CR 91/22

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YEAR 1991

Public sitting

held on Friday 22 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 vendredi 22 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:

Dr. Gavan Griffith, Q.C., Solicitor-General of Australia,

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;

S. Exc. M. Hammer DeRoburt, G.C.M.G., O.B.E., M.P., chef principal et président du conseil de gouvernement local de Nauru; ancien Président et responsable de la présidence du conseil des ministres, ancien ministre des affaires extérieures et intérieures et de l'industrie des phosphates de la République de Nauru; doyen des hommes d'Etat nauruans; expert éminent des questions relatives à Nauru,

M. Ian Brownlie, membre du barreau d'Angleterre; professeur de droit international public à l'Université d'Oxford, titulaire de la chaire Chichele; *Fellow* de l'All Souls College, Oxford,

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M. Gavan Griffith, Q.C., Solicitor-General d'Australie,

comme agent et conseil;

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comme coagent;

M. Henry Burmester, conseiller principal en droit international au service de l'Attorney-General d'Australie,
comme coagent et conseil;

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

M. Derek W. Bowett, Q.C., professeur et ancien titulaire de la

chaire Whewell de droit international à l'Université de Cambridge,

Professor Alain Pellet, Professor of Law at the University of Paris X-Nanterre and at the Institute of Political Studies, Paris,

Dr. Susan Kenny, of the Australian Bar,

as Counsel;

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

Mr. Paul Porteous, First Secretary, Australian Embassy, The Hague,

as Advisers.

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

Mme Susan Kenny, du barreau d'Australie,

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

comme conseillers.

The PRESIDENT: Please be seated. Professor Mani.

Mr. MANI: Thank you Mr. President.

Mr. President and honourable Members of the Court.

First of all, I wish to submit that the written pleadings and oral presentations so far made by both the Parties before the Court points to the close interrelationship between the objections raised by Australia to the jurisdiction of the Court and the admissibility of Nauru's claims. They also highlight a clear disagreement between the Parties over the historical setting and implications of various material facts of the case, including facts which Australia would consider relevant to its preliminary objections.

Australia's treatment of the facts of the case, even facts crucial to the determination of the preliminary objections, has been eclectic and impressionistic, intended to create confusion in their proper understanding. This single factor necessitated an adequately elaborate treatment of the facts as part of Nauru's presentations, as reflected in its pleadings so far, both written and oral.

The oral presentations made by the Australian delegation have not raised any new substantial argument to counter the points of law and fact raised in the Nauruan pleadings.

The Australian Agent sets out two or three matters so that, as he states, "Court is not left with an incorrect impression of fault" (see CR 91/21, 21 November 1991, p. 8). I am not sure, Mr. President, that he has so succeeded. But he has most assuredly succeeded in further clouding issues carefully put before the Court on Tuesday by Nauru. Let me briefly refer to two of these, namely (a) resettlement and (b) the Davey Committee Report.

(a) Resettlement

In contradistinction to the Australian Agent (CR 91/21, 21 November 1991, p. 8), the rejection of resettlement cannot be altogether sheeted home to one side or the other - there was simply not a meeting of minds on the question of national identity.

Nauru has already stated that the Nauruan people were quite willing to consider proposals of

resettlement, though showing a natural preference to stay on their own island, if only it could be rehabilitated (CR 91/19, 18 November 1991, p. 19).

It is wrong to assert that sovereignty, as such, was the sticking point of Curtis Island. It was a measure of autonomy that was being sought by the Nauruans and reference on this point is made to the quite full account by the Head Chief in his statement in the Nauruan Memorial (Nauru Memorial, Vol. I, Appendix 1, paras. 18-23; see also United Nations Visiting Mission to the Trust Territories of the Pacific, 1956, *Report on Nauru, Trusteeship Council Official Records, 24th Session*, Supplement No. 4, para. 51, see Nauru Memorial, Vol. 4, Ann. 9, p. 54; id., para. 52, pp. 54; United Nations Visiting Mission to the Trust Territory of Nauru and New Guinea, 1962, *Report on Nauru, Trusteeship Council Official Records, 29th Session,* Supplement No. 2, Nauru Memorial, Vol. 4, Ann. 11, p. 125).

In a sense, the Australian Agent's position regarding the breakdown of the resettlement negotiations reflected a consistent pattern on the part of Australia to attempt to reinterpret history in its favour, particularly on this point. I respectfully draw the attention of the Court to Annex I to the 1965 Report of the United Nations Visiting Mission which clearly presents the Nauruan version of what happened at these negotiations (see United Nations Visiting Mission to the Trust Territories of Nauru and New Guinea, 1965, *Report on Nauru, Trusteeship Council Official Records, 32nd Session,* Supplement No. 2, p. 12, Nauru Memorial, Vol. 4, Ann. 12, p. 150). The question, therefore, was not one of Nauruan demand for Australia to concede its sovereignty over the Curtis Island, but one of the need to preserve the national and social identity of a people seeking self-government under the principle of self-determination. The issue of sovereignty was not the point, any more than it had been with the resettlement of the Banabans on the Rabi island.

(b) Davey Committee Report

The Australian Agent is right in stating that with the failure of the resettlement negotiations, the issue relating to the rehabilitation came to the fore. He then opened the door, a little more than Australia previously had done, to reveal some of the positive aspects of the Davey Committee Report

as to rehabilitation, which were referred to in some detail by Nauru on 18 November (CR 91/19, 18 November 1992, pp. 27-28).

It is not that the Report was limited in its attitude to an agricultural use that was important, but rather that it opened up the real possibilities of land uses that were able to be achieved. These were, in fact, costed out by the Davey Committee. For example, the construction of an air-strip with water storage in conjunction was a major step never previously placed before the Nauruans. Whilst critical that the Davey Committee did not provide full rehabilitation of all areas, nevertheless Nauruans saw this as a welcome development, showing practicality of rehabilitation, not as the Australian Agent has suggested "little prospect for the feasibility of any rehabilitation project". As earlier stated, the later Weeramantry Report not only gives credibility to the Davey Committee's views, but advances them further (CR 91/19, 18 November 1991, p. 42). Australia is simply hiding its head in the sand to suggest that rehabilitation of the island is "impractical". The Davey Committee, and later the Weeramantry Report, have demolished that notion for ever.

In this context, Professor Bowett mentions that Professor Connell was right to describe rehabilitation in terms of a disagreement over practicalities and not as a legal dispute. Of course, the Court would understand that when describing the Davey Committee's findings, Nauru was concerned to bring to the mind of the Court the fact that this Committee had, in fact, opted for a strong measure of rehabilitation. On this it was showing "practicality". After all, what we were meeting there was the argument that Nauru's case had no credibility, based on a premise of rehabilitation responsibility that could not be fulfilled. This has been put to rest.

Mr. President, Professor Bowett also stated that the Davey Committee never talked of legal responsibility. That was clearly not one of its terms of reference and, in fact, the Australian statement immediately prior to its appointment had massaged that fact by saying that "this in no way committed them to meeting any costs for rehabilitating the island". (CR 91/19, 18 November 1991, p. 30.) In other words, Australia was busy denying its legal responsibility. However, Professor Bowett has been good enough to draw attention to the passage that Professor Connell read out from the Davey Committee Report regarding extractive industries and the special circumstances

operating for Nauru (CR 19/21, 21 November 1991, p. 33). Any fair reading of that would, I suggest, draw the immediate inference that the Davey Committee supported the Nauruan position even though its terms of reference precluded the Committee from so saying expressly.

Rehabilitation and Independence Talks

The Australian Agent has correctly identified the three issues on the agenda of the independence negotiations, namely (1) political independence, (2) control and future operations of the phosphate industry; and (3) rehabilitation of mined-out lands. In fact the Trusteeship Council itself had made this classification of issues. However, when it came to analysis, one finds that item (3), that is, rehabilitation, disappears into the folds of an astounding perversion of history which ends up in an unexpected fusion of the three issues into one issue, or perhaps two issues. The issue of rehabilitation has always stayed as a dominant and distinct issue, as explained in detail by my colleague Professor Barry Connell on 18 November (CR 91/19, 18 November 1991, pp. 28 ff.). I also refer here to Nauru Written Statement, Part I, Section 3 (pp. 8 ff.) and Nauru Memorial, Part I, Chapter 4, (pp. 69 ff.).

