Reading Material
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MODULE 7

CONTENTS

'Environment Authority Bill ill-drafted'

From Soma Basu 26/3/97 7-H

NEW DELHI, March 24.

Even though the constitution of an Environment Appellate Authority (EAA) is still pending, the National Environment Appellate Authority Bill, 1997 — which was passed by Parliament last week — seems to be sending confusing signals to both the caretakers and abusers of environment.

On March 19, the Union Minister for Environment and Forests, Prof. Saifuddin Soz, promised in Parliament that the appellate authority consisting of a chairman, a vice-chairman and three members would be set up within a week or 10 days. With the promised deadline ending this month, political lobbying has quietly begun for the appointments to be cleared by the Prime Minister's Office. But sources point out that the exercise is likely to be delayed primarily owing to the "invisible pressures", besides other administrative hurdles.

Eitherway, the Environment and Forests Ministry is in for a tightrope walk once the appellate authority becomes fully functional. Cutting across party lines, several MPs believe that the Bill — which replaced an ordinance promulgated by the President on January 30, 1997 — is "ill-drafted". Several environmental activists are much chagrined that the country took a quarter of a century for the enactment of a legislation and yet failed to look at environment and development in a "balanced way".

India became a signatory to United Nations sponsored convention on "human environment" in 1972. Thereafter, it took 14 years to bring in the Environment Protection Act, 1986, and another decade to amend the Act and set up the appellate authority.

While the need for such an appellate authority has been largely welcomed mainly on the ground that the courts are overburdened with environmental cases and public interest litigations (PILs) and it is hoped that this apex body — having the status of a High Court — will help in effective and expeditious disposal of appeals, the "loopholes" too cannot be and have not been overlooked.

Dr. Y. Radhakrishna Murty of the CPI(M) told *The Hindu* that the appellate authority "will fail to be a full-fledged national judiciary body". "Though its infrastructure and paraphernalia will be like any other full-fledged court, its functions will be restricted and status reduced to that of a Central Administrative Tribunal," he apprehended.

Such fears are common as objections to the appellate authority being headquartered in New Delhi have also been put forth. Points out Dr. Murty, "Delhi is already over-crowded posing a problem of dangerous pollution levels. Why not locate it in a central place in the country which could be convenient for people coming from distant places such as Kanyakumari and elsewhere?" The composition of the authority is also likely to rake up the old "technocrat vs bureaucrat" war. The Bill envisages that a person shall not qualify for appointment as a chairperson unless "he has been a judge of the Supreme Court or the Chief Justice of a High Court" while a vice-chairperson should have at least two years experience as a Secretary to the Government. The three members to be appointed are also required to have professional knowledge or practical expertise in areas pertaining to conservation, environmental management, law or planning and development.

With such qualifications, it is feared that the appellate authority will only become an "extended body of bureaucrats". The Rajya Sabha MP, Mr. John Fernandes of the Congress (I), demanded that only non-officials and environmental experts with professional knowledge of a high repute be on the EAA. Similar views were echoed by the BJP MP, Mr. Narendra Mohan.

While not taking kindly to the appointment of a retired judge rather than a sitting judge as the chairman, many also believe that the composition of the authority should be broadbased and expanded from three to at least five.

While representatives from Universities and voluntary organisations working in the field are preferred for membership the *locus standi* of appellants is also in question. Clause 11 of the Bill entitles only a person or an association of persons likely to be directly affected by the grant of environmental clearance or any person who owns or has control over a project for which an application has been submitted for environmental clearance. "This rules out all PILs lending a self-limiting role to the EAA," according to Dr.Murty.

"The Heart of My Home": Colonialism, Environmental Damage, and the Nauru Case

Antony Anghie*

For I am all the subjects that you have,
Which first was mine own king; and here you sty me
In this hard rock, whiles you do keep from me
The rest o' th' island

WILLIAM SHAKESPEARE,
THE TEMPEST act 1, sc. 2, lines 341–44

I. INTRODUCTION

On June 26, 1992, the International Court of Justice (ICJ) ruled that it has jurisdiction to hear the case *Certain Phosphate Lands in Nauru*,[1] brought by the Republic of Nauru against the Commonwealth of Australia. In the absence of a settlement, the Court will proceed to consider the merits of the allegations made by Nauru—that it suffered damage as a result of Australia's violation of its rights under both the relevant United Nations Trusteeship provisions and several general principles of international law including self-determination, perma-

* B.A., LL.B., Monash University; S.J.D. Candidate, Harvard Law School; MacArthur Scholar, Harvard Center for International Affairs; Research Assistant, Nauru Commission of Inquiry into the Rehabilitation of Worked Out Phosphate Lands, 1987–88. My thanks to Kwame Anthony Appiah, Alexia Brown, José de Areilza, Keith Highet, Qadri Ismail, Duncan Kennedy, Ileana Porras, Riaz Raheem, Annelise Riles, Ronald Roberts, Henry Steiner, and Detlev Vagts. My particular thanks to Abram Chayes, Mark Hageman, and David Kennedy. I first became acquainted with the Nauru Case as a result of working for the Nauru Commission—and my thanks in that regard to Barry Connell; and to C.G. Weeramantry, for whom I had the privilege of working as a Research Assistant while attached to the Commission, and whose work has helped immensely in providing the basis for the inquiry outlined in this Article.

1. Certain Phosphate Lands in Nauru (Nauru v. Australia), 1992 I.C.J. 240 (June 26) (Preliminary Objections, Judgment) [hereinafter Preliminary Objections, Judgment]. As used in this Article, the term "Nauru Case" refers generally to the dispute and the proceedings. This Article suffers from the awkwardness of discussing a case that is currently before the International Court of Justice; any conclusions drawn as to matters before the Court derive from the comprehensive research and findings detailed in REPUBLIC OF NAURU, COMMISSION OF INQUIRY INTO THE REHABILITATION OF WORKED OUT PHOSPHATE LANDS OF NAURU, REPORT (1988) [hereinafter COMMISSION REPORT]. A summary of this report is presented in CHRISTOPHER WEERAMANTRY, NAURU: ENVIRONMENTAL DAMAGE UNDER INTERNATIONAL TRUSTEESHIP (1992).

nent sovereignty over natural resources, and abuse of rights.[2] Nauru alleges that these violations occurred when it was administered by Australia—first, pursuant to the League of Nations Mandate System and, subsequently, under the Trusteeship System of the United Nations, which succeeded the Mandate System.[3] Nauru now seeks a declaration from the Court that Australia is bound to make restitution or reparation to Nauru for the damage and prejudice it suffered as a result of the Australian administration.

The Case brought by Nauru against Australia involves a number of issues that are of central importance to international law. The Case is the first instance of a former dependent territory bringing action against a metropolitan authority for abusing its power when administering the dependent territory. As such, it raises a number of questions of grave significance to all former colonies. The Case also presents the stark plight of a people whose verdant island home, once known as "Pleasant Island," has been transformed by mining into a scarred wasteland. Nauru looks to international law for a means of remedying the environmental damage. The rehabilitation of the island is necessary for the survival of the Nauruans as an independent people.

Nauru contained extremely rich phosphate deposits that are a very valuable source of fertilizer.[4] Approximately one third of the island was mined out while it was administered by Australia.[5] While the Nauruan claim broadly encompasses a number of acts and omissions on the part of that administration, it focuses in particular on Australia's failure to provide for the rehabilitation of the lands it had mined out, and on its failure to ensure that the Nauruans received proper compensation from the exploitation of the phosphate deposits.[6]

Nauru's case is based primarily on the international obligations created by the trusteeship system.[7] The trusteeship system and its predecessor mandate system were created in order to protect dependent peoples against colonial exploitation. The central goal of the trusteeship system was to prepare dependent territories for independence as sovereign states. The Court has never previously considered a case involving trusteeship obligations in the merits phase.[8] Neither has it

2. *See infra* part V.

3. The Nauru Mandate and Trusteeship systems are discussed in detail *infra* part III.

4. ENCYCLOPAEDIA BRITANNICA 562 (15th ed. 1985)

5. Application Instituting Proceedings (Nauru v. Australia), at 14 (May 19, 1989) [hereinafter Nauru Application].

6. *Id.* at 30, 32.

7. *See generally* R.N. CHOWDHURI, INTERNATIONAL MANDATES AND TRUSTEESHIP SYSTEMS (1955); JAMES N. MURRAY, THE UNITED NATIONS TRUSTEESHIP SYSTEM (1957).

8. For example, the *Northern Cameroon Case* raised the issue of a breach of trusteeship obligations. The Court declined to exercise jurisdiction, however, because it held that a judgment would be devoid of purpose. Northern Cameroon (Cameroon v. U.K.), 1963 I.C.J. 15 (Dec. 2) (Preliminary Objections, Judgment).

dealt with the issue of permanent sovereignty over natural resources.[9] The Court has also not yet had an opportunity to consider the issue of international responsibility for environmental harm.[10] The manner in which it deals with this latter question could be noteworthy for two reasons. First, considerable uncertainty surrounds the applicable law. Second, the ICJ could become an important forum for settling environmental disputes between states.[11]

The first five parts of this Article outline the background to the case, the fiduciary obligations created by the mandate and trusteeship systems, and the arguments that may arise in relation to trusteeship obligations, self-determination, permanent sovereignty over natural resources, and environmental responsibility. It also examines the Nauru Case from the perspective of the international law relating to indigenous peoples.

In the final three parts, the Nauru Case is explored in its larger context. In focusing on the relationship between a metropolitan power and a dependent people, the Nauru Case raises fundamental issues regarding colonialism. The relationship between colonialism and international law is the central theoretical focus of this Article. The imperial idea that cultural differences divided the European and non-European worlds is important to an understanding of the colonial project[12]—the dispossesion of the non-European world and the implementation of a civilizing mission of suppressing and transforming peoples perceived as different, as "other." This dichotomy between the two worlds posed novel problems for European jurists who had to account for the colonial project in legal terms. Attempts to solve these problems gave rise to many of international law's central doctrines, particularly sovereignty doctrine.

This Article seeks to displace approaches to sovereignty doctrine that traditionally focus on how order is created among sovereign states[13] without giving much weight to the history of the doctrine. These approaches are Eurocentric in outlook.[14] This Article is different because it emphasizes the problem of cultural difference and not the

9. For detailed discussion of these doctrines see *infra* part V.

10. The *Nuclear Tests Case*, which raised this issue, was discontinued for lack of purpose. Nuclear Tests (Austl. v. France), 1974 I.C.J. 253 (Judgment of Dec. 20).

11. *See Declaration of the Hague, Mar. 11, 1989, Selected International Legal Materials on Global Warming and Climate Change*, 5 AM. U. J. INT'L L. & POL'Y 567 (1990) (requesting countries to settle environmental disputes at the ICJ).

12. *See* ADAM WATSON, THE EVOLUTION OF INTERNATIONAL SOCIETY: A COMPARATIVE APPROACH (1992).

13. *See* LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 1 (2d ed. 1987).

14. The traditional historical understanding of sovereignty focuses on the doctrine's European origins during the Peace of Westphalia. *Id.* at xxxvi.

issue of order among sovereign states. Second, this Article seeks to show that sovereignty doctrine, as applied to colonies, was not simply a European idea extended to peripheral areas. Rather, it developed out of the colonial encounter, and adopted a form different from accepted notions of Western sovereignty. Third, this Article avoids presenting the history of sovereignty as simply the background necessary to arrive at the conceptual question of how order is maintained among states.[15] My argument is that conceptual and historical renditions of sovereignty are related and that the history of the doctrine is selectively included in its most contemporary "conceptual" version. This raises the issue of what is included and excluded and why?

The inquiry into sovereignty must be understood in the context of the "civilizing mission." This mission advanced European civilization as embodying universal standards.[16] Jurists, however, had difficulty claiming that European civilization, in all its avowed specificity, was "universal" and binding on non-European societies. Furthermore, the argument asserted a fundamental difference between Europe and non-Europe even as it sought to eradicate this difference. My argument is that the civilizing mission, the historical maintenance of a dichotomy between what was posited as two different cultural worlds, combined with the task of bridging the resulting gap, provided international law with a dynamic that had important consequences for the generation of international institutions and doctrines, particularly sovereignty doctrine.

The Nauru experience illustrates the new approach to the non-European world in the period after World War I. In this phase, the uncivilized were viewed as being in need of rescue from the colonial system, and the problem of cultural difference was to be managed through the newly invented mandate system. The mandate system placed territories not yet capable of being independent under an administration supervised by the League of Nations. It was through this system and its successor, the trusteeship system, that international law and the civilizing mission promised to fulfill its task of incorporating all territories into international society on equal terms as part of one, universal system.

The Nauran case suggests that the arrival of independence for the non-European states does not necessarily signal the end of the civilizing mission's influence on the development of international law. This

15. Within the conceptual approach, it is understood that sovereignty is in some respect historically contextual. But the conceptual approach's treatment of history is lacking: the issue is simply acknowledged, and then summarily dismissed, rather than made an integral part of the inquiry into sovereignty.

16. MOHAMMED BEDJAOUI, INTERNATIONAL LAW: ACHIEVEMENT AND PROSPECTS 7–8 (1991).

Article's exploration of the doctrines of self-determination and permanent sovereignty over natural resources demonstrates, rather, that the dynamic of the civilizing mission persists in ways that have an enduring significance for international law. The Nauru Case then, perhaps as no other case before it, raises profoundly important questions about the manner in which international law and institutions have addressed the phenomenon of colonialism in all its phases—the colonial project itself, decolonization, and now the even more complex post-colonial phase.

II. HISTORICAL BACKGROUND OF THE NAURU CASE

Nauru is an island located in the Central Pacific at about latitude 0° 32′ South and longitude 166° 56′ East. It is only 8.25 square miles in area and has an indigenous population of approximately 5300 people.[17] The Nauruans are believed to be of mixed Micronesian, Melanesian, and Polynesian stock. They developed their own distinct language in the course of their history.[18] The island consists of a coastal plain and a central plateau known as "topside." The southwest of the island contains Buada Lagoon.[19] Mango, breadfruit, and pineapple trees grew beside the lagoon, while coconut and pandanus trees flourished on the coastal belt.[20] Fishing was an important activity on Nauru, and fish were cultivated in the lagoon. Topside contained wild almond trees, hibiscus, and pandanus.[21]

These were the resources that the Nauruans depended upon for all their needs prior to the arrival of Europeans. Contact with Europeans occurred in 1798 when Captain John Fearn, sailing from New Zealand to China, arrived at the island. Contact between the Nauruans and Europeans intensified in the 1830s as whaling ships used the island to replenish supplies, and beachcombers and deserters made Nauru their home.[22]

Rivalries between Australian, British, and German trading companies operating in the Pacific and, in particular, near New Guinea increased during the latter half of the nineteenth century. Britain and Germany decided to intervene officially,[23] and the two countries, in

17. *See* Memorial of Nauru (Nauru v. Austl.), 1990 I.C.J. Pleadings (1 Certain Phosphate Lands in Nauru) 89 (Apr. 1990) [hereinafter Nauru Memorial]. The most significant sources of information on Nauru are WEERAMANTRY, *supra* note 1; BARRIE MACDONALD, IN PURSUIT OF THE SACRED TRUST (1988); NANCY VIVIANI, NAURU: PHOSPHATE AND POLITICAL PROGRESS (1970); MASLYN WILLIAMS & BARRIE MACDONALD, THE PHOSPHATEERS (1985).

18. VIVIANI, *supra* note 17, at 4.

19. Nauru Memorial, *supra* note 17, para. 200, at 83.

20. 5 COMMISSION REPORT, *supra* note 1, at 1032–33.

21. *Id.*

22. *Id.* at 10.

23. *Id.* at 19–20.

1886, divided up the Western Pacific into spheres of influence with Nauru falling within the German sector and the neighboring phosphate island of Banaba into the British sector. Germany officially annexed Nauru in 1888.[24]

Phosphate was discovered on the island in 1900 by an employee of the Pacific Islands Company, a British trading enterprise. This company, later reconstituted as the Pacific Phosphate Company, succeeded in purchasing the rights to mine for phosphates from the Jaluit Gesselschaft, the German trading company that had been granted the right to exploit the mineral resources of Nauru by the German Reich. Mining began and a small royalty was paid to Nauruan landowners.[25] Shortly after the outbreak of the First World War, Australian forces occupied the island and administered it during the war.[26]

Once the war ended, Nauru became part of the larger debate at the 1919 Versailles Conference regarding the disposal of the former colonies of the defeated Germany and the Ottoman Empire. Some countries, such as Australia, New Zealand, and South Africa, were intent on simply replacing the Germans as colonial masters. U.S. President Wilson, however, was emphatically opposed to the continuation of the colonial system by any of the Allied Powers.[27]

Prime Minister Hughes of Australia dismissed Wilson's aspirations as unrealistic and referred to the League of Nations as Wilson's "toy."[28] Hughes's outspoken position in favor of annexation was motivated by a complex set of factors that included economic gain[29] and the desire to assuage his country's pain for all of the sacrifices (including the loss of 60,000 Australian lives) it had made for the British war effort.[30] South Africa's Prime Minister Jan Christiaan Smuts was equally intent on annexing South West Africa but found it unnecessary to prosecute his case as Hughes was doing all the advocacy required.

24. *Id.* at 20. For a discussion of whether this action amounted to a valid acquisition of sovereignty over Nauru even under the international law applicable at the time, see WEERAMANTRY, *supra* note 1, at 8.

25. The royalty was about one-seven-hundredth the value of the product. VIVIANI, *supra* note 17, at 35.

26. *Id.* at 40–41.

27. *See generally* MACDONALD, *supra* note 17, at 1–18; WEERAMANTRY, *supra* note 1, at 41–54. *See also* Address to Congress by President Woodrow Wilson, Fourteen Points (Jan. 8, 1918), *reprinted in* R. CRANSTON, THE STORY OF WOODROW WILSON 461 (1945). For more on the background to the mandate debate see NORMAN DE MATTOS BENTWICH, THE MANDATES SYSTEM 1–20 (1930); QUINCY WRIGHT, MANDATES UNDER THE LEAGUE OF NATIONS 1–63 (1930); CHOWDHURI, *supra* note 7, at 13–35.

28. Letter from Hughes to Governor-General of Australia (Jan. 17, 1919), *quoted in* PETER SPARTALIS, THE DIPLOMATIC BATTLES OF BILLY HUGHES 122 (1983). *See also* Nauru Memorial, *supra* note 17, at 13–14, n. 1.

29. VIVIANI, *supra* note 17, at 42.

30. *See* WEERAMANTRY, supra note 1, at 48.

Hughes sought British support for his position. His persistence was finally successful as it led British Prime Minister Lloyd George to endorse and advocate a compromise solution that was ultimately accepted.[31] Territories such as Nauru and New Guinea, while remaining under the supervision of the League, were to be administered "under the law of the mandatory as integral portions thereof."[32] In an attempt to win Hughes' support, Lloyd George argued that while the mandate scheme required the protection of certain rights of the natives, the compromise formula allowed Australia something comparable to ownership over the island.[33] Having been assured considerable control over the natives, the Dominions celebrated their diplomatic victory as an acknowledgement of their new international status.[34]

Although the Conference thus decided in principle to grant the mandate over Nauru to the British Empire, it was far from clear what this actually meant in terms of the specific arrangements among Britain, New Zealand, and Australia. Consequently, a bitter internal struggle developed among the three states.[35] Hughes was intent on nothing less than complete control over Nauru. Predictably, Prime Minister Massey of New Zealand was vehemently opposed to Hughes' plans as New Zealand was also dependent on a steady supply of phosphates.[36] Britain too was intent on asserting its interests in Nauru and suggested placing Nauru under British administrative authority already established in the region by the High Commissioner of the Western Pacific.[37] Finally, the three governments decided to draft a separate agreement relating to Nauru. The resulting Nauru Island Agreement (NIA)[38] determined that the phosphates were to be shared among the three signatories.[39] Phosphate mining commenced shortly afterwards.

The mandate system was eventually included as article 22 of the League of Nations Covenant. The partner governments, however,

31. WEERAMANTRY, *supra* note 1, at 46–47. The compromise involved the creation of so-called class "A," "B" and "C" mandates. *See* discussion *infra* part III.A.

32. This was the formula applied to class C mandates. *See* LEAGUE OF NATIONS COVENANT, art. 22, discussed *infra* part III.A.

33. WEERAMANTRY, *supra* note 1, at 47.

34. *se* WILLIAMS & MACDONALD, *supra* note 17, at 128–29.

35. *See generally* MACDONALD, *supra* note 17, at 2–6.

36. WILLIAMS & MACDONALD, *supra* note 17, at 127.

37. Milner's proposal would have had the effect of making Nauru part of the Gilbert and Ellice Islands Colony, which had also included Banaba. *See* MACDONALD, *supra* note 17, at 10–11.

38. Agreement between Australia, Great Britain and New Zealand Relative to the Administration of Nauru Island, July 2, 1919, 225 C.T.S. 431 [hereinafter Nauru Island Agreement (NIA)]. The mandate had not in fact been conferred at the time of the signing of the NIA.

39. According to the terms of the NIA, Australia and the United Kingdom each recieved 42% of the phosphates produced, and New Zealand the remaining 16%. *See* discussion *infra* part III.

concluded the NIA prior to the official granting of the mandate over Nauru, which occurred, finally, on December 17, 1920.[40] This was achieved by means of a separate document, the Nauru Mandate. While referring to the general provisions of article 22 of the League of Nations Covenant, the Nauru Mandate specified in greater detail the obligations imposed on the mandatory powers.[41]

The island was administered under the resulting regime until the outbreak of World War II. Nauru suffered tremendous hardship during the War. The Japanese occupied the island in 1942 and forcibly deported a part of the population. The Australians recaptured the island in 1945. Almost one-third of the Nauruans lost their lives during this period.[42] No phosphate was mined between 1941 and 1947.

The next major change in the international legislative history of the island occurred in 1947, when Nauru was placed under the United Nations Trusteeship System, which succeeded the Mandate System. The Nauru Mandate was replaced with a Trusteeship Agreement for Nauru.[43]

Nauruan dissatisfaction with their minimal involvement in the political and economic life of the island intensified during the Trusteeship period. Following U.N. criticism of the administration of the island, the Nauru Local Government Council (NLGC) was formed in 1951. The powers enjoyed by the Council, however, were minimal and it was not until 1965 that Nauruans became involved, even to a limited respect, in legislative actions on the island. 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.[44] The Nauruan campaign for independence ended on January 31, 1968, when the trusteeship over Nauru was terminated and Nauru became an independent state.

As for the historical origins of the dispute itself, representatives of the Nauruan people have maintained that the three partner governments were responsible for the rehabilitation of the lands mined out prior to July 1967, when Nauru acquired control of the phosphate

40. Mandate for Nauru, 2 LEAGUE OF NATIONS O.J. 93 (1921) [hereinafter Nauru Mandate].

41. *See* discussion *infra* part III.

42. VIVIANI, *supra* note 17, at 77–87.

43. Trusteeship Agreement for the Territory of Nauru, Nov. 1, 1947, 10 U.N.T.S. 3 [hereinafter Trusteeship Agreement].

44. *See* WEERAMANTRY, *supra* note 1, at 273–74.

industry.[45] As no alternative industries had been developed on the island, Nauru continued mining for its survival. Nauru has accepted responsibility for the rehabilitation of all lands mined since July 1, 1967.[46]

The partner governments denied responsibility. In 1986, various diplomatic approaches having failed, the Nauru Government appointed a Commission of Inquiry into the Rehabilitation of the Worked Out Phosphate Lands of Nauru.[47] Among the questions presented, the Commission was required to identify the parties responsible for the rehabilitation of the lands in question. The Commission, which was chaired by a professor of international law, Christopher Weeramantry,[48] presented its findings in a ten-volume report that found the three partner 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.[49]

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.[50] The Commission of Inquiry concluded that the cost of rehabilitating the land mined during the period in question was $72 million (Australian); Nauru has provisionally asserted that it lost 172.6 million pounds because of the phosphate pricing system.[51]

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

45. The Nauruans were represented at these discussions by the Nauruan Local Government Council led by the Head Chief of Nauru, Hammer DeRoburt. Australia argued before the ICJ that Nauru had waived all claims relating to rehabilitation at the time it entered into an agreement with Australia, in 1967, for the transfer of control over the phosphate industry. The Court rejected Australia's argument by a majority of 12 to 1. The history of Nauru's assertion of the claim regarding rehabilitation is set out by the Court in Preliminary Objections, Judgment, *supra* note 1, at 247–50.

46. Australia argued, in the jurisdiction phase of the proceedings, that Nauru acted in bad faith in bringing the claim against Australia without having commenced the rehabilitation of the island. Preliminary Objections of Australia (Nauru v. Aust.), 1990 I.C.J. Pleadings (Certain Phosphate Lands in Nauru) para. 404, at 162–63 (Dec. 1990) [hereinafter Australia Memorial]. The Court rejected this contention by 12 to 1. Preliminary Objections, Judgment, *supra* note 1, at 255.

47. For the background of the Commission, see WEERAMANTRY, *supra* note 1, at xiii–xvi.

48. Professor Weeramantry was appointed to the International Court of Justice in 1990 but has played no role in the Court proceedings regarding Nauru.

49. Preliminary Objections, Judgment, *supra* note 1, at 242.

50. Nauru Memorial, *supra* note 17, at 309. The figure takes into account all the expenses incurred by Australia in administering the island and managing the phosphate industry and also includes potential interest earnings.

51. *Id.*

Court from exercising its jurisdiction.[52] The preliminary objections phase of the case was heard in November 1991; the Court published its decision ruling that it had jurisdiction to hear the case the following June.

III. THE LEGAL REGIME APPLICABLE TO NAURU

A. The System of International Law

1. The Mandate System

Nauru's case is based primarily on the fiduciary obligations embodied in the mandate and trusteeship systems. Although the United Nations trusteeship system, which succeeded the mandate system, outlines a far clearer set of obligations undertaken by Australia, the mandate system nevertheless requires careful analysis as it provides the legal framework against which Australia's actions in its first phase of administering the island must be assessed. In addition, while the International Court of Justice has never directly considered the question of a breach of trusteeship agreement,[53] the mandate system has been the center of extensive litigation in the series of cases surrounding the status of South West Africa, which became the independent state of Namibia.[54] The principles developed in these cases lend themselves to clarification of both mandate and trust obligations.

The concept of an international trusteeship and the related idea of self-determination acquired a specific legal form for the first time in international law with the creation of the mandate system. Nevertheless, the idea of a mandate can be viewed as the institutional manifestation of a much 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. This idea is found in the work of the sixteenth-century Spanish theologian and jurist Francisco de Vitoria.[55] Repudiating the idea that the Indians of the New World were simply heretics and barbarians who could be dispossessed of their property, Vitoria argued that the Indians had their own sovereigns and that their public and private rights had to be respected.[56] At the same time, however, Vitoria asserted that the Indians were like children in need of governance by "people of intelligence."[57] Furthermore, the essential elements of trusteeship, as that concept is broadly understood today, also formed an essential part of Vitoria's jurisprudence: "the property of the wards is not part of the guardian's property; but it has owners and no others are its owners; therefore the wards are the owners."[58]

A number of developments through the centuries suggest that the idea of a trust played a role in both domestic and international relations. In the former realm, Chief Justice Marshall of the U.S. Supreme Court stated, in the celebrated case of *Cherokee Nation v. Georgia*,[59] that the Indians "are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian."[60] This concept of trust continues to play a vital role in regulating the relationship between Indian tribes and the United States and Canadian governments.[61]

This theme of trusteeship, largely ignored in nineteenth-century international law writings, was recovered by the statesmen and lawyers confronted with the task of administering the former colonies of Germany and Turkey at the end of World War I. In seeking a legal basis for trusteeship, the League focused on two ideas: first, the creation of justiciable obligations imposed on the mandatories and intended to protect the interests of the dependent peoples; and second, the establishment of a system of supervision designed to ensure that the mandatory power was administering the mandated territory in accordance with those obligations.

The primary substantive obligation undertaken by the mandatory or power is stated in subsection 1 of article 22 of the League Covenant,

52. Judge Ago, however, maintains that Nauru could and should have taken action against all three parties. *See* Preliminary Objections, Judgment, *supra* note 1, at 326–28 (dissenting opinion of Judge Ago). Australia's laudable submission to the jurisdiction of the Court, based on its concept of 'international citizenship', is discussed by Senator Gareth Evans, Australia's Minister for Foreign Affairs and Trade, in 13 AUST. Y.B. INT'L L 413 (Philip Alston & D.W. Greig eds., 1992).

53. *See supra* note 8.

54. *See* International Status of South West Africa, 1950 I.C.J 128 (July 11) [hereinafter International Status of South West Africa]; Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa, 1955 I.C.J. 67 (June 7); South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.), 1962 I.C.J. 319 (Dec. 21) (Preliminary Objections Judgment); South West Africa Cases (Eth. v. S. Afr., Liber. v. S. Afr.), 1966 I.C.J. 6 (Jul. 18) (Second Phase Judgment); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 (June 21) [hereinafter Namibia Case].

55. For an outline of Vitoria's work, see ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS (1954); David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT'L L.J. 1 (1986); JAMES B. SCOTT, THE SPANISH ORIGIN OF INTERNATIONAL LAW (1934); James B. Scott, *Preface to* FRANCISCO DE VITORIA, DE INDIS ET DE IVRE BELLI RELECTIONES at 5–6 (Ernest Nys, ed., John P. Bate, trans., Carnegie Institute 1917) (1696); ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSE OF CONQUEST 93–108 (1990).

56. VITORIA, *supra* note 55, at 128.

57. VITORIA, *supra* note 70, at 161.

58. *Id.* at 127.

59. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

60. 30 U.S. (5 Pet.) at 17.

