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held on Tuesday 19 November 1991, at 9.30 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 mardi 19 novembre 1991, à 9 h 30, 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

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

as Co-Agents, Counsel and Advocates;

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

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

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

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as Agent and Counsel;

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

as Co-Agent;

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

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

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comme conseillers.

The PRESIDENT: Professor Brownlie, please.

Professor BROWNLIE: Thank you, Mr. President.

Yesterday, I had made an attempt to reconstitute the documentary history of the dispute with particular reference to the Talks of 1965, 1966 and 1967.

In order to deal with two Australian assertions, the first that no legal claim was ever made by the representatives of Nauru, and the second that if indeed such a claim was made, then at some point in time it was waived by Nauruan representatives. I had reached the two episodes of 22 November and 6 December 1967, which are featured a great deal in the pleadings, with the Head Chief Mr. Hammer DeRoburt on 22 November making a very clear statement of the Nauruan legal position on rehabilitation and then making a statement on 6 December 1967, in which no reference is made to that question. I had looked at the circumstances in which the statement of 6 December had been made.

Mr. President, I want to make two final comments on the significance of the statement of 6 December.

The first is that no delegation attending the Fourth Committee meetings at the 22nd session of the General Assembly interpreted the statement as a waiver of the claim to rehabilitation. On the contrary, there were statements made by several delegations referring to the outstanding rehabilitation question (I refer to the Preliminary Objections of Australia, Vol. II, Annexes, p. 263, para. 22, which was the statement of the Soviet delegate, and p. 266, para. 5, the statement of the Indian delegate).

The second overall point is that the general pattern of conduct on the part of Nauruan representatives in the material period is what should count, and that the pattern of conduct by those representatives from 1964 until independence completely contradicts the Australian thesis of waiver.

United Nations Resolutions

The final stages of the achievement of independence was supervised and monitored by the

relevant United Nations organs.

There is no evidence whatsoever to suggest that the pertinent resolutions of the Trusteeship Council and General Assembly involve a recognition of the existence of a waiver of rights on the part of Nauru.

But, Mr. President, such silence is never an obstacle in the eyes of Australia. For Australia, the logic is very simple. And, thus, for them, the 1967 Agreement involved a renunciation of Nauruan claims (though it did not say so).

For Australia, the United Nations organs were aware of the terms of the 1967 Agreement and so, when resolutions relating to independence were adopted, these, Australia says, involved recognition of the renunciation of Nauruan claims (though the resolutions did not say so).

This is the house of cards presented, for example, by Mr. Griffith at the first session of these hearings (CR 91/15, pp. 40-41). And Mr. Griffith stated proposition after proposition without benefit of precise citation from documentary sources.

The key General Assembly resolutions of 1965 and 1966 make express reference to the duty of rehabilitation. And the final resolution, General Assembly resolution 2347 (XXII) of 19 December 1967, adopted unanimously, recalled the earlier resolutions 2111 (XX) and 2221 (XXI), both of which had contained strong recommendations with respect to rehabilitation, and noted that Nauru should become independent on 31 January 1968 and resolved:

> "In agreement with the Administering Authority, that the Trusteeship Agreement for the territory of Nauru approved by the General Assembly on 1 November 1947, shall cease to be in force upon the accession of Nauru to independence on 31 January 1968 ..."

Mr. President, Members of the Court, the Australian thesis amounts to this. The granting of independence took place without the duty of rehabilitation being acknowledged by Australia. The United Nations organs permitted the completion of the independence procedure without obliging Australia to accept the burden of rehabilitation. Therefore, Nauru has waived its claim.

In our submission, there is no evidence to support the Australian assertions concerning waiver. Moreover, the related thesis, that the United Nations organs, as it were, acted as the agents of Australia in the mechanism of waiver, is startling and unattractive.

The position adopted by Australia, in its essentials, involves imposing a choice upon the Nauruan leadership in the period immediately before independence. According to this choice, either Nauru postponed independence until such time as Australia recognized its responsibility, or independence was accepted but only on the condition that the claim concerning rehabilitation was renounced.

This is precisely the scenario adopted by the Agent and Counsel of Australia. But it is a scenario unrelated to the evidence and one which, in our submission, was inherently unlikely to correspond with the intentions of the Trusteeship Council and the General Assembly in the run-up to independence.

Nauruan Affirmation of the Claim after Independence

Immediately upon the achievement of independence, the Nauruan claim was affirmed by the President of Nauru, in circumstances referred to in graphic detail by my colleague, Professor Connell. If I could just remind the Court, on 31 January, it is reported in the Australian press that President DeRoburt had said in public:

> "We hold it against Britain, Australia and New Zealand to recognize that it is their responsibility to rehabilitate one-third of the island." *(The Sun (Sydney)*, 2 February 1968; Nauru Memorial, Vol. 4, Ann. 69.)

Moreover, the theme of rehabilitation was also the subject of the letter dated 5 December 1968, from the President of Nauru to the Australian Minister of External Affairs (Nauru Memorial, Vol. 4, Ann. 76). The significance of this letter has already been explained by my colleague, Professor Connell.

The fact is that Nauruan conduct in the post-independence period provides confirmation of the claim to rehabilitation and thus of the consistency of the Nauruan position throughout, both before independence and after independence.

However, before I move on to an examination of the post-independence evidence, I shall, with your permission, present my submissions on the queston of waiver.

They are as follows:

First: during the key discussions in 1965, 1966 and 1967, Australia tended to avoid any express denial of the claim, relying generally on the assertion that Nauru would have "sufficient funds" at the time of independence, a theme which has been repeated here by the Australian Agent.

Secondly: When the Nauruan position was stated with precisions at the Thirteenth Special Session of the Trusteeship Council, on 22 November 1967, the Australian representative there present made no denial or reservation.

Thirdly: Australia has failed to produce any evidence of an express waiver and relies exclusively on inference.

Fourthly: The inferences which Australia has invited the Court to draw are baseless and are incompatible with the documentary record taken as a whole.

Fifthly: In any case, in our submission Australia has failed to satisfy the standard of proof applicable to the renunciation of rights.

Sixthly: - and lastly - the Court should require, in our submission, special rigour in proof of renunciation when the context involves relations before independence and when the alleged waiver relates to claims concerning breach of Trusteeship obligations.

The "Unreasonable Delay" Argument

I now move on to the "unreasonable delay" argument and that leads me on to the post-independence history.

Australia has invoked the concept of extinctive prescription or, in the phrase used in these proceedings, "unreasonable delay" and that argument was developed by my friend Professor Bowett in particular (CR 91/16, pp. 25-29).

In the Nauruan Written Statement (pp. 48-50, paras. 119-23) it is demonstrated that the lapse of time, as a matter of law, the lapse of time *as such* does not bar claims and that some other element, such as prejudice to the Respondent State, is required. In fact, Counsel for Australia appears to accept this view, thus resiling from the position by Australia in the Preliminary Objections of Australia (paras. 381-386).

The position of Nauru is very straightforward. The rehabilitation claim was on record, at least as early as 1965, but was not the subject of agreement and consequently remained unresolved at the time of independence. After independence, the claim was maintained by Nauru but initiatives on the part of Nauru towards a settlement met with a refusal to negotiate.

And so, in our view, the thesis of "unreasonable delay" is, in essence, an attempt to depict the reluctance of Australia to take Nauruan claims seriously as a delay in presentation of the claim on the part of the Applicant State. On this view of history - but only on this view of history - the Application of Nauru came as a surprise to Australia.

The first element in the Australian argument is "that no legal claim was ever presented post-independence" (CR 91/16, p. 27) and that the "dalay" (in their phrase) of 24 years constitutes an implied waiver (*ibid*., pp. 25-26).

In our view, the premises of the Australian argument are pleasingly eccentric.

In the first place, if the pre-independence waiver were established, then no post-independence claim could arise, it being common ground between the Parties that independence as such made no difference.

Secondly, an implied waiver can only operate in respect of an actual claim.

Thirdly, Counsel for Australia asserts that "no legal claim was ever presented post-independence".

Leaving aside the contradictions in the Australian argument, the key elements, in our submission, are these. As a matter of law, once notification of a claim has been made, the principle of prescription simply cannot apply. The Australian Government was notified of the claim prior to independence, for example, in the three phases of negotiation in 1965, 1966 and 1967.

And the Australian pleadings have recognized the continuity of the history of the dispute before and after independence, as I pointed out at the outset of my speech yesterday.

Consequently, and given that Nauru has maintained its claim relating to rehabilitation since independence, the notification in the period before independence rules out the operation of the principle of prescription.

In my submission, the relevant legal sources reveal that the principal element in the concept of "undue delay" or "prescription" is delay in the original notification of the claim to the Respondent State and once a claim has been notified there must be a very strong presumption against the application of extinctive prescription. This view is supported by Sir Hersch Lauterpacht, Charles Rousseau and other authorities and the relevant citations may be found in our Written Statement (Nauru Written Statement, pp. 50-51, paras. 126-130).

On the basis of the notification of the claim before independence, Australia cannot claim the benefit of prescription.

But Australia argues that, in any event, no legal claim was presented after independence (CR 91/16, pp. 26-28).

This argument has two aspects, of which the first is, as it were, sub rosa. The Australian presentation in this context ignores the pre-independence evidence of legal claims which I have already reviewed. And so, this omission allows Australia to insinuate that the post-independence initiatives appear on an empty canvas, when, in reality, they involve the continuation of a long-developed Nauruan stance.

The second aspect of the Australian argument is closely related to the first. It involves the suggestion that, because a document does not anticipate the precise contents of the Application, or otherwise present a precise legal claim, therefore no legal claim has been made. And this is the extremely artificial approach which Counsel for Australia brings to the post-independence history of the dispute (CR 19/16, pp. 26-27).

After all, the context in which the exchanges occurred since independence was that of diplomacy rather than negotiation. No third-party settlement procedure was involved and therefore legal argumentation as such was out of place.

Nonetheless, the Australian responses to Nauruan initiatives post-independence have shown a clear appreciation of the element of continuity with the dealings before independence and have presented what are in substance legalistic grounds for refusing Nauruan requests.

There can be no question that whenever a reference to rehabilitation occurred in a document,

the Australian Government and its advisers would be well aware of the legal ramifications and the connected series of antecedents reaching back to the Talks in the years 1964 to 1967.

Thus, although Professor Bowett (CR 91/16, p. 26) belittles the Nauruan letter dated 5 December 1968 (Nauru Memorial, Vol. 4, Ann. 76) the Australian response adopts a formal tone and deploys legal considerations in justification of its conclusions. The key paragraph of the Australian reply, dated 4 February 1969, is as follows:

> "I have consulted the New Zealand and British Governments on your proposal. You will recall that the Partner Governments, in the talks preceeding the termination of the Trusteeship Agreement, did not accept responsibility for the rehabilitation of mined-out phosphate lands. The Partner Governments remain convinced that the terms of the settlement with Your Excellency's Government were sufficiently generous to enable it to meet its needs for rehabilitation and development. In the circumstances, therefore, you will understand that the Partner Governments are not able to agree to your proposal." (Nauru Memorial, Vol. 4, Ann. 77.)

Obviously, from the terms of that letter, an important point of principle was involved, other Governments were consulted, and what was produced was a formal and cautious response to the Nauruan letter of the 5 December 1968.

The issue of rehabilitation was raised at the highest level in 1973 and 1974. The sequence of events has been recorded by the then President of Nauru, as follows:

> "On a State Visit to Canberra in 1973, I raised with the then Prime Minister, the Honourable E. G. Whitlam, the question of rehabilitation as a matter of concern. Again, when Senator Willesee, the Acting Minister of Foreign Affairs in the Whitlam Government [in Australia], visited Nauru in 1974, I raised the matter with him but to no avail. A subsequent approach to the Australian Prime Minister, the Honourable R. J. L. Hawke, in 1983, met with a similar response. At that point, my Government, well understanding that primary mining of phosphate was within a few years of completion, decided that an independent study of the rehabilitation problem should be set up and so the Commission of Inquiry was later launched." (Statement of Mr. Hammer DeRoburt, appended to the Nauru Memorial, Appendix 1, para. 30.)

In 1983 the President of Nauru addressed a letter to Mr. Hawke, the Prime Minister of Australia, which read (in part):

> "I thank you very much for sparing me some time from your very busy schedule on the Tuesday, 30th August, at the Lakeside Hotel in Canberra, to enable me to mention two outstanding matters which have been of serious concern to successive Governments of Nauru. As I had undertaken, I am now writing on one of these matters, the rehabilitation of worked-out phosphate lands on Nauru."

And the letter continues

> "Prior to, and at the time of, Nauru's achievement of independence from the Partner Governments of Australia, New Zealand and the United Kingdom, we had requested Australia and the other Governments to rehabilitate that part of the phosphate deposit which has been mined by them for the benefit of their countries. However our requests were rejected by the three Governments, the last occasion being at the General Assembly of the United Nations in December 1967."

And he completes the letter

> "My Government, acting out of necessity and in pursuance of a formal resolution made during the First Parliament (1968-1971) of Nauru, has now decided to approach the present Government of Australia to seek a sympathetic reconsideration of Nauru's position in this matter." (Nauru Memorial, Vol. 4, Ann. 78.)

And in our submission the terms of that letter of 1983 convey very clearly the continuity in the history of the dispute, and the contents of successive letters show that this element of continuity was perceived on both sides.

And then we come to the letter dated 14 March 1984 in which Mr. Hawke replies to the President of Nauru writing in 1983. And Mr. Hawke says:

> "Thank you for your letter of 6 October 1983 requesting reconsideration of the proposal that the Australian Government, along with the former partner governments of New Zealand and the United Kingdom, contribute to the cost of rehabilitating areas on Nauru that have been subjected to phosphate mining.
>
> After careful consideration of your request, in consultation with my Ministers concerned, I wish to inform you that Australia stands by the position it took in 1967 when together with New Zealand and the United Kingdom it rejected a similar request for rehabilitation assistance. The former partner governments agreed at that time that it was a requirement of termination of the trusteeship agreement that they were entirely cleared of any onus or financial responsibility for the rehabilitation of Nauru."

And Mr. Hawke continues

> "The position was reaffirmed early in 1969 by the then Minister of External Affairs who, in response to a similar proposal, emphasized that the partner governments remained convinced that the terms of the settlement with the Government of Nauru were sufficiently generous to enable it to meet its needs for rehabilitation and development.
>
> I regret, therefore, that Australia sees no reason to vary its position on this matter." (Nauru Memorial, Vol. 4, Ann. 79.)

And so, Mr. President, in the opinion of Nauru this letter of 1954 gives a true picture of the attitude of the Respondent State. The Australian Government refuses to recognize its responsibility

and accepts that this traditional refusal dates back to 1967.

No surprise is expressed; and no complaint of delay in raising the question. Mr. Hawke is accepting that the question is one of long-standing.

In other words the subject of the correspondence is clearly a dispute going back to the pre-independence period.

There is one last point on this. Australia accepts that, if there was a waiver, it is irrelevant whether or not Australia was prejudiced (CR 91/16, p. 28). However, it is contended also that Australia was in fact prejudiced by the alleged delay.

The first element of prejudice asserted by Professor Bowett is that Australia did not have all the documents apparently because "the present claim of Nauru takes us back to the days of the Mandate".

With respect this complaint has a very hollow ring. Both Parties had access to the British archives and Australia has its own archives of that period.

However, the Agent of Australia expressed a very different view in his opening speech where he said:

> "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." (CR 91/15, pp. 23-24.)

The second element of alleged prejudice invoked by Professor Bowett is that Australia is being sued alone (CR 91/16, pp. 28-29).

In the view of Nauru this is the consequence of a perfectly proper choice based upon legal considerations which will be expounded by my colleague, Professor Crawford. The question of parties has no relation to the issue of delay.

Mr. President, Members of the Court, the element of prejudice envisaged in the legal sources is precisely related to the difficulties of proof in the context of stale claims.