It is quite correct to say, as the Australian Agent stated, that during the Nauru Talks there were instances of give and take. But according to the history of the Talks, so well documented by the Australian officials at Canberra, pressure was clearly exerted on the Nauru delegation to abandon, whether formally (as part of the Phosphate Industry Agreement) or informally, their rehabilitation claim in exchange for ownership of the phosphate industry and independence. The Nauruan delegation most categorically rejected the Australian suggestion of abandonment of the rehabilitation claim. The Nauru pleadings, both written and oral, contain a number of references to the records of the Nauru Talks on this point as well. I would only recall the oral statement made by Mr. Hammer DeRoburt, the Head Chief of Nauru on 15 November (CR 91/18, pp. 14 and 15); my earlier oral presentation on the same day (id., pp. 40-44) and the oral presentation of Professor Barry Connell on 18 November (CR 91/19, pp. 35-37).

Mr. President, the Australian Agent said: "What is important is that the Agreement was struck to dispose of the three issues identified by Chief DeRoburt" (CR 91/21, p. 15). This is

completely wrong, and is inconsistent with all documentary evidence. The decision on independence was based on an agreement concluded quite separately from the Phosphate Industry Agreement. In fact, the independence agreement was not announced until 24 October 1967 by the then Australian Minister of Territories (Preliminary Objections of Australia, Vol. II, Ann. 8, p. 61). On the other hand, on the third issue, agreement could not be reached between the parties on rehabilitation.

The Head Chief's Statement of 6 December 1967

Professor Bowett has, in his second oral presentation, shifted his earlier stand by changing his interpretation of Mr. DeRoburt's statement before the Fourth Committee of the United Nations General Assembly on 6 December 1967 (CR 91/21, 21 November 1991, p. 40). Now, the missing sentence is of no importance because Professor Bowett says so. By way of reply, may I refer to Head Chief Hammer DeRoburt's oral presentation of 15 November (CR 91/18, p. 18) and also to the oral presentation of Professor Barry Connell of 18 November (CR 91/19, p. 84). If, according to Professor Bowett, rehabilitation was purely an economic or financial problem, the implications of phosphate being a wasting asset do not indicate any economic or financial problems at all! Nauru rejects all such artificial interpretations on Mr. DeRoburt's statement, as they are aimed solely to produce a waiver of a claim central to the concern of a small community. We note in this context that even Professor Bowett's analysis would lead to an equivocal result upon which little reliance could be placed.

Lack of Good Faith: Rehabilitation for Nauru

Mr. President, the Agent for Australia further argues that "Nauru's own actions since independence confirm the limited prospects for rehabilitation". Then he says: "Nothing has been rehabilitated. Nauru points to the stockpiling of soil and little else" (CR 91/21, 21 November 1991, pp. 10-11). Thus, his argument in effect asserts lack of good faith on the part of Nauru.

The above statement of the Australian Agent, more than anything else, reveals a considerable

degree of innocence on matters relating to large scale restoration of mined-out lands in general, and particularly of mined-out lands which constitute four-fifths of a single island coral atoll such as Nauru. A perusal of the Report of the Nauru Commission of Inquiry headed by Professor C. G. Weeramantry (as he then was) would in fact be instructive in this regard. Incidentally, I take this opportunity to clarify an earlier statement made by Head Chief Hammer DeRoburt. Professor Barry Connell was the counsel assisting the Commission of Inquiry, and not a member.

Nauru has already explained, rather elaborately, the scope and extent of work done so far by Nauru towards fulfilment of its obligation to rehabilitate the phosphate lands worked-out since 1 July 1967. I respectfully draw the Court's attention to Section 4, Part I, of Nauru's Written Statement (p. 14), and also to my earlier oral presentation of 15 November (CR 91/18, pp. 51 ff.). Nauru firmly denies that it has failed to show good faith in this regard.

The Nature of Australia's Obligations Under the Trusteeship

The Australian Counsel, Professor Pellet, said that Australia, as the Administrator of the Territory of Nauru, acting alone could not have asserted itself against the British Phosphate Commissioners (BPC) who had the total control over everything relating to the phosphate industry. While Professor Crawford will deal with this point on behalf of Nauru more adequately and more comprehensively, Mr. President, please permit me to point out that the responsibilities of Australia as the Administering Power emanated from the Mandate and the Trusteeship Agreement and that it was obliged to give effect to the principle of disinterestedness and the right of the colonial people to sovereignty over their natural resources.

Can an Administering Power take shelter under certain private agreements to evade international obligations imposed by the Mandate and the Trusteeship Agreements, and Article 22 of the League of Nations Covenant and Chapters XI, XII and XIII of the United Nations Charter, and also under general international law? The answer is obviously in the negative. It may be of interest to note in this context that until the independence of Nauru there was only one flag, literally one flag, that flew on Nauru and that was Australia's.

Photographs

Nauru is indebted to the Australian Agent for drawing attention to the "devastating view" in photograph 2 of Volume 2 of the Nauru Memorial (CR 91/21, 21 November 1991, p. 10). Of course, Nauru knows and the Court is aware that Nauru is constitutionally responsible for two-thirds of the rehabilitation. Volume 2 carefully makes the distinction for the Court. I draw attention to the fact that map 3 in Volume 2 gives the location and direction of photographs and on that map are clearly marked the areas mined-out under Australian Administration. Some recent mining is shown simply to demonstrate the method of mining and how one arrives at the situation shown in the so-called "devastating view".

Mr. President, two distinguished Members of the Court were good enough to direct questions to us on Tuesday 19 November. The Nauru Counsel will answer the question posed by Judge Shahabuddeen. However, as regards the question raised by Judge Schwebel, Nauru would wish to take advantage of the facility to submit its reply in writing.

Before I conclude, I must acknowledge with thanks the assistance so kindly rendered by my distinguished colleague, Professor Connell, in the preparation of this presentation.

And, Mr. President, I would now request you to call upon Professor Ian Brownlie to continue Nauru's oral presentation. Thank
you, Sir.

The PRESIDENT: Thank you Professor Mani. Professor Brownlie, please.

Professor BROWNLIE: Mr. President, Members of the Court, may it please the Court.

My task is to address the objection relating to other methods of settlement and also the argument based on waiver.

Australia has been content essentially to maintain its submissions on the issue of delay, and Nauru does likewise and I shall not refer to that topic again (see CR 91/20, pp. 12-19).

Preliminary Matters

There are also two preliminary matters to which I would, with respect, draw the Court's attention.

The Role of Facts in these Proceedings

In the first place I would like to explain why Nauru thought it necessary to place emphasis on the facts even at this stage of the proceedings.

In our view the nature of the issues, and not just the fluidity of the Australian arguments, has necessitated a substantial excursion into matters of fact. The case concerning the alleged waiver, for example, has called for a careful examination of the documents available.

But there is another aspect of the facts which has been the subject of particular concern to Nauru.

I refer to the issue of good faith.

It is true that yesterday the distinguished Agent of Australia stessed that Australia's submissions on the issue are limited, and Nauru is pleased to take note of this statement.

However, in the Preliminary Objections the principle of good faith is invoked in relation to a series of assertions which amount to the charge that Nauru is simply not serious about rehabilitation.

If I could remind the Court of the most uncharitable passage in the Preliminary Objections:

> "It is contrary to the principle of good faith for Nauru, having taken no steps itself to rehabilitate areas mined under its own control, and despite having been provided with adequate financial resources, to now make a claim on Australia for alleged breaches of the Trusteeship Agreement. Rather, such a claim is exposed as no more than a convenient demand to focus attention elsewhere than the place where the responsibility for Nauru's present condition in fact lies - Nauru itself. The claim, given the circumstances in which it is made, is not only made without good faith, but is also disclosed as not based on legitimate grounds in law." (Preliminary Objections of Australia, p. 163, para. 406.)

This flavour was maintained in the first round of the oral hearings, and my colleague, Professor Connell, acting under precise instructions, found it necessary to place the history of the

question of rehabilitation on record.

In this same context, it is not really convincing when Mr. Griffith says that the issue of good faith has not been submitted as a separate preliminary objection. It was after all given prominence in the Preliminary Objections (pp. 162-164) as an aspect of judicial propriety and that was the terminology used.

