CASE CONCERNING CERTAIN PHOSPHATE LANDS IN NAURU (NAURU *v.* AUSTRALIA) (PRELIMINARY OBJECTIONS)

Judgment of 26 June 1992

In its Judgment on the preliminary objections filed by Australia in the case concerning Certain Phosphate Lands in Nauru (Nauru *v.* Australia), the Court rejected Australia's objections concerning the circumstances in which the dispute relating to the rehabilitation of the phosphate lands worked out prior to 1 July 1967 arose between Nauru and Australia; it also rejected the objection based on the fact that New Zealand and the United Kingdom are not parties to the proceedings; and lastly, it upheld Australia's objection based on Nauru's claim concerning the overseas assets of the British Phosphate Commissioners being a new one. The Court thus found, by 9 votes to 4, that it had jurisdiction to entertain the Application and that the Application was admissible; it also found, unanimously, that the Nauruan claim concerning the overseas assets of the British Phosphate Commissioners was inadmissible.

The Court was composed as follows: President Sir Robert Jennings; Vice-President Oda; Judges Lachs, Ago, Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Ranjeva; Registrar Valencia-Ospina.

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The complete text of the operative paragraph of the Judgment is as follows:

"THE COURT

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

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

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

AGAINST: Vice-President Oda;

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

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

AGAINST: Vice-President Oda;

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

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

AGAINST: Vice-President Oda;

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

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

AGAINST: Vice-President Oda;

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

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

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

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

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

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

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

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

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Judge Shahabuddeen appended a separate opinion to the Judgment; President Sir Robert Jennings, Vice-President Oda and Judges Ago and Schwebel appended dissenting opinions.

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I. *History of the case* (paras. 1-6)

In its Judgment, the Court recalls that on 19 May 1989 Nauru filed in the Registry of the Court an Application instituting proceedings against Australia in respect of a "dispute . . . over the rehabilitation of certain phosphate lands [in Nauru] worked out before Nauruan independence". It notes that to found the jurisdiction of the Court the Application relies on the declarations made by the two States accepting the jurisdiction of the Court, as provided for in Article 36, paragraph 2, of the Statute of the Court.

The Court then recites the history of the case. It recalls that time-limits for the filing of the Memorial of Nauru and

the Counter-Memorial of Australia were fixed by an Order of 18 July 1989. The Memorial was filed on 20 April 1990, within the prescribed time-limit. On 16 January 1991, within the time-limit fixed for the filing of the Counter-Memorial, the Government of Australia filed preliminary objections submitting that the Application was inadmissible and that the Court lacked jurisdiction to hear the claims made therein. Accordingly, by an Order dated 8 February 1991, the Court, recording that by virtue of the provisions of Article 79, paragraph 3, of the Rules of Court, the proceedings on the merits were suspended, fixed a time-limit for the presentation by the Government of Nauru of a written statement of its observations and submissions on the preliminary objections. That statement was filed on 17 July 1991, within the prescribed time-limit, and the case became ready for hearing in respect of the preliminary objections.

The Court then sets out the following submissions presented by Nauru in the Memorial:

"On the basis of the evidence and legal argument presented in this Memorial, the Republic of Nauru

Requests the Court to adjudge and declare

that the Respondent State bears responsibility for breaches of the following legal obligations:

First: the obligations set forth in Article 76 of the Charter of the United Nations and articles 3 and 5 of the Trusteeship Agreement for Nauru of 1 November 1947.

Second: the international standards generally recognized as applicable in the implementation of the principle of self-determination.

Third: the obligation to respect the right of the Nauruan people to permanent sovereignty over their natural wealth and resources.

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

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

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

Requests the Court to adjudge and declare further

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

Requests the Court to adjudge and declare

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

It further sets out the submissions presented by Australia in its preliminary objections and by Nauru in the written statement of its observations and submissions on the preliminary objections, as well as the final submissions presented by each of the Parties at the hearings, the latter of which are as follows:

On behalf of Australia,

"On the basis of the facts and law set out in its preliminary objections and its oral pleadings, and for all or any of the grounds and reasons set out therein, the Government of Australia requests the Court to adjudge and declare that the claims by Nauru against Australia set out in their Application and Memorial are inadmissible and that the Court lacks jurisdiction to hear the claims."

On behalf of Nauru,

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

To reject the preliminary objections raised by Australia, and

To adjudge and declare:

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

(*b*) that the claims are admissible.

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

II. *Objections concerning the circumstances in which the dispute arose* (paras. 8-38)

1. The Court begins by considering the question of its jurisdiction. Nauru bases jurisdiction on the declarations whereby Australia and Nauru have accepted the jurisdiction of the Court under Article 36, paragraph 2, of the Statute. The declaration of Australia specifies that it "does not apply to any dispute in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement".

