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THE NATIONALIZATION OF CHILE'S LARGE COPPER
COMPANIES IN CONTEMPORARY
INTERSTATE RELATIONS

By JOHN FLEMING†

I. INTRODUCTION

THE nationalization of Chile's large copper mines has given rise to a legal debate whose outcome may seriously affect international economic and political relations during the coming decades. The controversy concerns the "lawfulness" of Chile's actions as judged by current standards of international conduct which serve to define a nationalizing state's responsibility to affected foreign parties. On the one hand, United States-based mining companies, whose assets were nationalized by the Allende government in 1971, adamantly claim that customary and generally accepted "minimum international standards" require that aliens whose property is taken by a host nation for public use must be "justly" compensated for their losses.¹ "Just compensation," as defined by the United States is an indemnity which is "prompt, adequate, and effective" in its payment and which reflects the "going concern" value of the assets taken.² The mining companies assert that if these minimum standards are not met, the act can only be considered unlawful and thereby subject to international sanctions.

On the other hand, the Chilean government unwaveringly has insisted that its nationalization program, as designed and executed, is completely in step with existing international norms.³ Therefore, it

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The author is presently writing a major treatise, to be completed in late-1973, on the political-economic development of Chile.

1. See, e.g., Kennecott Copper Corporation, *Expropriation of El Teniente: The World's Largest Underground Copper Mine* 64-79 (Aug. 1971) [hereinafter cited as *Expropriation*].

Kennecott Copper Corporation, one of the nationalized companies (see notes 20-49 and accompanying text *infra*), has published its views in a series of pamphlets concerning the nationalization. While expounding the corporation's own point of view, the pamphlets also contain English translations of some of the Chilean documents pertinent to the nationalization.

2. See notes 76-94 and accompanying text *infra*.

3. See, e.g., Brief of the Republic of Chile Resisting Review of Excess Profits Deduction, in Kennecott Copper Corporation, *Confiscation of El Teniente: Chile Defends Confiscation and Suspends Debt Payment* (Supp. 2, Feb. 1972) [hereinafter cited as *Confiscation*].

would view any punitive measures exercised against it as violating its national sovereignty. The government and representatives of Chile fully recognize the State's responsibility to compensate dispossessed foreign property owners. In fact, the constitutional amendment authorizing the nationalization of the mines involved expressly provides for payment of "suitable" compensation.⁴ However, Chilean officials argue that no prevailing or compelling standards of international justice exist which serve to precisely define the terms of just compensation and, therefore, Chile has instead turned to its own laws to interpret its obligations.⁵

Besides providing for a maximum indemnity equal to the book value of the assets nationalized, the Chilean nationalization legislation also demands that the nationalized parties be held liable for the damages they inflicted upon the State while operating in Chile.⁶ In accordance with this quite significant interpretation of international responsibility, Chile made a number of controversial deductions in computing the amount of compensation to be offered to the North American mining companies. Among the claims filed against the foreign mining enterprises were deductions for loans invested poorly, assets and equipment turned over in defective condition, and excessive profits.⁷ The result of this procedure was the elimination of any possible compensation to four of the five mining companies affected.⁸

Complicated economic, social, and political factors led to Chile's nationalization of its copper industry and must be understood in order to understand fully Chile's legislative actions. Initially, it is important to note that copper is Chile's primary natural resource and, by far, its principal export product.⁹ Today Chile is the third largest copper producer in the world, behind the United States and Zambia, and ranks second only to Zambia as an international copper producer-exporter.¹⁰ Income from the international sale of the red metal accounts for nearly 51 per cent of Chile's foreign exchange earnings and in recent years has financed approximately 16-18 per cent of its national budget.¹¹

4. Law No. 17,450, July 16, 1971.

5. See notes 95-173 and accompanying text *infra*.

6. Law No. 17,450, July 16, 1971.

7. Comptroller General's Resolution on Compensation: Determination of the Compensation to the Nationalized Copper Enterprises, Resolution No. 529, Oct. 11, 1971, in 10 INT'L LEGAL MATERIALS 1240-53 (1971) [hereinafter cited as Comptroller General's Resolution].

8. *Id.*

9. COMMITTEE FOR ECONOMIC DEVELOPMENT, ECONOMIC DEVELOPMENT ISSUES: LATIN AMERICA 93 (1967) [hereinafter cited as COMMITTEE].

10. NORTH AMERICAN CONGRESS ON LATIN AMERICA, NEW CHILE 101 (1972) [hereinafter cited as NEW CHILE].

11. CODELCO, *Influencia del Cobre en la Economía Nacional* 3-4 (1969). The North American Congress on Latin America asserts that copper represents 80 per cent of Chile's total exports. NEW CHILE, *supra* note 10, at 94.

Yet until the mid-1960's, the greater part of the copper industry in Chile was owned and operated exclusively by North American mining companies, while the state's earnings from its copper resources were derived almost entirely from taxes levied on the North American owners of the large mines.¹² As a consequence of this conspicuous financial dependence on the foreign-controlled copper industry, Chile's national ills as a struggling underdeveloped nation have often been attributed to the foreign exploitation of Chile's precious metals. North American mining interests have been accused of perpetuating and aggravating Chile's weak industrial development, its primitive agriculture, its unemployment and low salaries, and its misery and backwardness.¹³ According to Chilean calculations, the three largest North American mines alone have siphoned abroad some \$10.8 billion in the last sixty years of operations. In contrast, the entire Chilean national patrimony has been evaluated at only \$10.5 billion.¹⁴

By the 1960's, nationalistic passions were aroused in Chile, and nationalization in the minds of the majority of the Chilean public had become synonymous with economic independence and an improved standard of living. As a reflection of this mood, the two leading candidates in the 1964 presidential elections, Eduardo Frei and Salvador Allende, both pledged that they would nationalize Chile's major foreign-owned copper industries in the best interests of the Chilean people.¹⁵ But while Allende committed himself to immediate and total¹⁶ nationalization of the large mines, Frei adopted a more moderate stance whereby the State would first purchase 51 per cent of the controlling stock in the North American companies.¹⁷ Frei's "Chileanization" program further envisioned Chilean control over the sales and distribution of all copper and its by-products mined in Chile. With the support of much of the political right, Frei was elected by a clear majority of 56 per cent in 1964, while Allende placed second with 39 per cent of the vote.¹⁸ Together, Frei and Allende received 95 per cent of the electoral support in 1964. In a broad sense this election was thus considered a triumph for the forces of political nationalism in Chile.¹⁹

12. See COMMITTEE, *supra* note 9, at 594.

13. President Allende, Mensaje de Ejecutivo, con el que inicia un proyecto de reforma constitucional que modifica el artículo 10, No. 10, de la Constitución Política del Estado, Dec. 23, 1970.

14. *Id.*

15. F. GIL & C. PARRISH, THE CHILEAN PRESIDENTIAL ELECTION OF SEPTEMBER 4, 1964: PART I, AN ANALYSIS 27-29 (1965) [hereinafter cited as GIL & PARRISH, PART I].

16. *Id.* at 27.

17. *Id.* at 29.

18. F. GIL & C. PARRISH, THE CHILEAN PRESIDENTIAL ELECTION OF SEPTEMBER 4, 1964: PART II, 1964 PRESIDENTIAL ELECTION RETURNS 9 (1965).

19. See generally GIL & PARRISH, PART I, *supra* note 15.

On January 25, 1966, little more than one year after taking office, President Frei began moving forward with his proposed Chileanization plans. At that time, legislation embodying the initial terms of the Chileanization accords was submitted to Congress.²⁰ As ratified on April 25, 1966, this statute permitted the Chilean State to purchase a 51 per cent equity interest in the companies classified as the Gran Minería, *i.e.*, those copper mining companies producing in excess of 75,000 metric tons of copper per annum.²¹ Included in this category were three large mining companies which until 1966–1967 had been totally owned and operated by two United States-based firms: the Kennecott Copper Corporation and the Anaconda Copper Company.²² Together, these three mines accounted for over 80 per cent of Chile's total copper production.²³ In addition, the legislation provided for state participation in two new developing mines: the Exótica Mine, owned by the Anaconda Company; and the Río Blanco (Andina) Mine, owned by the Cerro de Pasca Corporation.²⁴

The Kennecott Corporation's El Teniente subterranean copper mine was the first to negotiate the sale of a 51 per cent interest in its holdings in Chile under the Frei administration. Until 1967, the El Teniente mine had been owned and operated by the corporation through a wholly-owned subsidiary.²⁵ In December 1965, Kennecott entered into an agreement with the Chilean government to form a new company, the Sociedad Minera El Teniente S.A.²⁶ Then, in 1967, the Chilean government's Corporación del Cobre (CODELCO) purchased a 51 per cent

20. Law No. 16,425, Apr. 25, 1966.

21. The classification known as the Gran Minería was originally established by Law No. 11,828, May 5, 1955, which specified that any mining company in Chile producing 25,000 metric tons of copper per year or over would be subject to special operating regulations. This definition was later revised to encompass those companies producing 75,000 metric tons of copper per year. Law No. 16,624, May 17, 1967.

22. Comptroller General's Resolution, *supra* note 7, at 1242.

23. *NEW CHILE*, *supra* note 10, at 94.

24. CODELCO, *Algunos Aspectos de la Nueva Política en el Cobre* (July 25, 1969). Anaconda's Exótica mine, which was expected to go into production in 1970, was projected to produce 100,000 metric tons of copper, and therefore was also classified as a component of the Gran Minería. The Río Blanco (Andina) Mine, on the other hand, was not scheduled to reach an annual production of 75,000 tons per year until 1972, and was not included in the Gran Minería at that time. CODELCO, *Chile y Su Política del Cobre* (1972).

25. Expropriation, *supra* note 1, at 3–4. El Teniente was owned by the Braden Copper Company, a subsidiary of Kennecott. While some of the agreements with the Chilean government concerning El Teniente were actually entered into by Braden, this Article, for the sake of clarity and simplicity, will refer to Kennecott as the interested party in all transactions and disputes concerning the mine.

26. On December 3, 1964, following Frei's election, the Chilean government and Kennecott executed a Memorandum of Understanding, which outlined the prospects for Chile's direct participation in the ownership of the El Teniente mine. Pursuant to that memorandum a new company, the Compañía Minera El Teniente, was established on September 16, 1966. On April 13, 1967, Kennecott, through Braden, (*see* note 25 *supra*) transferred the whole of its Chilean properties to the new company in return for 100 per cent of the stock; CODELCO then purchased 51 per cent of this stock from Kennecott. Expropriation, *supra* note 1, at 80.

equity interest in El Teniente from its North American owners for a sum of \$80 million, thus giving the State a controlling interest in the mine.²⁷ This purchase price was based on a capitalization of the joint company at \$160 million.²⁸ It was further contracted that this sum would be paid by the State over a period of twenty years, with the proviso that an equivalent sum be loaned to El Teniente in order to finance that company's new expansion plan initiated by the Frei government. Chile completed its payments in less than three years in order to generate the funds required for the expansion program as quickly as possible.²⁹

The expansion loan, guaranteed by the Chilean government, totaled, with interest, approximately \$93 million, and was scheduled to be paid over a fifteen-year period beginning December 31, 1971 in the form of negotiable promissory notes.³⁰ By the terms of this transaction, Kennecott was able to benefit from the influx of the sorely needed capital in the El Teniente mine while assuring itself that the development loan would eventually be paid in full by the Chilean government. At the same time, it was to receive dividends from 49 per cent of the profits earned from El Teniente's copper production, after taxes. The Government, meanwhile, was able to defer for four years the real cost of the 51 per cent stock purchase in El Teniente, by guaranteeing the immediate reinvestment of all payments made to Kennecott.

In a parallel phase of his Chileanization program, Frei also entered into a joint partnership with Anaconda in its new Exótica mine

27. See Note, *The Chileanization of the Copper Industry*, 2 N.Y.U.J. INT'L L. & POL. 158, 163-65 (1969); Decree No. 99 Concerning the Formation of Sociedad Minera El Teniente S.A. and Authorization of Investment, Aug. 24, 1966, in 6 INT'L LEGAL MATERIALS 1146 (1967).

28. The Central Unica de Trabajadores (CUT), a leftist-controlled labor union, announced that \$160 million was an over-evaluation of the El Teniente assets, and that in 1963 (before reevaluating its assets), the company had claimed its net worth to be \$65.7 million. Therefore, under no circumstances, CUT declared, should Frei's government have paid more than \$40 million for the 51 per cent interest in the El Teniente mine in 1967. La Central Unica de Trabajadores de Chile, *Problemas Nacionales; Los Doce Grandes Escándalos del Cobre* 12 (1969) [hereinafter cited as *Central Unica*]. Kennecott, on the other hand, claimed its pre-reevaluation worth had been \$72,453,000. Following independent appraisers' estimates, the real book value of the El Teniente properties (including depreciation) was established in 1967 at \$244,394,000. See text accompanying note 189 *infra*. When the new mixed company was legally formed on April 13, 1967, this net book value was increased to \$285,667,000, representing the contribution of total net capital to the company in that year. According to Kennecott, these figures were approved by the Chilean government in complete conformity with Chilean laws. Kennecott Copper Corporation, *Confiscation of El Teniente: Expropriation Without Compensation 6-7* (Supp., Oct. 1971). Nevertheless, for the purpose of capitalizing the Sociedad Minera El Teniente S.A. and purchasing a 51 per cent interest, the Frei administration established the net worth of the El Teniente mine at \$160 million in 1967. Cf. Decree No. 2,167 Authorizing the Existence and Approving the Statutes, [Charter and By-Laws] of the Stock Corporation Named "Sociedad Minera El Teniente S.A.," Oct. 1, 1966, in 6 INT'L LEGAL MATERIALS 1148 (1967).

29. See *Expropriation*, *supra* note 1, at 80.

30. *Id.* at 81-82; Note, *supra* note 27, at 164-65.

and with Cerro in its developing Río Blanco (Andina) mine.³¹ Two new joint companies, Compañía Minera Exótica S.A. and Compañía Minera Andina S.A., were formed with Anaconda and Cerro respectively. In the case of Exótica, CODELCO agreed to purchase 25 per cent of an equity capital of \$25 million in the new mixed company.³² This 1967 accord was actually an extension of a 1964 agreement in which CODELCO and Cerro had jointly contracted to develop Río Blanco on the basis of a 25 year franchise granted by the State.³³

The third phase of Frei's copper program referred to as the "negotiated nationalization," affected two remaining Anaconda Copper Company subsidiaries operating in Chile, the Chile Exploration Company, which exploited the massive Chuquicamata open pit copper mine, and the Andes Mining Company, which operated the Potrerillos-El Salvador copper mine. On December 31, 1969, the net assets of these two companies were transferred to two new corporations, Compañía del Cobre Chuquicamata S.A. and Compañía del Cobre El Salvador S.A.³⁴ Simultaneously, CODELCO purchased 51 per cent controlling stock in both new companies with state-guaranteed, six per cent promissory notes payable over twelve years.³⁵ The 1969 book value of the new companies was established at \$275.4 million for Chuquicamata and \$66.6 million for El Salvador.³⁶ Accordingly, the book value of the 51 per cent holdings in the mixed companies was fixed at \$140.5 million for Chuquicamata and \$34.1 million for El Salvador. This again was a sore point for the Chilean left, which claimed that the total book value of both companies combined was closer to only \$180 million.³⁷

By the terms of Frei's "negotiated nationalization" agreement with Anaconda, CODELCO was given the option to purchase the remaining 49 per cent of Anaconda's assets in the Chuquicamata and El Salvador mines after January 1, 1973, but before December 31, 1981, provided that 60 per cent of the balance of the purchase price of the

31. Note, *supra* note 27, at 172-78; see Decree No. 215 Concerning Authorization of Investment in the Exótica Mine, Feb. 13, 1967, in 6 INT'L LEGAL MATERIALS 454 (1967).

32. Fatouros, *Documents and Legislation Concerning the "Chileanization" of Anaconda's Chile Exploration Company: Introductory Note*, 9 INT'L LEGAL MATERIALS 921 (1970).

33. See Note, *supra* note 27, at 172.

34. See Statement by President Frei on Negotiations for Government Acquisition of Anaconda Company Properties, June 26, 1969, in 8 INT'L LEGAL MATERIALS 1073 (1969) [hereinafter cited as Statement by President Frei].

35. *Id.*

36. ANACONDA COMPANY, ANNUAL REPORT: 1969, at 22-23. Unlike Kennecott's El Teniente assets, no revaluations of the holdings of Anaconda or Cerro took place during this period. See text accompanying note 189 *infra*.