61. *See* WEERAMANTRY, *supra* note 1, at 82–83.

which stated that "the well being and development" of the peoples subject to the mandate, formed a "sacred trust for civilization."[62] The mandate system was based on a compromise formula that categorized mandate territories into three classes: "A," "B," and "C" mandates.[63] Nauru was classified as a "C" mandate.[64]

The broad idea underlying the mandate is apparent from article 22(1): dependent peoples, instead of continuing to be the victims of colonial domination and exploitation, were to be the subjects of international protection. The suggestion made in article 22(3), with reference to Turkish colonies included in the class "A" mandate, was that the "well-being and development" of the mandate peoples had to be preserved and advanced in order to enable them to become, ultimately, citizens of sovereign states.[65]

Thus, the mandate system was unique in establishing the principle of international accountability for the administration of the territory in question. Furthermore, although the League authorized the mandatory to administer class C mandates as an "integral portion" of the mandatory, it did not confer sovereignty over that territory to the mandatory. This point was made not only by the ICJ,[66] but also by the domestic courts of mandatories who determined the status of the mandated territory for the purposes of the domestic legal system.[67]

This system reinforced the principle that control and ownership of the territory are distinct issues and that the trustee "is precluded from administering the property for his own personal benefit."[68] The relevant jurisprudence characterizes the mandate not so much as a set of rules, but as a policy that had to be pursued to ensure the well-being and development of the mandated peoples, and the preservation of their property for the time when they would emerge as members of an independent and sovereign state.[69]

The extent to which the mandate system embodied substantive legal obligations is suggested by the fact that these obligations were made

62. LEAGUE OF NATIONS COVENANT art. 22, paras. 1–2.

63. *Id.* at para. 3.

64. This was a category reserved for territories that, "owing to the sparseness of their population or their small size, or their remoteness from the centers of civilisation" can be "best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population." *Id.* at para. 6.

65. The principle that C mandates were to become independent states was affirmed in the *Namibia* Case. *See* Namibia Case, *supra* note 69.

66. International Status of South West Africa, 1950 I.C.J. 128, 132 (Jul. 11).

67. *See, e.g.*, Rex v. Christian, S Afr. L. R. 101 (App. Div. 1924); Frost v. Stevenson, 58 C.L.R. 528 (Austl. 1937).

68. International Status of South West Africa, 1950 I.C.J. 128, 149 (Jul. 11) (separate opinion of J. McNair). Consistent with the idea that no profits were to be made in the course of acting as a mandatory, President Wilson claimed that the mandate was a burden rather than a privilege. *See* H. DUNCAN HALL, MANDATES, DEPENDENCIES AND TRUSTEESHIP 127 (1948).

69. International Status of South West Africa, *supra* note 54, at 148–49.

justiciable. For example, article 7 of the Nauru Mandate stipulated that if a dispute arose between the mandatory power and any other Member of the League as to the "interpretation or application" of the mandate, recourse could be made to the Permanent Court of International Justice.[70]

In terms of supervision, the mandatory was obliged to satisfy requirements designed to enable the League of Nations to assess the territory's progress. For instance, mandatories were required to submit an annual report to the League Council.[71] These reports were submitted to the Permanent Mandates Commission (PMC), the monitoring organ established to "receive and examine the annual reports of the Mandatories, and to advise the Council on all matters relating to the observance of the mandates."[72] The PMC consistently maintained that the sovereignty of the mandatory did not extend beyond its mandated territory; furthermore, it clearly regarded the mandate system as designed to bring about the independence of all the mandate territories, regardless of the category in which each was placed.[73] This assertion by the PMC had real effects on the administrative practices of the B and C mandates because it foreclosed attempts by the mandatory to absorb the mandated territory into its own.[74]

2. The Trusteeship System and the Theories of Resettlement and Rehabilitation

The League of Nations collapsed with the outbreak of the Second World War, and the Mandate System was officially terminated on April 18, 1946.[75] The Charter of the United Nations, which succeeded the League of Nations, provided under article 75 that the United Nations would establish an international trusteeship system.[76] Nauru was placed under the trusteeship system by the General Assembly on November 1, 1947.[77] Apart from referring to specific obligations applicable to Nauru, the Trusteeship Agreement also incorporated the obligations created by the whole U.N. Trusteeship System itself.[78]

The U.N. Charter provided for a far more precise set of obligations than were contained in the Mandate System under the League of

70. Nauru Mandate, *supra* note 40, art. 7.

71. LEAGUE OF NATIONS COVENANT art. 22, para. 7.

72. *Id.* para. 9.

73. *Id.* at 81.

74. *Id.* at 81.

75. CHOWDURI, *supra* note 7, at 113.

76. U.N. CHARTER art. 75. Chapter XI of the Charter, articles 75 to 91, establishes the trusteeship system.

77. Trusteeship Agreement for the Territory of Nauru, 10 U.N.T.S. 3 (1947) [hereinafter Nauru Trusteeship Agreement].

78. *Id.* at 6.

Nations. Article 76(b) describes one of the 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.[79] Under this system, a territory was treated as having a much more sophisticated personality than under the League Covenant and the Nauru Mandate.[80] For example, sovereignty was viewed as having economic, social, and cultural components, and the Trusteeship Agreement specified procedures for ensuring the political advancement of the Nauruan people.[81]

As for supervisory mechanisms, all U.N. functions relating to the Trusteeship were to be performed by the General Assembly,[82] assisted by a Trusteeship Council[83] made up of countries divided equally between those that administered trust territories and those that did not.[84] The General Assembly was empowered to consider reports submitted by the trustee administering authority,[85] and to accept petitions from inhabitants of the trust territories. Most significantly, the Charter provided for "periodic visits to the respective trust territories."[86]

Although the substantive obligations of the trusteeship system have never been the subject of a decision by the Court, the comments of domestic courts have illuminated the nature of the trusteeship obligation. For example, in interpreting the Trusteeship provision applicable to the Pacific trust territory of Saipan, the U.S. Court of Appeals for the Ninth Circuit acknowledged the vagueness of the substantive provisions but concluded that "we do not believe that the agreement is too vague for judicial enforcement."[87]

The broad theme of the Trusteeship period is the emergence of Nauruan nationalism and the Nauruan struggles to gain control of the phosphate industry and to become a sovereign state in the face of opposition from the three trustee powers, especially Australia. Even during the time of the Mandate, it had become increasingly evident that the mining process could, conceivably, leave the Nauruans homeless.[88] The issue was raised directly in the Trusteeship Council in 1948,[89] and the issue of resettlement was sporadically considered by the Australian administration in the 1950s.[90] The search for a suitable island commenced in earnest in the early 1960s, as the Trusteeship Council exerted intensifying pressure on Australia to make good their trusteeship obligations.

The Banabans of Ocean Island provided a precedent for the resettlement process. After the British colony had been efficiently mined out, the inhabitants were resettled in Rabi, an island in the Fijian group.[91] Nauru presented more complex problems because of its status as a trusteeship territory and the Nauruans' strong desire to maintain their sovereignty and identity as a people after resettlement.[92] At the same time, however, the Australian Department of Territories had begun to formulate a plan to persuade the Nauruans to settle in Australia and eventually become citizens.[93] This was to be achieved by adopting policies that would foster assimilation. Australian officials decided not to disclose this assimilationist plan to the Nauruans.[94] Thus, the seriousness of the attempts made by the Department of Territories to find an island for resettlement by the Nauruans as a sovereign people in the 1960s can be doubted. Furthermore, the resettlement initiative seemed to be motivated less by a concern for the future of the Nauruans than by a desire to continue the exploitation of their natural resources unimpeded by their presence.[95]

The problem finally focused on the question of whether the Nauruans were prepared to settle on Curtis Island, off the Australian coast.[96] The Australians were prepared to give the Nauruans limited self-government as Australian citizens, but remained unwilling to concede sovereignty.[97] After protracted negotiations, Nauruan Head Chief DeRoburt declared in August 1964 that the Nauruans intended to remain on the island.[98] When the parties failed to agree on reset-

79. U.N. CHARTER art. 76(b).
80. *See supra* note 65 and accompanying text.
81. The more detailed nature of the obligations are suggested by article 5. Nauru Trusteeship Agreement, *supra* note 77, at article 5(b), (c).
82. UN CHARTER art. 85, para. 1.
83. U.N. CHARTER art. 85, para. 2.
84. U.N. CHARTER art. 86, para. 1(c).
85. U.N. CHARTER art. 87, para. (a).
86. U.N. CHARTER art. 87, para. (c).
87. People of Saipan v. U.S. Dept. of Interior, 502 F.2d 90, 97–99 (9th Cir. 1974). This case raised a series of issues comparable to the Nauru Case, including the nature of the protection offered by the Trusteeship against environmental damage to the inhabitants' lands.
88. For questions raised in the PMC as to the effect of mining on the land available for cultivation and habitation in 1937 see generally WEERAMANTRY, *supra* note 1, at 95–96.
89. *See* WEERAMANTRY, *supra* note 1, at 285.
90. VIVIANI, *supra* note 17, at 113.
91. For the unsuccessful litigation launched by the Banabans, see Tito v. Waddell & Others (No.2); Tito & Others v. Attorney General [1977] 3 All ER 129. *See* WEERAMANTRY, *supra* note 1, 210–30 (discussing the Banaban litigation).
92. WILLIAMS & MACDONALD, *supra* note 17, at 465.
93. Minute to the Department of Territories, 5 Nov. 1953, *quoted in* WEERAMANTRY, *supra* note 1, at 288.
94. One official recommended, "I believe our best interests would be served by playing along with the Nauruans on the idea of a new Nauru." *Id.* at 290.
95. Soviet Representative, Trusteeship Council, 1953, *reprinted in* WEERAMANTRY, *supra* note 1, at 302.
96. VIVIANI, *supra* note 17, at 145–46.
97. *Id.* at 146.
98. Ironically, Curtis Island contained mineral sands, the rights to which had already been sold by the Australian Government. *Id.* at 146.

tlement, the question of rehabilitating the Nauruan lands emerged as an issue to be resolved between the parties and the Trusteeship Council turned its attention toward this issue.

On December 21, 1965 the General Assembly, reaffirming the "inalienable right of the people of Nauru to self-government and independence," resolved 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."[99] On December 20, 1966 the General Assembly reasserted its position in even stronger terms.[100]

The Australian government responded to these various pressures by appointing the Davey Committee to inquire into the prospects of rehabilitating the mined out lands. The Committee reported in 1966, suggesting that rehabilitation was feasible, at least on a modified scale.[101] The Administration, however, maintained its previous position that rehabilitation was not possible, and implemented a strategy of linking the issues of rehabilitation with the emerging, and by then almost inevitable Nauruan progress toward independence, by attempting to make the granting of independence conditional on Nauruan withdrawal of their claim for rehabilitation.[102]

A series of discussions, known as the "Nauru Talks," were held from 1964 to 1967 between the Nauruans and the Australian government, concerning resettlement, rehabilitation, independence, and royalties. The talks resulted in the adoption of the Nauru Island Phosphate Agreement (NIPA) in 1967. Australia initially attempted to retain control over the phosphate industry.[103] Confronted by implacable opposition by the Nauruans, however, Australia eventually agreed to transfer all rights to Nauru. It then asserted that this constituted a complete settlement of any Nauruan claims to compensation for rehabilitation. Despite Australian pressures to include a provision in NIPA to this effect, the Nauruans refused such a clause.[104]

In the final agreement, the phosphate industry was sold to the Nauruans for $21 million (Australian).[105] This, together with the fact that the Nauruans would receive 100% of the net proceeds from future phosphate sales, was characterized by Australia as a generous gesture that took into account the Nauruans' long term needs.[106]

99. Question of the Trustee Territory of Nauru, G.A. Res. 2111(XX), U.N. GAOR, 20th Sess., 1407th plen. mtg. (1965).

100. G.A. Res. 2226(XXI), U.N. GAOR, 21st Sess., 1500th plen. mtg. (1966).

101. Nauru Memorial, *supra* note 17, at 71–73.

102. Nauru Memorial, *supra* note 17, at 221.

103. VIVIANI, *supra* note 17, at 164–67.

104. *See* WEERAMANTRY, *supra* note 1, at 274.

105. *Id.* at 164. For a broad outline of the matters covered by the NPA, see WEERAMANTRY, *supra* note 1, at 273.

106. *See* WEERAMANTRY, *supra* note 1, at 278.

B. *The System of Domestic Law: The Nauru Island Agreement*

The agreements discussed above outline the international regimes applicable to Nauru that were to be implemented in the domestic legislation of the island. The most significant legislation applicable to the administration of Nauru in practice was the Nauru Island Agreement of 1919.

Referring to the anticipated grant of the Mandate, the NIA, according to its preamble, was entered into in order to "make provision for the exercise of the said Mandate and for the mining of the phosphate deposits on the said Island."[107] The characterization of the mining operation as possessing a distinct but related identity from the Mandate itself suggests the complex relationship between the mining operation and the administration of the island.

The administration of the island was entrusted to an Administrator who was to be appointed initially for a five-year term by the Australian government. Eventually the three partner governments developed the practice of allowing Australia to appoint each of the succeeding Administrators.[108] Subsequent interference by New Zealand and the United Kingdom in the everyday administration of the island was minimal.

In addition to outlining the functions of the Administrator, much of the agreement focused on devising a system to exploit the phosphates. The British Phosphate Commissioners (BPC) was established consisting of three members, with each of the partner governments appointing one such member. According to the NIA, all title to the phosphate deposits and related property was to be vested in the BPC.[109] Any previously held title to the phosphates or other property was to be "converted into a claim for compensation at a fair valuation"[110] payable by the three Governments.[111] This arrangement was consistent with the position that the partner governments were, through the

107. Nauru Island Agreement, *supra* note 38, pmbl.

108. The Trusteeship Agreement for Nauru itself recognized that while the three partner governments jointly comprised the "Administering Authority," it was Australia which in practice administered the territory. Nauru Trusteeship Agreement, *supra* note 77, art. 4.

109. *Id.* art. 6.

110. *Id.* art. 7.

111. *Id.* art. 8. No payments were made to the Nauruans pursuant to this article. Instead they were paid a royalty that Australia characterized as gratuitous despite the fact that the Nauruans owned the phosphates. *See* discussion *infra* part V.B. The total royalty paid to the Nauruans as a percentage of the value of the phosphate exported (which was sold at cost rather than world price to farmers in Australia and New Zealand) was 0.3% in 1921; 5.1% in 1939; 2.7% in 1948; 7.8% in 1959; 7.6% in 1964; and 31% in 1965. These figures include all the monies placed in various funds established by the Administration for the benefit of the Nauruans. VIVIANI, *supra* note 17 at 189–90. All the expenses of administering Nauru were met from the sales of the phosphates, in accordance with article 2 of the NIA.

BPC, acquiring control over the phosphate operations by purchasing the relevant assets.

The Nauruans suffered the consequences. As early as 1925, the damaging effects of the mining were apparent, and the Nauruans protested that unless the mining depth was limited, the planting of food producing trees would become impossible. The protests were unheeded and the BPC, supported by the partner governments, continued mining to an unrestricted depth.

In summary, the legal regime established on the island by the NIA and the Lands Ordinances raises serious questions as to the compatibility of the Administration of the island with the terms of the Mandate. Simply put, the arrangements outlined above suggest that the welfare of the Nauruans was profoundly subordinated to the commercial interests of the BPC and, through them, the partner governments. Instead of being a source of protection, the mandate became, in practice, the cover for a system of exploitation that effectively destroyed one-third of the Nauruan homeland.

IV. OVERVIEW OF THE NAURUAN CASE AGAINST AUSTRALIA

A. The Nauruan Causes of Action

The core of Nauru's legal theory of recovery concerns Australia's failure to fulfill its obligations under the Nauru Mandate and the Nauru Trusteeship Agreement. In addition, Nauru's argument relies on general established doctrines of international law. Nauru claims Australia breached principles of permanent sovereignty over natural resources and self-determination in the course of its administration. Additionally, Nauru contends that Australia violated customary international law doctrines by engaging in a denial of justice in the broad sense—denial of justice *lato sensu*.[112] First, it is claimed that Australia abused its authority over the territory and people of Nauru. Second, Nauru asserts that Australia violated the solemn duties of a predecessor state that is entrusted with the task of administering or preparing a territory whose title is to be transferred.[113] Finally, Nauru could possibly claim that Australia violated customary international law principles prohibiting unjust enrichment.[114]

As a remedy, Nauru requests that the ICJ adjudge and declare that "Australia has incurred an international legal responsibility and is bound to make restitution or other appropriate reparation to Nauru for the damage and prejudice suffered."[115] Although it has provided provisional figures relating to the losses suffered because of the manner in which the phosphates were exploited, Nauru seeks that the issue of reparations be decided in a separate phase of the proceedings in the absence of agreement between the parties.[116] Interestingly, Nauru has also reserved its right to request aggravated damages that "reflect the particular elements of excess and the lack of ordinary consideration in the conduct of the Respondent State."[117]

It is important for the success of Nauru's arguments before the ICJ that the content of the mandate and trusteeship obligations be seen and interpreted in evolutionary terms. Authority for this evolutionary approach to interpreting the trusteeship is provided by the ICJ's statement in the *Namibia* Case.[118] As a consequence of this approach, the actions of a trustee power—in this case Australia—must be consistent with developments in international legal norms as to how dependent peoples should be prepared for self-government. The evolution of norms is evident in the relevant PMC proceedings and the U.N. General Assembly resolutions. These provide relevant guidance as to how the international community perceived the purposes of the Australian mandate and trusteeship over the island.

B. The Australian Response

In the preliminary phase of the case, Australia raised a number of objections to Nauru's allegations, and requested that the ICJ declare

112. *See* Nauru Application, *supra* note 5, at 30; Nauru Memorial, *supra* note 17, at 160–63.

113. *See* Nauru Application, *supra* note 5, at 30; Nauru Memorial, *supra* note 17, at 167–71. The essential element of the action is a misuse of rights by a state in such a manner as to cause damage or prejudice. The Permanent Court of International Justice has referred to this principle in connection with the administration by a state of territory whose sovereignty is to be transferred. *See* Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), 1926 P.C.I.J. (ser. a) No. 7 at 30; *Free Zones Cases* (Fr. v. Switz.), 1930 P.C.I.J. (ser. A) No.24 at 12 and 1932 P.C.I.J.(ser. A/B) No. 46 at 167. In the Nauru case, it is arguable that the rights enjoyed by Australia by virtue of the Mandate and Trusteeship systems were exercised for purposes other than those for which they were granted, thus breaching international law. *See* WEERAMANTRY, *supra* note 1, at 358–60. *See generally* B.O. Iluyomade, *The Scope and Content of a Complaint of Abuse of Rights in International Law*, 16 HARV. INT'L L.J. 47 (1975).

114. The principle that a party cannot retain benefits unjustly acquired, independent of any relationship established by the law of tort, contract, or trusts is an aspect of many domestic systems of law and has been characterized as a principle of international law by many eminent authorities, including Bin Cheng, O'Connell, and de Arechaga. *See generally* WEERAMANTRY, *supra* note 1, at 355–58.

115. Nauru Application, *supra* note 5, at 32.

116. *Id.*

117. *Id.*

118. "[T]he concepts embodied in Article 22 of the Covenant . . . were not static, but were by definition evolutionary . . . ." Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16.

that it lacked jurisdiction to hear the case.[119] Australia argued that Nauru had waived all claims regarding rehabilitation: this waiver was an implicit and necessary aspect of the 1967 agreement, and had been affirmed by Head Chief Hammer DeRoburt's statements in the United Nations at the time of the termination of the trust. Australia further argued that the General Assembly and the Trusteeship Council alone were competent to assess the breaches of trusteeship obligations, and it was not within the Court's competence to reopen a trust that had been terminated by the United Nations. Australia also argued that Nauru had delayed raising the matter. Another argument was that Nauru was acting in bad faith by claiming the island had to be rehabilitated if people were to continue living on it. Australia pointed out that Nauru itself had continued to mine the land and had failed to commence the process of rehabilitation. Most significantly, Australia asserted that the Court could not decide the issue of Australia's responsibility without also pronouncing on the responsibility of the two other governments that comprised the Administrative Authority of Nauru. Thus, Australia argued, the Court would be deciding on the responsibility of absent parties who had not consented to the Court's jurisdiction. All of these arguments were rejected by the Court.[120]

In accordance with the practice of the Court, Australian arguments as to the merits phase of the case will not be publicly disclosed until the hearing of that phase. Nevertheless, statements made by the Australian Government suggest, in broad terms, its position. Australia asserts that the Nauruans enjoyed a high standard of living during the period of mandate and trusteeship, and that this was reflected by the comments made by U.N. Visiting Missions on the quality of the health care, education, and public services provided to the Nauruans.[121] On the crucial question of rehabilitation, Australia argues that the phosphate agreement gave Nauruans the economic benefit of the phosphate industry, that the partner governments gave up their mining concession without compensation, and that, as a result, Nauruans had the means to provide for rehabilitation.[122] Australia has also continuously stressed that the income Nauru received from the phosphates would have ensured the long-term well-being and prosperity of the nation.[123]

Australia suggests in effect that if the needs of the beneficiaries were "adequately" provided for, the trustee could then dispose of the remaining trust assets in whatever manner it pleased—indeed, that it could appropriate the residual assets for itself.[124] The crucial issue, therefore, is whether the mandate and trust obligations may be interpreted so widely as to accommodate this reading.

Furthermore, Australia has repeatedly responded to several of the Nauruan allegations with the argument that the Trusteeship Council and the General Assembly never declared the Administration to be in violation of the trusteeship obligations.[125] This argument could raise complex issues as to the legal effects of the Trusteeship Council's actions. A further question may arise regarding Australia's persistent failure to provide the Council with the information it continuously requested as to royalty payments.

V. NAURU'S THEORIES OF RECOVERY

A. *Trusteeship and Self-Determination*

1. Overview of Self-Determination

At the ICJ, Nauru can forward two claims tied to the right of a subject people to self-determination. First, the Australian government failed to fulfill its obligations under the mandate and trusteeship to fully apprehend the right of the Nauruan people to self-determination. Alternatively, self-determination as a general principle may provide a basis for action by Nauru independent of the trusteeship obligations themselves. Even in the absence of the specific trust arrangement, the relationship between Australia and Nauru could have been characterized as one giving rise to an obligation by Australia to respect Nauru's right to self-determination.

119. *See* Australia Memorial, *supra* note 46, at 3–4. For a list of all the arguments so presented see Antony Anghie, *International Decisions*, 7 AM. J. INT'L L. 282 (1993).

120. One of Australia's objections was upheld, although this was not significant enough to prevent the case from continuing to the merits phase. For the decision and the reasoning of the majority, see Preliminary Objections, Judgment, *supra* note 1, at 259–62.

121. Australian Dept. of Foreign Affairs and Trade, Nauru: International Court of Justice Action Against Australia Backgrounder, *reprinted in* 13 AUSTR. Y.B. INT'L L. 409, 410 (Philip Alston & D.W. Greig eds., 1992).

122. *Id.* at 411.

123. *Id.* Australia argues that "[t]he income from phosphate mining should have given Nauru one of the highest per-capita incomes in the world." *Id.*

124. Australia has never really denied that it profited from the exploitation of Nauru's resources.

125. *See* Australia Memorial, *supra* note 46, at 83. Overall, while Australia lost the jurisdiction phase of the proceedings, certain arguments used in that phase may be repeated in the merits context. On one previous occasion involving mandate obligations, the South West African litigation of 1962 and 1966, the Court declared that it had jurisdiction in the first phase and then declared, in the merits phase, that further materials presented in that phase necessitated the reversal of the original finding that jurisdiction was established. Thus a number of technical and procedurally oriented defenses may remain open to Australia. *See* Preliminary Objections, Judgment, *supra* note 1, at 270–76.

The mandate and trusteeship systems may be regarded as specific regimes used to achieve the goal of self-determination. However, the doctrine of self-determination has evolved and expanded in the post-World War II era into a general principle of international law applicable to all colonial and dependent territories. From its legal origins in the League Covenant, the concept of a right of self-determination has been further elaborated in the U.N. Charter,[126] in the two primary international human rights covenants,[127] and in the declarations of the U.N. General Assembly.[128]

The principle of self-determination has been expressed as the right of a people to "freely determine their political status and freely pursue their economic, social and cultural development."[129] The right, furthermore, has been made explicitly applicable to Trustee powers.[130] The right of "all peoples" to self-determination continues to be one of the most controversial doctrines in international law[131]—what "peoples" are entitled to this right? At least for the Nauruans, this question does not pose a difficulty as they have been explicitly designated as a "people" in the Nauru Trusteeship Agreement. Instead, the controversy centers on the scope of the obligations of Australia to respect the Nauruan people's right to self-determination under the trusteeship.

2. Political Participation and Education

In its most formal conception, the right of self-determination simply means the right of a subject people to freely determine their political status. But under the mandate and trustee systems, the administering power had an affirmative duty to promote the realization of the right to self-determination. In order to consider the question of whether Australia fulfilled its obligations to promote and to respect the Naruan right of self-determination, the Australian record in the areas of political participation and education will be examined. These areas are examined here for the simple reason that educated and politically active people are better able to pursue their own development than people who are deprived of such opportunities and advantages.

The Administration was successful in building schools and providing the Nauruans with various public services,[132] earning the praise of the PMC and the Trusteeship Council.[133] But as a trustee entrusted with the solemn mission of furthering the political development of its ward, Australia engaged in an irreducible conflict of interest. As Weeramantry observed, the entire mandate system was afflicted with the problem of divided loyalties:

> Here was one of the primary enigmas of the mandate system. There was an attempt to protect defenceless states against the desire of the more powerful to exploit their resources. At the same time this could only be done by entrusting those defenceless states to the control of one or other of those very states which were anxious to have power over them for advantages of their own.[134]

In Nauru, the efficient extraction of the phosphates was of central importance to the BPC and the Administration. On the other hand, the Administration was entrusted with the duty to provide the Nauruans with the education necessary to develop the political, economic, and legal skills required to vindicate their rights as an independent people. The Administration, as trustee, not only failed to protect the welfare of the Nauruans, but also prevented the Nauruans from protecting their own interests.

These themes are illustrated by the saga of the "Geelong Boys." The first Administrator of Nauru, Brigadier General Griffiths, adopted an admirable policy of educating the Nauruans for responsible administrative positions. He initiated a program to train promising Nauruans in Geelong, a city in Australia.[135] A number of concerned Geelong organizations, intent on helping Australia discharge its in-

126. U.N. CHARTER arts. 1(2), 55.

127. International Covenant on Civil and Political Rights, art. 1(2), 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, art. 1(2), 993 U.N.T.S. 3 [hereinafter ICESCR].

128. *See, e.g., Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at para. 6, U.N. Doc. A/4684 (1966) [hereinafter U.N. Declaration on Granting Independence to Colonial Countries and Peoples].

129. ICCPR, art. 1(1).

130. ICCPR, art. 1(2).

131. Dismissed by one eminent jurist, Sir Gerald Fitzmaurice, as "nonsense," the principle now seems an established part of international law, not only because of its inclusion in the international legal instruments mentioned, but also because of its recognition by the ICJ in several cases. *See, e.g.*, Namibia Case, *supra* note 69, at 31. The literature on self-determination is considerable. *See, e.g.*, JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 84–103 (1977); ANDRES RIGOSUREDA, THE EVOLUTION OF THE RIGHT TO SELF-DETERMINATION (1973); U.O. UMOZURIKE, SELF-DETERMINATION IN INTERNATIONAL LAW (1972); W. OFUATEY-KODJOE, THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW (1977).

132. It should be noted, however, that education was funded by the Nauruans from the royalties given to them by the mining. *See* VIVIANI, *supra* note 17, at 98.

133. *Id.* at 64. These assessments, however, were often based on favorable comparisons with conditions generally prevailing in Pacific territories, as opposed to standards deriving from the Trusteeship provisions requiring the development of Nauru into an independent state. For example, the Trusteeship Council was concerned that no Nauruan had completed a university education by 1955. VIVIANI, *supra* note 17, at 117. Viviani also suggests that educational policy was not particularly well implemented even within the Administration's own limited terms. *Id.* at 115–20.

134. WEERAMANTRY, *supra* note 1, at 90.

135. *Id.* at 112.

ternational obligations, participated in the program[136] and the students thus trained were known as the "Geelong Boys."

As early as 1928, Griffiths reported on the success of the program and reiterated his belief that "in a comparatively short time practically the whole of the Nauruan service positions will be filled by Nauruans."[137] This successful experiment was short-lived. W.A. Newman,[138] Griffiths' replacement, was far less supportive of the Nauruans. While acknowledging that the Geelong scheme had produced "amazingly successful results," he warned that: "[I]t would be unwise to educate the Nauruan population generally to a higher standard than laid down in the simple existing programme of instruction."[139]

In 1932, Head Chief Detudamo caused consternation in the Administration and among the BPC by speaking of independence.[140] This aspiration, combined with the political awareness of the Geelong Boys, made it increasingly difficult for the Administration to negotiate phosphate royalties and to administer the island in general. Consequently, the Administration branded the Geelong Boys as malcontents and excluded them from any role in the administration of the island.[141] Since the Geelong Boys' experience had demonstrated that education was subversive, Administration policy changed accordingly. Deciding that the Nauruans were to be given only basic forms of education, the Administration then claimed that the Nauruans were incapable of managing affairs for themselves.[142]

Protection of the phosphates was the key issue behind the treatment of the Nauruans, and this was reflected not only in educational but political policies. Little was done to develop the political institutions on the island or to progressively include the Nauruans in the more important decision-making processes of the island. During the first

136. *Id.*

137. *Id.* (quoting Griffiths).

138. General Griffiths had unsuccessfully attempted to protect the Nauruans from the BPC. Newman, however, collaborated with the BPC against the Nauruans. For a discussion as to how the BPC dominated the Administration, see WEERAMANTRY, *supra* note 1, at 103–04.

139. WEERAMANTRY, *supra* note 17, at 112–13.

140. WILLIAMS & MACDONALD, *supra* note 17, at 282.

141. *Id.* at 279–82; *see also* WEERAMANTRY, *supra* note 1, at 113. It is noteworthy that DeRoburt, who played a decisive role in the Nauruan independence campaign, was one of the Geelong Boys.

