IN THE INTERNATIONAL COURT OF JUSTICE

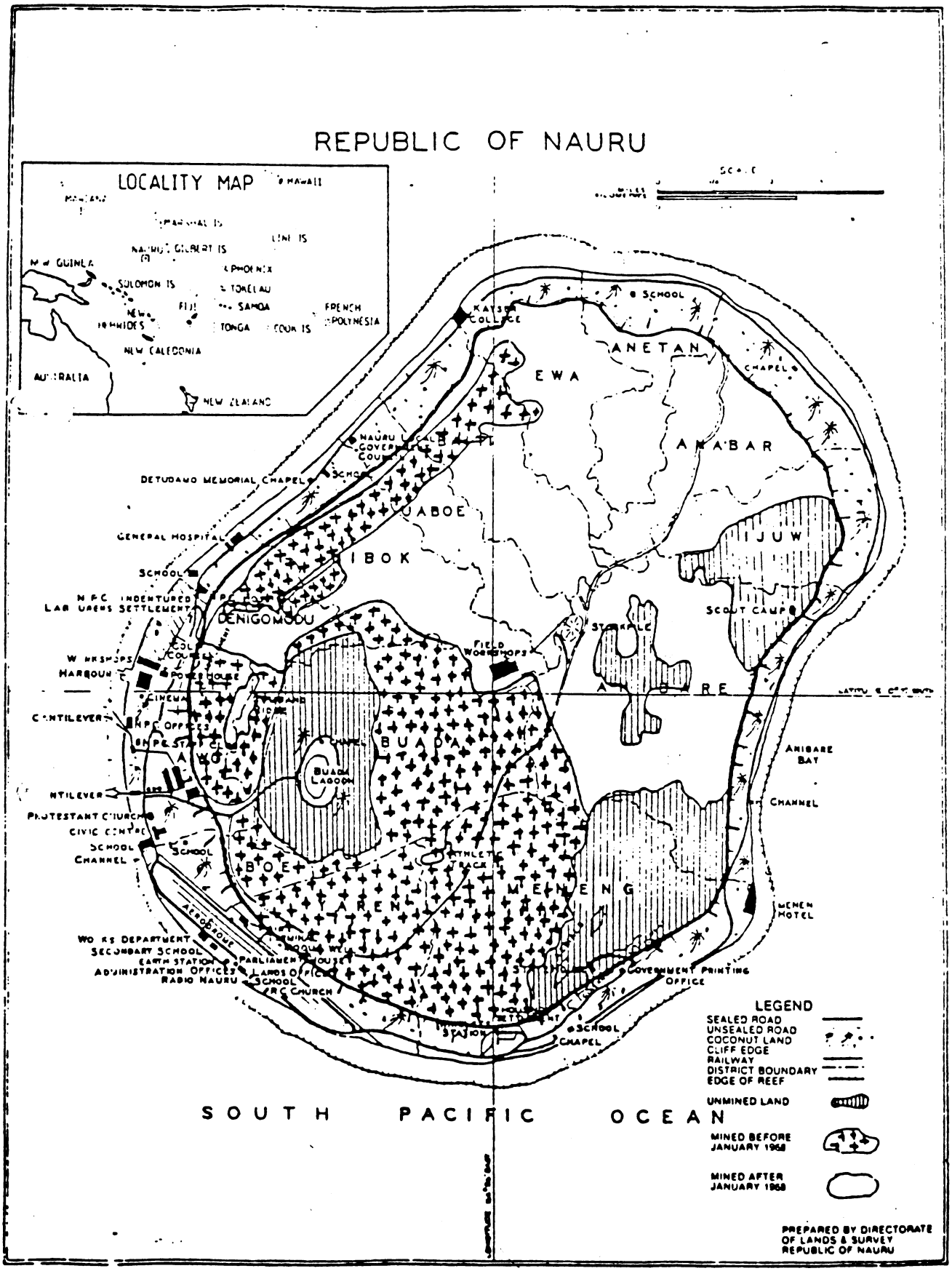
IN THE MATTER OF A CLAIM BY THE REPUBLIC OF NAURU AGAINST THE COMMONWEALTH OF AUSTRALIA CONCERNING THE REHABILITATION OF CERTAIN PHOSPHATE LANDS MINED UNDER AUSTRALIAN ADMINISTRATION BEFORE NAURUAN INDEPENDENCE

APPLICATION OF THE REPUBLIC OF NAURU

19 MAY 1989

NAURU

PHOSPHATE LAND MINED BEFORE JANUARY 1968



REPUBLIC OF NAURU

APPLICATION OF THE REPUBLIC OF NAURU

To the Registrar of the International Court of Justice, the undersigned being duly authorized by the Republic of Nauru and being the duly appointed Counsel for the Republic of Nauru:

I have the honour to refer to the Declarations made by the Republic of Nauru and by the Commonwealth of Australia accepting the jurisdiction of the Court as provided for in Article 36 paragraph 2 of its Statute and, under the jurisdiction thereby conferred on the Court, to submit, in accordance with Article 40 of the Statute and Article 40 of the Rules of Court, an Application instituting proceedings in the name of the Republic of Nauru against the Commonwealth of Australia in the following case, involving the dispute between the Republic of Nauru and the Commonwealth of Australia over the rehabilitation of certain phosphate lands worked out before Nauruan independence.

I. JURISDICTION OF THE COURT

1. Both the Republic of Nauru and the Commonwealth of Australia have accepted the compulsory jurisdiction of the Court under Article 36 paragraph 2 of the Statute, without any relevant reservation.

