruans would be sufficiently generous to enable all expenditure necessary for the long term welfare of the Nauruans, including rehabilitation if they decide upon it, to be met. He suggested that it would be of use to look carefully at the Davey report to determine what rehabilitation, if any, seemed sensible and proper to undertake. It would also be useful to know what the order of magnitude of the cost of such a rehabilitation program would be. Head Chief DeRoburt replied (para.16) that, as there was no acknowledgment of the Partner Governments' responsibility, he could not see that any advantage would be served by the Working Party discussing the report. So, once again, the Nauruans eliminated any prospect of progress along the lines suggested by the Davey Committee.

170. On 18 April 1967 the report of the Working Party was discussed in formal negotiations between the Partner Governments and the Nauruans (SR5, pp.85-89, Record of the 1967 Negotiations, Annex 5, Vol.3, NM). It covered, *inter alia*, the preparation of a price indicator, profit sharing in mineral extracting, rehabilitation and the Long Term Investment Fund. On rehabilitation, Mr Warwick Smith repeated that the Partner Governments considered that decisions on what action should be taken on rehabilitation was wholly a matter for the Nauruans. Thereafter there is no mention in the formal negotiations with the Nauruans of the Davey report although exchanges on the principle of rehabilitation and responsibility continued for another month.

B. UNITED NATIONS ATTITUDE TO REHABILITATION

1. 1964

171. As resettlement receded as a possibility, attention turned within the United Nations to rehabilitation. But, as the various studies referred to in the previous section indicate, rehabilitation was not without problems. In 1964 the Special Representative explained, in answer to questions from Liberia, why it was not feasible:

> "it would be extremely difficult and expensive to reclaim the land from which the phosphate had been taken. The phosphate deposits

occurred in plateaux around very hard limestone pinnacles and reached to a depth of twenty to thirty feet. The pinnacles occurred at intervals of about three or four yards, and their diameter at the base was ten or twelve feet. In order to recover the land, it would be necessary to blast down the pinnacles one by one, crush the rock and cover it with a sufficiently thick layer of fertile soil imported from Australia. But even if that were done two insuperable difficulties would remain. First, the ground on Nauru was very porous. When there was any rain, whatever the amount, the water passed quickly through the layers of earth and was held only by the pressure of the salt water, whose density was greater. The extreme porosity meant that the land would be arid. Even if certain crops could be grown, cash crops would be out of the question. Secondly, the island was remote from any possible market and could be worked only on a basis of subsistence agriculture. That was not what the Nauruans wanted. It was probably for that reason that the people of the island had stated that they would be compelled to find a new home in order to survive as a people" (United Nations, *Trusteeship Council Official Records, 31st Session*, Doc.T/SR.1236).

2. 1965

172. The 1965 Visiting Mission noted the views of the 1962 Mission on rehabilitation. That Mission had concluded that:

"settlement ... in a new home is unavoidable ... [N]o one who has seen the wasteland of coral pinnacles can believe that cultivable land could be established over the top of it except at prohibitive expense. Even a layman can see that, and it is to be noted that the suggestion for rehabilitation of the land has never come from anyone who has visited the island" (United Nations, *Trusteeship Council Official Records, 29th Session*, Suppl. No.2, para 65; reproduced in Annex 11, Vol.4, NM).

173. The 1965 Mission noted the enormous expense and difficulties said to be involved but, not being experts, declined to make any recommendation. Appended to the report, however, were memoranda submitted by the NLGC. Also reproduced was a statement of the BPC with estimated cost of rehabilitation (United Nations, *Trusteeship Council Official Records, 32nd Session*, Suppl. No.2, reproduced in Annex 12, Vol.4, NM).

174. In discussion in the Trusteeship Council in June 1965, the Special Representative indicated that an expert committee would be established to make a full scale investigation. This proposal had arisen out of negotiations with Nauru the same month and resulted in appointment of the Davey Committee. A USSR draft resolution (T/L.1098) inviting the Administering Authority, *inter alia*, to restore the ground cover of the island was defeated in the Trusteeship Council (United Nations, *Trusteeship Council Official Records, 32nd Session*, Doc.T/SR 1269).

175. In the Fourth Committee in 1965, rehabilitation was again raised. The Liberian representative introduced a draft resolution on behalf of the Afro/Asian group, claiming that the Nauruans were already capable of full self-government and independence, which should be granted to them. Further, Australia should restore the island by returning soil in phosphate vessels which now arrived in Nauru empty and that the cost of so doing would be 12 million pounds (today, $A84 million) (United Nations, *General Assembly Official Records, 20th Session, Fourth Committee*, Doc.A/C.4/SR.1591). Mr McCarthy, the Australian representative, replied by saying that the draft resolution did not reflect the true circumstances, and that it was only by exploiting the phosphates that the Nauruans could live so well (United Nations, *General Assembly Official Records, 20th Session, Fourth Committee*, Doc.A/C.4/SR.1593).

176. Subject to some amendments, the Afro-Asian resolution was adopted in the Committee by 61-0-19. It requested that the Administering Authority fix the earliest possible date, but not later than 31 January 1968, for Nauruan independence and "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" (United Nations, *General Assembly official Records, 20th Session, Fourth Committee*, Doc.A/C.4/L.825). (The matter of the habitability of the island is discussed further in Part II, Chapter 3.) On 21 December 1965 resolution 2111(XX) was adopted in plenary by 84-0-25 (Australia, NZ, UK, US, other Western and Latin American States).

3. 1966

177. In July 1966 the Trusteeship Council was informed that the Davey report had been received by Australia the previous month and it was now being examined. It would be made available to the Council. Head Chief DeRoburt also addressed the meeting. The text of his statement is set out at paragraph 186 of

the Nauruan Memorial. It asserted that the Administering Authority should bear responsibility for rehabilitation of one third of the island.

178. In its report the Council made specific mention of rehabilitation. The conclusions on this point read 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 a Committee of Experts, including a representative of FAO, appointed by the Administering Authority.
>
> 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 is 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 requests the Administering Authority to make the report of the Committee of Experts on the Rehabilitation of the worked out mining land available to its members as soon as possible and recommends that it be studied as soon as possible during the course of conversations between the Administering Authority and the delegates of the people of Nauru.

> The Council recalls resolution 1803(XVII) concerning permanent sovereignty over natural resources and invites the attention of the Administering Authority to its provisions.
>
> The Council notes the statement of the Administering Authority that the discussions between the joint delegation and the Nauruan delegation in Canberra will continue to be infused by what the Head Chief called 'a spirit of understanding' and a positive, most heartening and most encouraging 'response and attitude'." (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 21st Session*, Suppl. No.4 (A/6304) Part II, para.408.)

179. The Council in this recommendation also noted that further joint discussions were to be held to deal with the question of rehabilitation and the future operation of the phosphate industry. The Council hoped that these discussions would resolve both problems:

> "It believes that every effort will be made to adopt a solution in conformity with the rights and interests of the Nauruan people." (para.408)

180. Liberia had unsuccessfully sought to include in the report of the Trusteeship Council a statement to the effect that "if the Committee of Experts considers rehabilitation is feasible, Council recommends that the Administering Authority should take immediate steps towards restoring Nauru" (see United Nations, *Report of Trusteeship Council, General Assembly Official Records, 21st Session*, Suppl. No.4 (A/6304) para.426). A further Liberian attempt to get a similar resolution adopted by the Trusteeship Council in July 1966 also failed (United Nations, *Trusteeship Council Official Records, 33rd Session*, Doc.T/SR.1296).

181. It is clear that the Council was fully aware of the Nauruan claims during the negotiations on the future of the phosphate industry, including their claims as to responsibility for rehabilitation. These were set out in the preamble to the conclusions and recommendations of the Council. The question of rehabilitation was seen as part of the overall negotiations on the future of the phosphate industry. There is no suggestion that rehabilitation was a prerequisite to independence or that failure to rehabilitate would involve a breach of a trusteeship obligation. The sole concern was that the overall settlement secure Nauruan rights and benefits as a whole.

182. The Fourth Committee again considered Nauru in December 1966 at the 21st General Assembly. The Australian Representative referred (1663th meeting, 9 December 1966) to the various plans for the future of the Nauruan people including resettlement and the Davey report whilst the Liberian representative (Miss Brooks) took issue with several of the Trusteeship Council's conclusions. Miss Brooks raised again the question of ownership of the phosphate, independence by 31 January 1968 and her confidence that the Administering Authority would contribute to restoring the worked-out phosphate lands (United Nations, *General Assembly Official Records, 21st Session, Fourth Committee*, Doc.A/C.4/SR.1663.) A Liberian resolution (Doc.A/C.4/L.851) was introduced which had three main recommendations:

- that Australia fix the earliest possible date, not later than 31 January 1968, for Nauruan independence;

- that the Administering Authority transfer control over operation of the phosphate industry to the Nauruan people;

- that the Administering Authority take immediate steps, irrespective of the costs involved, towards restoring Nauru to habitation by the Nauruan people as a sovereign nation.

183. The original resolution (Doc.A/C.4/L.851) had confined its recommendation on rehabilitation to a situation "should the Committee of Experts consider that rehabilitation of the worked-out land is feasible". These words were however deleted in a Corrigendum - A/C.4/L.851/Corr 1. This resolution was adopted in Committee by a vote 58-3-13 and on 20 December 1966 in plenary by a vote 85-2 (Australia, UK) - 27 (NZ). For text of resolution 2226(XXI), see Annex 16, Volume 4, NM.

184. The Australian representative, speaking in explanation of his vote in the Fourth Committee said that it was "not correct to say that the phosphate operations had spoiled previously fertile land, for the land was rock and could not be used for agricultural purposes". Given that the negotiations were deferred until 1967 at the request of the Nauruan leaders, he regretted that the Committee had adopted such a resolution at that time.

185. The delegate of China also said that since Nauru had not responded to the Davey Committee:

> "he did not consider that any recommendation should have been made on the question of the rehabilitation of the worked-out land."

The amended resolution was adopted by the Fourth Committee on 15 December 1966 (United Nations, *General Assembly Official Records, 21st Session, Fourth Committee*, Doc.A/C.4/SR.1672.)

4. Trusteeship Council, 1967

186. The 34th session of the Trusteeship Council (29 May - 30 June 1967) again examined Nauru. It was attended by Mr Reseigh as Special Representative and Head Chief DeRoburt. The issue of the future of the island was considered at some length in the Trusteeship Council. Mr Reseigh mentioned, in the course of an account of conditions in the Territory, the 1966 Davey report on rehabilitation:

> "the Administering Authority considered that the Committee had made a painstaking review of the problem which made a valuable contribution to the solution of the problem, but the final decision rested with the Nauruan people. The new financial arrangements which had been made for the phosphate industry should enable the Nauruan people to take the necessary measures for their future" (United Nations, *Trusteeship Council Official Records, 34th Session*, Doc.T/SR.1313).

He also described the phosphate agreement reached on 15 June and the political discussions which had commenced in Australia following conclusion of the negotiations on phosphate. The latter would be continued after the Trusteeship Council session.

187. Head Chief DeRoburt felt the only important point on which there was real disagreement was the question of the rehabilitation of the worked-out mining lands. The Nauruans believed that the Partner Governments should accept responsibility for rehabilitating land worked before 1 July 1967, while the Nauruans would accept responsibility for land worked after that date, thus assuming two-thirds of the responsibility. (United Nations, *Trusteeship Council Official Records, 34th Session* Doc.T/SR.1313.)

188. In answer to questions and in the general debate Mr Reseigh repeated the Partner Governments' view on rehabilitation. The lengthy statement bears careful study. He said:

"The basic position of the Administering Authority regarding the restoration of worked-out land was, firstly, that there must be adequate resources to provide for the future of the Nauruan people, and, secondly, that the Nauruan people themselves should decide what was to be done. Taking up the second point, he recalled that various proposals had been made for the resettlement of the Nauruans, but that they had not been found acceptable by the Nauruan representatives. The Nauruans had decided that they wished to remain on the island. It was possible, however, that a future Nauruan Government or individual Nauruans would subsequently decide in favour of resettlement elsewhere. The choice must therefore be left open and the choice as to whether resources were to be utilized for rehabilitating worked-out areas or securing the future in other ways should also be left to the Nauruans.

With regard to measures to be taken for the treatment of worked-out areas, the matter had been considered by a Committee of Experts. The experts were people with high qualifications and the Nauruan representatives had approved their appointment. The Chairman had been one of the best qualified engineers in Australia, nominated by the appropriate professional body in Australia, and other members had been a professor of agricultural economics, and a soil expert of Belgian nationality nominated by the Food and Agriculture Organization. None of the members had been employees of or connected with the Australian government service. He was sorry that the Nauruan representatives had reflected on the objectivity of the experts. But in any case, it would not have been proper for the Administering Authority to act unilaterally on the basis of the report.

As to when the steps required should be taken, it would seem to him wise to leave open the maximum options regarding the use of available resources. If mined land was not needed and might not be needed for decades, it would seem better, rather than devoting resources to its rehabilitation immediately, to lay those resources aside at interest and undertake the treatment of the land as needs developed.

With regard to the use of resources, it seemed to him quite unrealistic to consider the question of treatment of worked-out land without considering the benefits of alternative uses of the resources, such as investment at

interest or investment in Nauruan enterprises needing capital. The concern of the Administering Authority in the discussions which had just been completed had been that the resources available to the Nauruan community should be adequate. In considering that matter, there were many questions which had to be taken into account, including the continuing needs of the Nauruans when the phosphates were exhausted and income from their extraction ceased. All those aspects had been considered as carefully as possible by the Administering Authority in the settlement made. Under the agreement reached, payments to or for the Nauruans would amount to the equivalent of about $US21 million during the coming financial year. The Nauruans had a number of needs that they would wish to meet, including payments to the long-term investment fund which was designed to secure an income for the Nauruans after the phosphates were exhausted. Nevertheless, the sum represented about $US40,000 for each family over and above its earnings. The Administering Authority had placed before the Nauru Local Government Council a suggestion regarding the gradual levelling of the island and its covering with soil where necessary. It was estimated that the cost would be some $US2 million per annum. If the Nauruan community continued to contribute to the long-term fund at the present rate, and if the price-cost relationship remained as at present, the fund would total about $US400 million by the time the phosphates were exhausted. It would thus receive an annual income from investments of about $US24 million per annum. The Administering Authority believed that that settlement would give the Nauruan people a reasonable opportunity to safeguard their future, whether on Nauru or elsewhere." (United Nations, *Trusteeship Council Official Records, 34th Session*, Doc.T/SR.1314.)

189. Mr DeRoburt was questioned by the representative of the United States on a number of issues. The following records some of that exchange.

"Mr McHenry (United States of America) asked whether Nauruans lived on the unworked phosphate lands or farmed them. Mr DeRoburt (Adviser to the Special Representative) replied that previously the Nauruan population had lived exclusively off what they could pick or fish and that the trees growing on the phosphate plateau had provided them with material to build their homes. However, since the deposits had begun to be worked and the population had derived benefits from

them, the Nauruans no longer lived on the phosphate lands or farmed them...

Mr McHenry (United States of America) said it was recognised that the Nauruans wanted to stay on their island, especially in view of the difficulties of settling elsewhere. However, the Nauruans might for some reason be obliged to change their minds one day. He asked whether, that being so, it was wise at the present time to embark on the rehabilitation of all the worked-out lands and whether it would not be preferable to do as other countries had done and follow a more conservative mining process.

Mr DeRoburt (Adviser to the Special Representative) said that the question had been raised on several occasions by the representatives of the Partner Governments. The Nauru Local Government Council had considered the matter at length and its reply was to be found in the documents which had been circulated to the members of the Trusteeship Council. There were several ways of carrying out the rehabilitation program but the point was that whatever was done would be costly. The Nauru Local Government Council would have to take care not to squander the profits it would derive from the phosphate industry - its only source of income - if it was not to be in difficulty when the time came to rehabilitate the lands."

190. The delegate for France also said:

"Sound management of the capital that would accumulate before the phosphate deposits were exhausted should enable the Nauruan community to live comfortably on Nauru or, if it so decided, elsewhere. His delegation 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, and his delegation was sure that the Territory would take its final decision on its future in total freedom and in complete conformity with its aspirations."

191. The United States said:

"His delegation believed that the dominant influence of the phosphate industry on all aspects of Nauru's future should be the subject of careful and urgent consideration, and it had therefore been encouraged to learn from the Head Chief that attention was being given to the possibility of diversifying the Nauruan economy. However, consideration should also be given to certain variables in that economy; for scientific progress, which could help to solve the Nauruan water supply problem, could also reduce the need for phosphate. It was difficult, therefore, to predict with certainty whether future generations of Nauruans would wish to remain on the island, as the present generation did. That problem inevitably affected the question who should rehabilitate the worked-out land, and more particularly whether, when and at what rate rehabilitation should be carried out. His delegation therefore hoped that the representatives of the Nauruan people would consider those questions carefully, both before and after the expected political changes in the Territory." (United Nations, *Trusteeship Council Official Records*, 34th Session, Doc.T/SR.1316.)

192. Mr Reseigh, in his closing statement on 23 June 1967 regretted that agreement had not been arrived at on the treatment of the worked-out lands. He gave details of a plan under which $A12 million per annum (today, $A84 million) would be paid into a special fund to meet the costs of a new airport and living space until the whole of the mining area had been treated. He said that the responsibility of the Partner Governments was to see that the financial resources would be available so that the Nauruans could give effect to their decisions concerning their own future and affirmed that the Partner Governments could not have been more generous in their financial arrangements. For example, they were selling the assets of the BPC at historic rather than commercial cost and it had been decided to give the Nauruans 100% of the net proceeds of the phosphate at fair value, although the practice of sharing net profits in most other similar enterprises was 50/50. He added that the agreed arrangements had taken into account the extractive nature of the industry and the small size of the island. (United Nations, *Trusteeship Council Official Records, 34th Session*, Doc.T/SR.1317.)

193. At the 1320th meeting of the Trusteeship Council, a Liberian resolution (T/L.1132) that recommended that Nauru become an independent republic by 31 January 1968; that the conclusion of a treaty of friendship should not be a

precondition to independence; and that the Administering Authority should take immediate steps to restore the island for habitation, was defeated 2(Liberia, USSR)-5-1 (China) (United Nations, *Trusteeship Council Official Records, 34th Session*, Doc.T/SR.1320).

194. The Chapter of the 1967 report of the Trusteeship Council on Nauru is set out in Annex 28 to the Preliminary Objections. The Council in its report noted the proposals for the future of Nauru that had been put forward in discussions between the Partner Governments and Nauruan representatives. This led the Council to:

> "note(s) with satisfaction that the 1967 Canberra discussions were held in a favourable atmosphere. The Council, however, regrets that the parties were unable to complete their discussions due to lack of time but notes that they undertook to study the various proposals and to resume discussions at an early date. The Council is confident that these discussions will take place in the same spirit of cooperation and expresses earnest hope that agreement will be reached to the satisfaction of both parties. The Council is gratified to note that the Administering Authority has expressed its sympathetic attitude in connexion with the Nauruans wish to realise their political ambitions by 31 January 1968." (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 22nd Session*, Suppl. 4 (A/6704), Part II, para.322.)

195. In relation to rehabilitation, this was considered under the general heading of economic advancement. The Council rehearsed at length the previous consideration of this matter by the Council and the views of the relevant Parties. The views of the Partner Governments and of Nauru were set out at length. (See United Nations, *Report of Trusteeship Council, General Assembly Official Records, 22nd Session*, Suppl. No.4 (A/6704) Part II, paras.378-390). It is useful to set out the full text of the conclusion reached by the Council in relation to the phosphate settlement:

> "The Council, recalling its belief that every effort will be made to adopt a solution to the phosphate question in conformity with the rights and interests of the Nauruan people, notes with satisfaction that an agreement was reached in Canberra in 1967 between the Nauruans and the Administering Authority, whereby the ownership, control and management of the phosphate industry will be transferred to the

Nauruans by 1 July 1970. The Council further notes with satisfaction 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.

The Council notes that the Administering Authority has distributed the report of the Committee of Experts on the rehabilitation of the worked-out land in accordance with the Council's recommendation at the thirty-third session.

The Council also notes that the report of the Committee of Experts 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." (para.403)

5. Special Session, Trusteeship Council, November 1967

196. A special session of the Trusteeship Council, to terminate the 1947 Agreement for Nauru, was held on 22 November 1967. Head Chief DeRoburt, assisted by Professor Davidson, represented Nauru. The records of the meeting of the Trusteeship Council meeting are reproduced in Annex 29 to Preliminary Objections.

197. Head Chief DeRoburt's speech on 22 November 1967 was generous in its praise of Australia and the other Partner Governments.

> "Australia had administered the island of Nauru for almost half a century. About two generations of Nauruans had taken five decades to arrive at their present situation. Fifty years was not an unduly short period for a homogeneous group of a few thousand people with a single culture and heritage, one language and one religion, to learn to manage their own affairs. Australian tutelage of those people, which it also exercised also on behalf of the other two partner Governments of New Zealand and the United Kingdom, had been effective. Those governmemts could be proud of their achievements on Nauru and he wished to thank them, on behalf of the people of Nauru, for the many benefits received."

198. Towards the end of the speech, Head Chief DeRoburt raised rehabilitation:

> "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, *Trusteeship Council Official Records, 13th Special Session*, Doc.T/SR.1323; reproduced in Annex 29 to Preliminary Objections.)

199. At the conclusion of the session the Council unanimously adopted resolution 2149 (S-XIII) on 22 November 1967 which recommended "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" (text in Annex 19, Vol.4, NM).

6. United Nations General Assembly, December 1967

200. In 1967 the Fourth Committee had to consider not just the normal annual report of the Trusteeship Council on Nauru but also the outcome of the Special Session of the Council in November 1967, recommending independence for Nauru. The Summary Records are reproduced in Annex 30 to the Preliminary Objections. Mr K H Rogers of the Australian delegation made a comprehensive statement on 6 December 1967 on the history of Nauru and its administration under the Mandate and Trusteeship, its economy, social conditions and the recently concluded phosphate and political settlements (United Nations, *General Assembly, Official Records, 22nd Session, Fourth Committee*, Doc.A/C.4/SR.1739; Annex 30 to Preliminary Objections; full text reproduced in Annex 31 to the Preliminary Objections). He also observed in passing that "*the Nauruans had enjoyed an enviable prosperity. The* per capita *income at* 30 June 1966 had been over $US1,800, higher than the per capita income of Australia and one of the highest in the world". On the phosphate industry he said, as reproduced in the summary records:

> "For most of 1967 the representatives of Nauru and Australia had been discussing the future of Nauru and the phosphate industry and had reached happy agreements on both questions. Nauru would attain full and unqualified independence, without limitations of any kind, on 31 January 1968. The phosphate enterprise would be purchased by the Nauru Local Government Council and would come completely under its control and management in three years' time. The agreement provided for the supply of 2 million tons of phosphate per year at a price of $US12.10 per ton fob which would mean an annual return to the Nauruans of $15 million. The Nauruan authorities would set up the Nauru Phosphate Corporation, which would take charge of the phosphate industry in 1970, provided that the agreed payments had been completed by then. If the price of phosphate and the cost of production remained in the same relationship as at present and the Nauruans continued to put aside the same proportion of their funds as in the previous year, they would build up a fund which, in twenty-five

years, would stand at approximately $400 million.[4] In that way the economic well-being of the population would be ensured once the phosphate deposits were exhausted." (Annex 30 to Preliminary Objections.)

201. Head Chief DeRoburt spoke at the same meeting and after describing the situation and the history of Nauru, he commented on the events of recent years and the future in these terms:

> "Those [historical] experiences had intensified the Nauruans' consciousness of their identity as a separate people and had increased their determination to be free and independent. Those were the social or cultural reasons why the decisions taken by the Nauruans and the Administering Authority were the only ones which could rightly have been taken. They were the reasons for the decision that he was sure the Committee would shortly be taking in regard to the Trusteeship Agreement.
>
> In other respects, the case was no less strong. During most of 1967, as had been mentioned, work had been under way to prepare the necessary political and administrative structure. Economically, Nauru's position was strong because of its good fortune in possessing 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, 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,

[4] See the CIE Study, Annex 26 to Preliminary Objections, which examines the income from phosphate mining generated since independence.

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." (paras.19 and 20)

202. On 7 December 1967 the draft resolution, as amended and further orally revised, was adopted unanimously by the Committee. It contained no reference to rehabilitation. On 19 December 1967, at its 1641st plenary session, the General Assembly formally adopted resolution 2347(XXII) (text in Annex 17, Vol.4, NM). Its principal operative paragraph read:

"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."

CHAPTER 5

THE NEGOTIATION AND OUTCOME OF THE 1967 PHOSPHATE SETTLEMENT

Section I: 1965

203. One of the central issues in this case is the nature of the provision made by the Administering Authority for the future of the Nauruan people. Central to this is the 1967 settlement reached on the phosphate industry. This Chapter examines the negotiation of that agreement and the agreement itself.

204. Negotiations on the phosphate issue commenced in earnest in 1965. They were held in Canberra from 31 May to 10 June 1965 (Annex 2, Vol.3, NM). The negotiations took place between the Partner Governments and the Nauruan representatives led by Head Chief DeRoburt.

205. DeRoburt was assisted by two other Councillors and three expatriate advisers (2 economic, 1 legal). (One of the economic advisers was Mr K E Walker who in Appendix 2, Volume 1, Nauruan Memorial mentions that from 1965 to 1971 he was involved in all of the negotiations between Nauru and the partner Governments that dealt with phosphate, financial and political matters. Since November 1983 he has been the Honorary Nauruan Consul, Sydney.)

206. The discussions covered both political arrangements and the phosphate industry. Among the documents tabled were papers by Nauru and the Partner Governments setting out their position on the ownership of the phosphate (see Annexes A and J respectively of the Record of Discussions, Annex 2, Vol.3, NM 122 and p.177).

207. On 10 June 1965 a Summary of Conclusions was signed by both parties. In summary it:

- provided that as a step towards self determination a Legislative Council and an Executive Council were to be established. The former was to have an elected Nauruan majority and wide powers excluding only defence, external affairs and the phosphate industry.

- contained a statement by the Nauruans that they wanted 31 January 1968 as the target date for independence and a statement by the Administering

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Authority that it considered that further discussions should take place in 1968 after two or three years' experience regarding the possibility of further movement towards greater Nauruan executive responsibility.

- provided that future arrangements for the phosphate industry including some form of partnership or joint enterprise were to be discussed in 1966 after the Legislative Council had been established and was operating effectively.

- provided that royalties for 1965/66 were to be 17/6 per ton and for 1964/65 13/6 ton; ad referendum, with the former being based on an extraction rates of 2m tons per annum "subject to the assurance of the Australian delegation that this acceptance was without prejudice to any Nauruan requests for a reduction in the rates of extraction after 1967/68." (These proposed royalty rates were put to the United Kingdom and New Zealand Governments for their agreement, which was given.)

- set out the views of the Nauruan delegation 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. And also contained a statement by the Australian delegation that it 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."

- contained an agreement to establish an independent technical committee of experts to examine rehabilitation.

- recorded the differing views of the Nauruans and the Administering Authority on the ownership of phosphate mining rights. The Nauruans argued that the BPC could not validly work the phosphate without the agreement of the Nauruan people, whereas the Australian delegation held that the rights were legally vested in the British Phosphate Commissioners.

208. The summary of conclusions is set out as Annex L to the 1965 Record of Negotiations reproduced in Annex 2, Volume 3, NM p.194.

209. Following the 1965 talks, the Australian Department of Territories prepared, with advice from the BPC, a package of proposals to put to the Nauruans on long term arrangements for the future conduct of the phosphate

industry on Nauru and the level of royalties to be paid pending such arrangements being accepted and put in place. These proposals were considered by the Australian Government which decided, subject to the agreement of the United Kingdom and New Zealand Governments, that a set of proposals be put to the Nauruans under which the phosphate industry would be operated by the Partner Governments and the Nauruans; the arrangements should ensure the continued supply of Nauruan phosphate to the Partner Governments; the Nauruans were to have full participation in the conduct of operations; and the Nauruans were to receive not less than 50% of the financial benefit. From 27 to 30 April 1966 discussions took place between officials of the three governments in preparation for the talks with the Nauruans. The meeting endorsed the proposed approach on the phosphate industry, which was then presented to the Nauruans in negotiations commencing in June 1966.

Section II: Nauruan/Partner Governments' Discussions, June/July 1966

210. Nauruan/Partner Governments' discussions were held over 12 sessions from 14 June to 1 July 1966. Mr Warwick Smith led for the Partner Governments and Head Chief DeRoburt for the Nauruans. (The Record of Negotiations is contained in Annex 4, Vol.3, NM.)

211. The Partner Governments' opening statement on 14 June 1966 put forward general principles which might serve as the basis of a long term agreement. It proposed the establishment of a Nauru Phosphate Commission, the fixing of the level of exports, financial arrangements providing Nauru with not less than 50% of the benefits with a substantial amount to be paid into a long-term fund and an assurance that the whole of the Nauru output would be available to the Partner Governments. The opening Nauruan statement rejected partnership with the BPC, said that the beneficial interest in phosphate should accrue to the Nauruans, but that the BPC could operate the phosphate industry as managing agents with both parties agreeing on a long term contract on price, full payment of profits with BPC receiving only a management fee and purchase by Nauru of the BPC owned assets on the islands. In the following discussions most exchanges centred on pricing policy. The Davey Committee's report on rehabilitation was also examined (paras.166 to 167 above).

212. On 1 July 1966 the two delegation leaders signed an agreed minute representing the outcome of the negotiations (NM, Vol.3, p.405). It provided that Nauruan phosphate should be valued at $A12.00 per ton for the purposes of any financial arrangements, the differing positions on which it was noted had

been set out in the opening statements of the two delegations. The issue was to be examined further in a Working Group, which would also examine the types of arrangements in force in various parts of the world for sharing the financial benefit of phosphate mining operations. It was envisaged that the BPC would serve as agents for the operation of the industry at Nauru. The Minute recorded the differing positions of the two delegations on rehabilitation. *Nauru said that they should receive the full financial benefit of the phosphate so that there would be funds available to rehabilitate the whole island.* The Joint Delegation, the Minute noted, explained that the benefits from the proposed phosphate arrangements would be adequate to provide for the long-term security of the Nauruan people, including a continuing income after the costs of any resettlement or rehabilitation. Each delegation maintained their respective positions on phosphate rights as stated in the 1965 discussions. Nauru proposed the purchase of the capital assets of BPC, but the Partner Governments proposed that the assets should continue to be vested in BPC. It was also agreed that talks should resume in October or November 1966 after the Working Party had met. In the event, these talks did not resume until after the consultations in 1967 between the Partner Governments.

Section III. The phosphate settlement 1967

A. POLICY RE-CONSIDERATION BY THE PARTNER GOVERNMENTS

213. In the last quarter of 1966 and the first quarter of 1967 the Partner Governments reconsidered their proposals in respect of the future of Nauru before resuming the suspended discussions with the Nauruans. Broadly, the view of the three Governments was that they should aim to reconcile the political advancement of the Nauruans with reasonable security of supplies of Nauruan phosphate. They agreed that the phosphate rights exercised by the Partner Governments might be extinguished and BPC assets on Nauru transferred to the Nauruans at an agreed price, as the Nauruans themselves had requested on 14 June 1966 (see para.211). Any phosphate settlement would also have to cover all outstanding questions, leaving the Partner Governments with no responsibility for such matters as resettlement or re-filling of mined areas. The Nauruans could determine their own future and become independent in 1968 if that was their wish. The transfer of all the rights in the phosphate was viewed as a *quid pro quo* for the assumption by Nauru of responsibility for rehabilitation. This is confirmed by the real value of the 1967 settlement in Nauruan Lands. See Part II, Chapter 2, Section VII of this Counter-Memorial.

B. RESUMED NEGOTIATIONS WITH THE NAURUANS

214. From 12 April to 15 June discussions resumed with the Nauruans in Canberra. The record of the 1967 negotiations (hereinafter "1967 Negotiations") is reproduced in Annex 5, Volume 3, NM. (Page numbers refer to the numbers used in the negotiation record appearing at the top of the page.) There were two breaks from 22 April to 9 May and from 20 May to 13 June to enable the Partner Governments to reconsider their negotiating stance on the future of the phosphate industry. Most inter-delegation discussions in these two months centred on the industry. Only three sessions were devoted to political matters. The phosphate negotiations culminated in a Heads of Agreement on 15 June 1967, which is not in dispute. The following account therefore emphasises the outcome of the negotiations, particularly on the issues of rehabilitation and transfer of the phosphate industry.

1. Phase 1: 12-20 April 1967

215. The Partner Governments opened negotiations on 12 April with a statement that outlined the stage reached when the talks were adjourned in July 1966 (SR1, pp.99-101, 1967 Negotiations) (see para.212 above).

216. Nauru submitted a statement (Nauruan Document 67/1, pp.144-153, 1967 Negotiations) prepared by their economic advisers, Philip Shrapnel and Co Pty Ltd of Sydney. It had two key elements: First, the Partner Governments' interests in the phosphate should be confined to supply and price, and secondly all other matters affecting the industry should be the exclusive concern of the Nauruan people. Further, the primary criterion for appraising various proposals was to be the welfare of the Nauruan people. It was said that "The needs of the Nauruan people centre around their long term future on Nauru. In order to remain on Nauru the island must be rehabilitated in a manner satisfactory to the Nauruan people".

217. Mr Warwick Smith stated that the Partner Governments had reconsidered their position and developed a fresh approach, especially on phosphate rights and the sale of capital assets. This was subject, as part of an overall settlement, to acceptance by the Nauruans of the principle that their future benefits from the phosphate would be adequate to provide for their needs including rehabilitation (or resettlement).

218. On 18 April the report of the Rehabilitation (Davey) Committee set up in 1966 was discussed (SR5, pp.87-89, 1967 Negotiations), with Mr Reseigh noting that agreement could not be reached in the Working Party regarding its consideration. Mr Warwick Smith said that he had gathered that the Nauruans thought that it could be useful for the joint delegation to indicate its views on the Report in an informal way. This he then did. He said:

> "The Partner Governments considered that decisions on what action should be taken regarding rehabilitation was wholly a matter for the Nauruans. The Partner Governments had said they would expect that the amount accruing to the Nauruan people from phosphate income would be adequate for the future needs of the Nauruan community including rehabilitation."

219. On 19 April Head Chief DeRoburt made and submitted three lengthy statements on rehabilitation, financial considerations and management of the industry (Nauruan Documents 67/2 - 67/4, pp.136-143, 1967 Negotiations). On the first issue, the Nauruan delegation, he said, had argued from the beginning that the responsibility for restoring the land already mined rested with the Partner Governments. The Nauruan need for proper rehabilitation of Nauru was, he said, a direct result of the breakdown of negotiations for resettlement. He said:

> "The Nauruans themselves proposed resettlement as being a solution that would be better for all parties concerned, and had such a solution been achieved there would by now have been a partnership arrangement yielding considerable benefits to both sides. However, the failure of the resettlement proposals to provide a secure future and preserve the national identity of the Nauruan people has left us no alternative except an expensive rehabilitation project for which we need every penny we can get." (p.141)

220. The following day (20 April) Mr Warwick Smith replied (SR7, pp.80-82, 1967 Negotiations). The decision to abandon the resettlement proposals, he said, was a decision by the Nauruans, not one that was forced upon them and, in so deciding, they had rejected proposals which were sound and practicable. It was the view of the Partner Governments that decisions regarding rehabilitation were matters for the Nauruans and that the Partner Governments' proposals in respect of the financial arrangements provided adequate means to carry out whatever re-development of the mined areas might prove to be necessary. Mr Warwick

Smith also denied that there was any widely accepted obligation to restore mined lands to their original condition and then tried unsuccessfully to get the Nauruans to discuss specific re-development projects which the Nauruans claimed would cost $240 million. This was rejected and the following day the negotiations were adjourned until 9 May to enable the Partner Governments to reconsider their position.

2. Phase 2: 9-20 May 1967

221. Following reconsideration by the Partner Governments of their negotiating stance, the next phase was almost totally devoted to the future of the industry on Nauru. On 10 May a Joint Delegation proposal (Joint Delegation Document 67/2, pp.158-161, 1967 Negotiations) was put to the Nauruans which substantially met their position on control of the industry. The paper, however, contained one paragraph (9) on rehabilitation, namely that "the partner governments consider that the proposed financial arrangements on phosphate cover the future needs of the Nauruan community including rehabilitation or resettlement".

222. On 12 May Head Chief DeRoburt asked (SR12, pp.62-5, 1967 Negotiations) whether he was right to assume that on the question of independence there were no differences between the Partner Governments and the Nauruans except on the timing of independence. Mr Warwick Smith, in reply, said that the Joint Delegation was able to talk about political advance in only a preliminary way. It was simply not ready to talk in depth about political advance because its attention had been concentrated on the not unrelated question of phosphate which had yet to be settled in a number of respects. The Partner Governments had agreed to discuss political issues during the current series of talks, but before he could reply to the Head Chief, he wanted to know what he meant by independence.