142. The Administration seemed intent on creating a society that would remain in a permanently subordinate position. The Australians involved in the Geelong program recognized this design and continuously attempted to bring this matter to the attention of the Australian Ministry of Territories. They were rebuffed on each occasion. *See generally* WEERAMANTRY, *supra* note 1, at 384–90 (describing the struggles by Australians concerned for the welfare of the Nauruans). H.E. Hurst, one of the key members of the Geelong Group, was investigated for communist activities. Hurst himself believed that Australia meant to eradicate the Nauruans. H.E. Hurst, *Australia Seeks to Destroy Nauruans as a People*, PACIFIC ISLANDS MONTHLY, Nov. 1964, at 73.

debates of the Trusteeship Council regarding Nauru, it was pointed out that only one position of importance, that of "Native Affairs Officer," was held by a Nauruan, the Nauruan Head Chief. A Nauruan Council of Chiefs was established in 1928, but its powers were carefully limited to advising the Administrator on Nauruan matters; the Administrator was not bound to act upon this advice.[143] Apparently unwilling to provide advanced education to the Nauruans for fear of its politically destabilizing consequences, the Administration instead justified its neglect to ensure political progress by simply characterizing the Nauruans as apathetic and inherently inept.[144]

As a result of the continuing pressure that both the Trusteeship Council and the Nauruans themselves exerted, the Council of Chiefs was replaced in 1951 with the Nauru Local Government Council.[145] Once more, however, the powers of the Council were largely advisory; the Administration retained its discretion as to implementation of this advice and the financing of the activities of the Council.[146] Further pressure resulted in the formation of a Nauruan Legislative Council in 1966, just two years prior to independence. The phosphate industry was made immune from regulation by the Council even at this late stage, and it was not until 1967 that the Nauruans won complete control over the industry.[147]

3. Interpreting Self-Determination

In the context of the history roughly sketched above, the Nauruans allege that Australia breached its trusteeship duties to promote the right to self-determination of the Nauruan people and, in particular, that Australia failed to fulfill its obligations under article 76(b) of the U.N. Charter. In response, Australia characterizes the trusteeship obligations imposed by article 76 as obligations of "result" that bestowed on the Administering Authority considerable discretion as to how to achieve the result of independence. Australia argues in its

143. *Id.* at 94.

144. These were the terms in which the Nauruans were described to the Trusteeship Council by the Administration. In fact, the Nauruan Council of Chiefs, increasingly impatient with the impenetrable paternalism of the Administration, made desperate attempts to acquire greater control over the administrative policies and the finances of the island. In 1948, the Nauruans petitioned the Trusteeship Council directly and requested that a U.N. Visiting Mission come to the island to inquire into the situation. The petition was regarded as serious enough to justify a visit by the Acting Minister of External Territories to the island, who persuaded the Nauruans to withdraw the petition. *See* VIVIANI, *supra* note 17, at 94.

145. Membership on the Council was determined by popular vote. Virtually 100% of the eligible Nauruans voted in the first two elections. *See* VIVIANI, *supra* note 17, at 115.

146. Viviani remarks that, as a consequence, "the Administrator still controlled the new Council completely." *Id.* at 104.

147. *Id.* at 165.

Preliminary Objections to the Court that "there can be no doubt that the result was achieved: Nauru became independent and the people prospered."[148] The argument is highly questionable. The Nauruans ultimately prospered despite and not because of the Administration's policies. For example, they regained control over the phosphate deposits only after overcoming the Administration's attempts to retain control.[149]

Thus the Australian argument that it fulfilled its duties under the Nauruan trusteeship by permitting formal political independence and ceding control of the phosphate lands contains two underlying premises worth considering. First, the Australian response suggests that any judicial review of its actions must be based on the idea that the trust obligations provided Australia with considerable political discretion as to what means were to be used, in the particular circumstances presented by Nauru, to discharge those obligations.[150] Second, Australia's position asserts that the trusteeship obligations called for no more than ensuring that the Nauruans received independence.

Clearly, the trust obligations imposed a considerable burden on trustee powers. Nevertheless, as it is suggested in the *Namibia* case, where the policies enacted by the trustee powers were "actuated by a motive, or directed towards a purpose other than one to promote the interests of the inhabitants of the territory,"[151] the argument as to a valid exercise of discretionary authority cannot apply. Given that Australia was acting with, most charitably put, divided loyalties, the Australian defense that it was acting within the discretion granted it under the trusteeship seems unfounded.

The second premise of the Australian defense suggests that the eventual achievement of formal political independence by Nauru discharged all trustee obligations. This position's emphasis on formal independence suggests that, once independent, a former trusteeship territory cannot invoke the principles of self-determination to make the trustee power accountable for its economic, political, and social policies, regardless of the extent to which these policies may have impaired the newly emergent state from participating effectively in the international community.

International norms and practice indicate that formal political independence is an essential element of self-determination.[152] International organizations have invoked the right of self-determination primarily on those occasions when colonial powers deny subject peoples their political rights and impede the pace of political independence.[153] Once formal independence is achieved, these watchdog international bodies seem far less concerned with the issue of providing the newly independent state with a mechanism to seek remedies for any damage and prejudice it suffered as a result of the the policies pursued by the ousted colonial power.[154]

While there is ample evidence to suggest that formal independence is central to the concept of self-determination, this in itself does not establish that the granting of formal independence is all that the principle demands. Article 1(2) of the International Covenant on Civil and Political Rights presents self-determination as a broad concept, imposing on both trustees and colonial powers broad obligations related to political, economic, and cultural development.[155]

Commentators on the doctrine of self-determination, while acknowledging that its scope is yet to be fully and precisely defined, nevertheless suggest that the concept of self-determination has several different components.[156] U.O. Umozurike argues that the doctrine of self-determination includes the right to government by the will of the people, the free pursuit of economic, social, and cultural development, the enjoyment of fundamental human rights and equal treatment, and the absence of discrimination.[157] A second authority, W. Ofuatey-Kodjoe, after his careful study of state practice and the practice of international organizations, includes within the scope of the right of self-determination "the liberty to take steps to achieve full self-government without hindrance."[158] Impeding such a progress will therefore give rise to a violation of international law.

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148. Australia Memorial, *supra* note 46, at 96.

149. WILLIAMS & MACDONALD, *supra* note 17, at 481.

150. Australia accepts that the trust obligations were legal in character but argues that "the obligations involve the exercise of a political as well as a legal judgment." Australia Memorial, *supra* note 46, at 96.

151. *See* Namibia Case, *supra* note 54, 1971 I.C.J. at 56.

152. *U.N. Declaration on Granting Independence to Colonial Countries and Peoples*, *supra* note 207, at 66, art. 3. This emphasis on formal political independence pervades the Declaration; the preamble "[s]olemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations." *Id.* at pmbl.

153. The U.N. criticism of South Africa for its activity in Namibia prior to its independence provides an example of such action. *See* Namibia Case, *supra* note 69; U.O. UMOZURIKE, SELF-DETERMINATION INTERNATIONAL LAW 112–37 (1972).

154. With respect to Namibia, the international community has attempted to ensure that Namibia's rights of actions against South Africa will be preserved. *See* discussion of permanent sovereignty over natural resources doctrine *infra* part VI.

155. Trusteeship obligations, as embodied by article 76 of the U.N. Charter which is particularly addressed by Australia, are far more detailed and extensive. As such, they cannot be readily subsumed into the simple act of granting independence without doing violence to that article. *See* Hugh Thirlway, *The Law and Procedure of the International Court of Justice: 1960–1989*, 1991 BRIT. Y.B. INT'L L. 1, 21–33 (discussing treaty interpretation and the principle of "natural and ordinary meaning").

156. U.O. UMOZURIKE, SELF DETERMINATION IN INTERNATIONAL LAW 190 (1972).

157. *Id.* at 192.

158. W. OFUATEY-KODJOE, THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW 165 (1977).

The far more detailed terms of the documents that defined the U.N. trusteeship system, and the relationship between trustee and subject peoples, strongly suggest that it would be difficult to subsume these many obligations into the mere act of granting political independence without doing considerable violence to the spirit of the trusteeship system. Such a myopic focus on independence alone is completely contrary to the purposes of the mandate and trusteeship systems. If independence was all that mattered, the Administration, presumably, could have granted the Nauruans independence in 1949 and thereby discharged all their obligations.[159] The whole rationale of the system—and this is made explicit in the terms of the mandate system itself—was the development of independent communities so that they could "stand by themselves under the strenuous conditions of the modern world."[160] This overarching purpose—the uplifting of the Nauruan people—would be a primary consideration before the ICJ in its interpretation of the specific legal obligations of Australia.[161] Seen in these terms, any Administration policy that impeded such a process would be in violation of international law.[162]

If the principle of self-determination simply requires the formal granting of independence, then abuses suffered by a dependent people will cease to possess any legal significance at the precise point in time when the people become independent sovereigns and acquire the capacity to make claims in international law. International law would continue to maintain a formal notion of the "sovereign equality of states," even while appearing to endorse a process by which the enduring effects of maladministration establish substantive inequalities between states.

B. Permanent Sovereignty Over Natural Resources (PSNR)

1. Overview of PSNR Doctrine

The seizure and exploitation of natural resources found in colonial territories were an integral part of the colonial project.[163] More often than not, colonizers obtained concessions through direct coercion or by "agreements" that were largely incomprehensible to the natives who were the ostensible signatories to them.[164]

As Western colonialism collapsed in the post-1945 era, one of the most immediate tasks confronting newly independent countries was that of regaining control over their natural resources. Many developing countries resorted to outright expropriation of foreign property interests in order to accomplish this goal. In the international legal arena, a loose coalition of newly independent nations spearheaded the passage of a series of General Assembly resolutions that formulated the doctrine of permanent sovereignty over natural resources.[165]

The link between natural resources and sovereignty is outlined in the legal instruments that serve as the foundation of PSNR doctrine. In 1962, the U.N. General Assembly passed the most significant statement on PSNR, Resolution 1803, which declares: "The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and the well-being of the people concerned."[166] Likewise, article 1(2) of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights describe the right of a people to control its natural resources.

The language of the documents that describe the doctrine of PSNR is often general and has led to many interpretive problems. For example, the content of the right and the meaning of the term "peoples" were left unexplained. If "peoples" refers to the peoples under colonial rule, do these peoples possess a latent sovereignty with an accom-

159. Given the lack of political and educational advancement, there is an argument to be made that the Nauruans would have been better off at least to the extent of having control over the phosphates at an earlier stage.

160. LEAGUE OF NATIONS COVENANT art. 22(1).

161. The Vienna Convention on Treaties provides that a treaty is to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose." Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31, para. 1, 1155 U.N.T.S. 331.

162. This also makes unclear the validity of the Administration's apparent view that satisfactory implementation of the principle of self-determination for the Nauruans consisted of persuading the Nauruans to resettle in Australia as Australians while the island was mined out. *See* WEERAMANTRY, *supra* note 1, at 297–302.

163. *See* Bengt Broms, *Natural Resources, Sovereignty Over*, *in* 10 ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW 306 (Rudolf Bernhardt ed., 1981) (observing that gaining control over natural resources was a significant motive of colonizers).

164. The experiences of the Nauruans and their neighbours, the Ocean Islanders illustrate this theme. *See* Tito v. Waddell & Others (No. 2), 3 ALL ER 129, 149 (1977).

165. The doctrine of PSNR became an important element of the developing world's demand for a so-called New International Economic Order. *See, e.g.*, Permanent Sovereignty Over Natural Resources, G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962); Charter of Economic Rights and Duties of States, G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. 30, U.N.Doc. A/9030, at 50 (1974); Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, U.N. GAOR, 6th Spec. Sess., Supp 1, U.N. Doc. A/9559 (1974). For accounts of the doctrine and the controversies it has generated see Subrata Roy Chowdhury, *Permanent Sovereignty Over Natural Resources in* INTERNATIONAL LAW AND DEVELOPMENT 59–85 (Paul de Waart et al., eds., 1988); F.V. GARCIA-AMADOR, THE EMERGING INTERNATIONAL LAW OF DEVELOPMENT 132–40 (1990); Ian Brownlie, *Legal Status of Natural Resources in International Law (Some Aspects)*, 162 R.C.A.D.I. 245 (1979); PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES IN INTERNATIONAL LAW AND PRACTICE (Kamal Hossain & Subrata Roy Chowdhury eds., 1984)

166. G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962). G.A. Resolution 1803 is of particular importance as it has been generally accepted as part of international law, unlike many other PSNR declarations.

panying right to their natural resources? If so, what obligations, if any, are imposed on colonial powers by this right?

Despite the uncertainty of PSNR doctrine, it became a focal point for the intense debate over the legality of the wave of nationalizations that accompanied decolonization. In particular, PSNR framed the dispute between newly independent nations set on the course of expropriation and the objects of expropriation policies—the foreign enterprises that claimed entitlement to continued rights to natural resources acquired during the colonial period.[167]

Drawing upon general principles of international law and the doctrine of PSNR, the developing countries marshalled several arguments in support of their position. As a starting point, they argued that the natural resources had always belonged to the people of the territory and that this ownership continued through the colonial episode. Furthermore, any concession granted by the colonial power with respect to resources of the colony was subject to review by the newly independent people upon independence. This principle is reflected in the language of a U.N. report issued during the heyday of PSNR doctrinal ferment.[168]

The developed world responded by arguing that such nationalizations incurred state responsibility by violating the doctrine of acquired rights, which mandates that a new state must respect the obligations undertaken by a predecessor state.[169] Accordingly, it followed that newly independent countries were legally bound to honor the concessionary rights to their natural resources that private enterprises had acquired prior to independence.[170] The former colonial powers did not dispute the right of a sovereign to nationalize property *per se*.[171] Rather, they argued that nationalization could take place provided a number of conditions were met, the most significant being payment of compensation according to internationally determined standards.[172]

The developing countries rejected these views with a range of arguments. In its most radical formulation, the developing block argued that all international law, including doctrines of acquired rights, were part of an international law that they had played no role in formulating.[173] Given the essential tenet of international law that sovereigns can be bound only by laws to which they have consented, the developing countries asserted that they were not bound by rules that they rejected upon independence. A less sweeping response to the demand of former colonial enterprises for compensation attempted to limit the scope of the doctrine of acquired rights. Even if the doctrine of acquired rights was accepted as binding law, it applied only to rights that were "properly vested, *bona fide* acquired and duly evidenced."[174] Where rights were acquired as a result of duress or fraud, presumably, these rights would not be protected by the doctrine.[175] Furthermore, the issue of compensation had to be decided by taking into account and setting off the profits that had been made by the enterprise prior to nationalization.[176]

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167. For an account of this debate that combines legal analysis and historical case studies, see HENRY J. STEINER & DETLEV F. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 479–562 (3d ed. 1986).

168. Mohammed Bedjaoui, *First Report on Succession of States in Respect of Rights and Duties Resulting From Sources Other than Treaties*, UN Doc. A/CN.4/204, in [1968] 2 Y.B. INT'L L. COMM'N 115, UN Doc. A/CN.4/SER.A./1968/Add.1.

169. This concern is evident in the debates surrounding the drafting of the G.A. Res. 1803, *supra* note 166. The Netherlands, for instance, argued that "as a general rule, *old* investments should not be jeopardised by new laws and should be protected in accordance with the generally recognised principle of international law of respect for legally acquired rights." *See* Karol Gess, *Permanent Sovereignty Over Natural Resources*, 13 INT'L & COMP. L.Q. 398, 442–43 (1964).

170. The techniques used by colonial powers to safeguard their concessionary rights included the incorporation of provisions protecting fundamental rights and freedoms in the constitutions of the territories that were to become independent. *See* OKON UDOKANG, SUCCESSION OF NEW STATES TO INTERNATIONAL TREATIES 462–63 (1972).

171. The proposition that states may exercise their sovereign power by nationalizing enterprises dealing with natural resources has been clearly established; however, uncertainties exist as to how international law qualifies the exercise of such power. *See, e.g.*, Francesco Francioni, *Compensation for Nationalisation and Foreign Property: The Borderland Between Law and Equity*, 24 INT'L & COMP. L. Q. 255, 260–61 (1975); DANIEL P. O'CONNELL, THE LAW OF STATE SUCCESSION 101–02 (1956).

172. Both the United States and the United Kingdom successfully fought for the inclusion of a reference to "international standards" in the crucial 1962 resolution that states that the "owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law." G.A. Res. 1803, *supra* note 166, at art. 4. For the debates surrounding the drafting of this resolution, see generally Gess, *supra* note 169; Stephen M. Schwebel, *The Story of the U.N's Declaration on Permanent Sovereignty Over Natural Resources*, 49 A.B.A.J. 463 (1963).

173. *See generally*, S. Prakash Sinha, *Perspective of the Newly Independent States on the Binding Quality of International Law*, 14 INT. & COMP. L.Q. 121 (1965); R.P. Anand, *The Role of the "New" Asian-African Countries in the Present International Legal Order*, 56 AM. J. INT'L LAW 383 (1962).

174. 1 DANIEL P. O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW 247 (1967).

175. It is difficult to find any instance of a concession being set aside on these grounds. *See* LUNG-FONG CHEN, STATE SUCCESSION RELATING TO UNEQUAL TREATIES 78–89 (1974). In the British colonies, attempts by colonized peoples to question the legality of concessions acquired subsequent to cession or conquest during the colonial period were defeated by the simple claim that actions undertaken by the British authorities—and other entities such as the East India Company in whom sovereignty was vested—were "acts of state," and thus beyond the scrutiny of municipal courts. It would seem that while it was possible to vest sovereignty and therefore immunity in a trading company, the colonized lacked the sovereignty and therefore the international personality to bring any sort of claim in the international sphere. *See* [1963] 2 Y.B. INT'L L. COMM'N 117 UN Doc. A/CN.4/SER.A/1963/Add.1. Analogous reasoning was used to deny the Banaban claim. *See supra* note 91.

176. Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 1978 R.C.A.D.I. 300.

2. PSNR Doctrine as a Legal Cause of Action

One barrier to the employment of PSNR doctrine as a legal cause of action is the lack of agreement between the developed nations and developing nations as to its parameters. The developed world, by stressing the conditional nature of the sovereignty that was won by the developing countries, presented those countries with a stark paradox. They could now participate in the international system as sovereign states and enjoy all the benefits that accompanied such participation. But this participation also implied an acceptance of existing rules of international law—including precisely those rules that prevented an inquiry into the history of colonial exploitation and have blocked attempts by the developing nations to negate the effects of that exploitation.

In response, the developing countries have staked their position on one of the central propositions of international law: sovereigns are bound only by the principles to which they consent. As sovereign powers, they claim not to be bound by the preexisting doctrines that the former colonial powers have sought to foist upon them as a condition of discussing compensation.

Ironically, however, the developed world has been able to have it both ways on this issue. The doctrine of PSNR, formulated by the developing world, was in large part successfully resisted by the developed world precisely on the basis that developed countries had not "consented" to the formulation of the principles being urged on the international community by the passage of General Assembly resolutions. The effectiveness of developed country sovereign resistance to emerging international law has been recognized by international tribunals.[177] The developing countries, however, are taken to have consented to the preexisting rules of law simply by becoming sovereign—this despite the explicit repudiation by those countries of the rules in question. Thus "consent" has taken on completely different meanings for the developed and developing worlds.

If Nauru relies purely on the doctrine of PSNR, it will argue that it was vested with certain rights in its resources even while it possessed only the status of a "people." This vesting of rights in a "people" is explicitly provided for in General Assembly Resolution 1803, which describes "the right of peoples and nations to permanent sovereignty over their natural wealth." While the wording is ambiguous,[178] it

177. *See, e.g.*, Texaco Overseas Petroleum Company et al. v. Libyan Arab Republic, 53 I.L.R. 389 (1978), *reprinted in* 17 I.L.M. 1 (1978). If the new norms have not become international law, then presumably it is the old rules that continue to prevail.

178. For example, the initial distinction between "peoples and nations" suggests that both dependent peoples and existing states (nations) possess the right; however, the article concludes with the term "people of the State concerned," which may suggest that the "people" mentioned are those of an existing "State."

should provide Nauru with sufficient grounds to argue that dependent "peoples" such as the Nauruans had a right to sovereignty over their resources.

Such a line of argument challenges several current interpretations of the doctrine. For example, in his authoritative study on the drafting of the resolution, Karol Gess rejects the notion that a colonial people necessarily possess sovereignty.[179] Gess argues that it is difficult to justify the idea of colonial people possessing sovereignty over their resources even while under colonial rule since the "peoples" referred to in the General Assembly resolution are peoples in "colonial administrative units which came into being between the middle and end of the nineteenth century."[180] These units, Gess argues, hardly correspond with the pre-colonial units,[181] while PSNR doctrine applies only to units where there is a continuity between the pre-colonial and colonial unit. Consequently, the doctrine does not protect the right of these dependent peoples inhabiting the unit that came into being only because of colonialism.[182]

3. Nauru's Claim under PSNR

Nauru's claim in this arena centers on the question of what authority the three partner governments acted under in appropriating the island's wealth. Australia has justified its position with respect to the phosphates in a number of ways. The Australian government has consistently argued that the BPC validly derived its rights to the phosphates from the British Phosphate Company, which in turn purchased these rights from the Jaluit Gesselschaft. Australia has also taken the position that the rights so derived were protected under article 80 of the U.N. Charter, which seems to protect acquired rights.[183] Australia intended to invoke this provision in the United Nations to protect the NIA by arguing that the rights exercised with respect to the phosphates and provided for by the NIA were not subject to the subsequent terms of the mandate and trusteeship systems.[184]

179. Gess, *supra* note 169.

180. *Id.* at 447.

181. *Id.*

182. In other words, it seems, former colonies possess no legally congnizable existence except that provided by an international law that permitted conquest and dispossesion. Profound implications follow from such an argument, but these cannot be explored here. Basically, Gess's position questions the validity of Nauru's claim and, furthermore, illustrates aspects of the range of argumentative strategies, based on sovereignty doctrine, which suppress the colonial past.

183. U.N. CHARTER art. 80(1).

184. MACDONALD, *supra* note 17, at 25–27. The British, however, believed the argument untenable.

From a Nauruan perspective, this argument is suspect for a number of reasons. Preexisting private rights over mandate and trust territories had to be respected by the administering power.[185] Nevertheless, this principle cannot be taken to endorse a situation in which the administering authority nationalizes the private concession in question and then operates it for its own benefit. Such an action would be completely contrary to the basic tenet that a fiduciary cannot act in such a way as to benefit itself from the property of the trust.

Arguably, this is precisely what occurred on Nauru: the partner governments in effect nationalized the Nauruan phosphate concession of the British Phosphate Company in 1920.[186] Given that the partner governments derived their powers from the mandate, they were required to exercise them in a manner consistent with the terms and requirements of the mandate. In addition, the partner governments did not suffer any financial loss in the nationalization process because the resources of Nauru paid for the transaction by which the BPC acquired rights to mine the phosphates.[187] While the nationalization of the industry was valid and arguably required by the mandate, the subsequent failure of the partner governments to run the industry for the benefit of the natives coupled with their policy of appropriating industry profits for themselves constituted a violation of the terms of the mandate.[188]

It has been further suggested by Weeramantry that the purchase of the concession by the BPC, even if valid, did no more than transfer a *right to mine* for the phosphate.[189] This was the only right that the Jaluit Gesselschaft possessed, and the only right that could, therefore, be transferred to its successors in title. No alternative basis for title has been suggested by Australia.[190] Consequently, the title to the phosphates, as opposed to the right to extract them, must have always

185. On the question of the continuity of private concession over mandated territories and the power of the Administering Authority to nationalize private interests, see Mavrommatis Palestine Concessions (Greece v. U.K.), 1924 PCIJ, (ser. A) No.2; 1925 PCIJ, (ser. A), No.5.

186. WEERAMANTRY, *supra* note 1, at 382. In establishing this state monopoly, the mandatory would have been bound by the terms under which the mandate was to be exercised.

187. The sum of 3.5 million pounds was paid by the partner governments for the purchase. This was regarded as "an advance to the Commissioners who were expected to earn enough from the business to repay the principal with interest over the next fifty years." WILLIAMS & MACDONALD, *supra* note 17, at 141.

188. In considering the issue of how the purchase of the concession is to be characterized, the Court will be guided by the principle stated by Judge Shahabuddeen that "although form is not unimportant, international law places emphasis on substance rather than on form." *See* Preliminary Objections, Judgment, *supra* note 1, at 2778 (J. Shahabuddeen, separate judgment).

189. WEERAMANTRY, *supra* note 1, at 194.

190. An argument could be made that title to the phosphates themselves were acquired by conquest. However, no such claim has been made by Australia.

resided with the Nauruans.[191] As such, royalties should have been commensurate with the value of the phosphates, and not the minimal payments that were actually made, which were characterized even by Australia as gratuitous. Also, if the mining rights were derived from the German concession, so too were the corresponding obligations under German law to rehabilitate the lands damaged in the course of mining or to provide appropriate compensation.[192]

Apart from these considerations that arise from the legal regime specific to Nauru, the Nauruan PSNR argument receives considerable support from a variety of other sources. First, there is the problem of Gess's convoluted construction of General Assembly Resolution 1803. Gess's interpretation of the term "people" in the resolution is a manifestly artificial way of avoiding the "natural and ordinary" meaning of the term as referring to colonial peoples.[193]

Similarly, 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"[194] has a particular application to Nauru given its overwhelming dependence on phosphates as a primary resource. Furthermore, the example of Nauru was explicitly considered in the drafting of the provision.[195] And in its resolution dealing with Nauru in 1966, the General Assembly reaffirmed the right of the Nauruans by "[r]ecognising that the phosphate deposits on the island of Nauru belong to the Nauruan people."[196] Finally, the notion that the resources of a mandated territory belong to its people, rather than its administering authority is reinforced by the international community's condemnation of the South African expropriation of Namibian uranium.[197]

At a minimum, the consideration of a Nauruan claim for damages based upon PSNR principles will provide the ICJ with an opportunity

191. This principle is understood in German law, Nauruan cutomary law, international law, and the common law of Australia. *See* Mabo and Others v. State of Queensland, 107 A.L.R. 1 (1992) (Austl).

192. WEERAMANTRY, *supra* note 1, at 188–89.

193. *See* Hugh Thirlway, *The Law and Procedure of the International Court of Justice: 1960–1989*, 1991 BRIT. Y.B. INT'L L. 1, 21–33 (on techniques of interpretation)

194. ICCPR, art. 1(2)

195. The delegate for El Salvador cited the example of Nauru in response to the British delegate's statement that he could not conceive of a case of a people being deprived of their own means of subsistence. *See* U.N. GAOR 3d Comm., 674th mtg., UN Doc. A/C.3/SR/674, at 248. Nauru was likewise mentioned in deliberations on permanent sovereignty over natural resources. *See* U.N. GAOR 2d Comm., 794th mtg., UN Doc. A/C.2/SR/794, at 294.

196. G.A. Res. 2226 (XXI).

197. Question of Namibian Uranium, G.A. Res. 35/227, U.N. GAOR, 35th Sess., 111th plen. mtg. at 229, U.N. Doc. A/RES/35/227 (1981). Like Nauru, Namibia was a C class mandate. *See also* Caleb M. Pilgrim, *Some Legal Aspects of Trade in the Natural Resources of Namibia*, 1991 BRIT. Y.B. INT'L L. 249.

to clarify the parameters and the legal import of this unsettled and contentious body of doctrine.

C. Environmental Damage

1. International Environmental Harm

The essence of Nauru's claim against Australia is the prejudice it continues to suffer as a consequence of Australia's failure to rehabilitate the lands damaged by phosphate mining. In light of recent developments in the area of international environmental law, Nauru is in a position to forward a novel claim of transnational environmental damage that transcends traditional doctrines of recovery based on injury to private property interests.

The development of modern international environmental law is usually associated with the Stockholm Declaration of 1972 and its stated principles concerning liability for environmental harm.[198] These principles have been affirmed and elaborated by the recent Rio Conference on the Environment.[199] Two of the central principles emerging from the Stockholm Conference are: man's fundamental right to "an environment of quality"; and the responsibility of states to ensure that "activities within their jurisdiction or control do not cause damage to the environment of other States."[200]

Apart from the norms outlined in these instruments, it has been asserted that the traditional doctrine of state responsibilty provides protection for the environment. These arguments rely on the broad principle that a "state is bound to prevent such use of its territory, . . . [which] is unduly injurious to the inhabitants of the neighbouring state."[201] This principle was applied to the question of environmental damage in the *Trail Smelter Case*,[202] an arbitration between the United States and Canada concerning damage caused to the state of Washington by the activities of a corporation based in Trail, British Columbia.

198. *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14 (1972), *reprinted in* 11 I.L.M. 1416 (1972). *See generally*, Louis B. Sohn, *The Stockholm Declaration on the Human Environment*, 14 HARV. INT'L L.J. 423 (1973).

199. *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/5 (1992), *reprinted in* 31 I.L.M. 874 (1992)

200. *Declaration of the United Nations Conference on the Human Environment*, *supra* note 198. This Principle is the basis of Principle 2 of the Rio Declaration.

201. OPPENHEIM'S INTERNATIONAL LAW 291 (Hersh Lauterpacht ed., 8th ed., 1955). On state responsibility see IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 431–35 (3d ed. 1979). On state responsibility for international environmental damage see generally INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM (Francesco Francioni & Tullio Scovazzi eds., 1991); PATRICIA W. BIRNIE & ALAN E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 138–60 (1992); Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259 (1992).

202. The Trail Smelter Case (U.S. v. Can.), 3 R.I.A.A. 1911 (1941).

There, the tribunal ruled that a state "owes at all times a duty to protect other States against injurious acts by individuals from within their jurisdiction."[203] However, for relief to be granted, the case had to be one of "serious consequence"[204] and the injury established by clear and convincing evidence.[205]

While a broad principle prohibiting one state from causing harm to another has been pronounced, it is unclear as to how this doctrine actually applies to environmental issues.[206] For instance, considerable difficulties exist in determining what standards should be imposed on countries with regard to air and water pollution caused by industrial activities that are completely legal under international law. These difficulties are reflected by the extent to which responsibility is qualified in the Restatement of Foreign Relations Law of the United States:

> (1) A state is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control
>
> (a) conform to generally accepted international rules and standards for the prevention, reduction, and control of injury to the environment of another state or of areas beyond the limits of national jurisdiction; and
>
> (b) are conducted so as not to cause significant injury to the environment of another state or of areas beyond the limits of national jurisdiction.[207]

Given that the "international standard" mentioned in paragraph 1(a) is by no means clearly established, the limitation this paragraph seeks to impose seems largely notional.[208] In any event, the responsibility is heavily qualified by language such as "to the extent practicable."

