

# Implications of the *Nauru* case on the new international economic order

The International Court of Justice<sup>1</sup> declared that it had the jurisdiction to adjudge Nauru's claim against its erstwhile administering authority, Australia under the trusteeship system of the United Nations.<sup>2</sup> The 1992 judgment of the ICJ was no doubt on the preliminary objections advanced by Australia against the claim, but it has raised several questions of seminal value<sup>3</sup> in international law. From one perspective it has resuscitated and resurrected the New International Economic Order,<sup>4</sup> a notion prevalent during the 60s and 70s.

The importance of this pronouncement still remains eventhough the proceedings of the merits were discontinued following the signing of a compact of settlement between Australia and Nauru. The settlement represents in effect only the satisfaction of Nauru's primary claim for the expenses associated with rehabilitating the lands mined by Australia.

This Article examines Nauru's claim in the light of the NIEO. The case involved the examination of the claim of an island which was under a system of tutelage through the mandate and trust system of the United Nations, against its former administering

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1. Hereinafter ICJ

2. *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections*, 1992 I.C.J. 240.

3. See Antony Anghie, "The Heart of My Home': Colonialism, Environmental Damage and the Nauru Case", 34 *Int'l. L.J.* 445 (1993). The author has discussed the entire dispute and the possible lines on which merits of the decision may have proceeded.

4. Hereinafter NIEO.

authority. The claim centered around the aggravated mining of phosphates present in vast measure on the island by the British Phosphate Commissioners (BPC); an entity of the administering authorities.

The NIEO is part of the movement of a loose coalition of newly independent states to secure for themselves, through resolutions in the General Assembly, what are broadly termed as the right to permanent sovereignty over Natural Resources.<sup>5</sup> It is considered as an appropriate legal regime to facilitate expropriation and repudiate the vestiges of their colonial past mainly in relation to economic activities. An attempt is made here to discuss how the Nauru claim is accordingly coloured by the newly emerging concept of PSNR-NIEO<sup>6</sup>

### *The background of Nauru case*

Nauru, an island in the Central Pacific is 8.25 square miles in area and has an indigenous population of approximately 5300 people.<sup>6a</sup> Until the contact made with Europeans in 1798, the fishing carried out in the lagoon trees, hibiscus and pondamus which grew on the island were the only resources that the islanders enjoyed. Germany officially annexed Nauru in 1888. In 1960, phosphate was discovered on the island, and a German trading company commenced mining. At the conclusion of the first world war it was decided to place Nauru under the mandate system of the League of Nations,<sup>7</sup> with the charge of tutelage being given to Britain, New Zealand and Australia. The Nauru Island Agree-

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5. Hereinafter PSNR.

6. An exhaustive treatment of all legal issues relating to Nauru is found in Weeramantary, *Nauru: Environmental Damage under Trusteeship* (1992).

6a. See Memorial of Nauru (*Nauru v. Australia*), 1990 I.C.J. (pleadings)89. See also, Weeramantry, *supra* n.6.

7. The mandate system is found in Art.22 of the League of Nations Covenant. It makes a distinction A, B and C class of mandates. The mandate system was a compromise between the proponents of  
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ment determined that the phosphates were to be shared among the three signatories. This agreement was independent of the mandate agreement.

The island was occupied by the Japanese in the Second World War and it was recaptured by Australia. In 1947, Nauru was placed under the United Nations trusteeship system which succeeded the mandate system. The Nauru mandate was replaced with a trusteeship agreement.

Following local protests and U.N. criticism of the administration of the island, the Nauru Local Government Council was formed in 1951. Despite these changes, the Nauruans continued to be deprived of any right to interfere with the administration and operation of the phosphate industry. Nauruan demands for full control over the phosphate industry were finally met in 1967, when the partner governments sold the industry to the Nauru Local Government Council. The Nauruan campaign for independence was terminated and Nauru became an independent state.

The Nauruan claim was for rehabilitation of the mined lands against the three partner governments who between themselves administered the territory and controlled the entity that undertook the mining activities, until 1st July 1967. The partner governments denied responsibility and the Nauruan Government appointed a commission of inquiry into the rehabilitation of the worked out phosphate lands in Nauru<sup>8</sup> which presented its findings in a ten-volume report that found the three partner

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the colonialists and those who favoured self determination; for the 'liberated' colonies of Germany after the First World War. The responsibility to administer the territory under the mandate is by virtue of an agreement entered into by the League and the country designated as the mandatory. See generally, Quincy Wright, *Mandates under the League of Nations*, 1-63 (1930).

