CHAPTER I
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INTRODUCTION

The nineteenth century was a century dominated by the West European industrial revolution. This led to an intensive search for raw materials in the overseas territories which produced these raw materials. These territories were subjugated in order to ensure production and export of raw materials to the European nations to sustain their industries. The ever-growing hunger for raw materials in the wake of industrial revolution led these countries to found new empires. The industrial expansion resulted in enormous surplus of manufactured goods which were sold in the foreign markets, generating huge surplus capital. In their quest for raw materials the industrial nations obtained long-term land and mineral concessions at extremely favourable terms from territories which were either ruled by them or were under their domination. On the eve of World War II, about eighty percent of the landmass of the world and seventy percent of the world's population was under the control of Western powers.

The industrially advanced nations of Western Europe had a common faith in laissez-faire economics and identical values, interests and institutions. They also had a common goal viz. safety of foreign investments made by them in the colonies and underdeveloped territories. This made it necessary to spread European
standards of civilization which eventually gave birth to international law of "civilized nations". Having been victims of European colonialism and having to part with their precious natural resources under coercion, many countries had no voice in the development of principles of international law which were founded entirely on the needs of European business civilization. The colonial powers did not hesitate to use force to exact special privileges for their nationals or to vindicate the standards of behaviour enunciated by them in order to protect their business interests. This phenomenon led the foreigner and his state to demand and assert in favour of the former certain rights in the host state. In this way the seeds of state's responsibility towards aliens were sown. The doctrine of responsibility of States was devised as a legal cloak to serve and protect the imperialistic interests of the European powers. The present international law relating to expropriation of foreign property is thus a product of the nineteenth-century European business civilization.

In the last few decades several countries of Asia and Africa have attained independence giving rise to vigorous demands for economic emancipation. These States which were treated merely as "objects" of international law have challenged the validity of the
norms created out of unequal relationship between colonial powers and colonized territories in the nineteenth and early part of the twentieth century. The newly independent States have questioned the propriety of applying these principles in a vastly changed world which consists of rich and poor nations enjoying sovereign equality. They insist that principles formulated without their participation, and in fact against their interests, must be changed. The principles which were invoked to perpetuate the economic domination of the weak by the powerful States ought to be replaced by new rules of international law. They should take into consideration aspirations of the newly independent countries for economic independence, something which cannot be achieved unless these countries have complete sovereignty over their natural resources and wealth.

As an expression of economic self-determination, the newly independent States of Asia and Africa as well as Latin American States are now asserting sovereignty over their natural resources. However, these resources are already burdened under the concessions acquired by the Western colonial powers. In order to be able to exercise rights over their natural resources these countries consider it necessary to free themselves from the bondage of onerous and unequal obligations imposed
upon them, by expropriating investments of the colonial period. They are also demanding complete overhaul of the traditional norms governing expropriation of alien property, which in their view are not only unjust but also unrealistic in the changed circumstances.

The present thesis is a modest attempt to look at the traditional rules relating to expropriation of alien property and challenges to these rules. The eagerness of the newly independent states and other countries of the third world to create a new international economic order has been demonstrated by their initiative in several forums to restructure the traditional law so that it reflects changing needs of the society.

The occasion for considering the subject was offered by a Resolution of the United Nations General Assembly on 7 December 1963 requesting the International Law Commission to undertake codification of the principles of international law governing State responsibility. However, the Resolution did not indicate scope of the subject. García-Ameñor, who was the first Special Rapporteur of the International Law Commission on the question of State Responsibility, appears to have been largely guided by the Anglo-American approach
which regards the law of wrongs to aliens and their property as the mainstay of traditional law of state responsibility. Thus in his reports Garcia-Amador concentrated on responsibility of States for injuries to aliens and dealt with such questions as diplomatic protection of aliens, local remedies rule, Calvo clause, denial of justice, non-performance of contractual obligations and acts of expropriation as well as the question of compensation.

After Garcia-Amador left the International Law Commission in 1962, Roberto Ago was appointed the Special Rapporteur. Ago considered that it would be a futile exercise to start with the most controversial aspect of the state responsibility, viz., responsibility of States for injuries to aliens, a theme which in the past had been central to the theory of state responsibility. The Commission agreed that it should begin by studying the general aspects of state responsibility.

This approach was approved by the Sixth Committee during eighteenth session of the General Assembly. In accordance with this decision, the Commission is currently engaged in framing secondary norms which establish responsibility, inasmuch as they are concerned with determining the consequences of failure to fulfil obligations established by the primary rules as distinguished from the latter which impose particular obligations on States in specific fields of inter-State relations.