II. BACKGROUND TO THE DISPUTE

2. The Nauruans have occupied their island in the Central Pacific as an independent people since time immemorial. In 1888, Nauru was annexed by Germany and became part of the Imperial German Protectorate of the Marshall Islands. This annexation occurred after Nauru had been placed within the German sphere of influence under the Anglo-German Convention of 10 April 1886.[1] In 1900 extensive phosphate deposits were discovered on Nauru and on nearby Ocean Island. The concession to mine phosphate within the Imperial German Protectorate of the Marshall Islands was held by the Jaluit Gesellschaft; that concession was renewed in 1905 for 94 years. The concession could not be transferred except with the consent of the Imperial Chancellor. On 12 December 1905 the Imperial Chancellor consented to the transfer of the concession to the Pacific Phosphate Company, an Anglo-German consortium incorporated in the United Kingdom and formed for the purpose of exploiting the phosphate deposits on both Nauru and Ocean Island. The concession was actually transferred by an agreement of 22 January 1906, and the Company exploited the phosphate on Nauru in a relatively small way from 1907 onwards.

3. On 6 November 1914, after the outbreak of the First World War, Australian forces occupied Nauru. At the end of the war, the Australian Government expressed a desire to annex Nauru, in order to gain control over the phosphate deposits in the interests of Australian agriculture. But at the Versailles Conference it was agreed that Nauru, along with other German colonies, would be placed under the Mandate system.

4. The Mandate for Nauru was conferred upon "His Britannic Majesty" by the Principal Allied and Associated Powers under Article 119 of the Treaty of Versailles of 28 June 1919,[2] and pursuant to Article 22 of the League of Nations Covenant. Thereafter, pursuant to Article 22 paragraph 8 of the Covenant, the League of Nations Council on

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[1] GF de Martens, *Nouveau Recueil General de Traites* (2nd series) vol 11, 507.
[2] 112 *British and Foreign State Papers* 73.

17 December 1920 "confirmed" the Mandate for Nauru, and defined the conditions on which it would be exercised.[3] Under the Mandate the Mandatory undertook to "promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present mandate" (Article 2).

5. Shortly after it had been decided to allocate the Mandate for Nauru to the "British Empire", on 2 July 1919, the Australian Government reached an agreement with the United Kingdom and New Zealand with the expressed intention of making "provision for the exercise of the said Mandate and for the mining of the phosphate deposits on the said Islands".[4] Under Article 1 the administration of the Island was vested in "an Administrator", with the first Administrator to be appointed for five years by the Australian Government. In fact, the Australian Government appointed all the Administrators of the Island until independence. The Administrator was given by Article 1 "power to make ordinances for the peace, order and good government of the Island, subject to the terms of this Agreement". The Administrator's powers were not limited by the provisions of the Mandate. Under Article 2 the expenses of the administration, so far as they were not met by other revenue, were to be paid for out of the proceeds from phosphate sales.

6. The 1919 Agreement also provided for a Board of Commissioners (the British Phosphate Commissioners (BPC)) consisting of three members, one appointed by each Government, in whom title to the phosphate deposits would be vested.[5] Article 9 provided for the phosphate deposits to be worked under the "direction, management, and control of the Commissioners subject to the terms of this agreement". The three States were given priority of access to Nauruan phosphate, at a price which was to be set no higher than was necessary to cover the costs of mining and administration.[6] Phosphate not needed by them was to be sold at market price. Profits from the phosphate operations were to be "credited by the Commissioners to the three Governments... and held by the Commissioners in trust for the three Governments to such uses as those Governments may direct, or if so directed by the Government for which they held shall be paid over to that Government" (Article 12). Article 13 of the Agreement provided:

> There shall be no interference by any of the three Governments with the direction, management, or control of the business of working, shipping or selling the phosphate, and each of the three Governments binds itself not to do or to permit and act or thing contrary to or inconsistent with the terms and purposes of this Agreement.

Thus the three Governments agreed that the provisions of the Agreement, which involved the working of Nauruan phosphates at cost price for the benefit of the agricultures of the three Governments, should take priority over all other purposes. The Agreement was required to be "ratified" by the three Parliaments (Article 15). In fact it was "ratified" by the Australian Parliament by the Nauru Island Agreement Act 1919

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[3] 113 *British and Foreign State Papers* 1111.

[4] The text of the Agreement is scheduled to the Nauru Island Agreement Act 1919 (Cth) and to the Nauru Island Agreement Act 1920 (UK).

[5] This vesting occurred by means of a subsequent Agreement of 25 June 1920 between the Crown (represented by the Australian and New Zealand High Commissioners in London and the British Secretary of State for the Colonies, acting on behalf of their respective governments) and the British Phosphate Company. In return for taking over the Company's mining operations as a going concern the Governments agreed to pay to the Company 3,500,000 pounds.

[6] Article 14 allocated shares in the phosphate to each Government, with Australia and the United Kingdom receiving 42% and New Zealand 16%. In fact the United Kingdom used only a small fraction of this allocation, with the bulk of the phosphate (66%) going to Australia: M Williams and B MacDonald, *The Phosphateers* (Melbourne University Press, Melbourne, 1985) 565.

(Cth), and approved by a resolution of the New Zealand Parliament,[7] in each case without condition. But the ratification by the United Kingdom Parliament was expressed to be "subject to the provisions of Article twenty-two of the Covenant of the League of Nations": Nauru Island Agreement Act 1920 (UK) section 1.

7. The Nauru Island Agreement of 1919 was amended by the Nauru Island Agreement 1923. The 1923 Agreement provided that:

> 2. The Administrator shall conform to such instructions as he shall from time to time receive from the Contracting Government by which he has been appointed.
> 3. Copies of all ordinances, proclamations and regulations made by the Administrator shall be forwarded by him to the contracting Government by which he has been appointed, for confirmation or disallowance, and to the two other Contracting Governments for their information; and the Administrator shall supply through the Contracting Government by which he has been appointed such other information regarding the administration of the Island as either of the other Contracting Governments shall require.