8. This Commission was chaired by a professor of International Law, Christopher Weeramantry. Prof. Weeramantry was appointed to the International Court of Justice in 1990 but played no role in the Court proceedings regarding Nauru.

governments responsible for the rehabilitation of the lands. The position of the partner governments remained unchanged by these findings and on May 19, 1989, Nauru commenced proceedings against Australia in the International Court of Justice.<sup>9</sup>

The central claims made by Nauru were that it had suffered loss - first as a result of the failure of the partner governments to rehabilitate the lands mined prior to July 1, 1967 and second because of the manner in which the phosphates had been exploited. Nauru provisionally asserted that it lost \$172.6 million pounds because of the phosphate pricing system,<sup>10</sup> and the cost of rehabilitating the land mined at \$72 million.

Proceedings were not instituted against New Zealand and the United Kingdom whose submissions to the compulsory jurisdiction of the Court contained reservations that could have prevented the Court from exercising its jurisdiction and therefore only Australia was proceeded against.

The preliminary objections of the case was heard in November, 1991 and the Court published its ruling that it had jurisdiction to hear the case.

### *Judgment in the preliminary phase*

The preliminary objections are not very pertinent to the present discussion but it is necessary to cite them for a proper understanding of the context, considering the fact that the judgment on the merits was pre-empted by a settlement.

Australia's objections and the rulings of the court on them were as follows.

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9. See *Preliminary Objections Judgment*, *supra* n.2 at p.242.

10. See *Nauru vs. Memorial*, *supra* n.6a at p.309.

The language of Australia's declaration of acceptance of the compulsory jurisdiction precluded the Court's jurisdiction. The Court rejected this as it could not find any agreement whereby the two states undertook to settle their dispute by resorting to an agreed procedure other than recourse to the Court.<sup>11</sup> Analysing the provisions of the phosphate agreements and other evidence in court did not find any clear and unequivocal waiver as alleged, in favour of Australia.<sup>12</sup> The Court discussed the factual background of the termination of trusteeship and concluded that Nauru's claims, if any, remained unaffected by the termination of the trusteeship.<sup>13</sup> The contention of Australia on the delay on the part of Nauru in bringing the claim was also rejected.<sup>14</sup> The court also observed that bad faith did not infirm the action of Nauru in bringing the claim<sup>15</sup> and that the absence of New Zealand and Britain did not affect the case.<sup>16</sup>

Nauru had also laid claim against the overseas assets of the British Phosphate Commissioners who were in charge of mining in the territory. This entity was wound up in 1987. The Court rejected this portion of the claim on the ground that it was a new claim and consequently inadmissible.<sup>17</sup>

Judge Shahabuddeen delivered a separate but concurring opinion. Judges Jennings, Oda, Schwebel and Ago delivered dissenting opinions on various grounds.

### *The legal regime of mandate and trust and PSNR*

Nauru's case is based primarily on the fiduciary obligations embodied in the mandate and trusteeship system. Although the

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11. See paras 8-11 of the judgment.

12. See paras 12-21 of the judgment.

13. See paras 22-30 of the judgment.

14. See paras 31-35 of the judgment.

15. *Ibid.*

16. *Ibid.*

17. See para 62 of the judgment.

United Nations' trusteeship system which succeeded the mandate system outlines a far greater system of obligations than its predecessor, they have not really been judicially tested as most pronouncements exist only as regards the mandates.<sup>18</sup>

The idea of a mandate is simply an institutional manifestation of the older idea that natives should be protected by the colonizing power and that their interests and lands should be looked after in trust by that power. The primary substantive obligation undertaken by the mandatory is stated in Article 22 (1) of the League Government, which stated that the well being and development of the peoples subject to the mandate formed "a sacred trust for civilization". It would be a system of tutelage<sup>19</sup> wherein the state under the charge would be developed without exploitation and plunder and thereafter, upon being able to stand by itself, it emerges as an independent and sovereign state. The Covenant and the specific agreements of the mandate enumerated the rights and obligations which were with an accent on upliftment of the people.

