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Public sitting

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

President Sir Robert Jennings presiding

in the case concerning Certain Phosphate Lands in Nauru

(Nauru v. Australia)

VERBATIM RECORD

ANNEE l991

Audience publique

tenue le lundi 11 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 Member of the Bar, New Delhi,

Mr. Leo D. Keke, Presidential Counsel of the Republic of Nauru; former Minister for Justice of the Republic of Nauru; 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,

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

Mr. H. B. Connell, Associate Professor of Law, Monash University, Melbourne; Member of the Australian Bar; former Chief Secretary and Secretary to Cabinet, Republic 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 :

M. V. S. Mani, professeur de droit international à l'Université Jawaharlal Nehru de New Delhi; ancien secrétaire en chef et secrétaire du conseil des ministres de la République de Nauru; membre du barreau de New Delhi,

M. Leo D. Keke, conseiller du Président de la République de Nauru; ancien ministre de la justice de la République de Nauru; membre du barreau de la République de Nauru et du barreau d'Australie,

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;

M. Ian Brownlie, Q.C., F.B.A., 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,

M. H. B. Connell, professeur associé de droit à l'Université Monash de Melbourne; membre du barreau d'Australie; ancien secrétaire en chef et secrétaire du conseil des ministres de la République de Nauru,

M. James Crawford, professeur de droit international, titulaire de la chaire Challis et doyen de la faculté de droit de l'Université de Sydney; membre du barreau d'Australie,

comme conseils et avocats.

Le Gouvernement australien est représenté par :

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

comme agent et conseil;

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

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,

comme conseils;

M. Peter Shannon, conseiller juridique adjoint au département des affaires étrangères et du commerce extérieur d'Australie,

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

comme conseillers.

The PRESIDENT: Please be seated. The sitting is open.

The Court sits today in its composition for the proceedings instituted by the Republic of Nauru against the Commonwealth of Australia for the settlement of a dispute concerning *Certain Phosphate Lands* in Nauru. The bench does not include a judge possessing the nationality of either of the two Parties but neither Nauru nor Australia has availed itself of its consequent right, under Article 31 of the Court's Statute, to choose a person to sit as judge *ad hoc*.

One Member of the Court, Judge Weeramantry, has explained to me that he was Chairman of a Commission of Inquiry which reported on matters which may be pertinent in this case and that in accordance with Article 17 of the Court's Statute he will therefore take no part in this case.

Sadly I must also record the loss of Judge Taslim Olawale Elias, who died in office on 14 August after more than 16 years on the bench. His passing is for his friends and colleagues the source of great sorrow, and the loss to the Court is great. Before we proceed to the business for which the Court is assembled, it is fitting that I should pay tribute to Taslim Elias and to what he contributed to the international bench, and to the development and understanding of international law within his own country and continent as well as in the United Nations.

The name of Taslim Elias will in his own country remain indelibly associated with the consolidation of legal studies and with the firm inculcation of the meaning and importance of international law. It will in particular be honoured for many years to come by the alumni of the law school that has been given his name. He served Nigeria for 15 years as, successively, Attorney-General, Minister of Justice and Chief Justice of the Supreme Court. He contributed much also to the modern legal profile of the continent of Africa, especially in the Organization of African Unity, whose constitution bears his stamp, and in the Asian-African Legal Consultative Committee. On the broader international front, Taslim Elias came to be regarded, with reason, as a bulwark of the International Law Commission: and the significance of his powerful and positive influence at the Vienna Conference on the Law of Treaties has become a legend.

His career on this bench was no less remarkable. In 1980, already the Vice-President, he found himself suddenly at the helm of the Court owing to the death in office of President

Sir Humphrey Waldock. Such was the esteem in which Taslim Elias was held that his colleagues very soon elected him their President. He thus became the first African jurist to accede to this office. During the three years of his Presidency he defended the interests of the Court with vigour and success for in him the erudition of a distinguished jurist and masterly writer was sustained by a force of character of which integrity and courage were the keynotes.

His courage was manifest in the heroic determination with which, day after day, he struggled against physical ailments of his later years and insisted on continuing to take a full part in the work of the Court. We are all, his friends and colleagues, conscious of the passing not only of an outstanding judge and jurist, but also of a lovable colleague and friend.

I ask all those present to stand for one minute in order to pay silent tribute to the memory of Judge Taslim Olawale Elias.

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Please be seated. I should now say that the vacancy to the composition of the Court left by the death of Judge Elias is shortly to be filled by an election of the United Nations in accordance with the Statute of the Court. The person elected will not, of course, be able to take any part in the present proceedings on preliminary objections in this case.

*

The Court has before it today the representatives of two Parties to the Statute of the Court, the Republic of Nauru and the Commonwealth of Australia. Australia is a party to the Statute by virtue of its membership of the United Nations. Nauru is not a Member of the United Nations but, through the fulfilment of the conditions laid down in Article 93, paragraph 2, of the Charter, and General Assembly resolutions 91(I) and 42/21, became a Member to the Statute on 29 January 1988.

On 19 May 1989 the Government of the Republic of Nauru filed in the Registry of the Court an Application instituting proceedings against the Commonwealth of Australia, whose Government,

before Nauru became independent as a Republic on 31 January 1968, had been acting as the administrator of that island under a United Nations Trusteeship Agreement.

In its Application, the Government of Nauru maintained that certain phosphate lands worked-out by mining during the period of Australian administration should have been rehabilitated in order to provide for the long-term needs of the population after independence. It alleged that Australia nevertheless failed to make due provision for this rehabilitation.

Nauru claimed, among other things, that, through this alleged failure, Australia was in breach of certain obligations accepted under the trusteeship system of the United Nations or owed to Nauru under general international law.

Accordingly, Nauru requested the Court to adjudge and declare that Australia had incurred international legal responsibility and was bound to make restitution or other appropriate reparation to Nauru for the damage and prejudice suffered.

In order to found the jurisdiction of the Court in the case, the Government of Nauru made, in its Application, the following statement:

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

That Application having been communicated to the Australian Government, and the Parties' views on the procedure ascertained, the Court, on 18 July 1989, made an Order fixing 20 April 1990 and 21 January 1991 as the respective time-limits for a Memorial and a Counter-Memorial.

The Memorial was filed within the time-limit and, in its submissions, further particularized Nauru's claim. However, in a letter addressed to the Court on 19 September 1990 the Australian Government, after stating its view that the Court had no jurisdiction in the case and that the Application was not admissible, made known its intention to file preliminary objections in accordance with Article 79 of the Rules of Court.

Australia's objections were filed on 16 January 1991, that is to say, within the time-limit fixed for the Counter-Memorial, as required by the Rule. It will be appropriate for me to leave to the Agent of Australia the statement of the grounds of his Government's objections, the written

presentation of which concludes with the following submission:

> "On the basis of the facts and law presented in the Preliminary Objections, the Government of Australia requests the Court to adjudge and declare that the Application by Nauru is inadmissible and that the Court lacks jurisdiction to hear the claims made by Nauru for all or any of the reasons set out in these Preliminary Objections."

The immediate procedure to be followed upon the filing of any preliminary objection is governed by the third paragraph of Article 79 of the Rules of Court, which provides for the proceedings on the merits of the case in question to be suspended and a time-limit to be fixed for the presentation by the other Party of a written statement of its observations and submissions. In an Order made on 8 February 1991 the Court fixed the required time-limit at 19 July 1991, and Nauru's statement was duly filed on 17 July. The Government of Nauru, in its written submissions,

> "requests the Court to reject the preliminary objections of Australia, and to adjudge and declare:
>
> *(a)* that the Court has jurisdiction in respect of the claim presented in the Memorial of Nauru, and
>
> *(b)* that the claim is admissible".

The Court has now, in accordance with the further provisions of Article 79, to hear the Parties' oral arguments with respect to its jurisdiction in the case and the admissibility of the Application.

I note the presence in the Court of the Agent of the Republic of Nauru, Mr. V. S. Mani and the Agent of the Commonwealth of Australia, Mr. Gavan Griffith. At the present hearing, it will be for the Agent of Australia to address the Court first. Before I call upon him, however, I should announce that, after ascertaining the views of the Parties, the Court has decided, in accordance with Article 53, paragraph 2, of the Rules of Court, to make the pleadings and annexed documents hitherto filed in the case accessible to the public.

I now call upon Mr. Griffith.

Mr. GRIFFITH: As the Court pleases. Mr. President, Members of the Court.

If we may say at the outset, that Australia's position is that it did not administer the trust territory. The administration, in our submission, was by an authority comprised of United Kingdom, Australia and New Zealand and, when we refer to the Administering Authority we refer to the

administration of those three States.

This is a claim brought against Australia by Nauru which Australia feels bound to oppose - at this stage on grounds of admissibility and jurisdiction. Australia's opposition to this claim is not based on antagonism towards Nauru, and certainly not on a wish to deny the competence of this Court as a matter of principle.

We in Australia, have entertained, over many years, a feeling of warm friendship and respect for the people of Nauru and have no doubt that, whatever the outcome of this case, these feelings will continue. Nevertheless, we are bound to say that we see no basis for this new and rather unexpected claim. It was (and it remains) the belief of the Australian Government that Australia had dealt fairly with the Nauruan people. Certainly, that also was the view of the Governments of the United Kingdom and New Zealand, which, as I mentioned, shared with Australia the obligations of administration. And, we believe, this also was the view of the United Nations. When the three Administering Governments were discharged from their responsibilities under the Trusteeship Agreement, by the United Nations, that discharge was given against a background of appreciation for the efforts made by the Administering Authority to bring Nauru to independence. The record of the United Nations is absolutely clear on this.

So the Court will understand that it is with some feelings of dismay and disappointment that we now face these unexpected claims by Nauru.

As regards the Court, Australia's objection to its jurisdiction of course does not stem from any antipathy towards, or distrust of, the Court. On the contrary, Australia has always held the Court in the highest possible esteem.

Since it first accepted the compulsory jurisdiction of the Permanent Court in 1930, Australia has maintained and accepted jurisdiction under the optional clause. Its current Declaration of Acceptance dated 1975 does not contain any limitation as to time or subject-matter. Indeed, the Declaration of Acceptance contains very few limitations on jurisdiction. Australia contends, however, that one of those few limitations is relevant to this case

It goes almost without saying that a broad acceptance of jurisdiction can give rise to its own

difficulties. A State, we say, should not be exposed to suits which do not have any real foundation. The preliminary objection procedure of the Court, of course, affords a measure of practical protection and we rely upon that procedure in this case. That procedure falls within the framework of what is provided for in the Statute.

Australia submits that Nauru cannot show that the Court has jurisdiction over the claims made by it in this case. Nor, we say, can Nauru show that its claims are admissible against Australia. For this reason, our application is for the Court to decline to proceed further.

PRELIMINARY OBJECTIONS

Mr. President, Members of the Court, Nauru argues that Australia's preliminary objections should not be determined at this stage and should be joined to the merits. It says that Australia's objections are not essentially preliminary. For this reason, I refer first to the Court's Rules on this matter. We emphasize at the outset that it is for Nauru as applicant to establish to the Court's satisfaction that the Court has jurisdiction and that the claim is admissible against Australia. Australia contends that Nauru cannot meet this burden.

The procedure is controlled by Article 79 of the Rules of Court. Under paragraph 7 of Article 79, the Court may uphold an objection, reject it, or declare that in the circumstances of the case, the objection does not possess an exclusively preliminary character. It follows that, unless it determines that none of Australia's objections have an exclusively preliminary character under Article 79, we submit that the Court must consider and determine Australia's objections. Under the Rules as they now stand, there is no longer a residual discretion to defer consideration of preliminary objections by joining them to the merits.

