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held on Tuesday 12 November 1991, at 10 a.m., at the Peace Palace,

President Sir Robert Jennings presiding

in the case concerning Certain Phosphate Lands in Nauru

(Nauru v. Australia)

VERBATIM RECORD

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Audience publique

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sous la présidence de Sir Robert Jennings, Président,

en l'affaire de Certaines terres à phosphates à Nauru

(Nauru c. Australie)

COMPTE RENDU

Present:

President Sir Robert Jennings
Vice-President Oda
Judges Lachs
Ago
Schwebel
Bedjaoui
Ni
Evensen
Tarassov
Guillaume
Shahabuddeen
Aguilar Mawdsley
Ranjeva

Registrar Valencia-Ospina

Présents:

Sir Robert Jennings, Président
M. Oda, Vice-Président
MM. Lachs
Ago
Schwebel
Bedjaoui
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Evensen
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Aguilar Mawdsley
Ranjeva, Juges

M. Valencia-Ospina, Greffier

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The PRESIDENT: Please be seated. We will continue with the pleading of Australia, in this case. Professor Bowett.

Professor BOWETT: Thank you, Mr. President.

Mr. President, Members of the Court, when I addressed you yesterday I had submitted three propositions: first, that Nauru's claim was essentially a claim for breach of the Trusteeship Agreement; secondly, that such a claim lay exclusively within the competence of the Trusteeship Council and the General Assembly; and, thirdly, that no such claim of breach was ever made to either body and no finding of breach was ever made by either body.

4. Is the Termination of the Trusteeship Agreement by the General Assembly, without any finding of breach, conclusive for the Parties?

If, therefore, there was no finding of breach by any competent United Nations organ when the Trusteeship Agreement was terminated, the question then arises, does this conclude the matter? In other words, was Nauru thereafter precluded from contending that there was a breach?

Prima facie, one would assume that where the General Assembly discharges an Administering Authority from its obligations under the Agreement - unconditionally and without any reservation as to future liabilities - that discharge is definitive. That must be the basic assumption. The act of discharge, unconditionally and without reservation, implies an acceptance by the Assembly that the Administering Authority has fully discharged its treaty obligations.

And, if that is so, it would be an extraordinary situation if a Member State - especially the former Trust Territory - could subsequently challenge that definitive, unconditional discharge by alleging a breach.

Certainly such an extrardinary situation was not contemplated by the Court in the *Northern Cameroons* case. The Court referred to the Assembly's resolution on termination as having "definitive legal effect" (*I.C.J. Reports 1963*, p. 32). Moreover, the Court took the view that a Member State's right under the Trusteeship Agreement, to invoke the jurisdiction of the Court in order to challenge the legality of acts of the Administering Authority would be at an end. It would not survive as the sole means of challenge, when all the other forms of supervision were terminated. The only exception would be where a Member State sought a remedy in the Court for injury to itself,

or to its nationals, presumably because the remedy would be for a wrong lying outside the Trusteeship Agreement.

The general principle was aptly stated by Judge Wellington Koo, in a separate opinion, in these terms:

> "when the ultimate objective of a Trust is attained, and the particular Trusteeship Agreement is terminated, all questions relating to the Administering Authority's observance of the obligations thereunder are obviously intended to have been settled also" (at p. 61).

In order to test this hypothesis - the hypothesis of the conclusiveness and finality of the Assembly's resolution on termination - it may be useful to contemplate what the position might have been, had Nauru alleged a breach.

Let us assume the Trusteeship Council and the General Assembly rejected the allegation and found that there was no breach. Would not that have ended the matter? Would it have been possible for Nauru to wait until after independence, and then come to this Court to argue that the General Assembly was wrong, that it did not have exclusive jurisdiction, and that the Court was competent to find that a breach had occurred?

Surely not, Mr. President! In the *Northern Cameroons* case, the Court noted that counsel for the Republic of Cameroon had expressly stated that:

> "Cameroon is not asking the Court to criticize the United Nations; Cameroon is not asking the Court to say that the United Nations was wrong in terminating the Trusteeship..." (*I.C.J. Reports 1963*, p. 33).

Although the Court did not, therefore, have to decide the issue, since it was not asked, the tenor of the judgment leaves little doubt that the Court would have refused to find that the United Nations was wrong. This is confirmed by the Court's Opinion in *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, in 1962, where the Court emphasized that, unlike courts in most national systems of law, it had no power to review the validity of legislative or governmental acts (*I.C.J. Reports 1962*, p. 168). The same point was made in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, (*I.C.J. Reports 1971*, p. 45), where the Court acknowledged that it had no powers of judicial review over General Assembly

resolutions.

So, we can safely assume that, had the issue of breach been expressly put to the United Nations in 1967, and the allegation rejected, it would not now be open to Nauru to challenge that rejection before this Court. The question is, therefore, should Nauru be in a better position 24 years later, because it failed to make that challenge in the appropriate United Nations bodies in 1967?

If the challenge had been made, and breach alleged, the General Assembly certainly had power to decide on the question of breach. That much is clear from the Assembly's finding of breach in relation to South-West Africa, a mandated territory: a fortiori the power to decide on a breach of Trusteeship must reside in the Assembly. This is confirmed by the Court's *dictum* in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* case:

> "it would not be correct to assume that because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design" (*I.C.J. Reports 1971*, p. 50).

And, of course, in the *Namibia* case the Court totally rejected the argument that, being a political organ, the General Assembly was not competent to act judicially and make a finding of breach. That view would, in the words of the Court, "amount to a complete denial of the remedies available against fundamental breaches of an international undertaking" (para. 102). If that is true of breaches of a mandate, it must certainly be true of breaches of trusteeship.

Moreover, the Assembly had extensive powers to deal with such a breach; it could call upon the Administering Authority to remedy the breach. It could delay terminating the Agreement until the breach had been remedied, or it could terminate the Trusteeship with an express proviso that the Administering Authority remained liable for all the financial consequences of the breach or even an express proviso that the matter of responsibility remained to be decided after independence.

It is not unknown for the General Assembly to recognize expressly that there are outstanding problems or disputes to be resolved after independence. For example, in 1949 by resolution 289 (IV) of the Fourth Session, the Assembly recommended independence for Libya not later than 1952.

But it knew there were boundary problems, and so it called on the Interim Committee to study them meanwhile. This study revealed that the southern boundary of Libya was in dispute. Accordingly, by resolution 392 (V) of the Fifth Session of 15 December 1950, the General Assembly called on France and Libya to negotiate and resolve this problem after independence.

But this did not happen in the case of Nauru. There is no finding of breach, and not even a recognition by the Assembly that an issue of responsibility remained to be decided after independence. The General Assembly's resolution appears as final and definitive. So we are back to the question: why should Nauru be in a better position, 24 years later, because it failed to make any allegation of breach in 1967?

The answer is surely that it should not. There is no reason why a delay of 24 years should strengthen Nauru's case which it now brings before this Court. Nor is it possible for Nauru to argue that the "finality" of the Assembly's termination of the Agreement does not extend to a final disposition of the claim of breach, because Nauru made no such claim in 1967, and therefore the Assembly did not deal with the question.

No, Mr. President, the fact is that the Trusteeship Committee and the General Assembly were fully aware of the Nauruan claim, and of all the facts on which that claim rested. But the way in which the Assembly dealt with the claim changes dramatically once the terms of the Canberra Agreement were known, and Mr. DeRoburt assured the Assembly that, by virtue of that Agreement, Nauru would have at its disposal all the financial means to solve the problem.

So the issue was addressed by the Assembly and was fully embraced within the overall finality of the Assembly's termination of the Agreement, and all matters of responsibility arising from that Agreement. It cannot be right to allow Nauru to re-open the matter now, on the basis of an allegation of breach it never saw fit to make to the Assembly. And there are various arguments to support this conclusion.

There is first the argument of exclusivity. If, as we have demonstrated in relation to this type of claim, the General Assembly was exclusively competent during the currency of the Agreement, why should that exclusivity be now denied simply because Nauru waited until 24 years after the

Trusteeship had been terminated?

Second, there is an argument based on the range and effectiveness of the remedies for any such breach. As I have explained, the Assembly had various options available to it in dealing with any breach, both political and legal. The Court has more limited options, given that the Agreement is terminated.

Third, there is an argument about authority. For if this Court were now to decide that there was in fact a breach by reason of the failure to rehabilitate the mined lands, does this not reflect upon the authority - even the competence - of the General Assembly? After all, the General Assembly had at its disposal the whole apparatus of supervision - the questionnaires, the reports, the system of petitions, the Visiting Missions, the facility for questioning the Administering Authority within the Trusteeship Council - so that if there was a breach why did not the Trusteeship Council or the General Assembly detect it? It is no answer to say that Nauru did not complain of any breach. Because the elaborate system of supervision was designed to safeguard the Trusteeship system against breaches, quite independently of whether the inhabitants of the territory complained of a breach. And, in any event, the issue of rehabilitation was out in the open from 1964 onwards, so the problem was one of judgment, not one of detection.

The Trusteeship Council and the General Assembly were well aware of the difference of opinion between the Nauruans and the Administering Authority over this question of rehabilitation. So, if there was a breach, why did not the General Assembly declare that there was a breach?

The Court will see that if it now proceeds to find there was a breach, this would constitute the most damning indictment of the Trusteeship Council and General Assembly. It will amount to an accusation of either incompetence or bias. If the substance of Nauru's case were correct, the United Nations itself would be responsible for a total failure to exercise adequate supervision amounting to collusion in the allegedly wrongful activities of the Administering Authority. Indeed, misdeeds on the scale of those alleged could only have been possible with the tacit approval of the United Nations and ultimately, at the end of the Trusteeship, with its condoning of the activities of the three Administering States in the performance of their functions. A finding in favour of Nauru would

diminish the authority of the General Assembly. Fourth, there is an argument about finality. From the point of view of the United Nations, the act of terminating a trusteeship ought to be an act of finality. It brings to an end the whole system of supervision and discharges from further obligations the Administering Authority. The final resolution of 19 December 1967, resolution 2347 (XXII) is in unqualified terms: it welcomes the achievement of full and unqualified independence. There is a false note introduced into this ostensibly final act if you then postulate the possibility that, years later, one United Nations organ - the Court - may re-examine the record to see whether breaches, which ought to have been identified and censured by the Assembly, were in fact committed.

Nauru attempts to oppose the finality of the General Assembly's action in terminating the Trusteeship by pointing to the Assembly's treatment of Namibia (Written Statement, p. 80). And, of course, it is true that the Assembly continued to hold South Africa responsible for usurpation of the rights of the people of Namibia to the natural resources of the territory after the Mandate had been terminated.

But, Mr. President, the argument is little short of ludicrous. The Mandate for South-West Africa was terminated because there was a fundamental breach and South Africa continued to be responsible because it continued in unlawful possession.

