*Fordham International Law Journal*

*Volume* 10, *Issue* 1 1986 *Article* 2

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**Abstract**

Part I of this Note will discuss the concepts of sovereignty, state responsibility for injuries to aliens, and compensation for expropriation under international law. Part II will examine United States policy on expropriations and explore how United States citizens may seek redress for foreign property loss in United States courts. Part III will argue that, under an international legal analysis, the United States would be liable in cases such as Ramirez and Langenegger, and will propose a standard for determining when the United States should compensate its citizens for foreign property loss. Next, this Note will conclude that the United States should assume responsibility for foreign property loss by its citizens when its activities in the foreign territory directly or indirectly caused the loss. Finally, this Note will conclude that the United States should assume responsibility for foreign property loss by its citizens when its activities in the foreign territory directly or indirectly cause the loss.

# UNITED STATES LIABILITY FOR EXPROPRIATIONS IN FOREIGN TERRITORY: SETTING THE STANDARD FOR RESPONSIBILITY

## *INTRODUCTION*

The United States Government has the right to take property belonging to its citizens, both in domestic and foreign territory,[1] providing that adequate compensation is given.[2] When the property is located in foreign territory, however, it is difficult to determine whether responsibility for the taking should be placed on the United States or the territorial sovereign.[3]

In two recent cases, *Ramirez v. Weinberger*[4] and *Langenegger v. United States*,[5] citizens of the United States sued their government for losses resulting from the expropriation of their property in foreign territory. The United States claimed in both instances that the territorial sovereign was responsible for the taking and, therefore, the act of state doctrine[6] barred judicial

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1. *See* Hanson Co. v. United States, 261 U.S. 581, 587 (1923) ("the power of eminent domain is not dependent upon any specific grant; it is an attribute of sovereignty, limited and conditioned by the just compensation clause of the Fifth Amendment"); *see also* Seery v. United States, 127 F. Supp. 601, 603 (Ct. Cl. 1955); Turney v. United States, 115 F. Supp. 457, 464 (Ct. Cl. 1953); Gray v. United States, 21 Ct. Cl. 340 (1886).

2. U.S. CONST. amend. V; *see also* Armstrong v. United States, 364 U.S. 40, 49 (1960) (just compensation clause of fifth amendment was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"); Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165 (1974); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

3. *See, e.g.*, Aris Gloves v. United States, 420 F.2d 1386 (Ct. Cl. 1970); Best v. United States, 292 F.2d 274 (Ct. Cl. 1961); Anglo Chinese Shipping Co. v. United States, 127 F. Supp. 553 (Ct. Cl. 1955).

4. 745 F.2d 1500 (D.C. Cir. 1984), *vacated sub nom.* Weinberger v. Ramirez, 105 S. Ct. 2353 (1985), *on remand* 788 F.2d 143 (D.C. Cir. 1986).

5. 756 F.2d 1565 (Fed. Cir.), *cert. denied*, 106 S. Ct. 78 (1985).

6. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). The classic statement of the act of state doctrine was made in Underhill v. Hernandez, 168 U.S. 250, 252 (1897):

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by the sovereign powers as between themselves.

review of the cases.[7] Although the courts employed different rationales, both rejected this argument.[8] However, although the courts recognized that the United States is liable to its citizens for injuries resulting from its involvement in the affairs of other nations,[9] the claimants were ultimately denied relief.[10]

Determining which state is responsible for an expropriation of property in a peace-time context is a relatively new question.[11] It is impossible to adequately address the issue in the vacuum of domestic law. At present, there is no consensus on whether international law imposes a duty on states to compensate aliens for the expropriation of their property.[12] Moreover, current views of state responsibility law hold that foreign coercion or intervention will exculpate a state of liability for

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7. *See Langenegger*, 756 F.2d at 1569; *Ramirez*, 745 F.2d at 1533.

8. *Compare Ramirez*, 745 F.2d at 1539 (Hickenlooper Amendment, 22 U.S.C. 2370(e) (1982) created exception to the act of state doctrine when expropriation by foreign state violated international law) *with Langenegger*, 756 F.2d at 1569 (act of state doctrine not a bar to judicial review because court could determine level of United States involvement in the taking without scrutinizing the motives of the territorial sovereign). *See also infra* notes 102-117 and accompanying text for a discussion of the act of state doctrine and the Hickenlooper Amendment.

