NATIONALIZATION OF FOREIGN PROPERTY (1983). By Subhash C. Jain. Deep & Deep Publications, D-1/24, Rajouri Garden, New Delhi-110 027. Pp 298. Price Rs. 125.

THE POST-COLONIAL era is marked by its deep concern for social transformation, one of the indispensable concomitants of which is the economic development on modern lines. Obviously the leadership of Third World countries is committed to the exploitation of their economic resources for ensuring economic justice to their people. This often necessitates nationalization of foreign property, which in turn, raises the problem of compensation to the foreign owner. This sensitive area has been picked up by the author of the work[1] under review. A learned analysis resulting in various conclusions and suggestions about the desirability or otherwise of the application of traditional norms of international law to determine compensation and recent trends in the area constitute its prime theme. This is a critical study in North-South dialogue between developed countries representing the North and developing countries representing the South, aiming at a "quest for a viable and universally acceptable criterion for payment of compensation in cases of expropriation of alien property"[2] and at "ushering a new international economic order"[3] with a view to remove economic imbalances.

The book consists of foreword, preface, seven chapters with a fairly large number of references, table of cases, bibliography of numerous works, name index and subject index.

In chapter I, which is introductory, the author refers to the issues involved in the North-South dialogue, the current developments and the relevance of the question of nationalization of foreign capital to the dialogue. He points out the difference in approach between the developing and developed countries. According to him, whereas the former "see the dialogue as a vehicle to correct inequities and obtain structural changes in the international economic system,"[4] the latter emphasize "the role of private enterprise and private capital flows, particularly private investment in the development process."[5] The view of developed countries is contradicted by the developing countries which, according to the author, say that "profit-motive is predominant in private enterprise whereas a different approach ...[is] necessary in the case of social services...As such, massive public sector investment may be called for in these areas. Market forces on which great emphasis is laid by developed countries ignore

1. Subhash C. Jain, *Nationalization of Foreign Property* (1983).
2. *Id.* at 7.
3. *Id.* at 9.
4. *Id.* at 10.
5. *Ibid.*

developmental considerations."[6] As there has been no significant breakthrough in the North-South dialogue, the developing countries have rightly started asserting permanent sovereignty over their natural resources, freedom from unequal and onerous obligations through nationalization of foreign investments of the colonial era, and need for restructuring traditional norms relating to nationalization of such investments in the changed context of the post-colonial period.

Chapter II is devoted to the concepts of, and distinctions between, taking, expropriation, nationalization, requisition, confiscation and what is sometimes referred to by Western scholars as "creeping expropriation" (indirect expropriation). According to the author, traditional international law is inadequate to help determine what amounts to indirect expropriation. He suggests a number of tests that might be considered for deciding whether a state action can really be termed as an indirect expropriation.[7]

Chapter III relates to concession contracts and expropriation. In this chapter the author explains the nature of these contracts and describes the experiences of several erstwhile colonies in the matter of granting concessions to the industrialized countries. He pointedly draws attention to the fact that most often the concessions were granted under duress and were inequitable to the colonies. Consequently, after their emancipation from the foreign yoke, they had to embark on the termination of various concession contracts entered into with foreign investors during the colonial period. The author gives, at length, the reasons as to why a distinction should be made in the treatment of pre-independence and post-independence concessions. He justifiably points out that in view of their colonial past, the former are not entitled to the same measure of compensation upon nationalization as the latter. This is because the post-independence concessions followed freely concluded investment-agreements. He says : "Indefinite respect for the privileges obtained during colonial period is equally in derogation of the principle of international law which envisages an equitable social order based on the mutual interests of the various peoples. Its universal appeal is lost if it results in hardship to one particular section of the international community thereby overwhelmingly patronizing the other."[8] The author then stresses that even in the case of post-independence investment-agreements there should be a mechanism for their review and revision in order to make them more viable and to ensure equivalence of advantages to the contracting parties.