37. CUT claimed that Anaconda's total assets in Chile were worth only \$180 million, and therefore, Frei should not have agreed to pay Anaconda any more than \$90 million. See Central Unica, *supra* note 28, at 14.

first 51 per cent interest was paid.³⁸ Purchase would again be with government-guaranteed promissory notes issued by CODELCO.³⁹ It was agreed that the price for the remaining interest in the two mines would be determined by multiplying Anaconda's share of the average annual earnings of the companies after taxes by a factor dependent on the date of the transaction.⁴⁰

In retrospect, there can be no doubt that the Frei administration had clearly foreseen the eventual nationalization of Chile's major foreign-owned mines.⁴¹ In fact, Frei had already negotiated the total purchase of Anaconda's holdings in Chile even before the 1970 presidential elections.⁴² But by 1970, Frei's Chileanization program had still not quenched Chile's thirst for nationalism. Although even the rightist candidate in 1970, Arturo Alessandri, agreed that nationalization of the large foreign-owned mines was in Chile's best interest if executed fairly and justly, the Chilean people turned to their left for leadership. Radomiro Tomic, the candidate of Frei's strong Christian Democratic party, supported the "immediate and integral"⁴³ nationalization of the Gran Minería, as did the socialistic Dr. Salvador Allende. The hard-fought campaign ended in victory for Allende, who won office with a plurality of 36 per cent of the votes cast.⁴⁴ Tomic, a leftward-tilting centrist candidate, won 29 per cent of the vote.⁴⁵ Thus, Allende and Tomic together polled 65 per cent of the public's support, indicating a strong national endorsement of *immediate and total* nationalization of Chile's large copper mines.

The new socialist administration immediately seized upon what promised to be a guaranteed political victory for the popular government. By the time of Allende's November inauguration, the President-elect's nationalization proposal was in its final drafting, to be submitted for congressional consideration on December 21, 1970.⁴⁶ Fol-

38. Decree No. 116 Concerning the Acquisition of Majority Holdings in Anaconda's Chile Exploration Company, Oct. 31, 1969, in 9 INT'L LEGAL MATERIALS 924 (1970).

39. Power of Attorney Setting Forth the Procedures for the Execution of the Sale of CCC Shares by Anaconda's Chile Exploration Company to the Chile Copper Corporation, in 9 INT'L LEGAL MATERIALS 952 (1970).

40. ANACONDA COMPANY, ANNUAL REPORT: 1970, at 25. See text accompanying note 210 *infra*.

41. During a campaign speech in 1964, Frei stated that "if tomorrow's internal or external events indicate that nationalization is a better alternative, I will not hesitate to nationalize the copper industry." El Mercurio (Santiago), Apr. 9, 1964, at 27, col. 3.

42. Statement by President Frei, *supra* note 34.

43. American Embassy, Santiago, Chile, U.S. Dep't of State, Economic Programs of Presidential Candidates 8-313, Aug. 21, 1970 (copy on file at the Villanova Law Review).

44. N.Y. Times, Sept. 6, 1971, at 1, col. 5.

45. *Id.*

46. Proyecto de Reforma Constitucional que Modifica Artículo 10, Número 10, de la Carta Fundamental, Dec. 21, 1970, in 10 INT'L LEGAL MATERIALS 420 (1971) (English translation).

lowing six months of substantial deliberation and several minor amendments, Congress unanimously ratified the constitutional amendment on July 11, 1971.⁴⁷ Five days later the reform was enacted into law with the President's signature.⁴⁸

The constitutional amendment as ratified by the legislature modified chapter III (constitutional guarantees), article 10, no. 10 of the Chilean Constitution, concerning the "Right of Property in its Various Forms." For all intents and purposes, the law has now placed all of Chile's basic resources and resource industries in the hands of the State for reasons of national interest. In addition, the legislation attached three "Transitory Articles" to the Constitution which specifically called for the immediate and total nationalization of the companies of the Grand Minería and the Compañía Minera Andina.⁴⁹

Chile's nationalization of its large mines constitutes a bold challenge to traditional standards of international law, particularly as interpreted by the United States. The advent of such a precedent at this time may help to stimulate a significant revamping of international legal standards with regard to nationalization of foreign-owned assets and quite possibly may reflect profound alterations in the interstate system.

Nationalizing, expropriating, or requisitioning enterprises controlled by aliens seems to be increasingly common in the contemporary world.⁵⁰ Within just the last several decades, a growing number of movements toward economic and political nationalism have appeared among less developed nations. Such nationalistic struggles are normally characterized by vigorous efforts to gain domestic control over foreign-owned or foreign-operated enterprises. Naturally, the most likely targets of such efforts are those foreign enterprises which are involved in the exploitation of natural resources which are of key importance to the economies of such nations.

The reasons for nationalistic movements among Third World nations are probably as numerous and as varied as the states themselves. At the risk of making generalizations, however, it can be said that most developing states are becoming increasingly self-reliant, partially as a result of improved technological, industrial, and marketing capabilities, and partially in response to a growing awareness that excessive external economic dependence often impedes real economic

47. See Versión Oficial, Sesión del Congreso Pleno, July 11, 1971, in *El Mercurio* (Santiago), July 13, 1971, at 9, col. 1.

48. Law No. 17,450, July 16, 1971.

49. For translations of Chile's constitutional amendment, see 10 INT'L LEGAL MATERIALS 1067 (1971); Confiscation, *supra* note 3, at 1.

50. For a more complete discussion of this current development, see Bureau of Intelligence and Research, U.S. Dep't of State, Nationalization, Expropriation, and Other Taking of United States and Foreign Property Since 1960, Doc. RECS-14, Nov. 30, 1971 [hereinafter cited as Research Study].

and social development. Popular rancor, whether well-founded or not, generally appears in those developing countries in which foreign-controlled enterprises, accused of repatriating a disproportionate share of the national wealth, operate in the midst of widespread poverty.⁵¹

Nationalistic struggles have not been confined to any one geographical area nor directed toward any particular nation, although the United States has often been implicated by virtue of its extensive international holdings. Some 34 noncommunist developing nations have already nationalized, expropriated, or requisitioned United States or other foreign-owned assets.⁵² This growing nationalistic trend is reflected in the fact that 64 instances of nationalization, expropriation, or requisitioning of concerns with United States ownership interests have occurred in noncommunist countries since as recently as January 1969, while only 51 such actions were taken between January 1961 and December 1968.⁵³ Of the 115 cases recorded since 1961, 70 (60.9%) currently remain unresolved, and 59 (84.3%) of these 70 cases have taken place since January 1969.⁵⁴ Chile alone accounts for 16 of these.⁵⁵ Furthermore, of these 70 currently unsettled cases, 27 (38.6%) affect resource industries.⁵⁶ It should further be noted that within the last several months foreign-owned petroleum industries in Iraq, Abu Dhabi, Qatar, Kuwait, and Saudi Arabia have been threatened with at least partial nationalization in the very near future.⁵⁷ Likewise, Venezuela's president, Rafael Caldera, recently announced that over \$5 billion in foreign oil investments in that country may be taken over within the next two years, although present concessions extend at least until 1983.⁵⁸ In Guyana, the government has already

51. *Id.* at 1.

52. *Latin America*: Argentina, Bolivia, Brazil, Chile, Ecuador, Guyana, Haiti, Mexico, and Peru. *Africa*: Algeria, the Congos, Dahomey, Egypt, Guinea, Iraq, Israel, Kenya, Libya, Malawi, Sierre Leone, Somalia, Sudan, Syria, Tanzania, Tunisia, Uganda, Yemen, and Zambia. *Asia*: Burma, Ceylon, Khmer Republic, India, and Indonesia. *Id.* at ii.

53. *Id.* at 8.

54. *Id.*

55. *Id.* To date, Allende's socialization efforts have resulted in the nationalization or negotiated sale of large sectors of the foreign-owned business community. In addition to the five mining enterprises of the Gran Minería and Andina, the affected foreign concerns include: Alimentos Purina (a subsidiary of Ralston Purina), Anglo-Lautaro (a nitrate industry with a 51 per cent ownership interest held by the Chilean government), Bethlehem-Chile Iron Mines Co. (a wholly-owned subsidiary of Bethlehem Steel), Chitelco (Chile's telephone company of which 70 per cent is owned by ITT), Ford Motor Co. of Chile, Industrias Nibco (50 per cent ownership held by Northern Indiana Brass Co. and 25 per cent held by European investors), RCA-Chile, and South American Power-Chilectra (70 per cent ownership interest held by the Boise-Cascade Co.). Furthermore, the new administration has nationalized a large portion of the banking industry in Chile, including Banco de Brasil, Banco Frances e Italiano, Bank of London and South America, First National City Bank, and the Bank of America. *Id.* at 23-27.

56. *Id.* at 9.

57. Wash. Post, Oct. 6, 1972, at A1, col. 4.

58. Wash. Post, Feb. 25, 1972, at A16, col. 1.

nationalized a portion of the bauxite and aluminum operations of North American businesses and is presently poised to nationalize the remainder of the foreign-dominated aluminum industry.⁵⁹ Even Panama, whose relations with the United States must remain relatively amicable due to her financial dependence on the United States, is in the process of nationalizing American utility companies operating there.⁶⁰

It seems certain that many nations of the developing world are attempting to gain control over their own resources and that many major industries face possible nationalization of their external investments within the decade. Quite probably, nationalizing states, plagued by conditions similar to those allegedly hindering Chile's development, will look to the measures already tested by other Third World nations in determining the limits of their international responsibilities. In any case, the capital-exporting nations, as well as international businesses, should be prepared for this likely contingency. But, more importantly, if the international legal order is to remain effective and functional, it must be able to deal with such transformations within the changing nation-state system.⁶¹

II. THE RIGHT TO NATIONALIZE, EXPROPRIATE, OR REQUISITION THE PROPERTY OF ALIENS

It should first be made clear that Chile's right to nationalize the foreign assets of the large mining enterprises in Chile is incontestable under existing standards of interstate conduct. Practically without exception, the nations of the international community have fully recognized the right of any state to nationalize property within its territorial domain for public use, including the property of aliens. This facet of interstate practice is regarded as a matter of state sovereignty; it is axiomatic that no state can interfere with another's sovereign right to dispose of property ownership privileges as it deems necessary.

Over the years, proclamations to this effect have appeared in numerous documents. Certainly the most prominent contemporary declaration of state sovereignty over material resources was that of the United Nations General Assembly in 1962. A commission composed of nine appointed members, including representatives of the United States, the Union of Soviet Socialist Republics, and Chile, met over a period of three years to examine and discuss the historical experience of states which have nationalized, expropriated, or otherwise requisitioned the

59. FORBES, Oct. 16, 1971, at 32.

60. Wash. Post, July 9, 1972, at G4, col. 1.

61. For an interesting discussion of nationalization in less developed nations, see Rafat, *Compensation for Expropriation of Property in Recent International Law*, 14 VILL. L. REV. 199 (1969).

property of aliens. The task of the commission was to synthesize the collective practices of these states and to formulate international standards which would accurately reflect this experience, as well as the current realities of interstate relations.⁶² The report of the commission, known as General Assembly Resolution 1803, was adopted by the General Assembly on December 14, 1962, and contains the following eight principles:

1. 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 of the well-being of the people of the State concerned.
2. The exploration, development, and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction, or prohibition of such activities.
3. In cases where authorization is granted, the capital imported and the earnings on the capital shall be governed by the terms thereof, by the national legislation in force, and by international law. The profits derived must be shared in the proportions freely agreed upon, in each case, between the investors and the recipient State, due care being taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources.
4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security, or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. *In such cases 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.* In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.
5. The free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality.
6. International co-operation for the economic development of developing countries, whether in the form of public or private

62. L. GOODRICH, E. HAMBRO & A. SIMONS, CHARTER OF THE U.N.: COMMENTARY AND DOCUMENTS 136 (3d ed. 1969).

capital investments, exchange of goods and services, technical assistance, or exchange of scientific information, shall be such as to further their independent national development and shall be based upon respect for their sovereignty over their natural wealth and resources.

7. Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international co-operation and maintenance of peace.

8. Foreign investment agreements freely entered into by, or between, sovereign States shall be observed in good faith; States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution.⁶³

The fundamental intent of this comprehensive statement was to promote international cooperation in assisting the independent development of less developed countries around the globe.⁶⁴ In addition to the above eight principles, the Resolution emphasizes the equality of all states, the right of every nation to self-determination, and the importance of sovereignty over natural resources for rapid and independent national growth.⁶⁵

Similar declarations concerning national sovereignty over natural resources have become relatively common during the last decade. In Latin America, a number of statements noting the need to initiate economic and social reforms based on mutual cooperation, respect for the self-determination of peoples, and recognition of national sovereignty, have been adopted within the last ten years.⁶⁶ One of the more recent of such proclamations is the report of the Special Latin American Coordinating Committee (CECLA) presented during the ministerial conference in May 1969, in Viña del Mar, Chile. Known as the Latin American Consensus of Viña del Mar, this document was signed on May 17, 1969, by twenty-two member nations. In addition to detailing Latin America's position on international cooperation

63. G.A. Res. 1803, 17 U.N. GAOR Supp. 17, at 42, U.N. Doc. A/5217 (1962).

64. *Id.* at 15.

65. *Id.*

66. Among these must be included: the resolutions and declaration of the Bogotá Conference of 1948; the Act of Bogotá of 1960; the Declaration to the Peoples of America of 1961; the Charter of Punta del Este of 1961; the Charter of Alta Gracia of 1964; the Economic and Social Act of Rio de Janeiro of 1965; the Protocol of Buenos Aires of 1967; the Declaration of the Presidents of America of 1957; the Action Plan of Viña del Mar of 1967; the Charter of Tequendama of 1967; and the Declaration of Santo Domingo of 1968. Report of the Special Latin American Coordinating Committee on the Consensus of Viña del Mar, May 17, 1969, in 8 INT'L LEGAL MATERIALS 976 (1969).

within the hemisphere, the Consensus emphatically requires "[s]pecific operative measures . . . to remove the external obstacles that hold back the rapid development of Latin American countries."⁶⁷

Those measures must be based on the principles already accepted by the inter-American and international communities, which principles guarantee the political and economic independence of the countries concerned [including] . . . the sovereign right of every country to dispose freely of its natural resources⁶⁸

At the opening session of the Viña del Mar conference, it was Chile's former president, Eduardo Frei, who introduced CECLA's proclamation. In his address, Frei reasoned:

The right of Latin American countries to adopt decisions regarding the preservation and utilization of their basic resources, within the framework of postulates such as the United Nations Resolution on Permanent Sovereignty Over Natural Resources, cannot be regarded as an aggression to anyone. Even from a juridical and historic standpoint, the Latin American states inherited, from the Spanish or Portuguese crown, supreme authority over the manner in which such wealth should be used for the common weal. On the other hand, to forget this basic right of the Latin American states to attend to their natural resources can lead to the rigid institutionalization of situations which may become a form of economic aggression, leading to irrational conflicts whose mere existence is disadvantageous for Latin America, the United States of America, and all other countries.⁶⁹

The Allende government was very well aware of its rights as a sovereign state in nationalizing its large mines, and deftly employed General Assembly Resolution 1803 to serve as the launching platform for its socialization program. President Allende quoted the United Nations Resolution when the initial nationalization proposal was delivered to the Congress,⁷⁰ and it was repeatedly discussed by both international law authorities and congressmen during hearings before the Chilean Senate and House Committees on the Constitution, Legislation, Justice, and Rules when the constitutional amendment was re-

67. *Id.* at 977.

68. *Id.*

69. Address by Eduardo Frei Montalva to the Special Meeting of the Special Latin American Coordinating Committee, May 1970, in 11 VA. J. INT'L L. 187 (1971).

70. We emphasize that with the nationalization of copper begins our second independence. We will realize this nationalization by exercising our rights as recognized in the United Nations Charter and as recognized by the Supreme Court of the United States. This is not an act of vengeance against anyone, but rather the exercise on the part of Chile of her supreme right to be free, united, prosperous, and sovereign.

President Allende, *supra* note 13.

viewed. Congressional transcripts of floor debates on the amendment likewise contain frequent references to the doctrine.⁷¹

Finally, it should be noted that no accords between Chile and the United States or its private enterprises have ever been signed which might have acted to enjoin the nationalization of North American properties in Chile.

