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Public sitting

held on Thursday 21 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

ANNEE l991

Audience publique

tenue le jeudi 20 novembre 1991, à 10 heures, au Palais de la Paix,

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
Ni
Evensen
Tarassov
Guillaume
Shahabuddeen
Aguilar Mawdsley
Ranjeva, Juges

M. Valencia-Ospina, Greffier

The Government of the Republic of Nauru is represented by:

Mr. V. S. Mani, Professor of International Law, Jawaharlal Nehru University, New Delhi; former Chief Secretary and Secretary to Cabinet, Republic of Nauru; and an expert in the affairs of Nauru,

Mr. Leo D. Keke, Presidential Counsel of the Republic of Nauru; former Minister for Justice of the Republic of Nauru; and an expert in Nauruan affairs; and Member of the Bar of the Republic of Nauru and of the Australian Bar,

as Co-Agents, Counsel and Advocates;

H. E. Hammer DeRoburt, G.C.M.G., O.B.E., M.P., Head Chief and Chairman of the Nauru Local Government Council; former President and Chairman of Cabinet and former Minister for External and Internal Affairs and the Phosphate Industry, Republic of Nauru; the Senior most Nauruan Statesman; an outstanding expert in Nauruan affairs.

Mr. Ian Brownlie, Member of the English Bar; Chichele Professor of Public International Law, Oxford; Fellow of All Souls College, Oxford,

Mr. Barry Connell, Associate Professor of Law, Monash University, Melbourne; Member of the Australian Bar; former Chief Secretary and Secretary to Cabinet, Republic of Nauru and an expert in affairs of Nauru,

Mr. James Crawford, Challis Professor of International Law and Dean of the Faculty of Law, University of Sydney; Member of the Australian Bar,

as Counsel and Advocates.

The Government of Australia is represented by:

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as Agent and Counsel;

H.E. Mr. Warwick Weemaes , Ambassador of Australia,

as Co-Agent;

Mr. Henry Burmester, Principal Adviser in International Law, Australian Attorney-General's Department,

as Co-Agent and Counsel;

Professor Eduardo Jiménez de Aréchaga, Professor of International Law at Montevideo,

Professor Derek W. Bowett, Q.C., formerly Whewell Professor of International Law at the University of Cambridge,

La Gouvernement de la République de Nauru est représenté par :

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comme coagents, conseils et avocats;

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S.Exc. M. Warwick Weemaes, ambassadeur d'Australie,

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M. Eduardo Jiménez de Aréchaga, professeur de droit international à

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M. Derek W. Bowett, Q.C., professeur et ancien titulaire de la chaire Whewell de droit international à l'Université de Cambridge,

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Mr. Peter Shannon, Deputy Legal Adviser, Australian Department of Foreign Affairs and Trade,

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M. Alain Pellet, professeur de droit à l'Université de Paris X-Nanterre et à l'Institut d'études politiques de Paris,

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M. Paul Porteous, premier secrétaire à l'ambassade d'Australie aux Pays-Bas,

comme conseillers.

The PRESIDENT: This morning we hear Australia again. Mr. Griffith please.

Mr. GRIFFITH: Mr. President, Members of the Court: Article 79 (5) of the Rules requires that I deal only with those matters relevant to our objections, and prohibits me from responding in detail to the very many factual matters which occupied so much of the time of the first four counsel, unexpectedly for us introduced to the Court as "experts in the affairs of Nauru" (CR 91/18, p. 8).

So directed, we adopt what has been described against us by Professor Brownlie as the "Trappist" approach, and remain silent rather than join issue on the many matters of fact canvassed by our opponents which are not truly relevant to our objections. For the same reason, we do not respond, in context or in kind, to the many occasions where our arguments have been answered only by colourful invective mixed with recurring incantations to logic and commonsense.

We must, however, clarify two or three matters so that Court is not left with an incorrect impression of fault.

Nauru lays the blame for the failure of the resettlement proposals on Australia. But, resettlement was an idea first introduced by the Trusteeship Council. It was raised as an appropriate solution for Nauru as early as 1951, by the United Nations Visiting Mission (see 1951 Report of the United Nations Visiting Mission, Nauruan Memorial, Vol. 4, Ann. 7). Thus it was in response to such requests that the Partner Governments and Nauruan representatives investigated possibilities for resettlement. Of course, it was the right of the Nauruan Community to make its own decision on resettlement. So it was Nauru, and not Australia, which made the decision in 1964 to reject resettlement when Australia said that it could not give up sovereignty over Curtis Island (Preliminary Objections of Australia, para. 63), and of course the Court will understand that Australia was in no position to transfer sovereignty of any portion of its territory.

Thus, the ending of resettlement negotiations was a matter of fact, not of fault. When this occured in 1964, the question of rehabilitation came into the fore.

We know that the Davey Committee inquired into that question, and each of the members was appointed with the approval of Nauruan representatives, and one was a representative of the

United Nations (Report of the Davey Committee at p. 2 in Nauruan Memorial, Vol. 3, p. 212).

As we have heard, the Davey Committee made a number of findings. Three are relevant for present purposes. First, that the refilling of the worked-out lands with suitable material from elsewhere should be ruled out as quite impracticable and unrealistic; secondly, that the worked-out lands could not, practically speaking, be made suitable for agriculture, except to a very limited extent; and thirdly, that the worked-out lands might, nonetheless, be treated so as to create a more attractive environment, suitable for habitation or other public purposes (Report, pp. 5, 37, 29, 44, in Nauruan Memorial, Ann. 3, pp. 215, 248, 250, 255). The Committee made no finding as to who should bear the responsibility for such treatment (Report, p. 26, in Nauruan Memorial, Ann. 3, p. 236). It did, however, say that steps should be taken as soon as possible to plan the Island's land use (Report, p. 44, in Nauruan Memorial, Ann. 3, p. 255).

At its 34th Session, the Trusteeship Council gave attention to the Committee's Report and specifically noted the first of its findings, to which I have just referred. The Council went on to note the strong Nauruan reservations, which were set out in the Council's Report (Preliminary Objections of Australia, Vol. II, Ann. 28, p. 240). Nauru then attacked the Committee on the grounds that it had exceeded its terms of reference, had not been briefed impartially by the Administering Authority, and had laid down policy.

The Council itself concluded by "regretting that differences continue to exist on the question of rehabilitation", and expressed "earnest" hope that it will be possible to find a solution to the satisfaction of both parties (Preliminary Objections of Australia, Vol. II, Ann. 28, p. 242). The Council clearly believed that the Davey Committee had held out very little prospect for the feasibility of any rehabilitation project.

Properly read, we say the Davey Committee Report was in keeping with the earlier reports of the Australian CSIRO Report of 1953/54, which had also found that any project intended to make the worked-out lands suitable for agriculture should be ruled out as unlikely to succeed.

The Court has been referred several times to photograph 2 in Volume 2 of the Nauruan Memorial. To put this devastating view into perspective, we must remind the Court that some

two-thirds of mined lands have been excavated by Nauru since independence. Thus, two-thirds of photograph 2 fairly depicts exploitation for which Nauru accepts responsibility.

Nauru's own actions since independence confirm the limited prospects for rehabilitation. It acknowledges that it immediately resumed responsibility in relation to the mined area, after 1967. Thus, Nauru has had almost a quarter of a century in which to take positive steps towards rehabilitation. Despite its insistence to the contrary, before the Court, it has not shown that it has made any real progress. Nothing has been rehabilitated. Nauru points to the stockpiling of soil. And we say little else. It is paradoxical that Nauru accuses Australia of breaching an international obligation by failing to do something which, even now, it has not done itself. With this case obviously in mind, it nonetheless has not shown that rehabilitation, even in a newly defined and limited sense, is a practical possibility.

We refer now to the statement by Chief DeRoburt in his evidence to the Court (CR 91/18, p. 13), and on this the Parties are agreed on here, that the independence negotiations dealt with three major issues:

1. Political independence;

2. Control and future operation of the phosphate industry; and

3. Rehabilitation of mined-out lands (see also CR 91/15, p. 38).

1. Political independence

The Court is now all too familiar with the facts concerning this issue, and I will not refer to them further.

2. The phosphate industry

We know that under the terms of the 1967 Canberra Agreement, Nauru bought the capital assets at an agreed written down value.

Professor Mani has submitted that Australia: "compelled" Nauru to buy its only resource, the phosphate rights (Mani, CR 91/18, pp. 46-47). This is not so. The Partner Governments did not sell, and Nauru did not buy, any rights over the phosphate lands themselves. The Partner Governments sold only the capital assets of the British Phosphate Commissioners on Nauru (see

Article 7 of the Agreement, reproduced in Preliminary Objections of Australia, Vol. II, p. 73). So Nauru received not just the bare natural resources but a functioning industry. Shortly after the Agreement was signed, the Trusteeship Council noted the Canberra Agreement "with satisfaction" on the basis that the ownership, control and management of the phosphate industry were to be transferred to the Nauruans (Trustreeship Council Report 1967, para. 403; Preliminary Objections of Australia, Vol. II, p. 242). The only "cost" to Nauru was the depreciated cost of plant and equipment.

The Nauruans admit that they acted with competent and independent advice at this time. The basis on which the phosphate industry was handed over was fully before the relevant United Nations bodies. All was agreed. There was no voice of complaint, Nauruan or otherwise.

The result of the 1967 Agreement was that the Partner Governments transferred to Nauru their entire interest in a valuable income-producing resource. Clearly much was given up by the Partner Governments. In this context, we submit, it is also important to keep in mind the considerations of an inter-temporal nature concerning these facts. Expectations of today in respect of natural resources, as much as other matters, are not always the same as yesterday.

Before the Court it is a matter of complaint that, under the Canberra Agreement, Nauru undertook to make a certain tonnage of phosphate available to the Partner Governments. But there was a mutuality in this arrangement. The Partner Governments thereby underwrote an assured market for the phosphate at world prices, adjusted annually (Canberra Agreement, Clause 5). The Nauruans took an operating business. It was not the phosphate itself but the income stream from its sale which has made Nauru wealthy. The phosphate and the fixed assets were worth nothing without a market. And this is what this part of the Agreement delivered to the Nauruans.

I turn now to the question of national wealth. The fact that Nauru chooses to lock up part of its savings in trust accounts is its own decision. There is no special rule, we say, for calculating national income peculiar to the Nauruans (cf. Mani, CR 91/18, pp. 48-49). Whether the income is spent or saved, or put aside for rehabilitation is, of course, a matter for the Nauruan people. But, on any view, their national income includes national savings.

But, what the Nauruan income figures show, (and that is not in dispute in this case), is that the Partner Governments left the people of Nauru with more than adequate financial resources to make their own decisions for the future, including the rehabilitation issue. This is what Nauru wanted, and this is what it got. It was, of course, the stated intention of the Partner Governments to put the Nauruans in this position. I refer, for example, to the statement made by Mr. Smith in 1967, which has been quoted to the Court by Nauru on an earlier occasion (CR 91/18, p. 41).

Errors in the per capita figures of income of 1968 have been corrected before the Court. To bring matters 20 years up to date, in 1988 the annual per capita income for Nauru, in United States dollars, was US$10,000. This was the same as New Zealand and some 80 per cent of that of Australia (US$12,340) and the United Kingdom US$12,810). Compare with, say, the per capita income of neighbouring Pacific countries, such as Fiji, in 1988 its per capita income was US$1,315, Papua New Guinea, US$810 (source: World Bank World Development Report 1990 and International Monetary Fund International Financial Statistics Yearbook 1989). As to the future, the study attached to the Preliminary Objections of Australia (Vol. II, Ann. 26, p. 187) shows that in 1995, the Nauruan income from accumulated savings alone should generate a per capita income only slightly less than Australia's per capita income. On any view, we say, the Nauruans are a wealthy people.

As we have seen, the Nauruans do not put the adequacy of their means in issue in this case. Their case is that their national wealth is irrelevant. But this *must* be very relevant to test the contention that all three matters for consideration - independence, control of the phosphate industry and the rehabilitation issue - were resolved on termination of the Trusteeship. It is the fact of the agreed adequacy of financial resources which confirms there was also determination of the third issue, that of rehabilitation.

3. The Rehabilitation Issue

As we have seen, the Canberra Agreement was a bargain, struck at the termination of informed negotiations between the Parties for the purpose of resolving all three issues:

independence, control of the phosphate industry and rehabilitation. As part of the negotiating process, each of Nauru and the Partner Governments conceded matters. The Partner Governments sought Nauru's recognition that they were giving up valuable rights over the phosphate deposits (Nauruan Memorial, Vol. 3, Anns. A and J, pp. 122 and 177, Record of the 1965 Negotiations; Nauruan Memorial, Vol. 3, p. 408, Agreed Minute; Nauruan Memorial, Vol. 3, p. 573, Joint Delegation, paragraph 67/2). They maintained this claim throughout the negotiations in 1966 and 1967. As Professor Mani informed the Court, Nauru refused to recognize this right (CR 91/18, p. 46) and the Partner Governments did not pursue it. They gave way.

