NAURU V. AUSTRALIA: THE INTERNATIONAL FIDUCIARY DUTY AND THE SETTLEMENT OF NAURU'S CLAIMS FOR REHABILITATION OF ITS PHOSPHATE LANDS

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Ramon E. Reyes Jr.*

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I. INTRODUCTION

On August 10, 1993, the Republic of Nauru and the Commonwealth of Australia settled their historic lawsuit in which Nauru sought reparations for the rehabilitation of the island's once-rich phosphate producing lands. The case, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, was the first in which a former trust territory sought redress from a former trusteeship authority for the administration of the territory's economic assets. The dispute raised interesting questions of international law concerning accountability for the operations and conduct in a trust territory. Although the International Court of Justice ("ICJ") did not get the opportunity to decide the merits of the case, the dispute and its subsequent settlement stand as convincing evidence that a fiduciary duty exists in international law.

Nauru's claims arose from the mining of its phosphate deposits by the British Phosphate Commissioners ("Commissioners") during the...
period of the island's trusteeship. The claims were based primarily on Australia's alleged violation of Articles 3 and 5 of the Trusteeship Agreement for the Territory of Nauru ("Trusteeship Agreement"), and Article 76 of the United Nations Charter ("Charter"). Nauru also claimed that Australia violated several principles of general international law when it allowed the island's phosphate deposits to be mined to a point of near-depletion, and when it allowed the benefit of the phosphate industry to be shared by the three administering authorities rather than the Nauruan people.

Although Australia's counter-memorial has not been made public, it is not difficult to discern Australia's specific opposition to Nauru's claims. First, as a preliminary matter, Australia contended that Nauru's claims were inadmissible as a matter of international law and that Nauru had waived any claims to rehabilitation of the phosphate lands. In legislative authority concerning the phosphate industry. In accordance with a trilateral agreement made on February 9, 1987, the overseas assets of the Commissioners were divided between the United Kingdom, Australia, and New Zealand. For a full discussion of the history of the Commissioners and how it came to control Nauruan phosphate, see Ellen M. FitzGerald, Note, *Nauru v. Australia: A Sacred Trust Betrayed?*, 6 CONN. J. INT'L L. 209 (1990).

8. For a discussion of Nauru's trusteeship, see infra notes 40-82 and accompanying text.


10. U.N. CHARTER art. 76; Preliminary Objections, Judgment, supra note 3, at 243.

11. In particular, Nauru claimed that Australia breached the following obligations:

1. the international standards generally recognized as applicable in the implementation of the principle of self-determination;
2. the obligation to respect the right of the Nauruan people to permanent sovereignty over their natural resources;
3. 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*;
4. the obligation of general international law not to exercise powers of administration in such a way as to constitute an abuse of rights; and
5. the principle of general international law that a State which is responsible for the administration of a territory is under an obligation not to bring about changes in the condition of the territory which will cause irreparable damages to, or substantially prejudice, the existing or contingent legal interests of another State in respect of that territory.

Preliminary Objections, Judgment, supra note 3, at 243-44 (paraphrased).

addition, Australia claimed that the suit could not proceed without the presence of the United Kingdom and New Zealand, and, in any event, that the ICJ lacked jurisdiction to hear the case. Second, and going to the substance of Nauru’s claims, Australia contended that Nauruans enjoyed a higher standard of living during the period of the mandate and trusteeship than it had ever experienced previously. Moreover, Australia claimed that if Nauru’s needs were sufficiently provided for, it could dispose of the remainder of the assets in whatever manner it desired—Australia could use the residual assets for its own benefit.

Although the ICJ did not reach the merits of the case, it rejected six of Australia’s seven preliminary objections concerning the court’s jurisdiction over the matter, the alleged waiver of any claims by Nauru, and the fact that New Zealand and the United Kingdom were not parties to the action. In a unanimous decision, the ICJ did uphold one of Australia’s preliminary objections concerning one of Nauru’s claims to the Australian allocation of the overseas assets of the British Phosphate Commissioners. However, in a nine to four vote, the ICJ found that, based on Article 36(2) of the Statute of the Court, it had jurisdiction to

13. Australia also objected on the grounds that the termination of Nauru’s trusteeship precluded any claims for rehabilitation, the lawsuit was precluded because Nauru had not submitted it within a reasonable time, and also that the claim was precluded because of Nauru’s alleged lack of good faith. Preliminary Objections, Judgment, supra note 3, at 246-55. For a full discussion of Australia’s objections, see infra part III.C.


17. Id.

18. Article 36(2) states the following:

The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without any special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

(a) the interpretation of a treaty;
(b) any question of international law;
(c) the existence of any fact which, if established, would constitute a breach of an international obligation;
(d) the nature of extent of the reparation to be made for the breach of an international obligation.

entertain Nauru’s Application, and the suit was permissible under international law.\(^\text{19}\)

This article analyzes the recent settlement of the dispute between Nauru and Australia. In addition, the article analyzes the decision of the ICJ in the preliminary objections phase of the case.\(^\text{20}\) More importantly, it discusses the nature, source, and extent of the fiduciary duty\(^\text{21}\) in international law, and whether Australia has breached this duty. Furthermore, the article argues that had the ICJ reached the merits of the case, it would have held Australia, as the administering authority of the trust territory, liable for the breach of its international fiduciary duty in administering Nauru’s economic assets—the island’s phosphate deposits.

Part II of the article presents a review of Nauru’s social and political history, including an account of its existence under the League of Nations Mandate System (“Mandate System”) and the United Nations Trusteeship System (“Trusteeship System”). Part III presents a comprehensive analysis of the dispute between Nauru and Australia. The section begins with a discussion of the history of \textit{Nauru v. Australia} and an analysis of Nauru’s claims for reparations, and continues with a brief description of Australia’s preliminary objections to the ICJ’s assertion of jurisdiction over the dispute and the admissibility of Nauru’s claims. The section further discusses the ICJ’s decision of June 26, 1992 in \textit{Nauru v. Australia}, which rejected the bulk of Australia’s preliminary objections. The section continues with a brief analysis of Australia’s arguments in opposition to Nauru’s substantive claims. Part III concludes with a presentation and discussion of the settlement of \textit{Nauru v. Australia}. Part IV of the article focuses on the search for a fiduciary duty in international law. The section discusses the nature, source, and extent of the international fiduciary duty Australia owed to Nauru during the mandate and trusteeship periods. Part V discusses whether Australia has breached this international fiduciary duty, and Part VI concludes with a brief prediction on how the ICJ would have decided the merits phase of the case.

\(^\text{19}\) Court].

19. Order of June 29, \textit{supra} note 16, at 345. An application to the International Court of Justice is analogous to a complaint filed in the municipal context. Nauru’s Application was filed on May 19, 1989. Nauru Application, \textit{supra} note 5.


21. For a definition of fiduciary duty in this context, see \textit{infra} notes 254-58 and accompanying text.
II. BACKGROUND

An analysis of Nauru’s claims for reparations because of Australia’s alleged misconduct must necessarily start with a historical review of the two nations’ relationship. This includes a discussion of Nauru’s social and political history, and its existence under the Mandate System and Trusteeship System with Australia at the helm.

A. Nauru’s History

The Republic of Nauru is an independent island nation located in southeastern Micronesia. The island consists of an uplifted coral formation of about 21.2 square kilometers, with a central plateau sixty meters high that is covered with beds of phosphate rock. Below the plateau is a fertile strip of land ranging from 150 to 300 meters in width. This strip contains most of the habitable land on the island, but allows for

22. A historical perspective is relevant not only for a thorough understanding of the legal issues involved in the case, but also because such discussions are frequently included in the opinions of the International Court of Justice. See generally Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18); Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.) 1984 I.C.J. 246 (Oct. 12).

23. Nauru gained its independence on January 31, 1968. See 1991 BRITANNICA WORLD DATA 742 (15th ed.). Nauru is currently a special member of the Commonwealth of Nations, the International Telecommunications Union, the International Civil Aviation Organization, the Universal Postal Union, and the South Pacific Commission. Id. at 742-43.


24. Micronesia is a group of approximately 2100 islands located in the southwestern Pacific Ocean, spread over an area of three million square miles. See 25 ENCYCLOPÆDIA BRITANNICA 232, 253 (15th ed. 1991). Nauru is positioned at 0 degrees, 32 seconds south latitude and 166 degrees, 56 seconds east latitude, approximately 4050 kilometers northeast of Sydney, Australia, and 4160 kilometers southwest of Honolulu, Hawaii. Id. at 281.

25. The plateau is between thirty and sixty meters above sea level. The phosphate rock is derived from guano deposits. Id. at 282.

very limited agricultural production. Nauru is encircled by an unbroken coral reef, which affords the island no usable harbors.

Nauru’s current population is estimated at 9300, of which three-fifths are indigenous Nauruans of Micronesian, Melanesian, and Polynesian descent. One-fourth of the population is comprised of other Pacific Islanders, while the remainder are of Asian and European descent. Again, Nauru’s entire population is concentrated along the habitable coastal strip encircling the plateau.

Nauru’s economy is based almost entirely on the mining, processing, and exporting of the high quality phosphate deposits found on the central plateau. The phosphate industry provided Nauru with a Gross National Product of $160 million (U.S.) in 1988. This allowed Nauruans to experience a per capita income of about $20,000 (U.S.), which was the

27. 8 ENCYCLOPÆDIA BRITANNICA 562 (15th ed. 1991). Although Nauru’s climate is tropical (daytime temperatures average 28° Celsius), irregular rainfall (2060 mm annually) and very porous soil of poor quality limits agricultural production. Id. The subsistence crops of coconut palms, pandanus (a small palm-like plant yielding fiber used for weaving), bananas, pineapple, and a few vegetables, cannot support the island’s population. See 25 ENCYCLOPÆDIA BRITANNICA, supra note 24, at 282.

28. 8 ENCYCLOPÆDIA BRITANNICA, supra note 27, at 562.

29. This estimate is from 1991. 1991 BRITANNICA WORLD DATA, supra note 23, at 748. Seventy-seven percent of the population is under the age of 29, and there is an annual growth rate of 2.1%. Nauruan life expectancy is 64 years of age for men, and 69 for women. Id.

30. 8 ENCYCLOPÆDIA BRITANNICA, supra note 27, at 562.

31. Id.

32. Id.; see 25 ENCYCLOPÆDIA BRITANNICA, supra note 24, at 282. The large deposits of phosphate rock have been formed by the interaction of guano with limestone. The raw phosphate rock found on the central plateau is unsuitable as fertilizer because it is relatively insoluble and contains high percentages of fluorine. Therefore, the rock must be put through a complex process whereby it is treated with chemicals, such as sulfuric acid, to produce water-soluble compounds such as calcium phosphate, phosphoric acid, and ammonium phosphate. In their refined state, the phosphates are known as Nauru Calcined Rock. See Leslie, supra note 26, at 399.

More than 100 million tons of phosphate rock are mined each year throughout the world. Major producers include the United States, the Russian Federation, and Morocco; other producers include Egypt, Israel, Jordan, Syria, Algeria, and Tunisia. Ninety percent of the rock is used for the production of phosphate fertilizers. Although phosphate rock derived from guano deposits, like that found in Nauru, is a minor factor in the world supply and demand, it is a major source for phosphate fertilizers used in Australia and New Zealand. Nauru produces about two million tons of phosphates annually, and exports the finished product to Australia, New Zealand, the United Kingdom, and Japan. See 21 ENCYCLOPÆDIA AMERICANA 963 (Int’l ed. 1985).

33. 1991 BRITANNICA WORLD DATA, supra note 23, at 772.
highest in the region, and among the highest in the world.\textsuperscript{34} However, this level of income should not be overstated. Assuming constant 1984 production levels, Nauru's phosphate deposits will be completely depleted by the year 2000.\textsuperscript{35} As Nauru relies almost exclusively on phosphate mining for its livelihood, it will surely experience a difficult economic situation in the next decade. Agricultural production and commercial fishing provide the only other industries from which Nauru can produce income, but neither is sufficient for the island's economic needs. As a hedge against the inevitable economic decline, the Nauruan government has invested profits from the phosphate industry in Australian real estate, a national airline and shipping line, and other long-term enterprises.\textsuperscript{36}

The mining operations on Nauru are coordinated by the Nauru Phosphate Corporation, an agent of the national government. Fifty percent of the profits from the mining industry is distributed to the national government; the other half is divided among Nauruan landowners, a trust-fund, and the local government.\textsuperscript{37} The income from phosphate mining has allowed Nauru to build an impressive infrastructure and to afford a high standard of living to its inhabitants.\textsuperscript{38} However, as was previously stated, this level of achievement should not be overstated as the island's phosphate reserves are soon to be completely depleted.\textsuperscript{39} The result of the British Phosphate Commissioners' exclusive mining of the phosphate rock has been to leave Nauru without adequate resources to provide for the island's future.

