NATIONALIZATION OF U.S. COPPER MINES IN CHILE—COMPENSATION OR CONFISCATION?

On the night of September 28, 1971, Chilean President Salvador Allende Gossens disclosed publicly in a speech at the presidential palace of La Moneda the social, political and mathematical arguments that led Chile to nationalize by constitutional amendment the copper mines that are her main source of wealth.[1] At the end of his speech, President Allende announced that he had determined, pursuant to the power granted him by the Nationalization Law of July 16, 1971,[1a] that nothing would be paid to the nationalized American copper companies for their $400-million share in five nationalized mines. With this announcement, a unique dilemma had presented itself to the future of U.S.-Latin American relations.

Latin American analysts have characterized President Allende's approach to Chile's social and economic problems as a "pioneer experiment in democratic Marxism."[2] "The Chilean way" consists of Allende's program of establishing a peaceful socialist revolution and achieving economic self-determination through ostensibly legal nationalizations of concentrations of wealth, by creating a Marxist-Leninist government which operates under a republican constituion. Such a schism in ideological approach represents an important gamble not only for the proponents of capitalism, but for those of communism as well. This schism has prompted such divergent personalities as Supreme Court Justice William O. Douglas to view Allende's regime as a possible model for *democratic* Latin American revolution,[3] while militant French leftist Regís Debray praises Allende for his *socialist* efforts.[4]

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1. Address by President Salvador Allende Gossens of Chile, in Santiago, Chile, September 28, 1971.

1a. Constitutional Amendment Concerning Natural Resources and Their Nationalization [July 15, 1971], *Diario Oficial de la Republica de Chile*, July 16, 1971; translated text appearing in 10 INT'L LEGAL MATERIALS 1067 (1971).

2. SATURDAY REV., Jan. 22, 1972, at 61.

3. *Id.* at 63.

4. *Id.*

The dilemma thus presents itself: does the Chilean experiment in democratic Marxism justify the nationalization without compensation of American copper interests to finance a plan for economic development and social reform in derrogation of customary international law relating to such nationalizations? The answer, in the opinion of this writer, is a qualified "No".

What at first glance appears to be a logical extension of a planned nationalization of U.S.-owned copper interests which began in 1969 with the Chilean purchase of 51% controlling interests in Anaconda and Kennecott holdings[4a] may well represent a serious departure from the rules of customary international law. Nationalization laws, in general, represent no innovation to the established principles of international law which have long recognized a State's sovereign rights to its natural resources and economic self-determination.[5] However, an equally well-recognized principle of customary international law relates to State responsibility for injury to aliens.[6] In the opinion of this writer, nationalization should represent not only an exercise of sovereign rights over natural resources and economic self-determination; it should also represent a corresponding recognition of responsibility under established principles of international law for the rights of owners of nationalized properties.

It shall be the purpose of this Comment to investigate the Chilean Nationalization Law of July 16, 1971, and the subsequent measures taken by the Chilean government as they pertain to the *Gran Mineria* or the large, formerly U.S.-owned, copper mines and their effect in light of the principles of customary international law relating to nationalization or expropriation. Implicit in an investigation of this type will be an attempt to resolve the apparent paradox represented by the conflicting views of a state's sovereignty over natural resources and economic self-determination versus state responsibility for financial injury to aliens.

I. THE CHILEAN NATIONALIZATION LAW OF JULY 16, 1971 AND SUBSEQUENT DEVELOPMENTS

The Chilean Nationalization Law as promulgated by the government under the Presidency of Salvador Allende Gossens

4a. Wall Street Journal, Sept. 30, 1971, at 8, col. 2.
5. 8 WHITEMAN, DIGEST OF INTERNATIONAL LAW 1026, § 25 (1967).
6. *Id.* at 906.

represents a constitutional amendment to article 10, section 10 of the Political Constitution of the State.[7] This amendment declares in paragraph 17 that "[b]ecause the national interest so requires, and in exercise of the sovereign inalienable right of the State freely to dispose of its natural wealth and resources . . . those companies which constitute the Major Copper Mining Industry . . . are hereby nationalized and therefore declared to be incorporated into the full and exclusive domain of the nation."[8] As previously noted, this represents no innovation to the principles of customary international law. What may represent a serious departure, however, are the provisions relating to calculation of compensation and deductions therefrom: specifically, the presidential determination of "excess profits" to be determined retroactively from the passage of law 11.828 in 1955 to the present. This determination is not obligatory according to the law and is to be determined solely by presidential consideration.[9] President Allende's announcement that $774 million in "excess profits" would be deducted from compensation paid to U.S. copper companies for their interests in the nationalized Chilean mines simply meant that the two companies, Kennecott Copper Corporation and Anaconda Company, would receive nothing for their holdings. According to the U.S. view, this represents a flagrant violation of international legal principles which are said to require "prompt, adequate and effective" compensation for the full value of the nationalized property.[10] The Chilean view requires "just" compensation to be set off by a long history of exorbitant profits[11] extracted by foreign owners "under the guise of amortization, foreign expenses and other categories. . . ."[12]