223. Chief DeRoburt responded by reading a 15 page statement (Nauruan Document 67/7, pp.119-133, 1967 Negotiations) on political and constitutional changes which had been prepared by his newly appointed constitutional adviser, Professor J W Davidson. Mr Warwick Smith said the Nauruan statement would be studied and then asked if the Nauruans had considered the various possible outcomes of self-determination and whether it could offer any comments on its reasons for choosing the particular proposal (sovereign independence) then put forward. He also asked how the process of self-determination was to be ascertained, to which Head Chief DeRoburt replied that it would be done

through the elected members of the NLGC (SR12, pp.63-64, 1967 Negotiations).

224. From 16 May to 14 June negotiations again returned to the phosphate industry. Mr Warwick Smith, in a long statement on the industry on 16 May, said that on the question of rehabilitation the Partner Governments maintained that it was not for them to decide what should be done; this was a decision for the Nauruans. Financial arrangements could be such as to permit the Nauruans to do what they wished, within reasonable limits, in the way of rehabilitation. As part of the total arrangement the Joint Delegation would like to see the Nauruans withdraw their claims in respect of rehabilitation (SR13, p.56, 1967 Negotiations). The following session (SR14, pp.46-52, 1967 Negotiations) he asked whether the Nauruans would press their view that the Partner Governments had responsibility for rehabilitation despite the financial arrangements made. The summary record (para.27) notes 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". Mr Warwick Smith also offered immigration rights to Australia and New Zealand, to which the Head Chief replied that the Nauruans had given up the notion of resettlement.

225. On 18 May Head Chief DeRoburt raised again his concern that the political questions were not being discussed and was told that the Joint Delegation was not in a position to talk substantially at that stage (SR16, pp.38-40, 1967 Negotiations). At the same meeting Mr Shrapnel read an 11 page statement (Nauruan Document 67/8, pp.108-118, 1967 Negotiations), in response to that of the Joint Delegation of 10 May. This covered guaranteed supply, agreed price, capital assets, phosphate rights, rehabilitation, the management of the industry and financial arrangements. It was suggested that the Partner Governments should sell the capital assets on Nauru to the NLGC.

226. On 19 May Head Chief DeRoburt requested the Partner Governments to consider another document (Nauruan Document 67/9, pp.106-7, 1967 Negotiations) on the phosphate industry and, in response to a suggestion from the Partner Governments, said that the Nauruans would not relate immigration to rehabilitation. The relations with the Partner Governments on immigration would have to be just like those the Partner Governments had with other governments (SR18, pp.32-33, 1967 Negotiations).

227. On 20 May the negotiations were adjourned until June as no agreement could be reached on matters relating to the phosphate industry, with the Nauruans insisting, *inter alia*, on being given complete control of management and operation of the industry on the island no later than three years after the signing of an agreement.

3. Phase 3: 13-14 June 1967

228. On 13 and 14 June, following the agreement of the United Kingdom and New Zealand Governments, the negotiations with the Nauruans on the future of the phosphate industry were concluded. There was again no mention of rehabilitation either in the four summary records or in the Heads of Agreement. On 15-June the Heads of Agreement was initialled by both parties. Its scope was set out in a press statement issued that day by the Minister for Territories (reproduced at p.1, 1967 Negotiations, Annex 5, Vol.3, NM) which read:

> "Representatives of the Nauru Local Government Council and the Governments of Australia, New Zealand and Britain have agreed to arrangements for the future operation of the phosphate industry on Nauru and on the terms under which phosphate on Nauru will be supplied to the three countries for the next three years.
>
> Announcing this today the Minister for Territories, Mr Barnes, said that the Nauru Local Government Council will buy the assets of the British Phosphate Commissioners at Nauru within the next three years on an agreed basis of valuation and terms of payment. Preliminary estimates put a value on the assets of the order of $20 million. During the three years the British Phosphate Commissioners will be responsible for day to day management of the industry at Nauru. If payment for the assets has been completed by the end of the third year the complete ownership and operation of the phosphate industry at Nauru will become the responsibility of the Nauru Phosphate Corporation which the Nauruans propose to establish.
>
> Phosphate will be supplied to the British Phosphate Commissioners at the rate of two million tons per year. The basic price will be $11 per ton in each of the three years provided that if the assets have been paid for in full by 30th June 1969 the basic price in the third year will be $12 per ton. The basic price will be varied so as to reflect market conditions according to an agreed formula. After all costs of

production and of administration of Nauru have been met the figure of $11 would represent a return to the Nauruans of about $6 per ton.

Mr Barnes said that it is open to either of the parties in the second year of the agreement to review the arrangements for the supply of phosphate but if these are not altered they will continue to operate after 30th June, 1970, unless they are subsequently altered at twelve months' notice.

The royalty payments which have hitherto been made for phosphate from Nauru have been fixed at $4.50 per ton for 1966/67. Royalty payments in future years will be superseded by the arrangements set out above."

4. The purchase of BPC assets on Nauru

229. Paragraphs 496 to 500 of Volume 1 of the Nauruan Memorial deal with "reparation in respect of the payment for BPC assets purchased with Nauruan funds". The substance of the claim is that the $A21m paid by Nauru for the BPC assets on Nauru "were made on sufferance" (para.497) and that:

"498. In the view of the Government of Nauru, the forced purchase of access to its own natural resources was a further segment in the long line of inequitable treatment at the hands of the Australian Government and its collaborators. The payment compounded the unjust enrichment resulting from the economic management of phosphate affairs in the trusteeship period and before. It was extracted during the very sensitive period prior to independence in January 1968, and one of several unusual features was the payment required by the outgoing authority for the capital assets of the British Phosphate Commissioners on the island: see the provisions on capital assets in Arts.7 to 11 of the Agreement of 1967."

Given the prominence given to this issue by Nauru, Australia considers it necessary at this stage to set out the actual historical record.

230. The question was first raised in 1966, not 1967, in the context of discussions on the future arrangements for the phosphate industry. On 14 June 1966 the Partner Governments, in an opening statement (Annex 3 to the 1966 Record of Negotiations, reproduced in Annex 4, Vol.3, NM), proposed an association agreement, with the Nauruans receiving 50% of the benefits. At no

point in the 5 page statement was there any mention made about Nauru purchasing the assets. At the same meeting the Nauruan delegation presented and circulated a 6 page opening statement (Annex 4 to the 1966 Record of Negotiations). *Its substance was rejection of partnership. The BPC should* instead operate the phosphate industry in the capacity of managing agents "under contract with the Nauruan people with present matters of contention (extraction rate, calculation of selling price etc) being defined by the contract". The statement then set out six basic principles which should underlie the agreement on the managing agent relationship. Principle (d) of the Nauruan statement read:

> "(d) Purchase of BPC - owned Capital Equipment
>
> The Nauruan people consider that it is consistent with their moral and legal rights as owners of the phosphate deposits that they should also own the capital equipment used by the BPC in mining phosphate on Nauru. It is therefore proposed that the Nauruan people should purchase this equipment from the BPC at a mutually agreed price. Since the Nauruan people do not have the financial resources to undertake the payment immediately it is further proposed that payment be made over a period of ten years with the annual amount being viewed as a charge on profits. Once the initial purchase has been completed it is expected that the BPC will look to the Nauruan people for such replacement of the capital equipment as may be required."

Thus, the proposal to purchase the assets came from the Nauruans themselves.

231. On 1 July 1966 an agreed minute was signed by Mr Warwick Smith and Head Chief DeRoburt (Annex 19 to the 1966 Record of Negotiations). It contained the following paragraph

> "Capital Assets
>
> The Nauruan Delegation proposed the purchase of the capital assets of the BPC at Nauru, the intention being that payment be made for these assets out of the financial benefits that the Nauruan people received from the industry over a period of ten years and that these assets be made available to the BPC for the operations at Nauru. The Joint Delegation indicated that it was part of the Partner Governments' proposal for a long-term agreement

that the capital assets would continue to be vested in the British Phosphate Commissioners" (emphasis added).

232. In the 1967 Nauruan/Partner Governments' negotiations, the sale of the BPC assets was mentioned in the Nauruan opening statement (Nauruan Document 67/1, pp.144-153, 1967 Negotiations, reproduced in Annex 5, Vol.3 NM). On 17 April 1967 the purchase of assets was discussed. A Nauruan paper of 14 April 1967 on the "Constitution and Role of the Extracting Authority at Nauru" was tabled which incorporated the sentence that "the assets of the BPC would be purchased by the Nauruans and held by the [Nauruan] corporation, paying over ten years with ownership passing before or soon after independence" (Working Paper 1, p.164, 1967 Negotiations).

233. Mr Warwick Smith after acknowledging that the Partner Governments had in 1966 wanted the assets to continue to be vested in the BPC, said that "the Partner Governments were agreeable now to the sale of the assets as part of a mutually acceptable total arrangement but agreement would depend on the future arrangements for the phosphate industry" (SR4, pp.90-93, 1967 Negotiations). In this and following meetings there were discussions about splitting the assets (rejected by the Nauruans), their valuation, how they were to be paid for and when ownership would pass, but at no stage was there any suggestion by the Nauruans that they were being forced to make an offer for them. Indeed on 18 May 1967 a Nauruan Delegation document "Phosphate Proposals by Nauruan Delegation" - repeated in paragraph 5 that "the Nauruan Delegation submits that the Partner Governments should sell the capital assets of the phosphate industry at Nauru to the Nauru Local Government Council ..." (Nauruan Document 67/8, pp.108-118, 1967 Negotiations). On 15 June 1967 a Heads of Agreement in respect of the Nauru Phosphate Agreement was signed by the Partner Governments and the Head Chief. Paragraph 6 dealt with capital assets, stating that "the Partner Governments undertake to sell and the Nauruan Local Government Council undertakes to buy the capital assets of the phosphate industry at Nauru" and set out certain arrangements in relation to those assets. On 14 November 1967 these provisions were formalised in Part III of the Nauru Phosphate Agreement (Annex 6, Vol.3, NM). It is thus incorrect to say, as the Nauruan Memorial puts it (para.498), that there was a "forced purchase of access to its own natural resources" and that the agreement "was extracted during the very sensitive period immediately prior to independence in January 1968". The purchase of the assets was proposed by the Nauruans themselves on 14 June 1966, ie 17 months before the final agreement was signed.

C. The Phosphate Agreement

234. On 14 November 1967 the Phosphate Agreement was signed in Canberra. It is reproduced as a schedule to the *Nauru Phosphate Agreement Ordinance 1968*, set out in Annex 9 to the Preliminary Objections. It formalised the Heads of Phosphate Agreement initialled on 15 June 1967. The main provisions were:

- Nauru phosphate would be supplied exclusively to the Partner Governments at a rate of 2 million tons per annum.

- The price would vary from year to year according to an agreed index.

- For the first three years the basic price would be $A11 per ton fob Nauru and if the Nauruan purchase of BPC assets was paid in full before 31 July 1970 the basic price for the third and subsequent year would be $A12 per ton.

- The Partner Governments would sell to the NLGC the capital assets of the BPC on Nauru.

- The assets would be valued at original price less depreciation at a rate consistent with the economic life of the assets. A joint team would establish the value of the assets.

- The NLGC would commence quarterly payments for the assets of no less than $750,000, commencing on 30 September 1967 with interest accruing at the rate of 6% on the unpaid balance.

- The NLGC would set up a body to be known as the Nauru Phosphate Corporation to manage the phosphate on behalf of the NLGC.

- For the first three years of the agreement the BPC would continue to manage the phosphate installations on Nauru.

- During the three year period there would be consultations for the transfer of management authority from the BPC to the Nauru Phosphate Corporation at the end of the third year.

- The Agreement would enter into force from 1 July 1967 and would remain in force for three years and thereafter indefinitely subject to certain conditions.

As with the Heads of Agreement there was no mention of rehabilitation. Subsequently, it was agreed that the value of the BPC assets would be $A21 million. That sum was fully paid by 18 April 1969.

D. The value of the 1967 settlement to the Nauruans

235. The real value of the 1967 settlement to the Nauruans is discussed in Part II, Chapter 2, Section VII, of this Counter-Memorial. The Nauruan financial situation at independence is also considered in that part of the Counter-Memorial. As well as the earlier study prepared at the time of the Preliminary Objections by the Centre for International Economics (Annex 26 to the Preliminary Objections), Australia includes with this Counter-Memorial a further study on the value of the phosphate industry that would have been paid by a purchaser in 1967 (Annex 1 to this Counter-Memorial). The analysis contained in these documents shows the 1967 phosphate settlement was, in fact, very generous to the Nauruans. Further discussion of this matter is postponed to the next Part of this Counter-Memorial.

PART II

THE ABSENCE OF A TENABLE CLAIM

CHAPTER 1

PRELIMINARY MATTERS

Section I: The elements of the dispute

236. In its judgment of 26 June 1992, the Court rejected Australia's preliminary objections that the Nauruan rehabilitation claim had been waived, or settled, when the Nauruan Trusteeship Agreement of 1947 was terminated by the United Nations General Assembly (*ICJ Reports 1992*, pp.247 and 253, paras.13 and 30). Accordingly, the claim concerning responsibility for rehabilitation comes before the Court for adjudication on the merits.

237. The claim which the Court is now to decide is thus quite specific. It is only a claim for rehabilitation (see paras.2 to 8 above). It does not involve (and cannot support) judicial investigation of allegations by Nauru that Australia failed to comply generally with its obligations with respect to the administration of the Territory. The Court itself has recognised this. As the Court observed in its judgment of 26 June 1992, resolution 2347(XXII) of 19 December 1967 (terminating the Trusteeship) was a resolution of "definitive legal effect" (*ICJ Reports 1992*, p.251, para.23). It was only given the "particular circumstances of the case", that the Court held that the "rights Nauru might have had in connection with the rehabilitation of the lands remained unaffected" (*ibid.* p.253, para.30).

238. Although the claim for rehabilitation is a limited one, Nauru fails to establish any adequate legal basis for it. In its search for such a basis, Nauru relies primarily on Articles 3 and 5 of the Nauru Trusteeship Agreement of 1947, and Article 76 of the United Nations Charter (NM, para.243). But it cannot point to any provision in these instruments which specifically enjoins an Administering Authority to restore lands used for mining during the period of trusteeship, or any like provision, for none exists. Instead, Nauru says that the alleged duty arose from "the existence of the trusteeship" "in the particular circumstances of Nauru" (NM, para.290).

239. Nauru thus admits that its claim is based on inference from certain quite general obligations and is almost entirely fact-dependent. Despite this, Nauru does not identify and marshal the facts or evidence on which it relies in any orderly way. Its case against Australia depends on broad generalisations and vague, but nonetheless highly prejudicial, impressions. Nauru's allegations so

lack particularity that it is, on occasions, virtually impossible for Australia to do more than guess the case which it must answer. For example, in referring to the basis for the alleged duty to rehabilitate, Nauru refers to two matters - the existence of an indigenous community on the island as a unit of self-determination, and the island's eventual uninhabitability if phosphate mining continued indefinitely (NM, para.290). But reference to these matters is unhelpful: as Nauru's coming to independence in 1968 shows, the Nauruan community has successfully exercised its right to self-determination. And since then it has lived on the island in continued prosperity and has itself chosen to mine (without there being any rehabilitation) more land than was mined prior to independence. Having regard to these facts it is impossible to see the supposed duty as "self-evident". Hence, these circumstances alone cannot found the basis of Nauru's claim against Australia. Australia is forced to gather the case against it as best it can.

240. Certain matters alleged by Nauru are clearly irrelevant to the specific claim for rehabilitation with which the Court is concerned. These include allegations relating to the pre-Trusteeship period. For Nauru says that it "does not make any claim in respect of breaches of the Mandate as such" (NM, para.287). Yet throughout its written and oral pleadings, Nauru has sought to rely on, and gives undue prominence to, the alleged misconduct of the Mandatory Powers, including Australia, during the period in which Nauru was a Mandated Territory. For example, it is said by Nauru that during the Mandate, the Australian administration on Nauru was motivated solely by the desire for Australian economic gain (NM, paras.29-35). But this allegation, though intended to prejudice Australia's case, cannot be at all relevant to a claim said to arise at a later date, ie, during the subsequent Trusteeship.

241. There are other similar allegations (eg NM, paras.56, 63, 78). But these highly coloured allegations must be disregarded, for they do not arise for determination in this case. Even if the Court were to find Australia responsible in some way for such acts, any such responsibility would necessarily be limited to the post-1947 Trusteeship period. See Part III, Chapter 2, Section 1.

Section II: The alleged basis of responsibility

242. Nauru alleges that:

(i) Australia's principal object in the administration of the Trusteeship was to exploit Nauruan phosphate for the benefit of the agricultural requirements of Australia, New Zealand and the United Kingdom (NM, paras.284, 332).

(ii) During the Trusteeship, the 1919 Agreement and the Lands Ordinance 1921 (as amended) were operated to establish a system which expropriated the rights of Nauruan landowners without adequate compensation. According to Nauru, the effect of the "legal regime overall, and the de facto position of the BPC" was that "the entire island and its resources" were placed at Australia's "effective disposition" (NM, paras.284, 323, 397); and the resulting legal regime "was fundamentally opposed to the giving of an appropriate degree of respect to the land rights of the indigenous inhabitants". In particular, Nauru alleges that the interest of the individual landowner was placed at the disposal of the BPC "subject to the payment of 'royalties' which were not the process of genuine negotiation 'at arm's length' and which were in any case unrelated to the real value of the resources being disposed of" (NM, para.397; see also paras.284, 299, 321, 371). Further, according to Nauru, there was a failure to return worked-out phosphate areas to landowners without undue delay and an absence of adequate procedure for deciding complaints arising from the unjustified retention of land by the BPC (NM, para.399).

(iii) During the Trusteeship, there was a substantial failure to provide funds for the normal purposes of administration. In particular, according to Nauru, public financial arrangements for Nauru were constituted entirely by the financial returns from phosphate mining (NM, paras.123, 125, 284, 368-70). The income of the BPC was not treated as public revenue, nor was it taxed as profits of a trading company (NM, paras.336, 373).

(iv) During the Trusteeship, the Administering Authority failed to make full and fair reports on the economic affairs of Nauru and the phosphate industry to the United Nations. The findings of the Trusteeship Council were "flawed by serious errors of fact induced by the misrepresentations of the Administering Authority" (NM, paras.281, 284, 315-6, 320-1, 339).

(v) During the Trusteeship, there was a failure on Australia's part to exercise the degree and form of governmental authority appropriate to the obligations of Trusteeship (NM, paras.284, 365).

243. But these claims, though also clearly intended to prejudice Australia's case, have no direct relationship to the issue of responsibility for rehabilitation. This was the only issue regarded as unsettled at the time of termination of the Trusteeship and which therefore survived the dispositive act of termination by the General Assembly. See *ICJ Reports 1992*, p.253.

244. Nauru's specific claim for rehabilitation cannot warrant a wholesale attack on, and judicial inquiry into, the entire United Nations Trusteeship administration on Nauru. It cannot by this case call into question the entirety of the colonial past. Given the dispositive act of the General Assembly in terminating the Trusteeship, there can be no question that the three Partner Governments discharged fully their obligations to the United Nations. In this case, the only relevant question concerns breach of an alleged obligation which required action in the form of rehabilitation, or some obligation which required the Administering Authority to make specific financial provision for rehabilitation.

245. Nauru's allegations concerning the BPC are relevant, if at all, only in so far as Australia is said to have incurred responsibility for breach of the supposed obligation, by reason of certain acts or omissions of the BPC. In this connection, Nauru is bound to establish that, in acting under the international instruments relating to the BPC which bound the three Partner Governments (in particular, the 1919 Agreement), Australia breached the supposed obligation involving action to rehabilitate, or the making of financial provision for rehabilitation.

246. Nauru does not, it must be emphasised, provide many details of the asserted legal basis of its claim that, by virtue of the legal and administrative arrangements for the Nauruan phosphate industry, Australia incurred responsibility to rehabilitate, or provide specific funds for rehabilitation. In earlier oral pleadings, it asserted that Australia should, as a matter of fairness, be required to rehabilitate lands worked out during the Trusteeship (CR 91/18, p.28). But this alone does not establish a legal basis for its claim. Uncertain notions of fairness cannot take the place of accepted legal principle, particularly where the dispute concerns a Trusteeship Agreement brought to an end apparently with the complete satisfaction of the United Nations.

247. Nauru seeks to manufacture from Articles 3 and 5 of the Trusteeship Agreement and Article 76 of the Charter an obligation which simply does not exist. There is nothing in the Trusteeship Agreement or the Charter which would have prevented Australia from allowing a venture, like the BPC, to operate in the Trusteeship Territory on the basis set out in the 1919 Agreement without undertaking some rehabilitation project.

248. It is not enough merely to state as Nauru has done that Australia failed to promote the political and economic advancement of the Territory, contrary to Article 76 of the Charter, or Articles 3 and 5(2)(b) of the Trusteeship Agreement (NM, paras.377, 392). Such a statement calls for analysis of a kind altogether lacking in the Nauruan Memorial. Nauru does not show how Australia's acts and omissions might have constituted a breach of such general obligations of result. For example, Nauru complains that the BPC phosphate-derived income was never taxed (NM, paras.336, 373). Under the 1919 Agreement, however, the BPC's revenue was used to fund the Nauruan administration. The BPC was not permitted to take Nauruan phosphate without making any return to the Nauruan community. On the contrary, it was required to make a substantial return. There is, therefore, no apparent substance to this complaint.

249. In the next Chapter, it will be shown that the obligations arising under Article 76 of the Charter, and the relevant Trusteeship provisions, are obligations of result (for example, to promote the economic advancement of the Nauruan people). The Administering Authority (including Australia) was given a discretion as to the choice of means by which the obligations were to be discharged. Neither the Trusteeship Agreement nor the Charter refers to any obligation to rehabilitate, or to provide the financial means for rehabilitation. And Nauru does not suggest that Australia incurred international responsibility simply by permitting the BPC to mine phosphate on Nauru during the Trusteeship period.

250. As the following Chapter also shows, until 1965 it was thought by the Nauruans, the Administering Authority and the United Nations that the most appropriate way to secure the long-term future of the Nauruan people was by way of resettlement. Rehabilitation was not then considered to be a practicable option (and there cannot have been a duty on the part of the Administering Authority to do something which was then believed impracticable).

251. Towards the end of 1964, however, the Nauruans decided to reject resettlement as an option, so that the Administering Authority was obliged to

consider alternative means to provide for their long-term future. The question of rehabilitation was further investigated and was again found not to be feasible. Expert scientific inquiry could not yield any assured, practicable method of rehabilitation. Even if such a method had been found, there would have been too little time for the Administering Authority to undertake any rehabilitation scheme before Nauru itself became independent. As the Nauruans' own more recent inquiry has shown, even with advances in scientific and technical know-how, no useful rehabilitation scheme can proceed until a comprehensive land-use plan has been formulated. See Part III, Chapter 1. Such a plan had not been formulated by the Nauruans prior to independence and has not been formulated since.

252. *The next Chapter will show that it was in this context that the* Administering Authority's preferred means was to make sufficient financial provision for the Nauruan people that they might undertake to rehabilitate the worked-out phosphate lands, if this happened to become practicable and if they so chose. Adequate financial provision was, therefore, made by the Administering Authority, by means of the 1967 Canberra Agreement. See Part II, Chapter 2, Section VII. The question therefore becomes whether or not this choice of means was an abuse of the discretionary powers given to the Administering Authority under the Trusteeship Agreement and the Charter, so as to constitute a breach of a duty arising under those international instruments. The duty was, of course, the general duty under Article 76 to promote the advancement the inhabitants, not the duty alleged by Nauru to rehabilitate.

253. As the following Chapter shows, the terms of the 1967 Canberra Agreement were fully reviewed by the Trusteeship Council and the General Assembly. The evidence shows that neither the Trusteeship Council nor the General Assembly considered that the choice of means selected by the Administering Authority was inappropriate, much less improperly motivated. It was after that review that the General Assembly decided to terminate the 1947 Trusteeship Agreement and to grant the Nauruans full independence and control of their own affairs. The only possible basis for challenge by Nauru is that the 1967 Canberra Agreement did not constitute a bona fide exercise of power, because the financial provision made by it was totally inadequate. But this clearly is not the case (Chapter 2, Section VII). Indeed, Nauru itself admits that it has sufficient funds to undertake rehabilitation.

254. In effect, Nauru's claim is that the Administering Authority ought to have given it a fund which was specifically committed to rehabilitation, irrespective of the general financial provision made available to Nauru under the Canberra Agreement. This claim is not only unreasonable, it is altogether incompatible with the general discretion entrusted to the Administering Authority under the Trusteeship Agreement and the Charter.

255. Besides the Trusteeship Agreement and the Charter, Nauru also alleges that it has other legal bases for its claim in associated principles of general international law; in particular, the principles of self-determination and permanent sovereignty over natural wealth and resources (NM, paras.44-5, 419). These principles cannot, however, be invoked to change the obligations imposed by the Charter and the Trusteeship Agreement. See Part II, Chapter 3 below. Even if guides to the interpretation of those obligations, their application is subject to the notion of "intertemporal law", discussed in the next section.

256. In any event, the facts leave little scope for the operation of the principles of self-determination and permanent sovereignty. The mining of Nauruan phosphate was constantly under review by the relevant organs of United Nations. It took place not only with their consent, but also with that of the Nauruan people. Prior to 1965, neither the United Nations nor the Nauruans gave any serious thought to the possibility of rehabilitation. By independence, the Administering Authority had transferred all interest, and control over, the phosphate industry to the Nauruans (on terms most favourable to them). See Part II, Chapter 2, Section VII. Indeed, since 1968, Nauru itself has chosen to continue to mine at an even greater rate, without rehabilitating the land. Surely, principles of self-determination and permanent sovereignty over natural resources cannot impose a higher obligation of conduct on the Administering Authority than Nauru has thought appropriate to accept for itself. These principles are simply not relevant to the question, "who bears the cost of rehabilitation?"

257. Apart from principles of self-determination and permanent sovereignty over natural resources, Nauru also relies on doctrines of denial of justice *lato sensu* and abuse of rights (NM, paras.439, 449), as well as the so-called duties of a predecessor State. Notwithstanding the apparent breadth of these grounds, they cannot enlarge the dispute beyond what is already claimed - a declaration as to responsibility for rehabilitation. None of the allegations made

in relation to these supposed bases of claim touch or concern this issue. See Part II, Chapter 3.

258. In any event, the allegations made by Nauru in this context (examined in Part II, Chapter 3) are entirely inconsistent with the judgments made by the relevant United Nations organs during, or at the termination of, the Trusteeship Agreement. Generally speaking, these organs commented most favourably on the efforts of the Administering Authority to discharge its duties as such. Furthermore, as Chapter 3 also shows, Nauru's assertions concerning the scope and application of these doctrines have little or no authoritative support. These asserted doctrines are incapable of providing separate causes of action.

Section III: The intertemporal issue

A. THE LEGAL PRINCIPLE

259. The determination of the validity of the Nauruan claims must be made by reference to the state of international law at the time the relevant acts in question were committed and the facts that gave rise to the alleged breaches of international law occurred. This is a fundamental proposition which must remain at the forefront of consideration of the legal issues raised in this case. The Court itself has already recognised the need to ensure that Nauru's delay in seising the Court does not cause prejudice to Australia with regard to determination of the applicable law (*ICJ Reports 1992*, p.255, para.36).

260. As proclaimed by Max Huber in the *Island of Palmas* case:

> "a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled." ((1928) 2 UNRIAA 831 at 845)

As was also said in that case:

> "As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law) a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued

> manifestation, shall follow the conditions required by the evolution of law." (Ibid)

In this case, therefore, Nauru not only has to establish the existence of a right to rehabilitation at some stage during the Trusteeship, it has to show that that right continued to exist and that it still exists today.

261. In order to determine the wrongfulness of an act of a State it is essential to judge that conduct on the basis of the law as it was interpreted and applied at the time the allegedly unlawful conduct was performed. To judge the conduct of Australia in the light of the law as it may have evolved subsequently would be an attempt to apply the new law retroactively, in violation of fundamental principles of justice.

262. This intertemporal principle has been proclaimed and codified by the International Law Commission's draft articles on State Responsibility. Article 18 reads:

> "An act of the State which is not in conformity with what is required of it by an international obligation constitutes a breach of that obligation only if the act was performed at the time when the obligation was in force for that State."

263. In the commentary to this Article the ILC supported the rule with the consideration that "the principle that an individual cannot be held criminally liable for an act which was not prohibited at the time when he committed it (*nullum crimen sine lege praevia*) is a general rule of all legal systems". In finding that the principle applies in international law, the report adds that it provides a safeguard for all subjects of law "since it enables them to establish in advance what their conduct should be if they wish to avoid a penal sanction or having to pay compensation for damage caused to others" ([1976] YBILC, Part.II, Vol.II, p.90).

264. The application of the principle to tortious and criminal responsibility is recognised by H Lauterpacht, *International law*, Vol.I, the General Part, p.133; G Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol.I, (1957) p.24. A related principle applies in relation to treaties, to the effect that they will not normally bind a party in relation to an act or fact which took place before the date of entry into force of the treaty (Vienna Convention on the Law of Treaties, Art.28).

265. A further aspect of the intertemporal principle is its application to terms used in treaties. As the International Law Commission recognised "the effect of changes in the law upon a treaty is rather a question of the application of the new law to the treaty - a question of the modification of the rule laid down in the treaty by a later legal rule rather than one of the interpretation of the terms" ([1964] YBILC 1964, Vol.II, p.203).

266. The 1971 *Namibia* advisory opinion may at first glance appear to contradict this principle. In that case the Court stated that "viewing the institutions of 1919, the Court must, when considering Mandate obligations, take into consideration the changes which have occurred in the supervening half century, and its interpretation cannot remain unaffected by the subsequent development of law" (*ICJ Reports 1971*, p.31, para.53). The Court stated that the concepts of the Mandate, including that of the "sacred trust" "were not static, but were by definition evolutionary" (ibid). However, in any attempt to apply that decision to this case, it must be recalled that the Court was then judging the contemporary conduct of South Africa which continued to apply apartheid in 1971 in the territory of Namibia and did not report to the General Assembly. Here, the situation is entirely different.

267. Nauru wants the Court to judge not the conduct of a State at the time of judgment based on continuing behaviour, but the conduct of the Administering Authority over a lengthy period prior to 1967. They want this conduct judged by reference to legal concepts which were evolving throughout the time the relevant conduct took place and some of which have evolved considerably subsequently. Claims arising out of conduct that took place as long ago as 1947 cannot be determined on the basis of emergent principles of international law that were not established by 1967 or, even if established by then, were not applicable to all the earlier conduct. Even if in this case the Court considers that certain obligations under the Trusteeship or general international law evolved with subsequent development of the law, this does not mean that such developments of the law apply to earlier acts committed prior to the development of the law. To do so would clearly be contrary to the statement of the rule by Judge Huber concerning the legal appreciation of facts.

268. The application of later legal rules to treaty provisions relevant in this case is discussed in greater detail elsewhere in this Counter-Memorial. At this stage Australia simply reaffirms that the application of a treaty, in the same way as the determination of international responsibility, must have regard to the law

in force at the time the relevant acts were committed. And the fact that one is dealing with a Trusteeship arrangement does not affect this conclusion.

269. The Australian Government rejects the implication in various parts of the Nauruan Memorial (see eg NM, paras.422-429) that the Court should determine the legal claims by reference to developments in moral, social and legal values subsequent to the events which gave rise to the claims alleged.

B. APPLICATION OF THE INTERTEMPORAL PRINCIPLE TO THE FACTS

270. The Nauruan claim relates to the alleged failure of Australia to make adequate provision for the restoration of the area mined for phosphate prior to 1967. It is clear that the various grounds on which Nauru seeks to rely relate to actions over the twenty year period from 1947 to 1967, not simply the position as at 1967.

271. It is the conduct of the Administering Authority throughout the Trusteeship which, it is alleged, gave rise to a breach of a duty to rehabilitate, or to provide the financial means to enable rehabilitation to take place. Whether such an obligation existed and was breached depends on the legal principles applicable throughout the whole trusteeship period, and only on those principles.

272. Even if, as the *Namibia* case suggests (see para.266 above), and Nauru itself submits (NM, para.423ff), it is appropriate to interpret the Charter and the Trusteeship Agreement itself in a dynamic way, this does not enable the Court to interpret those provisions on the basis of the law as it has evolved since 1967. For to do that would be to misunderstand the nature of the obligation alleged and the basis for it: it is alleged that there was an obligation to rehabilitate mined areas arising out of the Trusteeship as such. And this can only be because at the time of independence some trusteeship obligation had not been fulfilled.

273. The claim made by Nauru against Australia is, in substance, that when the Nauruans rejected resettlement at the end of 1964, the Administering Authority became obliged to rehabilitate. For clearly there could be no question of rehabilitation if the island was, with the consent of the inhabitants, to be abandoned. It was only when the Nauruans made the decision to remain that the question of rehabilitation really arose. From the perspective of the United Nations and the Administering Authority, the Administering Authority was

under an obligation to provide for the welfare of the Nauruan people. Prior to 1964, the United Nations, the Administering Authority and the Nauruans were all agreed that resettlement was the best means to fulfil this obligation. It was not until the Nauruans rejected resettlement that rehabilitation was seriously considered as an alternative. As already noted, however, the Administering Authority regarded rehabilitation as impracticable and, in any event, time did not permit the Administering Authority to carry out actual rehabilitation. In this circumstance, the Administering Authority had no alternative but to make adequate financial provision for the future of the Nauruan community. Intertemporal principles would require these circumstances to be taken into account.

274. In light of these facts, the real question raised by Nauru is whether the arrangements made by the 1967 Canberra Agreement were in fact a bona fida exercise of the discretion of the Administering Authority. In these circumstances, the onus is on Nauru to show either that the 1967 Canberra Agreement was totally inadequate, or that the funds made available to the Nauruans by that Agreement somehow excluded financial provision for rehabilitation.

275. Nauru cannot avoid this conclusion by relying on general principles of international law, such as principles of self-determination or permanent sovereignty over natural resources as they might be applied to a situation today. Similarly, intertemporal law prevents recourse, in this case, to the newer, post-1967 notions of the "polluter pays principle", or the notion that an extractive industry must re-instate an area mined. In relation to the latter, there was at the time no such generally acknowledged duty in Australia, United Kingdom or New Zealand or elsewhere. For instance, in French law a duty to rehabilitate did not appear in the Mining Code until 1977 (loi no.77-620 of 16 June 1977, Art.20 amending Art.83[5]). See also the situation in Togo described in Alaglo, "Togo, its geopotential and attempts for land-use planning" in P Arndt and G W Lyttig (eds), *Mineral Resources Extraction, Environmental Protection and Land Use Planning in the Industrial and Developing Countries*, pp.260 ff. This indicates that rehabilitation of mined phosphate areas did not occur. Nor is there evidence of any duty to rehabilitate mined-out lands in international environmental instruments adopted before 1967. To apply these

[5] Article 83 nouveau: "La remise état, notammment à des fins agricoles, des sites et lieux affectés par les travaux et par les installations de toute nature réalisés en vue de l'exploitation et de la recherche, peut être prescrite; elle est obligatoire dans le cas des carriéres".

notions here would be to apply retrospectively to the Administering Authority values, standards and obligations to which it was not subject at the relevant time.

276. Finally, as already noted, Nauru makes no claim of breach in respect of the Mandate period. It follows that Nauru's claim is in respect of phosphate land mined out during the Trusteeship only, excluding the area of the island mined prior to 1947. (Approximately twenty-five per cent of pre-independence mining occurred before the Trusteeship was established in 1947.) If the case were otherwise, the Administering Authority under the Trusteeship Agreement would incur an obligation in respect of acts for which it was not as such responsible, undertaken under a quite different legal regime. This would also introduce elements of retrospectivity incompatible with intertemporal law.

Section IV: Relationship between the Trusteeship and 1919 Agreement

277. Before turning to examine the nature of the trusteeship obligations, it is necessary to deal with one other matter raised by Nauru, the relationship between the 1919 Agreement and the Trusteeship. Nauru contends that the supposed violations of the trusteeship obligations by Australia "in virtually every case flow from the system inherited in 1947" (NM, para.286; see also para.283). This refers particularly to the regime established by the 1919 Agreement. Australia notes that the status quo under the 1919 Agreement was known to the United Nations at the time of the adoption of the Trusteeship Agreement. There was no suggestion in that latter Agreement that the previous arrangements governing the phosphate industry (and made under the 1919 Agreement) were in any way incompatible with the trusteeship system which was a continuation of the basic mandate principle of the "sacred trust".