The doctrine of prescription or delay requires the existence of some procedural disadvantage suffered by the Respondent State. Apart from the question of notification, the only other issue of

procedural fairness tends to concern the availability of evidence to allow the Respondent adequate means of defence.

Australia was notified of Nauruan claims at least as early as 1965 and the Agent has accepted that Australia has not been disadvantaged in respect of matters of proof.

The relevant legal sources have been set out in the Nauruan Written Statement, pages 50-52, paragraphs 126-133.

I have now completed the argument on delay and will present my submissions on that subject.

First: The element of lapse of time in the history of the dispute results exclusively from Autralia's refusal to take Nauruan legal claims seriously.

Secondly: Australia was notified of Nauruan claims no later than 1965 and has suffered no procedural disadvantage whatsoever.

Thirdly and lastly: The diplomatic correspondence since independence confirms that there has been no element of the unexpected in the relations of Nauru and Australia.

Recourse to some Other Method of Peaceful Settlement

My next task, Mr. President, is to address the exclusion clause in Australia's declaration which refers to "any dispute in regard to which the parties thereto have agreed to have recourse to some other method of peaceful settlement".

In the Preliminary Objections (paras. 278-283) Australia postulates an agreement by Nauru "to the settlement of disputes between it and the Administering Authority ... by direct negotiation" (see para. 283, in particular).

Also in the Preliminary Objections (paras. 284-291) Nauru is alleged to have "agreed to accept as settled all outstanding issues with the Administering Authority by resolution of the Trusteeship Council and General Assembly, as the final method of settlement" (see para. 284, in particular).

In his oral argument on behalf of Australia Professor Jiménez de Aréchaga produced a much more complex hypothesis. And with your permission, Mr. President, I would like to remind the Court of how complex that hypothesis is. Professor Jiménez de Aréchaga said:

> "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."

And he continues

> "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 on 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." (CR 91/15, pp. 44-45.)

Mr. President, this is complex indeed, and represents a considerable restructuring of the argument as originally presented in the Preliminary Objections of Australia.

The Preliminary Objections of Australia proposes two agreements for present purposes, Professor Jiménez de Aréchaga in the oral hearings now proposes a single agreement.

All these three alleged agreements in our submission remain pure historical hypotheses unmatched by any evidence.

The Preliminary Objections of Australia itself provides no single item of documentary evidence to support the thesis that the Nauruans had agreed to settle claims by direct negotiation. The Australian Government invokes recommendations by United Nations organs (paras. 278-279) none of which refer to an agreement. In addition, there is reference to the fact that negotiations took

place and resulted in the Canberra Agreement of 1967 (paras. 280-283).

But no document is cited to support the thesis of an agreement to negotiate.

The second agreement alleged in the Preliminary Objections of Australia is to the effect that at the termination of the Trusteeship, Nauru agreed to the settlement of all issues by resolution of the Trusteeship Council and General Assembly. In the relevant paragraphs of the Australian Written Pleading (paras. 284-291) no single document is cited to embellish what constitutes essentially a piece of imagination.

And so, Mr. President, we are left with the third proposal of a possible agreement in the oral argument of Professor Jiménez de Aréchaga.

With respect to a distinguished colleague the diverse considerations he invokes do not involve the production of evidence that any agreement was ever concluded.

First of all, the agreement could only have been tacit since no written text is indicated or document cited.

Secondly, the agreement, if it existed assumed a power on the part of the United Nations organs the existence of which is problematical.

But none of the elements invoked provides proof of an agreement to have recourse to inquiry, mediation and conciliation whether through the mechanism of the Trusteeship Council or otherwise.

Mr. President, the creation of a mandate of peaceful settlements of that type, delegated to one or more organs, would surely have left some traces in the records of the United Nations.

Moreover, the Trusteeship system, with its Visiting Missions, was designed as a monitoring and supervision apparatus. To see the process as a mechanism for the settlement of legal disputes is nothing less than whimsical.

And in general the Australian thesis in this respect leaves many questions unanswered.

Why do the resolutions of the Trusteeship Council and the General Assembly make no reference to the process of dispute settlement, the procedures of mediation and conciliation and so forth?

Why do the consideranda of the resolutions make no reference to Article 33 of the Charter?

Why do the resolutions make no reference to the settlement of the various issues invoked by Australia?

The text of the most relevant Trusteeship Council resolution, resolution 2149 (S-XIII) provides no support for the extravagant constructions of Counsel for Australia. The resolution, in its operative part, reads as follows:

"*The Trusteeship Council*,

1. Notes the formal announcement by the Administering Authority that, following the resumed talks between representatives of the Nauruan people and of the Administering Authority, it has been agreed that Nauru should accede to independence on 31 January 1968;

2. Welcomes by statements made in the Trusteeship Council by representatives of the Governments of Australia, New Zealand and the United Kingdom of Great Britain and Northern Ireland as the Administering Authority, and by the representatives of the Nauruan people, that the Administering Authority has agreed to meet the request of the representatives of the Nauruan people for full and unqualified independence;

3. Recommends that the General Assembly at its twenty-second session resolve, in agreement with the Administering Authority, that the Trusteeship Agreement for the Territory of Nauru approved by the General Assembly on 1 November 1947 shall cease to be in force upon the accession of Nauru to independence on 31 January 1968.

1323rd meeting,
22 November 1967."

Mr. President, there are three further considerations of fact which militate against drawing any inference in favour of the Australian interpretation of the history.

The first is the sheer complexity of the structure proposed by Professor Jiménez de Aréchaga.

The second consideration of fact is the conduct of Australia after the independence of Nauru. Australian responses to Nauruan initiatives may refer to the 1967 Agreement or they may refer to the termination of the Trusteeship. But they contain no references to a process of dispute settlements involving organs of the United Nations.

Thirdly, there is a temporal element which Austalia has ignored. Until, quite late in the day, it became clear to the Nauruans that Australia would not recognize the responsibility concerning rehabilitation, there was in fact no mature dispute to be submitted to one of the "traditional methods of peaceful settlement of disputes" referred to by Professor Jiménez de Aréchaga (CR 91/15,

pp. 44-45).

By the time the Phosphate Industry Agreement was concluded, there was little the Nauruan could do except to reserve their rights with respect to breaches to the Trusteeship Agreement and this, in our submission, they did.

In the final run-up to independence the action of the United Nations organs in relation to the rehabilitation claim conditioned its existence but did not resolve the issue.

Mr. President, Members of the Court, in concluding my arguments on this "other methods of settlement" proviso, I must comment on the audacious approach to questions of evidence adopted by the Respondent State in these proceedings.

I am referring to the arguments in the alternative offered by Austalia which involve totally incompatible factual assertions.

Thus it has been argued that no legal claim relating to breach of the Trusteeship was ever made (Professor Bowett, CR 91/15, pp. 74-80). And so Professor Bowett stated "There was no express allegation of breach, and no finding of breach by any United Nations body." (CR 91/15, p. 79.)

On the other hand it has been argued by Professor Jiménez de Aréchaga that the action of the United Nations organs "did result in the settlement of all the facets of the dispute which Nauru now brings before the Court" (CR 91/15, p. 44; and generally at pp. 44-69).

Mr. President, this reliance upon widely divergent theses of fact confirms the view that the inferences which Australia is asking the Court to draw are simply unrelated to the documentary evidence and to the real history of the dispute.

And so our submission is that there is no basis for the application of the proviso in Australia'a Declaration accepting the Court's jurisdiction and there is no impediment to the exercise of jurisdiction.

In approaching the end of my presentation I need to deal with a quite different question.

The Nature of the Nauruan Claim

In his speech last Monday my friend Professor Bowett raised certain questions concerning the nature of the Nauruan claim. He said:

> "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 ...
>
> 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." (CR 91/15, p. 72.)

These remarks raised two connected questions which I must now address.

The first question concerns the essential continuity of the history of the dispute since before independence. In the Preliminary Objections of Australia, Australia clearly accepts this continuity.

And Passages in the Preliminary Objections of Australia which confirm the Australian position on continuity include the following:

> "289. According to the Australian declaration accepting the jurisdiction of the Court it is necessary that the parties to the dispute have agreed to have recourse to 'some other method of settlement'. In this case, the Nauruan agreement to the method of settlement involving the Trusteeship Council and the General Assembly results from the fact that the representatives of the Nauruan people, freely and of their own accord, participated in the debates of the Trusteeship Council and of the Fourth Committee of the General Assembly, accepted these fora for their claims, raising and discussing the very questions which are now the subject-matter of the dispute brought to the Court. These representatives consented to and did not oppose resolution 2347 (XXII). All this constituted agreement by conduct.
>
> 290. The Republic of Nauru bases its case on being entitled to invoke the actions and statements of the representatives of the Nauruan people, before independence. Clearly, they must also be bound by their actions and statements at that time.
>
> 291. Nor can Nauru be heard to say that it was not in a position to participate fully as an independent nation in the United Nations consideration of the issues raised by its claim. It was a third party beneficiary of the trusteeship system and must, therefore, be bound by and taken to have agreed to the method of settlement provided for through the United Nations organs."
>
> "377. ... Unlike the Nauruan claims in relation to the performance of the Trusteeship Agreement, in relation to which Australia concedes that Nauru has a legal interest, there is no

similar basis for a claim to the 1987 assets."

> "391. Even if the 1983 letter represents a relevant raising of the Nauruan claims it is still 16 years after agreement was reached on independence and the termination of the Trusteeship and, more particularly, on the terms of the settlement of all the phosphate industry issues. This in Australia's view is a delay that is fatal to the present Nauruan claim."

So much for the Preliminary Objections. And this important element of continuity has also been recognized by Counsel during the oral argument: I refer, for example, to the speech of Professor Jiménez de Aréchaga (CR 91/15, p. 48).

In the submission of Nauru, the consequence is that Australia has waived any question of admissibility relating to the fact that the elements of the dispute arose before independence.

Both parties have recognized this continuity. No doubt - we are respectfully aware of this - the Court has an inherent power to address issues *proprio motu*. However, in the submission of Nauru, particularly in the context of admissibility of claims, it is perhaps inappropriate to exercise such a power unless important considerations of international public order so require.

In the present proceedings, it is impossible to discern considerations of public order of a type which would militate against the admissibility of Nauruan claims on the basis simply that they arose before independence.

It is also worth noting that the Australian recognition of the formal and procedural validity of the claims of Nauru since before independence may be said to provide an answer to those who suggest that success on the Merits in this case would precipitate an unacceptably high number of claims from other Applicant States.

I must also revert briefly to Professor Bowett's contention that the dispute is not concerned with obligations apart from the Trusteeship Agreement and, in particular, the bases of claim related to general international law.

Nauru, of course, reserves its position on the precise legal bases of its claim. What, in our submission, is significant for present purposes is the recognition by Australia of continuity in the history of the dispute before and after independence. The justification in a procedural and evidential sense of the causes of action by means of which an Applicant State articulates its claim is obviously not a question of a preliminary character.

Mr. President, that concludes my first speech and I would, with great pleasure, ask you to give the floor to Professor Crawford.

The PRESIDENT: Thank you very much, Professor Brownlie. Professor Crawford, please.

Professor CRAWFORD:

Introduction

Mr. President, Members of this Honourable Court. This is the first time I have appeared before this Court. May I say how much of an honour it is to do so.

1. These remarks will be addressed to the Australian argument that the termination of the Trusteeship by the United Nations prevents Nauru from bringing its claims now, or the Court from hearing them.

Professor Bowett put this termination argument in a number of ways. He said that the Trusteeship Council and the General Assembly had exclusive authority to determine issues relating to the Trusteeship Agreement. Since their authority was exclusive, it would follow that the Court has no authority. Secondly, and alternatively, he argued that the termination of the Trusteeship Agreement necessarily settled all legal issues relating to the Trusteeship obligations. Thirdly, and again alternatively, he asserted that the General Assembly *did* in fact resolve Nauru's claim, and resolved it adversely to the Nauruan people. He did not suggest that there was any express decision by the General Assembly that Nauru had no rights with respect to the rehabilition of its lands. But he argued that such a decision was to be implied from the terms of General Assembly resolution 2347 (XXII). And finally, he argued that because the Nauruans failed to obtain an express decision from the General Assembly in their favour, the termination of the Trusteeship Agreement terminated their claim. According to this argument, an express positive decision in Nauru's favour, and nothing less than that, was required.

Preliminary Comments

Before dealing with these alternative forms of the termination argument, a few preliminary

comments are called for.

2. The first of these concerns the relationship between the Trusteeship Agreement and general international law. Counsel for Australia was dismissive of the idea that general international law has any role to play in this case. He suggested that the Trusteeship Agreement had come along and supplanted general international law, imposing order and precision on what had previously been vague and imprecise standards of general international law, standards lacking cogency or rigour (Verbatim Records, 11/11/91, pp. 72-73).

But this is to invert the order of issues, and to subvert what this Court said in its key pronouncement in the Namibia Opinion. The Court stressed there that the legal instruments "cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law" (*I.C.J. Reports 1971*, p. 3, at p. 31). There, of course, the Court was discussing a mandated territory, but the same evolutionary principle must apply to a trust territory. And that approach has been applied by the Court subsequently, for example in the *Western Sahara* case, *I.C.J. Reports 1975*, page 12, which concerned the application of the principle of self-determination under Chapter XI of the Charter. I would refer also to what the Court said as to the relationship between general international law and treaty obligations in the Nicaragua case, *I.C.J. Reports 1988*, page 14.

Consistently with this approach, general international law has a significant role to play, for example - and I give only one example - in helping determine where the balance is to be struck in cases where it is said that the rights or interests of an administering power conflict with the rights or interests of the people who were the beneficiary of the trust.

3. Now a second preliminary point. Counsel for Australia, Professor Bowett, stressed the scope of the General Assembly's power to determine legal issues arising under a trusteeship agreement. That the General Assembly has dispositive power in some cases is clear from the Namibia Opinion - and we certainly accept that. But Counsel seemed to say that the General Assembly could determine authoritatively (as against an Administering Authority or a dependent people) any legal issue arising from a trusteeship agreement. Not even the *Namibia* case

goes that far, since that case was only concerned with the authority of the General Assembly pursuant to a repudiation by the Administering Authority of the very conditions which gave it title to remain in the territory.

The scope of the power which Counsel for Australia attributed to the General Assembly was at least partly a function of the view that the Assembly's authority over legal disputes relating to trust territories was actually exclusive. If you have an exclusive power over something, presumably it is also a comprehensive power. But it cannot be right that the General Assembly's power is exclusive and the fact that it is not right - I shall argue that shortly - casts doubt about the related Australian position on the question of the scope of the power of the General Assembly.

For the purposes of the present case, it is not necessary to go into much detail on these issues. Nauru's primary argument is that the General Assembly was not asked to resolve the present dispute by either Nauru or Australia, and that it did not do so. That it did not settle the dispute expressly Australia concedes. I argue below that it did not do so impliedly or by necessary operation of law either.

Since that is the case, I would simply record Nauru's view on the question of competence, which is that the General Assembly's power to settle or resolve legal disputes arising in relation to trust territories is limited to the settlement of disputes either expressly referred to it by the parties, or to the resolution of legal issues necessarily arising in the course of such functions as the termination or revocation of trusteeship agreements. The present dispute, in the Nauruan submission, fell within neither of these categories.