A. *The Chilean Nationalization Law Versus Established Principles of International Customary Law?*

At the outset, it is important to recognize that we are embarking into an area of international law in which such divergent views are held by representatives of the capital-exporting

7. *Diario Oficial de la Republica de Chile*, No. 27.999, July 16, 1971.
8. 10 INT'L LEGAL MATERIALS 1067 (1971).
9. *Id.* at 1069.
10. *U.S. Statement on Economic Assistance and Investment in Developing Nations* (Jan. 19, 1972), 11 INT'L LEGAL MATERIALS 241 (1972).
11. Address by Chilean Senator Carlos Altamirano, in Santiago, Chile, July 26, 1971.
12. Wall Street Journal, Sept. 30, 1971, at 8, col. 2.

countries of the West, represented by the United States, and the capital-importing countries of the less developed world, that "any immediate hope for wide international agreement or meaningful substantive principles seem remote, if not fanciful."[13] Even though hope for agreement may be lacking, it is essential that we recognize these divergent views with their strengths and weaknesses based upon their acceptance by the various segments of the international community.

1. *State Sovereignty Over Natural Resources.*—The principle of state sovereignty over natural resources and self-determination, as a rationale for the majority of nationalization and expropriation legislation in the developing countries of the world is a well-recognized principle of customary international law.[14] This principle was embodied in a 1952 United Nations General Assembly Resolution which stated that the right of people to freely use and exploit their material wealth and resources is inherent in their sovereignty.[15] The initial resolution met with much criticism by the larger capital exporting countries of the world represented by the United States, the United Kingdom, the Union of South Africa and New Zealand.[16] The main criticism was not directed at what the resolution stated, but rather what it failed to state. This is, the lack of any provision calling on government to act in accordance with international law in the exercise of their sovereignty over natural resources.[17] The capital-exporting countries, led by the United States, contended that this initial resolution was unnecessary and that it could seriously impair the international flow of private capital necessary for the economic growth of the underdeveloped countries.[18]

The concern for the maintenance of investment incentives was again reflected in a General Assembly resolution adopted in 1964 which recommended that those countries seeking to attract private foreign capital re-examine their domestic policies, legislation and administrative practices "with a view to improving the investment climate."[19]

13. W. SURREY & C. SHAW, *Legal Protection of International Business Transactions*, A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS, § IV (American Bar Association, 1963).

14. *See* 8 WHITEMAN, *supra* note 5.

15. G.A. Res. 626, 7 U.N. GAOR at 495, U.N. Doc. A/2361 (1952).

16. *Id.*

17. *Id.* at 496.

18. *Id.*

19. G.A. Res. 824, 10 U.N. GAOR, U.N. Doc. A/2890 (1954).

A 1958 General Assembly resolution recommended the establishement of a Commission consisting of Afghanistan, Chile, Guatemala, the Netherlands, the Philippines, Sweden, the U.S.S.R. and the United States,

> to conduct a full survey of the status of this basic constituent [permanent sovereignty] of the right to self-determination . . . [in which] due regard shall be paid to the rights and duties of States under international law and to the importance of encouraging international cooperation in the economic development of underdeveloped countries.[20]

In spite of the reference to the rights and duties of States under international law the United States again refused to vote in favor of the establishment of this commission "because of the possible harmful effect on the investment climate for less developed countries."[21]

It is interesting to note that the objection by the Cuban delegation to a phrase embodied in a 1960 General Assembly Resolution, which qualifies the sovereign right of a State over its natural resources,[22] reflected an amendment to article 24 of the Cuban Fundamental Law of February 7, 1959, which deleted the requirement of appropriate compensation for nationalized properties.[23] This prompted Professor Domke of New York University School of Law to retort:

> States may indeed easily find ways and means to adapt their municipal law on the 'taking' of property to the aims they consider desirable under changed circumstances. It is the supremacy of public international law which has to be asserted in this matter.[24]

2. *State Responsibility for Injury to Aliens.*—The concept of State responsibility under international law for injuries to aliens has also been a focal point of intensive study and debate. In 1953 the General Assembly of the United Nations requested the International Law Commission to undertake the codification of the customary international legal principles regarding state responsibility. The Commission appointed as *rapporteur* for that subject Dr. F.V. Garcia-Amador, who submitted six reports on various aspects of

20. G.A. Res. 1314, 13 U.N. GAOR, U.N. Doc. A/4090 (1958).
21. 13 U.N. GAOR Supp. 18, U.N. Doc. A/4090 (1958).
22. G.A. Res. 1515, 15 U.N. GAOR Supp. 16, U.N. Doc. A/4684 (1960).
23. CUBAN FUNDAMENTAL LAW, art. XXIV (Feb. 7, 1959).
24. Domke, *Foreign Nationalizations*, 55 AM. J. INT'L L. 585, 587 (1961).

State responsibility.[25] In 1961, Professors Louis B. Sohn and R.R. Baxter of Harvard Law School prepared the Draft Convention on the International Responsibility of States for Injuries to Aliens (Twelfth Draft 1961),[25a] but final agreement on a draft convention has not been reached. This inability to reach a final agreement is a further manifestation of the impasse between the divergent views of the capital-exporting nations of the West and the less developed capital-importing countries of the world.

Regardless of any impasse which may be present respecting a definite codification of the substantive principles of international law regarding state responsibility, it is important to note that there is a substantial body of customary international law relating to this fundamental principle, which has been embodied in long-established legal systems throughout the world.[26] As Professor Domke has stated,

> [t]he end of certain regimes often brings with it changes in political and social conditions. And yet recognition of acquired rights is the principle basis of intercourse in economic relations, as recognized by the laws of civilized nations.[27]

The Brazilian Judge Levi Carneiro, in a dissenting opinion, recognized the "anomalous situation which arises where governments desire foreign investment while at the same time rights in property and contractual relations are threatened or even destroyed."[28] In the *Anglo-Iranian Oil Company Case,* he said:

> When there are so many countries in need of foreign capital for the development of their economy, it would not only be unjust, it would be a grave mistake to expose such capital, without restriction or guarantee, to the hazards of the legislation of countries in which such capital has been invested.[29]

This brings up the question of what principles of state responsibility enjoy continuing validity in the contemporary international community. One of the foundations of customary law is the principle that a state is not exonerated from international responsibility for injury done to an alien for the reason that it ac-

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25. [1960] 2 Y.B. INT'L L. COMM'N 42, U.N. Doc. A/CN 4/125 (1960).

25a. L. Sohn & R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens,* 55 AM. J. INT'L L. 545 (1961).

26. *See* Domke, *supra* note 24, at 587.

27. *Id.* at 585.

28. Anglo-Iranian Oil Co. Case, I.C.J. REP. 151, 159-160 (1952) (Carneiro, J., dissenting).

29. *Id.*

cords the same treatment to its nationals. Customary international law recognizes the principle of an "international minimum standard of justice."[30]

In regards to property rights of aliens, there is said to exist a minimum standard of protection afforded to these rights in the face of domestic nationalization or expropriation legislation. According to the view held by a significant number of nations, the international minimum standard of justice requires that, with certain exceptions, an alien is to be compensated adequately for any of his property that is seized by a state.[31] Accordingly, the alien is entitled to such compensation even though nationals of the seizing state are not compensated for their property taken under similar circumstances.[32]

II. CONTEMPORARY (SUBSTANTIVE) INTERNATIONAL LAW REGARDING EXPROPRIATION OR NATIONALIZATION

While there is apparently wide acceptance by the international community of the international rule of law recognizing the right of a State to exercise control over its natural resources and economic development, there are four conditions which are generally accepted by customary international law to limit the exercise of this sovereign right.[33]

A. The "Public Purpose" Condition

The recognition of the validity of nationalization laws has generally been qualified by the condition that the taking be for "a public purpose or in the public interest."[34] As Professor Domke has pointed out, the concept of "dominant public purpose"[35] is embodied in the constitutions of many countries primarily as a protection for their own citizens against executive and legislative

30. W. BISHOP, CASES AND MATERIALS ON INTERNATIONAL LAW 866 (3d ed. 1971).

31. *See* Domke, *supra* note 24, at 589. *See also* 8 WHITEMAN, *supra* note 5, at 1154.