The history of Article 79 discloses that its principal purpose is to ensure the fair, but efficient,

determination of objections of this kind. Article 79 corresponds with Article 67 of the 1972 Rules which in turn was a revision, as the Court is aware, of Article 62 of the 1946 Rules.

The Court will also recall that the Sixth Committee of the General Assembly had been critical of the Court's previous practice of dealing with preliminary objections. In particular, we remind the Court that the Sixth Committee repeatedly disapproved of the practice of joining preliminary objections to the merits. Thus, in 1970, the Sixth Committee had stated in its Report that:

> "In particular, the view was expressed that it would be useful for the Court to decide expeditiously on all questions relating to jurisdiction and other preliminary issues which might be raised by the parties. The practice of reserving decisions on such questions pending consideration of the mertis of the case had many drawbacks and had been sharply criticized in connection with the *South West Africa* cases and the *Barcelona Traction* case." (Report of the Sixth Committee, *UNGA* (25th Session, Dec. 1970), UN Doc. A/8238, p. 19.)

The following year, 1971, the Report of the Sixth Committee repeated:

> "Mention was also made of a suggestion that the Court should be encouraged to take a decision on preliminary objections as quickly as possible and to refrain from joining them to the merits unless it was strictly essential." (Report of the Sixth Committee, *UNGA* (26th Session, Dec. 1971), UN Doc. A/8568, p. 21.)

Reference to the *South West Africa* cases and to the *Barcelona Traction* case, mentioned in the Sixth Committee Report, recalls the fact that in these two cases the Applicant eventually failed on grounds first raised several years before as preliminary objections. By declining to determine them when they were first made, the Court and the parties were involved in avoidable delay, expense and argument.

The Rules relating to preliminary objections were revised in 1972 to solve this problem. A number of changes were made. Paragraph 5 of Article 62 of the 1946 Rules had specifically provided that:

> "After hearing the parties the Court shall give its decision on the objection or shall join the objection to the merits."

The 1972 revision deliberately deleted this express authorization to defer decisions on preliminary objections to the merit stage. Paragraph 7 of Article 67 of the 1972 Rules (which corresponds of course to paragraph 7 of Article 79 of the present Rules) was added. It stated in part:

> "After hearing the parties, the Court shall give its decision in the form of a judgment, by which it shall either uphold the objection, reject it, or declare that the objection does not

> possess, in the circumstances of the case, an exclusively preliminary character. If the Court rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for further proceedings."

The addition of paragraph 6, now to be found in paragraph 6 of Article 79, gave further encouragement to determine preliminary objections before going to the merits. It provided:

> "In order to enable the Court to determine its jurisdiction at the preliminary stage of the proceedings, the Court, whenever necessary, may request the parties to argue all questions of law and fact, and to adduce all evidence, which bear on the issue."

Thus the new Rule directed the Court to determine all questions of law and fact relating to jurisdiction and to call for relevant evidence. It did not matter that a question of law or fact might incidentally touch the merits.

So the current form of the Rules is the outcome of a more direct approach to the determination of preliminary objections. Before the revision, the Court had felt practically compelled to defer determination of a preliminary objection where it in some way raised the matter of law or fact bearing on the merits. This was said, in the Barcelona Traction case, to be in the interests of "the good administration of justice" (*I.C.J. Reports 1964*, p. 43). But the revised Rules offered a different solution. Hence, one authoritative writer has stated:

> "In the presence of such an objection, the Court, instead of bringing in the whole of the merits by means of a joinder, would, according to paragraph 6, request the parties to argue at the preliminary stage those questions, even touching upon the merits, which bear on the jurisdictional issue. Thus, there would no longer be justification for leaving in suspense or for postponing a decision of the Court's own jurisdiction." (E. Jiménez de Aréchaga, "The Amendments to the Rules of Procedure of the International Court of Justice" (1973) 67 AJIL, p. 1, at p. 11. See also G. Guyomar, *Commentaire du Règlement de la Cour internationale de Justice - Interprétation et Pratique*, p. 371 (1972).)

Article 61, also introduced after the 1972 revision, enables the Court to act similarly in relation to objections as to admissibility and other matters. (Article 61 substantially reproduces Article 57 of the 1972 Rules.) Thus, if the Court thought it appropriate, it might request the parties to plead aspects of the case which it thought relevant to the preliminary objections, even though also relevant to the merits.

Australia submits to the Court today that, in this case, Article 79 *requires* the Court to consider and determine its objections at this preliminary stage. This is in the interests of the fair

administration of justice. (Cf. *Appeal Relating to the Jurisdiction of the ICAO Council, I.C.J. Reports 1972*, p. 56). Hence, before hearing the merits, the Court must satisfy itself of its jurisdiction and of the admissibility of the claim. We say Nauru's argument on this point fails to recognize this clear operation of the terms of Article 79.

REJECTION OF NAURU'S ARGUMENT

Mr. President and Members of the Court, we turn now to Nauru's argument. Nauru in its Written Statement has divided Australia's objections into two classes: those relating to jurisdiction and those relating to admissibility. It is true that it is a logical order for objections to jurisdiction to precede objections to admissibility. However, Australia submits that this matter of characterization is largely beside the point. Our basic proposition is that the Court should not proceed to the merits *if* there is lack of jurisdiction or if the claim is inadmissible.

Nauru, in its Written Statement, gives a narrow definition of jurisdiction. It singles out as "jurisdictional" only one of Australia's objections - that based on the reservation to its acceptance of the Court's jurisdiction. And it does not concede that even this clear jurisdictional objection should be determined now (see paragraph 114 of Nauru's Written Statement). Our answer to this is that Article 79 requires determination of the jurisdictional objection.

Nauru states that the rest of Australia's objections are objections to admissibility. That is, they raise issues as to whether the Court should in fact exercise its jurisdiction in this case. Nauru contends that each of these matters should be left to the merits. In essence, Nauru's submission needs the support of the old paragraph 5 of Article 62 of the 1946 Rules. Of course our response is that such deferment would be contrary to the terms of Article 79. Our submission is that each of our objections is preliminary.

Often, of course, there is no clear distinction between objections to jurisdiction and objections to admissibility. Characterization may vary from case to case; it is the particular facts which are important. Thus, the non-existence of a dispute may be either an objection against admissibility, or to jurisdiction, depending on whether customary international law, or the text of a compromissory

clause conferring jurisdiction on the Court is in issue. As indicated in our written pleading, our submissions are directed to establishing that, on the facts of this case, fine distinctions should not be made between objections based on jurisdiction stricto sensu, and other objections. This is all the more so as some of our objections, which are characterized by Nauru as going to admissibility, in fact go more to jurisdiction. For example, we have some doubts that our objections based on the absence of those States whose legal interests would be the very object of the judgment on the merits relates to admissibility *stricto sensu*.

We say further that paragraph 7 of Article 79 is not restricted to preliminary objections of a jurisdictional nature. It applies to all objections, whether they relate to jurisdiction, to admissibility, or to any other matter "the decision upon which is requested before any further proceedings on the merits". This is clear from the terms of paragraph 1 of Article 79. In the joint dissenting Judgment in *Nuclear Tests* it was said:

> "it would be pointless for us to characterize any particular issue as one of jurisdiction or of admissibility, more especially as the practice neither of the Permanent Court nor of this Court supports the drawing of a sharp distinction between preliminary objections to jurisdiction and admissibility. In the Court's practice the emphasis has been laid on the essentially preliminary or non-preliminary character of the particular objection rather than on its classification as a matter of jurisdiction or admissibility." *I.C.J. Reports 1974*, p. 363.)

This observation, we submit, is equally applicable here. We refer also to the Mavrommatis case (*P.C.I.J., Series A, No. 2*, p. 10).

Hence we submit that each of Australia's preliminary objections must be dealt with as a preliminary matter and each is sufficient to end these proceedings. Each falls within paragraph 1 of Article 79.

None of our objections affects the merits of Nauru's case. Each is capable of determination at this preliminary stage without going into the merits. It follows that the Court should not, in our submission, defer decision on any of the preliminary objections. The Court should determine them now even if that involves issues of some complexity.

Mr. President, Members of the Court, let me explain, therefore, why the particular objections

raised by Australia are preliminary in this manner and should be considered at this stage. Clearly, the question whether an objection is preliminary in character depends on whether the Court needs to decide the merits in order to decide the objection.

Whether or not an objection is "preliminary" is a matter of degree. Some objections necessarily have a substantially preliminary quality. But generally speaking, the preliminary character of an objection must depend on the circumstances of the case. An objection will not be "preliminary" in the relevant sense if it is so connected to merits issues that, in determining the objection, the Court determines the merits. Here we say that each of Australia's objections is capable of being determined at the preliminary stage without going into the merits of the case. For this reason, each must be regarded as preliminary.

Thus, if an objection does not require the Court to pass on the merits, it is preliminary in the relevant sense. As we have said, each of Australia's objections can be so decided without a decision as to the reponsibility of Australia for the substantive claims made against it by Nauru. No objection involves any prejudging of any legal submission on which Nauru's claims for relief directly depend. That is, no objection involves passing on Nauru's claim that Australia's failure to rehabilitate the worked-out phosphate lands constituted a breach of international law. Further, our objections based on Australia's reservation to the Court's jurisdiction and the need for the Court to have before it all States who are, in fact, involved in the so-called dispute, clearly also do not raise the substantive matter. None of our objections concerns the question whether the obligations arising under the Trusteeship Agreement were, or were not, fulfilled. Rather they concern only the legal effect of the termination of the Agreement. And also, of course, the issue of the Parties before the Court.

As I have mentioned, an objection does not cease to be preliminary simply because it requires some consideration of facts or evidence which may also bear on the merits of the case.

This is confirmed by paragraph 6 of Article 79, which we have referred to. It was also recognized by the Permanent Court in the *Polish Upper Silesia* case *(P.C.I.J., Series A, No. 6,* p. 15). There the Court stated that it might properly consider subjects belonging to the merits of the

case, even at the preliminary objection phase, or else no such objection could ever be considered.

Thus, the Applicant State cannot have preliminary objections deferred simply by pointing to some aspect of them which touches the merits. The Applicant must demonstrate in some clear way that the issue raised by the objection would involve a decision on the merits, so that it cannot be regarded as preliminary in the relevant sense.

At this stage we say that it is clear that it cannot be argued that the Court lacks the necessary evidence, or proof of facts, to be able to rule on Australia's objections at this stage. Australia has set out the factual and legal basis of its objections in some detail. It has also provided the relevant documentary evidence. All the relevant facts are before the Court. They are either admitted by Nauru, or in the public domain, or evidenced by documentary material already before the Court. To make good its objections, Australia relies on the conduct and statements of United Nations bodies and of Nauru itself, as well as the terms of the Trusteeship Agreement and the Charter. There is, therefore, and we submit to the Court, no basis for any argument that the determination of Preliminary Objections would require factual or evidentiary material available only at the merits stage.

THE FACTS

Mr. President, Members of the Court, we turn now to the facts of this case. Australia has set out in Part One of its Preliminary Objections the factual material which it considers relevant. Our case is that all the evidence relevant to these preliminary objections is now in the Court's hands.

The salient facts are shortly summarized. From 1 November 1947 until 31 January 1968, as mentioned by the President this morning, Nauru was administered by three Governments under a Trusteeship Agreement approved by the United Nations. Article 2 of the 1947 Trusteeship Agreement provided that the three Governments - United Kingdom, Australia and New Zealand - would together constitute the joint authority to "exercise the administration of the Territory". The three Governments were to be called the "Administering Authority". Notwithstanding that the joint

character of the Administering Authority was a distinguishing feature of the Trusteeship, Nauru seeks here to claim against Australia alone, as if it were the Administering State or Administering Authority.