Thus under the agreement actual governing power with respect to the Territory was vested in the Government which had appointed the particular administrator, with powers of legislation and disallowance vested exclusively in that Government.

8. With the exception of the Nauru Island Agreement Act 1920 (UK), by which the United Kingdom Parliament confirmed the Nauru Island Agreement 1919 "subject to the provisions of Article twenty-two of the Covenant of the League of Nations" (section 1),[8] all legislation passed for Nauru from 1919 to 1968 (including the legislation under which Nauru became independent) was enacted by the Australian Parliament or by the Administrator appointed by and acting under the instructions of the Australian Government.

9. On 26 August 1942 Nauru was occupied by Japanese forces. Over two thirds of the Nauruans were deported to the island of Truk in Micronesia, which was then under Japanese control, and through disease and poor working conditions the total number of Nauruans had fallen by almost a third in 1945. Nauru remained under Japanese occupation until 14 September 1945, when Australian forces retook the Island.

10. Following the resumption of Australian administration, Nauru was brought under the trusteeship system pursuant to Art 77(1)(a) of the Charter. Under the Trusteeship Agreement for the Territory of Nauru of 1 November 1947,[9] the Governments of Australia, New Zealand and the United Kingdom were designated "as the joint Authority which will exercise the administration of the Territory" (Article 2), but Article 4 provided for the actual administration to be vested in "the Government of Australia... except and until otherwise agreed by the Government of Australia, New Zealand and the United Kingdom". It was never so agreed.

11. Under Article 3 of the Trusteeship Agreement the Administering Authority undertook "to administer the Territory in accordance with the provisions of the Charter and in such a manner as to achieve in the Territory the basic objectives of the International Trusteeship System, which are set forth in Article 76 of the Charter". Article 76 of the Charter provided that a basic objective of the trusteeship system was "(b) to promote the political, economic 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". Article 5(2)(a) of

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[7] *Public Acts of New Zealand (Reprint) 1908-1931*, vol II, 657.
[8] See para 6.
[9] 10 *United Nations Treaty Series* 3.

the Trusteeship Agreement further provided that the Administering Authority would "take into consideration the customs and usages of the inhabitants of Nauru and respect the rights and safeguard the interests, both present and future, of the indigenous inhabitants of the Territory". The Agreement was approved by General Assembly Resolution 140(II) of 1 November 1947, and came into force on that day.

12. The position of the Australian Government as the actual governing authority in Nauru was formalized by the Nauru Agreement of 26 November 1965 between the three Governments. That Agreement established a Legislative Council with power to make laws "for the peace, order and good government of the Territory": these laws would have effect when assented to by the Administrator or by the Governor-General of Australia, if it was reserved for the Governor-General's assent (Article 1(2), (3)). However the Legislative Council's power was not to extend, among other things, to

> (iii) the phosphate industry (including the operation, ownership and control of that industry);
> (iv) phosphate royalties; and
> (v) the ownership and control of phosphate bearing land. (Article 1(2)(a))

Article 3 provided:

> Subject to the provisions of this Agreement, the administration of the Territory is, on and after the appointed day, to be vested in an Administrator appointed by the Government of the Commonwealth of Australia.

The Agreement superseded the Agreements of 1919 and 1923, which ceased to have effect (Article 7). The Agreement was forthwith implemented by the Nauru Act 1965 (Cth).

13. For some time before, the Nauruan people (acting through a Nauru Local Government Council established in 1951) had been seeking greater control over the phosphate industry and over their own lives. Discussions on control of the phosphate industry started in about 1964, and agreement was eventually reached, on 14 November 1967, about the arrangements for the future operations of the industry. The Nauru Island Phosphate Industry Agreement 1967 provided for the Council to take over the "capital assets of the phosphate industry at Nauru that are vested in the commissioners on behalf of the partner Governments" (Clause 7) at a valuation based on "original cost less depreciation at a rate consistent with the economic life of the asset" (Clause 8(1)). The first instalment of the price so payable became due on 30 September 1967, and interest was charged at 6% per annum on the unpaid balance (Clauses 9, 10). Under Clause 5(1) phosphate from Nauru was required to be "supplied exclusively to the partner Governments" at the rate of two million tons per annum or as near as possible, at a price fixed in accordance with Clause 6. The agreement contained provisions for the assumption on behalf of Nauru of liabilities with respect to the phosphate industry. The Agreement was subject to the law of the Australian Capital Territory (Clause 25),[10] and was deemed to have come into force on 1 July 1966. It was given effect to by the Nauru Phosphate Agreement Ordinance of 19 January 1968, an ordinance of the Commonwealth of Australia made under the Nauru Act 1965 (Cth), ten days before Nauruan independence.

14. Nauru became independent as a Republic on 31 January 1968, pursuant to General Assembly Resolution 2347(XXII) of 19 December 1967 and to the Nauru Independence Act 1967 (Cth).

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[10] This is the seat of the Australian federal Government. Under section 122 of the Commonwealth of Australia Constitution, the Commonwealth Parliament has plenary legislative authority over the Australian Capital Territory.