9. *See Langenegger*, 756 F.2d at 1570; *Ramirez*, 745 F.2d at 1530.

10. The *Ramirez* case was mooted by a special Congressional bill which called on the Honduran Government to compensate the United States citizen whose property was taken. *See* Pub. L. No. 98-473, 98 Stat. 1894, 98th Cong. 2d Sess. Oct. 12, 1984; 105 S. Ct. 2353 (vacating the D.C. Circuit's opinion). The *Langenegger* court held that United States involvement was not substantial enough to trigger fifth amendment liability, and referred the plaintiff to international arbitration. 756 F.2d at 1573.

11. Most United States cases dealing with this issue arose in post-World War II Germany and Japan, involving claims of property loss for which the United States shared responsibility with other allied occupying states. *See, e.g.*, Aris Gloves v. United States, 420 F.2d 1386 (Ct. Cl. 1970); Best v. United States, 292 F.2d 274 (Ct. Cl. 1961); Anglo Chinese Shipping Co. v. United States, 127 F. Supp. 553 (1955); *see also infra* note 54.

12. The view long held by the United States and most Western nations is that states must provide prompt, adequate and effective compensation to aliens whose property is expropriated. This standard was first articulated by Secretary of State Cordell Hull in his letter to Mexico regarding the latter's large-scale nationalization of property in the 1930s. *See* 5 U.S. Dept. State, For. Rel. of U.S., Diplomatic Papers 1938, 685 (1956); *see also* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 533 (3d ed. 1979) [hereinafter I. BROWNLIE, PRINCIPLES]; Clagett, *The Expropriation Issue Before the Iran-U.S. Claims Tribunal: Is "Just Compensation" Required by International Law or Not?*, 16 LAW & POL'Y INT'L BUS. 813 (1984). Many less developed countries have taken an extremist view that sovereign states have sole discretion to determine when to take property and how much, if any, compensation will be provided. *See, e.g.*, Arechaga, *State Responsibility for the Nationalization of Foreign Owned Property*, 11 N.Y.U. J. INT'L L. & POL. 179, 183 (1978).

resulting injury to aliens.[13] Thus, even if the United States asserts, in cases such as *Ramirez* and *Langenegger*, that the territorial sovereign is responsible for an expropriation, the injured individual will likely receive no remedy under prevailing views of international law.[14]

Part I of this Note will discuss the concepts of sovereignty,[15] state responsibility for injuries to aliens,[16] and compensation for expropriation under international law.[17] Part II will examine United States policy on expropriations and explore how United States citizens may seek redress for foreign property loss in United States courts.[18] Part II will then analyze the *Ramirez* and *Langenegger* decisions in light of the conflicting international and domestic approaches to expropriation cases.[19] Part III will argue that, under an international legal analysis, the United States would be liable in cases such as *Ramirez* and *Langenegger*, and will propose a standard for determining when the United States should compensate its citizens for foreign property loss.[20] Finally, this Note will conclude that the United States should assume responsibility for foreign property loss by its citizens when its activities in the foreign territory directly or indirectly cause the loss.[21]

## I. *STATE RESPONSIBILITY FOR EXPROPRIATIONS UNDER INTERNATIONAL LAW*

The subject of international law,[22] that is, the entity to

13. *See infra* note 60 and accompanying text.
14. *See infra* notes 59-60 and accompanying text.
15. *See infra* notes 29-42 and accompanying text.
16. *See infra* notes 43-64 and accompanying text.
17. *See infra* notes 65-92 and accompanying text.
18. *See infra* notes 93-141 and accompanying text.
19. *See infra* notes 146-187 and accompanying text.
20. *See infra* notes 189-231 and accompanying text.
21. *See infra* notes 232-238 and accompanying text.
22. The principal sources of international law are treaties, custom, and general principles of law. C.F. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS 27 (1967). Judicial decisions, scholarly works and United Nations resolutions are evidence of what the international community regards as tenets of international law. *Id.*