32. Anderson, *Basis of the Law Against Confiscation of Foreign Owned Property*, 21 AM. J. INT'L L. 525 (1927).

33. Blanchard, *The Threat to U.S. Private Investment in Latin America*, 5 J. INT'L L. & ECON. 230-31 (1971).

34. INT'L L. COMM'N, REPORT, 17 U.N. GAOR, U.N. Doc. A/CN 4/125 (1960).

35. Report of the Forty-Eighth Conference of the INT'L L. ASS'N (New York, 1958), xi (1958).

abuse. The obvious limitation of this condition is that the determination of "public purpose" remains with the nationalizing state and cannot easily be challenged in light of the few limits to what a State may consider necessary for the national, social or economic benefit.

B. The Territorial Condition

Briefly stated, it has generally been recognized that a state can only nationalize assets which are located within its own sovereign territory at the time of the nationalization decree. To this extent, extraterritorial effects of nationalization may be recognized to be limited in effect.[36] However, the territorial restriction is generally held to safeguard property interests outside of the nationalizing country.

C. The Non-Discrimination Condition

The third restriction upon the validity of nationalization decrees involves the requirement of non-discrimination. This restriction was recognized in the 1961 case of *Banco Nacional de Cuba v. Sabbatino*[37] which stated that the traditional rule included the prohibition of discrimination against the nationals of one country, as in retaliatory action by the expropriating state against the expropriated. The requirement of non-discrimination also has its roots in the minimum standard required under international law for the protection of foreigners.[38] Under this minimum standard of protection, the seizing state will not be able to successfully contend that the nationals of the taking country receive the same treatment, for such treatment may violate the minimum standards required under customary international law.

D. The Compensation Condition

The requirement of compensation presents the most controversial limitation of the right to nationalize. Most measures taken by a seizing state are challenged on the ground of inadequate compensation. The general duty of a government to render *some* compensation in case of nationalization is almost universally recognized through customary international law, studies and drafts

36. U.S. v. Pink, 315 U.S. 203, 220 (1942).
37. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 429 (1960).
38. *See*, Domke, *supra* note 24, at 589.

of national and international bodies, bilateral treaties, and the texts of nationalization laws themselves which expressly call for compensation, though they are not in agreement as to what form the compensation should take.[39] As stated by Professor Wortley, "The existence of a concept of property, and the general rule that expropriation must, generally, take place against adequate compensation, stand or fall together."[40] The recognition of acquired rights is fundamental to the existence of a concept of property and is "the principle basis of intercourse in economic relations, as recognized by the law of civilized nations."[41]

As with the other broad concepts of international law regarding state sovereignty and international responsibility, the concept of compensation has become a point of divergence of view by the capital-exporting countries of the West and the underdeveloped countries of the world. While compensation in general is regarded as a controlling principle attendant with nationalization and expropriation legislation, "particularly knotty theoretical and practical problems cluster about the determination of what constitutes 'adequate' compensation."[42] The United States adheres to the position that in order to meet the requirements of customary international law, the compensation must be "prompt, adequate and effective."[43] In this writer's opinion, the least that should be required is that compensation should satisfy the international minimum standard of justice. If no compensation has been granted, a violation of international law will be deemed to have occurred.[44] Nationalization or expropriation is then said to impose a duty to pay just compensation, even though the conduct of taking is not itself wrongful under international law as an exercise of sovereign rights over natural resources and economic development.[45] If the taking were to violate the other generally accepted conditions of nationalization as to public purpose, territoriality, or non-discrimination, there is considerable agreement that these violations would constitute independent viola-

39. *See* Becker, *Just Compensation in Expropriation Cases: Decline and Partial Recovery*, 53 AM. SOC'Y INT'L L. PROC. 336-44 (1959).

40. WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW 152-53 (1959).

41. *See* Domke, *supra* note 24, at 603-04.

42. *See* W. SURREY & C. SHAW, *supra* note 13, at 315.

43. *See* Becker, *supra* note 39.

44. *See* W. SURREY & C. SHAW, *supra* note 13, at 316.

