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YEAR 1991

Public sitting

held on Monday 18 November 1991, at 10 a.m., at the Peace Palace,

President Sir Robert Jennings presiding

in the case concerning Certain Phosphate Lands in Nauru

(Nauru v. Australia)

VERBATIM RECORD

ANNEE l991

Audience publique

tenue le lundi 18 novembre 1991, à 10 heures, au Palais de la Paix,

sous la présidence de Sir Robert Jennings, Président,

en l'affaire de Certaines terres à phosphates à Nauru

(Nauru c. Australie)

COMPTE RENDU

Present:

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

Registrar Valencia-Ospina

Présents:

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

M. Valencia-Ospina, Greffier

The Government of the Republic of Nauru is represented by:

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

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

as Co-Agents, Counsel and Advocates;

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

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

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

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

as Counsel and Advocates.

The Government of Australia is represented by:

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as Agent and Counsel;

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

as Co-Agent;

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

as Co-Agent and Counsel;

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

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

La Gouvernement de la République de Nauru est représenté par :

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

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as Counsel;

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

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

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

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

comme conseillers.

The PRESIDENT: Please be seated. I am sorry to say that Judge Lachs will not be here this morning as he is not very well. Mr. Connell, if you please.

Mr. CONNELL: If the Court pleases.

Mr. President and Members of the Court, it is an honour to plead before you and to present to the Court on behalf of the Applicant, the Republic of Nauru, arguments with respect to two matters, the history and development of the rehabilitation issue, and the nature and identity of the various funds arising from some of the proceeds of Nauruan phosphate.

On Monday, 11 November 1991, the distinguished Agent of the Respondent State used the rather startling phrase "new and unexpected claim", with reference to the Nauruan claim concerning rehabilitation. That was far removed from reality. "New" it was not, and it could only have been unexpected if the Respondent State had been unexpectedly blind to the issues. Nothing in the history of Nauru has been more to the forefront that the concern of the Nauruan people for their devastated lands. In order to demonstrate this, Mr. President, I am necessarily going to have to refer to the facts in some detail. Although references are given to particular quotations, more detailed authorities supporting what I am about to say are contained in Volume 1 of the Nauru Memorial.

The people of Nauru, early in the history of mining, going back to the 1920's queried the Australian administration why their land should be ruined for the benefit of others. From that day there has been a continuous struggle to redress what to the Nauruan people was a perceived wrong.

The nature of the problem is graphically illustrated in the photographs contained in Volume 2 of Nauru's Memorial. In particular, the Court is referred to photograph 2, which starkly portrays a low aerial shot showing the completely pitted landscape. The broad extent of the problem is displayed in photograph 1, whilst the extent of the mining which was carried out by the British Phosphate Commissioners, known as the BPC, is shown on map 2 of that Volume.

MEANING AND USE OF THE TERM "REHABILITATION"

"Rehabilitation" is a term constantly used in the case, and it is important that its scope and

meaning is understood. In the Report of the Commission of Inquiry into the Rehabilitation of Worked-Out Phosphate Lands of Nauru, known as the "Weeramantry Report", the following meaning was attributed to it:

> "*(a)* returned the land to its former state - or as near to the former state as is reasonably practicable - and this includes revegetation. This concept usually relates to grasslands or forest of low commercial value;
>
> or
>
> *(b)* reforming the land to a shape and condition suitable for a nominated land use." (Republic of Nauru, Commission of Inquiry into the Rehabilitation of Worked-Out Phosphate Lands of Nauru Report, p. 1133, commonly known as the "Weeramantry Report".)

The Court has been told more than once in the last few days that the Commonweath Scientific and Industrial Research Organisation (commonly referred to as the CSIRO) Report of 1954 suggested that rehabilitation was impracticable. What needs to be understood, however, is what meaning is there attributable to rehabilitation. The inquiry by CSIRO was directed by the Australian Government to inquire into regeneration of the land specifically for agricultural purposes, which it found not to be a "practical possibility" (Preliminary Objections of Australia, Vol. II, Ann. 14). It was really not until the Davey Committee Report of 1966 (a year before independence) that a more wide-ranging and multi-faceted inquiry into the scope of rehabilitation was undertaken. The Report of the Davey Committee pointed out that "agricultural use is not the only possible objective for land restoration".

Rehabilitation, in reality, is the process carried out to the point prior to implementation of a planned land use. On the mined plateau of Nauru there may in the end be many designated land uses, of which the most common would be roads, airport, farms for pigs, poultry or vegetables, urban residential use, urban public use, forest and dams. In other words, rehabilitation would be reforming or returning the mined-out lands to a suitable state to allow for a more congenial environment for the Nauruans when the phosphate deposits will be exhausted (Davey Committee Report, Nauru Memorial, Vol. 3, Ann. 3, p. 211).

The rehabilitation process is the conversion from the mined site to a site, which in the words of the Weeramantry Report, has "such a suitable surface condition, consolidation of subgrade, and

final level or contour as is specified or required for the planned future land use of the site" (p. 1134).

The Weeramantry Report further described these activities to include, as appropriate,

> "removal or destruction of the dolomitic limestone pinnacles and other boulders, recovery of exposed residual or subsurface phosphate, excavation or building up of site, crushing of limstone or backfill, consolidation of the subgrade and addition of topsoil" (p. 1134).

It was that process that was considered both practical and cost-feasible by that Report.

However, the Court is respectfully reminded that the Weeramantry Report did not believe that even with careful planning that the task would be completed within one generation. So that when Australia stated last Monday that following General Assembly resolution 2226 (XXI) it was not expected that the task would be completed within the two years leading to independence - that would have been entirely correct. It was never considered that it would be completed within that time scale. This was one of the factors that necessitated separate negotiation and arrangement, as it would extend far beyond the date of independence, unless independence was to be delayed unacceptably both to the Nauruan people and the United Nations.

The need for such massive rehabiliation is brought about by the essentially destructive nature of the extractive mining (see photographs 5 and 7 in Volume 2, Nauru Memorial). The phosphate rock between the limestone pinnacles is mined to a depth of from 12 to 50 feet, and once extracted there are left giant forests of limestone pinnacles. The land is rendered useless. The landowner has nothing upon return of his land other than an empty shell of the lands.

HISTORY OF THE REHABILITATION PROBLEM

A. The Mandate

I turn now, Mr. President, to some early considerations of the nature of mining and an early attempt to contain the problem under the Mandate.

The manner in which Australia achieved its preeminent status on Nauru and its reasons for doing so are recorded in detail in Part 1, Chapter 2, of the Nauru Memorial, and in Barry Macdonald's paper produced by the New Zealand Institute of International Affairs *In Pursuit of the Sacred Trust* (Chapter 1). By way of interpolation, Mr. President, I recall that the Australian

Counsel, Professor Pellet, by way of an aside, mentioned the affection that Nauru appears to have for Dr. Macdonald's paper. This prompts me to mention in passing another study, in which Dr. Macdonald played a major role as an author with Maslyn Williams, *The Phosphateers*, a work published in 1985. That work was commissioned not by Nauru but by the British Phosphate Commissioners to inscribe their place in history. It was so revealing that the BPC records used in the compilation of that work have been kept away from public gaze in the Australian Archives, whilst Macdonald's own research materials have been embargoed and placed under lock and key in the New Zealand Archives! The book appears without footnotes. The comment, Mr. President, is a useful antidote to the thought that the Respondent State is somehow under some prejudice with respect to documentation so jealously guarded by itself. In reality this is an instance where it is the Applicant who is being shut out.

With the Mandate settled, and the Australian Administration firmly in place, the rate of mining was stepped up. The Nauruans realized soon enough that the habitability of the island was at stake. The first Administrator, General Griffiths, shared their concerns. Acting on his own initiative, he introduced a Lands Ordinance in 1925 to confine mining to a depth of 20 feet. The reasons for introducing this are explained in a Memorandum to the then Australian Prime Minister (Memorandum to Prime Minister, 25 March 1926, Australian Archives CRS A518, D 112/6/1; Nauru Memorial, Annexes, Vol. 4, Ann. 50).

> "He [Griffiths] said that it was the natives themselves whom most strongly desired that mining should not exceed this depth. They were firmly convinced that if this depth were exceeded it would be impossible to plant any food producing trees in the future. It was therefore the representations of the natives that were responsible for the ordinance.
>
> He considered that the restriction of mining to a depth of twenty feet was really necessary so that food-bearing lands might be assured for future generations. The Nauruan population was a rapidly increasing one, and the natives and himself were obliged to think of the future. The interests of the natives were the first consideration: the phosphate industry was a secondary consideration."

Australia did not accept his reason. Under the 1923 Amendment to the Nauru Island Agreement it had power to disallow the Ordinance. It did so and the Ordinance never entered into force. In its place (and after Griffiths' replacement) was introduced the 1927 Lands Ordinance

Amendment Ordinance, an Ordinance which acquired for the Administration complete control over phosphate and non-phosphate bearing land. That Ordinance in effect dispossessed the Nauruans and left mining unlimited in scope and depth. The sad tale of this Ordinance is told at length in the Nauru Memorial (Vol. 1, paras. 523-539, pp. 194-202). The terms of that Ordinance remained in force to control Nauru land-holding up to the time of Independence.

Even before the era of scrutiny by the United Nations Visiting Missions, mining on Nauru had exercised the minds of the Permanent Mandates Commission. The first time it had a chance to consider Nauru, the Commission reported

> "This tiny island which is hidden in the vast extent of the Pacific, has only about 2,000 inhabitants. Its sole wealth - and it is considerable - consists in vast and rich deposits of phosphates. The Mandate for this island was conferred by the Principal Allied and Associated Powers upon the British Empire, which delegated the working of this mineral wealth to Australia, Great Britain and New Zealand. These three Governments have devolved upon Australia the responsibility for the administration for a first period of five years. From information supplied by the Mandatory Power, the Commission finds ground for fear that the fundamental principle of the institution of Mandates may, as regards its application to this island, be prejudiced in two ways. It fears on the one hand that the material wealth of this island and the small number of its inhabitants may induce the mandatory Powers to subordinate the interests of the people to the exploitation of the wealth. It is, therefore, not without deep concern that it considers the question whether the wellbeing and development of the inhabitants of this island, which, in the words of the Covenant 'form a sacred trust of civilisation', the accomplishment of which it is the Commission's duty to safeguard, are not in danger of being compromised. It is moreover, concerned with the consideration of the question whether the mandatory Power, by reserving the ownership and exclusive exploitation of the resources of this territory to itself, has brought its policy into true harmony with the requirements of the Mandate which, in accordance with the Covenant, it should exercise on behalf of the whole League of Nations." (League of Nations, Permanent Mandates Commission, Minutes, 2nd Session, 11th Meeting, 1922, p. 55.)

M. Rappard, the distinguished Secretary to the Permanent Mandates Commission, had commented in 1923 that the Mandate was a system of tutelage and that this implied a disinterested activity. Sir Frederick Lugard, a distinguished member, commented that if the principle of disinterestedness were abandoned, there would in reality exist a disguised form of annexation (League of Nations, Permanent Mandates Commission, Minutes, 3rd Session, 1923, p. 56). (This comment, indeed, was entirely valid, particularly in view of the historical attitude of Australia towards Nauru. Australia would have much preferred to annex Nauru, but for the introduction of the Mandate system.)

After consideration, the Commission, that is the Permanent Mandates Commission, adopted the following declaration of principle

> "It would be contrary to the spirit of disinterestedness which is the characteristic of the system of mandates for a mandatory State to create, under cover of its mandate, in the territory entrusted to it for administration, a Government enterprise of an industrial or commercial character, the profits of which were credited to the central budget of the Mandatory State." (League of Nations, Permanent Mandates Commission, *Minutes*, 3rd Session, 1923, p. 59; Nauru Memorial, Annexes, Vol. 4, Ann. 24.)

Having made its stand on principle, the Permanent Mandates Commission was concerned thereafter to consider the actual effects of the mining on the indigenous inhabitants. But for this information, the Permanent Mandates Commission was completely dependent upon the Annual Reports of the Australian Administration.

However, in 1939, at a time when phosphate exports had shot up from a half million tons a year to nearly a million (70% of which went to Australia) there was an interesting exchange between the Permanent Mandates Commission and Mr. J. R. Halligan, the Australian representative before the Commission. He was later actually to become Secretary of the Australian Department of Territories which administered Nauru, and then, still later, the Australian Commissioner of the British Phosphate Commissioners. A number of questions were asked him.

> "Mlle Dannevig asked whether there was sufficient room left on the island for native population.
>
> Mr. Halligan pointed out that Nauru was an island with a circumference of some twelve miles. The outer rim was formed by a coral reef which was exposed at low tide. Then came a beach and a strip of fertile land some 200 to 800 yards wide running up to a plateau in the centre of which the phosphates were deposited. The natives lived on the fertile strip where they had sufficient accommodation and were able to grow their crops of coconuts and pandanus palm.
>
> M. van Asbeck recalled the question asked by the Chairman at the thirty-fourth session as to whether worked-out land was permanently unsuited for cultivation of any kind. Was any more recent information available on that point?
>
> Mr. Halligan referred to the photographs contained in the annual report for 1926, which showed that the removal of phosphate deposits left pinnacles of coral exposed which were obviously unsuitable for cultivation.
>
> Count De Penha Garcia asked whether the Administration had made any calculation of the probable duration of the phosphate deposits.

> Mr. Halligan replied that several rough estimates had been made of the probable life of the phosphate fields. Much would depend on the depth of the deposits and the rapidity of working. At the present rate of output, it would be calculated that the deposits would probably last up to eighty or even to a hnndred years." (League of Nations, Permanent Mandates Commission, *Minutes*, 36th Session, 8-29 June 1939, pp. 166, 169-170.)

At a crucial point of the island's mining history, when production had doubled and the results of earlier mining were there for all to see, the answers exhibited no sense of urgency, no real concern, no apparent knowledge of the destructive force that was being unleashed on the Mandate.