Here we have a totally different situation. There is no finding of breach and the Administering Authority handed over the territory as required. Thus the presumption must be one of finality, of a complete discharge by the Assembly, granted to the Administering Authority.

From the point of view of the Administering Authority, the need for finality is even greater. It seeks an absolute, unconditional discharge from its obligations under the Trusteeship Agreement. And there can be no question but that, on the basis of the resolution adopted by the Assembly in 1967, the three Administering Powers believed that they had been given such a discharge. This is why, in 1969, they refused to enter into discussions on rehabilitating land for the construction of a new airstrip (see Nauru Memorial, Annexes, Vol. 4, Anns. 76 and 77); and why, in 1984, they again refused to re-open the rehabilitation issue (Anns. 78 and 79).

There is an element of unfairness in seeking to impose a legal responsibility on the Administering Authority for breaches of an Agreement, some 24 years after being discharged from their responsibilities under that Agreement. For, this is not some new issue of responsibility which has come to light only 24 years afterwards. This is exactly the same issue as was discussed and fully known to all the Parties - including the General Assembly - before the termination was effected.

II. WAIVER OF THE CLAIM

Mr. President, I now turn to address the question whether, assuming Nauru to have had a valid claim for breach, that claim was in fact waived. Obviously, we reach this question only if the Court rejects my previous argument and decides, contrary to Australia's submission, that Nauru had a valid claim for breach, which was not extinguished by the termination of the Trusteeship Agreement. On that hypothesis, the question remains: was such a claim, in any event, waived by Nauru?

We have to examine the waiver in two rather different contexts. There is first the question whether, in the context of Nauru's negotiations with the three Partner Governments, leading to the Canberra Agreement of 1967, Nauru in fact accepted the terms of that Agreement as a final settlement. Obviously, if that is so, the acceptance of the Canberra Agreement by Nauru constituted an implied waiver of its previous claim on rehabilitation. Second, there is the question whether, after the signing of the Canberra Agreement, Nauru in effect signalled to the General Assembly that it waived its claim. I will examine these two contexts separately, and in that order.

1. Waiver vis-à-vis the Partner Governments

From 1966 onwards, the Partner Governments were under increasing pressure within the United Nations to move towards independence for Nauru as quickly as possible: General Assembly resolution 2226 (XXI) of 20 December 1966 recommended 31 January 1968 as the latest date.

Given the lateness of the Nauruan people's decision not to resettle, but to stay on Nauru itself and, given further, the repeated technical reports that large-scale rehabilitation was not practical, you

can see that the Partner Governments were not themselves prepared to contemplate rehabilitation. They did not believe it to be feasible, or to make good economic sense, and they did not have time enough to do it prior to independence, in any event.

They took the decision, therefore, that it should be left to the Nauruans to decide for themselves whether to rehabilitate or not. They, the Partner Governments, would transfer the ownership and control of the phosphate industry to the Nauruans. And the terms of the transfer would be such that the Nauruans would be guaranteed sufficient financial resources, not only to maintain a high standard of living, but also - if they so chose - to rehabilitate the island. But it was to be for the Nauruans to decide and to do. The Partner Governments accepted no responsibility for rehabilitation. They would make sure the Nauruans had all the necessary finances, but there the responsibility of the Partner Governments ended.

This position emerges clearly from the records of the discussions in 1966-1967. And it is important to trace through the positions of the two sides in the records of those discussions. Nauru has provided those records in Volume 3 of its Annexes. They have to be examined carefully to see whether Nauru did, or did not, waive its claim.

Now, in June of 1966 the Partner Governments stated their position in a formal statement on behalf of the Joint Delegation:

> "this Delegation [the Joint Delegation] would envisage that the project level of receipts by the Nauruan community should be discussed from the point of view of building up a long term fund adequate for the long term security of the Nauruan people and adequate also ... for making appropriate and practicable provision for the rehabilitation of Nauru if that remains the definite objective of the Nauruan people" (Ann. 4, p. 386).

Note that this clearly referred to rehabilitation of the lands already mined, pre-independence. This position was reiterated in July 1966. And, at this stage, the Nauruans seemed to agree. The Agreed Minute of the meetings between 14 June and 1 July 1966 sets out the Nauruan position in the following terms:

> "The Nauruan view was ... that they should receive the full financial benefit from the phosphate industry, so that there would be funds available to rehabilitate the whole of the island." (Ann. 4, p. 407.)

Clearly, the Nauruans were referring to the areas mined pre-independence and they were assuming

that they, the Nauruans, would be responsible for all rehabilitation. But over the next few months a significant change occurred in Nauruan thinking, and they decided that they would hold the Partner Governments responsible for rehabilitating areas mined pre-independence. In the record for the meeting on 20 April 1967 there is noted a statement by the Nauruans that they accepted responsibility for rehabilitation in respect of future mining, post-independence, but not past mining. The reply of the Partner Governments was clear and categorical. It was the Nauruan's decision not to resettle elsewhere, and, in the words of the Secretary, speaking on behalf of the three Partner Governments:

> "it was the view of the Partner Governments that decisions regarding rehabilitation were also matters for the Nauruans, and that the Partner Governments' proposals in respect of the financial arrangements provided adequate means to carry out whatever redevelopments of the mined areas might prove to be necessary" (Ann. 5, p. 81).

And that seemed to be that. The proposals of the Partner Governments on 10 May 1967 (Joint Delegation 67/2) repeated that:

> "the Partner Governments consider that the proposed financial arrangements on phosphate cover the future needs of the Nauruan community including rehabilitation or resettlement" (*ibid*., p. 160)

For this reason, the Partner Governments sought to persuade the Nauruans to withdraw their claim. The record for the meeting on the morning of 16 May states that: "the Joint Delegation would like to see the Nauruans withdraw their claims in respect of rehabilitation" (Ann. 5, p. 56).

But evidently the Nauruans at this stage were not prepared to do so. This is clear from the record for the afternoon meeting on that same day, for that states that the Nauruans would still maintain their claim on the Partner Governments in respect of rehabilitation of areas mined in the past.

Thus the Nauruans were claiming that the Partner Governments should meet the cost of rehabilitation of areas mined pre-independence. They had abandoned the idea that they would themselves assume the responsibility, provided their revenues were adequate.

But let us note two further things. The Nauruan claim is against "the Partner Governments", not just Australia. And there is no hint that the Nauruans viewed this claim, this responsibility, as

deriving from the Trusteeship Agreement.

However, no more is heard of the Nauruan claim, and the Canberra Agreement on the Transfer of the Phosphate Industry was duly signed on 14 November 1967. It contained not a word about rehabilitation.

But it did, as the Partner Governments had promised, make rather generous financial provision for the Nauruans. They could look forward to US$21 million income for 1968, that is to say $40,000 per annum for each family, over and above whatever they might earn for themselves. If, from this total income, the Nauruans maintained the existing level of contributions into the long-term fund, this would amount to $400 million by the time the phosphates were exhausted. And if that sum were invested, they could anticipate around $24 million per annum, as an income from that investment.

So the Partner Governments had kept their promise. The financial arrangements were generous enough to enable the Nauruans to tackle the entire rehabilitation problem, if they so wished.

Clearly, the Partner Governments did not expect to hear any more of the Nauruan claim that they, the Partner Governments, should also bear the cost of rehabilitation. And they did not. From the middle of May until the signing of the Canberra Agreement on 14 November 1967 all was silence.

Now I would invite the Court to consider very carefully the implication of this five months of silence.

The Partner Governments had insisted throughout that they did not accept the Nauruan claim and that the financial terms they were offering were a sufficient discharge of any obligation the Nauruans might think they owed. That was the offer in the 1967 Agreement, and it was signed and accepted by Nauru. The question is, was that, or was it not, a waiver of the Nauruan claim?

Nauru says not. It argues in its written observations that, because the Agreement contained no waiver clause, therefore there was none.

But, of course, that cuts both ways. One could just as well argue that the Agreement contained no "without prejudice" clause, and that if the Nauruans did not agree that the Agreement

was a comprehensive one, the onus was on them to say so, and to insist that the Agreement contained a clause preserving their claim. And the Agreement contained no such clause.

If you look at the transaction in terms of simple offer and acceptance, then there is no doubt that the Nauruans knew the Partner Governments were offering a comprehensive settlement. They knew that, if they again voiced their claim, the offer would be withdrawn, or at least reduced in value. So they kept their silence. They maintained that silence at the very time when, in good faith, they should either have reasserted their claim, or refused to sign the Agreement if it lacked a "no prejudice" clause. In the result, elementary considerations of good faith suggest that the Nauruans could not both accept the Agreement and renew their claim.

2. Waiver vis-à-vis the United Nations

Mr. President, that is precisely what they did. On 22 November, only one week after signing the Agreement, in addressing the Trusteeship Council, Chief DeRoburt said this:

> "There was one subject, however, on which there was still a difference of opinion - responsibility for the rehabilitation of phosphate lands ... He merely wished to place on record that the Nauruan Goverment would continue to seek what was, in the opinion of the Nauruan people, a just settlement of their claims." (Annex 29 to Preliminary Objections of Australia.)

If that statement was intended to preserve the claims it was, in my submission, too late and addressed to the wrong audience. Any statement of preservation of claims had to be made before the Canberra Agreement was signed, not after. And it had to be made directly to the Partner Governments, not the Trusteeship Council.

In short, Mr. President, if one party accepts a comprehensive offer, so that an agreement is made with another party, that party cannot, by a unilateral statement a week later, in a different forum, revise the agreement. The waiver had been made, implicitly, on 14 November in Canberra. It could not be retracted on 22 November in New York.

It seems likely that these rather elementary propositions of good faith, and good sense, began to occur to Chief DeRoburt himself. For, at the crucial stage in the United Nations discussions, on 6 December 1967, Chief DeRoburt changed his position. He then said:

> "One [problem] which worried the Nauruans derived from the fact that land from which phosphate had been mined would be totally unusable. Consequently, although it would be an expensive operation, that land would have to be rehabilitated and steps were already being taken to build up funds to be used for that purpose ... The revenue which Nauru had received

> in the past and would receive during the next 25 years would, however, make it possible to solve the problem." (Preliminary Objections of Australia, Ann. 30, para. 20.)

You will note that the "problem" he refers to is the whole problem of rehabilitation, not just that produced by post-1967 mining. And he speaks of this as a Nauruan problem. There is no mention, this time, of any continuing responsibility in the Partner Governments or of any claim against the Partner Governments.