Whether the issue is classified as a preliminary objection, or as going to the "inherent jurisdiction" of the Court, as a matter of propriety, is, in our submission, really a matter of academic interest.

The issue of good faith, applied in a rather broadcast way, has inevitably necessitated the correction of the record by Nauru.

The Jurisdictional Ambience of these Proceedings

As a second preliminary point, I would like to refer to the particular ambience of these proceedings from a jurisdictional point of view.

In the first place, there are two coincident declarations accepting the jurisdiction of the Court.

Australia has only raised one preliminary objection relating to jurisdiction. In general both declarations are coincident in ambit.

And so, in our submission, Mr. President, it should follow that the principle of consent is paramount and that there is a presumption of the existence of jurisdiction.

Now we appreciate that in practice the Court does not find that recourse to presumption is helpful, but in the present case, in our view, there are cogent reasons for imposing a high standard of proof in relation to the alleged "tacit agreement" invoked by Australia as a justification for limiting the competence of the Court in these proceedings.

And apart from that, we would say that in general the other Australian preliminary objections constitute thinly disguised issues of merits.

Agreement to have Recourse to some other Method of Peaceful Settlement

I turn now to the argument based on an alleged agreement to have recourse to some other method of peaceful settlement.

Professor Jiménez de Aréchaga raises the question of form. In my speech in the first round I had made the point that, since no written text had been proposed as the basis of the agreement, then the alleged agreement could only have been tacit. I had certainly not suggested that form was a mandatory requirement.

The key point is surely that in practice it would be highly unlikely than an agreement on a mechanism for the settlement of a dispute or family of questions of a legal nature would be tacit. No examples of such agreements have been indicated and, in our submission, it may be doubted whether any examples exist.

In this connection it is to be recalled that a particular concern of States resorting to this type of reservation was the problem of overlap with existing or future compromissory clauses in treaties and conventions.

And the reasonable inference is that the Australian condition has a similar connotation and certainly does not refer to the action of political organs of the United Nations.

As to the evidence of the course of conduct offered by Professor Jiménez de Aréchaga in his reply, this appears to be essentially identical to the material offered in the first round.

Moreover, Counsel for Australia continue to ignore the temporal element in the evidence.

For it was only within a few weeks of independence, and we pointed this out before, that it became clear to the Nauruans that Australia would not recognize the responsibility concerning rehabilitation, and thus there was in fact no mature dispute to be submitted to one of the "traditional methods of peaceful settlement of disputes" (Professor Jiménez de Aréchaga, CR 91/15, pp. 44-45).

Mr. President, there is a certain unreality in the idea that the negotiations of the period 1965 to 1967 were anything more than that. The Nauruan position was that if the responsibility for rehabilitation was not accepted by Australia, then Nauruan rights would at least be reserved. And until the signing of the Canberra Agreement on 14 November 1967, there could be no dispute as

such to be submitted to a procedure of settlement.

The Australian argument supposes that an unaccepted proposal within a series of continuing negotiations should have been referred to dispute settlement. And the hypothesis, in our submission, is evidently artificial.

I shall now turn to the question posed by Judge Shahabuddeen.

He asked whether the agreements contemplated by the Australian reservation included agreements made between Australia and entities which were not States at the time the agreements were made.

My reply on behalf of Nauru has two elements.

In the first place, there can be no doubt that the natural inference must be that the Australian reservation refers only to agreements with States. This is because the terms of the declaration must be presumed to be in accordance with the provisions of the Statute of the Court and, according to the Statute, Article 34, paragraph 1, "only States may be parties in cases before the Court".

So the reservation can only have a purpose in relation to overlapping clauses.

However, Nauru finds it necessary to add a second element to the answer.

In our submission, in any case, the question could not arise on the present facts because the agreement postulated by Australia by its very nature would cease to have any effect at the time of independence.

That is our reply to Judge Shahabuddeen.

And in the light of this reply, Nauru recalls that its position is entirely compatible with the argument that the constitutive facts of the legal dispute prior to independence have been recognized by the Respondent State as a legal dispute persisting at the time of independence (see Written Statement, para. 113).

The Alleged Tacit Agreement and the Law of Treaties

Mr. President, I would now like to return to the hypothesis of a tacit agreement involving the Nauruan Community and Australia for the settlement of various questions involving breaches of the Trusteeship Agreement by the organs of the United Nations.

In my submission, such an agreement would be subject to the principles of the Law of Treaties which continue, of course, to form part of customary international law.

It is not simply that the Vienna Convention only applies to agreements in written form. The alleged agreement now in issue antedated the coming into force of the Vienna Convention in any case.

However, the provisions of the Vienna Convention on questions such as invalidity and termination naturally reflect the codification work of the ILC, which completed its work on treaties in 1966 and reported to the General Assembly. If I may remind the Court, Article 48, paragraph 1, of the Vienna Convention deals with the effect of error, and it provides as follows:

> "A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty."

Article 49 provides that "if a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty".

Mr. President, why this excursion into the Law of Treaties?

Australian Counsel has accused Nauru of accepting only certain parts of the legal régime. But in postulating a tacit agreement in the period 1965 to 1967 Australia, in our submission, must face the implications of that hypothesis. And the implications are surely to be found in the Law of Treaties.

In its Memorial, as part of the particulars of breaches of obligation under the Trusteeship Agreement, Nauru has presented evidence that Australia failed to report fully and fairly on the financial aspects of the production and disposal of the phosphate deposits. Specific evidence is provided of the dubious practices of the BPC in reporting to the Trusteeship Council over a very long period (Memorial, pp. 121-40). Evidence is provided of the systematic suppression of important information concerning the financial position of the BPC.

Mr. President, for present purposes it is only necessary to point out that there is documentary evidence of substantial misrepresentations, both to the Nauruans and to the United Nations organs,

on the basis of which it is reasonable to assume that the tacit agreement, if it had existed, would have been void or voidable as a result of the error induced by the lack of fair and accurate reporting on the financial basis of the phosphate operations.

No doubt it can be said that these issues go to the merits.

Exactly so, Mr. President.

But they are directly relevant to certain aspects of the Australian argument.

The legal status of the alleged tacit agreement must have been extremely problematical. For, apart from the effect of the systematic misrepresentations in the Law of Treaties, the agreement would also have fallen foul of Article 103 of the Charter and, in so far as it was imposed by the Australian Government, would have constituted a part of the problem not a part of the solution, as Australia contends in these proceedings.

There is also the further consideration that, when the issues are seen in the context of the breaches of the Trusteeship Agreement referred to in our Memorial, even the Australian preliminary objection based on the reservation of other methods of settlement is discovered not to have an exclusively preliminary character.

The Alleged Waiver and the Australian Misrepresentations

My next task is to respond to the speech of Professor Bowett but, before I move on, I need to deal with one aspect of the waiver argument at this stage.

A waiver may be the result of an agreement, involving a quid pro quo, or it may constitute a unilateral act - that is obvious enough. If it is a unilateral act, its legal validity may still depend on certain conditions, given that waiver is a voluntary act.

On this basis, Nauru contends that the misrepresentations which I have just noted in the context of the alleged tacit agreement, also have the legal consequences that the alleged waiver, if it occurred, would have lacked essential validity.

The Alleged Absence of any Allegation of Breach of the Trusteeship Agreement

In his reply, Professor Bowett reiterated his argument that Nauru failed to assert that failure

to rehabilitate was a breach of the Trusteeship Agreement.

On this issue generally Nauru reaffirms its position as stated in the first round (CR 91/19, pp. 62-71).

Professor Bowett, attempting to improve on the positions adopted in the first round, presents a number of what are essentially debating points.

In the speech characteristic of the Australian method of pleading in these proceedings, Counsel for Australia stays well clear of the documents.

Mr. President, the proposition Professor Bowett was defending was that Nauru had failed to make a claim for breach of the Trusteeship Agreement. Yet in seven pages of text received by me, there is reference to only two documents.

The documents referred to in the transcript of the first round are for the most part ignored.

The Nauruan argument (CR 91/19, pp. 68-69) that for a claim to emerge from the evidence it is necessary to foreshadow the precise contents of the Application, remains unanswered.

The Nauruan argument (CR 91/19, p. 69) that there could be no question of presenting claims - as opposed to reserving rights - until the question of rehabilitation was finally left unresolved, remains unanswered.