Mr. President, Members of the Court, it is useful to dwell for a short moment on how, towards the end of the Mandate, Australia found itself in the position of complete control over the small island and its rich phosphate reserves. Control over the island was exercised by Australia through the 1919 Nauru Island Agreement. Under that Agreement, all expenses of the Australian Administration, whether of a salary or welfare nature, were to be paid through the receipts of the BPC arising from the sale of phosphatic rock. It is useful to note that whenever extraordinary expenditure was required by the Administration, this was mounted through the BPC and was taken out of the receipts of phosphate. Take, for example, the situation at the end of the Second World War, when all Nauruan housing had been reduced to rubble following incessant bombing. Reconstruction was carried out by the Administration through an advance of £200,000 from the BPC (Viviani, *Nauru*, p. 90). This was, in turn, repaid by the Administration by a specific "Royalty" of 6d. a ton for every ton of phosphate exported.

In order for the BPC to gain access to the phosphate, the Australian Administration enacted a Lands Ordinance in 1921 and with an important Amendment in 1927. As indicated already, the effect of the 1927 Lands Ordinance Amendment effectively left no bargaining power in the Nauruans, the owners of the land. As the Nauruan Memorial demonstrates (Nauru Memorial, Vol. 1, Part 1, Chapter 3), it constituted a form of expropriation as there was nothing of value for the BPC to hand back. It constituted a systematic destruction of land without redress. And that system remained in force until independence in 1968.

The Second World War was an horrific hiatus. Nauru homes were bombed out of existence and the Nauruan population was reduced by one-third.

Following that war, Australia administered the island under a Trusteeship Agreement of 1947, acting on behalf of the three Governments. In fact, Australia had made attempts to become the sole Administering Authority but without success (Macdonald, *In Pursuit of the Sacred Trust*, p. 22). Australia had believed it earned that right as it had, after all, been constantly the Administration.

In describing the fact that there were consultations between the three Governments before nominating an Administrator in the Mandate period, the Australian Counsel, Professor Pellet, refers to Dr. Barrie Macdonald as having said that consultations were always held between the three Governments prior to the appointment or an Administrator (Verbatim Record, 12 November 1991, p. 59). But in simply selectively mentioning that fact, he fails to illustrate the essentially passive nature of the other Partners. And, it is useful for that reason to quote the reference in full:

> "Although New Zealand and the United Kingdom had been consulted about the appointment of each Administrator, and their representatives had attended all relevant discussions at the Permanent Mandates Commission, neither had played any significant role. True, from time to time, they had admonished Australia - as over changes to labour regulations and restrictions on mining practice - but this was usually at the behest of the BPC and did not reflect any close interest in the island. But the tripartite arrangement was an insurance policy; quiescence meant no more than a general satisfaction with the conduct of the phosphate industry." (Barrie Macdonald, *In Pursuit of the Sacred Trust*, p. 21.)

B. Post-War - Resettlement

I turn now to the resettlement issue.

Nauruans, anxious about rehabilitation were told, particularly by the BPC, that rehabilitation was an impractical exercise. Such information was given to each Visiting Mission. And the first Mission in 1951 stated that the phosphate land once worked is completely wasteland and impossible to reclaim (United Nations Visiting Mission - Nauru 1951, *Trusteeship Council, Official Records*, Supplement No. 3 (T/898), para. 50). At this early point, only a couple of years into resumed mining after the war, the Mission stated that resettlement may provide the only satisfactory long-term solution. In this regard, the Mission had noted the Banabans as a case in point.

Banaba - also known as Ocean Island - was the twin phosphate island to Nauru in the Central Pacific. It was part of the then British colony of the Gilbert and Ellice Islands. The British

Government, at the behest of the BPC, resettled the population, somewhat smaller than that of Nauru, on the island of Rabi in the then colony of Fiji (*ibid*., para. 38). The Nauruans were well aware of the circumstances of this move and its difficulties. And that story was played out in the Chancery Division of the High Court in England in the *Tito and others* v. *Waddell and others* case (No. 2) [1977], 3, All England Reports 129. By contrast, the Nauruans felt protected because of the strength of the Trust. But they were anxious and remained so throughout discussions of resettlement - to them the maintenance of their community and identity was paramount. To them, the Trust eventually would offer them self-determination - though that was not necessarily the view of Australia.

The "Rabi" solution was attractive to the BPC, though the Secretary of the Australian Department of Territories at that time (1953) considered that the BPC may well have been pushing the thought simply to get Nauruans out of the way (Nauru Memorial, Vol 4, Ann. 60).

In the meantime, the Australian Government organisation, the Commonwealth Scientific and Industrial Research Organisation (CSIRO) carried out an inquiry in 1953 as to whether land on Nauru was suitable for agricultural purposes. It found that regeneration for agricultural purposes was a practical impossibility (Preliminary Objections of Australia, Vol. II, Ann. 14). The report, whilst denying the possibility of agriculture for the worked-out phosphate lands, stated that "it is possible that some better use can be made of these lands than at present". In the result, the phrase "no practical possibility" was used thereafter whenever the question of rehabilitation was raised. One of the authors of the Report, Dr. Phillis, did say again in 1960, without further investigating, that regeneration of the worked-out phosphate land was not possible. He was content with his earlier 1953 survey results. These were the only inquiries into rehabilitation as such, before the Davey Report. Some estimates of soil importation had been made by the BPC in 1964 (Preliminary Objections of Australia, Vol. I, p. 36).

This report of the CSIRO boosted the BPC preference for resettlement. The only other alternative put forward was to proceed with an assimilation proposal, as Nauruans had been educated "in the European manner" (Nauru Memorial, Vol. 4, Ann. 62). This was a scheme

transmitted to the Nauruans by letter from the Australian Minister for Territories on 12 October 1960 (Preliminary Objections of Australia, Vol. II, Ann. 4) of supported individual emigration to the countries of the Partner Governments, but it was never attractive to the Nauruans for the obvious reason that it meant assimilation and loss of community.

Soon thereafter, a Director of Nauruan Resettlement, Mr. W. R. Marsh, of the Australian Department of Territories was appointed in 1962 by the Australian Minister for Territories, Mr. Hasluck. The Nauruans, a little bemused by these attempts to move them on but extremely worried by the increased level of mining and the resultant devastation, were gracious enough to say they would consider whatever serious proposals were placed before them. The early 1960s then were, for the want of a better term, the resettlement days. Mr. Marsh assiduously combed the South Pacific looking for spare islands offering a fair prospect. In the end it came down to two - just off the Australian coast, Curtis Island and Fraser Island. The Nauruans preferred Fraser Island but were told it was not available. So it was Curtis Island or not at all. Although the mosquitoes were bad and the people rather unfriendly, nevertheless the Nauru Local Government Council representatives promised they would put the case to the Nauruan Community. Mr. Marsh went to Nauru to present the proposal. It was rejected on the clear but simple ground that the offer of Curtis Island carried with it Australian citizenship and nothing other than local government controls in the State of Queensland. The Nauruans were not able to preserve their national identity.

This was no *volte-face* as suggested on behalf of the Respondent State on Monday, 11 November (p. 76 transcript). The Nauruans had never given their *imprimatur* to *any resettlement*. That could only come about if the specific requirements of the Nauruans and, in particular, their requirement for a continued national identity were fulfilled.

The evidence of Mr. Marsh before the Weeramantry Committee was useful and it is set out in the Nauru Memorial, Vol. 4, Annex 73. Little attention has been given to the question of what resettlement would mean in the context of a Trusteeship Agreement. What would have been the situation of the Nauruans had most been moved to Curtis Island? It is entirely possible that the Nauruans could still have sought independence for Nauru and gained control of the phosphate

industry. There would have been little chance of the BPC remaining in control of that industry. Mr. Marsh upon reflection considered that the Nauruans could have negotiated both resettlement, independence on Nauru and control of the industry - a view shared, I might add, by Ms. Brooks, a Liberian representative, and former Chairman of the Trusteeship Council and President of the General Assembly (Weeramantry Report, pp. 869-883).

To carry through resettlement, as Mr. Marsh told the Weeramantry Inquiry with all the required infrastructure was likely to take anything up to seven years. But the decision was made by 1964 that the Nauruans would reject Curtis Island and resettlement and stay on the island. Therefore one moves from resettlement with its associated plans to rehabilitation and its associated plans. With the decision now made clearly to remain, rehabilitation became paramount. And, of course, the Nauruan point was logical. If you are so keen to finance our resettlement elsewhere, then there is no reason why you should not finance the rehabilitation when we stay on Nauru.

C. Post-War - Rehabilitation

The Nauruans now pressed for a reconsideration of the conventional thinking of the BPC and Australia on restoration of worked-out lands that it was all impractical. Nobody had thought very cogently on the question, the Austalians because they did not want to do it anyway, and the Nauruans perhaps a little simplistically without proper advice, were thinking of an imported soil technique, which was both costly and possibly dangerous from a soil quarantine point of view.

The estimates of cost relating to imported soil provided by BPC in 1964 and the letter of CSIRO in January 1965 were predictably less than encouraging (Preliminary Objections of Australia, Vol. II, Anns. 18, 19, 20). Meanwhile, at the United Nations, moves had been made to reassess the situation in the light of the Nauruan decision to remain on the island. The General Assembly passed resolution 2122 (XX). And that resolution, Mr. President, absolutely makes it clear that, following the breakdown of any resettlement plans and any action consequent on that, rehabilitation of the worked-out phosphate lands assumed a new importance. And to reinforce the message, the Head Chief made clear to the next meeting of the Trusteeship Council, the

33rd Session, that the island would have to be completely rehabilitated and that such rehabilitation rested with the Administering Authority. The Head Chief added, however, that in the event that Nauru gained independence in 1968, Nauruans would therefore assume responsibility for land mined thereafter. He further indicated that the proportion based on presently mined as to future mined land was one-third to the Administering Authority and two-thirds to the Nauruan people. Significantly, he added that in order to be able to discharge their responsibility for two-thirds of the rehabilitation project, the Nauruans would require all the benefits that could be derived from the island's only natural asset - phosphates (*Trusteeship Council, Official Records,* 33rd Session (July 1966) T/SR 1285, p. 91). In saying that, the Head Chief well understood that to achieve independence Nauru would have to demonstrate some economic viability. And it could not do that unless it controlled the phosphate industry and continued to mine. He also knew that Australia would push, with its heavy dependence on phosphate, for a security of supply at an agreed price.

It is important, however, Mr. President, Members of the Court, to realise the consistency of the Nauruan position. It did not change thereafter one iota from that revealed by the Head Chief at the 33rd Session of the Trusteeship Council. One could properly say that resolution 2111 (XX) and the guidelines set by the Head Chief in the Trusteeship Council in the 33rd Session were the firm base for all later argument on rehabilitation.

Meanwhile something had to be done about rehabilitation. And to this time, the only extant documents were the 1954 CSIRO limited report with the addenda letters and some BPC costings. Already in 1965, the Nauru Local Government Council had signalled to the Australian Government that the Administering Authority should assume responsibility for restoration of the mined areas, at no cost to the Nauruans. The Australian Minister for Territories appointed, in late 1965, a Committee on rehabilitation. The Committee was made up of a consulting engineer, Mr. Davey, as Chairman, Professor Lewis, a Professor of Agricultural Economics, and Mr. Van Beers, a Soils Officer of the Food and Agricultural Organization. The terms of reference were more wide-ranging than that of the CSIRO inquiry in 1954 (Nauru Memorial, Vol. 3, Ann. 3). Now although the Committee spent only ten days on the island, the Report released in the latter half of 1966, was as

thorough as it could be, given the constraints of time under which it worked. In fact, the Weeramantry Report in considering the Davey Committee Report gave as its assessment the view that, given the time frame which did not allow for test work and the reliance that one had to place on information gained from BPC engineers on the island and in Australia, many of the observations and recommendations were as valid now as they were in 1965 (Weeramantry Report, p. 1132).

What the Davey Committee did not do was to suggest that restoration work could not be carried out or was impracticable. It is a travesty of the truth to quote simply the first conclusion of the Davey Committee Report, as the Australian Preliminary Objections do (Preliminary Objections of Australia, Vol. I, para. 81), or to state, as Australia has done before this Court, that the Davey Committee Report was pessimistic as to the practicality of rehabilitation on a large scale (Verbatim Record, Monday 11 November 1991, p. 77).

For the first time, Mr. President, here was a Report which said that work could be carried out, would be practicable, but would cost money (though not an impossible amount having regard to the value of the phosphate mined).

The Davey Committee agreed, as all authorities before and after have done (including the Weeramantry Report), that simply backfilling the mined areas from external sources was not a practical or even a wise course. What the Committee did say, however, was that land could be adapted attractively for habitation, that a large construction project of airstrip and water storage should be set-up, that some areas should be revegetated and that a system of land use planning was desirable. And this was costed out in Section Ten of the Report at 31 million dollars Australian at that time.

It is true that a statement by the Head Chief (Nauru Memorial, Vol. 3, Ann. 4, p. 339) criticized the Report, basically because it did not go far enough and offer total restoration. "Our people", he said, "have been seeking restoration of the mined areas as a *right* to have returned to us adequate land for a permanent home". But he went on,

> "We were interested in resettlement only because it appeared to be an easier way of solving our problem, and the Administering Authority encouraged this by suggesting that it would be impossible to live on Nauru and, that even if we could,

> it would still not be in our best interests to do so ... To the Nauruans the most pleasing aspect of this report is that the Committee has confirmed our view that it is practicable for us to stay on Nauru. We have lived on this island for centuries, and when no other solution could be found we were sure if the mined lands were restored it would be possible for us to remain on Nauru even though our views were not accepted by the Administration."

In that sense, the Report was a watershed.

Mr. President, I would like to jump ahead a moment to the end of 1968.