Thus, at the crucial stage, when the Assembly has to vote on terminating the Trusteeship, the silence returns: and that can only be construed as a waiver of any claims. For that was the time to speak out, so that, if the Assembly agreed with the Nauruans in their claim of a continuing financial responsibility on the Partner Governments, the Assembly could record that agreement in its resolution. We would then have seen, not a complete discharge of the three Partner Governments from all their obligations as Administering Authority, but a qualified discharge. The resolution could have qualified that discharge by noting that there was this continuing responsibility. But nothing of this kind happened. And so, in Australia's submission, we are entitled to treat that statement on 6 December as a clear waiver. This was no mere "superficial inconsistency", as Nauru suggests, placing all the emphasis on the statement of 22 November. This was *the* principal statement by Nauru, before the principal organ, the General Assembly, at the critical point when the decision on termination had to be made. And it confirmed entirely the view of the Partner Governments that the Canberra Agreement was intended to be a complete and comprehensive settlement, was offered as such, and was accepted by Nauru as such.

III. THE UNREASONABLE DELAY IN THE PRESENTATION OF THE PRESENT CLAIM BY NAURU

The discussion of waiver leads me naturally into the third, and last, part of my presentation. Here I shall deal with the quite extraordinary delay in the presentation of this claim. It is this long delay which confirms the implication that any real claim had been waived long ago.

As Nauru says at paragraph 125 of its Written Observations:

> "It is generally accepted that delay may in the circumstances of the particular case constitute an implied waiver of the claim."

That is true. And so the question arises, how does Nauru explain this long delay - 24 years - except as a waiver of any claim it might have contemplated?

In effect, Nauru says only two things: first, that Nauru did renew the claim after independence, and, second, that in any event Australia has suffered no prejudice. Let me take those two arguments separately.

1. The so-called post-1967 claims

Nauru refers to a letter dated 5 December 1968 (Nauru Memorial, Vol. 4, Ann. 76). The operative part of this letter was the following:

> "We are now concerned at the expansion of air services in the Pacific region and feel that if we remain inactive for too long, we may lose important opportunities for economic and communications development. This approach, therefore, is to request your concurrence and that of your Government and its Partners, New Zealand and the United Kingdom to a meeting with representatives of my Government to work out how best the airstrip could be constructed as a rehabilitation project and to determine the degree of financial and technical assistance the Partner Governments would be able to offer."

What can one make of this letter? The Court will note that this is not the previous rehabilitation claim. This is a request for financial and technical assistance to construct an airstrip. The rehabilitation element is purely incidental: rehabilitation is involved only in the sense that the airstrip will have to be on the mined areas, so filling in and flattening out of the land will be involved. The Court will also note that it is addressed not to Australia alone, but to the three Partner Governments. And the Court will note that there is no mention of any breach of the Trusteeship Agreement, or of any legal responsibility arising from that Agreement, or, indeed, of any legal responsibility of any kind. It is a request for financial and technical assistance, pure and simple.

The Australian reply (Ann. 77), having consulted the Partner Governments, was that those three Governments had made it clear in the talks prior to independence that they accepted no responsibility for rehabilitation as such, and that the terms of settlement agreed were sufficiently generous to enable Nauru to meet all its needs, for rehabilitation and development. But technical assistance could be offered.

Then Nauru refers to a visit by Mr. DeRoburt to Canberra in 1973, during which he raised the rehabilitation issue. The same thing happened ten years later in 1983 (see Ann. 78). But, again, this

was not raised as a legal claim. It was raised as "a matter of concern" to Nauru. And, again, there is no reference to any responsibility arising from the Trusteeship Agreement, and remaining undischarged by the termination of that agreement. And, again, Nauru got the same reply (Ann. 79).

Finally, in 1986, Nauru addressed identical Notes to the three Partner Governments - not just to Australia (Ann. 80). But this was not a claim of any sort. It was merely to notify the three Governments that Nauru was establishing a Commission of Inquiry, to enquire into the question of who had responsibility for rehabilitation. All it asked of the three Partner Governments was their co-operation in producing documents or information.

So, what conclusion must one reach? The fact is that no legal claim was ever presented post-independence. The conclusion must be, inevitably, that Nauru had waived that claim way back in 1967. Nauru knew it had accepted the Canberra Agreement as a final settlement. This is why Nauru waived the claim in addressing the General Assembly in December 1967. And that is why Nauru no longer referred to any legal claim, or any claim of right, in all the years from 1967 to 1991. This long delay in bringing proceedings in this Court simply confirms that the claim had been waived.

2. The lack of prejudice to Australia

But, of course, Nauru now says that the delay does not matter, because Australia has not been prejudiced by the delay. Let me deal briefly with this argument.

It must be obvious that if what is in issue is essentially a waiver, then prejudice does not enter into it. Either there was a waiver, or there was not. If there was a waiver, then the fact that Australia may not have been prejudiced by the long delay between the waiver and the bringing of this present case is beside the point. The waiver would remain valid.

But, in any event, Australia has in fact been prejudiced by this long delay in connection with these present proceedings. Nauru says this cannot be so because Australia has all the documents it needs. But the Court must be aware that the present claim of Nauru takes us back to the days of the Mandate - and Australia does not have all those documents. The British Government might, but Nauru has chosen not to make the United Kingdom a Party to these proceedings.

And there are more important matters of prejudice than documents. As I have indicated, any claim of breach of the Trusteeship Agreement ought to have been made in the United Nations, prior to termination. If it had been made, it would have been made against all three Partner Governments. It would have had to have been made against all three, because it is inconveivable that the General Assembly would have allowed only one of the three Administering Powers to be singled out as legally responsible for the obligations held jointly by all three.

Moreover, the Trusteeship Council or the General Asssembly would have dealt with the claim of breach, and either dismissed it, or held the three Governments accountable for the breach by reference to the standards of administration reasonably required at that time.

But look at the position now. Australia is sued alone. Nauru seeks to colour the issue of the legitimacy of the acts of administration by reference to current standards of environmental protection. And Australia can no longer seek a ruling on the charge of maladministration from the competent political organs: they now have no role, and so Australia may be forced to defend itself - on matters of political and economic judgment - before this Court. I mean no disrespect to this Court when I say that Australia does find that prejudicial. It is a burden Australia never expected to shoulder - alone, and 24 years after it had been discharged from all further obligations by an appreciative and grateful General Assembly.

So, Mr. President, for all these reasons Australia submits that this claim is inadmissible. It is too late, it is brought against the wrong respondent, and in the wrong forum: and the very tardiness of the claim confirms Australia's view that Nauru waived any claim long ago, and knows it.

Mr. President, that concludes my statement. I appreciate the patience of the Court and would ask you to call upon Mr. Henry Burmester.

The PRESIDENT: Thank you very much, Mr. Bowett.

Mr. Burmester, please.

Mr. BURMESTER: Mr. President, Members of the Court, it is a great honour for me to address the Court as Co-Agent for Australia. I had the honour to be associated with the previous case in which Australia appeared before this Court, some 17 years ago. Hence, it is an even greater

honour that I am on this occasion able directly to address the Court, for which I have the greatest respect.

Mr. President, my submissions concern first Nauru's claim to the overseas assets of the British Phosphate Commissioners, and secondly, the issue of good faith.

As to the Nauruan overseas assets claim, Australia makes four submissions. Australia submits the claim is inadmissible because it was not first made in Nauru's Application, but was left to Nauru's Memorial. Secondly, Australia submits that, in any event, the claim does not arise from a legal dispute, within the meaning of Article 36(2) of the Statute of the Court. Thirdly, Australia submits that Nauru can in fact show no legal interest in the overseas assets of the BPC. And finally, in relation to the overseas assets claim, Australia also relies on each of the submissions which it makes in relation to the other parts of Nauru's case.

I turn first to the facts. The British Phosphate Commissioners, commonly called the BPC, were appointed by Australia, New Zealand and the United Kingdom, under an Agreement made in 1919 and amended in 1923. We have already given an account of the Agreement in our written submissions (see paragraphs 24-31 and 131-135 of Preliminary Objections). Under a further Agreement made in 1920, the BPC acquired a mining concession over the phosphate deposits on Nauru.

In 1967, just prior to Nauruan independence, the Nauruan assets of the BPC were sold to Nauru pursuant to the Canberra Agreement of that year (see paragraphs 95-107, and 136 of the Preliminary Objections). As we have already said, the terms of the 1967 Agreement were particularly favourable to Nauru.

Then, in 1987, some 20 years later, the three Partner Governments determined to wind up the undertaking of the BPC. Accordingly, pursuant to an Agreement between them, the BPC's remaining assets were distributed amongst the Partner Governments (Nauruan Memorial, Ann. 31). Subsequently, on 23 June 1988, there was an exchange of notes between the Partner Governments, under Article 5(2) of the Agreement, confirming that all agreed steps had been taken and bringing the 1919 Agreement to an end.

The assets distributed in 1987 were derived from a number of sources. They, in fact, represented decades of trading by the BPC in phosphate, in shipping, and other activities. Some of the assets may have been derived from the proceeds of sale of Nauruan phosphate. Some may have come from the sale, in 1967, of the BPC's Nauruan assets to Nauru. However, much of the BPC's remaining assets came from elsewhere, and did not derive from Nauru at all. And this is clear from an examination of the 1987 Agreement itself. The Preamble emphasizes that in more recent years the BPC had been managing agents in relation to the mining of phosphate on Christmas Island, an Australian territory. It was because that function had come to an end that it was decided to proceed to wind up the affairs of the BPC.

I turn then to Nauru's claim.

This is a new claim. It did not appear in the Nauruan Application, but was left to the Nauruan Memorial. Nauru says, in effect, that the claim was wrapped up in its original Application, in the sense that its original Application concerned breaches of obligations relating to the Trusteeship Agreement.

Australia submits, however, that this cannot be accepted. An examination of the Nauruan Application, particularly Parts IV and V, shows the care and precision with which the Nauruan claims have been formulated. There is no reference to overseas assets. In its Application, Nauru challenged only Australia's failure to rehabilitate phosphate lands worked out before 1 July 1967. The relief sought in the Nauruan Application related only to this. Compensation for rehabilitation was the stated purpose of the Application.

The terms of Nauru's Application are consistent only with this interpretation. Presumably it was for this reason that Nauru referred to its unsuccessful efforts to get Australian recognition of the obligation to rehabilitate (Application, para. 40). It was also in keeping with this that Nauru drew attention in its Application to its appointment of a Commission of Inquiry into the rehabilitation of the phosphate lands. Everything in the Application indicates that the fons et origo of this case, to adopt an expression used in the *Nuclear Tests* case (*I.C.J. Reports 1974*, p. 263), is the claim for rehabilitation.

Yet, we now find, in the Nauruan Memorial a claim to what is termed "the Australian allocation" of the overseas assets of the British Phosphate Commissioners. This is clearly very different from a claim for rehabilitation.

Not surprisingly, Nauru has not shown any real connection between claims for rehabilitation and its claim to the overseas assets of the British Phosphate Commissioners. Nor, indeed, any connection between its claims to the overseas assets of the British Phosphate Commissioners and alleged breaches of the Trusteeship Agreement.

