

Legal Aspects of the New International Economic Order

The complaint of the poor nations against the present state is not only that we are poor both in absolute and relative terms and in comparison with the rich nations. It is also that within the existing structures of economic interaction we must remain poor, and get relatively poorer, whatever we do . . . The demand for a New International Economic Order is a way of saying that the poor nations must be enabled to develop themselves according to their own interests, and to benefit from the efforts they made.

—Julius Nyerere, 1974¹

Introduction

The general neglect of the New International Economic Order (NIEO) in contemporary discussions and analyses of international relations has obscured the scale of this initiative and the seriousness with which it was treated by states, international institutions, and scholars alike. The NIEO combined a powerful political campaign with a compelling moral vision of global order that sought nothing less than the transformation of the international economic system. The NIEO was presented in a number of different registers, and it emphasized the importance of mutual benefit, enlightened self-interest, interdependence, and cooperation. And yet this was in itself insufficient. Law was an important dimension of the NIEO for, as President Luis Echeverría of Mexico asserted in 1972, “It is necessary to take co-operation out of the realm of good will to crystallize it in the field of law.”² How then did the Third World attempt to use international law to make the NIEO a legal reality? In this essay I provide an overview of the political vision that inspired the NIEO, some of the key areas of economic relations that the Third World attempted to transform, the legal doctrines it sought to develop or reform for these purposes, and the different strategies it formulated in its campaign.

The creation of the Organization of Petrol Exporting Countries (OPEC) and its demonstration of power through the oil embargo it managed in 1973 both inspired the Third World and alarmed the north. The assertion of Third World power—at least by some of the oil-producing nations in 1973—caused enormous concern and was characterized as an “economic Bandung.”³

Understandably, the NIEO was viewed with some hostility, by developed countries. The responses were varied. Irving Kristol accused the Third World of “mau-mauing” the West, its actual or potential benefactor; Henry Kissinger began a

concerted campaign to organize the rich against the poor, and, more moderately, Willy Brandt headed a commission that eventually published the report that would bear his name, and which attempted to demonstrate how all countries, rich and poor alike, could benefit from international reform.⁴ The legal aspects of the NIEO campaign were inevitably contested by the developed states and the lawyers supporting their position. My interest lies, then, in examining the confrontation between the Third World and the West as it played out in legal terms.

The broad argument this essay offers is, first, that imperialism was too deeply entrenched in international law to be reformed by that very same law; and second, that the Third World initiative was unable to expand its reach to regulate power within the private sphere—in particular, the activities of corporations and the vision of property, contract, and economic relations that they furthered. A conclusion considers the NIEO's ambiguous legacy.

The Background

The political origins of the NIEO can be traced back at least to the Bandung Conference in 1955 and its attempts to foster solidarity among newly independent countries. Given the divisions that existed among the countries that organized and participated in that event, the tensions between China and India, and the attempts of Ceylon to insert U.S. views into the proceedings, it must be recognized that the Third World project has always been marked by the challenge of establishing solidarity in the midst of significant divergences and differences. Importantly, from a legal point of view, the Conference affirmed some basic principles of international law, including the sovereign equality of states, the right to be free of interference, and the importance of cooperation in the international arena.

The Third World recognized, even at this stage, that international law was crucial to its broader campaign of decolonization and development. The Asian African Legal Consultative Organization (AALCO) an intergovernmental organization that was to be a forum of cooperation on legal matters among Asian and African states, and which served as an advisory body for member states in the field of international law, was created in the aftermath of Bandung.⁵ AALCO was to play an important part in a number of Third World initiatives that were later taken up in the United Nations. Following Bandung, Third World states organized themselves into the Non-Aligned Movement and the Group of 77 in the 1960s. This was the political foundation of the NIEO. As the Final Communiqué of the Bandung Conference reveals, economic development was a primary concern of the participants; it featured as the first topic in the communiqué, and the continuities between Bandung and the NIEO are evident.