A number of complex and unresolved issues connected with causation, harm, and the status of lawful activities that cause transborder damage surround the question of responsibility for international en-

203. *Id.*

204. *Id.*

205. *Id.*

206. As many commentators point out, the issues of causation and responsibility were never actively contested in the case as Canada had already accepted responsibility for the damage. *See, e.g.*, Alexandre Kiss, *Present Limit to the Enforcement of State Responsibility for Environmental Damage*, *in* INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM, *supra* note 201, at 29.

207. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 601 (1980).

208. On the absence of any clear international standard, see Sanford E. Gaines, *International Principles for Transnational Environmental Liability: Can Developments in Municipal Law Help Break the Impasse*, 30 HARV INT'L L.J. 311, 313–14 (1989). The fact that states affected by the nuclear accident at Chernobyl did not accuse the Soviet Union of violating international law also suggests the lack of such standards. *See* PHILIPPE SANDS, CHERNOBYL: LAW AND COMMUNICATION (1988).

vironmental damage.[209] On an even more extreme level, some question whether states really accept responsibility for environmental damage and whether international law imposes an obligation on states to pay compensation for damage they cause.[210] Because of the uncertainties about the applicability to the environment of general principles of international law, many states have turned to treaties to deal with specific types of pollution and environmental harm.[211]

The claim that international law does not require the payment of damages for environmental harm seems particularly anomalous when a clear nexus exists between the harm and a resulting infringement of state sovereignty. This point is best illustrated by Australia's petition before the ICJ in the *Nuclear Tests Case*.[212] Australia alleged that its sovereignty was adversely affected by the radiocative fall-out from French nuclear tests in the Pacific. Australia based its position on general principles of international law relating to the infringement of its sovereignty.[213]

From the arguments presented in the *Nuclear Tests Case*, it is possible to visualize harmful environmental conduct as exhibiting a number of broader dimensions. These dimensions include the infringement of a state's ability to utilize its wealth in a manner determined by its own political processes; a limitation of its administrative, political, and economic policy choices available (as an affected state must devise a means of dealing with the environmental damage); and adverse effects on the health and future well-being of a state's citizenry, animal, and plant life.

2. Nauru's Claim for Environmental Harm

The social, economic, and political well-being of the Nauruan people, which must be advanced by the trustee powers under the terms of the U.N. Charter and the Nauru Trusteeship Agreement, are intimately linked with the condition of the environment. Furthermore, there can be scarcely any doubt as to the nature of the harm suffered and its many ramifications for the cultural and economic life of the Nauruans.

Approximately one-third of Nauru's surface was mined out during the time in question. Because phosphate mining is a particularly destructive process, the mined land becomes an uninhabitable wilderness of coral-limestone pinnacles.[214] Pacific ecosystems are particularly fragile and the disruption of the Nauruan system has led to the development of new microclimates with increased sunlight and lower humidity. Patterns of plant life have been adversely affected, and certain plant species are now extinct.[215]

Considered within the framework of responsibility for environmental damage outlined above, the issues of harm and of causation pose no difficulties in the Nauru Case. The precise nature of the state's obligation, suggested in the *Trail Smelter Case*, to prohibit private parties from acting in an internationally harmful manner is far from clear, but in this case the obligation is of a primary nature, as it is the action of the respondent state, Australia, which is under direct scrutiny. As Judge Ago suggests, it is in these circumstances that the question of state responsibility for environmental harm and the issue of payment of damages for that harm presents itself in its clearest form.[216]

The foregoing analysis is based on the assumption that Nauru and Australia may be regarded as separate sovereign states, and that the obligations that Australia owed Nauru were those owed by one sovereign to another.[217] Australia, however, could possibly argue that the language of the Stockholm Declaration, which prescribes a duty not to "cause damage to the environment of other States or of areas beyond the limits of national jurisdiction"[218] provides it with a defense. Australia could claim that the mandate system gave it jurisdiction over the island to be administered as an "integral part" of Australian territory.

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209. *See, e.g.*, Julio Barboza, *Second Report on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law*, U.N. Doc. A/CN.4/402 for an account of one stage of the protracted exploration of this issue.

210. *See, e.g.*, Benedetto Conforti, *Do States Accept Responsibility for Environmental Damage?*, *in* INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM, *supra* note 201, at 179–80.

211. *See, e.g.*, *Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, reprinted in* 11 I.L.M. 262 (1973); *Vienna Convention for the Protection of the Ozone Layer, reprinted in* 26 I.L.M. 1529 (1987).

212. Application by Australia Instituting Proceedings, Nuclear Tests (Austl. v. Fr.) (1973), I.C.J. Pleadings, Nuclear Tests, Vol. I at 14.

213. Australia asserted that:

> (ii) The deposit of radio-active fall-out on the territory of Australia and its dispersion in Australia's airspace without Australia's consent:
>
> (a) violates Australian sovereignty over its territory;
>
> (b) impairs Australia's independent right to determine what acts shall take place within its territory and in particular whether Australia and its people shall be exposed to radiation from artificial sources.

Id.

214. Ian Anderson, *Can Nauru Clean Up After the Colonialists?*, NEW SCIENTIST, July 18, 1992, at 12–13.

215. *Id. See also* WEERAMANTRY, *supra* note 1, at 31.

216. Roberto Ago, *Conclusions du colloque "Responsabilite des Etats pour les dommages a l'environnement," in* INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM, *supra* note 201, at 493, 495.

217. The question of jurisdiction over territory is of great importance in issues of environmental harm. Thus, article 21 of the Stockholm Declaration, *supra* note 198, prohibits a state from causing damage "to the environment of other States or of areas beyond the limits of national jurisdiction."

218. Stockholm Declaration, *supra* note 198, art. 21.

However, the existence of a fiduciary relationship between the two countries during the period under question does not defeat Nauru's environmental claim. Rather, it may be argued that the duty imposed upon Australia is even more onerous in this case—had Nauru been a sovereign independent state it could have asserted itself internationally in order to prevent further environmental damage. However, the international personality necessary to make such an claim was lacking,[219] and, indeed, the partner governments' task was to develop that very personality. As trustee, Australia was accordingly under a heightened duty to ensure the well-being of the Nauruans.

Australia has not responded in detail to the specific issue of liability for environmental damage.[220] Australia's strongest argument against environmental liability, perhaps, is the argument that the mining activities that caused the damage simply were not illegal at the time they occurred. If the underlying activity was not illegal, the resulting environmental damage itself was was not illegal. To the extent that a case can be made against Australia it is based, then, on Australia's failure to remedy the damage caused by the mining and any liability arising from that mining.

Such an argument takes the question of international environmental harm back to its first principles. Is it the harm, or the failure to remedy its effects which gives rise to legal responsibility? Indeed, is there even an obligation under general principles of state responsibility to remedy effects of environmental damage? No answers are readily available to these fundamental questions; it is for this reason that consideration by the ICJ of the Nauru Case could be of enduring significance.[221]

Despite the demands for rehabilitation set forth in 1965 by General Assembly Resolution 2111, and despite its own conclusion that rehabilitation was unfeasible, Australia continued full-scale mining operations, extracting 1.5 million tons of phosphate in 1966.[222] Although this self-contradictory behavior perhaps does not in itself give

219. The international community sought to protect Nauruan rights by unsuccessfully requesting that the lands be rehabilitated by Australia. *See* G.A. Res. 2111(XX).

220. In the first phase of the proceedings, Australia argued that much of the mining has been conducted by Nauru itself, subsequent to becoming independent; and that Nauru's failure to commence rehabilitation suggested bad faith. Australia Memorial, *supra* note 46, at 162–63. This argument was rejected by the Court.

221. The Convention on the Regulation of Antarctic Mineral Resource Activities, which deals specifically with the question of mining and environmental damage, adopts a theory by which liability is incurred, not by the causing of the damage per se, but the failure to remedy its effects. Art. 8 places strict liability on a party for "damage to the Antarctic environment or dependent or associated eco-systems arising from its Antarctic mineral resource activities, including payment in the event that there has been no restoration to the *status quo ante*." *Convention on the Regulation of Antartic Mineral Resource Activities, reprinted in* 27 I.L.M. 868, 872 (1988).

222. VIVIANI, *supra* note 17, at 187. Resettlement talks had also broken down by 1965.

rise to responsibility,[223] it does illuminate possible grounds for Nauru's claim for aggravated damages.

Whatever the uncertainties regarding the status of environmental responsibility and its application to the Nauru Case, it would seem that the obligations of a trustee to promote the social, economic, and cultural well-being of native peoples previously outlined in article 76(b) of the U.N. Charter encompass environmental damage. In this light, the resolutions of the General Assembly, which called upon Australia to rehabilitate the island, did so simply on the basis that the restoration was necessary for the continuing existence of the Nauruan people. And for the Trusteeship Council, self-determination implied the emergence of a viable, functioning community that could sustain itself and flourish on the island in a manner that it determined for itself. This same concern is evident even at the time of the Nauru Mandate. Even the Permanent Mandates Commission, which could not properly envisage the extent of the damage caused by the mining, inquired about its effects and the future of the Nauruans.[224] Simply put, the issue involves the physical core of sovereignty itself—territory. The Nauruans cannot survive as a people without the rehabilitation of their island.

D. Nauru and Indigenous Rights

1. The Nauruans as an Indigenous People

The relationship between the rights of indigenous peoples and environmental protection is becoming a subject of increasing international concern, as demonstrated by the initiatives taken regarding these issues at the Rio Conference on the Environment.[225] Although considerable literature has been generated on the subject of indigenous rights,[226] no binding principles of international law that deal specifi-

223. Interesting arguments may be made that Australia, *in its own terms* failed to observe standards of due diligence; this failure of due care transformed an otherwise legal activity into an illegal activity. On the issue of due diligence, *see* BIRNIE & BOYLE, *supra* note 201, at 144.

224. The PMC inquired about matters such as the effect on mining for the availability of food for future generations, the space available for a larger population and the uses to which the areas being mined were being put. *See* WEERAMANTRY, *supra* note 1, at 95–98.

225. *See, e.g., Rio Declaration on the Environment and Development, supra* note 199.

226. *See, e.g.*, Jose R. Martinez Cobo, *Study on the Problem of Discrimination Against Indigenous Populations*, UN Doc. E/CN.4/Sub.2/1986/7/Add. 1–4 (1986); Bernadette Kelly Roy & Gudmundur Alfredsson, *Indigenous Rights: the Literature Explosion*, 13 TRANSNATIONAL PERSPECTIVES 19 (1987); Russell L. Barsh, Note, *Indigenous Peoples: An Emerging Object of International Law*, 80 AM. J. INT'L L. 369 (1986); THE RIGHTS OF PEOPLES (James Crawford ed., 1988); William A. Shutkin, Note, *International Human Rights Law and the Earth: the Protection of Indigenous Peoples and the Environment*, 31 VA. J. INT'L L. 479 (1991). On the relationship between the environment and human rights in general see W. PAUL GORMLEY, HUMAN RIGHTS AND THE ENVIRONMENT: THE NEED FOR INTERNATIONAL COOPERATION (1976); Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103 (1991).

cally with the relationship between the environment and indigenous rights have yet emerged.[227] Therefore, the only remedies indigenous peoples can rely upon in existing international law are those that might be fashioned from international human rights provisions such as article 27 of the International Covenant on Civil and Political Rights, which deals with the rights of minorities and provides limited protection for the cultures of those minorities.[228]

One of the defining qualities of indigenous peoples, as they have been generally characterized, is their unique relationship with their environment.[229] The land is regarded as an essential, integral part of the physical, spiritual, cultural, and religious existence of the community, which has corresponding responsibilities for its preservation.[230]

The early lifestyle of the Nauruans compared with that of many other indigenous peoples. There was an intimacy between Nauruans and their land that provided them not only with the necessities of life, but also played an integral role in their communal and spiritual existence. Rituals developed around many of the island activities such as harvesting,[231] and Nauruans attributed spiritual significance to the trees, which became the subject of Nauruan legends.[232] One astute observer, Paul Hambruch, pointed out that the relationship was an essential feature of Nauruan customary law, which adjusted to continuing developments and was precise enough to be incorporated into the German civil code applied on the island. In 1914 Hambruch observed that:

> These notions of law cover a wide spectrum: land, reef, ocean, tree, animal, house, tools, family, nation, etc. With the highly developed people of Nauru these ideas have taken on a definite legal character and many were to be found to be so well applicable, that one bases decisions in important legal matters on this law.[233]

227. For recent international conventions that deal with the protection of indigenous rights see *International Labor Organisation Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, (1989), reprinted in* 28 I.L.M. 382 (1989); Lee Swepston, *A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989*, 15 OKLA. CITY U. L. REV. 677 (1990).

228. This provision protects the rights of "persons belonging to minorities" to "enjoy their own culture." ICCPR art. 27. *See* Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 YALE J.INT'L L. 127 (1991).

229. *See, e.g.*, Cobo, *supra* note 226.

230. *Id.* at 28.

231. 5 COMMISSION REPORT, *supra* note 1, at 1032–33.

232. *Id.*

233. PAUL HAMBRUCH, NAURU (1914), *cited in* Nauru Memorial, *supra* note 17, at 91.

The complex systems of ownership, which encompassed not merely the land but the reef and parts of the sea, were allied with systems of sharing and succession. However, land was not treated as a commodity; Nauruan customary law attributed a sacrosanct nature to the land.[234]

With the advent of the phosphate industry, traditional Nauruan life was completely transformed. A song written probably in the early 1920s poignantly and presciently reveals the Nauruan perceptions of the changes taking place:

> By chance they discovered the heart of my home
> and gave it the name phosphate.
> If they were to ship all phosphate from my home
> there will be no place for me to go.
> Should this be the plan of the British Commission
> I shall never see my home on the hill.[235]

The destructiveness of phosphate mining was not limited to the environment. Nauruan culture has been profoundly and irreversibly affected. The advent of a market economy has led to the destruction of many Nauruan traditions such as chants, ceremonies, games, and harvesting rituals.[236] The dietary habits of the Nauruans, for example, have been completely changed. Fish, coconuts, and fruits have been replaced by canned food. Undoubtedly, many of these changes were unrelated to the immediacies of the phosphate industry and would have been implemented by the Administration with the best of intentions and even may have been welcomed and desired by the Nauruans themselves. As early as 1935, however, an Australia anthropologist who visited the island pointed to dangers these new changes presented and concluded that the goal should be "to develop a people who will take a pride in being Nauruans and not in being imitators of Europeans."[237]

234. WEERAMANTRY, *supra* note 1, at 158. For Weeramantry's detailed analysis of Nauruan customary law in terms of anthropological evidence and various schools of jurisprudence, see generally *id.* at 154–79, where he points out that the concept of usufruct and trust were recognized parts of Nauruan customary law.

235. *My Dear Home Nauru, reprinted in* WEERAMANTRY, *supra* note 1, at 30.

236. An earlier attempt at this process is detailed by Weeramantry. The traders who first came to Nauru in the 19th century sought to make the Nauruans attracted to such goods as tobacco, which could then be used for trading purposes. The Nauruans were inconveniently self-sufficient, and dependencies had to be cultivated. Thus "smoking schools" were established on the island with pipes and tobacco initially being given to the Nauruans free of charge. Firearms, alcohol and European clothing were other items for which a trade developed. WEERAMANTRY, *supra* note 1, at 33.

237. Camilla H. Wedgwood, *Report on Research Work in Nauru Island, Central Pacific*, 7 OCEANIA 361–62 (1936), *reprinted in* Nauru Memorial, *supra* note 17, at 88.

2. The Trusteeship and Indigenous Rights

The Nauru Trusteeship Agreement states in part that in administering the territory, the Administering Authority will

> (a) take into consideration the customs and usages of the inhabitants of Nauru and respect the rights and safe-guard the interests both present and future of the indigenous inhabitants of the Territory . . . .[238]

The provision designates Nauruans as "indigenous inhabitants" and gives the doctrine of sovereignty—the latent sovereignty of the Nauruans that is protected by the trusteeship—a distinctive local character. It then follows that the Administration should not merely avoid policies that violate the latent sovereignty of Nauru, but also avoid policies that violate the sovereignty in the particular, unique form that it adopts in the Nauruan context. That unique sovereignty is defined by the specific "customs and usages of the inhabitants of Nauru."[239]

This is the first occasion on which one of the fundamental ambiguities of the mandate and trusteeship systems is given legal recognition. Under the mandate system, recognition was given to the specific culture existing in Nauru (and the other territories) only for the purpose of deciding the degree of backwardness of the territory in question and designating the applicable mandate category ("A," "B," or "C"). Under the trusteeship system, by contrast, the indigenous culture must be taken into account in order to ensure that it be better preserved. This suggests that the process envisaged under the trusteeship system is not the simple transformation of Nauruans into Europeans, but a more complex and problematic synthesis of Nauruan life and European ways.

A new and uncertain accommodation is reached between the "progressive" of international law and the "indigenous" of the Nauruans. The concept of progress, "civilization," is no longer a purely monolithic and Western-oriented process. The entire panoply of trusteeship obligations is expressed as being at least potentially affected by the customs and usages of the Nauruans, which must, in the terms of the provision, be taken "into consideration." The questions are problematic, but the explicit protection given to the customs of the Nauruans suggests that this provision enables, indeed requires, an inquiry into the way in which the *Nauruans themselves*, as opposed to some ostensibly abstract "sovereign state," understood and lived out their relationship with their environment.

238. Nauru Trusteeship Agreement, *supra* note 77, art. (5)(2)(a).
239. *Id.*

Indigenous people throughout the world are confronted with the task of adapting the vocabulary of political, economic, and cultural rights to represent their reality, and to win some legal protection for their lifestyle as a result. There are clearly persuasive arguments to be made that the preservation of their environment is connected with their right to life and their cultural identity. However, these arguments are often ineffective. One reason is that indigenous peoples, while the subject of much debate in international law, have not as yet acquired any sort of assertable international personality.[240] Furthermore, existing rights, which are couched in terms of the protection of the individual, are insufficient.[241]

In the Nauru Case, however, each of these difficulties is transcended because the applicable law recognizes the Nauruans as a collectivity and explicitly seeks to protect their cultural existence as such. It is this framework which would allow theNauruans to articulate their own histories and their own perception of themselves, not necessarily as "indigenous peoples" intent on reverting to their purer origins, but as peoples with their own culture and law who have been shaped by complex forms of cultural exchange and imposition.[242]

But given all this, how should the inquiry proceed? The inquiry is difficult, since it presupposes a clear standard against which the Administration's actions may be tested. It also raises very complex issues of the extent to which the people of Nauru accepted the changes made to their lifestyle during the period of trusteeship.[243]

One line of argument that can be presented will rely on demonstrating clear Nauruan objections to the violation of their customs and their customary law with regard, for example, to land use. The ineffectual protests made by the Nauruans against the BPC policy of

240. As Hurst Hannum observes, "it has thus far proved impossible to arrive at a commonly accepted definition of 'indigenousness.'" Hannum further notes that the lack of a definition does not necessarily preclude action on behalf of indigenous people; however, it does limit considerably the sort of recourse indigenous people have to certain remedies. HURST HANNUM, AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 88 (1989).

241. On the question of the applicability of the right to self-determination to indigenous peoples, see Curtis G. Berkey, *International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples*, 5 HARV. HUM. RTS. J. 65 (1992).

242. On the question of the complex narratives that establish the identities of indigenous peoples, see Chris Tennant, *The Rights of Indigenous Peoples in International Law*, 34 HARV. INT'L L.J. 277 (1993) (book review).

243. This in turn raises the question of the degree to which adminstrative practices created a "social reality" that resulted in simple Nauruan acquiescence—although not such acquiescence as to lead to Nauruan acceptance of assimilation. For an illuminating analysis on the issue of the reproduction of consent see Efren Rivera Ramos, *The Colonial Welfare State in* ISSUES OF SELF-DETERMINATION 115–32 (William Twining ed., 1991).

mining without restraint would constitute an example of such an objection.[244]

Alternatively, arguments could be presented to the effect that the very terms of article 5 of the Nauru Trusteeship Agreement were violated. By giving explicit protection to "native land," this provision clearly identifies the crucial significance of the relationship between land and the well-being of the Nauruans. The circumstances surrounding the Nauru Lands Ordinances, which enabled the lands to be leased out for mining without the specific consent of the Administration may provide one example of such a breach. The very terms of article 5 were violated as the "public authority" exercised its administrative and legislative powers in such a manner as to facilitate the destruction of the lands, rather than protect the land against harm. It must be noted that the Lands Ordinances were passed during the mandate period; nevertheless, it can be argued that the trustee had an obligation to change the legislation and policies on the island to conform with evolving international norms.

E. The Environment and Inter-Generational Equity

A final emerging environmental issue of relevance to the Nauru Case involves the concept of inter-generational equity.[245] The idea of rights has expanded to include the rights of future generations whose options and policies will be limited by the actions of the current generation. The current generation must therefore act in such a manner as to preserve by way of trust the inheritance of these generations. This concept is of increasing importance in contemporary debates regarding the framework of rights necessary to deal with the particular problems of environmental damage and nonrenewable resources. The moral argument, which has been elaborated most prominently by Edith Brown Weiss,[246] has been the subject of international discussion. Several international instruments and declarations have incorporated this concept.[247] However, as Weiss notes, "the translation of the expressed concern for future generations into normative obligations that relate the past to the future to protect future generations still needs to be done."[248] Again, remarkably, the Nauru Case transcends these difficulties because article 5 of the Nauru Trusteeship Agreement, by referring to the well-being of both "present and future interests" of the inhabitants, suggests that an obligation is imposed on the Administration to consider their policies not only in terms of current generations, but future generations as well.

There is arguably a sufficient basis for the ICJ to consider the Nauru Case in terms of inter-generational equity. Given the explicit invocation of future interests by both the PMC and the Trusteeship Council,[249] the Administration's policies of accelerated mining and attempting to resettle the Nauruans are especially troubling.

In its simplest terms, the obligations that arise under the concept of inter-generational equity reaffirm the notion that the mandate and trusteeship systems were devised to enable self-determination in its fullest sense: the development of a state in which future generations of inhabitants could exist and prosper. The Nauru Case raises fundamental questions as to how the rights of future generations should be defined and protected, and what remedies are appropriate if the obligation has been violated.

VI. INTERNATIONAL LAW AND THE CIVILIZING PROCESS

Quite apart from the specific legal issues, the Nauru Case may also be studied from the broader perspective of the developments that the mandate and trusteeship systems represent for the trajectory of international law. My purpose here is to sketch the jurisprudence of different eras in international law, in order to outline the manner in which the non-European world has been characterized within it, and thus the circumstances that required the formulation of new conceptual and jurisprudential structures to deal with the particular problems caused by "the other" at that time.

A. Francisco Vitoria and the Sixteenth Century

The mandate system was devised to further a mission whose origins may be detected in the origins of international law itself: that of locating and placing uncivilized societies and then proceeding to incorporate and reform them. The animating ideas of the mandate system have been admirably expressed as follows:

> Although the aborigines in question are . . . not wholly unintelligent, yet they are little short of that condition, and so are unfit

244. One law on the island, The Movement of Natives Ordinance of 1921–22, which was repealed only in 1968, imposed various restrictions on the movement of the natives. *See* WEERAMANTRY, *supra* note 1, at 111.

245. *See, e.g.*, Lothar Gündling, *Agora: What Obligation Does Our Generation Owe to the Next? An Approach to Global Environmental Responsibility*, 84 AM. J. INT'L L. 190–212 (1990).

246. EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY (1989).

247. *See, e.g.*, Stockholm Declaration, *supra* note 198, princ. 1; *The World Charter for Nature*, G.A. Res. 37/7, U.N. GAOR, 37th Sess., Supp. No. 51, at 17, U.N. Doc. A/37/51 (1982).

248. WEISS, *supra* note 246, 29–30. *See also* Shutkin, *supra* note 226, at 503–04.

249. *See supra* part III.

> to found or administer a lawful State up to the standard required by human and civil claims . . . . It might, therefore, be maintained that in their own interests the sovereigns of Spain might undertake the administration of their country, providing them with prefects and governors for their towns and might even give them new lords so long as this was clearly for their benefit. I say there would be some force in this contention; for if they were all wanting in intelligence, there is no doubt that this would not only be a permissible, but also a highly proper, course to take; nay our sovereigns would be bound to take it, just as if the natives were infants.[250]

This passage is taken from a lecture entitled "On the Indians Lately Discovered" given by Francisco de Vitoria, a sixteenth-century Spanish theologian and jurist. It is commonly regarded today as the first work of international legal scholarship.[251]

What is first noticeable is the characterization of the Indians, initially as imbeciles and then as infants.[252] This is a matter of some importance in achieving a particular narrative coherence. Being imbeciles or infants, the Indians *are characterized as belonging to the same order* as the Spaniards. Thus a double act of representation is enacted here: the Indians are domesticated *and* placed in the same system, albeit at an inferior level, as the Spanish.

This characterization must be understood in the context of Vitoria's awareness of the problem of jurisdiction. Renaissance jurists and political philosophers were preoccupied with the issue of whether the Pope had temporal jurisdiction and could therefore limit by his decrees the actions of secular rulers. This problem manifests itself in the case of the Indians in a peculiar form posed because of the issue of cultural difference.[253]

Rather than address this primal conflict of laws problem, Vitoria resolves the issue in this passage by simply representing the Spanish

250. FRANCISCO DE VITORIA, DE INDIS ET DE IVRE BELLI REFLECTIONES 161 [ON THE INDIANS LATELY DISCOVERED] (Ernest Nys ed. & J.P. Bate trans., The Carnegie Institute of Washington 1917) (1696). *See also* TZVETAN TODOROV, THE CONQUEST OF AMERICA : THE QUESTION OF THE OTHER (Richard Howard trans., 1984).

251. This is suggested by the very publishing history of the work. It is the first title in the Classics of International Law series produced by the Carnegie Foundation.

252. Vitoria also characterizes Indians as animals, objects, and heretics.

253. As Vitoria states, in refuting the idea that there exists a single emperor who is "lord of the whole world and therefore of these barbarians also":

> Now in point of human law, it is manifest that the Emperor is not lord of the world, because either this would be by the sole authority of some law, and there is none such; or, if there were, it would be void of effect insamuch as law presupposes jurisdiction. If, then, the Emperor had not jurisdiction over the world before the law, the law could not bind one who was not previously subject to it.

VITORIA, *supra* note 250, at 145.

and Indians as belonging to the same social universe. Although belonging to this universe, the Indians are wanting in its essential characteristics—art, agriculture, law, administration. Because of the lack of these features, Spanish intervention is necessary. Once this apparently overarching framework is created, Vitoria simply proceeds to enmesh the Indians in Spanish laws and customs by enunciating doctrine after doctrine, which effectively enables the Spanish to engage in trading, travelling, and prosletyzing. All of these are characterized as valid under natural law.[254] Inevitably, then, violence is located in Vitoria's system of law in the figure of the Indian whose behavior cannot but violate some aspect of "natural law." Volition and intention that give rise to legal consequences are thus attributed to the Indians. Violations justify reprisals. The process becomes self-sustaining, as each encounter between the Indians and the Spanish gives rise to violations by the Indians that give rise to reprisals by the Spanish. Thus, once a single violation occurs, just war doctrine legitimates the waging of limitless war against the Indians.[255]

B. The Nineteenth Century

By the latter half of the nineteenth century, at the height of colonial expansion, positivism became the primary legal philosophy of the era.[256] Consequently, sovereign will was understood to be the fundamental basis of rules, this rather than transcendent principles based on religion or reason.[257]

International lawyers of the period, such as John Westlake and Thomas Lawrence, largely based the whole system of international law doctrine on sovereign will.[258] Sovereignty doctrine was linked, however, by the other primary characteristic of the law of this era: the clear demarcation of the world into European and non-European sections.[259] Cultural differences became the explicit basis for legal categories. International law existed only among the civilized nations of Europe and only European states were fully sovereign. Non-European

254. *See, e.g., id.* at 149, 152.

255. This is dealt with in Vitoria's Second Lecture, On the Indians, or on the Law of War Made by the Spaniards on the Barbarians. *See id.* at 163.

256. For surveys of the 19th century, see GERRIT W. GONG, THE STANDARD OF "CIVILIZATION" IN INTERNATIONAL SOCIETY (1984); Ian Brownlie, *The Expansion of International Society: the Consequences for the Law of Nations, in* THE EXPANSION OF INTERNATIONAL SOCIETY 357–70 (Hedley Bull & Adam Watson eds., 1984).

257. *See* THOMAS LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 10–26 (1895).

258. *See* JOHN WESTLAKE, CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW (1894); THOMAS LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW (1895).

259. Hence Lawrence commences his book as follows: "International law may be defined as the rules which determine the conduct of the general body of civilized states in their dealings with one another." THOMAS LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 1 (1895).

states, however, existed outside the realm of the law and thus could not legally oppose the sovereign will of the European states.[260]

Given this scheme, the question of jurisdiction that preoccupied Vitoria became irrelevant. Rather than attempting to establish a common legal universe applicable to all societies regardless of their culture, the nineteenth-century jurists explicitly based their system on a cultural divide that was formulated as a legal divide. The non-European world became incorporated into the exclusive system of law only by virtue of its engagement with the European world.[261] This engagement, most often, took the form of conquest. The process was reinforced by the non-European world's lack of sovereignty, which translated into a lack of any legal basis with which to resist this process.