\textit{B. Nauru: Pre-mandate to Independence}

To properly frame the dispute between Nauru and Australia, it is necessary to examine their political relationship prior to Nauru's independence. This is necessary because any duty owed to Nauru must be based on an obligation arising during the period of Australian control of the island. Logically, the first place to begin this examination would appear to be the Nauru Mandate and Trusteeship Agreement, as these

\textsuperscript{34} Id.
\textsuperscript{35} See, e.g., \textit{Weeramantry}, supra note 23, at xiii ("The known phosphate resources of the island as recorded by the Nauru Phosphate Commission are likely, at present rates of mining and sales, to run out about 1994.").
\textsuperscript{36} See, e.g., Leslie, supra note 26, at 399-400.
\textsuperscript{37} \textit{8 Encyclopedia Britannica}, supra note 27, at 562.
\textsuperscript{38} For a discussion on Nauru's infrastructure, see \textit{id}.
\textsuperscript{39} See \textit{Weeramantry}, supra note 23, at xiii.
documents were the source of Australia's administrative power and as the ICJ would have been bound to apply international conventions and treaties first.40 However, it is important to know what happened prior to the Mandate in order to understand the extent to which Nauru's resources had been controlled by other nations. And, this is the better place to start.

The first European to visit Nauru was Captain John Fearn of the British ship Hunter, who arrived at the island in 1798 when sailing from New Zealand to China.41 Thereafter, Nauru was frequently visited by whaling ships through the 1830s, which used the island to replenish supplies. A few sailors even settled on the island.42

Disputes between Australian, British, and German trading companies operating in the Pacific intensified during the latter half of the nineteenth century.43 In 1886, the United Kingdom and Germany entered into the Anglo-German Convention of April 6, 1886, which divided the western Pacific into separate spheres of influence and Nauru fell within the German sector.44 By 1888, German settlers persuaded their government to incorporate Nauru into the Imperial German Protectorate of the Marshall Islands.45

The Nauruan phosphate deposits were discovered in 1899 by an employee of the Pacific Islands Company, a British trading enterprise. At that time, a concession was given to Jaliut Gesellschaft, a German company which started mining the phosphate in 1900. In 1906, the concession was transferred to the Pacific Phosphate Company, which ran the mines until 1914.46 During World War I, Australia occupied Nauru and controlled its phosphate industry.47

Following World War I, a number of nations including Australia, New Zealand, and South Africa wanted to replace Germany as the colonial master of Nauru. The United States, however, was opposed to the

40. See Statute of the Court, supra note 18, art. 38(1).
41. See 8 ENCYCLOPÆDIA BRITANNICA, supra note 27, at 562.
42. See WEERAMANTRY, supra note 23, at 5.
43. Id.
44. See Nauru Application, supra note 5, at 4.
45. It is claimed that European-supplied firearms contributed to the spread of interclan warfare from 1878 to 1888, and this led to pressure by the German Settlers. 8 ENCYCLOPÆDIA BRITANNICA, supra note 27, at 562.
46. WEERAMANTRY, supra note 23, at 16-27. Pacific Phosphate was formerly the Pacific Islands Company. Profits were shared with Jaliut Gesellschaft. For a detailed discussion of the transfer of the concession, see id.
47. See id. at 41-54.
annexation of Nauru by any of the Allied Nations. Under the direction of President Woodrow Wilson, the United States lobbied for Nauru to be provided for by the League of Nations.

Australian Prime Minister Hughes dismissed the United States' aspirations for the League of Nations as unrealistic. Hughes wanted to annex Nauru for a number of reasons, including garnering the inexpensive source of high quality phosphate for the Australian agricultural industry and the desire to ease the country's heartache from losing 60,000 Australians during the war.

Australia sought support for its position from Great Britain. It received that support when British Prime Minister Lloyd George endorsed and advocated a compromise that was ultimately accepted by the United States. Under the compromise, which was concluded at the Versailles Conference, territories such as Nauru and New Guinea would remain under the supervision of the League of Nations but would be administered "under the laws of the mandatory as integral portions" thereof.

On December 17, 1920, "His Britannic Majesty" was granted a class "C" mandate for Nauru pursuant to Article 119 of the Treaty of Versailles and Article 22 of the League of Nations Covenant. The purpose of the Mandate was to promote the material wealth and physical well-being of the people of Nauru and "development for a sacred trust of civilization." Under this system, "His Majesty" enjoyed a wide scope of power over Nauru, which it controlled as an "integral portion[ ] of its territory." However, this type of mandate did not grant the United Kingdom sovereignty over the mandated territory.

48. Id.
49. Id.
50. See id. at 48; see also NANCY VIVIANI, NAURU: PHOSPHATE AND POLITICAL PROGRESS 42 (1970).
51. The compromise plan involved the creation of class "A," "B," and "C" mandates. See infra notes 83-101 and accompanying text; see also WEERAMANTRY, supra note 23, at 46-47. In order to win Hughes's support, Prime Minister George argued that while the Mandate System required the protection of certain rights of the inhabitants, the plan allowed Australia something comparable to ownership of the island. Id. at 47.
52. LEAGUE OF NATIONS COVENANT art. 22.
53. Id.; see also Nauru Application, supra note 5, at 6. For a discussion of the C mandate, see infra notes 54-56 and accompanying text.
54. LEAGUE OF NATIONS COVENANT art. 22.
55. The Covenant stated that the C mandates were best administered under the domestic laws of the Mandatory power. Id.
56. This was specifically held by the International Court of Justice and other municipal
Prior to the Nauruan Mandate, an internal struggle occurred among Australia, New Zealand, and Great Britain concerning the actual control of the island. While Australia was intent on nothing short of complete control over Nauru, New Zealand, also dependent on an inexpensive supply of phosphate, desired the same. Similarly, Britain desired to assert its influence over Nauru through the authority already existing in the region in the form of the High Commissioner of the western Pacific.

On July 2, 1919, the three nations settled their internal struggle and entered into the Nauru Island Agreement ("NIA"). According to the NIA's preamble, the agreement was entered into to "make provision[s] for the exercise of the . . . Mandate and for the mining of the phosphate deposits on the . . . island." Reference to the mining operations as a related yet distinct aspect aside from the Mandate indicates the importance the three governments placed on the phosphate deposits. A great deal of the NIA was directed at developing a system to extract the phosphate deposits. Under the NIA, Australia, New Zealand, and Great Britain would share the phosphate.

In addition to structuring a system to exploit the phosphate deposits, the NIA established a system for the island's administration. Australia was appointed the initial Administrator of Nauru for a five-year period. Thereafter, the three governments adopted the practice of allowing Australia to appoint the succeeding Administrators. A few years later, general administration of the island was transferred to the British Phosphate Commissioners.


58. Id. (citing BARRIE MACDONALD, IN PURSUIT OF THE SACRED TRusT 10-11 (1988)).

59. See Agreement between Australia, Great Britain and New Zealand Relative to the Administration of Nauru Island, July 2, 1919, 225 C.T.S. 431 [hereinafter Nauru Island Agreement].

60. Id. at pmbl.

61. See generally id. at 431-33.

62. Id. at 433.

63. Id. at 432.

64. See Trusteeship Agreement, supra note 9, art. 4.

Ownership of the phosphate deposits and all related property was vested in the Commissioners. Prior to this vesting, the three governments paid a royalty to the Nauruan people to gain control over all previously held title to the deposits and other property. The royalty, which was a percentage of the value of the phosphate exported, was paid into three funds: the Nauru Royalty Trust Fund, the Nauruan Landowners' Royalty Trust Fund, and the Nauruan Community Long-term Investment Fund. These funds were used to administer the island.

The Commissioners “administered” the island until the outbreak of World War II. Japan occupied Nauru from August 26, 1942, through December 14, 1945. During this period Japan forcibly deported a large number of Nauruans, and nearly one-third of the population lost their lives. No phosphate was mined during the period of Japanese occupation of Nauru.

Following World War II, Nauru became a United Nations Trust Territory. The United Nations Trusteeship System was, in part, designed “to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government. . . .” Under the Trusteeship Agreement, Australia, New Zealand, and the United Kingdom accepted the responsibility of ensuring the safety, well-being, and development of the Nauruan society.

Throughout the periods of the Mandate System and the Trusteeship System, the Nauruan population became increasingly dissatisfied with their

66. Id.
67. Id.
68. Anghie, supra note 15, at 461. The payments, however, were not based on the market value of the phosphate deposits or the land, nor were they paid directly to the Nauruans who owned the land. Instead, Nauruans were paid a royalty, characterized by Australia as a gratuity, based on a percentage of the value of the phosphate that was exported. Id.
69. Viviani, supra note 50, at 189-90.
70. See 25 ENCYCLOPÆDIA BRITANNICA, supra note 24, at 283.
71. Weeramantry, supra note 23, at xi-xii. However, the Independent Commission of Inquiry found that there “was no material . . . supporting any responsibility on the part of the Japanese government for rehabilitation.” Id. at 411.
73. Id. at 451.
74. Fitzgerald, supra note 7, at 218.
75. U.N. CHARTER art. 76(b).
76. See Trusteeship Agreement, supra note 9, arts. 2-7.
minimal participation in the economic and political life on the island. As a result of criticism from the United Nations, the Nauru Local Government Council ("NLGC") was formed in 1951 to allow for increased involvement of the population in the island's affairs. However, the NLGC lacked any real ability to effect political or economic decisions on the island.\(^7^7\)

The Nauruans' continued dissatisfaction with their situation resulted in the "Nauru Talks," a series of negotiations held between 1964 and 1967 concerning resettlement, rehabilitation, independence, and royalties. The "Talks" resulted in the adoption of the Nauru Island Phosphate Agreement ("NIPA") in 1967.\(^7^8\) In the NIPA, the partner governments, Australia, New Zealand, and the United Kingdom, agreed to sell the mines to the NLGC for $21 million (Australian).\(^7^9\) In addition, the NLGC agreed to supply the three governments with phosphate at a below market rate on a long-term production contract.\(^8^0\) Although Australia wanted to include a clause in the NIPA settling any claims Nauru might have to rehabilitation of the phosphate lands, such a clause was explicitly rejected by Nauru, and was not included.\(^8^1\)

Nauruans gained political control over the island on January 31, 1968, when they were granted independence by Australia, New Zealand, and Great Britain.\(^8^2\)

C. League of Nations Mandate System

Understanding the essence of Nauru's claim for rehabilitation requires an examination of the relationship established by the Nauru Mandate and the Mandate System. This is so because the Trusteeship System, from which Australia's duty is alleged to have come, was motivated by the same concerns as the Mandate System.\(^8^3\) As Article 22 of the League of Nations Covenant gave effect to the Mandate System, it is the best place to continue the examination. In addition, although there has been no litigation in the ICJ concerning the breach of obligations under a

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77. See Anghie, supra note 15, at 452.
78. Id. at 460.
79. See WEERAMANTRY, supra note 23, at 272-73.
80. See id. at 273.
81. Id.
82. 1991 BRITANNICA WORLD DATA, supra note 23, at 742.
trusteeship, there has been extensive litigation on the Mandate System. These cases help clarify both the Mandate and Trusteeship Systems.

Article 22 creates the principle under which the Mandate System was to be operated. Article 22 states

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such people form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

This principle commands not only that the mandatory act in the "best interests" of the inhabitants, but also look toward the "well-being and development" of the people. The obligation to exercise its authority according to these principles arose out of the agreements signed by the mandatory and the League of Nations.