There is, however, concession to the effect that the Nauruan delegation to the Canberra Talks made "occasional references" to Trusteeship obligations.

The references to Trusteeship obligations were, in fact, in our view, reasonably persistent. Moreover, major Nauruan delegation papers presented the legal position on rehabilitation as clearly as could be expected in the context of what was not an arbitration, adjudication or conciliation, but a negotiation.

Moreover, Counsel for Australia stays away from a particularly telling passage.

If I may remind the Court, the Record of Discussion for the evening meeting of 16 May 1967 of the Canberra Talks contains the following passage:

> "During the following discussion it emerged that the Nauruans would still maintain their claim on the Partner Governments in respect of rehabilitation of areas mined in the past, even if the Partner Governments did not press for the withdrawal of the claim in a formal manner such as in an agreement." (Nauru Memorial, Vol. 3, Ann. 5, p. 411 at p. 466.)

This passage refers to maintaining the claim and to withdrawal of the claim, which is refused. It makes clear that not only would the Nauruans refuse to agree to a formal withdrawal but they would not accept an implicit withdrawal.

The Australian approach to the documents has been, in essence, to complain that the Nauruan representatives did not constantly use the language of Foreign Ministry legal advisers.

Nauru's case is that, given the actual circumstances, the absence of a Foreign Ministry and a negotiation between a dependent territory seeking independence from its metropolis, then the evidence of a dispute, which was a legal dispute and involved Trusteeship obligations, was more than sufficient.

A perfect example of a sufficiently-explicit reference to the international law background appears in the formal statement made by the Nauruan delegation during the 1966 Talks. If I could read the passage just once more, because it has been consistently ignored by the other side. This is the Session of 20 June 1966:

> "The Nauruan people have consistently claimed (this is in 1966) that it is the fundamental responsibility of the Administering Authority to restore the mined phosphate lands to their original condition. *This responsibility stems in part from the obligation that the Administering Authority has under the United Nations Trusteeship System to safeguard the future of the Nauruan people.* It also stems from the very large profits from past mining activity that the Administering Authority has chosen to distribute to phosphate consumers in Australia, New Zealand and the United Kingdom (by not charging world prices) instead of returning them to the Nauruan people as their due entitlement." (Nauru Memorial, Vol. 3, Ann. 4, p. 333 at p. 340; Session of 20 June 1966, Section B, para. 1; emphasis added.)

Whilst for the most part standing away from the documents, Counsel for Australia is content to say that this passage refers only to a responsibility which stems "in part" from the Trusteeship System. But in the context of the passage, this phrasing in no way reduces the significance of the legal proposition which is made.

The Evidence of Waiver

In general, Nauru reaffirms the arguments and submissions on this question in the first round

(CR 91/19, pp. 56-86; CR 91/20, pp. 8-12).

In the first place Australia maintained its general approach to the evidence. Thus certain episodes are focused upon but the overall pattern of conduct by Nauru is ignored.

Specific evidence adverse to Australia is the subject of silence and thus no attempt has been made to explain the silence of the Australian representative at the Thirteenth Special Session of the Trusteeship Council on 22 November 1967 in face of a precise statement of the Nauruan claim (see CR 91/19, p. 85).

In the second round Professor Jiménez de Aréchaga argued that it was significant that the alleged waiver by Mr. Hammer DeRoburt occurred in the Fourth Committee on 6 December 1967 in contrast to the statement on the 22 November 1967 which occurred in the Trusteeship Council.

Nauru considers that what is legally significant is the documentary record taken as a whole, including the records of the discussions from 1965 to 1967.

But two further observations are called for. The distinction between the Fourth Committee and the Trusteeship Council can have no importance unless the statement of 6 December 1967 involved a renunciation of rights and, in our submission, there is no evidence that it did.

Secondly, there is a certain contradiction in the picture presented by Professor Jiménez de Aréchaga. You may remember, the context, according to Counsel for Australia, is a process of dispute settlement, appropriate for legal disputes and is the culmination of a process involving what he called "traditional methods" of peaceful settlement.

Mr. President, it is very odd, if that were the milieu, to discover that the critical outcome of dispute settlement must depend on whether a statement is delivered in the Fourth Committee or in the Trusteeship Council. That is to say, in one political organ rather than another.

Finally, Counsel for Australia suggests that since 22 November the Head Chief, Mr. Hammer DeRoburt, had had a radical change of mind. No evidence is offered for this piece of supposition.

I shall turn now to Professor Bowett's examination of waiver, as presented in the second round.

Once again, as in the first round, Counsel for Australia constructed with great panache what was, in result, an entire Potemkin village of suppositions. And the process of construction was a pleasure to witness.

The Court was told of a "package deal" of 1967. But the Phosphate Industry Agreement was not a "package deal" and was not expressed to be one.

The Court also heard again of the alleged significance of the five months - the critical five months - between the May/June Talks of 1967 and the signature of the Canberra Agreement on 14 November 1967.

As I indicated earlier in this speech, in May 1967 the Nauruans had refused a request from the Partner Governments for a formal renunciation and Professor Bowett acknowledges that refusal.

But he goes on to say: "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." He interprets this silence as a waiver and suggests that this five months induced the Partner Governments to believe Nauru had quickly dropped its claim and adopted their package offer. And certainly he goes on to say that by keeping its silence, Nauru made no attempt, in his view, to correct this view of the Partner Governments.

Mr. President, in our submission, this is pure supposition. However, it does have the advantage of reducing what had previously been 24 years of alleged silence to a mere five months. Otherwise, in our view, it lacks merit.

First, the Heads of Agreement for the sale of the phosphate industry was signed on 15 June 1967.

Secondly, both sides had agreed to put to one side the issue of rehabilitation whilst the issues of the sale of the phosphate industry and that of independence were determined.

Thirdly, the Agreement for independence and the date 31 January 1968 were not agreed by Australia until 15 October 1967. The separate Agreement on independence was announed in a statement to the Australian House of Representatives by the Australian Minister for Territories only on 24 October 1967 (Preliminary Objections of Australia, Vol. II, Ann. 8, p. 61).

The independence arrangements involved considerable negotiations and detail, as can be seen from the Australian Minister's statement. It is therefore mistaken, in plain fact, to say, as the Australian Agent said yesterday: "What is important is that the Agreement was struck to dispose of the three issues identified by Chief DeRoburt." And I respectfully remind the Court that these three issues were (1) political independence, (2) control and future operation of the phosphate industry and (3) rehabilitation of mined-out lands. These were separate issues requiring separate agreements.

Fourthly, the Phosphate Industry Agreement was being drafted on the basis of the signed Heads of Agreement with some care by the Attorney-General's Department in Canberra and it was not signed until 14 November 1967.

Fifthly, there was no airline to Nauru in those days and Nauruan delegates came and went by sea. The time of Nauruan leaders was well taken up getting home, informing the electorate, negotiating the independence agreement in detail, and arranging to attend the Trusteeship Council on time. There simply was no time to negotiate what the Head Chief described as "the most irreconcilable of the three issues".

Sixthly, the Head Chief made it clear to the Trusteeship Council on 22 November that the matter of rehabilitation was still outstanding, and proclaimed that fact again to all the assembled persons as recounted in these oral hearings by Professor Connell on Independence Day.

So there was no waiver, either express or by implication. Furthermore, there was absolutely no contemporary document that would show that either Australia, the other Partner Governments or the United Nations believed or were induced to believe that Nauru had dropped its claim. The evidence of silence from the Australian Representative in the Trusteeship Council certainly points the other way.

Professor Bowett returned to the theme that on 6 December 1967 Mr. Hammer DeRoburt waived the claim. In his second round speech he now concedes the possibility that there were two problems to which the Head Chief was referring and that one of them was "clearly the rehabilitation".

My submission on this subject is quite simple. Hearing the debate between the two sides in

these proceedings the supposition which is the most favourable to Australia is that the statement on 6 December is equivocal. And that is the best that Professor Bowett can now do in the second round.

But equivocal though it may be, Mr. President, it contains no words of renunciation.

Given the evidence as a whole, and given the nature of the statement itself, there is, in our submission, no basis for a finding that the statement was, in law, a renunciation of rights.