4. My third preliminary observation relates to the question whether the issue of termination possesses in the circumstances "an exclusively preliminary character". As the Nauruan Agent has already stressed, that is not a question that can be answered generically or categorically, in the context of all conceivable arguments that the rehabilitation obligation has somehow come to an end. The question must be why is it said that the obligation has been terminated? If there is some simple and general legal proposition, unrelated to the facts of the given case, which determines that the claim must fail, then so be it. For example, if it is the case that no legal obligations can ever survive

termination of a trusteeship in any circumstances, then nothing further remains to be said. Nauru, of course, argues that that is not the case. If this Nauruan argument is accepted, then the position becomes much more complex. Australia does not suggest that the General Assembly expressly terminated or decided the Nauru rehabilitation claim. And it follows from that that the legal consequences of the relevant General Assembly resolutions, and especially of resolution 2347 (XXII), can only be decided on after a full analysis of the circumstances leading to independence, of the Nauruan and Australian positions on the various issues in dispute, and of the negotiations which preceded independence - negotiations which, as Australia concedes in the Preliminary Objections of Australia (Preliminary Objections of Australia, paras. 278 ff.), were capable of having continuing legal consequences. The legal consequences of resolution 2347 (XXII) are accordingly bound up with the whole complex of transactions which arose in the crucial pre-independence period and which are central to the Nauruan claim on the merits.

In these circumstances, Mr. President, the issue of the legal consequences of General Assembly resolution 2347 (XXII) should not be subjected to a summary resolution by the Court of the kind sought by Australia. It is, therefore, submitted that the question does not possess, in the circumtances, an exclusively preliminary character.

The Allegedly Exclusive Authority of the Political Organs of the United Nations

5. Having disposed of these preliminary matters, let me turn to the first of the arguments made by Australia in support of the view that the termination of the Trusteeship terminated the claim. This was the argument that the General Assembly and the Trusteeship Council were the only organs competent to determine the issue of breach - that they were exclusively competent. Obviously, if this were so, the Court could not make its own independent finding, in this or, indeed, in any case concerning a trust territory.

6. It should be noted that Australia accepts (Preliminary Objections of Australia, paras. 217-218) that the obligations arising under the Trusteeship Agreement and under related rules are legal and not merely political or moral obligations. It also accepts that those obligations were

justiciable. The spectre of non-justiciability underlay the second *South West Africa* cases: one cannot have legal obligations or legal rights in relation to something that is exclusively political. Australia does not go so far.

But the non-justiciability of the Trusteeship obligation having been dismissed by the front door, comes in through the back door in a more subtle guise. To say that only political organs can determine an isue is very like saying that it is not a legal issue. According to Australian arguments, the political organs had *exclusive* authority to decide the issue of breach of the Trusteeship Agreement, and therefore this Court's competence to do so is excluded, at least unless and until the General Assembly authorizes it to act, for example, by requesting an advisory opinion. Far from being an agency of co-ordinate authority within the United Nations system, the Australian argument reduces the Court to a subordinate role - a role hardly consistent with its position as the "principal judicial organ of the United Nations".

7. What is the basis for this so-called exclusive authority of the political organs of the United Nations, on which Australia relies? Well, one reason given by Professor Bowett was that the Court was not competent to deal with the issue before 1968 because there was no compromissory clause in the Trusteeship Agreement and because the Court was never asked to give an advisory opinion on Nauru. The argument seems to be that a political organ has legal authority, and not only that but exclusive legal authority, on any issue over which no international court or tribunal has jurisdiction.

8. The principle, Mr. President, has only to be stated to be rejected. That principle would mean that international organizations have extensive areas of exclusive legal authority, since the truth is that international courts do not have general jurisdiction over the legality of the acts of international organizations.

The true position is that, as a matter of general principle, international law exists independently of the jurisdiction of courts to apply it in a given case. And this is as true where international organizations are limited by or subject to international law, as it is in any other situation. The Australian argument equates the absence of jurisdiction of international tribunals with the exclusive competence of political organs. But, if that was so, how could the Court ever deal, in

the absence of jurisdiction conferred after the event, with the legality of the acts of an international organization?

9. Mr. President, the exclusive competence of the political organs of the United Nations to determine legal questions is not to be presumed. Not even the Security Council's "primary authority" over matters of international peace and security excludes the jurisdiction of this Court to determine legal issues relating to the use of force, as the Court made abundantly clear in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Jurisdiction and Admissibility, I.C.J. Reports 1984,* p. 392, at pp. 431-436; *Merits, I.C.J. Reports 1986,* p. 14 at p. 26). This must be the position *a fortiori,* with Chapters XII and XIII of the Charter, neither of which confer "primary", let alone exclusive, authority on the Trusteeship Council or the General Assembly.

10. The argument that the General Assembly and the Trusteeship Council had exclusive jurisdiction over the issue is also inconsistent with the Court's approach to these matters, as the *Namibia* Opinion shows (*I.C.J. Reports 1971,* p. 6 at pp. 45, 47, 50, 52). In the Namibia Opinion the Court had a splendid opportunity to fail to grasp the nettle of the legality of General Assembly acts, in fact it addressed precisely that question. The Court has frequently dealt with legal issues arising from mandated, trust and non-self-governing territories, even where those issues involved politically charged controversies which were under consideration by other United Nations bodies.

11. Australia does accept that there are exceptions to the "excluive jurisdiction" of the political organs: in particular the jurisdictional clauses in some trusteeship agreements, and the possibility of advisory opinions being sought on legal issues arising in relation to trust territories (Verbatim Records, 11/11/91, p. 74). But these exception threaten Australia's major proposition of exclusive power.

12. For example, the Court has never accepted that the legal position of a mandate or a trust territory which lacks a jurisdictional clause (and that was true, for example, of the South West Africa Mandate) was any different from the legal position of a mandate or a trust territory with a jurisdictional clause. Nauru in fact had one during the League of Nations period and did not have

one during the United Nations period. In particular, it has never been suggested, and certainly not suggested by the Court, that the basic rights of the people of a territory were any different depending on whether a jurisdictional clause existed. And as to advisory opinions, it cannot be the case that a dispute becomes subject to law *because* an advisory opinion is requested with respect to that dispute.

13. For these reasons, Nauru submits that the political organs of the United Nations did not have exclusive power over Trusteeship issues, and that this Court retains with respect to such territories the power to determine legal issues arising before it.

The Effects of Termination of the Trusteeship

14. I turn now to the second Australian argument, which was that the termination of the Trusteeship Agreement necessarily settled all legal issues relating to the Trusteeship obligations. Although Professor Bowett did not spend much time dealing with it, obviously the leading authority here is the decision of the Court in the *Northern Cameroons* case, *I.C.J. Reports 1963,* page 15. Before dealing with that case in some detail, I should first refer to the general legal principles applicable to the survival of rights which have accrued under international law or under a treaty.

15. It has long been recognized that a trusteeship agreement has two aspects, the aspect of a treaty and the aspect of a régime for the administration of territory in the interests of the people of the territory.

If the relevant category for the purposes of the survival of rights is the category of treaties, then the general principle is that the termination of a treaty does not terminate rights acquired under it. That is to say, rights already acquired. This was what the Court held in the First Phase of the *South West Africa* cases, *I.C.J. Reports 1962,* page 319.

On the other hand, if the relevant category for the purposes of the survival of rights is the category of trusteeship régimes, then the general principle is that rights acquired under such a régime survive the dissolution of the treaty which created it, if that is necessary in order to protect the interests of the beneficiary. The *Status of South West Africa* Opinion, *I.C.J. Reports 1950,*

page 128, is a clear application of that principle.

On either basis, then, on the basis of a treaty or on the basis of a régime, any right or legitimate claim of the people of Nauru under Trusteeship must be presumed to have survived the termination of the Trusteeship Agreement. Such a right or claim could have been extinguished only 1) if it was duly terminated by a competent authority, or 2) if the termination was the necessary consequence of acts lawfully performed by such an authority.

16. Against this background, which I submit is the relevant background of principle, I turn to the *Northern Cameroons* case. That case involved a claim by the Republic of Cameroon under the jurisdictional clause in the Trusteeship Agreement.

I hope I will be forgiven, Mr. President, and I hope I may be forgiven for using an expression as well for teaching grandparents to suck eggs, but I think the facts of the *Northern Cameroons* case are such that a brief description of them is called for. The Republic of Cameroon claimed that an administrative union between one part of the Northern Cameroons trust territory and a province of what was then the protectorate of Nigeria; that administrative union was in breach of the Trusteeship Agreement. The inference behind the Republic's trying, presumably, was that the administrative union predisposed the people of that part of the trust territory to vote, at a United Nations supervised plebiscite, for union with Nigeria rather than with the Republic of Cameroon. However the Republic of Cameroon did not seek to invalidate the General Assembly's decision confirming the result of the plebiscite. It simply sought a declaration of the legality of the administrative union, a declaration which, it accepted, could have no further legal consequences. The Court, by ten votes to five refused to consider the merits of the claim.

17. It must be stressed that the Court in that case did not decide that all legal claims arising from a Trusteeship Agreement were terminated, by operation of law, on the termination of the Agreement. The General Assembly had been concerned with a specific situation, clearly presented for its decision. That situation directly concerned the future of the people of the Trust Territory, and in particular the validity of the plebiscites that had been held. As the Court said, "the termination of the Trusteeship Agreement was a legal effect of the conclusions in paragraphs 2 and 3 of

resolution 1608(XV)" (*I.C.J. Reports 1963*, p. 15 at p. 32). I should add that paragraphs 2 and 3 were the paragraphs which directly addressed the issues of the time.

The Court noted that the Republic of Cameroon had raised its plea of nullity of the plebiscites before the General Assembly. With complete justification it construed paragraphs 2 and 3 of resolution 1608 as a specific rejection of that plea. The Court's holding on termination of the Trusteeship was confined to that issue.

18. By contrast, in the present case, at the suggestion of the Nauruan representative and without any demur from Australia, the competent United Nations organs refrained from dealing with the rehabilitation issue, and treated that issue as distinct from the question of independence and termination of the Trusteeship. Counsel for Nauru have already demonstrated that this was so, in his treatment of the waiver issue, and I refer to what was said then.

19. It is true that the Court in the *Northern Cameroons* case did state that rights and privileges granted to other United Nations Members or their nationals came to an end with the termination of the trusteeship (*I.C.J. Reports 1963*, p. 15 at p. 34). But that comment related only to the exercise of those rights *subsequent* to termination. And that was obvious, since the rights were only conferred for the duration of the trusteeship. The Court did not need to decide whether the right to claim reparation for breaches of the rights to other United Nations Members or to their nationals prior to termination would have survived. It was a different situation and it did not need to decide that question. It were funny that both Judge Wellington Koo and Judge Fitzmaurice thought that, had such rights existed under the Trusteeship Agreement, they would have survived its termination (*ibid.*, at pp. 55, 120). The Court itself expressly left the issue open (*ibid.*, at p. 35).

Nor was the Court concerned with the question whether a right or claim already vested in the people of the Trust Territory would have survived the termination of the Trusteeship Agreement. In the circumstances this was not surprising, since the people concerned had elected to become part of another State and would therefore lack any separate legal personality as a basis for bringing a post-independence claim.

20. The Court also expressed the view that

> "the Republic of Cameroon would not have had a right after 1 June 1961, when the Trusteeship Agreement was terminated and the Trust itself came to an end, to ask the Court to adjudicate upon questions affecting the rights of the inhabitants of the former Trust Territory and the general interest in the successful functioning of the Trusteeship System" (*I.C.J. Reports 1963*, p. 15 at p. 36).

But again this was not because of any general rule that "all legal issues" arising from the Trust were necessarily terminated, but because any right of the Applicant State and the Applicant State was relying on a compromissory clause under the Trusteeship Agreement, but because any right of the Applicant State to bring proceedings was part of the "system of protection" established by the Agreement and by Chapter XII and XIII of the Charter. The right on which the Republic of Cameroon relied was not a personal or individual right. It had no right that the people of the Trust Territory should vote one way or another. The right it relied on related to the "general interest", as Judge Wellington Koo stressed (*ibid*., at pp. 46, 55). That right terminated with the termination of the other aspects of the system of supervision.

21. By contrast the rights of the people of the territory concerned were the very object and purpose of the system - the "sacred trust of civilization" - and not merely an aspect of its supervision. As the Court held in 1950 in the *South West Africa* Opinion, *I.C.J. Reports 1950*, page 128, there was no reason why those substantive and personal rights of the people of the territory should be regarded as terminated with the termination of the system of supervision of the members. This would only occur if (as in the *Northern Cameroons* case) the people who were the beneficiaries had themselves elected to abandon any separate status and identity - in which case the right would terminate because the bearer of the right ceased to exist. Or it would occur if the right was expressly terminated by a competent authority.

If I may summarize the position, then, the effect of the General Assembly resolution extended only to the legal questions necessarily inherent in the termination of the trusteeship, or actually raised for decision in that connection. The present legal claim of the Republic of Nauru falls into neither of these categories.

It is true, and Australia lays considerable stress on the fact (Verbatim Record, 12/11/91, p. 9), that Judge Wellington Koo in the *Northern Cameroons* case did adopt a broader view than this. His

view was that "all legal issues" involving the people who were the beneficiary of the trusteeship were resolved by operation of law when the trusteeship agreement was terminated. But this view was not adopted by the Court. Judge Wellington Koo himself described his decision as reached "generally by a different line of reasoning" (*I.C.J. Reports 1963*, p. 15 at p. 41). Moreover he never confronted a central difficulty with his reasoning, which is this: that on his view the rights of third States and their nationals to claim in relation to the Trusteeship Agreement would have survived termination, but not the rights of the beneficiary people themselves which was the point of the Trusteeship Agreement.

22. Mr. President, the present case differs from the Northern Cameroons case in no less than four important ways, and each of these differences supports the Nauruan argument that the rehabilitation claim survived the termination of the trusteeship.

First, in the *Northern Cameroons* case, the question before the Court had to be resolved by the General Assembly before the termination of the Agreement. The necessary result of the General Assembly's decision was the creation of a territorial right in a third State, Nigeria. That decision was irreversible. And in addition the decision had the necessary effect of extinguishing the legal entity, the people of the Trust Territory, in whom the primary Trusteeship right was vested. That people having ceased to exist, any rights vested in them also ceased to exist. Neither of these problems arose in the present case.

The second difference is that, in the *Northern Cameroons* case, the issue of the terms and outcome of the plebiscite held in the Northern Cameroons was squarely before the General Assembly, and was the principal focus of its resolution 1608 (XV). The Republic of Cameroon had expressly raised this issue before the General Assembly, as the Court noted (*I.C.J. Reports 1963*, p. 15 at p. 32), and its arguments had been expressly rejected. By contrast, the Nauruan representative expressly stated before the United Nations in 1967 that the issue of rehabilitation was not a matter "relevant to the termination of the Trusteeship Agreement", I am quoting those famous words, "nor did the Nauruans wish to make it a matter for United Nations discussion". Clearly enough, what he meant - and I will not labour a point that counsel before me have made - was that it

was a separate issue to be taken up after independence - as in fact it was (see Nauru Memorial, paras. 603-12, esp. para. 609, for the relevant passages from the debates).

The third point of difference relates to the legal consequences of a decision by the Court here, as compared with the *Northern Cameroons* case. In that case the Court did not deny that the issue presented before it, the issue of the legality of the administrative union, involved a legal question, which would normally have been within its jurisdiction to decide (Professor Bowett of course would deny that, but the Court did not deny it). The problem for the Court was that, as between the parties, no remedy of any kind - that is to say, no relief which it was in the power of the parties to give or of the Court to require - could be awarded. The Republic of Cameroon did not claim that there was anything the United Kingdom could do to give effect to a judgment of the Court, whether by the payment of reparation or any other act. Accordingly, the issue before the Court was "remote from reality" (*I.C.J. Reports 1963*, p. 33). The Court could not render "a judgment capable of effective application" (*ibid*.), one capable of affecting "existing legal rights or obligations" (p. 34). But the position is quite different here. In the present case Nauru does not seek to redefine its political or territorial status. Satisfaction of the Nauruan claim is not a matter "remote from reality". On the contrary, the mined-out land is a pressing reality. Unlike its position in the Northern Cameroons case, the Court here is in a position to render a judgment capable of effective application, capable of affecting existing rights and obligations. Indeed it is precisely such a judgment that Austalia seeks to avoid!