The League of Nations Covenant established three classes of mandates, "A," "B," and "C," all of which were under the general supervision of the Permanent Mandates Commission ("PMC"). The PMC was not an organ of the League, but was given the authority to receive and examine annual reports from the mandatories to the League Council. The commission also advised the League Council on all matters related to the Mandates. The PMC regarded the Mandate System as a

84. Id.
85. LEAGUE OF NATIONS COVENANT art. 22 (emphasis added).
86. See LOUIS HENKEN ET AL., INTERNATIONAL LAW CASES AND MATERIALS 275-76 (2d ed. 1989). This entails forecasting long into the future in order to maximize the territories' potential economic and social development. See Leslie, supra note 26, at 397.
87. WEERAMANTRY, supra note 23, at 27.
88. See R.N. CHOWDHURI, INTERNATIONAL MANDATES AND TRUSTEESHIP SYSTEMS: A COMPARATIVE STUDY 182-228 (1955). PMC had responsibilities similar to those of the United Nations Trusteeship Council. Specifically, the Commission used three devices to supervise the mandatories: obligatory annual reports by the mandatory; hearings in which the mandatory could defend those reports; and the receipt of native petitions and visiting mission reports. FitzGerald, supra note 7, at 213.
89. LEAGUE OF NATIONS COVENANT art. 22, para 9.
90. Id.
way to bring about the independence of all mandated territories. Further, the PMC consistently stated that sovereignty over the mandated territory did not lie in the administering authority. In most cases, this view affected the actual administrative practices in class ‘‘B’’ and ‘‘C’’ mandates because it forbade attempts to exercise sovereignty over the economic assets of the mandated territories.

Class A mandates comprised the former Ottoman provinces in the Middle East. In these mandates, the administering authorities had only nominal authority and limited supervisory power as the territories were almost ready to attain independence, albeit with the authority’s help.

Class B mandates were composed of the former German colonies of Central Africa. In these mandates, the administering authorities had greater power to supervise affairs and administer policies. Such mandates were vested, and held under trust. All former German territories in Africa and the Pacific Ocean, including Nauru, were incorporated into class C mandates. These mandates were controlled as an integral portion of the territory of the mandatory, and were subject to the mandatory’s municipal law.

The Mandate System, which was the first of its kind, reinforced the general principle that control of a territory is separate and distinct from the issue of ownership of the territory’s economic assets. The trustee was “precluded from administering the property for his own personal benefit.” The economic assets of the territory needed to be preserved for a time when the territory would become an independent sovereign nation. The importance of these rights and obligations is indicated by the fact that the Mandate System made disputes concerning the

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91. See Anghie, supra note 15, at 457.
92. Id.
93. FitzGerald, supra note 7, at 212.
94. Id. at 212.
95. Id.
96. Id. at 213.
99. Id. at 149 (separate opinion of Judge McNair).
"interpretation or application" of the mandate justiciable in the Permanent International Court of Justice. 101

Although the League of Nations was short-lived, its principles were not. The League supplied the first real example of international accountability in practice, and the concept of the sacred trust survived the League's demise.

D. The United Nations Trusteeship System

The Mandate System was officially terminated on April 18, 1946, following the demise of the League of Nations. 102 However, the relationship established by the Mandate System, 103 which some have called a "sacred trust," or a "fiduciary duty," did not end with the League's termination. 104 When faced with the problem of what to do with the administration of dependent nations after World War II, the delegates at the San Francisco Conference ("Conference") turned to the experiences of the Mandate System and tried to learn from its mistakes. One positive aspect of the Mandate System, the sacred trust, was carried over into the United Nations Trusteeship System. 105

The United Nations Charter ("Charter") established a set of obligations that are more precise than those contained in the Mandate System. These obligations are contained in the Trusteeship System outlined in Chapters XII and XIII of the Charter. 106 The foundation of the Trusteeship System is, however, Chapter XI, entitled the "Declaration Regarding Non-Self-Governing Territories" ("Declaration"), which re-established the principle of the sacred trust. Although Article 73 is not by its terms applicable to the International Trusteeship System established by Chapters XII and XIII, its principles are applied broadly. 107 Article 73 is considered to be applicable to all areas of the world that are not fully self-
governing, including protectorates, colonies, and other possessions, as well as trust territories created under the Trusteeship System.

The Declaration establishes the fundamental principle on which the Trusteeship System is based—the administering authority recognizes the "interests of the inhabitants of these territories are [to be] paramount, and accept[s] as a sacred trust the obligation to promote [to] the utmost . . . the well-being of the inhabitants." Further, the Declaration shows the intention of the Members of the United Nations to promote the political, social, and economic development of the inhabitants of trust territories and to promote and to advance international peace and security. As with the Mandate System, the Trusteeship System constitutes a dual mandate—an obligation running to both the territory's inhabitants and the international community.

Some of the objectives of the Trusteeship System are set forth in Article 76 of the Charter. According to the Charter, the Trusteeship System was established to promote the political, economic, social, and educational development of each territory's inhabitants to ensure their progress toward self-government. In order to ensure that the principles and objectives of the Trusteeship System would be upheld, the Charter provided that the General Assembly would perform all United Nations functions related to the trusteeships. The General Assembly was charged with the responsibilities of considering reports submitted by the administering authorities, considering petitions from the trust's inhabitants, and performing periodic visits to the respective trust territories.

108. See generally Emil J. Sady, The United Nations and Dependent Peoples 24-25 (1957); U.N. Charter art. 73.
109. See generally Sady, supra note 108, at 24-25; U.N. Charter art. 73.
110. U.N. Charter art. 73 (italics added).
111. Id. art. 73(a)-(e); see FitzGerald, supra note 7, at 214.
112. See generally Toussaint, supra note 107, at 11. While the obligations of the Trusteeship System have never been tested by the International Court of Justice, they have been the subject of litigation in domestic courts. For example, the United States Court of Appeals for the Ninth Circuit stated that while the substantive provisions of the Charter were vague, "we do not believe that [a trusteeship] agreement is too vague for judicial enforcement." Saipan v. United States Dep't of Interior, 502 F.2d 90, 99 (9th Cir. 1974). The Saipan case raised issues similar to those raised in the Nauru case.
113. See U.N. Charter art. 76(b).
114. See id. art. 85, ¶ 1.
115. See id. art. 87, ¶ (a).
116. See id. art. 87, ¶ (c).
In fulfilling its responsibilities with respect to the trusteeships, the General Assembly was assisted by the United Nations Trusteeship Council. The Trusteeship Council, which was established as an analog to the PMC, was comprised of countries equally divided between those that administered trust territories and those that did not. The council was charged with the same responsibilities as the General Assembly. In addition, the council was given the responsibility of drafting a questionnaire on the “political, economic, social, and educational advancement of the inhabitants of [the] trust territory.” The administering authority would then be responsible for reporting the answers to the questions to the General Assembly.

III. NAURU V. AUSTRALIA

With a basic understanding of Nauru’s social and political history, as well as the Mandate and Trusteeship Systems, one can turn to the dispute between Nauru and Australia. This section discusses the lawsuit from its inception to settlement. A case history is followed by a presentation of Nauru’s claims, a discussion of Australia’s Preliminary Objections and the ICJ’s decision of June 26, 1992, a brief summary of Australia’s response to Nauru’s claims, and a discussion of the settlement of August 10, 1993.

A. Case History

The lawsuit actually began on August 21, 1987, when Nauru applied to become a party to the Statute of the International Court of Justice (“Statute”). Nauru sought to become a party to the Statute for the sole

118. See U.N. Charter art. 86.
119. See id. art. 87.
120. Id. art. 88.
121. Id.
122. Preliminary Objections, Judgment, supra note 3, at 240.
123. Id. at 245.
124. See Settlement Agreement, supra note 2.
125. See U.N. Doc. S/19137 (1987); U.N. SCOR, 2754 mtg. at 114, U.N. Doc. A/43/2 (1987). All members of the United Nations are considered parties to the Statute of the International Court of Justice. A state which is not a member of the U.N. can become a party to the Statute “on conditions determined by the General Assembly upon
purpose of bringing suit against Australia, which, as a Member of the
United Nations is also a party to the Statute. According to Article 93(2)
of the Charter, a state that is not a member of the United Nations may
become a party to the Statute on conditions “determined by the General
Assembly upon the recommendation of the Security Council.” After
such a recommendation, the General Assembly accepted Nauru as a
party to the Statute of the ICJ. As a party to the Statute, Nauru was
able to bring suit against Australia in the ICJ.

On May 19, 1989, Nauru filed an application with the ICJ and
instituted proceedings against Australia for rehabilitation of the phosphate
lands (“Nauru Application”). Jurisdiction was based on Article 36(2)
of the Statute of the Court, whereby states can declare that they recognize
the court’s compulsory jurisdiction in all legal disputes. This

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126. See U.N. Charter art. 93, ¶ 2.
127. Id. art. 93, ¶ 2.
128. Summary Statement by the Secretary-General on Matters of which the Security Council is seized and on the stage reached in their consideration, Addendum, U.N. Doc. S/18570/Add.42 (1987). The Security Council recommended that Nauru be admitted as a party to the Statute of the Court on condition that it deposit an instrument with the Secretary-General containing (1) acceptance of the provisions of the Statute; (2) acceptance of all obligations of a member of the United Nations under Article 94 of the Charter; and (3) an undertaking to contribute to the expenses of the International Court of Justice. See id.
129. The acceptance was conditioned on the Republic of Nauru filing an instrument, signed and ratified by the government, containing
(a) [Nauru’s] acceptance of the provisions of the Statute of the International Court of Justice;
(b) Acceptance of all the obligations of a Member of the United Nations under Article 94 of the Charter;
(c) An undertaking to contribute to the expenses of the Court such equitable amount as the General Assembly shall assess from time to time, after consultation with the Government of the Republic of Nauru.

Id.
130. See Statute of the Court, supra note 18, art. 35(1).
132. See Preliminary Objections, Judgment, supra note 3, at 245. Article 36(2) states
The . . . parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning [the following]:
(a) the interpretation of a treaty;
recognition may be conditional—limited in time and based on reciprocity. Both Australia and Nauru recognized the ICJ’s compulsory jurisdiction pursuant to Article 36(2). Nauru’s declaration of acceptance was deposited with the Secretary-General on January 29, 1988, and Australia’s on March 17, 1975. Ultimately, however, the issue of jurisdiction was one for the court to decide.

On July 18, 1989, pursuant to Article 48 of the Statute of the Court, the ICJ fixed the time limits for filing the written proceedings in the case. Nauru’s Memorial was due on April 20, 1990, and Australia’s Counter-Memorial on January 21, 1991. After Nauru filed its Memorial, Australia filed preliminary objections claiming, among other things, that the ICJ lacked jurisdiction to hear the case. Pursuant to Article 79 of the Rules of the Court, the ICJ suspended the proceedings on the merits and fixed July 19, 1991 as the time for Nauru to present a written statement concerning the preliminary objections. The written

(b) any question of international law;
(c) the existence of any fact which, if established, would constitute a breach of an international obligation;
(d) the nature or extent of the reparation to be made for the breach of an international obligation.

Statute of the Court, supra note 18, art. 36(2).

133. Statute of the Court, supra note 18, art. 36(3).

134. Acceptance of the ICJ’s jurisdiction under Article 36(2) is by the method of unilateral declaration, deposited with the Secretary-General of the U.N. according to Article 36(4) of the Statute of the Court. The unilateral declaration of acceptance binds that state to litigate disputes to the extent the other state’s acceptance coincides. See id. art. 36(2)-(4).

135. See Preliminary Objections, Judgment, supra note 3, at 245. Under Nauru’s declaration, the ICJ’s jurisdiction is “not extend[ed] to any dispute with respect to which there exists a dispute settlement mechanism under an agreement between the Republic of Nauru and another State. . . .” Australia’s declaration states that the court’s jurisdiction “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.” Id.

136. Statute of the Court, supra note 18, art. 36(6).

137. Id. art. 48.

138. See Order of July 18, supra note 131.


140. This was done on February 8, 1991. See Preliminary Objections, Judgment,
statement was filed on July 17, 1991. From November 11 through 22, 1991, public hearings were held on the issues of the preliminary objections.

B. Nauru’s Claims

The Nauru Application and Memorial raised four principal legal arguments. First, through its acts and omissions, Australia violated its express obligations under Article 76 of the Charter and Articles 3 and 5 of the Trusteeship Agreement. Second, Australia failed to comply with “international standards recognized as applicable in the implementation of the principle of self-determination.”

Third, Australia breached its obligations under general international law. And fourth, Australia denied Nauru justice lato sensu (justice in the broad sense).