Australia takes a less than candid stance when discussing Nauru President Mr. DeRoburt's letter of 1968, written to the Australian Minister of External Affairs soon after independence (Nauru Memorial, Vol. 4, Ann. 76). The Australian discussion of this before this Court on Tuesday (Verbatim Record, Tuesday 12 November, p. 26) uses a selective part of the letter and asks the rhetorical question, what can one make of this? Australia says "The Court will note that this is not the previous rehabilitation claim". But the first two paragraphs of the letter addressed to the Australian Minister of External Affairs, and which were not quoted, relate directly to the Davey Committee Report of 1966, and the question of rehabilitation, and I quote the paragraphs:

> "As you may be aware, the Committee of Experts appointed by the Partner Governments and the Council of Nauru in 1966, to examine the possibility of rehabilitating the mined-out phosphate lands on Nauru, advocated in their Report the building of an airstrip to international specifications as a possible and useful way of rehabilitating such lands.
>
> Due to differences in principles of approach to the question of rehabilitation as a whole, the Committee's Report was not adopted although, in the discussions of it at working party level, representatives of the Partner Governments as well as the Nauru Delegation saw merits in the suggestion. The Nauru Delegation, led by myself, had declined then to pursue the proposal to its conclusion as to have done so would be taking the matter out of its proper context of rehabilitation, which question we had always wanted to be treated integrally. The Nauru Delegation, however, did point out to the representatives of the Partner Governments at the talks that it reserved the right to take up the suggestion for an airstrip in future with the Governments concerned."

Indeed, Mr. Presdient, what do we make of this? It is and was part of the rehabilitation programme. It is put forward in the light of the Davey Committee proposal for a major construction, including an airstrip. It was raised in the December following independence.

It was a clear attempt by the President of Nauru to bring forward the discussions on rehabilitation, which he had envisaged as an attempted settlement of the rehabilitation issue, arising out of his specific statement to the Trusteeship Council about which we have heard so much.

Australia says there was in this letter no allegation of breach or of any legal responsibility. But it is clear from the reply of the Minister (Nauru Memorial, Vol. 4, Ann. 77) that it was so seen by Australia. Why otherwise would the Australian Minister deny responsibility for rehabilitation of mined-out phosphate lands, and then parade the formula - "The Partner Governments remain convinced that the terms of settlement with Your Excellency's Government were sufficiently generous to enable it to meet its needs for rehabilitation and development."

D. Rehabilitation and the Naura Talks

Mr. President, I move now to the question of rehabilitation as it was faced in the Nauru Talks.

The Nauru Talks involved discussions between representatives of the Nauru Local Government Council and Australia, with largely silent participation at various stages by the other Governments. The Talks were conducted between 1964 and 1967 (these Talks are all consolidated within Volume 3 of the Nauru Memorial). They dealt with three principal areas of concern: political independence, the future of the phosphate industry, and the rehabilitation of the worked-out phosphate lands. In reality, political independence created some problems in the mind of Australia relating to the nature of small States, particularly in the Pacific region. And the second question, the future of the phosphate industry, was to become in the end a matter of bargain. Australia wished, so far as possible, to resist losing ultimate control of this resource, so vital for its own rural interests. It was facing, however, an uphill struggle against the persistence of the Nauruans and the difficulties created by the Committee of Twenty-Four. Australia eventually had to be content with a régime which gave it security, priority, even exclusivity of supply at an assured price. It managed also to convince the Nauruans to pay for an island full of fast depreciating machinery and buildings even though, of course, that had already been originally paid for out of the proceeds of phosphate.

However, the sticking point was the third area. It was a sticking point because to undertake rehabilitation would cost money. That had been demonstrated quite convincingly when the Davey Committee came up with a figure of $31 million. One must remember, Mr. President, that Australia was here facing something very unusual. Since the days of Prime Minister William Morris Hughes

and the attempted annexation of Nauru after the First World War by Australia, that country under the terms of the Nauru Island Agreement had never had to contribute a cent either to the upkeep or the development of Nauru. Everything was paid for out of the proceeds of phosphate, including the salary of the Australian Administrator (Nauru Island Agreement, Article 12). As a result, Australia consistently denied any responsibility for the rehabilitation of worked-out mined lands. But its consistency in denial was never argued on the grounds that it had no obligation under the Trust. Nor does Australia seem to deny such an obligation. During the Talks it was put on the basis of not being consistent with mining practice or supposed impracticality. It need not be reiterated here that the sheer destructiveness of the extraction, the demolition of the island home of the Nauruans before their very eyes, made comparisons with other mining projects highly problematic. Moreover they were being assured by the Administration that there was no redress.

It was during one of these series of Talks between Nauru and Australia that an interesting exchange took place between the Head Chief and the Chairman of the Meeting, Mr. Warwick Smith. Nauru had only recently been offered Curtis Island and had noticed there mineral sand mining being undertaken.

The Head Chief said

> "Since the Governments were prepared to restore the area of Curtis Island affected by mining for mineral sands why were they not prepared to undertake similar responsibilities on Nauru.
>
> The Chairman said that it was standard practice to rehabilitate mineral sands but not open cut mining or phosphate. He had mentioned these matters merely to indicate that the Governments' view was that rehabilitation was likely to be impracticable and ineffective in the long term. The Governments were however quite willing to see the proposed investigation committee set up to look into the question to help to get a common view, although this in no way committed them to meeting any costs for rehabilitating the island." (Record of Negotiations, 31st May-10th June, 2nd June p.m. 1965, internal p. 6-7; Nauru Memorial, Annexes, Vol. 3, Ann. 2 Volume, pp. 41-42.)

The reference there, Mr. President, to the "proposed investigation committee", was to the Davey Committee about to be established.

The sequel in this exchange was even more extraordinary. When the Davey Committee did investigate, it gave its considered opinion of the position existing in Nauru.

> "There has developed, therefore, a climate of opinion in which the need for controls to obviate destruction and pollution of the natural environment is accepted, and restorative treatment of affected land is the responsibility of the extractive industry. It is not the Committee's responsibility to recommend who should bear the cost of any treatment of worked-out phosphate lands undertaken on Nauru, but it would seem consistent with the general trend in regulatory policies for extractive industries to require such treatment to be a responsibility of the phosphate-extractive industry."
>
> "Conditions vary and there are some very special circumstances affecting the Nauruan case, notably the limited land and other resources of the Island and the fact that mining operations will lay bare two-thirds of the total land area. Moreover agricultural use is not the only possible objective for land restoration, and even if uneconomic for this purpose, there are many possible alternative methods of treatment.
>
> Informed decision-making about the treatment of areas stripped of phosphate calls for consideration of the full range of alternative treatments. The end-use desired and the costs involved largely determine the choice of alternatives. For some purposes, such as water catchment and storage, airport and road construction, a soil cover will not be necessary. For other purposes, such as public buildings, residential and recreational areas, only a modicum of soil cover is needed. For agricultural production, rehabilitation would require a deeper covering of soil to be placed on treated areas (together with, for many types of crops, the provision of supplementary irrigation water). For greater environmental congeniality much could be achieved by revegetation of worked-out areas, without or with a minimum of resoiling treatment." (Nauru Memorial, Vol. 3, Ann. 3, pp. 236-237.)

The very Committee set up by Australia had substantially undermined the Australian position on mining practice and impracticality. In its Statement of Rehabilitation, the Nauruan Delegation immediately took this point up:

> "There is ample precedent for requiring extractive industries to restore mined land, especially where open cut methods are used. Thus, in Australia, companies mining beach sands are required to restore the land surface to its original condition, and it was planned to impose such requirements upon companies mining rutile sands on Curtis Island. Some regard for this principle has also been acknowledged on Ocean Island but not on Nauru. The question of open-cut mining has been subject to recent investigation in the United States and increasing legislative action is being taken to require restoration of land surfaces.
>
> In this connection we agree fully with the conclusion reached by the Committee of Experts appointed to investigate the rehabilitation of mined lands on Nauru that 'it would seem consistent with the general trend in regulatory policies for extractive industries to require such treatment (rehabilitation) to be a responsibility of the phosphate-extractive industry'". (Nauru Talks 1967, 69/2 internal p. 140 Nauru Memorial, Vol. 3, Ann. 5, Vol. pp. 555-556.)

The rehabilitation issue was very much on the table. But there was no settlement of that issue.

Not long after, the Nauru Local Government Council had negotiated Heads of Agreement which were signed in Canberra on 15 June 1967, and which were perfected into a formal agreement, entitled an Agreement relating to the Nauru Island Phosphate Industry. Though the Agreement was

finally signed in November, it took effect retrospectively on 1 July 1967. That Agreement dealt specifically with the future of the Phosphate Industry, and by clauses 5 and 6 provided arrangements which Australia was seeking on supply and price. What it did not do was make provision for rehabilitation of phosphate lands.

Australia had asserted at the Talks that

> "Financial arrangements could be such as to permit the Nauruans to do what they wished, within reasonable limits, in the way of rehabilitation. As part of the total arrangement the Joint Delegation would like to see the Nauruans withdraw their claims in respect of rehabilitation." (Nauru Talks 1967, p. 56: Nauru Memorial, Annexes, Vol. 3, Ann. 5, Vol. p. 471.)

This was answered by Nauru in the following way:

> "As the Island was to be a permanent home for the Nauruan people, rehabilitation is needed. The Nauruans could not talk about details under a cloud of denial of broad principles. The land must be rehabilitated. Once agreement on broad principles was reached technical details could be discussed ... if the Governments claim that their proposals [should] be fully adequate for the present and future needs of the Nauruans, then we feel that it is up to you to try to convince us on this point by giving whatever details you feel appropriate" (*ibid.*, internal p. 83 (emphasis in original) Nauru Memorial, Annexes, Vol. 3, Ann. 5, Vol. p. 497),

and again I quote

> "We are not prepared publicly or privately to accept the Partner Governments' view that the proposed financial arrangements are adequate to cover our future needs including rehabilitation or resettlement." (*ibid.*, internal p. 112: Nauru Memorial, Annexes, Vol. 3, Ann. 5, Vol. p. 527.)

In essence, in gaining independence and control over the phosphate industry, Nauru was receiving nothing more than it was entitled to. It had, of course, agreed to pay at independence $21 million for the depreciated assets of the BPC on the island. Therefore, upon independence, whatever it might have received in the first year, which was boosted by some back royalty payments, it had to face up to a substantial payment out as a condition of gaining control over the industry. The payment of the purchase money for the Nauru assets was a *sine qua non* towards gaining management of the industry (Nauru Memorial, Vol. 3, Ann. 6, Agreement relating to the Nauru Island Phosphate Industry, Clauses 11 and 13).

One of the proposals put by the Joint Delegation to the Nauruans when drafting the Heads of Agreement was a clause in these terms:

"*Rehabilitation*

9. The Partner Governments consider that the proposed financial arrangements on phosphate cover the future needs of the Nauruan Community, including rehabilitation or resettlement." (Id., internal p. 160: Nauru Memorial, Vol. 3, Annexes, Ann. 5, p. 575.)

The proposed Clause was not proceeded with because the Nauruans refused to accept it. That was the last seen of it.

Already in the Talks, the Australian Chairman, Mr. Warwick Smith, had sought to place on the Nauruans responsibility for rehabilitation. He stated that "on rehabilitation you [the Nauruans] have accepted the responsibility for it provided that all the proceeds from the phosphate are available to the Nauruan people". Nauru answered this in the following terms:

"Before going on further, the Nauruan delegation would like to correct what appears to be a misconception of the Partner Governments about our attitude to rehabilitation of the mined areas on Nauru. A few days ago (14th April), the Chairman re-stated the Governments' position that, in your view, the financial arrangements would be 'sufficiently liberal to take care of the Nauruan requirements, including rehabilitation or resettlement'. We do not agree with your attitude on this matter (for reasons we shall give later) but at least we understand what you are saying.

However, the Chairman then said 'on rehabilitation, you [the Nauruans] have accepted the responsibility for it provided that all the proceeds from the phosphate are available to the Nauruan people'. This is not a correct statement of what we have been saying. It is correct only regarding areas mined in future. The Nauruan delegation has argued from the beginning that the responsibility for restoring the land already mined (about one-third of the island) rests with the Partner Governments who cannot divest themselves of this responsibility merely by saying that they will not accept it." (Nauru Talks 1967 67/2 internal page 140, Nauru Memorial, Vol. 3, Ann. 5, p. 555.)

And again:

"We value the freedom that we can attain on Nauru sufficiently to face the cost of rehabilitating lands that we mine in the future, but we are well aware that our basic opportunities to survive as an independent people are being severely curtailed by such large expenditures on rehabilitation and we need every penny that we can get. We are not prepared publicly or privately to accept the Partner Governments' view that the proposed financial arrangement are adequate to cover our future needs including rehabilitation or resettlement." (1967 Nauru Talks, internal p. 112 - Nauru Memorial, Vol. 3, Ann. 5, Vol., p. 527.)

Nothing could have been clearer.

E. Rehabilitation with the United Nations - 1967

There was no change in the United Nations to the attitude and arguments advanced by the Nauruans during the course of the Nauru Talks 1964-67. In fact, the discussion of the issue in the United Nations provides support, both for the continuity of the dispute over rehabilitation and for the proposition that there was a clear distinction between political independence, control over the phosphate industry and the question of rehabilitation.

The Report of the Trusteeship Council for the year ending June 1967 reveals that the Head Chief regarded the question of rehabilitation as the most irreconcilable issue with the Administering Authority. He stated that the Nauru Local Government Council considered that the Administering Authority should accept responsibility for rehabilitation of land already mined, but that the Local Government Council would be responsible for all lands mined after l July 1967, that is, the effective date of the Phosphate Industry Agreement, which would give Nauru the net proceeds of the sale of phosphates (*General Assembly*, *Official Records*; Preliminary Objections of Australia, Vol. II, Ann. 28, para. 386).