Fourthly, the present case, and this is the fourth difference, the present case involves a claim by the beneficiary of a trust territory, rather than a State with an indirect interest of a political or economic kind. In the *Northern Cameroons* case, as the Court pointed out, it had not been asked to review the General Assembly's conclusion that the plebiscite was a valid expression of the people's views. It followed, in the Court's words, that "a decision by the Court ... that the Administering Authority had violated the Trusteeship Agreement, would not establish a causal connection between the violation and the result of the plebiscite" (*I.C.J. Reports 1963*, p. 15 at pp. 32-33). In other words, whatever its indirect effects may have been, any violation of the Trusteeship did not derogate

from the exercise of self-determination by the people concerned and that was the main thing. By contrast the present claim can be seen as a further consequence of the Nauruan people's right to self-determination, just as its survival after the termination of the Trusteeship was a consequence of the expressed wish of the Nauruan representatives to leave the question to be resolved separately.

23. In its Written statement (para. 227) Nauru pointed out that if there was an automatic termination of all legal claims by operation of law, the possibility of claims by an independent Namibia arising out of the former South African administration would be excluded. It also noted the widespread recognition (including by the General Assembly and the Security Council) that those claims survived and would enure to the benefit of the newly independent State of Namibia. I stress incidentally, Mr. President, that we are not asking the Court to resolve any dispute that may arise, or may have arisen, with respect to Namibia any more than with any other third State dispute. Professor Bowett said that this argument was "little short of ludicrous". His explanation was that

> "the Mandate for South-West Africa was terminated because there was a fundamental breach and South Africa continued to be responsible because it continued in unlawful possession" (Verbatim Records, 12 November 1991, p. 16).

But the point is, and I hope I may be forgiven for repeating it, that South Africa continued in possession on the terms of the mandate, in the sense that it was too bound by the obligation that was contained in the mandate, and the relevant United Nations organs clearly envisaged the possibility of the survival of claims against it *after* the independence of Namibia. Moreover at least one of those claims, that to Walvis Bay, involved acts of South Africa that predated the General Assembly's termination of the mandate.

24. For these reasons, Mr. President, the Nauruan right to rehabilitation was not terminated by operation of law, as the inevitable consequence of General Assembly resolution 2347 (XXII). The question remains whether it was terminated by implication, and to this I now turn.

The General Assembly did not impliedly Reject the Nauruan Rehabilitation Claim

25. Australia also argued that the General Assembly impliedly terminated the Nauruan claim.

In particular it drew that inference from the general and unreserved, what was described as the "welcoming", language of resolution 2347 (XXII) (see Verbatim Records, 12 November 1991, p. 16). The argument was briefly made, and can be briefly refuted. What resolution 2347 welcomed was the statement made by the Administering Authority that it would comply "with the request of the Nauruan people for full and unqualified independence" (Nauru Memorial, Vol. 4, Ann. 17, para. 2). It would be a strange form of compliance, and a strange form of welcome, at the same time to confer independence on the people of a trust territory and to reject one of their clearly expressed wishes in relation to the conferral of independence. That wish was expressed by the representative of the Nauruan people in the Trusteeship Council. It was that the rehabilitation issue should be left to be resolved after independence on a bilateral basis. Nor can the illusion of waiver in the Fourth Committee be relied on, since the terms of operative paragraph 2 of resolution 2347 are identical to, and are obviously taken from, the language of Trusteeship Council resolution 2149 (S-XIII) of 22 November 1967 (see Nauru Memorial, Vol. 4, Ann. 19). The wording in the two paragraphs is identical. And that Trusteeship Council resolution was adopted before the alleged waiver by Mr. DeRoburt in the Fourth Committee!

26. There are other reasons for concluding that resolution 2347 (XXII) does not purport to terminate, or adjudicate upon, the Nauruans' claim. For example the resolution "recalls" the earlier resolutions on the issue (resolutions 2111 (XX) and 2226 (XXI)), resolutions which called for the rehabilitation of the lands. Those resolutions were not recalled, Mr. President, for the purpose of being rescinded! Nor is it the case that references to earlier resolutions of the General Assembly are merely historical, as Professor Jiménez de Aréchaga argued (Verbatim Record, 11 November 1991, p. 60). How many explanations of votes or abstentions have been recorded in the General Assembly because some earlier, disfavoured resolution has been "recalled" or brought to mind?

27. This conclusion is also sufficient to dispose of Australia's argument that a decision in Nauru's favour would "reflect upon the authority - even the competence - of the General Assembly", to quote Professor Bowett, "would constitute the most damning indictment of the Trusteeship Council and General Assembly" and would "amount to an accusation of either incompetence or bias"

(Verbatim Record, 12 November 1991, p. 14). The first point is that we are still at the stage of preliminary objections. It remains to be seen whether the Court will tend to agree or disagree with the views of the General Assembly, views which anyway tended to favour Nauru on the points at issue. It also remains to be seen what conclusion, if any, the Court will find it necessary to reach on the administrative competence of the various United Nations bodies dealing with Nauru. These are not matters for the present stage of the proceedings. The key point, however, is that the General Assembly deliberately left the issue to be resolved bilaterally, and therefore there can be no question of conflict.

Was an Express Saving of the Claim Required

28. Finally, Australia argued that because the Nauruans failed to obtain an express decision from the General Assembly in their favour, the termination of the Trusteeship Agreement terminated their claim (Verbatim Records, 12 November 1991, pp. 8, 16-17). Counsel argued that "the act of discharge, unconditionally and without reservation, implies an acceptance by the Assembly that the Administering Authority has fully discharged its treaty obligations" (Verbatim Records, 12 November 1991, p. 8).

But to focus on General Assembly resolution 2347 (XXII) as a "discharge" is misleading. The General Assembly was concerned to terminate the Trusteeship so as to bring about the independence of Nauru. It was not its purpose to clear the Administering Authority of fault, in relation to a matter not presented before it for decision and not necessary to be decided as a prerequisite to independence. One might as well say that a resolution welcoming the release of a person from protective detention was passed in order to clear the detaining authorities from any wrong-doing that may have been committed during the period of detention. That is an exactly equivalent argument. And the argument is even less persuasive if the release of the detainee is described, as Nauruan independence was described in resolution 2347 (XXII), as "unqualified".

There is no authority requiring express recognition by the General Assembly as a precondition to the continuation of the rights of the people concerned. Not only that, but to require the

renunciation of a claim on the part of the people of the trust territory, as a precondition to their independence, would violate rules in relation to self-determination that were well-established by 1967. In particular it would violate the rule stated in paragraph 5 of resolution 1514, that the independence of Trust and Non-Self-Governing Territories is to occur "without any conditions or reservations". There is no indication at all that the General Assembly sought to impose such a condition.

29. Mr. President, even if there is a requirement of express recognition of the continuing Nauruan claim by the relevant political organ, and I have argued that there is not, but even if there is, it is submitted that there was sufficient recognition of that right here. In particular there was ample recognition of the Nauruan claim, by reason of the terms of resolutions 2111 (XX) and 2226 (XXI); the reaffirmation of those resolutions in resolution 2347 (XXII); and the resolution of the Committee of Twenty-Four of 27 September 1967. These have been extensively discussed in the Memorial and by other Counsel appearing for Nauru, and you will be relieved to hear that I will not repeat what they have said (see the Nauru Memorial, paras. 586-587, 604-608, 610, 613-614 for details).

30. It should be stressed that Nauru does not argue that its right to rehabilitation arises by virtue of any particular resolution of the General Assembly, the Trusteeship Council or the Committee of Twenty-four, notwithstanding their support for Nauru's position. The right arises by reason of the relevant rules of international law, treaty law and general international law, as they apply in the circumstances of the case. Given that that is so, the most that could be required in the case of a termination would be recognition of the claim in question as a subsisting claim. We were not asking for an *impera marta*, the only thing that would be required would be recognition, and there is ample evidence of such recognition here.

31. Additional support for this conclusion is provided by the accepted principles of interpretation. United Nations resolutions are, like treaties, to be interpreted in the context of relevant principles of general international law. In the present case, the relevant principle is the principle of self-determination, including the important rule, stated in paragraph 5 of

General Assembly resolution 1514 (XV) and which was at the time being increasingly stressed by the General Assembly, that the independence of Trust and Non-Self-Governing Territories is to occur,

> "without any conditions or reservations, in accordance with their freely-expressed will and desire ... in order to enable them to enjoy complete independence".

The role of United Nations organs was to give effect to that principle.

32. As earlier Counsel have stressed, the Nauruan position on this issue was well known to delegations attending the Trusteeship Council and General Assembly. No delegation - not even the Australian delegation - contradicted the Nauruan representative's reservation with respect to the issue of rehabilitation.

Conclusion

33. For all these reasons, it is submitted that the Nauruan claim survived the termination of the Trusteeship Agreement, an event which was contemporaneous with the independence of Nauru.

The Australian Agent argued that a decision in Nauru's favour on this point would have serious adverse consequences in several ways. First, he said, it would "open the floodgates" of post-independence claims, which have usually been regarded as governed by some form of clean-slate doctrine. Secondly, it would create uncertainty in the minds of former Administering Powers as to the possibility of claims being brought against them relating to their former administrative acts. May I conclude Nauru's presentation on the issue of termination by commenting briefly on these two broader policy arguments.

34. So far as the floodgates of post-colonial claims are concerned, the primary point, of course, is that the Court's function is to do justice in accordance with international law as between the Parties before it.

But in any event, the floodgates would not be opened, not even in Holland, by a decision in Nauru's favour in this case. Nauru's position is that the legal disputes which survive termination are those which meet the following two conditions: first, the legal dispute in question must have arisen

during the currency of the administration of a trust territory; and secondly, the dispute must not have been resolved by the United Nations in the process leading up to independence, whether by express resolution on the issue by a competent authority or because the issue was necessarily tied up - as it was in the Northern Cameroons case - with the General Assembly's decision on the form of independence. We say nothing about territories other than trust territories. We say nothing about disputes raised for the first time after independence even though these relate to pre-independence facts. We say nothing about disputes directly arising from the territorial or dispositive aspects of Trusteeship. There are few claims which meet these two conditions, and those that do can safely be left to be resolved on their merits.

35. On the question of unfairness to former Administering Powers, it is suggested that there is no unfairness. First of all, if what I have said above about the limited circumstances of the present claim is correct, the level of uncertainty involved for former Administering Powers is correspondingly slight. There are very few situations that meet the criteria I have outlined above, and accordingly, the disruptive effects - if that is what they would be - of a decision in favour of Nauru on this point would be minimal.

As far as Australia itself is concerned there is no prejudice. Australia was well aware of the claim prior to independence. The claim was asserted, and well publicized, immediately after Nauru gained independence. Australia showed in its response to diplomatic notes, and in its other contacts with Nauru in the post-independence period, a lively awareness of the claim. I refer, for example, to the Australian Minister's letter of 1968, which according to the Australian Agent, seems to have been a letter vigorously denying a claim which Nauru had not made!

36. So there was no uncertainty on the part of Australia. But if there had been, Australia was in a perfect position to resolve it during the United Nations debate. It could have proposed an additional clause to what became General Assembly resolution 2347 (XXII), an additional clause determining the rehabilitation claim against Nauru. It had the legal skills and the diplomatic resources to draft and promote such an amendment. In the Australian argument, it was said that the onus was on the Nauruans to do this. But that is unreasonable. The Nauruans were the

beneficiaries of a not-yet-extinguished Trusteeship. They were present, by courtesy, as part of the Australian delegation. They were a small group, then lacking in resources. Why was the onus on them to resolve any uncertainties Australia may have had?

In fact, Mr. President, there was no uncertainty. The Nauruans had made their position clear. No doubt Australia judged - in 1967 of all years, no doubt correctly - what the chances of an amendment terminating the rehabilitation claim would have been.

37. Mr. President, Members of the Court, that concludes the Nauruan arguments on the issue of termination and its effects. With your leave, Professor Brownlie will now address the issue of the Nauruan claims with respect to the overseas assets of the British Phosphate Commissioners.

The PRESIDENT: Thank you very much, Professor Crawford.
Professor Brownlie, please.

Professor BROWNLIE: Mr. President, with your permission, I constitute a sort of entracte between the issue of termination and the further question which my colleague, Professor Crawford, will address of joinder of parties and the principle of consent.

In this short speech, my role is to respond to the arguments presented by the distinguished Co-Agent of Australia, concerning Nauru's claim to the overseas assets of the British Phosphate Commissioners.

First Australian Argument

Mr. Burmester produced four arguments. The first was that the claim is inadmissible because it was not made in Nauru's Application.

Mr. Burmester first of all characterizes the Nauruan claim as exclusively related to the claim for rehabilitation (CR 91/16, p. 33), and having done that, he argues that the claim to a part of the overseas assets is "clearly very different from a claim for rehabilitation". And he complains that the Application of Nauru contains no reference to the question of overseas assets (*ibid.*).

Mr. President, the true position is that the claim relating to rehabilitation is but one facet,

though a facet of great importance, of a group of claims based upon breaches of the Trusteeship Agreement and related causes of action. The circumstances concerning the overseas assets and their ultimate disposal are intimately bound up with the history of the island since the beginning of the Mandate and until the disposal of the overseas assets of the British Phosphate Commissioners in 1987.

Against the background of the Application (paras. 43-52) and the Memorial of Nauru, the structure of Nauruan claims can be properly understood.

And against this background, it can be seen that the claim respecting the overseas assets flows naturally from the matrix of law and fact disclosed originally in the Application.

It is, with respect, very artificial to characterize the assets claim as "clearly very different".

In the submission of Nauru, the claim to the assets was "implicit in, and consequential on," the claims relating to breaches of the Trusteeship Agreement.

And the same applies to the claim for the harassment of fishing vessels in the *Fisheries Jurisdiction (United Kingdom* v. *Iceland*), *Merits*, and the *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland*), *Merits*, cases. These and other references are to be found in the Written Statement at pages 124 to 127.

Moreover, the functional criteria applied by the Court in previous cases on the question of new claims or alleged modification of claims are amply fulfilled. As in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility* case, it would make no practical sense to require Nauru to institute fresh proceedings to deal with the question of title to a part of the overseas assets. And, of course, there is no good reason to allow defects of form, if that is what they are, to outweigh considerations of practical convenience.

Furthermore, there is clearly, in our submission, no ground for alleging procedural prejudice or surprise.

As the diplomatic correspondence reveals, Nauru was very prompt in its reactions to reports concerning the disposal of the overseas assets. This correspondence can be examined conveniently in

Nauru's Written Statement (pp. 117-120, paras. 335-341). And the same correspondence involved interested third States with a very short time and so, in our submission, Mr. Burmester's point about notification to other States lacks substance.

And so the conclusion on this Australian argument on assets is that the Australian argument that the claim to overseas assets does not appear in the Application is an argument that does not constitute a basis of inadmissibility.

Second Australian Argument

And so I move to the second Australian argument which is that there is no legal dispute within the meaning of Article 36 (2) of the Statute.

This contention of Mr. Burmester should, in our submission, not detain the Court for long. The diplomatic exchanges are clear enough. I would direct the Court's attention to two items.

The first is the letter from the President of Nauru, dated 4 May 1987. It is in diplomatic language but it also adopts a firm tone and it includes the following passages:

> "I have read with some interest of the recent visit to Australia of Sir Geoffrey Howe, the British Foreign Secretary. From news reports it appears that he and you have discussed amongst other things, matters of regional Pacific interest.
>
> It occurred to me, therefore, a most opportune moment to raise with you a matter of great concern to my government. We were concerned to learn by your Diplomatic Note in January, along with Notes from the United Kingdom and New Zealand, that the assets of the British Phosphate Commissioners were about to be wound up by an agreement then shortly to be signed. As you are, no doubt, aware, my government voiced that concern by a further Diplomatic Note to you dated 30 January 1987. This was sent in similar terms to both the other partner governments in the former Trust. So far, there has been no reply to this Note,"

and the President continues:

> "My government takes the strong view that such assets, whose ultimate derivation largely arises from the very soil of Nauru Island, should be directed towards assistance in its rehabilitation, particularly to that one-third which was mined prior to Independence.
>
> The Note to you and other governments, however, was by way of an interim measure merely moving you to withold distribution of assets until the report of the present independent Commission of Inquiry in the Rehabilitation of the Worked-Out Phosphate Lands of Nauru has been completed and published. My government is, of course, optimistic that your Australian government will participate in such inquiry and make such submissions to it as it deems fit." (Preliminary Objections of Australia, Vol. II, Ann. 13.)