The trust system that replaced the mandate system upon the demise of the League of Nations provided for a far more precise set of obligations that were contained in the mandate system under the League of Nations Article 76 (b)<sup>20</sup> describes one of the

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18. Observations do exist on the nature of the system of tutelage available under the mandate or trust but no direct finding has been recorded until now for trusts. See, *International Status of South West Africa*, 1950 I.C.J. 128; *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa*, 1955 I.C.J.67; *South West Africa Cases*, 1968 I.C.J. 319 (Preliminary Objections), *South West Africa Cases*, 1966 I.C.J. 6 (Second Phase Judgment); *Legal Consequences for States of the continued Presence of South Africa in Namibia...*, 1971 I.C.J.16.

19. See Generally, Norman Bentwich "Status of Mandatory Power" 12 Brit. Y.B. Int'l. L.157 (1939); Lewis, "Mandates Territories: Their International status", 39 L.R. Rev. 458 (1923); Mark Carter Mills, "The Mandatory System", 17 Am. J. Int'l. L.50 (1923).

20. Charter of the United Nations, hereinafter the Charter.

basic objectives of the trusteeship system as the promotion of the political, economic, social and educational development of the inhabitants of trust territories in order to ensure their progress towards self government. The territory was given more importance. The trusteeship agreements like Nauru's were more pronounced.<sup>21</sup>

The supervisory organ under this system was the General Assembly assisted by the Trusteeship Council.

Regarding the NIEO and PSNR, it is submitted that the trusts and mandate system was a big step forward to self determination.<sup>22</sup> This is a similar right that from PSNR-NIEO. The trust itself echoed, in a primitive way, some of these obligations which PSNR later defined.

### *The New International Economic Order : an overview*

During the colonial years, there took place seizure and exploitation of natural resources by the colonial master of the colonised.<sup>23</sup> This exploitation which went unquestioned and unregulated was spurred on by the virtually unregulated nature of terms with the colonial project funding the industrial revolution that had taken off and grew from strength to strength. A major motive of the colonizers was in fact, gaining control over the natural resources of the territory which was colonized.

Most of the exploitation of natural resources during the colonial times took the place of 'concession agreements; which

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21. See the specified procedure for ensuring political advancement of the Nauruan people in Article 5 of Nauru Trusteeship Agreement.

22. See generally, Leeper S. Donald, "Trusteeship Compared with Mandate", 49 Mich. L. Rev. 1139 (1957).

23. See Bengt Broms, "Natural Resources, Sovereignty Over" in 10 *Encyclopaedia of Public International Law* 306 (Rudolf Bernhardt, Ed. 1981).

consisted of a virtual barter of the natural resources to an entity called the concessionaire. These agreements were for a long period of time and had negligible spin offs in terms of paltry royalties paid by the concessionaire in lieu of the natural resource concerned.<sup>24</sup> These agreements resulted in the virtual drain of the natural resources of a community and were the first targets of newly independent nations.

With the end of the second World War, the colonial regimes' grip over the colonised people considerably diminished, paving the way for a large number of newly independent nations to join the comity of nations. The founding of the United Nations, which marked a democratization of the World Order, gave these newly independent countries a place on the world stage. The nations who were formerly colonial territories were confronted with the major problem of regaining control over their natural resources which were largely under the management of the concessionaire of colonial vintage.<sup>25</sup>

Many developing countries resorted to outright expropriation of foreign property interests in order to secure the control over natural resources.<sup>26</sup> In order to lend a legal as well as an acceptable backing to this move which was bound to have drastic consequences, a loose coalition of newly independent nations spearheaded the passage of a series of General

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24. See David N. Smith and Louis T. Wells, "Mineral Agreements in Developing Countries; Structures and Substance", 69 Am. J. Int'l. L. 560 (1975); See also Samuel K. Asante, "Restructuring Transnational Mineral Agreements", 73 Am. J. Int'l. L. (1979) for an exhaustive discussion with many illustrations of the actual status of such agreements. It concludes that in some very primitive areas due to existence of a legal void, the agreements, filled in all for all the laws.