278. Australia rejects for the reasons already set out (paras.240 to 242 above) the Nauruan suggestion that events during the Mandate period have some "legal and evidential significance" for these proceedings (NM, para.287). In these proceedings it is only conduct during and particularly at the end of the Trusteeship that is relevant. The Nauruan contention in relation to evidence from the Mandate period conflicts, in any event, with other parts of the Nauruan Memorial that seek to rely solely on evidence from 1965-1967 (NM, para.274).

279. The Court must look at the evidence before it covering the Trusteeship period. This includes the provisions of the 1919 Agreement so far as they were relevant to the phosphate mining during that period. It is clearly impermissible,

however, to extract from conduct in the 1920s conclusions as to the nature of conduct in the 1960s. Yet this Nauru seeks to do.

280. So far as the 1919 Agreement is relevant to the Trusteeship period, Australia does not, in these proceedings, find it necessary to rely on Article 80 of the Charter in order to argue that its actions in conformity with the 1919 Agreement between the Partner Governments (under which the phosphate mining took place) overrode any possible obligation under the Trusteeship Agreement to rehabilitate. Australia, of course, denies that such an obligation existed. Australia in the Trusteeship Council did, when the issue of the consistency of the two Agreements was raised, on occasions refer to Article 80. Australia agrees with Nauru, however, that the 1919 Agreement "left it open" to *Australia to comply with its trusteeship obligations* (NM, para.514). That Agreement was, as Australia itself recognised, no more than an "administrative instrument" between the three Partner Governments laying down in part practical provisions for the mining of phosphate by a commercial instrumentality of those governments.[6] The 1919 Agreement is not relevant to whether any requirement to rehabilitate arising from trusteeship was breached.

281. The fact that the United Nations knew of the 1919 Agreement is, however, relevant to any question whether Australia's actions generally in relation to the phosphate industry were consistent with its trusteeship obligations. This strongly suggests that its provisions were not regarded by the United Nations as inconsistent with the trusteeship obligations. It would be an extraordinary proposition to suggest that the United Nations approved the Nauruan Trusteeship knowing full well the basis on which the phosphate operations on the territory were to take place if it considered that operation opposed to the fundamental objectives of the trusteeship system. Nor would the United Nations have continued to supervise that system over twenty years without rectifying such a supposedly serious failure. The Nauruan case to the contrary necessarily calls into question the integrity of the United Nations supervisory mechanisms. As the then Australian Solicitor General said in his paper prepared for the purposes of the 1965 round of negotiations, "it is inconceivable that a provision limiting the rights of, or the grant of rights to, the Commissioners would not have been included in the Trusteeship Agreement, if

[6] In the Trusteeship Council in 1949, the representative of Australia said in relation to the 1919 Agreement that "a study of that document would show that its aim was to lay down practical provisions for the mining of phosphates. Thus the Agreement of 1919 should not be considered an organic law but an administrative instrument". United Nations, *Trusteeship Council Official Records, 5th Session*, 8th meeting, 27 June 1949.

the United Nations had intended to impose such a limitation" (reproduced in Vol.3, NM, p.188-9).

282. Australia does not consider it necessary to take a position on the Nauruan contention that the trusteeship principles have the status of *jus cogens* (NM, para.254). As indicated, Australia does not seek to say that the 1919 Agreement overrides the trusteeship system. And there can be no suggestion that the Trusteeship Agreement itself is in some way inconsistent with the alleged *jus cogens* principles. For that would be to make a nonsense of the whole trusteeship system. So one is left with the need to apply the trusteeship principles of the Charter and the specific obligations of the Trusteeship Agreement to the facts of the case. No decision on the status of these principles and obligations as *jus cogens* is, therefore, necessary. Australia does not, therefore, respond further to this particular claim.

CHAPTER 2

NOVEL ALLEGATIONS OF BREACH IN RELATION TO THE CLAIM FOR REHABILITATION DERIVING FROM TRUSTEESHIP

Section I: The nature of the obligations of the Administering Authority

283. Any consideration of the claim that there is a duty to rehabilitate flowing from trusteeship obligations must have regard to the nature of those obligations. Australia does not deny that legal obligations do in certain circumstances arise under the trusteeship system. The Court in the 1971 *Namibia* advisory opinion indicated in relation to the Mandate that "definite legal obligations" arose designed for the attainment of the object and purpose of the Mandate (*ICJ Reports 1971*, p.30). And Australia does not deny that this general proposition also applies to the Nauru Trusteeship Agreement.[7]

284. But it is the terms of the Charter and the particular Trusteeship Agreement which must alone determine the content of any obligations which arise from those instruments.

A. OBLIGATIONS OF RESULT

285. The obligations that arise under Article 76 of the Charter are defined in terms of the "objectives" to be achieved (what can be termed obligations of result: see Report of the International Law Commission, [1977] YBILC Vol.II Part 2 at pp.18-30). The obligations are not defined in terms which specify the precise means to be employed by the Administering Authority to achieve a specified result. In consequence, the Administering Authority is left with considerable discretion as to the choice of means, provided the end result is achieved. This is significant in the present case, for there can be no doubt that the ultimate result envisaged by the trusteeship system was achieved: Nauru became independent and the people prospered. And at no stage did the

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[7] Australia, at the time of conclusion of the Trusteeship Agreement for Nauru, conceded that Article 76(d) of the Charter imposed a binding obligation on the Partner Governments. The records state: "In reply to questions raised by the delegations of India and China, the Australian delegation affirms that Article 76(d) of the Charter is accepted by the Delegations of Australia, New Zealand and the United Kingdom as a binding obligation in relation to the Trusteeship Agreement for Nauru, it being also noted that in accordance with the terms of Article 76(d) the welfare of the inhabitants of Nauru is of paramount consideration and obligation" (United Nations, *General Assembly Official Records, 2nd Session, Fourth Committee*, Report of Sub-Committee I, Doc.A/C.4/127).

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NOVEL ALLEGATIONS OF BREACH IN RELATION TO THE CLAIM FOR REHABILITATION DERIVING FROM TRUSTEESHIP

Section I: The nature of the obligations of the Administering Authority

283. Any consideration of the claim that there is a duty to rehabilitate flowing from trusteeship obligations must have regard to the nature of those obligations. Australia does not deny that legal obligations do in certain circumstances arise under the trusteeship system. The Court in the 1971 *Namibia* advisory opinion indicated in relation to the Mandate that "definite legal obligations" arose designed for the attainment of the object and purpose of the Mandate (*ICJ Reports 1971*, p.30). And Australia does not deny that this general proposition also applies to the Nauru Trusteeship Agreement.[7]

284. But it is the terms of the Charter and the particular Trusteeship Agreement which must alone determine the content of any obligations which arise from those instruments.

A. OBLIGATIONS OF RESULT

285. The obligations that arise under Article 76 of the Charter are defined in terms of the "objectives" to be achieved (what can be termed obligations of result: see Report of the International Law Commission, [1977] YBILC Vol.II Part 2 at pp.18-30). The obligations are not defined in terms which specify the precise means to be employed by the Administering Authority to achieve a specified result. In consequence, the Administering Authority is left with considerable discretion as to the choice of means, provided the end result is achieved. This is significant in the present case, for there can be no doubt that the ultimate result envisaged by the trusteeship system was achieved: Nauru became independent and the people prospered. And at no stage did the

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[7] Australia, at the time of conclusion of the Trusteeship Agreement for Nauru, conceded that Article 76(d) of the Charter imposed a binding obligation on the Partner Governments. The records state: "In reply to questions raised by the delegations of India and China, the Australian delegation affirms that Article 76(d) of the Charter is accepted by the Delegations of Australia, New Zealand and the United Kingdom as a binding obligation in relation to the Trusteeship Agreement for Nauru, it being also noted that in accordance with the terms of Article 76(d) the welfare of the inhabitants of Nauru is of paramount consideration and obligation" (United Nations, *General Assembly Official Records, 2nd Session, Fourth Committee*, Report of Sub-Committee I, Doc.A/C.4/127).

supervisory bodies within the United Nations express the view that, in its choice of means, the Administering Authority was in breach of its legal obligations (see Part I, Chapter 4 above).

286. The International Law Commission has recognised a distinction between "obligations of means" and "obligations of result". This distinction is reflected in draft Articles 20 and 21 of the articles on State responsibility adopted by the Commission in 1977. There is nothing in the relevant trusteeship obligations which requires a particular course of conduct by the Administering Authority. They are rather quintessential obligations of result. They require, for instance, the promotion of the well-being of the inhabitants. The means by which an Administering Authority achieves that is a matter for its own choice.

287. As the International Law Commission recognised in its commentary there are some obligations of result where, even if the initial choice of means has not achieved the required result, a State may avoid a breach of the obligation by subsequent adoption of alternative means (see draft Art.21(2)). This may involve achieving the result required or in some cases, where the nature, purpose and field of application of the obligation allows, an equivalent result. (See generally the commentary to the ILC Draft Art.21 [1977] YBILC Vol.II, Part 2 pp.18-30; also reproduced in I Brownlie, *State Responsibility* (1983) pp.254-276). See also the Sixth Report on State responsibility by Professor Ago, [1977] YBILC, Vol.II, Part 1, pp.8-20.

288. Nauru seeks to find a breach of trusteeship in certain actions of the Administering Authority (NM, para.289-302). But in doing this Nauru overlooks the fact that the obligations contained in Article 76 of the Charter and the Trusteeship Agreement are obligations of result. None of those provisions required Australia to act in any particular way to meet the obligations. Rather, the Trusteeship Agreement, in particular, recognised that the obligations on the Administering Authority to "promote", for instance, advancement of the inhabitants or to assure to the inhabitants an increasing share in the services of the territory were to be met by action chosen by the Administering Authority having regard to the "circumstances of the Territory" or the "particular circumstances of the Territory and its people" (Art.5(2)(b) and (c) respectively of the Trusteeship Agreement). As well, Article 3 of the Trusteeship Agreement required the Administering Authority to administer the territory "in such a manner as to achieve" the basic objectives of the trusteeship.

289. It follows that the failure to rehabilitate cannot in itself constitute a breach of any international trusteeship obligation, given the absence of any such *specific requirement in the trusteeship provisions.* Nauru must establish that, by Australian actions and conduct in failing to rehabilitate, and given the alternative means adopted, Australia in some way failed to achieve an outcome required under the Trusteeship. Unless it can do this no possible breach could be established.

290. More importantly, even if it could be established that Australia's actions from time to time failed to meet a trusteeship obligation requiring rehabilitation, Nauru must also show that the failure to achieve the result required by that obligation continued as at independence despite the adoption of alternative means to achieve the obligations of result, namely the favourable phosphate settlement which included the complete transfer to Nauru of the phosphate industry and the trust funds then in existence. Because the relevant obligations are obligations of result, subsequent conduct was clearly envisaged in the circumstances as allowing a trusteeship State to achieve the results required of it. (See draft Article 21(2) of the ILC draft Articles on State responsibility.) Nauru would still, therefore, have to show that the terms on which independence was granted failed to achieve a result equivalent to that result which previously may have been considered to require rehabilitation or a fund specifically committed to rehabilitation.

291. By their supervision and recommendations United Nations bodies could clearly indicate to an Administering Authority what action was necessary to meet a particular trusteeship obligation. And in Australia's case, it paid careful regard to the recommendations of the United Nations and adjusted its behaviour accordingly (see paras.92 to 106 for examples). It is for this reason important that any consideration of Australian responsibility for rehabilitation have regard not to individual acts during the trusteeship but to the situation as at independence when Australia relinquished any further administrative responsibility. Even if particular actions during the Administration did not fully meet trusteeship obligations, it is only if a relevant breach can be established having regard to the situation at independence that Nauru could succeed. And it can only do this if it can successfully show that, instead of rehabilitation, the ultimate means chosen by the Administering Authority to ensure the well-being of Nauru did not in fact satisfy the relevant obligations. In reality this means that Nauru must show that the means chosen by the Administering Authority - the provision of finance under the 1967 arrangements - were totally inadequate to

achieve rehabilitation. But this cannot be so. Nauru admits it has the financial means. For this reason, Australia strongly denies that Nauru can establish a breach on the facts quite apart from the difficulties that exist in establishing any legal bases for its claim. In effect Nauru claims that it was entitled to earmarked funds, assigned specifically to rehabilitation and irrespective of the general wealth of the Nauruans under the 1967 arrangements. This is not only patently unreasonable, but it is unsupportable as a restriction on the general discretion entrusted to the Administering Authority.

B. DOMESTIC LAW ANALOGIES

292. Another important consideration is that, in considering the nature of the obligations of the Administering Authority, it is the actual provisions of the Charter and Trusteeship Agreement to which the Court must have regard. Australia rejects the attempt by Nauru to import into these treaty provisions the whole set of legal rights and duties connected with the notion of a "trust" in domestic law, particularly the common law. To do that is to mistake completely the fundamental elements of the United Nations Trusteeship System. Domestic law analogies have limited value in this area. The Court recognised the difficulty in equating domestic systems with the international mandate and trusteeship system in the *Status of South West Africa (Advisory Opinion) (ICJ Reports 1950*, p.132):

> "The League was not, as alleged by that Government [South Africa], a 'mandator' in the sense in which this term is used in the national law of certain States. It had only assumed an international function of supervision and control. The 'Mandate' had only the name in common with the several notions of mandate in national law. The object of the Mandate regulated by international rules far exceeded that of contractual relations regulated by national law. 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 civilisation. It is therefore not possible to draw any conclusion by analogy from the notions of mandate in national law or from any other legal conception of that law."

293. Similarly, Judge McNair in his separate opinion in that case pointed to the inappropriateness of seeking to apply private law institutions directly to an international institution. He said:

> "What is the duty of an international tribunal when confronted with a new legal institution the object and terminology of which are reminiscent of the rules and institutions of private law? To what extent is it useful or necessary to examine what may at first sight appear to be relevant analogies in private law systems and draw help and inspiration from them? International law has recruited and continues to recruit many of its rules and institutions from private systems of law. Article 38(i)(c) of the Statute of the Court bears witness that this process is still active, and it will be noted that this article authorises the Court to 'apply ... (c) the general principles of law recognised by civilized nations'. The way in which international law borrows from this source is not by means of importing private law institutions 'lock, stock and barrel', ready-made and fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of 'the general principles of law'. In my opinion, the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions" (p.148).

294. It is important to note the use to which Judge McNair would put private law analogies: it was only as "an indication of policy and principles". It was not to import the private law rules and institutions. The "international institution" of trusteeship must be defined by reference to its own rules. Australia therefore rejects completely the relevance of the Appendix by Professor Honoré in the Nauruan Memorial. That Appendix examines in some detail trust and trust-like institutions in domestic legal systems and makes the mistake warned of by Judge McNair of seeking to import directly the content of private law rules applicable to a particular domestic law concept. In addition, the Appendix looks selectively at only one relevant analogy, that of the "trust". The inappropriateness of selecting this analogy is highlighted by an examination of mandates established under Article 22 of the Covenant, the predecessor to the United Nations trusteeship system. As was recognised by Quincy Wright in his 1933 study of mandates, resort to domestic law analogies in relation to Article 22 of the Covenant was made difficult by the fact that three words with different legal meaning were used: mandate, tutelage and trust. He concluded that there was little evidence that the word "trust" was used in a technical sense; by contrast, there was considerable evidence that the word "mandate" was so used. (*Mandates under the League of Nations* (1933) pp.375-390, esp at 377). It

would be equally a mistake to read the reference to "trust" in the United Nations Charter in a technical, private law sense as referring to "trust" in the common law. Nauru points to no evidence that it should be so construed. Nor do the negotiations of these provisions at the time of the San Francisco Conference support the conclusion for which Nauru contends. As is said by Kelsen, an "institution of public, especially of international, not of private, law is intended" (H Kelsen, *The Law of the United Nations* (1951) p.566). And as Lauterpacht, who was sympathetic to use of domestic law analogies in international law said of the Mandate system, "(T)he technicalities, exceptions and historical peculiarities of any given system of private law have no application in the interpretation of mandates." (*Private Law Sources and Analogies in International Law* (1927) p.200; see also C Rousseau, *Droit international public*, Vol.II (1974) p.380.)

295. Even if one examines the Honoré appendix, with a view to seeing if any policy and principles might be imported into the international institution, one finds little assistance. The conclusion of the Appendix is that there is a "pervasive use of protective institutions" in domestic law systems. Persons holding an office under these institutions are normally subject to supervision by some other body, often a court. But it is difficult to generalise as to the precise duties of a trustee. As Honoré acknowledges (Appendix para.20, Vol.1, NM, p.361, NM) the terms of the trust instrument set out the power and duty of the trustee and normally these terms can vary so long as they are not unlawful or *contra bonos mores*. This reinforces the fact that the trusteeship system created by the Charter depended very much on the terms of individual trusteeship agreements to determine the precise obligations of an Administering Authority. The Charter also established an elaborate system of supervision, the "securities for performance" already mentioned. To this extent one might acknowledge that the trusteeship system is analogous to protective institutions in private law.

296. Nauru seeks in addition, however, to import on to the international plane a general "duty of loyalty" and an "intense" fiduciary duty applicable in all trust situations, which it is said requires the administration of the trust solely in the interest of the beneficiaries (Honoré Appendix para.21, Vol.1, NM, p.361). But to rely solely on the intense fiduciary duty applicable to trustees in domestic law is to state the notion of fiduciary duty too absolutely. As Wright said:

> "The terms 'trust' and 'entrusted' were used to emphasize the fiduciary character of the relations of both League and mandatory to

> the mandated peoples rather than to import into the institution the English law of strict trusts." (p.389)

297. And as is stated in a leading Australian text: "The trust is a fiduciary relation, but every fiduciary relation is not a trust" (*Jacobs' Law of Trusts* (5th ed 1986), p.10). A fiduciary duty operates in a wide range of situations and varies in its content depending on the situation. One can in certain circumstances have a fiduciary duty without at the same time being precluded from pursuing one's own interest. For instance, in a number of English cases limits on the application to a fiduciary of the principle that a person must not put himself in a position where interest and duty conflict have been recognised. Hanbury and Maudsley, *Modern Equity* (12th ed 1985), say:

> "But it is not safe to make the attractive over-simplification of saying that a fiduciary must always account for all gains which come to him by reason of his fiduciary position." (p.577)

This emphasises the need for caution in any attempt to generalise and draw absolute rules that should apply to the actions of a trusteeship authority on the international law plane.

298. The need for caution in translating rules from the private law area into international law is underlined by the essentially different nature of the relationship. In a private law trust one is normally dealing with a business or personal relationship involving limited and identified property or assets. By contrast, under a trusteeship under the Charter one is dealing with the discharge of a complete range of governmental functions on behalf of a whole self-determination unit. The two situations are not comparable. In this context it needs to be remembered that it is the duties of the Administering Authority as trustee that are alleged to be breached. It is not alleged that the BPC itself was a trustee. In fact, Nauru says that the BPC is in the same position as any private trading enterprise. Yet it appears to allege that the benefits gained by the Partner Governments through their ownership of the BPC in some way should be equated with and treated as actions in conflict with a fiduciary duty imposed on them in their capacity as administrators of the territory. This is to confuse two separate roles. Throughout the Mandate and Trusteeship the different roles and responsibilities of the three Governments as Administering Authority and as owners of the BPC were recognised and accepted. For Nauru to suggest otherwise is to ignore the way in which the United Nations treated the operations of the BPC (see paras.108 to 119 above). To read the trusteeship

provisions as carrying the corollary that the mandate or trustee powers could not benefit from the resources of the territories in question through a commercial entity would be to ignore the widespread practice of Administering Powers under both the League and the United Nations. In the case of Nauru, the lack of any logical basis for saying that such an arrangement infringed some fiduciary duty which thus supports an obligation to rehabilitate is highlighted by a review of the salient facts.

299. The grant and extension of mineral concessions to foreign concerns in mandate and trust territories was an accepted feature of their administration. The League of Nations in particular accepted the practice of the Partner Governments in relation to Nauru. As Professor Quincy Wright said speaking of Nauru:

> "Does the principle of gratuitous administration prohibit the mandatory from engaging in business for profit in the mandated area? Apparently not. The Commission has distinguished between the mandatory government in that capacity and in the capacity of a private entrepreneur." (Wright, *Mandates under the League of Nations* (1933) at pp.453-4.)

300. Nauru in effect attempts to impose some additional obligation on the exploitation of Nauru's resources in order to found a duty to rehabilitate. It attempts to impose obligations which would have the effect that an Administering Authority could not promote the economic advancement of a trust territory through exploitation of its resources, or could only exploit subject to prohibitive conditions. This attempt to create some ideal model of a "sacred trust" gets no support from an examination of the trusteeship system in practice.

301. In the context of United Nations trusteeship, one can conclude that the basic notion of a "sacred trust" may well involve certain fiduciary duties on an Administering Authority. And it is this general principle, rather than any specific rule applicable to a trustee as such, that might be imported into international law. The content and nature of such a fiduciary duty can vary considerably. Its content can only be determined by a consideration of the actual circumstances governing the relationship. And if one examines the situation in this case, the only reasonable conclusion that one can reach is that while the nature of the trusteeship relationship imposed an obligation to have regard to the interests of the people of Nauru, as reflected in Article 76 of the Charter and the

Trusteeship Agreement, it did not impose a duty to act solely in the former's interest.

302. The "open door" embodied in the former "A" and "B" mandates is not absolute under the trusteeship system. It is:

> "subordinated by the Charter and Trust Agreements to the interests of the inhabitants.... The Charter provides (Art.76(d)) that 'equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals' (and also for the latter in the 'administration of justice') shall be 'without prejudice' to 'political, economic, social and educational advancement of the inhabitants of the trust territories' as well as the other basic objectives. This is an important change which gives the Administering Authority much more freedom of action to safeguard the interests of the population which may coincide in certain cases with its own interest." (Duncan Hall, *The Trusteeship System* (1947) 24 BYBIL 33, 68).

303. The Administering Authority secured from the BPC the costs of the administration of Nauru, as well as royalty payments. It emphasised to the United Nations the difference between its responsibilities for administration and the commercial role of the BPC (see para.306 above). And given this, the Administering Authority properly met its duty to have regard to the interests of the Nauruans in ensuring that the royalties and administration expenses were provided from the BPC operations. Australia rejects the Nauruan assertion that the exclusive object of the Administering Authority was the exploitation of the phosphate deposits for their own benefit. There was no necessary incompatibility, in any event, between its interest in exploitation of the phosphate and the Nauruan interest in development of employment opportunities and the general prosperity that mining brought. The well-being of the Nauruan people was conscientiously ensured in terms of social, economic and political advancement. This was guaranteed by the financial aspects of the phosphate agreement and the transfer of the trust funds (see paras.242 to 243 above).

304. The Nauruan argument if upheld must mean that Nauru is not only accusing Australia of a breach of trust, but also accusing the United Nations itself of not being diligent enough. Because, if the preceding argument is not accepted and domestic law "trust" analogies are considered directly relevant, it is clear that the real "trustee", with the obligations which are said to be

incumbent on such a person, is not the Administering Authority but the United Nations itself. The Administering Authority was no more than a representative or delegate of the United Nations. (See M Glele-Ahanhanzo, "Article 76" in J-P Cot et A Pellet, *La Charte des Nations Unies* (2nd ed 1991) pp.1113-1127).

305. The Administering Authority was accountable to the United Nations from which its authority over the territory derived. Apart from obligations owed to other Member States (which are not in question here), the obligations of a trusteeship power were matters for review and judgment by the supervisory organs of the United Nations. Yet there were only recommendations and nothing more made in this regard in relation to the rehabilitation of the mined areas of Nauru (see paras.171 to 202 above). If Nauru is to allege a breach by Australia of some trusteeship obligation it at the same time effectively condemns the United Nations and the whole supervisory mechanisms used to review the performance of an Administering Authority.

Section II: The choice of means by the Administering Authority

306. Because the relevant trusteeship obligations are obligations of result, the choice of means necessary to meet those obligations remained with the Administering Authority. Various factors influenced the choice that was in fact made.

307. The phosphate mining itself which took place under a concession held by the British Phosphate Commissioners cannot be described as inconsistent with the Trusteeship Agreement, for it clearly was not. Nauru itself does not question the mining *per se*, for it alleges only a duty to rehabilitate. The question is whether, in order to comply with the trusteeship obligations, such mining had to be accompanied by rehabilitation.

308. Prior to 1964, as has been indicated (paras.121 to 141), resettlement was seen by the Nauruans, the United Nations and the Administering Authority as the most appropriate way in which to ensure the future well-being of the Nauruan people. All the efforts of the Administering Authority were concentrated on this.

309. Given that resettlement was the preferred solution, rehabilitation was until that time not an option that made any sense. To incur the cost of rehabilitation would have been to waste financial and other resources that would be needed for other purposes, including the establishment of a new homeland.

Rehabilitation was also regarded as of uncertain benefit given the lack of rainfall, the risk of any replacement soil being washed away and the prohibitive cost of transporting replacement soil to Nauru. These issues had been carefully examined in CSIRO and BPC studies between 1954 and 1965 and are referred to in greater detail in paragraphs 143 to 157 above. As the 1954 CSIRO report said, for instance, "no practical possibility whatsoever is seen of wide scale utilisation of worked out phosphate lands for agriculture" (Preliminary Objections, Vol.II, p.129).

310. The United Nations shared the scepticism as to the usefulness of rehabilitation. In the 1962 Visiting Mission report, for instance, it was concluded that "settlement... in a new home is unavoidable" (see paras.121 to 141 above for a detailed examination of United Nations consideration of this issue).

311. Up until 1964, when the option of resettlement was abandoned (although not entirely by the United Nations and the Partner Governments), there was a general acceptance that given likely population growth and the inability to make the phosphate lands productive, rehabilitation was not a viable option. It is impossible for Nauru to contend in these circumstances that rehabilitation was a necessary means to comply with the trusteeship obligations. The trusteeship obligations were being met and were expected to be met by a choice of means other than rehabilitation.

312. After 1964 the choice of means necessary to fulfil the trusteeship obligations was dictated by additional factors. The Nauruans decided to stay on the island. They also demanded independence no later than 1968. Clearly, it was not possible in that time for the Administering Authority to undertake rehabilitation. A further, comprehensive study of this issue was undertaken by the Davey Committee. It too concluded that comprehensive rehabilitation of all mined areas "while technically feasible" was "impracticable" given the very many practical considerations involved. An examination of the conclusions of the Committee has been provided in paragraphs 153 to 165 above.

313. While certain uses of mined-out land could be contemplated (such as an airstrip or water storage), the Committee emphasised the need for long-term land use planning. It also pointed to the fact that:

> "elsewhere in the world phosphate mining appears not to have been subject to the same kind of regulatory requirements for land

> restoration or rehabilitation as other kinds of mining operations. This is undoubtedly because the difficulties and costs involved make treatment of worked out phosphate lands generally uneconomic..." (p.27; reproduced in Vol.3, NM, p.237).

314. Hence, there is no basis for Nauru to say that rehabilitation was the normal way in which phosphate mines were treated. Rehabilitation, in the circumstances of Nauru, was only an issue that arose from the fact that the phosphate lands occupied a significant proportion of the land mass of Nauru and in circumstances where the option of resettlement was not taken up.

315. It should also be recognised that rehabilitation would not restore something that previously had been of great value. As the Davey report said:

> "The plateau area had in the past not been intensively used by the Nauruan people. The whole population formerly resided and still resides on the narrow strip of low coconut lands surrounding the island, comprising some 998 acres, and in the relatively fertile basin of about 154 acres surrounding the Buada Lagoon, a small lake at approximately sea level. The phosphate lands carried a vegetative cover ranging from sparsely growing and stunted trees to denser stands of tomano and wild almond with some coconut trees and pandanus in favoured areas. The main former use of the phosphate lands - as a source of timber for canoes and thatching materials for hut construction and as a reserve for the hunting of birds, the only form of wild life on the island - are scarcely relevant to the present economic circumstances and way of life of the Nauruan people. The limited food produced on the uncultivated uplands obviously never made a significant contribution to the subsistence of the Nauruans. The very porous, thinly soiled phosphate lands would undoubtedly have been the first and most seriously affected in the recurring drought periods, and in any event the output on the coastal fringe in favourable years would have been inadequate for consumption requirements. Today there is no sign that unmined land on the slopes of the plateau is being used for any form of productive activity except for a very small area which is under cultivation as a vegetable garden by Chinese members of the BPC work force...
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> The concern of the Nauruans over the denuded condition of the phosphate-bearing lands after mining is not so much because of any

> loss of currently useful production there but because of loss of opportunities for future utilization of these areas for habitation, agriculture or other purposes. It was estimated that these reduced opportunities would become a more serious restraint upon the Nauruan economy as population density on the island increases substantially above present levels. Difficulties would also occur when and if reduced dependence upon imported foodstuffs became necessary or desirable" (p.9-10, Vol.3, NM, p.219).

316. Given the continuing uncertainty as to the economic feasibility of rehabilitation and the fact that the form of any rehabilitation would need to depend very much on the choice of the Nauruan people as to land use priorities, the Administering Authority took a proper decision. It decided that any obligations it had under the Trusteeship to promote the well-being of the Nauruans could be met by financial provision which would enable the Nauruans to carry out rehabilitation in the future if they so decided. The financial means provided were substantial and adequate for this purpose. They included the Trust Funds in existence at the time of independence. This included the Long Term Investment Fund designed specifically to provide for the economic future of the Nauruan people when the phosphates were exhausted, the value of which stood at over A$6 million on 30 June 1967 ($A42 million in 1993 values). In addition, the Partner Governments relinquished completely the interests of BPC in the phosphate deposits (a settlement worth $A90 million in 1967 or $630 million in 1993 values). A fuller analysis of this settlement indicating the benefits received by Nauru is contained in the Section VII of this Chapter.

317. The 1967 settlement was made after a careful re-examination of the whole question of rehabilitation. Once resettlement was abandoned, the Administering Authority in good faith further reviewed the feasibility of rehabilitation. The Davey Committee reported. It concluded that comprehensive rehabilitation in the sense sought by Nauru was not feasible. Is it suggested by Nauru that an obligation to rehabilitate existed whether or not it was feasible and in the interests of the inhabitants? Such an obligation would not appear consistent with the fundamental trusteeship principle to promote the well-being of the inhabitants. It would be expending money that could otherwise be spent on the welfare of the inhabitants on a futile exercise.

318. It was in these circumstances that the Partner Governments entered into the negotiations on the future of the phosphate industry. And it was with a view

to enabling Nauru itself to determine what course of action to take in relation to rehabilitation that the comprehensive settlement was agreed to by the Partner Governments. If Nauru was to achieve the independence which it wanted by 1968 there was clearly no opportunity to undertake further studies into whether rehabilitation was the best way in which to promote and protect the long term interests and well-being of the Nauruan people. The Partner Governments did not deny their responsibility to ensure the well being of the Nauruan people. They were clearly mindful of it and at independence left them very well provided. And as the Nauru Commission of Inquiry report indicates, Nauru itself has done little to pursue rehabilitation. As that report further indicates, rehabilitation is not a question simply of restoring land, but of Nauru deciding as a people on the particular form of land use that it is desired to achieve through rehabilitation. The Davey report had also recognised this.

Section III: Absence of any specific provision to rehabilitate in the Trusteeship Agreement

319. The Nauruan allegations concerning rehabilitation, if the Court considers it open to examine them in substance, cannot rely on any specific provision concerning rehabilitation in the Trusteeship Agreement or Chapter XII of the Charter. This is significant given that Nauru considers these instruments provide "the primary causes of action on which Nauru relies" (NM, para.243). Nauru is forced to contend that an obligation to rehabilitate arises out of the *existence* of the trusteeship "in the particular circumstances of Nauru" (NM, para.290). Regard, says Nauru, must be had to:

> "the basic purposes of the trusteeship system. That system would lack substance altogether if its principles were not inimical to the physical destruction of the homeland of the people of a trust territory" (para.294).

320. Australia does not deny that it had duties of a general kind arising from Article 76 of the Charter. But, as the Nauruan Memorial demonstrates, while it is easy to make general assertions based on such broad undertakings, it is more difficult to point to the legal and factual basis upon which any requirement to rehabilitate could be made out in this case. For, as Nauru recognises, only one-third of the phosphate lands were mined during the trusteeship. The mining of that area clearly did not make the island uninhabitable and the mining was carried out *with* the consent of the Nauruans and to their benefit. Nauru itself has chosen to mine the remaining two-thirds of the phosphate lands and yet has

not found it necessary to undertake any rehabilitation itself in order to ensure the island remains inhabitable. Nauru has continued to prosper as an independent State with a high rate of population increase. This indicates that Nauru is not really serious about rehabilitation, but is seeking some financial gain at Australia's expense.

321. As Judge Shahabuddeen has recognised, "part of the problem concerns the correct appreciation of Nauru's case" (*ICJ Reports 1992*, p.282). And Nauru itself does not assist. Judge Shahabuddeen outlines what he understands to be the essence of the Nauruan case. This is that Australia:

> "failed to exercise these comprehensive governmental powers so as to regulate the phosphate industry in such a way as to secure the interests of the people of Nauru... [T]here was a failure to institute the necessary regulatory measures to ensure the rehabilitation of worked-out areas, not in the case of mining in any country, but in the case of large-scale open-cast mining in the miniscule area of this particular Trust Territory. The consequence, according to Nauru, was that the Territory became, or was in danger of becoming, incapable of serving as the national home of the people of Nauru, contrary to the fundamental objectives of the Trusteeship Agreement and of the Charter of the United Nations" (p.282).

322. If this is the real Nauruan claim it follows from this formulation of the claim that the only provision of Article 76 of the Charter that is relevant is Article 76(b). This provides that one of the basic objectives of the trusteeship system is:

> "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."

323. It is not apparent how a requirement to rehabilitate can arise from such a broad objective. Nor can one read into such an obligation of result any requirement to pursue particular actions such as rehabilitation. There are no other provisions of the Charter which appear to be relevant.

324. The 1947 Trusteeship Agreement itself (Annex 29, Vol.4, NM) was approved by General Assembly resolution 180(II) on 1 November 1947. Again, it contains no specific duty to rehabilitate mined-out areas. Article 3 provides that the Administering Authority will administer the Territory in such a manner as to achieve the basic objectives of the Trusteeship system set forth in Article 76 of the Charter. Article 5(2)(a) requires the Administering Authority to respect the rights and safeguard the interests of the indigenous inhabitants. Article 5(2)(b) provides that, in discharge of its obligations under Article 3, it will "promote, as may be appropriate to the circumstances of the Territory, the economic, social, educational and cultural advancement of the inhabitants". It is difficult to see how these provisions in the Trusteeship Agreement create a requirement to rehabilitate.

325. The Nauruan Memorial is marked by a distinct lack of any consideration of how the actual trusteeship provisions can support a claim for rehabilitation. Nauru contents itself with broad assertions such as that the Trusteeship Agreement and Article 76 of the Charter are clearly standard-setting in character and involve the application of the standards and obligations of general international law in a particular territory (NM, para.247). The position under general international law is dealt with below (Chapter 3). Nauru also seeks to derive general comfort from the trusteeship obligations on the ground that they embrace some "broad concept of trusteeship reflecting the general institutions of guardianship and curatorship" (NM, para.263) and that this in some way supports the rehabilitation claim. Australia rejects this argument in paragraphs 292 to 305 above. It highlights, however, the complete lack of specificity in the Nauruan claim that rehabilitation arises from the trusteeship obligations. The actual conduct said to constitute breach of these vague obligations is examined below (Part II, Chapters 3 and 4).

Section IV: Absence of any allegation of breach prior to termination

326. The allegation that Australia in some way has breached an obligation to rehabilitate arising from the Trusteeship Agreement is novel and is not one that was made by Nauru or the United Nations prior to termination of the Trusteeship. On the contrary, Head Chief DeRoburt made a formal acknowledgment before the Trusteeship Council that rehabilitation was not an issue relevant to the termination of the Trusteeship Agreement or a matter for United Nations discussion (see para.207 above).

327. While the Court has concluded that at the time of independence the question of rehabilitation of the phosphate lands had not been settled (*ICJ Reports 1992*, 254, para.33), that in no way is the same as a finding that Nauru had alleged prior to independence that the failure to rehabilitate constituted a breach of the trusteeship. And as any examination of statements by Nauru on this issue prior to independence shows, there was no allegation of breach of trusteeship. A legal basis for the alleged claim was not stated. It was presented by Nauru as no more than a moral claim and that is how Australia understood it until these proceedings. Nauru itself has recognised that even now its claim is based on what it considers fair and equitable (CR 91/18, p.28).

328. The two United Nations resolutions that called for rehabilitation (resolutions 2111(XXI) and 2226(XXI)) contained no suggestion of breach of the Trusteeship Agreement (paras.176 to 183 above). They simply recommended certain action by the Administering Authority in the same way as recommendations were made to other administering authorities on a whole range of trusteeship issues by both the General Assembly but also more particularly the Trusteeship Council.