The Declaration of the Establishment of a New International Economic Order was passed by the General Assembly on the May 1, 1974.⁶ Most of the NIEO initiatives originated in the General Assembly, where the Third World could use its numbers to advantage. As the text itself suggests, the NIEO was an attempt to bring about global social and economic justice and to “eliminate the widening gap between the developed and developing countries.” Broadly, the Third World sought to address the effects of neocolonialism, which was always perceived to shadow decolonization, by proposing a set of policies and principles regarding foreign investment and nationalization, fair

commodity prices, the international regulation of transnational corporations, a reformed trading regime, and the transfer of financial resources to developing countries.⁷

The Declaration anticipated the need for a more detailed framework by its reference to the Charter of Economic Rights and Duties of States (CERDS), which was the other major expression of the NIEO campaign, and which was passed on the December 12, 1974.⁸ As the term “Charter” suggests, this document attempted to outline a legal framework that would support the ambitious goals of the NIEO. The Third World attempted to base its vision of international economic law on principles that were fundamental and well established, just as it sought legal justification for its position by reference to the UN Charter, the most authoritative statement of international law. This was to enhance the legitimacy and binding quality of the NIEO and shield it from the inevitable charge that none of the proposals made in the NIEO were legally binding in developed states. Thus the CERDS presents itself as translating classic and indisputable rules of international law—sovereignty, nonintervention, the prohibition on the use of force, which are all outlined in chapter 1 of the CERDS (under the heading “Fundamentals of International Economic Relations”), and which were followed in chapter 2 by principles (with the heading “Charter of Economic Rights and Duties of States”) that may be seen to elaborate on the legal economic framework deriving from these basic rules.

Features of the NIEO Campaign and the Reform of International Institutions

The NIEO represents the most sustained attempt yet witnessed to further what might be termed the south project.⁹ The resourcefulness and innovation of the south in attempting to use extant international institutions, particularly the United Nations, to further its own interests is still unparalleled. It should be remembered, further, that all of this was occurring in the midst of ongoing tensions between different members of the Third World, which remained divided on matters of ideology, development policy, and political affiliation. The project of decolonization had united all of these states. Like the postcolonial state itself, which faced the challenge of finding a common identity after the nationalist struggles that bound disparate groups together had achieved its goal, the new states were confronted with the issue of how they could achieve unity beyond decolonization.

A development project offered itself as the necessary and logical next step. It was imperative to enhance the welfare of the people who had been exploited by colonialism. South-south cooperation was a crucial aspect of this project, as recognized in Bandung. But, in addition, it was clear that development could not take place without global reform. Here, two very prominent goals, which could be largely agreed upon by developing states, no matter their economic and political orientations, were essential to the south project: first, nationalization of natural resources owned by foreign interests; and second, reform of the trading system, which aimed, in particular, to ensure better prices for the commodities upon which Third World economies were so dependent, and to further ensure the stability of these prices. Major reforms of both international institutions and international law were required.

Both the World Bank and the International Monetary Fund, the dominant international institutions with respect to global finance and economics, were essentially controlled by the West and had in fact come into existence, in 1944, before decolonization had properly even begun. The General Agreement on Trade and Tariffs (GATT) provided the developing countries with greater opportunities to participate, but the essential framework of the GATT did not address the particular and compelling needs of developing countries, assuming an equality among trading partners that did not exist and that colonialism had in fact prevented.¹⁰ The analysis by the prominent Argentinian economist Raúl Prebisch pointed to the systemic disadvantages of developing-country economies and their deteriorating terms of trade. The first United Nations Conference on Trade and Development (UNCTAD) took place pursuant to General Assembly Resolution 1785 (XVII) of 1962.¹¹ The final Act of the 1964 Conference saw the institutionalization of UNCTAD and the creation of the Group of 77. UNCTAD was established despite the concerted opposition of Western countries.

While UNCTAD presented a broad vision of the role of trade in development, it focused in particular on establishing a Commodity Price Stabilization Fund as a means of preventing the massive fluctuations in commodity prices that impaired the development efforts of Third World countries whose economies were based on commodity production. UNCTAD also attempted more broadly to create a fairer international trading system by espousing the General System of Preferences (GSP), which essentially required wealthier states to grant poorer ones preferential access to their markets. The GSP challenged the Most Favored Nation (MFN) principle that prohibited such discrimination and that was such a fundamental part of the General Agreement on Trade and Tariffs, entrenched in that treaty as its first article. Prebisch himself served as the founding secretary-general and was succeeded by the Sri Lankan Gamani Corea, whose graduate work at Oxford focused on the instabilities of an export economy, and who was a particular champion of the commodity fund.¹²

UNCTAD was not intended to be in itself an institution that could rival in power and structure the World Bank and the International Monetary Fund, which were established before the United Nations and which operate largely independently of it. Rather, it was seen as a forum formulating a vision of international trade law that could serve as the foundation of a future trade organization. The International Trade Organization (ITO) provided for by the Havana Charter of 1948 did not come into existence. The GATT, which was a provisional arrangement that now had to improvise to serve the function envisaged for the ITO, was also not a proper international institution as it lacked international personality. However, as a treaty system, it did embody binding obligations for all of its members, which UNCTAD did not. The prominent Algerian jurist and champion of the NIEO Mohammed Bedjaoui was in no doubt about the antagonistic relationship between the two entities:

From the moment of its foundation, UNCTAD seemed destined to become an “anti-GATT.” The oligarchical and conservative character of the latter institution does not need to be demonstrated and, and co-existence between a renewed UNCTAD and a GATT set in its ways no longer seems conceivable.¹³

The Reform of International Law

Third World scholars understood that the various developing country initiatives in the field of international law were united, whatever the disparities in doctrinal areas, by an underlying vision and jurisprudence regarding international law, its history, and operation. Beginning in the 1950s, scholars from the new states, such as R. P. Anand and Taslim O. Elias, had been trying to formulate a developing country position. Much of this literature at this stage was intent on demonstrating that the so-called new states were no strangers to international law, that certain fundamental principles of international law—regarding the laws of war, the immunities of diplomats, the binding character of treaties—had been part of the law that governed relations among entities in Africa and Asia. These lawyers largely believed that although international law was created by the West and then used to further colonial policies, it could be adapted and used to serve developing country interests. The colonial aspects of international law could be identified and excised. Developing states could use their newly won sovereignty to advance their cause and reform an international system that had been created to subordinate it. The developing country lawyers particularly believed—as did many Western scholars sympathetic to the predicament of the new states—that international law had to adapt to changing realities, the most significant of which was decolonization and the changes it brought to the entire international legal system.

Regardless of the particular area of international law it was seeking to reform, the Third World had to address and challenge the fundamental issue of the legal doctrine regarding the sources of international law that in its conservative version would negate any attempt at reform. International law is basically made from two main sources, customary international law and treaty law.¹⁴ Consent is the basis of international law—no sovereign state is bound by a rule unless it has consented either explicitly, as in the case of a treaty, or else more implicitly as in the case sometimes of customary law. This presented a crucial problem to Third World jurists: Western states, although in a minority, could exercise their sovereignty and refuse to accept the legal reforms proposed by the NIEO, and this refusal would be permissible under international law. The Third World strategy for changing international law focused on using its vast majorities in the General Assembly to pass a number of wide-ranging resolutions—including of course the NIEO Declaration and CERDS itself. Third World jurists argued that the principles of economic law they articulated were no more than an elaboration of existing and fundamental principles of sovereignty. Similarly, they argued that General Assembly resolutions articulated existing law and derived a special legitimacy because of the fact that they were passed by large majorities. Thus the NIEO prompted a major debate among international lawyers regarding the fundamental question of how international law was to be made. As a result, the burning questions of whether General Assembly resolutions made international law, and whether they constituted a sort of “soft law” with some binding qualities, were heatedly debated by scholars in the 1970s.

The efforts of developing countries, once they became independent, to regain control over their own natural resources was one of the principal elements of the

NIEO. This project had a long history, which extended back to disputes between the United States and Mexico regarding the rights of U.S. investors. The issue of sovereign control over natural resources was taken up in the United Nations in the early 1950s. Numerous resolutions were passed by the General Assembly affirming the right of states to control and dispose of their own natural resources.¹⁵ The right to permanent sovereignty over natural resources was connected to self-determination—a corollary of political self-determination—and to economic development. While there was little dispute about the right of a state to nationalize an industry, there was no agreement between developed and developing states on the question of whether any compensation was payable in cases of “expropriation” and how this was to be assessed. Developing countries argued that it was their sovereign right to determine the standard of compensation according to their own national laws; developed countries argued that the standard was to be established according to international standards that were prescribed by customary international law. Former colonies, of course, played no role in developing this “customary law” as they lacked precisely the sovereignty to enable them to act in the international realm. The CERDS 1974 Resolution asserted explicitly that the standard of compensation was to be determined by national levels; the developed countries made a point of opposing this particular provision of CERDS.