The fact is that the claim to the overseas assets of the British Phosphate Commissioners appears as an after-thought. Perhaps someone thought of it after the Application was lodged and said "let us add it to the original claim". Australia submits that this cannot be done. And this issue is not a matter of form only. It is a matter of procedural fairness, not only to Australia, but to third States as well.

The Rules of the Court are clear. Article 38 provides:

> "The Application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based; it shall also specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based."

I repeat, "shall specify the precise nature of the claim". In relation to the overseas assets claim, however, it is clear Nauru did not comply. There is not a single reference in the Application to the overseas assets of the British Phosphate Commissioners.

An important purpose of Article 38 is to give proper notice of claims to the immediate respondent, here Australia, as well as to other States whose interests may be affected. This is because, under Article 42 of the Rules, a copy of the Application is specifically required to be transmitted to "other States entitled to appear before the Court". An application (or notification of a special agreement instituting proceedings) is the only document which is required to be transmitted in this way.

Article 42 is clearly intended to protect the interests of States which may be affected by the proceedings. Once on notice, such States can determine whether or not to make application to

intervene or to take any other action which may seem appropriate.

As Nauru's Application did not refer to its overseas assets claim, however, the transmission of its Application to other States would not have notified other States of the claim.

The possibility of prejudice in this case is far from fanciful. Together with Australia, the United Kingdom and New Zealand have each received a share of the assets held by the BPC. The interests of those two other States are also at stake. Indeed, this much has already been recognized by Nauru, in the diplomatic exchanges between it and all three Partner Governments (Nauruan Memorial, Ann. 80, Nos. 5, 6, 8, 9, 10, and 17). By failing to comply with the Rules of Court, Nauru has deprived two of the Partner Governments of the notice to which each was entitled.

Clearly, the Rules of this Court should not be applied so as to impair the rights of other States which are not parties to the proceedings. The Permanent Court, in the *Société Commerciale de Belgique* case, noted this specifically, in relation to the amendment of claims and submissions. The Court said:

> "It is clear that the Court cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character. A practice of this kind is calculated to prejudice the interests of third States to which, under Article 40, paragraph 2, of the Statute, all applications must be communicated in order that they be in a position to avail themselves of the right of intervention provided in Articles 62 and 63 of the Statute. Similarly, a complete change in the basis of the case submitted to the Court might affect the Court's jurisdiction." (*1939 P.C.I.J., Series A/B, No. 78*, p. 173.)

Now Nauru argues for a liberal approach, but the result for which it contends is not supported by the authorities to which it refers. For Nauru cannot show that its claim to the overseas assets of the BPC is a claim implicit in, or consequential on, or arising directly out of, the original claim for rehabilitation. Nauru cannot, therefore, satisfy the tests referred to in the *Temple of Preah Vihear* case and the *Fisheries Jurisdiction* case - both cases mentioned by it in its written submissions (see paras. 350-351).

It is for these reasons that Australia submits that Nauru's claim to the overseas assets of the BPC is inadmissible, because it is a new claim, made contrary to the Rules of Court which are intended to ensure that proper notice is given not only to the Respondent but to non-party States as

well.

A Legal Dispute

I turn to my second argument. Apart from the issue of procedural fairness, Australia also submits that, in any event, the Court has no jurisdiction under Article 36 (2) of the Statute, to deal with this claim. It says, first, that Nauru has not identified a legal dispute within the meaning of Article 36 (2). Secondly, it says that Nauru has not demonstrated a *legal interest* sufficient to support a valid claim.

For there to be a legal dispute, there must be first, a dispute in the legal sense, and secondly, it must be a dispute falling within one of the four categories set out in Article 36 (2).

In the *Mavrommatis* case (*1924 P.C.I.J., Series A, No.* 2, p. 11), the Permanent Court did define a dispute as "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons". But as later cases show a mere assertion of a disagreement is not sufficient. There must be something more. This much is clear from the recent *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (*I.C.J. Reports 1988*, p. 27). In that case, the Court referred to the 1962 South West Africa case and said in substance that there will only be a dispute in the relevant sense if there is a claim by one party which is positively opposed by the other. This can only be determined by reference to the attitudes of the parties.

So let us turn then, Mr. President, to the diplomatic exchanges because in this case there have been no prior negotiations as a result of which the claim of Nauru can be seen to be positively opposed by the Partner Governments. In this case, the attitudes of the Parties must be determined by reference to diplomatic exchanges. And these are set out in the Nauruan Memorial (paras. 471-476) and in Australia's Preliminary Objections (Ann. 13). (Some parts of them are also set out at paragraphs 335 to 340 of Nauru's Written Statement.)

The subject was opened by Nauru in January 1987 when, in a Note of 5 January, Nauru wrote for information concerning the BPC assets and asked that it "be consulted in matters relating to [their] disbursement ...".

Australia on 20 January 1987 confirmed that "arrangements are in hand" for winding up the BPC and indicated that the Partner Governments would shortly sign an agreement to bring this about. At the end of that month, and following Australia's reply, Nauru wrote again, expressing:

> "regret that the three Partner Governments are contemplating the winding-up of the British Phosphate Commissioners and distribution of their funds".

However, the Note did not go any further than "requesting" the three Partner Governments to keep the funds of the BPC intact and its records preserved until Nauru's Commission of Inquiry into land rehabilitation had completed its task.

Some months went by. Then in May 1987, the President of Nauru wrote to the Australian Prime Minister indicating that it was the "strong view" of the Nauruan Government that the assets of the BPC should be "directed towards" rehabilitation, but as the terms of that letter make clear, the Nauruan President was not making any specific claim. He wrote:

> "The Note [of 30 January 1987] to you and other Governments, however, was by way of an interim measure merely moving you to withhold distribution of assets until the report of the present independent Commission of Inquiry into the Rehabilitation of the Worked-Out Phosphate Lands of Nauru has been completed and published ... The whole rehabilitation question is a most vexing problem. On this question, there appears to be a number of intangibles, and it is the belief of my Goverment that irrevocable stances should not be assumed by the various governments at the outset."

The Nauruan President did not take the matter much further. In his last letter, of July 1987, he wrote:

> "I find it difficult to accept [the Australian Government's statement] that the residual assets of the BPC were not derived in part from its Nauru operations. I shall not, however, pursue that here but leave it perhaps for another place and another time."

Now this last sentence in the letter, "I shall not, however, pursue that here ..." indicates that there was no claim between Australia and Nauru that was positively opposed. Australia submits that none of this exchange adds up to a specific claim by Nauru to the overseas assets of the BPC which was positively opposed by the Partner Governments, including Australia. Furthermore, none of this indicates any basis on which a claim might have been made. On the contrary, the exchange

amounts only to an expression of strong interest in the assets, on the basis, it was said, that they were derived from the BPC's Nauruan operations. This fact was denied by Australia. But no claim to the assets was in substance made until Nauru lodged its Memorial in this case. There is, therefore, no dispute in the legal sense revealed by the diplomatic exchanges.

Even if, contrary to my submissions, the Court were to find that there was a dispute concerning the source of the BPC's overseas assets, it does not follow that there is a *legal* dispute within the meaning of Article 36 (2) of the Statute.

For a dispute, in the legal sense, to exist there must, as I have indicated, be an opposition of views. To be a *legal* dispute the opposition must relate to a matter falling within Article 36 (2) of the Statute. But Nauru has not said that there is an opposition of views concerning any such matter.

Hence, in relation to this particular claim, Nauru has not said that any question of international law is involved in the claim. It does not point to any fact which, if proven, would indicate a breach of international obligation. It does not say that there is any question concerning the interpretation of a treaty. Yet these are essential elements of the definition in Article 36 (2) of a legal dispute over which the Court has jurisdiction.

The diplomatic exchanges in this case contain no material which would turn the alleged dispute into a legal dispute. Thus, the overseas assets claim quite clearly does not fall within the principle of the *Right of Passage over Indian Territory, Preliminary Objections* case. In that case the Court was able to identify a legal dispute from the relevant negotiations and diplomatic exchanges which had disclosed a definite complaint based on action alleged to be inconsistent with international law. There is no such complaint in this case (*I.C.J. Reports 1957*, p. 149).

If Australia's submissions in this regard are accepted and the Court is satisfied that there is no legal dispute in relation to Nauru's overseas assets claim, it follows that the claim does not fall within Article 36 (2) and the Court has no jurisdiction in respect of the claim.

Mr. President, Members of the Court, there is a further reason why Australia submits that the claim to the overseas assets of the BPC cannot fall within Article 36 (2). It is accepted that this Article cannot confer substantive rights. Australia submits that the claim cannot give rise to a legal

dispute, within the meaning of this provision, because Nauru has not shown any legal interest in the overseas assets of the BPC.

Indeed, Australia submits that Nauru could not demonstrate any relevant interest in these assets. Nauru does not claim that the assets belong to it. And clearly the assets belong to the BPC. The BPC was an instrumentality of three Partner Governments. The BPC did conduct phosphate operations on Nauru from which it derived revenue. It does not, however, follow from this that Nauru has a legal interest in the assets of the BPC. A State does not acquire a legal interest in a claim relating to the business of a foreign national simply because the foreign national carried on business in that State many years before. Nauru has not, however, asserted any other possible basis for its claim.

Furthermore, the present claim to the assets of the BPC is not consistent with Nauru's conduct in the past. In 1967 Nauru asked to buy those assets of the BPC on Nauru. It paid the Partner Governments an agreed price. It did not make any claim at this time to any other assets of the BPC. Yet it knew at that time the extent of the assets of the BPC. A balance sheet of the assets of the BPC was attached to each Annual Report of the Administering Authority which was submitted to the United Nations.

The facts which Australia has set out in some detail in its Preliminary Objections show that the purchase by Nauru of the assets of the BPC was an entirely voluntary transaction (paras. 109-112 of Preliminary Objections). Nauru does not now seek to re-open its purchase of those assets, except to found a claim for compensation. The only reasonable interpretation of Nauru's actions in 1967 is that at that time it did not consider that it had any basis to claim the overseas assets. Nauru seeks to put off the consideration of its legal interest in this matter until the merits stage. But these questions of jurisdiction are necessarily preliminary. Article 36 (2) of the Statute cannot give jurisdiction if there is no legal dispute, whether because there is no dispute in the relevant sense or because Nauru has shown no legal interest in the claim. All these matters are interconnected. All aspects of Australia's submissions on Article 36 (2) are essentially preliminary. And the Rules make it clear that questions which are preliminary should be determined at this stage

of proceedings.