Australia contends that as a result of the latter reservation the Court lacks jurisdiction to deal with Nauru's Application. It recalls that Nauru was placed under the Trusteeship System provided for in Chapter XII of the Charter of the United Nations by a Trusteeship Agreement approved by the General Assembly on 1 November 1947 and argues that any dispute which arose in the course of the trusteeship between "the Administering Authority and the indigenous inhabitants" should be regarded as having been settled by the very fact of the termination of the trusteeship, provided that that termination was unconditional.

The effect of the Agreement relating to the Nauru Island Phosphate Industry, concluded on 14 November 1967 between the Nauru Local Government Council, on the one hand, and Australia, New Zealand and the United Kingdom, on the other, was, in Australia's submission, that Nauru waived its claims to rehabilitation of the phosphate lands. Australia maintains, moreover, that on 19 December 1967 the United Nations General Assembly terminated the trusteeship without making any reservation relating to the administration of the territory. In those circumstances, Australia contends that, with respect to the dispute presented in Nauru's Application, Australia and Nauru had agreed "to have recourse to some other method of peaceful settlement" within the meaning of the reservation in Australia's declaration, and that consequently the Court lacks jurisdiction to deal with that dispute.

The Court considers that declarations made pursuant to Article 36, paragraph 2, of the Statute of the Court can only relate to disputes between States. The declaration of Australia only covers that type of dispute; it is made expressly "in relation to any other State accepting the same obligation . . . ". In these circumstances, the question that arises in this case is whether Australia and the Republic of Nauru did or did not, after 31 January 1968, when Nauru acceded to independence, conclude an agreement whereby the two States undertook to settle their dispute relating to rehabilitation of the phosphate lands by resorting to an agreed procedure other than recourse to the Court. No such agreement has been pleaded or shown to exist. That question has therefore to be answered in the negative. The Court thus considers that the objection raised by Australia on the basis of the above-mentioned reservation must be rejected.

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

Having taken into consideration the negotiations which led to the Agreement of 14 November 1967, the Agreement itself, and the discussions at the United Nations, the Court concludes that the Nauruan local authorities did not, before independence, waive their claim relating to rehabilitation of the phosphate lands worked out prior to 1 July 1967. The Court finds therefore that the second objection raised by Australia must be rejected.

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

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

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

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

The Court observes that such a resolution had "definitive legal effect" (*Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 32), and that consequently the Trusteeship Agreement was "terminated" on that date and "is no longer in force" (ibid., p. 37). It then examines the particular circumstances in which the trusteeship for Nauru was terminated. It concludes that the facts show that, when, on the recommendation of the Trusteeship Council, the General Assembly terminated the trusteeship over Nauru in agreement with the Administering Authority, everyone was aware of subsisting differences of opinion between the Nauru Local Government Council and the Administering Authority with regard to rehabilitation of the phosphate lands worked out before 1 July 1967. Accordingly, though General Assembly resolution 2347 (XXII) did not expressly reserve any rights which Nauru might have had in that regard, the Court cannot view that resolution as giving a discharge to the Administering Authority with respect to such rights. In the opinion of the Court, the rights Nauru might have had in connection with rehabilitation of the lands remained unaffected. The Court therefore finds that, regard being had to the particular circumstances of the case, Australia's third objection must be rejected.

4. Australia's fourth objection stresses that Nauru achieved independence on 31 January 1968 and that, as regards rehabilitation of the lands, it was not until December 1988 that that State formally "raised with Australia and the other former Administering Powers its position". Australia therefore contends that Nauru's claim is inadmissible on the ground that it has not been submitted within a reasonable time.

The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay down any specific time-limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible. The Court then takes note of the fact that Nauru was officially informed, at the latest by letter of 4 February 1969, of the position of Australia on the subject of rehabilitation of the phosphate lands worked out before 1 July 1967. Nauru took issue with that position in writing only on 6 October 1983. In the meantime, however, as stated by Nauru and not contradicted by Australia, the question had on two occasions been raised by the President of Nauru with the competent Australian authorities. The Court considers that, given the nature of relations between Australia and Nauru, as well as the steps thus taken, Nauru's Application was not rendered inadmissible by passage of time, but that it will be for the Court, in due time, to ensure that Nauru's delay in seising it will in no way cause prejudice to Australia with regard to both the establishment of the facts and the determination of the content of the applicable law.