In the same way, Nauru pressed its claim for rehabilitation. The Partner Governments refused to recognize that claim and, at the end of the day, the bargain was struck. Just as the Partner Governments gave up what they believed to be valuable rights over the phosphate deposits (quite apart from the physical assets sold to Nauru), so Nauru, we say, gave up its claim for rehabilitation. And for this, Nauru received the obvious benefit of full possession of the phosphate industry, with associated agreements which carried an assured income over the life of the deposits. This was, as we have seen, the delivery of the financial means which gave Nauru the capacity to decide the rehabilitation issue as it chose. That there was then a mutual "giving up" is obvious, despite the fact that neither matter is recorded in the 1967 Agreement. Clearly, the Partner Governments could not thereafter assert claims over the phosphate deposits and, we say, clearly also, Nauru could not thereafter assert its claim for rehabilitation.

The Partner Governments, including Australia, regarded the terms of the 1967 Canberra Agreement as particularly favourable to Nauru. Nauru disputes this. Fortunately, the Court need not concern itself as to the balance of benefit. What is important is that the Agreement was struck to dispose of the three issues identified by Chief DeRoburt. This must include the rehabilitation claim.

Good Faith

I now make some final comments on the issue of good faith. Australia has not submitted that the issue of good faith is a separate preliminary objection before the Court. Australia has invited the

Court to consider, at this stage, whether the Court should exercise its discretion not to hear Nauru's claim.

Nauru has contended that this Court does not have an inherent jurisdiction (or power) to enable it to safeguard its judicial function. Clearly the Court must have such an inherent jurisdiction.

Nauru misinterprets Australia's submissions on good faith. It has constructed an edifice of fact and argument for the purposes of attack. On this issue, Australia's submissions are limited. Australia does not question Nauru's integrity. Nor does it question its rights to manage its economy as it sees fit. Australia does say, however, that the claim which Nauru now makes has been satisfied; that Nauru has delayed too long in bringing it to Court. In this connection, Australia refers once again to Nauru's continuing failure to show that rehabilitation is in fact practicable. This leads Australia to say that these proceedings should be dismissed.

Further, we maintain our submissions on delay, and we note particularly that Nauru has not mentioned any basis for its statement that its claim against the overseas assets of the British Phosphate Commissioners became actionable only in 1987 (CR 91/18, p. 57). Why should the winding up of the British Phosphate Commissioners give Nauru more rights than it had before winding up?

Australia submits that, if the Court is to protect its judicial function, it should decline to hear claims which are not credible, therefore not bona fide. This, says Australia, is the case with the Nauruan claim.

Questions

In the submissions which follow, we shall answer questions directed to us on Tuesday 19 November, apart from Judge Shahabuddeen's question directed to Australia alone, to which we shall reply in writing as the answer is a little bit longer than the answers to the other questions.

With the leave of the Court, Professor Jiménez de Aréchaga will now reply on issues relevant to his submissions. If the Court pleases.

The PRESIDENT: Thank you Mr. Griffith. Professor Jiménez de Aréchaga.

Mr. JIMENEZ DE ARECHAGA: Mr. President, distinguished Members of the Court.

At the present stage of the proceedings, there is only time for some brief comments on the statements made by the Agent and Counsel for the Applicant.

I shall begin with the statement made by the Agent for Nauru, Professor Mani, last Friday.

Comments on the Agent's Statement

The most striking feature in the Agent's statement is that he did not ask the Court to reject Australia's Preliminary Objections of Australia. He limited himself to ask the Court to declare that the Preliminary Objections of Australia do not have an exclusively preliminary character. That was the whole thrust of his intervention.

His singular insistence on this point may suggest a new strategy on the part of the representative of the Government of Nauru. Perhaps realizing the weakness of his case on the merits, the Agent concentrated now on merely trying to keep the case alive and pending in the General List of the Court.

In support of his contention that the Court "should declare that each of the objections raised by the Respondent State does not possess an exclusively preliminary character", the Agent for Nauru (CR 91/18, p. 31), invoked the decision which has been taken by the Court in 1984, in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* case concerning the multilateral treaty reservation.

This is not a valid precedent for our case and, in fact, it goes in the opposite direction.

The Court was confronted in 1984 with the United States multilateral treaty reservation, which requires all parties to a multilateral treaty affected by the decision to be also parties to the case before the Court. To pronounce on that reservation the Court had the choice between two different interpretations: that which has been advanced by the United States contending that

El Salvador, Costa Rica and Honduras would also be affected by the future decisions on the merits, and that proposed by Nicaragua to the effect that the reservation did not apply because the prohibition of the United Nations Charter on the use of force had become part of customary international law.

It is difficult to imagine an objection which, under any of the two interpretations, would go more deeply into the merits than this one. Obviously, that objection was not of an exclusive preliminary character, since it would have obliged the Court to anticipate the effects of its future decision on the merits or to pronounce at the preliminary stage on the nature of the substantive law applicable in the case. So the Court proceeded correctly in exercising its discretion under Article 79, paragraph 7, of the Rules and in making the declaration that the multilateral treaty objection concerned matters of substance relating to the merits of the case and, therefore, was not of an exclusively preliminary character.

But the situation, or, to borrow the language of the Rules of Court, the circumstances of the present case are not only completely different, they are opposite.

The purely preliminary character of all the objections raised by Australia, in the circumstances of the present case, is easy to demonstrate.

The first preliminary objection by Australia, concerning the Court's jurisdiction, is based on the reservation of "other means of peaceful settlement".

For its application it is sufficient to show that the Parties had agreed, expressly or by implication, with respect to certain disputes, to have recourse to other means of pacific settlement, different from judicial settlement.

It is not necessary for the operation of this reservation to show that actual settlement of the dispute had been reached. We have, however, demonstrated that settlement of the disputes was in fact achieved through the processes of the trusteeship system, but such a demonstration was made *ex abundantia cautela* and in support of other preliminary objections. From a strictly technical point of view, to achieve a final settlement is not required for the reservation to be operative. In this way I am answering the first question asked the day before yesterday by Judge Schwebel.

This assertion I have made may be confirmed by the recent Judgment of the Court concerning the Senegal/Guinea-Bissau dispute.

In this case Senegal had raised a similar preliminary objection of "other means" opposing the jurisdiction of the Court to deal with the merits of the Arbitral Award. Yet these "other means" invoked by Senegal had not resulted in a full settlement of that dispute, because the delimitation of economic zones has not been accomplished by the Arbitral Tribunal.

It is true the Court did not need to pronounce on the Senegalese preliminary objection because the other party agreed that the Court's jurisdiction at that time did not comprise the substantive dispute of maritime delimitation, but only concerned the issue of the existence and validity of the award. However, if this agreement of the Parties had not been obtained, it is very likely that the Court would have had to accept the Senegalese objection at a preliminary stage and despite the absence of a complete settlement of the dispute.

This confirms, in my submission, that the preliminary objection of "other means" does not depend on the success of these "other means", and consequently, the objection has an exclusive preliminary character, being unrelated to and independent of any merits.

* * *

The objections of inadmissibility which had been raised by Australia equally do not concern the merits and do not prejudge the basic Nauruan contention, which consists of asserting the existence under the Trusteeship Agreement of a legal and moral duty on the part of a mining operator to rehabilitate the mined-out land, *unless* he compensates for the rehabilitation costs. The issue whether the duty alleged by Nauru exists in the circumstances of the present case or whether proper compensation has been already awarded is *the question* for the merits in this case.

On the other hand, the grounds of inadmissibility invoked by Australia are by definition of a preliminary nature, and do not touch the merits, since these issues are not the same issues of fact, or of law, that will arise on the merits. Australia's main contention with respect to inadmissibility is that the Court should not be requested to undertake again the task of judging the performance of the

trusteeship, so as to overrule and contradict the conclusions and decisions reached by the organs competent under the Charter. The merits are irrelevant to this contention in the sense that the quesiton of breach of the Trusteeship Agreement is simply not involved. Whatever would have been the final decision of the General Assembly - whether that decision would have involved a finding of a breach in favour of Nauru or an absence of a breach in favour of Australia, the contention of Australia is that the Court should not review that finding, but accept the finality of the General Assembly resolution. So it is an objection of an exclusive preliminary character.

Other arguments leading to inadmissibility invoked by Australia do not touch the merits, either, since Australia contends that the Nauruan allegations of breach are precluded by the unqualified termination of the Trusteeship Agreement, which extinguished *ipso jure* any claims since no reservations or saving clauses were inserted in the General Assembly final resolution. I will deal with this point later.

* * *

Finally, the exclusive preliminary nature of the objection of lack of consent on the part of the United Kingdom and New Zealand to the Court's jurisdiction cannot be put in doubt. To accept this preliminary objection simply requires the Court to look at the record and, in the light of the applicable principles, to conclude on the absence of jurisdiction of the Court to make these two States responsible for alleged breaches of the trusteeship and condemn them *in absentia* for supposed violations of the trust.

As to the objection to the overseas assets claim, if it is a new claim, and if the Court considers it is not precluded by the Statute and the Rules, then the issue whether the Court has jurisdiction under Article 36, paragraph 2, of the Statute, does not require the Court to assess the substance of the Nauruan claim. It is only called upon to say whether there is a dispute within the meaning of Article 36, paragraph 2. And the Rules clearly contemplate that such a decision is to be made at a preliminary stage.

Yet, Mr. President, Nauru contends that, because certain of Australia's objections in Nauru's

view involve complex facts, the Court cannot treat them as exclusively preliminary (CR 91/19, p. 54). But that, as I have shown, is a wrong interpretation of what makes a matter exclusively preliminary. It is not the necessity of taking facts into account that deprives an objection of its preliminary nature. The Rules recognize that in order to decide on preliminary objections the Court will need to hear and determine evidence on facts relevant to the objections (Art. 79, para. 6, of the Rules). The real question, is whether the objections themselves can only be determined by determining facts or points of law that prejudge or go directly to the merits of the claims in question. That was clearly the situation in the *Nicaragua* case. There are certain questions of law raised by Australia's objections that must be determined in order to rule on our objections. But this again, does not preclude the objections from being exclusively preliminary. As has been just shown, in relation to each one of Australia's preliminary objections, these points of law do not concern the merits of the claim, but retain an exclusively preliminary character. For this reason, the objections are able to be, and in our opinion should be, determined at the present stage.

Finally, Mr. President, in relation to these questions of preliminary objections, I need not remind the Court of the fact that the 1978 Rules are different from the earlier Rules on this point. The reason for the change was referred to in the Agent's initial opening statement. Nauru appears to ignore this. In our submission the Court should be mindful of this change.

Comments on DeRoburt's Statement

The Head Chief DeRoburt said on Friday (at p. 17) that since the report of the Trusteeship Council was already before the Fourth Committee, he "did not regard the Fourth Committee session as the appropriate moment or venue to restate Nauruan's position in regard to rehabilitation".

If we had had the chance to examine him, as if he were a witness, we would have asked him his views about the differences between the two organs, the Trusteeship Council and the General Assembly.

The answer, obviously, is that while the General Assembly, according to Articles 79 and 85 of the Charter, is the proper forum and the only organ competent to fix the conditions for the alteration

or the termination of a trusteeship agreement, the Trusteeship Council is an organ acting under the authority of the General Assembly.

As it is well known, the two organs have a different composition. While in the Trusteeship Council there was parity of representations between administering States and other members, in the Fourth Committee of the General Assembly, there is a large anti-colonial majority.

These two differences - the powers of the respective organs and their differing membership - strongly suggested that the issue of rehabilitation would have encountered a more receptive audience in the Fourth Committee. Above all, this organ was the only appropriate forum which could adopt the necessary decisions for maintaining Nauru's rehabilitation claim or for transforming it into a financial responsibility. Yet, Head Chief DeRoburt did not dare and did not attempt to raise his reservation on the rehabilitation claim at the Fourth Committee level, as he had done in the Trusteeship Council. In our initial statement, Mr. President, we wondered about the reasons for such an abstention on his part. In his personal recollections last Friday he furnished us some clues as to the grounds for that abstention, and for the marked change in his statements between 22 November and 6 December 1967. In so doing, he confirmed our assertion as to the existence of a radical change of mind and of a radical change of position between these two dates. What happened during these 15 days in the corridors of the General Assembly?

He stated, with respect to the independence and economic viability of Nauru, that he had encountered "initial reservations, in certain quarters" (CR 91/18, p. 10). That might have been the reason why he proclaimed in the Fourth Committee that the Nauruans had the resources to sustain their independence, between what they had received in the past and what they will receive from their own exploitation of the phosphate, without referring to any further bonus to be received from Australia.

That was all he said, keeping silence with respect to his claim for rehabilitation.

We have contended that such silence by the interested party could not fail to have been noted by the Fourth Committee membership, and explains the absence of general support and the absence of any initiative to insert in the resolution to be adopted a saving clause or a paragraph keeping alive

the rehabilitation claim. The explanation given by the Head Chief for his abstention to refer to that issue was that "it was not a moment for any acrimony".