25. See Geiger, "The Unilateral Change of Economic Agreements", 23 Int'l. & Comp. L.Q. 73 (1974).

26. See Ian Brownlie, *Principles of Public International Law*, 667 (4th ed. 1990).

Assembly Resolutions that formulated the doctrine of the Permanent Sovereignty over Natural Resources together with its concomitant theme of a New International Economic Order.<sup>27</sup>

The activity of the newly independent nations under the aegis of the General Assembly started in 1952. In one of its earlier resolutions on the subject the General Assembly recognised that 'the rights of peoples to use and exploit their natural resources is inherent in their sovereignty'.<sup>28</sup> The draft of the two international covenants on human rights proposed by the Human Rights Commission of the United Nations affirmed as early as in January 1955 that the right of peoples to self determination also includes permanent sovereignty over their natural wealth and resources.<sup>29</sup> The right of all peoples to use freely, exploit and dispose of their natural resources and wealth came to be recognised as an attribute of self determination.<sup>30</sup>

#### *The U.N. resolution of 1962*

In 1962, the U.N. General Assembly passed the most significant statement on PSNR,<sup>31</sup> which declared that :

"The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of

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27. See Subrata Roy Chowdhury, "Permanent Sovereignty Over Natural Resources" in Paul de Waart, eds. *International Law and Development* 59-85. See also Stephen M. Schwebel, "The Story of UN's Declaration on Permanent Sovereignty Over Natural Resources", 49 A.B.A.J. 463 (1963).

28. Resolution No. 626 (VII) of 21 December 1952.

29. This right was accordingly incorporated in Common Article 1 of the two most important international treaties on human rights, namely Int'l Covenant on Economic, Social and Cultural Rights and the Int'l. Convention Civil and Political Rights, 1966.

30. Much later this found incorporation in the 13th Article of the Vienna Convention of Succession of States in respect of Treaties 1978.

31. G.A. Res. 1803, UN GOAR 17th Sess. Supp. No. 17 at 15. UN Doc. A/5217 (1962).

their national development and the well being of the people concerned”.

This resolution was generally accepted by developed states as declaratory of standards of customary international law but considered conservative in character by many developing nations.<sup>32</sup>

The language of the documents that describe the doctrine of PSNR is often general and has led to many interpretative problems. For example, the content of the right and the meaning of the term “peoples” were left unexplained. If “peoples” refer to the peoples under colonial rule, do these peoples possess a latent sovereignty with an accompanying right to their natural resources ?<sup>33</sup>

#### *NIEO resolution and the Charter of Economic Rights*

Resolution No. 1803 remained largely unchallenged and sailed in clear waters until October 1972 and December 1973. It came to be recognised that the sole authority to determine compensation payable upon nationalisation of the natural resources of a state would be the courts of that state.<sup>34</sup> The competence of the host state to determine the amount of compensation and the provision for settlement of investment disputes in accordance with national laws as an expression of state sovereignty was clearly spelt out in another General Assembly resolution in 1973.<sup>35</sup>

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32. See, Ian Brownlie's views cited in *Permanent Sovereignty Over Natural Resources in International Law and Practices*, p.39 (Kamal Hossain & Subrata Roy Chowdhury, 1984).

33. See Anthony Anghie, *supra* n. 3 at p.473.

34. Res. No. 88 (XIII) of 19th October 1972 of the Trade and Development Board of the United Nations Conference on Trade and Development (UNCTAD).

35. G.A. Res. No. 3171 (XXVIII) of 17th December 1973.

In 1974, two important resolutions were passed by the General Assembly, the Charter of Economic Rights and Duties of States<sup>36</sup> and the Resolution on the New International Economic Order.<sup>37</sup> This served as the culmination of the movement seen through the 50s and 60s; of the concept of the Permanent Sovereignty over Natural Resources.<sup>38</sup> The Resolutions of 1974 consolidated the proposals pursued by developing countries at various other forums and presented them as coherent and comprehensive programme. Rather than emphasizing the reformation of certain sections of the global economy it called for restructuring of the system itself. International management of global economy so as to promote the economic development was the Central theme of these proposals.<sup>39</sup>

#### *NIEO, PSNR and the Nauru case*

Though the NIEO and PSNR were formulated to be some sort of a dialogue between the richer and poorer sections of the globe, the momentum built in terms of activity on the floor of the General Assembly did not radiate its fullest extent.<sup>40</sup> Translating the dry words of the resolution into action, throws up many problems which are examined briefly.

The NIEO and PSNR are no doubt a craving on the part of the poorer and poorest societies based on an intense longing for

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36. G.A. Res. No. 3281. UN GAOR 29th Sess. Supp. 30, U.N. Doc. A/9030 at 50 (1974).

37. G.A. Res. No. 3201, U.N. GOAR, 6th Spec. Sess. Supp. 1 U.N. Doc. A/9559 (1974).

38. See also Ian Brownlie, "Legal Status of Natural Resources In International Law (Some Aspects)", 162 R.C.A.D.I. 245 (1979).