The United Nations had considerable powers of supervision and control over the Trusteeship. These were powers which it regularly and effectively exercised. Our later submissions will deal with these matters. The Administering Authority not only reported annually to the United Nations on economic, political and social matters, but the United Nations also sent visiting missions to the Territory at three-yearly intervals between 1950 and 1965. Every year the Trusteeship Council inquired into the situation in Nauru and made its report to the General Assembly. The General Assembly specifically considered that report in its Fourth Committee. The result was that the United Nations, through its various organs, was kept fully informed of Nauruan affairs, including particular concerns about resettlement and rehabilitation and the phosphate industry.

Australia's preliminary objections refer to and rely upon the extent of United Nations involvement in Nauruan affairs in the Trusteeship period. Presently, we make two particular points. First, at no stage did the Nauruan representatives complain to the Administering Authority or to the United Nations that the failure of the Administering Authority to rehabilitate the worked-out phosphate lands amounted to a breach of the Trusteeship Agreement. The second point is that at no stage did the United Nations, through any of its organs, make a finding that the Administering Authority was in breach of the Trusteeship Agreement for this or for any other reason.

On the contrary, the record clearly shows that the Administering Authority responded to each and every United Nations recommendation in a very practical manner; and that the Administering Authority sought to shape its policies to meet the desires of the Nauruan people, as well as United Nations recommendations.

In Chapter 3 of Part I of Austalia's Preliminary Objections, we have given a detailed account of these matters. I refer the Court to that account, including observations of the United Nations Visiting Missions, to whom was entrusted the task of supervising the Administering Authority in carrying out its Trusteeship obligations.

The first Visiting Mission to Nauru in 1950 reported:

> "that the Nauruans have derived considerable benefit from the [phosphate] industry is at once obvious to anyone visiting the Territory. On the whole, the Mission found the Nauruans better clothed, in better health, better nourished and better educated than usual at this time in Pacific Island territories." (Set out in paragraph 46 of Australia's Preliminary Objections.)

The final Visiting Mission in 1965 stated:

> "Thanks to the phosphate, this tiny island lost in the mid-ocean has houses, schools and hospitals which would be the envy of places with a very ancient civilization. Its citizens pay no taxes. Because of these favourable conditions and the spirit of mutual assistance characteristic of the inhabitants, poverty is virtually unknown in Nauru. There is a high standard of living; necessities and even many luxuries are imported. The stores and shops are well stocked with goods. Few people walk in this Territory, which has an area of 8 1/4 square miles and a circumference of 12 miles [less than 20 kilometres]: there are over 1,000 motor vehicles (not to mention bicycles) for a total population of 4,914, including 2,661 Nauruans (at 30 June 1964)." (Set out in paragraph 51 of Australia's Preliminary Objections.)

Nauru's present allegations, that Australia, as part of the Administering Authority, was guilty of maladministration, simply do not fit with these reports. Australia submits that the record is very clear: the administration of Nauru by the three Partner Governments was a successful one on any view; the more so when judged against the standards of the day. It very clearly fulfilled, we say, each of the United Nations' objectives for the Trusteeship Territory, as set out in Article 76 of the Charter. But, now Nauru asserts that Australia - and Australia alone - as one only of the Partner Governments, was in breach of its Trusteeship obligations when it failed to rehabilitate the worked-out phosphate lands.

The history of the Nauruan claim for rehabilitation, which appears from the admitted facts, shows that this claim has no basis. From the beginning of the Trusteeship, it was clear to everyone that steps would be necessary to be taken to provide for the Nauruan community when the phosphate lands were worked out. At the start, it was assumed by virtually everyone that resettlement elsewhere would be the appropriate answer. To use the language of the 1953 United Nations Visiting Mission, this was considered to be "the only practicable solution". As late as 1962, the United Nations Visiting Mission commented:

> "settlement ... in a new home is unavoidable ... no one who has seen the wasteland of coral pinnacles can believe that cultivable land could be established over the top of it, except at prohibitive expense. Even a layman can see that and it is to be noted that the suggestion for rehabilitation has never come from anyone who has visited the island." (Reproduced in paragraph 200 of Australia's Preliminary Objections.)

With the encouragement of the United Nations, Australia, as part of the Administering Authority, worked with Nauruan representatives to find a suitable place for resettlement. Nauruan representatives inspected Curtis Island in 1963 - that is an island off the Queensland coast in Australia - and found it satisfactory. Indeed, the record shows (paragraphs 60-63 of Australia's Preliminary Objections) that a great deal of effort was directed to resettlement, until the change of heart by the Nauruan people themselves, in October 1964. At that date, the Nauruan community decided that it did not want resettlement. That decision was a little more than three years before independence, on 31 January 1968.

Between 1965 and 1967, there were many discussions concerning future political arrangements for Nauru and the phosphate industry. From 1966 onwards, the Partner Governments came under increasing pressure from the United Nations to move towards independence for Nauru by 31 January 1968 (*UNGA* resolution 2226(XXI) of 20 December 1966). The Nauruan representatives raised the matter of rehabilitation of worked-out lands with the three Partner Governments. The Partner Governments, including Australia, made it clear that they regarded rehabilitation of worked-out lands as impracticable, given the enormous cost involved and the doubtful benefit to the Nauruan community. They based these opinions on the negative expert reports which had been given on the subject.

As early as 1953, an inquiry by the Australian Commonwealth Scientific and Industrial Research Organisation (CSIRO) had concluded: "the regeneration of this [worked-out] land is a practical impossibility" (reproduced in paragraph 71 of Australia's Preliminary Objections). And this organization confirmed that view in 1959-1960 (reproduced in paragraph 72 of Australia's Preliminary Objections).

Then, in 1965, the United Nations General Assembly re-examined the matter and requested that "steps be taken ... towards restoring" Nauru (resolution 2111(XX) of 21 December 1965). The

Administering Authority took the first obvious step and appointed a committee of experts to examine the question of rehabilitation once again. That committee, known as the Davey Committee, reported to the Administering Authority and Nauru in June 1966. The Committee concluded that:

> "while it would be technically feasible (within the narrow definition of that expression) to refill the mined phosphate areas of Nauru with suitable soil and/or other materials from external sources, the very many practical considerations involved rule out such an undertaking as impracticable." (Reproduced in paragraph 81 of Australia's Preliminary Objections.)

In the face of this, it was apparent that rehabilitation was out of the question. Clearly, the Partner Governments would not have been acting responsibly if they had begun a programme labelled "impracticable" by all the experts, especially if it involved diverting valuable financial resources from the Nauruan people. The Davey Committee Report was brought to the attention of the United Nations and neither the Trusteeship Council nor the General Assembly referred to the possibility of rehabilitation again.

As we have mentioned, in October 1964, the Nauruans themselves had chosen to reject resettlement as an answer. But their independence was only a few years away and, of course, as independent people they would be free to decide for themselves whether to accept or reject the advice of experts, including the experts who had already reported. 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. In 1967, the real question was, "how should financial provision be made?"

The answer was the Canberra Agreement of 1967. By this Agreement, the Partner Governments transferred ownership and control of the whole of the phosphate industry to the Nauruans and did so on terms highly beneficial to the Nauruan people. The three Governments also transferred to the Nauruans all the funds accumulated from past phosphate royalties and intended to provide for the long-term future of the Nauruan community. When the Partner Governments gave up control of the phosphate industry, the British Phosphate Commissioners stayed on as managers,

only until the Nauruan Phosphate Corporation could take their place. At the same time, the Partner Governments promised to buy the entire output of the phosphate industry, at a price to be varied, in accordance with market conditions. The Nauruan representatives specifically sought to purchase the assets of the British Phosphate Commissioners in Nauru, as part of their plan to take over the industry as a going concern. In doing so, they rejected the earlier proposal of the Partner Governments to run the industry as a 50-50 enterprise. The purchase price of A$21 million was the written-down or depreciated value, fixed by agreement between the parties, following a joint team assessment (see clause 8 of the 1967 Phosphate Agreement, Annex 9 of Australia's Preliminary Objections).

We say that, on any view, the 1967 Canberra Agreement was a generous settlement of all Nauruan claims, including that of rehabilitation. It was common practice at that time, in many parts of the world, to make only 50-50 division between the host State and the operator of a concession, such as the British Phosphate Commissioners. That fact was known to Nauru and the Partner Governments. Yet the Nauruans were given 100 per cent ownership (see the Report set out in Annex 7 of Australia's Preliminary Objections). The Canberra Agreement equipped the Nauruan community with very large financial resources, including a profitable business operation with an assured and profitable market. And, it left the Nauruans free to choose how they wished to spend these resources. The United Nations General Assembly knew all of this when it resolved to terminate the 1947 Trusteeship Agreement. It knew of the Davey Committee's gloomy report on rehabilitation prospects and it knew of the terms of the Canberra Agreement. It knew also that when Nauru achieved its independence it would do so with ample financial resources. For this reason, we say Nauru did not ask the United Nations to consider the matter of rehabilitation any further.

Mr. President, Members of the Court, what is clear in this case is that there is no claim that Nauru was left with inadequate resources at the time of independence.

There may be some disagreement as to the precise extent of the undoubtedly large resources of Nauru. In particular, the Court will recall that Nauru's Written Statement includes a paper by Mr. K. Walker replying to a paper on Nauru's Phosphate Income, which is Annex 26 of Australia's

Preliminary Objections. Mr. Walker, in his Written Statement, correctly notes (in the Appendix to Nauru's Written Statement, paragraph A6) that there is an error in Table 5 of the Australian paper. That Table, entitled "Comparison of Per Capita Income, 1967", wrongly, as Mr. Walker says, showed the 1967 income of Nauru to be US$2,130. The correct figure is *Australian $*2,130 and we are grateful for Mr. Walker pointing out that error. However, Mr. Walker went on to say, that the correct figure in US dollars is US$1,902. This is per capita income in the year 1967. This is not so. We have made an error and confessed that. And Mr. Walker here has made an error which we refer the Court to. The correct figure for Nauru's per capita income in 1967 in US dollars is 2,386 (an amount higher than that stated by Australia's Written Statement). Mr. Walker's error in calculating the United States dollar equivalent arises from the fact that in 1967 there was US$1.12 for every Australian dollar. Therefore, to convert from the US dollars to Australian dollars, it was necessary to multiply by $1.12. Mr. Walker has incorrectly divided by $1.12, the sort of thing I mostly do myself. On correcting these errors of each Party in expressing this amount in US dollars, the fact is that at the sum of $2,386 the Nauruan per capita income was higher in 1967 than that of New Zealand and the United Kingdom, and this can be seen from Table 5 of the Australian paper, Annex 26, page 169 of Australia's Preliminary Objections. I am sorry to have taken the Court into such detail of this matter but it is a matter of error which we were happy to confess and then to resolve.

Further, in his paper, Mr. Walker argues that the phosphate income paid into the Nauruan Trust Funds should not be counted as per capita income. On this analysis, he says the per capita national income figure for 1966-67 would not be the sum of US$2,386, which is the corrected figure (or A$2,130) but Australian *$*776. It cannot be correct to ignore savings in the expression of national income. We say this is an approach which does not conform to national income accounting conventions. These provided that national income includes all income earned in a particular year, whether or not it is spent in that year. So national income must include both spending and savings. Mr. Walker's analysis we say is like saying that someone who earns *$*6,000 and saves *$*3,000 really only has an income of *$*3,000. So the error of this approach is obvious. Thus, the correct figure for

per capita income in 1966-67 for Nauru is the corrected amount just mentioned, namely US$2,386 and, as we have mentioned, that is a sum higher than that of New Zealand and the United Kingdom in that year.