5. The Court further considers that Australia's fifth objection to the effect that "Nauru has failed to act consistently and in good faith in relation to rehabilitation" and that therefore "the Court in exercise of its discretion, and in order to uphold judicial propriety should . . . decline to hear the Nauruan claims" must also be rejected, as the Application of Nauru has been properly submitted in the framework of the remedies open to it and as there has been no abuse of process.

III. *Objection based on the fact that New Zealand and the United Kingdom are not parties to the proceedings* (paras. 39-57)

6. The Court then considers the objection by Australia based on the fact that New Zealand and the United Kingdom are not parties to the proceedings.

In order to assess the validity of this objection, the Court first refers to the Mandate and trusteeship regimes and the way in which they applied to Nauru. It notes that the three Governments mentioned in the Trusteeship Agreement constituted, in the very terms of that Agreement, "the Administering Authority" for Nauru; that this Authority did not have an international legal personality distinct from those of the States thus designated; and that, of those States, Australia played a very special role established by the Trusteeship Agreement of 1947, by the Agreements of 1919, 1923 and 1965, and by practice.

The Court observes that Australia's preliminary objection in this respect appears to contain two branches, the first of which can be dealt with briefly. It is first contended by Australia that, in so far as Nauru's claims are based on the conduct of Australia as one of the three States making up the Administering Authority under the Trusteeship Agreement, the nature of the responsibility in that respect is such that a claim may only be brought against the three States jointly, and not against one of them individually. The Court does not consider that any reason has been shown why a claim brought against only one of the three States should be declared inadmissible *in limine litis* merely because that claim raises questions of the administration of the territory, which was shared with two other States. It cannot be denied that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and there is nothing in the character of that Agreement which debars the Court from considering a claim of a breach of those obligations by Australia.

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

The Court then examines its own case-law on questions of this kind (cases concerning the *Monetary Gold Removed from Rome in 1943 (Preliminary Question)*, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* and the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*). It refers to the fact that national courts, for their part, have more often than not the necessary power to order *proprio motu* the joinder of third parties who may be affected by the decision to be rendered; and that that solution makes it possible to settle a dispute in the presence of all the parties concerned. It goes on to consider that on the international plane, however, the Court has no such power. Its jurisdiction depends on the consent of States and, consequently, the Court may not compel a State to appear before it, even by way of intervention. A State, however, which is not a party to a case is free to apply for permission to intervene in accordance with Article 62 of the Statute. But the absence of such a request for intervention in no way precludes the Court from adjudicating upon the claims submitted to it, provided that the legal interests of the third State which may possibly be affected do not form the very subject-matter of the decision that is applied for. Where the Court is so entitled to act, the interests of the third State which is not a party to the case are protected by Article 59 of the Statute of the Court, which provides that "the decision of the Court has no binding force except between the parties and in respect of that particular case".

The Court then finds that in the present case, the interests of New Zealand and the United Kingdom do not constitute the very subject-matter of the Judgment to be rendered on the merits of Nauru's Application and that, although a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia. Accordingly, the Court cannot decline to exercise its jurisdiction and the objection put forward in this respect by Australia must be rejected.

IV. *Objections to the claim by Nauru British Phosphate Commissioners*
(paras. 58-71)

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

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

and that

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

The British Phosphate Commissioners were established by article 3 of the Agreement of 2 July 1919 between the United Kingdom, Australia and New Zealand, one Commissioner to be appointed by each of the Partner Governments. These Commissioners managed an enterprise entrusted with the exploitation of the phosphate deposits on the island of Nauru.

Australia, *inter alia*, maintains that Nauru's claim concerning the overseas assets of the British Phosphate Commissioners is inadmissible on the ground that it is a new claim which appeared for the first time in the Nauruan Memorial; that Nauru has not proved the existence of any real link between that claim, on the one hand, and its claims relating to the alleged failure to observe the Trusteeship Agreement and to the rehabilitation of the phosphate lands, on the other; and that the claim in question seeks to transform the dispute brought before the Court into a dispute that would be of a different nature.

The Court concludes that the Nauruan claim relating to the overseas assets of the British Phosphate Commissioners is inadmissible inasmuch as it constitutes, both in form and in substance, a new claim, and the subject of the dispute originally submitted to the Court would be transformed if it entertained that claim. It refers in this connection to Article 40, paragraph 1, of the Statute of the Court, which provides that the "subject of the dispute" must be indicated in the Application; and to Article 38, paragraph 2, of the Rules of Court, which requires "the precise nature of the claim" to be specified in the Application.