Factually, Nauru contended that from 1919 to 1967 the phosphate industry was run in such a way that the real benefit of the mining went to the agricultural industries of Australia, New Zealand, and the United Kingdom. The Application alleged that the price paid for the Nauruan phosphate was kept well below the world market price, and the royalty rate Nauru received during this period was lower than it would have been in an arms-length transaction. The price for the phosphate was fixed by an agreement among the three administering authorities, who each had priority access to the phosphate. Also, the excess production was sold at world market prices for the account of the three authorities. Furthermore, when the NLGC purchased the mines back from the Commissioners, it was conditioned on Nauru’s supplying the three

supra note 3, at 243.

141. Id.
142. Id.
143. Nauru Application, supra note 5, at 30.
144. Id.
145. Id.
146. Id.
147. Id. at 12.
148. Id. at 14. It is estimated that the revenue lost as a result of the low royalty rate is as high as $335 million (Australian). Id. at n.11.
149. This was reflected in the below market price. Id. at 6-8.
150. Id. at 6.
151. In essence, Nauru bought back its own property by paying a fee to the trustees. See id. at 12.
governments with two million tons of phosphate per year, all at a previously fixed price. As a result, the benefit accruing to the Nauruans was a great deal less than it should have been.

Nauru claimed that as well as decreasing the benefit from the mining industry, none of the three trustees provided for the rehabilitation of the phosphate lands. Under German administration, the leases with Nauruan landowners compensated for the devaluation of the land due to the mining activity. However, such provisions were absent from the agreement with the Commissioners. In fact, Nauru claimed that while Australia was aware of the need for rehabilitation it never acknowledged an obligation to rehabilitate the devastated land. Moreover, Nauru alleged that during the period from 1924 to 1953 Australia only spent between twenty and forty percent of the Commissioner’s profits on Nauru’s administration.

In all, Nauru alleged that Australia, through its own actions and those of the Commissioners, breached the duty to administer Nauru’s economic

152. Id. From Nauru’s point of view, this was a total output contract.
153. Id. at 12. Nauru also assumed all liabilities associated with the mining industry.
154. Id. at 12, 14.
155. Id. at 14. When Nauru began operating the mines, nearly one-third of the phosphate deposits were already completely mined-out. This left the remaining land “completely useless for habitation, agriculture, or any other purpose unless and until rehabilitation was carried out.”
156. Id.
157. Id.
158. Id. at 16. Nauru supported this argument by pointing to a report by Australia to the Trusteeship Council. The report reads

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 alive to the possibilities that the island may 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 island.


Nauru also claims that the Commissioners never acknowledged an obligation to pay royalties to the Nauruan people. To support this point, Nauru cites numerous instances of correspondence between the Trusteeship Council and Australia regarding the inadequacy of the royalty and the lack of a positive response in this regard. See id., at 18, 20, 22.

159. Id. at 16.
assets in a way that promoted "to the utmost . . . the well-being of the inhabitants" of Nauru.\textsuperscript{160}

As one remedy, Nauru asked the ICJ to find that Australia had incurred "an international legal responsibility . . . to make restitution or other appropriate reparation to Nauru for the damage and prejudice suffered."\textsuperscript{161} Although Nauru provided a provisional accounting of the damages it suffered due to Australia’s actions, the Application requested that the issue of damages be decided in a separate phase of the proceedings if the parties could not agree thereto.\textsuperscript{162} Nauru also reserved the right to request aggravated damages to "reflect the particular elements of excess and the lack of ordinary consideration in the conduct of [Australia]."\textsuperscript{163}

\textbf{C. Australia's Preliminary Objections and the Decision of June 26, 1992}

In its judgment of June 26, 1992, the ICJ rejected all but one of Australia’s seven preliminary objections.\textsuperscript{164} In a unanimous vote, the court did uphold Australia’s objection concerning Nauru’s claim to the Australian allocation of the overseas assets of the British Phosphate

\begin{itemize}
\item \textsuperscript{160} U.N. \textit{CHARTER} art. 73; \textit{see also} Nauru Application, \textit{supra} note 5, at 30.
\item \textsuperscript{161} Nauru Application, \textit{supra} note 5, at 30-32.
\item \textsuperscript{162} \textit{Id.} at 32.
\item \textsuperscript{163} \textit{Id.}
\item \textsuperscript{164} Preliminary Objections, Judgment, \textit{supra} note 3, at 257-67. Australia raised seven Preliminary Objections to the Nauru Application:
\item 1. The ICJ lacked jurisdiction to deal with Nauru’s Application because of Australia’s reservation to the ICJ’s compulsory jurisdiction, \textit{id.} at 245-47;
\item 2. Nauru waived all claims relating to the rehabilitation of the phosphate lands, \textit{id.} at 247-50;
\item 3. the termination of the Trusteeship by the U.N. precludes the claims from now being asserted, \textit{id.} at 250-53;
\item 4. Nauru’s claims are inadmissible on the ground that they were not raised within a reasonable time, \textit{id.} at 253-55;
\item 5. Nauru failed to act in good faith in relation to the rehabilitation of the phosphate land, \textit{id.} at 255;
\item 6. Nauru’s claims are inadmissible because any judgment on the breach of the Trusteeship Agreement involves the responsibility of New Zealand and the United Kingdom, who have not consented to the ICJ’s jurisdiction in this case, \textit{id.} at 255-62; and
\item 7. Nauru’s claims concerning the overseas assets of the British Phosphate Commissioners do not arise out of a legal dispute between the parties within the meaning of Article 36(2), \textit{id.} at 262-67.
\end{itemize}
Commissioners. However, in a nine to four vote, the court found that, based on Article 36(2) of the Statute of the ICJ, it had jurisdiction to entertain Nauru's Application and that the suit was permissible under international law. What follows is a brief presentation of the facts on which Australia based its preliminary objections and the ICJ's reasoning and decision on each.

To prove its first objection—that the ICJ lacked jurisdiction over the case—Australia pointed to three facts. First, the General Assembly and Trusteeship Council had exclusive jurisdiction over the dispute as the parties' relationship arose out of the Trusteeship Agreement. Second, there was ample opportunity to resolve the dispute under the Trusteeship System, and any dispute of that nature should be regarded as having been settled by the fact of the Trusteeship's termination. Third, Nauru had raised the issue of rehabilitation during the Nauru Talks, and, at the end of those discussions, the issue was not covered in the Nauru Island Phosphate Agreement. Basically, Australia contended that the two nations agreed to have recourse to some other method of settling this dispute, one outside of Australia's declaration of compulsory jurisdiction. Therefore, Australia argued, the ICJ lacked jurisdiction to hear the case.

In rejecting Australia's first objection, the ICJ reasoned that Article 36(2) only applied to disputes between States, and therefore the issue was whether "Australia and the Republic of Nauru did or did not, after . . . Nauru acceded to independence, conclude an agreement whereby the two States undertook to settle their dispute . . . by resorting to an agreed procedure other than recourse to the Court." The ICJ found that there was no evidence of such an agreement after Nauru achieved independence. Therefore, based on Article 36(2), the court decided it had jurisdiction to hear the case.

165. Id. at 268.
166. Statute of the Court, supra note 18, art. 36(2).
169. Id. at 246-47.
170. Id. at 247.
171. Id. at 246.
172. See id.
173. Id.
174. Id. at 246.
Australia argued that its second objection—that the Nauruan authorities waived all claims to rehabilitation of the phosphate lands—was supported by two facts. First, the implicit result of the 1967 Agreement was that Nauru had waived any claims to rehabilitation. By accepting transfer of the entire phosphate industry to its control, Nauru was accepting all responsibility for rehabilitating the land. Second, a statement by the Nauruan Head Chief to the General Assembly amounted to an undertaking by the Nauruan authorities to finance the rehabilitation of the land from future revenue and constituted a waiver of any claim against Australia.

With respect to Australia's second objection, the ICJ noted that the NIPA contained no clause that expressly waived Nauru's claims to rehabilitation, nor could the Agreement, when read as a whole, be seen as implying such a waiver. Furthermore, when viewed in context, the statements by Nauruan officials did not imply a "departure from the point of view expressed clearly and repeatedly by the Nauruan people"—Australia was responsible for rehabilitating the phosphate lands. Therefore, those statements should not be interpreted as a waiver

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175. Id. at 247.
176. Id.
177. Id.
178. Id. at 248. Speaking to the Fourth Committee of the U.N. Generally Assembly on December 6, 1967, the Nauruan Head Chief, Mr. DeRoburt said

[The island had the] good fortune [to possess] large deposits of high-grade phosphate. That economic base, of course, presented its own problems. One which worries Nauruans derived from the fact that the 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 that problem.

Id. at 248-49.
179. Id. at 250.
180. Id.
181. Id. at 249. In a meeting of the 33rd session of the Trusteeship Council, a representative of Nauru stated that

[T]he 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
of Nauru's claims for rehabilitation of the phosphate lands mined prior to independence.\footnote{182}

The third objection—that termination of the Trusteeship by the United Nations precluded the claims from being asserted\footnote{183}—was relatively simple. Australia claimed that the competence to determine any breach of the Trusteeship Agreement was with the Trusteeship Council and General Assembly.\footnote{184} And, therefore, when the General Assembly terminated the Trusteeship, the system of administration came to an end, and, "in the absence of an express reservation on the Administering Authority, the termination [was] conclusive and operate[d] as a complete discharge from all further responsibility."\footnote{185}

The ICJ summarily rejected Australia's third objection, noting that the General Assembly had expressed its desire that Australia address the rehabilitation issue.\footnote{186} Although Resolution 2347,\footnote{187} which terminated the Trusteeship Agreement, did not expressly reserve any rights to rehabilitation, the court did not view the resolution as a waiver of such rights either.\footnote{188} In other words, "the rights Nauru might have had in connection with rehabilitation of the lands remained unaffected" by the termination of the Trusteeship.\footnote{189}

Australia's fourth objection is similar to the defense of laches.\footnote{190} Australia claimed that from its independence in January 1968 to December 1988, Nauru did not formally raise the issue of rehabilitation with Australia or the other Administering Powers.\footnote{191} As a result of this delay,
Australia had been prejudiced in that much of the documentation relating to the Mandate and Trusteeship had been lost or misplaced in the interval.\textsuperscript{192} Further, additional prejudice existed because developments in the law during this time had rendered it difficult to ascertain the legal obligations of the Administering Authorities at the time the alleged breaches occurred.\textsuperscript{193} Therefore, Australia argued, Nauru’s claims were inadmissible because they were not submitted within a reasonable time.\textsuperscript{194}

In rejecting this objection, the ICJ disagreed with Australia’s assessment of the facts. First, however, the court acknowledged that a delay on the part of a claimant may render an application inadmissible, but that “international law does not lay down any specific time-limit in that regard.”\textsuperscript{195} The court then pointed out that, as early as February 1969, Nauru had notified Australia of its desire to work out a specific rehabilitation scheme for the island.\textsuperscript{196} Moreover, there were subsequent written and oral indications of Nauru’s claims to Australian officials.\textsuperscript{197} Therefore, the court found that the Nauruan “Application was not rendered inadmissible by [the] passage of time.”\textsuperscript{198}

Australia’s fifth objection—lack of good faith on Nauru’s part—also was summarily rejected by the ICJ.\textsuperscript{199} Australia claimed that “Nauru has failed to act consistently and in good faith in relation to rehabilitation,” and that the court should “exercise . . . its discretion and . . . uphold judicial propriety” by “declin[ing] to hear the Nauruan claims.”\textsuperscript{200} In other words, Australia argued that because Nauru had continued to mine the phosphate and had not yet acted to rehabilitate the lands, it should be precluded from raising its claims against Australia. Noting that the Application had been properly submitted in the framework of remedies open to Nauru, the ICJ stated that it was too early to decide this issue, but that at that point Nauru’s conduct did not amount to an abuse of process. Therefore, the court rejected this objection.\textsuperscript{201}

\begin{itemize}
\item \textsuperscript{192} Id.
\item \textsuperscript{193} Id.
\item \textsuperscript{194} Id.
\item \textsuperscript{195} Id. at 253-54.
\item \textsuperscript{196} Id. at 254.
\item \textsuperscript{197} Id.
\item \textsuperscript{198} Id. at 255.
\item \textsuperscript{199} Id.
\item \textsuperscript{200} Id.
\item \textsuperscript{201} Id.
\end{itemize}
Australia’s sixth objection—Nauru’s claims were inadmissible because any judgment involved the responsibility of New Zealand and the United Kingdom, neither of whom had consented to the ICJ’s jurisdiction in this case—contained two aspects. First, Australia argued that the nature of Nauru’s claims—arising out of the Trusteeship Agreement—required that the suit be brought against the three States jointly and not against one of them individually. Second, Australia claimed that deciding the merits of the case would involve a finding as to the discharge of the United Kingdom’s and New Zealand’s obligations under the Agreement without their presence. This would be prejudicial to the two nations and contrary to the fundamental principle that the jurisdiction of the ICJ derives solely from the consent of States.