39. A. Jayagovind, "From Order to Chaos - Some Reflections on International Economic Order", paper presented in the Commonwealth Legal Education Association Conference at Bangalore, India, June 4-6, 1993.

40. K.C. Reddy (ed.), *New International Economic Order Perspectives* (1991), 12.

survival and equality. They were prompted by the need for a kind of institutional and regulatory framework which enables different nations to work and grow together co-operatively to achieve the maximum potentialities in economic objectives like development, trade, employment and eradication of poverty.<sup>41</sup> This aspect has partly worked through the North-South dialogue resuming and the emergence of strong multilateral forums like NAM and G-77 to propagate the ideals of the NIEO. A change in the behaviour of the IMF was also observed.<sup>42</sup>

However, as relating to a problem like Nauru, the NIEO and PSNR pose even greater difficulty. The main barrier in this regard is the lack of agreement between the developed nations and the developing nations as to its parameters. A model is presented by the developed world, most of whom were erstwhile colonial masters; that the newly emerged states among the ranks of the developing countries can participate in the international system as equal members; which will include respecting rules that prevent an inquiry into colonial times.<sup>43</sup> This model is perhaps the absolute antithesis to the NIEO; but represents the most extreme view of the case of the developed world.

More moderate disagreements with the NIEO movement are witnessed some of which have been recognised by international tribunals. The most significant opposition in this regard is a variant of the doctrine of inter-temporal law,<sup>44</sup> which requires that the actions of the colonial powers must be judged according

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41. See *supra*, n.3.

42. K.C. Reddy, "Collective Self-Reliance" in K.C. Reddy (ed.), *New International Economic Order Perspectives* (1991), 25.

43. The developing country's response is on the lines that since sovereigns are only bound by the principles to which they consent; they cannot be bound by pre-existing doctrine that the former colonial powers have sought to foist upon them as a condition of discussing compensation.

44. First postulated in the *Island of Palmas Arbitration* (*Netherlands v. U.S.A.*) 2.R. Int'l Arb. Awards 820 (1928). See generally Philip Jessup, "The Island of Palmas Arbitration", 22 *Am.J. Int'l. L.* 735 (1928).

to the law contemporary with those times and consequently there can be no retroactivity of international law; assuming PSNR is part of it.

The wordings of the resolution no. 1803 are ambiguous and there are writings that exist to suggest that the phrase 'people' in terms of their possessing a right to permanent sovereignty over natural resources; do not include a 'people' under colonial domination; since they have no sovereignty whatsoever to speak of.<sup>45</sup>

### *Twisting the NIEO to suit Nauru*

The blatant violation of the trust and mandate through wanton mining in Nauru, is a tragedy that never should have occurred. However, it is to be noted that its fall-out has spanned new horizons to develop international law even further. The theory of NIEO-PSNR had its heyday in the 60s and 70s, but with Reaganism and Thatcherism, it nearly died out. However with the filing of Nauru case in the ICJ, issues of developed versus developing, resurfaced in forums of international law.

The NIEO-PSNR theories basically concern the right of a newly independent state to unshackle itself from the obligations and unfair deals that have been entered into on behalf of their people that has invited great detriment to them. It has been therefore used in the context of expropriation and compensation payable.

In Nauru, however PSNR-NIEO's unexplored theoretical base has been attempted to be put into practice by the attempt to canvass a claim for damage done to natural resources under

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45. See Karol Gess, "Permanent Sovereignty Over Natural Resources", 13 Int'l & Comp. L.Q. 398 (1964).

tutelage. It adds a new dimension to PSNR that sovereignty is indeed permanent which lies dormant in a people under tutelage but can resuscitate at moments such as these. The claim of Nauru was indeed one based on a new world order, a legal regime, that would give justice equally to all nations and shed the fruits of economic development and prosperity amongst all in the developing world.

### *The claim of Nauru vis-a-vis the NIEO*

The Nauru dispute though settled through the compromise raised important questions relating to the NIEO which would have found a recognition in the potential judgement on merits; if one had been pronounced.