Apart from this issue of per capita income in 1967, now clarified, the common ground between the Parties is that at independence Nauru was a wealthy country. In 1968 Nauru looked forward to a high income, with high national savings, making it one of the richest nations per capita in the world.

Further, the material before the Court makes it clear that Nauru has funds to cover its own estimates of the costs of rehabilitation. If the Trust Funds which were transferred to it at independence had been invested as intended, they would have given Nauru a capital of Australian dollars $83 million, without any other source of income. And the Nauru Rehabilitation Fund alone, deriving from post-independence mining, amounted to A$242 million in 1989 and A$260 million in 1991 (see paragraph 43 of Nauru's Written Statement). This more than covers the most recent estimate by Naurus' Commission of Inquiry, of the cost of rehabilitating the worked-out land.

The Rehabilitation Fund was established by an ordinance in 1968, shortly before independence (Annex 10 of Australia's Preliminary Objections). It was not the only fund created for the long-term future needs of the Nauruan people. The 1968 Ordinance itself indicates there were other funds available, including the Long-Term Investment Fund, established as early as 1947. One of the purposes of that Fund was for use by the Nauruans for resettlement or rehabilitation depending on their future decisions (paragraph 194, Australia's Preliminary Objections). This much had been made clear by Australia at the time the Fund was first established, and the Fund steadily increased, as a result of increases in the royalty rates paid by the British Phosphate Commissioners.

As to this matter of national wealth, Nauru says that the extent of its financial resources, both at independence and now, is beside the point. It states that its claim simply concerns "breach of obligations under the Trust" (paragraph 83 (iv) of Nauru's Written Statement). As Nauru puts its case, "whether or not Nauru had adequate reserves at independence is not the issue" (paragraph 36 of Nauru's Written Statement). Further, it asserts that whether or not the Nauru Rehabilitation Fund

could finance the whole of the operation of rehabilitation of the island is "simply beside the point" (paragraph 62 of Nauru's Written Statement).

Our response is to say that the financial resources of Nauru at independence must be material to the question whether there has in fact been a breach of any obligation of the kind alleged. The Administering Authority saw the 1967 Canberra Agreement as the instrument through which the three Governments, including Australia, would fully and finally discharge their obligations to Nauru. The economic facts confirm that the effect of the 1967 Canberra Agreement was to leave Nauru financially secure, and free to determine for itself whether or not it wished to follow the path of rehabilitation. And, with this in mind, the United Nations terminated the Trusteeship and fully discharged the Administering Authority from its Trusteeship obligations.

So, some 23 years after independence, Nauru does not contest the adequacy of the financial arrangements made at independence, or the fact of its financial strength to cover the costs of rehabilitation, if it chooses to pursue that course. It merely says these facts are irrelevant. Nevertheless, it seeks to re-open financial settlements made as the basis for terminating the Trusteeship and granting Nauru independence.

Nauru has had 23 years to rehabilitate the worked-out land. It states that it has now started a pilot study. There is little evidence of the study's progress. Nauru has not claimed any great success and we say rehabilitation is still not shown to be feasible. It may be no more than wishful thinking. But there is a certain irony in the argument that Australia was under a legal obligation to take action to rehabilitate, when after almost a quarter of a century, Nauru itself has done so little to take the same action.

THE DISPUTE

Mr. President, Members of the Court, we turn now to the so-called dispute. At bottom, the dispute is whether Australia, as part of the Administering Authority, should bear the cost of rehabilitating land worked out prior to Nauruan independence. Nauru and Australia agree that this was the subject of discussion and negotiation in the years leading to the Canberra Agreement. In

these proceedings, Nauru alleges for the first time that Australia has been guilty of maladministration during the period of the Trusteeship. Nauru says, in essence, that Australia was in breach of obligations under the Charter and the Trusteeship Agreement, because it failed to rehabilitate worked-out land by phosphate mining prior to 1967. This, according to Nauru, makes the dispute a legal dispute. But at no time before these proceedings, either during the Trusteeship or after, has Nauru ever accused Australia or any of the Partner Governments of breach of the Trusteeship Agreement.

Australia submits that the jurisdiction of the Court is excluded in this case by virtue of the reservation contained in its Declaration of Acceptance of 17 March 1975, excluding "any dispute in regard to which the parties ... have agreed ... to have recourse to some other method of peaceable settlement". The recourse to the competent organs of the United Nations, the Trusteeship Council and the General Assembly was, we submit, such a means of settlement.

In addition, Australia submits that the Nauruan rehabilitation claim was settled and satisfied by the Canberra Agreement of 1967; any liability for rehabilitation was extinguished by the termination of the Trusteeship Agreement by the United Nations on 19 December 1967. Further, that any claim by Nauru for rehabilitation was waived when it accepted the terms of the Canberra Agreement or by the subsequent conduct of its representatives in the United Nations. We argue that each of these submissions is an issue of admissibility to be determined by the Court at this stage.

Furthermore, as we have already indicated, Australia submits that the Court cannot proceed to hear this case without the consent of the United Kingdom and New Zealand. The Administering Authority was, as I have said, the three Governments, not Australia acting alone. The United Kingdom and New Zealand are indubitably parties to a dispute - if there is any - and are not sued by Nauru. Professor Pellet will explain to the Court how the absence of the two other parties is fatal to Nauru's claim.

Australia also makes specific submissions on non-admissibility and lack of jurisdiction in relation to Nauru's claims for overseas assets of the British Phosphate Commissioners, and on the issue of absence of good faith. Counsel will deal with those issues in due course.

As I have indicated, Australia submits that the Nauruan claim for rehabilitation was settled, satisfied or waived in the comprehensive settlement reached by the Partner Governments with Nauruan representatives prior to independnece. That settlement is, as we have seen, evidenced in the Canberra Agreement of 1967. The Agreement formed the basis of the United Nations decision to terminate the Trusteeship, a decision having the unqualified support of Nauruan representatives.

The negotiations which resulted in the Canberra Agreement related to four issues:

(a) resettlement;

(b) rehabilitation;

(c) the price of phosphate; and

(d) the control of the phosphate industry.

Each of these matters had been the subject of consideration and report by the United Nations. The making of the Agreement meant that each of these matters ceased to be an issue between the parties. This is because the Partner Governments and Nauru, by its representatives, agreed at the time the Canberra Agreement was made that all four issues should be laid to rest, as between the Administering Authority and the Nauruan community, on the basis that, on its forthcoming independence, Nauru would take over ovnership and full control of the phosphate deposits, the phosphate industry, and its associated investment funds. This meant that Nauru might in the future make its own choices, whether or not for rehabilitation. We say the United Nations endorsed this, and on this basis agreed to terminate the Trusteeship.

Nauru now says most emphatically that its claim for rehabilitation stems from the Trusteeship obligations. This does not, however, fit with the statement made by the Head Chief Hammer DeRoburt on 22 November 1967. He then made it clear to the Trusteeship Council that he did not consider rehabilitation was:

> "an issue relevant to the termination of the Trusteeship Agreement, nor did the Nauruans wish to make it a matter for United Nations discussion" (para. 178 of Australia's Preliminary Objections).

Australia submits, before the Court today, that Nauru cannot have it both ways. If the

rehabilitation claim does not relate to Trusteeship obligations, then we say there is no legal basis for it. If the claim arises from Trusteeship obligations, then it must, we submit, be taken to have been settled by the unqualified termination of the Trusteeship which was warmly supported by Nauru at the time. It is this late change of heart by Nauru which lies behind the Australian view that there is some absence of good faith in the institution of these proceedings over 20 years after independence. Indeed, let me say this, a review of the treatment of this issue in the United Nations leads to only one conclusion: the United Nations did not regard the failure to rehabilitate as a breach of the Trusteeship Agreement. Clearly also, it did not regard it as an issue which survived the termination of the Trusteeship.

The records make it clear that the United Nations was very much aware of the Nauruan rehabilitation claim. The Trusteeship Council Report for 1966 clearly shows that the Council not only knew of the Nauruan claims but also of the serious doubts about the feasibility of rehabilitation (see paragraphs 167 to 168 of the Preliminary Objections). It was for this reason that it pressed the Administering Authority to make appropriate investigations. Consider also the Liberian recommendation at the General Assembly of 1966, that the Administering Authority take steps towards rehabilitation. This became General Assembly resolution 2226 (XXI) to which further reference will be later made. It is clear, however, that the Report of the Committee of Experts - the Davey Committee - made available to the Trusteeship Council in May 1967, had a significant effect: for in June 1967, the Trusteeship Council declined to support another Liberian resolution calling for rehabilitation by the Administering Authority, although it did, of course, note the continuing differences on the question.

In endorsing Nauruan independence in November 1967, the Special Trusteeship Council made no mention of the rehabilitation issue. This was no doubt because, as already mentioned, Nauru had indicated that rehabilitation was not an issue relating to trusteeship. In December 1967, the Nauruan Head Chief went so far as to say to the Fourth Committee that Nauru would have ample resources to meet the future problems of worked-out lands and the ending of the phosphate industry (para. 181 of Australia's Preliminary Objections). It was in keeping with this that the United Nations

General Assembly unanimously passed resolution 2347(XXII) which ended the Trusteeship Agreement; it said nothing about the issue of rehabilitation.

Clearly, the Trusteeship Council, the Fourth Committee and the General Assembly, as well as the Administering Authority, agreed to end the Trusteeship Agreement on the basis that all those issues which had been the subject of negotiation and debate were definitively settled prior to independence.

The precise legal consequences to be drawn from these uncontested facts are the subject of our submissions.

There are, however, a few general points which we first make. First, even in its preliminary aspects, this case may have wide-ranging implications for what may be termed "former colonial issues". The Nauruan claim invites the Court to reopen a settlement made with independence in view. For the Administering Authority, there is a clear interest in finality, in closing the chapter once and for all time. But a decision of this Court may have significant implications for the finality of independence settlements generally. The stability of post-independence relationships between States must be a matter of significant concern. Secondly, Australia joins with Nauru in so far as Nauru invites the Court to decide this case (and that includes our Preliminary Objections) on the legal grounds that are stated in the written pleadings and the oral submissions. This is not, after all, a case of rich against poor State. There is no need for emotive arguments. It is not a case of David and Goliath, or of a tiny island and a large metropolitan power. Throughout the Trusteeship, the Administering Authority, including Australia, as well as the Nauruan community were subject to the supervision and overall control of the United Nations. The Nauruan community enjoyed the full protection of the United Nations and each Party acted on an informed basis throughout.

Before this Court, of course, the equality of the Parties will be preserved. Rich or poor, large or small, the Court will ensure that their legal rights have equal protection.

Yet, Mr. President, Members of the Court, here we are faced with an allegation that Australia has in some way breached the Trusteeship Agreement. From Australia's point of view, this is a strange outcome to a successful administration of Nauru which, so far as the Administering

Authority was concerned (including Australia), was recognized, supervised and discharged by resolution of the competent organs of the United Nations. It is the legal consequences to be drawn from these undisputed facts that are the subject of our submissions.

Professor Jiménez de Aréchaga will present our submissions next, concerning the effect of Australia's reservation, excluding any dispute the subject of some other agreed method of settlement.

Professor Bowett, tomorrow, will present our submissions concerning the legal effect of the termination of the Trusteeship on the claim to rehabilitation.

Mr. Burmester will then present our submissions concerning Nauru's claim to the overseas assets of the British Phosphate Commissioners. He will also deal with the issue of good faith.

And, as I have said, Professor Pellet will present our submission that Nauru's claim against the Administering Authority cannot be determined in relation to Australia, without the presence of the United Kingdom and New Zealand. His submissions we expect will be completed on Wednesday.