The ICJ rejected both aspects of this argument. With regard to the first aspect, the court noted that the question of joint and several liability was one that should be reserved for the merits phase, but was independent from the issue of whether Australia could be sued alone. The court did not see any reason why the claims against Australia should not proceed absent the other nations’ presence. In the court’s opinion, “[i]t could not be denied that Australia had obligations under the Trusteeship Agreement . . . and there is nothing in the character of the Agreement which debars the court from considering a claim for breach of those obligations by Australia.” With regard to the second aspect, after a lengthy discussion, the ICJ found that New Zealand and the United Kingdom were not necessary parties to the proceedings regarding the Nauru Application. Further, Article 59 of the Statute protects the interests of States not party to the case. Therefore, the court was free to adjudicate the claims notwithstanding the absence of the two nations.

202. Id. at 255-56, 258.
203. Id. at 258. In this context, Australia raised the question of whether the liability of the three States under the Agreement was joint and several so that any one of them could be liable to make full reparation for the damage flowing from the administration of Nauru. Id. at 258-59.
204. Id. at 259; see also Statute of the Court, supra note 18, art. 36.
205. See Preliminary Objections, Judgment, supra note 3, at 261-62.
206. Id. at 259.
207. Id. at 261-62.
208. Id. at 261; see also Statute of the Court, supra note 18, art. 59.

[The ICJ’s] 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
Australia's final objection—that Nauru's claim to the overseas assets of the British Phosphate Commissioners was inadmissible as the ICJ had no jurisdiction—was based on several grounds.\(^{210}\) Primarily, Australia alleged that the claim was a new one, as it first appeared in Nauru's Memorial.\(^{211}\) The court agreed with Australia and found that the claim first appeared in the Memorial and was not part of the original claim in the Application. Therefore, the ICJ decided that the claim was inadmissible and upheld the objection.\(^{212}\)

### D. Australia's Response to Nauru's Claims

Following the ICJ's decision on Australia's preliminary objections, the court set time limits for further pleadings in the case.\(^{213}\) Under the Order, Australia's Counter-Memorial was due on March 29, 1993, while a decision on the subsequent procedure was reserved.\(^{214}\) Australia's Counter-Memorial was in fact filed on March 29, 1993,\(^{215}\)

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\(^{210}\) Id. at 264. All of the grounds were not addressed by the ICJ. The grounds were the claim is a new one; Nauru has not established that the claim arises out of a "legal dispute" between the [p]arties, within the meaning of Article 36, paragraph 2 of the Statute of the Court; Nauru cannot claim any legal title to the assets in question and has not proven a legal interest capable of justifying its claim in this regard; and each of the objections raised by Australia concerning the other claims by Nauru also applies to the claim relating to the overseas assets.

\(^{211}\) Id. at 265.

\(^{212}\) Id. at 265-66. The ICJ may decide a new claim as long as it can be included in the original claim in substance. Here, even though the claim was a new one, it was not implicit in the Application, nor did it arise directly out of the question that was the subject matter of the Application. Therefore, the court could properly dismiss the claim. See Temple of Preah Vihear (Cambodia v. Thai.) 1962 I.C.J. 36 (June 15); Fisheries Jurisdiction (F.R.G. v. Icel.) 1974 I.C.J. 203 (July 25).

\(^{213}\) Order of June 29, supra note 16, at 345.

\(^{214}\) Id. at 346.

\(^{215}\) See Certain Phosphate Lands in Nauru (Nauru v. Austrl.), 1993 I.C.J. 316 (Order
and, while its contents have not been made public, the arguments are not difficult to discern based on the preliminary objections and public statements made by the government.\textsuperscript{216}

First, Australia has consistently argued that, as neither the Trusteeship Council nor the General Assembly ever expressly declared Australia to be in violation of their obligations under the Trusteeship Agreement and United Nations Charter, it could not be responsible for the rehabilitation of the phosphate lands.\textsuperscript{217} In addition, although Australia lost the jurisdictional phase of the proceedings, many of the arguments raised in that phase also would have been raised in the merits phase.\textsuperscript{218}

Second, Australia argued that the Nauruan people experienced a higher standard of living under the Mandate and Trusteeship Systems than ever before.\textsuperscript{219} According to Australia, Nauruan health care, public services, and education all improved exponentially during the period of Australian administration.\textsuperscript{220} Therefore, it satisfied its obligations under the Trusteeship Agreement and the United Nations Charter.

Third, Australia claimed that Nauru already has the means to rehabilitate the island's phosphate lands. Australia claimed that as the NIPA gave Nauru the economic benefit of the phosphate industry, and as the three administering authorities transferred their interest in the mining concession without compensation, Nauru could afford to rehabilitate the phosphate lands without Australia's assistance.\textsuperscript{221} Further, Australia has consistently maintained that the revenue from the phosphate industry ensured Nauru's long-term prosperity.\textsuperscript{222}

Interestingly, Australia's final argument is that because the beneficiaries of the trust, the Nauruans, were adequately provided for, the
trustee, Australia, could use the remaining trust assets for its own benefit.\(^\text{223}\)

**E. The Settlement Agreement**

Following the submission of Australia's Counter-Memorial, the ICJ fixed time limits for the final pleadings in the case.\(^\text{224}\) Nauru was given until December 22, 1993 to file a Reply, and Australia was given until September 14, 1994 to file a Rejoinder.\(^\text{225}\) However, the parties never filed such pleadings as the case was settled on August 10, 1993. The parties notified the ICJ of the settlement on September 9, 1993 and agreed to discontinue the proceedings.\(^\text{226}\) The case was discontinued on September 13, 1993.\(^\text{227}\)

Pursuant to the settlement, Australia agreed to pay Nauru $107 million (Australian) "in an effort to assist the Republic of Nauru in its preparations for its post-phosphate future."\(^\text{228}\) However, the Settlement Agreement explicitly states that the settlement payments "are made without prejudice to Australia's long-standing position that it bears no responsibility for the rehabilitation of the phosphate lands."\(^\text{229}\) While the inclusion of such a provision is not surprising and may seem to strike a blow against the existence of an international fiduciary duty, this is not the case. The Settlement Agreement, along with other factors, can be viewed, at the very least, as a tacit acknowledgment of some responsibility by Australia for the massive environmental and economic damage perpetrated on the island of Nauru.

The settlement payments themselves are due over a twenty-one year period.\(^\text{230}\) A total of $57 million (Australian) was to be paid on or before August 31, 1994, in various installments.\(^\text{231}\) The remaining $50 million


\(^{225}\) See id.


\(^{227}\) See id.

\(^{228}\) Settlement Agreement, *supra* note 2, art. 1(1).

\(^{229}\) Id. art. 1(1).

\(^{230}\) Id.

\(^{231}\) Id. Ten million was due by August 31, 1993. Id. Thirty million was due on or before December 31, 1994. Id. Seventeen million was due on August 31, 1994. Id. art. 1(1)(a)-(c).
(Australian) is due over the next twenty years in annual installments at a rate of $2.5 million, "maintained in real terms by reference to the Australia Bureau of Statistics' non-farm GDP deflator." At the conclusion of the twenty-year period, Australia will continue to provide development cooperation assistance to Nauru at a mutually agreed level. The United Kingdom and New Zealand each agreed to pay $8.5 million (Australian) toward the settlement.

The Settlement Agreement also includes a general release of all claims against Australia, New Zealand, and the United Kingdom, as well as a provision wherein the parties agree to discontinue their action in the ICJ. Both of these provisions are typical of settlement agreements in the municipal and international contexts.

On August 10, 1993, in addition to signing the Settlement Agreement, the Australian Government and Nauru signed the Joint Declaration of Principles Guiding Relations Between Australia and the Republic of Nauru ("Joint Declaration"). The purpose of the Joint Declaration was to "maintain and strengthen" the "unique and historical" relationship shared by the two countries. Through the Joint Declaration, the nations sought "to build on existing bilateral, regional and other mutually beneficial arrangements in accordance with their shared commitment to constructive co-operation."

The Joint Declaration is interesting in that it covers a wide range of subjects, including, among other things, diplomatic cooperation and consular representation, financial services cooperation, fisheries surveillance assistance, communication and travel, crime, terrorism and

232. Id. art. 1(1)(d).
233. Id. art. 1(2).
235. Settlement Agreement, supra note 2, art. 3.
236. Id. art. 2. The Settlement Agreement also contains an article which provides that the Agreement will "enter into force on the date on which the parties have notified each other that the constitutional requirements of each party for the entry into force . . . have been complied with." Id. art. 4.
239. Id.
240. Id.
smuggling, and legal cooperation. More specifically, the Joint Declaration accords most-favored nation status on each country and removes all tariff and non-tariff barriers between the nations. Moreover, the Joint Declaration ensures that Nauru will receive the "maximum economic benefit from the production and international marketing of its phosphate resources." Although the legal effect of the Joint Declaration cannot be questioned, its future practical effect on Nauru's economy remains largely unknown.

F. Post-settlement Rehabilitation Plans

Four-fifths of Nauru was stripped to mine the phosphate deposits. Once mined, the land becomes unsuitable for almost any purpose. Although Nauru still continues to mine the remaining land, it does so on a much smaller scale than done previously because of the diminished phosphate supply. However, even with conservative mining, the island's phosphate deposits will be depleted by the year 2000 at the latest. Accordingly, Nauru has developed a number of other possible assets to provide for the population's needs. To those ends, Nauru has developed a plan to rehabilitate the phosphate lands into habitable land.

Although the details of the rehabilitation plan have not been made public, some aspects have been mentioned. The plan calls for "areas of biological diversity," which will be strategically located throughout the periphery of the island and will expand into a developing rain forest. Nauru will establish horticulture stations at each area, where workers will

241. Id.
242. "[A]s may be consistent with both countries' domestic requirements and international commitments, recognizing that Australia already offers free and unrestricted access into the Australian market for all Naurua products (except sugar) on a non-reciprocal basis under SPARTECA." Id.
243. Id.
245. Id.
246. See id.
247. See id.
248. Id.
249. Id.
250. Id.
nurse seedlings into trees, then into a forest, etc.\textsuperscript{251} Nauru also intends to use the mined-out coral pinnacles as building material and land fill.\textsuperscript{252} The land will be graded, and catchment basins and reservoirs will be built for the storage of rain water.\textsuperscript{253} It is clear that Nauru’s ecological and economic future depends, in part, on the success of the rehabilitation plan.

\textbf{IV. TOWARD AN INTERNATIONAL FIDUCIARY DUTY}

Although the dispute between Nauru and Australia has been settled, and the International Court of Justice did not have an opportunity to decide the merits of the case, it is not mere speculation to state that the court would have found that an international fiduciary duty exists, and that it was breached by Australia. In this respect, the ICJ would have made history, as no prior court has decided this exact issue.

At this point it would be helpful to clarify what is meant by a “fiduciary duty.” Black’s Law Dictionary defines a fiduciary relationship as one which is “founded on trust or confidence reposed by one person in the integrity and fidelity of another.”\textsuperscript{254} Also, a person acts in a fiduciary capacity when she transacts business, or handles property which is not her own, for the benefit of another person as to whom she stands in a relation of implying a great deal of confidence and trust.\textsuperscript{255} Out of the relationship arises the duty to act for the benefit of the other while subordinating one’s personal interest.\textsuperscript{256} A person under a fiduciary duty must not exert influence or pressure on the beneficiary, deal with the subject matter of the trust as to benefit himself or prejudice the beneficiary, or take personal advantage of the relationship.\textsuperscript{257} In all, this is the highest duty implied by law, and there is always liability for its breach.\textsuperscript{258}

In determining whether the ICJ would have found that an international fiduciary duty exists, one would have to follow the guidelines of Article 38 of the Statute of the Court. Article 38 requires that in deciding disputes the court must apply (1) international conventions or treaties; (2) customary international law; (3) general principles of law; or (4) judicial

\begin{itemize}
\item \textsuperscript{251} \textit{Id.}
\item \textsuperscript{252} \textit{Id.}
\item \textsuperscript{253} \textit{Id.}
\item \textsuperscript{254} \textsc{Black’s Law Dictionary}, \textit{supra} note 237, at 626.
\item \textsuperscript{255} \textit{Id.} at 625.
\item \textsuperscript{256} \textit{Id.}
\item \textsuperscript{257} \textit{Id.} at 626.
\item \textsuperscript{258} \textit{Id.}
\end{itemize}
decisions, scholarly writings, and other subsidiary means for determining
rules of law. These sources are listed in descending order of
application. Therefore, to determine the existence and scope of the
international fiduciary duty, the ICJ would first look to international
conventions or treaties.