III. THE DISPUTE BETWEEN THE REPUBLIC OF NAURU AND THE COMMONWEALTH OF AUSTRALIA

15. The dispute between the Republic of Nauru and the Commonwealth of Australia has its origins in the fact that from 1919 until 1 July 1967, when the Nauru Island Phosphate Industry Agreement 1967 came into force, the phosphate industry was carried on in such a way that the real benefit of phosphate mining went to the agricultural sectors in the three States, principally Australia. As a result the benefit derived by the Nauruans from phosphate was much lower than it should have been, both because the royalty rate was lower than it would have been in an arms length negotiation, and because the price of phosphate, on which the royalty was calculated, was artificially kept well below world price.[11] A freely negotiated phosphate agreement, based on the recognition that the phosphate belonged to the Nauruan people, did not occur until 1967. When that Agreement came into force, approximately one third of the phosphate lands on the Island had been mined by BPC under Australian administration (see the Map reproduced as a frontispiece, above). As a result of this mining process, there remained on the mined-out lands nothing but a forest of limestone pinnacles, varying between 5 and 15 metres in height. The land was thus rendered completely useless for habitation, agriculture, or any other purpose unless and until rehabilitation was carried out.

16. Under the German administration of Nauru before 1914, provision was made for compensation to the Nauruan landowners for the reduced value of their lands as a result of mining.[12] However shortly after Nauru came under Australian administration, an Ordinance was made setting out the terms for mining leases to be concluded with the Nauruan landowners, terms which avoided any reference to compensation or rehabilitation.[13] In the following year, all German laws applying to Nauru were repealed, including the Imperial Mining Ordinance for the African and South-Sea Protectorate of 1906.[14] No equivalent Australian mining legislation was applied to Nauru. As a result, under the arrangements for mining on Nauru there was neither legislative nor contractual provision for the rehabilitation of those lands. Neither BPC nor the Australian administration accepted any obligation to provide for their rehabilitation.

17. Thus the Government of Australia, acting as the administration of Nauru, failed to make adequate and reasonable provision for the long-term needs of the Nauruan people, and in particular for restoring to a reasonable level the Island of Nauru for habitation by the Nauruan people as a sovereign nation. Particulars of this failure are set out in the following paragraphs.

18. On many occasions BPC took decisions, which were accepted or ratified by the Australian Administration, which directly affected the Nauruans and about which they were not consulted. In 1955-6 and again in 1964, BPC unilaterally decided to increase greatly the extraction rate of phosphate (from about 1.1 million to 1.6 million tons in 1955-6 and from 1.6 to 2.5 million tons in 1964).[15] The effect of these decisions was to

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[11] The accumulated revenue lost to Nauru as a result of the fact that BPC sold Nauru phosphate at less than the prevailing world price (taken as the price for Makatea phosphate from French Polynesia, which was of similar quality, and including an allowance for the loss of the opportunity to earn a return from those funds) has been estimated at approximately $A335 million in 1987 prices. (For present purposes this calculation should be treated as provisional.)

[12] Imperial Mining Ordinance for the African and South-Sea Protectorate (*Schutzgebiete die Kaiserliche Bergverordnung*), 27 February 1906, Arts 78, 83, as applied to Nauru pursuant to Art 92 and to an Addition (*Nachtrag*) to the Jaluit Gesellschaft's Concession on 27 February 1907.

[13] Lands Ordinance 1921 (Nauru) section 2(A).

[14] Laws Repeal and Adopting Ordinance 1922 (Nauru) section 4(1).

[15] N Viviani, *Nauru. Phosphate and Political Progress* (Australian National University

accelerate the potential exhaustion of the phosphate, and to ensure that it was mined out before BPC's concession expired in 2000.

19. BPC, supported by the Administering Authority, consistently took the view that there was no obligation to pay phosphate royalties to the Nauruan people. This was despite the fact that an obligation to pay some royalty had been acknowledged under the German administration before World War 1.[16]

20. During the inter-war years some royalties were paid to the Nauruan people, increasing from a total of 3 pence per ton in 1922 to 8 pence per ton in 1939: this ranged from 0.3% of the value of the phosphate exported (1922) to 5.1% (1939). From 1948, when the export of phosphate from Nauru resumed, until 1965, when the first round of talks was held which eventuality led to the Nauru Island Phosphate Industry Agreement 1967, the total royalty payments to the Nauruan people (including payments to the landowners and to a Long Term Trust Fund) ranged from 2.6% of the value of phosphate exported (1949) to 8.5% (1961), with an average throughout this period of 5.94%.[17] Moreover in their mining operations in Nauru (unlike those on Ocean Island, a British colony) BPC accepted no obligation to replant trees, or otherwise to restore the land to a cultivable state.[18]

21. The total costs of the administration of Nauru were payable by BPC, rather than being charged to the Administering Authority. Thus the administration of Nauru was run as a profit making concern, supported entirely by the proceeds of the phosphate. In accordance with the 1919 Agreement (referred to in paragraph 6 above), phosphate was supplied to the three States as nearly as possible at cost price, allowing for BPC's costs and the limited payments made to the Nauruans. For example in the period 1923-1940, BPC costs were never less than 91.4% of the f.o.b. price of phosphate (a price which was itself well below world price), with administration and payments to Nauruans making up the remaining 8.6%. For the period from 1948 to 1965, BPC costs as a percentage of f.o.b. prices averaged about 85%. For the years from 1924 until 1953 for which data are available, the percentage of administration public funds spent solely for the Nauruan benefit never exceeded 40% and in most years was less that 20%.[19]

22. The Nauruans were denied independent legal or economic advice with respect to the phosphate operations until 1964. For example, independent legal advice was refused in 1962,[20] and independent advice was again refused in 1963.[21] Even when independent advice was permitted, in 1964, the particular adviser sought as first choice was refused.[22]

23. The long term implications of the phosphate mining occurring without any provision for rehabilitation were noted by United Nations bodies as early as 1949. In its *Report to the Trusteeship Council August 6 1948-July 22 1949*, the Australian Government noted:

> The phosphate deposits will be exhausted in an estimated period of seventy years, at the end of which time all but the coastal strip of Nauru will be worthless. The Australian Government is live to the possibility that the Island might not then provide a satisfactory home for the indigenous population and that it may be necessary to give the Natives an opportunity to transfer to some other

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Press, Canberra, 1971) (hereafter referred to as Viviani) 128-9.