Mr. President, I turn briefly to my final submission on the overseas assets claim. That is, that each of the preliminary objections made by Australia to Nauru's other claims apply equally to the overseas assets claim. The overseas assets claim is either a new claim (as Australia has submitted), or part of Nauru's other claims because directly connected to the question of Trusteeship obligation. If it is not a new claim, then Australia's submissions concerning the termination of obligations under the Trusteeship apply equally to the overseas assets claim. So too do its submissions concerning waiver. That is, Australia submits that Nauru's overseas assets claim, like the claim for rehabilitation, was settled, satisfied, or waived in the comprehensive settlement reached by the Partner Governments with Nauruan representatives in the Canberra Agreement of 1967, or extinguished by the United Nations decision to terminate the Trusteeship.

Further, the reservation contained in Australia's Declaration of Acceptance of 17 March 1975 applies equally to the overseas assets claim.

Australia's submissions concerning the absence of consent of States which are very directly the object of Nauru's claim, stand in a slightly different position. For Australia's contentions in this regard apply whether or not the Nauruan claim to the overseas assets of the BPC is regarded as new, or part of the original Application. Australia's submissions on this issue of absence of consent are to be presented by Professor Pellet, so here I do no more than briefly draw the Court's attention to the salient facts.

The Nauruan claim in relation to the overseas assets is to one pot of gold. Consider the position if Nauru had made claim to the assets of the BPC when it was still a going concern. The claim would, of necessity, have been made against all three Partner Governments for no one of the Partners could have dealt on its own with the assets of the BPC. The reason was that the BPC was created by, and subject to, all three Governments.

Is the position any different now that the BPC has been wound up and the assets distributed? Australia submits that this fact cannot improve the Nauruan claim. It is legally beside the point.

For if Nauru has a claim, it is against the assets of the BPC generally. It is in keeping with

this that Nauru has said that it may seek access to the accounts of the BPC. There can be no basis for assigning a special liability to Australia. Indeed, none has been suggested.

The same requests in relation to the overseas assets were made of New Zealand and the United Kingdom (see e.g., Ann. 80, Nos. 5, 6, 7, 8, 9, 10, 11, 12). Yet in the Nauruan Memorial those requests and expressions of interest have become an alleged legal dispute with Australia alone.

This points to only one conclusion. The claim to the overseas assets of the BPC can only be regarded as a claim against all three Partner Governments. For the reasons about to be given to the Court, in the absence of the United Kingdom and New Zealand, such a claim cannot be adjudicated upon by this Court.

Mr. President, that would be a convenient time for me to pause.

The PRESIDENT: Do you wish to go on after the break, Mr. Burmester?

Mr. BURMESTER: I have some brief submissions on the issue of good faith, Mr. President. I could continue now; it would take about 15 minutes.

The PRESIDENT: Well, perhaps we should have our break now. Thank you.

The Court adjourned from 11.30 to 11.45 a.m.

Mr. PRESIDENT: Mr. Burmester.

Mr. BURMESTER: Mr. President, Members of the Court. Before the break I completed my submissions on Nauru's overseas assets claim. But, as I indicated earlier, there is one other matter for me to address and this is the issue of good faith, in relation to the Nauruan claims as a whole. This issue is covered in Part V of Australia's Preliminary Objections.

We do not rely on the issue of good faith as a separate ground but as a matter relevant to the exercise, as a matter of judicial propriety, of the Court's discretion to decline jurisdiction. In dealing with it, we seek to draw together much of our previous submissions. We submit that when Nauru's claims are considered as a whole, it is clear that they are not credible claims. That is, they are not bona fide claims in any real sense and that, therefore, the Court should exercise its discretion so as to decline jurisdiction in this case. Australia puts its submissions on good faith on this basis.

Take the matter with which I have just dealt, the claim by Nauru to the overseas assets of the BPC. I have already shown that this has never been a real claim. Nauru has never really had a legal interest in the subject-matter and, although Nauru knew the relevant facts for many years, it did not make any claim to the overseas assets of the BPC until it came to lodge its Memorial. The truth is that this claim has never been a bona fide claim at all but has been invented in the course of preparing the Nauruan Memorial.

As to Nauru's other claims, as Professor Bowett and Professor Jiménez de Aréchaga have shown, each of the claims now made by Nauru was settled as between Nauru and Australia by the 1967 Canberra Agreement and each of them was recognized as settled in the termination of the Trusteeship by the United Nations. That is, all these claims have in fact been satisfied. They cannot be given new life by this Application.

That Nauru's claims are not credible claims is confirmed by the fact that Nauru has delayed many years before bringing them to this Court.

What is more, during the period of the Trusteeship, no one alleged that Australia, as part of the Administering Authority, had been guilty of any act of maladministration. Certainly, the Nauruan representative never made any such suggestion.

Indeed, all the contemporary evidence points the other way. Thus in the final report of the Trusteeship Council before independence, the Council noted that:

> "Relations between the Administering Authority and the Representatives of the Nauruan people continue to be cordial; that economic, social and educational conditions continue to be satisfactory and that commendable progress has been made in the Territory." (Para. 310, reproduced in Annex 28 to Australia's Preliminary Objections.)

This tends to confirm the fact that there can be no real claim against Australia for acts done by the Administering Authority during the period of the Trusteeship.

In view of this, it is not surprising that Nauru did not make any allegation of maladministration against Australia at any time in the decades immediately after independence. More than 20 years have now passed since then but only now Nauru accuses Australia of a variety of breaches of International Law, including breaches of the Trusteeship Agreement. These include claims that Australia "abused its rights" over the territory, and "by reason of its improper and arbitrary conduct as Administering Power in Nauru, engaged in acts of maladministration, wrongful under International Law". (Para. 47 of the Application.)

This is clearly inconsistent with the historical record. That record gives no support whatever to Nauru's claims and it is for this reason that Australia has felt it necessary to point in its Preliminary Objections (paras. 400-407) to what it considers the absence of good faith on the part of Nauru in now bringing its claims to this Court.

Before independence, the issue of rehabilitation had, of course, been the subject of much debate and was well known to all the Parties, as well as to the United Nations General Assembly - that has been covered in earlier submissions. The record makes it clear, however, that Nauru did not at any time allege that Australia, as part of the Administering Authority, was guilty of a breach of the Trusteeship. As other Australian counsel have noted, in November 1967, the Nauruan Head Chief informed the Trusteeship Council that the issue of rehabilitation was not "relevant to the termination of the Trusteeship Agreement", "nor did the Nauruans wish to make it a matter for United Nations discussion". (Para. 178 of Australia's Preliminary Objections.)

Now, in these circumstances, Australia says that Nauru does not bring its claims in good

faith. For 24 years, Nauru represented to the Administering Authority and to the United Nations that it had no quarrel with the Administering Authority and that it was pleased with the way in which the Administering Authority had brought it to independence. It has not shown any different attitude until now and there is some unfairness in bringing these claims against Australia at this late date.

In addition, the conduct of Nauru indicates that even it does not believe in the practicability of rehabilitating the worked-out phosphate lands. Nauru does not deny that if it wishes to rehabilitate the lands worked-out after 1 July 1967, it must bear the cost. This in fact represents about two-thirds of the whole worked-out area. As we have already noted, there is little evidence that Nauru has taken any significant steps towards that end and it is not as though there has been any lack of funds. Nauru has derived considerable income from phosphate mining since 1 July 1967. Certainly, Nauru has given no evidence that rehabilitation is a practicable course. It therefore scarcely seems open to Nauru to accuse Australia of a breach of a legal obligation to take action which may be impracticable, even impossible and, moreover, action which Nauru itself has not been prepared to take.

Mr. President, Members of the Court, Australia submits that if Nauru's claims are taken as a whole, it is clear they are not bona fide claims. They have for the most part been settled or satisfied and in one case the relevant claim never did constitute a real claim at all.

Now Nauru emphasizes in its Written Statement (para. 42) that the principle of good faith does not create obligations . But Australia submits that this is beside the point. What is relevant, and what Australia submits, is that the Court clearly has an inherent jurisdiction to protect the integrity of the judicial processes. Accordingly it has jurisdiction to ensure its processes are not misused.

Mr. President, this idea is familiar in common law jurisdictions. In such jurisdictions, the court is said to have an inherent jurisdiction to protect its processes so as to ensure that they can operate effectively. As part of this jurisdiction a court is said to have power to stop an abuse of its process. In common law jurisdictions it is said to be an abuse of process to bring proceedings if the dispute has been settled or if the action is groundless.

In these jurisdictions another way of putting this is to say that such an action has not been brought in good faith for a proper purpose. The standard texts recognize this. I refer particularly to Halsbury's Laws of England (4th ed. Vol. 36, para. 75, Vol. 37, paras. 14, 434-435, 437, 442-443) and to the English Supreme Court practice (1991, paras. 18/19/17 and 18/19/18).

In common law jurisdictions, in a case where an abuse of the court's process is shown, the court may, in the exercise of its discretion, decide to prevent the case from going further. This action is not, of course, taken lightly. Nonetheless, it will be taken if the court believes the facts justify it.

Australia submits that the Court should be guided by similar principles in this case. This is in keeping with the Court's statement in the *Northern Cameroons* case: "The Court itself, and not the parties, must be the guardian of the Court's judicial integrity." (*I.C.J. Reports 1963*, p. 29.)

Australia submits that this Court has an inherent power to protect the integrity of the judicial process and that therefore the Court has the power to prevent the continuance of these proceedings. The Court's discretion is a broad one.

In this case there is ample evidence which would enable the Court to exercise its discretion against Nauru, as a matter of judicial propriety. We submit that, having regard to all relevant circumstances, it is clear that Nauru is misusing the Court's processes by pursuing claims which are not credible and not brought bona fide and the Court should exercise its discretion against hearing the claims brought by Nauru against Australia.

Mr. President, we make these submissions without prejudice to the other grounds of objection to the Court's decision on this case.

Mr. President, that concludes my submissions on this point. I invite you to call on Professor Pellet.

The PRESIDENT: Thank you, Mr. Burmester..

Mr. Pellet, if I may, I will leave it to you to find a convenient place to break your presentation anywhere within a reasonable range of 1 o'clock.

Mr. PELLET: Thank you very much, Mr. President. It is a big responsibility for me but I will try.

M. PELLET : Monsieur le Président, Messieurs les juges, un internationaliste ne peut qu'être honoré et, peut-être, un peu ému, chaque fois qu'il se présente devant vous. Je suis à la fois l'un et l'autre - et je vous remercie bien vivement de votre bienveillance. J'ajoute que l'éminence des collègues qui composent les deux équipes de plaidoirie et dont beaucoup, de part et d'autre de cette barre, sont aussi des amis avec lesquels - ou contre lesquels - j'ai eu déjà l'occasion de plaider, ajoute encore à cet honneur et à cette émotion.

Monsieur le Président,

1. Il m'échet de présenter l'exception préliminaire de l'Australie fondée, comme ceci est indiqué dans les écritures australiennes sur l'absence de consentement de tiers exception que Nauru croit pouvoir présenter différemment comme portant sur "la jonction ou le consentement de tierces parties ("Joinder or Consent of third Parties"; exposé écrit, p. 85).