A crucial aspect of this debate had to do with the status of private actors, specifically corporations, under international law, as these actors claimed to possess rights under concessionary agreement between themselves and the nationalizing state. These concessions often contained ambiguous language relating to arbitration in the event of a dispute between the parties. Fearing that national courts would rule in favor of the government that had nationalized the assets in the first place, these corporations attempted to internationalize the matter by arguing that their rights were protected by international law. The International Court of Justice rejected this claim when it was raised in 1951 by the British government attempting to challenge the Iranian nationalization of the Anglo-Iranian Oil Company,¹⁶ one of the acts that led to the overthrow of the Mossadegh government. The Court relied on elementary and classical principles of international law in asserting that international law only governed relations between sovereign states, and private parties could not claim rights under the system. This was in effect an affirmation of what the Court had earlier established, that a contract between a sovereign and a private party could be regulated only by the national law of a state, and not by international law. The national law in such cases would be the law of the country that granted the concession in the first place. This was the fundamental principle of sovereignty that was now challenged by corporations and the states that supported them. In a further attempt to enhance its position in this battle, the Third World established the United Nations Commission on Transnational Corporations in order to formulate an international code that would regulate multinationals.¹⁷ This project contained its own paradoxes in the context of the NIEO: the Third World was affirming its sovereignty but also acknowledging its limitations in the face of complex global entities such as corporations by trying to form an international law to manage these entities—suggesting their own national

laws could not properly do so even when those corporations were operating within their jurisdiction.

The international law of nationalization became a hotly contested subject for scholars and lawyers in the 1970s. Many volumes were published, and the developing countries' position was attacked as being a threat to the very foundations of society and its constitutive elements, the law of contract and property. The Middle Eastern nationalizations and the oil embargo had added to the atmosphere of threat and challenge and had suddenly and curiously reversed usual geopolitical roles, however briefly. Writing in the *American Journal of International Law* in 1974, scholars argued that the oil embargo was a form of coercion contrary to international law, since it affected food supplies, the production of fertilizer, and economic relations in general. Indeed, this Arab coercion was of such magnitude that it amounted to a use of force and hence represented a violation of Article 2(4) of the Charter—the article whose essential purpose is to prohibit war. Needless to say, it was ironic that, on one of the few occasions that developing country states exercised their economic power against the West, protests immediately followed that this was a violation of one of the most fundamental norms of the UN Charter, the prohibition on force. In essence, the oil embargo on countries supporting Israel in the 1973 conflict was seen as an act amounting to something like war.¹⁸ Needless to say, the United States has often resorted to the use of oil embargoes, and according to at least one account, “the U.S. has historically imposed a greater number of oil embargoes than other nation.”¹⁹

While attempting to advance their version of the law of foreign investment, the Third World countries failed to develop any judicial mechanisms that would interpret and apply the often ambiguous and contestable principles of international law that obtained. Indeed, the Third World viewed the principal judicial organ of the United Nations system, the International Court of Justice, with great suspicion and distrust because of its 1966 decision essentially favoring the apartheid regime of South Africa that the Third World sought to dismantle. Bedjaoui clearly recognized that “a body of new norms should be matched by new institutions to be responsible for the application of those norms”; new institutions and international bodies, including judicial bodies, had to be established because “the new rules must not remain a dead letter.”²⁰ In a sense, however, the Third World position was coherent, as it asserted that legal disputes relating to natural resources were to be adjudged by national courts using national law.

Instead, however, crucial issues regarding the character of permanent sovereignty over natural resources were decided by international arbitral tribunals set up to resolve commercial disputes largely manned by Western lawyers. Arbitration, of course, had been a vital component of international law since its beginnings. Now, it acquired a new and vital function of deciding disputes between sovereign states and multinational corporations. In a series of arbitral decisions beginning in the 1950s, which dealt with disputes between multinational corporations and Middle Eastern states, a new, hybrid system of law was formulated—“transnational law” rather than international law. Whereas international law governed relations among states, transnational law was said to govern relations between states and private actors such as multinational corporations. A number of crucial developments followed. Under the law elaborated by these

tribunals—a “quasi international law”—contracts between states and multinational corporations became internationalized: they were adjudicated by the application of the new transnational law by arbitral tribunals rather than national law by national courts. An entirely new law establishing the respective rights of states and corporations was formulated in this recently invented realm of transnational law to deal with this situation.

It was a law that was articulated by arbitrators who were invariably sympathetic to the rights of the corporation rather than those of the states. In essence, the hybrid law of transnational law was selectively used in such a way that favorable principles of international law were applied to corporations as though they possessed a sovereign status that must be protected: contracts between a corporation and a state were likened to “treaties” whose terms were sacrosanct. These arbitrators claimed to be applying a universal “natural law of contracts” that drew upon and yet was not based on classic principles of international law, rather than the national law of the developing country state whose resources were in question. The stark irony was that in this highly selected and protected sphere of arbitration, arbitrators could develop the law with little restraint and regard to the fact that these principles were often directly contrary to the positions taken by developing countries in the NIEO. Western states could block the NIEO legal initiative in the General Assembly by expressing their opposition and refusing to consent to the proposed law. The Third World, by contrast, had few resources to prevent the formulation of transnational law through these arbitrations. Whereas the Third World sought to use public international law to reduce the private power of the corporation, these arbitral decisions ensured precisely the reverse—the deployment of public international law principles to consolidate and indeed expand private rights in the name of a new “transnational law.”²¹