329. It is only following the Commission of Inquiry report in 1988 that Nauru started to claim that Australia had breached its trusteeship obligations by failing to carry out a rehabilitation program. Until then, there was never any statement to indicate that Nauru considered its demands on the Partner Governments as anything other than a moral claim. Yet if Australia and the other Partner Governments were in breach of trusteeship obligations by failing to rehabilitate, Nauru would have said so from the beginning when the claim was first made and particularly in United Nations forums. Yet it did not. One can only conclude that Nauru until recently never considered that there had in fact been any breach of trusteeship obligations.

Section V: Relevance and effect of General Assembly recommendations

330. The significance of the fact that certain General Assembly resolutions referred to rehabilitation falls to be determined in light of the obligations of the Administering Authority. The fact that a resolution calls for particular action cannot in itself be taken as indicating that failure to comply amounts to a breach of Trusteeship obligations. As noted above, these were obligations of result. There were many United Nations resolutions relating to particular Trusteeships. Such resolutions were no more than recommendatory, so that failure to adopt the recommended course did not amount to breach of any international obligations.

The important thing was to effect the required result. The only obligation owed by the Administering Authority in respect of these resolutions was to consider them in good faith.

331. As Judge Lauterpacht said in the 1955 *Advisory Opinion on South West Africa (ICJ Reports 1955*, p.66 at p.116):

> "The Trusteeship Agreements do not provide for a legal obligation of the Administering Authority to comply with the decisions of the organs of the United Nations in the matter of trusteeship. Thus there is no legal obligation, on the part of the Administering Authority, to give effect to a recommendation of the General Assembly to adopt or depart from a particular course of legislation or any particular administrative measure. The legal obligation resting on the Administering Authority is to administer the Trust Territory in accordance with the principles of the Charter and the provisions of the Trusteeship Agreement, but not necessarily in accordance with any specific recommendation of the General Assembly or of the Trusteeship Council."

332. Judge Lauterpacht examined the practice of States administering Trust Territories to demonstrate that such States have asserted their right not to accept recommendations of the Trusteeship Council and the General Assembly, and that this right "has never been seriously challenged" (at 116). Nauru is one example, quoted by Judge Lauterpacht:

> "When the Trusteeship Council recommended in respect of Nauru that the long term royalty investment funds should not necessarily be limited to Australian Government securities, but should be invested freely in the best interest of the Nauruans, the Administering Authority explained why it was unable to act upon the recommendation (A/933, *Official Records, Fourth Session, Suppl. No.4, p.77; A/1306, Fifth Session*, Suppl. No.4, p.134)" (*ICJ Reports 1955* at 117.)

333. Australia was required to take account of the resolutions on rehabilitation (which it did), but it was under no obligation to give effect to the recommendations on rehabilitation contained in them. In fact, Australia gave serious consideration to the various recommendations of the Trusteeship Council and those of the General Assembly and explained its reasons for not

acting on the recommendations (see Judge Lauterpacht in the 1955 advisory opinion, *ICJ Reports 1955* at p.119-120). These reasons have been outlined in some detail above (see especially paras.171 and 188). (As Chapter 4 below shows there can therefore be no separate allegation that Australia has failed to comply with some independent duty in relation to its accountability to the United Nations.) The United Nations itself made no finding that Australia abused any duty in this regard. As Part I has shown, there were sound reasons for Australia choosing not to set about rehabilitating Nauru's worked-out phosphate lands before independence. There was no technical solution that could have been implemented in a way that was economically sensible. It was also recognised at the time that any rehabilitation would need to be the result of a land use plan covering the whole island and not just that area already mined. In these circumstances, the Administering Authority chose alternative means to rehabilitation. One cannot, therefore, derive a breach of trust obligations from the fact that recommendations on rehabilitation were made by the General Assembly.

334. As well as the General Assembly, the Visiting Missions and the Trusteeship Council throughout the period regularly discussed the issue of rehabilitation (see paras.171 and following) and this is reflected in their reports. Not once is any finding made in those reports, nor do they contain any serious suggestion, that failure by the Administering Authority to rehabilitate would amount to a breach of trusteeship obligations.

Section VI: The unconditional termination of the Trusteeship precludes any complaint of breach of the Trusteeship Agreement

335. In its judgment of June 1992, the Court held that, having regard to the particular circumstances, "the rights Nauru might have had in connection with rehabilitation of the lands remain[ed] unaffected by the termination of the Trusteeship by the General Assembly" (*ICJ Reports 1992*, p.253, para.30). Australia no longer contends that the Court does not have jurisdiction to hear the Nauruan claim. Nor does Australia contend any longer that Nauru's claim for rehabilitation is inadmissible in its entirety.

336. In the same judgment, the Court also held that General Assembly resolution 2347(XXII) of 19 December 1967 had "definitive legal effect" and that the Trusteeship Agreement was terminated on that date (p.251, para.23). Clearly enough, this changed the status of the Territory. It also meant that, since that date, there has been no basis on which to challenge an alleged failure by the

Administering Authority to comply with its obligations with respect to the administration of the Territory. This is because the termination of a Trusteeship Agreement is the ultimate act of supervision by the United Nations. It signifies either that the Administering Authority has committed so serious a breach that it is disqualified from acting further in that behalf, or that the Administering Authority has fulfilled its obligations so well that there is nothing left for it to do other than respect the people's exercise of their right to self-determination.

337. In Nauru's case, there is no doubt that the General Assembly terminated the Trusteeship on the ground that the Administering Authority had discharged its task so well that there was nothing further for it to do, save abide by the Nauruans' act of self-determination. In so doing, it made a conclusive pronouncement on the conduct of an Administering Authority with respect to its trusteeship obligations. There can be no question of the United Nations' competence in this regard. In the *Namibia* case, the Court said:

> "the United Nations... acting through its competent organs, must be seen above all as the supervisory institution, competent to pronounce, in that capacity, on the conduct of the mandatory with respect to its international obligations, and competent to act accordingly." (*ICJ Reports 1971*, at pp.49-50.)

338. There is no difference in this respect between the United Nations as a successor body to the League of Nations in relation to a Mandate and its position when exercising an ultimate supervisory authority with respect to a trusteeship regime under its powers derived from Articles 16 and 85 of the Charter.

339. Thus, when the United Nations decided that, because the Administering Authority had completed its task, the Nauruan Trusteeship should be brought to an end, it disposed of all the legal issues concerning the administration of the Trusteeship by the Administering Authority - "at least, those relating to the basic trusteeship obligations as distinct from individual rights of United Nations members, such as for example to equality of treatment" (J Crawford, *The Creation of States in International Law* (1979) p.342).

340. As a result, Nauru cannot successfully argue that, by failing to exercise its governmental powers so as to provide for a rehabilitation scheme on Nauru, Australia breached obligations arising under the Trusteeship Agreement with respect to the administration of the Trusteeship. It apparently seeks to make

these arguments (CR91/20, p.83; CR91/22, p.45), but they are foreclosed by the prior pronouncement of the United Nations, acting through the General Assembly. To succeed, therefore, Nauru must show that its rehabilitation claim arises from general international law and not from obligations under the Trusteeship Agreement with respect to trusteeship administration. It must be these general international law rights, if any, which the Court holds unaffected by the General Assembly's decision to terminate the Trusteeship. (The status of Nauru's claim at general international law is dealt with in Chapter 3.)

341. It will be recalled that the General Assembly well knew that Nauru and the Administering Authority differed on the question of responsibility for rehabilitation (*ICJ Reports 1992*, p.253, para.30). The position may have been different had the Assembly, in terminating the Trusteeship, also reserved the question of rehabilitation, or imposed a condition concerning the performance of any related and outstanding obligation. It did not. The unqualified terms of resolution 2347(XXII), making no reference to rehabilitation whatsoever, are consistent only with the Assembly's pronouncement that all the obligations of the Administering Authority with respect to the administration of the Trusteeship had been met. In this situation, termination must be taken as determinative and a *finis litium* to any assertion of failure to comply with the obligations concerning the Territory's administration. The resulting situation is explained by one writer in the following terms:

> "the answer would seem to be that the Assembly's function here is a determinative one - that it is designated by the Charter to decide particular matters of political fact, applying principles of self-determination implicit in the Trusteeship instruments. It is obviously necessary, as Judge Wellington Koo pointed out, that in these matters there be some *finis litium*" (J Crawford, *The Creation of States in International Law* (1979) pp.343-4).

342. This analysis carries with it the consequence that upon termination of the Nauruan Trusteeship, there was no longer any basis on which to question the performance of obligations concerning Australia's administration under the Trusteeship Agreement. Moreover, the unconditional termination is compelling evidence that the United Nations considered that there had been no breach of the Trusteeship Agreement, though the Administering Authority had declined to accept the responsibility for rehabilitation which Nauru sought to thrust upon it.

343. Of course, as noted above, there remains the question whether, at general international law, Nauru had any other entitlement. See Chapter 3 below. But if the responsibilities of supervision exercised by the United Nations bodies are not to be ignored, it must unquestionably be recognised that termination unconditionally of the Trusteeship now precludes any second-guessing, or re-examination, of the action of the United Nations General Assembly with a view to finding some breach of trusteeship obligations never previously identified.

Section VII: The benefits from phosphate mining

A. INTRODUCTION

344. Even if one takes a broad view of the trusteeship obligations which Nauru asserts support a requirement to rehabilitate, Nauru must still demonstrate that there was a breach of those obligations. In considering whether there is any factual basis for the Nauruan allegation of breach, the benefits received by Nauru from phosphate mining and particularly the 1967 phosphate agreement must be examined. This shows there is no basis for the Nauruan claim.

345. Phosphate mining on Nauru transformed the island from an isolated subsistence community to one whose inhabitants had adequate financial and other resources to become and remain a modern independent State. It remained a community where the return from phosphate meant that, after 1951, direct taxes on the Nauruan people were unnecessary (see para.84 above). This Chapter examines the benefits from the phosphate industry received by Nauru prior to independence and as part of the independence settlement. It also examines the economic and financial consequences of phosphate mining.

346. That the phosphate operations brought the island prosperity is evident from comments by United Nations Visiting Missions. The 1965 Visiting Mission said for instance:

> "Thanks to the phosphate, this tiny island lost in mid-ocean has houses, schools and hospitals which could be the envy of places with a very ancient civilization. Its citizens pay no taxes. Because of these favourable conditions and the spirit of mutual assistance characteristic of the inhabitants, poverty is virtually unknown in Nauru. There is a high standard of living: necessities and even many luxuries are imported. The stores and shops are well stocked with goods. Few people walk in this Territory, which has an area of 8 1/4 square miles

> and a circumference of 12 miles: there are over 1,000 motor vehicles (not to mention bicycles) for a total population of 4,914, including 2,661 Nauruans (at 30 June 1964)" (para.2, Annex 12, Vol.4, NM).

347. *This was not a new phenomenon. Earlier Visiting Missions expressed* similar views:

> "That the Nauruans have derived considerable benefit from the industry is at once obvious to anyone visiting the Territory. On the whole, the Mission found the Nauruans better clothed, in better health, better nourished and better educated than is usual at this time in Pacific Island territories." (para.42, 1953 Visiting Mission report, Annex 7, Vol.4, NM.)

and

> "the mining of phosphate has brought to the Nauruans greater prosperity and better social services than are enjoyed by any other community of similar size in the Pacific region" (para.18, 1956 Visiting Mission report, Annex 9, Vol.4, NM).

Throughout the period of the Mandate and Trusteeship, the provision of administration expenses from the proceeds of the phosphate operations led to a community that was well provided for in terms of health, education and welfare and that paid virtually no taxes. The absence of taxes is particularly pertinent having regard to Nauru's allegations concerning the absence of adequate public funding by the Administering Authority.

348. In this the role of the BPC was important.

> "The role of the British Phosphate Commissioners in the Territory was related primarily to the phosphate enterprise, which was the sole reason for the presence of their Nauru management. The direct effects of the enterprise on the Nauruan community were, first, financial benefits through royalties, surface rights payments, free social services and free or subsidised public utilities; and second, opportunities for employment of Nauruans within the Commissioners' Nauru management. Incidental benefits included the frequent diversion of the management's resources to public works and housing projects for the Nauruan community, and a share in the use of various facilities, such as a cheap shipping service for which they were reimbursed by the

Administration or the Nauru Local Government Council as the case might be.

Although the Commissioners provided nearly all the funds for the Administration budget, they had no powers in determining its content. They may have been invited to give advice on some item." (Report on the Administration of Nauru, 1966-68, p.17)

349. Nauru complains that the revenue derived by the BPC from phosphate mining was neither taxed, nor treated as public revenue (NM, para.336). But this was more than offset by the fact that the phosphate income of the BPC paid entirely for a very high standard of administration, whilst the Nauruans paid no tax at all (see Part I, Chapter 3).

350. While the Nauruans were well provided for as a result of the phosphate operations, there was also a large expatriate community principally to provide labour to work in the phosphate operations. The pattern emerged from early days whereby the Nauruans, who received direct income and other benefits from those operations, did not find it necessary to seek employment in the phosphate industry. Non-Nauruans made up around half of the island population during most of the period under Mandate and Trusteeship.[8]

B: ROYALTIES AND TRUST FUNDS

351. Throughout the Trusteeship, royalties were paid to a number of trust funds. The details of these have been set out above (para.89). In response to changing needs and expectations, the amount paid in royalties gradually increased, and rose significantly in the years prior to independence (see paras.92 to 105). As at 30 June 1967 the amounts standing to the credit of the two principal trust funds were substantial. They were as follows:

Nauru Landowners Royalty Trust Fund	$A3,022,607.00
	(in 1993 values $A21 million)
Nauru Long Term Investment Fund	$A6,241,719.49
	(in 1993 values $A43.4 million)

[8] *Population figures appear in the reports of the Administering Authority to the United Nations.* See also Table II to the 1965 Report of the Visiting Mission to Nauru, Annex 12, Vol.4, Nauruan Memorial.

There was also a sum in the Royalty Trust Fund of $A307,774 ($A2.1 million in 1993 values) and payments continued to be made to individual landowners (see para.89 above). There was, therefore, almost $A10 million ($A70 million in 1993 values) in trust funds.

352. The Partner Governments, in the years after resettlement was abandoned, ensured that significant amounts were paid to the Long Term Fund. It was intended that that Fund would be available when the phosphate ran out, to be spent on projects of benefit to the Nauruan people, including possible rehabilitation projects if they so chose. Accumulating the funds available at independence by reference to the short term government bond rate yields an estimate by 1995 of some $A136 million (see CIE study, Preliminary Objections Vol.II, p.186). The Trust Funds were passed to Nauruan control on independence for this reason. To effect this, Ordinances were made just prior to independence to put Nauruan administration concerning the phosphate royalties on a satisfactory basis. The *Nauru Phosphate Royalties Trust Ordinance* 1968 and the *Nauru Phosphate Royalties (Payment and Investment) Ordinance* 1968 were among the Ordinances enacted in the few days prior to independence. These Ordinances appear as Annexes 10 and 11 to the Preliminary Objections. These Ordinances were designed to reflect the new arrangements for the payment of royalties after 1 July 1967 as a result of the 1967 Agreement.

353. At the same time, the phosphate agreement was given legislative effect in the *Nauru Phosphate Agreement Ordinance* 1968. The Trust Ordinance formally established the Long Term Investment Fund and the Landowners Royalty Trust Fund, subject to the control of the Royalties Trust, in place of their existence as trust funds under the control of the Administrator. The Royalties Trust set up by the first Ordinance was created as a separate legal person with responsibility to administer the trust funds which it has continued to do until the present (see its 1988-89 Report, Annex 29 to Preliminary Objections).

354. In the other Ordinance, the Royalties Ordinance, detailed provision was made for a number of different trust funds, including a Development Fund, Housing Fund and Rehabilitation Fund. The amounts payable to the various funds set out in the Ordinance reflected the wishes of the Head Chief and Chairman of the Nauru Local Government Council. Establishment of these additional Funds reflected the priorities of the new Nauruan Government. Hence, while a separate Rehabilitation Fund was now established and a separate allocation made to it, this was the result of a decision by the Nauruan

Government to identify this issue as one which would require special provision. In the same way a separate Development Fund was created. So far as the Partner Governments were concerned, the Long Term Investment Fund had been established to meet the needs, however identified, of the Nauruan community when the phosphate was exhausted, and this could include expenditure on rehabilitation if that was what the Nauruans wanted. It was a fund available for rehabilitation or for other future needs, depending on what Nauru chose to do with it.

355. The existence of these Funds, with their existing balances and prospects of continuing payments into them, ensured that after independence the Nauruan people would be in a position to make their own decisions as to how to develop their country, and that they would have the financial means with which to undertake whatever reasonable development decisions they made.

C: THE VALUE OF THE PHOSPHATE SETTLEMENT

356. An assessment of the benefits received by Nauru must include an examination of the benefits received as a result of the Phosphate Agreement of 1967. To understand the significance of this agreement it is necessary to understand fully the course of the negotiations leading to its conclusion. This has been recounted in outline in Chapter 5 of Part I above. This section will refer to certain elements in those negotiations in more detail.

357. The settlement involved, in particular:

(a) the purchase of the BPC assets by Nauru at a favourable price; and

(b) the relinquishment of any continuing BPC interest in the phosphate - there was to be no further share in the profits nor any management role for the BPC once the assets were purchased.

358. This outcome represented a significant concession from what the Partner Governments considered to be their reasonable entitlements. These concessions were made on the basis that Nauru would assume all responsibilities for the island's future including responsibility for any future rehabilitation if that was considered appropriate. The Court has found that Nauru did not waive its claim with respect to rehabilitation. But the 1967 Agreement and the negotiations preceding it show very clearly that Nauru has acted quite unreasonably in seeking to pursue it. It was clearly only one element in the negotiations. Each side made a number of concessions and it was certainly seen by both sides at the

time as just one element in the Nauruan negotiating position. An examination of the negotiations confirms this.

359. The circumstances in which Nauru agreed to purchase the assets have been outlined in paras.229 to 233 above. The final price agreed to be paid for the assets was $21 million. A paper prepared at the time by the Department of Territories, based on BPC information, sets out some figures which show that the price was fixed on a basis entirely favourable to Nauru, ie at "original cost less depreciation at a rate consistent with the economic life of the asset" (cl.8(1) Canberra Agreement). The paper is Annex 2 to this Counter-Memorial. It shows at 30 June 1966 assets at cost of $25 million, a book value of $15 million and approximate replacement value of $44 million. The paper indicates, however, that if the BPC negotiated with an incoming operator "on a commercial basis it would regard $30,000,000 to $32,000,000 as a minimum value for the assets represented above, on the basis of a takeover as a going concern". See also Record of Negotiations, 21 April 1967, Vol.3, NM,p.493. The Partner Governments did not sell the assets as if there was a normal commercial transaction. The price was part of the overall package of benefits being provided to Nauru.

360. A review of the negotiations shows that it had been the expectation of the Partner Governments that they would continue to receive some share of the proceeds from the phosphate, whether in the form of a share of profits or in the form of a management fee. And this was not unreasonable given that the BPC had concession rights over the phosphate to the year 2000. In 1966 Nauru had accepted that the BPC should be the managing agents of the phosphate operation, for which BPC would receive a fee. But Nauru changed its position the following year and said instead that a Nauruan Phosphate Corporation should operate the entire industry.

361. The position reached at the start of the 1967 negotiations is set out in Appendix II to the records of the meeting of 12 April 1967 (Vol.3, NM,p.518-9). The new Nauruan position was outlined in their opening statement at the 1967 talks (Nauruan Delegation 67/1, Vol.3, NM, p.559 ff). Important passages are as follows:

> "Given the urgent need for funds to rehabilitate Nauru and to provide for the Nauruan community when the phosphate is exhausted it is vital that the Nauruan people receive the maximum possible financial return on their phosphate. At the time when the Council prepared its

Opening Statement at the June talks, it made provision for the payment of a management fee to the British Phosphate Commissioners operating the phosphate industry as managing agents for the Nauruan people. However the representatives of the Partner Governments have since refused to meet any costs of rehabilitating Nauru (except what could be squeezed out of future earnings of the phosphate industry). In these circumstances the Council has had to reconsider its whole position. In doing so we have come to the conclusion that if we are to *maximize the economic returns to the Nauruan people (while meeting* the essential interests of the Partner Governments) we cannot afford to pay a management fee to the British Phosphate Commissioners, or indeed to any other mining operator. In meeting the interests of the Partner Governments by entering into an agreement on supplies and on price the Nauruan people are accepting all the normal business risks and it would be quite inappropriate for the Partner Governments to expect a commercial profit over and above the agreement on supplies and price.

The hard fact of the matter is that the Nauruan people must obtain the maximum amount of money from the phosphate. The Partner Governments will be aware that if the Nauruan people have to meet the entire cost of rehabilitation there will be very little money available in the form of a capital sum for when the phosphate is exhausted. Even if the Nauruan people were to receive immediately the whole of the difference between the fob ($12.00) and the sum of costs of production ($3.74), costs of administration ($1.20) and managerial fee of 10% on costs ($0.37) they would, over the life of the phosphate, *receive $312 million or only some $70 million after* rehabilitation costs are met. Under a managerial fee arrangement the BPC would receive $22 million after all costs had been met (excluding the $140 million they have received since 1949 in the form of lower prices passed on to consumers of superphosphate) whereas the Nauru people would receive only $70 million and an island restored to something approximating its original condition. This $70 million is quite insufficient to provide for the future after the phosphate is exhausted and the Nauruan people therefore need the $22 million that would otherwise go to the BPC." (at pp.562-563)

362. Nauru itself in this statement linked both rehabilitation and future control of the phosphate industry. And this reflects the fact that the negotiations between the Partner Governments and the Nauruans demonstrate that the matters of the phosphate industry and rehabilitation were discussed and dealt with together, as part of an overall settlement. When the Partner Governments gave up their claim for a share of the phosphate revenue, they did so on the understanding that Nauru would assume full responsibility over all matters connected with the phosphate industry. This is evident from a perusal of the records of the 1967 meetings (see, for instance, 20 April 1967, Vol.3, NM, pp.495-6). In particular, the Partner Governments considered the financial arrangements involving the phosphate industry as relevant to the rehabilitation claim. They said:

> "[T]he decision to abandon the resettlement proposals was a decision by the Nauruans, not one that was forced upon them, and that in so deciding they were rejecting proposals which were sound and practicable. That decision was taken by the Nauruans, and it was the view of the Partner Governments that decisions regarding rehabilitation were also matters for the Nauruans and that the Partner Governments' proposals in respect of financial arrangements provided adequate means to carry out whatever redevelopment of the mined areas might prove to be necessary." (Vol.3, NM,pp.495-96.)

363. Despite this, the Joint Delegation proposed that without prejudice to their respective positions the two delegations might look at the needs for rehabilitation which Nauru said required a substantial sum. The Nauruans, however, refused to discuss particular rehabilitation needs and stuck with their general position that "our interests are best served by maintaining the general position that the future of the Nauruan people depends on getting as much as possible from the remaining phosphate on the island" (see Nauruan Delegation 67/5, Vol.3, NM, p.497). On 10 May 1967 when talks returned to this issue after a break, the Partner Governments restated their position (Joint Delegation 67/2, Vol.3, NM, pp.573-75). This included the statement: "The partner governments consider that the proposed financial arrangements on phosphate cover the future needs of the Nauruan community including rehabilitation or resettlement". It is again clear that the financial arrangements and rehabilitation continued to be linked. Nauru responded in a statement (Nauruan delegation 67/6, Vol.3, NM, p.549). This included the statement: "we have been placed in a position where

our basic needs for survival can only be met by receiving the full financial return from the operation of the industry".

364. The Nauruans sought a position of maximum global benefit. They did not ask for any separate allocation of funds, any special "earmarking" of funds for rehabilitation. Given that they had not developed a rehabilitation plan, that decision is understandable: for identifiable, specific projects would have been scrutinised by the Partner Governments to see whether they would be likely to cost the specific sum sought by the Nauruans. So, in truth, neither side contemplated an earmarked sum. It is surprising to find that, today, the core of Nauru's complaint is that no specific sum was earmarked.

365. On 16 May a further discussion took place on the phosphate arrangements. The Partner Governments also continued to argue that some sharing arrangement was appropriate having regard to the 1966 Working Group Report (Vol.3, NM, pp.468-9). The Working Party Report produced following the 1966 round of negotiations between the Partner Governments and Nauru is set out as Annex 7 to the Preliminary Objections. The 1966 Report considered financial arrangements in force in various parts of the world for sharing the benefit of phosphate mining operations. It pointed to two different approaches: share of profits between operating companies and governments and the return of profit on shareholders' funds. The Australian representatives considered that the available material suggested a 50:50 sharing between Government as the owner and the commercial enterprise as operator was a not unreasonable general principle to be drawn from the material (para.12 of the Report).

366. At the 16 May discussions, the Secretary, speaking for the Partner Governments said:

> "The Joint Delegation thought that there was scope for reaching a sharing agreement in financial arrangements. The Nauruan Delegation now claimed that the full proceeds of phosphate were needed due to rehabilitation, otherwise the Delegation seemed to accept that a sharing arrangement would be the normal practice." (Vol.3, NM, p.469)

367. The Head Chief said that "went a long way towards describing the Nauruan position but not entirely" (see Vol.3, NM, p.469). After commenting on the valuation of assets a further set of figures on sharing was put forward by the

Partner Governments (Joint Delegation 67/3, Vol.3, NM, p.572). This proposed a 75% to 25% split between Nauru and Partner Governments.

368. On 17 May 1967, in response to continued Nauruan insistence on Nauruan management, the Partner Governments made a further proposal whereby the sharing arrangement would be replaced by a system involving a lower price for the phosphate while BPC continued as agents of a Nauru Phosphate Corporation. The proposal was part of a package which it was made clear comprised: "a price of 110 shillings with the entire proceeds going to the Nauruans ... capital assets value of $30 million paid for over an agreed period at 6%: management arrangements [involving management by BPC subject to a Nauru Phosphate Corporation (as set out in Joint Delegation 67/4, Vol.3, NM, p.569)], an understanding on rehabilitation under which Nauru would not continue to press this subject and linked with rights of immigration into Australia and New Zealand" (see SR.15, Vol.3, NM, pp.459-460).

369. The Nauruan response took the form of a lengthy statement (Nauruan Delegation 67/8, Vol.3, NM, p.523ff) which rejected the Partner Governments' position on phosphate rights and rehabilitation and suggested a lower purchase price for the assets. The Nauruans argued that it was only fair that they receive all the future economic benefit from the phosphate if they were to be responsible for all rehabilitation, particularly in the light of figures which they said showed the Partner Governments had received a significantly greater return in the past than that which was fair (see para.26-29 of ND 67/8). (See also SR.16, 18 May 1967, Vol.3, NM, pp.453-5.) There was no suggestion here that Nauru would assume only limited responsibility for any rehabilitation.

370. On 19 May further Nauruan proposals were made (ND 67/9, Vol.3, NM, pp.521-2) which sought management by the BPC limited to two years. They also rejected the link between rehabilitation and immigration that the Partner Governments had made (Vol.3, NM, p.447). The Partner Governments accepted the Nauruan proposals on assets (about $20 million). They continued, however, to have problems with the Nauruan management proposals (SR.18). On 20 May the final Nauruan proposal for three years' management by BPC was made and it was agreed this would be referred to the Partner Governments. When negotiations resumed on 13 June the Partner Governments had accepted the basic proposals including the purchase period proposed in May by Nauru and attention turned to points of detail about when title to the assets would pass. This

then led to the Heads of Agreement being signed on 15 June 1967 (Vol.3, NM, p.410ff).

371. The final settlement clearly was a package arrangement. This much is apparent from the course of the negotiations. There were, it is true, some areas where the two sides remained in disagreement. These included rehabilitation where Nauru would not give any explicit release to the Partner Governments, and phosphate rights where Nauru refused to recognise explicitly that any such rights were held by the Partner Governments. The Partner Governments while not relinquishing their clearly stated position were prepared in good faith to conclude an agreement which would provide Nauru with the full economic benefit of the phosphate industry. The Partner Governments gave up a share of the profits (or management fee) which would have continued until the year 2000 (when BPC's rights under the concession ended). Based on figures provided by Nauru, this would have amounted to at least $A60 million (para.20 of ND 67/8; see Vol.3, NM, p.530). An estimate of the discounted cash flow estimates of profits lost by BPC by relinquishment is $A90 million (or in today's values $A630 million) if one values the phosphate as a going concern which Nauru had to acquire on commercial terms (see Annex 1). And this is not an unreasonable assumption. Nauru had no right at international law to acquire the whole phosphate industry for nothing. It was accepted at the time that acquired rights did not simply disappear with the independence of a new nation: D P O'Connell, *State Succession in Municipal and International Law* (1967) Vol.1, Ch.13; J H W Verzijl, *International Law in Historical Perspective* (1974) Vol.VII, p.196-202. Capital assets were also sold for $A21 million instead of their market value of approximately $A30 million.

372. In other words, an examination of the financial aspects of the settlement shows that the Partner Governments gave up over $A100 million ($A700 million today) which would have been theirs in any purely commercial transaction. It is simply not true to say that Australia along with the other two Governments did not make particular and sufficient provision for Nauru's future when the 1967 Agreement was concluded.

373. Nauru at the time used figures of $A90 million as the cost of the rehabilitation to be met by Partner Governments. This was one third of a total cost of $A240 million, which was the notional figure calculated by the Davey Committee as the cost of resoiling to a depth of 4 foot of 3500 acres (ie the whole of the phosphate lands). But this sort of rehabilitation was found by the

Davey Committee to be impracticable. It recommended works amounting to $A31 million. And this was in relation to the *whole* island, and not just the area mined by the BPC. On this basis it is quite apparent why the Partner Governments considered the financial settlement as a whole was more than adequate to compensate the Nauruans for their assumption of responsibility for rehabilitation of the whole island.

374. Nauru in 1967, and in its Memorial again, has argued that the fact that Australia and the other Partner Governments had received phosphate at low royalty rates is in some way relevant to the fairness of the phosphate settlement and in particular responsibility for rehabilitation (see Nauruan comments in 1967 where an estimate is made for lost income of $160 million (ND 67/8, para.20, Vol.3, NM, p.530), and more recently Appendix 2 to the Memorial (Vol.I, NM, p.306), where an estimate of 91 million pounds is made for lost income).

375. But this is not relevant. First, the Nauruan claim before this Court is a claim that there was an obligation to rehabilitate, not a claim to recover the difference between actual and optimal royalty rates. Secondly, in any event, it is clearly impermissible to apply standards of "fair return" that may have been applicable in 1967 and to suggest that they can be applied retrospectively to 1920. See Part II, Chapter 1, Section 3 above. Yet this is what Nauru seeks to do. (The legal irrelevancy of the claim in this respect is dealt with in Part II, Chapter 3 below.) For present purposes, it must be stressed that these figures are irrelevant to any assessment of the fairness of the phosphate settlement in relation to the issue of rehabilitation.

D: FINANCIAL SITUATION AT TIME OF INDEPENDENCE

376. Australia considered that at independence the Partner Governments had given Nauru adequate financial resources to provide a secure future for the island. It took the view that it was for Nauru to decide how it wished to spend the then accumulated royalty funds and the income from the phosphate operations, of which they would receive the full benefit. After the BPC assets on Nauru had been purchased, the BPC had no remaining interest in the Nauruan phosphate.

377. This complete relinquishment of any further interest amounted to a renunciation of rights over the phosphate that under the original concession ran to the year 2000. This enabled Nauru to get the full economic benefit of the

phosphate, which Australia at the time estimated would, over 25 years, enable Nauru to build up a fund of $400 million to ensure the economic well-being of the population (United Nations, *General Assembly Official Records, 22nd Session, Fourth Committee*, Doc.A/C.4/5R1739).

378. As the Administering Authority contemplated, and as has in fact occurred, Nauru has had the benefit of considerable phosphate income since independence which, properly managed, should have provided a substantial income for Nauru and put it in a position where its future was secure. The disposition of funds made by the three Partner Governments allowed for this. It is worth noting statements made in the few years prior to independence that indicate the wealth then available to the small Nauruan population. In 1965, Australia told the Fourth Committee that it estimated the proposed royalties and an extraction rate of 2 million tons a year meant that the Nauruans would receive the equivalent of some $4 million a year.

> "As a result of those royalties, the average income of the island, according the recent United Nations survey was the second highest in the world surpassed only by the United States" (United Nations, *General Assembly Official Records, 20th Session, Fourth Committee*, Doc.A/C.4/SR.1588.)

379. In 1967, Australia told the Fourth Committee that during the years of the Trusteeship the Nauruans had enjoyed an enviable prosperity:

> "The per capita income at 30 June 1966 had been over US$1,800, higher than the per capita income of Australia and one of the highest in the world."

380. And, the representative of Australia continued, in explaining the outcome of the 1967 phosphate negotiations:

> "The agreement provided for the supply of 2 million tons of phosphate per year at the price of $US12.10 per ton fob which would mean an annual return to the Nauruans of $15 million. The Nauruan authorities would set up the Nauru Phosphate Corporation.... If the price of phosphate and cost of production remained in the same relationship as at present and the Nauruans continued to put aside the same proportion of their funds as in the previous year, they would build up a fund which, in twenty five years, would stand at

approximately $400 million. In that way the economic well being of the population would be ensured once the phosphate deposits were exhausted" (United Nations, *General Assembly Official Records, 22nd Session, Fourth Committee,* Doc.A/C.4/SR.1739).

381. This economic well-being was recognised in an article that appeared in the magazine *National Geographic* in September 1976 entitled "This is the World's Richest Nation - All of It!" (Annex 32 to the Preliminary Objections).

382. The Australian Department of Foreign Affairs and Trade commissioned an independent study which examines Nauru's income from phosphate both before and after independence (Annex 26 to Preliminary Objections).[9] It confirms that at independence Nauru's per capita income was one of the highest in the world. Following independence, while information is hard to compile, the study concludes that "available evidence suggests that the phosphate income has not always been well spent. Educational and health standards have fallen and large sums of money have been wasted on items such as a national airline" (p.2). The airline in fact consumed 70 per cent of government phosphate revenue between 1974-75 and 1987-88. The study also shows that:

(a) from the trust funds available to Nauru at independence, their value in terms of income saved in today's terms would be some $83 million, which by 1995 would have accumulated to $136 million;

(b) the capitalized value of the future stream of profits from the concession from 1968, assuming they continued to 1995, would in today's dollar terms amount to $945 million; and

(c) assuming a Nauruan population of 6,000 in 1995, and adding the savings that could have been made by placing the same proportion of phosphate revenue in trust funds as occurred before independence with the savings available at independence, this fund would provide a per capita income per year of $16,600 - only slightly less than Australia's current per capita income.

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[9] The study was prepared by the Centre for International Economics. This centre is a highly respected, independent firm of economic consultants based in Canberra. It is headed by Dr Andrew Stoeckel, one of Australia's leading economists. Many of its professional staff have had experience in government as well as private enterprise. It has undertaken several major studies in the economies of developing countries in the Asia/Pacific region, and its clients include the World Bank and Australian National Centre for Development Studies.

383. Indeed, even with some of the problems associated with the use of revenue noted in the study, the Trust Funds managed by the Government of Nauru still hold substantial assets. These are set out in the Annual Report of the Nauru Phosphate Royalties Trust for 1988-89, tabled in the Nauruan Parliament (Annex 27 to Preliminary Objections). They include a large number of valuable, sound property investments in Australia, the United States, Guam, the Philippines and other countries.

384. Hence, Nauru could be a community of persons having no necessity to work - living on the substantial income from the phosphate resources. The economic study strongly suggests that the Nauruans were left with adequate resources at the time of independence. Such resources have come from the Trust Funds handed over at independence and the handing over of the total interest in the phosphate industry as a result of the Canberra Agreement.

Section VIII: Conclusion

385. If, as Nauru appears to contend, a duty to rehabilitate arose from the fact that mining would destroy the homeland of a people, this can only be because in some way the circumstances in which this mining took place prevented the well-being of the people of Nauru from being realised. Yet the factual material shows clearly:

(a) at the time of independence, the Nauruan homeland was not destroyed;

(b) the Nauruan people were left in a situation where their economic and social well-being had been secured;

(c) rehabilitation, in the sense of restoration of the area mined during the Trusteeship, was not in 1967 practicable, although particular proposals for restoration and use of the mined out land may have been; and

(d) Nauru was left by the Administering Authority in 1967 with the financial resources to choose how it might in future restore and use the mined-out area for particular purposes, but it has until now not in fact taken any steps actually to restore and use the mined area for any alternative purposes.

386. For twenty-five years since independence Nauru has continued to be a viable island community. It has, in fact, through its own decisions mined twice the area mined prior to independence.