[16] Viviani, 132.

[17] The figures are taken from Viviani, 187, 191.

[18] The express obligation to replant was the basis for the English High Court's decision in relation to Ocean Island in the case of *Tito v Waddell (No 2)* [1977] 3 All ER 129.

[19] Viviani, 180.

[20] Viviani, 143.

[21] Viviani, 135.

[22] Viviani, 136.

Island.[23]

In responding to the Australian report on that occasion the Trusteeship Council...

> call[ed] upon the Administering Authority to ensure that, if any conflict arises between the needs of the inhabitants and the expansion requirements of the phosphate industry in such matters as materials, equipment and labour, the needs of the inhabitants must have precedence.[24]

24. General Assembly Resolution 322(IV) of 15 November 1949 resolved...

> 2. To reaffirm the principle that the interests of the indigenous inhabitants must be paramount in all economic plans or policies in trust territories...

25. In each year from the early 1950s, the Trusteeship Council asked the administering authority to obtain detailed figures on BPC's Nauruan operations. On each occasion Australia's reply took a similar form: "The British Phosphate Commissioners is not a commercial undertaking working and selling the phosphate for profit. In these circumstances any question of comparison of price is irrelevant". The Australian reply went on to assert that no separate financial accounts were kept for Nauru.[25] This repeated statement made by the Administering Authority was not true. Figures were and are available comparing on an annual basis the cost of BPC operations on Nauru and Ocean Island.[26] It can therefore be said that the Government of Australia persistently misled the Trusteeship Council and withheld from it relevant information about the phosphate operations on Nauru.

26. From 1949 onwards, the Trusteeship Council referred consistently to the long-term future of the Nauruans and to the possibilities of rehabilitation or resettlement. For example the *Report of the Trusteeship Council 18 December 1951-24 July 1952*, after referring to a further request from the Council for "studies of a technical nature" to be carried out in order to determine the possibility of making use of worked-out phosphate lands, recorded that "the Administering Authority stated that investigation indicated that it would not be practical generally to make use of worked-out phosphate land".[27]

27. The Trusteeship Council frequently referred to the issue of royalties. For example, in the *Report of the Trusteeship Council 4 December 1952-21 July 1953*, the Council reported that the Administering Authority, in response to an earlier request to consider a further increase in royalties:

> Stated that the royalties were reviewed from time to time, but pointed out that they were not determined by the price of phosphate exported, but by the financial requirements of the present and future needs of the inhabitants.[28]

In response, the Council's Visiting Mission...

> considered that the Local Government Council's request that the royalties rate should increase in proportion to the cost of living was basically legitimate. It was not, however, in a position to determine if the cost of living had risen since the royalty rate was last adjusted.[29]

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[23] General Assembly Official Records, 4th Session, Supp No 4 (A/933) 74.
[24] id, 76.
[25] Trusteeship Council, *Report on Nauru 1952-3* (T/1076) 32, cited by Viviani, 126.
[26] See the Tables in Viviani, 187-91. See also M Williams and B MacDonald, *The Phosphateers* (Melbourne University Press, Melbourne, 1985) 564-5.
[27] General Assembly Official Records, 7th Session, Supp No 4 (A/2150) 262.
[28] General Assembly Official Records, 8th Session, Supp No 4 (A/2427) 119.
[29] ibid.

Faced with this impasse, the Council yet again expressed the hope...

> that full details of the new financial arrangements between the Administering Authority and the British Phosphate Commissioners will be furnished in the next annual report.[30]

Again such details were not provided.

28. In 1955, the Trusteeship Council suggested

> that the Administering Authority might give further consideration to the possibility of rehabilitating the worked out phosphate lands.[31]

29. In 1956 the Trusteeship Council noted the Visiting Mission's comment that, although it was not in a position to judge what was a fair rate to be paid to or on the behalf of the Nauruans...

> It was clear... that the royalty payment for the benefit of the Nauruans was low, at least in terms of their future needs.[32]

30. Similarly in 1962 the Trusteeship Council stated that:

> It shares the view of the Visiting Mission that the strongest obligation rests with the governments of the countries which have benefited from low price, high quality phosphate over the many years of the operation of the Commissioners to provide the most generous assistance towards the cost of whatever settlement scheme is approved for the future home of the people of Nauru. In this connection, it takes note with satisfaction of the declaration of the Administering Authority that ample provision of means for developing a future home is not and will not be a stumbling block towards a solution and that the Administering Authority will be mindful of its obligation to provide such assistance.[33]

This undertaking was reaffirmed in 1963.[34]

31. The Agreed Minutes at the end of the 1965 talks on Nauru recorded the following with respect to rehabilitation:

> 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 make any commitment regarding responsibility for any rehabilitation proposals the objectives and cost of which were unknown and the effectiveness of which was uncertain.[35]

32. The Australian Government, confronted with the need to fulfil its obligations to resolve the difficulties for the Nauruan community caused by the non-rehabilitation of the phosphate lands, proposed their resettlement on Curtis Island in Queensland. But it

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[30] ibid.
[31] *Report of Trusteeship Council 17 July 1954-22 July 1955*, General Assembly Official Records, 10th Session Supp No 4 (A/2933) 220.
[32] id, 333.
[33] *Report of Trusteeship Council 20 July 1961-20 July 1962*, General Assembly Official Records, 17th Session Supp No 4 (A/5204) 41.
[34] *Report of Trusteeship Council 20 July 1962-26 June 1963*, General Assembly Official Records, 18th Session, Supp No 4 (A/5504) 28.
[35] id, 94-5.

refused to guarantee to the Nauruan community on Curtis Island its right to preserve and maintain its separate social identity: resettlement was thus envisaged as a step towards total assimilation of the Nauruan community into the Australian population. As a result the proposal for resettlement was unacceptable to the Nauruan people. The Australian Government made no other proposal to resolve the question of rehabilitation prior to independence.