Ce n'est pas vraiment la même chose, Monsieur le Président. Mais l'Australie a la prétention de définir comme elle l'entend les exceptions qu'elle soulève et je m'en tiendrai donc à celle qui est vraiment la nôtre : comme l'Australie l'a montré dans ses exceptions préliminaires, la requête de Nauru met inévitablement en cause d'autres Etats, sur la responsabilité desquels la Cour ne pourrait pas éviter de se prononcer si elle devait exercer sa compétence. Ce faisant, elle négligerait en effet le principe, absolument essentiel, qui fonde sa compétence : celui du consentement à la juridiction internationale.

Et c'est ce que je vais maintenant m'efforcer d'établir.

2. Monsieur le Président, si vous m'autorisez cette parenthèse, je le ferai, en évitant d'alourdir mes propos par la mention des références exactes de la jurisprudence ou de la doctrine que je vais citer. Ces références figurent dans le texte écrit de ma plaidoirie que je viens de remettre au Greffe et je serais très reconnaissant à celui-ci de bien vouloir rétablir ces références dans le procès-verbal.

3. Cette parenthèse refermée, je souhaite revenir à titre liminaire sur le fait que Nauru déforme indûment la nature et la portée de l'exception préliminaire soulevée par l'Australie et qu'il m'incombe

de défendre.

Dans son exposé écrit, Nauru insiste, avec une certaine emphase, sur le problème des "parties indispensables" ("indispensable parties") bien que, pour sa part, l'Australie n'ait pas employé l'expression et que je sois assez enclin à partager la conclusion théorique de Nauru selon laquelle "There is no 'indispensable parties' rule in international law" ce qu'indique son exposé écrit, page 87.

Encore faut-il s'entendre sur le sens exact de cette forte affirmation.

Elle n'est, en réalité, acceptable que du fait de la portée particulièrement large, et même laxiste, que Nauru confère à cette pseudo-règle. Telle que Nauru la conçoit, elle pourrait, je crois, s'énoncer de la manière suivante :

> "La Cour doit s'abstenir de statuer au fond dès lors que les Etats tiers, intéressés par la solution du litige, ne sont pas parties à l'instance."

Et, sous cette forme bien trop générale, il ne peut y avoir aucun doute : cette prétendue règle n'existe pas.

Oh, bien sûr, Monsieur le Président, Nauru se garde bien d'indiquer formellement ce qu'elle entend par "règle des 'parties indispensables'", et la formulation que je viens d'en proposer ne figure nulle part dans son exposé écrit. Mais elle peut assez facilement en être déduite. Et, sous cette forme excessive, je le répète, il est vrai que cette "pseudo-règle" ne relève pas du droit positif.

Mais, en l'espèce, ce n'est pas sur cette règle que l'Australie s'appuie, mais sur un autre principe qui n'est, pour sa part, guère susceptible de contestation, celui du consentement à la juridiction internationale. J'y viendrai précisément dans un second temps après avoir montré, dans une première partie, que la Nouvelle-Zélande et le Royaume-Uni partagent entièrement avec l'Australie la prétendue responsabilité des manquements qui sont attribués par Nauru à l'Australie seule.

Ce qui a valu "sur le terrain", concrètement, dans le cadre du régime de la tutelle et plus spécialement en ce qui concerne l'exploitation des phosphates, vaut tout autant devant la Cour, qui ne peut dissocier ce que la Société des Nations puis les Nations Unies ont uni, pas davantage qu'elle ne peut se prononcer sur la responsabilité d'Etats qui ne sont pas présents à la présente instance. On ne peut s'y tromper : l'Australie n'est qu'un bouc émissaire sur lequel Nauru espère attirer les foudres

de la justice internationale, faute de pouvoir s'en prendre aux trois Etats qui constituaient conjointement l'autorité de tutelle.

4. J'en viens donc tout de suite, Monsieur le Président, si vous le voulez bien, à mon premier point : les responsabilités de l'Australie, si responsabilités il y a, sont indissociables de celles des deux autres gouvernements participant à la tutelle.

La démonstration de cette proposition fondamentale ne paraît pas constituer une tache herculéenne tant cette indissociabilité relève de l'évidence dès lors que l'on examine avec tant soit peu d'attention le fonctionnement du mandat et de la tutelle successivement confiés par la SdN et par les Nations Unies aux trois gouvernements.

Le fait est patent si l'on examine le problème sous l'angle politique et administratif, ce que je ferai dans un premier temps. Et les choses sont plus claires encore si l'on centre l'analyse sur le mécanisme d'exploitation des terres à phosphates, question qui est l'objet même de la requête de Nauru et à laquelle je m'attacherai ensuite.

5. Intéressons-nous donc d'abord, à la tutelle dans son acception la plus large, au "régime international de tutelle pour l'administration et la surveillance" de certains territoires, que régit le chapitre XII de la Charte des Nations Unies.

Je ne nie pas, Monsieur le Président, que ce régime a été précédé d'un autre puisque, après la Grande Guerre, le Conseil de la Société des Nations a confié à "Sa Majesté britannique" "l'administration, sous le régime du mandat" de l'île de Nauru, pour reprendre les termes de l'article premier du mandat du 17 décembre 1920. Mais, pour l'essentiel, au moins quantitativement, les faits que Nauru reproche à l'autorité administrante ont eu lieu pendant la période de tutelle. En outre, et c'est cela surtout qui importe au point de vue juridique, le régime de tutelle sur Nauru se présente expressément comme la continuation du mandat.

Si bien que sauf à me répéter inutilement, il me paraît raisonnable de présenter, en un exposé unique, les grandes lignes du fonctionnement et du mandat et de la tutelle, en mettant l'accent sur la seconde.

6. Monsieur le Président, les analystes les plus autorisés du régime international de tutelle ont

été frappés par un trait particulier de la tutelle exercée sur Nauru et qui ne se retrouve nulle part ailleurs : son caractère collectif qu'ont relevé aussi bien sir Hersch Lauterpacht dans la septième édition du traité d'Oppenheim (*International Law*, Longmans, Londres, vol. I, p. 208), Hans Kelsen (*The Law of the United Nations*, Stevens, Londres, 1951, p. 601 et 609) ou Goodrich et Hambro (*Charter of the United Nations, Stevens, Londres, 1949*, p. 440) ou Maître Nicolas Veicopoulos (*Traité des territoires dépendants*, Sirey, Paris, t. 1, 1960, p. 144), M. Charles Rousseau (*Droit international public*, t. II : *Les sujets de droit, Sirey*, Paris, 1974, p. 404) ou bien d'autres.

Il n'y a pas à chercher bien loin pour constater le caractère collectif qui sous-tend la rédaction des sept brefs articles de l'accord de tutelle pour le territoire de Nauru, que l'Assemblée générale des Nations Unies a approuvés le 1er novembre 1947. L'article 2 de cet accord désigne *"conjointement"* (le mot y est) "les Gouvernements de l'Australie, de la Nouvelle-Zélande et du Royaume-Uni ... comme l'autorité qui exercera l'administration du territoire". Et les cinq articles suivants confèrent des droits et des obligations exclusivement à l'"autorité chargée de l'administration" composée de cette manière et ceci est vrai, qu'il s'agisse

- de l'administration au sens strict du territoire et de la réalisation des "fins essentielles" de la tutelle concédée, ceci en fonction de l'article 76 de la Charte (article 3 de l'accord de tutelle);
- de la paix, de l'ordre, de la bonne administration et de la défense (article 4 de l'accord de tutelle);
- de la coopération avec le Conseil de tutelle et de la manière de traiter les habitants (art. 5);
- du respect des traités et de l'application éventuelle des recommandations des institutions spécialisées (art. 6) ou
- des dispositions à prendre pour maintenir la paix et la sécurité internationales (art. 7).

Oui, Monsieur le Président, tout cela relève, en vertu de l'accord de tutelle lui-même, de la compétence de l'autorité chargée de l'administration, c'est-à-dire, *conjointement*, des trois Gouvernements de l'Australie, de la Nouvelle-Zélande et du Royaume-Uni.

7. Il y a lieu à cet égard de s'arrêter un bref instant sur un argument avancé aux pages 100 et 101 de l'exposé écrit de Nauru. Si j'ai bien compris, cet argument consiste à affirmer qu'une "autorité administrante" dans le cadre du régime de tutelle ne constitue pas une personne juridique distincte de l'Etat ou des Etats qui la composent. Faute de quoi, nous dit-on, il serait impossible de rechercher la responsabilité d'une autorité administrante une fois la tutelle ou le mandat dissout et, en particulier, la responsabilité de l'Afrique du Sud en Namibie. *Horresco referens.*

C'est un faux débat, Monsieur le Président.

L'Australie ne prétend pas et n'a jamais prétendu que les mandataires et les autorités de tutelle constituent ou aient constitué un nouveau sujet du droit des gens; et, bien sûr, elle convient qu'il ne s'agit que d'Etats ayant des droits et des obligations particuliers. Simplement, en la présente espèce, ces droits et ces obligations appartiennent conjointement, comme le précise l'article 2 de l'accord de tutelle, aux trois "gouvernements", terme ici synonyme d'"Etats".

Il y a là, certes, une particularité très remarquable mais, je le rappelle en passant, il ne s'agit nullement d'une invention ex nihilo de l'accord de tutelle; il s'agit tout simplement d'une application - la seule application d'ailleurs - d'une possibilité expressément envisagée par l'article 81 de la Charte : l'autorité chargée de l'administration "peut être constituée par un *ou plusieurs* Etats".

Ici donc, plusieurs Etats. Et plusieurs Etats que l'accord de tutelle place sur un pied de parfaite égalité.

8. Cette égalité n'est pas remise en cause par la seconde phrase de l'article 4, dont la partie nauruane fait pourtant grand cas. Il n'est peut-être pas inutile que je relise cet article 4.

Après avoir indiqué que l'"autorité chargée de l'administration [c'est-à-dire les trois gouvernements] répondra de la paix, de l'ordre, de la bonne administration et de la défense du territoire", l'article 4 poursuit :

> "A cette fin, en vertu d'un accord conclu entre les Gouvernements de l'Australie, de la Nouvelle-Zélande et du Royaume-Uni, le Gouvernement de l'Australie continuera à exercer dans ledit territoire pleins pouvoirs législatifs, administratifs et judiciaires, au nom de l'autorité chargée de l'administration, à moins que les trois Gouvernements susmentionnés en décident autrement et jusqu'au moment où une décision en ce sens interviendrait."

L'Australie donc apparaît ici, en effet, comme le "bras séculier" de l'autorité administrante et il est vrai que, sur le terrain, elle représente l'autorité administrante exactement comme M. James Murray avait fait remarquer qu'au temps du mandat, Nauru "had been administered jointly by the United Kingdom, New Zealand and Australia ..., the latter State acting as day-to-day mandatory" (James N. Murray, *The United Nations Trusteeship System*, the University of Illinois Press, Urbana, 1957, p. 75). Mais sur quels fondements juridiques reposait cette administration au jour le jour ?