III. STATE RESPONSIBILITY INCURRED IN THE NATIONALIZATION, EXPROPRIATION, OR REQUISITIONING OF THE PROPERTY OF ALIENS

Just as there is little disagreement over a state's sovereign right to dispose of the property of aliens as it sees fit, so is there a general consensus concerning that state's obligation to compensate dispossessed foreign owners for their property losses. The period following World War I has seen frequent incidents of nationalization, expropriation, or requisitioning of private, foreign-owned property, and, practically without exception, host nations have recognized their responsibility to compensate in some way for the assets taken.⁷² Martin Domke concluded from his research:

The duty of a government to compensate in cases of nationalization is almost universally recognized. This is clearly shown by the texts of the nationalization laws of Iran, Egypt, Indonesia, and Cuba, expressly providing for compensation, though each in a different way. Even in the state practice of Communist countries, the obligation to pay compensation has not yet been denied, but recognized in treaties with other Communist countries and in arrangements with Western countries⁷³

The general harmony on this issue has led most authorities to maintain that a state's responsibility in instances of nationalization or expropriation of private property is an international legal obligation.⁷⁴ More-

71. See Versiones Oficiales del Senado, from 312a Legislatura, Sesión 26a, Jan. 20, 1971, to 313a Legislatura, Sesión del Congreso Pleno, July 11, 1971, in *El Mercurio* (Santiago), Jan. 23, 1971, at 8, col. 1, to July 13, 1971, at 9, col. 1.

72. The early nationalization of foreign property in the Soviet Union was a unique exception to this standard. In 1917, the Soviet Union initiated a large-scale socialization process calling for the nationalization of whole sectors of the economy regardless of ownership. At that time, the Soviets recognized no liability on their part to compensate for the property taken in the social reform. The Western nations hardly considered the Soviets' actions to be legitimate, however, and in 1918 twenty official protests were lodged against the Soviet Union for the alleged confiscations of private property. Three years later, the 1921 Brussels Conference on Russia formally declared the Soviet nationalization an irrefutable breach of international law and "at variance with the practice of civilized states." B. WORTLEY, *EXPROPRIATION IN PUBLIC INTERNATIONAL LAW* 115-35 (1959).

73. Domke, *Foreign Nationalizations — Some Aspects of Contemporary International Law*, 55 *AM. J. INT'L L.* 603-04 (1961).

74. See, e.g., García-Amador, (*Fourth Report on International Responsibility*, [1959] 2 *Y.B. INT'L L. COMM'N* 16-19, U.N. Doc. A/CN.4/119 (1959).

over, the studies of the United Nations Commission on Permanent Sovereignty Over Natural Resources led the General Assembly to concur in Resolution 1803 that "[i]n such cases the owners 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."⁷⁵

A. The United States Position: Prompt, Adequate, and Effective Compensation⁷⁶

The United States has consistently maintained that, in accordance with generally accepted principles of international law, the taking of the property of an alien for public use is "lawful" only if there are reasonable provisions for the determination and payment of "just compensation." In its view, just compensation must be "prompt, adequate, and effective" and must represent the "going concern" value of the assets taken. The "going concern" value, in contrast to the book value, includes the aggregate of intangibles, such as technology, experience, sales markets, profitability, and clientele, all of which account for an enterprise's market value and which usually enhance its worth. Book value, on the other hand, simply represents the actual real value of the assets under consideration. In the words of the United States Department of State:

The Department of State has traditionally defined fair compensation as adequate, prompt and effective payment. This definition can acquire precision only in terms of a particular set of facts. In the case of an operating enterprise, adequate compensation is usually considered to be an amount representing the market value or "going concern" value of the enterprise, calculated as if the expropriation or other governmental act decreasing the value of the business had not occurred and was not threatened.⁷⁷

With regard to the effectiveness of payment, the State Department maintains that:

The United States has not accepted the principle which has been urged by some countries that payment in local currency as a general matter meets the standard of prompt, adequate and effective compensation. Whether local currency payment is effective com-

75. G.A. Res. 1803, pt. 4, 17 U.N. GAOR Supp. 17, at 42, U.N. Doc. A/5217 (1962). See text accompanying note 63 *supra*.

76. The reader will find this section mercifully brief. The position of the United States on this matter has been developed extensively in numerous sources. See, e.g., note 158 *infra*.

77. J. Rehm, Ass't Legal Advisor for Economic Affairs, U.S. Dep't of State, Expropriation of American Investments Abroad (Memo of Nov. 19, 1962, M.S. File 200.11/11-1962), in 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1143 (1967).

pensation depends upon all of the circumstances of the case, i.e., the convertibility of the currency, whether or not it is useful to the foreign owner for new investment within the country⁷⁸

Finally, prompt compensation is normally understood to imply payment of indemnification as soon as it is reasonable under the circumstances, although a promise of payment should be made at the outset. This does not necessarily entail immediate payment or, for that matter, full payment at one time.⁷⁹

Perhaps the best known, though certainly not the earliest, statement establishing the position of the United States is found in an exchange of diplomatic notes between former Secretary of State Cordell Hull and Mexico's Foreign Minister in the late 1930's.⁸⁰ In a dispute between the two countries occasioned by Mexico's extensive nationalization of agricultural properties owned by United States nationals and by the subsequent delays of indemnification proceedings, Secretary Hull advised the Mexican government:

[U]nder every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor. In addition, clauses appearing in the constitutions of almost all nations today, and in particular in the constitutions of the American republics, embody the principle of just compensation.⁸¹

The United States has steadfastly struggled to uphold this rather strict interpretation of what it has considered a "minimum international standard of justice" around the world and has signed agreements with several dozen nations to assure the payment of prompt, adequate, and effective compensation in the event either country has need to nationalize, expropriate, or requisition the other's assets.⁸²

78. Metzger, Ass't Legal Advisor for Economic Affairs, U.S. Dep't of State (Aug. 1, 1951, Dep't of State File 251.1141/8-151), in 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1183 (1967).

79. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 189 (1965): Payment with reasonable promptness . . . means payment as soon as it is reasonable under the circumstances in the light of the international standard of justice The comments to this section explain that a nationalizing state need not pay "immediately," although some provision for future payments must be made. Payments must be made as soon as possible, but not necessarily in one sum. *Id.*, comment *a* at 569.

80. Officials in the State Department's International Claims Division who were questioned in conjunction with research for this Article suggested that former Secretary of State Cordell Hull's memoranda to the Mexican Foreign Minister (*see* 3 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 655-63 (1942)) plainly state the position of the United States with regard to the Chilean nationalizations. In keeping with generally accepted State Department policy, sources consulted with regard to this research have requested that their names be withheld.

81. Letter from Secretary of State Hull to the Mexican Foreign Minister, Aug. 22, 1938, in 3 G. HACKWORTH, *supra* note 80, at 658-59.

82. Among those nations currently bound by such accords with the United States are: Belgium, the Republic of China, Denmark, France, Germany, Greece, Iran,

Support for the position adopted by the United States may be found in a number of cases which evidence acceptance of the "prompt, adequate, and effective" standard in some interstate practice.⁸³ In 1928, for instance, the Permanent Court of International Justice stated, in the *Factory at Chorzow (Merits)* case,⁸⁴ that a government must pay "fair compensation," or the "just price of what was expropriated."⁸⁵ In the court's estimation, just compensation, when the right to expropriate existed, would be the "value of the undertaking at the moment of dispossession, plus interest to the day of payment."⁸⁶

Similarly, the United States-Germany Mixed Claims Commission, examining claims of property damage following World War I, determined:

[I]n all claims based on property taken and not returned to the private owner the measure of damages which will ordinarily be applied is the reasonable market value . . . if it had such market value⁸⁷

The *Lena Goldfields, Ltd.* case⁸⁸ is sometimes referred to as a classic example of state responsibility in cases of nationalized or expropriated mining property.⁸⁹ In 1925, the English-owned Lena Goldfields company was granted a concession by the Soviet government to conduct mining operations in the Soviet Union. In 1929, however, the socialist regime found it necessary to revoke the concession due to policies which conflicted with the first Soviet five-year plan. The company thereupon invoked an arbitration clause which had been included in the concession agreement, and a tribunal was convened to hear the case. Although the Soviets at first consented to the arbitration, they later refused to be a party to the hearings. The tribunal, nonetheless, continued to consider the matter, and eventually recommended that the private company be awarded damages based on the fair purchase price as a going concern, which would include the present value of all of the future profits to be derived from the mine.⁹⁰

Ireland, Israel, Italy, Japan, Korea, the Netherlands, Nicaragua, Pakistan, and South Vietnam. For the precise terms of such accords, see 8 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 1087-89 (1967).

83. See note 286 *infra*.

84. [1928] P.C.I.J., ser. A, No. 17.

85. *Id.* at 47.

86. *Id.* The court noted that in a case where the right to expropriate did not exist, compensation should be greater than merely the value at the time of taking.

87. Administrative Decision No. III, Mixed Claims Commission (United States v. Germany), in 2 M. WHITEMAN, *DAMAGES IN INTERNATIONAL LAW* 1528-29 (1937).

88. *Lena Goldfields, Ltd. (Great Britain v. the Soviet Union)* (arbitral award and decision published in *The Times* (London), Sept. 3, 1930); see 36 CORNELL L.Q. 42-53 (1950).

89. See WORTLEY, *supra* note 72.

90. Expropriation, *supra* note 1, at 74. For a discussion of methods of valuation, see R. LEWIS & G. CLARK, *ELEMENTS OF MINING* 356-69 (3d ed. 1964).

In several cases, even nations which have not formally accepted the United States' "prompt, adequate, and effective" formula have provided compensation representing the full "market value" of the nationalized assets. Perhaps the most recent example was the extensive nationalization of foreign-owned properties in Tanzania in 1967. The socialist-oriented legislation undertaking these nationalization reforms provided for "full and fair compensation" to dispossessed owners; "full value" of the affected concerns was calculated according to the "net value of the assets taken over."⁹¹

Thus, it is apparent that the United States has not stood alone in its assessment of state responsibility in the taking of private assets. But, as the world's poorer nations have progressively gained political and economic strength vis-à-vis the wealthy capital-exporting nations, so have they more boldly attempted to assert their own rights as nation-states. Consequently, many decisions and rulings of recent decades have provided terms of indemnification more favorable to the nationalizing states. Moreover, as will be discussed later, compensation agreements in future instances of nationalization of foreign assets are not expected to meet United States criteria for just compensation.⁹²

The Chilean nationalization of the large foreign-owned mines is a case in point. In accordance with its own interpretation of existing international law, the Chilean government has constructed compensation provisions for the affected companies which incorporate specific principles of social justice.⁹³ Although the indemnification awards are far from being satisfactory to United States interests, the Chilean government is confident that it has not overstepped current international legal bounds.⁹⁴

B. *The Chilean Position*

1. *No Prevailing and Compelling Minimum Standards*

Chile unhesitatingly recognizes its obligation to compensate foreign nationals whose property has been nationalized, expropriated, or otherwise requisitioned by the State for public use.⁹⁵ Moreover, recognition of this national responsibility has long been a feature of Chile's

91. Note, *Tanzanian Nationalizations: 1967-1970*, 4 CORNELL INT'L L.J. 59, 66 (1970).

92. See text accompanying notes 286-88 *infra*.

93. See Law No. 17,450, July 16, 1971.

94. See note 3 *supra*.

95. When the legislative proposal to be sent to Congress to amend the Constitution was originally signed by the Chief Executive in Santiago's Plaza de la Constitución, Allende stated:

I want it to be perfectly well understood that this is not an act of aggression against the people of North America or against the North American government, nor is it at all aggressive. We are going to apply the law and to indemnify

internal laws, and was incorporated into the original draft of Chile's present Constitution in 1925. While recognizing the eminent right of the State to expropriate private property, the 1925 Constitution required that "indemnification" for property taken be set by mutual consent or "appropriate court proceedings," and that such "indemnification" be paid in advance.⁹⁶ This provision was amended in 1967 to make the "social function" of property clearer, by specific mention of the State's preeminent interest in its natural resources, and to eliminate the requirement of payment in advance.⁹⁷ Yet, as amended, the provision retained recognition of the obligation to compensate an owner of expropriated property, noting that he "shall always have the right to compensation, the amount and terms of payment of which shall be equitably determined by taking into consideration the interests of the community and of the expropriated owner."⁹⁸

The Allende government has taken the position that there are no prevailing and compelling standards to be found in prior edicts of international law which effectively serve to define just compensation.⁹⁹ Indeed, General Assembly Resolution 1803,¹⁰⁰ the purpose of which was, in part, to express existing international law on the issue of

according to what is just through the normal Chilean State institutions and the businesses themselves.

Address by President Allende, Dec. 21, 1970, in *El Siglo* (Santiago), Dec. 23, 1970, at 7, col. 1.

96. CONSTITUCIÓN POLÍTICA art. 10, no. 10, para. 1 (Chile, 1925). Prior to the 1967 amendment (see note 98 and accompanying text *infra*), art. 10, no. 10 of the Constitución Política read:

No one can be deprived of property under his control, nor of any part thereof, nor of the right he may have therein, except by virtue of a judicial decree or a writ of expropriation on account of public interest, conformable to a law. In this case indemnification, as may be agreed on, or as may be fixed by appropriate court proceedings, shall be paid the owner in advance.

The exercise of the right of property is subject to the limitation or rules that the maintenance and advancement of social order demand, and, in this sense, the law may impose obligations or servitudes for public benefit in favor of the general interests of the State, of the health of the citizenry and of the public welfare.

97. Law No. 16,617, Jan. 18, 1967, amended art. 10, no. 10 of the Constitución Política to read:

The law may prescribe the manner in which property is to be acquired, used, enjoyed, and disposed of and the limitations on obligations thereon which ensure its social function and render it accessible to all. The social function of property includes whatever may be required by the general interests of the State, public benefits and health, a better utilization of the productive sources and energies in the service of the community, and a raising of the living conditions of the people as a whole.

Whenever the interests of the national community so demand, the law may reserve to the State exclusive domain over natural resources, productive goods or others, declared to be of preeminent importance to the economic, social, or cultural life of the country.

98. CONSTITUCIÓN POLÍTICA art. 10, no. 10, para. 3 (Chile, 1925, amended 1967).

99. See, e.g., Confiscation, *supra* note 3, at 77. "Nor can the defense counsel invoke the principles of International Law. None has been violated, just as none can be found . . ." *Id.*

100. See G.A. Res. 1803, 17 U.N. GAOR Supp. 17, at 42, U.N. Doc. A/5217 (1962).

sovereignty over natural resources in a more vigorous and comprehensive form, simply states that compensation to dispossessed owners must be "appropriate."¹⁰¹

The Resolution very significantly makes no mention of the "prompt, adequate, and effective" formula defended by the United States, nor does it indicate that "appropriate" compensation must represent the "going-concern" value of the assets taken. During debate on Resolution 1803, the United States attempted to change the phrasing of point 4 to coincide with its traditional stance, but the proposed amendment was summarily rejected in favor of the present wording.¹⁰² Instead, the resolution only recommended that "appropriate" compensation be determined "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."¹⁰³

The United States has suffered an even more recent disavowal of its "prompt, adequate, and effective" maxim. During the first four months of 1972, Chile endeavored to renegotiate a large portion of the \$3 billion external debt which it had disastrously accumulated in the past.¹⁰⁴ Present at the renegotiating conferences held in Paris were Chile's creditors from the United States, Japan, and 11 western-European nations.¹⁰⁵ American negotiators wedged into the talks a consideration of the unfavorable terms of compensation Chile had offered to the nationalized copper companies and further insisted that any rescheduling of Chile's debt must include more favorable terms of compensation to be granted to the mining companies.¹⁰⁶ Quite expectedly, Chile's negotiators, headed by then-Ambassador Letelier, refused to be budged by such leverage. The United States eventually withdrew its demand and instead sought a promise of "prompt, adequate, and effective" compensation in the event of future Chilean nationalization of foreign-owned properties within its territory. However, these terms were once again found unacceptable by the Chilean negotiators and were eventually renounced in favor of an agreement more palatable to all parties concerned.¹⁰⁷ The final accords, as adopted on April 20, 1972, thus stated that the Chilean authorities "confirmed their policies of recognition and of payment of all foreign debt and

101. *Id.*

102. *See* 17 U.N. GAOR, 2d Comm. 233-34 (1962).

103. G.A. Res. 1803, pt. 4, 17 U.N. GAOR Supp. 17, at 42, U.N. Doc. A/5217 (1962).

104. *See* Wash. Post, Apr. 20, 1972, at A8, col. 1.