Although the International Law Commission has deferred consideration of the question of responsibility of States in the specific area of injuries to aliens, the more specific question of nationalization or expropriation of the property of aliens is receiving attention in the context of debates on permanent sovereignty of States over their natural resources and new international economic order in many other forums of the United Nations, such as the United Nations Conference on Trade and Development (UNCTAD), the Economic and Social Council (ECOSOC), and the United Nations General Assembly. The latter adopted Resolution 3171 (XXVIII) on 17 December 1973 on Permanent Sovereignty Over Natural Resources.
Resources and the Charter of Economic Rights and Duties by Resolution 3281 (XXIX) on 12 December 1974. The deliberations in these forums do not seem to support assertions of some jurists asserting validity of norms of customary international law in the field of State responsibility after the entry of several new States of Asia and Africa in the society of nations. Amarasinghe, writing in 1967, disagreed with Guna Roy as to the outmoded nature of the customary international law and emphasized that "a legal order originating in a custom must continue, in spite of new entrants into the community". He also stated that differences did not call for a reorientation of the law on the subject.

The recent developments in the world indicate the anxiety of the international community to restructure the pattern of economic relations among the States on the basis of equitable distribution of wealth and resources. This calls for reappraisal of norms of customary international law as well as institutional set up. Happily there is a thaw in cold war and we no longer live in a bipolar world. This should enable

the international community to attend to urgent needs of the developing countries. The present voting structure in the international financial institutions is patently unjust in which, of the one hundred and twenty seven members, one hundred and eight have less than one per cent of votes each and seventy-five have less than one-half of one per cent each, and in which the richest countries have sixty-three per cent of the total voting strength and the poor countries taken together only twenty-five per cent. This unhappy situation needs to be rectified. There are also problems of debt rescheduling of developing countries, establishment of a common fund to facilitate buffer stock of selected commodities, elimination of restrictive trade practices and tariff barriers, and questions concerning code of conduct for transfer of technology to the poor countries, code of conduct for multinational corporations etc. Thus efforts are afoot to create a more congenial international setting for inter-dependence and world economic order.

The concentration of economic power in the multinational corporations has led even some of the developed countries like Canada to be on their guard,

not to speak of the developing countries which consider themselves vulnerable to their manipulations. In the list of the wealthiest countries and companies taken together, the fifteenth richest ranking "world power" is a company -- Exxon with $50 billion income, and not a country. The waning of empires and near end of colonialism have brought in their wake certain problems of readjustment and even structural changes in international economic relations. The treatment of alien property, foreign investments and nationalization thereof are the key problems resolution of which is considered vital to the establishment of a new international economic order.

Right to Nationalize

A recent report of the Secretary-General of the United Nations indicated that during 1960 and mid-1974, some eight hundred and seventy five take-overs or nationalizations took place in sixty-two countries affecting nine hundred and forty five investors.

Nationalization on this scale of foreign enterprises

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or property once again reaffirms the sovereign right of States to nationalize or expropriate foreign property. The problem came to the fore with the Mexican expropriations of the property of the United States' nationals in the nineteenth century. This was followed by acquisitions of alien property, by Russia in 1920s and nationalizations in the post-war period by other countries. As already observed, with the decolonization and independence of numerous states of Asia and Africa, the controversy over the law relating to expropriation of alien property has intensified. There is a lot of disagreement as to the amount of compensation that must be paid in case of expropriation of alien property. The attempts at codification of the law on this problem by several private bodies, such as Institute of International Law, Harvard Law School, International Law Association, regional bodies such as International Conference of American States, Inter-American Juridical Committee, Asian-African Legal Consultative Committee and under the auspices of the League of Nations and the United Nations indicate the importance attached to the problem under consideration. One witnesses the continued preoccupation of the world community to grapple with the problem of compensation for expropriation of alien
property. We shall see how the society of nations is meeting modern challenges to the traditional law on the subject and how the new law is emerging.

Scheme of the Work

It may be made clear at the outset that it is not proposed to suggest a new norm of international law in this area which, as Castaneda put it, is "a long and complex process that might take several years to complete", but rather an attempt to examine some of the principles involved as well as the process of evolution of such a norm.

Present Law in Historical Perspective

Chapter II deals with present law in historical perspective and also touches upon issues of conflict and co-operation in international economic relations. This is a necessary digression which enables us to underlie the importance of economic interdependence of states but incidentally provides the international setting for problems of expropriation and nationalisation. An attempt has been made in this Chapter to outline certain trends, which, if allowed to continue, could lead to a long and arduous struggle in the world for "the basic elements of life, and this in
turn, could lead to violence". It is an urgent obligation of the international community to remedy the situation, whether one views assistance to the developing world as "reparations for alleged past injustices and inequities" or "as a contribution toward stability and order and the ensuring of human dignity". Mr. Castaneda, Chairman of the Working Group on the Charter of Economic Rights and Duties, echoed the growing realization that the poverty of some created the wealth of others" and this he added, "could only generate an unstable situation". In this Chapter we shall go into the reasons for North-South confrontation and emphasize the need for the industrialized countries to respond constructively to the legitimate economic aspirations of the developing countries. Foreign investment in the latter countries amounts to several million dollars and earnings on these investments are an important source of strength to the industrialized countries. U.S. direct investment in developing


10 Ved Nanda, ibid., p.56

countries by the end of 1976 was 29,050 millions of dollars (out of a total of $137.2 billion). Earnings from the investment came to $11.1 billion indicating an increase of 30 per cent half of which was contributed by petroleum affiliates in developing countries.