Customary international law has been described as "the lowest common factor of principles of municipal law as these have been developed within the Western world's major legal system." Oliver, *Legal Remedies and Sanctions*, in R. LILLICH, INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 61, 66 (1983) [hereinafter R. LILLICH, SRIA].

which legal rights and duties apply, is the sovereign state.[23] The concept of state sovereignty[24] is the central component of state responsibility law[25] and expropriation law.[26] Under an international legal analysis, these principles will govern the determination of whether, in cases such as *Langenegger*[27] and *Ramirez*,[28] a state has breached international law and whether it is liable for injuries suffered by foreign nationals within its territory.

### A. *The Sovereignty and Equality of Nations*

The concept of state sovereignty affords nations the right to control their own affairs and shape their own destinies, free from external interference.[29] As sovereign equals, states are protected against intervention by other states.[30] Acts of inter-

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23. *See* P. JESSUP, A MODERN LAW OF NATIONS 15 (1968) [hereinafter P. JESSUP, LAW OF NATIONS]; L. OPPENHEIM, 1 INTERNATIONAL LAW: A TREATISE § 13, at 19 (H. Lauterpacht 8th ed. 1955); Jessup, *Responsibility of States for Injuries to Individuals*, 46 COLUM. L. REV. 903, 907-08 (1946) [hereinafter Jessup, *Responsibility of States*].

24. *See infra* notes 29-35 and accompanying text for a discussion of state sovereignty.

25. *See infra* notes 43-64 and accompanying text for a discussion of the international law of state responsibility.

26. *See infra* notes 65-92 and accompanying text for a discussion of the international law of expropriations.

27. Langenegger v. United States, 756 F.2d 1565 (Fed. Cir. 1984), *cert. denied*, 106 S. Ct. 78 (1985). *See infra* notes 169-185 and accompanying text for a discussion of this case.

28. Ramirez v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984), *vacated sub nom.* Weinberger v. Ramirez, 105 S. Ct. 2353 (1985), *on remand* 788 F.2d 143 (D.C. Cir. 1986). *See infra* notes 146-168 and accompanying text for a discussion of this case.

29. *See* W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 264 (1964); P. JESSUP, LAW OF NATIONS, *supra* note 23, at 12-13, 40-41. As conceived by early Anglo-American jurists, sovereign states were "those states which exercise supreme authority over all persons and property within their boundaries and are completely independent of all control from without." W. WILLOUGHBY & C. FENWICK, TYPES OF RESTRICTED SOVEREIGNTY AND OF COLONIAL AUTONOMY (1919). The concept remains essentially the same in modern practice. *See, e.g.*, U.N. CHARTER, art. 2 (1), (7) (recognizing the "principle of the sovereign equality of all its Members" and pledging not to "intervene in matters which are essentially within the domestic jurisdiction of any State. . . .").

30. *See* Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 39, U.N. Doc. A/8028 (1970) [hereinafter Res. 2625], in which the United Nations defined the principle of sovereign equality as follows:

"(a) States are juridicially equal;

"(b) Each State enjoys the rights inherent in full sovereignty;

vention in the affairs of sovereign states are considered a breach of international law.[31]

Under the principle of territorial sovereignty, a state has unlimited jurisdiction over all matters within its territory.[32] Domestic matters are exclusively within the competence of sovereign states, and are beyond the reach of international law and other states.[33] However, exercises of sovereign power that affect other states or their nationals are within the scope of international law, and the state must comply with the duties prescribed by that law.[34] As international law is consensual, if the state does not regard the duty in question as a binding legal tenet, or simply chooses to violate it, there is no enforcement mechanism.[35]

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"(c) Each State has the duty to respect the personality of other States;

"(d) The territorial integrity and political independence of the State are inviolable;

"(e) Each State has the right freely to choose and develop its political, social, economic and cultural systems;

"(f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States."