105. *Id.*

106. N.Y. Times, Apr. 20, 1972, at 3, col. 4.

107. *Id.*

their acceptance of the principles of payment of just compensation for all nationalizations in accordance with Chilean and international law."¹⁰⁸

The posture adopted by Chile at this time was very much akin to the position of the Mexican government during its nationalization reform programs of the 1930's. During that particular controversy, in which Secretary of State Cordell Hull formally made reference to the United States' "prompt, adequate, and effective" formula for compensation, the Mexican Foreign Minister replied:

My government maintains . . . that there is in international law no rule universally accepted in theory nor carried out in practice, which makes obligatory the payment of immediate compensation nor even of deferred compensation, for expropriations of a general and impersonal character like those which Mexico has carried out for the purpose of redistribution of the land. . . .

. . . .

. . . Nevertheless Mexico admits, in obedience to her own laws, that she is indeed under obligation to indemnify in an adequate manner, but the doctrine which she maintains on the subject, which is based on the most authoritative opinions of writers of treatises on international law, is that the time and manner of such payment must be determined by her own laws.¹⁰⁹

Eventually, several joint Mexican-American Claims Commissions were established to rule on matters of just compensation for dispossessed North American property owners. Final indemnification agreements were often considerably lower than the original claims, although in the case of the petroleum industries, compensation was calculated according to the "standard American valuation based upon prudent investment theory."¹¹⁰ Standard Oil of New Jersey, for instance, had originally claimed that the net worth of its Mexican holdings was \$400 million.¹¹¹ Nonetheless, when compensation was forthcoming in 1941, the joint Claims Commission had calculated the worth of the company at closer to \$18.4 million, and Standard accepted this 95 per cent reduction in its original claim.¹¹²

Similar precedential cases in which less than full compensation has been accepted in complete satisfaction of claims of property losses are plentiful, particularly in the post-World War II years. In fact, the volume of such evidence easily serves to substantiate the opinion

108. Wash. Post, Apr. 20, 1972, at A8, col. 1. See Wash. Post, Apr. 21, 1972, at A28, col. 1.

109. Letter from the Mexican Minister of Foreign Affairs to United States Secretary of State Cordell Hull, Apr. 3, 1938, in 3 G. HACKWORTH, *supra* note 80, at 657-58.

110. J. WILKIE & A. MICHAELS, *REVOLUTION IN MEXICO: YEARS OF UPHEAVAL, 1910-1940*, at 241 (1969).

111. *Id.* at 241-42.

112. *Id.*

held by Chilean authorities that no compelling or prevailing legal standards exist within the edicts of international law which serve to clearly define "just" compensation. The common occurrence and acceptance of such compensatory provisions as reduced and partial payments, lump-sum agreements, deferred payments, and payments in non-interest bearing government bonds manifest the flexibility of the applicable international standards. In view of this evidence, an unpublished study by the Department of the Treasury concluded in 1970 that recent compensation settlements have been "based on the recognition of a community of interests, rather than on the application of principles of international law."¹¹³

The extensive nationalization programs enacted during the socialization of Eastern Europe between 1945 and 1950 were perhaps the first large-scale actions which brought into question the policy that compensation must be "prompt, adequate, and effective" and must reflect the "going concern" value of nationalized private foreign assets. In the relevant deliberations over compensation, the socialist states universally argued that the concept of social justice, which had motivated their sovereign acts in the first place, not only limited the extent of their obligation to pay, but also justified the calculation of indemnification based on a state's *ability* to pay.¹¹⁴ Most of the settlements arranged with American interests were "lump-sum" agreements paid out of foreign assets blocked in the United States.¹¹⁵ Generally, the indemnity paid represented only a small fraction of the amount claimed by the affected foreign property owners. In Poland, for example, although American claims for nationalized private assets exceeded \$680 million, only \$40 million was eventually paid in full settlement of the claims.¹¹⁶ Rumania paid United States nationals a total of \$30.5 million, which was considered a sizeable sum, given that the total of awarded claims against Rumania amounted to almost \$60 million.¹¹⁷ During the same period, an agreement between the United States and Yugoslavia resulted in payment of \$17 million. Although this sum was only 42.5 per cent of the original claim, the American government eventually acknowledged that \$17 million would cover the fair value of the claims.¹¹⁸

113. R. Vega, *Expropriation*, at 88, June 1, 1970 (unpublished U.S. Dept't of the Treasury Memorandum).

114. Cf. Doman, *Postwar Nationalizations of Foreign Property in Europe*, 48 COLUM. L. REV. 1143 (1948).

115. R. Vega, *supra* note 113, at 41-47; Rafat, *supra* note 61, at 212-15.

116. R. Vega, *supra* note 113, at 43.

117. STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 88TH CONG., 1ST SESS., REPORT ON CLAIMS PROGRAM ADMINISTERED BY THE FOREIGN CLAIMS SETTLEMENT COMMISSION UNDER THE INTERNATIONAL CLAIMS SETTLEMENT ACT OF 1949, AS AMENDED (Comm. Print 1963).

118. R. Vega, *supra* note 113, at 41-43.

Settlements have not yet been reached with all of the Eastern European nations, however. The latest negotiations with Czechoslovakia were discontinued in 1968.¹¹⁹ Approximately 5.3 per cent of the American claims filed against Czechoslovakia were paid from an available fund of \$8.5 million.¹²⁰ Negotiations with Hungary are still in progress with no agreement having been reached to date. Hungarian assets which were frozen in the United States amount to only \$1.6 million, while claims for nationalization of private property in Hungary total some \$58 million.¹²¹ The Union of Soviet Socialist Republics and the United States have endeavored only within the last few months to resume negotiations on the Soviet debt to the United States stemming from the early lend-lease agreements and war debts.¹²²

The socialized Eastern European nations were not alone in protecting their national interests with regard to compensation settlements following World War II. In Western Europe, both France and Great Britain managed to arrange partial payment settlements with nationalized property owners in those nations.¹²³ Between 1944 and 1946, the French government nationalized the Renault Company (1944), the Bank of France (1945), the commercial banks (1945), the air transportation industry (1945), the coal industry (1946), the electric and gas industries (1946), and the securities and insurance companies (1946). Prior to taking these measures, the French government recognized its obligation to compensate for this nationalized property, part of which was foreign-owned. Nonetheless, in the final analysis, only partial compensation was paid in settlement of the claims.¹²⁴ In the case of the Bank of France, a total of 28,000 francs was indemnified to shareholders in the bank. However, according to the bank's own accounts, normal liquidation was estimated to be near 70,000 francs, although this sum was later reduced to 44,000 francs when the bank's "dubious" methods of evaluation were questioned.¹²⁵

In the case of the commercial banks, compensation "was to be based on the average market value for the period from September 1, 1944, to October 31, 1945, a period during which the nationalization of the banks had become a certainty."¹²⁶ In other words, indemnification to the shareholders in these commercial banks was equal to

119. *Id.* at 44.

120. *Id.*

121. *Id.* at 45.

122. Interview with officials of the Economic and Business Bureau of the U.S. Dep't of State, in Washington, D.C., Apr. 15, 1972.

123. For additional discussion of these nationalizations, see Rafat, *supra* note 61, at 209-11.

124. M. EINAUDI, M. BYE & E. ROSSI, NATIONALIZATION IN FRANCE AND ITALY 76-77 (1955).

125. *Id.* at 40.

126. *Id.*

the worth of the banks more than a year after the announcement of nationalization had been made. During this period, market values dropped considerably.¹²⁷ On at least one occasion, the French government even found it in its interest to employ retroactive measures; specifically, the nationalization of the French air transport industries was enacted on February 9, 1945, but was deemed effective as of September 1, 1944.¹²⁸

During these same years, Britain's government felt it within the national interest to nationalize the coal (1946), electric (1947), and steel (1949) industries, as well as the railroads (1947) and airlines (1939 & 1946).¹²⁹ As in France, the market value of nationalized concerns was calculated according to the value of the stock in November 1946, well after the prospective nationalization of the enterprises had been assured and the value of the affected shares had consequently dropped.¹³⁰

Examining the nationalization programs in Britain and France, Konstantin Katzarov has concluded:

In considering the compensation of parties affected by nationalization in England and France in general, it must be admitted that it has been neither [prior nor full]. Moreover, care is taken not to reveal openly this attitude, which may well have been dictated by ideological considerations, and attempts have been made to camouflage it.¹³¹

The Mideast has traditionally been considerably less accommodating to its creditors than has Western Europe. In nationalizing the Universal Company of the Suez Maritime Canal, for example, President Nassar of Egypt charged that his country was receiving only 44 per cent of the net profits from the canal, although the essential waterway runs through Egyptian territory.¹³² As an exercise of its national sovereignty, Egypt nationalized the canal in 1956 and took the company's operations into its own hands. Although the nationalization decree had provided for compensation based on the value of the com-

127. Rafat, *supra* note 61, at 210.

128. K. KATZAROV, *THEORY OF NATIONALIZATION* 44 (English ed. 1964).

129. See generally Schmitthoff, *The Nationalization of Basic Industries in Great Britain*, 16 *LAW & CONTEMP. PROB.* 557 (1951).

130. See Cairns, *Some Legal Aspects of Compensation for Nationalized Assets*, 16 *LAW & CONTEMP. PROB.* 594 (1951).

131. K. KATZAROV, *supra* note 128, at 328-29. Certainly there are conflicting opinions concerning the French and British post-war nationalization experiences. Professor Weston concluded that the French claims commissions appeared generally to have striven for a distribution based on the net market or going concern value extant ordinarily at the time of loss. B. WESTON, *INTERNATIONAL CLAIMS: POST-WAR FRENCH PRACTICE* (1971). Professor Lillich similarly claims that the British Foreign Compensation Commission respected a standard of evaluation based on going concern value. R. LILLICH, *INTERNATIONAL CLAIMS: POST-WAR BRITISH PRACTICE* (1967).

132. See Rafat, *supra* note 61, at 233.

pany's stock on the Paris Stock Exchange on the day before the nationalization actually took place, a final settlement was reached only after the conflict evolved into armed hostilities. Not until July 13, 1958, was an agreement reached between Egypt and Universal's stockholders, whereby the stockholders received E£ 28.3 million in addition to the external assets of the company.¹³³ This sum amounted to approximately 25 per cent of the E£ 130 million originally claimed by the nationalized company.¹³⁴

In Latin America, compensation negotiations in cases of nationalization have sometimes favored the interests of the nationalized parties. This has often been due to the close economic and political dependence of these nations on the major capital-exporting countries. For example, when the revolutionary government of former President Ovando in Bolivia nationalized the nation's three largest tin mining companies in 1952, the government effected full indemnification of the foreign entrepreneurs. It is generally conceded that the relatively generous terms of compensation in this case had a great deal to do with Bolivia's dependence on American and British tin smelting plants, necessary for the processing of Bolivia's raw metal.¹³⁵

The Gulf Oil Company, on the other hand, did not enjoy such favorable treatment when the Bolivian government nationalized its assets on October 17, 1969. A compensation settlement was announced on September 10, 1970, which decreed that Bolivia would pay Gulf \$78.6 million in installments, from 25 per cent of the future profits from the operation of the former Gulf installations. Although Gulf had estimated its net worth between \$120-30 million, the settlement was considered "fair and equitable under the circumstances."¹³⁶

Finally, the Cuban nationalizations of North American properties should be discussed briefly. Following Fidel Castro's rise to power in 1958, the Cuban government moved to terminate foreign control over the island's economy. One of the first acts in the socialization of Cuba was to nationalize the country's sugar plantations, the majority of which were North American-owned.¹³⁷ The Agrarian Reform Act of May 17, 1959,¹³⁸ assured the owners of nationalized agricultural properties an indemnification based upon the real book value of the land, plus improvements, to be paid in twenty-year bonds at 4½ per cent interest. To cover the indemnification awards, the Cubans set

133. *Id.* at 237.

134. See R. Vega, *supra* note 113, at 82-83.

135. *Id.* at 52-58; Research Study, *supra* note 50, at 21-22.

136. N.Y. Times, Sept. 12, 1970, at 35, col. 4.

137. See Rafat, *supra* note 61, at 245.

138. Act of May 17, 1959, 2 LA JURISPRUDENCIA AL DÍA (LEGISLACIÓN) 933 (1959).

aside \$100 million in tax-exempt bonds. The sugar plantations being nationalized, however, were valued at roughly \$250 million.¹³⁹ The United States Department of State expressed "concern . . . with regard to the adequacy of the provision for compensation," and immediately deemed the arrangement unsatisfactory to American interests.¹⁴⁰

On July 6, 1960, relations between the United States and Cuba took an abrupt turn for the worse when President Eisenhower called for a 95 per cent reduction in Cuba's remaining 1960 sugar quota, the island's primary source of foreign revenue.¹⁴¹ The Cuban government responded to this blatant economic pressure on the same day by nationalizing all American-owned property in Cuba.¹⁴² According to this broad nationalization law, compensation was to be paid in cash up to \$10,000 and in Cuban bonds for all sums exceeding that amount. The National Bank of Cuba was assigned the task of determining the specific amount of compensation to be paid.¹⁴³ This compensatory provision was again found unacceptable by United States interests. Nonetheless, Cuba refused to alter its legislative provisions, arguing that years of imperialistic exploitation of its resources had driven its economy into a "chaotic economic and financial situation."¹⁴⁴ Furthermore, Cuban authorities maintained that the overwhelmingly unfavorable balance of payments between the United States and Cuba, which had been inherited by the new government, prohibited by prior payment of the proper indemnification in cash, in an amount judicially determined, as required by the Cuban Constitution.¹⁴⁵

The United States broke diplomatic relations with Cuba after the Cuban government demanded on January 3, 1961, that the United States' Embassy staff be reduced to eleven officials.¹⁴⁶ Subsequently, all Cuban assets in the United States were frozen.¹⁴⁷ To date, over 8000 claims, exceeding \$3.3 billion, have been filed against the Cuban government pursuant to the Cuban Claims Act,¹⁴⁸ although no negotiations between the two countries have taken place.¹⁴⁹ Moreover, with

139. R. Vega, *supra* note 113, at _____.

140. U.S. Dep't of State, Press Release No. 417, June 11, 1959, in 40 DEP'T STATE BULL. 958, 959 (1959) [hereinafter cited as Press Release].

141. Exec. Proclamation No. 3,355, 3 C.F.R. 80 (1963).

142. Law No. 851, July 6, 1960, 2 LA JURISPRUDENCIA AL DÍA (LEGISLACIÓN) 1162 (1960).

143. *See* Rafat, *supra* note 61, at 249.

144. Unpublished Cuban note of June 15, 1969, in Rafat, *supra* note 61, at 247.

145. Press Release, *supra* note 140, at 958.

146. *See* R. Vega, *supra* note 113, at 51.

147. *See* 31 C.F.R. § 515 (Supp. 1971). It has been estimated that the total value of realizable assets frozen was \$60 million. *See* Re, *The Foreign Claims Settlement Commission and the Cuban Claims Program*, 1 INT'L LAW. 81, 82 n.3 (1966).

148. 22 U.S.C. § 1643 (1970).

149. R. Vega, *supra* note 113, at 52.

official relations between the states almost entirely severed, there is little chance that negotiations might be resumed in the near future.

The examples of indemnification settlements cited above tend to reaffirm the principle that a state is obligated to compensate foreign owners if it unilaterally takes away their property. However, the precedents do not clearly bring to light any coherent norm which might serve as a guide in determining the indemnification due in any specific case.

2. *State Responsibility to Formulate Terms of Indemnification*

The Allende government reasoned that if international law lays bare no definition of "just" compensation, responsibility to formulate the terms of indemnification logically falls upon the nationalizing state.¹⁵⁰ Allende relied upon General Assembly Resolution 1803 in support of this stand and set about to construct adequate guidelines for the calculation of "appropriate" indemnification in the specific cases of the Gran Minería and Andina mines.¹⁵¹

a. *"Less than Full Compensation:" Social Justice and Ability to Pay*

The overriding consideration in Chile's search for an appropriate formula for compensation was the belief that the act of nationalization was primarily a means of securing social justice. Essentially, the nationalizations were understood as an effort by the Government to restore to public ownership assets of superior import to the Chilean people which had been "unjustly" held and exploited by foreign entrepreneurs. This viewpoint was succinctly expressed in a Chilean government brief resisting review of excess profits deductions, in which the Government argued that the issue should be analyzed from:

the point of view of countries which have the urgent necessity of achieving economic independence in order to obtain a better development of the human communities constituting them

. . . .