The second item is a letter dated 23 July 1987, which I have already referred to - yesterday - in which the President of Nauru replies to a temporizing letter from the Australian Minister for Foreign Affairs. In the operative paragraph there, if I may repeat it, the President says:

> "I refer to your letter dated 15 June 1987 relating to the matter of the disposal of assets of the British Phosphate Commissioners.
>
> I am sure, taking into account my Government's knowledge of the manner of accumulation of surplus funds by the British Phosphate Commissioners, that you would not be surprised if I were to say that I find it difficult to accept your statement that the residual assets of the British Phosphate Commissioners were not derived in part from its Nauru operations. I shall not, however, pursue that here but leave it perhaps for another place and another time." (Nauru Memorial, Annex 80, No. 14.)

Mr. President, allowing for the nature of the correspondence and the personal flavour which it carries, the existence of an unresolved issue is very clear. And it must be remembered that both Governments would understand the context and the historical background well enough.

Beyond this, the Australian argument that there is no evidence of a legal dispute, involves a repetition of the theme we have heard on other occasions that statements can only provide evidence of a dispute if they involve formal claims in phraseology which anticipates the terms of an Application.

In the submision of Nauru, there is a sufficiency of evidence that a legal dispute existed.

But there is also a submission in the alternative.

The position of Nauru is that the claim to the overseas assets is clearly "implicit in and consequential on" the claims set forth in the Application, in accordance with the criteria applied to subsidiary claims in the Temple case (*I.C.J. Reports 1962*, p. 36). On this basis, there is no necessity for an autonomous body of evidence of a legal dispute. On this basis also, Mr. Burmester's argument could only prosper if he could show that Nauru had actually renounced the subsidiary claim.

Third Australian Argument

I now move on to the third Australian argument on this point which is that Nauru has not

shown any legal interest in the overseas assets (CR 91/16, pp. 40-42).

If I may say so, this argument competes for lack of merit with certain other Australian positions.

The Nauruan position has been expressed fully in the Written Statement (pp. 131-135, paras. 369-386). The key considerations are there elaborated. Against the background of the 1919 Agreement, the British Phosphate Commissioners operated in tandem with the Administration. Any power to accumulate and deal with asets was subject first to the Mandate and thereafter to the Trusteeship Agreement.

Mr. Burmester's argument involves describing the British Phosphate Commissioners as "the business of a foreign national" (CR 91/16, p. 41) and thus ignores the legal context of trusteeship completely.

I may say that, like other members of the Australian delegation, he is insensitive to the question of the ownership of the phosphate lands.

Counsel for Australia appear to be unaware that the Nauruan community was the beneficiary of the Trusteeship régime and not the British Phosphate Commissioners or Australian farmers.

Yet, Mr. Burmester seeks to oppose the interests of the BPC, having no status in the Trusteeship régime, to the interests of the beneficiary of that régime, the people of Nauru.

In completing my response to the argument on legal interest, I have to say that it is ironical that the Co-Agent for Australia, in seeking to deny the legal interest of Nauru, has placed on the record a significant admission.

Thus he had this to say:

> "The assets distributed in 1987 were derived from a number of sources. They, in fact, represented decades of trading by the BPC in phosphate, in shipping and other activities. Some of the assets may have been derived from the proceeds of sale of Nauruan phosphate. Some may have come from the sale, in 1967, on the BPC's Nauruan assets to Nauru. However, much of the BPC's remaining assets came from elsewhere and did not derive from Nauru at all." (CR 91/16, p. 31.)

But this passage does recognize that "some of the assets may have been derived from the proceeds of sale of Nauruan phosphate".

The Nauruan position is developed in Chapter 7 of the Memorial. In the Written Statement (paras. 385-386) we have found it necessary to make certain declarations concerning access to documents held by Australia, relating to the overseas assets. By way of conclusion, we would like to emphasize that Nauru considers that at the present phase of the proceedings, for purposes of admissibility, for purposes of this phase of preliminary objections, it is sufficient for the Applicant State to demonstrate that it is reasonably certain that a legally protected interest exists in an identifiable body of assets. And in the same context, it is not necessary that the Applicant State identifies specific aspects or indicate a precise percentage of the value of assets to which Nauru is entitled.

On the other issues raised by Mr. Burmester, Nauru is content to reaffirm the positions adopted in the Written Pleadings.

And in particular on the forced purchase of BPC assets on Nauru in 1967 the Court is asked to refer to the Memorial (pp. 180-181, paras. 496-500). The passages there respond to the argument of Mr. Burmester (CR 91/16, p. 41), who seeks to use this particular prejudicial transaction as a further source of prejudice to Nauru.

Fourth Australian Argument

Then there is the final fourth Australian argument in which Mr. Burmester seeks to apply each of the Preliminary Objections made by Australia to Nauru's other claims as he puts it equally to the overseas assets claim (CR 91/16, pp. 42-43).

This is a rather strange application which one assumes would be difficult to apply to the evidence of waiver and the evidence of delay. These arguments of course clash with what Mr. Burmester now describes as a "new claim" (CR 91/16, p. 32) relating to the assets.

And on these questions Nauru is content by way of sufficient reply to invoke the relevant passages of its Written Statement (paras. 361-368, 390-391).

Mr. President, that concludes my second speech, and I thank the Court for its patience and

consideration. I would ask you to decide whether I should ask for the floor again for my colleague, Mr. Crawford, now or after the break?

The PRESIDENT: Thank you, Professor Brownlie. I think it will be convenient probably to take the break here, and we will try to be back before half past eleven. Then we can listen to Professor Crawford again, and he can have his say in one piece.

The Court adjourned from 11.15 to 11.30 a.m.

The PRESIDENT: Please be seated. Professor Crawford.

Professor CRAWFORD: Mr. President, Members of the Court.

1. This part of the oral submissions of the Republic of Nauru will address the argument that the present case cannot continue against Australia as sole respondent, because this would violate the principle of consent in international law.

Relationship between Indispensable Parties Rule and the Principle of Consent

2. In its Written Statement, Nauru addressed these issues in Chapter V of Part IV, under the general heading "Joinder or Consent of Third Parties" (see Written Statement, paras. 244-323). Naura reaffirms, and will certainly not repeat, what is said there. The Nauruan arguments were a response to arguments in the Preliminary Objections of Australia, to the effect that the other two States were "indispensable parties" to the proceedings, within the principle of the *Monetary Gold Removed from Rome in 1943* case (*I.C.J. Reports 1954*, p. 32). Australia argued this was so, either because any decision adverse to it would imply a right of recourse against the other two States (Preliminary Objections of Australia, paras. 347-348), or because any such decision would imply that those States are also legally responsible to Nauru and they have not consented to such a decision (Preliminary Objections of Australia, paras. 349-366). They were the two grounds of the argument in the Preliminary Objections of Australia.

By contrast, Professor Pellet in his oral presentation stressed that Australia's objection was based not on any issue of joinder, nor on any application of the "indispensable parties" rule, but on the basic principle of consent (Verbatim Records 19/16, pp. 50-52). With an airy wave of the hand he thereby sought to dismiss the long line of decisions, cited in the Nauruan Written Statement, which deal with the power of the Court to decide cases, notwithstanding the absence of a third State or States whose legal rights or interests are implicated in the decision. Both the Preliminary Objections of Australia and Nauru's Written Statement had dealt with that statement under the rubric of "joinder of parties".

No doubt, the principle of consent in international law and the rules relating to joinder or non-joinder of third parties are not simply identical. The principle of consent is a fundamental principle, having consequences across the whole field of international law. But the precise issue before the Court is this: how does the principle of consent apply to its judicial jurisdiction in the absence of a third party with a direct interest in the case? What is its effect as a matter of the admissibility of proceedings? And this is an issue which the Court has faced again and again, with results that are impressively consistent.

In short, the cases on indisputable parties, or on the effects of non-joinder, are authorities on consent. And the reason is simple. If the third party was properly before the Court as a party, that would be because it had consented to the jurisdiction. In other words, the rule which these cases establish is the primary manifestation of the consent principle in the present context of the admissibility of claims affecting third parties.

Thus the *Monetary Gold Removed from Rome in 1943* case (*I.C.J. Reports 1954*, p. 32) can be put equally as an authority on indispensable parties, or as an authority on consent. It can be said that the Court could not exercise jurisdiction in that case because an indispensable party was not before it. Or it can be said that the Court could not exercise jurisdiction in that case because a State whose rights or legal interests would be affected in a particular way had not consented to the proceedings. Either way, it comes to the same thing. The very subject-matter of the dispute in that case, that is to say the *Monetary Gold Removed from Rome in 1943* case, involved the legal rights or responsibilities of a State not a party. That State had not consented to become a party, and had not consented to the adjudication of the case in its absence.

3. So what is the principle of the admissibility of proceedings between two States when the factual situation underlying the proceedings involves or implicates more than just those States? Where is the line to be drawn between Nauru's right to choose the State against which to bring proceedings, and a third State's right in effect to prevent such proceedings by refusing to consent to them?

The short answer is as follows - and I say this by way of summary of Nauru's general

submission on this issue. At the level of admissibility, at the level of preliminary objections, the absence of third parties is a fatal objection in only the clearest and rarest cases. Once the Court has jurisdiction as between two parties, it has consistently elected to do justice between them as far as it can. The Court has consistently said that it will only decline to hear a case which somehow affects a third State if the legal rights or liabilities of that State are the very subject-matter of the proceeding.

Mr. President, the subject-matter of this proceeding, in substance and in form, is the responsibility of Australia to Nauru in respect of the rehabilitation of the lands. That responsibility arose from rules of international law, both customary international law and treaty law, binding on Australia. That responsibility arose because of the acts of Australia's own officials, acting in Australia's interests, and (if it matters) in no sense under the direction or control of other States. To establish that responsibility in no way requires Nauru to rely on the wrongful acts of other States. That being so, the proceedings are admissible, despite the fact that neither Australia nor Nauru has sought to join third parties which were also involved. The interests of third parties are protected by Article 59 of the Statute and by the mechanisms available under the Statute for intervention. Those interests do not need to be protected at Nauru's expense, by preventing it from obtaining a judicial determination of a long-asserted claim.

Certain Preliminary Matters

4. Before seeking to justify the answer I have just given, and to deal with the Australian arguments in more detail, let me make two preliminary points.

5. My first preliminary point relates to the idea that the Administering Authority under the Trusteeship may have been in some sense a separate legal entity. Counsel for Australia chided Nauru for arguing in its Written Statement, that the Administering Authority was "not a separate legal entity in international law". Australia, he said, had never argued that it was such an entity (Verbatim Records 91/16, pp. 55-56; see Nauru Written Statement, paras. 284-287).

Well, in the first place the Preliminary Objections of Australia rely on the British decisions involving responsibility for the debts of the International Tin Council (see Preliminary Objections of

Australia, para. 314). And those cases involved precisely the issue of whether the member States of an international organization, a separate legal entity both in international law and in English law, were themselves liable for its debts. The cases were decided by the House of Lords on the basis that, because the debts were those of a separate legal entity, the member States were not liable (see *Rayner (J.H.) (Mincing Lane) Ltd.* v. *Department of Trade; Maclaine Watson v. Department of Trade* [1990] A.C. 418). If there is no question in Australia's mind that the Administering Authority was or was not a separate legal entity, why then did it cite the International Tin Council cases in its Preliminary Objections?

But there is a more profound point here as well. The Australian Agent expressed it in his opening address, when he said that "Australia did not administer the Trust territory" (Verbatim Records 91/15, p. 13). And that was the very first thing he said. The implication is clear: it was "not our responsibility". But, if not, whose responsibility could it be but that of a separate legal person? - that separate legal person that Professor Pellet disavows and disowns?

Mr. President, there is no third thing between the liability of a separate legal entity, such as an international organization with separate legal personality, and the liability of one or several States - to use the words of Article 81 of the Charter. States remain responsible for their own actions, even if they may perform them on behalf of, or in conjunction with, others as well as themselves. Any other view would produce legal irresponsibility.

There is, I regret to say, evidence of such irresponsibility in the Preliminary Objections of Australia, where Australia went so far as to deny that it was under any obligation to comply with the Trusteeship Agreement. Instead, it attributed that obligation to a "partnership" constituting the Administering Authority (Preliminary Objections of Australia, para. 321). But there is no general principle of law that a "partnership" constitutes a separate legal entity. It certainly does not do so under the legal systems of Australia, the United Kingdom, New Zealand or Nauru. Nor is there any indication of an intention on the part of the United Nations to constitute or to recognize as a separate legal entity an "Administering Authority" somehow separate and distinct from the States which were involved. Article 81 of the Charter refers indistinguishably to an Administering Authority

consisting of "one or several States", and it could not possibly be argued that a single State which was an Administering Authority was somehow in that capacity a separate legal entity. If that is true of a single State, it is true of several States.

Is it any surprise, then, that Nauru insists that the "Administering Authority" was not a separate legal entity, in the way that an international organization is an entity separate from its members? The term "Administering Authority" in this case was simply a legal description for a particular arrangement which involved a degree of participation on the part of the other two States, a device for associating the United Kingdom and New Zealand in the administration of Nauru. And as I shall demonstrate later in these remarks, that association, though initially it may have been intended to be substantial, was nominal and consultative only. It does not prevent these proceedings being brought against Australia alone.

6. My second preliminary point is this. By definition, the situation we are now dealing with concerns a State that is a party to the proceedings, that *has* accepted the Court's jurisdiction, and that would otherwise be at risk of being found to have breached international law. And the question is, can it escape that potential finding by relying on the concurrent breaches of international law of another State or States which have not consented to the proceedings, or at least, which are not parties? In other words, where, as between the wronged State and the wrongdoing State, should the burden fall, of the potential consequences or implications for third parties also arguably guilty of wrongdoing. Should an applicant State, which claims to have been wronged, be denied its day in court because the court only has jurisdiction over one or some of the wrongdoers, and other potential wrongdoers have not consented, or are not parties?

The principle of consent and the admissiblity of these proceedings

7. Mr. President, when one looks at what international courts confronted with this issue have done and said, there can be no doubt as to the answer. The Court is entitled to hear a case otherwise properly brought between two States, unless the legal rights of another State would form the very subject-matter of the decision.

8. Clear authority for that proposition is contained in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (*I.C.J. Reports 1984*, p. 392). I refer the Court to the discussion of that case in the Nauruan Written Statement, at paragraphs 250 to 252. The key passage in the Court's decision is set out in full in paragraph 251 of the Nauruan Written Statement, and I will only read, of that passage, the central section. The Court, after referring to the *Monetary Gold Removed from Rome in 1943* case, expressed the principle as follows:

> "Where ... claims of a legal nature are made by an Applicant against a Respondent ... and made the subject of submissions, the Court has in principle merely to decide upon those submissions, with binding force for the parties only, and no other State, in accordance with Article 59 of the Statute ... other States which consider that they may be affected are free to institute separate proceedings, or to employ the procedure of intervention ... The circumstances of the *Monetary Gold* case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction; and none of the States referred to [that is to the States involved in the Nicaragua case] can be regarded as in the same position as Albania in that case, so as to be truly indispensable to the pursuance of the proceedings." (*I.C.J. Reports 1984*, p. 392, at p. 431.)

In fact this issue had been strenuously and very fully argued by the United States. But the Court was unanimous in rejecting the United States argument.