This modern formulation is an outgrowth of the traditional concept of sovereignty, premised on the inherent dignity of states and the right of smaller states to participate in international affairs on an equal footing with larger ones. *See* W. FRIEDMANN, *supra* note 29, at 33; P. JESSUP, LAW OF NATIONS, *supra* note 23, at 31; R. KLEIN, SOVEREIGN EQUALITY AMONG STATES: THE HISTORY OF AN IDEA 144 (1974).

31. *See* G. SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 76 (6th ed. 1976) ("[t]he mutual recognition of one another's sovereignty means that in the absence of permissive rules of international law to the contrary, States accept a legal duty not to trespass on the territorial jurisdiction of other sovereign States"); *see also* the Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, (S-VI), GAOR Sixth Spec. Sess., Supp. (No. 1) 3, U.N. Doc. A/9559 (1974) [hereinafter Res. 3201], which called for "full respect for the following principles: Sovereign equality of States, self-determination of all peoples, inadmissibility of the acquisition of territories by force, territorial integrity and non-interference in the internal affairs of other States."

32. G. SCHWARZENBERGER, *supra* note 31, at 76.

33. I. BROWNLIE, PRINCIPLES, *supra* note 12, at 291. The privileges of sovereignty include the state's right to apply its laws within its territory, to freely choose its political and economic systems, and to exploit its natural resources. *See* Res. 2625, *supra* note 30; M.S. RAJAN, SOVEREIGNTY OVER NATURAL RESOURCES (1978).

34. I. BROWNLIE, PRINCIPLES, *supra* note 12, at 292. Economic boycotts and expropriation decrees affecting the property of aliens are clear examples. *Id.*

35. *See* L. OPPENHEIM, *supra* note 23, § 11-12, at 15-19. Since consent is the basis of international law, states must first recognize that a principle of law is in fact binding upon them before they will accede to the obligations imposed. *Id.*; *see also* W. FRIEDMANN, *supra* note 29, at 85 ("The obedience to [international] law does not necessarily rest upon either command or the threat of sanction but on the acceptance of a norm as binding.").

A state may agree to limitations on its sovereignty, such as granting territorial privileges to other states by treaty or custom.[36] Thus, a state may be allowed to perform governmental functions within the territorial domain of another sovereign state, with concurrent jurisdiction.[37] However, if a state encroaches on an area within the exclusive jurisdiction of another state without permission, it is guilty of unlawful intervention.[38]

Although a nation may be sovereign and equal with other states in theory,[39] it may be economically or otherwise dependent on other states in reality.[40] The discrepancy between re-

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36. I. BROWNLIE, PRINCIPLES, *supra* note 12, at 292; G. SCHWARZENBERGER, *supra* note 31, at 76.

37. I. BROWNLIE, PRINCIPLES, *supra* note 12, at 292; G. SCHWARZENBERGER, *supra* note 31, at 76. A prime example is the stationing of foreign armed forces on a military base in another state. The sending state may exercise jurisdiction over the acts of its nationals on the base while at the same time the "receiving state may punish any breaches of its own law." I. BROWNLIE, PRINCIPLES, *supra* note 12, at 364, 370-71; *see also* G. SCHWARZENBERGER, *supra* note 31, at 82.

38. G. SCHWARZENBERGER, *supra* note 31, at 52; *see also* I. BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY (PART I) 187-88 (1983) [hereinafter I. BROWNLIE, STATE RESPONSIBILITY]. The duty of nonintervention in the affairs of sovereign nations is an established corollary to the principle of sovereignty. I. BROWNLIE, PRINCIPLES, *supra* note 12, at 291. It is expounded in the Charter and declarations of the United Nations, the Organization of American States, and in stated policies of individual nations. *See, e.g.*, Res. 2625, *supra* note 31: "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law." The OAS Charter contains almost identical language in Art. 18. *See* 2 U.S.T. 2394, T.I.A.S. No. 2361 (1952); *see also* U.N. CHARTER art. 2 para. 4.

39. *See* U.N. CHARTER art. 2 para. 1 (recognizing the sovereign equality of all states). Once the minimum requirements of statehood are fulfilled, *see* I. BROWNLIE, PRINCIPLES, *supra* note 12, at 74 (consisting of a permanent population, defined territory, a government, and the capacity to enter into relations with other states), a state is accorded equal status with other states in the international community, regardless of size, wealth, political system or duration of existence. W. FRIEDMANN, *supra* note 29, at 32.