At the same meeting, the representative of France congratulated the Parties that full ownership of the phosphate deposits was granted to the Nauruan people, but regretted that no agreement had been reached between the Administrative Authority and the Nauruan people on the rehabilitation of the worked-out mined lands (*ibid*., paras. 412-413). The French representative showed a clear appreciation that rehabilitation was a distinct issue - that point was also clearly accepted by the Liberian representative, who asked that before independence the Administrative Authority commence undertaking the restoration of the island (*ibid*., para. 410). The Liberian representative already had said, in the previous year's Trusteeship Council Report, that the question of ownership and that of restoration was not contingent one upon the other (Nauru Memorial, Vol. 5, para. 605).

In its Report for the year ending June 1967, the Trusteeship Council regretted that differences continued to exist on the question of rehabilitation, and expressed earnest hope that it will be possible to find a solution to the satisfaction of both Parties (Preliminary Objections of Australia, Vol. II, Annexes, para. 403).

Then at the Thirtieth Special Session of the Trusteeship Council, the Head Chief on

22 November 1967 made his statement that the three Governments should bear responsibility for rehabilitation for land mined prior to 1 July 1967, but that was not an issue relevant to the termination of the Trusteeship Agreement currently before the Trusteeship Council. The Nauru Government, he added, would continue to seek a just settlement of their claim (Preliminary Objections of Australia, Vol. II, Ann. 29, para. 20). It is Nauru's submission that the Head Chief was entirely correct in saying that it was not an issue pertinent to termination. He also made it clear that rehabilitation represented a justifiable claim by Nauru. No one, not even Australia, at that Trusteeship Council meeting expressed any dissent or even doubt with this statement. It is not unfair to say that, looking at the history of the problem within the Trusteeship Council, the various representatives had taken a similar view to that of the French representative, that it was a distinct issue and certainly not tied either to termination or ownership of the industry.

The Head Chief did not repeat that statement in the Fourth Committee just less than a fortnight later. His own statement explains that convincingly. Yet in the Fourth Committee the Indian representative noted the considerable difference of opinion between the Nauruans and the Administering Authority, and he shared the hope that a just agreement would be reached in conformity with General Assembly resolution 2226 (XXI) (Preliminary Objections of Australia, Vol. II, Ann. 30, p. 266). Here again, there was not an attempt made by Australia or anyone else to refute this position. No statement or explanation was given that the Nauru position now some years old had changed. No one noted any change. And, of course, for good reason, for there had been no change. The United Nations evidently assumed that Australia would, in all good faith, be prepared to hold talks with Nauru on rehabilitation upon independence and it felt no need specifically to stipulate this as a condition for "unqualified" independence.

F. Post-Independence Acts

On Independence Day 31 January 1968, with all former Governments represented and including a representative of the Secretary-General of the United Nations, the Head Chief, now as President, stated that he held it against the Governments of Australia, New Zealand and Britain to recognize that it was their responsibility to rehabilitate one-third of the island (Nauru Memorial,

Vol. 1, para. 615). Before representatives of the Australian and the world press, he stated that Nauru held the former Partner Governments responsible in meeting the cost of rehabilitation of the mined-out areas, namely one-third of the island (Nauru Memorial, Vol. 4, Ann. 69). This was not the act of a person who had supposedly only a month or two earlier waived any claim in the Fourth Committee. And certainly there was not a hint or suggestion by anyone from whatever side either of surprise or that there had been a previous waiver. It was, after all, about as strong a gathering as possible in which to assert the continuity of the claim and, of course, on the very first available occasion.

Amongst a people as democratic as the Nauruans, where there are no organized parties and within a Parliament made up simply of independent members, it is not always easy to obtain a consensus. However, on one matter there is always expressed a national consensus - and that is the Nauruan assertion of the clear responsibility of the former Administering Authority to carry out rehabilitation of land mined prior to independence at the cost of the Administering Authority. Two simple examples of this may be shown.

First, in drafting the fundamental law of the State, the Constitution, there was inserted by the Nauruan Constitutional Convention, which sat jut before independence and a few months after, a provision, Article 83, Clause 2, which reads:

> "Nothing in this Constitution makes the Government of Nauru responsible for the rehabilitation of land from which phosphate was mined before the First day of July, One thousand nine hundred and sixty-seven." (Nauru Memorial, Vol. 4, Ann. 42.)

This was to make clear to future governments of Nauru that moneys were not to be expended on rehabilitation of lands worked-out in the past which is properly the responsibility of Australia, and of the other Partner Governments.

Secondly, in that first Parliament a resolution was passed, moved by the Honourable Kenas Aroi (who became President for a while in 1989, during the pendency of this case before the Court), calling for the prosecution of Nauru's rehabilitation claim with Australia and the other Partner Governments.

There was also established at independence a Rehabilitation Fund. It is true that it was

established five days before independence by an Australian Ordinance. But, this and other funds, which will be discussed in more detail later, were set up at the behest of the Nauruans so that upon independence there would be a system of funds into which a part of the royalties from phosphates would be placed. It is important to note, however, that the Rehabilitation Fund did not exist before 25 January 1968. It is a fund developed from nothing during the course of Nauru's independence existence. It now stands at A$278 million, but in the first few years after independence the Fund was clearly at a low level of capital accumulation.

The Fund is specific. The object of the Fund is simply and solely for moneys in the Fund to be expended on restoring or improving parts of the island of Nauru that have been affected by mining for phosphate since July 1967 (Nauru Written Statement, p. 15, also see Nauru Constitution, 6th Schedule).

So since taking control of the phosphate industry, Nauru has engaged in a new but vital conservation measure required for the rehabilitation process. When land is being cleared for mining after removal of vegetation there is exposed a thin layer of topsoil and contaminated phosphate. This is illustrated in Photograph 6 of Volume 2 of the Nauru Memorial. The preservation of this topsoil overburden is quite crucial for later use in the rehabilitation process particularly where topsoil will be required. Nauru has assiduously skimmed off this valuable overburden ever since 1968 and stock-piled it for the future. Under the Austalian Administration, the BPC simply cleared the topsoil overburden to a depth of six to ten inches, transported it to the coastal treatment plant where it was blended with phosphate and sold (Weeramantry Report, Vol. 5, Chap. 33, p. 1029). The Weeramantry Report (p. 1030) estimated in 1988 that the stock-pile since 1968 now stood at over $^{3}/_{4}$ million tonnes. And the Report stated:

> "This black topsoil is composed of a combination of friable granular phosphate and the humus developed over centuries from the plateau trees and other vegetation. It is fertile and forms a good seed bed."

That valuable stockpile continues to grow.

Over the first decade of independence, when Nauru was setting up its Public Service, perfecting its administrative procedures, developing and administering its funds, and performing all

the requirements of a small but industrially active State, the rehabilitation issue was not lost sight of. Every opportunity was taken, even after the rebuff of the 1968 letter to the Australian Minister over the rehabilitation project, to seek a reappraisal of the Australian position. As the Head chief in his statement (Nauru Memorial, Vol. 1, p. 258) says, he raised the matter with the Austalian Prime Minister, the Honourable E. G. Whitlam, on a State Visit to Canberra, and then again when the Australian Acting Foreign Minister, Senator Willessee, visited Nauru in 1974. In each case, however, Australia remained, as before independence, quite intransigent.

By the early 1980s, the Rehabilitation Fund was growing but, at the same time, the mining life of phosphate on Nauru was beginning to come to an end. And it was clear that plans were needed, and a further attempt to obtain the material assistance of Australia in the rehabilitation process was required. Therefore, it was necessary to make a further approach, and a letter was sent by the President of Nauru to the then and present Prime Minister of Australia, the Honourable R. J. L. Hawke in 1983 (Nauru Memorial, Vol. 4, Ann. 78). This met with a similar response to the other approaches, when the reply was eventually sent to the President in March 1984 (Nauru Memorial, Vol. 4, Ann. 79). There were, however, in the reply the following added words:

> "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."

This brought a new dimension to the proceeding for nowhere had such a conditional requirement previously been so expressed, and certainly not either to the Nauru Local Government Council or the relevant organs of the United Nations. After much consideration, the Nauruan Cabinet, in 1986, determined to institute an independent inquiry to fulfil a dual purpose. First, it would test the question of responsibility and the "so called" conditions prior to determination of Trusteeship, and, secondly, it would carry out a further but much more technical and sophisticated inquiry into the cost feasibility of rehabilitation. For this purpose, it chose Professor Weeramantry, as Chairman, and an Australian civil engineer, Mr. R. H. Challen, along with Mr. G. Degidoa, a senior Nauruan. The inquiry had the benefit of counsel assisting and a small research staff. It conducted sittings over a space of 15 months and the report in ten volumes was delivered to the

Cabinet and Parliament of Nauru on 29 November 1988. Australia and the other Partner Governments in the Trust were invited to participate but they declined (Nauru Memorial, Vol. 4, Ann. 80, Nos. 1, 2, 3).

This Inquiry, Mr. President, is mentioned not simply to illustrate a further step along the track but to show the immense measures to which Nauru was willing to go, as it were, to get it right. Of course, this was an expensive inquiry but it was important in the eyes of the Nauru Government that, as a very small nation, they not only should be in a position to hold real and positive information but also that, if action was necessary, every available step had been taken and followed.

Upon the tabling of the Report in December 1988, bound copies were sent to Australia and the other Partner Governments. (Nauru Memorial, Vol. 4, Ann. 80, Nos. 22, 23, 24.) Diplomatic Note No. 167/1988 to Australia, *inter alia*, stated the following:

> "In this connection, the Department of External Affairs specifically draws attention, *inter alia*, to the following principal conclusions of the Commission of Inquiry:
>
> (1) that the failure to restore the worked-out land to usable condition, or to compensate the Nauruans for the loss of use of their lands, was a violation of international law and the relevant agreements;
>
> (2) that there was no agreed or just settlement which exonerated the former Partner Governments from the responsibility to rehabilitate the lands;
>
> (3) that a cost-feasible plan of rehabilitation of all the worked-out lands on Nauru can be developed."
>
> ...
>
> "In the meantime the Department of External Affairs notes that the conclusions in the Report, in particular those referred to in the preceding paragraph, support the view which the Department has consistently maintained as to the responsibility for rehabilitation of the lands mined before 1968.
>
> The Department of External Affairs wishes to record to the continued determination of the Government of Nauru to proceed to the rehabilitation of the worked-out lands; so as to secure the future of the Nauruan people. In that regard, the Department again calls upon the Australian Government to accept its responsibilities and to co-operate to this end. The Department stands ready to discuss the forms which such co-operation might take." (Nauru Memorial, Vol. 4, Ann. 80, No. 24, pp. 564-565.)

Australia replied (Nauru Memorial, Vol. 4, Ann. 80, No. 26) by simply recalling its statements made in an earlier Mote to Nauru that it would not be bound by findings of the

Commission of Inquiry and that the Australian Government regarded the comprehensive Phosphate Agreement concluded prior to independence as a just settlement that cleared the Partner Governments of the former British Phosphate Commissioners of any responsibility for the rehabilitation of Nauru (Nauru Memorial, Vol. 4, Ann. 80, No. 15). That in itself was an unusual way of expressing the matter, as though, whatever happened, it was the *alter ego*, the British Phosphate Commissioners, that were concerned. The Note simply concluded by reserving its position on the Report.

Nauru waited a further two months without any further action or news. The Government then finally took the step to begin proceedings against Australia in this Court. It announced the lodging of the Application on 19 May 1989 by Diplomatic Note No. 69/1989 dated 20 May 1989 (Nauru Memorial, Vol. 4, Ann. 80, No. 28). Notes were also sent advising New Zealand and the United Kingdom of the position, also on 20 May 1989 (Nauru Memorial, Vol. 4, Ann. 80, Nos. 29 and 30).

Two things, Mr. President, stem from this history. The Nauruan people since before independence, extending back to some of the earliest days of mining, have expressed a concern at the systematic laying waste of their land, knowing well that there is but a small finite territory with an increasing population. The demand for rehabilitation has been consistently expressed, despite a period in the late 1950s and early 1960s when the Administration turned the attention of all to resettlement. Every move has been undertaken properly and upon consideration, though constantly faced by the intransigence of the former Administration of the Trust.

Given the importance of the issue, the Nauruans have been painstakingly diligent to allow Australia, in particular, every chance and avenue to explore solutions. There has been a complete absence from Australia of constructive suggestion to assist in the rehabilitation. Always Australia has insulated itself by its own formula of "generosity" and "adequate resources". These, of course, are issues of the merits.

Nauru therefore has had to mount a task of great proportions, with the scarcest resources imaginable in manpower and infrastructure, to attempt to cope with a problem that was not, initially, of its making. Nauru has been prepared to save hard in the Rehabilitation Fund, and to expand its

knowledge and resources by inquiries and other means to achieve a just result. In doing this, Nauru is met with the almost fatuous comment that the claim is new or unexpected. One has to ask what more over a period of years could they possibly have done to move Australia into action.

No country, Mr. President, given its size and resources could have spent more time persevering to achieve an amicable and just solution. In terms of what is at stake, and the sheer physical task of rehabilitation, the time element is slight. Nauru has exhibited throughout the utmost seriousness about the claim, without unnecessary rancour or delay.

THE PHOSPHATE FUNDS

Mr. President, I have I think about 15 minutes to go. I am wondering whether this might be the time which you would desire to break.

The PRESIDENT: Mr. Connell, we, at this side of the bench, are also getting rather anxious about time.

Mr. CONNELL: I can continue if you would require.

The PRESIDENT: No, it is not only a question of continuing. The estimate we were given of the length of your presentation was one hour and it has so far extended to nearly an hour and a half, and this has been true of every presentation so far on the Nauru side. I wonder if I could draw attention of counsel generally to Article 60 of the Rules of Court which says that the oral statements shall be directed to the issues that still divide the Parties and shall not go over the whole ground covered by the pleadings or merely repeat the facts and arguments these contain. Now, there has been quite a lot of repetition of material that is set out in the written pleadings very clearly and it would help the Court, I think, if counsel could merely give references to that material when they wish to use it, rather than reminding us again of the text which is in the written pleadings. You want another 15 minutes, Mr. Connell?