Recognizing that the whole institution of arbitration as it had evolved was biased against developing countries, the Third World attempted to formulate a new arbitral system through the United Nations Convention on International Trade Law (UNCITRAL). Somewhat unheralded as an aspect of the NIEO, the project was in fact initiated by the AALRC. Neither of these strategies was effective. UNCITRAL developed a model law of international arbitration; but as Muthucumaraswamy Sornarajah, the most prescient and expert Third World scholar, pointed out from the outset, this proposal itself contained many elements that further undermined developing countries’ control over their economies by “internationalizing” contracts between corporations and developing country states,²² thus enabling those contracts to be adjudicated under the international law of contracts that had in effect been made by a few Western specialists, and that was inimical to Third World interests. Even more ironically, it was the categorization of these contracts as special “development contracts” that justified their special treatment under this law.

After the second oil shock, the emergence of dictatorships, and the failure of Third World socialism in a number of countries, the NIEO’s ambitions foundered, and developing states began to compete with one another to attract foreign investment. The model of the Asian Tigers became the one to emulate. In these circumstances, it was the transnational law authored by a few Western scholars, administered and developed by arbitral tribunals with their own culture of favoring business, that

prevailed and assumed a new and unprecedented significance in providing expansive protection to the investments that the Third World was now desperate to attract.

International Law and the Legacies of the NIEO

The meaning and significance of the NIEO have inevitably shifted as a result of subsequent events—the collapse of the NIEO project, the emergence of neoliberalism, the intensification of globalization, the global financial crisis, and now, the emergence of Brazil, Russia, India, and China (the so-called BRICS). Overall, the NIEO attempt to reform and reconstitute international law and eliminate its colonial operations proved unsuccessful.²³ Scholars have dealt extensively with the complex economic and political factors that led to the defeat of the NIEO: the oil crises, the machinations of Kissinger and other prominent Western diplomats, the opposition of the G7, and weaknesses within the Third World itself as many countries succumbed to dictatorship. In terms of the legal initiative, however, what proved most decisive was the fact that an international law that had lent itself to the colonial project seemed structurally immune from attempts to change its character. Astute scholars such as Bedjaoui realized this. It was always understood, of course, that the legal doctrine of sovereign equality should never be confused with equality in terms of political, economic, and military power. And yet, even at the purely legal and jurisprudential level, the primordial inequalities that international law had instantiated endured and indeed prevailed. Simply, the new states could not readily change customary international law that had been made prior to their existence and, indeed, had been used to subordinate them. Conversely, the “old” states could assert their sovereign right to refuse to accept the NIEO principles that sought to negate the effects of colonialism. Clearly, “old” sovereign states enjoyed advantages that “new” sovereign states lacked, whatever the proclamations about the equality of states.

Similarly, at the institutional level, the principal UNCTAD ambitions were largely unfulfilled. Little came of the UNCTAD drive for a new Commodity Trading System. And it was GATT, not UNCTAD, that established the model, the foundation of the new global trading system, which emerged as the World Trade Organization. Too disheartened and disorganized to bargain effectively in the Uruguay round of trade negotiations leading to the creation of the WTO, the developing countries allowed the intellectual property and trade in services issues, for which corporations had lobbied intensely, to be inserted into the regime—this despite the fact that they were far removed from what was supposed to be the central focus of the trade regime, trade in commodities. In return, they were promised that the succeeding Doha round was to be the “development round” that would properly address developing country concerns including trade in agriculture. The current impasse in negotiations indicates the grand failure of that initiative as once again the West proved resilient. The inclusion of the General System of Preferences that UNCTAD had lobbied for in the trade regime was small consolation for this setback.

More broadly, at the institutional level, the Western-controlled IMF and World Bank expanded their power. Neoliberalism strengthened and expanded its reach in developing countries in the 1980s. The World Bank, abandoning all liberal policies of “basic needs,” focused instead on structural adjustment programs, this in partnership

with the IMF. The NIEO had raised the issue of global injustices and inequities; but at least in the West, human rights replaced development as “the Last Utopia.”²⁴ The depredations of dictators throughout the Third World in the 1970s and 1980s made the human rights project appear urgent—and it certainly served an important purpose. But the argument that the protection of civil and political rights was the main means of achieving global justice lent itself perfectly to the task of negating the NIEO claim that economic restructuring and redistribution were essential for the achievement of decent standards of living for the millions of people in the Third World. Further, a vision of human rights bereft of any substantial sense of economic and social rights—and at its best even this was limited—was conceptually incapable of contesting the intensification of neoliberalism as a policy.