45. *Id.*

tions of international law separate from the issue of compensation.[46]

> The United States adheres to its view that
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> property shall not be taken 'except for public purposes nor shall it be taken without the prompt payment of just compensation,' in an effectively realizable form representing the 'full equivalent' of the property taken with 'adequate provision' at or prior to the time of taking for 'the determination and payment thereof.'[47]

Substantial disagreement remains as to whether "adequate compensation" means full compensation. If, as some writers contend, prompt, adequate and effective compensation remains the existing principle of international law,[48] the question of whether the taking of property constitutes a violation of international law turns upon whether "adequate" compensation has been rendered and the highly controversial issue then becomes: what compensation is required in order to make the taking lawful under customary international law? The United States, while requiring "full" compensation, has nevertheless recognized agreements whereby less than full compensation has been accepted. This acceptance of less than full recovery does not amount to an abrogation of the "full equivalent" rule, for it is merely an acceptance based upon political and economic reasons, prospects of further trade relations and other motives.[49]

Other writers contend that the prompt, adequate and effective compensation rule, while appropriate in the case of individual instances of expropriation, should not be applied in derrogation of the exercise of sovereign rights pursuant to a broad program of economic and social reform, since to do so would deny to poorer, less developed States (who could not sustain the burden of prompt, adequate and effective payment) the right to economic self-determination and much needed social reforms.[50] "Just compensation" might mean, in a case such as this, that rendering no compensation is "appropriate" in the face of overwhelming national economic and social reforms, yet the prevailing recognition of

46. *Id.* at 318.
47. *See* Domke, *supra* note 24, at 603-04.
48. *See* Becker, *supra* note 39.
49. *Id.*
50. Comment, *Foreign Seizure of Investments: Remedies and Protection,* 12 STAN. L. REV. 606-637 (1960).

acquired rights in the light of the protection afforded by customary international law would require that *some* compensation be rendered,[51] at least in accordance with that which the minimum standard of justice should require.

Assuming that the least compensation which should be required under international law is that which meets at least the minimum standard of justice requirements, should this standard of adequacy turn exclusively on the extent of the previous owner's loss (the United States' view) or should the standard be affected by an allegedly long history of exorbitant profits extracted by foreign owners under the guise of amortization, foreign expenses and other categories[52] with a disproportionately small benefit to the local economy? There are no easy answers to such complex problems which involve not only legal, but also conflicting political, social and economic considerations. If anything emerges with clarity, it is that "state practice and judicial precedents are inconclusive and that the views of capital-exporting and developing countries on the precise guidelines for determining 'appropriate' or 'adequate' compensation tend to be widely disparate."[53] Indeed, it is hardly novel to recognize that "widely disparate views" are held not only as to adequacy of compensation, but also as to the general principles of international law such as have been investigated herein and elsewhere. In the face of this continuing disparity of views, the international community necessarily recognizes the inevitability of disagreements and, as such, provides for it through the balancing tests of prevailing international consensus, reflected in state and international drafts and studies, national legislation and international bilateral and multilateral conventions and treaties which we call the international rule of law. It is the strength of this consensus which determines the validity of states' acts under customary international law. The consensus appears to be strong in requiring that some "fair" compensation be rendered to the former owners of nationalized properties.

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51. U.N. Doc. A/CN 4/119 (1960).

52. The determination of excess profits for each corporation was calculated as a percentage of its book value as of Dec. 31, 1970 and any profits extracted from Chilean mines in excess of that percentage were considered excessive. This percentage was calculated to be ten percent on their holdings since 1955.

53. *See* W. SURREY & C. SHAW, *supra* note 13, at 316.

III. CRITERIA WHICH WILL GIVE RISE TO AN INTERNATIONAL CLAIM

Recognizing the diversity of view and inherent disagreement implicit in determinations of international law, the question remains as to what are the *minimum* international criteria under which a taking of property through nationalization or expropriation will give rise to an international claim.

It is clear that public international law derives protection for property interests and international transactions from two primary sources: customary international law and bilateral treaties and conventions. A taking of the property of an alien is a violation of international law if it is in derogation of the terms of a binding treaty obligation. It is also clear that if the property of a United States citizen is taken by a foreign state and, upon seeking compensation or other redress in local courts, the claimant is subjected to a denial of justice, this would constitute an independent breach of international law for which a claim would lie.[54] And, as we have seen before, if a taking of property by a foreign state is not for a public purpose, involves discrimination against the alien, involves substantial extraterritorial assets, or does not make provision for "adequate" compensation, it may constitute one or more independent violations of customary international law for which the duty of reparation is recognized.[55]

In addition to the above factors which could form the basis of an international claim, it is imperative that we investigate the importance and validity of two additional emerging principles of law regarding international responsibility: namely, the abuse of rights concept and the doctrine of unjust enrichment.