40. *See* I. BROWNLIE, PRINCIPLES, *supra* note 12, at 76. The existence of "prima facie evidence of statehood," that is, a government, legal system, separate nationality and the conduct of foreign relations, is not determinative of the degree to which foreign control dominates the nation. *Id.* There may also be consensual arrangements between states whereby certain powers are delegated to a foreign sovereign while the state retains its international status as a state. Hannum and Lillich, *The Concept of Autonomy in International Law*, 74 AM. J. INT'L L. 858, 859, 888 (1980). These so-called "associated states" may maintain unlimited control over their internal affairs while abdicating control over, typically, foreign affairs and national defense. *Id.* at 888; *see also* I. BROWNLIE, STATE RESPONSIBILITY, *supra* note 38, at 187-88.

ality and theory[41] has made it difficult to enforce the principle of non-intervention, or indeed, to determine whether impermissible intervention has occurred.[42]

### B. *The Law of State Responsibility for Injuries to Aliens*

While the standard by which a state treats its own citizens is a domestic matter,[43] a state's treatment of foreign nationals within its jurisdiction falls within the scope of international law.[44] The rules and norms governing this area constitute the international law of state responsibility for injuries to aliens.[45]

State responsibility law protects the rights of individuals who are within the territory of a foreign sovereign.[46] Traditionally, those who are injured by foreign states must rely on

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41. This discrepancy owes in large part to the anachronism of national sovereignty as applied to the modern international scene. W. FRIEDMANN, *supra* note 29, at 35. Professor Friedmann notes that, "contrary to the predominant trend in previous centuries, the emergence of national states often means today not the integration of smaller units in a common political and legal authority, but the disintegration of larger units into a number of smaller, and often barely viable, political entities." *Id.* at 31.

With little or no industrial development, limited natural resources, and no experience in self-government, combined with the political tension of East-West relations, small nations are ill-described as sovereign equals with large ones. *See* R. KLEIN, *supra* note 30, at 167 ("In sum, no mythical concept of sovereign equality can charm away the brutal character of group behaviour, the wide variations of power existing among nation-states, and the reality that it is to the facts of power that they invariably make responses. . . .").

42. An exact definition of "intervention" is elusive and would seem to depend on the circumstances in any given case. *See* Joyner & Grimaldi, *The United States and Nicaragua: Reflections on the Lawfulness of Contemporary Intervention*, 25 VA. J. INT'L L. 621 (1985). At one extreme, intervention has been defined as "dictatorial interference by a State in the affairs of another State for the purpose of maintaining or altering the actual condition of things." L. OPPENHEIM, *supra* note 23, § 134 at 305 . A more moderate view would distinguish between "agency and control" and "ad hoc interference and 'advice.' " I. BROWNLIE, PRINCIPLES, *supra* note 12, at 77.

43. *See supra* note 33 and accompanying text; Joyner, *supra* note 42, at 653. One exception to this rule is human rights violations, e.g., genocide perpetrated on the sovereign's own citizenry, which is a violation of international law. *Id.*

44. *See* Sohn & Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545, 545 (1961) ("International law has developed over the last two hundred years standards and procedures designed to protect the life, liberty, and economic security of nationals of one State who live or conduct business activities in another State.").

45. *Id.*; *see also* C.F. AMERASINGHE, *supra* note 22; I. BROWNLIE, PRINCIPLES, *supra* note 12; Jessup, *Responsibility of States*, *supra* note 23; Lillich, *The Current Status of the Law*, in R. LILLICH, SRIA, *supra* note 22, at 3.

46. C.F. AMERASINGHE, *supra* note 22, at 4.

their own sovereign to assert their claim.[47] The claim ceases to be their own and becomes the claim of their state.[48] The right of a state to protect its nationals abroad is a long-standing principle of international law, although less-developed nations have often criticized its practice as an abuse of diplomatic protection.[49]

In 1954, the International Law Commission (ILC) convened to codify the law of state responsibility.[50] To date, the

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47. Jessup, *Responsibility of States*, *supra* note 23, at 907-08; Ohly, *A Functional Analysis of Claimant Eligibility*, in R. LILLICH, SRIA, *supra* note 22, at 282-83 ("to secure appropriate remedies for their greivances, individuals must find protection of their human rights and compensation for their injuries through resort to . . . the States to which those individuals owe their allegiance.").