On that, I submit that he is wrong. On the contrary, that was the right moment, that was the right venue, for showing the acrimony against the Administering Authority which has been displayed in the written and oral pleadings before this Court. In order to succeed in his claim DeRoburt needed at that precise moment to transform his reservation into a saving or qualifying clause to be added to the General Assembly termination resolution.

In the Trusteeship Council he had merely put on record a unilateral reservation, concerning Nauru's own position, which did not receive support or endorsement from the Trusteeship Council. That was not enough for succeeding in his purpose. What he needed to obtain from the General Assembly was not the filing and recording of another unilateral reservation, which he did not dare to make at the Fourth Committee. What he needed was a pronouncement by the General Assembly endorsing his claim, by means of an additional paragraph or a qualifying proviso added to the termination resolution, as it had been the case in 1965 and 1966. Moreover, since this was the occasion for the termination of trusteeship, Nauru needed a proviso embodying a finding of breach, not a mere recommendation as in 1965 or 1966. That was the indispensable vehicle for the survival of Nauru's claim.

Otherwise, an unqualified termination resolution, deprived of a clear finding of breach on the rehabilitation issue, was fatal to Nauru's claim, because it discharged ipso jure the Administering Authority of any further liability with respect to the Trusteeship. As I have said before, under the authority of Roman jurists, the absence of condemnation, in the circumstances, implied an absolution.

Comments on Professor Crawford's Statement

I will make now some comments on Professor Crawford's brilliant statement of the day before yesterday. Professor Crawford referred to the welcome given in paragraph 1 of resolution 2347 of the General Assembly and derived an argument from this welcome. He also referred to paragraph 2

of the resolution but he omitted the examination of paragraph 3 of the General Assembly resolution.

Attention must be paid to this third paragraph of resolution 2347, because it refers to the agreement concluded between the United Nations and the Administering Authority terminating the Trusteeship, an agreement necessary under Articles 79 and 85 of the United Nations Charter.

This agreement to terminate the Trusteeship Agreement made the Administering Authority *functus officio* and thus divested it of any authority with respect to the territory of the island.

Consequently, the claim of rehabilitation of the land could no longer be met by the Administering Authority, which was deprived of access to the territory. In these circumstances it is obvious that the alleged obligation to rehabilitate the land became devoid of object and was consequently extinguished. It was not a question of previous resolutions being rescinded, as Professor Crawford said: these resolutions had ceased to have any possibility of application.

This simple observation demonstrates that the alleged preservation of rights beyond termination, so eloquently developed by Professor Crawford, cannot be applied in this particular instance.

Of course, our adversary might say that "in lieu" of a claim for actual rehabilitation of the land, a claim for financial compensation would have arisen, replacing the original obligation.

But one may legitimately ask how such an automatic transformation, such a novation of the original obligation, could have taken place, by a sort of spontaneous generation, amidst the total silence on the subject in resolution 2347.

It is difficult to conceive that the United Nations would enter into an agreement with the Administering Authority with the object of bringing to an end all the rights and obligations of trusteeship, and instead of granting the discharge from all responsibilities which results from its apparent terms, would enclose, by reference alone, a pending claim for breach of the trusteeship, resurrected, phoenix-like, and transformed into a claim for monetary compensation. It cannot be conceived that the United Nations Organization would have imposed upon the Partner Governments such an obligation in this sort of clandestine way, without saying so in clear terms.

The undeniable truth is that the Agreement between the United Nations and the Administering

Authority, according to its terms, did not demand from the Administering Authority further contributions or responsibilities; it discharged the Partner Governments of their obligations as trustees in unconditional and unqualified terms. There was not the slightest reference to outstanding obligations or liabilities, nor was there any reference to breach or maladministration of the trusteeship. The State of Nauru, created and declared independent by that same Agreement between the United Nations and the Administering Authority, could derive all the rights and benefits resulting for it from that Agreement, such as "full and unqualified independence", and assistance from the United Nations, but it could not derive rights, claims or benefits which were not provided in the Agreement between the United Nations and the Administering Authority.

Professor Crawford also referred to the *Northern Cameroons* case, but we could not discern from his treatment of the case whether he invoked it in support of his argument or he tried to distinguish that case from the present dispute.

We on our part have referred to this case as being in support of Australia's position.

Professor Crawford quoted a passage from that Judgment (CR 91/20, p. 39). Every word of that passage is fully and literally applicable to the present case. The Court said in 1963 that the Applicant:

> "would not have had a right after 1 June 1961, when the Trusteeship Agreement was terminated and the Trust itself came to an end, to ask the Court to adjudicate at this stage upon questions affecting the rights of the inhabitants of the former Trust Territory ..." (*I.C.J. Reports 1963*, p. 36).

In respect to this case, Professor Crawford described Judge Wellington Koo's position as diverging from the main trends of the decision. This is not so. This distinguished Judge wrote a separate opinion "broadening and strengthening the basis of the Judgment" (*I.C.J. Reports 1963*, p. 41).

We have invoked the authority of this distinguished Chinese jurist and scholar, who was one of the founding fathers of the Charter of the United Nations, and in particular of the Chapters concerning trusteeship and adminsitration of non self-governing territories. To give an example, he was the one who proposed, at the San Francisco Conference, the key institution of the Visiting Missions, a proposal which Australia supported.

In that case of Northern Cameroons in 1963, Judge Koo had to answer and reject the argument that the terms "recourse to some other means of peaceful settlement does not embrace a settlement by an organ of the United Nations".

To reply to this assertion, Judge Koo observed that Article 33 of the Charter includes resort to "arrangements or other peaceful means", saying:

> "The emphasis here is obviously on the 'peaceful' character of the means to be chosen by the parties for a settlement of their dispute; and no means of settlement which fulfills this qualification is precluded ..." (*I.C.J. Reports 1963*, p. 52).

So Judge Koo concluded that "settlement by the General Assembly is one of the implicitly recognized means. This view is borne out by the record" (*ibid*., p. 52).

In support of a similar conclusion with respect to the action of the Trusteeship Council, Judge Koo recalled a debate in 1946 concerning a Chinese proposal giving a role to the advisory functions of the International Court of Justice in the settlement of disputes between the administering authorities and the administered communities. Judge Koo recalled that:

> "The proposal was withdrawn after it was made clear by the other speakers that settlement of a dispute with the Administering Authority by the Trusteeship Council was not excluded ... but only that 'this would occur through the normal processes of the Trusteeship System ...'." (*ibid*., p. 52.)

Comments on Professor Brownlie's Statement

I will deal with the observations made by Professor Brownlie concerning the preliminary objection based on the reservation of Australia. It was observed in this respect that the Republic of Nauru was not formally in existence as a State before independence, and thus it could not sign a formal treaty with Australia establishing the recourse to other methods of peaceful settlement. Professor Brownlie's concern for documentary evidence, for a formal instrument is, to say the least, surprising, because in his well-known *Principles of Public International Law*, he teaches that in international law "there are no substantive requirements of form" (4th Ed., p. 606).

Of course, an agreement may result from the conduct of the parties, as well put in Judge Schwebel's second question.

The answer to his question is yes. The agreement of the parties to have recourse to some other

method of peaceful settlement may not only be express, but tacit, and evidenced by their course of conduct. It is agreement by course of conduct that Australia advances in the current case.

It is not disputed that agreements may be express or tacit, they may be written or oral and, in the latter case, agreements may result from a course of conduct; Article 3 of the Vienna Convention on the Law of Treaties assumes their legal force.

The Partner Governments had ratified the Charter and accepted the Trusteeship Agreement, thus subjecting themselves to the supervisory system of the Charter, which included the recourse, in case of disputes or problems, to the peaceful means of settlement inherent in the Trusteeship régime.

The agreement of the other party, the people of the administered community, to have recourse to those same peaceful means resulted from their invocation and exercise of the rights and benefits provided in their favour by the whole system of supervision established in the Charter and in the Trusteeship Agreement.

By submitting petitions, by receiving visiting missions, by bringing their problems to the Trusteeship Council, by asking for recommendations from the General Assembly, by entering into negotiations with the Administering Authority on the basis of these recommendations, the administered community, the people of Nauru, agreed by their conduct to resort to the procedures of peaceful settlement inherent in the trusteeship system. We further refer in connection with this point to paragraphs 289-291 of our Preliminary Objections.

The fundamental reason why Nauru is not justified in denying the evidence of an agreement to that effect is that its whole case is based on the contention that, before independence, the people of Nauru derived rights from the Charter of the United Nations and consequently assumed corresponding obligations to these rights it involved or exercised.

It would be an untenable position for the Applicant to claim certain rights, as already existing under the mandate and the trusteeship, and at the same time deny all connection with the United Nations system of trusteeship and reject the undeniable fact that the people and the territory of Nauru were placed under a régime of international accountability which subjected them to the supervision and to the procedure of peaceful settlement of the Trusteeship Council and of the

General Assembly. It is not possible for the Applicant to deny that the whole system of the United Nations gave to these organs certain powers to decide how the international administration had been conducted and to pronounce on the disputes which arose between the people of the territory and the Administering Authority. As a matter of fact, the whole régime of petitions provided in Article 87, paragraph (b), of the United Nations Charter is predicated on the assumption of the existence of rights of the people under Article 80 of the Charter, and before independence, as recognized by this Court in the advisory opinions on *South West Africa* (1950) and on *Namibia* (1971).

And if such a contradictory position is adopted by the adversary, the answer is obvious. One cannot blow hot and cold at the same time; one cannot claim certain rights resulting from the United Nations Charter while at the same time denying the corresponding obligations, such as the submission to the peaceful procedures derived from the trusteeship system as established in the United Nations Charter. It would be contradictory to claim that the General Assembly had the power to recommend the rehabilitation of the mined areas or to grant independence, while denying agreement to resort to the same mechanism in case of disputes between the administered people and the Administering Authority.

When the Repubic of Nauru, on 18 November 1987 became a party to the Statute of the Court, it accepted the provisions of the Statute, an integral part of the Charter (under Article 92 of the Charter), and it accepted all the obligations of a Member of the United Nations under Article 94 of the Charter.

Article 35, paragraph 2, of the Statute of the Court provides that the conditions under which the Court shall be open to other States, such as Nauru, shall be laid down by the political organs of the United Nations, "but in no case shall such conditions place the parties in a position of inequality before the Court".

To claim that Nauru, as such, had accepted no obligations concerning the recourse to peaceful procedures under the trusteeship regime because it was not formally in existence until after independence, to object that it did not sign a formal instrument accepting the obligations of pacific

settlement in the Charter, while claiming at the same time that Australia is liable for breaches of the trusteeship régime, would place the Parties to the present dispute in an inadmissible position of inequality before the Court since only one of them, Australia, will be bound by the provisions of the Charter.

With these observations with respect to Professor Brownlie's presentation I hope to have answered also Judge Shahabuddeen's first question.

Mr. President, before leaving the floor I would ask you to be so kind as to give the floor to Professor Bowett for his reply.

The PRESIDENT: Thank you Professor Jiménez de Aréchaga. And now Professor Bowett please.

Professor BOWETT: Mr. President, Members of the Court. I shall deal with three issues, as succinctly as I can; the absence of any clear allegation of breach by Nauru, the issue of waiver, and the question of the finality of the resolution on termination.

1. The absence of any allegation of breach of the Trusteeship Agreement

During the first round of oral argument I called to the Court's attention the fact that, prior to the termination of the Trusteeship Agreement, Nauru never seems to have alleged that failure to rehabilitate was a breach of that Agreement. The significance of that fact, of course, is that it highlights the absence of the very claim which is the basis of Nauru's Application to this Court.

It is no answer to that point to say that the record shows a clear difference of opinion, pre-1967, as to who should bear the cost of rehabilitating the land mined prior to independence. A difference of opinion is not an allegation of breach of the Trusteeship Agreement. One can imagine many such differences of opinion between the Administering Authority and the people of the Territory during trusteeship. Should new hospitals be built? Is a four-lane highway needed? What should be the curriculum in the schools? And so on. There is enormous scope for differences of

opinion under trusteeship, and the Trusteeship Council would doubtless act as arbiter, and recommend a solution or a compromise. But none of this converts a difference of opinion into a claim of breach of the Trusteeship Agreement.

And that is how it was with the difference over rehabilitation. Professor Connell was right in saying it was a disagreement over practicalities. Nauru did not put the matter in terms of breach of the Trusteeship Agreement, nor did Australia deny responsibility in those terms. Indeed, it is fair to say that neither side argued in terms of *legal* responsibility of any kind. Nor did the Davey Committee talk about *legal* responsibility (see Report, p. 26: Nauru Memorial, Vol. 3, Ann. 3). It referred only to a "climate of opinion", a "general trend in regulatory policies" for extractive industries to undertake rehabilitation.

What then was Nauru claiming? Some understanding of the basis of the claim can be gleaned from the statement made by Chief DeRoburt before the Court.

Before turning to that statement, Mr. President, let me make it clear that I raise no question whatsoever as to the integrity and sincerity of Chief DeRoburt. It was a privilege to listen to the testimony of a man who, throughout his life, has given such singular service to his people. However, what he said was -

> "the Nauruan people were all the more determined to obtain acceptance by the Administering Authority of the simple principle that it bears responsibility for rehabilitation of phosphate lands to be mined out during its Administration. This responsibility, the Nauruan Community believe, was moral as well as legal." (CR 91/18, p. 10.)