If the President pleases, that is the extent of our opening submissions and perhaps it is for the Court to indicate whether it desires Professor Jiménez de Aréchaga to start before the coffee break.

The PRESIDENT: Thank you very much Mr. Griffith. I think it would be convenient now to have a short break so that we do not divide up Professor Aréchaga's time. We will return in just over ten minutes. Thank you.

The Court adjourned from 11.15 to 11.30 a.m.

Mr. PRESIDENT: Please be seated. Professor Aréchaga.

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

Introduction

I have the honour of appearing before you again and it is my task to present the Preliminary Objection against the Court's jurisdiction which has been raised by Australia on the basis of its reservation, which excludes "any dispute in regard to which the parties thereto have agreed to have recourse to some other method of peaceful settlement".

In its Written Statement, Nauru deals perfunctorily with this jurisdictional objection, portraying it as referring exclusively to the method of direct negotiations between the Parties. This is to misunderstand our argument. On the basis of this misinterpretation, our adversary submits that the objection should be rejected or declared not to be of a preliminary character.

We shall try to demonstrate that the means of peaceful settlement agreed upon and utilized by the Parties, in respect of the dispute, were not simply direct negotiations but included as well certain methods of peaceful settlement resulting from the complex mechanism established by the United Nations Charter for the supervision of a trusteeship administration.

The exercise, during 20 years (between 1947 and 1968), of these various other methods of pacific solution, and the interaction between them, did result in the settlement of all the facets of the dispute which Nauru now brings before the Court.

Through the exercise of the United Nations functions of supervision of a trusteeship administration, several traditional methods of peaceful settlement of disputes were brought into play. The process comprehended an amalgam of elements of investigation, inquiry, mediation and conciliation, together with negotiations, conducted not directly between the parties but under the aegis and under the control of the competent United Nations organs.

The Trusteeship system of supervision established by the Charter embraced those traditional

methods and, in so doing, it became a specific method of its own, "the method of the Charter", exercised through the normal processes of the Trusteeship system and specially designed to examine in a contentious way and to solve new kinds of disputes, not between States, but arising between the Administering Authority and the indigenous inhabitants, the people whose rights were preserved by Article 80 of the Charter.

So far as the Administering Authority was concerned, there was a clear, legal obligation to submit to this special Charter system for the settlement of disputes. They had no option but to accept it. The essence of Nauru's case is that Nauru had no such obligation but remained free to resort to the International Court, whenever it chose, after independence. Australia's position is that both Parties - the Administering Authority on the one hand, and Nauru on the other - were bound by the same obligation. The régime did not envisage a preferential system for Nauru.

In order to support this contention, I have to engage in a brief description of certain relevant aspects of the Trusteeship régime, in particular, the handling of disputes in that system.

The handling of disputes in the Trusteeship system

One key mechanism of the Trusteeship régime was the power granted to the competent United Nations organs to send Visiting Missions to the trust territories.

This power was combined with the right recognized to the peoples to submit petitions, orally or in writing, even directly to the Visiting Missions. These petitions were subject to adversary examination with special representatives of the Administering Authority. The combination of these powers resulted in an application of a traditional method of peaceful settlement mentioned in Article 33 of the Charter: the method of investigation or inquiry.

The utilization of this method culminated with the double supervision and scrutiny exercised annually, first by the Trusteeship Council and secondly by the General Assembly through its Fourth Committee.

These organs questioned the performance of the Administering Authority, on the basis of three sources of information: the reports of the Visiting Missions; the examination of petitions and the

report presented by the Administering Authority, in the form of answers to a detailed questionnaire.

On those bases of fact, the Trusteeship Council made recommendations and suggestions in a new report, a report of its own, addressed to the General Assembly. Article 50 of the Rules of Procedure of the Trusteeship Council provided that this Report:

> "shall contain suggestions and recommendations for the improvement of the administration of the territory, and *for dealing with any problem in regard to the territory*".

That was the specific provision of the Rules of Procedure of the Trusteeship Council dealing with any problem with regard to the territory. The General Assembly, in its turn, made its own recommendations or endorsed those of the Trusteeship Council. These recommendations were addressed not just to the Administering Authority, as originally envisaged, but also to the representatives of the administered communities. The two sides in conflict were directed to proceed to consultations and negotiations in order to settle their differences.

But all that was not the end of the matter. The implementation of these consultations and negotiations had to be reported back to the United Nations organs, so that these reports were, in turn, critically examined in subsequent years by both supervisory United Nations organs.

It seems difficult to deny that this whole system of supervision embraced the application of two traditional methods of peaceful settlement, described in the treatises of International Law as the functions of mediation and conciliation.

Clearly, the action of the competent United Nations organs went beyond the function of good offices, since it was not confined to bringing the two sides to the negotiating table. The Trusteeship Council and the General Assembly not only recommended the prosecution of consultations and negotiations, they suggested concrete terms of adjustment and they controlled the implementation and the result of the recommended negotiations.

Above all, it was the responsibility of the United Nations organ to ensure that there was no breach of either the Charter or the Trusteeship Agreement. Whenever there was evidence of a breach - whether derived from the complaints of the people of the administered territory or from the United Nations own investigations - it was the duty of the United Nations bodies to ensure compliance with its

obligations by the Administering Authority.

In short, the United Nations trusteeship system of supervision incorporated with respect to the special kind of dispute we are dealing here, at least four traditional methods of peaceful settlement: investigation or inquiry; mediation, conciliation and supervised negotiations.

The four issues in dispute

These general considerations were applied in the case of Nauru, whose population enjoyed a substantial degree of political advancement, possessing representative organs, democratically elected by direct and universal suffrage. These elected representatives were fully capable to present and negotiate their claims vis-à-vis the Administering Authority and did so under the supervisory control of the competent United Nations organs. The status of Nauru as a valid interlocutor, possessing a separate identity and qualified as a proper Party to the disputes with the Administering Authority is not in dispute in these proceedings. It has not been questioned by Nauru in its Written Observations (para. 102); cf. also Preliminary Objections of Australia, paras. 184-186).

In its Written Observations, at paragraph 90, Nauru objects that there is no evidence of a formal agreement to negotiate or to have recourse to other methods of peaceful settlement.

However, the exercise by the Nauruan representatives of their rights under the Charter; the invocation by them vis-à-vis the Administering Authority of the powers granted to the United Nations organs constituted a tacit acceptance, an acceptance by conduct, and an actual recourse to these other means of peaceful settlement.

The dispute between Nauru and the Administering Authority now brought before the Court, was previously submitted to the competent United Nations organs and concerns the whole performance of the Trusteeship administration. But in particular, it refers to four closely related issues, all arising from the state of the worked-out mining land.

These four closely related issues are:

1. the resettlement of the Nauruan population;

2. the royalties paid to the long-term trust funds;

3. the transfer of the phosphate operation; and finally

4. the rehabilitation of the worked-out land.

With respect to these four issues the action of the United Nations organs consisted in inquiring into the relevant facts and making recommendations designed to promote negotiations and consultations between the Administering Authority and the representatives of the people of Nauru.

Subsequently, in analysing annually the various reports on the territory, the Trusteeship Council and the General Assembly supervised the implementation of their previous recommendations and suggestions, and suggested further steps for the final adjustment of the remaining differences.

We shall see briefly how these procedures developed in respect to each one of the four issues we have identified.

1. The question of resettlement

The early Visiting Missions considered that the only long-term solution for Nauruan problems, the only alternative they said was "the resettlement of the population elsewhere" (1953 Visiting Mission, para. 35, reproduced in Ann. 8 of Nauru Memorial).

This was the recommendation suggested by the Trusteeship Council in the early 1960s. However that recommendation was subject to an important proviso. Resettlement could not be imposed by the Administering Authority or even by the General Assembly; "the final decision and choice of alternatives", said the Trusteeship Council, "would rest entirely with the Nauruan people" (Report of the Trusteeship Council 1960, A/4404, p. 149).

The record shows that representatives of the people of Nauru conducted an inspection of Curtis Island in 1963 and found it satisfactory. However, the Nauru Local Government Council was finally unable, in October 1964, to accept the proposal for resettlement in Curtis Island (cf. Preliminary Observations of Australia, paras. 194-206).

The rejection of resettlement by the Nauruan Council, seen in retrospect, was a hard-headed choice based on economic benefits. As the 1962 Report of the Trusteeship Council (A/5204, p. 31) foresaw:

"it could hardly be expected that they would ever wish to go back to the restricted and isolated

life of a remote island without the peculiar advantages of the island they now occupied".

In short, the Nauruans choose assured prosperity on Nauru, however unattractive the environment, instead of relative poverty on an unspoiled Curtis Island.

Thus, the investigations and negotiations which were carried out in order to solve this first issue of resettlement, reached an impasse, but the question was solved in this way in full accordance with the recommendations of the Trusteeship Council and the General Assembly to the effect that "the final decision and choice of alterantives should rest entirely with the Nauruan people".

2. The royalties paid to the Long-Term Trust Funds

A second dispute between the Administering Authority and the Nauruan Local Government Council, during the 1950s, concerned the adequacy of the royalties paid to the Nauruans, out of the proceeds of the phosphate operation. The Memorial is so emphatic on this complaint that it describes the alleged insufficiency of the royalties paid as "the root of our claim" (Memorial, para. 298).

Yet, as a consequence of the recommendations made by the Visiting Missions and by the Trusteeship Council, the royalties were continuously increased in the 1960s, that is to say, in the period in which the United Nations supervision was most effective.

Thus, in 1961-1962 the Visiting Mission described the increases of that period as "substantial". The Trusteeship Council Report for 1961-1962 (A/5204) noted "from the Report of the Visiting Mission that the rate of royalty derived by the Nauruan people from the phosphate has been increasing over the years" (p. 41, para. 65), going from 4 per cent to 24 per cent (para. 63) and in 1964 the royalties paid to the Long-Term Investment Fund were increased in the proportion of three to one (Preliminary Objections, Vol. II, Ann. 5, pp. 20-21).

In 1965 the Trusteeship Council further welcomed what it called another "notable increase in royalty rates" (A/6004, p. 50).

The satisfactory improvement reached on this money dispute was a direct consequence of the methods of control and supervision exercised by United Nations organs. What was decisive in this respect was the original idea of the Trusteeship Council of advocating consultations and regular

annual meetings not just between the Administering Authority and the Nauruan Council, but between this Council and those who kept the strings of the purse, namely the British Phosphate Commissioners (Trusteeship Council Report, 1962, p. 39).

And, we may ask, to where were those royalties paid?

From the very beginning of the Trusteeship regime, the Administering Authority established a long-term fund whose purpose was described in the first report, the 1947-1948 Report of the Administering Authority. This early Report informed the General Assembly that "Special trust funds have been created which will mature with later generations of Nauruans, providing them economic means established in the days of abundance" (p. 24).

Again in 1953, the Administering Authority reiterated to the Trusteeship Council that "a trust fund was being accumulated from year to year with a view to safeguarding the economic future of the Nauruan people" (*Yearbook*, United Nations, 1953, p. 582). On their part, the United Nations supervisory organs agreed with the policy of the Administering Authority which was "reluctant to increase payments to individual landowners, preferring to pay any increases to trust funds for the benefit of the whole Nauruan community" (*Yearbook*, 1953, p. 582). The Trusteeship Council endorsed in 1958 this policy of the Administering Authority recommending "that any increase should apply mainly to the Nauruan Community Long-term Investment Fund" (Report of the Trusteeship Council, 1958, p. 99).