Une lecture plus attentive ou plus complète que celle que fait Nauru de l'article 4 que je viens de lire permet de dégager trois éléments essentiels :

1) les fonctions dévolues à l'Australie le sont "en vertu d'un accord"
conclu entre les trois gouvernements;

2) en vertu de cet accord, l'Australie agit "au nom de l'autorité chargée
de l'administration" (au nom donc des trois gouvernements "on (their) joint behalf"; et

3) cette situation durera jusqu'au moment où les trois gouvernements (et
eux seuls) viendraient à en décider autrement.

C'est très clair, Monsieur le Président. L'Australie est appelée à jouer un rôle particulier dans le domaine couvert par l'article 4 (pas dans ceux faisant l'objet des six autres articles de l'accord de tutelle, soit dit en passant), mais dans le cas de l'article 4 elle joue un rôle particulier mais seulement à titre de représentant de l'autorité chargée de l'administration, c'est-à-dire encore et toujours des trois gouvernements.

9. Dans le cadre d'une analyse strictement juridique, l'accord conclu entre les trois gouvernements, dont fait état l'article 4, ne présente d'ailleurs aucun intérêt particulier. Les Nations Unies en prennent note, mais cet accord est pour elles res inter alios acta et, par avance, les Nations Unies donnent leur bénédiction aux trois gouvernements dans l'hypothèse où ils décideraient, eux, eux seuls, de le modifier. De leur côté, les Nations Unies ne connaissent que l'autorité chargée de l'administration et, encore une fois, cette autorité chargée de l'administration, ce n'est pas l'Australie.

Arrêtons-nous tout de même un instant à "l'accord conclu entre les Gouvernements de l'Australie, de la Nouvelle-Zélande et du Royaume-Uni" le 2 juillet 1919 et modifié le 30 mai 1923, dont les Nations Unies acceptent, sans l'imposer, la pérennisation dans le cadre de la tutelle.

Comme l'Australie l'a indiqué dans ses exceptions préliminaires (p. 15), cet accord traite de deux catégories de questions : d'abord les questions relatives à l'exploitation des phosphates, problème sur lequel je reviendrai, je pense, demain; et ensuite, les questions portant sur l'administration de Nauru qui, seule, pour l'instant, nous intéresse. Les deux aspects sont d'ailleurs soigneusement distingués puisque, par l'article 13 de l'accord de 1919 :

> "les trois gouvernements s'engagent à ne pas intervenir dans la direction, la gestion ou le contrôle des opérations d'exploitation, d'expédition ou de vente des phosphates",

opérations qui sont confiées aux British Phosphate Commissioners, les "BPC", et qui font l'objet de la plus grande partie du traité dont seuls les deux premiers articles concernent l'administration de l'île.

L'article 2 pose le principe de l'autosuffisance financière et ne nous concerne pas, au moins dans l'immédiat. Quant à l'article 1er, il confère à un administrateur : "le pouvoir de prendre des ordonnances pour la paix, l'ordre et le bon gouvenement de l'île dans le respect des termes du présent accord"; et il précise en outre que :

> "Le premier administrateur doit être désigné pour une période de cinq ans par le Gouvernement australien; par la suite l'administrateur sera désigné de la manière fixée par les trois gouvernements."

En fait, et bien que ce ne fût pas expressément prévu, des consultations ont toujours eu lieu entre les trois gouvernements préalablement à la nomination des administrateurs. Ce n'est pas moi qui le dis, mais un auteur que Nauru affectionne particulièrement, M. Barrie Macdonald (In *Pursuit of the Sacred Trust*, New Zealand Institute of International Affairs, Occasional Papers n° 3, 1988, p. 21).

10. Le Conseil de la SdN a peu après, le 17 décembre 1920, confié le mandat sur Nauru à "Sa Majesté britannique", en application de la décision prise lors de la conférence de la paix. Les limites, bien françaises, de mon esprit d'analyse m'incitent à ne pas aventurer une interprétation de

l'expression "Sa Majesté britannique". Il y a là du Commonwealth cette "énigme enveloppée de mystère", comme le disait Churchill, qui défie tout à fait l'analyse cartésienne. Je me bornerai par conséquent prudemment à remarquer que le mandat n'est en tout cas pas confié à l'Australie seule, car si "Sa Majesté britannique" est aussi australienne, ce n'est pas, je crois, faire injure à l'Australie que de dire qu'elle n'est pas seulement australienne. Et si l'on avait entendu remettre à l'Australie le mandat sur Nauru, rien n'eut été plus simple que de le dire, comme d'ailleurs la Société des Nations l'a fait le jour même pour la Nouvelle-Guinée, placée sous mandat australien le 17 décembre 1920 également.

11. Le mandat une fois acquis par "Sa Majesté britannique" donc, et non par l'Australie, une nouvelle négociation s'engagea au sein de l'Empire britannique en vue de préciser les rapports de l'administrateur de Nauru avec le gouvernement qui le nommait, d'une part, et les rapports des trois gouvernements participants entre eux, d'autre part.

Déjà, le 8 septembre 1922, Bruce, premier ministre australien, avait rappelé devant le Parlement que, bien que l'Australie ait nommé le premier administrateur, elle consultait et informait les deux autres gouvernements.

> "It cannot be said, then, [concluait-il] that the administration of the island is exercised by the Australian Government to the exclusion of the other two Governments." (Exceptions préliminaires, annexe 1.)

Mais l'accord de 1919 était trop général et trop flou et il fallait préciser les choses. Tel a été l'objet de l'accord complémentaire du 30 mai 1923.

Il comporte, comme je l'ai dit, deux parties.

Les paragraphes 1 et 2 explicitent le principe déjà sous-jacent à l'article 1er de l'accord de 1919 de la subordination de l'administrateur au "gouvernement contractant qui l'a désigné". Pour leur part, les paragraphes 3 et 4 concernent surtout les rapports entre les trois gouvernements; le paragraphe 3 impose au gouvernement qui a nommé l'administrateur de communiquer aux deux autres gouvernements participants les proclamations et directives prises par l'administrateur et le

paragraphe 4 concerne les relations du mandataire avec la SdN.

Ce paragraphe 4 constitue une disposition importante :

> "Tout rapport qui doit être soumis au Conseil de la Société des Nations ... doit être adressé par l'administrateur agissant par l'intermédiaire du gouvernement contractant qui l'a désigné au Gouvernement de Sa Majesté à Londres, pour présentation au Conseil *au nom de l'Empire britannique en qualité de mandataire*."

C'était reconnaître, Monsieur le Président, et de la manière la plus claire qu'au plan du droit international, le seul qui importe dans cette enceinte qui lui est consacrée, il n'y avait qu'un seul responsable : "l'Empire britannique, en qualité de mandataire", et non pas le gouvernement qui avait désigné l'administrateur. Nauru ne s'y est pas trompée : dans le très bref passage de son exposé écrit qu'elle consacre à l'accord de 1923 (p. 102) elle analyse les paragraphes 1 à 3 qui, considérés isolément, peuvent être interprétés de manières assez diverses. Mais Nauru se garde bien de souffler mot du paragraphe 4 qui, lui, lève tous les doutes que l'on pouvait avoir : pour des raisons évidentes de commodité, un gouvernement administre Nauru au jour le jour; mais il le fait au nom des trois gouvernements et, au plan international, c'est l'ensemble que ces trois gouvernements constituent qui seul apparaît en plein jour, qui seul assume la responsabilité de cette administration. Avec les adaptations qu'ont imposées la transformation du mandat en tutelle et les évolutions internes de l'Empire britannique - adaptations réalisées par la pratique mais qu'aucun texte à ma connaissance n'a consacrées - ce sont ces dispositions de l'accord de 1919 et de celui de 1923 qui sont restées en vigueur jusqu'en 1965. A cette date, un nouvel accord a consacré la plus grande autonomie du peuple nauruan et a abrogé pour l'avenir l'article premier de l'accord de 1919 et l'arrangement de 1923. Elle l'a modifié dans un sens d'ailleurs favorable à l'Australie (qui se voit reconnaître le droit exclusif de nommer l'administrateur, celui-ci perdant au surplus certains de ses pouvoirs théoriques au profit du gouverneur général du Commonwealth d'Australie). Mais peu importent ces modifications: en réalité, outre que le nouveau mécanisme n'est resté en vigueur que 26 mois, il a été, lui aussi, mis en place par un accord entre les trois gouvernements qui, conformément à l'accord de tutelle - ceci est précisé dans l'accord de 1965 - se sont réservé le droit de le modifier, le cas échéant.

12. Il est bien vrai, Monsieur le Président, que l'administrateur de Nauru a toujours été nommé

par le Gouvernement australien, même si c'était en consultation avec les deux autres gouvernements. Et il est bien vrai que cet administrateur a, dès lors, reçu ses instructions du Gouvernement australien. Mais ceci résulte d'arrangements purement internes à l'Empire britannique, arrangements perpétués au sein de l'autorité collective chargée de l'administration après 1947. Et, en vertu des mêmes arrangements, et ce qui est plus important encore, des accords conclus successivement avec la "communauté internationale organisée", la SdN d'abord et les Nations Unies ensuite, en vertu donc de cet ensemble de traités, les trois gouvernements acceptent ensemble, conjointement, collectivement, la responsabilité de cette administration au plan international.

Et cela se vérifie, dans les faits, tout au long de l'existence du mandat et de la tutelle. Il serait très long et il serait très lassant de procéder à une énumération complète de tout ce qui atteste de ceci. Il suffit d'en donner quelques exemples.

Ainsi, un analyste fort peu bienveillant pour l'Australie - toujours Monsieur MacDonald - a relevé que des représentants de la Nouvelle-Zélande et du Royaume-Uni ont, comme ceux de l'Australie, toujours participé aux débats de la Commission permanente des mandats de la SdN (*In Pursuit of the Sacred Truth, op. cit.*, p. 21). Il en fut de même aux Nations Unies, et tout particulièrement à la Quatrième Commission et au Conseil de tutelle. Du reste, la Nouvelle-Zélande a continué de siéger au sein du Conseil de tutelle jusqu'en 1968, au titre de l'article 86, paragraphe 1 a), de la Charte, c'est-à-dire en tant que membre chargé d'administrer un territoire sous tutelle, alors que le seul territoire sous tutelle exclusivement néo-zélandaise, le Samoa occidental, avait accédé à l'indépendance en 1962.