The Third World’s attempt to respond to this shift to human rights by campaigning for a “Right to Development” failed to achieve any legal or policy credibility, whatever the validity of the claims involved. In short, human rights and neoliberalism—and this should be no surprise to historians and political theorists—could coexist, if not complement each other. It has been only relatively recently, in the late 1990s, that human rights law has attempted to contest neoliberal versions of globalization and the hardships they seem to generate.²⁵ Similarly, the “international law of development” that the authors of the NIEO hoped to bring into being was replaced by “law and development,” a revival of a largely failed movement of the 1960s that now, almost inexplicably given the noted shortcomings of its earlier version, attracted massive funding and institutional support. Once again, however, it was reform at the national rather than international level that was prescribed: the argument was that countries’ development programs were hindered by the absence of proper laws, and legal reform and modernization at the national level was called for.²⁶ It was hardly surprising, then, that by the 1990s the World Bank was one of the most ardent promoters of “law and development” and the “rule of law,” even going so far as to claim that its activities were advancing the “right to development.”

Crucially, furthermore, it could be argued that we might see in the West’s response to the NIEO—the strategies of the developing countries to negate the NIEO—the formulation of a set of technologies that were fundamental for the later development of the legal infrastructure of neoliberalism. This is especially seen in the response to the PSNR initiative. Basically, the West responded to the PSNR challenge by expanding and refining the arena of what might be called “transnational law.” In essence, power shifted to the private realm of international commercial actors—multinational corporations. And instead of using the instruments of public international law to manage actors and transactions in the private realm, public international law was now used to effectively diminish its own scope and enhance the power of these private actors. It is even arguable that classic and fundamental principles of public international law, such as the sovereign right of a state to regulate activity within its territory according to its own laws, were undermined by the NIEO initiative and the West’s response. Arbitration was still in a nascent form in the 1970s, but the essential structures that were put in place by the arbitration decisions generated by the oil nationalizations in the 1970s laid the firm foundations for a field that has

now grown dramatically in power and importance—international investment arbitration. As a result of the jurisprudence formulated by these arbitrations, we have now reached a stage where, for example, state regulations designed to protect the environment or human health through plain paper packaging for cigarettes could allow corporations to claim that their property rights have been affected and that they should be compensated.²⁷ This is simply to say that private power—always a driving, if obscured influence on the making of international law²⁸—has now expanded its reach massively and this with the support of public international law and institutions. We see this repeated and refined in subsequent developments in international economic law regimes, whether the current foreign investment law regime or international trade law. It has led to a situation where scholars argue that public international law is largely ineffectual in managing private power.²⁹

The emergence of the BRICs raises the question of whether their rise can be seen as the revival of something like the NIEO project.³⁰ It might be argued that the NIEO essentially failed because whatever the validity of its moral claims or its economic analyses, it simply lacked the real economic and political power necessary to change the system. The BRICs by contrast wield considerable power in the international system, although debate exists about its extent. The recent creation of the BRIC Bank could compete in various ways with the World Bank and the IMF in articulating and promoting a different approach to development, one that is more state-based.³¹

Overall, however, it remains an open issue as to whether the BRICs present a challenge to the essential structures of the international economic system and the legal system that supports it.³² Instead, it would seem the BRICs are largely making reforms within the existing framework and, indeed, becoming increasingly adept at using it for their own purposes. For instance, they participate with increasing confidence and effectiveness in the operations of the WTO (Brazil and China are among the most active users of the international dispute resolution system). While they have concerns, for instance, about the international foreign investment regime and the extent to which it has limited sovereign rights to regulate economic activity, China and India are now both major exporters of foreign investors. Thus they benefit from and have increasingly supported legal regimes that protect the foreign investor—regimes that consolidated themselves with the defeat of the NIEO.³³ The question then arises whether the BRICs, despite often proclaiming themselves to be leaders of the Third World, are now in various ways endorsing and using an inequitable system for their own purposes—or whether their success, with all its ambiguities, demonstrates that the NIEO was wrongheaded in supposing that development (of sorts) was possible within the existing framework that the West created and defended against the NIEO.