3. The transfer of the phosphate industry

The issue concerning the ownership and exploitation of the phosphate industry was settled in full accordance with the recommendations of another organ of the United Nations; not the Trusteeship Council but the Special Committee of the General Assembly on the Situation with regard to the implementation of the declaration on the Granting of Independence to Colonial Countries and Peoples, also known as the Special Committee of 24, with responsibility for enforcing resolution 1514 of the General Assembly. This body recommended in 1964 that "the Nauruans should be given full control over their natural resources" (Annex 8 of the *General Assembly Official Records*, 19th Session). This followed calls by the Trusteeship Council in earlier years for the

Nauruans to be consulted on the issue of an equitable share in the phosphate industry (*Trusteeship Council Report* 1963, p. 28).

Again in 1966, the Special Committee of 24 "noted that talks were to be held shortly between the people of the Territory and representatives of the Administering Authority regarding the ownership of and control over the operations of the phosphate industry. The Special Committee of 24 stated that the Nauruans should be given full control over their natural economic resources and the Committee hoped that the forthcoming discussions would resolve all outstanding questions in this regard" (*Yearbook* 1966, p. 541).

Following the lead of the Special Committee of 24, the Trusteeship Council, in 1966, invited the Administering Authority to give attention to the provisions of the General Assembly resolution of 14 December 1962 concerning permanent sovereignty over natural resources (Preliminary Observations of Australia, vol. II, Annex 28, p. 241, para. 389).

The settlement reached in the 1967 Canberra negotiations concerning the ownership and exploitation of the phosphate industry, more than complied with the recommendations of these United Nations organs. Nauru received much more than the bare natural resources to which it is entitled under the doctrine of permanent sovereignty over natural resources. It received, in addition, a prosperous industry functioning as a going concern, with an assured market at international prices, plus all the facilities and installations required to continue the exploitation without a single day's interruption. These installations were purchased at original cost less depreciation instead of the more expensive replacement cost. Moreover, during three years the Nauruan Corporation received the technical assistance necessary to undertake full management of the industry.

The Administering Authority, as the Solicitor-General has just said, abandoned the claim for a share in the benefits, despite the fact that a 50 per cent sharing of benefits was the prevailing rule in taking control of mining operations of a similar nature (Preliminary Objectives of Australia, vol. II, Annex 7, p. 33). Moreover, a further increase in royalties was fixed for the period 1966-1967.

These terms of settlement concerning the transfer of the phosphate industry were such that the Trusteeship Council "noted with satisfaction that the ownership, control and management of the

phosphate industry would be transferred to the Nauruans by 1 July 1970, and that transitional arrangements provided for a substantial increase in phosphate royalties and for the increased participation of the Nauruans in the operation of the industry" (Preliminary Objections, Annex 8, vol. II, p 242).

4. The rehabilitation of the worked-out land

It is of particular interest for present purposes, to recall the process followed with respect to the handling by United Nations organs of the question concerning the rehabilitation of the worked-out mining land.

In compliance with the General Assembly request in 1965 that steps be taken towards restoration of the land, agreement was reached between the Administering Authority and the Nauruan Government Council, at the 1965 Canberra Conference for "the setting up of an independent technical committee of experts to examine the question of rehabilitating the worked-out mining land" (Summary of Conclusions, Nauru Memorial, vol. III, pp. 196-197).

The Trusteeship Council was directly involved in the setting up and in the membership of this Committee, which was "Appointed to Investigate the Possibilities of Rehabilitation of Mined Phosphate Land" - its official title. This title indicates that this body of investigation or inquiry was called upon to report on the issue of the feasibility and practicability of the rehabilitation of the mined-out area.

As to the membership of this Expert Committee, the Trusteeship Council asked a specialized agency of the United Nations, the Food and Agriculture Organization (FAO) "to give favourable consideration to an invitation by the Administering Authority to make a representative available to serve on this Committee" (*Trusteeship Council Report 1965*, p. 50).

The experts finally appointed were persons with high qualifications and the Nauruan representatives approved their appointment (A/6704, para. 399, Annex 28 of Preliminary Objectives of Australia, vol. II, p. 241).

The Trusteeship Council informed the General Assembly in its 1965 Report that "it looked forward to the Report of the Expert Committee" (*Trusteeship Council Report 1965*, p. 50).

Other evidence of the importance assigned by the Trusteeship Council to this report was that in 1966, it "requested the Administering Authority to make the report available to Council Members as soon as possible" and recommended that it be studied as soon as possible" (*Trusteeship Council Report*, para. 408). The decisive relevance of this report on the issue of restoration of the land may be gathered from a proposal made by Liberia in the Trusteeship Council requesting rehabilitation but subordinating it to a condition: "should the Committee of Experts consider that rehabilitation of the land is feasible" (A/6304, p. 45, para. 426). A proposal which was not adopted.

The report of the Expert Committee was made available to the members of the Trusteeship Council on 16 May 1967 (A/6704, para. 384), a few months before the termination of the Trusteeship.

In the 1967 ordinary meeting of the Trusteeship Council, this body "noted that the Report of the Committee of Experts on the rehabilitation of the worked-out land ..." concluded "that the very many practical considerations involved ruled out such an undertaking as impracticable" (*Yearbook* 1967, p. 600).

The Trusteeship Council further noted that "The Nauru Local Government Council ... could not, in general, accept its conclusions" (A/6704 para. 385, reproduced in Annex 28, Preliminary Objections).

On 22 and 23 November 1967, five months after receiving the Report, the Trusteeship Council met in a special session in order to deal with an Australian request concerning the termination of the Trusteeship Agreement and the declaration of independence of Nauru as from 31 January 1968.

The Trusteeship Council adopted unanimously, on a proposal submitted by Liberia, its resolution 2149 (2) in which it noted that it had been agreed that Nauru would accede to independence on 31 January 1968.

Paragraph 3 of the Trusteeship Council resolution referred expressly to the Agreement of the Administering Authority for the adoption of the resolution terminating the Trusteeship. This requirement derives from Article 79 of the Charter, which demands the agreement of the States

directly concerned for any alteration or amendment of a trusteeship agreement.

It is significant that resolution 2149 of the Trusteeship Council did not include any mention of the question of rehabilitation of the land. The usual Liberian proposal recommending restoration of the land was not made and the issue was not taken up by either the Fourth Committee of the General Assembly.

The action of the General Assembly is even more significant. General Assembly resolution 2347 concerning independence, approved unanimously, put an end to the Trusteeship Agreement and declared Nauru independent, without saying a word about an alleged subsisting duty or obligation on the part of the former Administering Powers to restore the worked-out land or to assume any financial liability in that respect. Instead of the missing provision concerning restoration of the land, a paragraph was added to the resolution, at the level of the Fourth Committee. The Nauruan Council, invoking the enormous expenses and difficulties involved in such a rehabilitation project, had previously requested "United Nations assistance in this matter" (A/6004, Report of the Trusteeship Council, p. 312). Having regard to this earlier request, the General Assembly Fourth Committee added a new paragraph to resolution 2347:

> "urging the organs of the United Nations concerned and the specialized agencies to render all possible assistance to the people of Nauru in their endeavour to build a new nation".

In the written statement of Nauru, it tries to explain this eloquent silence of General Assembly resolution 2347 by saying that the United Nations organs did not deal with the subject of land rehabilitation because the representatives of Nauru "did not wish to make it a matter for United Nations discussion" (Preliminary Objections of Australia, Vol. II, Ann. 29, p. 249).

This explanation is unacceptable. The representative of Nauru had no power or right to withdraw unilaterally from consideration by United Nations organs an issue which had been in the agenda of the United Nations organs; had been actively considered by them at least since 1951 and was discussed in November-December 1967, both in the special session of the Trusteeship Council and in the General Assembly. So, the silence on the issue of rehabilitation in the resolution speaks for itself. The undeniable fact is that General Assembly resolution 2347 did not demand from the Administering Authority the rehabilitation of the land nor declare its financial liability in that

respect. There were incidental references to the question in isolated statements by two delegations, those of India and the USSR, but, differently from what had occured in previous resolutions, there was no support or pronouncement by the General Assembly membership on this issue of rehabilitation.

It is true, as remarked in the Memorial, that the Preamble of resolution 2347 recalls the previous resolutions of the General Assembly where reference was made to the subject. But this citation and re-citation of preceding resolutions in the Preamble is a common practice of the General Assembly, devoid of any normative or operative effect. The assertion in the Nauruan Written Observations (para. 239, p. 83) that there was a "reaffirmation" of the preceding resolutions, is inaccurate. The phrase in the preamble of Resolution 2347 merely recalls the historical fact that previous resolutions were adopted, but it does not reaffirm their contents. The Preamble of resolution 2347 also recalls the recommendations urging a future independence, but obviously those recommendations, even if recalled, had ceased to have any operative effect once independence had been actually declared. In the same way, the previous recommendations on land restoration became devoid of object once the independence of Nauru was declared and the Trusteeship terminated. The Trustee was *functus officio* and divested of all authority in the territory so that it could no longer go into the island to carry out the recommended restoration. The adoption of resolution 2347 was a final opportunity to condemn any alleged misperformance of the Trustee and "transform the rehabilitation claim into a demand for pecuniary compensation" (Memorial, p. 118).

The adoption of resolution 2347 was the proper occasion for such a condemnatory pronouncement and none was forthcoming.

Consequently, there was discharge from that claim. As the Roman jurist Paulus put it: the power to condemn implies the power to absolve. It is legitimate to ask what were the reasons that explain such an eloquent silence in the General Assembly resolution.

The exchange in the Fourth Committee

One of these reasons must be found in an exchange which took place between the

representatives of Australia and of Nauru in the presence of the whole membership of the United Nations, in the Fourth Committee of the General Assembly.

As already indicated, despite the attempt of Nauru to withdraw the question of rehabilitation from discussion at the United Nations, both Parties dealt with the subject of rehabilitation and of financial liability in that respect.

The representative of Australia, after referring to the various agreements reached at Canberra in 1967, stated:

> "if the price paid for the phosphate and the cost of production remain in much the same relationship as now and the Nauruan people put aside the same proportion of their funds as they put aside last year for their long-term fund, this fund will, on the exhaustion of the phosphate deposits in 25 years, stand at approximately dollars 400 millions.
>
> This may seem a very large amount of money, but it must be remembered that Nauru has only one major economic asset, which is a wasting one.
>
> This money is necessary to sustain the future generations of Nauruans." (Preliminary Objections of Australia, Vol. II, Ann. 31, p. 275.)

This statement, if it were incorrect or inaccurate, called for an immediate rectification and reply from the Nauruan representative who was then sitting in the Fourth Committee of the General Assembly as a member of the Australian delegation.

Yet, although an answer was given, it was not in opposition or correction to what the representative of Australia had just said. On the contrary, it confirmed the Australian statement.

Head Chief DeRoburt began by admitting the strength of Nauru's economy at that time. He said:

> "Economically Nauru's position was strong because of its good fortune in possessing large deposits of high-grade phosphate."

But he also recognized the existence of problems, saying:

> "That economic base, however, presented its own problems. One which worried the Nauruans derived from the fact that land from which phosphate had been mined would be totally unusable."

And he added that a second problem was, and I again quote him, "that phosphate was a wasting asset: in about 25 years time the supply would be exhausted". This frank presentation of the problems before the whole United Nations membership required from DeRoburt an answer as to

how he intended to solve these problems. His answer was:

> "Consequently, although it would be an expensive operation, that land would have to be rehabilitated and steps were already being taken to build up funds to be used for that purpose."

Now, the immediately obvious question in the mind of the audience of the Fourth Committee, was how those funds were going to be set up, what would be their financial source? Head Chief DeRoburt's answer identified two sources of funds and distinguished one from the other from a chronological point of view. He said:

> "The revenue which Nauru had received in the past and would receive during the next 25 years would, however, make it possible to solve the problem."