33. General Assembly Resolution 2111(XX) of 21 December 1965, as well as calling upon the Administering Authority to establish a legislative council and to grant independence to Nauru not later than 31 January 1968...

> Further request[ed] 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.

34. Despite the earlier recommendations, it was not until 1965 that a study was made of the feasibility of a wholesale or partial rehabilitation or re-vegetation of the mined out areas. That study recommended a form of partial rehabilitation with provision for adequate water catchment,[36] but its recommendations were not acted on.

35. Further talks were held in 1967, leading to the Nauru Island Phosphate Industry Agreement of 14 November 1967.[37] At this stage the Partner Governments sought to have incorporated in the Agreement a provision excluding any liability to rehabilitate the mined-out lands. In particular the Partner Governments stated that:

> On the question of rehabilitation the Partner Governments maintain that it was not for them to decide what should be done for rehabilitation; this was the decision for the Nauruans. Financial arrangements could be such as to permit the Nauruans to do what they wish within reasonable limits, in the way of rehabilitation. As part of the total arrangements the joint delegation would like to see the Nauruans withdraw their claims in respect of rehabilitation.[38]

The Nauruan position, as stated by Head Chief DeRoburt, was that:

> As the Island was to be a permanent home for the Nauruan people, rehabilitation is needed. The Nauruans could not talk about details under a cloud of denial of broad principles. The land must be rehabilitated. Once agreement on broad principles was reached technical details could be discussed...[39]

Similarly the Nauruan delegation stated:

> We are not prepared publicly or privately to accept the Partner Governments' view that the proposed financial arrangements are adequate to cover our future needs including rehabilitation or re-settlement.[40]

There was no resolution of this issue. The 1967 Agreement made no provision with respect to rehabilitation, one way or the other.

36. In 1966, the Trusteeship Council recalled General Assembly Resolution 2111(XX), and its provisions in relation to rehabilitation, and commented:

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[36] Territory of Nauru, *Report by Committee Appointed to Investigate the Possibilities of Rehabilitation of Mined Phosphate Lands* (1966) 44.
[37] For the provisions of the Agreement see para 13 above.
[38] Nauru Talks 12 April -16 June 1967, Transcript, 56.
[39] id, 82.
[40] id, 112.

> The Council recalls Resolution 1803(XVII) concerning permanent sovereignty over natural resources and invites the attention of the Administering Authority to its provisions.[41]

Similarly General Assembly Resolution 2221(XXI) of 20 December 1966 stated as follows:

> *Recognising* that the phosphate deposits on the Island of Nauru belong to the Nauruan people...
> 3. Recommends further that the Administering Authority should transfer control over the operation of the phosphate industry to the Nauruan people and take immediate steps, irrespective of the cost involved, towards restoring the Island of Nauru for habitation by the Nauruan people as a sovereign nation.

37. The Head Chief of the Nauru Local Government Council, soon to become the President of Nauru, stated, in the course of United Nations discussions of the independence of Nauru in late 1967, that:

> There was one subject, however, on which there was 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 the 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 to their claims.[42]

38. The Special Committee of Twenty-Four in a resolution of 27 September 1967 requested the Administering Authority "to rehabilitate Nauru according to the express wish of the people so that they could continue to live there".[43]

39. General Assembly Resolution 2347(XXII) of 19 December 1967, adopted unanimously, recalled the earlier Resolutions 2111(XX) and 2221(XXI), both of which contained strong recommendations with respect to rehabilitation, noted the agreement that Nauru should become independent on 31 January 1968 and resolved:

> 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...

40. Nauru has repeatedly sought from the Australian Government a recognition of its obligation to rehabilitate the lands in question. Despite these requests the Australian Government has consistently rejected the Nauruan claim for compensation or material assistance with respect to rehabilitation of the phosphate lands. For example, by Note of 27 July 1987, the Australian High Commission on Nauru stated:

> the Australian Government regards the comprehensive phosphate agreement concluded prior to independence as a just settlement that cleared the partner

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[41] *Report of Trusteeship Council 1 July 1965-26 July 1966*, General Assembly Official Records, 21st Session Supp No 4 (A/6304) 43.
[42] Trusteeship Council, 13th Special Session, 22-23 November 1967, T/SR 1323-4, 3.
[43] ibid.

> governments of the former British Phosphate Commissioners of any responsibility for the rehabilitation of Nauru.[44]

Thus the belated recognition in 1967 of Nauru's rights to the remaining phosphate has been unilaterally treated as excluding any rights to the rehabilitation of land mined before that time.

41. In view of the failure by the Australian Government to accept its responsibility in relation to the mined-out lands or to agree to negotiate on ways in which that responsibility might be met, as well as of the need to adopt an overall plan for the rehabilitation of all its phosphate lands, Nauru established an independent Commission of Inquiry into the Rehabilitation of the Worked-out Phosphate Lands. The Report of that Commission was delivered to His Excellency the President of Nauru on 29 November 1988, and was tabled in the Parliament on 20 December 1988. The Commission concluded, *inter alia*:

> (1) that the failure to restore the worked-out land to usable condition, or to compensate the Nauruans for the loss of use of their lands, was a violation of international law and the relevant agreements;
>
> (2) that there was no agreed or just settlement which exonerated the Partner Governments from the responsibility to rehabilitate the lands;
>
> (3) that a cost-feasible plan of rehabilitation of all the worked-out lands on Nauru can be developed, along lines specified in the Report.[45]

The Commission also recommended that a trial rehabilitation program, covering several hectares of land mined after 1968, be undertaken. That recommendation was accepted and the trial rehabilitation program has commenced.