C. The Mandate System

International attitudes towards colonialism changed dramatically in the new order inaugurated after World War I. It became recognized that colonialism could result in abuse, in pillage and exploitation. Thus, the civilizing mission took on a new form. Instead of being left to the unfettered discretion of sovereign states, the mission was perfected by a new regime of international institutions. Vitoria's idea of trusteeship or wardship over the natives, ignored and dismissed for centuries, was restored to international law.[262]

The execution of this mission was made possible through the displacement and reconfiguration of sovereignty. German sovereignty over Nauru, for example, was extinguished by the Peace Treaty at Versailles when Germany renounced its sovereignty over all of its colonies.[263] Yet, the issue of where sovereignty over the mandated territory was then vested was never satisfactorily resolved: possible candidates included the League, the mandatory, and the mandated territory itself, which was now characterized as possessing "latent sovereignty."[264] Consequently, Wright claimed, the mandates were "not under the sovereignty of any state but in a status new in international law."[265]

It was, however, precisely in the midst of this uncertainty that the civilizing mission could address its new and most formidable challenge, that of *creating* sovereignty in the mandated territories.[266] This was to be achieved by the first truly international institution, the League of Nations, whose own status within the framework of traditional sovereignty doctrine was extremely problematic. The goal represented international law at its most aspirational moment. Far from being dictated to and ruled by sovereignty as exercised by states, it set about the divine task, through international institutions, of creating it.[267] Sovereign states such as Australia were harnessed, through League arrangements, to perform this task of bestowing a legal status on a territory for the purposes of preparing that territory for entry into international society.

The absence of sovereignty and the engagement of international institutions, however, created novel practical possibilities. The mandate system necessitated the adoption of a concept of the nation-state against which the developments of particular territories could be judged. In addition, however, the mandate system could realize these conceptions by using the mandatories' administrative systems. Through the various mandatories, the League could address issues aside from legal status, including population, health, education, land tenure and wages, labor matters, external trade, public revenues, order and justice, and public works and services.[268]

By collecting and analyzing information from various territories the League viewed itself as formulating for the first time a universally applicable science of colonial administration, a science that transcended the particularities of colonial administration in specific territories.[269] The civilizing mission was now implemented in its most intrusive and comprehensive form as the institutional apparatus created objects of knowledge that it proceeded to administer with increasingly specialized techniques.[270] The conquests of the nineteenth century were replaced with the census, the education systems, the systematization of land tenure, and the modification and modernization of legal systems. Civilization was no longer a vague idea haphazardly introduced in disparate ways by colonial powers within their own territories.

260. *Id.* at 58.

261. Paradoxically, treaties between European and non-European states were commonplace at the time. The international lawyers of the period could not coherently account for this, given that the non-European states were not supposed to exist in international law. *See* Gong, *supra* note 256, at 59–60.

262. In addition to the introductory chapters of virtually all works on the mandates see ALPHEUS SNOW, THE QUESTION OF ABORIGINES IN THE LAW AND PRACTICE OF NATIONS (1919).

263. Nauru Application, *supra* note 5, at 6.

264. QUINCY WRIGHT, MANDATES UNDER THE LEAGUE OF NATIONS 500–08 (1930).

265. *Id.* at vii.

266. For the types of inquiry this generated see P.E. Corbett, *What is the League of Nations?*, 1924 BRIT. Y.B. INT'L L. 119; Geoffrey Butler, *Sovereignty and the League of Nations*, 1920–22 BRIT. Y.B. INT'L L. 35.

267. *See generally* David Kennedy, *The Move to Institutions*, 8 CARDOZO L. REV. 841 (1987).

268. These are only some of the headings in the table of contents of Wright's masterly work. WRIGHT, *supra* note 264.

269. Wright enthuses, "Nothing less than a science of colonial administration based on a deductive and experimental method was here contemplated. The discovery by such a method and verification by practical application of useful principles and standards is probably the most important contribution which the mandate system could make." *Id.* at 225. For debates in the PMC as to these issues see *id.* at 219–64. We see revealed here the geneology of a number of contemporary international institutions.

270. *Id.* at 552.

Rather, it became centralized within the mandate system.[271] Civilization was not so much imposed by force as it was implemented through administrative techniques aimed at making the natives internalize a new social reality and regulate their own behavior accordingly.

The advent of the mandate system brought nothing less than the dissolution of sovereignty. This was combined with a new and complex arrangement between the different entities that were responsible for the territory. It was within the space created by the absence of sovereignty that these authorities could proceed to extend and refine the civilizing mission by means of a new science of administration. The theme of the mandate system is inclusion and the incorporation of backward territories into international society, but it is the crucial exclusion of the non-European world from this society in the first instance that gives the whole system its momentum.

D. Decolonization

In terms of the trajectory outlined in this Article, the most significant development of the U.N. era was the emergence of demands for universal democracy, human rights, and self-determination. International law had to address these issues if it was to justify itself. The necessary consequence of these actions was decolonization. Non-European states were admitted into "international society,"[272] and colonies became independent. These developments, however, generated a new set of issues, namely the reconciliation between the concepts of universality, equality, and participation, newly espoused by international law and the previous history of exclusion and disempowerment experienced by the colonized.

Simply put, the problem that emerged, from the European point of view, was how to prevent the disruption of international order that would ensue if the developing world were allowed to articulate its history of exploitation through the use of its newly acquired legal resources. The non-European world had to be distanced and excluded, not because it was barbaric or threatening (although residues of these ideas remained) but because it sought reparations.

This distancing was and is achieved by drawing upon the hidden resources of sovereignty doctrine. In sketching out different phases of the civilizing mission, I have suggested the existence of two constants. The first is the exclusion of the non-European world, which is deprived

271. Doubt must be expressed, of course, as to whether this project was successfully implemented. The point is that it is the creation of the mandate system that makes these new projects even possible to contemplate.

272. Peter Lyon, *The Emergence of the Third World*, *in* THE EXPANSION OF INTERNATIONAL SOCIETY, *supra* note 256, at 229–39.

of any legal vehicle through which it can voice its own history and assert its own claims. The second is the endorsement of European intervention, whether by the Spanish crown in the time of Vitoria, the British empire in the nineteenth century, or the League of Nations in this century.

My argument is that fundamental aspects of sovereignty doctrine are constituted by that history of negating the non-European world even while intervening in it. Thus, concealed within the most current and conceptual rendering of sovereignty is this other unique history.[273] It is revealed in the form of legal resources. These resources take the form of the arguments and principles relating to sovereignty doctrine that were developed, refined, and extended in enacting the dual process of exclusion and intervention.[274]

For example, during the colonial phase, sovereignty doctrine suppressed attempts by a colony to make any legal claims simply by denying the colony standing. Colonies, lacking international personality, could not legally contest their treatment by the colonizer.[275] With decolonization and the prohibition of intervention,[276] however, such a denial is no longer viable as colonies themselves become sovereign. In these circumstances, sovereignty doctrine reveals itself in a new guise. It is now elaborated in relation to issues of self-determination and permanent sovereignty in a way that prevents those doctrines from impinging on colonial history or its effects. The arguments are that independence, the acquisition of sovereignty, and acceptance into the international community signify something akin to consent by the newly independent country to all that had occurred in the past and to the system of rules by which it was assessed. In seeking to deny its past, sovereignty doctrine requires all colonized territories that seek to become sovereign to relinquish their own history and the claims that could arise from it. Simultaneously, it asserts the achieve-

273. "But have we a right to assume the survival of something which was originally there, alongside of what was later derived from it? Undoubtedly. There is nothing strange in such a phenomenon, whether in the mental field or elsewhere." SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 15 (James Strachey trans., W.W. Norton, 1989) (1930)

274. At one level, the phenomenon I am laboriously attempting to describe may be termed, simply, "precedent." In situations where inequality has been sustained and endorsed by law over a long period of time, it is inevitable that the burden of the past, explicitly introduced into legal considerations by the doctrine of precedent, will endure beyond the creation of formal equality as between previously unequal parties. And yet, the "dramatic differences" referred to between the "naturalist" jurisprudence of Vitoria and the "positivist" 19th century suggest that the concept of "precedent" is inadequate. Westlake in the 19th century never draws on Vitoria's writings but yet achieves the same ends in terms of the dual function I seek to describe.

275. Interestingly, such arguments may yet be invoked in the Nauru Case. Australia could argue that although Nauru was a *beneficiary* of the rights and obligations embodied in the trusteeship, it had no standing to enforce these rights because it was not party to the relevant treaties—such as the Nauru Trusteeship Agreement.

276. U.N. CHARTER article 2(4) prohibits the more extreme forms of intervention.

ment of a "universal" international law.[277] More profoundly, there no longer exists any language or alternative vocabulary by which sovereignty and independence can be articulated on the international plane.

This is one reading of international law and sovereignty doctrine and it is, crudely, the reading outlined in support of the suppression of colonial claims. The preceding discussion suggests that the doctrine is not necessarily implacable in its denial of colonialism and the enduring inequities that colonialism has created. Nor is international law simply a product of colonial will. It has, after all, provided Nauru with the means of pursuing its claim. Concepts of self-determination and trusteeship have a substantive content. International institutions may play a vital role, as the Trusteeship Council did in the case of Nauru, through articulation of this content and by ensuring implementation of the appropriate norms. Had it not been for the mandate and trusteeship systems and their supervisory mechanisms, Nauru would not have survived until independence.[278]

My argument, then, is that there is no inherent logic to sovereignty doctrine. This is demonstrated by the completely different versions of sovereignty that are found in each of the phases examined in this section. It is also demonstrated by the competing versions of sovereignty that are propounded by different parties attempting to advance their interpretation of the meaning of principles such as "self-determination" or "permanent sovereignty over natural resources."

Sovereignty doctrine, then, is articulated, supported and developed through particular argumentative practices: through the actions of states, the writing of scholars, and the decisions of jurists. It is possible to question these practices. One could question, for example, the strategic way in which the non-European world is characterized by Vitoria or Gess, and the manner in which this characterization leads to a particular outcome that appears inevitable and "legal."[279] Having identified these strategies, it may be possible to contest them and to deny whatever claims they make to being the universal and logical interpretation of the doctrine in question.[280]

277. BEDJAOUI, *supra* note 16, at 10.

278. It is necessary to point to the uniqueness of the Nauru experience. It is the trusteeship system's specific obligations that have enabled the case to proceed thus far. Former colonies may not enjoy even this limited recourse to international law.

279. In each of these cases the native is provided with exactly that degree of sovereignty that enables it to be *bound* by international law, while denied the rights offered by the system.

280. Different methods of exploring the issues that then arise, in terms of the themes of this Article, are suggested by Kimberlé Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law*, 101 HARV. L. REV. 1331–87 (1988); *The Politics of Law: A Progressive Critique* (David Kairys ed., 1982); MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA (1989); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: the Case of Classical Legal Thought in America 1850-1940*, 3 RES. L. & SOC. ANN. 3–24 (1980); ROBERTO UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986); PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991); Anthony Carty, *Critical International Law: Recent Trends in the Theory of International Law*, 2 EUR. J. INT'L L. 66 (1991).

More broadly, it is possible to question the boundaries within which the inquiry is supposed to take place. I have attempted to avoid focusing on the classical conceptual problem of order among states as it deflects attention from an examination of the historical evolution of sovereignty doctrine. As David Kennedy has argued, international law may be studied as a process that excludes and suppresses the articulation of certain types of claims and identities.[281] By identifying the way in which sovereignty doctrine enacts these exclusions and by seeking to recover those identities, it may become possible to establish a new way of viewing international law. In so doing, it also may be possible to prevent a repetition of the practices of exclusion that have characterized and continue to characterize international law, whether the excluded are the colonized, members of minority groups,[282] indigenous people, or women.[283]

VII. SUNSHINE AND COCONUTS: CONSTRUCTING THE NATIVE

The argument in this Article is based in part on Edward Said's concept of "Orientalism," which he describes as a "Western style for dominating, restructuring and having authority over the Orient."[284] As the discussion of the mandate system suggests, Orientalism works by representing other cultures as inferior, incapable, and disorganized and therefore a suitable object for conquest and control. The military subordination of the colonized is combined with the suppression of its ability to represent itself meaningfully within the larger system of images, ideas, and concepts that combine to construct "reality" and provide the basis for action. Power and representation are thus intimately connected.

While the larger structures of international law may be presented in these terms, the processes of Orientalism also played a crucial role in the everyday administration of Nauru. While this Article has suggested that the Administration's policies may be understood in terms of its desire to exploit phosphates, Said suggests another way of approaching the issue. This method attempts to explain Administrative policy by focusing on the officials' images of the Nauruans, and the way these images were used as a basis for policy and action.

281. David Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. L. REV. 1 (1988).

282. *See, e.g.*, HANNUM, *supra* note 240.

283. *See, e.g.*, Hilary C.M. Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991).

284. EDWARD SAID, ORIENTALISM 3 (1978).

The relationship between representation and power on Nauru is illustrated simply enough by the instances, already detailed, when the Australian authorities stated to the Permanent Mandates Commission that the Nauruans did not use Topside at all and that mining there did not infringe on the Nauruan's interests.[285] In a context where the island being discussed was halfway around the world from Geneva where the PMC met, the Nauruans simply became the way they were represented by the Administration. The Nauruans' own practices and beliefs—their use of Topside as a source of food, shelter, and clothing, and Topside's cultural and spiritual significance—became irrelevant and mining continued.

These images are linked, not only to administrative policy, but to legal argument. Writing in the 1923–24 edition of the British Yearbook of International Law, Professor A.H. Charteris of Sydney University, concluded his article on the Nauruan mandate by discussing the phosphate royalties being paid to the Nauruans:

> The remuneration is small perhaps in the eyes of a civilised man in view of the immense value of the product in the Commonwealth, but it is not small to a child of nature who lives on cocoanuts and fish and sunshine.[286]

The statement is cited not so much for its condescension, which must have been commonplace at the time, but for the way in which it decisively characterizes the Nauruans and presents this characterization as the basis for a legal assessment of the sufficiency of the royalty.

Many of the images used by the Administration to present the Nauruans have been mentioned already: the Nauruans as a people were happy, not unintelligent, very indolent, politically apathetic, and inept.[287] The underlying premises of these images were the Nauruans' absence of agency and their corresponding inability to make their own, independent history.[288] In general terms, descriptions of the interaction between the Nauruans and the Australians portrayed the Nauruans as lacking an independent existence.

285. *See supra* part III.

286. A.H. Charteris, *The Mandate Over Nauru Island*, 1923–24 BRIT. Y.B. INT'L L. 137, 151.

287. *See supra* part.VI.A.

288. A "benevolent" paternalism characterized the views of Australians and New Zealanders who knew the Nauruans but who firmly felt "that their Pacific friends were congenitally feckless and could never be changed for the better by education, much less by a sudden excess of prosperity." WILLIAMS & MACDONALD, *supra* note 17, at 282. The authors also noted that for these observers, "[t]he quaint idea that 'natives' could ever become collectively sensible in the management of money or the running of a major industral and commercial undertaking was, in their view, just as ludicrous as the belief that they would become ready for modern self-government in the forseeable future." *Id.*

One Australian administrator described the difficulty of Nauruan resettlement in the following terms:

> I believe that a policy of encouraging and helping assimilation can be pursued by us steadily and unostentatiously and that its prospects of success would not be affected if we do not openly disclose it to the Nauruans as a deliberate policy. Assimilation must develop from spontaneous choice by individual Nauruans and from opportunities presented. We can steadily help both of these develop.[289]

The most striking aspect of this passage is the self-conscious appreciation of the power of a colonial authority. The apparatus of colonial administration could present "opportunities" for the Nauruans to participate in what was essentially their own disappearance, the assumption being that Nauruan agency was completely non-existent. Free will could be manufactured and Nauruans could be convinced that they were acting in their own interests when actually doing no more than what had been planned for them by the Administration. That the Nauruans felt oppressed by the Australian perceptions that they attempted to contest and modify is made clear by the statements they made during the pre-independence talks:

> We feel that the Australian people have an image of Nauruans which is quite wrong . . . . Australians seem to have a picture of an absurdly small people who want too much from Australia, who want complete sovereign independence, and who are not as grateful as they should be for what Australia is generously offering them.[290]

The idea that the Nauruans had aspirations to freedom comparable to those of their own people escaped the Administration. This is reflected, even more profoundly, by the plan that the Administration was attempting to implement—that of making the Nauruans Australians by resettling them on either an offshore island or on the mainland itself. The view was that the Nauruans, lacking an independent identity or history, had no option other than to be assimilated into the territory and history of Australia itself. This was a logical conclusion to one version of the narrative of the civilizing process: the transformation of the native into a citizen of the metropolis.

The images and attitudes that informed Australian attitudes toward Nauru from the 1920s onwards have current relevance. Dimensions of

289. WEERAMANTRY, *supra* note 1, at 289 (emphasis in original).

290. *Id.* at 296.

this image are apparent in the Preliminary Objections that Australia lodged with the Court in 1990. In attempting to rebut the argument that it had failed to discharge its trusteeship obligations, Australia asserted that "it had given Nauru adequate financial resources to provide a secure future for the island."[291] This "giving" consisted of the transfer of the mining operation, and the profits the Nauruans were expected to make from future phosphate sales, together with the money already collected in trust funds. All these things represented, arguably, no more than the return of Nauru's assets to the Nauruans.

Australia then refers to a study done on Nauru's phosphate investments that suggests that Nauru had considerable funds to rehabilitate the island and concludes that "available evidence suggests that the phosphate income has not always been well spent. Educational and health standards have fallen and large sums of money have been wasted on items such as a national airline."[292]

The legal significance of these arguments is unclear. Nauru makes no claims as to whether or not Australia "provided" it with "adequate" funds for its future. Rather, the financial issue relates to profits made by Australia from the sale of Nauru's phosphates. Furthermore, to the extent that emphasis is placed on the unwise manner in which Nauru allegedly spends its funds, it can hardly be argued that responsibility in international law is contingent upon the way in which the applicant state chooses to run its economy.[293]

The recurring statements as to Nauru's alleged profligacy are interesting, however, as they represent yet another attempt to construct the Nauruans in a manner consistent with the statement made in 1923 that natives live on sunshine and coconuts and hence require no money. Moreover, when "given" money, Naurans dissipate it as natives are lamentably wont to do. Having outlined the finances that the Nauruans would have received after independence, the Australian argument concludes that, "Nauru should be a community of essentially retired persons—with no necessity to work—living on the substantial income from the phosphate reserves."[294]

The consistent theme underlying the Australian position is that action and initiative are attributable to Australia, while passivity and

291. Australia Memorial, *supra* note 46, at 64.

292. *Id.* at 66.

293. The consequences of adopting such an approach are ambivalent as uncomprehending judgments are often readily made by outside observers about the policies and economic priorities of a state. For instance, the Economist ungenerously reports that "[g]enerations of Australians have lived beyond their means" and that this results in "a mismatch between effort and reward that has been reconciled by borrowing around $116 billion—more per person than any other country in the world." *Australia's Hard Choice*, ECONOMIST, Mar. 6, 1993, at 15.

294. Australia Memorial, *supra* note 46, at 66. Furthermore, these arguments seem based on the same premise underlying Charteris's argument, that the Administration could do as it wished with the resources of Nauru providing the "needs" of the Nauruans were "adequately" met.

incompetence characterize the Nauruans.[295] It is Australia which properly provides the economic means by which Nauru, if only capable of managing its own affairs,[296] could develop its own society and shape its own destiny. When Nauru acts, however, it does so only to demonstrate its incapacity by dissipating the funds it has been given. Interestingly, however, even *if* the Nauruans invested their finances sensibly, this would simply return them to the stasis ("a community of essentially retired persons") that seems to be presented as their natural condition. The task of nation-building is a task that is the prerogative of other, presumably more civilized, states.

The image of the native is developed into a comprehensive framework of understanding through the actions of officials, administrators, and lawyers. It evolves in internal memoranda, scholarly publications, statements before the Permanent Mandates Commission and Trusteeship Council, parliamentary debates, newspaper reports, and legal argument before the Court itself. What is remarkable is the consistency of the system of perceptions that has resulted, despite the fact that it has been formed over a long period of time by a wide variety of people.[297]

Given the sheer resilience and strength of these perceptions about the Nauruans and the long tradition of exercising authority over them, it is hardly surprising that the Administration was incapable of grasping the autonomy of the Nauruans, their powerful desire for independence, and the tenacity and resourcefulness with which they fought for that goal despite their lack of economic, political, and legal expertise. This rigid system of perceptions appears to have prevented the Administration from comprehending the changing international climate, and the Nauruans' effective use of the opportunities that this changing climate presented for them.[298] As the preceding discussion suggests, Australia's slowness to respond to the emerging political realities was perhaps influenced as much by a deep disbelief in the

295. Australian action is continuously presented as purely a product of its own will. This position elides the manner in which the Nauruans successfully fought against Australian attempts to bring about resettlement in Australia, to continue mining, to maintain control over the industry, and to delay independence for as long as possible, thus exerting pressures that compelled changes in the Administration's policies.

296. This point is made more explicitly later in the Australia Memorial: "Nauru is a wealthy country or at least had the potential to be so if it had properly managed the potential wealth it inherited at the time of independence." Australia Memorial, *supra* note 46, at 163. This statement is made in relation to an argument that Nauru was seeking to blame Australia for its own bad management and that it was bringing the claim in bad faith.

297. This is not to claim that this was the only view of the Nauruans. As pointed out earlier in the Article, Australians such as H.E. Hurst attempted to present the other point of view but were generally suppressed.

298. The South West Africa litigation, with its controversial outcome, was occurring at the same time as the Nauruan progress toward independence in the 1960s.

ability and determination of the Nauruans as by its hope of maintaining control over the phosphates.

Ironically, even as the Nauruans were being characterized by the Administration as politically inept and uneducated, they were successfully waging a campaign against that same Administration to win their own freedom and establish themselves as an independent nation.[299] Nauru has made persistent attempts to settle its dispute with Australia by diplomatic means.[300] However, Australia's attitudes regarding Nauru have been, by and large, dismissive and condescending. It is difficult to avoid the conclusion that the rigidity of the attitudes adopted by Australia toward the Nauruans has prevented both the possibility of real communication between the two countries and a full appreciaton by Australia of the strength and merit of Nauru's position. The Nauru Case is a result.

In theoretical terms, the preceding analysis of the way the images of the Nauruans have been developed suggests, of course, that the images and narratives in the discourse of international law derive from a number of fields other than law—anthropology, travel literature, and journalism. From a strictly legal perspective, what becomes crucial in any attempt to understand the way in which these discourses operate is to identify those points at which these images and narratives insert themselves into ostensibly legal argument and the effect this has upon the nature of that argument.

The reverse, however, is also true. The language of international law is becoming increasingly important in shaping our perceptions of contemporary events. It is only by analyzing the complex relationships between international law and these other discourses that we may develop a means of understanding the way international law, in the post-Cold War world, exercises its curious power.[301]

299. The courage and acumen that DeRoburt demonstrated in leading his people to independence can hardly be overstated. Although ill, DeRoburt left his hospital bed to present his country's case before the Court in 1991. It was his last public appearance. He died three weeks after the Court handed down its decision in Nauru's favor. *See Obituary of Hammer DeRoburt*, DAILY TELEGRAPH, July 24, 1992, at 19.

300. *See* Preliminary Objections, Judgment, *supra* note 1, at 253–55.

301. The terminology of international law is playing an increasingly prominent role in the contemporary public realm. The present crises of Bosnia, Somalia, and Iraq are almost invariably discussed with reference to international law. This lends an ambiguous authority to some views of the issues being scrutinized. The question then becomes one of how this vocabulary of "sanctions," "state terrorism," "violations," "compliance," and "intervention" is used to structure perceptions, actions, and policies. Traditional approaches of international law scholarship, such as that of identifying relevant rules, applying them and outlining the following conclusion do not address the issue of how international law operates within the public realm. The manner in which international law is part of a broader public discourse in this context is perhaps best suggested by the emerging methodologies deriving from literary criticism and anthropology. *See generally* EDWARD SAID, CULTURE AND IMPERIALISM (1993); JAMES CLIFFORD, WRITING CULTURE (1987); PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991); SELECTED SUBALTERN STUDIES (Ranajit Guha & Gayatri Spivak eds., 1988).

VIII. CONCLUSION

If the Nauru Case should proceed to the merits, it will provide the International Court of Justice with a unique opportunity to outline the law relating to a number of extremely significant areas of international law. This is true, independent of the outcome of the case. Issues relating to colonialism have preoccupied international lawyers for much of this century. Yet this Article seeks to suggest that it is far too simple to see colonialism as a phenomenon that is ended and may now be the subject of a valedictory judgment.

Colonizer and colonized: this is the central dichotomy used to frame the Nauru experience and the larger themes it represents. That these concepts have an enduring significance is suggested by the fact that so many vital contemporary debates are presented as debates between former colonial powers and their subjects, the developed and the developing.

And yet, my postulated dichotomy does not hold true. Australia is both colonizer *and* colonized. Indeed, its creation as a colonial subject is unique, involving as it does the massacre of the Aborigines[302] on the one hand and the establishment of a penal colony for the oppressed, desperate, and criminally condemned of Britain on the other.[303] It is understandable, given this past, that ideas of freedom and egalitarianism have been of central importance to the development of an independent Australian identity. Australia, then, defines itself in these terms as separate from and opposed to the corruptions of the old world and of imperialism. Given this complex set of experiences, the question remains as to how these histories coexist,[304] and which history will prevail.[305]

Colonialism is not a simple phenomenon. Its forms are various and subtle. It reproduces itself through its victims and continuously creates

302. *See* ALAN MOOREHEAD, THE FATAL IMPACT: THE INVASION OF THE SOUTH PACIFIC 1767–1840 (1987). Mabo and Others v. State of Queensland, 107 A.L.R. 1 (1992) (Austl) at 79.

303. *See, e.g.*, ROBERT HUGHES, THE FATAL SHORE (1988).

304. There is, then, yet another history to be written about the Nauru Case. It is a history of two overlapping, reinforcing and interpenetrating relationships—between the United Kingdom and Australia; and between Australia and Nauru. I have characterized the latter relationship as one between the colonizer and the colonized. It is not impossible to view the former relationship in similar terms, with Nauru acting as a means of both obscuring and reinforcing this reality; there is an intimation of this theme in Australian Prime Minister Hughes's stand at Versailles—his demand that Australia be given control over Nauru in return for the thousands of Australians who died as part of the British war effort. But all this requires a separate inquiry.

305. This is the recurring theme of Australian history, as exemplified in the title of the final volume of Clark's memorable history. *See* 6 C.M.H. CLARK, THE OLD DEAD TREE AND THE YOUNG TREE GREEN: A HISTORY OF AUSTRALIA (1987). For a comparative study, dealing with Australia's ambivalent nationalism, see BRUCE KAPFERER, LEGENDS OF PEOPLE: MYTHS OF STATE (1988). *See also* C.M.H. CLARK, THE QUEST FOR GRACE (1990).

and represses new subjects. In this way, colonialism is like sovereignty itself. This is a challenge for international lawyers, whose craft inevitably demands the articulation and reproduction of the language of sovereignty and with it, perhaps, the suppressions and exclusions that characterize its history.

AFTERWORD

The Nauru Case was settled by a "Compact of Settlement" between Australia and Nauru, which was signed on August 10, 1993. Under the terms of the Compact, Australia agreed to pay Nauru A$107 million. Of this amount, $57 million is to be paid by August 31, 1994; 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. The settlement represents, in effect, satisfaction of Nauru's primary claim for the expenses associated with rehabilitating the lands mined out prior to independence. Nauru has agreed to discontinue its ICJ action against Australia. Australia has requested the United Kingdom and New Zealand to contribute to the settlement.

It is reported that some Pacific states, following Nauru's success, are contemplating action against former administering powers for environmental damage suffered prior to independence.[306]

306. *Paying Our Dues*, and Mary Louise O'Callaghan, *Signing up to Right a Colonial Wrong*, THE AGE (Melbourne), Aug. 10, 1993 at 19; *Making Waves in the Pacific*, ECONOMIST, Aug. 21, 1993, at 31. This Article was completed in May 1993. No attempt has been made to modify the text in the light of the settlement. I now hope that the Article illuminates some of the factors that may have led to the settlement; that it contributes to the continuing debates surrounding the unresolved issues raised by the case; and that, at a deeper level, it outlines the challenges posed by these issues to our understanding of the structures of international law.

Finding a Mechanism to Enforce Women's Right to State Protection from Domestic Violence in the Americas

Katherine M. Culliton*

INTRODUCTION

This Article will examine the enforceability, under international human rights law, of American women's fundamental right to state protection from domestic violence. A serious and widespread problem of domestic violence[1] directed against women exists in the United States, as well as in Latin America and the Caribbean. Domestic violence is the leading cause of injury to women in the United States.[2] A similar problem exists in Latin America and in the Caribbean. Throughout the region, states have violated women's fundamental human rights by failing to prosecute domestic violence, to sanction

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1. In current terms of international law, "domestic violence" is defined to include acts of physical, mental, and sexual violence perpetrated against women that occur within the "family." *See General Recommendation No. 19*, Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), 11th Sess., U.N. Doc. CEDAW/C/1992/L.1/Add.15 (1992) [hereinafter *General Recommendation No. 19*]. For the purposes of this Article, the family includes marital, cohabiting, boyfriend-girlfriend, or blood relationships.

2. About 50% of women in the United States have been assaulted by their male partners at one point in their lives. A woman is more likely to be murdered by a male partner than a stranger. Four million women per year are severely assaulted by their male partners, and the problem has gotten worse in recent years. In addition, gender bias in the courts has led to a failure to prosecute domestic violence cases. *The Violence Against Women Act of 1991: The Civil Rights Remedy: A National Call for Protection Against Violent Gender-Based Discrimination*, S. REP. No. 197, 102d Cong., 1st Sess. 37 (1991) [hereinafter *Senate Report*].