The larger question is what remains of the fundamental claims of the NIEO. The opening chapter of Bedjaoui's work and its powerful invocation of intensifying poverty and a growing food crisis resonates today. The failed NIEO campaign to manage multinational corporations has lessons for contemporary efforts to hold corporations accountable for human rights violations; what has changed is that the earlier campaign was mounted in the name of sovereignty, the recent one in the name of the cosmopolitan cause of human rights. Further, the ascent of a few countries from the ranks of the Third World cannot obscure the fact that the "Third World," the

millions who lack a decent standard of living, is still very much with us.³⁴ And a further question arises about problematic aspects of development that seemed to be embodied in the NIEO. It was in important respects a “top down” model; and it is starkly evident that environmental concerns are entirely absent from the NIEO initiative, even though the Stockholm Conference on the Environment, the beginnings of international environmental law, took place in 1972. Whatever the deficiencies of the NIEO, and whatever the changes that have occurred subsequently in international law and relations, the fundamental question raised by Nyerere as the one central animating issue of the NIEO remains: is the international system, including the international legal system, structured in a manner that leads to the systematic immiseration of the vast majority of the world’s population? Nyerere, of course, referred to the inequalities between rich and poor nations, but his question may be posed with equal force and purpose to the increasingly inescapable phenomenon of rich and poor peoples.

NOTES

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1. Quoted in Craig Murphy, *The Emergence of the NIEO Ideology* (Boulder, CO: Westview, 1984), 1.
2. Quoted in Brigitte Bollecker-Stern, “The Legal Character of Emerging Norms Relating to the New International Economic Order,” in *Legal Aspects of the New International Economic Order*, ed. Kamal Hossain (London: Frances Pinter, 1980), 68.
3. *Ibid.*, 68–78.
4. See Daniel Sargent’s essay in this special issue.
5. I am indebted to Rohan Perera, “The Role and Potential of the Asian-African Legal Consultative Organization (AALCO) in Providing an Asian Perspective in Contemporary Developments in International Law” (manuscript on file with the author). AALCO was later transformed into the Asian African Legal Consultative Committee.
6. Declaration on the Establishment of a New International Economic Order, Gen. Ass. Res. 3201 (S-VI), May 1, 1974 (hereafter NIEO Declaration). It continued in important respects the themes that had been outlined in some detail in an earlier resolution, International Development Strategy for the Second United Nations Development Decade, Gen. Ass. Res. 2626 (XXV), October 24, 1970.
7. For an important account of the many initiatives, see Hossain, ed., *Legal Aspects of the New International Economic Order*.
8. Charter of Economic Rights and Duties of States, Gen. Ass. Res. 3281 (XXIX), December 12, 1974.
9. See Vijay Prashad, *The Poorer Nations: A Possible History of the Global South* (New York: Verso, 2013), 3.
10. United Nations, *The History of UNCTAD, 1964–1984* (New York: United Nations, 1985), 10–12.
11. United Nations Conference on Trade and Development, UN Gen. Ass. Res. 1785 (XVII),

December 8, 1962. It was passed a few days prior to the passage of Permanent Sovereignty Over Natural Resources, Gen. Ass. Res. 1803 (XVII), December 14, 1962.

12. Gamani Corea, *My Memoirs* (Sri Lanka: Gamani Corea Foundation, 2008).

13. Mohammed Bedjaoui, *Towards a New International Economic Order* (Paris and New York: UNESCO / Holmes and Meier, 1979), 209. Bedjaoui's account of the vision and jurisprudence of the New International Economic Order is the most comprehensive and powerful.

14. There are other potential sources of international law that were in fact used by the West to negate the NIEO. For a more detailed account of the importance of sources to the NIEO project, see Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005).

15. See, for example, Integrated Economic Development and Commercial Agreements, Gen. Ass. Res. 523 (VI), January 12, 1952. The most complete account of the Permanent Sovereignty debate in the United Nations is provided by Nico Schrijver, *Sovereignty over Natural Resources* (Cambridge: Cambridge University Press, 1997). For an important recent analysis of the permanent sovereignty debate, see Sundhya Pahuja, *Decolonizing International Law: Development, Economic Growth, and the Politics of Universality* (Cambridge: Cambridge University Press, 2011).

16. Anglo-Iranian Oil Case (United Kingdom v. Iran) 1952 ICJ 93 (July 22, 1952).

17. See Samuel K. B. Asante, "UN Efforts at International Regulation of Transnational Corporations," in Hossain, ed., *Legal Aspects of the New International Economic Order*, 123–37.