The revenue received in the past was obviously the sum of the Trust Funds accumulated by the payment of royalties during the Trusteeship régime. The revenue which Nauru would receive during the next 25 years clearly referred to the profits to be generated by the phosphate industry, totally transferred to Nauru as owner and manager.

Between these two sources, one referring to the past, the other to the future, there is no room for the additional claim now advanced against Australia, as if Australia constitutes a sort of additional or substitute provider of funds to be called up to contribute as soon as other sources had been dissipated or a substantial debt has been incurred.

The interpretation we have advanced of Head Chief DeRoburt's words is confirmed by the subsequent phrases in his statement. He makes reference to what he calls "alternative sources of income", namely the Trust Funds then in existence but he does not mention at all, even by way of a reservation, any pending or eventual claims against the former Administering Authority. He said:

> "Already some of the revenue was being allocated to development projects. So that Nauru would have *substantial alternative sources of work and of income* long before the phosphate had been used up. In addition, a *much larger proportion of its income* was being placed in a long-term investment fund, so that, whatever happened, future generations would be provided for."

Finally, Head Chief DeRoburt concluded with a categorical assertion of financial autonomy:

> "In short, the Nauruans wanted independence, and were confident that they had the resources with which to sustain it." (Preliminary Objections of Australia, Vol. II, Ann. 30, pp. 256-257.)

The other Party has emphasized previous statements by Head Chief DeRoburt containing a reservation, but these were cancelled by this latter, conclusive statement made formally before the 4th Committee of the General Assembly.

Undoubtedly, there was a change on the part of the Head Chief between what he said in Canberra and in the Trusteeship Council, and what he did say and especially what he left unsaid before the Fourth Committee. But the conclusion is unavoidable that Head Chief DeRoburt did not maintain there his claim against Australia and in effect dropped it in the presence of the whole membership.

It may be asked what were the reasons for this change of position. It is possible to give only hypothetical answers, since a total explanation may perhaps only be found in exchanges in the corridors of the General Assembly. Doubts raised by some Members as to the long-term economic viability of Nauru may have determined that assertion by Head Chief DeRoburt when he proudly said that the Nauruans "wanted independence and were confident that *they had* the resources with which to sustain it".

Perhaps the need, or the desire to obtain a unanimous vote, including the consent of the three Partner Governments, may have advised a less challenging attitude. But these are only speculations.

What is a fact is that, as a result of that statement, there was, in the General Assembly, for the first time, an absence of support and general receptivity for the issue of the restoration of the land. Head Chief DeRoburt's statement discouraged other Members from any idea or intention to submit proposals or paragraphs in the resolution concerning that issue. This is shown, for instance, by the attitude of Liberia, an active Member and then President of the Trusteeship Council. Liberia had been in previous sessions the champion of rehabilitation of the land, submitting repeated proposals to that effect. Yet, in November and December 1967 Liberia abandoned that issue, despite being the proponent of the Trusteeship Council and the General Assembly final resolutions, where no reference at all is made to that subject.

Besides Head Chief DeRoburt's statement, three converging factors explain the general change of heart in the General Assembly on this matter. These factors were: (1) the Expert Committee's report which concluded on the factual impracticability and the economic absurdity of trying to refill the worked-out areas; (2) the complete transfer of control over the phosphate operation and the generous terms of that transfer; and (3) what the Trusteeship Council described as the *notable* increase in the royalties paid to the long-term Trust Fund for the benefit of the Nauruan Community and the very substantial value of this Fund even at the time of independence.

On the basis of these considerations there was an implicit endorsement by the General Assembly of the Administering Authority position, which had been reiterated by Australia time and again at the Canberra Conference and at the United Nations organs.

Let us be clear on Australia's position, as it was formally described by its representatives. It was not one of declining

> "responsibility for meeting the cost of rehabilitation"

but on the contrary to assert that it had met that responsibility

> "by ensuring that the payments to the Nauruans would be sufficiently generous to meet all expenditure necessary for . . . rehabilitation, if they [the Nauruans] decided upon it" (Preliminary Objections of Australia, Vol. II, Ann. 7, p. 34; see also Ann. 28, p. 242, para. 401).

To accomplish this purpose the Administering Authority left Nauru a double source of funds. The first one was the Trust Funds, not only the Nauruan Long-Term Investment Fund established in 1947, but also the new Nauruan Rehabilitation Fund established by Australian Ordinance of 25 January 1967 which prescribed that the monies

> "shall not be expended otherwise than for the purpose of restoring or improving the parts of the island that had been affected by mining for phosphate" (Preliminary Objections of Australia, Vol. II, Ann. 10, p. 88).

According to figures published by Nauru, the present added value of these two Funds would finance three times over the cost of rehabilitation as it was estimated in 1987 by the Nauruan Commission of Inquiry (Preliminary Objections of Australia, Vol. II, Ann. 26, p. 195).

And a second and even larger source of funds was the complete and gratuitous transfer of the phosphate operation. For we must not forget that Nauru continued the same form of phosphate exploitation and even duplicated it, thus indulging in what it dramatically describes as "the physical destruction of the homeland".

The stream of profits resulting from this exploitation between July 1967 and today has been estimated to have a value in present dollars which would finance four times over the 1987 Nauruan estimate of the cost of rehabilitation of the area mined before 1967 (Preliminary Observations of Australia, Vol. II, Ann. 26, pp. 189 and 195).

In its Written Statement (at para. 62, p. 21), Nauru tacitly admits that these two sources of revenue - the Trust Funds and the phosphate industry - are largely sufficient to finance the rehabilitation of all the worked-out land; it limits itself to characterizing this fact as irrelevant and beside the point.

How can it be irrelevant, Mr. President and beside the point, when it confirms the Australian position? Again, that position is that the Administering Authority's responsibility was and is limited to the question whether sufficient funds were left with the Nauruans upon independence, so as to finance the rehabilitation of the one-third of phosphate lands which were mined-out during the Mandate and the Trusteeship.

Conclusion

In our submission, the unanimous adoption of resolution 2347, including the affirmative vote of the three States composing the Administering Authority, in terminating the Trusteeship Agreement also settled "through the normal processes of the trusteeship system" all the issues which had been in dispute between Nauru and the Administering Authority, as well as any additional grievances which have been brought by Nauru before the Court.

This full discharge comprises, not only the four disputes we have identified, but also the other grievances advanced by Nauru in its Memorial concerning the furnishing of information as to the phosphate prices; the generic allegations of maladministration of the Trusteeship; of expropriation

without compensation; of denial of justice and abuse of rights; in sum all the complaints denounced in the Memorial. All these issues have been settled by "other means", that is to say, by and within the United Nations organs competent to supervise the performance of the Trusteeship Administration and competent to solve all the disputes which may arise from the allegations of maladministration of a trusteeship.

The provisions contained in the General Assembly resolution 2347, and those it omitted, were based on the premise that the Administering Authority had satisfactorily discharged all the obligations it had undertaken in respect of the Trust Territory and its people, as well as towards the United Nations, culminating with the most important one of having led the Trust Territory to full independence, without a drop of blood.

These considerations find support - I invoke the support of the separate opinion of Judge Wellington Koo, one of the architects of the Trusteeship regime at the San Francisco Conference. In the Northern Cameroons case, which, of course, is different from the present one, Judge Wellington Koo concluded nevertheless, on the absence of jurisdiction of the Court, on the basis of an objection similar to the one we are advocating, the exception of "other means of peaceful settlement". That preliminary objection had been raised in the Northern Cameroons case by the Attorney General of the United Kingdom, adducing, like Australia is doing now, that the dispute had been settled by "other means"; those other methods being and I quote from the Attorney General's statement "the machinery of debate and decision of the General Assembly" (*I.C.J. Pleadings 1961*, at pp. 261 and 294-300).

Judge Wellington Koo asserted that a resolution of the General Assembly terminating a Trusteeship Agreement:

> "in settling the whole matter of the Trusteeship ... by necessary implication and effect, has also settled the dispute between the present Parties. This settlement thus fulfils the condition of exclusion from the scope of Article 19 prescribed by the terms: 'settled ... by other means'." (*I.C.J. Reports 1963*, pp. 51-52.)

In the present case, the disputes were solved through methods different from judicial settlement. The controversies were handled and settled by continuous negotiations, supervised and

directed by the competent United Nations organs, their action and pressure amounting to the exercise of the peaceful methods of mediation and conciliation, combined with investigations and inquiries conducted by Visiting Missions and expert committees. These were "other peaceful means of [the parties] own choice", to borrow the terms of Article 33 of the Charter.

In the light of these facts and these precedents, it is submitted that the settlement reached in this case meets the conditions of exclusion from the Australian declaration of acceptance of compulsory jurisdiction. The dispute is one "which the Parties thereto have agreed to have recourse to some other method of peaceful settlement" and have so agreed, on their own accord and by their own conduct. The exercise of these "other methods" has culminated in the solution of the disputes.

I have arrived at the end of my statement. I wish to thank you Mr. President, Distinguished Members of the Court, for your patience and attention.

The PRESIDENT: Thank you very much Professor Jiménez de Aréchaga. Mr. Griffith, we have a good half-hour left, I wonder whether we could perhaps begin to hear Professor Bowett's presentation.

Mr. GRIFFITH: If the President pleases, we are in the Court's hands as to that. We have made very good time and we certainly feel quite comfortable about finishing our entire presentation by Wednesday. It may be more appropriate for Professor Bowett to do it in one run as it were, but if the Court would like him to commence, we point out that it is unexpected for us to have advanced so far and we did not bring a complete copy of his text with us and have not yet given it to the interpreters. But really we are in the hands of the Court. Professor Bowett is quite comfortable to commence if the Court would like that.

The PRESIDENT: Yes, Mr. Griffith, if Professor Bowett could begin perhaps the first part of his presentation, I think it would be convenient for the Court.

Mr. GRIFFITH: At the same time, Mr. President, we could give one copy of the text to the interpreters.

The PRESIDENT: Yes.

Mr. BOWETT: Mr. President, Members of the Court.

It falls to me to discuss the termination of the Trusteeship. Specifically, the issue is this: did the termination of the Trusteeship Agreement also terminate the particular liability for breach by Australia, which is the basis of the present claim?

Australia argues that it did. Australia also argues that this is an issue of admissibility which the Court must properly address at this stage. Nauru contests this. Nauru argues that this is a question which does not have an "exclusively preliminary character" (paragraph 203 of Written Statement), so that it need not be addressed at this stage.

But, Mr. President, if this particular claim of breach was terminated in 1967, so that the claim cannot lie, what would be the point of proceeding with months of written pleadings on the merits of the claim, followed by days, or even weeks, of oral argument? That could scarcely be a profitable use of the Court's time or even of the Parties' time. So, in my submission, the question whether such a claim now exists at all is very much a preliminary issue, properly and necessarily taken at this stage.

1. The nature of the Nauruan claim

It is of the utmost importance to grasp the essential nature of the Nauruan claim. It is a claim of maladministration of the Trust territory, a claim of breach in relation to administration. Essentially, it is the claim that Australia was in breach of the Trusteeship Agreement by failing to rehabilitate the island prior to 1967. Nauru cites specifically breaches of Article 76 of the Charter,

and Articles 3 and 5 of the Trusteeship Agreement in the first of its submissions. It is in Article 5 of the Trusteeship Agreement that precise obligations are formulated.

So, we are not concerned with the obligations which the Administering Powers assumed towards the United Nations as such - obligations of report, supervision and control - or obligations owed to Member States generally: we are concerned only with obligations owed to the people of Nauru under a system of administration controlled and supervised by the United Nations.