C'est aussi systématiquement à l'autorité administrante que sont adressées les recommandations faites par le Conseil de tutelle et l'Assemblée générale. Et à cela, il n'y a, à ma connaissance, aucune exception. Jamais ces organes ne visent individuellement l'un ou l'autre de ces trois Etats. Et il n'y a pas davantage d'ambiguïté sur ce que les Nations Unies entendent par "autorité administrante": ce n'est pas l'Australie, ce sont bien les trois gouvernements; certaines résolutions précisent d'ailleurs que ces trois gouvernements agissent "en qualité d'autorité administrante" (c'est le cas, exemples parmi d'autres, des résolutions 2347 (XXII) de l'Assemblée

générale ou 2149 (S-XIII) du Conseil de tutelle).

Destinataires des résolutions des Nations Unies en tant que composants de l'autorité administrante au même titre que l'Australie, la Nouvelle-Zélande et le Royaume-Uni ont eux aussi pris une part active aux discussions qui ont mené aux tranformations successives du régime administratif effectivement appliqué, et ces deux Etats ne se sont nullement laissé dicter leur conduite par l'Australie.

13. Je ne reviens pas sur la période du mandat. Mais il faut rappeler que le projet d'accord de tutelle lui-même a été présenté conjointement par les gouvernements des trois Etats après de très âpres discussions. De même, en ce qui concerne l'accord du 26 novembre 1965, l'annexe 2 reproduite dans le volume III du mémoire de Nauru donne une vue tout à fait inexacte de la manière dont les choses se sont passées. En effet, seul est reproduit le long compte-rendu des négociations qui eurent lieu du 31 mai au 10 juin 1965, entre la délégation représentant le conseil de gouvernment local de Nauru et les représentants officiels australiens de l'autorité administrante - the "Australian Officials representing Administering Authority", comme le précise très nettement le compte-rendu officiel des négociations. Mais la position des trois gouvernements avait auparavant été arrêtée de façon précise au cours d'une réunion qui avait eu lieu en avril (voir exceptions préliminaires, p. 32) et les négociateurs australiens représentant l'autorité administrante restèrent en contact avec les représentants des deux autres gouvernements.

Monsieur le Président, je ne m'arrête pas pour l'instant à la négociation de l'accord de 1967, qui appelle le même genre de remarques mais qui concerne plus précisément, plus directement, l'exploitation des phosphates, problème sur lequel je reviendrai demain. En revanche, il faut dire un mot des conditions dans lesquelles il a été mis fin à la tutelle, et qui sont également tout à fait éloquentes.

Le 31 janvier 1968, Nauru accéda à l'indépendance, mais cette indépendance ne fut pas octroyée par l'Australie; elle résulte de longs pourparlers entre les représentants du peuple nauruan d'une part, et ceux des trois gouvernements de l'autre. Certes, l'Australie a, d'une manière générale, été leur porte-parole, mais jamais elle n'a agi en son nom propre. Ainsi,

- l'Australie tenait son mandat de négociations de l'autorité administrante, une position commune étant précisément arrêtée au cours de réunions tripartites, préparatoires aux rencontres avec les Nauruans; tel a été le cas en particulier de réunions tenues du 27 au 30 avril 1966, et du 7 au 9 mars 1967;

- si la discussion s'engageait sur un terrain qui excédait les termes de ce mandat de négociations, les négociateurs faisaient savoir aux Nauruans qu'ils leur fallait consulter les trois gouvernements et, à plusieurs reprises, la nécessité d'une concertation entre les gouvernements participants à l'autorité administrante imposa de suspendre les négociations avec les Nauruans; les écritures des parties donnent maints exemples de ce phénomène (voir notamment les exceptions préliminaires, p. 43-54);

- au surplus, la délégation de l'autorité administrante a toujours été composée de représentants des trois gouvernements, - sauf dans certains groupes de travail purement techniques qui en référaient aux négociateurs "politiques"; du reste, la délégation de l'autorité administrante s'est toujours présentée comme une délégation conjointe, jamais comme "délégation australienne";

- pour sa part, la délégation nauruane s'est constamment adressée aux "Gouvernements participants", sans d'ailleurs que cela l'empêche de tenter d'ouvrir des brèches dans le "front commun" présenté par les trois gouvernements comme le montre ici encore M. Barrie Macdonald (cf. *In Pursuit of the Sacred Trust, op. cit.* p. 47-57).

Et les Nauruans de s'efforcer de négocier en privé avec chacun des trois gouvernements, notamment la Nouvelle-Zélande, isolément (voir *ibid*., p. 56); ceci montre au moins une chose intéressante, c'est que les représentants de Nauru avaient bien conscience d'avoir à faire non pas à un, mais à trois gouvernements, ceux-ci, en tant que membres de l'autorité administrante, ayant l'obligation d'aboutir à une position commune que Nauru essayait évidemment de rendre plus difficile;

- du reste, les Gouvernements britannique et néo-zélandais ne se sont nullement dérobés à leur responsabilité et le discours prononcé par le représentant du Royaume-Uni à la Quatrième Commission de l'Assemblée générale, M. Luard, le 6 décembre 1967, à la veille de l'indépendance est tout à fait éclairant; il reconnaît d'abord le rôle positif joué par l'Australie; puis il souligne :

"que les trois autorités administrantes ('the three administering Governments') ont contribué à

> cette évolution et ont participé aux négociations qui ont abouti à l'indépendance" (A/C.4/SR. 1739, par. 28 - exceptions préliminaires, vol. II, annexe 30),

revendiquant ainsi une responsabilité propre pour son pays et la Nouvelle-Zélande.

14. Ainsi, Monsieur le Président, le mandat était conjoint; la tutelle était conjointe. L'un et l'autre ont été confiés, collectivement, aux trois gouvernements participants. Ce sont ces trois gouvernements qui étaient, ensemble, les seuls interlocuteurs des Nauruans aussi bien, d'ailleurs, que des organismes internationaux, chargés de contrôler le respect de leurs obligations de mandataire ou d'autorité administrante, la Société des Nations puis l'Organisation des Nations Unies. Ces trois gouvernements en ont constamment assumé, collectivement, la responsabilité au plan international prenant, ensemble, toutes les décisions concernant le fonctionnement du mandat ou du régime international de tutelle, modifiant ensemble ce mécanisme d'un commun accord, négociant ensemble avec les Nauruans et les organes de contrôle jusques et y compris la fin de la tutelle.

Certes, l'Australie administrait au jour le jour. Mais elle s'acquittait de ces fonctions en vertu d'un mandat que les trois gouvernements lui avaient conféré. Ce faisant, elle n'a jamais agi en son nom propre mais toujours au nom de l'ensemble des trois gouvernements qu'elle représentait. Encore cette "représentation" était-elle, si l'on peut dire, exclusivement "de terrain" et n'avait-elle aucune portée internationale, ou, plus exactement peut-être, cette représentation était purement "endogène", interne à l'autorité administrante. Dans les rapports avec l'extérieur, ce n'est jamais l'Australie qui apparaissait en tant que telle, mais l'autorité administrante, qui "endossait" la responsabilité de tout ce qui avait été fait en son nom.

15. Il est donc, Monsieur le Président, à peine besoin d'avoir recours à la théorie de la représentation en droit international. Toutefois, il faut bien voir que, quand bien même les trois gouvernements n'auraient pas, expressément, endossé cette responsabilité, celle-ci ne leur incomberait pas moins.

Certes, si l'on raisonne dans le cadre de la représentation, la Nouvelle-Zélande et le Royaume-Uni auraient pu, en ce qui les concerne, mettre en cause la responsabilité de l'Australie - le sujet représentant - ils auraient pu le faire s'ils avaient estimé que l'Australie ne s'était pas acquittée correctement de ses obligations de représentant. Mais ceci n'est plus vrai lorsque la responsabilité

est invoquée par des entités extérieures à l'autorité administrante qu'il s'agisse d'autres Etats, du peuple nauruan ou d'organisations internationales.

Selon la définition soigneusement élaborée par M. Riad Daoudi, qui s'est inspiré de celle, classique, de Sereni, ("La responsabilité en droit international", *RCADI*, 1948, vol. 73, p. 75-76), la :

> "représentation s'analyse juridiquement en droit international en la substitution d'un sujet de droit [ici l'Australie] à un autre sujet de droit [ici l'ensemble formé par les trois Etats] dans l'exercice d'une compétence internationale propre au sujet représenté vis-à-vis de tiers" (ici, les compétences découlant de la tutelle) (R. Daoudi, *La représentation en droit international publi*c, Pédone, Paris, 1980, p. 72).

Il en découle que les actes accomplis par le représentant (l'Australie) doivent être considérés bien évidemment comme accomplis par le représenté lui-même; ceci avait déjà été très fortement souligé par Anzilotti, au tout début de ce siècle ("La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers", *RGDIP*, 1906, p. 11; voir aussi R. Daoudi, *ibid.*, *passim*, notamment p. 73). Il en est de même dans tous les systèmes de droit interne, et l'on peut considérer qu'il y a là un véritable principe général de droit. Qui fecit per alium fecit par se.

Il existe quelques applications jurisprudentielles de ce principe - je pense en particulier à l'affaire Liwschitz dans laquelle un ressortissant autrichien tenait le Danemark pour responsable de la perte d'une somme d'argent qu'il avait remise au ministère des affaires étrangères de ce pays. Mais le requérant a été débouté par le tribunal danois qu'il avait saisi car le Danemark avait agi, en l'occurrence, pour le compte de l'Autriche-Hongrie (*Annual Digest of International Law Cases*, 1925-1926, n° 165, p. 226). On trouve d'autres illustrations, sinon du principe, du moins de l'idée qui l'inspire, dans la pratique internationale; par exemple, les missions spéciales communes à plusieurs Etats engagent simultanément l'ensemble de ces Etats (voir le commentaire de M. Bartós, rapporteur spécial du projet sur les missions spéciales à la CDI, ACDI, 1967, vol. II, p. 55). On peut peut-être aussi considérer que l'idée même d'une responsabilité propre des organisations internationales procède de la même notion, de la même idée générale, même s'il s'agit d'une institution juridique autonome, etc.

Ceci, Monsieur le Président, pour dire une chose simple, mais de très grande portée dans notre affaire : dans toute la mesure où l'Australie aurait représenté l'autorité administrante c'est celle-ci

- c'est-à-dire les trois Etats ensemble et non l'Australie seule - qui, en tout état de cause, serait seule responsable des manquements éventuels au droit international commis par l'Australie.

Mais il est inutile de s'appesantir : en la présente occurrence, les trois gouvernements ont, par leur comportement constant, montré qu'ils se tenaient pour collectivement responsables de la tutelle et, au plan international, ce sont, en effet, eux et eux seuls, qui ont agi ensemble.

Mr. President, although I am absolutely ready to go on, I suggest that this could be a good time to stop for today since I will now turn to a slightly different topic; but I am, of course, in your hands.

The PRESIDENT: Thank you, Mr. Pellet. I think that would be a good place to break for the morning and we will resume tomorrow at 10 o'clock.

The Court rose at 12.45 p.m.