42. On 20 December 1988, the Nauruan Government, in a Note to the Australian Government reaffirmed its view that Australia (in its capacity as the actual administering authority of Nauru) had failed to make any proper provision for the long-term needs of the Nauruan people, and that this failure, which was a breach of the relevant agreements and of general international law, took the form, *inter alia*, of a failure to make any provision for restoring the worked-out phosphate lands to a reasonable level for habitation by the Nauruan people as a sovereign nation.[46] In response, the Australian High Commission to Nauru merely recalled its Note of 27 July 1987, and reserved its position with respect to the Republic of Nauru's claim.[47] Similar notes were sent to the Governments of New Zealand and the United Kingdom, and produced a similar response.[48]

IV. THE CLAIMS OF NAURU

43. Nauru claims that Australia -- by its acts and omissions as set out in Part III of this Application -- has breached the express obligations accepted by it under Article 76 of the United Nations Charter and under Articles 3 and 5 of the Trusteeship Agreement for Nauru of 1 November 1947.

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[44] The text of the Australian Note of 27 July 1987 is set out in Appendix 1.

[45] The Commission of Inquiry estimated the total rehabilitation cost for the pre-1968 lands at A$72,120,000: Commission of Inquiry into the Rehabilitation of the Worked-out Phosphate Lands, *Report* (1988) ch 35.

[46] The text of the Nauruan Note of 20 December 1988 is set out in Appendix 2.

[47] The text of the Australian Note of 3 March 1989 is set out in Appendix 3.

[48] British High Commission Note of 6 March 1989; New Zealand High Commission Note of 9 February 1989.

44. Nauru further claims that Australia -- by its acts and omissions as set out in Part III of this Application -- has breached its obligations arising with respect to Nauru under general international law.

45. In particular Nauru claims that Australia, through its failure to make any provision or any adequate provision for the rehabilitation of the phosphate lands worked-out under Australian administration in the period before 1 July 1967, and having regard to the terms and conditions on which Australia allowed those lands to be exploited, failed to comply with international standards recognized as applicable in the implementation of the principle of self-determination.

46. Nauru further claims that Australia, through its failure to make any provision or any adequate provision for the rehabilitation of the phosphate lands worked-out under Australian administration in the period before 1 July 1967, and having regard to the terms and conditions on which Australia allowed those lands to be exploited, engaged in a denial of justice in the broad sense (denial of justice *lato sensu*) with respect to the Nauruan people.

47. Nauru further claims that Australia, through its failure to make any provision or any adequate provision for the rehabilitation of the phosphate lands worked-out under Australian administration in the period before 1 July 1967 and having regard to the terms and conditions on which Australia allowed those lands to be exploited, abused its rights over the Territory of Nauru and with respect to the Nauruan people, and, by reason of its improper and arbitrary conduct as administering authority in Nauru, engaged in acts of maladministration wrongful under international law.

48. Nauru further claims that Australia, through its failure to make any provision or any adequate provision for the rehabilitation of the phosphate lands worked-out under Australian administration in the period before 1 July 1967, failed to comply with applicable international standards in respect of the preparation for and transfer of control by a predecessor in title or a predecessor responsible for the control and administration of territory.

49. Nauru further claims that there exists a duty of restitution in respect of acts of the Respondent State which involved a failure to take into account the rights and interests of the Nauruan people in relation to the habitability of Nauru, or of the Republic of Nauru as a successor in respect of the territory of Nauru, and that this duty extends to the restoration of those parts of the island, mined under Australian administration before 1 July 1967, to a reasonable condition for habitation by the Nauruan people as a sovereign nation.

V. RELIEF REQUESTED

50. For these reasons, each of which is pleaded in the alternative, Nauru, reserving the right to supplement or to amend this Application and subject to the presentation to the Court of the relevant evidence and legal argument, requests the Court to adjudge and declare that Australia has incurred an international legal responsibility and is bound to make restitution or other appropriate reparation to Nauru for the damage and prejudice suffered. Nauru further requests that the nature and amount of such restitution or reparation should, in the absence of agreement between the parties, be assessed and determined by the Court, if necessary, in a separate phase of the proceedings.

51. In respect of the bases of claim enumerated in paragraphs 43 to 49 (inclusive) above, Nauru reserves the right to ask the Court, at the appropriate stage of the proceedings, to reflect the particular elements of excess and the lack of ordinary consideration in the conduct of the Respondent State by an award of aggravated or moral damages (in the compensatory mode).

52. The Republic of Nauru has designated the undersigned V.S. Mani as its Agent for the purposes of these proceedings, without prejudice to its general right to appoint another Agent and/or co-Agents. All communications relating to this case should be sent directly to the Republic of Nauru. The Agent for the Republic will, as soon as possible, advise you of the address of the embassy of a friendly foreign country to the Netherlands to provide an address for service in The Hague pursuant to Article 40(1) of the Rules of Court.

Respectfully submitted,

IAN BROWNLIE
Duly authorized for this purpose in accordance with Article 38 paragraph 3, of the Rules of Court.

19 May 1989

AUTHENTICATION

I, V.S. MANI, being the Chief Secretary and Acting Secretary for External Affairs of the Republic of Nauru, hereby certify, in accordance with Article 38(3) of the Rules of the International Court of Justice, that the above signature is that of Professor Ian Brownlie, who has been duly authorized to sign the application on behalf of the Republic.

DATED this 19th day of the month of May, Nineteen hundred and eighty-nine.