48. *See* I. BROWNLIE, PRINCIPLES, *supra* note 12, at 518-19; Jessup, *Responsibility of States*, *supra* note 23, at 907-08.

49. *See generally* E. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1915); R. LILLICH, SRIA, *supra* note 22, at 4-5.

In the nineteenth century, major European nations sought to secure the interests of their nationals abroad through the exercise of diplomatic protection. C.F. AMERASINGHE, *supra* note 22, at 2; Jessup, *Responsibility of States*, *supra* note 23, at 906. European nations maintained there was an "international minimum standard" in the treatment of aliens. *See* I. BROWNLIE, PRINCIPLES, *supra* note 12, at 524-28; R. LILLICH, SRIA, *supra* note 22, at 10-15. If a state failed to live up to this standard, it breached its duty under international law, and was responsible to the State whose citizen was injured. *Id.* At the same time, Latin American states, which felt that diplomatic protection was merely a facade for intervention, formulated the Calvo Doctrine, which rebuked the international standard of treatment of aliens in favor of a national standard of treatment. Jessup, *Responsibility of States*, *supra* note 23, at 910; *see also* Garcia-Amador, *The Proposed NIEO: A New Approach to the Law Governing Nationalization and Compensation*, 12 LAW. AM. 1, 18 (1980). Under the Calvo Doctrine, as long as aliens were treated the same as nationals of the state, the duties imposed by international law were fulfilled. *Id.* Although the Calvo Doctrine was never widely adopted outside Latin America, it has greatly influenced the development of international law in recent years. The NIEO, for example, provides that expropriations of alien property should be compensated by the national standard, and states need not comply with any international norm. *Id.* at 25; Arechaga, *supra* note 12, at 186.

50. *See* United Nations Office of Public Information, THE WORK OF THE INTERNATIONAL LAW COMMISSION 83 (3d ed. 1980) [hereinafter THE WORK OF THE ILC]. The ILC was created by the United Nations in 1947 for the progressive development and codification of international law. *See generally* C.F. AMERASINGHE, *supra* note 22, at 31-32; I. BROWNLIE, STATE RESPONSIBILITY, *supra*, note 38, at 13-14; Jagota, *The Role of the International Law Commission in the Development of International Law*, 16 INDIAN J. INT'L L. 459 (1976). The ILC is composed of legal experts from member nations, representing the full range of views in the world community. The ILC's work is the most definitive expression available for current views on the international law of state responsibility. Such views are, however, heavily influenced by states that are relative newcomers to the international scene, and which have voiced considerable opposi-

ILC has issued only draft articles on state responsibility law.[51] However, as these articles are the most representative and authoritative expression of the international community's views on state responsibility, they are an important reference for determining the present status of the law.[52]

For a state to be liable under the international law of state responsibility, there must be an act or omission that breaches an obligation established by international law, is imputable to the state, and causes injury to the alien.[53]

The mere occurrence of an injury within a state's territory is not sufficient to impose liability on that state.[54] The unlaw-

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tion to standards of international law established before they achieved their independence. *Id.*

When the ILC was formed, the subject of state responsibility was given top priority as a matter for codification. *See* THE WORK OF THE ILC, *supra*; [1975] 2 Y.B. INT'L L. COMM'N at 51-56. A primary reason for this decision was the dissatisfaction with existing principles of international law, especially regarding property rights. R. LILLICH, SRIA, *supra* note 22, at 14. This topic had become increasingly politicized and the less developed nations believed that the rules of state responsibility were contrary to their interests because they protected the property of citizens of capital-exporting nations and placed the whole burden of compensation on the weaker state. *See* Guha-Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?* 55 AM. J. INT'L L. 863 (1961).