The Concept of Expropriation

Chapter III deals with the concept of expropriation. The act of taking of alien property by the State may involve individual or general expropriation, requisition or even confiscation. The question arises whether compensation is payable in all these cases. Does every interference with alien property amount to expropriation? Does it make any difference if a taking is of impersonal character? Does the nature of State action affecting foreign property or his contractual rights have bearing on the amount of compensation payable? Answers to all these questions have been attempted in this chapter.

The Concession Contracts and Expropriation

In the context of expropriation of alien property, the question often arises whether concession contracts are in the nature of proprietary rights. Different views have been expressed on this matter. During the colonial period several concession contracts were concluded. The terms of these concessions were not always equitable. The question of treatment of these concessions has become an important issue after decolonization. The International Law Commission, while dealing with the law relating to succession in respect of treaties, did not endorse the thesis put forward by some jurists that there was a presumption that a newly independent state consented to be bound by any treaties in force with respect to its territory. The Commission held that, in accordance with the principle of self-determination, which was an important Charter principle, (tabula rasa) the clean slate rule was applicable in the matter of succession to treaties. It might be asked whether the same rule should not be applicable to concession contracts concluded with the foreign concessionaires before new states attained independence. The treatment accorded to these concession contracts in State practice, judicial pronouncements and in juristic
writings is the subject-matter of consideration in Chapter IV. The question whether pre-independence concessions need to be reviewed or revised in the changed circumstances and whether States can unilaterally terminate them have also been examined in this chapter.

Conditions Precedent to Expropriation in Traditional International Law

Although the sovereign right of a state to expropriate alien property has never been seriously challenged, whether this right is subject to any limitations and, if so, what limitations, has been a subject of great controversy. According to traditional international law, an expropriation to be valid should be for a public purpose, non-discriminatory and preceded by "due, prompt and effective" compensation. Strong dissent has been expressed by Soviet, Latin American and Asian-African States to some of these principles. Several pertinent questions arise. What is the legal basis of payment of compensation? What should be the criterion for such payment? The capital-exporting countries have often insisted that there is a minimum standard of international law on payment of compensation. How far is it true? Is this standard reflected in the due, prompt and effective compensation? The elements of
of this formula have been individually examined in the light of state practice and recent developments in the United Nations. Lump sum compensation settlements have had considerable impact on the traditional compensation formula. These modern developments have seriously eroded the traditional compensation formula. It is interesting to note that in the sixty-year period prior to its nationalization, Kennecott of Chile had earned profit to the tune of $10.8 billion whereas the total gross national product of Chile over its four hundred years of history was only $10.5 billion. It might be asked whether traditional compensation formula could be fairly applied in these situations. The rigid application of the non-discrimination principle also might be questionable in view of the need to give a preferential treatment to the developing countries in matters of trade and investments for achieving a balanced international economic order. All the above issues which have been constantly agitating the minds of jurists and decision-makers alike have been discussed in some detail in Chapter V.

Local Remedies Rule

As a general rule a foreigner aggrieved by expropriation of his property cannot seek diplomatic protection of his home state unless he has exhausted local remedies in the host state. The International Law Commission, which is engaged in codifying general rules on state responsibility, has included the rule on exhaustion of local remedies in the draft articles so far prepared by it. The nature and scope of this rule have been widely debated. It becomes important to go into comparative merits and demerits of the rule, its place in the contemporary international law and the circumstances in which exhaustion of local remedies may be dispensed with. In this connection, the concept of denial of justice and its exact scope also merit examination.

The institution of diplomatic protection has for long been a major cause of irritation for the Latin American states in view of the history of a series of international claims espoused by the powerful states in support of their nationals. The traditional basis of diplomatic protection has been violation of what are called "minimum standards of civilization" towards aliens, and Vattel's famous dictum that a State itself
is injured in the person of its nationals. To avert abuses of diplomatic protection, which often assumed the form of "gunboat diplomacy", the Latin Americans devised Drago Doctrine and Calvo Clause. Recent developments indicate that international standard of treatment of aliens is under attack. Is this attack to be treated as an assault on the institution of diplomatic protection itself? What is the present status of Calvo Doctrine and Calvo Clause? Answers to all these questions have been attempted in Chapter VI.

The present study is mainly concerned with legal problems arising out of expropriation of foreign property. The protection of alien property is outside the scope of this study. Similarly, any interference with foreign property during war time does not form part of our study. For the sake of convenience the terms expropriation and nationalization have been used interchangeably. Likewise, the term property extends to all property rights and interests and includes but is not confined to investments.