387. It is difficult in these circumstances to see how the trusteeship obligations as set out in the Charter and the Trusteeship Agreement obliged the Administering Authority to rehabilitate the island.

388. One has only to describe the situation that in fact prevailed on Nauru at the time of independence and subsequently to see that it is not a situation remotely like that portrayed by Nauru. One could hypothetically suppose an extreme situation where a whole island became uninhabitable through the actions of an Administering Authority, for instance, through the use of the island for an atmospheric nuclear test necessitating the exclusion for 100 years of any human habitation. Such a situation could clearly be accepted as inconsistent with trusteeship obligations. But the situation on Nauru is clearly not comparable in any way. The mining was accepted, indeed welcomed, by the Nauruans. Australia rejects the Nauruan attempt to equate the two situations which its legal arguments would appear to do.

389. Nauru fails to show that there was any particular duty in relation to rehabilitation separate from the overriding duty of the Administering Authority to promote the well-being of Nauru as a whole so that the people were able to exercise their right to choose independence. For the reasons outlined above, Australia considers that Nauru has shown no legal basis for any such duty to rehabilitate in the Charter, the Trusteeship Agreement (or trusteeship objectives to which those instruments refer).

390. The significance and value of the independence settlement should not be underestimated. Under the terms of the concession, BPC had a right to recover phosphate until the year 2000. As a survey at the time showed, it was common practice in the case of mining operations for sharing arrangements to be negotiated between operating companies and governments. The survey showed a wide variation, influenced by the local economic and political policies and situation, in the percentage of net profit going to government ranging from 35% in the USA to 85% in Chile. Against this background a fifty per cent sharing arrangement between the Partner Governments and Nauru was seen as not unreasonable (Annex 7 to Preliminary Objections).

391. While Nauru argued at the time that the concession was not validly based, the reality was that it had been acquired as a commercial concern by the Partner Governments in 1920, and the expectation was that they would continue to receive the benefits arising from it. There was nothing unusual about the concession to suggest its legal status was not well founded.

392. Australia does not deny the right of Nauru to decide, as did many other newly independent States at this time, that it should acquire total control of the phosphate operation subject to appropriate compensation. And the Partner Governments in the negotiations conceded this right. But the fact that ultimately the phosphate rights were given up for nothing is of major significance in considering whether the means chosen by the Partner Governments discharged the trusteeship obligations. The full extent of the benefits in terms of a significant income stream for Nauru which more than adequately enabled any rehabilitation program to be undertaken has been set out in detail above (paras.382 to 384). If valued as a going concern that was acquired compulsorily it suggests compensation of $90 million would have been payable to the BPC. Yet no such payment was made. Only the physical plant and equipment was paid for at a valuation that benefited Nauru (see paras.370 to 373 above).

393. The 1967 Canberra Agreement, along with the transfer of the trust funds, provided Nauru with the means to choose whether, when and how rehabilitation would be effected. Given the considerable financial provision made for Nauru, it is apparent that Nauru's only complaint is that the Partner Governments did not specifically earmark part of the settlement as allocated to cover the cost of rehabilitation. As the negotiations show, Australia on behalf of the Partner Governments consistently maintained that it had given Nauru the means whereby it could choose for itself whether to rehabilitate. Nauru always wanted more. But this does not establish a breach of any trusteeship obligation to rehabilitate. It points simply to a dispute over the generosity of the phosphate settlement. But that is not the subject of the current dispute.

394. For all the reasons set out in the above sections of this Chapter, Nauru fails to establish that:

(i) there was any obligation under the trusteeship to rehabilitate; and

(ii) Australia, jointly with the two other States comprising the Administering Authority, did not discharge any of the duties incumbent on it according to the law of trusteeship.

CHAPTER 3

NOVEL ALLEGATIONS OF BREACH BASED UPON INTERNATIONAL STANDARDS OR DUTIES ARISING INDEPENDENTLY FROM TRUSTEESHIP

Introduction

395. As well as breach of the Trusteeship Agreement and the Charter, the Nauruan Memorial alleges breaches of general international law, including breaches of principles of self-determination and permanent sovereignty, denial of justice *lato sensu*, breach of duties of a predecessor State and abuse of rights. These allegations are the subject of this Chapter. None finds any support in the contemporary historical record. The last three rely upon asserted doctrines which are incapable of providing separate causes of action in this case.

396. Each supposed breach of international law alleges conduct which, had it occurred, ought properly to have been brought to the notice of the Trusteeship Council, since it fell directly within the scope of the Council's supervision. But the alleged conduct was not raised at any stage, so that either it did not occur, or the United Nations, in particular the Trusteeship Council, failed to discharge its own basic trusteeship responsibilities.

397. As part of the International Trusteeship System, the administration of the Territory of Nauru was governed by Chapter XII of the Charter as well by the 1947 Trusteeship Agreement. The relevant provisions were specifically directed to the conduct of the Administering Authority in relation to the Territory. Of their nature, these provisions subjected the Administering Authority to obligations which were at once more precise and more stringent than those under general international law. As the preceding Chapter shows, the three Partner Governments, including Australia, fully discharged their more rigorous obligations under the Charter and the Trusteeship Agreement. *A fortiori*, then, Australia also met the requirements of general international law. In this Chapter, Australia describes its position at general international law only because that position has been challenged by Nauru.

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Section I: There was full compliance with the principles of self-determination and permanent sovereignty over natural resources

398. Nauru alleges that Australia is guilty of "substantial breaches of the principle of self-determination", because it says Australian policies with respect to the phosphate industry involved the supposed "disposal of the territorial foundation of the unit of self-determination accompanied by a failure to provide an adequate sinking fund to cover the costs of rehabilitating the worked-out phosphate lands" (NM, para.413). Nauru also says that Australia is guilty of "a particularly grave series of breaches" of the principle of permanent sovereignty, because Australian policies resulted in "a major resource being depleted on grossly inequitable terms" and "the physical reduction of the homeland of the people of Nauru" (NM, para.419). These are extraordinary claims. If true, the United Nations (as well as the Administering Authority) would have been guilty of most serious wrongdoing.

A: THE UNITED NATIONS WOULD NOT HAVE PERMITTED A BREACH OF THESE PRINCIPLES

399. The trusteeship system was established under the authority of the United Nations. The United Nations had primary authority and responsibility for the system and each Administering Authority remained subject to the General Assembly and the Trusteeship Council throughout its trusteeship (Charter, Arts.75, 76, 81, 85, 87, 88). (The position of the United Nations is examined further in Part III, Chapter 3, Section IV.)

400. It is scarcely likely that the United Nations would have closed its eyes to the supposed breach of the principle of self-determination. First, one of the "basic objectives" of the trusteeship system was the "progressive development [of each Territory] 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" (Charter, Art.76(b)). In the case of Nauru, the Administering Authority had given an assurance that Nauruans would be accorded "a progressively increasing share in the administrative and other services of the Territory" and that the Authority would "take all appropriate measures with a view to the political advancement of the [Nauruans] in accordance with Article 76(b) of the Charter" (Trusteeship Agreement, Art.5(2)(c)).

401. It is equally unlikely that the United Nations would have permitted the supposed violations of the principle of permanent sovereignty. The economic advancement of the trust territories was also a basic objective of the trusteeship system together with respect for human rights and fundamental freedoms (Charter, Art.76(b) and (c)). Under the Nauru Trusteeship Agreement, the Administering Authority promised, amongst other things, to "respect the rights and safeguard the interests, both present and future, of the indigenous inhabitants of the Territory" and to promote their economic development (Art.5(2)(a) and (b)). The practice of the United Nations, particularly the Trusteeship Council, reflected the substantive operation of the principle which had been adopted by the General Assembly, by resolution 1803(XVII) on 14 December 1962.

402. Had there been any breach of these principles, the Trusteeship Council would have identified and directed the attention of the international community to it. But this did not occur. It will be recalled that although the Trusteeship Council made recommendations to the Administering Authority from time to time, the Council invariably expressed general satisfaction with the conduct of the Administering Authority throughout the Trusteeship. Thus, the Council's 1961 Report recorded:

> "satisfaction [with] the progress made in the Territory during the year under review in various fields, through the efforts of both the Administering Authority and the Nauruan people". (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 16th Session*, Suppl. No.4 (A/4818), Part II, Ch.IV, para.1)

403. In its last annual report before independence, in June 1967, the Council noted that:

> "relations between the Administering Authority and the representatives of the Nauruan people continue to be cordial; that economic, social and educational conditions continue to be satisfactory; and that commendable progress has been made in the Territory". (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 22nd Session*, Suppl. No.4 (A/6704), Part II, para.310; set out in Annex 28 Preliminary Objections)

In the same report, the Council said:

> "The representatives of the Nauruan people reiterated their desire to become independent by 31 January 1968 and specifically proposed that the Island should become a republic within the British Commonwealth.
>
> ...
>
> The Council is gratified to note that the Administering Authority has expressed its sympathetic attitude in connexion with the Nauruans' wish to realize their political ambition by 31 January 1968." (para.332)

404. Under the heading "Economic Advancement", the Council:

> "recalling its belief that every effort will be made to adopt a solution to the phosphate question in conformity with the rights and interests of the Nauruan people, note[d] with satisfaction that an agreement was reached in Canberra in 1967 between the Nauruans and the Administering Authority, whereby the ownership, control and management of the phosphate industry will be transferred to the Nauruans by 1 July 1970.
>
> ...
>
> The Council note[d] further the statement of the Administering Authority that the financial arrangements agreed with respect to phosphate took into consideration all future needs of the Nauruan people, including possible rehabilitation of land already worked." (para.403)

405. The Trusteeship Council's deliberations with respect to Nauru are discussed in more detail in Part I, especially Chapters 3 and 4. The record shows that the Trusteeship Council kept a watchful eye on political and economic conditions in the Territory right up to independence, and that there was never the slightest indication that the Council considered that Australia, as representative of the Administering Authority, had violated principles of self-determination or permanent sovereignty.

406. Further, as shown in Part I, the United Nations was kept well-informed of developments on Nauru during the Trusteeship period. The Trusteeship Council

sought and received detailed information on the Territory. The Administering Authority provided annual reports on all aspects of its administration. There were also the regular Visiting Missions and, after 1961, there was direct Nauruan participation in the work of the Trusteeship Council. See para.63; also see eg para.76 above. If Nauru's claims were true, the Trusteeship Council must have closed its eyes to patent and very serious wrongdoing by the Administering Authority, and the United Nations must have neglected its own very special duty - to supervise the Territory's political and economic development in accordance with the Charter.

407. Had the island been "disposed of" or its major resource depleted on "grossly inequitable terms" as Nauru alleges (NM, paras.413 and 419), the result would have been evident not only to all Nauruans, but to the Visiting Missions of 1965 and earlier who were sent to examine and report on conditions in the Territory. (For the reports of the Visiting Missions, see Annexes 7-12, Vol.4, NM.) This alleged state of affairs would have called for very serious discussion by all relevant United Nations bodies, particularly before any decision to terminate the Trusteeship was made. But the record does not disclose such a discussion.

408. Instead, the contemporary record shows that the Nauruan representative encouraged the United Nations to terminate the Trusteeship on the basis that the emergent State would have a viable economic future, because of its newly acquired ownership of the phosphate resource. It will be recalled that on 6 December 1967, Head Chief Hammer DeRoburt had assured the Fourth Committee that:

> "During most of 1967, ... work had been under way to prepare the necessary political and administrative structure. Economically, Nauru's position was very strong because of its good fortune in possessing large deposits of high-grade phosphate. ... 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, *General Assembly Official Records, 22nd Session, Fourth*

Committee, Doc.A/C.4/SR. 1739 set out in Annex 30 to Preliminary Objections.)

409. At the Trusteeship Council's Special Session on 22 November 1967, Head Chief DeRoburt assured the Council that:

> "Australia had administered the island of Nauru for almost half a century. Australia's tutelage of [the Nauruan] people, which it exercised also on behalf of the other two partner Governments of New Zealand and the United Kingdom, had been effective. Those Governments could be proud of their achievements, and he wished to thank them, on behalf of the people of Nauru, for the many benefits received.
>
> During the past two decades, the Council had sent to Nauru six visiting Missions which had been instrumental in encouraging and fostering his country's progress towards independence. The burdensome task borne by the Administering Authority for half a century, and by the Council for a shorter but no less significant period, was coming to an end." (*United Nations, Trusteeship Council Official Records, 13th Special Session*, Doc T/SR 1323, in Annex 29 to Preliminary Objections).

410. The result was that on 19 December 1967, the General Assembly resolved that:

> "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." (Resolution 2347(XXII), reproduced in Annex 17, Vol.4, NM.)

411. Nauru's allegations that Australia breached principles of self-determination or permanent sovereignty are utterly inconsistent with Nauruan conduct around the time of Nauruan independence. No Nauruan alleged at that time that the island had become uninhabitable, or that Nauruans had been deprived of a major resource on grossly inequitable terms. Although Nauru did not waive its claim for rehabilitation (*ICJ Reports 1992*, p.250), its representative made it clear to the international community that Nauru saw the question of rehabilitation as quite separate from the matters appropriate for

discussion by the United Nations, ie, self-determination and its corollary, permanent sovereignty. The Head Chief told the Council that rehabilitation:

> "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." (United Nations, *Trusteeship Council Official Records, 13th Special Session*, Doc T/SR 1323; set out in Annex 29 to Preliminary Objections).

The Head Chief stated unequivocally that Nauruans did not regard self-determination and rehabilitation as related in any way. Given the Nauruan statements made in December 1967, it seems improbable that there were, at the very same time, breaches of the dimensions which Nauru now alleges against Australia.

412. As the Court said in its judgment of 26 June 1992, the resolution of 19 December 1967 had "definitive legal effect" and the Trusteeship Agreement was "terminated" on that date and "is no longer in force" (*ICJ Reports 1992*, p.25, referring to the *Northern Cameroons* case, *ICJ Reports 1963*, p.32). The resolution made no reference to rehabilitation and contained absolutely no indication that there had been any less than total compliance by the Administering Authority with the principles of self-determination, or permanent sovereignty over natural resources.

413. It was for this reason that the Court held, in the *Northern Cameroons* case (*ICJ Reports 1963*, pp.32,37), that it would not inquire into the allegation made by the Republic of Cameroons that the Administering Authority had failed to comply with its obligations in respect of that Territory and, in particular, its obligation under Article 76(b) of the Charter to bring the people of Northern Cameroons to self-government. If Nauru, in the present case, is to substantiate its claim that the phosphate industry policy during the Trusteeship resulted in substantial breaches of the principles of self-determination and permanent sovereignty, it necessarily challenges the decision of the General Assembly in December 1967 that it was appropriate, having regard to the particular circumstances of Nauru, that the Nauruans should exercise their right to self-determination, absent any condition as to the island's rehabilitation.

414. Nauru does in fact allege that the Administering Authority breached these principles and, as the foregoing paragraphs show, this necessarily implies that the United Nations failed too. That is, the United Nations failed to fulfil its own

special duty to the Territory to ensure that the Authority complied with its basic obligations. Given the facts referred to above (and in Part I) and the particular involvement of the United Nations in issues of self-determination, it is impossible to believe that the Organisation could have closed its eyes to such breaches in this way.

B: AUSTRALIA'S RECORD WITH REGARD TO SELF-DETERMINATION IS EXEMPLARY

415. As already noted, pursuant to Article 76(b) of the Charter and therefore under the Agreement, "self-government or independence as may be appropriate to the ... territory and the freely expressed wishes of the peoples concerned" was a basic objective of the Trusteeship. Under the 1947 Trusteeship Agreement, the Administering Authority undertook to promote the political (as well as economic) advancement of the Territory accordingly. Within the context of the trusteeship system, the Trusteeship Agreement contemplated a specific process for Nauruan self-determination. In conformity with that Agreement and during the Trusteeship, the Administering Authority brought the Nauruans to the stage where they were freely able to determine their political status, and having done so, to emerge as a State with a sound economic future.

416. As Part I has shown, under the administration of the joint Authority, there were considerable social and political advancements on Nauru between 1947 and 1968. Amongst other things, education became compulsory for Nauruan children from ages six to sixteen and there was ample assistance to enable children to continue their studies, particularly in Australia. The political and administrative system was altered over time to allow for progressively more Nauruan participation in government until complete independence in 1968. In 1951 the Nauruan Council of Chiefs was replaced by the Nauru Local Government Council, an elective body with considerable influence. Its powers were enlarged in 1963, and in 1965 Nauruans were granted even more autonomy, the details of which are discussed in Part I. As well, Nauruans increasingly assumed senior administrative posts.

417. Clearly, Australia (on behalf of the joint Authority) fulfilled the undertaking to give Nauruans an increasing share in the government of the Territory, so that they might freely choose their political status. In preparing Nauru for independence, Australia's conduct was exemplary. As Part I has shown, in agreeing to terminate the Trusteeship Agreement, the Administering Authority and the United Nations acted totally in accordance with the wishes of

the Nauruan people. Independence was, in every sense, the result of "a free and genuine expression of the will of the people concerned" (*Western Sahara* advisory opinion, *ICJ Reports 1975*, p.32). As the United Nations noted, 31 January 1968 was the date which the Nauruans themselves chose for independence and the Administering Authority respected their choice. See Part I. As the Australian Minister for Territories stated, Nauruans sought and were given "full and unqualified independence" (para.70 above).

418. But it is said that the principle of self-determination was breached because of the "disposal" of the unit of self-determination together with the "failure to provide an adequate sinking fund to cover the costs of rehabilitating the worked out phosphate lands". This, it is said, was compounded by "a refusal to provide relevant economic data" to the Nauruans or the United Nations (NM, para.413).

419. As the next Chapter (Section I) shows, there is no basis in fact for the last allegation as to the provision of economic date. The allegation is entirely inconsistent with the conduct of the United Nations at the relevant time; and cannot arise for consideration in this case which concerns only the matter of rehabilitation.

420. Nor does the historical record support the Nauruan claim that the unit of self-determination was destroyed. During the Trusteeship period, what happened was that the BPC, with the knowledge and consent of the Nauruans and of the United Nations, mined for phosphate on the island. But the area actually worked out by the BPC between 1947 and 1967 was no more than one third of the total area worked out between 1906 and now. Further, the real value of the land in question lay only in the phosphate mined first by the BPC and subsequently, by Nauru. That land, it should be recalled, has never been used for agricultural or residential purposes and has always had an erratic rainfall. For this reason, even before mining took place, the phosphate lands would not have been capable of supporting anything like the present population of Nauru, otherwise than through phosphate exploitation. See eg, CSIRO report, 18 January 1965, Annex 20 to Preliminary Objections and para.144 above; Davey Committee report, Annex 3, Vol.3, NM, and para.149 above. Mining and a less aesthetically satisfying environment have been the price of Nauruan prosperity. This is a price which the Nauruans themselves have accepted; for it should also be borne in mind that Nauru itself has, since independence, continued to mine for phosphate, and at an even greater rate, without commencing rehabilitation.

Phosphate mining has not been treated by Nauru as anything other than an appropriate means of advancing the Nauruan economy, to support its growing population. This reflects the island's particular characteristics. Since 1906, Nauruan economic development has depended almost entirely on phosphate mining, more especially in the Trusteeship period before investments from phosphate revenue had an opportunity to accumulate.

421. Finally, Nauru's own conduct since independence is altogether inconsistent with its allegation that Australian policies involved the "disposal of the territorial foundation of the unit of self-determination", or "the physical reduction of the homeland of the people of Nauru". For during the twenty-five years since independence, Nauru has continued to mine, at a faster rate than ever before (NM, para.207). Further, Nauru did not develop or begin to carry out any rehabilitation program during that period. As a result, Nauru itself has already mined more than twice as much of its phosphate lands as did the former Administering Authority in the Trusteeship period. Nauruan claims that Australia is guilty of breaches of principles of self-determination and permanent sovereignty are to be set aside as entirely without foundation.

422. Nauru's complaint that it was not given an adequate sinking fund for rehabilitation is also unjustified. The previous Chapter shows that the means by which the Administering Authority chose to discharge its obligations (under Article 76 of the Charter and Articles 3, 4 and 5 of the Trusteeship Agreement) was to make more than sufficient financial provision to ensure the Nauruans a secure future, so that they might, if they so chose, undertake a properly planned rehabilitation scheme. The reasons for this have already been discussed: see Part II, Chapter 2. No question now arises as to the sufficiency of those funds to achieve that result, for Nauru itself concedes that it has in fact adequate funds to undertake the task. This is, indeed, not surprising, having regard to the generosity of the 1967 Canberra Agreement and to the funds transferred to Nauru on independence. See Part II, Chapter 2, Section VII. This should have assured to Nauru a prosperous future. Nauru's claim here as elsewhere in its Memorial is that, regardless of the generosity of the financial provisions made in 1967, the Administering Authority ought to have given it a fund specifically designated for rehabilitation. But this is far removed from the asserted breach of the principle of self-determination.

423. There might have been a breach of the principle of self-determination if Australia had prevented or hindered the Nauruans from choosing to be

independent. But this was not the case. There might also have been a breach if Australia had in fact deprived the people of the island which was to be their territorial unit of self-determination. There might then have been no valid act of self-determination at all. But this was not the situation on Nauru. Nauru's claims in this regard are without any foundation in fact. On the contrary, with the termination of the Trusteeship in January 1968, there emerged an independent State on an island which could not only support its population at the time but, on account of its phosphate resources, promised them a prosperous economic future (paras.376 to 384 above).

C: AUSTRALIA RESPECTED THE PRINCIPLE OF PERMANENT SOVEREIGNTY ABSOLUTELY

424. The principle of permanent sovereignty requires that every State recognize "the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests" (General Assembly resolution 1803(XVII), preambular para.5). Resolution 1803(XVII), adopted by the General Assembly on 14 December 1962, has been seen as the crystallization of this principle: see *Texaco v Libyan Arab Republic* 53 ILR 389, at pp.487, 491-2; *Kuwait v American Independent Oil Co (Aminoil), (1982) 21 International Legal Materials*, p.976, at p.1021; Higgins [1982] *Recueil des Cours*, Vol iii, p.293; Lachs [1980] *Recueil des Cours*, Vol.iv, p.57; Brownlie [1979] *Recueil des Cours*, Vol.i, p.261. The question whether international law on this subject altered during the trusteeship period need not be answered, for the fact is that Australia has acted completely in accordance with the demands of the principle. For the same reason, there is no need to consider whether the principle in fact entitles Nauru to rely on Australia's alleged responsibility as the representative of the former administering power, although that question is not without doubt (*cf* Bedjaoui, "The Right to Development" in *International Law: Achievements and Prospects*, UNESCO, Paris, 1991, p.1190; Gess, "Permanent Sovereignty over Natural Resources" (1964) 13 *International and Comparative Law Quarterly* 398 at 415; Fischer, "La souveraineté sur les resources naturelles" AFDI, 1962, p.516 at 526; Elian [1976] *Recueil des Cours*, Vol.v, p.48).

425. As Part I, Chapter 3 and Part 2, Chapter 2 make clear, arrangements with respect to royalties and ultimately, the entire Nauruan phosphate industry altered radically between 1947 and 1968. This was in keeping with similar developments throughout the world. Prior to 1950, long-term concessions

pursuant to which a foreign concession holder acquired exclusive rights to mine in return for comparatively modest royalties and rental were typical of arrangements governing the exploitation of natural resources in many places. The development of the principle of permanent sovereignty led to changes in approaches to foreign mining concessions, however, and, in the period between 1950 and 1967, to increases in the level of royalty payments and other forms of return to producer States. (See Cattan, *The Evolution of Oil Concessions in the Middle East and North Africa, (New York, 1967)*, pp.3-4; *Transnational Corporations in World Development: A Re-examination*, E/C.10/38, 20 March 1978 (UN Sales No.78.II.A.S), pp.102-122, esp 102-3). As part of these developments, there were increases in royalty payments throughout the Trusteeship, particularly after 1963. Even before 1963, royalties paid by the BPC compared favourably to those paid by mine operators in Australia. A paper prepared by the Australian Department of Territories indicates that in July 1958, the rate of royalty impost for zircon was 2/6 per ton; for coal, it was 9d per ton for the first twenty years lease, 1/- per ton for the second, and 1/3 per ton for the third twenty years; and for phosphates, 1/- per ton. Not surprisingly, the paper recorded the view that the proposed payment of 2/6 per ton for Nauruan phosphate was reasonable, having regard to the royalty rates applicable in New South Wales. (The paper appears as Annex 3 to this Counter-Memorial.) It will be recalled that the 1962 Visiting Mission had noted with satisfaction that, since 1947, the percentage benefit to the Nauruans against the value of phosphates at the point of exports had risen from just under 4% to 24%. There were even more significant increases after 1963, as the reports of the Trusteeship Council recorded. There was no indication in these reports that the Council considered that the Administering Authority was failing to ensure that the BPC paid royalties at a rate appropriate to the standards of the day (see paras.102 and 105).

426. At the Nauruans' request and in conformity with the Trusteeship Council's recommendations, a substantial part of these royalties was paid into trust funds for the benefit of Nauruans as a whole. When resettlement proposals failed in 1964, the Administering Authority ensured that an even larger proportion was paid into the Long Term Investment Fund, by way of saving for Nauru's future needs. It will be recalled that as at 30 June 1967 there was over $3 million standing to the credit of the Nauru Landowners' Royalty Trust Fund and about $6.25 million to the credit of the Long Term Investment Fund which, together with other Trust Funds, amounted to almost $A10 million, or $A70 million in 1993 values (para.351 above). At independence, these funds

were passed to Nauruan control to be applied to a rehabilitation program (or any other project) as the Nauruans saw fit.

427. In making the Phosphate Agreement of 14 November 1967, the three Partner Governments recognized the right of the new Nauruan State to dispose of its major resource as it saw fit. Pursuant to that agreement, the Administering Authority (ie, Australia, the United Kingdom and New Zealand) agreed that the BPC should give up its interest in the Nauruan phosphate industry on the terms proposed by the Nauruans. It will be recalled that the Nauruans purchased the BPC's Nauruan assets at their own request (Part I, Chapter 5, para.230). These assets were valued at original price less depreciation at a rate consistent with their economic life (1967 Agreement, Clause 8(1), reproduced as a schedule to Annex 9 to Preliminary Objections). This was not a normal commercial basis. As already noted, a commercial price would have yielded $A30 to $A32 million, rather than the $A21 million actually paid. After a three-year transitional period, the BPC was to transfer the management of the phosphate installations on Nauru to the Nauru Phosphate Corporation, a Nauruan corporation, to manage thereafter (Clauses 13 and 15). Thus, by the time Nauru emerged as an independent State on 31 January 1968, the former Administering Authority had already passed ownership and control of the phosphate deposits to the new State. This was in full accord with the principle of permanent sovereignty.

428. The 1967 Agreement was advantageous for the Nauruans; and the arrangements made under it were much more favourable than strictly required by the then applicable law. See Part 2, Chapter 2, Sections VII and VII. The basis of valuation for BPC's Nauruan assets clearly favoured the Nauruan purchasers (Part II, para.371). Under the Agreement, Nauru acquired the whole industry - the capital assets, the phosphate deposits and the considerable income which phosphate sales generated. Further, the former Administering Authority undertook to take the entire output of Nauruan phosphate at a stated rate of production and at a market-indexed price for at least the first three years (Clauses 5(2) and 23). The three Governments thereby assured the new State a guaranteed market at a guaranteed price. (This arrangement was, of course, subject to extension.)

429. For the three Partner Governments and the BPC, the Agreement involved the relinquishment of valuable legal interests. Until the pre-independence negotiations, the BPC had held undisputed concessionary rights over the Nauruan phosphate deposits which derived from the title of the three

Governments. They had purchased the interest of the Pacific Phosphate Company in 1920. That company had in turn acquired title under a grant made by the Imperial German Government in 1905. The three Governments had transferred the assets and undertaking of the Nauruan phosphate operations to the BPC under an indenture of 31 December 1920 and had vested title to the phosphate deposits pursuant to the 1919 Agreement. See Part I, Chapter 1. The BPC had not lost its concessionary rights when the 1947 Trusteeship Agreement came into force. Had the three Governments not given up their interests (held by BPC) prior to independence, Nauru would have been required to pay appropriate compensation for any compulsory acquisition. This would have included at least full compensation for the BPC's assets, valued at a somewhat higher commercial rate than the historic cost basis of the 1967 agreement. There would, moreover, have been no assured market.

430. At the start of the 1967 negotiations, the three Partner Governments had expected to make some form of profit-sharing arrangement with the Nauruans (Part I, paras.214 to 220). This was in keeping with the fact that the BPC had concession rights over the phosphate to the year 2000. It was also consistent with international practice as it then stood with respect to mining concessions elsewhere in the world. As already noted, the practice of granting concessions to foreign concerns by mandatory powers and administering authorities was an accepted feature of mandate and trusteeship administration. Further, prior to 1950, concession-based royalty and rental payments were typical forms of return received in producing countries. The Saudi Arabia and Aramco agreement of 30 December 1950 introduced the concept of equal profit-sharing between the producer State and the concessionaire in the context of oil concessions. Direct profit-sharing gradually gained wider acceptance so that, by 1967, the concept of mutual sharing reflected in a profit-sharing formula had become well accepted as the appropriate basis for the exploitation of natural resources. See Steiner and Vagts, *Transnational Legal Problems: Materials and Text* (1967), at p.373; H Cattan, *The Evolution of Oil Concessions in the Middle East and North Africa, (1967), ppxi, xii, 3-4, 9-10; Transnational Corporations in World Development: A Re-examination*, E/C.10/38, 20 March 1978 (UN Sales No.78.II.A.S), pp.102-122, esp 102-3, 117.

431. It was in keeping with these international standards that the three Partner Governments sought an equal sharing of the profits of the phosphate industry with the Nauruans. Their approach was also consistent with the conclusions of the 1966 Working Group (Annex 7 to Preliminary Objections). As noted above,

the Working Group identified two different approaches - profit-sharing between operating companies and governments and the return of profits on shareholders' funds (para.390). The available material indicated that a 50:50 sharing between the Nauruan Government and the commercial operator would have been consistent with arrangements elsewhere in the world (para.12 of the Report). By the end of the 1967 negotiations, however, the three Governments had agreed to relinquish all interest in the industry, including any entitlement to a share of the profits or management fee. By so doing, the Governments gave up much they might reasonably have expected to retain. From independence, Nauru thus received the entire economic benefit of the phosphate industry. As the earlier discussion of the 1967 negotiations shows, the three Governments were prepared to relinquish their claim to a proportion of the profits so as to take account of Nauru's particular circumstances, including the fact that the phosphate was a wasting resource. See Part I, Chapter 5 and Part II, Chapter 2, Section VII.

432. It should be borne in mind that, in 1967, direct exploitation by the producing country was not usual and that further significant changes in international approaches to foreign investment in mineral exploitation took place in the fifteen years or so following termination of the Trusteeship. See *Transnational Corporations in World Development: A Re-examination*, referred to in para.430 above. The more radical nature of contractual revisions in the 1970s is illustrated by the revisions made to the original Kuwait concession of 1934, particularly in the 1960s and 1970s, which culminated in the Kuwait Acquisition Agreement of 1 December 1975 (reproduced in Peter Fischer (ed), *A Collection of International Concessions and Related Instruments, Contemporary Series 1975/76*, Vol.2, (1982), pp.133ff). These further changes coincided with, and reflected, refinements in the principle of permanent sovereignty. They can, however, have no bearing on the present case. See para.438 following and Part II, Chapter 1, Section III.

433. In making the 1967 Agreement, the three Partner Governments also recognized that it was for the new Republic of Nauru to decide whether it wanted to embark upon rehabilitation and if so, the particular program it wished to pursue. It will be recalled that as late as June 1966, the Davey Committee of Experts had reported that "the very many practical considerations involved rule out such an undertaking [to rehabilitate] as impracticable". See Part I, para.157. The position of the Administering Authority was clearly understood by the Trusteeship Council which reported that:

"The basic points in the attitude of the Partner Governments were that the decisions about what steps for treatment of these worked-out mining lands should be taken -whether they should be treated, what treatment should be undertaken, when it should be done and at what use of resources - were ones that should properly be taken by the Nauruans themselves and not by anybody else; and that the responsibility of the Partner Governments was to see that the financial arrangements were such as to ensure that resources would be available to enable the Nauruans to make provision for their future in whatever way the present leaders or their successors might decide.

The Partner Governments thought that they had made sufficient provision in the financial arrangements that had been agreed on. Under these arrangements $US21 million would become available to or for the benefit of the Nauruan community in 1967-1968, amounting on average to about $US40,000 per family, and almost $US18 million a year from 1969-1970 on ... The Partner Governments have agreed that the Nauruan people would receive the benefit of the whole, ie, 100 per cent, of the net proceeds from selling the phosphate at fair value. They did this, although the information assembled by a joint working party of the Nauruan representatives and the Partner Governments which assembled a great deal of information about comparable mining practice elsewhere, showed that there was a well-established basis of sharing of net benefits and that in many cases the sharing was 50/50. The Partner Governments did consciously take into account the very real needs of the Nauruan people to provide for their long-term future because of the extractive nature of the industry and of the small size of the island, in deciding that it should not follow these precedents of sharing." (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 22nd Session*, Suppl. No.4 (A/6704), Part II, paras.401-2; set out in Annex 28 to the Preliminary Objections)

434. The Council noted "with satisfaction" that amongst other things, agreement had been reached to transfer ownership and control of the phosphate industry to the Nauruans (para.403). It did not indicate that the 1967 arrangements were anything less than satisfactory.

435. As noted in Chapter 2 (para.380), Australia's representative assured the General Assembly that the 1967 agreement would provide Nauru with an annual return of about $15 million and that the Nauruans might expect to accumulate a fund of about $400 million, if they continued to put aside the same proportion of their revenue as in previous years. The three Partner Governments clearly believed that this would ensure the economic well-being of the population once the phosphate deposits were exhausted.

436. The Nauruans and the Trusteeship Council concurred with this account (paras.195 to 202 above). It was, therefore, to be expected that the General Assembly would agree to terminate the Trusteeship for Nauru fully, and indeed properly, satisfied that the Charter and general international law standards had been complied with by the Administering Authority. Further, at no time has Nauru sought to impugn the representations made by the Authority to the United Nations concerning the effect of the 1967 Agreement.

437. Nauru's sovereignty over its natural resources is "permanent" in the sense that no action of the former Administering Authority could have deprived it of its legal capacity to regulate exploitation of those resources. Australia would have contravened the principle had it sought to bind Nauru to a long-term arrangement with respect to the phosphate industry, or sought to alienate Nauru's entitlement by claiming its own absolute right to the phosphate deposits. Australia did not adopt either course, however. On the contrary, Australia, together with the other two Governments, ensured that, on independence, Nauru was able to exploit the resource in its own interest. Australia did not seek in any way to prevent or hinder Nauru's operation of the phosphate industry, nor to impair Nauru's enjoyment of unchallenged sovereignty over that resource.

438. When the Trusteeship came to an end in January 1968, the full ramifications of the principle of permanent sovereignty were still being elaborated (Bedjaoui, [1970] *Recueil des Cours*, Vol.ii, p.495; Brownlie, [1979] *Recueil des Cours*, Vol.i, p.270; Hossain and Chowdhury, *Permanent Sovereignty over Natural Resources in International Law* (1984) p.11). Over the past decade or so, different legal arrangements have been formulated for the development of the natural resources of developing countries to give fuller expression to the principle of permanent sovereignty. But Nauru cannot complain that such arrangements were not applied during the Trusteeship, since they were not available to the Administering Authority then, and the

arrangements made by the former Authority must be assessed against the law in force at the time (*Island of Palmas Case* (1928) 2 UNRIAA 829; *Guinea-Bissau v Senegal* (1989) 83 ILR 1, at p.45; and Part II, Chapter 1, Section III).

439. As already noted, Nauru's claim that Australia's administration of the phosphate industry involved breaches of the permanent sovereignty principle finds no support in the contemporary historical record. On the contrary, it is clear that the Nauruans derived considerable benefits from the phosphate industry during the Trusteeship period. The Visiting Missions of 1953, 1956 and 1965 had each commented on this fact (para.349). The 1965 Visiting Mission specifically noted that phosphate mining enabled the community to afford excellent houses, schools and hospitals (1965 Visiting Mission Report, para.2, Annex 12, Vol.4, NM).

440. Further, Nauru's phosphate resources gave it a per capita income at independence which was one of the highest in the world. It should still have a very high per capita income (Annex 26 to Preliminary Objections, discussed in para.382). Nauru's claim that the phosphate has been depleted on grossly inequitable terms is entirely out of keeping with Nauru's very considerable prosperity throughout the trusteeship period and beyond.

Section II: There was no breach of any other general principle of international law

441. Besides alleging breaches of international law specifically relating to non-self-governing territories, Nauru claims that Australia is guilty of breaches of other more general principles. These claims too are insupportable. They are considered below.