Recent Developments

A SMALL STEP OR A GIANT LEAP? THE IMPLICATIONS OF AUSTRALIA'S FIRST JUDICIAL RECOGNITION OF INDIGENOUS LAND RIGHTS: *Mabo and Others v. State of Queensland*, 107 A.L.R. 1 (1992) (Austl.)*

On June 3, 1992, the Australian High Court delivered its decision in *Mabo v. Queensland*,[1] a ten-year dispute in which the indigenous Meriam people sought legal recognition of property rights in land they had inhabited for centuries. The High Court overturned the traditional expanded *terra nullius* doctrine,[2] and declared that, subject to state legislation evincing a contrary intention, the Meriams were the absolute beneficial owners of certain parts of Australia's Murray Islands. As the first Australian judicial acknowledgment of native land title, this decision represents a landmark development for the property rights of indigenous Australians as well as those of non-indigenous Australians. However, the decision contains qualifications on native title which may restrict its practical effects. Internationally, the case is consistent with other countries' judicial decisions on aboriginal rights and does not suggest any new norms. Nevertheless, the decision is a significant contribution to international law because its recognition of native title and its condemnation of the *terra nullius* doctrine buttress the international trend towards increased protection of indigenous people's human rights, including their property rights.

The Meriam people occupied the Murray Islands[3] long before European contact with Australia, and subsisted primarily through gar-

* The author would like to thank Gary W. Baldock at the University of New South Wales, Sydney, Australia, for his invaluable assistance.

1. Mabo and Others v. State of Queensland, 107 A.L.R. 1 (1992) (Austl.) [hereinafter *Mabo's Case*]. The named plaintiff, Eddie Mabo, was the Meriam who initiated the suit. *Id.* at 1, 7.

2. Under the expanded *terra nullius* ("uninhabited land") doctrine, territory could be settled if its present inhabitants were considered too backward to possess proprietary interests. *See infra* text accompanying notes 12–17.

3. The three Murray Islands lie in the Torres Strait between Papua New Guinea and Australia's Cape York. The largest is called Mer or Murray Island; the other two are Dauar and Waier. The islands' total land area is about 9 square kilometers, or 3.5 square miles. *Mabo's Case*, 107 A.L.R. at 8.

dening, fishing, and marine hunting.[4] They have always considered the Murray Islands to be theirs, and their conception of property rights is superficially similar to Western European notions of ownership. Early European reports from the late eighteenth and early nineteenth centuries indicate that, unlike the Aborigines of mainland Australia, the Meriams recognized both individual and small group land ownership.[5]

Despite Meriam occupation and apparent ownership of the Murray Islands since time immemorial, the British Crown and later the Commonwealth of Australia gradually encroached upon the Meriams' interests. Initial contact between Meriams and Europeans consisted mainly of infrequent visits by passing European ships.[6] In 1788,70 Captain James Cook claimed Australia on behalf of England, and by the late nineteenth century, the British imperial and colonial governments had begun to exercise a degree of de facto authority over the Murray Islands. In 1872 and 1875, the British imperial government passed the Pacific Islanders Protection Acts, which outlawed the slave trade[7] and established jurisdiction over British subjects in Western Pacific islands.[8] In the 1875 Act, the Crown explicitly denied "any claim or title whatsoever to dominion or sovereignty over any such islands or places."[9] However, British involvement in the islanders' affairs continued. In July 1878, a British police magistrate advised the Meriams to select a chief (to the Meriams, a "mamoose") to act as a liaison with colonial and imperial authorities; in October, Queen Victoria approved the annexation of the Murray Islands to Australia.[10] They were formally annexed on August 1, 1879.[11]

The British never considered the Meriams' presence an obstacle to annexing the Murray Islands and subjecting them to British sover-

4. Jeremy Beckett, *Ownership of Land in the Torres Strait Islands*, *in* ABORIGINES, LAND AND LAND RIGHTS 202, 203 (Nicolas Peterson & Marcia Langton eds., 1983).

5. The Meriams sectioned the island coasts into small villages, each of which was home to a particular clan. These villages, in turn, were divided into individually owned lots. Clan members were not required to live in their villages, but they identified with their clans for ritualistic purposes and marriage arrangements. *Id.* at 203–04.

6. *Mabo's Case*, 107 A.L.R. at 10.

7. Pacific Islanders Protection Act, 1872, 35 & 36 Vict., ch. 19 (Eng.).

8. Pacific Islanders Protection Act, 1875, 38 & 39 Vict., ch. 51 (Eng.).

9. *Id.*

10. *Mabo's Case*, 107 A.L.R. at 10.

11. *Id.* Some doubts concerning the annexation's legality arose in 1894. It was unclear whether a British colony with representative institutions and with boundaries defined by imperial legislation could legally incorporate additional land into its territory. However, these doubts were dispelled by the passage of the Colonial Boundaries Act, 1895, 58 & 59 Vict., ch. 34 (Eng.). *Id.* at 14–15. The Australian High Court recently held, in *Wacando v. Commonwealth*, 148 C.L.R. 1 (1981) (Austl.), that the Colonial Boundaries Act remedied any legal deficiency that might have existed in the Queensland legislation regarding the Murray Islands' annexation. *Mabo's Case*, 107 A.L.R. at 14–15.

eignty. Under customary international law at the time of Australian colonization, acceptable means of acquiring sovereignty included conquest, cession, and occupation of *terra nullius*.[12] Sovereignty over land is distinct from ownership of land. Sovereignty, which only a sovereign can acquire, is the political power to govern territory. Ownership (or "absolute beneficial title"), which can belong to anyone, is private title to a piece of property: the right to possess, occupy, use, and enjoy that property.[13] Despite this distinction, acquisition of sovereignty through occupation of *terra nullius* was equated with acquisition of absolute beneficial ownership by the sovereign when "no other proprietor of such lands" was found to exist.[14]

This equation appeared logical under the original conception of *terra nullius*, which contemplated unoccupied waste land. Much of basic property doctrine was grounded on possession; therefore, if no other persons were present to assert possession of land, nothing appeared to bar the Crown's assertion of both sovereignty and ownership. However, customary international law expanded the original *terra nullius* doctrine to justify, in addition to the acquisition of sovereignty, the exercise of ownership over land that actually was inhabited. Such acquisition was considered legitimate if the indigenous inhabitants were so "barbarous," "unsettled," or "primitive" as to have no recognizable law of their own, and thus no claim to land rights.[15] Lord Sumner, speaking for the Privy Council, summed up the colonial attitude toward the Crown's acquisition of land that was already inhabited:

> Some tribes are so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilised society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.[16]

12. *Id.* at 21.

13. *Id.* at 30, 31, 56. This distinction can be crucial, as illustrated by New Zealand's Treaty of Waitangi. Signed in 1840 by Britain and New Zealand's native Maoris, the Treaty reaffirmed native Maoris' right to "the full, exclusive, and undisturbed possession of their Lands and Estates, Forests, Fisheries, and other properties" while simultaneously providing that "all rights and powers of sovereignty . . . were ceded to Her Majesty . . . absolutely and without reservation." A. Barrie Pittock, *Aboriginal Land Rights*, *in* RACISM: THE AUSTRALIAN EXPERIENCE: A STUDY OF RACE PREJUDICE IN AUSTRALIA 188, 190 (F.S. Stevens ed., 1972).

14. *Mabo's Case*, 107 A.L.R. at 27.

15. *Id.* at 24–27. In practice, however, colonizing nations that recognized the expanded *terra nullius* doctrine rarely invoked it. In fact, Australia and the South Island of New Zealand were the only inhabited areas of any size to be settled expressly under this doctrine. Andree Lawrey, *Contemporary Efforts to Guarantee Indigenous Rights Under International Law*, 23 VAND. J. TRANSNAT'L L. 703, 712 n.37 (1990).

16. *In re* Southern Rhodesia, 463 App. Cas. 211, 233–34 (P.C. 1919).

Justifications for acquiring sovereignty over and ownership of previously occupied territory through the expanded *terra nullius* doctrine included bringing the benefits of Christianity and European civilization to "backward peoples" and cultivating land that had not been cultivated by its original occupants.[17]

Given this treatment during colonization, it is not suprising that, until *Mabo's Case*, indigenous people did not fare well in the Australian legal system. The first effort to gain judicial recognition of indigenous land rights came in 1971 with the "Gove case,"[18] brought by the Yirrkala Aborigines of the Northern Territory's Gove peninsula.[19] The Yirrkalas asked the Supreme Court of the Northern Territory for recognition of their right to the land, an injunction to stop bauxite mining on their reserve, and compensatory damages. They were unsuccessful: Australian officials were incredulous at the very idea of Aborigines instituting a legal contest,[20] and Justice Blackburn ruled against the plaintiffs on all substantive counts. The Court found that the Aborigines had no concept of property rights under their own law, and that Australian common law did not recognize any sort of customary native land title.[21] In support of the expanded *terra nullius* doctrine, Blackburn said that the expression "desert and uncultivated" had "always been taken to include territory in which live uncivilized inhabitants in a primitive state of society," and that, philosophically, "the more advanced peoples [are] justified in dispossessing, if necessary, the less advanced."[22]

In 1979, however, the High Court suggested in the case of *Coe v. Commonwealth of Australia*[23] that claims for recognition of Aboriginal land rights might be successful if brought through the correct procedural channels.[24] In *Coe*, an Aborigine named Paul Coe sued both Australia and Britain on behalf of all indigenous Australians; he claimed in broad, dramatic language that exclusive Aboriginal sovereignty over Australia had existed since time immemorial and that all historical claims to sovereignty by the British Empire and the Commonwealth of Australia were baseless and void. Coe sought relief ranging from compensatory damages to an injuction to stop all interference with any lands and waterways currently used by Aborigines.[25]

17. *Mabo's Case*, 107 A.L.R. at 21.

18. Milirrpum v. Nabalco Pty. Ltd., 17 F.L.R. 141 (1971) (N.T. S.Ct.). The case was originally brought by Mathaman, head of the Rirratjingu clan of Yirrkala Aborigines. After Mathaman's death in 1970, the case continued in the name of his younger brother Milirrpum. NANCY M. WILLIAMS, THE YOLNGU AND THEIR LAND: A SYSTEM OF LAND TENURE AND THE FIGHT FOR ITS RECOGNITION, at plate opposite 32 (1986).

19. Dorothy Bennett, *Aboriginal Land Rights in the Northern Territory* 1–2 (Parliament of the Commonwealth of Australia, Basic Paper No. 13, 1982).

20. WILLIAMS, *supra* note 18, at xi.

21. For a criticism of this decision, see John Hookey, *The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia?*, 5 FED. L. REV. 85 (1972).

22. *Milirrpum*, 17 F.L.R. at 200–01.

23. 24 A.L.R. 118 (1979) (Austl.).

24. Ben Boer, *The Legal Framework Affecting Aboriginal People in the East Kimberley* 18 (East Kimberley Impact Assessment Project, East Kimberley Working Paper No. 30, 1989). *Coe* was dismissed on procedural grounds. *See infra* text accompanying notes 26–27.

Coe's case was dismissed on procedural grounds: a divided Full Court refused to allow him to amend his overbroad statement of claim. The four justices expressed strong views on the issue in their *obiter dicta*. Justices Gibbs and Aicken both agreed with Justice Mason's denial of the plaintiff's application for leave to amend, and Gibbs characterized Coe's allegations as "absurd," "vexatious," "embarrassing," "erroneous," "defective," and "legally untenable." Despite his severe criticisms of the statement of claim, however, Gibbs allowed that

> the question what rights the aboriginal people of this country have, or ought to have, in the lands of Australia is one which has become a matter of heated controversy. If there are serious legal questions to be decided as to the existence or nature of such rights, no doubt the sooner they are decided the better . . . .[26]

Gibbs also acknowledged that some of Coe's allegations, while not amounting to a justiciable cause of action, "hint[ed] at the existence of questions that might be regarded as arguable."[27]

The dissenters, Justices Murphy and Jacobs, argued that there was definitely a legitimate question as to whether New South Wales was conquered rather than settled. Murphy wrote that there was ample support for the proposition that the Australian Aborigines, while nomadic, had occupied and attached themselves to defined territories in such a way as to create a de facto interest in those territories, thus preventing the land from being *terra nullius*. Therefore, he argued, Coe had the right to attempt to prove that Australia was not *terra nullius* before colonization, and that the British had acquired Australia by conquest rather than by peaceful settlement of unoccupied territory. If Coe could prove these propositions, the Aborigines would be entitled "to rely upon the legal consequences which follow."[28] Thus, the *Coe* decision, although it rejected Paul Coe's expansive allegations, anticipated the appearance of a properly framed, well-supported claim to native land title.

25. Colin Tatz, *Aborigines and Civil Law*, *in* ABORIGINES AND THE LAW 103, 117 (Peter Hanks & Bryan Keon-Cohen eds., 1984).

26. *Coe*, 24 A.L.R. at 131.

27. *Id.* at 130.

28. *Id.* at 138.

In 1982 a group of Meriams brought such a claim before the High Court of Australia.[29] In *Mabo's Case*, the plaintiffs did not contest Crown sovereignty, but rather Crown ownership, of the Murray Islands. They sought declarations "that the Meriam people [were] entitled to the Murray Islands . . . that the Murray Islands [were] not and never [had] been 'Crown Lands' . . . and . . . that the State of Queensland [was] not entitled to extinguish the title of the Meriam people."[30] The case was remanded to the Queensland Supreme Court for fact-finding[31] and then brought back before the Full Court for determination. Ten years later, the Court handed down its historic 170-page opinion.

The two primary issues in *Mabo's Case*, as expressed by Chief Justice Brennan in the majority opinion, were, first, whether Queensland's 1879 annexation of the Murray Islands had vested in the Crown absolute beneficial ownership of the islands as well as sovereignty, or sovereignty only; and, second, whether native title to the Murray Islands, if such title had ever existed, had been extinguished by official actions subsequent to the annexation. Brennan emphasized that ownership alone was challenged, and that in any event state sovereignty over a territory is not justiciable by Australian courts.[32]

Queensland argued that upon the 1879 annexation of the Murray Islands, the Crown had acquired not only sovereignty, but also absolute beneficial ownership over the territory. Queensland asserted that absolute beneficial ownership flowed automatically from sovereignty because "there [was] no *other* proprietor"—in other words, because there was no one else with any title to the land.[33]

Before evaluating Queensland's defense, Brennan reviewed the doctrine of *terra nullius*, which lay behind Queensland's acquisition of sovereignty as well as its assertion of ownership. He unequivocally denounced the expanded doctrine, under which land ownership could be acquired through settlement rather than through conquest or cession if its inhabitants were considered too backward or inferior to possess any proprietary interests.[34] Brennan stated that

29. Tatz, *supra* note 25, at 118.
30. *Mabo's Case*, 107 A.L.R. at 1–2.
31. *Id.* at 6.
32. *Id.* at 20.
33. *Id.* at 19 (emphasis in original).
34. It is interesting that Brennan so strongly rejected *terra nullius*, one of the historically accepted justifications for the Crown's acquisition of sovereignty over the already-inhabited continent of Australia, immediately after stating that the issue of Crown sovereignty could not be interfered with by Australian courts. Brennan may have been hinting that if sovereignty were justiciable, the legitimacy of Australian sovereignty would be in question. On the other hand, he simply may have been confident in lambasting the *terra nullius* doctrine—and thus the historical justification for sovereignty over Australia—because he knew that such sovereignty was immune from judicial determination.

> [t]he theory that the indigenous inhabitants of a "settled" colony had no proprietary interest in the land . . . depended on a discriminatory denigration of indigenous inhabitants, their social organisation and customs . . . . [T]he basis of the theory is false in fact and unacceptable in our society . . . .[35]

Brennan noted that the expanded *terra nullius* doctrine had been condemned by other legal authorities, including the International Court of Justice. He re-emphasized the holding that

> [t]he fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country . . . . It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.[36]

After rejecting the theory of automatic ownership derived from the expanded *terra nullius* doctrine, Brennan considered the three other bases for ownership asserted by Queensland. Each of these—the "feudal basis," the "patrimony of the nation basis," and the "royal prerogative basis"—was premised on the theory that the Crown had automatically acquired absolute beneficial ownership at the same time as or as a result of acquiring sovereignty. The Court examined and rejected all three.[37]

35. *Mabo's Case*, 107 A.L.R. at 27.
36. *Id.* at 28–29.
37. *Id.* at 32–42. The "feudal basis" derived from the English common law doctrine of tenure. According to this doctrine, the Crown held an interest known as radical, ultimate, or final title in all English land. Therefore, any other person holding a property interest shared that interest with the Crown, and the interest represented a relationship with the Crown rather than with the land itself. Brennan noted that it was arguable whether the doctrine of tenure applied to the Australian colonies, and thus whether radical title had been conferred on the Crown along with sovereignty. He found that even if the doctrine did apply, however, absolute beneficial ownership is not an automatic corollary of radical title, and radical title in this case did not supply an adequate basis for the Crown's assertion of absolute beneficial ownership. If Australia truly had been *terra nullius* with no inhabitants whatsoever, the Crown would have acquired absolute beneficial ownership through its radical title on the ground that there was no other potential owner. Because the land was already inhabited when the Crown acquired sovereignty, however, Crown acquisition of radical title through its sovereignty did not confer absolute beneficial title on the Crown. *Id.* at 32–34.

The "patrimony of the nation basis" derived from the notion that the Crown had obtained ownership of the Australian colonies by exercising certain powers, such as selling or dedicating parcels of colonial land, and by conferring certain benefits on the colonies, such as funding the colonial governments and subsidizing emigration to the colonies. According to Brennan, however, it did not follow that the Crown had acted in a proprietory capacity, as distinct from a

As Queensland's claim that the Crown had acquired universal and absolute ownership of colonial land did not survive the Court's scrutiny, Brennan next turned to the question whether native title to the Murray Islands, if such title existed, had ever been extinguished. According to Brennan, "[n]ative title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory."[38] Although the exact nature of native title is therefore specific to each indigenous community, Brennan described certain characteristics common to all native titles.[39]

Absent territorial laws allowing otherwise, stated Brennan, only indigenous people and their descendents may possess native title to land; native title is not alienable to non-natives.[40] The standing of any claimant to native title depends on biological descent and on mutual recogition between the claimant and the elders of a native clan

political capacity. The Crown was not required to possess absolute beneficial ownership of the land in order to exercise these powers, nor did ownership flow from the exercise of these powers over the land or from the conferral of benefits on it. "What the Crown acquired was a radical title to land and a sovereign political power over the land, the sum of which is not tantamount to absolute ownership of land." *Id.* at 37.

Regarding the "royal prerogative basis," Brennan noted that some authority described ownership of vacant lands in a new colony as a "proprietary prerogative." He found no judicial consensus as to exactly how and where ownership would vest under this theory, however, and he therefore rejected it as well. *Id.* at 38.

38. *Id.* at 42.

39. Brennan cited very little Australian authority for his detailed description of native title characteristics, although he did cite several British, American, and New Zealand authorities. Indeed, he prefaced this description with the assertion that "some general propositions about native title can be stated without reference to evidence," *id.* at 42, and held the characteristics he described to be "the common law of Australia with reference to land titles." *Id.* at 51. Unless Brennan found these characteristics so logical as to require no precedential support, which is unlikely, this seems to be an overt instance of judicial lawmaking. Judicial activism traditionally has been much less common in Australia than in the United States, but the *Mabo* decision may be part of a recent trend by the Australian High Court toward activism. *See* Peter Hartcher, *High Court Flushes Out the Roundheads*, SYDNEY MORNING HERALD, Oct. 9, 1992, at 9 ("The High Court's new, high-profile activism may threaten to turn our political system on its head . . . . [T]he recent decision of the court in the Mabo land rights case persuaded most politicians who were paying attention that the court was prepared to take a radical reformist role.").

Brennan may have been acknowledging the current trend toward globalization of indigenous rights, including property rights. While a state's treatment of its indigenous people has been traditionally a domestic concern, indigenous rights issues have been moving steadily into the international arena. *See infra* notes 64–67 and accompanying text. Brennan may have seen *Mabo's Case* in an international rather than a domestic context, and thus have felt less constrained in making domestically unprecedented generalizations regarding native title.

40. *Mabo's Case*, 107 A.L.R. at 42. Given that native title is determined by indigenous people's traditional occupation, it would seem logically necessary that only indigenous people may possess native title. However, the ostensibly beneficial inalienability provision could be viewed as paternalistic: even if they want to, Aborigines cannot sell or give away their land to anyone except the government. *See infra* notes 44–45 and accompanying text. The inalienability provision could be viewed as discriminatory as well, because it affords native title holders less autonomy regarding their property than it gives to non-native title holders.

or group. Native title is recognized by (although it is not part of) the common law, and is thus protectable by legal and equitable remedies. A claim for these remedies may be brought by a representative action on behalf of the indigenous people. Native title is inherent and will survive the acquisition of sovereignty by a foreign power, even if that power does not explicitly recognize the native title. For the indigenous inhabitants of a settled territory to lose their otherwise valid native title, it must be affirmatively extinguished.[41]

Brennan explained in detail the circumstances necessary for extinguishment of title. In order for the Crown to extinguish native title through legislative or executive action, he wrote, it must reveal a "clear and plain intention to do so."[42] A law that "merely regulates the enjoyment of native title" or "creates a regime of control that is consistent with the continued enjoyment of native title" expresses no clear and plain intention to extinguish native title.[43] Indigenous people can extinguish their native title by surrendering it voluntarily to the Crown, but otherwise their title is inalienable. Because the nature of such title derives from traditional laws and customs, extinguishment is automatic if the indigenous people cease to acknowledge traditional laws or to observe ancient customs.[44] Moreover, because native title is specific to each indigenous community, it is automatically extinguished upon the death of the last member of a group or clan. Finally, upon extinguishment of native title by any means, the Crown becomes the absolute beneficial owner of the land.[45]

Applying these principles to the Meriam people, Brennan next examined several official post-annexation transactions involving the Murray Islands to determine whether the government had demonstrated a "clear and plain intention" to extinguish native title. He found that an 1882 transaction reserving the Murray Islands from sale was not inconsistent with the Meriams' use and enjoyment of the land and thus did not serve to extinguish their native title. However, a lease of two acres on the island of Mer, granted to the London Missionary Society in 1882, was inconsistent with such use and enjoyment and extinguished native title with respect to that two-acre parcel of land. The effects of several other transactions, including a

41. *Mabo's Case*, 107 A.L.R. at 42–45.

42. *Id.* at 46.

43. *Id.* at 47.

44. *Id.* at 51–52. This element of native title tends to shackle titleholders to their ancient traditions and customs under threat of automatic loss of their property interest; it therefore discourages them from voluntarily abandoning their old ways and punishes them even if they are forced to abandon their traditions due to circumstances beyond their control. The fact that non-indigenous Australians exercise expanding influence over the continent makes it increasingly difficult for indigenous Australians to maintain the ways of their ancestors.

45. *Id.* at 46–52.

lease purportedly granted in 1931 over Mer's satellite islands, Dauar and Waier, were left for later determination.[46]

In his final holding, Brennan reserved judgment on Dauer and Waier and declared with respect to Mer:

> (1) that the land in the Murray Islands is not Crown land within the meaning of that term in s 5 of the Land Act 1962–1988 (Qld);
> (2) that the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the island of Mer except for that parcel of land leased to [the mission, and other potential exceptions];
> (3) that the title of the Meriam people is subject to the power of the Parliament of Queensland and the power of the Governor in Council of Queensland to extinguish that title by valid exercise of their respective powers, provided any exercise of those powers is not inconsistent with the laws of the Commonwealth.[47]

The three justices who concurred in Brennan's judgment agreed that the Meriams retained native title to the Murray Islands, and that this title was still subject to extinguishment. Their reasoning, however, differed slightly from Brennan's, and the legal arguments in Justices Deane and Gaudron's joint concurrence were often eclipsed by bursts of impassioned rhetoric. For instance, Deane and Gaudron referred to the colonization of Australia as a "conflagration of oppression and conflict which . . . spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame."[48] They explained that their emotional language was necessary to counteract long-held assumptions about the legitimacy of Aboriginal dispossession:

> [W]e are conscious of the fact that . . . we have used language and expressed conclusions which some may think to be unusually emotive for a judgment in this court. We have not done that in order to trespass into the area of assessment or attribution of moral guilt . . . . [T]he reason which has led us to describe, and express conclusions about, the dispossession of Australian Aboriginals in unrestrained language is that the full facts of that dispossession are of critical importance to the assessment of the legitimacy of the propositions that the continent was unoccupied for legal purposes and that the unqualified legal and beneficial ownership of all the lands of the continent vested in the Crown.

46. *Id.* at 52–54.
47. *Id.* at 56.
48. *Id.* at 79.

> Long acceptance of legal propositions, particularly legal propositions relating to real property, can of itself impart legitimacy and preclude challenge. It is their association with the dispossession that, in our view, precludes those two propositions from acquiring the legitimacy which their acceptance as a basis of the real property law of this country for more than a hundred and fifty years would otherwise impart.[49]

The principal disagreement among the concurring justices centered on whether the court should recognize the plaintiff's claim for compensatory damages. Justices Deane, Toohey, and Gaudron argued that if the Crown extinguishes native title through a grant of land inconsistent with such title, then the native titleholders have a right to claim compensatory damages. Justices Brennan and McHugh, with Chief Justice Mason, did not recognize a claim for compensatory damages under these circumstances.[50]

The only member of the seven-justice Full Court to dissent, Justice Dawson advocated a complete denial of relief on the ground that any native title to the Murray Islands that might have existed had been subsequently extinguished by the Crown. He departed from the majority in his belief that for native title to survive the Crown's acquisition of sovereignty, the Crown must affirmatively permit the native title to continue.[51] In contrast to Brennan's requirement of the legislature's "clear and plain intention" to extinguish native title, Dawson opined that extinguishment of native title could be inferred from factual circumstances.[52] Applying these principles to the facts of the case, he found that the Crown's treatment of all colonial land as *terra nullius* was inherently inconsistent with any recognition of native title. Such treatment implied that the Crown gave no permission granting continued native title after it had acquired sovereignty.[53] Therefore, according to Dawson, any previously existing native title to the Murray Islands had been extinguished.[54]

Mabo's Case represents a landmark in the judicial treatment of native Australians. Before the *Mabo* decision, indigenous land rights in Australia had been discussed primarily in moral, ethical, and political terms. Debate had been focused in religious, legislative, and educational fora as well as in the media, but the few attempts to address

49. *Id.* at 91.
50. *Id.* at 7.
51. *Id.* at 98.
52. *Id.* at 97.
53. *Id.* at 111–15.
54. *Id.* at 136.

indigenous land rights in the courts had met with little success.[55] The *Mabo* decision has placed the issue firmly in the judicial arena, paving the way for future litigation of native land claims by creating a binding legal precedent from the highest Australian authority.

The practical significance of *Mabo's Case* remains unclear. While the decision's recognition of native title creates a substantial new right for indigenous Australians, this right is not unassailable. The High Court was careful to note that, although the Meriam people continue to hold native title at least to the island of Mer, their title is subject to governmental extinguishment. Either the Queensland Parliament or the Governor of Queensland, acting on behalf of the Crown, is entitled to extinguish Meriam title to the island by passing legislation that clearly expresses this intention. Because of this provision, some critics have called the *Mabo* decision moot, stating that it is long on rhetoric but short on practical effects because it essentially takes as much as it gives.[56] However, it seems unlikely that Queensland would risk the inevitable political fallout from an official revocation of Meriam title. The land at issue consists of nine square kilometers or less of minimally valuable property,[57] while the potential political backlash from such a move is astronomical.

The decision in *Mabo's Case* has favorable implications for other indigenous Australians but it could represent a high water mark. The Meriams presented a fact situation that was particularly susceptible to a finding of native title. Besides establishing the required elements of native title—biological descent from the islands' occupants and maintenance of traditional laws and customs—the Meriams' land claim included other advantageous elements such as a very small land area in dispute, historical recognition of private land ownership in traditional Meriam practice, and long-standing cultivation of the land in question.[58] It would be difficult for other groups of indigenous Australians to show all these elements. Nonetheless, such favorable components are not absolute prerequisites for a finding of native title. In any event, some Aboriginal rights advocates believe that at least thirty percent, and possibly as much as sixty percent, of Western Australia is subject to immediate claims of native title.[59]

Given the extent of possible native title claims, *Mabo's Case* has implications for non-Aboriginal Australians as well. Companies and individuals may soon face native title claims against land in which they already have, or are considering acquiring, an interest. Licenses for mining or exploration may be particularly susceptible to native title claims.[60] Since the *Mabo* decision in June 1992, several Aboriginal groups have filed native title claims against mining companies, citing *Mabo's Case* as their primary authority.[61] Determination of title will depend on several factors, including the terms of the instrument creating the company's land interest, Aboriginal history and cultural traditions regarding the particular land parcel, any applicable federal, state, or territorial legislation, and the courts' interpretation of *Mabo's Case*.[62]

Companies or individuals against whom claims are made may be able to negotiate agreements with potential native titleholders. Should such title conflicts be unresolvable through negotiation, however, difficult policy questions will face the Australian state and territorial governments. If a native title claim succeeds in court against a conflicting claim, such as a mining license, the government will have to decide whether to exercise its prerogative under *Mabo's Case* to extin-

55. Bradford W. Morse, *Aboriginal Self-Government in Australia and Canada* 36 (Institute of Intergovernmental Relations, Kingston, Ontario, Background Paper No. 4, 1984).

56. *See, e.g., Black Rights and White Guilt*, SYDNEY MORNING HERALD, June 5, 1992, at 12.

57. *See supra* note 3.

58. European colonizing nations have traditionally placed a high value on land cultivation in the context of property rights. Because cultivation has been thought to imply investment of personal labor, as well as identification with and commitment to a specific piece of land, Europeans have been much more likely to acknowledge the property rights of an agricultural people than, for instance, those of a hunting and gathering people. *See, e.g.*, WILLIAMS, *supra* note 18 at 130–33, 150 (1986). The Meriams have subsisted primarily through gardening, *see supra* text accompanying note 4, in contrast to the more nomadic Aborigines of the Australian mainland. While Justice Brennan certainly did not imply in *Mabo's Case* that cultivation of land was a precondition to native title in that land, the Meriams' agricultural tradition may have worked in their favor. Although the effect on their opinions is unclear, the judges must have realized that recognizing native title in an agriculturally-oriented indigenous society would be perceived as somewhat less radical, and therefore more acceptable, than recognizing native title in the mainland Aborigines. *Mabo's Case* therefore might represent a first step in the recognition of the property rights of all indigenous Australians.