Mr. CONNELL: I would ask the Court's indulgence if I may; it could be less. It could be 10 minutes, perhaps, to deal with the question of the Funds.

The PRESIDENT: I think if you could go on and make it 10 minutes it would be helpful.

Mr. CONNELL: If the Court pleases. The second of my two matters, Mr. President, is the description of the various Funds, and some consideration of the Australian argument relating to the absence of good faith, a question already argued before you by the distinguished Agent on Friday (Verbatim Record, Friday 15 November 1991, pp. 50-57).

The Republic of Nauru is unusual, though not unique if one considers some of the smaller Middle Eastern States, in that the economy is based on but one major industry, phosphate. Phosphate rock was to be found on the plateau of Nauru which rises some 30 to 70 metres above sea-level. In a sense, Nauru resembles in shape an upturned oval dinner plate, the currently residential area being on non-phosphate bearing land around, as it were, the rim of the plate. The costal rim varies in width between 150 and 300 metres,

There is, however, one area in Nauru on the plateau which is residential and that is around the lagoon area of Buada. The Buada residential district is surrounded by a massive sea of coral pinnacles (Nauru Memorial, Vol. 2, Photograph 8).

However, in one respect Nauru can justly be described as unique, for, at the conclusion of phosphate mining the usable territorial area of the country will be reduced by 80 per cent. And that extent can be readily seen if one looks at Photograph 1 in Volume 2 of the Nauru Memorial.

But once phosphate mining was commenced, Mr. President, in earnest under the British Phosphate Commissioners, the Nauruan people quickly came to the realization that there had to be a finite time when the reserves of phosphate would be exhausted. Although estimates varied widely in the 1930's as to the time taken to exhaust the assets, the Nauruans could see that unless funds were conserved, assets would be dissipated and forever lost. Nauru, therefore, has a policy of funding phosphate proceeds into specific funds. These funds are now controlled by a Statutory Trust, the Nauru Phosphate Royalty Trust, which was set up at independence.

It is important, Mr. President, to realize that each one of the funds, bar one, came into being at the request of the Nauruans. They were not instigated or prompted from the Administration, with the exception of the first fund, established in 1921, The Nauru Royalty Trust Fund (Viviani, *Nauru*, p. 189), and that Fund had odd characteristics, which I will shortly describe. Any proceeds from the export of phosphate paid to Nauruans were paid during the Mandate and Trust by the BPC by way of what was termed a "royalty". As Nauru has stated in its Memorial (Nauru Memorial, Vol. 1, paras. 492-493), the so-called "royalties" over the years were derisory and inequitable. Furthermore, Australian Government legal advisers had even questioned their legality under the 1919 Nauru Island Agreement and considered that they were granted by way of concession. It was not until a year or two before independence that one could have described the "royalty" payments as in any way adequate.

Land on Nauru is individually owned. Therefore, to gain access the miner had to lease the land and the Australian Administration provided this means through, as has been described, the Lands Ordinance 1921, with its subsequent amendment in 1927. The Commissioners under the Ordinance paid a lump sum, a once and for all sum, to the owner. The sum was a very small amount, being £40 per acre in 1927. When the lease was mined, the landowner was paid a "royalty" at so much per ton of phosphate exported. This was stated to be, for example, in 1927 at $7^1/_2$d. per ton, but not all of that was actually paid in cash to the landowner. In 1927, for example, the landowner got a cash royalty of 4d. per ton, $1^1/_2$d. was paid to the Administrator to be used solely for the benefit of the Nauruan people, and 2d. was paid to the Administrator to be held in trust for the landowner and invested at compount interest for 20 years. At the end of 20 years, the capital was retained and the interest paid every half year to the landowner or those to whom it was willed upon his decease.

The landowner was, however, in receipt of the cash "royalty" but once, that is, at the moment his land was mined. When mining was complete, the BPC may discharge the lease, provided the BPC had no further use for it but, of course, the land was then completely useless and often, too, entirely inaccessible (Nauru Memorial, Vol. 4, Ann. 36, Sect. 4(c).) In fact, in numbers of cases

some decades passed before land reverted to the owner from the BPC.

It is proposed now, in chronological sequence, to mention these Funds.

First, *The Nauru Royalty Trust Fund* was established by the Administration in 1921. In the early years the payment into the Fund represented one-third of the total "Royalty" payable but was a lesser percentage as other Funds were established. The Fund was established for the purposes of funding education and other services for Nauruans. One might have imagined that education would have been financed out of monies set aside by the BPC to the Administration. But this was not so. Part of the "Royalty" paid to an individual landowner in fact was funded to pay for the educational services, such as they were, provided for all Nauruans. In other words, the landowners funded what was an essential government service - another example, perhaps, of "generosity".

It was not until much later in the post Second World War period that the Fund was used to support Nauruan commercial ventures, such as the Co-operative store. Upon independence it became the Nauru Royalty Fund and was, along with the Development Fund, the funding base of the present Nauru Local Government Council (the Constitution of Nauru, Sixth Schedule; Nauru Memorial, Vol. 4, Ann. 42). The Royalty Fund, to the extent that it was used for funding education, was in essence an education tax placed on landowners who were in receipt of royalties.

This is an opportune moment, Mr. President, to refer briefly to the system of public financing by Australia of Nauru under Trusteeship. This is described in the Nauru Memorial (Vol. 1, pp. 46-48). In simple terms, Nauru was wholly funded from royalties paid to the Administration, or to landowners, by the BPC out of the returns from phosphate. In essence, every ton of phosphate exported meant that the Nauruan Community was faced with a further piece of useless land which was paying, at its time of exploitation, for all the goods and services of the Australian Administration - an Administration which had undertaken solemn obligations to preserve the integrity of the land and community over which it had control. This is not meant to intimate that such land should never have been mined, but rather that it should not be mined, rendered thus useless, and then left without rehabilitation or just compensation.

Secondly, *The Nauru Landowner's Royalty Trust Fund* was established at the insistence of

the Nauruans in 1927 as a form of compulsory saving for landowners. A part of the landowners royalty was paid to the Fund and invested by the Administration. After 20 years the landowner or, where he was deceased, those holding by will or under intestacy, were entitled to the interest, and the capital re-invested. In 1955 the Fund was to be distributed both as to capital and interest after 15 years.

With independence the rules of the Fund were changed under the Nauru Phosphate Royalties Trust Ordinance of 1968. Payment out of the Fund to those entitled was to be of interest only, but not until 1993 or such earlier time as determined by the Government. The first payments are now being made from the Fund to those entitled landowners. Because of the extraordinarily wide landholding in Nauru, particularly rising from the intestacy provisions, something in the vicinity of one-half of the population are presently entitled to some payment from this Fund.

Thirdly, the Nauruan Community insisted that a specific fund be established for the purposes of accumulating capital for the needs and services of Government when the mining of phosphate ceases. This was known as the *Nauruan Community Long-Term Investment Fund* and was set up in 1947. This is the major Government fund. It has been recognized as such in Article 62 of the Constitution which describes it as "the Long Term Investment Fund". The Fund is invested according to law, and the income derived from monies invested are paid into the Fund. The Fund continues to accumulate and monies cannot be withdrawn or even used as collateral.

Article 62, Clause 3, of the Constitution sets that out:

> "Notwithstanding the provisions of Article 59, no moneys shall be withdrawn from the Long Term Investment Fund (otherwise than for investment under clause (2) of this Article) until the recovery of the phosphate deposits in Nauru has, by reason of the depletion of those deposits, ceased to provide adequately for the economic needs of the citizens of Nauru."

Fourthly, the *Nauru Housing Fund* was established at independence for the purposes of financing Nauruan housing. An intensive rehousing programme was undertaken at Government expense after independence which has now ceased. And housing, since 1987, is privately financed without Government subsidy and as a result that Fund now stands at a merely nominal figure.

Fifthly, the *Nauru Rehabilitation Fund* was also established at independence through the requirement of the Nauruan community to provide finance for a rehabilitation programme of

mined-out phosphate land post 1 July 1967, the date when the Nauru Phosphate Agreement came into effect. As I stated earlier that stands at A$278 million. It is now close to a figure where its annual income could match the annual outlays on rehabilitation required on two-thirds of the mined-out area of the island. It is a specific purpose fund and cannot be used for other than rehabilitation.

The Funds, the Nauru Landowners Royalty Trust Fund, the Nauruan Community Long-Term Investment Fund, the Nauru Housing Fund and the Nauru Rehabilitation Fund are all administered through an independently appointed statutory trust, the Nauru Phosphate Royalties Trust which reports annually and is accountable to the Nauru Parliament.

Australia has attacked Nauru for pursuing a claim against it whilst mining has proceeded on Nauru without any evidence that Nauru has been prepared to take action. It is thus implied that in some way this supposed conduct displays lack of good faith. The argument is patently without substance.

Rehabilitation is both a lengthy process in terms of time and very costly. At independence, so far as Nauru was concerned, it had no responsibility for that area already mined-out which was the responsibility of Australia. Because of the requirements of the Phosphate Agreement concluded in 1967, Nauru had to gear up its industry to meet the increased production demands of Australia embodied in that Agreement. At the same time, it was faced initially with very substantial payouts to the BPC for the island assets - $21 million. At that stage, the Rehabilitation Fund was virtually nil. There was, of course, no possibility of Nauru then entering itself a rehabilitation phase, though there was nothing to stop Australia.

When rehabilitation became more clearly an issue in the early 1980s, Australia firmly denied its responsibility when asked to contribute (Hawke letter, Nauru Memorial, Vol. 4, Ann. 79).

In the meantime, however, Nauru has assiduously stock-piled soil, built up a substantial Fund, held a major inquiry on responsibility and cost-feasibility, and is now involved in a trial project at substantial cost.

Nauru has certainly not done nothing. It has demonstrated very materially its continuing

commitment to rehabilitation.

Before I conclude, two matters should be mentioned about the further argument that, in any case, Nauru has more money in its Fund than is required for rehabilitation of the whole island. Even if it were true, it is wholly irrelevant to the legal issue of responsibility.

The figure required for rehabilitation is plucked, however, so it seems, from the estimates of the Weeramantry Report which as that Report stated were only rough guidelines and should not be regarded as final or based on a sufficiently developed estimate. Over and above that fact, however, the money that is in the Rehabilitation Fund can, in terms of Nauru, be fairly used for Government development land use on the mined-out land once that land has been reformed and contoured in accordance with the rehabilitation process. The cost of such projects are likely to be substantial. A fund, therefore, of nearly A$300 million is unlikely to be sufficient given the time, complexity of the total development, and today's costs. But, of course, these are questions two stages removed from the present. This illustrates clearly that this matter is not of an exclusively preliminary character - it requires meticulous consideration of the facts which in this case have hardly been touched upon and require far more mature consideration.

What was said as long ago as 1967 in the Nauru Talks by the Nauru representatives was as true then as it is now:

> "we are well aware that our basic opportunities to survive as an independent people are being severely curtailed by such large expenditures on rehabilitation and we need every penny we can get" (Nauruan Delegation Document 67/8, Nauru Memorial, Vol. 3, Ann. 5, p. 523, at p. 527 internal pagination p. 108, at p. 112).

In conclusion, Mr. President, it is evident that Nauru has exhibited consistency throughout as to its claim, it has adopted not only a serious attitude to the claim but has meticulously taken a very proper course with respect to rehabilitation. this is not the action of a State exhibiting bad faith. On the other hand it has acted with dignity and proper regard for the etiquette of the situation even when faced with the continuing intransigence of Australia. So far as the spendthrift claim of Australia is concerned this should be treated with contempt. The policies of the Nauru Government have always been open and democratically debated in Parliament and its budgets have always run the gauntlet of

close scrutiny. As the distinguished Agent for Nauru has said, the Australian statements border on quite unacceptable intervention. In any case the point can well be made that not many countries of this imperfect world would have so parsimoniously organized its resources in Funds for continuous investment and accumulation to take care of its future as Nauru has done. I refer you also on this matter to the paper of K. E. Walker in the Appendix to Nauru Written Statement, pages 165 to 167.

Mr. President, Members of the Court, that concludes my argument. I thank you for your patience. I would ask you, Mr. President, or perhaps at this stage it is a time to adjourn, that Mr. Ian Brownlie will follow me.

The PRESIDENT: In this case your original estimate of 15 minutes seems to have been accurate. We will now adjourn for a slight break and come back as soon as possible to listen to Professor Brownlie.

The Court adjourned from 11.50 a.m. to 12.05 p.m.

The PRESIDENT: Please be seated. Mr. Mani.

Mr. MANI: Thank you, Sir. On behalf of the Nauru delegation, I wish to apologize to you, Sir, and the Court for the inconvenience caused in terms of the time taken in our oral presentation. It appears there was some communication problem between me and the Registry staff and we will try our best not to be a cause of such lack of communication. Thank you Sir.

The PRESIDENT: Thank you very much, Professor Mani. What I was worried about actually was not so much the inconvenience of the Court but the inconvenience of your timetable going over the allotted time. But thank you very much for your apology, there is really no need to apologize, but we can arrange things between us, I am sure. Professor Brownlie.

Mr. BROWNLIE: Thank you, Mr. President. I would like to preface my presentation by emphasizing that the other side, as is its prerogative, has seen fit to cover, sometimes in a rather cloudy way, a wide range of what are in fact questions of fact and questions of documentary record and it is sometimes difficult, if one is to do it carefully, to reinstate the record; it takes sometimes a little time. And that is a matter entirely apart from the unfortunate problem of communicating to the Court the actual time which speeches will take.

I have to examine the history of the dispute and in doing so I will respond to the family of arguments concerning delay and waiver and I shall also, in due course, deal with the objection to jurisdiction based upon the reference to Australia's acceptance of the Court's jurisdiction to recourse "to some other method of peaceful settlement".