A: DENIAL OF JUSTICE

442. Nauru alleges that Australia's supposed failure to make provision for rehabilitation constitutes a denial of justice (Application, para.46; NM, Part III, Chapter 4). According to Nauru, this concept involves "the incidence of gross and manifest error in the application of the relevant legal standards, often associated with a policy of arbitrariness or discrimination" (NM, para.432) and, Nauru alleges, this applies to "the policies, decision-making procedures, and specific transactions, of the Australian Government and the British Phosphate Commission, in relation to the obligations of the legal regime constituted by

Article 76 of the United Nations Charter in conjunction with the Trusteeship Agreement for the Territory of Nauru" (para.434).

443. Plainly, the expression "denial of justice" does not cover every kind of international delinquency. The expression is ordinarily used to refer to international wrongs committed by States in respect of the person or property of a foreigner on its territory, and particularly to injuries committed by an organ of government in connexion with the administration of justice. See Fitzmaurice, "The Meaning of the term 'Denial of Justice'" (1932) 13 BYIL 93, at pp.95, 108. In its narrow sense, the expression relates to the treatment of aliens by judicial organs; in its broad sense, to the treatment of aliens by the State. See Sorensen (ed), *Manual of Public International Law* (1968) pp.557; Lissitzyn, "The Meaning of the Term 'Denial of Justice' in International Law" (1936) 30 AJIL 632.

444. By using the term "lato sensu", Nauru cannot give it a meaning which it does not bear in international law; and even if the facts alleged by Nauru were true, they would not attract the doctrine of denial of justice. At general international law, the doctrine is concerned with the responsibility of a State in relation to aliens and in particular, with the treatment of aliens by a State's judicial organs. It is not concerned with the rights and obligations of trusteeship. In relation to these, the Administering Authority was, of course, governed by the Trusteeship Agreement and the Charter. There can be no analogy between the relationship of a State towards aliens on its territory and that of an Administering Authority towards the inhabitants of a trusteeship territory (NM, para.436). For the latter was appointed by and at all times subject to the United Nations. There is no basis at all for Nauru's contention that the Charter and the Trusteeship Agreement provide a separate cause of action for denial of justice.

445. Furthermore, there is no factual basis for the Nauruan allegations concerning the administration of phosphate lands and royalty payments (NM, paras.438-443). The subject of public finance and royalties during the trusteeship is dealt with in detail in Part I, Chapter 3. It suffices to note here that the BPC paid royalties to Nauruans throughout the trusteeship period and there were substantial increments over the years. For example, it will be recalled that the total royalties paid to Nauruans in 1966 amounted to $A1.75 a ton, in 1967 to $A4.50 per ton (para.93 above).

446. The Trusteeship Council's annual reports concerning Nauru reflected its proper concern to ensure not only that it had adequate information on the size

and destination of royalty payments, but also that royalties were paid to Nauruans on an equitable basis. See Part I, Chapter 3, Section II. The record shows that the Administering Authority provided the Council with such information, either on its own initiative or in response to the Council's requests. Furthermore, the arrangements made by the Administering Authority for the payment of royalties were more than once commended by the Council. See, for example, the reports of the Trusteeship Council in 1959, 1960 and 1965 referred to in paragraphs 100 to 101 and 105 above.

447. If the Authority had been guilty of conduct amounting to a denial of justice, it ought to have been considered by the Trusteeship Council, as such conduct would have fallen within the ambit of its supervisory function. But neither the Council nor any other organ of the United Nations ever intimated that the Administering Authority was guilty of a denial of justice in its administration of the phosphate industry.

B: BREACH OF DUTIES OF A PREDECESSOR STATE

448. In an effort to find some further legal basis for its claim, Nauru contends that, at general international law, "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 harm to, or substantially prejudice, the existing or contingent legal interest of another State in respect of that territory" (NM, para.458).

449. Nauru provides no evidence of the widespread acceptance by nations of the relevant principle, as required of it by Article 38 of the Statute of the Court. Nauru seeks to rely instead on obligations arising in very different situations from that of trusteeship and by virtue of specific treaties, rules made under treaties, or other consensual arrangements. It also cites Decree No.1 of the United Nations Council for Namibia (Annex 21, Vol.4, NM), but this citation merely emphasises Nauru's failure to identify any relevant practice. For the differences between the situation in Namibia and Nauru are great: South Africa continued in illegal possession of the former territory in defiance of the United Nations whilst the Administering Authority on Nauru remained at all times observant of United Nations authority.

450. Nauru also refers to the *German Settlers in Poland* case (PCIJ, *Ser. B, No.6* (1923)) and the case of *Certain German Settlers in Polish Upper Silesia* (*PCIJ, Ser. A, No.7* (1926)). Neither provides any evidence for the supposed

principle, however. In the former, the Permanent Court was asked to give an advisory opinion concerning the nature of certain obligations contemplated by the Treaty of Versailles (*PCIJ, Ser. B, No.6* (1923), p.7). The actions of the German and Polish Governments fell to be considered in this context; and the particular provisions of the Treaty governed the Court's conclusions as to each State's respective rights and obligations. In the relevant part of the latter case, the Court was concerned to explain and maintain Germany's competence to dispose of its property prior to entry into force of the Versailles Treaty. It was in this context that the Court said:

> "[O]nly a misuse of this right could endow an act of alienation with the character of a breach of the Treaty; such misuse cannot be presumed, and it rests with the party who states that there has been such misuse to prove his statement." (*PCIJ, Ser.A, No.7* (1926), p.30)

451. If this case has any relevance (which may be doubted), it serves only to show that the (undischarged) burden of establishing such a case as Nauru seeks to make rests at all times with Nauru. But neither of the cases to which Nauru refers provides any authoritative support for the supposed principle for which Nauru contends.

452. Whatever the principles which may govern a predecessor State in relation to its successor, they had no application in relation to an Administering Authority in a trusteeship situation. As Nauru itself concedes, the obligations of the Administering Authority on Nauru were at all times governed by the 1947 Trusteeship Agreement and the Charter (NM, para.464).

453. Furthermore, even if there were some such principle as that alleged, the facts would not attract its operation here. Nauru has clearly failed to prove its allegations. Nauru does not contend that mining *per se* was unlawful, or that it infringed the principle of permanent sovereignty, or was carried on without the consent of the Nauruans. Whilst it appears to assert that a breach arose from the depradation of the natural resources on Nauru, it does not contend that phosphate mining should not have occurred and that the island should have been left in a pristine state. Such a claim would be inconsistent with Nauru's other claim that it was the failure to rehabilitate or adequately recompense that gave rise to Australia's responsibility.

454. As already noted, the record shows that Australia's administration of the phosphate operations was always subject to conscientious United Nations

supervision (paras.399 to 414 above and Part I, Chapters 3 and 4). Australia, representing the Administering Authority, did not harm or prejudice Nauruan interests. On the contrary, according to the Visiting Missions and the Trusteeship Council, Nauruans benefited a great deal from the phosphate revenues throughout the Trusteeship and, at independence, the Nauruans inherited the phosphate industry as a viable operation which assured them a prosperous future .

C: ABUSE OF RIGHTS AND ACTS OF MALADMINISTRATION

455. Finally, Nauru claims that as a result of Australia's alleged acts of maladministration, Australia is guilty of an abuse of rights. Nauru says "the principle of abuse of rights comprehends three patterns of conduct" - preferring the interests of the administration over those of Nauruans; refusing "to report essential data concerning the policies of the administration and their implementation"; and failing to take account of the relevant international standards in relation to the administration of the Territory (NM, para.449). Nauru says that this conduct as a whole "revealed a wilful disregard of the trusteeship regime as a legal process" (NM, para.454).

456. The status and content of the doctrine of abuse of rights is uncertain at international law and there has been little agreement amongst writers or arbitral and judicial tribunals concerning it. It may be regarded as the application of the principle of good faith to the exercise of rights. As Lauterpacht has recognised:

> "There is no legal right, however well established, that could not, in some circumstances, be refused recognition on the ground that it has been abused. The doctrine of abuse of rights is therefore an instrument which ... must be wielded with studied restraint." (Lauterpacht, *The Development of International Law by the International Court*, p.164.)

457. The fact is, however, that international responsibility can arise only if the supposed abuse amounts to an unlawful act which would, in this case, necessarily involve a breach of the Trusteeship Agreement and the Charter (NM, para.444). Nauru, it seems, also recognizes this when it alleges that:

> "In the Nauruan context the rule of law, the idea of due process, was constituted by the international legal regime of trusteeship, and accountability to the United Nations." (NM, para.454)

458. Nauru's meaning is far from clear, but it does apparently (correctly) concede in this passage that there can be no separate requirement of due process or the like, or any responsibility arising from an abuse of rights, unless there has first been a breach of trusteeship obligations. But, as the preceding Chapter demonstrates, there has been no such breach.

459. Further, as the record shows, the claim of abuse of rights has absolutely no factual basis. The relationship between the United Nations, particularly the Trusteeship Council, and the Administering Authority has already been discussed in some detail (Part I, Chapters 3 and 4; Part II, Chapter 2, Section V and VI; and Part II, Chapter 3, Section I). That relationship involved active inquiry on the part of United Nations bodies and co-operative reporting by the Administering Authority. The Trusteeship Council, aided by Visiting Missions and Nauruan representations, sought conscientiously to ensure that the Trusteeship administration was conformable with the Charter, especially Article 76.

460. If Nauru's claims were true, they ought to have been the subject of anxious debate and censure by the Trusteeship Council. On the contrary, the Council was warm in its praise of the Administering Authority's work. In light of the contemporary historical record, it can scarcely be contemplated that the United Nations, through the Trusteeship Council, failed to take any note of the imagined abuses.

CHAPTER 4

NOVEL ALLEGATIONS OF BREACH OF TRUSTEESHIP UNRELATED TO REHABILITATION

Introduction

461. The three preceding Chapters examine Nauru's specific claim that, at international law, Australia was under an obligation to rehabilitate lands mined out during the trusteeship period. The Nauruan Memorial also contains other allegations, however, which are unrelated to the rehabilitation claim. In particular, Nauru alleges that Australia, acting on behalf of the Administering Authority:

- failed to make full and fair reports to the relevant organs of the United Nations on the economic affairs of Nauru, including the phosphate industry (NM, paras.284, 315-6, 320-1, 339)
- failed to exercise governmental authority in a manner appropriate to the obligations of trusteeship (NM, para.364ff);
- failed to promote the political advancement of the inhabitants and their progressive development towards self-government and independence (NM, para.374ff);
- failed to promote the economic, social, educational and cultural advancement of the inhabitants (NM, para.389ff); and
- failed to respect the land rights of the indigenous inhabitants (NM, para.394 ff).

These allegations are dealt with in this Chapter. As the following discussion shows, they each lack factual support (Section I). In any event, the allegations cannot properly arise for decision in these proceedings and they are in conflict with the deliberations and conclusions of the Trusteeship Council and the United Nations (Sections II and III).

Section I: There is no factual basis for any of these allegations

462. The facts do not support any of these five allegations and each allegation is essentially fact-dependent. As the following account shows, Nauru fails to

marshal any evidence in its support and relies instead on vague generalisations and gives few details. Thus, even if it were open to Nauru to raise such matters in these proceedings (which Australia denies), Nauru's claims in this regard cannot succeed because of its failure to present evidence in their support.

A: THE ALLEGED FAILURE TO REPORT FULLY AND FAIRLY HAS NO BASIS IN FACT

463. Nauru alleges that the failure to report and to rehabilitate "form part of a pattern of conduct stemming from ... goals divorced from concern for the purposes of the trusteeship system and inimical to these purposes" and that "the failure to rehabilitate... forms an entirely consistent element in [this] pattern of conduct" (NM, paras.314-5; also NM, Part IV, Chapter 4). It further alleges that Australia's conduct "was characterised by a carefully maintained reticence which amounted to an absence of good faith" (NM, para.319).

464. Nauru adduces no relevant evidence in support of this allegation. Certainly, Nauru refers to records of the BPC, recording some of the internal deliberations of the Commissioners, and relies on isolated and selective passages, especially concerning events in 1946 and 1953 (NM, paras.355-363). But whatever the attitude of the BPC, it evidences nothing about the practice of the Administering Authority, a different body with separate purposes and responsibilities. However characterized, the approach of the BPC is immaterial.

465. The allegation that the Authority failed to report fully to the United Nations is not borne out by the United Nations record and is inconsistent with the detailed nature of the information in fact given by Australia to the Trusteeship Council. Each annual report presented by the Administering Authority to the Council set out the volume of phosphate exported, its value, the amount and distribution of royalties and the sums contributed by the BPC to the cost of the Nauruan administration. These figures were subjected to annual scrutiny by the Trusteeship Council. Triennial Visiting Missions also carefully inquired into these matters. See Part I, Chapter 3.

466. Nauru seeks to make out a case of wrongdoing on the basis that, from time to time, the Trusteeship Council sought further financial information from the Administering Authority (NM, para.339ff). But Nauru fails to take account of the actual responses of the Administering Authority. As noted in Part I, the Administering Authority never failed to reply to the Council's recommendations, either by way of explanation or the supply of the requested

data. Further, the Council's particular concerns regarding royalty payments, reflected in requests for additional information on the BPC in the years 1959-1961, were subsequently met by the introduction of a consultative process (between BPC and Nauruans) for the settlement of royalties and other like payments. As a result, after 1963, the Trusteeship Council no longer sought more detailed information from the Administering Authority on the royalties question. See para.110 above.

467. Nauru says Australia did not provide information on the price paid by the three Governments for Nauruan phosphate and prices obtainable in the world market. But, as shown in Part I, information was given by the Administering Authority to the Visiting Mission in 1962 which showed that the price paid for Nauruan phosphate did not differ significantly from that paid elsewhere in the world. This more than satisfied United Nations concerns.

468. When negotiations concerning the reorganisation of the phosphate industry began in 1965, the proposals made by the three Governments and the agreements reached with the Nauruans were the subject of careful reports to the Trusteeship Council and other relevant United Nations organs. Moreover, it should be borne in mind that there was direct Nauruan participation in the work of the Trusteeship Council from 1961 until the end of the Trusteeship. From 1961 onwards, a Nauruan adviser was appointed to the delegation of the Special Representative of the Administering Authority during the Trusteeship Council's annual consideration of the Administering Authority's report. It was open to the Nauruan adviser to speak on Nauruan affairs, particularly on financial and related matters (para.63 above).

469. It is true that Australia declined to provide the BPC's internal accounting documents to the Trusteeship Council, because the BPC was a separate commercial concern over which it had no independent control. It did not disguise this fact, as Nauru seems to allege, but made its position on this matter very clear to the Trusteeship Council. (See *Trusteeship Council Official Records, 18th Session*, 714th Meeting, 26 June 1956, p.112, quoted in Part I, para.116 ; see also NM, paras.544-545.) This is significant for it was plainly open to the Trusteeship Council to take issue with Australia on this point and it did not do so. Although the Trusteeship Council was clearly very much aware of the need for adequate information concerning Nauruan financial arrangements, it did not censure the Administering Authority for failing to provide internal BPC records, but regarded the additional data supplied by the Authority (concerning

the BPC's Nauruan trading operations) as fulfilling its purposes. See Part I, paras.108 to 119.

B: THE ALLEGED FAILURE TO EXERCISE GOVERNMENTAL AUTHORITY HAS NO BASIS IN FACT

470. This far-reaching allegation in fact reduces to two limited contentions. The first - that Australia should have exercised its governmental powers so as to provide for rehabilitation - forms the subject of previous Chapters (CR91/20, p.83, CR91/22, p.45). This is no more than another way of stating Nauru's claim that Australia's failure to rehabilitate constitutes a breach of international law (*cf ICJ Reports 1992*, p.282 (Judge Shahabuddeen)), a claim discussed earlier. See para.321ff.

471. Secondly, Nauru challenges the system of public finance maintained by the Administering Authority (NM, paras.284, 365ff). This was, Nauru alleges, affected by:

> "the dominance of the phosphate industry and its operations in the life of the island; the independence of the British Phosphate Commissioners in relation to the Administrator; and the fact that the operations of the Commissioners were not subject to taxation." (NM, para.365)

472. The phosphate operations were undoubtedly central to Nauruan life. The revenue from phosphate mining gave the Nauruans great benefits, including excellent social services and public utilities (described in Part I). By the end of the trusteeship, schooling was free and compulsory until age sixteen and medical treatment at a well-equipped general hospital was also free of charge. There had also been significant improvements in environmental sanitation, immunisation and nutrition. These public amenities were noted by successive Visiting Missions (para.347 above). There was little doubt that phosphate mining brought to the Nauruans:

> "greater prosperity and better social services than are enjoyed by any other community of similar size in the Pacific region." (1956 Visiting Mission Report, para.18, Annex 9, Vol.4, NM).

473. Without the phosphate revenue, it would have been impossible to finance and maintain on such a small isolated island the very high standard of living which the Nauruans enjoyed. Australia, representing the Administering

Authority, used its governmental authority to direct the phosphate revenue to this end and bring about this result.

474. The BPC also played an important role on the island, but was there only to manage the phosphate operations (Part I, Chapter 1, Section III above). It is true that the BPC was not taxed. Instead, it was required to pay for the entire administration of Nauru, including social services and public utilities. It did not decide how the sums contributed by it in this way were to be spent, however. This fell to the Administrator, the Nauru Local Government Council and its successor.

475. After 1951, not only did the Nauruans pay no tax at all, as would have been expected in any other country, but from the BPC they also received royalties, surface rights and other payments (see paras.81 to 84 above). Many Nauruans in receipt of direct BPC payments were not obliged to work at all. Others found employment in the BPC's operations.

476. Nauru alleges that Australia failed to exercise governmental authority appropriately because the Administering Authority permitted mining without rehabilitation. But at the time rehabilitation was thought to be either impossible or impracticable, so that Nauru effectively challenges the fact that mining was permitted at all. But it was only by phosphate mining that the Nauruans enjoyed the significant income that enabled them to enjoy the benefits of development missing from other Pacific island territories. Nauru cannot have it both ways. The Authority was bound either to permit mining, making such provision as appropriate for Nauru's future, or to forbid it until such time as rehabilitation became a realistic option, despite the absence of other Nauruan revenue. Australia, for the Administering Authority, chose the former, and at the same time it established a Long Term Investment Fund to cover the community's future needs (para.89 above).

477. *Indeed, by its own conduct since independence, Nauru has tacitly accepted the legitimacy and economic necessity of the pre-independence mining activities.* This is so because, over the last quarter century, Nauru has itself continued to mine in the same way and with, at least, the same intensity as the BPC in the trusteeship period. It has made no attempt since independence to rehabilitate any mined land, whether worked out before or after independence. *It is scarcely conceivable that Australia should be held culpable for the very same mining activities as those carried on by Nauru over the past twenty-five years.*

C: THE ALLEGED FAILURE TO PROMOTE POLITICAL ADVANCEMENT HAS NO BASIS IN FACT

478. Nauru asserts that "the experience of Nauru was essentially one of constitutional and political immobility" from 1919 until 1966 (NM, para.375). As Part I shows, however, this assertion has no regard for historical accuracy. It is very clear that there was significantly more Nauruan participation in governmental matters as Nauru progressed towards complete independence in 1968. After the Nauru Local Government Council replaced the Council of Chiefs in 1951, it exercised a good deal of influence in Nauruan affairs. The NLGC acquired further powers in 1963. In 1965, the Legislative Council was created with even greater autonomy and, as already seen, the Administering Authority freely accepted the Nauruan choice of independence on 31 January 1968. See Part II, Chapter 3, Section I. In this context, the words of the Nauruan Head Chief shortly before independence are relevant. It will be recalled that he then said that "Australian tutelage ... had been effective" and that the three Governments "could be proud of their achievements on Nauru" (quoted earlier at para.197). Expressed on the eve of independence, these sentiments are quite inconsistent with the claim now made by Nauru that Australia failed to promote Nauruan development towards self-government or independence.

D: THE ALLEGED FAILURE TO PROMOTE ECONOMIC, SOCIAL, EDUCATIONAL AND CULTURAL ADVANCEMENT HAS NO BASIS IN FACT

479. In the same vein, Nauru alleges that "there was a total failure to promote the economic advancement of the inhabitants in relation to the resources available" (NM, para.390). Nauru makes a similar allegation in relation to the other forms of advancement (NM, para.392).

480. Enough has already been said in this Counter-Memorial as to the social, educational and cultural advancement on Nauru. See Part I, Chapter 2 and Part II, Chapter 3, Section I. Indeed, Nauru does not seek to rely on any circumstance which might provide the slightest basis in fact for this assertion. There can be no doubt that Australia left the Nauruans healthy and well-educated.

481. Nor is there any evidence to support Nauru's allegations as to economic matters. Nauru alleges that royalty payments were well below an equitable

standard, despite the increases during the trusteeship period. Royalty payments were, however, frequently adjusted. (See eg, the adjustments made in 1947, 1950, 1953, 1957, 1960, 1964 and 1966 following consultations with Nauruans, described in Part I.) It is true that the basis for calculating royalties changed over time, particularly as the principles of permanent sovereignty became more defined. In the early 1950's, royalties were apparently fixed by the Administering Authority having regard to Nauruan needs, not simply the export price of the phosphates. But as the total export tonnage increased in the early 1960s from about 1.2m tons to 1.6m tons, so too the Administering Authority ensured that royalty payments by BPC also increased. There were marked increases in royalty payments, particularly after 1963. This was in keeping with the re-evaluation of foreign-owned mining concessions occurring internationally. Even before this, however, Nauruan royalty payments were entirely consistent with the royalty rates paid by mine operators in Australia. See Part II, Chapter 3 and Annex 3.

482. There can be little doubt that the intertemporal principle applies in this circumstance, so that the question of royalty payments falls to be determined against the law as it was interpreted at the time the payments were made. See Part II, Chapter 1, Section III above. The contemporary record shows that the payments fully complied with the standards of the day. This is confirmed by the results of the Trusteeship Council's scrutiny throughout the Trusteeship period. After some expressions of concern in the mid 1950s, the Council went on to express general satisfaction with royalty arrangements for the remainder of the Trusteeship period. See Part I, Chapter 3, Section II.

483. In considering the matter of royalties, it should also be borne in mind that the Nauruans' financial benefit from the phosphate industry was not confined to royalty payments made directly to individual Nauruans. A substantial proportion of the royalties were placed into investment funds for the benefit of the community as a whole. Hence, as at 30 June 1967, there were about $A3 million (in 1993 values, $A21 million) standing to the credit of the Nauru Landowners Royalty Trust Fund and about $A6 million (in 1993 values, $A42 million), to the credit of the Nauru Long Term Investment Fund (para.89 above). This represented accumulations of part only of the royalty payments made during the trusteeship. As already noted, the Long Term Fund was intended to ensure that the Nauruans had sufficient funds to provide for their needs when the supply of phosphate ended and it is clear that this aim has been substantially achieved. See Part II, Chapter 2, Sections VII and VIII, esp paras.377 to 383. It should be

borne in mind too that, after 1951, the Nauruans paid no taxes; that the cost of the administration was met out of funds paid directly by the BPC; and that, at independence, they acquired all rights to the phosphate revenues under an agreement entirely favourable to themselves.

484. There can be no doubt that at independence and by virtue of the 1967 Agreement (pursuant to which Nauruans acquired the phosphate industry as a going concern for a less than commercial price), Nauru could look forward to an economic future which was much better than their Pacific neighbours. It was Australia (with the other two Partner Governments) which had brought the Nauruan economy to this high level.

E: THE ALLEGED FAILURE TO RESPECT LAND RIGHTS HAS NO BASIS IN FACT

485. Nauru alleges that the failure to respect land rights (in breach of Article 5(2)(a) of the Trusteeship Agreement) was the product of the legal regime with respect to phosphate lands established during the Trusteeship (NM, para.396). Nauru challenges the Lands Ordinances on the basis that "the interest of the individual landowner was placed at the disposal of the British Phosphate Commissioners subject to the payment of "royalties" which were not the result of a process of genuine negotiation ... and ... were ... unrelated to the real value of the resources being disposed of" (NM, para.398). The Nauruan Memorial also contains another allegation concerning the failure to return worked out lands "without undue delay" (NM, para.399).

486. Australia denies that there is any factual basis for these allegations. Nauru itself gives no particulars of the supposed undue delay. In its other "royalties" aspect, the claim repeats the attack already made by Nauru in relation to the alleged failure to promote economic advancement. See paras.479 to 484 above.

487. Royalty payments were fixed on an equitable basis, by reference not only to the export price of the phosphates, but also to Nauruan needs. As already noted, royalty payments were also frequently adjusted and in the period prior to independence following direct consultations between the BPC and Nauruans. The royalties were, at Nauruan request, paid not only to individual Nauruan landowners, but also into funds for the benefit of the whole community. Moreover, the royalty rates to which the BPC was subject were entirely consistent with (and rather higher than) the rates of royalty impost paid by mine operators in Australia. See Part II, Chapter 3, para.425.

488. Moreover, the Lands Ordinances clearly provided compensation in respect of leases granted to the BPC. A review of the Lands Ordinances (para.40ff above) discloses that:

- each Ordinance was made following negotiation with the Nauruan landowners
- payment was made to individual landowners in the form of a lump sum at the time of the initial lease of phosphate-bearing land. This was £20 per acre in 1921, £40 per acre in 1927 and $240 an acre in 1967;
- royalties were paid to the individual landowners, as well as to funds available generally for the Nauruan community; and
- in relation to non-phosphate bearing land used for BPC operations, a sum was paid as annual rental to the relevant landowner for lease over such lands, together with compensation for individual trees destroyed, depending on species and size.

489. Nauru alleges that the 1921 and 1927 Land Ordinances resulted in an "effective 'taking' of the Nauruans' land" (NM, para.86), or were "effectively a form of expropriation" (NM, para.98). At all times, however, the Administering Authority on Nauru acted in accordance with what was accepted internationally as the appropriate standard of the day. As shown in the previous Chapter (paras.429 and 432), when the Trusteeship commenced, it was accepted internationally that mineral exploitation was appropriately effected by the grant of long-term mining concessions in return for royalties and rentals which, judged by today's standards, appear comparatively modest. The Authority acted in accordance with the developing principles of permanent sovereignty and changing standards by ensuring progressively higher levels of royalties were in fact paid to the Nauruans (Part II, Chapter 3). Finally, of course, it passed the entire industry to them and gave up its claim, based on the international practice of the time, to any further share in the industry's profits.

490. If Nauru was to prosper economically it was necessary to mine the phosphate lands. In return for mining, the individual landowners and the Nauruan community were the recipients of direct financial benefits from the mine operators. This was, as Article 5(2)(a) in fact stipulated, "in accordance with [the Administering Authority's] established policy" at the time the

Trusteeship Agreement was made. It was that policy which the United Nations had indicated was acceptable to it.

491. Under Article 5(2)(a) of the Trusteeship Agreement, the Administering Authority undertook to "respect the rights and safeguard the interests ... of the indigenous inhabitants of the Territory; and in particular ensure that no rights over native land in favour of any person not an indigenous inhabitant ... [were] created or transferred except with the consent of the competent public authority". Nauru does not show, however, that Australia acted otherwise than in accordance with established policy in relation to the rights of indigenous people, nor that Australia permitted the creation or transfer otherwise than with the consent of the competent public authority. Even if there were some more general and as yet unidentified obligation (which Australia denies), Nauru cannot show any factual basis for its assertion that Australia failed to respect Nauruan land rights.

Section II: The termination of the Trusteeship and the judgment of the Court preclude the consideration of allegations unrelated to the rehabilitation claim

492. Thus far, the factual bases of these five Nauruan allegations have been considered, even though unrelated to Nauru's rehabilitation claim. In truth, however, the rehabilitation claim cannot support any judicial inquiry in these proceedings into Australia's administration under the Trusteeship. There are two reasons for this: first, the Trusteeship was unequivocally terminated by the United Nations to its full satisfaction; and secondly, the allegations made concerning Australia's conduct are entirely inconsistent with the actions of the Trusteeship Council and other United Nations organs during the period of the Trusteeship. As a result, there can be no investigation as to whether Australia together with the United Kingdom and New Zealand breached any obligations other than the supposed obligation to rehabilitate (the existence of which Australia denies).

493. The issue in this case is solely whether Australia has a legal responsibility to rehabilitate the phosphate lands mined out during the Trusteeship (Application, paras.445-9, NM, para.621; CR91/18, pp.10-1; 17, 21). According to the Court's judgment of 26 June 1992, what survived the termination of the Trusteeship Agreement was the Nauruan rehabilitation claim and whatever rights the Nauruans might have in this regard (*ICJ Reports 1992*, para.30). There is, therefore, no place for other, unrelated allegations in these proceedings.

494. As the Court also observed in its judgment, resolution 2347(XXII) of 19 December 1967 - terminating the Trusteeship - had "definitive legal effect" (*ICJ Reports 1992*, para.23). In consequence, no question concerning the Administering Authority's compliance with its obligations with respect to the Territory can arise, except the question of rehabilitation which survived only because of the "particular circumstances of the case" (*ICJ Reports 1992*, para.30). Nauru cannot now raise any question concerning the adequacy of reports made by the Authority to the United Nations, or the fulfilment of its obligations of result to promote Nauruan political and economic advancement, and to respect Nauruan rights and interests.

495. The only matter for resolution in these proceedings is the question of rehabilitation. This is indeed consistent with the entire history of the dispute. Until the Nauruan Memorial, this was the only issue which had been raised. Rehabilitation was the only matter on which the three Partner Governments and Nauru had not agreed prior to Nauruan independence (paras.1 to 8 above) It was the matter to which Head Chief DeRoburt referred when he addressed the Trusteeship Council on 22 November 1967 (paras.196 to 198 above). In his 1983 letter the Nauruan President had referred only to the rehabilitation of worked out phosphate lands and it was this claim which Australia had rejected (Annexes 78 and 79, Vol.4, NM). The rehabilitation issue led to the establishment of the Commission of Inquiry in 1986, the Final Report of which, in turn, led to these proceedings (Annex 80, nos.4 and 28, Vol.4, NM).

496. These proceedings cannot, therefore, support a judicial inquiry into the further allegations which Nauru makes, for the allegations are unrelated to the question of rehabilitation. The claim which the Court is to decide is a specific one - whether Australia is responsible for rehabilitating phosphate lands worked out during the Trusteeship.

Section III: The conduct of the United Nations bodies during the Trusteeship excludes the possibility of any other supposed wrongdoing

497. Unlike the rehabilitation claim, the claims discussed in this Chapter were never made to the United Nations, notwithstanding that they cover supposed breaches during the Trusteeship period and they fell directly within the area of the Trusteeship Council's responsibility. They concern matters of such seriousness that it is scarcely conceivable that they would not have been drawn to the Council's attention, either by the Nauruans themselves or by Visiting Missions. In making these allegations, Nauru again fails to take account of the

extensive involvement of the United Nations in the administration of the Trusteeship system. As already noted, this involvement provided for full "securities for performance" by the Administering Authority of its obligations.

498. From its active scrutiny of Nauruan affairs, there was ample opportunity for the Trusteeship Council to assess the adequacy and reliability of the reports made by the Administering Authority to it. There was, however, never the slightest indication that the Trusteeship Council considered that the Administering Authority had failed to meet its obligations of report. Given this and the Council's conscientious pursuit of information concerning the Nauruan phosphate industry, it is virtually inconceivable that the Administering Authority breached any separate duty in relation to its accountability to the United Nations. Moreover, the record shows that Australia gave careful consideration to the Council's requests for information and either supplied the data sought, or explained why it could not do so. The outcome of the Council's scrutiny was invariably satisfaction with the Administering Authority's conduct.

499. It is equally difficult to imagine that, despite the safeguards of the Trusteeship system, the Administering Authority could have been permitted to contravene its basic obligations to promote the political, economic, social and educational advancement of the Nauruan population and to exercise its governmental authority in a manner appropriate to its obligations under the Trusteeship Agreement and the Charter. After all, throughout the Trusteeship, the Trusteeship Council, assisted by regular visiting missions, inquired into the government of the Territory, including the regulation of the phosphate industry and the distribution of phosphate revenue. (Part I, Chapter 3). The Trusteeship Council was well acquainted with the role of the BPC and with the system of public finance on Nauru. It well knew that Nauruans were not (at least after 1951) directly taxed, but that the BPC met the cost of the island's administration (cf Trusteeship Council Report, 1958-9, p.160, quoted in Part I, para.83).

500. In this area, as in others, the relationship between the Council and the Administering Authority was a co-operative one. Thus, when the Trusteeship Council recommended change, particularly in the early 1950s, the Administering Authority acted accordingly. For example, the capitation tax was abolished in 1951, in conformity with the Trusteeship Council's recommendations; and direct consultations between the BPC and the Nauruans on the questions of royalties were instituted at the Council's insistance. On the question of funding through the BPC's contributions, the Council accepted the

Administering Authority's assurance that the continuance of this system was in the Nauruans' best interests (Part I, paras.85-86).

501. The United Nations was well aware too of the cardinal importance of the phosphate industry. Visiting Missions regularly noted that the island's prosperity depended on phosphate revenue (Part I, para.345). The question of royalties was therefore scrutinised with particular care. Throughout the Trusteeship, Australia, on behalf of the Administering Authority, supplied information concerning the quantum of royalties and their distribution. The Council's requests for further information were substantially met by the Authority, either through the provision of additional data or the introduction of a consultative process to set royalty levels. When increases in royalty payments were made later in the Trusteeship, they were paid into the Nauruan Long Term Investment Fund, in accordance with United Nations wishes. In relation to royalty payments, there was not the slightest suggestion that the Administering Authority was acting other than in complete accordance with its obligations.

502. Notwithstanding the seriousness of Nauru's allegations, none can form the subject of judicial inquiry unless Nauru can show that the conduct of which it complains is not only attributable to Australia, but that it constitutes a breach of an international obligation owed to it. This it cannot do. Nauru does not show that Australia is guilty of any conduct which would constitute a breach of its international obligations.

503. The fact is that throughout the Trusteeship, the Trusteeship Council expressed its confidence in the Administering Authority and, in 1967, the Council concluded that "commendable progress has been made in the Territory" (United Nations, *Report of the Trusteeship Council, General Assembly Official Records, 22nd Session*, Suppl. No.4 (A/6704), Part II, para.30, Annex 28 to Preliminary Objections). At the close of the Trusteeship, it was apparent that the United Nations was well satisfied with the Administering Authority. The result of its administration was a well-educated, healthy and prosperous community.

504. The allegations which Nauru now makes are clearly inconsistent with the contemporary historical record. It is, therefore, not surprising that Nauru has been unable to substantiate the allegations considered in this Chapter by reference to the facts. In particular, it fails to show that the relevant obligations of result were not achieved, or that Australia failed to account properly to the United Nations. The United Nations, to which it was ultimately responsible, brought the Trusteeship Agreement to an end on the basis that the Authority had

fully performed its obligations under the Trusteeship Agreement. Nauru cannot invite the Court to second-guess the General Assembly on these matters, or to fail to give considerable weight to its opinion. The only questions in these proceedings are, therefore, whether Australia has a duty to rehabilitate and, if so, Australia has violated that duty. According to Australia, the answer to both questions is, of course, no.

PART III

THE REMEDIAL POSITION

INTRODUCTION

505. If, contrary to the submissions in Part II of this Counter-Memorial, the Court were to find Australia responsible for some breach of an international obligation relating to rehabilitation, the question would arise whether Australia was liable to make any reparation. This is an issue separate from the quantum of any damage, a matter which would need to be the subject of a separate phase of proceedings. But, as the Court has indicated (*ICJ Reports 1992*, p.262), the extent of any responsibility is a matter that arises at the merits phase if the Court finds a breach of international responsibility by Australia. It is for this reason that Australia considers it necessary to deal with the remedial position in this Counter-Memorial. It is, however, included only as a subsidiary matter and Australia considers, for the reasons given in the preceding Part, that no breach of international obligation by Australia can be established.

506. Nauru requests the Court to declare that by reason of Australia's international responsibility, Australia is "bound to make restitution, or other appropriate reparation to Nauru for the damage and prejudice suffered" (Application, p.30-1, para.50; NM, para.621). Australia does not accept any responsibility to rehabilitate worked-out phosphate lands, but even if the Court found against Australia on this point, restitution would clearly not be an appropriate remedy (*cf Forests of Central Rhodope (Merits)* case, 3 UNRIAA, p.1405; *Tito v Waddell (No.2)* [1977] 1 Ch.106, 328)[10]. Other aspects of the remedial position are examined in this Part. If Australia were found responsible, Nauru has disqualified itself from the relief which it seeks by reason of its own conduct (Chapter 1). Additionally, Australia's liability cannot extend to the Mandate period (Chapter 2, Section I). Nor can it extend beyond that proportion of the supposed injury which equity would hold Australia liable to bear, having regard to the co-equal responsibility of the United Kingdom and New Zealand (Chapter 2, Sections II and III) and the supervisory responsibility of the United Nations (Section IV). The question of Nauru's contributory negligence is also examined (Section V).