I shall leave it to my colleague, Professor Crawford, to deal with the legal implications of the termination of the Trusteeship.

Mr. President, that completes my second round argument on the alleged waiver.

Before concluding, however, there are certain other points with which I must deal briefly.

First, there is the question of the overseas assets of the BPC. In general Nauru reaffirms the submissions on this subject presented in the Written Statement (pp. 115-136) and in the first round of these oral hearings (CR 91/20, pp. 51-58).

In the second round the speech of the Australian Agent failed, in our submission, to present anything really new on this question. However, his speech evokes three short comments.

First, BPC, in his view, is a sort of autonomous entity, and almost a foreign corporation. Australia cannot see the implications, in terms of the law of State responsibility, of the phosphate operations. Under the Trusteeship régime Australia was responsible for controlling the operations of the BPC. And it remains responsible for the consequences of those operations. The fact that an entity on territory happens to be a private entity, if that's what it was, is certainly not an exclusion of State responsibility if the obligations require control of operations on that territory.

Secondly, there is no reason to assume that the BPC had ownership of the phosphate lands or, if in some sense it did, that this protects Australia from responsibility for breach of its international obligations under the Trusteeship régime.

Thirdly, for purposes of this phase of the proceedings it is only necessary for Nauru to establish a credible claim to some part of the general fund which was disposed of in 1987. The Agent of Australia has in this respect failed to appreciate the distinction between what is called for at

this stage by way of establishing a legally protected interest and what is called for at the stage of the merits.

Finally, I would like to draw the attention of the Court once again to what I call the sufficient funds hypothesis. If I could remind the Court that in the first round, in his speech, the Agent of Australia said this:

> "after October 1964 it is clear that the only reasonable course left to the Partner Governments was to provide the Nauruan people with sufficient financial resources for a viable independent future, including the financial means to carry out rehabilitation if that was their choice".

And that is the theme which appears in documents in the Canberra Talks of 1965 to 1967. This is a strange theme to emphasize.

Australia is asking the Court not to exercise its competence, not to address the legal issue raised by the Application. And alongside that, it is saying, and in any case why should you give justice to this particular Applicant State. And this emphasis on sufficient funds involves no reference to legal obligations. It assumes that Australia had a prerogative to decide what was good for the Nauruans as opposed to what was Australia's responsibility under the Trusteeship. And it involves after all an eccentric approach to justice. According to the sufficient funds approach if I knock somebody down with my motor car, my duty is confined to discovering whether they have a wallet which has a lot of money in it, or perhaps also what their credit worthiness is. This is a curious approach to the notion of justice.

And that concludes my presentation. I would like to thank my colleague Professor Connell for his co-operation in preparing some aspects of this speech and I would like to thank Mr. Griffith of the Australian delegation for co-operation in providing text of speeches promptly in the second round. And finally I thank the Court for its patience and kindness. Thank you, Mr. President.

The PRESIDENT: Thank you very much, Professor Brownlie.

Professor BROWNLIE: Can I ask you to call on my colleague, Professor Crawford?

The PRESIDENT: Certainly. Professor Crawford, could I ask you if you have a convenient

place in your argument where you could stop when we get to about 11.15 a.m.?

Professor CRAWFORD: Yes, Sir.

The PRESIDENT: Or would you prefer us to go now for our break and take it all in one piece?

Professor CRAWFORD: No, I am very happy to break it into two, Sir.

The PRESIDENT: Thank you very much. Continue please.

Professor CRAWFORD:

Introduction

Mr. President, honourable Members of the Court. It is my task to address the various points made by Professor Jiménez de Aréchaga, Professor Bowett and Professor Pellet in their reply on behalf of Australia, so far as they related to the issues of termination of the Trusteeship or non-joinder of third parties.

Termination of the Trusteeship

2. I will deal, before the break, with termination of Trusteeship. It may help the Court if I deal with the issues of termination in the same order as that adopted in my treatment of the issues last Tuesday.

Relationship between the Trusteeship Agreement and General International Law

3. On this issue Professor Bowett claimed to agree with the Nauruan analysis (Verbatim Records, 21 November 1991, p. 45). To judge from what he did with that analysis rather than what he said, the agreement was only grudging. For apparently its only effect was to enable him to allege yet another basis for the termination of rights. He accepted that the General Assembly must have taken such principles as self-determination and permanent sovereignty over natural resources into

account when dealing with issues of termination. But he then blithely asserted that this was no obstacle to the conclusion, on exiguous evidence, that rights as cogent, as salient, as these, were impliedly terminated at a time when the right-holder was still in a status of dependency in a situation of disadvantage. As Nauru has already argued, one function of these adjacent legal principles - if I may call them that - is that they powerfully reinforce the burden of proof on a wrongdoer who relies on extinguishment or waiver. Yet the Australian argument on these matters is not convincing even on ordinary standards of the onus of proof.

Limited scope of the General Assembly's power to determine legal issues arising under a trusteeship agreement/Alleged exclusive authority of the United Nations political organs

4. During its first round Australia postulated - I was going to say invented - a broad and exclusive authority on the part of the politcal organs of the United Nations to determine legal questions, and to do so with conclusive effect (Verbatim Record, Tuesday 19 November 1991, pp. 32-36). There was no direct return to that position in the Australian reply.

5. But Professor Bowett's main argument was a derivative of his argument that the General Assembly has exclusive power over trusteeship obligations. He argued that the General Assembly could not have abdicated its responsibility by leaving the rehabilitation issue to be settled bilaterally because, in his words:

> "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 could be no other independent third party which could guarantee performance of the Trust." (Verbatim Record, Thursday 21 November 1991, pp. 42-43.)

6. But, let us, for the sake of argument, assume that the General Assembly was "irresponsible" by reason of its relative silence in 1967. I note in passing that it was not absolutely silent, since it referred to its two previous resolutions dealing with rehabilitation. Would the consequence of this "irresponsibility" be that the Nauruans lost their rights? Because the General Assembly was not virtuous, were the Nauruans to be deprived of a subsisting right to rehabilitation? That is like saying that, because the relevant supervisor is irresponsible, and because the trustee is intransigent, then the

beneficiary must be made to suffer. That would be a most improbable rule for a system of trusteeship.

In any event, the assumption that what the General Assembly did was a gross abdication is also wrong, or at least unfair. After all, the alternative was to delay the termination of the Trusteeship, which the Nauruan people had said they did not want, which would have gone against paragraph 5 of resolution 1514, the General Assembly's Charter in this matter, and which might not have achieved the desired result anyway. If the Nauruan people were prepared to take their chance in seeking a subsequent resolution of their claim through the normal methods of the international settlement of disputes, including the possibility, not to be excluded, of recourse to this Court, why should the General Assembly have refused?

Yet again we have this curious situation where every difficulty with the system has a termination of rights hidden somewhere in it. After independence it could not be guaranteed that the Nauruans would be able to enforce their claim - and so their claim is terminated. As if claims in international law always lapsed unless the claimant had a guarantee of success! The Nauruans seem to have been beneficiaries only of an elaborate system of traps, from which they could never escape with their accrued rights intact. (I say accrued rights, because that is the necessary assumption of both the termination and the joinder arguments. Whether the rights had accrued is of course a matter for the merits. For present purposes that has to be assumed.)

The effects of termination of the Trusteeship

7. Professor Jiménez de Aréchaga cited the Roman jurist Paulus, to the effect that the power to condemn implies the power to absolve. The first point to be made is that the power to condemn - as distinct from recommend, in the General Assembly - was not unlimited, and that the power did not, as I argued the other day, in the circumstances, extend to resolving the present claim against the Nauruans. But ignoring these qualifications, Professor Jiménez de Aréchaga went on to argue that the absence of condemnation implied absolution (Verbatim Record, Thursday 21 November 1991, p. 25).

Mr. President, Paulus was concerned with the question of the existence of a power, not the question of the occasion for its exercise. Paulus was not saying that whenever an occasion arises in which condemnation is possible, but is not (for whatever reason) forthcoming, then the guilty person is absolved. That rule would play havoc with life in a monastery - how much more so in the United Nations!