Now you will note that the responsibility he envisages is that of the Administering Authority, not Australia alone. And it is moral, as well as legal.

We can dismiss the moral basis, if only because this is not a court of morals and, if we were to begin debating the morality of the claim, we should venture into areas very far removed from the central question: was an allegation of breach of Trusteeship made?

But let us suppose, for the sake of argument, that the Nauruans believed the claim had a legal basis as well. What was it? Was it to be found in Article 76 of the Charter, or Articles 3 and 5 of the Trusteeship Agreement?

Certainly, Chief DeRoburt does not say so. But what of his colleagues? Well, Me. Keke does not say so either. He makes what I can only describe as an "economic" argument. Specifically, he says:"Having enjoyed the abundant benefit of cheap Nauruan phosphate throughout its administration of the Territory, it would be neither fair nor equitable for Australia to abdicate its responsibility to rehabilitate the phosphate lands mined out during its administration ..." (CR 91/18, p. 28.)

In short, the basis of the claim seems to lie in an argument about economic equity. The idea is that Australia benefited economically from cheap phosphate; therefore, Australia should shoulder the financial burden of rehabilitation. Whatever view one takes of that argument, it has nothing to do with a breach of specific treaty obligations. Indeed, even as an economic argument it seems to depend on the view that the price for phosphate was too low. But scrutiny of the phosphate price was a recurring feature of the Trusteeship Council's supervision and, as I recall, on this issue, too, there was never an allegation of breach, nor a finding of breach.

And I ask the Court to consider carefully the implications of what Mr. Keke is saying. If the responsibility to rehabilitate arose from the cheap price of phosphate, it would follow that there would be no such responsibility if the Administering Authority had paid the fair market price. Accordingly, the task of the Court will be to determine whether, during all those years, a fair price was paid: for if the price was fair, there would have been no responsibility to rehabilitate. That is the Nauruan argument, not mine. I confess I do not see an *ex post facto* investigation into the price of phosphate as a task for this Court. The task has clearly been done already by the Trusteeship Council, and it is far removed from an inquiry into breach of Articles 3 and 5 of the Trusteeship Agreement.

Professor Mani repeats the same "economic" argument (CR 91/18, p. 35), and he asks the very pertinent question: "Was the rehabilitation claim any different from an allegation of a breach of a Trusteeship obligation?" (CR 91/18, p. 35.)

What we needed was not the question but, rather, the answer. And, if the the argument is simply an economic argument, turning on the price of phosphate, then the answer must surely be

"Yes, indeed, it is different"! An economic argument is not, on its face, an allegation of breach.

It is true, as both Professor Mani and Professor Brownlie have pointed out, that the Nauruan delegation, in talks with the Partner Governments, made occasional references to Trusteeship obligations. Many of these references were in the context of claims to ownership of the deposits of phosphate, or claims to a greater share of the profits. There is, in 1966, certainly one reference to the Trusteeship system as a partial basis of an obligation to rehabilitate (Nauruan Memorial, Vol. 3, Ann. 4, p. 340, Session of 20 June 1966). But this is a reference which cites no provision of the Trusteeship Agreement and which gives no explanation of how an obligation to rehabilitate derives from a particular obligation under the Trusteeship Agreement. In short, the Nauruan reference fell very far short of what the Court has required to constitute a claim or dispute, namely a view "as to the interpretation and application of relevant Articles of the Trusteeship Agreement" (I.C.J. Report 1963, p. 27).

In fact, the only real hint one gets as to the legal basis for the rehabilitation claim comes from the Statement of the Nauruan delegation during the 1967 Talks with the Administering Authority (Nauruan Memorial, Vol. 3, Ann. 5, pp. 140-141). Here it is argued that, in municipal law regulatory systems, such as that in Australia, extractive industries have an obligation to restore mined land. There is not a word about the Trusteeship Agreement imposing similar obligations.

And, of course, as we know, there is no comparable obligation in the Trusteeship Agreement and the Trusteeship Council never construed the Agreement as even *impliedly* imposing such a legal obligation.

So, to conlude on this point, Mr. President, Nauru has, so far, totally failed to demonstrate that there is any basis for a claim of breach of the Trusteeship Agreement. Nauru's claim ought to be summarily dismissed as disclosing no legal dispute. In the language of Article 79 of the Rules, the Nauruan Application ought to be declared inadmissible.

2. The Issue of Waiver

Mr. President, I believe it does help to clarify matters if I continue to separate out the question

of waiver vis-à-vis the Partner Governments, and waiver vis-à-vis the General Assembly.

As regards the former, the gist of the argument by Professor Mani (CR 91/18, pp. 40-44) is to suggest that there could be no waiver in the 1967 Canberra Agreement, because the two Parties - Nauru and the Partner Governments - had agreed to set the rehabilitation issue aside, so as not to hamper progress. Thus, rehabilitation being set aside, it could not have been waived as part of the Canberra "package deal".

Well, there is clearly nothing wrong with Professor Mani's ingenuity. But there is something drastically wrong with his chronology. The agreement to set aside the rehabilition issue so as to allow progress to be made on other issues, came in June 1966 - I repeat, June 1966. Professor Mani's citation is from the record of the meeting of 29 June 1966.

But one year later, when all the other issues were virtually settled, the Partner Governments were adamant that the remaining issue of rehabilitation should be tied up and embraced in the "package deal". And so in May of 1967 the Partner Governments pressed for a formal renunciation by the Nauruans of their claim for rehabilitation costs - or at least an understanding that Nauru would not pursue that claim. As I said during the first round of argument, at that stage, in May, Nauru refused.

But this is why the five months after May are so important. For between May and the signing of the Canberra Agreement on 14 November 1967, five months later, no more is heard of the Nauruan claim. So, the question is how is this Court to interpret this silence? Is it reasonable to believe the Partner Governments signed the Agreement, knowing that they faced a massive rehabilitation claim? Or is it reasonable to believe that Nauru's silence over this five months induced the Partner Governments to believe that Nauru had quietly dropped its claim and accepted their package offer? My submission is that this second interpretation is the only plausible one. And certainly, by keeping its silence, Nauru made no attempt to correct this view of the Partner Governments. It would have been the easiest thing in the world, at any stage during these five months, for Nauru to say, "Don't forget, we still have our rehabilitation claim". But the terms of the Canberra settlement were too good to lose, so Nauru kept its silence and, in my submission, waived

its claim.

Obviously Nauru rejects this interpretation of the negotiations leading up to the Canberra Agreement. But if Nauru is correct, and the issue of financial responsibility remained unresolved by that Agreement (see Professor Brownlie's CR 91/19, p. 79) it became all the more important that the issue should be put to the Assembly, fairly and squarely. For the issue was important, and Nauru says it believed a breach of the Trusteeship Agreement was involved, and that Nauru had alleged such a breach. Logically, therefore, the situation demanded that Nauru should raise it.

What happened, in fact, is already familiar to the Court. Chief DeRoburt mentioned the claim in the Trusteeship Council on 22 November. Not a word was said about this claim by any delegation at that time. On the contrary, the Liberian delegate, in previous years a sponsor of the call for rehabilitation, "commended the Australian Government for its tutelage" (Preliminary Objections of Australia, Vol. II, Ann. 29, para. 56). So, apparently, the claim fell on deaf - or at least unreceptive - ears. The claim was not, in fact, referred to at all by Nauru in the Fourth Committee of the General Assembly on 6 December. Yet Chief DeRoburt has suggested to you that he believed, nonetheless, that this claim was before the General Assembly.

My colleague, Professor Jiménez de Aréchaga, has already explained the fallacy in the reasoning of Chief DeRoburt. The Chief simply assumed that, because his statement of 22 November before the Trusteeship Council was on the record as maintaining the rehabilitation claim, the General Assembly would read that statement into his address to the Fourth Committee on 6 December. Well, that is not how the General Assembly operates. As part of the continuing dialogue in the United Nations, positions change constantly, and the Fourth Committee of the General Assembly was entitled to take his statement on 6 December as it stood.

And, as it stood, he made no allegation of breach, but rather assured them that the problem need not concern the United Nations, because the problem could be solved out of the revenue already received, and due to be received over the next 25 years, thanks to the Canberra Agreement. In my submission, that could only be construed by the Assembly as a waiver, or withdrawal of the claim.

When I put Chief DeRoburt's statement to the Court during the first round, I suggested that

"the problem" Chief DeRoburt was referring to, was the whole problem of rehabilitation - and I cited the actual passage from his statement (see CR 91/16, p. 24).

Not so, said Professor Mani (CR 91/18, p. 56). The problem referred to by the Chief, according to Professor Mani, was the problem that the phosphates were a wasting asset.

Mr. President, I will not tax the patience of the Court by analysing the statement by Chief DeRoburt to the Fourth Committee on 6 December 1967, sentence by sentence. The crucial part of the statement is to be found in the records of the Fourth Commitee for the 1739th Meeting at paragraph 20 (Preliminary Objections of Australia, Vol. II, Ann. 30). In fact, Chief DeRoburt referred to problems, in the plural. One such problem which he mentioned is clearly the rehabilitation problem. It is true that he mentioned also the fact that the phosphates were a wasting asset and that was a problem - so he identified two problems. But then he went on to say that the revenue received by Nauru and to be received over the next 25 years would enable Nauru "to solve the problem".

Which "problem" would the General Assembly reasonably think he was referring to? My submission is that the General Assembly was entitled to believe, and did believe, that he was referring to the problem of rehabilitation. Not only because that was the problem already raised by Nauru in the United Nations, but also because, clearly, that was a problem which could be resolved by money. The other problem - the fact that the phosphates were a wasting asset - was a fact of life. Money could not solve that problem.

So how, reasonably, could the General Assembly construe Chief DeRoburt's statement? Australia submits that there is only one reasonable construction. The General Assembly did not treat the claim as a claim of breach and, in any event, believed Nauru was not persisting in the claim as an issue relevant to, or arising from, Trusteeship.

I turn now to the third and last issue.

3. The Conclusiveness and Finality of the Termination of the Trusteeship Agreement by the General Assembly

On this crucial question, the Parties remain at odds. Australia says the Assembly was fully

aware of the earlier difference of opinion over rehabilitation but, knowing the terms of the Canberra Agreement, knowing also the recommendation of the Davey Report and having heard Chief DeRoburt's assurance that the problem could be dealt with by Nauru - after independence - and need not concern the United Nations, the Assembly made no finding of breach against the Partner Governments: and that was conclusive.

Nauru argues, through my colleague Professor Brownlie, that the failure of Nauru to specifically allege a breach is legally irrelevant (CR 91/19, p. 63). The reasoning appears to be that the Assembly knew of the Nauruan claims, that the Assembly must have construed these claims as legal claims and that, therefore, the Assembly must have construed these legal claims as involving an allegation of breach of Trusteeship.

As I have already suggested, there is scope for many, many differences between the Administering Authority and the administered people of the territory over the means adopted to carry out the substantive obligations of Trusteeship. But you simply cannot equate every difference of opinion with an allegation of breach.

Setting this aside, how does it improve Nauru's position if they are right? Let us accept, for the sake of argument, the Nauruan view that Nauru had, in effect, alleged breach of the Trusteeship Agreement and that the Assembly dealt with the problem in this light. How does that help Nauru?

Nauru's argument, as developed principally by my friend Professor Crawford, is this:

First

Nauru alleged a breach of the Trusteeship Agreement, specifically on 22 November in the Trusteeship Council.

Second

On the same day, Nauru invited the Trusteeship Council not to decide the issue of breach, but rather to leave this to bilateral negotiations with the Partner Governments after independence.

Third

Since the General Assembly was exclusively competent only as regards disputes expressly referred to it, Nauru remained free to pursue its claims after independence.

Now, clearly, the core of the Nauruan argument lies in the assumption that, faced with an allegation of breach, the General Assembly could decline to resolve the dispute. Put in other terms, the basic objectives of the trusteeship system, as set out in Article 76 of the United Nations Charter, and the implementation of the specific legal obligations assumed under the Trusteeship Agreements, can properly be left to bilateral negotiations between the Administering Authority and the administered people. It is not the obligation of the Assembly to oversee, and ensure, compliance.

Mr. President, I find this view of Chapter XII of the United Nations Charter unrecognizable. Such an abdication of responsibility is simply incompatible with the whole elaborate system of supervision. And it would be a true abdication of responsibility, for there would be no other independent third party which could guarantee performance of the trust.

If the abdication by the Assembly occurred during trusteeship, the people of the territory would lack locus standi to come before this Court, or to insist on arbitration. And if the abdication occurred at the termination of the trusteeship the situation would be little better. The newly-independent community's chances of a third party ruling would depend upon the pure chance that this Court might have jurisdiction.

