INTRODUCTION

Nationalization of foreign property has always been an area of controversy in international law. The nature of the controversy has been adequately dealt with in existing literature. But the character of the controversy and the techniques which have been used by the adherents to the different views to assert their standpoints have undergone a dramatic change. Whereas previously the dispute was carried out largely in diplomatic correspondence, in academic journals and occasionally before international arbitral tribunals, now the main arenas in which the subject is mooted are the General Assembly of the United Nations and other international forums and the domestic courts of various states. This shift itself justifies a study on the subject which takes the new developments into account.

The developing countries have sought to assert their views in international forums in which they enjoy a numerical strength. They have used that strength to pass resolutions which incorporate their views on nationalizations. They have also taken stances during disputes involving foreign nationalizations indicating that they are not prepared to accept norms developed during an earlier period of international law without their active participation.

The capital exporting states, however, have shown a rigid adherence to the existing norms relating to nationalization. They have argued for the maintenance of standards of protection of alien property developed in the early twentieth century and have sought to reiterate these positions in the course of recent disputes involving nationalizations.

Despite the fact that they maintain conflicting attitudes, there is also a strong trend emerging which favours a consensus approach to the settlement of foreign investment disputes. The emergence of this trend is due to the realisation that the avoidance of conflict is in the mutual interest of the different groups of states. The strengthening of this trend which conduces to the working of a compromise is in the interest of world order. For this to come about, it is necessary that intransigent positions based on doctrines formulated in the past be abandoned, particularly if they cannot further common policy goals which have been articulated by the world community. A thorough re-examination of these old doctrines, in order to determine whether they serve any purpose other than buttressing the interests of one group of states alone will aid the process of arriving at a compromise.

While the trend towards a compromise is being furthered by the realisation of the common interests involved in the process of foreign investment, the tenacity of the older rules on foreign investment disputes should not be underestimated. Multinational corporations, which are the major investors in the international scene favour the retention of the older norms of foreign investment protection because they give them maximum protection. In their endeavour to preserve these rules, they have received the support of their home states. Several strategies have been adopted towards this end. These include the drafting of codes on investment protection containing these norms and the setting up of arbitration bodies committed to the application of these norms. But an important strategy which has received a great deal of attention in recent times is the use of domestic courts to pursue nationalized property which has been brought into the jurisdiction of these courts.

This strategy involves the making of a claim to title to the property or the proceeds of the sale of the property or even other assets of the nationalizing state on the ground that the nationalization did not conform to certain standards required by international law. The idea of pursuing nationalized property through domestic courts is not a new one. It has been attempted before. But several factors make this strategy assume new significance. Firstly, whereas in the past there was no overt indication of support for such strategy from governmental sources, there does seem to be such support for it now. Secondly, doctrines like sovereign immunity and the act of state doctrine constituted impediments to the jurisdiction of domestic courts in the past. Recent legislative changes to the sovereign immunity principle and efforts at making similar changes to the act of state doctrine may indicate that the pursuit of nationalized property through the domestic courts has been made much easier.

The overt governmental support for such pursuit can be illustrated by the statement of the U.S. Department of State relating to the Libyan nationalization of oil fields operated by American corporations. Referring to the Hickenlooper Amendment which made changes to the act of state doctrine as stated by the U.S. Supreme Court in *Banco Nacional de Cuba* v. *Sabbatino,* the statement explained the theory on which the pursuit of the property through national courts rests, in the following terms:

> "The theory of a suit brought in pursuance of hot oil is simple. The company whose property has been seized in violation of international law maintains that the expropriating government did not, by virtue of an act that violates international law, acquire good title to the property in question. The company places prospective purchasers on notice of this contention. If, nevertheless, a party proceeds to the purchase of a hot product, the expropriated company initiates a legal action designed to regain possession of the property unlawfully taken from it, or the proceeds".

The Department of State went on to observe that the "pursuit of hot oil was a weapon in an effort to deal with the unlawful exprioriation of American investment overseas" and regarded the strategy of pursuit of the property in the courts of the jurisdiction to which it is taken as one which "promised to have a useful, if not decisive effect" in that it would inhibit unlawful expropriations.

The strategy of pursuit of nationalized property requires the rigid adherence to the old standards relating to nationalization. Thus, the continued assertion of traditional norms becomes vital to the adoption of this strategy. For this and other reasons the traditional norms continue to retain considerable vitality and bring about a polarisation in the views of capital exporting and capital importing states. Such a polarisation of views is obviously undesirable. It is an area in which solutions based on the accommodation of the interests of the different groups of states is urgently needed. It is for this reason that a reexamination of the law relating to the nationalization of foreign property, in the context of the developments taking place within the international community, is attempted in this work. After concluding that there is little support for maintaining the old norms on the nationalization of foreign property, the work examines the attitudes taken by municipal courts to claims relating to nationalized property taken into their jurisdictions. The work also explores avenues through which a compromise could be brought about between the competing norms.