8. In addition to citing Paulus, Professor Jiménez de Aréchaga cited a passage from the *Northern Cameroons* case (*I.C.J. Reports 1963*, p. 36) every word of which he said was applicable here (Verbatim Records, Thursday 21 November 1991, pp. 27-28). I will not re-read the passage, but will merely repeat that the Court was referring there to a claim brought by a third party - that is to say, not an entity which was a direct bearer of rights under the Trusteeship Agreement but was merely indirectly interested. And its claim was brought under the jurisdictional provision of the Trusteeship Agreement, a provision the Court held to be part of the machinery of supervision which terminated with the Trusteeship Agreement. It is of course possible to apply the same words here, Mr. President, but only if one first takes the precaution of changing their meaning.

9. Incidentally, when Judge Wellington Koo described himself as "broadening and strengthening" the basis of the Judgment in the Northern Cameroons case - I refer to the passage cited by Professor Jiménez de Aréchaga (Verbatim Records, Thursday 21 November 1991, p. 28) - that was no doubt true. The Court having fashioned in that case a careful and narrow path to its conclusion, Judge Wellington Koo reached the same conclusion by what I might describe as the four-lane highway of his formula about the termination of "all legal rights". Judge Wellington Koo may have reached the same destination on the facts as the majority, but he certainly got there by a different route. And Professor Jiménez de Aréchaga made no attempt to deal with what I described on Tuesday as the central difficulty with Judge Wellington Koo's argument - that is, the preference he gives for survival of the rights of third States and their nationals over the survival of the rights of the beneficiary of the trusteeship itself, the people of the territory. The majority judgment in the Northern Cameroons case deftly avoided that difficulty.

The General Assembly's "implied rejection" of the Nauruan claim

10. Professor Jiménez de Aréchaga tacitly conceded that it was unreasonable to imply a termination from operative paragraphs 1 and 2 of General Assembly resolution 2347, on which Australia had earlier relied. His emphasis now was all on operative paragraph 3 (Verbatim Record, Thursday 21 November 1991, pp. 25-26). Under that paragraph, the General Assembly:

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

But there is no more reason to treat this as an implied cancellation of rights than there is to treat as such a cancellation operative paragraphs 1 and 2. It is true that at a much later stage (in the Australian Prime Minister's letter of 1984), Australia stated that it had insisted on a withdrawal of the claim as a condition to Nauru obtaining its independence. But there is no trace of that insistence in the General Assembly debates. On the contrary, the historical record shows that Australia did not succeed in obtaining Nauru's agreement on this issue and as a result dropped its demand.

It is therefore strictly unnecessary to consider whether a forced renunciation of rights, had one been made, would have been valid. It is sufficient to re-emphasize that to infer such a cancellation from the silence of the resolution is unwarranted in fact, and especially unwarranted when one takes into account the relevant legal background of trusteeship and the adjacent legal principles to which I have referred.

11. Professor Jiménez de Aréchaga sought to reinforce the argument from termination by arguing that upon independence the Administering Authority became *functus officio*, and that thereafter there was nothing Australia could do to assist in the rehabilitation of the lands. He said: "In these circumstances it is obvious that the alleged obligation to rehabilitate the land became devoid of object and was consequently extinguished." (Verbatim Records, Thursday 21 November 1991, p. 26.)

One only has to look at photograph 2 of Volume 2, Mr. President, to see that the obligation was not and is not "devoid of object" It is true that after independence, Australia had no right simply to come on the land and carry out its own rehabilitation scheme contrary to the wishes of Nauru.

But that did not mean that it was free of any obligation at all. It is like arguing that a victim need not be compensated in other ways because one form of compensation - e.g., *restituo in integrum* - has become impossible. The argument appears to be that you have no obligation to compensate a victim, once it has become impossible for you, yourself, to undo the harm by your own efforts. That is like saying that a plastic surgeon has no further responsibility to compensate for some disfigurement he has caused because the victim has been discharged from the surgeon's hospital, and he can no longer do the work himself.

In the same vein, Professor Jiménez de Aréchaga argued that a new obligation must have come into existence to pay compensation in lieu of rehabilitation, and queried how there could have been "such an automatic transformation or novation of the original obligation" (Verbatim Records, 21 November 1991, pp. 26-27). But as Professor Pellet pointed out last week, the question whether there has been a breach of an international obligation, and the question what form of reparation should be awarded in the circumstances, are separate and distinct issues. That distinction is clearly recognized in the structure of the ILC's Draft Articles on State Responsibility. Merely because one form of reparation is unavailable does not mean that a claimant has to rely on a completely new and distinct obligation or has to show some form of novation. The breach was the same, the obligation was the same: the remedial issue follows, and of course, very much relates to the merits.

12. Professor Bowett also dealt with the issue of implied termination. In particular, he sought to reinforce his argument that there was an implied termination, by claiming that a judgment on issues of breach necessarily arose in the course of termination or revocation of the Trusteeship Agreement (Verbatim Records, 21 November 1991, p. 44), so that whenever one terminates a document, one makes a judgment about the breach of that document at that point. If that is right, then any State which fears that it may have violated a treaty, or against which some complaint of violation has been made, has only to give notice of termination of the agreement and to refuse to agree as part of any subsequent discussion on any provision about its liability. Remember that this relates to past, not future breaches - to things already done and suffered. The Australian argument is inconsistent with the general law on survival of claims arising under treaties, to which I referred on

Tuesday (Verbatim Records, 19 November, pp. 36-37). A State which receives notice of termination of a treaty is not thereby put on short notice to prove its claim or have it lapse by operation of law. And no analogous rule should be implied into the trusteeship system - the primary purpose of which, as the Australian argument so consistently fails to accept, was the protection of the rights and the interests of the beneficiaries.

Was an express saving of the claim required?

13. I have already stressed that the role of the General Assembly in this matter was not one involving exclusive power. Nor was it one where the General Assembly resolution as such was creative of legal rights which had no basis in the relevant instruments or in the adjacent legal principle. Neither in the Namibia Opinion nor in the Northern Cameroons case, did this Court treat the General Assembly as having, as it were, a general licence to prescribe new rights in relation to trusteeship. I refer also to the classical analysis of that issue by Judge Lauterpacht in his separate opinion in the *South West Africa (Hearing of Petitioners)*, Advisory Opinion.

It follows from this, Mr. President, that the General Assembly's role was not to constitute the right in the post-independence period, but at most to recognize the existence of a continuing claim which was founded in the relevant legal instruments and in the adjacent legal principles. I need only say that in its reply, Australia barely addressed - and certainly did not refute - the Nauruan argument that there was sufficient recognition of its claim as a subsisting claim on the facts of the present case. Here, as in other contexts, the Australian argument can be described as a form of argument from inconvenience, which is to say that where something is inconvenient it should be ignored.

Mr. President, that completes my presentation on the issue of termination, and it is a convenient point to break.

The PRESIDENT: Thank you, Professor Crawford. We will now adjourn for our short break.

The Court adjourned from 11.15 to 11.35 a.m.

The PRESIDENT: Please be seated. Yes, Professor Crawford.

Mr. CRAWFORD: Thank you, Sir. Mr. President, Members of the Court, I turn to the second subject:

Joinder of Parties

14. Mr. President, praise for an advocate is always pleasing. But praise should be reserved for the advocate who persuasively maintains the conclusion necessary for his client when neither reason, nor authority, nor principle, nor analogy, give him any support. I turn accordingly to Professor Pellet's ingenious treatment of the joinder issue.

Professor Pellet's Four Matters of Agreement

15. Professor Pellet conceded that the cases cited by Nauru under the rubric of joinder or indispensable parties were the relevant expressions of the principle of consent in the current context of admissibility - although he did his best to dispute their relevance on the facts. At the same time, he produced one additional authority, the *Eastern Carelia* Opinion, an Advisory Opinion involving a non-member of the League and distinguishable from the present case on any number of grounds (Verbatim Records, 21 November 1991, p. 60). If the Eastern Carelia Opinion is your best authority you are in a parlous state.

16. And he set out three other points on which he said that there is now agreement between us (Verbatim Records, 21 November 1991, p. 46-47). One relates to the non-applicability of private law analogies, on which the Preliminary Objections of Australia had so heavily relied. I will not repeat what I said about this earlier. I would only say that one does not have to be a believer, as Sir Hersch Lauterpacht was, in the principle of private law analogy to be impressed by the uniformity and justice of the results achieved by national legal systems in the field of concurrent

responsibility, and of its procedural analogues. Moreover, it would be curious if international law, an essentially individualistic system, adopted a more collective approach to the problem of joint conduct than do national legal systems which have the procedures actually to enforce collective responsibility. So that, however one looks at it, the legal experience in this matter strongly favours the Nauruan position.