So I would argue that such an abdication of responsibility by the Assembly cannot be presumed. And it is clear that the Nauruan case is pure presumption. For it is clear that resolution 2347 (XXII) contained no finding of breach and no decision that there was an outstanding question of legal responsibility for rehabilitation, and no decision to leave such question for future, bilateral negotiations. So it is all pure presumption and, in my submission, an unacceptable presumption, if only because it implies abandonment by the Assembly of its responsibilities. The fact is that, in the entire history of trusteeship, we have no such example of the Assembly abandoning its responsibilities in this way; not one example of the Assembly leaving an allegation of breach to be resolved bilaterally after independence.

The safer, and sounder, interpretation of that termination resolution is that offered by Australia. That, given the Assembly's knowledge of the Davey Committee Report, of the Canberra Agreement, of the Trusteeship Council's refusal to re-endorse the recommendation on rehabilitation, of Cheif DeRoburt's statement on 6 December - the resolution can only be properly interpreted as a full and final discharge of the Partner Governments from their responsibilities.

It is difficult to imagine the Assembly terminating the Agreement without terminating questions of liability for the performance of that Agreement. One would have thought that such questions were, par excellence, questions "necessarily arising in the course of such functions as the termination or revocation of trusteeship agreements" - I use Professor Crawford's own words to describe a category of which the Assembly clearly was competent (CR 91/20, p. 31). The talk of "survival of rights" or "reducing the Court to a subsidiary role", entirely misses the point. The United Nations Charter entrusted the safeguarding of those rights to the Assembly. If the Assembly abdicated its responsibilities there could be no guarantee of survival of rights, and no guarantee that this Court would have any role.

Unhappily, Mr. President, that is not quite the end of the matter. because Nauru argues that Australia has obligations both under the Trusteeship Agreement and under general international law. Conceivably, therefore, we may yet hear the argument that, even if the Assembly's resolution on termination was final and conclusive as to the Trusteeship obligations, this would not be so as regards the obligations under general international law - specifically those relating to self-determination, permanent sovereignty, denial of justice and abuse of rights.

So forgive me if I digress for a few moments to deal with this argument. As already indicated, Australia does not believe that the Administering Authority faced two, parallel but distinct, sets of legal obligations - one under the Trusteeship Agreement, the other under general international law. The true position was that the operative obligations were those in the Trusteeship Agreement. Obviously, in interpreting and applying those obligations the General Assembly would have in mind the United Nations Charter as a whole and evolving general principles of international law. It would be unthinkable for the United Nations General Assembly to ignore those principles, especially

principles like permanent sovereignty and self-determination, which the Assembly itself has fostered. So, on this point I agree entirely with Professor Crawford: we interpret the Court's jurisprudence in the *Namibia, Western Sahara, and Nicaragua* cases in exactly the same way (CR 91/20, p. 29).

But it must follow from this that the Assembly's final act of termination, if it was dispositive, was dispositive and conclusive as to all applicable legal principles, not simply the provisions of the Trusteeship Agreement viewed in isolation.

If the situation were otherwise it would be incomplete, and unfair. For if the General Assembly could not, during the trusteeship, deal with applicable legal principles outside the Trusteeship Agreement *stricto sensu*, who could? Not the Court, certainly, because pre-independence Nauru would have no *locus standi*. So these other legal principles would be unenforceable during trusteeship. Mr. President, the notion has only to be stated to be dismissed. It is unthinkable that the Trusteeship should be governed by legal principles which cannot be enforced during the currency of the trusteeship.

Mr. President, that concludes my statement. I am sure you would wish to call on Mr. Pellet after the break.

The PRESIDENT: Thank you very much, Professor Bowett. We will now have a short break.

The Court adjourned from 11.35 to 11.50 a.m.

The PRESIDENT: Please be seated. Professor Pellet.

M. PELLET : Monsieur le Président, Messieurs de la Cour,

1. Il me revient de répondre aux arguments par lesquels Nauru entend écarter l'exception préliminaire de l'Australie concernant l'incompatibilité de sa requête avec le principe du consentement à la juridiction internationale.

Ceci me conduit à traiter principalement de la plaidoirie prononcée par mon collègue et néanmoins ami, selon la formule consacrée, le Professeur Crawford, mardi dernier. Principalement, mais pas exclusivement puisque d'autres conseils de Nauru ont abordé la question peut-être d'ailleurs sans qu'ils en soient tout à fait conscients.

2. Monsieur le Président, en écoutant M. Crawford, j'ai constaté avec intérêt, et, parfois, avec un certain étonnement, que les deux Parties étaient en réalité d'accord sur un certain nombre de points fondamentaux, et pour éviter des polémiques inutiles, je souhaite énumérer d'emblée les plus importants de ces points. Il s'agit en particulier :

- de la non-transposabilité de principe des règles des droits internes en matière de responsabilité dans la sphère internationale (cf. CR 91/20, p. 87-88);
- du fait que les British Phosphate Commissioners relèvent de la responsabilité conjointe et égale des trois gouvernements participants (cf. CR 91/20, p. 82; voir aussi p. 84);
- de l'absence de personnalité juridique de l'autorité administrante en tant que sujet de droit distinct des trois Etats qui la composent (cf. CR 91/20, p. 63);
- ou même de la définition de base de la règle que Nauru persiste à appeler des "parties indispensables", mais en en donnant cette fois une définition qui, ne caricature pas - ou, en tout cas, caricature moins... - l'exception préliminaire de l'Australie, puisque les deux Parties s'accordent pour admettre qu'il ne suffit pas que des Etats qui ne sont pas présents à l'instance soient intéressés par l'arrêt que la Cour est appelée à rendre ("implicated in the decision" - CR 91/20, p. 59; voir aussi page 68), pour que la Cour soit incompétante.

3. Ceci étant, dire que l'Australie et Nauru sont d'accord sur ces prémisses importantes ne signifie pas, loin de là malheureusement, que les deux Parties en tirent les mêmes conclusions.

Je vais m'employer à le montrer en abordant successivement les questions suivantes, qui me paraissent constituer les principaux points de désaccord entre les Parties et qui portent

1. d'abord sur la définition même du problème qu'il appartient à la Cour de trancher à ce

stade;

2. ensuite sur l'existence de parties au différend qui ne sont pas présentes à la présente instance;
3. en troisième lieu, j'aborderai le problème de la prétendue prédominance de l'Australie, et enfin
4. je m'intéresserai à l'incidence que peut avoir en l'espèce le droit de la responsabilité internationale;

et je conclurai en disant un mot des conséquences qu'aura, pour Nauru, un arrêt de la Cour faisant droit aux exceptions préliminaires soulevées par l'Australie.

1. La définition des questions posées à la Cour au stade actuel

4. Depuis le dépôt de la requête, j'ai toujours, je dois dire, été très perplexe sur les conclusions mêmes de Nauru et cette perplexité s'est accrue à la lecture de son exposé écrit et à l'audition des plaidoiries orales faites en son nom. D'une part en effet, on ne sait pas très bien quelles violations Nauru impute à l'Australie, et la violation de quelles règles précisément; et, d'autre part, l'Etat requérant semble éprouver quelque difficulté à faire le partage entre ce qui concerne le fond et ce qui relève de la présente phase du litige - à moins que Nauru s'emploie à dessein à faire l'amalgame, avec l'espoir d'égarer la Cour et de la conduire à déclarer que les exceptions australiennes n'ont pas un caractère exclusivement préliminaire.

Il faut pourtant distinguer. Et on peut le faire; même si, bien évidemment, les deux aspects ne sont pas dépourvus de tout lien l'un avec l'autre.

Dans sa requête, Nauru demande à la Cour un certain nombre de choses que pour simplifier on peut je crois résumer ainsi : l'Australie est-elle responsable - j'ajouterai : est-elle responsable seule ? - de manquements aux obligations de la tutelle en matière d'exploitation des phosphates et doit-elle réparer les dommages éventuels en résultant ? Ceci, Monsieur le Président, c'est la question qui se pose au fond et que les conseils de Nauru ont d'ailleurs longuement abordée lors de leurs plaidoiries. Mais ce n'est pas la question qui se pose à ce stade.

Il ne s'agit pour l'instant nullement de savoir si l'Australie a commis une violation des obligations lui incombant, comme M. Crawford et ses collègues semblent le penser (cf. CR 91/20, p. 86) mais de déterminer si la Cour peut ou ne peut pas répondre à une telle question.

Pour ce travail "préliminaire", peu importe à vrai dire, que la Cour doive se livrer à "a detailed examination of the basis of the claim and of all the relevant facts", comme l'a dit le conseil de Nauru (CR 91/20, p. 91). Ainsi que l'a rappelé tout à l'heure le Professeur Jiménez de Aréchaga, le critère de distinction entre ce qui est exclusivement préliminaire et ce qui touche au fond [tient à ce que "la Cour permanente dans l'affaire des Intérêts allemands en Haute-Silésie polonaise, compétence, 1925 (C.P.J.I. série A n° 6, p.15),] "tient à ce que, la Cour, ne saurait, dans sa décision [sur une exception préliminaire], préjuger en rien, de sa décision future sur le fond". (*C.P.I.J., Certains intérêts allemands en Haute-Silésie polonaise, (compétence), série A*, n° 6, p. 15).

Or, en l'espèce, la Cour n'a nul besoin de dire si, oui ou non, l'Australie est responsable et doit réparation, pour constater justement qu'elle ne peut pas trancher cette question, qui, je le rappelle, constitue la question de fond. Car, pour ce faire, dans l'un ou l'autre sens, la Cour devrait se prononcer sur la responsabilité de la Nouvelle-Zélande et du Royaume-Uni

i) en même temps qu'elle se prononcerait sur la responsabilité de l'Australie et

ii) avant de déterminer la réparation éventuelle due par ce dernier pays.

Dans les deux cas, la Cour jugerait des Etats absents sans leur consentement. La thèse de l'Australie, Monsieur le Président, n'est pas plus compliquée que cela. Et ceci me conduit aux deuxième temps de mon raisonnement. Il tient en une constatation.

2. Certaines parties au différend que constitue notre affaire ne sont pas présentes à l'instance.

5. Si la Cour en venait à se prononcer au fond, ces parties absentes seraient donc jugées sans avoir consenti à sa juridiction.

Pour que ceci soit exact, il faut évidemment que ces deux Etats, la Nouvelle-Zélande et le Royaume-Uni, puissent à bon droit, être qualifiés de parties au différend.

Je l'avais montré je crois la semaine dernière en établissant que, dans la sphère internationale,

l'Australie n'est jamais apparue seule, elle n'est apparue qu'en tant que composante de l'autorité administrante. Je n'ai pas, apparemment, complètement convaincu le professeur Crawford - cela ne m'étonne pas outre mesure d'ailleurs . . . - qui semble conserver un doute sur ce point et qui a fait valoir que l'autorité administrante n'avait pas de personnalité juridique qui lui fût propre (cf. CR 91/20, p. 63); que, dès lors, cette "non-entité" ne pouvait pas encourir de responsabilité propre (*ibid*.); et que, donc, toute possibilité de trouver un responsable s'évanouirait (*ibid*. et CR 91/20, p. 77).

L'Australie, je l'ai dit, ne prétend nullement que l'autorité administrante ait une personnalité juridique. Elle est constituée par l'addition des trois "gouvernements participants". Mais cette addition n'est pas fortuite; elle est juridiquement organisée; elle est consacrée par des accords internationaux solennels et qui sont au coeur du litige : le mandat et l'accord de tutelle qui, tous deux établissent cette "conjonction".

Le conseil de Nauru a d'ailleurs donné une définition tout à fait acceptable de ce phénomème lorsqu'il a dit qu'il s'agissait d'un

> "particular arrangement which involved a degree of participation on the part of the other two States, a device for associating the United Kingdom and New Zealand in the administration of Nauru" (CR 91/29, p. 64).

Nauru peut peut-être prétendre - et elle le fait fréquemment - que les accords que concluent entre eux les trois gouvernements ne lui sont pas opposables; mais elle ne peut certainement pas dire la même chose pour le mandat et pour l'accord de tutelle - faute de quoi ce serait le fondement même de sa requête qui disparaitrait. Or, ces traités visent bien l'autorité administrante, les trois Etats, pas l'Australie.

Je ne vais pas m'y attarder trop longuement - j'ai parlé longuement de ceci la semaine dernière. Msis il est révélateur que Nauru fuie le débat sur ce point. Elle rappelle, en passant, que l'Australie voulait se réserver le mandat puis la tutelle sur Nauru (cf. CR 91/19, p. 18 et CR 91/20, p. 73); mais Nauru se garde bien de pousser plus avant le raisonnement et de constater que l'Australie n'a pas eu gain de cause et que le mandat a été confié, finalement, à "Sa Majesté britannique", la tutelle aux

trois gouvernements. Il est significatif que Nauru "oublie" complètement que le contrôle, de la Société des Nations puis des Nations Unies, s'exerce non pas sur l'Australie, mais sur "l'autorité administrante"; il est significatif aussi que Nauru tente de faire croire le contraire lorsque son conseil affirme que "Both the League of Nations and the United Nations expressed concern that the Australian administration of Nauru was improper" (CR 91/20, p. 83). Mais c'est faux, Monsieur le Président ! Sauf erreur de ma part, jamais, ni la Société des Nations, ni l'Organisation des Nations Unies n'ont visé l'Australie, si ce n'est en relation avec les deux autres gouvernements : si les Nations Unies ont donné *quitus*, c'est à eux trois qu'elles l'ont donné; si elles l'ont refusé - mais mes éminents collègues MM. Bowett et Jiménez de Aréchaga ont montré qu'elles ne l'ont pas refusé - si donc, cependant, elles l'avaient refusé, c'est à eux trois qu'elles l'auraient refusé.