A. Trusteeship Agreement and United Nations Charter

The first place the ICJ would have looked for evidence of an
international fiduciary duty is in the Nauru Trusteeship Agreement and in
the United Nations Charter. Trusteeship Agreements have characteristics
of international conventions and treaties, and, despite the difference in
nomenclature, they are considered the same. In fact, the drafters of the
Charter intended the Trusteeship Agreements to be interstate treaties to
which the United Nations would be a confirming party. Therefore, the
Nauru Trusteeship Agreement is akin to an international convention to
which Australia had adhered, and it would have been examined first for
evidence of the existence of an international fiduciary duty.

In interpreting the Trusteeship Agreement, one may use the principles
espoused in the Vienna Convention on the Law of Treaties ("Vienna
Convention"), even though that convention is not by its terms

259. See Statute of the Court, supra note 18, art. 38.
260. See, e.g., MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 4-5
(1988).
261. See, e.g., id. at 9; see also Leslie, supra note 26, at 413.
262. See Clive Parry, The Legal Nature of Trusteeship Agreements, 27 BRIT. Y.B.
INT'L L. 164, 184-85 (1940) ("The Draftsmen of the Charter envisaged trusteeship
agreements as inter-state administering agreements to which the [U.N.] would not—save
possibly in the case where the organization itself become an authority—be a contracting
party").

263. Trusteeship Agreement, supra note 9. Although at one time the nature of
trusteeship agreements was unclear, it is now understood. At the very least it is an
agreement by the trustee and the U.N. for the benefit of the inhabitants, who are not
parties. See generally TOUSSAINT, supra note 107, at 77-87. The Nauru Trusteeship
Agreement is like a multilateral treaty in that Australia, New Zealand, the United
Kingdom, and the United Nations are all signatories, and have agreed that Australia would
administer the “territory.” Trusteeship Agreement, supra note 9. The Agreement is also
like a unilateral declaration under Article 36, as each country is declaring that it will act
according to the objectives of Article 76 of the Charter, since the U.N. is only a
confirming party. See id.

[hereinafter Vienna Convention].
applicable. The Vienna Convention is applicable as evidence of the custom of interpreting treaties. Accordingly, in examining the Trusteeship Agreement to determine whether an international fiduciary duty exists, a court may use the principle of interpreting treaties in good faith and in accordance with the plain meaning of the text and also apply the doctrine of *pacta sunt servanda*.

Under the Nauru Trusteeship Agreement, Australia, New Zealand, and the United Kingdom agreed to place Nauru under the International Trusteeship System. The purpose of this system was to benefit the inhabitants of trust territories with guidance and aid from the administering authority. Further, the nations agreed that Australia would act as the “administering authority” of the territory. Therefore, Australia is bound by the plain meaning of the terms of the Trusteeship Agreement, as well as the International Trusteeship System, which appears to create an international fiduciary duty.

Article 3 of the Trusteeship Agreement states that the “Administering Authority [should undertake] 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. . . .” The major provision concerning the International Trusteeship System is the Declaration Regarding Non-Self-Governing Territories.

According to the Declaration, United Nations members who administer trust territories assume the same sacred trust as a mandatory did under the Mandate System. Article 73 of the United Nations Charter states

265. Even though Nauru and Australia are signatories to the Vienna Convention, it is limited by its terms to treaties between States and cannot be applied retroactively. *Id.* arts. 3, 4. However, its provisions can be used as evidence of customary international law. See IAN M. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 153 (1984).

266. “. . . in their context and in light of [the Treaty’s] object and purpose.” Vienna Convention, *supra* note 264, art. 31.

267. “Every treaty in force is binding upon the parties to it and must be performed by them in *good faith*.” *Id.* art. 26 (italics added).


269. *Id.*

270. *Id.* art. 4.

271. *Id.* art. 3.

272. U.N. Charter ch. XI.

273. *Id.*
Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full-measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories.\textsuperscript{274}

The Declaration shows the intention of the members to reinstate the sacred trust of the Mandate System. At the heart of the sacred trust is the obligation to exercise power for the benefit of the inhabitants and in so doing to protect their natural rights.\textsuperscript{275} Moreover, the trust is supported by international accountability, because, in the Trusteeship System, U.N. members accept responsibility and are therefore accountable.\textsuperscript{276}

By referring to Article 76 of the U.N. Charter and thus to the Trusteeship System, Article 3 of the Trusteeship Agreement indicates an intent of the drafters to create a system where the administering authority would place the interest of the inhabitants first and administer the territory to the maximum benefit of the inhabitants.\textsuperscript{277} Also, the authority would protect the natural rights of the inhabitants, including the island’s economic assets.\textsuperscript{278} Further, this relationship is explicitly called a "trust."\textsuperscript{279} These characteristics are typical of a fiduciary relationship\textsuperscript{280} and indicate that the nations of the world intended that such a duty be created by the Trusteeship System.

To characterize the relationship between an administering authority and the territory as one of a fiduciary nature, and to impose the resultant obligations, one need go no further than the plain meaning of the word trusteeship (or trust). Article 75 of the Charter describes the system as a "Trusteeship" and states that the administering authorities can place such territories in "trust."\textsuperscript{281} The plain meaning of trustee or trust in both

\begin{footnotes}
\footnotetext[274]{U.N. CHARTER art. 73 (italics added).}
\footnotetext[275]{See id.}
\footnotetext[276]{U.N. CHARTER ch. XI.}
\footnotetext[277]{Trusteeship Agreement, supra note 9, arts. 3, 5.}
\footnotetext[278]{Id. art. 5.}
\footnotetext[279]{U.N. CHARTER art. 73.}
\footnotetext[280]{Id.; see BLACK’S LAW DICTIONARY, supra note 237.}
\footnotetext[281]{U.N. CHARTER art. 75.}
\end{footnotes}
English and French (*tutelage*, *tutelle*) connotes a fiduciary relationship.\(^{282}\) It can be presumed that the drafters of the convention used these words knowing their obvious connotations and meant the same.

Article 5 of the Trusteeship Agreement refines the Administering Authority's duty even further.\(^{283}\) It calls for Australia to "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. . . ."\(^{284}\) Under the Trusteeship System, Australia was also to promote the economic, social, educational, and cultural advancement of the inhabitants.\(^{285}\) The language of Article 5(2)(b)\(^{286}\) mirrors that of Article 76(b) of the Charter.

The basic objectives of the Trusteeship System, as embodied in Article 76,\(^{287}\) are consonant with the intentions expressed in the Declaration.\(^{288}\) Article 76 states that the basic objectives of the Trusteeship System are the following:

(a) to further international peace and security;
(b) to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence . . . ;
(c) to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . . ; and
(d) to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations. . . .\(^{289}\)

The promotion of international peace and security, along with the obligation to advance political and economic development toward self-government, creates a dual mandate.\(^{290}\) Under the dual mandate, the

\(^{282}\) See Leslie, *supra* note 26, at 410-12.
\(^{283}\) Trusteeship Agreement, *supra* note 9, art. 5.
\(^{284}\) *Id.* art. 5(2)(a) (italics added).
\(^{285}\) *Id.*
\(^{286}\) *Id.* art. 5(2)(b).
\(^{287}\) U.N. *CHARTER* art. 76.
\(^{288}\) U.N. *CHARTER* ch. XI.
\(^{289}\) *Id.*
\(^{290}\) See Toussaint, *supra* note 107, at 53 (referring to U.N. *CHARTER* art. 76).
obligations of the sacred trust run to the inhabitants of the territory and to the world at large. This concept has been recognized internationally for quite some time. In fact, Article 76 embodies the principle of the dual mandate more clearly than did the Mandate System.

The fiduciary nature of the relationship is also evidenced in the basic objectives of Article 76. The obligation to look after what could be called the "best interest" of the inhabitants, found in Article 76(b), supports this point, as a fiduciary must act in the best interest of the beneficiary. Similarly, the objective of economic advancement of the inhabitants indicates that a fiduciary must act with the intent of maximizing the benefit under the trust. In all, there is clearly a fiduciary duty running from the administering authority to the inhabitants of the trust territory. Although the nature of that duty is the same under the Trusteeship and Mandate Systems, the scope of the duty is different.

Under the Trusteeship System, the scope of the sacred trust exceeds that of the Mandate System. Under the Trusteeship System, the relationship between administering authority and trust territory was thought to be one of a temporary nature, in which the administering authority would guide the territory toward self-government. Under the Mandate System, the relationship was considered more permanent, i.e., the territory was to be administered as an "integral part" of the controlling nation. As such, the administering authority owed a lesser duty to the territory. In other words, under the Trusteeship System, the administering authority owes more of a duty than under the Mandate System because the interests of the inhabitants are paramount, and the territory is not considered part of the controlling nation. Therefore, based on Articles 3 and 5 of the Trusteeship Agreement, Australia agreed to assume an explicit fiduciary duty to act in the best long-term interest of the inhabitants of Nauru and

291. See id. at 13; see also LORD LUGARD, THE DUAL MANDATE IN BRITISH TROPICAL AFRICA 18 (1923).
292. See TOUSSAINT, supra note 107, at 53; U.N. CHARTER art. 76.
293. U.N. CHARTER art. 76.
294. Id.; see also BLACK'S LAW DICTIONARY, supra note 237, at 625.
295. See U.N. CHARTER art. 76(b).
296. FitzGerald, supra note 7, at 215.
297. Id.
298. Id.
299. See generally FitzGerald, supra note 7, at 215.
300. Trusteeship Agreement, supra note 9, arts. 3, 5.
with an eye to promoting their political and economic well-being to the utmost.

That Australia is bound by the fiduciary duty is buttressed by the doctrine of *pacta sunt servanda*. Because of this rule of customary international law, when the Trusteeship Agreement was in force, it bound Australia to undertake its duty in good faith.

**B. Customary International Law**

Even if the Nauru Trusteeship Agreement is deemed not to be a binding treaty, the principles described therein would be applicable as evidence of customary international law. The concept of a trust at international law, and the resulting fiduciary duty, has existed for a few centuries. Only recently, however, has it risen to the level of customary international law. The League of Nations Covenant, the United Nations Charter, statements from delegates at the San Francisco Convention, and court decisions are all evidence of the existence and extent of the fiduciary duty at customary international law.

A contemporary source for the international fiduciary duty is the League of Nations Covenant. The Mandate System was the first to recognize the fiduciary duty, and it represented the culmination of a large amount of thinking and practice concerning the duty an Administering Authority owes to the territory’s inhabitants. Article 22 of the League of Nations Covenant emphasizes the concept of a fiduciary duty. Terms like “mandate” and “tutelage” signify the fundamental fiduciary relationship between a mandatory and the mandated territory. Further, the Mandate System was established with international accountability for the conduct of the mandatory, which is a central feature of a fiduciary relationship.