18. See Jordan Paust and Albert Blaustein, "The Arab Oil Weapon: A Threat to International Peace" *American Journal of International Law* 68, no. 3 (July 1974): 416–39. For Paust and Blaustein, the oil weapon violated the sovereignty of various affected states and the Charter goals of tolerance, friendly relations, and the peaceful settlement of disputes. The article is useful in trying to make a distinction between "forms of permissible and impermissible coercion." *Ibid.*, 413.

19. See A. F. Alhaji, "The Oil Weapon: Past, Present, and Future" *Oil & Gas Journal* 103, no. 17 (May 2, 2005). Ibrahim Shihata, later to be general counsel of the World Bank, also argued in the pages of the *American Journal of International Law* that the embargo was legal and a proper exercise of the right of Arab states to dispose of their natural resources. See Ibrahim F. Shihata, "Destination Embargo of Arab Oil: Its Legality Under International Law," *American Journal of International Law* 68, no. 4 (October 1974): 591–626.

20. Bedjaoui, *Towards a New International Economic Order*, 216.

21. The most comprehensive and expert account of this transformation is provided in a series of works by Muthucumaraswamy Sornarajah. For example, Sornarajah, "The Climate of International Arbitration," *Journal of International Arbitration* 8, no. 2 (June 1991): 47–86; Sornarajah, *The Settlement of Foreign Investment Disputes* (The Hague: Kluwer Law International, 2000).

22. Muthucumaraswamy Sornarajah, "The UNICITRAL Model Law: A Third World Viewpoint," *Journal of International Arbitration* 6, no. 4 (December 1989): 7.

23. A number of scholars attempt to account for this failure, and the varying explanations and their changing character over time are also in themselves an interesting question. The accounts for the failures written in the 1980s, for example, differ from those of more recent scholars such as Anghie, Pahuja, and Salomon.

24. See Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Harvard University Press, 2010). I focus on the relationship between the NIEO and the rise of human

rights in my review essay “Whose Utopia? Development, Human Rights and the Third World,” *Qui Parle* 22, no. 1 (Fall/Winter 2013): 63–80.

25. See Antony Anghie, “Time Present and Time Past: Globalization, International Financial Institutions and the Third World,” *New York University Journal of International Law and Policy* 32, no. 2 (Winter 2000): 243–90.

26. For an important analysis, see Pahuja, *Decolonising International Law*.

27. See David Schneidermann, “The Global Regime of Investor Rights: Return to the Standards of Civilized Justice,” *Transnational Legal Theory* 5, no. 1 (2014): 60–80.

28. Martti Koskenniemi, “Empire and International Law: The Real Spanish Contribution,” *University of Toronto Law Journal* 61, no. 1 (Winter 2011): 1–36. For an important analysis of private rights in the context of arbitration, see Amr A. Shalakany, “Arbitration and the Third World: A Plea for Reassessing Bias under the Specter of Neoliberalism,” *Harvard International Law Journal* 41, no. 2 (Spring 2000): 419–68.

29. Caroline E. Foster, “Diminished Ambitions? Public International Legal Authority in the Transnational Economic Era,” *Journal of International Economic Law* 17, no. 2. (2014): 355–97.

30. See Chen An and Chen Huiping, “China-India Cooperation, South-South Coalition and the New International Economic Order,” in *China, India and the International Economic Order*, ed. Muthucumaraswamy Sornarajah and Jiangyu Wang (Cambridge: Cambridge University Press, 2010), 92–131; M. Sornarajah, “The Return of the NIEO and the Retreat of Neo-liberal International Law,” in *International Law and Developing Countries: Essays in Honour of Kamal Hossain*, ed. Sharif Bhuiyan et al. (Boston: Brill, 2014); Ruth Gordon, “The Dawn of a New, New International Economic Order,” *Law and Contemporary Problems* 72 (Fall 2009): 131. The broad argument is that the global financial crisis and the emergence of the BRICS may open the space for alternatives of the sort articulated in the NIEO.

31. “An Acronym with Capital,” *Economist*, July 19, 2014.

32. For a detailed study, see Muthucumaraswamy Sornarajah “India, China and Foreign Investment,” in *China, India and the International Economic Order*, 132–65.

33. See Congyan Cai, “New Great Powers and International Law in the 21st Century,” *European Journal of International Law* 24, no. 3 (2013): 791.

34. See Margot Salamon, “From NIEO to Now and the Unfinishable Story of Economic Justice,” *International and Comparative Law Quarterly* 62, no. 1 (January 2013): 31–54; Thomas Pogge, “Divided against Itself: Aspiration and Reality in International Law,” in *Cambridge Companion to International Law*, ed. James Crawford and Martti Koskenniemi (Cambridge: Cambridge University Press, 2012) 372–87.