Respect for acquired rights is nothing more than a different version of social immobility which is expressed in the pseudo-principle of the unity of action of the States. It tends to affirm the consolidated situations of some private persons, completely ignoring the most elemental principle of justice which demands

150. See note 99 and accompanying text *supra*.

151. Cf. Letter from Francisco Orrego Vincuna, Professor of Public International Law, University of Chile, Santiago, to the author, Sept. 6, 1971 [hereinafter cited as Orrego Letter].

taking care of the necessities of others who have not consolidated their situation in any way and which they need to do in order to be able to say that they live in a humanly decorous situation.¹⁵²

This argument, which evoked an element of social justice, evolved into the legal notion that a state's responsibility to compensate owners of nationalized concerns is somehow mitigated if the act has been inspired by a concept of social justice and if its purpose is to increase public ownership rights on a large scale.

Furthermore, Chilean legislators insisted upon differentiating "nationalization" from "expropriation."¹⁵³ Apparently, no real attempt to distinguish these two terms had actually been made until the post-World War II era when the concept of nationalization came into wide usage with the socialization programs in Eastern Europe.¹⁵⁴ The conditions created by the war and the political and nationalistic demands of reconstruction required a new conception of the "social function" of property. "Nationalization" during this period generally began to connote expropriations carried out in the public interest.¹⁵⁵

Within the past three decades, a number of international legal authorities have come to recognize a legal distinction between acts of nationalization and expropriation.¹⁵⁶ Katzarov, one of the foremost authorities in this area of international law, has concluded:

[T]he evolution of law confirms beyond doubt not only a new attitude towards property allowing nationalisation to be regarded as a new legal institution, but also a very clear distinction between *expropriation* of the classical type, and *nationalisation*, as a means of converting private property into the property of the people of the State.

This finding makes it impossible to hold that the problems connected with nationalisation can necessarily be considered and solved in the same way as those arising out of expropriation, or any analogy therewith.¹⁵⁷

However, more precise definitions of the terms "nationalization" and "expropriation" have never been decidedly elaborated within the writs of international law. Generally speaking, the term "nationaliza-

152. Confiscation, *supra* note 3, at 76-77.

153. Orrego Letter, *supra* note 151.

154. See generally K. KATZAROV, *supra* note 128. Prior to 1945, most legislation concerning government takings of private property was composed in terms of "expropriations" and "confiscations" (expropriation without appropriate compensation), with the exception of the socialization programs in the U.S.S.R. after 1917. See note 72 *supra*.

155. See, e.g., García-Amador, (*Fifth Report on International Responsibility*, [1960] 2 Y.B. INT'L L. COMM'N 67, U.N. Doc. A/CN.4/125 (1960).

156. *Id.*

157. K. KATZAROV, *supra* note 128, at 147.

tion" is gradually evolving to imply that the act in question is motivated by the overall best interests of the community, with the expressed purpose of placing in public hands certain assets which are of superior importance to the community at large. Furthermore, the act generally encompasses entire economic undertakings, activities, and material assets.¹⁵⁸

It is interesting to note that the legal concept of nationalization was only first introduced into the text of the Chilean nationalization amendment after the original drafts had been submitted for study to the Senate Committee on the Constitution, Legislation, Justice, and Rules. Although at first each Senator studying the project in Committee felt that there was no significant difference between nationalization and expropriation, and that nationalization was merely a more politically acceptable term, further investigation of legal opinions revealed that nationalization might well be considered an action separate and distinct from expropriation according to evolving norms of international law.¹⁵⁹ When the proposed amendment was brought before the Senate one month later, its wording had been revised to eliminate all references to "expropriation" and instead it termed the constitutional amendment an act of "nationalization." Although discussions concerning the use of the term extended into both Senate and House floor debates, the revised wording of the Committee was eventually fully retained.¹⁶⁰

Particularly in the Chilean situation, distinctions between the terms nationalization and expropriation should not be viewed as merely semantical differences. As mentioned above, the nationalization of the nation's large mines was motivated by a consideration for the overall interests of the community. Its purpose was to place under public control certain assets which were considered to be essential to Chile's national welfare; the term "nationalization" was thus employed by the Chilean legislators specifically because it was felt that the word connoted a sense of social justice.¹⁶¹

The Chilean legislators further maintained that their *responsibility* to foreign entrepreneurs was conditioned by their righteous purpose — to rectify injustices suffered by their society while their resources were under foreign control. They reasoned that no nation

158. See generally I. FOIGHEL, NATIONALIZATION (1956); S. FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW 140-41 (I. Jackson trans. 1953); G. WHITE, NATIONALISATION OF FOREIGN PROPERTY 41-45 (1961).

159. Orrego Letter, *supra* note 151.

160. See, e.g., Versión Extractada Oficial, 312a Legislatura Sesión 31 Especial, Feb. 2, 1971, in *El Mercurio* (Santiago), Feb. 5, 1971, at 6, col. 1.

161. Orrego Letter, *supra* note 151.

has the right to jeopardize social justice by paying an indemnity so high as to be detrimental to the interests of the community.¹⁶²

Moreover, this interpretation of responsibility based on social justice did not originate with the Chilean nationalizations. Numerous international authorities have suggested that the obligations incurred by a "nationalizing" state might very well be considered separate from those obligations incurred by a state "expropriating" private property.¹⁶³ In fact, such a distinction as to state responsibility has, to some extent, already been institutionalized. García-Amador, Special Rapporteur of the International Law Commission Responsible for the Codification of the Laws of State Responsibility, has suggested a distinction between "the common types of expropriation and nationalization measures, a distinction which affects in particular the *quantum* of compensation and the form and promptness of payment"¹⁶⁴

The immutable concept of state sovereignty stands as the main defense of this attitude. To demand that a state sacrifice or jeopardize its goals merely to satisfy external standards of just compensation might, in some cases, limit the success of the reform sought. In a sense then, such a measure would compromise the very sovereignty of the nationalizing state.¹⁶⁵

Hersh Lauterpacht, writing in the late 1930's was, perhaps, one of the first to recognize that the terms of compensation for the taking of private property should fully consider the effects on the nationalizing or expropriating state. In his 1937 lectures at the Hague Academy of International Law, Lauterpacht stated:

[I]t is difficult to maintain that expropriation of property for the purposes of fundamental social reforms must stop short of the property of aliens. To maintain this would mean to attempt to impose upon States a prohibition to regulate their social and political life as they are entitled to do by virtue of the independence and autonomy recognized by international law. For the duty of full compensation might in effect mean the frustration of the contemplated reform.¹⁶⁶

162. See generally Confiscation, *supra* note 3, at 57-82.

163. See, e.g., K. KATZAROV, *supra* note 128. Katzarov is a leading advocate of the view that indemnification need be neither prior nor complete in nationalization, as opposed to expropriation, since entire industries are involved, and the taking is justified by valid social and economic needs of the state. At one point in the Senate debates, the President of the Senate, Patricio Alywin, gave up his chair to cite Katzarov on just this point. See note 160 *supra*.

164. García-Amador, *supra* note 155.

165. But see Kissam & Leach, *Sovereign Expropriation of Property and Abrogation of Concession Contracts*, 28 *FORDHAM L. REV.* 177, 189 (1959).

166. *INTERNATIONAL LAW: THE COLLECTED PAPERS OF HERSCH LAUTERPACHT* 388 (E. Lauterpacht ed. 1970).

Other authorities have since corroborated Lauterpacht's interpretation of international justice. Professor de la Pradelle has indicated that the breadth of the act of nationalization might automatically prohibit payment of full compensation and thus suggested that indemnification be "based upon the debtor state's financial capacity, equitably estimated, with payment spread over a reasonable length of time."¹⁶⁷ It has even been suggested that nationalization does not necessitate any redress whatsoever if compensation would so endanger the successful completion of the envisioned reform.¹⁶⁸

In light of the factors considered above, it is important to note Chile's ability to pay compensation. Chilean authorities have insisted that this aspect should enter into any adjudication proceeding involving indemnification, for the State's current financial situation relates directly to the question of what measure of compensation justly considers the community interest.¹⁶⁹ It is no state secret that Chile has sailed into dire financial straits over the past years; its huge foreign debt of over \$3 billion looms unusually large, considering Chile's practically nonexistent foreign reserve holdings.¹⁷⁰ In addition, the five nationalized mining concerns had outstanding debts totaling \$728 million at the time of nationalization which Chile, in a statement made by the President of the State Defense Council in 1971, agreed to assume in full — with the exception of those investments deemed not to have been invested "usefully." As of the time of this writing, the Comptroller General's guarantee still stands.¹⁷¹

Therefore, given Chile's present financial crisis, some Chilean officials have argued that the State is indisputably incapable of awarding additional compensation to the nationalized companies. To do so would be to compromise its intended reforms and thereby threaten the State's sovereignty. In this content, the willingness to absorb the debts of the mixed copper companies might justifiably be considered a conciliatory measure. In response to accusations by Secretary of State

167. "[U]ne indemnité basée sur les possibilités du débiteur raisonnablement considérées, dans un paiement échelonné sur un délai normal." 43 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 20 (1950).

168. 44 II ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 254 (1951).

169. See, e.g., Statements by Eduardo Novoa, CODELCO Press Conference, Santiago, Oct. 14, 1971 (copy on file at the *Villanova Law Review*) [hereinafter cited as CODELCO Press Conference].

170. Wash. Post, Mar. 18, 1972, at A16, col. 1.

171. Statement by Eduardo Novoa, CODELCO Press Conference, *supra* note 169. The State Defense Council was assigned the task of defending the interests of the State before any adjudicatory tribunals. Mr. Novoa also made clear his wish to investigate further the possibility of subtracting the companies' outstanding debts from possible compensation awards. *Id.*

Rogers that Chile was not abiding by international standards of justice, Chile's Foreign Minister Almeyda remarked:

[A]ll adverse criticisms . . . [ignore] the circumstance in which our country would have to take charge of debts contracted by the expropriated firms, corresponding to investments now made¹⁷²

Almeyda further claimed that Roger's statement "showed an ignorance of the sovereign right of the nation to determine, in accordance with the Chilean law and Constitution, the amount and means of fixing" the indemnity.¹⁷³

The Chilean provisions for compensation clearly embodied that country's bold interpretation of existing international standards of state responsibility. Several new paragraphs were inserted into the main text of the Chilean Constitution, establishing the ground rules and norms to be respected in all future measures taking the property of private parties. As amended, the relevant language the Constitución Política reads:

The amount of the compensation, or compensations, as the case may be, may be determined on the basis of the original cost of such assets, less amortization, depreciation write-offs (*castigos*), and devaluation through obsolescence. All or part of the excess profits the nationalized companies have obtained may also be deducted from the compensation. Unless the person affected agrees to some other form of payment, the compensation shall be paid in legal tender over a period of not more than 30 years and on terms to be determined by law.¹⁷⁴

In addition to amending the main text of the Constitution, three transitory articles were added specifically to legislate the nationalization of the Gran Minería and Andina.¹⁷⁵ According to the second of these, a "suitable compensation" must be provided for all "affected" parties.¹⁷⁶ "Suitable compensation" is determined by calculating the base book value of the assets taken on December 31, 1970. Denoting the book value of the assets as the maximum potential compensation, a number of possible deductions are then enumerated in the legislation, which may be subtracted from that figure if found to be applicable. Included in this rather formidable list of possible deductions are the following:

172. Wash. Post, Oct. 14, 1971, at A12, col. 1.

173. *Id.*

174. CONSTITUCIÓN POLÍTICA art. 10, no. 10, para. (d) (Chile, 1925, amended 1971).

175. CONSTITUCIÓN POLÍTICA arts. (transitory) 16-18 (1971).

176. CONSTITUCIÓN POLÍTICA art. (transitory) 17 (1971).

(1) The amount of upward revaluations made by the companies or their predecessors after December 31, 1964; (2) the worth of mineral deposits if included in the calculations of book value; (3) amounts representing assets that the State did not receive in good operating condition, or which were turned over without rights to service, repairs, and/or spare parts; (4) amounts representing studies, prospecting information, or other compensable intangible assets turned over without all the titles, maps, reports, and data making their full utilization possible; (5) amounts due the Treasury; (6) any amounts receivable that are not paid by the debtors when due (to be deducted from compensation installments only); and (7) payments made by the State or its agencies for shares of stock acquired by Chilean agencies or by virtue of the guarantees agreed upon for the said payment obligations.¹⁷⁷

The Comptroller General was assigned the task of determining which of the deductions listed were to be made and in what amounts, with the exception of deductions for excessive profits.¹⁷⁸ The President of the Republic was given the final responsibility to determine whether excessive profits had been earned by the companies and whether or not these should be deducted from the compensation to the owners of the nationalized companies.¹⁷⁹ None of the above-mentioned deductions was mandatory.

According to the constitutional amendment, any compensation determined to be owed by Chile was to be paid in installments over a period of not more than 30 years, at an interest rate of not less than three per cent.¹⁸⁰ The constitutional amendment further stated that indemnities would be paid in the form of "legal tender unless the nationalized companies agree to another form of payment."¹⁸¹ In the case of the Gran Minería and Andina, "legal tender" has been considered to mean American dollars.¹⁸²

In compliance with the constitutional mandate, on October 11, 1971, the Comptroller General announced the Chilean government's decisions and calculations regarding compensation due to each of the five nationalized concerns.¹⁸³ The indemnities in each case were calculated separately. In conformity with the new legislation, the mixed companies were completely dissolved and all of the companies' assets were immediately transferred to the State. However, it is important to note that, in effect, only the 49 per cent privately held interest in

177. Comptroller General's Resolution, *supra* note 7.

178. CONSTITUCIÓN POLÍTICA art. (transitory) 17, § a, para. 1 (1971).

179. *Id.* § b, para. 1.

180. *Id.* § d, para. 1.

181. *Id.*

182. See Comptroller General's Resolution, *supra* note 7.

183. *Id.*

the El Teniente, Chuquicamata, and El Salvador mines was actually nationalized. The other 51 per cent had already been effectively acquired by the State under the Frei government's Chileanization program.¹⁸⁴ Likewise, only 75 per cent of Exótica and 70 per cent of Andina were owned privately by the North American businesses at the time of the nationalization.¹⁸⁵ These prior transactions were not nullified by the amendment, although the government ultimately rejected the previously agreed upon evaluations of the assets concerned.¹⁸⁶

The total book value of each of the mines was first computed from the balance sheets of each of the mixed companies. The paid-in capital and reserves were added plus or minus the profit or loss for the fiscal year; from this amount anticipated and paid dividends were deducted.¹⁸⁷ The Comptroller General's office next proceeded to investigate and evaluate the various deductions to be subtracted from the base book values of the enterprises. To accomplish this task, a Department of Studies was created to coordinate the legal and technical proceedings.¹⁸⁸ The initial deductions, announced on October 11, 1971, corresponded to four principal categories of deductions as had been outlined in the nationalization legislation.

The first deduction was for revaluations after December 31, 1964. This deduction was aimed specifically at Kennecott's holdings in Compañía Minera El Teniente, because none of the other four mining enterprises had revaluated their assets since 1964. Kennecott's alleged revaluation came about as a result of the 1967 transfer of the assets and liabilities held by Kennecott in its El Teniente mine to the new mixed company, Compañía Minera El Teniente. In this process, the book value of the mining enterprise had been reassessed in 1965 by several independent appraisers to establish the real book value of the company at the time of transfer.¹⁸⁹ This upward revaluation increased El Teniente's book value by over \$219 million. The newly computed figure was subsequently approved by the necessary Chilean govern-

184. See text accompanying notes 20-40 *supra*.

185. See text accompanying notes 31-33 *supra*.

186. Interview with Claudio Bonnefoy, Legal Advisor, Chilean Embassy, in Washington, D.C., Sept. 9, 1971 [hereinafter cited as 1971 Bonnefoy Interview].

187. The following book values as of December 31, 1970, were calculated for each of the companies:

1) Cia. Minera Chuquicamata S.A.....	\$241,958,862.43
2) Cia. Minera El Salvador S.A.....	\$ 68,372,196.57
3) Cia. Minera Exótica S.A.....	\$ 14,815,052.52
4) Cia. Minera El Teniente S.A.....	\$318,301,198.77
5) Cia. Minera Andina S.A.....	\$ 20,145,469.44

Comptroller General's Resolution, *supra* note 7, at 1251-53.

188. *Id.* at 1243.