There was some debate concerning the effect of the phrase calling for the mandate territory to be administered “under the laws of the Mandatory as [an] integral portion[ ] of its territory...” This raised the question of the location of sovereignty over the territory’s assets during the

301. See Weeramantry, *supra* note 23, at 77-84.
303. *Id.*
304. *Id.*
306. See *id.*
mandate period: Was sovereignty with the territory, or the mandatory? Even though there was controversy over the Covenant and mandates, "the legal structure thus created established unequivocally, so far as the law was concerned, the central notions of trusteeship, pursuit of the well-being of the inhabitants and the principle of accountability of mandatories which lay at the heart of the system." 308

Despite the controversy, however, the concept of the sacred trust and the resulting fiduciary duty persisted. The United Nations Charter also manifests the general and consistent practice of States regarding the existence of the fiduciary duty. The creation of the Trusteeship System, which is very similar in form to the Mandate System, shows that States believed in the sacred trust despite the failure of the League of Nations. 309 Evidence of the continuation of a fiduciary duty is found in the similar wording of the fundamental obligation in Article 22 of the Covenant and the Declaration Regarding Non-Self-Governing Territories. 310 This evidences a widespread recognition of the obligation of the sacred trust. However, the Declaration goes even further than the Covenant by recognizing the attitudinal change regarding the relationship of an administering authority to the inhabitants. Under the Covenant, mandates were to be administered as "integral portions of [the] territory." 311 By making the interest of inhabitants "paramount," 312 the Declaration showed that the emphasis was to be placed on the rights of the inhabitants of the territories, not on the rights of the member States. 313

The fiduciary duty persisted, withstanding the changes in the administration of the systems. The sacred trust of the Mandate System was continued in the words and specific objectives of the Trusteeship System. The creation of the United Nations Trusteeship System is evidence of the existence of a widespread belief that a nation overseeing the development of a non-self-governing territory should maintain a fiduciary relationship with the territory's inhabitants. Further, the use of the word "trust" in the Charter and Trusteeship Agreement recognizes a

308. See Weeramantry, supra note 23, at 89.
309. See FitzGerald, supra note 7, at 234-35.
312. See U.N. Charter art. 73.
“well-defined responsibility assumed by the administering authority on behalf of the territories’ inhabitants” — the fiduciary duty.\textsuperscript{314}

Additional evidence of the international fiduciary duty at customary international law exists in the statements of delegates at the San Francisco Conference.\textsuperscript{315} Throughout the debates, delegates made reference to the purpose, scope, and expectations for the Trusteeship System. Speaking of the inhabitants’ expectations from the System, the delegate from the former Soviet Union stated that the Trusteeship System “gave rise to the hopes among the [inhabitants] that the way to development in economic, cultural and political fields would be open to them.”\textsuperscript{316} The delegate from the United Kingdom stated that the Trusteeship System brought with it “all the hope . . . for millions of people throughout the world,” that they would be brought along the “road to self-government and independence.”\textsuperscript{317} Finally, one delegate said that the Trusteeship System “constitut[ed] progress in the field of international law, a step towards the final liberation of colonial peoples, towards their independence, and towards realizing the principle of the right of self-determination.”\textsuperscript{318} All of these statements can be seen as creating an expectation of benefits on the part of the inhabitants of trust territories, and a resulting duty on the part of the administering authorities. These views evidence the existence of a fiduciary duty at international law.

\textit{C. General Principles of Municipal Law}

Although the Trusteeship Agreement, the United Nations Charter, and customary international law establish that an international fiduciary duty exists, the full extent of the duty has yet to be defined.\textsuperscript{319} General

\begin{itemize}
\item \textsuperscript{314} See FitzGerald, \textit{supra} note 7, at 235.
\item \textsuperscript{315} Id. at 234.
\item \textsuperscript{316} Id. at 236 (citing U.N. GAOR, 61st mtg. at 1278, U.N. Doc. A/315 (1946) (statement of Mr. Navikov [Union of Soviet Socialist Republics])).
\item \textsuperscript{317} Id. (citing U.N. GAOR, 61st mtg. at 1269, U.N. Doc. A/315 (1946) (statement of Mr. Thomas [United Kingdom])).
\item \textsuperscript{318} Id. (citing U.N. GAOR, 61st mtg. at 1284, U.N. Doc. A/315 (1946) (statement of Mr. Bartos [Yugoslavia])).
\item \textsuperscript{319} The resolution of Nauru’s claim requires clarification of the legal standard against which to judge Australia’s administration of the phosphate industry and its provisions for rehabilitation of the central plateau. Applying general principles of law, on which Nauru’s claim is partly based, will help the court “to fill the gaps in the interpretation of the trusteeship agreement under customary international law.” FitzGerald, \textit{supra} note 7, at 237.
\end{itemize}
principles of law can provide some assistance in this regard. Article 38(1)(c) of the Statute of the Court allows the court to consider "general principles of law recognized by civilized nations" in resolving disputes.\textsuperscript{320} Such rules arise from the parallel observance of legal norms by the nations of the world. Thus, the trust can be described as a general principle of law because it is recognized and accepted by the major legal systems of the world, not just the common law. The civil law, customary systems, and the major religious systems all recognize the fiduciary duty of a trustee and accord it much weight.

In the civil law, for instance, the \textit{mandatum} provides that a mandatory entrusted with the goods of another is under a legal duty to account for his custody of the goods in a faithful and honest manner.\textsuperscript{321} The mandatory is not to benefit from the mandate, except where the contract provides otherwise.\textsuperscript{322} Hindu law provides severe sanctions and punishments for stealing communal wealth or violating the rules of a trust.\textsuperscript{323} Islamic law imposes the duty upon the trustee not to take any profits or advantages from the trust. The \textit{waqf} (charitable trust) was such an important legal arrangement that a department of state was established in most jurisdictions to supervise the trustees.\textsuperscript{324} African customary law imposes the obligations of a trustee on the tribal chief. The chief cannot sell, give away, or otherwise dispose of any part of the tribal territory without the approval of the public assembly.\textsuperscript{325} The chief is under a duty to take care of the members of his tribe.\textsuperscript{326} Although the systems have differences, there is a common thread that runs through them: administering the trust in the best interests of the beneficiary and accountability for violating the rules of the trust.

The presence of differences in systems does not, however, lessen the force of the general principles asserted therein. Judge Christopher Weeramantry writes

\begin{quote}
It does not follow that all the technical attributes these rules carried in different legal systems would necessarily become part of international law, but their broad essence is universal. It is
\end{quote}

\begin{enumerate}
\item[320.] Statute of the Court, \textit{supra} note 18, art. 38(1)(c).
\item[321.] \textit{WEERAMANTRY}, \textit{supra} note 23, at 151.
\item[322.] \textit{Id.}
\item[323.] \textit{Id.} at 152.
\item[324.] \textit{Id.}
\item[325.] \textit{Id.}
\item[326.] \textit{Id.} at 151.
\end{enumerate}
that essence that was embodied in the concept of international trusteeship. . . .327

This comparative view of the trust gives meaning to the terms used by the drafters of the Trusteeship System. The trustee’s duties of not benefiting from the trust and avoiding conflicts of interest and duty coupled with “the presumption against the trustee in relation to dealings with the beneficiary, [and] the rules relating to fair-dealing” in part comprise the well-recognized fiduciary duty.328

D. Judicial Decisions

Although judicial decisions are only a secondary means of determining international law, such decisions provide good examples of the practical application of the rules of international law. There have been a few cases concerning the responsibility of an administering authority, although none has dealt with the specific issues of Nauru v. Australia.329 One case, which is strikingly similar on its facts, is Tito v. Waddell.330

Tito v. Waddell concerned a situation similar to that which occurred on Nauru. The suit was brought by the inhabitants of Ocean Island, a small island in the western Pacific Ocean. Unlike Nauru, Ocean Island was held as a Protectorate of the Crown: there were no agreements or mandates involved. However, the island’s phosphate industry was controlled by the same British Phosphate Commissioners as on Nauru.331 The Commissioners engaged in mining activity similar to that on Nauru. The Banabans332 brought suit in an English court claiming that the Crown had breached its fiduciary obligations through a conflict between its duty and its interest in the phosphate industry.333 This breach arose out of two transactions in which a low royalty for the phosphate was fixed and in

327. Id. at 153.
328. Id.
330. 3 All E.R. 129 (1977) (Eng.).
331. The Commissioners bought the license to mine the phosphate deposits on Ocean Island from the Pacific Islands Company. See Weeramantry, supra note 23, at 202-03.
332. The Banabans are the inhabitants of Ocean Island. Id. at 1.
333. See Tito, 3 All E.R. at 131.
which the Commissioners acquired land on Ocean Island in terms not favorable to the Banabans.\textsuperscript{334}

In its decision, the court makes a distinction between a true trust—a trust in the conventional sense—and a trust in the higher sense—a government obligation.\textsuperscript{335} The fiduciary obligation exists within the true trust and not in the trust in the higher sense.\textsuperscript{336} In this case there was only a trust in the higher sense, and hence no legal obligation of a fiduciary nature on which to hinge liability.\textsuperscript{337} The principle that emerges from \textit{Tito v. Waddell} is "that in the absence of an intention to create, or of an implication of [the] creation of, a legal and justiciable fiduciary obligation, there [is] no true trust," and hence no liability.\textsuperscript{338}

Although the Ocean Island case was decided against the Banabans, it is favorable to Nauru in that it shows a fiduciary duty can exist between an administering authority and the territory.\textsuperscript{339} This is possible if there is a "true trust." The case of Nauru is one which, by its very terms—Trusteeship Agreement, United Nations Charter, and general principles of law—is an express, or true trust. The International Trusteeship System and Trusteeship Agreement were intended to create a system of accountability on the part of trustees for administering the economic assets of the inhabitants.\textsuperscript{340} Even a municipal court would recognize the obligations undertaken in the Trusteeship Agreement and United Nations Charter, which formed the basis of Australia's right to administer Nauru's economic assets.

Such is the situation in the United States and Canada. In the case of \textit{Cherokee Nation v. Georgia},\textsuperscript{341} Chief Justice Marshall of the United States Supreme Court noted that Native Americans "are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."\textsuperscript{342} This concept of a trust, and the resulting fiduciary duty, continues to play an important role in the relationship between Native

\textsuperscript{334} See \textit{Weeramantry}, \textit{supra} note 23, at 224.
\textsuperscript{335} See \textit{Tito}, 3 All E.R. at 221.
\textsuperscript{336} See generally \textit{Weeramantry}, \textit{supra} note 23, at 224.
\textsuperscript{337} See \textit{Tito}, 3 All E.R. at 237-38.
\textsuperscript{338} \textit{Weeramantry}, \textit{supra} note 23, at 224.
\textsuperscript{339} The case was not a total loss for the Banabans. The court held that under the principle of benefit and burden, the burden of rehabilitating some land would be placed on the British Phosphate Commissioners. \textit{Id.} at 222-23.
\textsuperscript{340} See generally \textit{id.} at 224-25.
\textsuperscript{341} 30 U.S. (5 Pet.) 1 (1831).
\textsuperscript{342} \textit{Id.} at 17 (emphasis added).
Americans and the United States.\textsuperscript{343} Similarly, the Canadian Supreme Court has held that a fiduciary relationship exists with respect to the manner in which the government managed the lands held for the benefit of "native Canadians."\textsuperscript{344} In commenting on the "fiduciary duty" in the United States, a Canadian writer argues, "\[d\]uring the twentieth century the American courts have applied trust principles in a wide variety of situations to establish specific duties. The result has been to impose upon the government obligations which are closely analogous to those of a private fiduciary."\textsuperscript{345}

\textit{E. The Extent of the Fiduciary Duty}

At this point it is useful to draw some basic principles from the international fiduciary duty. In order to determine if Australia has breached its fiduciary duty with respect to Nauru, it is necessary to know exactly what the duty entails. The following principles comprise the fiduciary duty throughout the sources of international law referred to in this section.\textsuperscript{346} Therefore, they are applicable in the Nauru case, or in any other situation where a fiduciary duty exists. It is important to keep in mind that they are broad principles, and not technical rules peculiar to any individual legal system. Furthermore, there can be little doubt that these principles are part of general international law as mentioned in Article 38(1)(c) of the Statute of the Court.\textsuperscript{347}

The principles can be briefly stated as follows:

1. A duty to exercise diligence and prudence\textsuperscript{348}
   An administering authority has custody and control of the territory's "property." The authority must administer the property in the best interests of the beneficiary and with an eye to the maximum long-term benefits of the beneficiary. In all,

\textsuperscript{343} See, e.g., CHARLES F. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW, 82-85 (1987).

\textsuperscript{344} See Guerin v. R., 2 S.C.R. 335 (1984) (Can.).


\textsuperscript{346} These principles were formulated with specific reference to the Ocean Island case. See Tito, 3 All E.R. at 241.

\textsuperscript{347} See WEERAMANTRY, supra note 23, at 152-53.

\textsuperscript{348} Id. at 229. This is otherwise known as the duty of care. See LEWIS D. SOLOMON & ALAN R. PALMITTER, A STUDENT'S GUIDE TO UNDERSTANDING CORPORATIONS 295 (1990).
this is a high standard of care imposed upon the administering authority.\footnote{Darlene Johnson writes, "[i]t is now unquestioned that government has a duty to use reasonable care and skill in preserving tribal assets. Beyond this there is a duty to make the trust property productive." \textit{Johnson}, \textit{supra} note 352, at 330.}

2. A duty to avoid a conflict between interest and duty\footnote{\textit{Weeramantry}, \textit{supra} note 23, at 227. This is otherwise known as the duty of loyalty.}

An administering authority should always avoid placing its own interests in conflict with its duty under the agreement.