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

Separate opinion of Judge Shahabuddeen

In his separate opinion, Judge Shahabuddeen gave his reasons for agreeing with the decision of the Court rejecting Australia's preliminary objection that Nauru's Application was inadmissible in the absence of New Zealand and the United Kingdom as parties. In his opinion, the obligations of the three Governments under the Trusteeship Agreement were joint and several, with the consequence that Australia could be sued alone. However, he considered that, even if the obligations were joint, this, in law, did not prevent Australia from being sued alone. Also, in his view, while a possible Judgment on the merits against Australia might be based on a course of reasoning which was capable of extension to New Zealand and the United Kingdom, that reasoning would operate only at the level of precedential influence in any case that might be separately brought by Nauru against those two States; it would not by itself amount to a judicial determination made in this case of the responsibilities of those two States to Nauru. Consequently, there was no question of the Court exercising jurisdiction in this case against non-party States.

Dissenting opinion of President Sir Robert Jennings

President Jennings dissented from the Court's decision to reject that Australian objection to jurisdiction, which is based on the fact that New Zealand and the United Kingdom are not parties to the proceedings. The Mandate for Nauru was in 1920 conferred upon "His Britannic Majesty"; the Trusteeship Agreement of 1947 designated

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

New Zealand and the United Kingdom were two of the three members of the British Phosphate Commission; and they were both joint parties with Australia to the Canberra Agreement of 1967.

Thus, the legal interests of New Zealand and the United Kingdom are so inextricably bound up with those of Australia in this matter that they "would not only be affected by a decision, but would form the very subject-matter of the decision" (*I.C.J. Reports 1954*, p. 32); and this would be a breach of the principle of the Court's consensual basis of jurisdiction.

Dissenting opinion of Vice-President Oda

In his dissenting opinion, Vice-President Oda analyses the historical developments considered by the Court and demonstrates why he differs from the Judgment in the construction he places upon them. Under the trusteeship the possibility of rehabilitating the worked-out lands was thoroughly discussed in the relevant organs of the United Nations, the only forums in which a claim could have been put forward on behalf of the Nauruan people. Nevertheless, the Canberra Agreement to which all parties subscribed on the eve of independence made no mention of the issue, neither was it then dealt with separately. Considering that, at that critical point, Nauru failed to reserve a claim to land rehabilitation, the silence of the Agreement can be construed as implying a waiver. Furthermore, in the debates on Nauru within the Trusteeship Council, the rehabilitation question was repeatedly aired, but the Council eventually took no position on the matter in recommending the termination of the trusteeship. Neither did the General Assembly in adopting that recommendation, even if one or two allusions to the subject were made from the floor. Consequently, the responsibility of the Administering Authority, as well as the rights and duties of the Administrator, were completely terminated by resolution 2347 (XXII) of 19 December 1967, and that put an end to any claims arising from the implementation of the Trusteeship Agreement. No such claim, therefore, was taken over by the State of Nauru.

Even supposing a fresh claim could have been raised by independent Nauru, none was officially asserted until 1983 at the earliest. So long a silence made it inappropriate for the Court to find the claim admissible. Neither had Nauru taken any steps to rehabilitate lands worked since independence. In the Vice-President's view, this conduct, combined with lack of due diligence, disqualifies Nauru from alleging Australian responsibility to rehabilitate lands worked under trusteeship.

In consequence, Vice-President Oda considers that the Court should have upheld Australia's objections based on alleged waiver, the termination of the trusteeship, the effect of the passage of time, and lack of good faith. The fact that he voted against rejecting the objection based on the absence from the proceedings of New Zealand and the United Kingdom did not, however, mean that he necessarily upheld that objection also, since he considered that it was too closely bound up with the merits to be decided at the preliminary stage.

Dissenting opinion of Judge Ago

Judge Ago has regretfully been unable to join those of his colleagues who voted in favour of the Judgment of the Court because in his opinion there exists an insurmountable contradiction between two facts: Nauru has filed an Application against Australia alone, without also bringing proceedings against the United Kingdom and New Zealand, even though first the League of Nations and then the United Nations jointly entrusted three different States—the United Kingdom, Australia and New Zealand—on a basis of complete legal equality, with the administration of Nauru.

This being so, the Court should have upheld the preliminary objection of Australia based on the absence from the proceedings of two of the three Powers to which the trusteeship over Nauru had been entrusted.