17. Another point now formally abandoned by Australia is the idea that the Administering Authority was a separate legal entity. But, again, the withdrawal was enforced and reluctant and, on key issues, even illusory. For example, Professor Pellet described the Administering Authority as "juridiquement organisée et consacrée par des accords internationaux solennels" (Verbatim Records, 21 November 1991, p. 50). But listening to Professor Pellet, it appears that the principal point of this juridical organization was to evade juridical liability, the principal point of the consecration to evade the sacred trust. Again and again Professor Pellet sought refuge in legal constructs which bore little or no relationship to the political and administrative realities, and which had no apparent point other than the point of escaping liability for a State bound, as a Member State of the United Nations, by the Charter, and, as a participant, by the Trusteeship Agreement. While denying that there was separate corporate personality, Australia seeks to limit its liability by hiding behind labels.

18. The fourth area of agreement was even less happy. It relates to the question of the equal and conjoint responsibility of the three Partner Governments for the British Phosphate Commissioners. It is convenient to leave that issue until later.

The principle of consent and the admissibility of these proceedings

19. Professor Pellet continued to insist that the Court could not decide the case unless it was able to decide that Australia alone is responsible - that is to say, unless the Court is able to negate the responsibility of any other State (see Verbatim Records, 19 November 1991, pp. 90-91). In that context, he argued that simultaneity of decision was enough to attract the Monetary Gold principle - he had, the Court will remember, already conceded that this was not the case where any responsibility of another State was a *préable nécessaire*, a "necessary precondition", to a finding

against Australia (see Verbatim Records, 2 November 1991, pp. 60-61). That is not the present case. But, he said, simultaneity was enough.

20. Mr. President, the reason why simultaneity is not enough is that if a finding adverse to another State - in its implications, that is to say - is merely simultaneous, then it is not a finding at all, merely an implication, such as the implication the Court did not resist in the Nicaragua case, or the finding that would have been tantamount to a decision that it did not resist in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* case. By contrast, in *Monetary Gold* the Court, in deciding on the issues before it actually had to decide, in a manner binding on Albania, questions relating to its legal responsibility. Implications - even necessary or inevitable implications - tantamount to a decision, none of these were enough in that case. As a court of law it had actually to find Albania liable. And that, of course, it could not do.

21. The point can be tested as follows. Assume that Albania had intervened in the *Monetary Gold* case - as it had been hoped that it would do - it would immediately have become, in effect, the sole respondent, with the other four States each bringing their claims against it and arguing about priorities - and this without any change being necessary in Italy's Application. By contrast, in the present case, if the other two States were to intervene, that would not affect in the slightest the Nauruan case against Australia. Indeed, it is not entirely clear what the point of their intervention in the present case would be, since such intervention could not have the effect of expanding the range of claims Nauru makes in its Application so as to incorporate claims against other States, and since the Court's judgment would not, therefore, bind them in relation to their own legal position vis-à-vis Nauru.

22. Professor Pellet seemed to rely on a theory of liability in the present case in which the three States were, under the Trusteeship Agreement, effectively guarantors of a particular state of affairs, so that a mere determination by the Court that the Trusteeship Agreement required that state of affairs, and that it was not achieved, would necessarily imply their liability (e.g., CR 7, 63). The first answer is still that necessary implication is not enough, only an actual decision against a State. But the primary Nauruan theory of liability is that Australia, as the State with the actual legal and

administrative power over Nauru at the relevant times, should have taken certain steps in relation to a situation it had allowed to occur and failed to do so. By no means would the same argument apply to the other two States which never had actual legal or administrative responsibility over Nauru. It may be, of course, that they are nonetheless liable because Australia's acts were done on their behalf. But that would involve separate issues, including the determination of the meaning of the words "on behalf of" in Article 4 of the Trusteeship Agreement - issues which simply do not arise in the present case.

Professor Pellet also made some points about reparation (Verbatim Records, 21 November 1991, pp. 58-59). In that context, he argued that any decision adverse to Australia - that is to say, any decision on reparation adverse to Australia - had to take as its basis a decision adverse to the other two States. But again, this misunderstands the Nauruan position, which is very simple. First of all, the basis on which Nauru claims full reparation against Australia is that, in its view, that is what interntional law requires in the case where particular damage is done by acts or omissions imputable to a State and contrary to an international obligation binding on that State. If Nauru is wrong on that point - although I do not see how it could be - it claims just as much reparation as international law allows, including a declaration. These rules of international law on which Nauru relies apply in cases where no other State had any involvement of any kind. But they also apply in cases where some other States were involved. For example, as here, where the other States were involved as secondary wrongdoers or even, as in the *Corfu Channel* case, where the other State was the primary wrongdoer. So that even in the context of reparation, there is no question that a decision adverse to Australia requires a decision - whatever its implications - a *decision* - against any other State.

Australia's Objections based on the joint character of the Trusteeship

24. This was, again, the subject of lengthy and elaborate argument by Australia in reply. Before dealing with these arguments, it is necessary to make one fundamental point. The ingenuity of jurists is a means and not an end. In the end it is necessary to construe treaty provisions, and the administrative arrangements they embody, in a way which gives effect to the major underlying

principles, and which is reasonably faithful to the realities of the case. There is no point in simply multiplying hypotheses, in constructing a heaven of juristic concepts, especially when the new juristic concepts so constructed have as their only purpose to allow a State to limit or deny responsibilities it has freely undertaken.

25. For example, Professor Pellet argued that the Trusteeship Agreement condemned Australia to act "together with" the other States in the pursuance of the Trusteeship Agreement. Like much else that he said, this is true as far as it went: Australia failed in its aim to be allowed to be a single Administering Authority. But the salient point is not that Australia was compelled to administer the Trusteeship together with other States, but how little that "together" meant. Australia could not be displaced without its consent, which it never even considered giving. By the end - and the end was crucial - it had complete legal authority on Nauru, no obligation to give information to the other States, the right (under Article 6 of the 1965 Agreement) to make any decision about Nauru independently of the view of the other States, and so on. I will not repeat what I said on those questions the other day (see Verbatim Records, 19 November 1991, pp. 73-82).

In particular, it is misleading, when speaking of the Trusteeship period, which is the primary period the Court has to consider, to say that the three States could have freely changed the administrative arrangements. Australia was given a specially privileged status: without its consent no change was possible.

Professor Pellet took refuge in the possibility of an alternative structure being agreed on by the three States: an alternative structure which would have involved, in truth, a joint administration. Nauru's position is first, that this would make no difference, since each State would remain liable for its own wrongful acts - that would be the common organ situation of which the International Law Commission spoke. But in the second place, the Court can only judge the responsibility of a State - and the admissibility of proceedings to which a State is a party - in the circumstances as they actually occurred. It is not the Court's task to judge alternative worlds, fictional hypotheses.

26. Against the clarity of the texts and the reality of the administrative arrangements, Professor Pellet constructs a system under which the administration of the trust was first given to

three States equally and conjointly, and then delegated by them to Australia, so that the three States stood as a phalanx - not a legal person, but as if they were one - between the Nauruans and the State with the real power to do harm or good (Verbatim Records, 21 November 1991, pp. 54-55). That interpretation of the Trusteeship Agreement is, to put it mildly, tortured. And what is its point? Only to make Australia's position derivative, in other words, to convert the situation into one more closely analogous to that of *Monetary Gold*. The fact is that in the Trusteeship period, the other two States never had anything to give Australia: had they wished to take different decisions, to change matters of policy, they had no power to do so, individually or acting together against Australia's will. Professor Pellet suggested that the two of them alone could have complained against Australia alone for some wrong done by it as representative (Verbatim Records, 21 November 1991, p. 55). By what legal principle is Australia to be excluded from the indivisible legal nonentity thus constructed as a barrier between Australia and the real world (including the Nauruans)? The only principle appears to be that Australia was unlikely to complain against itself - as unlikely as to act as agent for itself, one must reply.