Nor are we really concerned with obligations outside the Trusteeship Agreement. It is true that Nauru in its submissions seeks to invoke obligations of international law outside the Trusteeship Agreement. But, as the Court well knows, there are real difficulties in assuming that apart from the Treaty, international obligations were owed to non-State entities such as the people of Nauru prior to independence. Moreover, where States are bound by quite specific treaty obligations, as in this case, there is little point in invoking such general concepts as self-determination, permanent sovereignty, denial of justice and abuse of rights. For the United Nations Charter and the Trusteeship Agreement involved specific treaty obligations covering precisely the same ground as the general concepts in relation to the actual situation. The precise Trusteeship Agreement obligations were intended to be the operative obligations, based upon these more general concepts but spelling out their specific application to the case of Trusteeship. It was never supposed that by reference to such general concepts additional obligations were assumed, or that, conversely, the Administering Powers might acquire grounds justifying non-performance recognized in general international law but finding no place in the United Nations Charter or the Trusteeship Agreement. No, the only role these general concepts would have would be to give guidance in the interpretation of the Trusteeship Treaty provisions in case of ambiguity. But Nauru alleges no such ambiguity but rather attempts to construct quite separate legal obligations on the basis of these concepts, and that simply cannot be done.

Thus, I would submit to the Court that, in reality, we have here a claim for breach of specific obligations of administration imposed by the United Nations Charter and the Trusteeship Agreement.

What, then, is the consequence of this conclusion? The consequence lies in the following

proposition:

2. Such a claim lay exclusively within the jurisdiction or competence of the Trusteeship Council and General Assembly

It can scarcely be doubted that, so long as the Trusteeship Agreement lasted, a claim by the people of Nauru that there had been a breach lay, exclusively, with the competent organs of the United Nations - the Trusteeship Council and General Assembly.

The International Court was not competent to deal with this particular claim during the currency of the Trusteeship Agreement, if only because Nauru was not a State, and had no locus standi before the Court.

Australia does not argue that the Assembly's competence was exclusive of the International Court in all cases. Obviously, the system of protection provided by the Charter and the Trusteeship Agreement envisaged an important role for the Court. It could be used by the Assembly to give legal advice in the form of advisory opinions. Or it could be used by a Member State in a contentious dispute with a State administering the territory, under the provisions of certain trusteeship agreements - although not this one. The very fact that this Agreement, unlike some of the other Trusteeship Agreements, and indeed, unlike the earlier Mandate Agreement for this same territory, contained no provision for reference to the International Court of Justice of disputes between Member States and the Administering Authority is itself significant. It tends to confirm the view that the Trusteeship Council and General Assembly were regarded as exclusively competent.

So, Australia does not argue that the Court's competence was excluded in all cases. It argues only that, *for this specific claim*, the Court had no competence during the currency of the Trusteeship Agreement.

But, competence aside, the interesting question - indeed, perhaps the most interesting question is, was such a claim of breach ever made? Mr. President, it was not. It may strike the Court as extraordinary that at no stage did Nauru ever put its claim to rehabilitation of the island clearly and expressly in terms of a breach of the Trusteeship Agreement.

3. No express claim of breach was ever made to either the Trusteeship Council or General Assembly

Now certainly the issue of rehabilitation was discussed - on several occasions especially after 1964 when the Nauruans themselves rejected resettlement and turned their attention to rehabilitation. But so were many issues of policy. And we need to keep in mind that the Charter and the Trusteeship Agreement phrase the obligations of the Administering Authority in terms of the result to be achieved. But any breach lies, essentially, in the failure to achieve the objectives of Article 76 of the Charter.

But the means or policies adopted to achieve those objectives are quite another matter. As to the objectives to be achieved, the Administering Authority has no discretion, for these objectives formed specific treaty obligations. But the means or policies adopted to achieve those objectives were quite another matter, and as to these the Administering Authority had a large measure of discretion. These means and policies were certainly subject to report, to discussion and recommendation. Thus, the General Assembly's resolution of 21 December 1965 was merely a request "that immediate steps be taken by the Administering Authority towards restoring the island of Nauru for habitation" (para. 4).

It was a recommendation as to means only. So, too, with the resolution in the following year, on 20 December 1966: it was a *recommendation* to "take immediate steps, irrespective of the cost involved, towards restoring the island of Nauru for habitation ..." (para. 3).

And the very fact that, on rehabilitation, the Assembly confined itself to a mere recommendation is a sure indication that this was a matter of policy, over which the Administering Authority had discretion. Had it been a matter of the binding objectives of the Trusteeship, the Assembly would have used mandatory language. A breach would arise only when the Administering Authority failed to meet the prescribed objectives. And no finding of breach was ever made, by either the Trusteeship Council or the General Assembly, because no allegation of breach was ever made, and neither the Trusteeship Council, nor the Assembly ever considered that there had been such a breach.

This is an important point. So important, in fact, that it is worthwhile briefly recapitulating the reactions to the rehabilitation issue in these two organs. And, at the same time, we can see

exactly why it never occurred to these two organs to characterize the conduct of the Administering Authority on this matter as a breach.

As you have heard earlier, the initial assumption by all parties was that the long-term solution lay in resettlement, not rehabilitation of Nauru itself. In 1953 the United Nations Visiting Mission saw resettlement elsewhere as the only feasible solution. Even as late as 1962 United Nations Visiting Missions regarded rehabilitation as impractical.

The *volte-face* by the Nauruans themselves in 1964, in deciding against resettlement, could not alter the practicalities. The CSIRO Inquiry in 1951 had rejected the practicality of widescale rehabilitation, so had the CSIRO report of 1965, and this view was later confirmed by the independent Davey Committee's Report in 1966.

It is scarcely surprising, therefore, that General Assembly resolution 2111 (XX) of 21 December 1965 did not find that failure to rehabilitate the land was a breach. It merely requested that "steps be taken ... towards restoring the island for habitation".

And steps were taken. Just as they were taken in response to the similar resolution in the following year, resolution 2226 (XXI) of 20 December 1966. The steps taken were not, of course, to immediately start rehabilitation. For the technical evidence suggested this to be impractical on any large-scale, and, in any event, no rehabilitation scheme could be completed within the two years prior to independence.

So the steps taken were essentially two. First, to have the Committee of Experts, the Davey Committee, examine the practicality of rehabilitation once more. And, second, much more important, to conclude the 1967 Agreement for the transfer of the entire Phosphate Industry to the Nauruans, on such financial terms as to ensure that, if it so decided, Nauru could undertake rehabilitation after independence. Nauru was to be given the financial means to make its own choices. The Trusteeship Council accepted that these two new, and important, measures were steps which responded to resolution 2226. The Trusteeship Council's Report for the period July 1966 to June 1967 (A/6704, Annex 28, Australian Preliminary Objections) noted these steps with approval.

The United Nations had full knowledge of what was being done - and that is precisely why no

further requests or recommendations were addressed to the Administering Authority on this matter of rehabilitation.

Consider the state of knowledge of the United Nations General Assembly, when it met in 1967.

- The Davey Committee Report, pessimistic as to the practicality of rehabilitation on a large-scale, was known.
- The terms of the Canberra Agreement of 1967 were known.
- The Trusteeship Council, meeting in June 1967, had not repeated any request for rehabilitation by the Administering Authority.
- The Fourth Committee of the General Assembly, meeting in June 1967, had rejected a Liberian proposal to require the Administering Authority to undertake immediate rehabilitation.

On 22 November 1967, Mr. DeRoburt had addressed the Trusteeship Council in the following terms:

> "full agreement had been reached between the Administering Authority and the representatives of the Nauruan people. There was one subject, however, on which there was still a difference of opinion - responsibility for the rehabilitation of phosphate lands ... That was not an issue relevant to the termination of the Trusteeship Agreement, nor did the Nauruans wish to make it a matter for United Nations discussion ..." (Trusteeship Council, Official Records, 13th Special Session, p. 3).

Mr. President, that was a remarkable statement. Not only did it fail to allege any breach of trusteeship, but it stated explicitly that this issue - the issue of responsbility for rehabilitation - was neither relevant to termination of the Agreement, nor even an appropriate matter for United Nations discussion. The effect of this statement on the Member States of the United Nations must have been considerable. If anyone had previously entertained private thoughts about breach, they were surely dismissed once this statement was made.

Then, on 6 December 1967, in the Fourth Committee, Mr. DeRoburt made a further statement. He said:

> "land would have to be rehabilitated ... The revenue which Nauru had received in the past and would receive during the next 25 years would, however, make it possible to solve the problem" (1739. Mtg. A/C 4/SR.173, p. 395).

Note that he says "the problem". Not just that part of it which might arise from mining after independence. He is clearly referring to the existing problem, the pre-independence mining. And he assured the Fourth Committee that, under the terms of settlement embodied in the Canberra Agreement, Nauru was assured of sufficient funds to solve the problem.

Small wonder, then, that in the knowledge of all these facts, and given the assurances by Mr. DeRoburt, the General Assembly on 19 December 1967 terminated the Trusteeship unconditionally. With not a word about any breach by the Administering Authority; and not a word about any continuing responsibility for the costs of rehabilitation, even though, beyond question, the Assembly had the power both to determine the breach and allocate responsibility.

Of course, Nauru now tries to obscure this clear record. Nauru argues that, in its Preamble, the resolution on terminating the Trusteeship referred back to the resolutions of 1965 and 1966. And so it is argued, by Nauru, that the Assembly maintained the view that a continuing responsibility for rehabilitation existed.

Mr. President, this is sheer wishful thinking. As my colleague, Professor Aréchaga, has just shown you, the reference in a Preamble to early resolutions in United Nations practice is simply a way of recalling the history of the matter. The omission of any reference to a continuing duty, or responsibility, to rehabilitate was quite deliberate: the rejection of the Liberian proposal in the Trusteeship Council in 1967 is sufficient evidence of that. The reason why the Assembly made no reference to any such responsibility lies in the state of mind of the Assembly. As I have just indicated, given that the Assembly knew of the Canberra Agreement, and knew of the assurances given publicly by Mr. DeRoburt, it would have been astonishing if the Assembly had done otherwise.

So, the conclusion is clear. There was no express allegation of breach, and no finding of breach by any United Nations body.

This record also makes one further point abundantly clear, and that is that Nauru did not allege any breach for the simple reason that Nauru did not believe that the Assembly would be likely to find that there was a breach.

No other construction can be placed upon Mr. DeRoburt's statement that the remaining

difference of opinion between Nauru and the Administering Authority over responsibility for rehabilitation was not a matter for United Nations discussion, or a matter relevant even to termination. That could only mean that Nauru did not regard this difference of opinion as likely to appear to the Assembly as a breach. It is impossible to justify the proposition that a breach of the Trusteeship Agreement - for that is what Nauru alleges - is not appropriate for United Nations discussion. The notion is patently absurd. It makes sense only if you accept that in 1967 Nauru did not believe it could convince the Assembly that any breach had occured.

The idea that a breach had occured, but that this was not an appropriate matter for United Nations discussion, is totally unacceptable. After all, the whole apparatus of supervision, the questionnaires, the reports, the visits, the petitions, was designed to ensure that breaches of the Trusteeship Agreement did not occur, or that if they did they were detected, discussed and censored by the United Nations. Breaches were, above all else, the concern of the United Nations. So the fact that Nauru did not allege a breach can mean only one thing: right up to the termination of the Trusteeship, Nauru did not believe that there had been a breach of the Agreement. There was a difference of opinion over who should bear the cost of rehabilitation of the lands - the lands worked prior to 1967 - but not a breach of the Agreement.

Mr. President, if I may, that is an appropriate point at which I can conclude.

The PRESIDENT: Thank you very much, Professor Bowett. We are very much obliged. We will assemble again at 10.00 tomorrow morning to hear Professor Bowett again. Thank you.

The Court rose at 1 p.m.