A. The Abuse of Rights Concept

In addition to international claims based upon the non-performance of an international obligation, the requirements of customary international law accept the principle which prohibits the abusive exercise of rights by the state in derogation of international responsibility.[56] This concept is exemplified in the Fifth Report prepared for the International Law Commission of the United Nations on the subject of "International Responsibility of

54. *Id.* at 318.
55. *See* Domke, *supra* note 24,.
56. *See* INT'L L. COMM'N REPORT, *supra* note 34, at 42, 60.

the State for Injuries Caused in its Territory to the Person or Property of Aliens" by Garcia-Amador as Special *Rapporteur*.[57] In this report, the Special *Rapporteur* recognized the abuse of rights concept as an additional ground for an international claim. An abuse of rights is said to exist in any domestic action "contravening the rules of international law, whether conventional or general, which govern the exercise of the rights and competence of the State."[58] An abuse of rights, then, is an action which is arbitrary and capricious in the face of international law, and in the realm of "unjustified irregularities which are prejudicial to aliens. . . ."[59] Moreover, an abuse of rights consists of "[t]he absence of a reason or purpose to justify the measure, some irregularity in the procedure, the measure's discriminatory nature, or, according to the circumstances, the amount, the degree of promptness or form of the compensation."[60]

B. The Doctrine of Unjust Enrichment

Article 38, paragraph (c) of the Statute of the International Court of Justice directs that the court shall apply "the general principles of law recognized by civilized nations."[61] One principle which is achieving recognition as a general principle of law is the doctrine of unjust enrichment. In a memorandum submitted for consideration by the second meeting of the Subcommittee on State Responsibility of the International Law Commission, Jiménez de Arechaga expressed the view that the well-recognized duty to pay "adequate" compensation "might be based on a different legal ground, namely, on the principle which prevents unjust enrichment, which all civilized legal systems recognize and accept."[62] He further states:

> 42. The principle which may constitute the legal foundation of the conduct of States in this matter is the principle of unjust enrichment. If no compensation would be granted, then the nationalizing State would be enriching itself unjustly, not so much at the expense of foreign individuals or companies,

57. *Id.*

58. U.N. Doc. A/CN 4/34/Add. 1, [1961] 2 Y.B. INT'L L. COMM'N 46-47 (1961).

59. *Id.*

60. *See* INT'L L. COMM'N REPORT, *supra* note 34.

61. I.C.J. STAT. art. 38, para. (c).

62. INT'L L. COMM'N REPORT, Report by Chairman of Sub-Committee on State Responsibility, 17 U.N. GAOR, Annex II, Agenda Item No. 76, at 16-17, U.N. Doc. A/CN 4/152 (1963).

> but really at the expense of a foreign State considered as a whole and as another and different political and economic entity. Through the unilateral exercise of its sovereign power to nationalize, a State would be depriving a foreign community of the wealth represented by the investments made, and would be taking thereby undue advantage of the fact that economic resources proceeding from another State had penetrated its territorial sphere. . . .
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> 43. This legal foundation of the international duty to compensate for the nationalization of foreign owned property may have important repercussions on the 'quantum' of the compensation due. The extent and scope of compensation would be determined by the enrichment obtained by the nationalizing State rather than measure, as it is traditionally done now, by the loss or impoverishment suffered by the affected foreign individual. [Legal Aspects of Foreign Investment, Friedmann and Pugh, editors, Chapter 41 by A.A. Fatourous, pages 723 and 729] It might become legitimate to take into account whether and in what measure the nationalized properties represent additional assets for the economy of the nationalizing State.[63]

The doctrine of unjust enrichment has already been the basis of negotiation in several global compensation agreements.[64] The doctrine of unjust enrichment represents not only a basis for international responsibility, but also a foundation for the determination of the extent and scope of compensation, which could be determined by the enrichment obtained by the nationalizing state rather than the loss suffered by the affected foreign individual.[65] The recognition of the validity of acquired rights should demand no less.