Some of the links between Nauru's case and the trusteeship system in discussing the PSNR-NIEO connection are bound to arise. Briefly the contentions were to the effect that the partner governments derived their powers from the mandate and that they were required to exercise them in a manner consistent with the terms and requirements of the mandate. This was breached by the subsequent failure of the partner governments to run the industry for the benefit of their nations. Their policy of appropriating industry profits for themselves constituted a violation of the terms of the mandate.<sup>46</sup> These arguments modify the PSNR argument to suit the legal sphere that Nauru was in. It was in the nature of suggesting that the title to the phosphates; as opposed to the right to extract them, must have always resided with the Nauruans.<sup>47</sup> As such royalties should have been commensurate with the value of the phosphates and not the

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46. See generally, Weeramantry, *Nauru : Environmental Damage Under International Trusteeship* (1992)).

47. This principle is recognised in German Law, Nauran customary law, international law and the common law of Australia. See *Mabo v. State of Queensland*, 107 ALR 1 (1992) (Australia). See also, Kanwal Puri, "The Human Rights of Indigenous Australians 6 NLSI 25 (1994).

minimal payments that were actually made which were even characterised by Australia as gratuitous.

The general notions of PSNR and the NIEO are also applicable and central to Nauru's claim. Resolution 1803 does not restrict the right to be claimed to newly emergent states but instead confers this right upon "peoples". The significance of this is not to be left out since it is to be comprehended that the world comity of nations through an instrument of expression at the highest world forum and indeed the most representative; the General Assembly of the United Nations has expressly conferred the rights over natural resources on the "peoples".<sup>48</sup> The principle stated in the International Covenant on Civil and Political Rights that in no case may a people be deprived of its own means of subsistence has a particular reference to Nauru which was explicitly considered in the drafting of the provision.<sup>49</sup> Various resolutions were also passed by the General Assembly in the run up to the termination of the trusteeship vis-a-vis Nauru and the rights of people over the natural resource.<sup>50</sup>

The Namiban Decree 1; passed by the international community in response to the expropriation of Namibia's uranium by South Africa reiterates the fact that the resources of a mandated territory belong to its people.<sup>51</sup> The ICJ indeed missed an opportunity to lay down law relating to this important concept of international law.

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48. This is contrary to Karol Gess' conception of PSNR. It considerably diminishes the concept by restricting to people who according to him possess the attribute of sovereignty and consequently the colonial people and those under 'tutelage' are not covered.

49. I.C.C.P.R., Article 1 (12).

50. See G.A. Res. No. 2111 (XX) reprinted in 1965 Y.B.U.N. 544; G.A. Res. 2226 (XXI) reprinted in 1966 Y.B. U.N. 543.

51. Namibia like Nauru was a 'C' Class Mandate. See *Question of Namibian Uranium*, G.A. Res. 35/227; U.N. GAOR, 35th Sess. 111th Plen. Mtg. at 229, N.N. Doc. A/Res/35/227 (1981).

*Inter-temporal law, NIEO and the Nauru claim :*

In the Nauru paradigm it is necessary to keep in mind all possible legal impediments that the claim would have while relating itself to the PSNR-NIEO concept. As stated earlier it was only by the 60s and in fact the early 70s that the PSNR-NIEO activity gathered momentum and were crystallised through resolutions passed at the General Assembly. This is necessarily juxtaposed by the fact that Nauru attained independence only in 1968.

The chronological setting above together with the fact that Nauru is using PSNR to make a claim rather than denying one, the doctrine of intertemporal law could be attracted.

The Doctrine of inter-temporal law is today a part of customary international law.<sup>52</sup> It was first recognised in the *Island of Palmas case*<sup>53</sup> where the arbitrator held that a juridical fact must be appreciated in the light of the law contemporary with it and not by the law in force at the time when a dispute in regard to it arises. This principle has been recognised by the ICJ too.<sup>54</sup> Applying this doctrine to *Nauru* it is clear that the invocation of PSNR-NIEO to the Nauru facts cannot be countenanced as the relevant law when a large part of the mining took place did not include PSNR-NIEO until 1962. Thus a large portion of claims that are probably similar to Nauru may easily be defeated if it is shown that when the facts constituting the cause

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52. See T.O. Elias, "Doctrine of Inter-temporal Law", 74 Am. J. Int'l. L. 285 (1980).

53. (*Netherlands v. U.S.A.*) 2.R. Int'l. Awards. 829 (1928) See also Phillip Jessup, "The Island of Palmas Arbitration", 22 Am.J. Int'l.L. 735 (1928).

54. *Inghiers and Ecrchos Case*, 1953 I.C.J. 47; see also Kelson, *Principles of International Law*, 95 (1952).

of action took place, the law applicable then did not consider the acts of omission or commissions, international wrongs or that they in anyway gave rise to liability in the form of damages.