59. *See* Hartcher, *supra* note 39. *Mabo's Case* directly affects only about 400 people—the population of Mer. *See* Paul Alexander, *Aborigines Score Land-Rights Victory in Australia Court*, SEATTLE TIMES, June 4, 1992, at A6. By comparison, there are approximately 600,000 Aborigines—3.4% of Australia's total population—living on the mainland. *See* Geoff Spencer, *White Australians' Land Rights in Doubt*, L.A. TIMES, Nov. 8, 1992, at 9.

60. The Australian government estimates that ordinary homeowners and business owners—who are apparently unaffected by the *Mabo's Case* decision—possess title to only about 15% of Australia's land. The British Crown owns much of the remainder, a large part of which is outback. This Crown land, some of which is leased to mining companies and other enterprises and some of which is vacant, will be the main target of native title claims. *See* Robert Milliken, *Talks Ordered as Aborigines Plan Territorial Claims*, THE INDEPENDENT, Nov. 3, 1992, at 14.

61. *See* Paul Chamberlin & Peter Hartcher, *Blacks Launch Four Native Land Title Claims*, SYDNEY MORNING HERALD, Oct. 14, 1992, at 2.

62. *See The Improbable Effects of Mabo*, SYDNEY MORNING HERALD, Oct. 14, 1992, at 16. In response to uncertainty concerning future interpretation of *Mabo's Case*, and in hopes of preventing an explosion of land claim litigation, Australian Prime Minister Paul Keating announced in October 1992 that he would chair an eleven-month consultation among representatives of the indigenous Australians, the government, and concerned industries in order to clarify the case's implications. The government also has announced that it may fund a number of test cases. *See* Catherine Foster, *Australia to Clear Up Aboriginal Land Rights*, CHRISTIAN SCI. MONITOR, Nov. 2, 1992, at 8.

guish native title through express legislation. The policy interests in protecting indigenous rights must be balanced against countervailing interests in exploiting natural resources, providing jobs, and stimulating the economy.[63]

In the broader context of international law, *Mabo's Case* appears to adopt other jurisdictions' policies regarding indigenous peoples rather than breaking new ground. The courts of the United Kingdom, the United States, Canada, and New Zealand have all recognized the inherent existence of land title vested in their indigenous populations and extinguishable only by express governmental legislation,[64] and the Australian High Court appears to have simply followed their lead.

Nonetheless, *Mabo's Case* is significant internationally because the principles expressed in the decision fortify a growing trend towards recognition and protection of indigenous people's rights.[65] Before the 1970s, there were no international standards by which states could determine policies regarding their indigenous populations; indigenous rights issues were almost always considered within a domestic framework. In the 1970s and 1980s, however, governments, international agencies, international advocacy groups and commissions, and other international entities began working together to define a set of international norms for the treatment of indigenous peoples.[66] As a result,

63. Although in future adjudications of land claims based on *Mabo*, competing policy interests may ultimately override indigenous property rights, the national government has expressed strong support for the protection of those rights. Australian Prime Minister Paul Keating has characterized the cries of outrage against the *Mabo* decision (most notably those of Hugh Morgan, chairman of Western Mining Corp. Ltd., one of Australia's largest resources companies) as "just bigotry . . . the voice of ignorance, the voice of hysteria and the voice of the nineteenth century." Spencer, *supra* note 59, at 9. Keating's support for indigenous land rights comes in the context of a much broader policy favoring reconciliation between black and white Australians. As part of this move, the Australian government, with the cooperation of state administrations, has already returned large sections of unleased Crown land to their traditional Aboriginal inhabitants. *Id.* Furthermore, in 1988 Keating announced the government's commitment to negotiating a binding instrument with the Aborigines and Torres Strait Islanders, which would represent a reconciliation between black and white Australians. Whether this instrument would be governed solely by domestic law or whether it would include an international dimension, such as a provision for dispute settlement in an international forum, is unclear. In either case, if the plans for this instrument are fulfilled, it could become an international precedent for indigenous rights and for governmental relations with indigenous peoples. *See* Lawrey, *supra* note 15 (analyzing the prospects for such an instrument in the context of recent efforts to improve international standards for indigenous rights).

64. *See, e.g.*, Lawrey, *supra* note 15, at 715; B.A. Keon-Cohen, *Native Justice in Australia, Canada, and the U.S.A.: A Comparative Analysis*, 7 MONASH U. L. REV. 250, 253–55 (1981) (Keon-Cohen represented two of the Meriam plaintiffs in *Mabo's Case*, 107 A.L.R. at 1); P.G. McHugh, *Aboriginal Title in New Zealand Courts*, 2 CANTERBURY L. REV. 235, 264–65 (1984); P.G. McHugh, *Maori Fishing Rights and the North American Indian*, 6 OTAGO L. REV. 62, 64 (1985).

65. Australian political support for indigenous peoples' land rights, with potential international precedential effects, was evolving even before the *Mabo's Case* decision. *See supra* note 63.

66. Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 YALE J. INT'L L. 127, 147 (1991).

studies, conventions, and declarations on indigenous rights have proliferated.[67] Despite this growing movement, however, there is currently no international guarantee of rights specific to indigenous peoples.[68] Even recognition of inherent native title to land is not yet sufficiently prevalent or longstanding to be considered customary international law.[69] Because international principles gain political legitimacy through widespread acceptance, *Mabo's Case* serves to bolster the hortatory status of the principles it recognizes—in particular, its unequivocal rejection of the expanded *terra nullius* doctrine, its corollary condemnation of social and racial discrimination, and its acknowledgment of inherent native title to land, albeit subject to restrictions. Now that indigenous issues, including land rights, have begun to move from the domestic to the international arena, courts may examine more closely the treatment of indigenous peoples by other states' courts. Despite its possible practical restrictions, *Mabo's Case* will represent to the world symbolically and philosophically a strong Australian authority in favor of indigenous land rights.

The immediate Meriam reaction to Mabo's Case was generally positive. While some Meriam leaders dismissed the decision as meaningless because their native title could still be overridden by state law, most of Mer's inhabitants rejoiced at the High Court's recognition of their right to the land they have always considered their own. The islanders celebrated the decision with a victory dance and a traditional turtle feast.[70]

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67. *See, e.g., id.* at 155–58. In addition to demanding recognition of land rights, indigenous groups have called attention to other concerns such as their need for cultural protections (for instance, to maintain traditional religions, languages, and customs) and their need for economic and social protections (for instance, welfare, housing, and health care). *Id.* at 159–60. The intellectual property rights of indigenous peoples comprise another area of increasing interest. *See, e.g.*, Anthony Seeger, *Singing Other Peoples' Songs*, CULTURAL SURVIVAL Q., Summer 1991, at 36–39 (discussing indigenous peoples' potential intellectual property interests in traditional songs).

68. Lawrey, *supra* note 15, at 707–08.

69. *Id.* at 715.

70. *See* Greg Roberts, *Meriams Mark Occasion with a Turtle Feast*, SYDNEY MORNING HERALD, June 4, 1992, at 4. Eddie Mabo, the Meriam leader who instituted this action ten years ago, did not live to celebrate. He died of cancer in January 1992. *Id.*

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Judicial Activism: Usurpation or Re-democratization?

Upendra Baxi

Introduction

At the very outset, it is worth recognizing the obvious. Adjudication, all said and done, is an aspect of *governance*. To be somewhat (and so rapidly) old-fashioned one might say, following Louis Althusser, that courts everywhere, at the end of the day, are strategic domains of both repressive and ideological state apparatus. No grand feats of political theory are, however, required to demonstrate all this! Victims of micro-fascism of power everywhere know this. So do, as it were, their next of kin: social action and human rights activists. They know well how the *rule of law* coexists and combines with the *reign of terror*.

Courts and justices wield the power of the state even as they are constituted by it. Citizens become *justices* when appointed by the executive of the day; therefore it is as unimaginable that a *naxal* would be elevated to the Indian Supreme Court as a 'capitalist roader' to the apex court in Cuba. Within this framework, of course, considerations of region, race, caste, gender play a distinctive role in converting citizens into justices. And in the exercise of the sovereign adjudicative power of the state justices and court can never be *passive*; they need, by definition, to be *active*.

States of emergency are not maintained by passivity of adjudicators; nor are draconian detention laws nor a regime of immunity for corruption in high places. Justices have to be active always in the preservation of structures-in-dominance. And they have to bring an unusual *insensitivity to injustice* as a mark of competence in adjudication.

The American Supreme Court offers a most instructive example. In the infamous *Dred Scott* decision it sustained slavery. For about a hundred years, it sustained *apartheid* at all levels of American social

Prof.Upendra Baxi, is former Vice-Chancellor of Delhi University, and presently Visiting Professor, School of Law, University of Warwick, U.K.

If *transparency and accountability* are the new constitutional virtues to be enforced on Indian political establishment in the title of probity and reticence in the exercise of high public power, ought not the judicial process and power enforce these virtues, in an equal measure, in regard to *transparency* in international economic negotiations favouring manifestly unconstitutional trade negotiations by the supreme Indian executive? If indeed, as the two very eminent economists say, it is true that "genuine economic liberalization for development begins from transparency of negotiations"(Bhaduri & Nayyar:1996, 82) what *overwhelming reasons, aside from the well-manicured strategies, such as canons of judicial self-restraint, justify giving such a short shrift to social action* petitions seeking a review of India's accession to GATT/WTO agreements?

I do not wish to burden this paper by elaborating the list of such-like questions. No doubt, many more could be added such as the issue of legitimation of the repeal of regulations concerning prohibition on alienation/free marketization of tribal lands.

Towards a Conclusion

The very raising of such questions, however, points towards what I have been describing as a tendency towards a *structural adjustment of Indian judicial activism*. To some extent this tendency manifests a continuity in Indian jurisprudence. It is also, to an extent, *carefully contrived*. I have archived the details of not too imaginative a packaging of propaganda against judicial activism elsewhere (see my Capital Foundation Lecture on Globalization and Judicial Activism, 1996, published also in the *Mainstream*). The technique consists in exhorting the judiciary to remain anxious concerning the trajectory of its 'activism.' Not just the corporate Bar but even eminent civil liberties lawyers have publicly advised the Supreme Court that activism is an apt response to the misfortune of India's marginalized masses. Activism in this view is legitimate when it addresses issues of pollution and environmental degradation, the plight of backward classes and atrocities against untouchables, bonded and child labour, and gender rights. But activism is not an appropriate sphere of judicial oversight over issues of marco-economic policy or even over issues concerning developmental decisions (translate, please, as Bhopal, Enron, the mutlinationalization of Indian mining

and mineral industries, impoverishment-aggravating measures of structural adjustment).

Insofar as the judicial activists feel constrained to heed this gratuitous anti-people and anti-human rights advice, *structural adjustment of Indian judicial activism will be accomplished.* And this will determine in India of the next decade the fate of a 'million mutinies' against the anti-poor policies of Indian state managers in the grip of the processes of globalization, heartily supported and endorsed by the mediocre liberalism of Indian intellectuals and urban middle classes.

These processes, of course, need to be carefully understood. But the task, as per the Eleventh Thesis of Marx against Feuerbach, is *how to change the situation or the conjuncture. The agonies of Indian judicial activism are thus laid bare. If (and there is abundant evidence for this proposition)* the accomplishment of the people-oriented *judiciary was primarily a result of people's struggles, the task of future struggles is to save the Indian judiciary from self-imposed structural adjustment of judicial activism.*

On the issue of how this may be defined, and appropriate strategies evolved, one may not expect unanimity among Indian social and human rights activists. But even through active dissensus, this is a path of future struggles.

The crucial question before peoples' movements is how the most people-freindly of governance apparatus (namely, the judiciary) can be both enabled and empowered, in confrontation with the forces, managers and agents of Indian globalization, to serve the constitutionally envisioned paradigm of Indian development.

The celebration of the Golden jubilee of Indian constitutionalism inaugurates itself with this interrogation.

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capital; it may nationalize sectors of industry; it may oversee corporate management on grounds of public accountability; it may regulate, and even prohibit in some areas, intrusion of foreign capital and entry of multinationals. The list is virtually endless. And although the broad picture is true, it is also true that the courts were asked to take regulation seriously at the bar of fundamental rights. Practically every major industrial house adorns law reports as a petitioner or appellant; there is not a single major law or policy on the regulation of the economy that has not been subjected to endless regime of stay orders and appeals. And almost all major doctrines of administrative law (fair play in action) stand embedded in the capital's combat against the Indian state planning and regulation.

Even if, and on balance, the state's power were sustained, this was achieved through adjudicatory processes which routinely problematized the *regulation* of the economy.

In this arena, judicial self-restraint was indeed a *masked performance of judicial activism*. It is unsurprising that the managers of Indian state planning did *not* complain as prolifically concerning judicial performance in this area as they did in the domain of agrarian reforms! The era of planning was also an era of collaboration between politics and industry. The managers of the Indian state were deeply imbricated in the struggle of fractions of Indian capitalist classes. They were at the same time *clients* and *controllers* of merchant, financial, and productive capital. As clients, they had to raise donations for political parties to finance elections and party activities, and as clients they had also to ensure a level of productivity of industry, and capital generally, which would sustain the satisfactions of growing Indian middle classes. As controllers, the Indian state managers needed and sought (and they accomplished through 'tricks' of planning) many a point of leverage over the capitalist class. It was also necessary for the Indian state to assume a growing role as a *finance capitalist state*, under the auspices of planned economy. This was accomplished superbly by nationalization of banks, insurance, resource industry (especially petroleum) and control over all public utilities as well as by capturing commanding heights of capital formation (through the Industrial Credit and Investment Corporation, and of course the Reserve Bank of India and foreign exchange controls).

The purpose of this necessarily generalized narrative is, in the present context, to illuminate the contexts of the formation of the culture of judicial self-restraint. There was simply no way in which the Indian judiciary could fail to reflect the deep ambivalence of Indian state managers towards Indian and foreign capital. There was only one way in which the courts could innovate about the Indian economy in terms of the constitutional notion of Indian development: only those policies and programmes of development are *just* which *have the intention and the impact of dis-proportionately benefiting India's impoverished masses.*

Since the nineties when India has embarked on a headlong and heedless process of economic liberalization (unconstitutional at its very core, given the constitutional conception of Indian development) the same culture of self-restraint has marked the Supreme Court's approach despite a radical change in the economic context. The changed context is fraught with a whole variety of perils for the Indian people (see Bhaduri & Nayyar, 1996).

Not merely has an otherwise activist Supreme Court of India taken judicial notice of the 'winds of change' (as did Justice Venkatchaliah in *Tomco*: 1995 Supp.1 SCC 499) but it has, broadly, sustained the triple D/s of *liberalization: disinvestment, denationalization and deregulation*. In the days of the planned state (now ludicrously described *ad nauseam* merely as the license quota Raj) the Supreme Court of India, and the High Courts, at least maintained *strict constitutional scrutiny* over nationalization and overall state regulation over economic activity. Since the nineties, barring a handful of exceptions, the judicial process seems to have altogether *surrendered* itself to the idolatry of globalization and liberalization. It has resolutely bypassed, barring a handful of situations, almost all of the following questions:

If 'regulation' and 'nationalization' were aptly probelmatized during the halcyon days of Indian planned state, should not the deregulation and privatization at least merit the same order of *prima facie constitutional scrutiny* in these halcyon days of economic liberalization?

If the judicial process was harnessed in the past to secure workers' rights against the overwhelming propaganda of productivity, should the courts now become active partners in the demise of the future of collective rights of workers in an era of globalization?

The redirection of social action litigation to activist-government dialogical practices in such situations when citizen groups are energized by the judicial rhetoric on human rights to activate the courts is, simply put, not consistent with the *promises of a people-oriented judiciary*. The subaltern masses of India are used to constant betrayal of *political promises*; they are numbed to incomprehension when even India's most activist Justices seem (and indeed from time to time *do*) betray *constitutional promises* which they themselves articulate from the High bench.

(c) *Forces of Globalization and Canons of Judicial Self-Restraint*

The conventional 'wisdom' on judicial self-restraint in advanced capitalist societies made its appearnace against the paradigm of *welfare state*. We all know, in one way or other, of the American Supreme Court's approach to New Deal reforms and the impact of President Roosevelt's Court-packing plan. But we do not always recall that the culture of judicial self-restraint in matters of economic policy in the United States developed primarily in relation to protection and promotion of rights of (as we still call them in India) weaker sections of society. No more will the Supreme Court of the United States strike down a Congressional statute providing for the rights of the labouring children or unorganized workers or minimum wage law.

In India the culture of judicial self-restraint developed around different issues. Despite high flown rhetoric of social justice, the first quarter century of Indian legislative activity witnessed no vigorous programme of law and policy concerning unorganized rural labour, gender equality, atrocities against untouchables and indigenous peoples, child labour, disabled and other vulnerable sections of Indian society. Outside of agrarian reforms, the courts have had very few occasions to invalidate welfare legislations. In fact, in the face of masterly legislative inactivity, in the famous *Stnavac Case* in the late sixties, the Supreme Court in effect wrote a law on contract labour which Parliament then enacted!

The Indian case presents an elaboration of doctrines of judicial self-restraint in two principal areas. The first is the expansion of discretionary powers of the state officials; the second, and related, is the area of economic regulation.

In the very first years of India's independence, the Supreme Court affirmed vast discretionary powers of the managers of the Indian state. They held that the fact or the probability of abuse of power is not a valid ground for denial to discretionary power to a regime. *Mala fide* exercise of discretionary powers may be challenged but of course the proof of such allegations is made so stringent that hardly any such attempt has been successful! Since the exercise of powers was discretionary, judiciary may not compel action; thus for example the power to make a reference of industrial disputes to labour adjudication under the Industrial Disputes Act could, and has, allowed the states to sit on matters,for as long as two decades, with enormous costs to working classes and their patterns of relations to law and politics. There are indeed very few modes by which agricultural labour may successfully seek implementation of the minimum wages law or the beneficiaries of the extended state anti-'poverty' programmes may seek fair implementation of the schemes, or draught or famine stricken people may seek, with judicial intervention, ameliorative action or compensation for executive acts of commission and omission. The vast edifice of 'administrative' law insisting on fair play in action remains primarily a jurisprudence of and for the urban middle classes (see my introduction to Massey, 1995).

Even if this observation is contested, it at least remains true that the notion of fair-play in administration (e.g., right of the affected parties to be heard, duty to give reasons, avoidance of bias in decision-making, etc.,) begins to be serviceable when governments exercise their discretionary power. When they avoid using it, canons of judicial self-restraint make judicial activism irrelevant for the disadvantaged, dispossessed, deprived and impoverished masses of India.

The second area where judicial self-restraint has institutionalized itself is that of economic or developmental decisions. Even today when courts deal with these, it is with utmost deference to the 'wisdom' of the executive (as seen in the discourse of mega-irrigation projects). Although embroidered with occasional anxieties for the rights of trade and industry, the Indian judiciary has sustained wide powers which the planned economy of India, till the recent epidemic of liberalization,

and its Indian subsidiary). At the very most, if any criminal liability existed it was in the category of causing *simple hurt*!

In many an inversion which characterized the apex judiciary's performance in the Bhopal case, a mighty multinational was able to represent itself successfully as a *victim* of social action and judicial process! And the real victims were allowed to be presented, ultimately, as maligners, whose docile bodies became sites of contention as to the nature of injury suffered: in upholding the settlement amount ($ 470 million as against $3 billion claimed on behalf of the victims by the sovereign government of India) the Supreme Court was able initially to locate only a few victims as having suffered serious injury! After accomplishing that, the Court changed its estimate of the magnitude of the victimage! And the Supreme Court continued to allow Union Carbide to appear before it in relation to several matters including the formation of a trust to construct a hospital (still not done) despite the fact that the sessions court had declared the corporation as an 'absconder' for non-appearance in the criminal proceedings!

Altogether the Bhopal adjudication is a saga of judicial betrayal of the very activist enunciations offered through social action litigation. Somehow, the MIC had also entered the soul of Indian jurisprudence. The processes of adjudication constituted the recurrence of the Bhopal catastrophe initiated by Carbide's perfidious practices of power; the very articulate concern for the real victims of the Bhopal catastrophe were invoked by the Supreme Court to justify the settlement.

The Bhopal adjudication reveals investment of judicial talent and activism on the side of foreign investors and multinationals, no matter how horrendous is the nature and impact of sovereign power on hundreds of thousands of children, women and men who till this day continue to unfold the latent impacts of what was, in effect, a mass experimentation with human beings in the long term impact of exposure to heavy dosages of MIC, a lethal chemical that can only be tested under the law of informed consent on human beings and in very small doses on experimental animals. The de-sensitization of an otherwise summit court extends to aborting one of the very few examples in the Third World of criminal prosecution for manslaughter. The adjudicatory performance of the Court in Bhopal case suggests not merely the limits of judicial willingness and capability of delivering justice to victims of deliberately

planned mass disasters, it also, (and this is *alarming*), displays an unprecedented solicitude for the rights of global capital against and over the fundamental rights of the people of India, expansively affirmed by the Court itself in relation to the Indian state and civil society.

(b) *Constitutional versus Political Promises*

No summit court in the world can be *comprehensively activist*, even the Supreme Court of India. Nor ought one expect apex judiciary to perform 'revolutionary' agenda of social justice without detours, digression and serendipity. After all, courts and justices have to arrive at a mix of *activism and restraint*.

This having been said, it matters a very great deal where *activism* and *restraint* ought to find their place in adjudication. This has always been a matter of escalated judicial and juridical discursive complexity. Many judges and jurists take the view that it is appropriate for justices to be *activist*, in some sense or the other, in relation to civil and political rights but not in the domain of *developmental or economic policy decisions*. These matters of policy, it is argued, involve complex considerations not fit for adjudicatory justice; these rather belong to the realm of the rough and tumble of politics (establishment and opposition) and lately politics of new social movements or politics of resistance. Justices and courts, it is maintained, ought to leave the 'political' arena unhindered.

Even the super-activist Supreme Court of India has followed this orthodoxy against its own radical discourse on human rights in India. It converted the discourse on Narmada as an issue of rehabilitation (which is, of course, important second-best way of dealing with developmental decisions) from the issues as presented before the judiciary: the issue of *transparency and accountability of such developmental decisions, the issue of peoples' right to know and to participate in decisions affecting the future of environment and the future of the future generations* (affairs, as it were, of inter-generational justice) and (without being exhaustive) *the security of peoples' right to free speech and expression against the unworkable and unjustified collective representation of the state as a monopoly-holder on definitions of 'public interest'*.

At least Narmada allowed scope for raising these issues which

IV was thus accomplished; the social, economic and cultural rights guaranteed under the directive principles of state policy are continually made enforceable as integral aspects of declared fundamental rights.

Fifth, the Supreme Court assumed the role of a custodian of political morality. Areas not considered justiciable (like the imposition of President's rule under Article 356) were made so. The supreme executive discretion in regard to reservations in jobs and educational institutions for "other backward classes" and educationally and economically backward classes was brought under strict constitutional scrutiny to prevent runaway reservation quotas, which served more political convenience than constitutional conviction.

And the Court sustained the Election Commission decisions on establishing democratic norms within political parties by requiring them to hold elections and subjecting them to disclose their assets and accounts.

Sixth, and the most striking of all, the nineties witnessed, in full retreat from the *Antulay* decisions (Baxi, 1989), judicial activism enunciating the most fundamental of all fundamental rights of the Indian people: *the right of all citizens of India to immunity from acts of corruption by people in high places*. In exercizing constitutional judicial power, the Supreme Court cast itself into the role of an ombudsperson (which Indian Parliament has effectively denied to Indian people for five decades). Through technically unimpeachable decisions, invoking the doctrine of a *continuing mandamus*, the Supreme Court has virtually divested the supreme executive of its powers to control the operations of the Central Bureau of Investigation and taken over its day to day investigation of charges of corruption in high places, even to the point of now requiring approval of the Court for transfer of the head of this agency! Whether decimation of the ranks of corrupt politicians can be accomplished by judicial process alone is of course an issue which generates acute anxieties and controversies. But in a sense it must be acknowledged that when social activism in India has virtually abandoned the fight against corruption in high places, the judiciary acts as a true inheritor of the values, virtues and vision of lamented Jai Prakash Narain's aborted Total Revolution. Hopefully, public movements will now be nurtured to combat microfascism of power at local levels more effectively by these astonishingly wide range of integrity and rectitude initiatives of the apex court.

The activism of the late eighties and nineties maintains some continuity with the first two phases of judicial activism identified earlier. But it also marks a rupture in the sense that the judiciary has become a prime instrumentality of *re-democratizing the processes of governance and practices of politics. The contemporary patterns of judicial behaviour of the judiciary has transformed it from a mere apparatus of governance into an institutionalized social movement*. There is no precedent for this in contemporary world judicial history. And perhaps *activism* is scarcely a word, despite its protean attributes, which captures this transformation.

Dark Linings on a Silver Horizion

It should not detract one bit from the warmth of appreciation of the achievements of this new phase of judicial activism to acknowledge the nature and the magnitude of self-imposed limits that Justices have themselves sculpted on their constitutional power and *duty*. The flip side of contemporary judicial activism is its canon of judicial self-restraint in matters entailing violation of peoples' rights in the current phase of the globalization of India.

(a) *Catastrophic Judicial Process for the Bhopal Victims*

This is a complex story which cannot be narrated fully in this paper. But a few aspects may suggest the outlines of this agonizing narrative. The Bhopal settlement offers a mightily unjust prologue to this narrative, which I have described in detail elsewhere (Baxi & Paul, 1985; Baxi, 1986; Baxi & Dhandha, 1990). Not merely were the victims, not heard properly by the Court, when a close door settlement was devised and then ratified by two judicial orders but the Court annihilated the rule of law in India further when it conferred immunity from criminal process as a part of a civil settlement on the Union Carbide and its affiliates. It required a Herculean effort on the part of victims movement, and social action groups, to have the Court review this immunity. While the Court was enabled to restore dignity to judicial process by canceling this immunity, this was to turn out to be a pyrrhic victory for the victims because in 1997 the Court was to rule that charges of

remedies is beyond the pale of amendatory power excepting in the unimaginable situation wherein a *judicial hara-kiri* the Supreme Court would validate an amendment which abridges judicial process and power. In later decisions, the letter and sprit of *Kesavananda* would be invoked to sustain judicial supremacy in matters of appointment of justices and transfer of High Court justices as well as in the domain of conditions of service, as well as emoluments of the judiciary itself. There is simply no counterpart, in the annals of world judiciary, of the institutionalization of the *structural autonomy of judiciary by the very exertions of adjudicatory power.*

Thus, curiously (and I believe happily) in response to the assault of the notion of 'commitment' the Supreme Court created its own dynamic space for activism.

At the same time, in terms of *process*, that is, the maintenance of suzerainty of the *unwritten constitution over the written one*, the Court continued to yield in *domains which do not affect the structural autonomy of judicial power.*

Thus, the Court endorsed emergency excesses, unjustifiable impositions of President's Rule under Article 356, extraordinary powers under security laws, political immunity to corruption in high places, and many manifestations of arbitrary, even despotic exercises of public power. Books on constitutional law and administrative law are full of instances of judicial accommodation. But the best evidence of all this emanates from a comparison between exercises of adjudicatory power in the 80s and the 90s with the first three decades of Indian constitutional interpretation. From the vantage point of judicial activism, especially in the 90s, it is indeed hard to believe that the institution called the Supreme Court of India could ever have been otherwise.

The Rapture and the Rupture

The nature of judicial activism in the last decade and a half is indeed radical. As I have described the process in *Social Action* ("Law, Struggle and Activists..." 35; 118-31) and elsewhere in several versions of my article "Taking Suffering Seriously: Social Action Litigation Before the Supreme Court of India," the birth and growth of Social Action Litigation (SAL), still miscalled by Indian-Americans as Public Interest Litigation (PIL), indeed accomplished the transformation *of* the Supreme Court of India into Supreme Court *for* Indians.

The SAL achieved many things. First, it marked the advent of judicial populism; that is, the Supreme Court (in the memorable phrase of Justice Goswami) began to imagine itself as the "last resort of the bewildered and oppressed" Indians. Second, it marked a moment of *judicial catharsis*: apex Indian adjudicators began performing a judicial penance for their outrageous emergency decisions. It is no accident that Justice Bhagwati who offered a most articulate defense of suspension of *all fundamental rights* during the emergency became the founder of SAL (this does not belittle the contribution of other activist Justices).

Third, the Court *democratized access to judiciary as a collective right of the peoples of India.* It did so by a variety of approaches: it entertained letters written by NGOs and NGIs (non-governmental individuals) as if they were writ petitions (a process I have named as *epistolary jurisdiction*); it innovated new practices of fact finding (especially through the means of independent socio-economic commissions to ascertain the facts); it invested itself with continued jurisdiction over *extensive domains of state lawlessness* (in custodial institutions such as prisons, juvenile homes, protective homes for women) and fashioned all kinds of judicial intervention and remedies.

Fourth, the Supreme Court read words and formulae in the Constitution of 1950 in ways that recognized and created *new fundamental rights*. A gradual erosion of the distinction between Part III and Part*

* Thus, starting initially, with reading into Article 21 the right to due process of law as including the right to bail, the right to privacy and dignity in the administration of criminal justice (the basic rights of undertrials and those punitively detained) the Supreme Court has *legislated new fundamental rights some of which were expressly, after deep deliberation, excluded from Part III by the constitution-makers. These rights include:*

- *the right to literacy and primary and secondary education*
- *the right to health*
- *the right to food, drinking water and integrity of environment*
- *the right to a minimum wage*
- *the right to information*
- *the rights to responsible affirmative action policies*
- *the right to compensation for torture, cruel, degrading and unusual punishment or treatment*
- *the right to speedy trial*
- *the right to enforce accountability of total institutions (juvenile homes, women's protective homes, psychiatric care institutions, prisons)*
- *the right to gender justice*
- *the collective right of the Indian people against immunity from corruption in high places*

before the law, rule of law, socialism and secularism. All this is rather well known to us now and a settled judicial doctrine.