IV. AN INTERNATIONAL CLAIM ARISING FROM THE CHILEAN NATIONALIZATION LAW

A. Administration of the Nationalization Law: A Denial of Justice

In recognition of a state's sovereign power over administration of its domestic law, the exhaustion of local remedies is generally considered a condition precedent to a valid complaint that a claimant has been denied justice either in procedural or sub-

63. *Id.* at paras. 42, 43.
64. *See* Domke, *supra* note 24.
65. *See* INT'L L. COMM'N REPORT, *supra* note 62, at para. 33.

stantive issues as measured under the international minimum standard of justice.[66] The appeals process called for in the Chilean Nationalization Law does not allow appeal of the determination of excess profits, but only of the right to compensation after the excess profits deduction and other specified deductions had been taken into consideration in the Comptroller General's evaluation of adequate compensation.[67] An additional claimed deduction for alleged deficient equipment and damage to the mines amounting to $1 billion is appealable and such a claim is presently pending. Any possible determination as to a violation of international law through a denial of justice necessarily comprehends the exhaustion of such local remedies. There is a tenable argument at this time that the non-appealability of the excess profits determination represents a "bypassing of the established Chilean judicial appeals procedures"[68] which may constitute a denial of justice as measured by contemporary international law.[69]

B. Violation of Customary Nationalization Legislation

As previously discussed, an independent violation of international law will be said to exist if any of the four conditions on the right of nationalization has been violated.

The public purpose condition of the nationalization legislation is satisfied by article 2, paragraph 17 which states that "the national interest so requires . . . ."[70] The Chilean government's avowed purpose in nationalizing the copper mines is to support a socialist plan of economic development and social reform. It is difficult to challenge this nationalization law on the condition of public purpose.

The condition of territoriality is not at issue in this nationalization measure which affects only the assets of the affected companies and mines located in Chile.

The conditions of non-discrimination and compensation are not so easily answered. Indeed, the determination of these conditions play an integral role in the present controversy. As for the non-discrimination condition, the Chilean government would contend that their broad program of social and economic reform

66. *See* 8 WHITEMAN, *supra* note 5.
67. 10 INT'L LEGAL MATERIALS 1067 (1971).
68. 11 INT'L LEGAL MATERIALS 91-92 (1971).
69. *See* 8 WHITEMAN, *supra* note 5.
70. *See* INT'L LEGAL MATERIALS, *supra* note 67, at 1068.

renders their nationals the same treatment afforded aliens as to property rights in the face of these nationalization measures. It must be realized, however, that although the law broadly applies to aliens and nationals alike, the economic reality is that it affects mainly foreign-owned enterprises. This in itself would not constitute discrimination if equally applied to all such enterprises owned by foreign corporations. The problem lies in the fact that the excess profits provision is not obligatory on the face of the legislation itself, and apparently has only been applied against the copper companies. Indeed, this determination is solely at the discretion of the President of the Republic.[71] The non-obligatory and discretionary application of the excess profits determination conceivably indicates the possibility of a discriminatory application of this provision.

The question of the adequacy of the compensation to be afforded the nationalized corporations is obviously at the focal point of controversy. Just what constitutes "adequate compensation" from an international standpoint is not clear. As has been pointed out in the text of this Comment, there is little agreement as to whether adequate compensation should mean full compensation[72] or whether it should include considerations in the face of exorbitant profits extracted to foreign owners under the guise of amortization, foreign expenses, and other categories. We have seen that an international minimum standard of justice should require that *some* compensation be rendered, but does not propose any definitive guidelines, if indeed such guidelines should ever exist.[73]

The issue of compensation is not only limited to what is the appropriate measure of damages or compensation in light of the nationalization law, but more importantly, involves the international validity of these compensation determinations in light of the concepts of abuse of rights and the equitable doctrine of unjust enrichment as they pertain to customary international law.

V. CONCLUSION

The determination made by the Chilean Government whereby a non-obligatory retroactive determination of "excess profits" results in no compensation being rendered to the nationalized cor-

71. *Id.* at 1069.
72. *See* Becker, *supra* note 39.
73. *See* 8 WHITEMAN, *supra* note 5, at 1143.

porations may be said to amount to an abuse of rights violation through the seemingly arbitrary and discriminatory application of this excess profits clause only to the assets of the particular foreign enterprises.[74] In a statement issued by Secretary of State Rogers on October 13, 1971, our government's discontent with this compensation formula was voiced:

> The U.S. companies which are affected by this determination of the Chilean Government earned their profits in Chile in accordance with Chilean law under specific contractual agreements made directly with the Government of Chile.[75] The excess profits deductions punish the companies today for acts that were legal and approved by the Government of Chile at the time.[76]

This retroactive determination of excess profits clearly constitutes an arbitrary and unreasonable irregularity in the application of the nationalization law. As such, this would constitute a violation of customary international law which is said to prohibit the abuse of sovereign rights in the treatment of claims of aliens.