6. Et M. Crawford de s'étonner : comment ce "non-sujet" de droit qu'est l'autorité administrante peut-il cependant exister ?

> "How can there be 'purely internal' relations between three distinct international persons relating to the discharge of international responsibilities imposed by a paramount instrument, the Charter ?" (CR 91/20, p. 76-77.)

Mais pour une raison toute simple, Monsieur le Président : parce que le mandat, puis la Charte justement, condamnent ces Etats à agir ensemble aux fins de la tutelle. D'ailleurs, serait-il raisonnable de prétendre que des Etats membres d'une confédération par exemple - qui n'est pas davantage un sujet du droit international - n'ont pas de rapports particuliers *inter se*, des rapports non pas "internes" mais, comme je l'avais dit, des rapports "endogènes" (cf. CR 91/16, p. 67) - destinés à organiser leurs relations entre eux sans, pour autant, que rien soit changé quant à leurs rapports avec les tiers.

Mais, en l'occurrence, on doit aller plus loin : l'article 4 de l'accord de tutelle "incorpore" dans celui-ci, non seulement l'accord de 1919-1923 mais aussi, par avance, les modifications que les trois gouvernements viendraient à y apporter. Et ceci nous fait faire un pas de plus : non seulement les trois Etats ont des rapports inter se, mais encore, quoi qu'en puisse penser Nauru (cf. mémoire, par. 241 et 421; exposé écrit, par. 297, 305-309, etc.), ces arrangements, qui sont consacrés par

l'accord de tutelle, lui sont bien opposables. Il ne s'agit pas, contrairement à ce qu'affirme Nauru (cf. CR 91/20, p. 74), de reconnaître "the special position of one of" the three States; il s'agit, au contraire, de dire que ce que décident, librement, les trois gouvernements dans leurs rapports entre eux et qu'ils peuvent, librement aussi, modifier, ne change rien à la conjonction dont l'accord de tutelle (et non pas les trois gouvernements) pose le principe.

En d'autres termes, les trois gouvernements peuvent décider de tout ce qu'ils veulent entre eux, de confier l'administration de l'île à un triumvirat égalitaire (comme ils l'ont fait en matière économique avec les BPC) ou d'y envoyer un proconsul unique entièrement soumis aux instructions d'un seul d'entre eux (comme Nauru affirme - à tort d'ailleurs - qu'ils l'ont fait pour l'administration générale). Cela ne change rien à l'affaire : c'est "l'autorité chargée de l'administration" donc les trois gouvernements, conjointement -, qui "répondra" au plan international "de la paix, de l'ordre, de la bonne administration et de la défense du territoire" comme le dit l'article 4 de l'accord de tutelle qui ne voit dans l'arrangement conclu entre les trois pays qu'un moyen - précaire et modifiable librement - pour atteindre ces fins. Etant entendu d'ailleurs que, par contre, l'hypothèse imaginée par le professeur Crawford, selon laquelle les trois partenaires auraient confié l'administration au jour le jour à un quatrième Etat (CR 91/20, p, 71) n'est pas recevable : elle est exclue par une interprétation formelle, insérée à la demande de l'Inde dans le rapport sur le projet d'accord de tutelle, interprétation aux termes de laquelle il était entendu que les trois gouvernements participants devaient rester seuls concernés (cf. A/402, rev. 1, 21 octobre 1947, p. 2-3 et A/420, 27 octobre 1947, p. 2). Et ceci n'est pas sans importance : les Nations Unies veulent bien que les trois gouvernements s'organisent comme ils l'entendent - mais elles tiennent à n'avoir à faire qu'à eux, qu'à l'autorité administrante, qui seule importe aux yeux des Nations Unies.

J'ai dit, mardi dernier (CR 91/16, p. 66), que les deux partenaires de l'Australie au sein de l'autorité administrante avaient constamment, non seulement assumé, mais revendiqué expressément leur part de responsabilité dans la mise en oeuvre de la tutelle.

Mais supposons un instant que tel n'ait pas été le cas. Que le Royaume-Uni ou la Nouvelle-Zélande, ou les deux, aient déclaré devant le Conseil de tutelle, ou l'Assemblée générale,

n'avoir, dans cette affaire, aucune part de responsabilité. Est-il concevable que ces organes des Nations Unies se fussent inclinés ? Peut-on imaginer un instant qu'ils eussent accepté cette violation flagrante de l'accord de tutelle et de l'article 81 de la Charte ? Evidemment non : ils auraient vivement réagi pour faire respecter le droit - comme la Cour, dont c'est la mission, ne peut, pour sa part, manquer de réagir face à cette mise à l'écart du droit des Nations Unies à laquelle insidieusement mais clairement, Nauru lui demande de procéder.

Car il est très apparent, Monsieur le Président, que la fin de la tutelle ne modifie pas les données du problème. Le conseil de Nauru le voudrait bien qui, à la fin de son exposé, affirmait mardi que "there is no reason to think that after its termination [il parlait de la cessation de la tutelle] a requirement of joint and inseparable proceedings for liability should be imposed" (CR 91/20, p. 94-95). Certes, la tutelle a cessé - mais si l'Australie (ou les trois gouvernements) devai(en)t voir sa (ou leur) responsabilité engagée, ce ne pourrait être que pour un manquement aux obligations qui en auraient découlé. Certes, l'autorité administrante a disparu avec la tutelle - mais, comme Nauru le répète à l'envi, cette autorité administrante n'avait pas de personnalité juridique et il n'est ni plus ni moins compliqué aujourd'hui de rechercher la responsabilité des trois Etats que ce l'eût été avant 1968 - à un moment, je le redis, où il est tout à fait impensable que les organes de contrôle (ou la Cour, si elle avait été saisie) auraient pu imaginer que l'un des trois gouvernements aurait pu engager sa responsabilité indépendamment des autres.

8. Il n'en aurait pu aller autrement que dans un seul cas de figure : si l'Australie, en tant qu'administrateur représentant sur le terrain les deux autres gouvernements ne s'était pas, à leurs yeux - aux yeux de la Nouvelle-Zélande et du Royaume-Uni - acquitté convenablement de ses obligations de représentant et si la Nouvelle-Zélande ou le Royaume-Uni avaient porté l'affaire au plan international. Dans cette hypothèse, en effet, ces deux Etats - mais eux seuls - auraient été en droit de se plaindre, non pas du non-respect des obligations de tutelle en tant que telles, mais de la violation des obligations particulières que l'Australie assumait à leur égard.

Et M. Crawford n'a qu'à moitié raison sur ce point lorsqu'il affirme que l'Australie "may have acted on behalf of the other two States, but it could not have acted on behalf of itself" (CR 91/20,

p. 70; voir aussi p. 71). C'est oublier les intuitions fulgurantes de Georges Scelle et la notion de "dédoublement fonctionnel" - c'est-à-dire l'idée qu'un Etat peut agir au plan international non seulement pour lui-même, mais aussi au nom de (on behalf of) la communauté internationale. Ici l'Australie agissait à la fois en tant qu'Etat participant à l'autorité administrante et comme agent exécutant de cette autorité administrante. Dans le premier cas les responsabilités de l'Australie étaient "primaires" pour reprendre le vocabulaire de M. Crawford; elles étaient "dérivées" dans le second (voir par exemple CR 91/20, p. 85).

Dans toute la mesure où l'Australie a agi en tant que représentant de l'autorité administrante elle ne pouvait - et elle ne peut aujourd'hui, être poursuivie que par les membres de celle-ci; et, comme il y a peu de chance que l'Australie se poursuive elle-même, seuls la Nouvelle-Zélande et le Royaume-Uni peuvent agir. Mais pas Nauru. Dans la mesure au contraire où l'Australie est tenue pour responsable en tant qu'Etat participant à l'autorité administrante, sa responsabilité peut être mise en cause par n'importe quel membre de la communauté internationale (en admettant que les autres conditions nécessaires soient réunies), Nauru, évidemment incluse, mais dans ce cas l'Australie ne peut être poursuivie qu'avec ses deux partenaires.

9. Ceci est décisif, Monsieur le Président.

Ceci est suffisant.

Je ne veux, cependant, pas donner l'impression de vouloir esquiver le débat, même s'il est parfaitement inutile, dans lequel mon adroit contradicteur a voulu m'entraîner.

Et je vais donc dire un mot d'un troisième point qui concerne

3. La prétendue prédominance de l'Australie et ses conséquences supposées

10. La thèse australienne sur ce point se décompose à son tour en deux propositions

1) la prédominance de l'Australie, complaisamment présentée par M. Crawford, ne correspond nullement à la réalité, en tout cas dans le domaine faisant l'objet du différend soumis à la Cour (c'est la première proposition australienne); et

2) quand bien même prédominance il y aurait, elle n'aurait aucun impact sur le sort de l'exception

préliminaire qui nous retient (c'est la seconde proposition australienne).

11. Première proposition donc : "il n'y a pas de prédominance".

Je sais bien qu'après le tableau, très caravagesque, qu'a brossé mardi le conseil de Nauru, où l'omniprésence australienne contrastait fortement avec l'absence totale de ses deux partenaires, cette affirmation peut paraître relever d'un goût excessif pour la provocation - goût que l'on me prêterait tout à fait à tort...

Mais j'ai écouté attentivement M. Crawford, j'ai lu et relu le compte rendu de son intervention; et je n'y ai pas trouvé la démonstration contraire. Certes, mon savant collègue insiste longuement sur le fait que l'Australie est sur le terrain et qu'elle administre "au jour le jour" (même si l'expression ne lui convient pas, c'est pourtant bien ce qu'elle fait) et sur cela, nous sommes d'accord; je l'avais souligné aussi, la semaine dernière (cf. CR 91/16, p. 56). Mais il oublie de rappeler non seulement que cette prédominance n'est que le résultat d'une délégation de l'autorité administrante - je n'y reviens pas - mais aussi et surtout qu'elle existe, peut-être, dans tous les domaines, sauf un : celui qui nous intéresse; celui de l'exploitation des phosphates.

Si, comme on nous l'affirme (cf. CR 91/18, p. 60), le fondement de l'obligation de remise en état trouve sa source dans les usages en vigueur dans l'industrie extractive et minière, il est clair que c'est d'abord aux BPC qu'il incombait de s'acquitter de cette prétendue obligation. Maintenant admettons qu'ils ne se soient pas acquitté de cette obligation; c'est très évidemment alors aux trois gouvernements qu'il appartient de se substituer aux BPC défaillants. Peu importe la prétendue suprématie que l'Australie pouvait exercer par ailleurs : cette prétendue prédominance cessait de toute façon là où commençait à intervenir les BPC que les trois gouvernements contrôlaient ensemble, également, sans prédominance de l'un d'entre eux. Au fond, la prédominance, si prédominance il y a, cesse au seuil de notre affaire.

Le conseil de Nauru sait bien d'ailleurs que ceci menace d'écroulement sa belle construction et il tente d'en affermir les fondations en affirmant que ce n'est pas contre les BPC que Nauru en a, mais contre l'Australie qui ne les aurait pas empêchés d'agir (cf. CR 91/20, p. 83). Mais c'est, ici encore, oublier une chose à vrai dire tout à fait fondamentale : l'Australie, en tout cas l'Australie

seule, ne pouvait pas empêcher les BPC d'agir. Cela lui était interdit par l'article 13 de l'accord de 1919 dont - et c'est très révélateur - M. Crawford n'a pas soufflé un mot alors que je m'y étais moi-même arrêté longuement dans ma première plaidoirie (voir CR 91/16, p. 59 et CR 91/17, p. 9). Je peux donc me borner à rappeler qu'en vertu de cette disposition tout ce qui concerne l'exploitation des phosphates est réservé aux BPC et que, dès lors, les trois gouvernements ne peuvent intervenir individuellement dans ce domaine.

On peut même se demander si cet article 13 n'est pas au centre d'un véritable marché de dupe pour l'Australie : la Nouvelle-Zélande et le Royaume-Uni se déchargent sur elle du soin de l'administration au quotidien; mais ils veillent [ils ce sont la Nouvelle-Zélande et le Royaume-Uni] jalousement à ne laisser à ce pays aucune prédominance d'aucune sorte pour ce qui touche aux phosphates, la question qui, par excellence, les intéresse ... celle qui, par excellence aussi, nous intéresse ici...

Et ce sont en effet les BPC - les BPC, seuls, - qui exploitent (qui "dévastent", dirait Nauru...) - Les BPC qui, comme l'admet M. MacDonald lui-même dans un passage cité pourtant à la fois par M. Connell (CR 91/19, p. 18) et par M. Crawford (CR 91/20, p. 76), ont la haute main sur tout ce qui concerne le phosphate (op. cit., p. 21), ce qu'ont constaté aussi toutes les missions de visite des Nations Unies - les BPC, enfin, qui sont l'émanation des trois gouvernements.