9. Counsel for Australia sought to distinguish the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* case. He particularly relied on the understanding of the dispute expressed by Judge Ruda (Verbatim Records, 13 November 1991, p. 41). Judge Ruda's views, of course, were expressed in a separate opinion in the jurisdictional phase of the case (*I.C.J. Reports 1984*, p. 392, at pp. 456-458), and he briefly repeated those views in his dissenting opinion in the merits phase. That was the only point on which Judge Ruda dissented at the merits phase. But Judge Ruda was concerned not with the Monetary Gold principle but with the issue raised by the Vandenberg amendment, the jurisdictional reservation relating to multilateral treaties. Judge Ruda agreed with the rest of the Court on the Monetary Gold issue, but he adopted an even more formal and discreet view of the dispute than did the Court itself, when it came to addressing the issues raised by the Vandenberg amendment. Judge Ruda's dissent on that issue is of no assistance to Australia in relation to the issue now before the Court.

10. *The Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* case involved responsibility for action jointly taken by a respondent State and third States. The Court has taken a very similar approach in cases involving the potential rights of third States, including territorial rights. Again, Nauru has analysed these decisions in its Written Statement (paras. 254-260) and I will not repeat that analysis here. But because Professor Pellet made some play with the Chamber's decision in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* case, I should say something about that case.

11. It will be recalled that the issue there was whether the waters of the Gulf of Fonseca are subject to a condominium or to what was termed a "community of interests" of the three riparian States. The argument for present purposes is the same whether one talks about condominium or community of interests, so I will talk about condominium. In seeking to intervene in the proceedings, Nicaragua argued that its legal interest in the Gulf and in adjacent waters was such that the Court could not proceed to decide the case in its absence under the *Monetary Gold Removed from Rome in 1943* principle (*I.C.J. Reports 1990*, p. 92, at p. 114) The Chamber rejected that argument. It said, amongst other things:

> "So far as the condominium is concerned, the essential question in issue between the Parties is not the intrinsic validity of the 1917 Judgement of the Central American Court of Justice as between the parties to the proceedings in that Court, but the opposability to Honduras, which was not such a party, either of that Judgement itself or of the régime declared by the Judgement ... It is true that a decision of the Chamber rejecting El Salvador's contentions, and finding that there is no condominium in the waters of the Gulf which is opposable to Honduras, would be tantamount to a finding that there is no condominium at all ... such a decision would therefore evidently affect an interest of a legal nature of Nicaragua; but even so that interest would not be the 'very subject-matter of the decision' in the way that the interests of Albania were in the [Monetary Gold case]." (*I.C.J. Reports 1990*, p. 92, at p. 122.)

Counsel for Australia made no express criticism of this passage, notwithstanding that, looking at it from Australia's point of view in this case, it drew a sharp and rather artificial, it might be thought, distinction between the existence of a condominium in the Gulf and its opposability to Honduras. Indeed, Professor Pellet compared the problem of the existence of a condominium with Nauru's claim, which, he said, is a claim against an Administering Authority composed of three States. It is impossible, he said, to pronounce on the rights of one of those States without

pronouncing on the rights of others (Verbatim Record, 13 November 1991, pp. 43-44).

With respect this does not really account for what the Chamber said in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* case. Given Professor Pellet's flexible way of determining what is the real object of a case, I will come back to that later, and the Chamber's acceptance that "a decision of the Chamber ... finding that there is no condominium in the waters of the Gulf which is opposable to Honduras, would be tantamount to a finding that there is no condominium at all", why was that not the object of the case? Australia gives no reason. And the present case is considerably clearer. Nauru is not here challenging the right of the other States to have been involved in the Trusteeship. It is merely seeking a determination of the responsibility of one State for its own acts committed on Nauru and doing serious harm to Nauru. And it is doing so in relation to a régime which was precisely not a condominium, and in which the interests of the Nauruan people were the very object of the arrangement. So those were the cases very briefly stated on which the Court has gone on to exercise judgment notwithstanding the interests including quite direct legal interests of third States.

12. On the other side of the line - and alone on the other side of the line - is the *Monetary Gold* case itself. I refer to, and adopt, the analysis of the case contained in the Nauru Written Statement, paragraph 261. Any other decision in the Monetary Gold case would have converted the Court into an enforcement agency in relation to decisions made in the absence of the debtor State, quite contrary to the provisions of the Charter and the Statute relating to the enforcement of decisions of the Court.

But the present case is quite unlike *Monetary Gold.* The legal rights or property of the United Kingdom and New Zealand are not the subject-matter of the present claim. No legal right or responsibility of either State needs to be proved or would be determined by the Court in this case. There are several reasons for this. First of all, what Nauru seeks here is a judgment, initially a declaratory judgment but at a later stage it may be a money judgment, against Australia. If Nauru succeeds on the merits, that judgment will not be opposable to any other State. It will require no conduct from any other State. Its legal effects will be purely bilateral. But in addition the focus of the claim is on the acts and omissions of Australia and of Australian officials responsible for the

administration of Nauru. The determination of the liability of a third State to one of the parties is not a precondition to the determination of this case. In order to establish its claim Nauru does not need to prove a single act committed by anyone other than Australia, or an Australian official.

Counsel for Australia conceded that the *Monetary Gold* case was a case where the liability of a third State was a precondition *(préalable nécessaire)* to the determination of the claim between the parties. He also conceded that in the present case there is no such precondition (Verbatim Records, 13/11/93, p. 44). Nauru's, he said, was merely a case of simultaneity where simultaneous responsibility would be shown. And as decisions such as the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* case show, simultaneity is not enough. Simultaneously with a decision that the United States was not entitled to engage in collective self-defence operations in and against Nicaragua, the Court in effect made a decision about the involvement of the States on whose behalf the United States was acting and it was quite clear about that.

In the present case, it is not necessary for the Court to determine that any other State is legally responsible, before it is in a position to determine that Australia is legally responsible. It can simply proceed to consider the relevant legal instruments, and the implications of the acts and omissions of Australia, acting through its officials who carried on the administration of Nauru. Nothing more is required. It is true that there may be implications for other States of any findings by the Court which are adverse to Australia. But this was so for El Salvador in the Nicaragua case. It is so for Nicaragua in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* case. In neither case was it a reason for the Court declining to exercise jurisdiction as between the parties. Nor is it here.

13. The position with the *Monetary Gold* principle is the same even if one asserts, as Australia sought to do, that there was a distinction between Australia's two capacities in the present case. It had a capacity as "actual administrator" and a capacity as a member of the "Administering Authority". That was one version of the argument. One response to the argument is that Australia in its capacity as the actual administrator of Nauru was bound by rules of international law just as

stringent as was the Administering Authority. Australia is sued in the present case in any relevant capacity, if it had more than one. But such a distinction is illusory. We have already seen, already submitted, that the Administering Authority was not a separate legal entity, but simply the three States. Australia may have acted on behalf of the other two States, but it could not have acted on behalf of itself. In relation to itself, it just acted.

Parenthetically I might point out that the phrase that Australia was acting "on behalf of" the Administering Authority should not be taken to import into the trusteeship régime the principles which apply to agent-principal relations under municipal legal systems. The Trusteeship Agreement refers to Australia as acting "on behalf of" the three States, but does not use the term "agent". Even if it had, there would be a real question what that meant. In so far as the trusteeship system and Australia's obligations under the Charter were concerned, there could have been no difference between the rules that bound it in its conduct on Nauru as part of the Administering Authority from the rules that bound it as agent. The most serious issues would arise if a Trusteeship Agreement had at the same time delegated "full powers", or for that matter, any powers, to a State which was not the Administering Authority, and had purported to authorize that State to act in ways that were prohibited to the Administering Authority under Chapter XII of the Charter. That would have been to authorize a violation of the Charter, which the General Assembly plainly had no intention of doing.

15. Thus the simple answer is the best answer: Australia in its capacity as administrator of Nauru was obliged to the full extent by the Charter and the Trusteeship Agreement, and by related rules of international law. That responsibility was primary and not derivative. There is no question of any precondition to a direct determination of Australia's liability, of the sort that arose in the Monetary Gold case.

16. There is another difficulty, Mr. President, in applying the *Monetary Gold* case principle here, and it is a difficulty specific to the context of trusteeship. The underlying idea of trusteeship, which is expressed in the Charter, is that the interests of the beneficiary are to be the paramount consideration, while the interests of the administrator, even its legitimate interests, are secondary.

Yet to apply the *Monetary Gold* principle to prevent an adjudication of the liability of the administrator towards the beneficiary would be to elevate the procedural interests of the administrator over and above the procedural interests of the beneficiary. In other words, to apply the *Monetary Gold* principle to preclude an action for breach of trust would be inconsistent with the trusteeship notion itself. And the trusteeship principle, being a Charter principle, must prevail.

17. However the argument is put, Mr. President, the conclusion is clear. The present case is properly constituted and should proceed to a determination on the merits. Naturally enough Counsel for Australia strove to avoid this conclusion, raising a number of more or less complex counter-arguments which I will have to deal with in turn. Before doing os, and to assist the Court in distinguishing the different versions of these counter-arguments, I should first of all itemize some, and I apologize to Professor Pellet if I do not do this in precisely the order in which he made them.

Australia argues that the consent principle precludes the exercise of jurisdiction in the present proceedings for the following five reasons.

(1) First, because of the joint character of the Trusteeship, which incorporated a rule of equality between the three Partner Governments.

(2) Secondly, because of the joint character of the British Phosphate Commissioners, which was, according to Australia, a form of economic government of the Island.

(3) Thirdly, because any finding adverse to Australia would be a finding of a liability which was *commune, conjointe, collective - en tout cas indissociable* (Verbatim Records, 13/11/91, p. 17).

(4) Fourthly, because of the "inevitable implications" for the United Kingdom and New Zealand of an adverse finding in relation to Australia.

(5) And finally, because the substance of the present claim was that it was brought against New Zealand and the United Kingdom as well as against Australia.

In Nauru's submission, none of these reasons has any validity in the present case. Let me deal with each of these arguments in turn.

Australia's Objections Based on the

Joint Character of the Trusteeship

18. Australia argued that the three Partner Governments formed a joint administration of the Trusteeship, with the corollary that they could, and can, only be sued together. Thus, Professor Pellet emphasized the equality of the three States. They were, he said, placed on a position of "perfect equality" (Verbatim Records, 12 November 1991, p. 56).

Mr. President, there is a certain irony in this argument. As the Nauruan Memorial demonstrates, Australia originally wanted Nauru for itself, either as a colony or, when it became clear that that was not possible, as a mandate under its sole administration. It sought - and I think it is not unfair to say that it fought - throughout the Mandate and Trusteeship to gain an increasingly exclusive authority over the government of the territory. By the time of the Nauru Agreement of 1965, it had substantially achieved this. And now, after the termination of the Mandate and Trusteeship, it seeks to rely on a formal, even fictional, equality which during the currency of the Mandate and Trusteeship it never ceased to resist (see Nauru Memorial, Vol. 1, paras. 29-35, and authorities there cited).

In fact, the different role and substantially greater power of Australia with respect to the administration of Nauru are plain from the various instruments, as even a brief review will demonstrate.

19. Under the Nauru Island Agreement of 2 July 1919 between the three States (Nauru Memorial, Vol. 4, Ann. 26), the administration of the island was vested in an Administrator appointed by the Australian Government for a term of five years (Art. 1). After the end of the five years, the Administrator was to be "appointed in such a manner as the three Governments decide" (*ibid.*). At this stage, therefore, there was the possibility, at least on paper, of one of the other Governments appointing the Administrator, and thus becoming the effective governing entity for Nauru.

20. Under the League of Nations Mandate for Nauru of 17 December 1920 (Nauru Memorial, Vol. 4, Ann. 27), the Mandate was conferred upon "His Britannic Majesty", and the Mandatory was given "full power of administration and legislation over the territory, subject to the present Mandate,

as an integral portion of his territory" (Art. 2). Professor Pellet had difficulty with the term "His Britannic Majesty", and I do not blame him. Not for the first time British statesmen used the constitutional complexities of the late British Empire as a vehicle for postponing a practical decision. Fortunately, the "enigma" represented by the British Empire has long since vanished. The Mandate was concluded at a time when what were then called the dominions were emerging as separate international entities. It was drawn up during the heyday of what was called the *inter se* doctrine - a largely unavailing attempt by the United Kingdom to exclude international law from the relations between the States of the former British Empire. None of that matters now. The Trusteeship Agreement simply refers to three States, who are members of the United Nations, and recognized the special position of one of them, that is to say, Australia.

21. As to the mandate period, all that needs to be said here is that it was Australia which was the embodiment or emanation of "His Britannic Majesty" for the purpose of exercising "full power of administration and legislation over the territory subject to the present Mandate as an integral portion of his territory". It is true that there was, as least on paper, a question who would appoint the Administrator after the first five years. But that question was settled by an agreement - which was not formalized in a treaty form - whereby Australia, after consultation with the other two Governments, continued to appoint successive Administrators.

And the primary role in the administration of Nauru of Australia as the appointing Government was strengthened by the Supplementary Agreement concerning Nauru of 30 May 1923 (Nauru Memorial, Vol. 4, Ann. 28). Under Article 1 of that Agreement, ordinances made by the Administrator on Nauru were subject to disallowance by the appointing Government, and by no other Government. Under Article 2, the Administrator was required to conform to the instructions of the appointing Government, and not to the instructions of any other Government. Under Article 3, copies of ordinances, proclamations and regulations were to be forwarded to the other two Parties, but only "for their information". Australia was the appointing Government throughout the whole period of the Mandate and, of course, throughout the whole period of the Trusteeship.

22. It should be recalled that Nauru was a "Class C" Mandate, one which could, according to

Article 22, paragraph 6, of the League of Nations Covenant:

> "best be administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population."

Nauru was administered as an integral portion of Australian territory. Its administration bore no relation to the territory of any other State. As far as can be discovered, no governmental official of either New Zealand or the United Kingdom lived on Nauru during the period from 1920 to early 1968, or performed governmental acts there. Throughout the whole of that period, the government officials on Nauru, the Administrator and the persons responsible to him, were Australian public servants, answerable to other Australian public servants in Canberra, and in no sense subject to the direction or control of any other Government. Article 22 of the Covenant referred to administration "under the laws of the Mandatory": in fact, those laws were Australian. No British or New Zealand law was ever applied to Nauru.

23. It is true, as Professor Pellet pointed out, citing Macdonald, that Australia consulted its partners before appointing each successive Administrator. But in the same passage, which was read in full by Professor Connell (Verbatim Record, 18 November 1991, p. 18), Macdonald affirms that neither New Zealand nor the United Kingdom played "any significant role" in the administration of Nauru (B. Macdonald, *In Pursuit of the Sacred Trust* (1988, p. 21). And that view is endorsed by the other writers on Nauru, who are cited in the Nauru Memorial (see Nauru Memorial, p. 242, footnote 3).

24. That Nauru had been in fact administered by Australia was recognized in the first preambular paragraph of the Trusteeship Agreement of 1 November 1947. Article 4 of the Agreement provided that the Government of Australia would continue to exercise "full powers of legislation, administration and jurisdiction in and over the Territory" on behalf of the three States, unless otherwise agreed (Art. 4). This marked a formal difference from the Mandate period, since the Mandate had not actually specified Australia as the administering power, whereas under Article 4, Australia would only cease to exercise full powers over Nauru if it so agreed. It never so agreed.

25. Despite this, Australia characterizes the relations between the three powers as "purely

internal" (Verbatim Record, 12 November 1991, p. 62). But as we have seen, the three States did not constitute, as the "Administering Authority", a separate legal person. How can there be "purely internal" relations between three distinct international persons relating to the discharge of international responsibilities imposed by a paramount instrument, the Charter? And what right did those three States have to enter into what are described as "internal" arrangements, if the effect of those arrangements was to shuffle off individual responsibilities, to reduce the level of legal protection available to the beneficiary of the Trusteeship Agreement, whose position was the *raison d'être* of the whole system?