But in 1973 the Court's ruling (decided by a wafer thin majority) caused political consternation. Under Indira Nehru Gandhi's leadership there emerged a political consensus among all parties that the judiciary had indeed usurped the constitutional powers of Parliament (till now identified with, and translatable as, the unquestionable supremacy of the Prime Minister of India).

The 'usurpation' was met with a crude display of executive power; three senior most justices who contributed to the majority formation in *Kesavananda* (all eligible, in turn, to be elevated to the Chief Justiceship of India) were superseded and A.N.Ray, who led the critique of the Court's opinion, was appointed as Chief Justice of India. This show of power was sought to be hegemonized in terms of the doctrine of 'committed judiciary.' So was the latter day supersession of Justice Khanna who dissented in the infamous *habeas corpus* case.

Our interest, for the present purposes, lies not so much in technical developments (important as they are and were to become) but in the provocation offered by the basic structure doctrine and the political response. No court in modern world had gone thus far; typically, judicial review extends to administrative acts and enacted laws when they can be shown to infringe the provisions of the Constitution. *What the court accomplished now was a unique assertion of judicial power under which it could negative an amendment to the Constitution duly passed by Parliament acting under the provisions of the Constitution.*

The language of 'committed judiciary' is of more than historical interest. Even today articulations critiquing judicial activism, though carefully avoiding this emergency-tainted rhetoric, resurrects the same notions concerning the legitimacy of executive hegemony over the ultimate constitutional interpretation.

Confronted by acute interrogation of the notion, Indira Nehru Gandhi was shrewd enough to say that all that was meant by 'commitment' was commitment to the Constitution of India! But surely the judicial oath of office already ensured this feat.

Although she never said it, wisely, in an explicit manner, the underlying text of power was clear and compelling. It [illegible]

Constitution that justices ought to be, and remain, committed. But lurking beneath an extensively, and embarrassingly, *written* Constitution lay an *unwritten* one. The *unwritten constitution* embodies a series of *tacit understandings about protocols of collaboration by the supreme judiciary with the supreme executive.* On any view of governance, the supreme judiciary may not in fundamental matters override the maxim that it is, at the end of the day, the task of elected executive to govern. The supreme judiciary, to invoke the newly fangled computer language, is merely (and at best) a *cursor* correcting the script of power; it can never, and should never, aspire to be the *keyboard*, let alone the *programme*, for the overarching exercise of political power. To continue the metaphor, the hard disc of power is composed by social engineers, namely the practitioners of political power among whom justices and courts could scarcely be included.

"Commitment" also began to define the mark of being a `progressive' judge. A ` progressive' judge, in the vocabulary of governance, is a being who respects the need to *affirm the unwritten constitution when it conflicts with the written one.* Thus, justices who endowed executive with unbridled power to amend (even repeal) the Constitution were considered progressive and were `duly' rewarded.

The notion that the seniormost justice of the Supreme Court should be elevated as Chief Justice is an aspect of the *unwritten constitution.* Although. superficially, this notion is venerated by the Indian Bar as an assurance of the autonomy of the judiciary, in its deep structure that assurance gets converted into a *pattern of allegiance to the unwritten constitution.* Since 1973, each and every associate Justice of the Supreme Court must remain aware of the *probability and even the possibility of supersession.* That *libidinal* apprehension, in the absence of even a whisper of a suggestion that the Constitution should be amended to convert the rule of seniority from a *convention* into a *rule* governing political practice, is undoubtedly a real one and shapes many an adjudicatory practice.

The conversion of the Supreme Court of India into a continuing constituent assembly, as it were, is no *routine* act of *activism.* It is, indeed, a *foundational* act. From 1973 onwards, judicial review itself becomes an integral aspect of the unamendable basic structure of the Constitution. The fundamental right of the people of India to judicial

This was both irritating and inconvenient. Even more so was the assertion of judicial power to invalidate legislations. The nationalists were, given their experience in the freedom struggle, suspicious of judicial power and autonomy; they prized, above all, parliamentary sovereignty. Of all the political personages, a charismatic and imperious Nehru was not going to accept judicial leadership over constitutional interpretation. The colonial legal liberalism of the first generation nationalist leaders of Independent India still harked back to the notions of British parliamentary sovereignty despite the Constitution they wrote.

That order of sovereignty was indeed accomplished by ensuring that the Supreme Court unquestionably accepted the power of Parliament to amend the Constitution. However, as it happened, the plenary power to amend did not reach the abolition of the right to private property till the late seventies. In the meantime, the politics of agrarian reform converted itself into a discourse concerning the *supremacy* of the power of Parliament over the powers of judicial review.

It is this period which provided politicians of all kinds with three related forms of power. First, the discursive power of an *alibi politics*; that is, it was the supreme judiciary which was acting as a roadblock to the redistribution of power and property relations to masses of people oppressed and exploited by the landlords. More than the power of the propriteriat, it was judicial power which needed to be confined and cribbed if the nation was to progress towards an egalitarian social order.

Second, the practices of political power tended to be *judiciary centered*, even *obsessed*. It seemed to be commonly assumed, in the Nehruvian era, that constitutional amendments were to be equated with good governance whereas, as is well known, the tasks of governance lay elsewhere.

Third, the Indian state managers learnt early enough the tricks of exercizing power without responsibility. They became specialists and pastmasters of decision-making which can only be characterized as *fly-now-pay-later rationality*. If the Supreme Court empowered itself with the burden of adjudging on the constitutional scope of amendments, this is a burden which will be returned to it with vengeance. The Constitution will continue to be amended and it would remain the task of the Supreme Court to do with it what they can. Perhaps, this strategy of

attrition was thought to be good enough to restore the future of executive supremacy over constitutional interpretation. When this did not succeed as expected, we gather another narrative of ascription.

The allegations of judicial usurpation were never made on *technical* grounds (that is, in this or that case, justices could have taken an equally cogent but a different view, tending towards 'distributive justice': to be sure, they could and ought to have) but on *political grounds*, implying that there was insufficient collaboration between the apex judiciary and the supreme executive of an order that sustains the legitimacy of the latter. The language of 'usurpation' had, then, in reality very little to do with meaningful implementation of agrarian reforms. It had a considerable lot to do with the nurturing of legitimation deficit of a political regime.

The Birth of Judicial Activism

The period between 1969 to 1973 marks the historic advent of judicial activism. It is during that period that the Supreme Court developed a new practice of judicial hegemony over the symbolic politics concerning the power to amend the Constitution. The story is well worn; we summate it briefly only with a view to highlight the struggle for ascendancy over power to determine the very nature of the Indian Constitution for all times to come.

From 1950 to 1967 the Supreme Court accepted the wide ranging assertion of Parliament's power to amend the Constitution even when it thoroughly deprived people of their fundamental rights to judicial remedies. However, while sustaining the validity of the seventeenth amendment, two justices, especially Hidyatuallah J., wondered aloud as to whether fundamental rights can be allowed to become the 'playthings' of a majority. This observation sowed the seeds of first the ruling in *Golak Nath* case that the amendatory powers of Parliament cannot extend to abrogation or repeal of fundamental rights; this was followed in 1973 by *Kesvananda Bharati* case where the Supreme Court ruled that Parliament's power to amend the Constitution was indeed plenary (it could rewrite the Constitution) but always subject to the implied limitations of the basic structure doctrine. The essential features of this structure may not be amended; if amended, these would be subject to judicial review. These features include: federalism, democracy, equality

and political life. The judicial leadership for de-segregation which begins in early fifties with *Brown v Board of Education*, and still continues unfolding, also required the same order of activity. No one, as far as I know, criticized the American Supreme Court as being an *activist* court before *Brown*. Subsequent to *Brown* all kinds of questions concerning the legitimacy of judicial *activism* have been elegantly and elaborately raised in the United States; so they have been in India by way of *mimesis*. There is very little originality in Indian discourse on the nature of judicial process, providing a fulsome testimony to what Ranajit Guha in the context of colonial historiography refers to as the tradition of "mediocre liberalism." But this is another story.

How do we understand the distinction between an *active* judiciary and an *activist* one? Why is judiciary and adjudication as a whole, an ensemble of governance not considered *activist*? Our answer to this question must necessarily be that activism is a narrative of *ascription*; that is, only under certain zodiac justices in their self-images and by their fearsome critics gets *labeled as activists*. The narratives of ascription are accomplishments of changing political *milieux*. When adjudicatory power and process are or get deployed to interrogate or disorient structures of dominance (racist, patriarchal, capitalist or casteist) outcries of judicial activism happen. Servicing of dominant ideologies, interests, values and visions is not activism; any problematization of all this is.

Accordingly, no discourse concerning judicial activism can be considered in isolation from the field of forces that we name, for weal or woe, as politics. Naming or ascription is a performative political practice. If this is accepted then it must also be accepted, further, that what gets said concerning the nature and legitimacy of judicial process and power can only be fully understood in terms of the context of circumstances of politics, or of ordering the contingencies of power.

In what follows I suggest, though not comprehensively nor with as much theoretical stringency as I would have wished, how the notions of judicial *activism* have been constructed in different orders of contingencies of politics and how, increasingly, justices and courts have contributed to the politics of that construction. I do not essay here any evaluation of the impact of judicial activism which itself raises the questions of the constituencies, beneficiaries and victims of judicial activism. This is a separate task by itself. Suffice it to

winners and losers of judicial activism enter the processes of evaluation of the significance of such activism and indeed at times in the very definitions of it. I hope, despite these limitations of scope, that a few generalized thematics below would assist more rigorous analysis of the role of judiciary in the processes of re-democratization of India.

Strange History of Ascription: The Nehru Era

In the formative period of Indian constitutionalism, many a strange thing happened. A most spectacular happening was the battle that Pandit Nehru waged against courts and judges, especially the Supreme Court of India. As early as 1951, Nehru complained that the "magnificent edifice" of the Constitution was being "purloined" by judges and lawyers! His ire was attracted by the Court's *zamindari* decisions where it insisted on payment of market value compensation for lands acquired by the abolition of this system. The Constitution that Nehru and Amebdkar wrote, however, provided for `just compensation.' Justices were only enacting their part; they *actively* asserted the sanctity of private property enshrined in the Constitution.

Strangely enough, Nehru perceived this as that order of judicial activism which amounted to *usurpation*! No matter what the Constitution *expressly* said, Nehru insisted that justices should place state legislations on agrarian reforms above the assurances of fundamental rights enshrined in the Constitution! Since they failed to do so, he enacted the First Amendment adding the notorious device of the Ninth Schedule under which laws listed in it were immunized from judicial scrutiny on the ground that they violated fundamental rights to equality or property! Of this amendment, Justice Hidyatullah was to say later that ours was the only constitution in the world that needed protection against itself!

What were the dominant ideologies, interests and values threatened by the judicial action on agrarian reform measures? As I have analyzed elsewhere (see my book *Courage, Craft and Contention*, 1985; Bombay, Tripathi), a possible answer to this question is that in displaying fidelity to a markedly bourgeois Constitution, the Supreme Court foiled not so much the nexus between property and polity as envisaged by the Constitution itself but the politics of images of a *socialist politics*. The judicial decisions betrayed political rhetoric. They said to the people of India, loud and clear, that the Constitution as drafted and adopted was not people friendly but property friendly!

Handbook of Environmental procedures & Guidelines - Govt of India - (1994)

Annexure-3

SITING GUIDELINES FOR INDUSTRIES

INTRODUCTION

1.1 Industrial development significantly contributes towards economic growth. However, industrial progress brings along with it a host of environmental problems. Many of these problems could be avoided if industries are located on the basis of environmental considerations, injudicious siting of industry can seriously effect the environmental features such as air, water, land, flora, fauna, human settlements and health of people. The entrepreneur should be fully aware of these implications and he should take necessary steps while setting up the industry so as to minimise the possible adverse effects on the environmental resources and quality of life. Often, an entrepreneur finds it very costly to install pollution control equipment and other mitigative measures after the industry is already set up. As such, preventive steps are needed at the time of siting rather than going in for curative measures at a later stage.

1.2 The Industrial Policy Statement of July 1980, recognised the need for preserving ecological balance and improving living conditions in the urban centres of the country. On the basis of this Policy, indiscriminate expansion of the existing industries and setting up of new industrial undertakings within the limits of metropolitan cities and the larger towns should not be permitted. However, the Policy has not touched upon the implications of setting up an industry in sensitive areas, both ecological or otherwise, which would have an effect on the overall development process.

1.3 At present, industries are being located on the basis of raw material availability, access to the market, transport facilities and such other techno-economic considerations without adequate attention to environmental considerations are recognised as an important criterion for setting of industry.

1.4 To prevent air, water and soil pollution arising out of industrial projects, the industrial Licensing procedure requires that the entrepreneurs before setting up the industry should obtain clearance from Central/State Air and Water Pollution Control Boards. The Central State Pollution Control Boards stipulate that air (gases) and water (effluents) emanating from the industry should adhere to certain quality standards. However, these stipulations do not prevent the industry from effecting the total environment by wrong siting. Also, the cumulative effect of a number of industries at a particular place is not being studied upon, with the result that an industry or an industrial area over a period of time could cause significant damage to the surrounding environment and ecological features.

1.5 In respect of certain industrial development projects it is not only necessary to install suitable pollution control equipment but also to identify appropriate sites for their location. To give a concrete shape to this requirement, a select group of 20 industries has been notified by the Department of Industrial Development. A formalised procedure has been stipulated for site selection from environmental angle with regard to these projects.

1.6 According to this procedure for the select group of industries, the letters of intent should be converted to industrial licenses only after the following conditions have been fulfilled:

(i) The State Director of Industries confirms that the site of the project has been approved from environmental angle by the competent State Authority.

(ii) The entrepreneur commits both to the State Government and Central Government that he will install the appropriate equipment and implement the prescribed measures for the prevention and control of pollution.

(iii) The concerned State Pollution Control Board has certified that the proposal meets with the environmental requirements and that the equipment installed or proposed to be installed are adequate and appropriate to the requirement.

1.7 The State Department of Environment will be the competent authority for approval of project sites from environmental angle. In those States where such Departments have not yet been set up, approval should be obtained from the nodal agency designated for looking after environmental matters. With regard to projects where support from the Central Government/International Agencies is envisaged and which come under the purview of Industrial Licensing, approval of the project site from environmental angle should be obtained from the Ministry of Environment & Forests, Government of India. The entrepreneur should provide the details of proposed project site, pollution abatement measures and such other relevant information as required for review from environmental angle.

1.8 The entrepreneur will be required to submit half-yearly progress report on installation of pollution control devices to the respective State Pollution Control Boards.

1.9 Depending on the nature and location of the project, the entrepreneur will be required to submit comprehensive Environmental Impact Assessment Report, and Environmental Management Plans.

ENVIRONMENTAL GUIDELINES FOR INDUSTRIES

2.1 In order to help the concerned authorities and the entrepreneurs, it is necessary to frame certain broad guidelines for siting an industry. It is also necessary to identify the parameters that should be taken into account while setting up an industry. With this in view, the following environmental guidelines are recommended for siting of Industries to ensure optimum use of natural and man-made resources in sustainable manner with minimal depletion, degradation and/or destruction of environment. Those are in addition to those directives that are already in existence under the Industries (Development and Regulation) Act.

2.2 Areas to be avoided

In siting industries, care should be taken to minimise the adverse impact of the industries on the immediate neighbourhood as well as distant places. Some of the natural life sustaining systems and some specific land uses are sensitive to industrial impacts because of the nature and extent of fragility. With a view to protecting such an industrial sites shall maintain the following distances from the areas listed:

(a) Ecologically and/or otherwise sensitive areas : at least 25 km; depending on the geo-climatic conditions the requisite distance shall have to be increased by the appropriate agency.

(b) Coastal areas : at least 1/2 km. from high tide line.

(c) Flood Plain of the Riverine Systems : at least 1/2 km. from flood plain or modified flood plain affected by dam in the upstream or by flood control systems.

(d) Transport/Communication System : at least 1/2 km.from highway and railway.

(e) Major Settlements (3,00,000 population) : distance from settlements is difficult to maintain because of urban sprawl. At the time of siting of the industry if any major settlement's notified limit is within 50 km, the spatial direction of growth of the settlement for at least a decade must be assessed and the industry shall be sited at least 25 km. from the projected growth boundary of the settlement.

Note :

Ecological and/or otherwise sensitive areas include (i) Religious and Historic Places; (ii) Archaeological Monuments (e.g. identified zone around Taj Mahal); (iii) Scenic Areas; (iv) Hill Resorts; (v) Beach Resorts; (vi) Health Resorts; (vii) Coastal Areas rich in Coral, Mangroves, Breeding Grounds of Specific Species; (viii) Estuaries rich in Mangroves, Breeding Ground of Specific Species; (ix) Gulf Areas; (x) Biosphere Reserves; (xi) National Parks and Sanctuaries; (xii) Natural Lakes, Swamps; ((xiii) Seismic Zones; (xiv) Tribal Settlements; (xv) Areas of Scientific and Geological interest; (xvi)Defence Installations, specially those of security importance and sensitive to pollution; (xvii) Border Areas (International) and (xviii) Air Ports.

Pre-requisite :

State and Central Governments are required to identify such areas on a priority basis.

2.3 Siting Criteria

Economic and social factors are recognized and assessed while siting an industry. Environmental factors must be taken into consideration in industrial siting. Proximity of water sources, highway, major settlements, markets for products and raw material resources is desired for economy of production, but all the above listed systems must be away for environmental protection. Industries are, therefore, required to be sited, striking a balance between economic and environmental considerations. In such a selected site, the following factors must be recognized.

- No forest land shall be converted into non-forest activity for the sustenance of the industry (Ref : Forest Conservation Act, 1980).
- No prime agricultural land shall be converted into industrial site.
- Within the acquired site the industry must locate itself at the lowest location to remain obscured from general sight.
- Land acquired shall be sufficiently large to provide space for appropriate treatment of waste water still left for treatment after maximum possible reuse and recycle. Reclaimed (treated) wastewater shall be used to raise green belt and to create water body for aesthetics, recreation and if possible, for aquaculture. The green belt shall be 1/2 k m. wide around the battery limit of the industry. For industry having odour problem it shall be a kilometer wide.
- The green belt between two adjoining large scale industries' shall be one kilometer.
- Enough space should be provided for storage of solid wastes so that these could be available for possible reuse.
- Lay out and form of the industry that may come up in the area must conform to the landscape of the area without affecting the scenic features of that place.
- Associated township of the industry must be created at a space having physiographic barrier between the industry and the township.

- Each industry is required to maintain three ambient air quality measuring stations within 120 degree angle between stations.

Environmental Impact Assessment (EIA)

3.1 The purpose of Environmental Impact Assessment (EIA) is to identify and evaluate the potential impacts (beneficial and adverse) of development projects on the environmental system. It is an useful aid for decision making based on understanding of the environmental implications including social, cultural and aesthetic concerns which could be integrated with the analysis of the project costs and benefits. This exercise should be undertaken early enough in the planning stage of projects for selection of environmentally compatible sites, process technologies and such other environmental safeguards.

3.2 While all industrial projects may have some environmental impacts all of them may not be significant enough to warrant elaborate assessment procedures. The need for such exercises will have to be decided after initial evaluation of the possible implications of a particular project and its location.The projects which could be the candidates for detailed Environmental Impact Assessment include the following :-

(i) Those which can significantly alter the landscape, land use pattern and lead to concentration of working and service population;

(ii) Those which need upstream development activity like assured mineral and forest products supply or downstream industrial process development;

(iii) Those involving manufacture, handling and use of hazardous materials;

(iv) Those which are sited near ecologically sensitive area, urban centres, hill resorts, places of scientific and religious importance;

(v) Industrial Estates with constituent units of various types which could cumulatively cause significant environmental damage.

3.3 The environmental Impact Assessment (EIA) should be prepared on the basis of the existing background pollution levels vis-a-vis contributions of pollutants from the proposed plant. The EIA should address some of the basic factors listed below:

(a) Meteorology and air quality

Ambient levels of pollutants such as sulphur dioxide, oxides of nitrogen, carbonmonoxide, suspended particulate matters, should be determined at the centre and at 3 other locations on a radius of 10 km with 120 degrees angle between stations. Additional contribution of pollutants at the locations are required to be predicted after taking into account the emission rates of the pollutants from the stacks of the proposed plant, under different meteorological conditions prevailing in the area.

(b) Hydrology and water quality

(c) Site and its surroundings

(d) Occupational safety and health

(e) Details of the treatment and disposal of effluents (liquid, air and solid) and the methods of alternative uses.

(f) Transportation of raw material and details of material handling.

(g) Impact on sensitive targets.

(h) Control equipment and measures proposed to be adopted.

3.4 Preparation of environmental management plan is required for formulation, implementation and monitoring of environmental protection measures during and after commissioning of projects. The plans should indicate the details as to how various measures have been or are proposed to be taken including cost components as may be required. Cost of measures for environmental safeguards should be treated as an integral component of the project cost and environmental aspects should be taken into account at various stages of the projects:

(a) Conceptualization : preliminary environmental assessment.

(b) Planning : detailed studies of environmental impacts and design of safeguards.

(c) Execution : implementation of environmental safety measures.

(d) Operation : monitoring of effectiveness of built-in safeguards.

The management plans should be necessarily based on considerations of resource conservation and pollution abatement, some of which are enumerated as under :

3.5 Liquid Effluents

(i) Effluents from the industrial plants should be treated well to the standards as prescribed by the Central/State Water Pollution Control Boards.

(ii) Soil permeability studies should be made prior to effluents being discharged into holding tanks or impoundments and steps taken to prevent percolation and groundwater contamination.

(iii) Special precautions should be taken regarding flight patterns of birds in the area. Effluents containing toxic compounds, oil and grease have been known to cause extensive death of migratory birds. Location of plants should be prohibited in such type of sensitive areas.

(iv) Deep well burial of toxic effluents should not be resorted to as it can result in re-surfacing and groundwater contamination. Re-surfacing has been known to cause extensive damage to crop and livestocks.

(v) In all cases, efforts should be made for reuse of water and its conservation.

3.6 Air Pollution

(i) The emission levels of pollutants from the different stacks, should conform to the pollution control standards prescribed by Central or State Boards.

(ii) Adequate control euipment should be installed for minimising the emission of pollutants from the various stacks.

(iii) In-plant control measures should be taken to contain the fugitive emissions,

(iv) Infrastructural facilities should be provided for monitoring the stack emissions and measuring the ambient air quality including micro-meteorological data (wherever required) in the area.

(v) Proper stack height as prescribed by the Central/State Pollution Control Boards should be provided for better dispersion of pollutants over a wider area to minimise the effect of pollution.

(vi) Community buildings and townships should be built up-wind of plant with one-half to one kilometer greenbelt in addition to physiographical barrier.

3.7 Solid Wastes

(i) The site for waste disposal should be checked to verify permeability so that no contaminants percolate into the groundwater or river/lake.

(ii) Waste disposal areas should be planned down-wind of villages and townships.

(iii) Reactive materials should be disposed of by immobilising the reactive materials with suitable additives.

(iv) The pattern of filling disposal site should be planned to create better landscape and be approved by appropriate agency and the appropriately pretreated solid wastes should be disposed according to the approved plan.

(v) Intensive programmes of tree plantation on disposal a s should be undertaken.

3.8 Noise and Vibration

Adequate measures should be taken for control of noise and vibrations in the industries.

3.9 Occupational Safety and Health

Proper precautionary measures for adopting occupational safety and health standards should be taken.

3.10 Prevention, maintenance and operation of Environmental Control Systems

(i) Adequate safety precautions should be taken during preventive maintenance and shut down of the control systems.

(ii) A system of inter-locking with the production equipment should be implemented where highly toxic compounds are involved.

3.11 House-Keeping

Proper house-keeping and cleanliness should be maintained both inside and outside the industry.

3.12 Human Settlements

(i) Residential colonies should be located away from the solid and liquid waste dumping areas. Meteorological and environmental conditions should be studied properly before selecting the site for residential areas in order to avoid air pollution problems.

(ii) Persons who are displaced or have lost agricultural lands as a result of locating the industries in the area, should be properly rehabilitated.

3.13 Transport Systems

(i) Proper parking places should be provided for the trucks and other vehicles by the industries to avoid any congestion or blocking of roads.

(ii) Siting of industries on the highways should be avoided as it may add to more road accidents because of substantial increase in the movements of heavy vehicles and unauthorised shops and settlements coming up around the industrial complex.

(iii) Spillage of chemicals/substances on roads inside the plant may lead to accidents. Proper road safety signs both inside and outside the plant should be displayed for avoiding road accidents.

3.14 Recovery - reuse of waste products

Efforts should be made to recycle or recover the waste materials to the extent possible. The treated liquid effluents can be conveniently and safely used for irrigation of lands, plants and fields for growing non-edible crops.

3.15 Vegetal Cover

Industries should plant trees and ensure vegetal cover in their premises. This is particularly advisable for those industries having more than 10 acres of land.

3.16 Disaster Planning

Proper disaster planning should be done to meeting any emergency situation arising due to fire, explosion, sudden leakage of gas etc. Fire fighting equipment and other safety appliances should be kept ready for use during disaster/emergency situation including natural calamities like earthquake/flood.

3.17 Environmental Management Cell

Each industry should identify within its set up a Department/Section/Cell with trained personnel to take up the model responsibility of environmental management as required for planning and implementation of the projects.

Will India Finally Yield to Pressure on Patent Protection?

By Miriam Jordan
Special to the Herald Tribune

NEW DELHI — First, an American university patented the healing properties of turmeric powder, cherished in India since ancient times for its power to cure wounds. New Delhi challenged the patent and won last year.

Now, a U.S. company has obtained a patent for a new line of rice that it describes as basmati — a long-grained, aromatic variety considered indigenous to the subcontinent and exported worldwide. India is considering how to fight the move.

It is not surprising that India, endowed with a wealth of plant life and traditional lore, would treasure its intellectual property. Paradoxically, however, these complaints are coming from a country that is regarded as a major offender of intellectual property rights.

Despite international pressure, New Delhi has refused to enact patent legislation for political reasons. But such protection, experts say, is a necessary step to encourage foreign investment here. And India's tarnished reputation puts the country at a disadvantage in challenging violations overseas.

In the basmati case, the United States recently granted a patent to RiceTec, Inc., a company based in Alvin, Texas, for a strain of rice that it developed. RiceTec says that its rice boasts qualities similar to the best Indian basmati, but has a different genetic makeup.

The invention of a new type of rice does not irk India. But calling the American-grown rice basmati enrages Indian authorities and rice growers, who say it typifies Western disdain of India's scientific heritage and business interests.

Annually, India sells more than $300 million worth of basmati to the Middle East, Europe and North America. "This is one of the best rices in the world, and it's unique to India and Pakistan," said Anil Adlakha, executive director of the All India Rice Exporters Association. "They are undercutting us."

Robin Andrews, chief executive of RiceTec, disagrees that the name basmati should apply only to rice from India and Pakistan. "We consider it to be a generic term and it is used in the patent in that sense," he said.

The Indian government is studying whether to contest the RiceTec patent in the United States. Separately, India's agricultural export promotion body is challenging RiceTec's application in Britain to register the trademark Texmati for Texas-grown rice.

On Friday, India's state-run Spices Board said it, too, had set up a committee to study ways to combat the granting of patents to traditional spices such as cardamom, coriander and fenugreek and their extracts in other countries, particularly the United States.

The lack of a pharmaceutical patent in India 'is the biggest hurdle to investment.'

The committee will prepare a report that establishes the spices' "traditional use in the country so that none can claim patent elsewhere," the board's chairman, V. Jayashankar, told Reuters.

There have been various efforts in India to establish protection for drugs and other products. In 1995, the Parliament considered a patent bill for pharmaceuticals and agrochemicals. But local drug companies lobbied fiercely against the bill, convincing many politicians that it would spell death for their businesses and drive up the price of drugs. The frailty of subsequent coalition governments has prevented reintroduction of the bill.

"The total absence of a pharmaceutical patent in India is the biggest hurdle to investment here," said D. Bhadury, managing director of Hoechst Marion Roussel Ltd., the Indian unit of the German chemicals giant Hoechst AG.

Local drug makers pirate thousands of foreign products. Multinational pharmaceutical companies estimate that each year their industry loses about $500 million in potential sales in India. Pfizer Inc., for one, withdrew from the Indian market drugs such as amlodipine, used to treat hypertension, and azithromycine, an antibiotic, after finding it impossible to compete with cheap copycats.

Brazil attracted nearly $1 billion in investment from pharmaceutical firms within one year of enacting a modern patent bill in 1996, according to industry estimates. Last year, Pfizer invested only $2 million in research and development in India.

"We would have invested several times more if India had changed its legislation," said Richa Chandra, head of the clinical research division for Pfizer in India.

As a member of the World Trade Organization, India is obliged to enact patent protection for pharmaceuticals, agrochemicals and food by 2005. The new government led by the Hindu nationalist Bharatiya Janata Party has pledged to resist pressure from the trade organization. Still, trade experts expect the government to enact legislation to meet the minimum requirements of the organization.

In particular, executives express hope that international pressure on India, combined with mounting pressure from Indian companies eager to protect their own inventions, will prompt government action.

In 1994, for instance, the government bowed to pressure from India's high-tech industry to pass a modern copyright law to protect its software. But for now, with the lack of patent protection at home, Indian pharmaceutical firms are forced to seek patents for their products in the United States or Europe.

"Our scientific community is beginning to realize that a lot of their innovations are being flushed down the toilet," said Pravin Anand, an intellectual property rights lawyer in New Delhi.

In the basmati case, many experts believe that India would be in a stronger position if it had its own so-called geographical appellations bill. Such a law may have conferred on basmati rice a special status, — based on the unique climate and soil of India as well as indigenous cultivation practices — making it more difficult for another country to market its own rice as basmati.

"Rather than look at these issues emotionally, let's put our systems in place — let's modernize our patent office," said Raghunath Mashelkar, a senior bureaucrat who led the team that fought the turmeric dispute and who heads the team examining the basmati case. "How long can we fight these cases one by one?"

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