189. In 1967, both the Chilean government and Kennecott, through the Braden Copper Company, agreed that the revaluation of El Teniente was necessary if Compañía Minera El Teniente was to secure financing for the company's new expansion program. See Kennecott Copper Corporation, *supra* note 28, at 6-7.

ment agencies in 1968 and 1969. However, in 1970 CODELCO refused to approve the 1965 revaluated book value, and a final decision on the matter was postponed until the nationalization of El Teniente in 1971. At that time, the \$219 million upward revaluation which appeared in Kennecott's books was subtracted from the base book value of the company.¹⁹⁰

In the second category were deductions for mineral deposits. The Chilean government assured the American copper companies that they would refuse to compensate for the actual mineral deposits themselves, which have always been considered part of Chile's national patrimony. Therefore, if the value of the ore bodies had been included in the companies' balance sheets, these amounts were deducted from the base book values calculated by the Comptroller General's Office. However, deductions for the values of mineral deposits were relatively insignificant.¹⁹¹

The third category encompassed the objections accepted on assets entitled to compensation. In an effort to facilitate the appraisal of the assets of the five companies, the Department of Studies engaged several technical commissions to report on the condition of the companies' assets in the field. The commissions were at work at the mines by mid-July 1971, at which time official communications also went out to CODELCO and ENAMI, the Chilean governmental agency regulating small mines, to obtain data on the tangible and intangible assets necessary for the efficient operation of the mines.¹⁹² On August 2, and August 16, two preliminary lists of assets found in defective condition were submitted to the Department of Studies; the final investigations were not requested until September 20, 1971.¹⁹³

To lend international credibility to these investigations, the Department of Studies also called to Chile teams of Soviet and French mining experts to take part in the evaluations of the private companies' assets.¹⁹⁴ In September 1971, the reports of these experts were sub-

190. The Comptroller General granted Kennecott a \$15 million discount for such items as depreciated assets. However, the State Defense Council asserted that the Comptroller General had had no authority to grant a discount of any sort, that the letter of the constitutional amendment required the full deduction of revaluations made after 1964, and that there had been no provision in the legislation for such discounts. The Defense Council, therefore, petitioned that the final deduction be made in the full amount of the original revaluation. See CODELCO Press Conference, *supra* note 169; Comptroller General's Resolution, *supra* note 7, at 1254.

191. The estimated values of the ore bodies as shown in the balance sheets of the companies were as follows:

1) Cia. Minera Chuquicamata S.A.....	\$5,398,937.59
2) Cia. Minera El Salvador S.A.....	\$ 353,692.06
3) Cia. Minera Exótica S.A.....	\$ 250,000.00
4) Cia. Minera El Teniente S.A.....	\$ 223,519.00
5) Cia. Minera Andina S.A.....	\$1,532,176.09

Comptroller General's Resolution, *supra* note 7, at 1251-53.

192. *Id.* at 1243-45.

193. *Id.*

194. Expropriation, *supra* note 1, at 33.

mitted to the Comptroller General's office, although their contents were not immediately made public. Within a few days, however, the reports were leaked from the government's classified files and into the hands of the press. *El Mercurio*, the leading opposition newspaper, quickly published the French report which turned out to be only mildly critical of the mines under American control.¹⁹⁵ The foremost leftist newspaper, *El Siglo*, returned the fire immediately by printing the Soviet study, a much harsher evaluation of the mining concerns.¹⁹⁶ In the mud slinging that ensued, the left claimed that the French experts spent only a short time in Chile and could not have properly assessed the mines. The opposition retorted that the Soviet engineers spent the better part of their stay learning the language and filching technological developments for their use at home.¹⁹⁷

The findings of the technical commissions were released in the Comptroller General's statement of October 11. Deductions for assets received in objectionable condition, calculated according to their values in the companies' inventories, less depreciation, were not insubstantial.¹⁹⁸

The fourth and final category included deductions for equity interests previously purchased by the State. These deductions levied against the nationalized mining companies concerned payment for the stock purchased by the Frei government several years earlier.¹⁹⁹ Thus far, this deduction has only been formally applied in the specific case of the installments paid by the Anaconda Company to the Chilean government, which is still being disputed in the United States courts.²⁰⁰

This particular deduction has, in several instances, led to problems for the Chileans. In the case of the Kennecott Corporation, the entire 51 per cent equity interest which had been purchased by the State in 1967 had been repaid within three years. This share of the El Teniente mine, which amounted to \$80 million, was immediately reloaned to Chile to help finance El Teniente's expansion programs. With interest, the loan came to \$93 million and was to be repaid over a fifteen year period beginning December 31, 1971.²⁰¹ However, on that day, the Chilean government chose to default on the first installment, delaying further

195. Wash. Post, Oct. 24, 1971, at A34, col. 1.

196. Expropriation, *supra* note 1, at 39.

197. Wash. Post, Oct. 24, 1971, at A34, col. 1.

198.	1) Cia. Minera Chuquicamata S.A.....	\$13,060,861.91
	2) Cia. Minera El Salvador S.A.....	\$ 5,596,139.09
	3) Cia. Minera Exótica S.A.	\$ 4,554,607.41
	4) Cia. Minera El Teniente S.A.....	\$20,520,167.06
	5) Cia. Minera Andina S.A.....	\$ 343,592.00

Comptroller General's Resolution, *supra* note 7, at 1251-53.

199. See text accompanying notes 20-37 *supra*.

200. See text accompanying notes 210 & 211 *infra*.

201. See text accompanying notes 26-28 *supra*.

action until such time as the final compensation for the El Teniente mine could be determined and the status of the \$80 million loan decided in light of the indemnification award due the company. Kennecott, on the other hand, maintained that this expansion loan should have nothing to do with the compensation settlement; it existed only as a development loan, apart from the earlier 1967 compensation agreement. The corporation, therefore, reacted to Chile's equivocation on this debt by launching two suits in the United States District Court for the Southern District of New York. The first of these²⁰² was filed against the Republic of Chile on February 2, 1972. The next day Kennecott filed a second suit²⁰³ against an Administrative Commission established by President Allende to assume the management duties of the State.²⁰⁴

On February 4, 1972, on motion, the district court ordered all assets of the Administrative Commission within its jurisdiction to be attached.²⁰⁵ Likewise, on February 18, 1972, the assets of the Republic of Chile within the jurisdiction were ordered attached.²⁰⁶ The Chilean government acquiesced under such economic pressure and agreed to resume payments on the loan.²⁰⁷ The two suits were settled and dismissed on March 31, 1972.²⁰⁸ To date, the first two installments, totaling approximately \$11.5 million, have been paid, the first on March 31, 1972 and the second on July 3, 1972.²⁰⁹

In the case of Anaconda, no payments were to begin on the 51 per cent equity capital purchased in the Chuquicamata and El Salvador mines until June 30, 1970. The first three installments, totaling approximately \$35 million, had been paid to Anaconda by the time the constitutional amendment was put into effect. Following the nationalization of the mines, these were considered deductible from any payable compensation. Furthermore, the Chilean government agreed to the schedule of payments due Anaconda, but only in amounts totaling the final compensation award to be received by that company. Thus, if no compensation was due, no payments would be due. In other words, the nationalization legislation was actually interpreted

202. *Braden Copper Co. v. Republic of Chile*, Civil No. 72-509 (S.D.N.Y., filed Feb. 2, 1972).

203. *Braden Copper Co. v. Administrative Commission*, Civil No. 72-508 (S.D.N.Y., filed Feb. 3, 1972).

204. Presidential Decree No. 73, July 17, 1971.

205. Civil No. 72-508 (S.D.N.Y., filed Feb. 4, 1972).

206. Civil No. 72-509 (S.D.N.Y., filed Feb. 18, 1972).

207. Interview with Claudio Bonnefoy, Legal Advisor, Chilean Embassy, in Washington, D.C., Feb. 28, 1972.

208. Civil Nos. 72-508, 72-509 (S.D.N.Y., filed Mar. 31, 1972).

209. *Kennecott Copper Corporation, Confiscation of El Teniente: Kennecott Pursues Its Remedies Outside of Chile* (Supp. 3, Dec. 1972) [hereinafter cited as Pursuit].

to encompass the 49 per cent privately held interest, in addition to all notes due on the previously purchased 51 per cent interest in the Chuquicamata and El Salvador mines.²¹⁰

As a direct consequence of this action, Anaconda also filed suit against Chile in New York, and the assets of the Corporación del Cobre and the Corporación del Fomento were once again attached by the federal courts.²¹¹ The repercussions of this retaliatory action are still uncertain as of the time of this writing.

The above-mentioned deductions were applied by the Comptroller General in an effort to calculate the real book values of the companies involved. Although these measures hardly conformed to the companies' estimations of their own "going concern" values, the use of real book value in determining compensation awards was fully sanctioned by the Chilean constitutional amendment. Thus, the provisions for compensation are part of the supreme law of the land. To question the legitimate usage of real book value is to challenge the Constitution itself. Chile's interpretation of just or appropriate compensation, therefore, enjoys a certain element of legal immunity by virtue of its constitutional nature.²¹²

b. Fiscal and Social Misfeasance

As an extension of Chile's defense of its privileges as a sovereign nation, the State has summarily asserted its right to adjust the compensation awards to take into account those policies and practices of the nationalized companies which infringed upon the welfare of the Chilean community.²¹³ Although the practices in question may well have been within the law at the time of their execution, their results were such as to inflict damage upon the Chilean society. The principle that otherwise lawful acts are subject to legal sanctions if the effects of such acts violate the rights of others is an intrinsic element in the legal systems of most states.²¹⁴ In Western law, this notion is generally referred to as

210. 1971 Bonnefoy Interview, *supra* note 186.

211. *Anaconda Copper Co. v. Corporación del Cobre*, Civil No. 72-878 (S.D.N.Y., Feb. 28, 1972).

212. In fact, the copper companies' adjudicative appeals did not attempt to question the usage of "book value" as opposed to "going concern" value. Rather, the companies' briefs questioned the method by which book value was estimated. *See, e.g.*, Confiscation, *supra* note 3, at 9.

213. *See, e.g.*, President Allende, *supra* note 13; Decree Concerning Excess Profits of Copper Companies, Sept. 28, 1971, in 10 INT'L LEGAL MATERIALS 1235 (1971) [hereinafter cited as Excess Profits Decree].

214. Domestic law in the United States contains this legal notion in its general concept of misfeasance. Chilean law similarly contains this general principle of law, normally referred to as "abuse of the law" (*principio de abuso del derecho*). *See generally* CÓDIGOS DE LA REPÚBLICA DE CHILE arts. 945-2110 (1954).

fiscal and social malfeasance. I have chosen this concept to encompass the aggregate of those abuses allegedly perpetrated on the Chilean nation by the private companies concerned.

Chile's nationalization amendment clearly provides the State with the legislative tools with which it can secure redress for damages suffered at the hands of the foreign mining enterprises. This has been the most controversial aspect of the Chilean nationalization scheme, especially because of the retroactive nature of these punitive deductions. Included in this category were two principal deductions: (1) excess profits earned by the nationalized companies since 1955; and (2) loans which the Government determined had not been "invested usefully."²¹⁵ Both of these items were to be assessed by the President of the Republic in accordance with his constitutional mandate.²¹⁶

Certainly the largest overall deductions from the base book values of the nationalized companies were those amounts representing alleged excess profits. The primary aim of this deduction was to obtain reimbursement from the mining companies for the injustices they purportedly perpetrated on Chile during more than a half-century of mining operations. President Allende reiterated this allegation in his decision to deduct excess profits from the companies' compensation awards. The Executive Decree Concerning Excess Profits of Copper Companies of September 28, 1971 read in part:

[T]he Constitution establishes a procedure for fixing compensation in favor of said enterprises. Rectifying an historic past that permitted the exploitation of basic natural resources of major copper mines by private investors, without adequate legislation to preserve to the State its right to receive the benefits of said exploitation, the Constitution has provided that deduction may be made of the excess profits obtained by foreign enterprises as a means of restoring to the country the legitimate participation it should have obtained from said natural resources. This declaration responds to the will to acknowledge that the national patrimony represented by its basic natural resources should be at the service of national interests, over and above any private interests, national and foreign.²¹⁷

Calculations of excess profits were to be computed retroactively, beginning as of May 5, 1955, the date of passage of Chile's "New Deal on Copper."²¹⁸ This legislation initially established Chile's Department of Copper (now the state copper corporation, CODELCO). In

215. CONSTITUCIÓN POLÍTICA art. (transitory) 17, § b, para. 1 & § h, para. 5 (1971).

216. *Id.*

217. Excess Profits Decree, *supra* note 213, at 1238.

218. Law No. 11,828, May 5, 1955.

addition, the 1955 law instituted a new tax system to be used to assess the earnings of the copper firms operating in Chile. The new Department of Copper was assigned the task of keeping current records on the nation's copper industries. The Allende administration claimed that the copper companies' books prior to 1955 falsified the real profits gleaned from Chile's mines and that the prior tax system was so riddled with loopholes that taxes paid were of no aid in deciphering profits reaped by the mining companies.²¹⁰ As a consequence, profits before May 1955 could not be accounted for or deducted in the nationalization legislation.²²⁰

The action to compute and deduct excess profits was set in motion on August 30, 1971, when the Comptroller General, in compliance with the regulations established by the constitutional amendment, requested that the President determine whether excessive profits had been earned, and whether these profits should be deducted from the compensation awards.²²¹ A period of thirty days was constitutionally granted in which the President was to make his computations.²²² The nationalization legislation outlined two methods by which the excess profits might be determined. First, "the normal profits they [the companies] have obtained in their international operations"²²³ might be considered. The average rates of profit earned by each of the companies in their mining ventures in the rest of the world, excluding Chile, would be compared to their rates of profit in Chile. The average international profit rates thus arrived at were to be used as a basis for estimating an acceptable average rate of profit. A higher rate of profit earned in Chile would thus indicate that excessive profits had been earned relative to similar operations in the rest of the world.

As a second alternative, the amendment provided that "agreements which the Chilean State may have concluded on the subject of maximum profitability of foreign companies established in the country"²²⁴ might also be used as guidelines in determining an equitable rate of profit for mining operations in Chile. An average rate of profit higher than agreed-upon standards might be considered excessive. This provision was an obvious reference to the controversial regulations on foreign capital and technology promulgated pursuant to the Cartagena Agreement of May 26, 1969.²²⁵ Under these regulations the Andean nations

219. President Allende, *supra* note 13.

220. CODELCO Press Conference, *supra* note 169.

221. See Comptroller General's Resolution, *supra* note 7, at 1245.

222. CONSTITUCIÓN POLÍTICA art. (transitory) 17, § b, para. 2 (1971).

223. *Id.*

224. *Id.*

225. The Cartagena Agreement, creating the so-called Andean Common Market, was signed by Bolivia, Chile, Colombia, Ecuador, and Peru at Bogotá, May 26, 1969,

of Chile, Peru, Colombia, Ecuador, and Bolivia, agreed to limit the annual remittances of profits earned by foreign investors in their countries to 14 per cent of invested capital. Profits above and beyond this remittance ceiling were required to be reinvested locally.²²⁶ This pact is the only external profit remittance limitation existing in Chile.

The Allende administration opted to employ the first of these possible techniques to estimate excessive profits.²²⁷ Data concerning each of the companies' international operations was gathered from the enterprises' own accounts, and their average rates of profit in the rest of the world were subsequently estimated. The Cerro Company's Río Blanco (Andina) mine and Anaconda's Exótica mine were not figured in these investigations because they had been operating less than a year on December 31, 1970, and, therefore, as yet had shown no annual profits. It was discovered in these investigations that the Anaconda Corporation earned an average 3.67 per cent on its investments in the aggregate of its international businesses apart from Chile. In Chile, however, Anaconda's average rate of profit on the book value of its assets between 1955 and 1970 was calculated to be approximately 16.68 per cent: 21.51 per cent at Chuquicamata and 11.84 per cent at El Salvador. Thus, the net difference between Anaconda's rate of profit on its operations in Chile as compared to its operations in the rest of the world was over 13 per cent.²²⁸ In other words, every dollar Anaconda invested in Chile returned four times as much profit as its average dollar invested elsewhere.

Similarly, Kennecott's multiple investments in the rest of the world were found to produce a much lower rate of profit than the mining company was earning in Chile. In its international activities, Chilean officials discovered that Kennecott averaged profits of about 9.95 per cent on its investments. Meanwhile, El Teniente yielded an annual rate of profit of 52.87 per cent between 1955 and 1970, a net difference of almost 43 per cent between the rate of profit in Chile and in the rest of Kennecott's international operations.²²⁹ These results, the government claimed, offered an irrefutable picture of economic imperialism perpetuated by wealthy elites against the less developed

and went into effect in October 1969. For an English translation, see 8 INT'L LEGAL MATERIALS 910 (1969).

In November-December 1970, the governing commission established by the Agreement met and promulgated a series of rules and regulations dealing with three main areas: tariffs, foreign investments, and imports of foreign technology. See Rundt's Weekly Intelligence, Feb. 2, 1971, at 3.