As a first step, I want to indicate certain significant features of the Australian argument.

In the first place, as the Preliminary Objections of Australia makes clear, Australia recognizes that the dispute concerning rehabilitation existed before independence. In particular, the Respondent State accepts the continuity of the history of the dispute before and after independence.

None of the various Preliminary Objections is based on the axis of independence as such, although, of course, there is one argument related to the termination of Trusteeship.

The recognition of the continuity of the dispute since before independence is inherent in the logic of various Preliminary Objections proposed by Australia. Thus, the various forms of the waiver argument are each related to events prior to the independence of Nauru on 31 January 1968.

In the view of Nauru, this recognition of the continuity of the legal elements of the dispute about rehabilitation reflects the realities of the situation and constitutes a point on which the Parties have a common position.

The fact that the dispute concerning Australian responsibility for rehabilitation developed before independence provides a highly significant background to the allegation of waiver. The Nauru Local Government Council, the NLGC, has been recognized by the Respondent State as the legitimate representatives of the Nauruan prople in the years prior to independence. And this recognition appears, for example, in these proceedings in the speeches of Mr. Griffith (CR 91/15, pp. 13-41) and Professor Bowett (CR 91/15, pp. 72-80; CR 91/16, pp. 8-25).

In the pre-independence period, the Nauruans were politically articulate and had sound leadership. However, it was only in 1964, if I may remind the Court, that they were permitted to have access to independent professional advisers and the reference is in the book by Nancy Viviani (Viviani, Nauru, 1970, p. 136). Moreover, the Nauruan leader, Mr. Hammer DeRoburt, appeared in the Trusteeship Council, designated as a member of the Australian delegation.

The circumstances in which the Nauru Local Government Council achieved independence included the existence of high quality leadership. And so, once adequate professional advice was forthcoming, the Nauruans, guided by Mr. Hammer DeRoburt, were able to formulate their negotiating strategy. The positions which emerged were clear and consistent and have remained so over the years.

Throughout the relevant negotiations and then after independence, certain Nauruan positions were carefully protected and maintained. Once the resettlement option had been laid aside in 1964, the leadership focused consistently upon the legal entitlements of Nauru in respect of rehabilitation.

The atmosphere changed and a consciousness of the legal framework was present.

Thus, in the course of the 1966 Talks on the future of the phosphate industry, the Nauruan delegation made the following formal statement (this on 20 June):

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

In the course of the talks leading to the Nauru Phosphate Agreement of 1967, on 19 April 1967, the Australian Chairman attempted to place upon the Nauruans the responsibility for rehabilitation. In a full written statement on the subject of rehabilitation the Nauruan delegation stated its position as follows (and that quotation has already been placed before the Court in the speech of my colleague, Professor Connell):

> "Before going any further the Nauruan delegation would like to correct what appears to be a misconception of the Partner Governments about our attitude to rehabilitation of the mined areas on Nauru. A few days ago (on 14 April) the Chairman re-stated the Governments' position that in your view the financial arrangements would be 'sufficiently liberal to take care of the Nauruan requirements, including rehabilitation or resettlement'. We do not agree with your attitude on this matter (for reasons we shall give later) but at least we understand what you are saying.
>
> However, the Chairman then said 'on rehabilitation you (the Nauruans) have accepted the responsibility for it provided that all the proceeds from the phosphate are available to the Nauruan people'."

In answer to that statement by the Chairman, the Nauruan delegation says:

> "This is *NOT* a correct statement of what we have been saying. It is correct only regarding areas mined *in future*. The Nauruan delegation has argued from the beginning that the responsibility for restoring the land already mined (about one third of the island) rests with the Partner Governments who cannot divest themselves of this responsibility merely by saying that they will not accept it." (1967 Nauru Talks, p. 140; Nauru Memorial, Vol. 3, Ann. 5, p. 555.)

The leader of the Nauruan Delegation to those Talks was, of course, Head Chief Hammer DeRoburt.

We then move on to the Meeting of the Trusteeship Council on 22nd November 1967, where the Head Chief was present in his capacity as Special Adviser to the Australian delegation and spoke on the issue of Nauruan independence. There is then the famous paragraph 20 of the Record as follows:

> "20. On all those matters, full agreement had been reached between the Administering Authority and the representatives of the Nauruan people. There was one subject, however, on which there was still a difference of opinion - responsibility for the rehabilitation of phosphate lands. The Nauruan people fully accepted responsibility in respect of land mined subsequently to 1 July 1967, since under the new agreement they were receiving the net proceeds of the sale of phosphate. Prior to that date, however, they had not received the net proceeds and it was therefore their contention that the three Governments should bear responsibility for the rehabilitation of land mined prior to 1 July 1967. That was not an issue relevant to the termination of the Trusteeship Agreement, nor did the Nauruans wish to make it a matter for United Nations discussion. He merely wished to place on record that the Nauruan Government would continue to seek what was, in the opinion of the Nauruan people, a just settlement of their claims." (*Trusteeship Council, Official Records,* 13th Special Session, 22 November 1967, p. 3.)

This well-judged statement of the legal position was not contradicted by any delegation in the Trusteeship Council.

Mr. President, I now move on to a fairly recent example of the steadfastness and professionalism which the Nauruan leaders have shown in the conduct of their affairs, both before and after independence.

In a letter to the Australian Minister for Foreign Affairs dated 23 July 1987, the President of Nauru, at that time Mr. Hammer DeRoburt, made the following observations on the question of the disposal of the 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 time and another place." (Nauru Memorial, Vol. 4, p. 544; Ann. 80, No. 14.)

Mr. President, Members of the Court, these materials, and the record as a whole, reveal a pattern of consistent Nauruan conduct. The record, and the resolution and quiet persistence of the Nauruan leaders, does not, in our submission, provide a climate suitable for the making of waivers.

It is, indeed, the position of the Respondent State which is characterized by a lack of consistency. A few examples of this will suffice.

Australia asserts that no claims were made to the Trusteeship Council or elsewhere on behalf of Nauru. At the same time it is argued that there was a comprehensive settlement of Nauruan claims in the Nauru Phosphate Industry Agreement of 1967.

Again, Australia asserts (*per* Professor Jiménez de Aréchaga) that the issues were settled through the action of the United Nations organs. At the same time it is argued that the Nauru Phosphate Agreement of 1967 constituted a comprehensive settlement of all outstanding questions.

I turn now to the Austalian arguments of waiver and delay in presentation of the claim. But first the history of the dispute must be recalled.

The History of the Dispute

This history can be summarized briefly as follows:

Stage one. By 1964 the Nauruans had determined to aim for rehabilitation of their homeland and the option of resettlement had been laid aside.

Stage two. In substantial negotiations in the years 1965 to 1967 the Nauruan Delegation maintained its position that there was a responsibility to restore land mined out.

Stage three. Independence is achieved in 1968 without a resolution of the issue of rehabilitation.

Stage four. After independence Nauru maintains its claim in respect of rehabilitation in the fact of Australian denial and refusal to negotiate.

In face of the documentary record the Australian Government has proposed a complicated series of arguments which are incompatible with the documentary record and to a great extent with each other.

"No express claim of breach of the Trusteeship Agreement was ever made"
(Australia)

On behalf of Australia it has been argued that "no express claim of breach of the Trusteeship

Agreement was ever made to either the Trusteeship Council or General Assembly" (CR 91/15, p. 74).

This argument is in fact presented in three interacting segments.

The most far-reaching proposition is that no express claim of breach was ever made. This argument involves segregating the breaches of the Trusteeship Agreement, and of Article 76, the United Nations Charter, from the obligations arising from the principles of general international law.

For the present I shall focus on the assertion that no express claim of a breach of the Trusteeship Agreement was made by Nauru. It is to be emphasized that the Australian argument refers precisely to the period before independence (see Professor Bowett, CR 91/15, p. 72).

The response of Nauru is two-fold. In the first place the Nauruan leadership was well aware of the legal framework within which the process of negotiation was taking place.

Secondly, even if, which is not admitted to be the case, even if, no express claim of breach of the Trusteeship Agreement was made, this is legally irrelevant.

The awareness of the existence of a legal framework for Nauru claims is evidenced in several ways. For Australia, Mr. Griffith has stated that the Trusteeship Council in 1966 "knew of the Nauruan claims", that is, concerning rehabilitation (CR 91/15, p. 40).

And General Assembly resolution 2111 (XX) of 21 December 1965 contains the following considerandum:

> "*Considering* the decision of the Nauruan people to stay on the island of Nauru and their request to the Administering Authority to restore, for habitation by the Nauruan people, the land worked out by the Phosphate Commission."

And that leads on to paragraph 4 of the operative part of the resolution, which provides

> "*Further requests* that immediate steps be taken by the Administering Authority towards restoring the island of Nauru for habitation by the Nauruan people as a sovereign nation."

The records of the negotiations which took place in 1965 contain substantial proof that the Delegation of the Nauru Local Government Council had a good appreciation of Nauruan

entitlements in accordance with the Trusteeship régime. Annex A of the records, consisting of 19 pages, has the rubric "ownership of phosphate". The Annex contains a considerable number of passages based on legal considerations.

First passage (Annex A, Nauru Memorial, Vol. 3, Ann. 2, p. 134)

> "In the submission of the Nauruan people no legal basis exists for any period of years for extraction of or right to extract phosphate from the territory of Nauru except as may be justified in the capacity of the 3 Governments under their Trusteeship powers and for the proper performance of such powers for the sole beneficial interest of the Nauruan people."

Second passage (*ibid.*, p. 135)

> "Article 73 of the Charter of the United Nations reaffirms and underlines the concept of Trustee Nations administering the Territories of peoples who have not yet attained self government. The progression of such peoples to independence and self government contemplates withdrawal of the Trustee powers and the cessation of any control of their territory or affairs. As a further consequence there is implicit a recognition of the fundamental right of such peoples thereafter to utilize their own lands and resources for their own future development and benefit free from any alleged proprietory rights of commercial exploitation by the Trustee Administrators for their own benefit."

Third passage (*ibid*., pp. 137-138)

This passage is very involved and consists of five consecutive claims. The series of paragraphs contains repeated references to Trusteeship, the Trusteeship régime and the concept of Trusteeship. And it is impossible to look at these documents without believing that the Nauruan Delegation were perfectly aware of the legal framework and the legal concepts in relation to which the claim was being presented.

> "5. There is a recognition in the Trusteeship concept since 1919 that the exercise of authority and rights by the Administering Powers in Nauru was and is fundamentally for the Nauruan people. It follows that where an exploitation takes place of natural resources of the Island all profit derived therefrom is the beneficial right of the Nauruan people subject to the reasonable and proper costs of production and a reasonable management fee.
>
> 6. It is a further duty and obligation of Trusteeship to preserve the territory being administered to serve the Nauruan people for their proper existence, development and advancement.
>
> 7. In exercising powers of administration there should not be permitted any exploitation which would have the effect of rendering the physical enjoyment of the Island less advantageous at any point of time to the continued living conditions thereon of the Nauruan people should they elect and desire to remain on the Island. Conversely there should not be permitted any exploitation in any fashion detrimental or inimical to the continued existence of the Nauruan people on the Island.

> 8. The concept of Trusteeship and acceptance by an enlightened nation inherently carries with it an obligation to raise the standards, status, education and living conditions generally of the people of the trust territory and to expend moneys of the administering powers to these ends.
>
> 9. It is not a valid approach to finance that all the administration's activities within the Island pursuant to its obligations should be paid for out of the resources of the territory and certainly not to deplete those resources to exhaustion point in the process."

And there are other relevant items in the record of the 1965 talks:

1. Mr. Shrapnel, *Record*, 7 June 1965, p.m., pages 1 to 2; Nauru Memorial, Annex 2, pages 88 to 89.

2. *Record of Negotiations,* Annex F, *ibid*., pages 166 to 169: Annex entitled "Rehabilitation of Nauru (Financial and Technical Requirements)".

3. *Record of Negotiations,* Annex L, *ibid*., pages 194 to 196 (Summary of Conclusions), at pages 195 and 196 (item 3: "Rehabilitation of Nauru").

Mr. President, Members of the Court, the record shows that by June 1965 the Nauruan Delegation, led by Head Chief Hammer DeRoburt and including a legal adivser, was formulating claims, referred to as such, and doing so within the legal framework of the Trusteeship régime.

This pattern of arguments and claims was thus established as early as 1965, and was maintained in the Canberra talks of 1966.

At the Fifth Session of these talks, on 20 June 1966, the statement of the Head Chief (which appears as Annex 11 to the Record of the Fifth Session) includes the following passages (Nauru Memorial, Ann. 4, pp. 340-341):

First:

> "9. Perhaps our views will be considered unsophisticated, but the Nauruan delegation feels that the principle to be observed should be the responsibility of Trusteeship to protect the interests of the Nauruan people rather than to minimize the cost of restoring our homeland to its former condition."

There are then a series of passages which follow under the heading "The Responsibility for Rehabilitating Nauru":

Second:

> "1. The Nauruan people have consistently claimed that it is the fundamental responsibility of the Administering Authority to restore the mined phosphate lands to their

> original condition. This responsibility stems in part from the obligation that the Administering Authority has under the UN Trusteeship system to safeguard the future of the Nauruan people. It also stems from the very large profits from past mining activity that the Administering Authority has chosen to distribute to phosphate consumers in Australia, New Zealand and the United Kingdom (by not charging world prices) instead of returning them to the Nauruan people as their due entitlement."