### *The Nauru case and the NIEO*

The new world order sought to be ushered in by president Bush characterized the climax of American and indeed British 'market' philosophy attempting to spread its influence to all parts of the globe. The NAM movement which prospered and attracted quite a bit of attention during the cold war years slackened and nearly died out. Neither were other third world forums active. The situation is a far cry from the heady days of the NIEO. The 1980s brought a series of events that complicated the picture. The Nauru claim reached the ICJ at this stage and therefore it appeared at some stage that the comparison should not be between the Nauru scenario and the NIEO as a concept of the 1970s.

The new NIEO influenced by the background of GATT shows a resurgence of the notion that foreign investment and foreign investors do not exist to promote the domestic interests of the host government. The dominant theme seen both in the GATT negotiations as well as the trends towards regional groupings such as NAFTA and the EEC are based on a scrambling toward political, economic and legal integration from a recognition that cooperation can erase destructive differences.<sup>55</sup> This may be counter productive in certain cases and it is submitted that the Nauru paradigm cannot be fitted within this matrix unless substantial equality and a sense of justice is instilled among the

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55. Helen Elizabeth Marshall "The 'New' New International Economic Order: Private International Law", 87 Am.S Int'l. L. Proc. 463 (1993).

various actors of the world stage. Otherwise any integration into a new world economic order would be a forced one in which there are hesitant and grumbling participants like Nauru whose colonial wounds are yet to be healed.

It is submitted that the new postulates will be relevant to a problem like Nauru only if the outstanding problems are healed. No amount of temptation for foreign investment can tempt a nation into forgoing its claim against an economic exploitation. The New NIEO which is a crash version of the old one, essentially dictated by nations of the west cannot have any relevance to a situation like Nauru. One cannot wish away the Nauru problem by brandishing temptation in the form of foreign investment. Nauru's experience, can show what really foreign investment can do in terms of playing havoc with a nations economy and natural resources. Of course one can always argue that this was at a time when no effective international as well as probably municipal safeguards were in place to prevent the foreigner from doing what he liked. But with the post modern view of the diminishing nature of a state,<sup>56</sup> what effective instrument can possibly exist to regulate foreign investment so as not to repeat Nauru ?

The final element is the 'settlement' reached. This is primarily a monetary one and the force of a judicial pronouncement in the areas of international law like PSNR that depended on a 'merits' judgement have now to wait. The vast monetary returns that Nauru gets, it is submitted, is no substitute for the judicial indictment that Australia could have possibly received; a pointer to the new New International Economic Order.

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56. See generally, *Lloyd's Introduction to Jurisprudence*, M.D.A. Freeman ed., 6th edn. (1994), pp.1147-1246.

### *The Nauru settlement*

Proceeding in the merits stage of the Nauru claim were discontinued in the ICJ following a compact of settlement between Australia and Nauru signed on August 10, 1993. Under the terms of the compact Australia agreed to pay Nauru A\$107 million. \$57 million is to be paid by August 31, 1994, and the remaining \$50 million, is to be paid in accordance with a Rehabilitation and 'Cooperation Agreement' under which Australia will fund \$2.5 million worth of jointly agreed rehabilitation and development activities in Nauru each year for the next twenty years.

In a sense the settlement reflects the satisfaction of Nauru's primary claim for expenses associated with rehabilitating the lands mined out prior to independence. However many have said that Nauru was bought over by the economic might of the west.

### *Conclusion*

If the *Nauru* case had been allowed to proceed to the merits stage it would have provided the ICJ a unique opportunity to pronounce upon the status of the NIEO, the only authority for which is found in arbitral award.

The lesson that Nauru has taught is no longer an implication for the NIEO but for the New NIEO, a brash resurgence of the developed nations attempting to bulldoze their way by spreading their economic hegemony. Can the GATT 'final Act' avoid a repeat of Nauru paradigm through the emphasis on a new global order for economic and trade? There exists a possibility that the noble visions of the GATT founders may be destroyed through

the economic dominance that may perhaps be achieved by some nations over the others which can lead to varied forms of oppression.

It is necessary therefore that the old NIEO be rejuvenated. The third world nations must be suitably inspired for this. The apparent penacea that the New NIEO offers to the Worlds' economic problems appears to falter when instances like Nauru are shown. Nauru is a classic example of a good system being misused and the same can repeat itself under GATT or the W.T.O. substituting it.

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