C'est pourquoi d'ailleurs la question de la remise en état a toujours été considérée comme relevant de la commune responsabilité de ces trois gouvernements. L'offre de réinstallation a été faite en leur nom commun (voir exceptions préliminaires, p. 30). Le financement de cette entreprise devait être assumé conjointement par eux (voir *ibid.*, p. 31). Même chose s'agissant de la remise en état à proprement parler. En 1965, le refus d'y procéder a été exprimé au nom des gouvernements participants ("on behalf of the Partner Governments" - *ibid.*, p. 39), position qui fut maintenue par la délégation conjointe en 1966 (*ibid.*, p. 42) et, à nouveau, en 1967 à la suite du rapport de la commission Davey (*ibid.*, p. 45).

Sur ce problème, Monsieur le Président, le seul qui importe dans le cadre de notre affaire, les faits parlent d'eux-mêmes : la responsabilité des trois Etats est conjointe et assumée conjointement.

Et l'on voit mal au nom de quelle logique l'Australie serait tenue à réparation.

Car quand bien même, il y aurait, comme l'affirme Nauru, "prédominance" australienne - ce qui, je le répète est inexact en tout cas dans notre domaine -, prédominance de toute façon ne signifie pas "exclusivité". Et personne, pas même M. Crawford, ne prétend le contraire. Je sais bien qu'il décrit, avec humour, l'Australie en empereur romain. Mais l'image est excessive, Hughes ou Garran, Pope ou McPherson, ces hommes qui ont marqué l'histoire de Nauru du côté australien, ne sont pas des "Auguste" des temps modernes - ou alors, Auguste peut-être, mais à l'époque où il n'était qu'Octave et où il partageait le pouvoir avec Antoine et Lepide ! Des Auguste du temps du triumvirat !...

12. En termes moins imagés, et c'est ma seconde proposition, l'improbable prédominance australienne n'a pas, et ne peut pas avoir d'effets juridiques à ce stade.

Elle pourrait en avoir, si les trois Etats étaient présents dans cette salle et si la Cour avait constaté leur responsabilité conjointe, et ceci au moment où se poserait le problème de la réparation, de l'éventuelle indemnité à laquelle prétend Nauru. Mais pour cela, Monsieur le Président, il faudrait d'abord que la Cour ait pris position sur le principe même de la responsabilité des trois Etats; or, à cette fin, que l'Australie soit responsable à 20 pour cent, 33 pour cent, 50 pour cent, ou 80 pour cent est sans aucune pertinence; quand bien même ont est responsable "à 1 pour cent", le fait demeure : on est responsable. Participant à l'autorité administrante et aux BPC conjointement avec l'Australie, la Nouvelle-Zélande et le Royaume-Uni sont responsables au même titre qu'elle - ce n'est pas un problème quantitatif - et "indissociablement" - si responsabilité il y a, bien sûr. Quelle que soit donc la clé de répartition qui serait retenue pour la réparation éventuellement due à Nauru, la Cour, si elle se prononçait au fond ne pourrait éviter de se prononcer sur les "intérêts juridiques" ("legal interests") de ces deux Etats. Et quoi qu'en ait dit le conseil de Nauru nous sommes bien dans le cadre de la jurisprudence de l'*Or monétaire* en ce sens que ces Etats seraient jugés sans avoir consenti à la juridiction de la Cour.

13. L'heure n'est plus à savantes discussions sur la portée de la règle que, par commodité, l'on peut appeler des "parties indispensables" dès lors qu'on assimile cette règle au principe du

consentement à la juridiction internationale. Il est cependant nécessaire de revenir un très bref instant sur ce qui paraît erroné dans la présentation qu'en a faite M. Crawford.

J'ai relevé trois aspects :

i) Pour important qu'il soit, l'arrêt de 1954 ne constitue pas l'unique précédent à l'occasion duquel la Cour [a fait application du principe,] a fait une application positive du principe (voir CR 91/20, p. 68); il constitue en effet la *ratio decidendi* de l'avis consultatif rendu en 1923 par la Cour permanente dans l'affaire du *Statut de la Carélie orientale*, (*C.P.J.I. série B n° 5*, p. 27-28).

ii) La simultanéité. J'avais indiqué, lors du premier tour de plaidoirie qu'à première vue, un prononcé judiciaire obligerait la Cour à se prononcer simultanément sur les responsabilité des trois Etats alors que, dans l'affaire de l'Or monétaire, la détermination de la responsabilité de l'Albanie eût été un préalable à l'examen du différend (CR 91 17, p. 44). Le conseil de Nauru s'est "emparé" de cette constation pour affirmer que "as decisions such as the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* show, simultaneity, is not enough" (CR 91/20, p. 69). En premier lieu, telle n'est pas du tout la portée de l'arrêt de 1984, qui est fondé, vous le savez mieux que moi, sur une toute autre constatation : l'existence d'une pluralité de différends. En deuxième lieu, je me permets de rappeler à mon collègue que j'avais été plus loin dans le raisonnement qu'il me prête et que j'avais montré que la différence (simultanéité contre préalable) n'était qu'apparente (CR 91/17, p. 45). Enfin et surtout, je vois mal ce que cela change : le problème n'est pas de savoir si la Cour devrait se prononcer d'abord ou en même temps que sur ceux de Nauru et de l'Australie sur les intérêts juridiques de la Nouvelle-Zélande et du Royaume-Uni, mais si elle peut éviter de le faire à un moment quelconque. Or, sous quelque angle que l'on prenne le problème, la Cour ne peut pas éviter cela.

iii) Et enfin, Nauru, qui affectionne particulièrement l'arrêt de la Chambre de la Cour du 13 septembre 1990 dans l'affaire du *Différend frontalier terrestre, insulaire et maritime*

(El Salvador/Honduras), l'interprète de manière fort discutable (voir CR 91/20, p. 67-68 et 94). M. Crawford a certes cité des extraits pertinents de cette décision (*ibid*.) mais en omettant un passage qui leur donne tout leur sens. J'ajoute donc ce passage :

"Si le Nicaragua est autorisé à intervenir, l'arrêt que rendra la Chambre ne déclarera pas, pour ce qui est des rapports entre cet Etat et les deux autres, que le Nicaragua possède ou ne possède pas ... de droits découlant du *condominium*..." (*C.I.J. Recueil 1990*, p. 122.)

C'est très important. Il n'est pas besoin d'être grand clerc pour constater que la situation est toute différente dans notre affaire : si la Cour devait accueillir la requête de Nauru, elle déclarerait "pour ce qui est des rapports entre cet Etat et les trois autres" - la Nouvelle-Zélande et le Royaume-Uni inclus - que ces deux derniers Etats ont engagé (ou n'ont pas engagé) leur responsabilité à son égard du fait qu'en tant que membres de l'autorité administrante ils auraient, ou non, violé les obligations découlant pour eux, au même titre que pour l'Australie, de la tutelle.

14. D'ailleurs, Monsieur le Président, Nauru sait très bien que l'Australie n'est pas le responsable unique des préjudices qu'elle invoque.

J'ai montré dans mon précédent exposé que la requête et le mémoire de Nauru faisaient, en réalité, des trois gouvernements regroupés au sein de l'autorité administrante, les véritables destinataires conjoints de ses demandes (voir CR 91/17, p. 21-26). Son conseil ne m'a pas démenti sur ce point, sinon pour affirmer que la Cour doit prendre les conclusions de l'Etat demandeur "au premier degré" sans se préoccuper du but réellement poursuivi (CR 91/20, p. 93-94), ce qui est à contre-courant de la jurisprudence tout à fait claire de la Cour.

Mais surtout, il est intéressant de voir que tous les conseils de Nauru, et l'agent lui-même, ont, avec une belle unanimité, confirmé ce que les écritures de ce pays montraient déjà de manière éclatante.

Je pense, par exemple

- à la présentation de M. DeRoburt qui a parlé abondamment des positions

  prises par l'"autorité administrante" ou les "trois gouvernements" lors des négociations auxquelles il a pris part, et qui indiquait par exemple : "Nauru's case is that the rehabilitation

of lands mined-out before 1 July 1967 is the responsability of the former Administering Authority" (CR 91/18, p. 51);

- à celle du professeur Connell qui définit les BPC comme l'"alter ego" - c'est son expression -, des trois gouvernements (CR 91/19, p. 43) et qui, citant l'annexe 5 du volume 3 du mémoire de Nauru, a insisté sur le fait que "the Nauruan delegation has argued from the beginning that the responsibility for restoring the land already mined ... rests with the Partner Governments" (CR 91/19, p. 35) ou
- à celle du professeur Crawford lui-même, que le thème dont il avait

la charge devait cependant rendre attentif à éviter ce genre de "lapsus" - qui sont autant d'aveux - et qui a pourtant visé, par exemple, "the Australian involvement as partner in ... the BPC's operations in Nauru" (CR 91/20, p. 84), etc.

Je pourrais multiplier les exemples et les citations mais je ne veux pas abuser de la patience de la Cour. Je vous prie seulement, Monsieur le Président, de me permettre d'ajouter ceci : au cours des deux premiers jours de plaidoiries (mon ardeur à établir des statistiques s'est lassée au troisième jour...), les coagents et conseils de Nauru ont évoqué, directement ou par citations interposées :

- 12 fois les "trois gouvernements";
- 51 fois les "gouvernements participants" ("Partner Governments");
- 28 fois l'autorité administrante; et
- 36 fois les BPC,

soit un total de 127 fois pour l'ensemble de ces quatre expressions. Ils ont beaucoup moins parlé de l'Australie seule ! Peut-on imaginer un aveu plus éclatant du véritable objet de la requête ?

On ne peut éviter, enfin, d'évoquer - et c'est le quatrième point que j'avais énoncé, le dernier -

4. L'incidence que peut avoir en l'espèce le droit de la responsabilité internationale

15. Car c'est bien d'un problème de responsabilité qu'il s'agit. Toutefois, je peux être bref et je le serai, car je n'ai pas le sentiment que M. Crawford ait témoigné, au nom de Nauru, d'une grande conviction sur ce point.

Le problème, Monsieur le Président, est le suivant : peut-on trouver, dans le droit de la responsabilité internationale des Etats, des éléments permettant de dissocier, aux fins d'un prononcé judiciaire, les responsabilités d'Etats qui, par leur action conjointe et la violation identique d'une obligation commune, auraient concouru à l'existence d'un dommage unique ? La réponse, très fermement, est négative, que l'on se place sur le terrain de la jurisprudence internationale, sur celui de la doctrine, ou sur celui des principes généraux tirés des droits nationaux.

16. En ce qui concerne la "recherche de jurisprudence", il faut bien dire que le "match est nul" entre les deux Parties. Du côté australien, nous avons toujours admis qu'il n'existait pas de précédents entièrement convaincants permettant d'établir que, dans une hypothèse comme la nôtre, la responsabilité doit être considérée comme conjointe (si ce n'est quelques décisions internes isolées qui sont très nettes en ce sens). Et si l'Australie a mentionné l'affaire de la faillite du Conseil international de l'étain (cf. exceptions préliminaires, p. 129 et CR 91/17, p. 34), c'est moins en tant que précédent - car il est vrai que les circonstances étaient assez différentes (cf. CR 91/20, p. 62-63) - que parce que la Chambre des Lords, par la plume de Lord Templeman, a dans cet arrêt important, bien montré qu'il serait injuste qu'un coresponsable soit condamné à réparation pour l'ensemble d'un dommage s'il ne peut, ensuite, se retourner contre les autres auteurs de celui-ci, ce qui serait le cas en l'espèce.

Mais il faut bien voir que la jurisprudence invoquée en sens contraire par Nauru est moins éclairante. Nauru se borne à citer quatre arrêts rendus par la Cour dont, avec la meilleure volonté du monde, je n'aperçois pas la pertinence. Par les deux premiers, ceux relatifs aux affaires du *Personnel diplomatique et consulaire des Etats-Unis à Téhéran, et des Actions armées frontalières et transfrontalières (Nicaragua c. Honduras)* (cf. CR 91/20, p. 94), la Cour a rappelé qu'elle pouvait connaître de certains aspects - juridiques - d'un différend sans en connaître d'autres - politiques (cf. *C.I.J. Recueil 1980*, p. 19 et *C.I.J. Recueil 1988*, p. 92). Quant aux deux autres, rendus l'un et l'autre dans l'affaire du *Détroit de Corfou* (CR 91/20, p. 96) [tous les deux,] ils ont un rapport extraordinairement lointain avec notre affaire puisque les bases de la responsabilité de l'Albanie d'une part et de celle, fort éventuelle, de la Yougoslavie, qui n'avait nullement été constatée

par la Cour, qui n'avait même pas été invoquée devant elle, de l'autre, [que les bases des deux responsabilités] eussent, de toute manière, été entièrement différentes. Si l'on préfère présenter ceci dans un langage plus familier aux juristes de common law, terrain sur lequel je m'aventure rarement, les "causes of action" étaient tout à fait distinctes.