26. Counsel for Australia characterized Article 4 of the Trusteeship Agreement as concerned only with "day-to-day" administration. He also made the point that the recognition of Australia's special role by the Trusteeship Agreement was limited to Article 4 (Verbatim Records, 12 November 1991, pp. 56, 61). But to describe Australia's "full powers of legislation, administration and jurisdiction in and over the Territory" (Art. 4) as being limited to matters of day-to-day administration is to trivialize those powers. It is as if one were to describe the powers of the Emperor Augustus as limited to matters of the day-to-day administration of the Roman Empire! No doubt there is a sense in which all administration is "day-to-day": where can we live but time? But that is not a limitation, and it is not the point Australia was trying to make.

27. Moreover, Australia's special role over Nauru was not confined - if "confined" is the right work - to the "full powers" referred to in Article 4. On each of the other matters referred to in the Trusteeship Agreement, Australia's role was dominant, paramount or even exclusive. The actual administration of the Territory, covered by Article 3, was in fact a matter for Australia, as I have shown. The Australian Administrator was the "competent public authority" for the purposes of Article 5, paragraph 2 *(a)*. Governmental responsibility over the recognition of Nauruan custom, the transfer of Nauruan land to non-Nauruans, the "economic, social, educational and cultural advancement" of the Nauruans, the increasing share in administrative and other services of the Territory and the guarantee of freedoms such as freedom of speech and of religion - these are the specific matters referred to in Article 5 - all of these were matters within the actual control and

responsibility of Australia. One might take as an example the issue of the freedom of the Nauruans to communicate with legal and economic advisers, something covered in general terms by Article 3 and, more specifically, by Articles 5, paragraph 2 *(b)*, *(c)* and *(d)*. Other Counsel for Nauru have noted that Australia denied the Nauruans access to independent legal or economic advice until 1964. Had New Zealand or the United Kingdom disagreed with that policy, there was nothing, other than the making of representations, that they could have done about it. They certainly would have had no authority to change it. Under Article 6 of the Trusteeship Agreement, the international agreements which were applied to Nauru were a selection of the international agreements to which Australia was a party. As far as is known, no consideration was given to applying to Nauru the provisions of any treaty to which either New Zealand or the United Kingdom was a party but Australia was not. And the defence of Nauru, which is the subject covered in Article 7, was a matter for Australia.

28. This extensive dominance over the Government of Nauru was made virtually complete by the Nauru Agreement of 26 November 1965 (Nauru Memorial, Vol. 4, Ann. 30). Mr. President, this is of particular significance, since as beetween the three Partner Governments it was under the terms of the 1965 Agreement that Nauru was governed throughout the crucial pre-independence period.

The terms of the 1965 Agreement are analysed in paragraph 293 of the Nauruan Written Statement. I refer in particular to Article 6 of the Agreement, under which Australia reserved the right to make "such other provisions in relation to the government of the Territory *as the Government of Australia deems necessary or convenient"* (emphasis added). Clearly this meant that Australia could govern Nauru irrespective of the views of the other two States. This is a strange form of equality!

In addition, Article 1 of the 1919 Agreement, and the whole of the 1923 Agreement, was terminated in 1965 (Art. 7). The effect of this was to put an end to the duty of the Administrator, which had existed under Article 3 of the 1923 Agreement, to "supply, through the Contracting Government by which he has been appointed such other information regarding the administration of the island as either of the other Contracting Governments shall require". After 1965 the other two Governments had no right even to obtain information about Nauru. They were wholly dependent

upon what Australia chose to give them.

29. The Nauru Agreement of 1965 was given effect to in Australian law by the Nauru Act of 1965 (Nauru Memorial, Vol. 4, Ann. 39). I do not want to burden the Court with details of Australian constitutional law, but it is worth pointing out that prior to the 1965 Act the constitutional status of Nauru was that it was a Crown colony governed by Australia under prerogative power. The Nauru Act 1965 treats Nauru as an Australian external territory, with its officials subject to effective Australian authority. There is a reference in Section 6, Sub-section 1, of the Act to the administration of the territory being carried out on behalf of the three Governments. But that reference has no operational effect in terms of the Act.

30. All the relevant negotiations with respect to Nauru in the period 1965 to 1967, and all the legal acts required from the point of view of the pre-independence legal system to bring Nauru to independence, all of these acts were carried out by Australian officials acting under the instructions of the Australian Government, and by Australian legislation. I refer for example to the Nauru Independence Act 1967 (Nauru Memorial, Vol. 4, Ann. 40). No equivalent legislation was passed by New Zealand or the United Kingdom.

31. So far as the Nauru Talks are concerned, the role of the United Kingdom and New Zealand officials who were present was consultative only. The 1965 Talks were held with "Australian Officials representing Administering Authority", or with the "Australian Delegation" for short. The 1966 and 1967 Canberra Talks were held with a "Joint Delegation of Officials representing the Administering Authority". The transcripts of the Talks are contained in Volume 3 of the Nauru Memorial. If I may just interpolate, it has been difficult to obtain good copies of the transcripts of the Talks, these are simply the best copies that are available and we apologize for the difficulties that everyone is experiencing making their way through them; this is simply the best that can be provided. With one exception, the meeting of 14 June 1967, New Zealand and the United Kingdom were present by a representative or representatives at the meetings. But they barely spoke. In 1966, according to the summary records, the British representatives never spoke; the New Zealand representatives only spoke once (Nauru Memorial, Vol. 3, Ann. 4, Meeting of

20 June 1966, p. 3 (Mr. Ansell)). In 1967 the British representatives are recorded as having spoken once (Nauru Memorial, Vol. 3, Ann. 5, Meeting of 12 April 1967, p. 100 (Mr. Morgan)), the New Zealand representatives five times (Nauru Memorial, Vol. 3, Ann. 5, Meetings of 16 May 1967, pp. 57, 59, 61 (twice); 12 May 1967, 65 (on each occasion, Mr. Ansell)). None of those interventions was of any significance to the issues under discussion: their total length was not much more than one printed page out of more than 500 of the total pages of the Talks including Annexes. This near-silence shows very clearly the relative roles of the three Governments in relation to Nauruan affairs.

32. Counsel for Australia gave up the unequal task of showing equality in the actual administration of Nauru, and relied primarily on the combined role of the three States concerned at the international level, for example in the General Assembly and the Trusteeship Council (Verbatim Records, 12 November 1991, pp. 62-64). But again it was the Australian representatives who took the leading role, speaking first in the general debates, answering the questions of the Permanent Mandates Commission and the Trusteeship Council, and so on. Moreover, although international obligations were owed to the Nauruan people, they had no separate standing in international forums at this stage. What Counsel for Australia refers to as the internal arena of affairs on Nauru was precisely the arena where the Trusteeship obligation was primarily owed, and where the damage was done.

33. Mr. President and Members of the Court, it is simply not true to say, as Australia does (Preliminary Objections of Australia, para. 341), that "the Administrator was responsible to all three Governments". An executive official is responsible to a superior who can give him instructions, and at least since 1923 only the Australian Government could do that. Nor is it true to say that New Zealand and the United Kingdom "in no relevant sense acted differently from Australia" (Preliminary Objections of Australia, para. 359). No United Kingdom or New Zealand official exercised governing authority over Nauru as Administrator or otherwise. No United Kingdom or New Zealand legislation formed part of the law of Nauru. Both the terms on which and the modalities by which Nauru achieved independence were the result of the legal acts of Australia - a

conclusion which is not affected by the fact that there was consultation with the other two Governments about those issues.

34. To summarize, although Counsel for Australia placed much stress on the agency issue, relying on the maxim *qui fecit per alium fecit per se* (Verbatim Records, 11 November 1991, p. 68), that maxim has nothing to do with the present case. Australia did nothing *per alium*, everything *per se ipsum* - nothing through anyone else, everything itself. It should be held responsible for its own acts.

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

35. Australia's second line of defence was to point to the joint operation by the three Governments of the British Phosphate Commissioners. They constituted, according to Professor Pellet's argument, the *régime juridique* on Nauru so far as economic matters and the exploitation of phosphate were concerned. They were, he said, "the economic administration" of Nauru (Verbatim Records, 13 November 1991, p. 8). A Visiting Mission Report, cited by Professor Pellet with approval, described them as having une *indépendance administrative* presque totale. That was an additional and distinct reason why it was wrong to single out Australia.

36. It may be conceded that the three Governments did share equally in the operation of the BPC, from an administrative point of view, although they did not share equally in the use of Nauruan phosphate, of which Australia took the lion's share.

But that is not the point of the case. The British Phosphate Commissioners were not parties to the Trusteeship Agreement. Whatever their economic power might have been, they had no legal power on Nauru. Their existence and authority was recognized neither in the Mandate nor in the Trusteeship Agreement. Both the League of Nations and the United Nations expressed concern that the Australian administration of Nauru was improperly preferring the interests of the BPC, an industrial enterprise, over the interests of the Nauruan people, the beneficiaries of the trust, and was therefore involved in a conflict of interest and duty.

It should be noted that the Visiting Mission Report cited by Professor Pellet was not

approving the position or conduct of the BPC on Nauru. It was merely describing it, and doing it in rather reserved terms.

On the merits of this case, Mr. President, Nauru will argue that there was never any ratification or approval by either the League of Nations or the United Nations of the position of the BPC, that is, of course, a central issue on the merits.

The gist of Nauru's rehabilitation claim is not that the BPC was somehow in breach of trust for mining the phosphate. It is that Australia was in breach of the Trusteeship obligation, and of associated principles of general international law, in allowing BPC to mine on terms that paid no regard to the legitimate rights of the Nauruan people, and in failing to redress the adverse consequences of the mining on the rights and legal interests of the Nauruan people, rights recognized by the Trusteeship Agreement and by general international law.

37. Mr. President, as I have mentioned, most of these issues are self-evidently issues for the merits. The relationship between the 1919 Agreement and the Mandate and the Trusteeship Agreement raises issues which are discussed at length in the Nauruan Memorial (see Part IV, Chap. 3), but on which Australia has not yet had the opportunity to plead. I need only say here that the present proceedings could still have been brought, in essentially their present form, had the British Phosphate Commissioners been a purely private enterprise, which is what Mr. Burmester for Australia said they were, and which is what for most of the time they claimed to be. No doubt the fact that Australia benefited substantially from the operations of the BPC is relevant to a consideration of the merits of the Nauruan claims. But the Australian involvement as partner in and chief beneficiary of the BPC's operations on Nauru can hardly make its position in these proceedings any better than it would otherwise have been, if BPC had been a private entity. And that was the point of the Australian argument.

Australia's Objections Based on the Existence of an Alleged "Joint Liability"

38. Australia's third line of defence related to the legal situation of joint, or conjoint, responsibility which is said to be the inevitable consequence of the administrative arrangements for

Nauru. This makes it, according to Australia, impossible to distinguish the aspect of the damage done by Australia from the aspects done by the other two States.

39. Mr. President, I might observe, in parenthesis, that the three Governments knew perfectly well who was entitled to what when it came to partitioning amongst them the overseas assets of the British Phosphate Commissioners, in 1987. In that exercise they could calculate to the nearest dollar. It is only when the issue is that of accounting to the Nauruans for the damage to their lands that the problem of solidarity emerges, that things become unclear, that there is what might be called a "collective unconscious". Only when it comes to the claims of the Nauruans based on the principle of trusteeship is there an insoluble accounting problem!

40. But what is the consequence in international law of a loss to a claimant caused concurrently by the acts of two persons, or caused by the acts of a person acting both on its own behalf and on behalf of another? That consequence might be felt at several levels: at the level of admissibility of a claim brought, as the present claim is brought, against the person who by its own acts caused the harm; at the level of the consequences in terms of responsibility for the wrong; and at the level of reparation.

I have already dealt with the first level, that of admissibility, because it is indistinguishable from the cases discussed above, of which the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* case is a paradigm, where damage was done concurrently by several actors. Indeed the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* case was a stronger case, from the point of view of the Respondent State, than the present case. In the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* case the primary actors were mostly not United States officials, or persons whose acts were directly attributable to the United States. In addition, the right of the United States to act in collective self-defence was derivative rather than primary, since it was acting at the request of the States which were, in its and their view, the subject of an armed attack.

By contrast in the present case all or virtually all the actors were Australian. Australia's

position on Nauru was not derivative of that of another State. Counsel for Australia sought to stress that the Australian position on Nauru derived in point of title from that of the three States jointly, and he compared the situation to that of a condominium (Verbatim Record, 13 November 1991, pp. 43-44). But neither Australia nor any other State had any title to be on Nauru except under the trusteeship system, the basic principle of which was the paramount interests of the people of the territory. A mandate or a trust territory involved no *dominium*, no sovereignty, of the Administering Authority, and the analogy of *condominium* is completely inappropriate.

41. The second level - I have been dealing with the first level of admissibility - on the context of this question is that of the extent and nature of liability in the case of acts performed jointly or concurrently by several States. Another possibility, which corresponds more exactly to the situation here, is that of acts performed by one State on its own behalf as well as on behalf of another State or States. And the first and obvious point to be made here is that this is plainly a matter for the merits. The legal régime established by the Trusteeship Agreement, and the relationship between that régime and the arrangements for the exploitation of the phosphate, are what Nauru's claim is all about. Even applying the narrow definition of merits given by the Australian Agent, this is plainly a matter for the merits - it requires the Court to analyse the juridical régime on Nauru *au fond*, to its depths - a matter plainly inappropriate at this stage of the proceedings.

42. Nauru submits that, when two or more States are involved in some form of common enterprise, they are nonetheless separately responsible for their own acts. A State is responsible for what it itself does, acting through its organs and officials, and through other persons whose conduct is attributable to it, notwithstanding that that act occurs with the participation or support of other States. I refer to the authorities cited in the Nauru Memorial (Vol. 1, paras. 623-630) which I will not repeat.

43. Although it is not necessary to make more than a passing reference to the point at this phase of the case, the work of the International Law Commission on State responsibility supports Nauru's position. For example the Commission in its 1978 commentary to the Draft Articles on State Responsibility stated:

> "A similar conclusion is called for in cases of parallel attribution of a single course of conduct to several States, as when the conduct in question has been adopted by an organ common to a number of States. According to the principles on which the articles of Chapter II of the draft are based, the conduct of the common organ cannot be considered otherwise than as an act of each of the States whose common organ it is. If that conduct is not in conformity with an international obligation, then two or more States will concurrently have committed separate, although identical, internationally wrongful acts." (*International Law Commission Yearbook*, 1978, Vol. 2 (2), p. 99.)

Two or more States, I repeat, will concurrently have committed separate although identical, internationally wrongful acts. It should be noted that in this passage the Commission was discussing the situation of a common organ of several States. That situation is much stronger in favour of joint responsibility than is the present case, since normally each State would exercise a measure of control over a common organ, whereas only Australia had such control here. But even in relation to common organs properly so-called, the Commission favoured a system of separate liability.

44. The Preliminary Objections of Australia, Mr. President, relied heavily on domestic law analogies to support its view that the liability of States engaged in a joint enterprise was "joint" or "inseverable", rather than "joint and several" (Preliminary Objections of Australia, paras. 309, 342). Counsel for Australia, by contrast, tended to agree with the view in the Nauruan Written Statement, that domestic law analogies in this field were of limited significance. Certainly, this must be true in detail: the refinements of particular legal systems in the field of joint responsibility are so often the product of history and of particular legal and economic institutions, that it is dangerous to generalize. It is particularly dangerous to adopt the terminology of particular municipal legal systems, which terminology often carries with it the incubus of a framework of particular rules. In the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* case, the Court warned that private law analogies, especially in fields such as admissibility, were unreliable because they tend to assume the existence of powers which international courts and tribunals do not have, including the compulsory power of joinder (*I.C.J. Reports 1984*, p. 392 at p. 431).