Third:

> "3. The Council wishes to make it quite clear that it is prepared to assume responsibility (there is this constant use of such words) responsibility for rehabilitating any land mined after the Nauruan people receive the full economic return on the phospate to which they are entitled. The financial responsibility for rehabilitating land already mined, or that will be mined before the Nauruan people receive the full return on the phosphate, clearly belongs to the BPC and through them to the Administering Authority. In essence what the Nauruan people are saying is that had they been an independent State prior to the mining of phosphate they would still have mined it, sold it at world prices, and then rehabilitated the land themselves. This they will do from the moment they receive the full economic benefit from the phosphate. If the Nauruan people were now to receive the full economic benefit from the phosphate they would meet some 62% of the total cost of rehabilitation, and the Partner Governments would be responsible for only 38% (which could easily have been financed from past profits)."

At the tenth session of the Talks in 1966 the Joint Delegation, in its comments on the Nauruan proposals, suggested "that the issue of rights on either side be put aside for the present in the endeavour to get a practical working arrangement" (Nauru Memorial, Ann. 4, p. 391). The record explicitly notes the "inability to reach agreement" on the issues of rehabilitation and resettlement.

The proceedings leading up to the adoption of the Heads of Agreement for the Nauru Phosphates Agreement of 1967 did not involve any contradiction of the well-developed Nauruan position on rehabilitation.

Neither the Heads of Agreement resulting from the 1967 Talks (Nauru Memorial, Vol. 3, Ann. 5, p. 420) nor the provisions of the Nauru Island Phosphate Industry Agreement (*ibid*., Ann. 6) contained any reference to the issue of rehabilitation.

This is not in any way surprising. The record of the discussions of 1967 shows without a shadow of doubt that the Nauruan Delegation had maintained its position on responsibility for rehabilitation and that, as a natural result, the question had been reserved.

Thus the record of the Talks during the evening session of 16 May 1967 includes the following passage:

> "*During the following discussion* it emerged that the Nauruans would still maintain their claim on the Partner Governments in respect of rehabilitation of areas mined in the past, even if the Partner Governments did not press for the withdrawal of the claim in a formal manner such as in an agreement." (Nauru Memorial, Vol. 3, Ann. 5, p. 401 at p. 406.)

Mr. President, the record shows that the Nauruan position on responsibility was presented within a legal framework and was maintained with care and consistency throughout.

However, Australia has argued that at no time did Nauru make an express claim of breach of the Trusteeship Agreement. This argument has at least the attraction of being probably the most unmeritorious plea ever presented to this Court.

The record of the negotiations shows that, given the situation as it then was, express reference was made to responsibility for the discharge of obligations arising from the Trusteeship Agreement. Such a statement was made at the session of 20 June 1966.

The context, it has to be recalled, was a series of negotiations. No claim as such was called for because it was not until the final conclusion of the Nauru Island Phosphate Industry Agreement of 1967 that it became clear that the Australian Government would not recognize a responsibility for rehabilitation.

And so it was not until the second half of 1967 that it was finally established that the issue would remain unresolved at the time of independence.

The views propounded on behalf of Australia call for the party who anticipates a breach of a legal dispute to prepare his writ well in advance. Apparently, the Nauruans were expected to turn up to the Canberra Talks with a document which foreshadowed more or less the precise contents of the Application, embellished possibly with citations from Oppenheim and other authorities.

In our submission the Nauruan representatives made their position in all respects sufficiently clear, and the Australian argument is divorced from a commonsense appreciation of the relationship between political negotiations and the legal significance to be attached to such negotiations.

The argument also lacks a legal foundation. The position of Australia, as expressed by Professor Bowett (CR 91/15, pp. 74-80) is that Nauru did not present any express claim of breach of the Trusteeship obligations to either the Trusteeship Council or to the General Assembly. And there is a more general implication in the Australian pleadings that no such claim was presented in

any other forum.

There are many weaknesses in this contention.

First of all, the Nauruan representatives always reserved their rights in respect of rehabilitation, and, in the context of negotiations and given the realities of diplomacy, this was the necessary and appropriate equivalent of presenting a claim.

Secondly, there could be no question of presenting claims until the questions to which the claims related were finally left unresolved.

Thirdly, there is no requirement in international law that a claim be presented in formal terms. In the *Northern Cameroons* case the Court adopted a practical test for the existence of a dispute. The Court found as follows:

> "The Court is not concerned with the question whether or not any dispute in relation to the same subject-matter existed between the Republic of Cameroon and the United Nations or the General Assembly. In the view of the Court it is sufficient to say that, having regard to the facts already stated in this Judgment, the opposing views of the Parties as to the interpretation and application of relevant Articles of the Trusteeship Agreement, reveal the existence of a dispute in the sense recognized by the jurisprudence of the Court and of its predecessor, between the Republic of Cameroon and the United Kingdom at the date of the Application." (*I.C.J. Reports 1963*, p. 27.)

The criterion of the "opposing attitudes of the Parties" was also applied in the Advisory Opinion of this Court in the *Headquarters Agreement* case of 1988 (*I.C.J. Reports 1988*, p. 28). In that Opinion the Court emphasized that it is not necessary that a party formulate its legal position in order to establish the existence of a dispute. In the words of the Advisory Opinion:

> "In the view of the Court, where one party to a treaty protests against the behaviour or a decision of another party, and claims that such behaviour or decision constitutes a breach of the treaty, the mere fact that the party accused does not advance any argument to justify its conduct under international law does not prevent the opposing attitudes of the parties from giving rise to a dispute concerning the interpretation or application of the treaty. "And the Opinion then goes on to rely on the findings in the Judgment in the case of *United States Diplomatic and Consular Staff in Tehran*]. In the case concerning United States Diplomatic and Consular Staff in Tehran, the jurisdiction of the Court was asserted principally on the basis of the Optional Protocols concerning the Compulsory Settlement of Disputes accompanying the Vienna Conventions of 1961 on Diplomatic Relations and of 1963 on Consular Relations, which defined the disputes to which they applied as 'Disputes arising out of the interpretation or application of' the relevant Convention. Iran, which did not appear in the proceedings before the Court, had acted in such a way as, in the view of the United States, to commit breaches of the Conventions, but, so far as the Court was informed, Iran had at no

> time claimed to justify its actions by advancing an alternative interpretation of the Conventions, on the basis of which such actions would not constitute such a breach. The Court saw no need to enquire into the attitude of Iran in order to establish the existence of a 'dispute'; ...) (*Ibid*., p. 28, para. 38.)

The logic of this passage, referring as it does to the posture of the Respondent is in essence that the elements of a dispute may emerge with sufficient clarity from the circumstances.

Before leaving the Australian assertion that no claim of breach of the Trusteeship Agreement was made to the Trusteeship Council or to the General Assembly, it is worth pointing out that in factual terms this assertion lacks substance.

The question of rehabilitation was therefore, Mr. President, a matter of general reputation and public record in the United Nations organs and especially in the Reports of the Trusteeship Council. As Mr. Griffith stated the matter in his opening speech to the Court in these proceedings: "The records make it clear that the United Nations was very much aware of the Nauruan rehabilitation claim." (CR 91/15, p. 40.)

Moreover, whilst Nauru does not accept the inferences drawn by Professor Jiménez de Aréchaga in his argument concerning the other methods of peaceful settlement (CR 91/15, pp. 44-69), the factual premise of that argument is to be recalled. Professor Jiménez de Aréchaga argues that the action of the competent United Nations organs resulted "in the settlement of all the facets of the dispute which Nauru brings before the Court" (CR 91/15, p. 44). How, it may be asked, could the organs settle all facets of the dispute if Professor Bowett is correct in his argument that Nauru made no express claim of breach to either the Trusteeship Council or the General Assembly (CR 91/15, pp. 74-80)?

The Australian Argument based on Waiver

But, of course, Australia contends that even if a claim was made it was waived by the representatives of Nauru prior to independence.

The position of Nauru is that the issue of waiver does not have an exclusively preliminary character but that, in any event, there has been no waiver of the claim relating to rehabilitation at any stage.

At the outset it is legitimate to point out the quite exceptionally tortured logic of the Australian

arguments concerning waiver.

First of all, the Australian argument as to waiver can only operate if it is accepted that Nauru had a valid claim for breach of the Trusteeship Agreement. Now, Mr. President, arguments in the alternative may often work well but this one, I submit, does not. It is rather like the position of the lawyer who once had to resist a warrant for extradition of his client from the United Kingdom to the Republic of Ireland on the basis that his client was totally innocent of the charge, but that in any event the offence was political. That is a difficult argument to put, because the factual premises are inconsistent with each other.

There is a further source of tension between the argument that the Nauru Island Phosphate Industry Agreement of 1967 constituted a comprehensive settlement and the argument that the claim had survived this only to be, it is alleged, waived as a consequence of a speech delivered by the Head Chief on 6 December 1967.

The evidence offered by Australia in support of the thesis of waiver is fragmentary and equivocal. The overall pattern of Nauruan conduct is ignored. The ordinary principles of logical inference are ignored. If a Nauruan leader makes a single statement which fails to refer to rehabilitation, this is a waiver. Overall consistency of conduct and evidence of persistence in the pursuit of legitimate goals counts for nothing.

In the submission of Nauru superficial inconsistencies cannot derogate evidentially from the general weight of the evidence concerning the position of the Nauruan Local Government Council prior to independence. As the Court stated in the Anglo-Norwegian Fisheries case:

> "it is impossible to rely upon a few words taken from a single note to draw the conclusion that the Norwegian Government had abandoned a position which its earlier official documents had clearly indicated" (*I.C.J. Reports 1951*, p. 138).

It is well recognized in the literature of international law that the renunciation of legal rights is not to be presumed (citations in the Written Statement of Nauru, pp. 62-63, para. 168).

So much for the relevant legal principles.

I now wish to examine the exiguous material alleged by Australia to provide evidence of waiver.

The 1966 Talks

Professor Bowett produces a statement from an Agreed Minute of the discussions held in Canberra in 1966, which reads as follows:

> "The Nauruan view was ... that they should receive the full financial benefit from the phosphate industry, so that there would be funds available to rehabilitate the whole of the island." (Nauru Memorial, Vol. 3, Ann. 4, p. 407.)

Mr. President, Members of the Court, this is not evidence of a waiver. The full text of the statement reveals the non-committal flavour of the passage. The text will appear in the transcript and the context can be adequately examined by the Court and a view taken:

> "The Nauruan view was that rehabilitation of Nauru was a matter of primary concern for the Nauruan people. They indicated that they were pursuing the rehabilitation proposals in the absence of any acceptable proposal for resettlement. They said that they should receive the full financial benefit from the phosphate industry so that there would be funds available to rehabilitate the whole of the Island. The Joint Delegation explained that the benefits to be received by the Nauruan community from the proposed phosphate arrangement would, it was envisaged, be adequate to provide for the present and long-term security of the Nauruan community including an adequate continuing income when the phosphate has been exhausted and when the costs of any resettlement or rehabilitation have been met. The Joint Delegation said they would be prepared to consider that, within the framework of a long-term agreement, arrangements be made for an agreed payment into the long-term investment fund, from which the costs or part of the costs of rehabilitation could be met. It was agreed that the report of the Committee on Rehabilitation should be examined by the Working Party."

The passage contains no indication of a waiver, even when it is read as a whole. What is revealed by the record is that the Nauruan representatives had insisted that it was "the fundamental responsibility of the Administering Authority to restore the mined phosphate lands to their original condition". I have already referred in this speech to various passages in the *Record of Negotiations* of 1966 which indicate the extreme implausibility that in the "Agreed Minute", quoted in its fragment by Counsel for Australia, there is an implied waiver of the rehabilitation claim.

Moreover, at the tenth session of the 1966 Talks, the record of the meeting contains the passage:

> "The discussion on rehabilitation and resettlement suggested that inability to reach agreement on those matters would not necessarily hold up the rest of the arrangements." (Nauru Memorial, Vol. 3, Ann. 4, p. 392.)

It may be noted that the "Agreed Minute" of 1966 does not refer to any agreement reached on

the question of rehabilitation and therefore the item reappeared quite naturally on the agenda of the subsequent talks in 1967.

So, Mr. President, there was no question of a waiver during the period 1966.

After a fragmentary excursion into the documentary record for 1966, counsel for Australia alleges that "over the next few months a significant change occurred in Nauruan thinking, and they decided that they would hold the Partner Governments responsible for rehabilitating areas mined pre-independence" (CR 91/16, p. 20).

Of this assertion by Counsel two things may be said. There is no sufficient evidence to justify the view that this involved a change of mind. And the logical assumption is surely that any responsibility could only relate to the pre-independence mining. To spell this out would not involve a "significant change". It really went without saying.

Moreover, if Counsel for Australia is correct in his view that "they decided that they would hold the Partner Governments responsible for rehabilitating areas mined pre-independence", then a claim was indeed made by the representatives of the Nauruan people.

This claim, alleged to be new by Counsel for Australia, was presented during the Canberra Talks in 1967. This is accepted by Australia, and so Professor Bowett on Tuesday morning stated:

> "In the record of the meeting on 20 April 1967 there is noted a statement by the Nauruans that they accepted responsibility for rehabilitation in respect of future mining, post-independence, but not past mining." (CR 91/16, p. 20.)

He also stated that "the Partner Governments sought to persuade the Nauruans to withdraw their claim" (*ibid*.).

And so what is noteworthy is that the Australian Government, through its Counsel, makes no reference to repudiation of the Nauruan claim by Australia. If the claim was made so clearly why was it not repudiated?

The Partner Governments are reported simply to have sought "to persuade the Nauruans to withdraw their claim". The reason given for this enterprise, Mr. President, is not the absence of any legal basis for the claim but the fact that:

> "the Partner Governments consider that the proposed financial arrangements on phosphate cover the future needs of the Nauruan community including rehabilitation or resettlement" (Nauru Memorial, Vol. 3, Ann. 5, p. 575; as quoted by Professor Bowett, CR 91/16, p. 20;

Joint Delegation 67/2).

As Professor Bowett admits, the attempt at persuasion failed (CR 91/16, p. 21).