17. La doctrine n'est guère plus prolifique.

En particulier, contrairement à ce qu'a affirmé mardi le conseil de Nauru, la Commission du droit international n'a jamais expressément pris position sur le problème en examen - tout en se montrant fort réticente, je l'ai déjà dit, vis-à-vis de l'idée même de solidarité (voir CR 91/20, p. 86-87).

En revanche le commentaire qu'il a cité de l'article 27 de la première partie du projet de la CDI sur la responsabilité des Etats non seulement ne sert pas la thèse qu'il soutient, mais il la contredit. Il est, en effet, bien précisé dans le passage qu'il a retenu (ACDI, 1978, vol. II, deuxième partie, p. 112), que "le comportement de l'organe commun [peut-être, ici, l'autorité administrante - mais est-ce un "organe" ?] ne peut qu'être considéré comme un fait de chacun des Etats dont il est l'organe commun", ce qui montre clairement que si l'Australie est tenue pour responsable d'un quelconque fait internationalement illicite, les deux autres gouvernements participants le seront aussi, par voie d'inéluctable conséquence (et non par simple "implication", comme M. Crawford veut me le faire dire). Mais, pour le reste, la position de la Commission ne fournit aucune piste sur la question de savoir à quel type de réparation, solidaire ou conjointe, sont tenus les Etats se trouvant dans cette situation.

18. J'en aurai presque terminé sur ce point, Monsieur le Président, lorsque j'aurai relevé que, si M. Crawford a eu la bonté de se montrer d'accord avec moi sur le fait que la transposition de règles des droits internes en la matière est aventureuse, cette non-transposabilité ne tient pas seulement, contrairement à ce qu'il a dit, au fait que ces systèmes juridiques sont le résultat de l'histoire, et des institutions juridiques et économiques propres à chaque Etat, ce qui, d'ailleurs est certain (voir CR 91/20, p. 87-88). Elle tient aussi [cette non-transposabilité] - elle tient surtout, à la structure propre de la société internationale.

Et c'est cette structure, ce génie propre au droit international, qui expliquent à la fois pourquoi un Etat ne peut voir ses "intérêts juridiques" déterminés contre son gré et pourquoi une condamnation à la réparation solidaire d'un dommage qu'il n'a pas commis seul mais conjointement avec d'autres n'est guère envisageable : dans les deux cas, c'est sa souveraineté qui serait menacée. Dans notre affaire, la souveraineté de l'Australie bien sûr - mais aussi, et peut-être plus encore, celle du Royaume-Uni et de la Nouvelle-Zélande.

19. La non-transposabilité des règles de droit interne a une autre incidence concrète dans notre affaire. Sur un point beaucoup plus spécifique.

Le conseil de Nauru se demande en effet pourquoi, alors que l'article 3 de l'accord de 1987 liquidant les avoirs d'outre-mer des BPC envisage la possibilité de poursuites contre un seul commissaire, il ne serait pas également possible de rechercher la responsabilité d'un seul des trois gouvernements devant cette Cour (CR 91/20, p. 95). La raison de cette impossibilité est, précisément, que les poursuites envisagées par l'accord de 1987 se situeraient au plan des droits internes et que les risques d'une condamnation *in solidum*, sans être certains, ne sont pas fictifs. Ceci non plus n'est pas transposable au plan international - et pour les raisons que j'ai dites.

20. On peut du reste prolonger l'interrogation et se demander aussi, comme le fait M. Crawford, pourquoi, alors que les trois gouvernements ont pu se partager, par l'accord de 1987, les avoirs des BPC, il ne pourrait pas en aller de même, devant la Cour en ce qui concerne la détermination de la réparation qui serait due par l'Australie seule (CR 91/20, p. 84).

Il y a, à cela, au moins trois raisons.

En premier lieu Nauru elle-même n'a pas demandé à la Cour de se borner à cela. L'Etat demandeur exige la réparation par l'Australie de l'ensemble du préjudice qu'il prétend avoir subi (transformant d'ailleurs ainsi quelque peu une responsabilité pour fait internationalement illicite en une sorte de responsabilité "objective"). J'ai subi un dommage, réparez !

En deuxième lieu, une limitation en ce sens des demandes de Nauru ne changerait, de toute manière, rien à l'affaire : la Cour devrait, en tout état de cause, apprécier le "dommage" global et en "déduire" la part incombant à la Nouvelle-Zélande et au Royaume-Uni - ce qui est une façon comme

une autre de déterminer leurs responsabilités.

Encore ne pourrait-elle procéder ainsi qu'au stade de la réparation qui se situe, je l'ai dit mercredi dernier (CR 91/17, p. 32), "en aval" de la détermination de la responsabilité stricto sensu. Au contraire, les parties à l'accord de 1987 n'avaient nullement à déterminer de responsabilités; il leur suffisait de procéder, comme elles l'entendaient, pour les raisons qu'il leur incombait d'apprécier, à la répartition des avoirs des BPC, sans aucune idée de réparation, et ceci fait toute la différence.

21. Tout ceci, Monsieur le Président, revient-il à dire que Nauru n'a aucun moyen d'agir ? Que si la Cour accueille les exceptions préliminaires australiennes, en tout cas celle que je défends à cette barre, elle serait victime d'une sorte de déni de justice comme, très visiblement, son conseil affecte de le croire lorsqu'il pose - sans d'ailleurs y répondre explicitement - la question suivante : "Should an applicant State, which claims to have been wronged, be denied its day in Court because the Court only has jurisdiction over one or some of the wrongdoers, and other potential wrongdoers have not consented, or are not parties?" (CR 91/20, p. 64-25, voir aussi CR 91/20, p. 71).

Certes, il résultera de votre arrêt que Nauru n'obtiendra pas de prononcé judiciaire au fond. Mais, j'ai déjà eu l'occasion de le dire, ce n'est pas une situation extraordinaire en droit international (CR 91/17, p. 21) et Nauru, en admettant que justice ne lui ait pas été faite depuis bien longtemps déjà, contrairement à ce qu'ont montré mes éminents collègues, MM. Bowett et Jiménez de Aréchaga, ne se trouverait nullement privée de s'adresser aux trois gouvernements comme, du reste, elle continue de s'y employer, ainsi qu'en témoignent, par exemples, ses deux notes du 20 mai 1989 - au sujet desquelles ses conseils ont conservé, jusqu'à présent, un silence fort éloquent ... silence qu'une question venue du Siège arrivera peut-être enfin à rompre !

En tout cas, Monsieur le Président, l'Australie ne saurait admettre que, comme le laisse entendre M. Crawford, ce qu'il appelle le "trusteeship principle" ait pour corollaire le droit, pour un ancien territoire sous tutelle qui a accédé à l'indépendance, de saisir la Cour au mépris des principes fondamentaux régissant sa compétence de (voir CR 91/20, p. 71 ou 77). Qu'il résulte de la Charte que la tutelle a pour raison d'être la protection et le bien-être des peuples qui en ont "bénéficié", l'Australie, je l'ai dit tout à l'heure (supra n° 2), en est mille fois d'accord.

Mais cet objectif ne saurait constituer une base valable de compétence juridictionnelle - surtout lorsque, comme c'est le cas dans la présente affaire, il en résulterait une inégalité, que les Nations Unies n'ont pas voulue, entre les Etats qui formaient l'autorité administrante et une atteinte grave à un principe, qui demeure fondamental dans la société internationale telle qu'elle est, le principe du consentement à la juridiction.

Ceci conclut ma plaidoirie que je vous remercie bien vivement, Monsieur le Président, Messieurs les Juges, d'avoir écoutée avec patience.

Et si vous le voulez bien, Monsieur le Président, M. Griffith, agent de l'Australie, souhaiterait formuler quelques très brèves observations sur la question des avoirs d'outre-mer des BPC, avant de présenter les conclusions finales de l'Australie.

The PRESIDENT: Thank you very much, Professor Pellet. Mr. Griffith.

Mr. GRIFFITH: Mr. President, Members of the Court. The one remaining issue, as Professor Pellet just said, before we make Australia's final submissions, is the status of Nauru's claims to the overseas assets of the BPC.

Nauru says that this claim, either relates to the rehabilitation claim; or that it is a claim that is connected with and flows naturally from the various claims based on breach of trusteeship and other causes of action set out in the Nauruan Application (CR 91/20, p. 52).

Mr. President, at this point we seek to turn to Professor Brownlie's words of criticism often directed to us and we submit to the Court that this is a proposition unsupported by logic or commonsense.

Clearly a claim to these assets cannot be said to flow from, or be related to, a separate claim based on the Trusteeship Agreement for rehabilitation of mined-out lands, or compensation for damage from the mining operation. The two claims have no common thread. Nauru relies heavily on the fact that some of the assets of BPC may have derived from past mining operations on Nauru. But that is quite irrelevant. It cannot show that the claim arises from, or flows from, or is consequential on alleged breaches of Trusteeship obligations arising from the failure to rehabilitate

and this is what the principal Nauruan claim is based on. If the connection is so obvious, why was the claim to the assets not made in the Nauruan Application? No explanation has been given to the Court.

As I mentioned earlier, Nauru asserts that the claim to the assets only became actionable on the termination of BPC in 1987 and not before (CR 91/18, p. 57). This, we say, supports the Australian view that the claim really is a new claim, which is not connected with the alleged breaches of law set out in the Application.

Nauru has failed to articulate in any clear way the legal basis for its overseas assets claim, regardless of whether the claim be regarded as a new claim or not. Nauru merely says that it has a separate claim in relation to the overseas assets that was implicit in or consequential on breaches of the Trusteeship Agreement. But assertion alone does not establish this. Nauru provides no details that would establish its claim.

Nauru also contends that the diplomatic correspondence establishes a legal dispute because of the "firm tone" of the relevant exchanges and the fact that they disclosed an "unresolved issue" (CR 91/20, pp. 54-55). But, for the reasons we have already given to the Court, one needs more than this. One needs an opposition of views on a matter falling within one of the four categories within Article 36 (2) of the Court's Statute. In this regard, Australia is not insisting, as Nauru has suggested, on "formal claims in phraseology which anticipates the terms of an Application" (CR 91/20, p. 55). What we are looking for is evidence of an opposition of views in the sense required by the relevant case-law, to which our earlier submissions referred.

As to the requirement of a legal interest, Nauru still fails to identify those legally protected material interests which, it says, it possesses in relation to the overseas assets. It asserts that the BPC conducted its operations under the terms of the 1919 Agreement between the Partner Governments. That Agreement regulated inter se the way in which the Partner Governments met their Mandate and Trusteeship obligations. Therefore, says Nauru, as we understand it, this establishes a sufficient legal interest in Nauru in relation to overseas assets. But, as I have indicated to the Court, Nauru has not in fact shown that its claim to the assets of the BPC derives from any

breach, or alleged breach, of the Trusteeship obligation. It simply asserts a legal interest in the assets on the basis that they derived in part, although in some as yet unascertained part, from the operations on Nauru. This does not reveal a legal interest sufficient for Nauru to bring a claim, even if all the other matters in relation to the claim to which we have referred were put on one side.

Mr. President, I need do no more than reaffirm the other elements of Australia's submissions previously made in relation to this claim by Mr. Burmester, except that, in relation to the issue of procedural fairness, I say a few brief words further.

The question of procedural fairness cannot be answered by simply asking what is convenient or practical. The *Nicaragua* case involved the inclusion of an additional ground of jurisdiction in the Memorial. Here we have a case of an additional *claim*, having an entirely different subject-matter from that raised by the original claims.

The Court does not have a discretion in dealing with such an additional claim. In addition to the provisions of Article 38 of the Rules of the Court, to which we have referred, I draw attention to Article 40 of the Statute of the Court. In mandatory language it says that an application *shall* indicate the subject of the dispute. This Nauru failed to do.

The fact that interested third States may have received notice of the particular Nauruan claim through diplomatic correspondence is beside the point. The matter has to be determined on the basis of the rules applicable in all cases. Nor, in any event, is notification of a claim the same as notification that judicial proceedings have been instituted in relation to that claim. The right of third States to intervene, to take other appropriate action, is not adequately protected by the fact that Nauru happens to have raised the issue in earlier diplomatic exchanges with some other States.

Mr. President, that concludes in a timely manner Australia's arguments before the Court. I will now read, in accordance with Article 60, paragraph 2, of the Rules, Australia's final submission.

FINAL SUBMISSION OF AUSTRALIA

On the basis of the facts and law set out in its Preliminary Objections and its oral pleadings, and for all or any of the grounds and reasons set out therein, the Government of Australia requests

the Court to adjudge and declare that the claims by Nauru against Australia set out in their Application and Memorial are inadmissible and that the Court lacks jurisdiction to hear the claims.

If the Court pleases.

The PRESIDENT: Thank you very much Mr. Griffith. So the Court will now adjourn and meet again at 10 o'clock tomorrow morning to hear the Rejoinder of Nauru. Thank you.

The Court rose at 12.55 p.m.