226. Rundt's Weekly Intelligence, Feb. 2, 1971, at 5.

227. See Comptroller General's Resolution, *supra* note 7.

228. CODELCO, Resumen Informativo Especial Sobre la Nacionalización del Cobre, Circular No. 187, Oct. 18, 1971, at 5.

229. *Id.*

nations.²³⁰ In his executive message of September 28, 1971, which announced the Government's decision to deduct excessive profits, Allende stormed:

[T]he backwardness and poverty which afflict numerous communities of the land are not phenomena that can be analyzed out of context with international economic relations existing between poor and wealthy countries. Foreign investment — so it is said — is one of the mechanisms that can contribute to raising the standard of living and increasing the rate of development in the underdeveloped countries. As a matter of fact, however, this mechanism has been converted into just one more element which, in conjunction with the financial dependency and unequal interchange, has served to mold the subordination of backward nations to the economically powerful countries.²³¹

The second legislated deduction intended to redress alleged injustices perpetrated by the North American mining companies involved certain loans which were determined not to have been "invested usefully."²³² Kennecott has thus far been the only one of the three companies to have been penalized on this account, and even this proceeding came about indirectly. As discussed above, in March 1972, the Chilean government agreed to resume repayments on the \$80 million expansion loan granted to Chile under the Frei administration.²³³ It was at this point that the Chief Executive determined that a portion of the \$80 million relaned to *Compania Minera El Teniente* had not been "invested usefully" and, therefore, would be deducted from the \$93 million due on the loan. As it stands at this time, this

230. The following excess profits were deducted from the base book values of the three affected companies of the *Gran Minería*:

1) Cia. Minera Chuquicamata S.A.....	\$300,000,000.00
2) Cia. Minera El Salvador S.A.....	\$ 64,000,000.00
3) Cia. Minera El Teniente S.A.....	\$410,000,000.00

Comptroller General's Resolution, *supra* note 7, at 1251-53. The companies disputed these figures, asserting that the Government was in error in computing the excessive profits deductions. Kennecott, for instance, argued that its "net total, final income" from the period between 1955 and 1970 was only \$253.3 million, after taxes, dividends, and earnings had been paid to the State. Kennecott maintained that the Chilean government, on the other hand, had retained \$1057.8 million of *El Teniente's* total profits during this period. According to Kennecott's calculations, even if withholding taxes and the State's portion of *El Teniente's* earnings were added to the \$253.3 million, the total would still be less than the \$410 million figure which Chile had ruled constituted excessive profits. Thus, the deduction for excess profits alone was greater than Braden's total earnings during the period under consideration, according to Kennecott. See *Confiscation*, *supra* note 3, at 45-46.

At this point it must be noted that these differences in accounting are largely academic. Undoubtedly, Chile's methods of accounting served its own interests, as the companies' served theirs. The larger and more important question concerns the legal right of a sovereign nation to make such punitive deductions from indemnification awards in cases of nationalization of foreign-owned property.

231. Excess Profits Decree, *supra* note 213, at 1239.

232. CONSTITUCIÓN POLÍTICA art. (transitory) 17, § h, para. 5 (1971).

233. See text accompanying note 207 *supra*.

specified deduction, amounting to approximately \$8.6 million, will be deducted from the final installment payment due on the loan in 1986. Thus, no real conflict is foreseen on this matter until this installment becomes due.²³⁴

The concept of deducting damages for fiscal and social misfeasance from compensation awards is not unknown in the history of interstate practice. Indemnification provisions in a number of instances have reflected reductions in the valuation of assets taken in order to compensate a nationalizing state for costs imposed by the affected enterprises.²³⁵ Such punitive deductions have previously been justified for the recovery of items unpaid at the time of nationalization, such as taxes, royalties, and dividends. Similarly, deductions have been exacted for harmful production methods and economic policies that had been employed in order to maximize the owners' profits. Even excessive profits have been deducted from possible compensation to redress partially financial injury sustained during the operations of nationalized enterprises.

The attempted nationalization of the assets of the British-owned Anglo Iranian Oil Company (AIOC) in May 1955 is one of the earliest cases in point.²³⁶ The AIOC had been extracting petroleum products from the sub-soil of Iran in accordance with a concession granted in 1933. Since that time, it had netted an average of \$500 million annually in profits; of this amount, the government of Iran had received a total of only \$45 million in taxes, royalties, and its share of the profits. By 1951 this exploitation of Iran's natural resources had become politically intolerable, and the Iranian government moved to nationalize the petroleum industry. On the basis of the Gass-Golshayan Agreement of July 17, 1949,²³⁷ the Iranian government charged that the AIOC owed Iran some £ 49 million in back taxes, dividends withheld, and royalties owed. In addition, Iran demanded payment of damages suffered as a result of AIOC's attempts to halt the sale of Iranian oil around the world.²³⁸

The case was appealed to the International Court of Justice, but to no avail; the court decided that it lacked jurisdiction to hear the case, and therefore could not pass on its merits.²³⁹ Thus, the Iranian claim remained in limbo until the Iranian government collapsed shortly

234. Interview with Claudio Bonnefoy, Legal Advisor, Chilean Embassy, in Washington, D.C., Sept. 22, 1972 [hereinafter cited as 1972 Bonnefoy Interview].

235. See text accompanying notes 236-50 *infra*.

236. See Rafat, *supra* note 61, at 222.

237. For a detailed analysis of the applicability of the Gass-Golshayan Agreement of July 17, 1949, see Rafat, *supra* note 61, at 222-26.

238. *Id.* at 225.

239. *Id.* at 227.

afterward, in August 1953. The new government agreed to form an international consortium of petroleum industries into which the assets of the AIOC would be contributed. Meanwhile, the shareholders in AIOC were compensated in full from consortium funds, relieving Iran from the burden of compensating the affected owners for Iran's reform program.²⁴⁰ However, the important legal question which surrounded the early nationalization legislation, *i.e.*, the right of a government to levy retroactive charges against a foreign-owned enterprise within its territorial domain was left unresolved.

The Peruvian nationalization of the assets of the North American-owned International Petroleum Company (IPC) in 1969 is the most recent case which will be considered here. On October 3, 1968, a military *coup d'état* overthrew the government of President Belaúnde Terry and established a leftist military dictatorship which still presides in Peru today. One of the first acts of the new regime was to nationalize the assets of IPC in Peru in the La Brea and Pariñas oilfields. Within a few months, IPC was informed that they would be charged \$690.5 million for Peruvian petroleum deposits extracted and marketed abroad since the commencement of operations in 1924. In addition, another \$54.8 million was added to this debt for damages resulting from harmful production methods employed during periods of poor relations with the Government. In all, the new Peruvian administration made claims of approximately \$754.5 million against the private company. The Government subsequently proceeded to evaluate the IPC assets in Peru at \$71 million, and a check for this amount was immediately drawn in the name of IPC. This money was transferred to the Peruvian Central Bank where it was thereupon embargoed until such time as the company's debts to Peru had been met.²⁴¹

IPC, of course, appealed the case to the Peruvian courts, maintaining that the seizure of its assets without compensation constituted unconstitutional confiscation of private property.²⁴² Both the Superior Court of Lima²⁴³ and the Peruvian Supreme Court²⁴⁴ found the case inadmissible, however, and ruled that new executive decrees overrode previous statutory law as a matter of course. The courts' arguments were couched in language respecting the "nationalistic needs" of the

240. *Id.* at 230.

241. See Furnish, *Peruvian Domestic Law Aspects of the La Brea y Pariñas Controversy*, 59 Ky. L.J. 351 (1970).

242. Expediente No. 969/68, Oct. 14, 1968, submitted before the Superior Court of Lima, Fifth Correctional Tribunal. The English translation is given in *Esso INTER-AMERICA, 2 THE BREA Y PARIÑAS CONTROVERSY* Doc. No. 67 (1969).

243. Expediente No. 969/68, R.S., Nov. 9, 1968 (Trib. Corr.).

244. Expediente No. 939/68, R.S., Jan. 3, 1969 (Corte Suprema).

“de facto” government and the best interests of the nation, akin to the “political question” rhetoric of our own courts. As for the unconstitutionality of the act, the courts determined that compensation had unquestionably been provided as required by international and domestic law. The issue of the IPC debt to Peru which nullified that compensation was ruled to have been within the legal and sovereign rights of the Peruvian state to obtain redress for damages that country had suffered as a result of IPC’s intolerable monopoly over Peru’s petroleum resources.²⁴⁵ Under Peru’s legal concept of “reivindicación,” the State was simply recovering ownership of property from a possessor who had no legal right to it.²⁴⁶

The new Government’s position was also outlined in responses to petitions filed by IPC with the Ministry of Development and Public Works and with the Executive.²⁴⁷ In both instances, the Peruvian government rejected the corporation’s pleas on the grounds that Peru had fully met its international and domestic legal obligations. In the executive message, the commanding generals reminded IPC that Spanish law, dating back to 1128, reserved all mineral rights for the Crown.²⁴⁸ Although titles to land were granted in the early 1900’s, it had always been tacitly understood that subsoil rights belonged exclusively to the State. The Peruvian petroleum codes have, since 1873, only recognized concessionary contracts to exploit minerals and subsoil products; there is no legal provision for private ownership of subsoil properties.²⁴⁹ To explain its arguments juridically, the administration cited a 1963 Peruvian Supreme Court ruling upholding the

245. Expediente No. 969/68, R.S., Nov. 9, 1968 (Trib. Corr.).

246. Furnish offered an explanation of the concept:

Good faith of the possessor is no defense to the obligation to make restitution where depletion of the property has occurred. *Reivindicación* involved no question of use by the possessor; it simply forces him to surrender all of the property to the owner, making reparation for whatever part of the original property cannot be returned.

Furnish, *supra* note 241, at 370–71.

247. IPC’s petitions read in part:

[W]e point out that in the period of more than forty years in which we have been in possession of the *La Brea y Pariñas* oilfields, such possession has been public, peaceful, and consented to by several governments . . . and has never been judicially questioned.

IPC Appeal of April 12, 1969, in *ESSO INTER-AMERICA, 3 THE BREA Y PARIÑAS CONTROVERSY*, Doc. No. 93 (1969) [hereinafter cited as *3 CONTROVERSY*].

248. S.R. No. 095-EM, Aug. 6, 1969, in *3 CONTROVERSY*, *supra* note 247, Doc. No. 109.

249. Articles 2 and 3 of the Mining Code of Peru provide:

In accordance with these principles, mining property, regardless of its form or nature, is the property of the state and its exploitation is considered as a matter of public concern (*utilidad pública*). The government grants the right to explore for periods of up to five years, and the right to exploit for an indefinite period.

PAN AMERICAN UNION, *MINING AND PETROLEUM LEGISLATION IN LATIN AMERICA* 281 (2d ed. 1969).

congressional legislation of that year which first invalidated the IPC claim to the La Brea and Pariñas properties.²⁵⁰

The Peruvian government thus steadfastly held that it had not violated international rights as guaranteed by the United Nations. It had enacted domestic legislation to execute by legal means a nationalization program and, as a sovereign state, had demanded restitution for damages suffered as a result of foreign interference in its economic affairs. Furthermore, Peruvian courts were established to hear all disputes which arose from these actions.

Although the United States government was understandably distressed over the actions of the Peruvian government, it is notable that no serious reprisals were taken against the new military regime. Economic aid to Peru has been reduced considerably since 1968, although at a recent meeting of the International Monetary Fund, former Secretary of the Treasury Connally was reported to have offered "warm support" to the Peruvians.²⁵¹ It is generally conceded that the State Department feared the consequences of taking direct action against the Peruvian government, lest such measures would drive the left-of-center regime further into the socialist anti-imperialist camp.

Thus, it is obvious that Chile's deductions of damages from the compensation awards provided for the mining enterprises are not entirely unprecedented in interstate practice. In fact, the concept of retribution for alleged injustices, in and of itself, might be viewed as quite justifiable. However, in the Chilean case, this issue becomes considerably more debatable since, when these deductions for fiscal and social misfeasance are combined with the other deductions discussed, the total of the deductions greatly exceeds the original base book values of several of the mining enterprises.²⁵² In effect, com-

250. On November 6, 1963, the Peruvian legislature passed Laws Nos. 14,695 & 14,696, which invalidated the 1922 international arbitration award which had originally granted the subsoil rights of the La Brea and Pariñas fields to IPC. The Supreme Court later used these laws as grounds for rejecting IPC's appeal. *See* Expediente No. 939/68, R.S., Jan. 3, 1969 (Corte Suprema).

251. *Wash. Post*, Oct. 14, 1971, at A12, col. 1.

252. The State Defense Council announced shortly after the Comptroller General's initial compensation decree that the Department of Studies had not completed its constitutional mandate; several possible deductions had not been investigated which should have been. In particular, the Council charged that in some cases the major copper producers had been "high-grading" in the mines, a production technique whereby a disproportionate amount of good ore is removed from the mines while allowing waste to accumulate so as to maximize short-run gains. The Council estimated that it would cost CODELCO as much as \$30 million to bring the ore and waste extraction levels back into balance.

In addition, the President of the Council charged that the North American companies had been shipping anode bars laden with gold, silver, and selenium from Chile. These precious metals were never accounted for since they were mixed in the copper and extracted in plants in the United States. Exact figures on the extent of this sort of activity were unavailable, although the Council promised the matter was being investigated. If findings disclosed that large amounts of metal had been shipped

compensation to three of the five nationalized mines was wholly eliminated by the State's deductions. Of the three North American firms affected by the reforms, only the Cerro Company was not charged with owing the Chilean state millions of dollars. The book value of Cerro's Río Blanco (Andina) mine was listed at \$20,145,469.44. This valuation was reduced by only \$1,875,768.09 following deductions for the mineral deposits themselves and the minor deductions for assets received in defective condition.²⁵³

In the case of the Anaconda Company, total deductions from its Chuquicamata and El Salvador properties exceeded the combined book value of these mines by \$78,078,570.65.²⁵⁴ However, Anaconda's third holding in Chile, the Exótica mine, was to receive \$10,010,445.11 in compensation after minor deductions for mineral deposits and assets received in defective condition had been subtracted from its estimated base book value of \$14,815,052.52.²⁵⁵

The Kennecott Corporation's El Teniente mine accrued by far the largest net deficit of any of the three mining enterprises, primarily due to the enormous reduction in compensation for excessive profits. Deductions totaling \$629,227,615.98 were subtracted from a book value of \$318,801,198.77, leaving Kennecott with a negative balance of \$310,426,417.21.²⁵⁶

It seems fairly certain at this point that Anaconda and Kennecott will not be held responsible for their net deficits as calculated in the compensation proceedings. In a news conference following the Government's announcement of the compensation awards, the Chilean Comptroller General indicated that the constitutional amendment did not expressly provide for the collection of net deficits resulting from indemnification settlements, and that such action was not contemplated.²⁵⁷

C. Adjudication of Conflicts of Interest

1. Local Remedies

General Assembly Resolution 1803 is quite firm in pronouncing that the first resort for settlement of disputes arising from instances of nationalization, expropriation, or requisitioning of private property

from Chile without being taxed, these amounts were also to be deductible from the companies' base book values. CODELCO Press Conference, *supra* note 169.

253. Comptroller General's Resolution, *supra* note 7, at 1253.

254. *Id.* at 1251-52.

255. *Id.* at 1252.

256. *Id.* at 1252-53.