Having brought its action against Australia alone, Nauru has thus placed the Court before an insurmountable difficulty, that of defining the possible obligations of Australia with respect to the rehabilitation of Nauru's territory without at the same time defining those of the two other States not parties to the proceedings. But the Court's ruling on the complaints against Australia alone will inevitably affect the legal situation of the United Kingdom and New Zealand, that is, the rights and the obligations of these two States. Were the Court to determine the share of responsibility falling upon Australia, it would thereby indirectly establish that the remainder of that responsibility is to fall upon the two other States. Even if the Court were to decide—on what would, incidentally, be an extremely questionable basis—that Australia was to shoulder in full the responsibility in question, that holding would equally inevitably and just as unacceptably affect the legal situation of two States that are not parties to the proceedings. In

either case the exercise by the Court of its jurisdiction would be deprived of its indispensable consensual basis.

Dissenting opinion of Judge Schwebel

Judge Schwebel, dissenting, maintained that the salient issue was, where more than one State is charged with a joint (or joint and several) commission of an act wrongful under international law, but only one such State is before the Court, may the Court proceed to adjudge the present State even though a determination of its liability may or will entail the effective determination of the liability of an absent State? In answering this question, private law sources and analogies are of little use, since in national law jurisdiction is compulsory whereas in this Court it is consensual.

The principal precedent is the *Monetary Gold* case. In that case, a holding as to the responsibility of the absent Albania was a temporal and logical precondition of rendering a Judgment between the Parties present, whereas it is agreed that, in the instant case, the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia. The Court unpersuasively assigns dispositive force to that distinction. Whether determination of the responsibility of the absent State is antecedent or simultaneous is not significant. What rather is dispositive is whether the determination of the legal rights of the present Party effectively determines the legal rights of the absent party.

The Court's reliance on its 1984 holding in *Military and Paramilitary Activities in and against Nicaragua* is misplaced since that latter holding was in error in this as in some other respects. In that case, Nicaragua brought suit against the United States alone, even though it claimed that El Salvador, Honduras and Costa Rica were vitally involved in its alleged delicts. For its part, the United States maintained that it was acting in collective self-defence with those three States to counter Nicaraguan subversive intervention which was tantamount to armed attack. In 1986, on the merits, the Court held that no responsibility could be attributed to Nicaragua for any flow of arms across its territory to Salvadorian insurgents. When that Judgment is read together with the Court's Judgment in 1984 that El Salvador, Honduras and Costa Rica would be protected by Article 59 of the Statute against any adverse effects of a Judgment on the merits against the United States, it appears that its articulate factual holding of 1986 was the inarticulate factual premise of its Judgment of 1984, for, assuming the factual allegations of the United States and El Salvador in 1984 to have been correct, it was clear then and is clear today that Article 59 furnished no meaningful protection to third States so situated. If the United States were to have ceased to act in support of El Salvador pursuant to the Court's 1986 Judgment, the latter's Government, far from having its interests conserved by the force of Article 59, could have fallen before the onslaught of the insurrection so significantly supported by Nicaragua.

Judge Schwebel maintained that, despite Nicaragua's sworn and reiterated denials before the Court of any material support of the Salvadorian insurrection, it later transpired that revelations, and admissions of the Governments of the Soviet Union and Nicaragua, demonstrated the reality and significance of that material support, and, hence, the disutility of Article 59. Such precedential status as the Court's 1984 Judgment may be thought to have was further prejudiced by Nicaragua's acting in 1986 contrary to its 1984 contention before the Court that its claims were against the United States alone.

In sum, the security interests of the States in whose collective self-defence the United States in 1984 claimed to be acting were as close, if not closer, to "the very subject-matter of the case" as were the interests of Albania in *Monetary Gold*. Moreover, the precedent of the *Land, Island and Maritime Boundary Dispute* appears to cut against the Court's conclusion in the current case.

It is clear from the facts of the instant case that Nauru was subject to the governance of a Mandatory and Trust Administering Authority composed of Australia, New Zealand and the United Kingdom; and that, by the terms of the governing international legal instruments, Australia uniformly acted "on the joint behalf" of the three States, and "on behalf" of the Administering Authority, as part of what those instruments termed "the joint Authority". The three Governments were described and regarded as "Partner Governments". All communications regarding the Mandate and trusteeship ran not between Australia and the League, and Australia and the United Nations, but between the tripartite Administering Authority and those Organizations. The phosphates operations themselves were run by the British Phosphate Commissioners who represented the three Governments. Nauru itself regularly maintained that not Australia alone, but the Administering Authority, the three Partner Governments, were responsible for restoration of worked-out phosphate lands. When it brought suit against Australia alone, it officially reiterated its identical claims against New Zealand and the United Kingdom.

Consequently, a Judgment by the Court upon the responsibility of Australia would appear to be tantamount to a Judgment upon the responsibility of New Zealand and the United Kingdom, States not before the Court. For this reason, proceeding against Australia alone is inadmissible.