In chapter IV the author deals with conditions precedent to expropriation in traditional international law. In traditional international law favoured by the developed countries it is imperative for the nationalizing state to pay adequate, prompt and effective compensation and nationalization should be for a public purpose and without discrimination among

6. *Id.* at 10-11.
7. See *id.* at 39-40.
8. *Id.* at 80.

aliens inter se or among aliens and nationals. He rightly criticizes the various principles and doctrines such as unjust enrichment, acquired rights and minimum standard of international law invoked by these countries to justify the traditional compensation formula, the elements of which have been discussed and explained in detail. The author shows how the latter formula has become completely outdated in the present day context and in this connection he usefully discusses debates in the United Nations and its various forums. He then deals with lump sum compensation agreements and gives some of their important features[9] to demonstrate that resort to these agreements represents a clear departure from the traditional compensation formula. He also gives some of the important and objective grounds for rejection of the latter.[10] In the same chapter he deals with recent Libyan concession cases decided by the arbitration tribunals. The author rightly concludes that the adequate, prompt and effective compensation formula cannot be considered fair to the developing countries especially in cases where the foreign investors of the colonial era "have made many times more profits as compared to their investment..."[11]

Chapter V is devoted to local remedies rule which insists on the exhaustion of remedies available in the nationalizing state before the aggrieved foreign investor seeks diplomatic protection of his home state. The author discusses in detail the character of the rule, its comparative merits and demerits, its place in contemporary international law and its relationship with the concept of denial of justice. He also discusses the institution of diplomatic protection and its legal basis, and the evolution of the Calvo doctrine according to which alien investors are not entitled to greater protection than nationals of the nationalizing state. In many cases the Latin American countries have sought to insert the Calvo clause in their contracts with the alien investors so that they do not seek diplomatic protection. Further, the author expresses the view that "since pre-independence concessions...could be terminated at the option of the newly independent States, it would be only logical to exclude them from the purview of diplomatic protection."[12] In the concluding chapter, however, he says that it would not "be advisable to altogether do away with the institution of diplomatic protection in all cases of expropriation or nationalization since its abolition may lead to drastic and violent remedies."[13]

The subject mater of chapter VI is the treatment of foreign investments and property in India. In fact this is a survey of nationalizations of foreign property in India and of Indian property abroad. The author

9. See *id.* at 157.
10. See *id.* at 159.
11. *Ibid*
12. *Id.* at 222.
13. *Id.* at 262.

highlights India's policy towards foreign investments and refers to some of the cases in which India nationalized foreign companies (tables given). In that connection he concludes that India has scrupulously adhered to principles of international law regarding adequate, prompt and effective compensation.

Chapter VII is the concluding chapter. In this, the author gives his own conclusions and views about the various issues discussed in the previous chapters. He attacks, inter alia, the traditional compensation formula because it does not take into account the fact that there was no participation of the subjugated countries in the exploitative concession-agreements in the colonial era. However, in view of the imperatives of collective self-reliance among the developing countries he has elsewhere in the book expressed the opinion that they may be "legitimately expected to accord a more favourable treatment in the field of economic relations to nationals from other developing countries as against nationals of developed countries."[14]

Evidently, the work adds to the distinguished literature in the area of international economic law, so vital for developing countries.[15] It may be prescribed as a reference book in the syllabi of relevant faculties of Indian and foreign universities.

The author has, however, not dealt with the theme of bilateral investment-agreements and their impact on norms of international law in the area of nationalization or expropriation. This by itself may constitute a theme for a separate study; but it is hoped that the author might also cover this in the next edition.

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14. *Id.* at 173.

15. See also reviews by Surya P. Sharma, 23 *I.J.I.L.* 330-34 (1883); M.L. Upadhyaya, X *Ind. Bar Rev.* 542-45 (1983) and U.S.D., 70 *A.I.R.* (*Jour. Sec.*) 101 (1983).

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