257. Interview with Claudio Bonnefoy, Legal Advisor, Chilean Embassy, in Washington, D.C., Oct. 14, 1971. In a subsequent news conference that day, the President of the State Defense Council stated that the Comptroller General's statement regarding Chile's recovery of any net deficits was unsupported by the legislation. According to the Defense Council, this matter would be left to the Special Tribunal to decide. CODELCO Press Conference, *supra* note 169.

must be to the domestic courts of the nationalizing state, unless there is an agreement to the contrary. Point 4 states:

In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted.²⁵⁸

In order to fulfill this requisite, the Chilean constitutional amendment assured that both the Government and the private nationalized companies were permitted to appeal the administration's proposed compensation settlements in Chilean courts.²⁵⁹ For this purpose, a Special Tribunal was established by the legislation to hear cases exclusively pertaining to the nationalization of the five large mines.²⁶⁰ According to the administration's own interpretation of the amendment, the Special Tribunal may not adjudicate other nationalization proceedings apart from the nationalization of the Gran Minería and Andina.²⁶¹

The Tribunal itself is a judicial body composed of five members: the Director of the Internal Revenue Service, the President of the Central Bank, one judge from the Court of Appeals of Santiago, one Supreme Court Justice, and one representative of the Constitutional Tribunal. The Director of the Internal Revenue Service and the President of the Central Bank are appointed to their positions by the President; consequently, they are considered sympathetic to the views of the administration. The Supreme Court Justice and the representative from the Court of Appeals were both selected from their respective bodies to serve on the Special Tribunal. Both of these courts have traditionally maintained a conservative posture in Chile. Finally, the members of the Constitutional Tribunal, who are appointed by the President with the approval of Congress, elected one of their number to serve on the Special Tribunal.²⁶²

The Chilean government maintains that the Special Tribunal provides adequate judicial appeals for both the Government and the nationalized companies. In any case, it can be argued that foreign investors indirectly consent to abide by all existing laws and judicial proceedings in a host nation by virtue of their willingness to invest in that nation in the first place. Likewise, the Chilean Civil Code provides that "all assets located in Chile are subject to Chilean laws even when the owners of said assets are foreigners and reside abroad."²⁶³

The nationalized enterprises, on the other hand, have maintained that the adjudicative procedures as provided in the Special Tribunal

258. See G.A. Res. 1803, 17 U.N. GAOR Supp. 17, at 42, U.N. Doc. A/5217 (1962).

259. CONSTITUCIÓN POLÍTICA art. (transitory) 17, § c, para. 1 (1971).

260. *Id.*

261. 1972 Bonnefoy Interview, *supra* note 234.

262. CONSTITUCIÓN POLÍTICA art. (transitory) 17, § c, para. 1 (1971).

263. CÓDIGOS DE LA REPÚBLICA DE CHILE art. 16 (1954).

skirt the system of higher courts which were extant in Chile at the time the companies contracted their investments. Consequently, the affected enterprises openly accused the Chilean government of purposefully preventing "recourse to the established judicial system so that any equitable compensation would be impossible."²⁶⁴ Nonetheless, the equity of the appeals procedure as provided by the constitutional amendment was not argued by either side before the Special Tribunal.²⁶⁵

By December 1971, all three North American companies had filed petitions with the Special Tribunal to seek more favorable terms of indemnification.²⁶⁶ The Cerro Company had actually filed for an early decision due to the relative simplicity of its case.²⁶⁷ These legal briefs did not question the use of "book value," however, nor did they challenge the right of Chile to make deductions from these base figures. Rather the thrust of the companies' arguments was to reject individually the specific deductions applied by the Government.

The first petitions filed by the companies before the Special Tribunal, however, did not go to the merits, but were concerned with the competence of the Tribunal to review the deductions made for "excess profits."²⁶⁸ Although these deductions were protested in principle, there remained some question as to whether the excess profits ruling was subject to review by the Tribunal. Kennecott's first specific petition in its appeal, for instance, stated:

If the Tribunal decides that it lacks the authority to hear and express itself with regard to this concrete point of our appeal, a study of the other materials and the controversy before the Tribunal would have no objective whatsoever. Not only the law, but also prudence and fairness counsel that we should avoid a useless trial at such an elevated cost to us.

. . . .

Therefore, we request that the Tribunal, in resolving the admissibility of the appeal presented, specifically pronounce itself regarding the admissibility in the part where protest is made against the deduction for excessive earnings, based on the competence conferred by transitory Article 17 of the Political Constitution.²⁶⁹

264. Kennecott Copper Corporation, *supra* note 28, at *i*.

265. In most instances, international law suggests that local remedies be exhausted in interstate conflicts before further action can be taken.

266. Petition of Braden Copper Company, Roll No. 2, Oct. 27, 1971; Petition of Cerro de Pasco, Roll Nos. 6 & 11, Oct. 28, 1971; Petition of Chilex Mining Company, Roll No. 4, Dec. 3, 1971; Petition of Andes Mining Company, Roll No. 5, Dec. 3, 1971.

267. Petition of Cerro de Pasco, Roll Nos. 6 & 11, Oct. 28, 1971.

268. *See, e.g.*, Confiscation, *supra* note 3, at 55.

269. *Id.* at 55-56.

For its part, the State Defense Council filed its brief with the Tribunal, which in several instances demanded even more extensive deductions from the already computed book values of the mixed companies.²⁷⁰ Subsequently, the Council filed a second series of briefs claiming that the Special Tribunal had no judicial authority to review the executive decree concerning excess profits.²⁷¹ In this appeal, the Council argued that the decree on excess profits was singularly different from the other deductions outlined in the constitutional amendment, for it was the only such deduction requiring specific action to be taken by the Chief Executive. Citing the Chilean legal concept of "executive privilege" (*facultad exclusiva*), which retains for the Chief Executive exclusive jurisdiction over certain matters, the Council claimed that:

[I]n no case can the decision of the President of the Republic be submitted to revision. It reiterates in this respect what was manifested earlier with regard to the fact that the decision is of *non-jurisdictional content*, and, by its very nature, incompatible with a possible decision of any tribunal.²⁷²

Following three months of discussions and hearings, the Special Tribunal, in March 1972, reached a decision regarding its authority to review the executive decree on excess profits. Its ruling in favor of the State Defense Council declared that the presidential decree was of a "non-jurisdictional" nature in this case and that the Tribunal was, therefore, not empowered to review this aspect of the nationalization appeals.²⁷³ Shortly afterward, Kennecott withdrew its petition from the Tribunal, threatening to take reprisals in other nations of the world.²⁷⁴ Anaconda similarly is expected to drop claims for compensation for its two large mines, El Salvador and Chuquicamata, although its appeal still remains before the Chilean Tribunal at the time of this writing. This is principally because the State has agreed to indemnify Anaconda for its 75 per cent holdings in *Compañía Minera Exótica* in which the various deductions made by the Comptroller General did not exceed the company's book value.²⁷⁵

270. Petition of State Defense Council against Chilex Mining Co., Roll No. 9, Oct. 28, 1971; Petition of State Defense Council against Andes Mining Co., Roll No. 10, Oct. 28, 1971; Petition of State Defense Council against Braden Copper Co., Roll No. 7, Dec. 3, 1971.

271. Petition of State Defense Council against Braden Copper Co., Roll No. 2, Jan. 17, 1972; Petition of State Defense Council against Chilex Mining Co., Roll No. 4, Jan. 17, 1972; Petition of State Defense Council against Andes Mining Co., Roll No. 5, Jan. 17, 1972.

272. Confiscation, *supra* note 3, at 79.

273. Special Tribunal Decision on the Question of Excess Profits of Nationalized Copper Companies, Aug. 11, 1972, in 11 INT'L LEGAL MATERIALS 1013-61 (1972).

274. Pursuit, *supra* note 209, at 49.

275. Cf. Comptroller General's Resolution, *supra* note 7, at 1252.

2. *Recourse to International Remedies*

Given the deeply entrenched positions of both Chile and the United States, it still seems too early to determine the eventual ramifications that the Chilean nationalizations may have on international law and interstate practice in general. The lawfulness of Chile's nationalization reforms can only be measured over a period of time. Certainly, Chile is not likely to alter its own perception of its rights as a sovereign state, nor is it apt to alter its interpretation of existing legal norms. The Chilean government remains confident that its actions lie within the limits of international law and accepted practice, since the nationalization legislation, as designed, provides compensation based upon the real book value of the affected assets. Chilean legislators have remained equally adamant that their efforts to obtain redress of damages are totally justified within existing international norms. If compensation has been eliminated by such measures, they argue, it is not because Chile has willfully violated prescribed international standards.

At the same time, the United States, with the support of other capital-exporting nations, will most assuredly refuse to concede the legality of Chile's nationalization program. In addition to recognizing the companies' more specific obligations to redress damages in Chile, an admission of responsibility on the part of the North American enterprises would abandon a possible deterrent to similar nationalist actions in the future. Instead, the United States has emphatically declared that Chile has overstepped the bounds of traditional international law. Speaking in behalf of the nationalized United States interest, Secretary of State Rogers stated:

The United States government is deeply disappointed and disturbed at this serious departure from accepted standards of international law. Under established principles of international law, the expropriation must be accompanied by reasonable provision for payment of just compensation. The United States has made clear to the Government of Chile its hope that a solution could be found on a reasonable and pragmatic basis consistent with international law.²⁷⁶

However, the United States has not confined its condemnations of Chile's acts to mere diplomatic rhetoric. Largely as a consequence of Chile's treatment of the American-owned mines, financial aid from most private and public sources in the Western world has virtually been halted. Lines of short-term credit have fallen from \$220 million

276. U.S. Dep't of State, Press Release No. 234, Oct. 13, 1971, in 65 DEP'T STATE BULL. 478 (1971).

in August 1970, to \$32 million in June 1972.²⁷⁷ There have been no new loans to Chile from the World Bank during the last 22 months, for instance, although Chile has claimed to have met all the necessary technical requirements for such loans.²⁷⁸ This stifled flow of funds from the World Bank is generally attributed to United States opposition, on the ground that the Chileans are no longer credit-worthy. In reaction to these policies, Chile's governor to the World Bank scored the Bank for acting in a "manifestly precipitate and prejudiced manner . . . not as an independent multinational body at the service of the economic development of all of its members, but in fact as a spokesman or instrument of private interests of one of its member countries."²⁷⁹ Similar criticisms have been leveled against the Inter-American Development Bank. In Chile, President Allende stated recently that such measures taken by the United States "have amounted to a virtual economic blockade" which has been extremely detrimental to the impoverished Chilean economy.²⁸⁰

Current attempts by the Chilean government to renegotiate portions of its vast foreign debt have similarly encountered considerable interference from United States interests. During conferences with its creditor nations in Paris this past year, Chile won agreement in principle for renegotiation of its foreign debt, about half of which is owed to the United States.²⁸¹ However, the agreement stated that details must be ironed out bilaterally between Chile and each of its creditors, and the United States has thus far refused to consider bilateral talks until "just compensation" is awarded to the nationalized mining firms.

The Kennecott Corporation is responsible for the most serious reprisals yet to be taken against the Chilean government. Claiming that the copper produced by El Teniente has been wrongly confiscated, the multinational corporation has attempted to interfere with the international marketing of the Chilean copper. Through court actions, Kennecott is trying to impound or attach all monies paid for Chilean copper in international sales. Recently, French authorities, on its motion attached payments for 1250 tons of Chilean copper being shipped to France.²⁸² The West German cargo vessel carrying this copper diverted its course to the Netherlands, only to be confronted with a Dutch attachment order.²⁸³ Similarly, informed sources in Stockholm warned that a \$1.5

277. Wash. Post, July 26, 1972, at A18, col. 3.

278. Address by Alfonso Inostroza, President of the Central Bank of Chile, to Annual Joint Meeting of the World Bank and International Monetary Fund, in Wash. Post, Sept. 29, 1972, at A1, col. 1.

279. Wash. Post, July 26, 1972, at A18, col. 3.

280. *Id.*

281. See notes 104-08 and accompanying text *supra*.

282. See Pursuit, *supra* note 209, at 59.

283. Wash. Post, Oct. 20, 1972, at A24, col. 5.

million shipment of copper from El Teniente's mines being shipped to Sweden on a Russian ship might be sequestered on arrival in Sweden.²⁸⁴ If these court orders are sustained in France, the Netherlands, Sweden, Germany, and in other nations, Chile may be forced to seek new markets for its principal export product.

Perhaps Chile's economic chaos, as countenanced by the world's capital-exporting nations, will, in itself, determine the lawfulness of its reforms. If Chile is forced to compromise its sovereign interests in the international community, surely other nationalizing states are bound to take heed. By the same token, however, Chile's interpretation of existing international standards may serve as fodder for other Third World reform movements. Recent legislation to nationalize United States petroleum interest in Iraq, for example, bears a close resemblance to Chile's own nationalization amendment.²⁸⁵

IV. CONCLUSION

The legal questions that have arisen as a consequence of Chile's nationalization of the Gran Minería and Compañía Minera Andina basically concern the determination of "just" compensation as defined by existing international standards. There is no argument as to Chile's sovereign right to dispose of its natural resources as it sees fit, nor is there any question of Chile's responsibility to provide affected parties with indemnification to compensate for their losses. However, the affected United States interests and the Chilean government have both reached summarily different conclusions regarding the extent of Chile's obligations to the foreign mining companies. The United States maintains that just compensation must be "prompt, adequate, and effective" in its payment and must reflect the "going concern" value of the enterprise at the time of nationalization. These assertions are reasonably well founded on numerous decisions reached by interstate claims commissions, international tribunals, and various domestic high court rulings. Such precedents constitute an important source in the construction of international norms or standards.

On the other hand, Chile has charged that, in actuality, there exist no compelling or prevailing standards of conduct in international prac-

284. Wash. Post, Oct. 17, 1972, at A11, col. 2.

285. Law No. 69 of 1972 (Iraq), art. 3, in 11 INT'L LEGAL MATERIALS 846-47 (1972), reads:

The State shall pay compensation to the Iraq Petroleum Company Limited for the rights and assets which have reverted to it in accordance with Article One. However there shall be deducted from this compensation the sums required to meet the taxes, fees and wages and any other sums which the government has demanded or may demand, as well as local debts relating to the operations referred to, and the means of determining the compensation and deductions, and other matters required for this purpose, shall be laid down by a regulation.

tice. Chile admits that numerous interstate documents tend to support the contentions of the foreign interests, but points to *de facto* settlements, particularly within the last thirty years, which have demonstrated a great deal of latitude in interpreting state responsibility to alien property owners. Thus, it follows that the obligation to determine "just" compensation must lie, in a sense by default, with the host nation.

Chile consequently proceeded to resolve the extent and conditions of its liabilities by taking into consideration the intended social justice of its reform actions. Realizing that "less than full" compensation settlements have been accepted in numerous previous instances, Chilean legislators designed their compensatory provisions to take into account the way in which the measure of compensation would affect the State. They further maintained that the State, as a sovereign entity, had the right to recover damages for the social and fiscal misfeasance of the foreign enterprises. As restitution for these alleged injustices, the Chilean government deducted such damages from the compensation awards to the nationalized companies.

The norms of international law which exist today have evolved from a composite of international experience in interstate relations. This development is necessarily on-going; the evolution of standards of law is a perpetual process as the interstate structure is constantly changing. It is generally agreed that responsive interpretations of legal conduct must, therefore, continually be formulated to fit the transforming realities. Placing the Chilean case within this broader historical context, it seems plausible to argue that new standards governing the determination of "just" compensation may be in the process of evolution. The long line of precedents discussed above, of which the Chilean case is but the most recent, suggests that domestic considerations can legitimately condition the process of determining the amount of compensation, as well as the method of payment, due affected aliens. Explicitly rejected is the argument presented by the United States that a universal minimum standard of "prompt, adequate, and effective" indemnification representing the "going concern" value of the assets taken must or should be respected in all cases by all nations. Rather, these precedents stress that "just" compensation can only be defined within a wider context — one which takes into account such factors as a state's perception of "social justice" and its ability to pay.

The American interests have argued in the Chilean case that legal precedent confirms the obligation of all states to pay "prompt, adequate, and effective" compensation. However, it appears that most of the

precedents cited in support of this position occurred in the pre-World War II years,²⁸⁶ thus the question arises as to whether or not these precedents can still be considered in conformity with prevailing international norms. To link these precedents to the contemporary situation, the companies have cited a number of examples related to the nationalization of North American holdings in Cuba during the late 1950's and early 1960's.²⁸⁷ While it is true that rulings unilaterally handed down by United States claims commissions dealing with the Cuban cases have tended to confirm the traditional American position, the individuals and companies affected by these nationalizations turned to the United States courts only after failing to reach a satisfactory accommodation with the Cuban government. Objectively speaking, therefore, there seems to be no reason to give greater weight to these unilateral decisions as sources of international law than to the decisions of the Cuban authorities. The Cuban position was relatively consistent with numerous other post-war reform measures which rejected traditional standards as guidelines to the determination of proper indemnification.

This is not meant to imply that new norms regulating compensation have been generally accepted. Indeed, several recent cases, such as the 1967 nationalization program in Tanzania,²⁸⁸ tend to corroborate the United States interpretation of the traditional standards. Notably, the Chilean government limited its position to the argument that no real standards of compensation exist which serve to define "just" compensation. Yet even this attitude has generated considerable heated international controversy. It seems apparent that if there does exist a movement towards a reformulation of the concept of "just" compensation, such a redefinition can occur only through a long and protracted accumulation of experience.

286. See Expropriation, *supra* note 1, at 64-79.

287. See text accompanying notes 137-49 *supra*.

288. See text accompanying note 91 *supra*.