45. But having said that, some useful points can be gained from the domestic law experience in dealing with

liability for joint conduct. I will not repeat the extensive review of authorities contained in the Nauruan Written Statement (paras. 266-277), which is itself based on the very extensive work done on the topic for the *International Encyclopedia of Comparative Law*, under the general editorship of Professor André Tunc. It is sufficient to cite the general conclusion reached in the section on "Complex Liabilities" in the *Encyclopedia*:

"It is the very general rule that if a tortfeasor's behaviour is held to be a cause of the victim's harm, the tortfeasor is liable to pay for all of the harm so caused, notwithstanding that there was a concurrent cause of that harm and that another is responsible for that cause ... In other words, the liability of a tortfeasor is not affected vis-à-vis the victim by the consideration that another is concurrently liable." (*International Encyclopedia of Comparative Law*, Vol. XI, Torts, A. Tunc, Chief Editor, Chap. 12, A. Weir, "Complex Liabilities", 1983, p. 43; see further Nauruan Written Statement, paras. 274-275.)

46. Similarly in one of the *Aerial Incident cases, (United States* v. *Bulgaria)*, the United States argued that:

> "it appears that in all civilized countries the rule is substantially the same. An aggrieved plaintiff may sue all or any joint tortfeasors, jointly or severally, although he may collect from them, or any one or more of them, only the full amount of the damage.
>
> The relationship between the joint tortfeasors themselves is a separate problem." (United States Memorial, *Aerial Incident of 27 July 1955, Pleadings 1959*, pp. 229-230, and see its comparative survey, *ibid*., pp. 230-233.)

The point I am making is that you cannot have multiple recoveries exceeding the amount of the damage.

47. At the procedural level, the comparative law position is essentially the same. It has not been possible to find a case where a claim based on a civil wrong or breach of trust resulting from the conduct of joint wrongdoers has been dismissed on the preliminary ground that not all the wrongdoers were amenable to the jurisdiction of the court concerned (see Nauruan Written Statement, paras. 279-281, and the authorities there cited).

48. Finally, it should be noted that the rule asserted by Australia would not even have applied had the British Phosphate Commissioners been sued in tort or for breach of trust. The British Phosphate Commissioners were not a separately incorporated entity: they were what they describe themselves as a partnership. And the rule of Australian, English and New Zealand law is that the liability of partners for both torts or civil wrongs, and for breach of trust, is joint and several. That means - I am obviously having to use common law terminology to describe a common law rule - that the beneficiary has the right to sue any individual trustee for the whole amount of the damage (see Glanville Williams, *Joint Obligations*, London, 1949, p. 159 and cases there cited; and see further Nauru, Written Statement, paras. 271-273).

49. Professor Pellet put the argument in another way. He spent some time analysing the United Kingdom and New Zealand acceptances of the Court's jurisdiction under the Optional Clause. His argument was put in this form. The Court can only condemn a State if it alone is responsible Having regard to the absence of jurisdiction under the Optional Clause, the Court has no jurisdiction

to determine that New Zealand and the United Kingdom are or are not responsible. Therefore, since the Court cannot determine that only Australia is responsible, it cannot proceed with the case. That was the argument.

In response, I should first say that since both States are parties, that is to say since both the United Kingdom and New Zealand are parties to the Statute and both have declarations in force under the Optional Clause, it is not conceded that they have not consented. But, for present purposes, the central point is this: the Court is not competent in the present proceedings to interpret any provisions in the Optional Clause declarations of the United Kingdom and New Zealand that they might seek to rely on if they were parties to proceedings commenced by Nauru - or, for that matter, if they were parties to proceedings commenced by Australia.

Thus the premise "The Court can only condemn a State if it alone is responsible" subtly mis-states the position. The Court can never, in proceedings against one State, determine that only that State is responsible. To do so it would have to determine the responsibility of non-parties, and that it cannot do. The true position is that the Court can only determine the responsibility of a State which is a party to the proceedings and, further, that it should (if it has jurisdiction over that State and if the case is otherwise admissible) proceed to do so, unless as a pre-condition it has to determine the responsibility of some other State. That is not the case here.

50. Mr. President, I have given this issue a more summary treatment than it would require were the Court facing the issue as a matter of the merits of the claim. Nauru's primary submission is that this issue does not possess in the circumstances an exclusively preliminary character. And the reason is simple. The extent and nature of Australia's liability in this case can only be determined after a detailed examination of the basis of the claim and all the relevant facts. Before that point, it is possible only to speak in general terms.

But speaking in general terms, one can say, and Nauru submits, that there is no authority for, and a great weight of international and comparative authority against, the proposition that there is a régime of joint liability in international law requiring the participation of all States involved before judgment can be given against any. Even if situations can be imagined in which there might be a rule

of strict joint liability, it is not the case that the present claim for breach of trusteeship, or of associated general international law rules, falls into that category.

Australia's Objections based on the "Inevitable Implications" for Third States of a Decision Against Australia

51. Mr. President, Australia's fourth line of defence was to argue that, because of the "inevitable implications" for New Zealand and the United Kingdom of a decision against Australia, the case should not proceed. Counsel argued that a decision adverse to Australia would necessarily imply that Australia has a right of recourse against the United Kingdom and New Zealand. A similar argument is made in the Preliminary Objections of Australia (paras. 352-353).

52. But a decision of the Court against Australia would not determine the issue whether Australia has a right of recourse against the United Kingdom and New Zealand. The existence of a right of recourse between States jointly participating in wrongful activity is a separate issue from the liability of one of those States to a person injured by that activity. The United Kingdom and New Zealand may well have defences to an Australian claim. The existence and extent of any such defences would have to be determined in those separate proceedings. As the Chamber pointed out in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* case, "[a] case with a new party and new issues to be decided, would be a new case". (*I.C.J. Reports 1990*, p. 92 at p. 134.)

53. One can illustrate the point by reflecting for a moment on the issues that would be likely to arise in proceedings brought by Australia against one or both of the other two States. They might argue - and I am talking about proceedings brought by Australia - that the principal wrongdoer may not seek contribution for the consequences of its own wrongful acts by claiming against a secondary wrongdoer or co-conspiritor. Such a rule exists in a number of national legal systems. The Court would have to determine whether it applies to international wrongs. Alternatively they might argue that the formula for distribution of assets set out in the 1987 Agreement should be applied, either because of its terms or by analogy, as an expression of fairness or equity between the parties. Although Nauru has been affected by it, the formula in the 1987 Agreement is not opposable to Nauru. Nauru has no particular interest in how the issue is resolved as between the three States.

Mr. President, this is, of course, speculation - but that is the *point*. None of these issues involves Nauru; none arises in the present proceedings. And because these issues do not arise, it is not the case that the liability of the other two States is an inevitable and inseparable corollary of a finding adverse to Australia in the present proceedings.

54. But, Mr. President, even if the Court's decision in this case carried the necessry implication that Australia has a prima facie right of recourse against the United Kingdom and New Zealand, that should not prevent the Court from exercising its jurisdiction in the present case. As we have seen, the Court has not allowed itself to be deterred from the due administration of international justice by any "logical corollary" of its findings, to use the phrase that the Court used in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case (*I.C.J. Reports 1986*, p. 554 at para. 578). Similarly, the fact that a finding as between the Parties would be "tantamount" to a finding in respect of the legal position of a third party, did not deter the Court in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras* case (*I.C.J. Reports 1990*, p. 92 at para. 122). The same position applies here.

The "Substance" of the Dispute

55. Fifthly, and finally, Mr. President, Australia argued that the substance of the present claim was that it was a claim brought against the United Kingdom and New Zealand. To a great extent this was another way of putting the arguments that I have already dealt with, and in particular the argument that the inseparable character of Australian liability prevents a determination. To that extent, the arguments that I have set out above are a sufficient response on this point. But to the extent that it was an independent argument, some brief remarks are in order.

56. It is a little ironic that, while insisting that the Court should penetrate the substance of the Nauruan claim to discern a legal claim against New Zealand and the United Kingdom, Counsel for Australia was much less willing to look at the substance of the relationship between the three Governments as to the administration of Nauru. But however that may be, there is no reason to treat this claim as anything other than what it is, a claim against Australia relating to the acts and omissions of its own officials and authorities in a matter of major concern to the Applicant State.

International law does not require a State to pursue remedies against all possible or potential respondents at the same time: it leaves, within very broad limits, a choice of means and of remedies. As the Court observed in the case concerning *United States Diplomatic and Consular Staff in Tehran*, "no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important" (*I.C.J. Reports 1980*, p. 19, para. 36). Nauru would say, in this case, however unimportant. And it cited that principle, and applied it to the situation of claims brought against one State arising from a multi-party dispute, in the *Border and Transborder Armed Actions (Nicaragua v. Honduras) Jurisdiction and Admissibility*, (*I.C.J. Reports 1988*, p. 69 at para. 91).

In short, there is no substance to the argument that the substance of the present proceedings differs from its form.

The Consequences for Admissibility of the Termination of the Trusteeship and the Dissolution of the British Phosphate Commissioners

57. Mr. President, that concludes the Nauruan account of the Australian counter-arguments on the principle of consent and related issues. I would like to make just two further points, both of which strongly support the conclusion that the Court ought to proceed to hear this case.

58. The first of these relates to the fact that this claim is brought now, after the termination of the Trusteeship and the dissolution of the British Phosphate Commissioners. Whatever the position might have been during the currency of the Trusteeship, there is no reason to think that after its termination a requirement of joint and inseparable proceedings for liability should be imposed. That would be to require a joint action after the joint conduct which was the subject of the action - I have already said, of course, that it was not joint conduct in any relevant sense - had ceased. As the cases cited in Nauru's Written Statement demonstrate, even where national law rules of joinder or of joint liability apply during a relationship such as a partnership, they do not apply after its termination (Written Statement, para. 272).

59. And this point was effectively acknowledged by the three Governments themselves in the 1987 Agreement (Nauru Memorial, Vol. 4, Ann. 31). Article 3 of that Agreement envisages that

claims will be brought and, by inference, will succeed against one of the three Governments "arising out of the actions of the Commissioners or former Commissioners as such". If, as envisaged by the 1987 Agreement, a system of joint and several liability - to use common-law terminology - applies to the acts of the Commissioners after the dissolution of the partnership, this must be true, *a fortiori*, in the case of a claim against Australia in respect of its administration of Nauru under the Trusteeship Agreement.

Nauru's Claim and the Due Administration of International Justice

60. Finally, Mr. President, it is submitted that the Court could not play its proper role in the administration of international justice if a State could immunize itself from jurisdiction by associating itself with others in the commission of some wrong. The Australian argument would make States effectively immune from international proceedings against them in respect of their own acts, provided those acts were performed jointly with or on behalf of another State or States. In fact, the Court, confronted with such cases, has always dealt with the issue before it on its merits, except, as I have said, where the rights of another State were the very subject-matter of the dispute (as in the Monetary Gold case).

61. This is borne out, for example, by the Corfu Channel case (*I.C.J. Reports 1949*, p. 1). There, the Court held that Albania was liable for the damage done to United Kingdom ships by mines laid in Albanian territory, although the mines were not laid by Albania itself. After noting that Yugoslavia - which was, shall I say, "strongly suspected" of having laid the mines - was not a party to the case, the Court commented that the only question it had to decide was whether Albania was liable under international law for the damage (*id*., p 17). It held that Albania was liable, on the basis that it had means of knowing about the presence of the mines and went on to assess the full amount of the British loss against Albania (*id*., p 23; and see *Corfu Channel* case *(Assessment of Compensation) I.C.J. Reports 1949*, p. 244). That was a decision against a State which was not the primary wrongdoer, in the sense of the State whose acts were the immediate cause of the damage.

Joinder to the Merits

62. Mr. President, the Austalian argument canvassed a wide range of issues arising from the so-called "joint administration" of Nauru and the joint liability that was said to arise from this. I have accordingly dealt with all of these issues, but this is without prejudice to the question whether any of them should be joined to the merits of the claim. I refer to what the Nauruan Agent has already said on that matter.

Mr. President, Members of the Court, that concludes my submissions on this point, and the Nauruan argument. Thank you for your patience and consideration.

The PRESIDENT: Thank you very much, Professor Crawford. That completes the presentation of the Nauruan case at this stage of the proceedings.

I think the Agents are aware that two Judges wish to ask questions and we will proceed to that now. I shall ask each one of them to put his questions orally, but a written version of the questions will be immediately available to the Agents. The questions may be answered either in the second round of pleadings, on Thursday and Friday, or, if the Agents so wish, they may be answered in writing later on within, shall we say, a reasonable time after the end of the oral proceedings.

Judge Schwebel.

Judge SCHWEBEL: Thank you, Mr. President. I have questions for Nauru and also questions for Australia.

First, for Nauru: Evidence has been introduced indicating that Nauru has maintained and maintains claims against the United Kingdom and against New Zealand based on the fact that phosphate lands worked out before Nauru's independence have not been rehabilitated (see, for example, Nauru's Memorial, Vol. 3, p. 356, para. 8: "each of the three Partner Governments should bear this cost [of rehabilitation] in proportion to the benefits they have already derived from the use of cheap phosphate at well below the world price"). The Court's attention has particularly been drawn to Notes dated 20 May 1989, dispatched by the Republic of Nauru to the representatives of the Governments of New Zealand and the United Kingdom, in which Nauru refers to its Application in this case against Australia and states that it is without prejudice to Nauru's position that

New Zealand, and the United Kingdom, in their capacity as States Party to the Mandate and the Trusteeship, were also responsible for the breaches of those Agreements and of general international law (*ibid*., Vol. 4, Ann. 80, Nos. 29 and 30).

And we have also heard, this morning, of Nauru's claims respecting the overseas assets of the British Phosphate Commissioners whose tripartite character has been described. We have heard the views of Counsel for Australia as to why Nauru's Application is directed against Australia alone and was not also brought against New Zealand and the United Kingdom. This morning we have just heard why, in Nauru's view, it need not have brought suit against New Zealand and the United Kingdom. What is the position of Nauru as to why it did not at the same time bring suit against New Zealand? What is the position of Nauru as to why it did not at the same time bring suit against the United Kingdom?

Secondly, for Australia: Australia's recognition of the Court's compulsory jurisdiction under Article 36, paragraph 2, of the Statute provides that it "does not apply to any dispute in regard to which the Parties have agreed or shall agree to have recourse to some other method of peaceful settlement". This reservation gives rise to these questions:

- Does this reservation mean simply that the Parties must have agreed to have recourse to some other method of peaceful settlement, whether in the event that recourse is employed or, if employed, is successful or not in resolving their dispute, or does it mean that that other method of peaceful settlement must have been successful - in the eyes of both Parties - in resolving their dispute?
- May the agreement of the Parties to have recourse to some other method of peaceful settlement be not only express but tacit and evidenced by their course of conduct? Is agreement by course of conduct the theory which Australia advances in the current case? If so, are there precedents in addition to that invoked by Australia, namely, elements of the *Cameroons* case, which support this construction of such a reservation?

Thank you, Mr. President.

The PRESIDENT: Thank you, Judge Schwebel. Now Judge Shahabuddeen.

Judge SHAHABUDDEEN: Thank you, Mr. President. I have two questions. The first is for both Parties. The second is for Australia.

The first question is this. The reservation in Australia's optional clause declaration states that -

> "this declaration does not apply to any dispute in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement".

My question is this. Do the agreements for peaceful settlement, contemplated by this reservation, include agreements made between Australia and entities which were not States at the time when the agreements were made?

Now the second question, which is for Australia.

On Monday of last week, Professor Jiménez de Aréchaga, for Australia, told the Court the following:

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)" (CR 91/15, p. 66).

Now my question is this. What was the legal basis of the responsibility for meeting the cost of rehabilitation, which Australia said it did not decline but on the contrary had met in the manner described?

Thank you.

The PRESIDENT: Thank you Judge Shahabuddeen. So that ends the proceedings this morning I think and the Court will sit again on Thursday morning at 10 o'clock to begin the second round of pleadings.

Thank you very much.

The Court rose at 12.55 p.m.