V.S. Mani
Chief Secretary and Acting Secretary for External Affairs
Republic of Nauru

APPENDIX 1

AUSTRALIAN NOTE OF 27 JULY 1987
(See paragraph 41)

Note No.45/87

The Australian High Commission presents its compliments to the Department of External Affairs of the Republic of Nauru and has the honour to refer to the Department's Notes Nos. 205/86 of 3 December 1986, 18/87 of 20 January 1987, 69/87 of 20 February 1987 and 105/87 of 16 April 1987, regarding the Commission of Inquiry into the Rehabilitation of Worked Out Phosphate Lands in Nauru.

The High Commission has the honour to advise the Department that requests made by the Department for specific documents will be dealt with in accordance with the principles embodied in the Australian Freedom of Information Act and the Archives Act. These principles involve, amongst other matters, the resource and cost implications of meeting the request and the nature of particular documents encompassed by the request.

The High Commission wishes to point out that the Government of Australia will not be bound by the findings of the Commission of Inquiry.

The High Commission wishes to record that the Australian Government regards the comprehensive Phosphate Agreement concluded prior to Independence as a just settlement that cleared the Partner Governments of the former British Phosphate Commissioners of any responsibility for the rehabilitation of Nauru.

The Australian High Commission avails itself of this opportunity to renew to the Department of External Affairs of the Republic of Nauru the assurances of its highest consideration.

Nauru
27 July 1987

Certified correct:

V.S. Mani
Agent of the Republic of Nauru
May 1989

APPENDIX 2

NAURUAN NOTE OF 20 DECEMBER 1988

(See paragraph 42)

REPUBLIC OF NAURU

Note No.167/1988

The Department of External Affairs of the Republic of Nauru presents its compliments to the Australian High Commission and has the honour to refer to the High Commission's Notes Nos. 14/84 of 19th March, 1984, 45/87 of 27th July, 1987 and 4/88 of 3rd February, 1988 relative to the rehabilitation of the phosphate lands worked out before Nauru's independence.

The Department of External Affairs has the further honour to record that the Report of the Commission of Inquiry into the Rehabilitation of the Worked-Out Phosphate Lands in Nauru was delivered to His Excellency the President of Nauru on 29th November, 1988, and was tabled in Parliament on 20th December, 1988. A copy of that Report accompanies this Note.

The Department of External Affairs wishes to reaffirm the position which has been consistently taken by the Government of Nauru since independence, and which was taken by the elected representatives of the Nauruan people before independence, that the administering authority under the mandate and trusteeship over Nauru was and remains responsible for the rehabilitation of the phosphate lands worked out in the period of its administration of Nauru, prior to 1st July, 1967 when the Nauru Island Phosphate Agreement 1967 entered into force.

Specifically, the Department of External Affairs wishes to reaffirm that Australia, in its capacity as one of three states involved in and party to the Mandate and Trusteeship agreement over Nauru, failed to make proper provision for the long-term needs of the Nauruan people, whose welfare was a sacred trust and overriding responsibility under the relevant agreements, and that this failure, which was a breach of those agreements and of general international law, took the form, inter alia, of a failure to make any provision for restoring the worked-out phosphate lands to a reasonable level for habitation by the Nauruan people as a sovereign nation. The Department notes that at no stage has the Government of Nauru, or any authorized representative of the Nauruan people, accepted or agreed that the Nauru Island Phosphate Agreement cleared the partner Governments or any of them of their responsibility for the rehabilitation of the lands.

Accordingly, the Department of External Affairs reaffirms that the Australian Government was and remains under an obligation to make reparation for this failure, whether in the form of monetary compensation or by making, in co-operation with the Government of Nauru, full provision for the rehabilitation of the relevant lands in a manner agreed between the parties.

In this connection the Department of External Affairs specifically draws attention inter alia to the following principal conclusions of the Commission of Inquiry:

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

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

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

The Government of Nauru is considering in detail the conclusions of the Report, and expects in due course to be able to make an announcement in principle as to the development of a co-ordinated plan for the rehabilitation of the worked-out lands as a whole. In the meantime the Department of External Affairs notes that the conclusions in the Report, in particular those referred to in the preceding paragraph, support the view which the Department has consistently maintained as to the responsibility for rehabilitation of the lands mined before 1968.

The Department of External Affairs wishes to record the continued determination of the Government of Nauru to proceed to the rehabilitation of the worked-out lands, so as to secure the future of the Nauruan people. In that regard, the Department again calls upon the Australian Government to accept its responsibilities and to co-operate to this end. The Department stands ready to discuss in detail the forms which such co-operation might take.

The Department of External Affairs of the Republic of Nauru avails itself of this opportunity to renew to the Australian High Commission the assurances of its highest consideration.

NAURU
20th December, 1988

Certified correct:

V.S. Mani
Agent of the Republic of Nauru
May 1989

APPENDIX 3

AUSTRALIAN NOTE OF 3 MARCH 1989
(See paragraph 42)

AUSTRALIA

224/1/2

Note No.16/89

The Australian High Commission presents its compliments to the Department of External Affairs of the Republic of Nauru and has the honour to acknowledge receipt of the Department's Note No. 167/1988 of 20 December 1988 and the accompanying copy of the Report of the Commission of Inquiry into the Rehabilitation of the Worked-out Phosphate Lands of Nauru.

The Australian Government will study the Report, but meanwhile it wishes to recall the statements in the High Commission's Note of 27 July 1987 and to reserve its position generally in relation to the Report and the Department's Note No. 167/1988 of 20 December 1988.

The Australian High Commission avails itself of this opportunity to renew to the Department of External Affairs of the Republic of Nauru the assurances of its highest consideration.

Nauru
3 March 1989

Certified correct:

V.S. Mani
Agent of the Republic of Nauru
May 1989