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[10] In the *Rhodope Forests* case, the tribunal found that Bulgaria had unlawfully confiscated forests belonging to Greek nationals. The arbitrator decided to award damages, rather than *restitutio in integrum* on the basis that it would be inappropriate to compel Bulgaria to restore the disputed forests because it was not likely that the forests were in the same state as they had been in 1918 and, in any event, only some of the dispossessed owners had made claims. The value of the forests was calculated as at the date of dispossession. See 3 UNRIAA, at pp.1432, 1435. In *Tito v Waddell (No.2)*, the Court held that an order for the replanting of part only of the mined-out phosphate lands on Ocean Island would be futile and "a sheer waste of time and money", and that an order for general replanting would be "wholly disproportionate to the meagre and long-delayed benefit that might in the end be achieved". See [1977] 1 Ch 106, at no 327-7 and 328.

CHAPTER 1

NAURU HAS DISQUALIFIED ITSELF FROM THE RELIEF IT SEEKS

507. In its decision on Australia's Preliminary Objections, the Court did not decide "the possible consequences of the conduct of Nauru with respect to the merits of the case" (*ICJ Reports 1992*, p.255, para.38). Australia contends that by reason of that conduct, Nauru cannot now receive the relief which it seeks.

508. At the 1323rd meeting of the Trusteeship Council on 22 November 1967, Chief Hammer DeRoburt declared that:

> "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..." (United Nations, *Trusteeship Council Official Records, 13th Special Session*, T/SR.1323, reproduced in Annex 29, NM)

By independence in January 1968, Nauru had thus clearly admitted responsibility for the phosphate lands mined after 1 July 1967. It has never since alleged that the former Administering Authority has any responsibility in that regard.

509. The admission is significant for two reasons. First, Nauru concedes, as it must, that it continues to carry on phosphate mining without post-mining rehabilitation just as the Administering Authority allegedly did prior to 1 July 1967. Indeed, according to Nauru, it has mined twice the area in twenty-five years as BPC mined in seventy-two years. According to Nauru, about one-third of the 1700 hectares of phosphate lands on Nauru was mined prior to 1 July 1967. Its mining program has covered the rest (NM, para.207). Secondly, on the matter of rehabilitation Nauru assumes that its responsibility is the same as the supposed duty of the Administering Authority, in this way conceding that that duty is no higher than its own.

510. Despite the greater area mined, however, Nauru has not at any time during the past twenty-five years begun to rehabilitate any mined-out land. At most, it has reviewed the matter and has, it says, kept money aside in the event that some program should become feasible. The Administering Authority did no

less. Given this, it might be thought that that Authority had, relatively speaking, accomplished rather more than Nauru has in the past twenty-five years.

511. As Part I has shown, rehabilitation was a matter for active consideration by the Administering Authority both before and after the failure of negotiations for resettlement in August 1964. It will be recalled that, in conformity with the United Nations' own views, the Administering Authority had until then regarded resettlement rather than rehabilitation as the best option for the Nauruan population. In the few years between 1964 and independence in January 1968, the Australian Government first sought and obtained the report of experts on the matter, the Davey Committee Report (paras.155 to 165 above). This report was later commended as "a particularly excellent and far sighted study" by the 1987 Commission of Inquiry (p.1132; see paras.11 to 13 above and paras.514 to 515 below). The Commission added that:

> "Many of the observations and recommendations are as valid today as they were in 1965."

512. Given the state of contemporary knowledge, it would have been foolhardy for the Australian Government (on behalf of the Administering Authority) to have sought to formulate and complete a rehabilitation program between the end of 1966 - following receipt of the report - and independence in January 1968. This was particularly so given the findings of the report (paras.157 to 165 above). The only course then open to the Administering Authority was to leave Nauru with funds sufficient for the task if it chose to undertake it. This was in fact the course adopted by the Authority (Part I, Chapter 5 and Part II, Chapter 2, Sections VII and VIII), and Nauru concedes that today it has such funds (para.7 above).

513. On its own account, however, Nauru has not since independence applied these funds to carrying out rehabilitation. It says that it has accumulated moneys in a public Trust Fund specifically marked for rehabilitation. That Fund was created before independence and has been augmented by the income generated by the phosphate industry which was transferred to Nauru by the three Partner Governments as part of the pre-independence arrangements.

514. Although Nauru says that "from the time of independence" it has undertaken some "preliminary planning", no details of this appear. It says that it has saved the topsoil displaced during mining, but in 1968, as now, it was plain that rehabilitation would involve much more than this. Indeed, it took Nauru some twenty years to appoint another investigatory body - in this case, a

Commission of Inquiry - to review the question of rehabilitation. That Commission presented its report to the Nauruan Government only recently, in November 1988.

515. The Commission observed:

> "For rehabilitation on Nauru to be cost-effective and to ensure that the Republic of Nauru and the Nauruan community as a whole gain most benefit in the future development and usage of the rehabilitated land, it is essential the rehabilitation be designed, scheduled and carried out in accord with the requirements of a Master Land-Use Plan the objective of which is the development of the whole of the mined phosphate lands of Nauru." (p.1141)

Such a Plan has not been established.

It also stated that:

> "Rehabilitation will be a long-term process. It will probably extend over a period of 20 years or more. Careful consideration must be given to decide what the land is to be used for, which land uses have the highest priority and on which areas of Nauru those land uses should be developed." (p.1140)

516. Nauru now claims to have begun a pilot project designed by a member of the Commission (Nauru's Written Statement on Preliminary Objections, para.59), but this is too little too late to show any serious commitment by Nauru to rehabilitation now or during the intervening years. As the Commission emphasized:

> "The apparent lack of motivation among the great majority of the Nauruans for personal involvement and participation is seen, by the Commission, as being the single most significant, likely impediment to the development of the Republic of Nauru in general and the successful rehabilitation of the mined-out lands in particular." (p.1037)

517. In sum, since independence, Nauru has continued to mine just as the BPC did before it. Post-independence mining has not been accompanied by, or made conditional on, a practicable rehabilitation program. The Administering Authority cannot have been under a higher duty in respect of rehabilitation than the beneficiary. Nor can the Authority have been bound to observe a higher

standard of conduct than the beneficiary. Nauru does not attempt to argue so. It must follow either that Australia was under no such duty as that alleged, or if there was a duty to rehabilitate after phosphate mining, Nauru too has been guilty of its breach. But it scarcely seems reasonable to suppose that for twenty-five years Nauru has been acting unlawfully in respect of its own territory.

518. Of course, if it were found that both Nauru and Australia had acted contrary to international law by failing to rehabilitate worked out phosphate lands, Nauru would be unable to press its claim because of the doctrine of unclean hands. Nauru itself concedes that the doctrine covers "conduct on the part of the claimant which is contrary to public international law" (Nauru's written Statement on Preliminary Objections, para.418). But the operation of the doctrine cannot depend on an actual finding that the claimant acted illegally. Nauru's hands are not the cleaner if it is guilty of the same (supposedly wrongful) conduct as Australia. The doctrine of clean hands requires that a claimant's own conduct be consistent with its claim. This is a specific principle forming part of the more general principle of good faith which is applicable in international as in other legal systems: see, for instance, A Miaja de la Muela, "Le rôle de la condition des mains propres de la personne lésée dans les réclamations devant les tribunaux internationaux," *Mélanges Andrassy* (1968) pp.189-213.

CHAPTER 2

AUSTRALIA , IF RESPONSIBLE, CANNOT BE LIABLE ON THE FACTS FOR THE WHOLE OF THE DAMAGE CLAIMED

Section I: No damages are recoverable in respect of the pre-1947 period

519. If Nauru were not disqualified from relief for the reasons set out in the preceding Chapter, it still would not be entitled to compensation for all the loss it claims, even if Australia were found responsible as Nauru alleges. Nauru seeks to impose on Australia responsibility for damage to Nauruan phosphate lands caused by phosphate mining before, as well as during the Trusteeship period (Application, p.30-1, para.50; NM, para.621). But Australia cannot be found liable in this case for damage caused prior to 1947, for the claim made by Nauru is that there has been a breach of a duty (to rehabilitate) which arose under the 1947 Trusteeship Agreement and the Charter, not under the pre-1947 Mandate (see paras.240 to 242 above).

520. It needs to be remembered that in the period prior to the Mandate approximately 630,000 tons of phosphate were shipped (N Viviani, *Nauru* (1970) 35; cf NM, para.289). In the period 1922 to 1941 8,254,990 tons were shipped. In the period 1947 to 1966, 23,347,636 tons were exported (Viviani, *op cit* 186-7). Hence the pre-trusteeship period mining represents roughly 25 percent of the total phosphate mined prior to independence. Australia considers that Nauru has no possible legal claim in relation to the period prior to 1947. Yet Nauru fails completely to make a distinction between the two periods and talks in general terms of all phosphate lands mined prior to 1 July 1967. Mining in the pre-1947 period cannot be in the same position as that post-1947. The Nauruan claim is one for rehabilitation under the Trusteeship. On this basis the surface area mined during that period, and not the actual tonnages, are relevant. Nauru alleges that one third of the island was mined prior to independence. It does not say how much of that was mined prior to 1947, or between 1947 and 1967. Yet that is critical information. Australia only has information on tonnages and has been unable itself to identify the relevant areas mined at the different times.

521. If the Nauruan claim is read as a claim for rehabilitation of land mined during the Trusteeship (as indeed it must), the deficiencies in Nauru's case become plainer still. Nauru, for example, asserts that one-third of the phosphate lands had been mined by the BPC prior to independence (see NM para.207; but

compare NM, para.289: "one third of the surface of the island"); but it is silent on the relevant matter - the proportion of land mined during the Trusteeship period. Evidently, Nauru has sought to develop a case against Australia based on highly prejudicial generalities, but few, if any, relate to the claim which is in fact before the Court.

522. This is not to say that the Trusteeship Agreement did, or was intended to, wipe the historical slate clean in Nauru. It came into force with Nauruan political, social and economic institutions still in place. Thus, the character of the Nauruan Trusteeship must, to some extent at least, depend on the circumstances in the Territory when the Trusteeship came into being. For this reason, it is not said in this Counter-Memorial that a matter is irrelevant to an assessment of the Nauruan claim simply because it has its origins in the Mandate. For example, any consideration of the relationship between the Trusteeship Agreement and the Nauru Island Agreement of 1919 must bear in mind that the 1919 Agreement was valid at international law and binding upon the parties to it in 1947 when the Trusteeship Agreement was approved by the United Nations General Assembly; and indeed its continued application was confirmed by Article 4 of the Trusteeship Agreement (see Part II, Chapter 1, Section IV). There was no suggestion that the approval by the General Assembly of the Trusteeship Agreement brought an end to the 1919 Agreement. Nauru fails to have regard to this circumstance in propounding the view that the 1919 Agreement was in some sense inconsistent with the discharge by Australia of its trusteeship obligations. But the continued relevance of the 1919 Agreement during the Trusteeship or the continuation of particular arrangements in relation to the phosphate industry that had existed under the Mandate does not entitle Nauru to claim damages arising from alleged breaches of the Trusteeship for acts carried out in the period prior to the Trusteeship.

523. The Mandate and the Trusteeship gave rise to different rights and obligations (*cf* Judgment of 26 June 1992, *ICJ Reports 1992*, p.256, para.41). After all, the United Nations granted the Mandate to "His Britannic Majesty", whilst the Trusteeship Agreement appointed a joint Administering Authority constituted by Australia, New Zealand and the United Kingdom. The conduct of the Mandatory Powers is simply not in issue in this case. Accordingly, the question of responsibility for damage prior to 1947 does not arise.

Section II: Australia would not be liable for the whole of the damages claimed for the Trusteeship period

524. At the Preliminary Objections stage, Australia argued that because its liability, if any, was collective with the United Kingdom and New Zealand, Nauru's claim could only be brought against all three States, not Australia alone. But in its judgment on Australia's Preliminary Objections, the Court held that the claim was not, for this reason, "inadmissible in *limine litis*" (*ICJ Reports 1992*, pp.258-9, para.48). At the same time, it specifically reserved for the merits the question whether, if found responsible, Australia would be liable for the whole, or part only of the damage (*ICJ Reports 1992*, p.262; *also* pp.286, 290 (Judge Shahabuddeen)).

525. There is, as the Court acknowledges, a clear distinction between responsibility *stricto sensu* and the consequences of violation. Even if it were held responsible, the consequences for Australia would not be the same as if it had acted alone, rather than, as was the case, in conjunction with the United Kingdom and New Zealand under United Nations supervision. The facts cannot be ignored in this fashion. Australia cannot be required to meet the totality of the damage, because it acted at all times in conjunction with the United Kingdom and New Zealand and responsibility under the Trusteeship Agreement was joint, or equal and collective. Alternatively, Australia acted not only for itself, but as agent for the United Kingdom and New Zealand as well (*cf ICJ Reports 1992*, p.280 (Judge Shahabuddeen)). However characterized, if there has been any failure, it was a failure in which all three States participated. Australia cannot, in accordance with accepted principles of international law, be required to meet the alleged damage which is due to the other two States, and to the United Nations. The legal bases for this contention are discussed below (Part III, Chapter 3).

A: THE UNITED KINGDOM AND NEW ZEALAND SHARED EQUAL RESPONSIBILITY WITH AUSTRALIA IN FACT

526. It cannot be correct to say, as Nauru has done, that New Zealand and the United Kingdom "never had actual legal or administrative responsibility over Nauru" (CR 91/22, p.45; CR 91/20, p.76). For this is entirely inconsistent with the fact that the United Nations had charged the *joint* authority with *legal* responsibility for the administration of Nauru, under its supervision. The three States had such responsibility jointly, whether they chose to exercise it directly, or for convenience, to delegate its performance to one amongst them.

527. Whatever Australia's special role, it could not alter the fundamentals of the legal arrangements required by the Charter and the Trusteeship Agreement (*cf ICJ Reports 1992*, p.326 (Judge Ago)). According to these, Australia at all times acted on behalf of the Administering Authority, i.e., on behalf of the United Kingdom, New Zealand and itself. It was this arrangement which was sanctioned by the United Nations (*cf ICJ Reports 1992*, p.340 (Judge Schwebel)).

528. Again, it cannot be correct to say, as Nauru has done, that the United Kingdom and New Zealand could not have retracted the authority delegated by them to Australia. Article 4 of the Trusteeship Agreement did not (indeed, could not) deprive either State of this residual power, particularly in the event that Australia failed to fulfil its obligations to them, including its duty to administer the Territory in accordance with the Trusteeship Agreement. If this were not so, it would have been virtually impossible for the United Kingdom and New Zealand to have discharged their trusteeship undertakings in good faith. Certainly, Article 4 sought to ensure that no one of the three States could unilaterally alter the agreed arrangements, but this only emphasized the joint character of their responsibility. For, whatever the arrangements between them, so far as the United Nations was concerned the three States were equally responsible in accordance with their undertakings, and as joint members of the Administering Authority.

529. Nor is it true to say that the United Kingdom and New Zealand could not have challenged Australia's administration (CR 91/20, p.75). The United Kingdom and New Zealand each had a juridical interest in Australia's performance (on their behalf) of the obligations of trusteeship; and either State could have taken steps to remedy a failure in the Australian administration, particularly if it involved a breach of the obligations which bound all three. Either State might have complained to Australia if it had been dissatisfied with the Australian administration; and had Australia disregarded its complaints, it might have indicated its concern to the United Nations to which it was ultimately responsible. Such a competence was inherent in the establishment of the joint Administering Authority under the authority of the United Nations; and it did not need to be specifically expressed.

B: WHATEVER AUSTRALIA'S ROLE ON NAURU, AUSTRALIA ACTED NOT ONLY FOR ITSELF BUT FOR THE UNITED KINGDOM AND NEW ZEALAND

530. That Australia acted in a representative capacity throughout the Trusteeship is confirmed by the Agreement to which Article 4 referred. The 1919-1923 Agreement bound each of the three States. It recorded their arrangements for the appointment of an Administrator, in the first instance by Australia and thereafter "in such manner as the three Governments decide" (Art.1). Australia continued to appoint Administrators only because the three Governments so decided. Pursuant to Article 3 of the supplementary Agreement of 1923, however, the other two States were entitled to require information regarding the Territory's administration from the Administrator, though not appointed by them. Subject to the changes effected by the 1965 Agreement, the arrangements made under the 1919-1923 Agreement remained on foot until shortly before Nauruan independence (para.56 above).

531. The fact is that Nauru falsely diminishes the roles of the other two States (CR 91/20, pp.80-1). There was a consistent pattern of consultation, discussion and negotiation between the three Governments in relation to all significant political, economic and social developments on Nauru; and the practice of the three States confirms that Australia acted in a representative capacity throughout the Trusteeship. Thus, Australia appointed an Administrator only after consultation with the United Kingdom and New Zealand (Part I, para.61). There were also tripartite consultations on other significant matters. As paragraph 68 shows, each of the Governments actively participated in the negotiation and conclusion of the Agreement of 26 November 1965 (which led to greater political autonomy for Nauru) and the Agreement of 14 November 1967 (which transferred ownership of the phosphate industry to Nauru).

532. All three Governments were active in the development of proposals for resettlement and committed themselves jointly to facilitating this. As already noted, it was the failure of the proposals for resettlement which led to consideration of the question of rehabilitation.

533. The arrangements for Nauruan independence, including the transfer of ownership of the phosphate industry, were the result of lengthy consultations amongst the three Governments. At every stage from resettlement to the ultimate phosphate agreement this led to sets of joint proposals. These formed the basis of later negotiations with Nauruan representatives. The record shows that in pre-

independence discussions with Nauru, Australia did not make any proposal to the Nauruans which had not first been considered and agreed by the other two Governments (see Australia's Preliminary Objections, paras.334-337). If Australia acted as chief spokesman, it so acted only at the behest of the United Kingdom and New Zealand.

C: NO ONE PARTNER GOVERNMENT COULD MAKE UNILATERAL DECISIONS OF MAJOR IMPORTANCE TO THE TERRITORY

534. The joint involvement of the United Kingdom and New Zealand in cardinal decisions is consistent with the incapacity of any one of the three States to perform the major responsibilities of the joint Authority by itself. Each was dependent on the other. For example, Australia could not have agreed to Nauruan independence absent the consent of the other two States. Their consent would have been required by the United Nations (*cf ICJ Reports 1992*, p.280 (Judge Shahabuddeen)). This was, of course, clearly appreciated by the three Governments. A consensus was required amongst all three States. More particularly, Australia could not have agreed to commit the Administering Authority, or the BPC, to the cost of rehabilitating the land worked out by the BPC without the consent of the United Kingdom and New Zealand. The very magnitude of any such program would have called for the agreement of the other members of the joint Authority. In a practical sense, no rehabilitation program could have been carried out successfully without the co-operation of the BPC, its three Commissioners and hence of all three Governments. It is not, therefore, surprising that in pre-independence discussions, Nauru sought the assent of the three Governments to undertake the task, or bear the cost of rehabilitation (para.219).

535. Further, had Australia sought unilaterally to commit the BPC to a rehabilitation program, it would have breached Article 13 of the 1919-1923 Agreement, preventing any unilateral interference by any Government in the management and control of the business of working the phosphate deposits. Referring to this provision in *Tito v Waddell (No 2)* Megarry V-C observed:

> "This article established the independence of the British Phosphate Commissioners as against any one or two of the three governments, though not, of course, against all three acting in concert." ([1977] 1 Ch.106, at p.152)

536. Plainly, the purpose of the provision was to prevent the unilateral interference by any of the three Governments in the business of the BPC - the

working, shipping and selling of phosphates. Control of the business was to be left to the Commissioners, who alone represented the three Governments in relation to this joint commercial venture. The provision was designed to strengthen the BPC's independence and thereby enhance its position as a commercial venture. Thus, it was intended to restrain Australia, just as much as the United Kingdom and New Zealand. This was so, notwithstanding that in relation to governmental matters Australia administered the Territory not only for itself but also for the other two Governments. In keeping with this, the Administrator's powers were expressed to be "subject to the terms of this Agreement" (1919 Agreement, Art. 1). Had the parties intended the Trusteeship Agreement to alter this arrangement, they would presumably have said so expressly. Instead, they apparently affirmed it.

537. Further, the arrangement was not inconsistent with the Trusteeship, for the function of the Administering Authority was a public one which did not involve the internal management of a business operation. Article 13 of the 1919 Agreement left the Administering Authority free to regulate the governmental, or public, aspects of the phosphate industry which were its proper concern. But if there was any failure in this regard, it was the failure of all three States. For under Article 4 of the Trusteeship Agreement and in practice, Australia acted, or failed to act, on behalf of the joint Authority.

D: THE PHOSPHATE INDUSTRY WAS OWNED BY ALL THREE STATES

538. In addition to the administrative regime established under the Trusteeship, the tripartite character of the ownership of the Nauruan phosphate industry provides yet another strong reason why Australia should not be required to meet more than a proportionate share of the damage. The 1919 Agreement established the BPC as a tripartite body with joint or collective responsibility for running the Nauruan phosphate business, the ownership of which enured to the three Governments. The Agreement vested ownership of the industry in three Commissioners, each of which was appointed by one of the three Governments (Art.2). Each Commissioner held office "during the pleasure of the Government" which appointed him (Art.4). The three Governments agreed that title to the phosphate deposits, and to the undertaking generally should vest in the Commissioners as their representatives (Art.6). Phosphate deposits were not to be sold for the purposes of the Commissioners, but "for the purpose of the agricultural requirements" of each of the three Governments "so far as those requirements extend" (Art.9). Phosphate was not to be supplied

elsewhere without "the unanimous consent" of the Commissioners (Art.10).

539. The Commissioners were co-equal; and each had the same rights and obligations. There was no question of predominance. Further, Nauru concedes that through their representatives, the three Governments had equal authority in relation to the management and control of the phosphate industry (CR 91/20, p.81). This position is confirmed by the agreement reached with the Nauruans in November 1967, pursuant to which the three Governments agreed to sell the assets and undertaking of the phosphate industry to a Nauruan enterprise.

540. Any failure, if failure there was, to rehabilitate was that of the BPC which was the joint enterprise of the three Governments. As a matter of equity, responsibility for such a failure must therefore be shared amongst the three States at whose instance the three Commissioners acted. Moreover, it should be noted that under the 1919 Agreement each State sought the same benefit - phosphate for its national agriculture. It would be quite inequitable to hold Australia liable by itself to bear the entire burden of reparation.

541. Given this, Nauru's contention (that BPC's tripartite character is not relevant because the Commissioners were not parties to the Trusteeship Agreement, CR 91/20, pp.81-3) misses the point. The fact is that the Commissioners were appointed by and acted for the three States concerned. The Trusteeship Agreement specifically mentioned and approved the continued operation of the instrument to which they owed their existence and which controlled their operations (Art.4). Through the BPC, the three States together enjoyed the real beneficial ownership and enjoyment of the phosphate industry. Given all this and that any failure to rehabilitate was that of the BPC, it would be inequitable to hold Australia liable, more than two decades later, to bear the totality of the damage.

542. Nauru says that Australia should not have permitted the BPC to mine on the basis that it did (*cf* CR 91/20, p.83). But the phosphate industry was subject to the provisions of the 1919 Agreement between the three Partner Governments. Australia could not unilaterally make decisions in relation to the industry. The active involvement in the phosphate industry of the United Kingdom and New Zealand (through their respective Commissioners) is clearly relevant to any liability to pay compensation. If, as Nauru says, Australia's involvement through the BPC in the phosphate industry is relevant, then so too must be the involvement of the United Kingdom and New Zealand.

E: ANY LIABILITY UNDER THE TRUSTEESHIP AGREEMENT IS EQUAL AND COLLECTIVE WITH THE UNITED KINGDOM AND NEW ZEALAND

543. The obligations of the three States under the 1947 Trusteeship Agreement were joint; and hence their liability for breach, if any, would be equal and collective. This flows from the terms of the Charter and the Trusteeship Agreement; and could not be altered by extrinsic facts (*cf ICJ Reports 1992*, p.274 (Judge Shahabuddeen)).

544. Article 81 of the Charter provides that an Administering Authority for a trusteeship territory "may be one or more States, or the Organisation itself". In conformity with this, Article 2 of the Trusteeship Agreement designated the authority which was to exercise the administration of Nauru as follows:

> "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." (Emphasis added).

545. The establishment of a *joint* Administering Authority for Nauru meant that there was a joint, or collective, responsibility for the performance of the obligations of the Administering Authority under the Trusteeship Agreement (*cf* H Lauterpacht, *Oppenheim's International Law* (London, 7th ed), Vol 1, p.208; H Kelsen, *The Law of the United Nations* (London, 1951), pp.601-9; Goodrich and Hambro, *Charter of the United Nations* (London, 1949), p.440; Nicolas Veicopoulous, *Traité des territoires dépendants* (Paris, 1960), Vol.1, p.144; Charles Rousseau, *Droit international public*, Vol.II (1977), p.404). Authority was conferred on the three States on the "basis of complete legal equality" (*cf ICJ Reports 1992*, p.326 (Judge Ago)).

546. Other provisions in the Trusteeship Agreement confirm that this responsibility was equal and collective. Thus, it was the *joint* Administering Authority which gave each of the undertakings mentioned in Articles 3, 5 and 6 of the Trusteeship Agreement, including undertakings to administer the Territory in accordance with Article 76 of the Charter; to co-operate with the Trusteeship Council; and to promote "the economic, social, educational and cultural advancement of the inhabitants". These undertakings were necessarily given jointly, as the Authority itself was joint. Thus, any breach of the Trusteeship Agreement, including these undertakings, would involve equal and

collective liability for Australia, New Zealand and the United Kingdom. In particular, if found responsible for breach of a duty to rehabilitate, Australia's liability would be equal and collective with the other two States. Australia could not, consistently with this, be liable for more than one third of the damage. Further, any such liability must be further reduced to take account of the acts and omissions of the United Nations, and also of Nauru. See Chapter 3 below.

547. Neither Article 4 of the Trusteeship Agreement nor the administrative arrangements made under it point to a contrary conclusion. For pursuant to that Article, the joint Administering Authority - Australia, New Zealand and the United Kingdom - accepted responsibility (jointly) for the "peace, order, good government and defence" of the Territory. It was on this basis that the United Nations approved the Trusteeship Agreement; and it was for this stated purpose that it was agreed by the three Governments that Australia would exercise legislative, administrative and jurisdictional power in the Territory "on behalf of the Administering Authority and except and until otherwise agreed" by the three Governments (Art.4). It is, as Judge Shahabuddeen noted, "difficult, therefore, to resist Australia's argument that, however extensive was its administrative authority over Nauru, that authority fell to be regarded in law as having been exercised by it on behalf of all three Governments" (*ICJ Reports 1992*, p.378).

Section III: The international community and Nauru regarded the three States as equally responsible for the territory

548. The international community of the day regarded the legal regime established by the 1947 Trusteeship Agreement as reflecting practical as well as legal reality. At the time of the Trusteeship, the international community held each of the three States equally responsible for the Territory. Thus, when the General Assembly or the Trusteeship Council made recommendations concerning Nauru, both addressed themselves to the *joint* Administering Authority, not to Australia alone. For example, in two most important resolutions - Trusteeship Council resolution 2149 (S-XIII) and General Assembly resolution 2347 (XXII) - the Trusteeship Council and the General Assembly resolved "in agreement with the Administering Authority" that the Nauruan Trusteeship Agreement should be brought to an end. There was no discrimination between the three constituents of that joint Authority.

549. The Trusteeship Council - charged by the Charter and the General Assembly with particular responsibility for supervision of the Territory's administration - clearly regarded the three States as responsible. For example, in

its 1949 Report the Council wrote:

> "The Council, recalling that although in accordance with article 4 of the Trusteeship Agreement the Government of Australia is entrusted with the administration of the Trust Territory, the Governments of the United Kingdom and New Zealand are also accountable to the United Nations under the terms of the Trusteeship Agreement, recommends that these Governments take such steps as may be appropriate to assist the Government of Australia in carrying out the recommendations of the Council." (United Nations, *Report of the Trusteeship Council, General Assembly Official Records, 4th Session*, Suppl. No.4 (A/933), p.76.)

550. The 1956 Trusteeship Council Report also recognized that:

> "Nauru is unique also in having more than one State as the Joint Administering Authority and in the special economic interest which the three Governments have in the Territory and which they exercise through the British Phosphate Commissioners designated by them." (United Nations, *Report of the Trusteeship Council, General Assembly Official Records, 11th Session*, Suppl. No.4 (A/3170), p.323.)

551. At the international level each of the three States held itself out as responsible for Nauru. Each took an active part in United Nations discussions concerning the Territory, particularly in the Fourth Committee and the Trusteeship Council (see eg Part I, Chapter 4). Indeed, New Zealand retained Trusteeship Council membership (until 1968) only on account of its part in the joint Authority for Nauru (Charter, Art.86(1)(a)).

552. Consistently with this, the Nauruans themselves have also claimed that the responsibility to rehabilitate was shared jointly by all three Governments. On 26 November 1967, Head Chief DeRoburt explained that:

> "[I]t was ... their contention that the three Governments should bear responsibility for the rehabilitation of land mined prior to 1 July 1987". (United Nations, *Trusteeship Council Official Records, 13th Special Session*, Doc.T/SR.1323; reproduced in Annex 29 to Preliminary Objections; *cf* Head Chief's Speech in *Trusteeship Council Official Records, 33rd Session*, Doc.T/SR,1285, p.91, set out in NM, para.186).

553. The Nauruan representatives adopted the same approach during the 1966-1967 discussions with the three Governments on independence and rehabilitation. Even more recently, in its notes of 20 May 1989 to the United Kingdom and New Zealand, Nauru maintained that both States "in the capacity as one of the three States involved in and party to the Mandate and Trusteeship over Nauru, was also responsible for the breaches of those Agreements and of general international law referred to in that Note" (Annex 80, Nos.29 and 30, Vol.4, NM). It was not until these proceedings that Nauru alleged that Australia should bear responsibility alone and meet the entire burden of any compensation by itself.

CHAPTER 3

THE LEGAL CONSEQUENCES OF SHARED RESPONSIBILITY

Section I: Equity would take account of the roles of the United Kingdom, New Zealand and the United Nations in deciding Australia's liability

554. In deciding questions of reparation, the Court has of course a large measure of discretion. The "jus aequum" always governs, however, in determining liability for damages. Thus, any liability which Australia might have incurred as a result of the supposed failure to rehabilitate would necessarily reflect the fact that the United Kingdom and New Zealand, as well as the United Nations, also contributed to the supposed injury. In these circumstances, Australia's liability, if any, would not be greater than its proportionate share of the damage (*cf* G Schwarzenberger, *International Law*, Vol.1 (3rd ed, 1957) p.669).

555. The Court has acknowledged the equitable and fact-dependent character of decisions regarding compensation. In the *Corfu Channel* case (*ICJ Reports 1949*, p.249) for example, the Court sought to make a fair and reasonable compensation, having regard to all the circumstances. International arbitral tribunals have adopted much the same approach. For example, in *Kuwait v Aminoil* ((1982) 66 ILR 519, at 581) the arbitral tribunal observed:

> "It is well known that any estimate in money terms of amounts intended to express the value of an asset, of an undertaking, of a contract, or of services rendered, must take equitable principles into account."

This applies with equal force to any estimate of the injury alleged in this case.

556. The tribunal's decision in *The Zaffiro* ((1925) 6 UNIRAA 160) shows the operation of equitable principles in circumstances such as these where there have been other participants besides the defendant State. The British-United States Arbitral Tribunal held the United States liable for the looting and destruction of the property of certain British nationals in Manila. This had been caused by the Chinese crew members of the Zaffiro, a US public vessel. The Tribunal found that they had been allowed ashore without effective control (6 UNIRAA, at 164-5). But besides the Zaffiro's crew, it was also shown that a number of other persons had participated in the looting. As a result, the

Tribunal, confirming the equitable and evidentiary character of its award, decided that:

> "In view, however, of our finding that a considerable, though unascertainable, part of the damage is not chargeable to the Chinese crew of the Zaffiro, we hold that interest on the claims should not be allowed" (at p165).

557. Since the arbitration was conducted twenty-seven years after the damage was caused, the interest was a substantial proportion of the amount claimed. In effect, the Tribunal did not require the United States to compensate for the totality of the damage because it would have been inequitable to have required it to do so.

558. Other arbitral decisions in which the defendant State was held liable only for a proportionate share of the loss, on account of other contributing factors, or because of other participants include *Yuille Shortridge and Co* (*Great Britain v Portugal*, 1861), *Lapradelle and Politis*, ii, 78; *Lacaze* (*France v Argentina*, 1864), *Lapradelle v Politis*, ii, 290; *British Claims in Spanish Morocco* (1925) 2 UNRIAA 615; and the *Martini* case (*Italy v Venezuela*) (1930) 2 UNRIAA 975. In *British Claims in Spanish Morocco*, Arbitrator Huber held Spain liable for only 25% of the injury in some areas, and 50% in others, depending on the extent to which injury resulted from other causes. In the *Martini* case, the Tribunal ordered Venezuela to pay only one third of the damage, holding that the rest had been caused by war.

559. One noted author has written that:

> "In the Venable Claim (1927), the Mexican United States General Claims Commission relied primarily on the *Lacaze* case (1864), between the Argentine and France for its finding that only the immediate and direct results of an illegal act are to be regarded as losses for purposes of reparation (4 RIAA, p.219, at p.225). In this Award, ... the proposition that losses should be limited to those which are the '*immediate* and direct consequence' of the illegal act is justified on grounds of reasonableness and equity (2 La Pradelle-Politis, p.290, at p.298). Similarly, in the *Portugo-German* Arbitration (1928), the Tribunal based its conclusion that a tortfeasor is responsible for intended damage irrespective of its direct or indirect character entirely on grounds of equity (2 RIAA, p.1011, at p.1031)." (Schwarzenberger, p.669, fn.89.)

Although it has not always been easy to assess the exact proportion to be borne by the defendant State, no tribunal has yet given up the task on account of its difficulty (*cf Metzger's case* (*Germany v Venezuela*) (1903) 10 UNRIAA 417.)

560. It would, therefore, be contrary to international practice to disregard the involvement of the United Kingdom and New Zealand, and of the United Nations (discussed below) in deciding the question of Australia's liability in this case. It would be quite inequitable to hold Australia liable for the totality of the damage to which the United Kingdom, New Zealand and the United Nations have clearly contributed. Practically speaking, it is, of course, virtually impossible to link specific items of damage to the acts of one Government (or Organisation) rather than another. However, bearing in mind the equal responsibility of the other two States for the Trust Territory and their respective shares in the phosphate industry, Australia contends that it would not be appropriate to require Australia to bear more than a proportionate share of the supposed injury said to have arisen from mining during the Trusteeship period; and any such liability should be further diminished to take account of the role of the United Nations (and also of Nauru). See Sections IV and V.

561. This approach is consistent with the preparatory work for the International Law Commission's draft Articles on State responsibility which has referred to a need for proportionality between any breach and its legal consequences (e.g., Special Rapporteur's Preliminary Reports, [1980] YBILC, Vol 2, Pt.1, p.127-8 (UN Doc.A/CN.4/330); [1981] YBILC, Vol 2, Pt.1, p.100 (UNDoc.A/CN.4/344)). The possibility that the conduct of other States might affect an award for damages has also been mentioned in preparatory work (eg, [1981] YBILC, Vol.II, Pt 1, UN Doc.A/CN.4/344, p.93, para.108, fn.69). Whilst the Commission has not completed its deliberations on the subject, it would apparently acknowledge that a principle of equity and reasonableness applies (*cf* Draft Report of the ILC at its 42nd Session, 13 July 1990, UN Doc.A/CN.4/L/450, pp.17, 29-31). The ILC's Drafting Committee has, moreover, also proposed the inclusion of a specific provision requiring that account be taken of the claimant's "negligence or ... wilful act or omission" (Article 6.2 bis of draft Articles on State responsibility: titles and texts of articles adopted by the Drafting Committee, at the ILC's 44th Session, 15 July 1992 (UN Doc.A/CN.4/L.472)).

Section II: There must be equitable apportionment in the absence of effective rights of contribution

562. Domestic systems acknowledge that situations involving collective responsibility give rise to the problem of apportioning liability. Each system apparently seeks to resolve the problem fairly. It is highly unlikely that any legal system would tolerate the possibility that a claimant might recover multiple awards in respect of the same damage from different defendants, with the result that the claimant received more than the damage actually suffered. It is improbable that international law would differ in this respect.