The *Record of Discussion* relating to the evening meeting of 16 May 1967 contains the following report:

> "During the following discussion it emerged that the Nauruans would still maintain their claim on the Partner Governments in respect of rehabilitation of areas mined in the past, even if the Partner Governments did not press for the withdrawal of the claim in a formal manner such as in an agreement." (Nauru Memorial, Vol. 3, Ann. 5, p. 401 at p. 406.)

Mr. President, the record of the 1967 Talks is absolutely clear on the question of rehabilitation, and so also is the view of the Nauruan Delegation, which made a series of statements on the subject.

Thus, the Nauruan Delegation's Statement 67/2 of 19 April 1967 contains the passage:

> "The two matters of future rehabilitation and past rehabilitation are quite separate and distinct and we cannot see why trust powers should try to force us to abandon our sincerely held views regarding governmental responsibility for rehabilitation as a pre-condition to any long term agreement."

At the afternoon session of 17 May 1967, the Nauruan Delegation was specifically asked to agree to "an understanding on rehabilitation which would mean that the Nauruans would not continue to press this subject and linked with rights of immigration into Australia and New Zealand". There is then a Nauruan Delegation Paper 67/8 of 18 May 1967 which replies to this invitation at great length. It was read out during the Talks on the same day:

"*Rehabilitation*

> 9. The Partner Governments have restated their position that the proposed financial arrangements on phosphate cover the future needs of the Nauruan community including rehabilitation or resettlement. The Nauruan Delegation is disappointed that they should be asked to renounce their sincerely held beliefs on this matter (formally or informally) as one of the collective pre-conditions necessary to obtain agreement.
>
> 10. The facts are that the Partner Governments have already rendered nearly one third of the island uninhabitable without having made any financial provision to restore the land that they have mined without our consent. The Nauruan people are prepared to take the financial responsibility of restoring land that is mined in the future when they are receiving the full economic benefits from the phosphate. However, the need for rehabilitation stems directly from the mining operations and the Partner Governments carry their share of the obligation to restore the mined areas whether they have provided for this in the past or not.
>
> 11. The Nauruans preferred re-settlement as being a cheaper solution for the Partner

> Governments and ourselves. However, the failure of re-settlement proposals to provide a secure future and preserve our national identity has forced us into an extensive rehabilitation project because we are at least satisfied that we can obtain on Nauru a prospect of national survival that would be denied us under any alternative proposal that the Partner Governments have yet put to us.
>
> 12. However, the cost of any reasonable rehabilitation of Nauru is so large that we cannot understand why the Partner Governments are not content with the considerable benefits they have already obtained from the phosphate (about $150 million from 1949 to 1965 in the form of phosphate obtained at less than world prices). Apparently the Governments want to make even more money at our expense as well as imposing a condition that we renounce all claims regarding the responsibility to rehabilitate the land already mined. Of course we know that little Nauru cannot force three important countries to make any such payments but you also ask us to deny our beliefs. Whichever way we look at it the Nauruans are the main losers from the need to rehabilitate the island. We value the freedom that we can attain on Nauru sufficiently to face the cost of rehabilitating lands that we mine in the future, but we are well aware that our basic opportunities to survive as an independent people are being severely curtailed by such large expenditures on rehabilitation and we need every penny that we can get. We are not prepared publicly or privately to accept the Partner Governments' view that the proposed financial arrangements are adequate to cover our future needs including rehabilitation or resettlement." (Nauru Memorial, Vol. 3, Ann. 5, p. 523, pp. 525-527.)

And so, there is no evidence whatsoever that the carefully formulated positions in these documents were subsequently departed from or compromised.

There were further talks leading to the adoption of the Heads of Agreement for the Nauru Phosphate Agreement on 15 June 1967 (Nauru Memorial, Vol. 3, Ann. 5, p. 419), but these Talks simply did not deal with the subject of rehabilitation and so it does not feature in the Heads of Agreement.

Australia finds no evidence of waiver in the record of the Talks in 1967 but Counsel for Australia remains undaunted.

After the Talks, he tells the Court "no more is heard of the claim" (CR 91/16, p. 21) and "from the middle of May until the signing of the Canberra Agreement on 14 November 1967 all was silence" (*ibid.*, p. 22).

Mr. President, in this case, silence is always supposed to be eloquent and the eloquence always speaks in favour of Australia.

The silence on this occasion has no particular significance, not least because the position of Nauru was very much on record already.

Not having discovered any waiver thus far, Counsel for Australia arrives chronologically at

the Agreement relating to the Nauru Island Phosphate Industry which was actually signed on 14 November 1967.

Like the Heads of Agreement, the Agreement itself contains no reference to rehabilitation. It does, however, deal with an extensive range of matters directly related to the transfer of ownership of the phosphate industry, arrangements for the management of the industry on Nauru, and so forth.

The Australian position, expressed by Mr. Griffith, is that the Canberra Agreement constituted a comprehensive settlement, in which "the Nauruan claim for rehabilitation was settled, satisfied or waived ..." (CR 91/15, p. 38).

Mr. Griffith states that four questions, of which one was rehabilitation, were settled by the Canberra Agreement. In his words:

> "This is because the Partner Governments and Nauru, by its representatives, agreed at the time the Canberra Agreement was made that all four issues should be laid to rest, as between the Administering Authority and the Nauruan community, on the basis that, on its forthcoming independence, Nauru would take over ownership and full control of the phosphate deposits, the phosphate industry, and its associated investment funds. This meant that Nauru might in the future make its own choices, whether or not for rehabilitation". (CR 91/15, p. 39.)

Mr. President, Members of the Court, no evidence is given for any of these assertions. The documentary record establishes that the issue of rehabilitation had been the subject of a careful and consistent set of reservations of rights by the Nauruan representatives.

The Agreement contains no clause concerning waiver. Given the history of the negotiations this strongly suggests that no waiver took place. Indeed, given the prominence of the claim concerning rehabilitation in the documentary record, if Australia had succeeded in extracting such a concession, an express relinquishment of the claim would have been natural.

But, there is no waiver clause and in the Trappist theory of law espoused by Australia in this case, this silence is to be nonetheless interpreted as a waiver. But it is beyond the bounds of ordinary sense to assume that Nauru would relinquish a long-held position sub silentio.

Certainly, Nauru's representatives did not interpret the Agreement in this way and Mr. Hammer DeRoburt restated Nauruan claims in the Trusteeship Council, shortly after the signing

of the Agreement, on 22 November 1967. In this statement, Mr. Hammer DeRoburt expressly addressed the rehabilitation issue and the purpose of the statement was expressed to be "to place on record that the Nauru Government would continue to seek what was in the opinion of the Nauruan people, a just settlement of their claims". (*Trusteeship Council, Official Records*, 13th Sepcial Session, 22 November 1967, p. 3.)

The absence of a waiver clause is explained by my friend Professor Bowett on the basis of a series of propositions totally unrelated to the record of the negotiations, the text of the Agreement or any other document (CR 91/16, p. 22).

At this point, I would respectfully remind the Court of the nature of the Agreement concluded on 14 November 1967. It is an Agreement relating to the Phosphate Industry. No reference is made to the Trusteeship Agreement or to the United Nations Charter.

The Parties were expressed to be the Nauru Local Government Council, of the one part, and the Partner Governments, of the other part.

Professor Bowett analyses this transaction in a completely novel way and as a sort of *contrat d'adhésion*, a contract of adhesion. Thus he says:

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

and Counsel for Australia continues:

> "If you look at the transaction in terms of simple offer and acceptance, then there is no doubt that the Nauruans knew the Partner Governments were offering a comprehensive settlement. They knew that, if they again voiced their claim, the offer would be withdrawn, or at least reduced in value. So they kept their silence." (CR 91/16, p. 22.)

On this analysis by Australia, the entire Agreement as a single document is an offer and the Nauruan alleged silence is an acceptance of that offer.

The fact that the text of the Agreement is integral and bilateral, is ignored.

The fact that the Agreement was a part of the entire series of Canberra Talks, is ignored.

The fact that, treated as a unilateral offer, the Agreement makes no reference to any economic ultimatum of the type suggested by Australia, is ignored.

The fact that neither the text of the Agreement nor any other document makes reference to a Nauruan acceptance of such an offer is ignored.

Mr. President, silence can only be eloquent, if at all, within a framework composed of law and common sense.

The Statement of 22 November 1967

In his pilgrimage in search of waiver, Counsel for Australia arrives next at the Statement made by Mr. Hammer DeRoburt in the Trusteeship Council on 22 November 1967. This statement maintains the Nauruan position in the clearest possible language. I think it is a passage which is sufficiently familiar to the Court at this stage:

> "On all those matters, full agreement had been reached between the Administering Authority and the representatives of the Nauruan people. There was one subject, however, on which there was still a difference of opinion - responsibility for the rehabilitation of phosphate lands. The Nauruan people fully accepted responsibility in respect of land mined subsequently to 1 July 1967, since under the new agreement they were receiving the net proceeds of the sale of phosphate. Prior to that date, however, they had not received the net proceeds and it was therefore their contention that the three Governments should bear responsibility for the rehabilitation of land mined prior to 1 July 1967." (*Trusteeship Council, Official Records,* 13th Special Session, 22 November 1967, p. 3.)

Counsel for Australia contends, first, that this "statement of preservation of claims" was too late because, in Australia's view, such a statement "had to be made before the Canberra Agreement was signed, not after" (CR 91/16, p. 24). And this surely is simply a repetition of the argument that the Canberra Agreement constituted a waiver of all outstanding claims.

But a further point is made. On behalf of Australia it is argued that the statement "had to be made directly to the Partner Governments, not the Trusteeship Council" (CR 91/16, p. 24). But in fact this is based on the same assumption that the 1967 Agreement constituted a waiver.

In passing it may be noted that Professor Bowett considers that the statement on behalf of Nauru was "addressed to the wrong audience", whereas Professor Jiménez de Aréchaga in another

speech asserts that the United Nations organs were engaged in the settlement of the Nauruan claims.

The Statement of 6 December 1967

I now come to the statement of 6 December 1967. This is the statement before the Fourth Committee of the General Assembly and for Australia it is stated that "we are entitled to treat that statement as a clear waiver" (CR 91/16, p. 25).

What then was the statement relied upon so extensively in the Australian pleadings?

The abbreviated version offered by Counsel for Australia is as follows:

> "One [problem] which worried the Nauruans derived from the fact that land from which phosphate had been mined would be totally unusable. Consequently, although it would be an expensive operation, that land would have to be rehabilitated and steps were already being taken to build up funds to be used for that purpose ... The revenue which Nauru had received in the past and would receive during the next 25 years would, however, make it possible to solve the problem." (Preliminary Objections of Australia, Ann. 30, para. 20; CR 91 /16, p. 24.)

Counsel for Australia then offers the following construction of this passage. He says:

> "You will note that the 'problem' he refers to [that is the Head Chief, Mr. Hammer DeRoburt refers to] is the whole problem of rehabilitation, not just that produced by post-1967 mining. And he speaks of this as a Nauruan problem. There is no mention [says Australian Counsel], this time, of any continuing responsibility in the Partner Governments or of any claim against the Partner Governments."

Mr. President, the complete passage reads as follows and with your permission I would like to present the complete passage. The Head Chief said:

> "That economic base, of course, presented its own problems. One which worried the Nauruans derived from the fact that land from which phosphate had been mined would be totally unusable. Consequently, although it would be an expensive operation, that land would have to be rehabilitated and steps were already being taken to build up funds to be used for that purpose. That phosphate was a wasting asset was, in itself, a problem: in about twenty-five years' time the supply would be exhausted. The revenue which Nauru had received in the past and would receive during the next twenty-five years would, however, make it possible to solve the problem. Already some of the revenue was being allocated to development projects, so that Nauru would have substantial alternative sources of work and of income long before the phosphate had been used up. In addition, a much larger proportion of its income was being placed in a long-term investment fund, so that, whatever happened, future generations would be provided for. In short, the Nauruans wanted independence and

> were confident they had the resources with which to sustain it." (General Assembly, Official Records, 22nd Session, 1739th mtg, A/C.4/SR 173, p. 395.)

As the distinguished Agent of Nauru has pointed out to the Court, Australian quotations of this passage, including the version offered by Australian Counsel on 12 November, omit the following sentence: "That phosphate was a wasting asset was in itself, a problem; in about twenty-five years' time the supply would be exhausted."

And so the prospect of the disappearance of the phosphate revenue was the problem referred to by Mr. Hammer DeRoburt and not, as Counsel for Australia asserts, the question of rehabilitation.

And, Mr. President, the statement relied on by Australia contains no single phrase indicating a renunciation of the claim regarding rehabilitation.

The Australian argument in its essentials is simply that the statement on 6 December does not expressly reserve the claim to rehabilitation. Once again, we have an example of silence which is supposed to be inimical to Nauru.

At this point Nauru finds it necessary to make for itself a brief excursion into the jurisprudence of silence.

The Court will recall the emphatic statement of the Nauruan position on the responsibility for rehabilitation by Mr. Hammer DeRoburt on 22 November 1967. This is the thirteenth special session of the Trusteeship Council. That session was attended by a representative of Australia, Mr. Shaw. The Official Records for the sessions on 22 and 23 November disclose no reaction on the part of the Australian representative to the very clear statement made by Mr. Hammer DeRoburt.

If the Australian interpretation of the Phosphate Industry Agreement is correct, Mr. Shaw should have evinced surprise and indignation for, after all, the Agreement had only been signed a short time before; and on the Australian view we are now asked to entertain, had settled the question. But no protest was made.

It must follow, in our submission, that Mr. Hammer DeRoburt would have no reason to suppose on 6 December that Australia did not accept his views as expressed on 22 November and no reason to suppose that his speech on 6 December could be construed as a repudiation of a long held

position.

Mr. President, with your permission that would be a suitable place for me to break my speech.

The PRESIDENT: Thank you very much Professor Brownlie and we will resume at 10 o'clock tomorrow morning.

The Court rose at 13.00 p.m.