The application of the excess profits determination in the administration of the nationalization law also constitutes an additional violation of international law in derogation of the equitable principle prohibiting unjust enrichment.[77] Even taking into consideration the valid deductions that may be present, it would be ludicrous to say that Chile, as the nationalizing state, will not be enriched at the expense of American copper enterprises. Although it may not be clear what the true measure of damages should be, the international recognition of the validity of acquired rights and the concept of state responsibility should compel that the compensation be no less than would be determined by the extent of enrichment realized by the nationalizing State of Chile.

The dilemma thus confronts both the United States as well as Chile. As the leading exponent of the capital-exporting countries of the world, the United States operates upon the premise that " . . . a principle objective of foreign economic assistance pro-

74. Although other large corporations have been nationalized, none appear to have been subjected to the "excess profits" clause save for the U.S. copper interests of the Anaconda and Kennecott companies.

75. Statement by Asst. Sec. of State Meyers, before House Sub-Committee on Latin American Affairs, Oct. 15, 1971.

76. *Id.*

77. *See generally* Friedmann, *Social Conflict and the Protection of Foreign Investment*, 57 AM. SOC. INT'L L. PROC. 126 (1963).

grams is to assist developing countries in attracting private investment."[78] The United States regards a favorable climate for investment to be a scarce and vital development ingredient.[79] Of course, the private investment the United States promotes also puts large amounts of capital into the treasuries of American corporations. Recognizing the rising tide of economic nationalism, the United States realizes that in order to continue private investment in developing nations, new forms of business enterprises will have to replace the "exploitative" agreements of the past, represented by the mining and petroleum concessions, where the economic benefits to the host country, if present were not particularly visible to the people.[80] Should the United States allow the nationalization of its copper industries without "adequate" compensation, the investment climate upon which it depends for expanding markets and the development of new sources of both raw and semi-processed materials, will be gravely retarded. For these reasons, among others, the United States desires compliance with the rule of international law which requires as the lowest common denominator that some form of "fair" compensation be afforded the former owners of nationalized properties.

The dilemma which is presented to Chile is whether the stance it has taken against the copper companies will be *economically* as well as politically expedient. Without doubt, President Allende has taken advantage of the popular resentment of foreign control and extraction of Chile's valuable natural copper resources to place himself in the political station he now holds. However, the nationalization of the U.S. copper companies, without provision for "fair" compensation, has also been accompanied by an exodus of businessmen, professionals and technicians, detrimentally affecting Chile's national production.[81] Chile's reserve of foreign currency has decreased over $100 million since 1970. A tremendous inflation has transpired as a result of a general consumer price freeze and a raise in salaries in hope that this double measure will generate a production increase.[82] The Chilean position regarding the copper companies has done much to alienate the sources of financial aid and future markets much to the detri-

78. 11 INT'L LEGAL MATERIALS 240 (1972).
79. *Id.*
80. 11 INT'L LEGAL MATERIALS 85 (1972).
81. PROGRESO, *Dreams and Economic Realities in Socialist Chile*, Dec. 1971.
82. *Id.*

ment of Chilean economic self-determination. The effect of the investment climate will also hurt Chilean development as its credit worthiness is shaken and further capital and technological flight takes place.[83] Then again, is this the social price which must be paid for the creation of a completely new society?

It is suggested that the long-term impact of Chile's economic nationalism will depend largely on what happens to the investment climate; that is, whether Chile will establish clear and workable rules for foreign investors and apply them *consistently*. The political motivations, which apparently have played a significant role in Chile's nationalization of the U.S. copper companies without adequate provision for compensation, have led to an inconsistent application of Chilean law *vis a vis* the other U.S. companies which have recently been nationalized.[84] The copper companies have been the only industry to which the excess profits determination has been applied. This inconsistency in approach has harmed the investment climate in Chile and the Latin American region as a whole, with its increased risk of future economic detriments, as well as the primacy of the rule of international law itself. The Chilean position should not be condoned.

Albert F. Quintrall

83. 11 INT'L LEGAL MATERIALS 85 (1972).

84. *Id.* at 91-94. Out of thirteen other nationalizations affecting U.S. firms in Chile, the copper industry has been the only case where no compensation has been provided or tentatively agreed upon.