563. The means by which liability is distributed in situations of this kind varies from legal system to legal system. A domestic system can offer little useful guidance in this context. Each such system deals with the matter according to its own social, economic and legal history. As well there are many relevant structural differences between domestic and international systems (*cf Nicaragua* case, *ICJ Reports 1984*, pp.392, 431).

564. For example, in the courts of common law States, if an applicant brings an action for damages in contract or tort against one co-contractor or co-tortfeasor, the respondent may elect to join (compulsorily) the other co-contractors or co-tortfeasors so as to recover contribution from them in respect of any award of damages. A just apportionment can thus be made. Common law judges have recognized that this right has become the corollary of the common law regime of joint and several liability, pursuant to which one person alone can be required to meet a liability which has also been incurred by others. In those circumstances in which the common law regards a regime of joint and several liability as appropriate, justice is completed by the ready availability of an enforceable right of contribution. As Lord Templeman observed in *J H Rayner Ltd v Department of Trade* [1990] 2 AC 418, at p.480:

> "An international or a domestic law which imposed and enforced joint and several liability on ... sovereign states without imposing and enforcing contribution between those states would be devoid of logic and justice."

565. International law cannot enforce contribution, because international adjudication is fundamentally consensual. Were a regime of joint and several liability to apply in a situation of collective State responsibility, a defendant State would not be able to exercise an enforceable right to contribution against

those of its co-wrongdoers which did not consent to the Court's jurisdiction. Joint and several liability at international law would carry with it the consequence that one State (here, Australia) could well be required to bear the totality of the damage brought about by a number of States. Such a result cannot be regarded as conducive to the peaceful settlement of disputes by judicial or other friendly means.

566. Nauru would defy the very logic of international law and invite the Court to adopt a regime which works equitably in domestic common law systems, but would not do so at international law. International law calls for a different way of dealing with the problem of apportioning liability in a situation of collective responsibility. Australia contends that if it has incurred any liability, then principles of equitable apportionment are to be applied. These would take account of the joint responsibility of the United Kingdom and New Zealand, as well as the role of the United Nations. This solution is contemplated by the Court in its judgment of 26 June 1992 (*ICJ Reports 1992*, p.262, para.48; also p.290 (Judge Shahabuddeen)).

Section III: Joint and several liability is not a part of general international law

567. It follows from the foregoing that Australia contends that joint and several liability is not a part of international law. Nauru contends, however, that where a number of States concurrently cause damage, or damage is caused by one State acting on its own and others' behalf, each State is not only separately responsible for its own acts, but one State can be required to compensate for the totality of the damage, notwithstanding the responsibility of the other States (Nauru CR 91/20, pp.86-7; CR 91/22, p.46). According to Nauru, there is a presumption in international law of "passive solidarity" or "joint and several liability". This is the device used by Nauru to overcome the fact that two of the three States responsible are not subject to the Court's jurisdiction. In conformity with its already stated position, Australia denies that any such presumption exists. Australia contends that if such a legal regime can exist at international law, it does so only by virtue of specific agreement. The 1947 Trusteeship Agreement shows that no such agreement was reached in relation to Nauru.

568. Australia's contention in this regard is entirely consistent with the attitude of States in concluding the 1972 Convention on International Liability for Damage by Space Objects (961 UNTS 187). The Convention established joint and several liability as a *special* regime for the *unprecedented* risks created by

State activities in outer space (Art.V, discussed in Australia's Preliminary Objections, pp.124-5, paras.299-302). But the record of the debates leading to the conclusion of the Convention clearly shows that States considered that to be a departure from customary international law. The delegates were conscious of breaking new ground and of adopting an exceptional regime as a practical solution for a novel subject - hazardous activities in outer space. The debates emphasize that States did not consider that a principle of joint and several liability (or passive solidarity) was part of general international law (Australia's Preliminary Objections, paras.300-302).

569. Nor do the decisions of this Court support Nauru's contention that, notwithstanding the joint involvement of the United Kingdom and New Zealand, Australia is liable for the totality of the damage. Nauru relies on the *Corfu Channel* case *(ICJ Reports 1949,* p.9), but that case concerned only the responsibility of Albania for failure to warn of the possibility of mines. It was not a case in which another State shared joint responsibility, nor was it suggested that Albania acted, or failed to act, at the behest of another State. Nauru cannot make good its contention in this regard simply by showing that, in some cases, liability for the whole damage has attached to one State, notwithstanding the possible involvement of others. Further, in the *Nicaragua* case, the Court specifically said that although the United States was responsible for its own unlawful acts, it was *not* responsible for the acts of the *contras* (*ICJ Reports 1986,* p.65) although the Court had determined that the United States assistance to the contras had been "crucial to the pursuit of their activities" (ie p.62).

570. Instead, the practice of this Court and of international arbitral tribunals emphasizes the equitable character of decisions concerning compensation. See Section I above. It does not provide any evidence for a presumption of joint and several liability, or passive solidarity.

571. Further, although the International Law Commission has not yet given detailed consideration to the consequences of collective responsibility, it has indicated that it is disinclined to accept the application of joint and several liability (or passive solidarity), even in relation to the injurious consequences of acts not prohibited by international law - where solidary responsibility might have been thought particularly appropriate (*cf* Report of the ILC on 42nd Session, UN Doc.A/45/10, para.517). In relation to States which participate in the unlawful act of another, Article 27 of the ILC's draft Articles on State responsibility does no more than affirm the well-established principle that each

State is responsible for its own acts - and only those acts. But the consequences of that principle point away from a regime in which one State can be held liable for the totality of damage (although also caused by other States) to an equitable apportionment of damages, having regard to the number of States involved (*cf* Quigley, "Complicity in International Law," (1986) LVII *British Yearbook of International Law* 77, at p.128).

572. There is little evidence that jurists consider the principle of joint and several liability to be part of general international law (*Cf* I Brownlie, *Principles of Public International Law* (3rd ed 1983) p.456 and (4th ed 1990) p.456). There is, however, support for a principle which permits a proportionate reduction of damages to take account of the role of concurrent wrong-doers:

> "Il n'y a pas place en droit international pour une théorie du grief global qui permettrait d'écarter la ventilation du dommage en cas d'intervention de plusieurs causes" (Brigitte Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale* (1973) p.292.)

Section IV: If Australia were to bear any liability at all, it would be lessened by the failure of the United Nations to exercise adequate supervisory authority

573. The failure, if failure there was, to provide for rehabilitation was as much the failure of the United Nations, as of the Administering Authority; and the resulting liability, if any, of Australia would be correspondingly less.

574. Chapters XII and XIII of the Charter dealt with the position of the United Nations in relation to trusteeship territories. Under Article 75, the primary duty of the United Nations was "to establish under its authority an international trusteeship system for the administration and supervision of ... territories" which like Nauru came under the system by agreement. The Charter gave the United Nations primary authority and responsibility for the trusteeship system and for ensuring that it met the "basic objectives" set out in Article 76. There was nothing in Chapter XII of the Charter to indicate that, once an Administering Authority had been appointed in accordance with Article 81, the authority and responsibility of the United Nations ended, or diminished. On the contrary, under the Charter the Administering Authority remained in each case subject to the General Assembly and the Trusteeship Council. See especially Articles 75, 81, 85, 87, 88; *cf* Judgment of 26 June 1992, *ICJ Reports 1992*, p.304 (Judge Oda).

575. Charter Articles 85, 87 and 88 were intended to ensure that the United Nations, acting principally through the General Assembly and the Trusteeship Council, was able to discharge its responsibilities on a well-informed basis. The General Assembly and, under its authority, the Trusteeship Council were empowered to entertain petitions from, and provide for periodic visits to trust territories; to consider reports from administering authorities and "take ... other actions in conformity with the terms of the Trusteeship Agreement" (Art.87). The Trusteeship Council was required to submit a questionnaire to each Administering Authority and each Administering Authority was required to make an annual report to the General Assembly on the basis of that questionnaire (Art.88).

576. In the case of Nauru, the Administering Authority made detailed reports to the United Nations annually. The reports dealt fully with the economic, political and social situation in the Territory and were considered by the Trusteeship Council each year. There were also Visiting Missions at three yearly intervals throughout the Trusteeship. They too reported at first-hand on the Nauruan situation. See eg, Part I, Chapter 2 above.

577. There was, moreover, direct Nauruan participation in the work of the Trusteeship Council from 1961 until the end of the Trusteeship. From 1961 onwards, a Nauruan adviser was appointed to the delegation of the Special Representative of the Administering Authority during the Trusteeship Council's annual consideration of the Administering Authority's report. That adviser was there to inform Council members (para.63 above).

578. The Charter made it clear that the administrative powers conferred on the joint Authority under the 1947 Trusteeship Agreement were always intended to be subject to the United Nations. In keeping with this, the United Nations was kept fully informed of developments in the Territory. When the United Nations terminated the Trusteeship in December 1967, it purported to discharge the Administering Authority from its trusteeship obligations on the basis of a well-informed confidence that the Authority had fulfilled its undertakings. It has not been suggested until now that the United Nations in fact failed to discharge its supervisory function and failed to ensure that the Authority had safeguarded the interests of Nauruans (*Cf ICJ Reports 1992*, p.305 (Judge Oda)).

579. But if, as Nauru alleges, there was a failure to make adequate provision for rehabilitation, that failure was as much, if not more, attributable to the United Nations under whose aegis the Administering Authority acted, as to the

Authority itself. A finding in favour of Nauru would be tantamount to a finding that the United Nations failed to discharge adequately its own obligations under the Charter. Worse still, if Nauru's claims are upheld, the United Nations would have closed its eyes to very serious breaches of international law, involving self-determination and principles of *jus cogens*. It is virtually inconceivable that such breaches could have been permitted by the United Nations had it supervised the Territory's administration properly. If, however, Nauru's claim were upheld, then plainly the failure on the United Nations' part would have contributed in large part to Nauru's supposed injury. As already foreshadowed, Australia contends that equity would require that this too be borne in mind in deciding Australia's liability. Australia could not, consistently with equitable principles, be held liable for that proportion of the damage which in such a case would rightly rest with the United Nations.

Section V: Australia's liability, if any, would be diminished by Nauru's conduct

580. If Nauru's conduct does not disqualify it from relief (Chapter 1 of this Part), it does, at least, diminish Australia's liability, if any, for non-rehabilitation. There are three reasons for this. First, it was the Nauruans themselves who gave priority to resettlement, rather than rehabilitation, prior to 1965. And even after that date, in the context of the discussions leading to the Canberra Agreement in 1967, the Nauruans noted that rehabilitation was not an issue that need concern the United Nations, and at no stage asked that specific funds be set aside for rehabilitation. Had they done so, and had the funds so earmarked been patently insufficient, it would have been possible for the United Nations to have taken a more critical view of the adequacy of the Canberra financial settlement. Secondly, if Australia has been guilty of failure to rehabilitate, then so too has Nauru. See Chapter 1 of this Part. According to international practice (discussed below), this fact would alleviate any liability Australia might bear. Thirdly, Nauru has not sought to pursue its claim with all due diligence.

581. The facts relating to the prosecution by Nauru of its claim are set out in the Court's judgment of 26 June 1992 (*ICJ Reports 1992*, pp.254-5, paras.33-36). As the Court noted, Nauru was officially informed of Australia's position on the subject of rehabilitation, at the latest, by letter dated 4 February 1969. In that letter, the Australian Minister for External Affairs informed the Nauruan President that Australia, together with the United Kingdom and New Zealand, denied responsibility for rehabilitation and "remain[ed] convinced

that the [1967] terms of settlement ... were sufficiently generous to enable [Nauru] to meet its needs for rehabilitation and development" (Annex 77, Vol.4, NM). It was not until December 1988 that Nauru, by notes of 20 December 1988 to the three Governments, stated its claim that Australia as well as the United Kingdom and New Zealand were legally responsible for land mined out before 1 July 1967 (Annex 80, Nos.22, 23 and 24, Vol.4, NM). These proceedings were not, of course, issued until May 1989, at least twenty years after Nauru became aware of Australia's position.

582. There have been a number of cases in which international arbitral tribunals have held that if the claimant's conduct is of this kind, the liability of the respondent will be correspondingly diminished. In the *Delagoa Bay Railway* case (*United States and Great Britain v Portugal*), the tribunal held that the act of the Portuguese Government - in unilaterally fixing a time limit of eight months for building a portion of the railway - was illegal in form but not in substance, since the eight months' limit was a reasonable one. The tribunal also found, however, that there were other extenuating circumstances, in that the company, when asked by the Portuguese Government to state the length of time which it required to complete the railroad, had remained silent and had thereafter made no objection when informed of the time fixed by the Government for completion. The tribunal considered that these circumstances "alleviated" the Government's liability, and warranted "a reduction of the amount" allowable to the company by way of compensation (quoted in Whiteman, *Damages in International Law*, Washington, 1937, Vol.I, pp.206-7; reported in La Fontaine, *Pasicrisie internationale*, Bern, 1902, p.402). In the *Davis* case (9 UNRIAA 460, at 463) the claim of a claimant consignor whose goods had been delivered to the wrong person by Venezuelan customs officers was completely defeated by the claimant's failure to inform the Venezuelan Government promptly of the error. A similar principle was applied in the *Naulilaa* case (2 UNIAA 1076) where the tribunal held Germany's liability was diminished by the dilatory conduct of the Portuguese Government.

583. In this case, Nauru has delayed too long in bringing its rehabilitation claim and in beginning a practicable rehabilitation program. Australia's liability, if any, is therefore to be reduced accordingly.

584. In any event, as the Court notes (*ICJ Reports 1992*, para.36), Australia cannot be liable to bear any costs resulting from Nauru's delay. Thus, if Australia is liable to meet any of the cost of rehabilitation, that cost must be assessed as at 1 July 1967, and not as at today's costs. For Nauru took over the

phosphate industry and responsibility for its management on 1 July 1967 and, if there has been any wrongdoing on Australia's part, it was completed on that date.

585. The practice of this Court and of international arbitral tribunals confirms that 1 July 1967 is the relevant date for the assessment of Australia's liability, if any there be. See, for example, *Corfu Channel (Compensation)* case, *ICJ Reports 1949*, p.249; *Rhodope Forests (Greece v Bulgaria)*, 3 UNRIAA 1389 and *US-German Mixed Claims Commission of 1922*, 7 UNRIAA13; and other cases cited in Gray, *Judicial Remedies in International Law* (Oxford, 1987), at p.80. Thus, in the *Rhodope Forests* case, the value of the forest was calculated as at the date of dispossession.

586. This case is quite different from the *Chorzow Factory* case (*PCIJ, Ser 4, No.13*, p.46) in which the date of judgment was chosen as the date for assessment, on the basis that the value of the expropriated factory would have appreciated in the hands of the claimant during the intervening years. This cannot be compared with the situation arising in the present case where Australia's default, if any, was completed by 1 July 1967.

587. Finally, it goes almost without saying that Nauru cannot recover the cost of doing the work of rehabilitation unless it can establish that this really constitutes its loss, and that it will apply any compensation which might be awarded in its favour to carrying out a practicable rehabilitation program.

588. As Chapter 1 of this Part has shown, Nauru itself has not at any stage in the past quarter century begun such a program, even in respect of the lands mined after 1 July 1967. Nor has it, during the past twenty-five years, developed a viable rehabilitation program. On the contrary, since independence it has continued to mine much as the BPC did in earlier years, and even the 1987 Commission of Inquiry felt obliged to say that rehabilitation might well fail because of a lack of real motivation on the part of the Nauruans (para.516 above). In these circumstances, there must be a degree of doubt as to whether a feasible rehabilitation program really can be developed and if so, whether Nauru would in fact apply any award which it might receive in this case to implementing such a program. Nauru should be required by the Court to show that there in fact exists a viable plan for rehabilitation which can be implemented by Nauru with the expertise available to it.

589. Further, at least one other conclusion of the 1987 Commission of Inquiry should also be borne in mind - that a rehabilitation program, if it was to work at

all, would need to cover all the mined-out lands. As the Commission said:

> "The land mined during the period 1906 to 1968 is physically indistinguishable from the land mined subsequently. The practicalities of rehabilitation, especially when rehabilitation is designed to comply with the requirements of a planned future land use, would prohibit a specific portion of the total mined-out land, i.e. the land mined prior to 1968, being rehabilitated separately from the remaining mined land." (p.1141)

It added that:

> "unless the Nauruan community and its Government have a full commitment to achieve the objectives themselves, unless they are prepared to undertake the work themselves - irrespective of what the work is - unless they are prepared to make the effort to train themselves to acquire the skills, whether manual or professional, that will be needed to enable them to eventually operate, manage and improve the various activities, industries and businesses, then the project will fail by default." (at pp.1165-6)

590. As proof of Nauru's serious intent and the practicability of any rehabilitation program, Nauru should also be required by the Court to set aside a sum which would enable it to rehabilitate the lands which it admits are its responsibility - the lands mined out after 1 July 1967. This must be a condition of any award that might be made in Nauru's favour.

591. And reparation payable by Australia would be payable as and when the actual costs of any particular rehabilitation project, being completed, fell to be met. These costs would have to be limited to rehabilitation *stricto sensu*, ie restoration of the land to its former state, and not the costs of new development projects, such as airfields or housing, undertaken on the site of the lands to be rehabilitated.

592. The payment by Australia would be also limited to that proportion of the cost which the Court determines to be attributable to Australia, bearing in mind the responsibility of Nauru, of the other two Partner Governments, and of the United Nations.

Section VI: Summation

593. For the reasons set out in Part II of this Counter-Memorial, Australia does not accept responsibility for rehabilitating lands mined out prior to 1 July 1967. In any event, because Nauru has failed to take any steps whatsoever towards rehabilitating the lands which it has mined out itself, Nauru is disqualified from the relief it now seeks. And if not so disqualified, Australia would still not be liable to meet the whole of the damage. For the reasons set out earlier, Australia's responsibility for the Trusteeship was co-equal and collective with the United Kingdom and New Zealand; and all three Governments shared the beneficial ownership of the phosphate industry. Accordingly, on the facts referred to in Chapter 2 of this Part, Australia could not be liable for any more than one third of the damage in respect of the land mined out during the Trusteeship. But any such liability would be reduced on account of the involvement of the United Nations in the supposed breach. As explained, such involvement is a necessary corollary of any finding of breach on Australia's part. Finally, Australia's liability, if any, would be further diminished on account of Nauru's failure to pursue its claim against Australia with due diligence, or to begin its own program of rehabilitation in respect of those lands which it has mined itself during the past quarter century.

SUBMISSIONS

1. The Government of Australia requests the Court to adjudge and declare that:

   on the basis of the facts and law presented in this Counter-Memorial, Australia is not in breach of any obligation relating to rehabilitation of phosphate lands on Nauru worked out prior to July 1967.

2. If the Court declines to accept Australia's primary submission and finds that Australia is in breach of a legal obligation, then the Government of Australia requests the Court to adjudge and declare that:

(a) Australia is not solely responsible for the damage, if any, to which such breach may have contributed, nor liable for the whole of the damage; and

(b) any Australian liability arises only in relation to actual work done in rehabilitation *stricto sensu* and in the amount which reflects Australia's due proportion of responsibility.

GAVAN GRIFFITH
Agent of the Government of Australia

HENRY BURMESTER
Co-Agent of the Government of Australia

WARWICK WEEMAES
Co-Agent of the Government of Australia

29 March 1993

Annexes

Key points

- In 1967 the market value of the right to mine phosphate on Nauru was the amount that an independent party would have been prepared to pay, in 1967, for this right.
- An independent purchaser would have been prepared to pay the discounted (to 1967) value of the expected future profits of the mine.
- Our analysis indicates that this value ranges from $55m to $319m. Our preferred estimate is a value of $90m. This is equivalent to $630m in 1993 dollars.

Background

In 1967, the right to mine phosphate on Nauru was a valuable asset. Sales were almost guaranteed and the process of extraction was relatively simple and low cost. Before independence, the right to mine phosphate was owned by the BPC, a right that was intended to remain until 2000.

At independence, the right to mine phosphate changed hands — from the BPC to the Nauruans — at no cost. Had this exchange been a commercial transaction, the BPC would clearly have sold the rights. But at what price? What was the market value of the mine?

The market value of the mine is the amount that some independent party — a venture capitalist for example — would have been prepared to pay for the right to mine in 1967.

The value of the right to mine to any purchaser is the stream of net income (that is, profits) that the mine can earn. Alternatively, it is the return to capital that the mine could earn. Any potential purchaser would have been prepared to pay up to (but no more than) the present (1967) value of the discounted steam of future profits from the mining operation, where the discount rate is the required rate of return.

In what follows, we take the point of view of an independent purchaser and set out the calculations to estimate how much such a purchaser would have been prepared to pay for the mine.

Elements of the calculation

Revenue

In 1967, Nauruan phosphate commanded $12 per ton. We assume that an independent operator would also have received this price and that the real price of phosphate remains the same throughout the life of the mine. In reality, the real price of phosphate rose slightly in the mid to late 1970s but fell again in the 1980s. This change appears to have been related to the oil price shocks in the early 1970s. It is unlikely that a purchaser in 1967 could have predicted these changes, and so a stable real price is a reasonable assumption.

By 1967, phosphate production was around 2 million tons per annum, and in the negotiations around independence, the Nauruans agreed to supply this amount each year. Clearly annual production of 2 million was easily achievable. We assume this same annual production throughout the life of the mine.

The life of the mine

In 1967 it was considered that the remaining phosphate deposit was 60 million tons. With annual extraction of 2 million tons, the mine was expected to last until 1997. We will assume therefore that mining operations cease at the end of 1997.

Operating costs

In 1967 it cost $3.74 to extract each ton of phosphate. We assume that the real cost of extraction remains the same throughout the life of the mine.

This, combined with our assumption of a constant real price of phosphate of $12 a ton amounts to assuming a constant real profit margin of $8.26 a ton. This means that our assumptions regarding prices and costs are quite robust as long as changes in real prices reflect changes in real costs and vice versa.

Capital costs

Mining requires equipment, so any purchaser of the mine must buy appropriate equipment. The obvious starting point is the equipment

already in use by the BPC, which the BPC valued at $30 million. Some 75 per cent of this was the value of (fixed) island installations while the remainder comprised 'moveable' assets.

In addition to the initial purchase of equipment, the mine operator must pay annual replacement and maintenance expenditure. In 1967 the BPC considered expected annual maintenance costs to be $60 000.

We assume that $30 million is paid for the equipment in 1967 and that annual maintenance costs of $60 000 are incurred. In addition, we assume that of these maintenance costs, 75 per cent are on island installations and 25 per cent on moveable assets. With a depreciation rate of around 5 per cent, this means a resale value of moveable assets of $2m in 1997.

Discount rate

The funds a buyer is to spend on the phosphate mine could be used to purchase some other income earning asset. This means that for the purchase of the mine to be worthwhile, it must earn at least the same rate of return as the next best income generating asset. This means that the stream of profits from the mine must be discounted at a rate reflecting what could be earned elsewhere. If appropriate, this rate needs to be adjusted for the riskiness of the asset.

Generally, the discount rate should also be adjusted for inflation. However, in the analysis that follows we will cast everything in terms of 1967 dollars, so a real rate of return is appropriate.

In 1967, long term government bonds could earn a real interest rate of 5 per cent. As this represents the most certain return investments could earn, we will assume that the rate of return required by the prospective purchasers of the mine is 5 per cent.

Risk

All investments are risky. In the case of the phosphate mine, elements of risk include:

- the amount of phosphate remaining;
- the amount that can be sold each year; and
- the price at which it could be sold.

In 1967, there was a clear idea of the amount of phosphate left to be mined (60 million tons). While the price was not certain, demand was assured and

profit margins were well known.

Another aspect of risk is country risk — the risk that at any time the mine could be nationalised with some of the returns from the investment being lost. However, the risk of mining on Nauru was no greater than that of mining elsewhere. Therefore it is not necessary to make any explicit adjustment for risk.

Taxation and royalties

Anyone purchasing the mine would most likely have to pay taxation and royalties to the government controlling Nauru. Taxation would have been to cover the costs of administering the island and the royalties would have been to pay a return to the Nauruan people. What would the appropriate royalty and taxation rates have been?

In 1967, 45 per cent of the phosphate income was paid in royalties and 20 per cent was paid in taxes (ie, to fund administration). In other countries the experience was quite different. In the US taxation and royalty rates were both 6 per cent, while in Makatea royalty rates were 2 per cent and tax rates were 26 per cent.

On the basis of Nauru's history we assume that any mine operator would be required to pay 45 per cent of revenue in royalties and taxes of 20 per cent of net income. It is important to note, however that these rates are extremely high by international standards at the time.

Summary of assumptions

Assumptions to establish the base case estimate are:

- The real price of phosphate is $12 per ton throughout the life of the mine;
- Annual production is $2 million tons — all of which is sold in the year it is produced — throughout the life of the mine.
- Mining continues to the end of 1997 and then ceases.
- The real cost of extraction is $3.74 per ton throughout the life of the mine. This combined with the first assumption implies a real profit margin of $8.26 per ton.

- Capital equipment is purchased in 1967 for $30 million. Annual maintenance costs are $60 000 and the 'moveable' assets are sold for $2m in 1997.
- The real discount rate is 5 per cent.
- Royalties of 45 per cent of mine revenue must be paid each year;
- Net mining income (after costs and royalties) is taxed at 20 per cent.

The calculation

Profits from the mine in each year are equal to:

- Revenue (2 million tons at $12 per ton)
- *less operating costs* (2 *million tons at* $3.74 *per ton)*
- *less* capital costs ($30 million in 1967 and $60 000 each year, with a residual value of $2m in 1997)
- *less* royalty payments
- *less* taxation

The 1967 value of this stream of profits is equal to the sum of each years profits after the profits in each year have been discounted to 1967 values using a discount rate of 5 per cent.

Results: the value of the mine

Performing this calculation gives a mine value of $90 million.

That is, under these assumptions, an independent operator would have been prepared to pay up to $90 million for the mine.

If we further assume bidding for the mine was competitive, then the market value of the mine would have been $90 million.

In 1993 dollars, the value of the mine is $630 million. This is calculated using the Australian GDP deflator (a price index published regularly by the Australian Bureau of Statistics and also published in the International Monetary Fund's *International Financial Statistics, Yearbook*) to inflate 1967 values to 1993 values. The GDP deflator indicates that 1993 prices are 7 times higher than in 1967 prices.

Sensitivity analysis

The three assumptions with the largest effect on our estimates are:

- the discount rate;
- the royalty rate; and
- the tax rate.

Table 1 presents estimates of the value of the mine at various discount, royalty and tax rates.

Table 1: **Value of mine, various royalty, tax and discount rates** ($m)

Tax rates (%)	Royalty rates (%) 5	10	20	45
	Discount rate 2 per cent			
5	319	300	263	171
10	301	284	249	161
20	266	250	219	140
25	248	234	204	131
	Discount rate 5 per cent			
5	214	201	175	111
10	202	189	165	104
20	178	167	144	90
25	166	155	135	83
	Discount rate 8 per cent			
5	152	143	124	75
10	143	134	116	70
20	126	118	101	60
25	117	109	94	55

The results indicate that:

- An investor requiring a lower rate of return (2 per cent) would have been prepared to pay 50 to 60 per cent more for the mine — at any give tax or royalty rate.
- An investor expecting a higher rate of return (perhaps viewing the investment as more risky) would have been prepared to pay around 30 per cent less for the mine — at any given tax or royalty rate.
- The lower the tax rate, the more an investor would have been prepared to pay — halving the tax rate from 20 to 10 per cent means an investor would have been prepared to pay some 13 per cent more.
- The lower the royalty rate, the more an investor would have been prepared to pay — lowering the royalty rate from 45 to 20 per cent means that an investor would have been prepared to pay between 50 and 60 per cent more.

ANNEX 2

N A U R U

INFORMATION PAPER ON POSSIBLE SALE OF THE B.P.C'S ASSETS AT NAURU TO THE NAURUANS

Background

One proposal that was made by the Nauruan delegation in the July 1966 discussions on the future of the phosphate industry was that the B.P.C's capital assets at Nauru should be sold to the Nauruan Government to be paid for over a period of ten years out of the financial benefits becoming available to the Nauruan Government from its share of proceeds of the phosphate industry. The partner governments have not yet indicated to the Nauruans their attitude to this proposal. In the exchange of views between governments all governments have stated that they would be prepared to entertain this proposal.

2. The purpose of this paper is merely to provide the partner governments with some information on the present situation of the assets at Nauru, possible arrangements envisaged for their sale, financing of any additions and replacements to plant and treatment of the sale transaction in the B.P.C's accounts.

Basis of valuation of assets

3. The capital investment at Nauru on 30th June, 1966 was as follows:

	Cost $'000	Book Value $'000	Approximate Replacement Value $'000
Island Installations (incl. Moorings)	18,393	12,909	33,400
Movable Plant	5,018	1,453	8,000
Stores (Materials and Spares)	1,931	908	2,500
Other Current Assets	500	500	500
	$25,842	$15,770	$44,400

Nauru Phosphate Rights are excluded. (Book value $3,927,270).

- The book values are extracted from the B.P.C. Balance Sheet as at 30th June 1966 and are valued at cost less depreciation.
- If the B.P.C. were placed in a situation of negotiating with an incoming operator on a commercial basis it would regard $30,000,000 to $32,000,000 as a minimum value for the assets represented above, on the basis of a takeover as a going concern. This is based on current replacement costs minus depreciation. It is considered virtually impossible to arrive at a commercial value by any other method. The commercial sale value of any asset is in a normal situation affected by the expectation of future profits both by the seller and by the potential purchaser. This could not be known in the Nauruan situation since profitability would depend on the terms of sharing of the financial benefit which are yet to be worked out with the Nauruans and on the arrangement which a purchaser might be able to make with the Nauruans about purchase price of phosphate which is quite unknown. There would not be a normal marketing situation since the potential purchasers of the asset would be few in number, if there were any at all, and the willingness of the governments to sell would be affected by their needs with the phosphate rock.

4. It will be seen from the above that there are broadly two bases which could possibly be adopted. The upper limit that could be asked for is the value on a commercial basis which would be expected of an incoming operator taking over as a going concern. This figure is given above as a range of $30-32 million. It is thought that the lower limit that could be expected to be paid would be the value as shown by the books - i.e., the

historical cost minus depreciation ($15.8 million). An estimate of the book value of the assets in 10 years' time, with necessary replacements, would be $8.5 million whereas the basis of takeover as a going concern would be some $16 million.

5. Some preliminary discussions that we have already had with the Nauruans indicate that they would feel that the commercial basis was unduly onerous. They believe that the valuation should be a modest one since they say that the assets, apart from the original contribution by partner governments (£stg2.65 million for Nauru in 1920), were established out of phosphate proceeds and that, in all the years up to the last two or three, the Nauruans have received only token payments for the phosphate and consumers in partner governments, even after the capital accumulations have been charged to phosphate, have received the phosphate at bargain prices.

6. What valuation the partner governments would appropriately insist on would appear to be conditioned by the tactics in the negotiations and in particular the sort of overall package of which the sale proposal formed a part. It might be useful to have some intermediate position or positions between the two extremes mentioned above, though the rationale for such intermediate positions is not apparent.

Arrangements for sale

7. Here again, the arrangements that it would be appropriate to make for the Nauruans to pay for the assets would depend in substantial part on the general package of which the sales arrangement form part. Clearly, the conditioning factors would be the capacity of the Nauruans to make the payment and this would be related to the size of the distribution from phosphate monies that they would get and upon the valuation that was being adopted for the assets. It would depend in part on whether the arrangement included interest on the outstanding

balance. In any arrangement it is likely that the instalment would be determined as an amount per ton of phosphate delivered, since the capacity to pay would depend on the volume sold. As an example of the sort of payment per ton that might be involved it may be noted that at $1 per ton on a 2 million ton annual output, it would need about 8 years to repay the 1966 book value of the assets (excluding phosphate rights which are assumed to be transferred or extinguished without payment) without any charge for interest. If the Nauruans' share of phosphate were $5 per ton excluding administration costs (i.e., up towards the agreed maximum), they would still have $4 per ton after making the payment, i.e., $8M. a year, which would appear adequate.

8. Normal commercial principles would indicate that interest should be paid on the outstanding balances involved in the purchase price of the assets. Whether, however, this should be so in this particular case would depend a good deal on the actual sharing arrangement that had been determined between the two parties and on the factors discussed in the following paragraphs.

9. The way in which the transaction will be dealt with would appear to depend basically on whether it is intended that the sale take place now (i.e., the property in the assets pass now from the B.P.C. to the Nauruans) or whether it is intended that the property pass when paid for.

10. If it were intended that the property pass now the transaction would probably be best dealt with by establishing a Debt representing the current agreed value of the assets which would be liquidated over the agreed period of years at a sum per ton of phosphate (based on 2 million tons output). As a contra against the debit for the instalments there would be a credit for the total amount charged in the accounts for depreciation on assets at Nauru. A charge for any purchases of assets would be made against the Nauruans' account. On the second assumption, namely that the

property would pass when the assets were paid for, the best method would appear to be to credit to a special account the instalment payments being made by the Nauruans and credit this account with an agreed amount of interest (or with the interest which the funds actually earn). The transaction would then be closed by the use of these funds to pay for the capital assets at the end of the period.

11. *An appropriate method of payment by the Nauruans* could be for retention of the instalments out of the Nauruans' share of proceeds of the phosphate operation.

DEPARTMENT OF TERRITORIES.

RC/DNcC 56/984

NEW SOUTH WALES DEPARTMENT OF MINES - ROYALTY RATES

I discussed the question of royalty payments with Mr. H.W. O'Connor, Accountant and Royalty Officer of the New South Wales Department of Mines, on the 19th June.

2. He said the policy of the New South Mines Department during the first 20 year period of lease is to keep the royalty impost for non-metallics to a minimum. The maximum rate for several non-metallic minerals except in the case of the more valuable non-metallics such as asbestos, precious stones and the like is 1/- per ton for first 20 years of the lease. If the lease is renewed, rates are as prescribed by the Governor. There is, generally speaking, a sharp increase in the impost.

3. The more valuable non-metallics, mentioned in the previous paragraph, are taken out of the unit class for royalty and put on a rate of 1½% for first 20 years of lease.

4. Mr. O'Connor mentioned that all Broken Hill Proprietary mines are subject to royalty impost based on net profits. The general set-up is 4% on first £200,000 of profits rising 2% for each £200,000 thereafter with no ceiling.

5. Beach sand minerals (rutile etc.) - the present rates are -

30/- per ton rutile
2/6 " " Zircon
1½% " " Monozite

The rutile rate, it is understood, will shortly be reduced as the market has collapsed.

6. With regard to coal, the royalty for the first 20 years of lease is 9d. per ton, the second 20 years 1/- per ton and the third 20 years 1/3 per ton.

7. Although no oil has been discovered, the rate laid down for petroleum and crude oil is 10% of gross value.

8. Mr. O'Connor feels that based on the New South Wales Mining Act, the payment of 2/6 proposed for Nauru is just and reasonable. He also said that Queensland has only recently come into the royalty field and they have largely followed New South Wales practice.

9. Attached is a statement showing the royalty rates payable on the lesser valuable non-metallics mined in New South Wales and provided for under Regulation 115A made under the Mining Act 1906/1952.

10. It will be noted that, although no phosphate has been discovered in New South Wales, a royalty rate of 1/- per ton is applicable.

15/7/58

DEPARTMENT OF MINES

ROYALTY RATES APPLICABLE TO LESSER VALUABLE NON-METALLICS.

REGULATION 115A MINING ACT 1906/52.

COAL	9d per ton
SHALE	9d per ton
ALUM	1s per ton
ALUMINA	1s. per ton
ALUMSTONE	1s. per ton
ALUNITE	1s. per ton
BARYTES	9d per ton
BAUXITE	6d per ton
BRICK CLAY	3d per ton
CALCITE	6d per ton
CHERT	6d per ton
CLAY SHALE	3d per ton
DIATOMACEOUS EARTH	1s. per ton
DOLOMITE	6d per ton
FELSPAR	1s. per ton
FIRECLAY	9d per ton
FLUORSPAR	9d per ton
FULLER'S EARTH	1s. per ton
GRANITE	9d per ton
GYPSUM	6d per ton
IRON	6d per ton
IRONSTONE	6d per ton
IRON ORE	6d per ton
KAOLIN	9d per ton
LATERITE	6d per ton
LIMESTONE	6d per ton
MAGNESITE	1s. per ton
MARBLE	9d per ton
MINERAL PIGMENTS	9d per ton
OXIDE OF IRON	6d per ton
PEAT	6d per ton
PERLITE	6d per ton
PHOSPHATES	1s. per ton
PIPECLAY	9d per ton
POTTERY CLAY	9d per ton
PYROPHYLLITE	1s. per ton
SEA SHELLS	1s. per ton
SERPENTINE	6d per ton
SILICA	6d per ton
SOAPSTONE	1s. per ton