27. Mr. President, the point has been sufficiently made. I only pause to say that it was sad to hear George Scelle's magnificent hypothesis, the "dédoublement fonctionnel" which sought to construct an international order out of the individual and mostly self-interested acts of States, misused to justify a breach of trust (Verbatim Records, 21 November 1991, pp. 54-55). Legal reasoning is not to be divorced from purpose, context or function - as the Australian argument sought to do.

28. (In parenthesis, Mr. President, my understanding is that Augustus only became Emperor after the triumvirate had ceased to function (Verbatim Records, 21 November 1991, p. 58). The reference to His Imperial Majesty on this occasion - far from Britannic - had a certain point, since Australian predominance took some time to become established, at least in a form which the other two States could do nothing to change.)

Australia's Objections based on the joint character of the British Phosphate Commissioners

29. In the domain of reality as distinct from legal fiction, the principal reason given by

Professor Pellet for emphasizing the joint character of the administration of Nauru - not joint in the sense that there was some degree of involvement, since Nauru has never denied that, but joint in the sense of inseparable - was that in the area of exploitation of phosphates the operation was truly joint, because it was based on the joint activity of the British Phosphate Commissioners (Verbatim Records, 21 November 1991, pp. 56-57).

On this point, despite what was said by Professor Pellet, there is little to add (Verbatim Records, 19 November 1991, pp. 82-84). The BPC had no legal rights on Nauru which overrode the Trusteeship obligation to the people of Nauru. Exactly what their legal rights were with respect to the phosphate is in dispute. Even if they had legal rights over the phosphate under the Australian laws which applied to Nauru at the time, the consistency of those rights with the Trusteeship obligation is in dispute. Even if the existence of those legal rights over time was consistent with the Trusteeship obligation, the manner of their exercise, in Nauru's view, gave rise to obligations for Australia in the exercise of its governmental authority over Nauru which it failed to discharge. These matters are dealt with, of course, in the Nauru Memorial.

As I argued on Tuesday, the joint character of the BPC as an industrial enterprise is simply irrelevant to the question of the admissibility of the present claim - although Australia's preference for its own commercial interests over the rights and interests of the people of Nauru protected by the Trusteeship Agreement and by adjacent legal principles may well be relevant at the stage of the merits, e.g., it may help to demonstrate Australia's international responsibility as Administrator for the resulting state of affairs.

30. The meaning and effect of Article 13 of the 1919 Agreement, are also relevant to the merits of the claim, but like these other matters they have no bearing on admissibility. Professor Pellet seeks to argue (Verbatim Records, 21 November 1991, p. 57) that because Article 13, in his view, prevented Australia from doing anything to protect the Nauruan people from the combined depredations of the BPC, and because Article 13 was contained in a tripartite Agreement (the 1919 Agreement), then the issue of Australia's responsibility is inseverably bound up with that of the other Parties to the 1919 Agreement. But that does not follow. First of all, it is far

from clear that Article 13 has the meaning Australia relies on. But in any event, the question here is not whether Australia may have been in breach of Article 13 vis-à-vis other parties to the 1919 Agreement, but what Australia's obligations were to Nauru under the Trusteeship Agreement, an instrument which in case of conflict must have prevailed over the 1919 Agreement.

There is, no doubt, an argument - Australia has not yet had the opportunity to make it - based on Article 80 of the Charter, that any right Australia might have had under the 1919 Agreement to decline to give effect to the "sacred trust" was preserved into the post-1945 period - that is the Article 80 arguments. All of that takes us profoundly into the merits. The short answer is that the relevant provisions - the provisions of the 1919 Agreement, and especially Article 13 whatever it meant - are not opposable to Nauru, and that their effect on Australia's legal responsibility is not a matter to be determined at this stage.

31. One of Professor Pellet's difficulties in dealing with terms like "Partner Governments" is that the partnership arrangement, under which the British Phosphate Commissioners operated, was not even subject to a system of joint and inserverable liability under its own proper law in cases of civil wrong or breach of trust. That makes it even more difficult to understand how its involvement as one of the elements of the present affair could create some additional form of inseverable liability, or could give rise to some additional reason for Australia being held less responsible for its own acts as governing authority. The repetition of the term "partner" - even the counting of the frequency of the words (Verbatim Records, 21 November 1991, pp. 62-63) - makes no difference to the legal position. And it should be stressed that this is no question of mere analogy from private law, but a question of the proper law of the relevant institution. The term "partner" in matters of civil wrong or breach of trust has the common-law rule of joint and several liability ingrained in it. The British Phosphate Commissioners were a common-law partnership. By what principle, when we move to the international plane and pay due regard both to the purpose and the antecedents of the "sacred trust", are we placed in the situation that the mere involvement of the BPC has made liability inseverable?

Australia's Objections based on the existence of an alleged "joint

liability"

32. With great respect - and I am dealing now more generally with the question of joint liability - the principal strategy of the Australian argument here was something I might call argument by thesaurus - the repetition of words roughly synonymous with "joint" or "inseparable", in the hope that the collection of synonyms might persuade where legal analysis, including comparative law analysis, has failed, or worse, turned out to contradict the Australian position (Verbatim Records, 21 November 1991, p. 63). In any event, I will not try the Court's patience by dealing one by one with the particular arguments made by Australia but will merely list them. No doubt the Court, examining the various authorities and references cited, will reach its own conclusion. And the terms of disagreement between the Parties are so acute as to need no further emphasis from me.

33. The Australian failings in argument include the following:

- its failure to cite any convincing authority for its position on inseverable liability (whereas it can only seek to diminish, without destroying, the authorities cited by Nauru (Verbatim Records, 21 November 1991, pp. 63-64);
- its brushing aside of the ILC's work, which does indeed support the notion of separate but distinct liability and that in a case (of joint organs) where inseverable liability was a much more likely outcome than it is here (Verbatim Records, 21 November 1991, p. 65);
- its assumption (contrary to all legal experience), that in the case of concurrent liabilities one partitions the cause of the loss on some principle of comparative fault or comparative gravity of cause and effect, and does so in such a way as to increase the burdens of recovery imposed by the law on the victim in the interests of the protection of the wrongdoers (Verbatim Records, 21 November 1991, p. 67);
- and above all, its failure to take into account the essential juridical context of the present case, the context of trusteeship, in which the interests of the beneficiary are to be given priority.

34. Thus at the end all Professor Pellet can say, confronted with the reproach that his argument will lead to a denial of justice, is that this is not an exceptional case in international law (Verbatim Records, 21 November 1991, p. 68) - as if it were not the function of a court, where

possible consistent with basic principles of jurisdiction, to do justice rather than to deny it. In the field of mandate and trusteeship agreements and, with one regretted exception in 1966, the Court has always managed to achieve that, giving effect to the intentions of the founders of the system rather than the ambitions of the closet colonizers, the disguised annexationists, who have with their various subtleties - including legal subtleties - sought to prevail.

35. Mr. President, Members of the Court, that concludes the Nauruan arguments on these two issues. With your leave, Mr. Keke, as Co-Agent, will now present Nauru's final submissions.

The PRESIDENT: Thank you, Professor Crawford. Mr. Keke.

Mr. KEKE: Mr. President, honourable Members of the Court, may I place before this Court the Final Submissions of the Republic of Nauru.

Final submissions on behalf of the Republic of Nauru

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

To *reject* the preliminary objections raised by Australia, and

To *adjudge* and *declare*:

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

(b) that the claims are admissible.

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

Mr. President and honourable Members of the Court, I wish to thank you sincerely for your forbearance and kindness in listening to the oral presentation and final submissions on behalf of the Republic of Nauru.

The PRESIDENT: Thank you, Mr. Keke. So that brings to an end the oral proceedings in the case concerning *Certain Phosphate Lands in Nauru (Nauru v. Australia)*.

Before adjourning the Court I would like, on behalf of the Court, to thank the Agents and Counsel on both sides for assisting the Court with very able arguments and also to congratulate them on maintaining a pleasant and even friendly atmosphere throughout the hard-fought case. We are very grateful for that.

Before I actually adjourn the Court I ought to use formal words which is usual before adjournment and say that, subject to this reservation, whereby the Agents of the Parties are requested to remain at the disposal of the Court for any further information or assistance it may require, I can now declare the present proceedings closed and the Court will now adjourn. Thank you very much.

The Court rose at 12.00 p.m.