3. A duty to avoid self-dealing\footnote{\textit{Id}.}

The authority should not sell to itself any of the assets of the territory.

4. A duty of fair-dealing\footnote{\textit{Id}.}

The territory can set aside a transaction unless the authority can show that it has taken no advantage of its position, there was full disclosure of the transaction, and the transaction was fair and reasonable.

5. A duty to carry out the terms of the agreement\footnote{\textit{Id}.}

Equity requires that the administering authority perform all the duties of the agreement.\footnote{\textit{Id}.}

6. Liability for loss or damage\footnote{\textit{Id}.}

If the trustee causes loss or damage to a beneficiary by violating a duty of the trusteeship, the loss or damage must be made good.

\section{V. The Breach}

The preceding discussion deals with the relatively simple question of whether an international fiduciary duty exists; and if it does, what is its extent? From an interpretation of the Trusteeship Agreement and the United Nations Charter, there emerges a rule of international law that can be called the fiduciary duty. Furthermore, under general rules of law and

\footnote{As Judge Weeramantry writes, the authority is "as solemnly \textit{bound within the terms} of those documents as a trustee is by a deed or a will." \textit{Id}. at 229. In fact, these principles are even more applicable in the Nauru case because of the existence of factor (5), which was absent in the Ocean Island case. That factor establishes "the intensity of the fiduciary duty associated with the mandate and the trust." \textit{Id}. at 230.}
the decision in *Tito v. Waddell*,356 the extent of that duty can be
determined. The more important question remains, however: Whether
Australia has breached its fiduciary duty with respect to the Nauru
Trusteeship?

There is ample evidence to support the contention that Australia has
breached its fiduciary duty under the Trusteeship Agreement.357 The most
glaring breach is of the obligation not to create a conflict of duty and
interest. Australia placed itself in such a conflict through the Nauru Island
Agreement and all of the economic, legislative, and administrative
arrangements that followed therefrom.358

The conflict arose out of the structure of the Phosphate Industry under
the Nauru Island Agreement. First of all, the British Phosphate
Commissioners was given exclusive control over the phosphate deposits.
It was given the power to acquire land almost at will, with little
consideration for the Nauruan people’s rights.359 Further, it was required
to sell phosphate to the three governments at the cost of extraction. By
giving control of the phosphate deposits to the Commissioners and keeping
the phosphate’s price fixed near its extraction cost and well below market
price, Australia deprived Nauru of much of the benefit of its own natural
resources.360 The real benefit of the phosphate industry went to the
agricultural sectors of each administering authority in the form of a price
for phosphate well below that of the market.361 It is contrary to the basic
principles of the fiduciary relationship for the administering authority to
seek benefit under the arrangement, while at the same time depriving the
beneficiaries of potential proceeds from their economic assets.362

356. 3 All E.R. 129 (1977) (Eng.).

357. The presentation in this section is somewhat biased. The only documents which
were available were the Nauru Application and the ICJ decision, as well as secondary
sources of information. Nauru’s Memorial is unavailable and the Counter-Memorial has
yet to be filed.

358. WEERAMANTRY, *supra* note 23, at 404. Australia breached its fiduciary duty
even before the Trusteeship was established. This is because Australia, New Zealand, and
the U.K. were motivated “to obtain the mandate over Nauru for the sake of obtaining
control over its phosphates rather than for any purpose connected with the advantage to
the Nauruan people. Statements to that effect were made . . . in each of the three
countries concerned,” and the documents on the issue confirm that as well. *Id.*

359. *See id.* at 405.


361. *See id.* at 12, 14.

362. This breach is exacerbated by the fact that the Nauruan people were not
adequately consulted regarding the value of their economic resources or of the agreements
Australia argues that the Nauruan people have benefited greatly from the Trusteeship. It achieved a level of society that is enviable among the developing nations of the world. As a result of Australia's tutelage, Nauru has made great advancements in its medical services, education, standard of living, and more. There is a high degree of literacy and little hunger or relative poverty. In all, Australia has assisted Nauru in transforming its society into one of the twenty-first century and has not breached its fiduciary duty. While the factual elements of this argument are true, it is not persuasive. The fiduciary duty is very high, and merely providing a benefit under the relationship is not enough. A fiduciary is under the obligation to place the beneficiary's interests first and to exclude all other interests.

By taking Nauru's phosphates for cost and giving little in return, Australia was placing its interests above those of Nauru in clear violation of its fiduciary duty.

A second example of Australia's breach of the fiduciary duty lies in its failure to exercise diligence and prudence in administering the economic assets of Nauru, or, in other words, its failure to exercise due care. This can be seen in different ways, each of which is enough by itself to violate the fiduciary duty. For example, Australia was aware at an early date that the land would need to be rehabilitated. However, it continued to allow the Commissioners to mine the phosphate at an accelerated rate. Further, no provision was made for rehabilitating the land. This was done with the knowledge that such conduct would deprive the Nauruans of the future use and enjoyment of their land. At the very least, Nauruans would be responsible for rehabilitating the land themselves. In any event, such action can only be seen as violating the fiduciary duty as the authority should return the assets in an equal or better condition. A fiduciary is under the obligation to administer assets in the best long-term interests of the beneficiary. Allowing the only economic asset of a small island to be mined to the point of near depletion without providing for that asset's rehabilitation cannot be viewed as they were entering into. One of the most basic rules of a fiduciary relationship is that the beneficiary is consulted before entering into a transaction. Here there was little, and often no, consultation with the Nauruans, which is a violation of the fiduciary duty. See id. at 16-18.

363. FitzGerald, supra note 7, at 226-27.
364. See BLACK'S LAW DICTIONARY, supra note 237, at 625.
366. See Nauru Application, supra note 5, at 18.
367. See WEERAMANTRY, supra note 23, at 405.
conforming with the best long-term interest of the island's inhabitants.\textsuperscript{368} Therefore, Australia has breached this aspect of its fiduciary duty.

There can be no doubt that Australia violated the fiduciary principle of avoiding self-dealing. As stated earlier, someone in a fiduciary capacity should not sell to itself any of the assets of the trust or seek to benefit therefrom.\textsuperscript{369} Here, Australia was a purchaser of the only export item of Nauru, phosphate, and benefited greatly under the Trusteeship Agreement. Australia was part of the monopoly in respect of Nauruan phosphate. All that was produced by the Commissioners was available to the three governments.\textsuperscript{371} And, again, the price was roughly the cost of extraction. Finally, any profits due to excess production sold on the world market were retained on account for the three authorities.\textsuperscript{372} In no way could this be considered proper fiduciary conduct. As the profits and advantages derived from a trusteeship are held in trust, they should be made available for the rehabilitation effort.\textsuperscript{373}

Perhaps the most egregious violation of fiduciary principles is in Australia's breach of the duty of fair dealing. Fiduciaries can conduct transactions with their beneficiaries; however, such transactions are carefully scrutinized. Only after there has been full disclosure of all relevant facts, and if the fiduciary has not taken advantage of its position, will a transaction be allowed. Also, the transaction must be fair and reasonable.\textsuperscript{374} None of this can be said of the agreements arising out of the phosphate industry on Nauru. The three nations withheld material information concerning the phosphate industry without which the Nauruans could not give full and fair consent to the royalties.\textsuperscript{375} Moreover, at no time prior to 1964 were the Nauruans given independent advice concerning the phosphate industry on their island.\textsuperscript{376} Further, Australia took

\textsuperscript{368} In fact, at the request of the British Phosphate Commissioners, Australia allowed the Commissioners to excavate phosphate below a depth of 20 feet. The 20 foot limit had been recommended by Administrator Griffiths of Nauru. See WEERAMANTRY, supra note 23, at 405.

\textsuperscript{369} See FitzGerald, supra note 7, at 244.

\textsuperscript{370} 25 ENCYCLOPÆDIA BRITANNICA, supra note 24, at 282.

\textsuperscript{371} FitzGerald, supra note 7, at 224 n.62.


\textsuperscript{373} See WEERAMANTRY, supra note 23, at 284.

\textsuperscript{374} See FitzGerald, supra note 7, at 244.

\textsuperscript{375} See WEERAMANTRY, supra note 23, at 242.

\textsuperscript{376} See Nauru Application, supra note 5, at 14.
advantage of its position as administering authority to compel Nauru to agree to the proposed royalties.377 Finally, in no way could the phosphate situation be considered fair and reasonable. In all, it can be seen that Australia took advantage of its position as administering authority and violated the fiduciary principle of fair dealing.

Additionally, Australia breached its fiduciary duty in not fulfilling the terms of the Trusteeship Agreement. According to the Trusteeship Agreement, Australia was responsible for administering Nauru in accordance with the United Nations Charter and Trusteeship System.378 That entails promoting the economic, social, and cultural advancement of the inhabitants of Nauru to the utmost.379 Australia’s conduct under the Agreement cannot be seen as accomplishing the basic objectives of the Trusteeship System. By leaving the phosphate deposits in a depleted condition and the land in an inhabitable condition,380 Australia was not promoting the economic well-being of the inhabitants of Nauru to the utmost. Through its action, Australia has violated the express provisions of the Trusteeship Agreement, which is a breach of its fiduciary duty.381

Although the foregoing is a very brief analysis of the subject, it seems as if Australia has breached every aspect of the fiduciary duty it owed to the people of Nauru. While Australia was a relatively good “trustee” and left Nauru with a relatively well-developed infrastructure,382 it was not the model administering authority. Nauru’s environment and economy has been significantly impaired because of Australia’s actions with regard to the phosphate industry.383 Therefore, in keeping with the principles of the fiduciary duty, namely, liability for loss or damages arising out of a violation of the trust, Australia has a duty to rehabilitate those parts of the island that were mined under its administration.

VI. CONCLUSION

An analysis of the United Nations Charter and the Trusteeship Agreement for the Territory of Nauru reveals that an international fiduciary duty does indeed exist. The duty emerges from the principles

378. Trusteeship Agreement, supra note 9, art. 3.
379. U.N. CHARTER art. 73(a).
380. Field, supra note 249.
381. See Trusteeship Agreement, supra note 9, art. 5.
382. FitzGerald, supra note 7, at 226-27.
383. Id. at 222-26.
expressed in the Declaration Regarding Non-Self-Governing Territories and the basic objectives of the Trusteeship System. The duty is created by placing the interests of the inhabitants first and calling for the administering authority to promote the inhabitants’ economic, political, and social advancement to the utmost. The fiduciary duty is reinforced even further by customary international law.

General principles of law serve to better define the fiduciary duty. A review of the institution of the trust in the various legal systems of the world illuminates the extent of the international fiduciary duty. At the very least, the fiduciary duty demands that the administering authority act in a way calculated to serve the best long-term political, social, and economic interests of the indigenous people, and leave the nation with a developed infrastructure and productive environment for the future. However, the fiduciary duty is not a technical rule, but a broad principle that is based on trust and confidence.

In the case of Nauru, it is evident that Australia breached its fiduciary duty. The Nauru Island Agreement alone is evidence of a conflict of interest and duty. Also, the accelerated mining in the face of eminent depletion and inevitable rehabilitation provides evidence of the breach of the duty of diligence and prudence. Moreover, Australia’s creation of a monopolistic situation with respect to the phosphate violated the rule that a fiduciary should avoid self-dealing and benefiting from the relationship. Finally, the facts surrounding the negotiation of royalty rates evidence Australia’s breach of the duty of fair dealing. It therefore seems likely that the ICJ would have held Australia liable for rehabilitating the phosphate lands.

Had the case been decided on its merits, it would have had far reaching implications for the rest of the world. Any former administering authority would have been vulnerable to such a suit. In particular, the United States could have been vulnerable to claims from the Pacific Island territories. The United States has used some of these islands as chemical weapons dumps, target ranges, and as nuclear test cites, e.g., Bikini Atoll. The Bikini Islanders, or some other group, might possibly bring suit against the United States for breach of its fiduciary duty. In fact, even though Nauru v. Australia was settled, it may still have far-

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384. U.N. CHARTER art. 73.
386. See generally id.
reaching implications. There have been rumors that many former trust territories are in the process of evaluating their claims, and chances for success, against their former administering authorities.\textsuperscript{387}