51. By 1978, the ILC adopted only Part One of the Draft Articles on State Responsibility, and submitted it to member nations for comments. *See* Draft Articles on State Responsibility Law, [1980] 2 Y.B. INT'L L. COMM'N (Part One). [hereinafter ILC Draft Articles] The United Nations General Assembly has expressed its support of the ILC's work, but endorsement of the codification will not come until final completion. *See* [1983] Y.B. INT'L L. COMM'N.

52. *See* I. BROWNLIE, STATE RESPONSIBILITY, *supra* note 38, at 10-18. In the Iran Hostages Case, the United States invoked the attribution principles of Article 8 of the ILC's Draft Articles on State Responsibility to support its contention that the government of Iran was responsibile for the conduct of the students at the American Embassy in Tehran. *See* Memorial of the Government of the United States of America at 46, Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3.

53. C.F. AMERASINGHE, *supra* note 22, at 37. A state may incur liability for a wrongful omission if it fails to punish wrongdoers who cause injury to aliens. *See* Christenson, *The Doctrine of Attribution in State Responsibility*, in R. LILLICH, SRIA, *supra* note 22, at 339-341; *see also* I. BROWNLIE, PRINCIPLES, *supra* note 12, at 439-440; RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 207 (Tent. Draft No. 6, 1985) [hereinafter RESTATEMENT].

54. *See* ILC Draft Articles, *supra* note 51; *see also* C.F. AMERASINGHE, *supra* note 21, at 49; I. BROWNLIE, STATE RESPONSIBILITY, *supra* note 38, at 36-48 (discussing Corfu Channel Case and principles of fault in determining state responsibility).

Conversely, in practice, states have sometimes assumed liability for non-state conduct. *See* R. LILLICH & B. WESTON, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP-SUM AGREEMENTS, PART ONE: THE COMMENTARY 113 (1975) [hereinafter

ful conduct must be imputable to the state by more than physical proximity.[55] The territorial sovereign will incur international responsibility only if the act or omission may properly be attributed to it, taking into account the nature of the conduct, the parties involved, and whether any defenses are available.[56]

The attribution of conduct[57] to a state becomes problematic when the parties causing injury do not act on behalf of the state,[58] when one state participates in the wrongful act of another,[59] or when a state is subject to foreign control or coer-

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R. LILLICH, INT'L CLAIMS]. For instance, claims against "predecessor regimes," political subdivisions, minor officials and third states acting in the territory have occasionally been settled by the current territorial sovereign. *Id.* at 114-36. As to third-state activity, however, host states have assumed liability only for wartime damages caused by their allies. *Id.* at 132. There are no instances in which states took responsibility for injuries to aliens resulting from "peacetime actions taken by, or under the authority of, third States." *Id.*

55. *See* Corfu Channel Case, (U.K. v. Alb.), 1949 I.C.J. (Judgment of Apr. 9) ("it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that state knew, or ought to have known, of any unlawful act perpetrated therein . . . . This fact, by itself, and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof"); *see also* C.F. AMERASINGHE, *supra* note 22, at 49; I. BROWNLIE, STATE RESPONSIBILITY, *supra* note 38, at 36-48, 180-192.

56. *See* ILC Draft Articles, *supra* note 51, art. 5-15; *see also id.* art. 29-34, which provide six additional defenses: consent of the wronged state, countermeasures against an internationally wrongful act, force majeure and fortuitous event, distress, state of necessity, and self-defense.

57. Attribution theory is used to determine when certain conduct constitutes an act of state for "the purpose of allocating responsibility to the State for the consequences of certain wrongful acts or omissions of its organs and officials." Christenson, *supra* note 53 at 321.

58. *See* ILC Draft Articles, *supra* note 51, Art. 11 (e.g. foreign officials and private individuals).

Attribution doctrine is generally used to distinguish between state acts and private acts. Christenson, *supra* note 53, at 326. Likened to the principle of "state action" under United States constitutional law, attribution doctrine focuses on "whether the State has an independent obligation to prevent harm or to act affirmatively for conscious community purposes." *Id.* at 341, 322. Thus, even if private activity leads to injury, the state may incur liability if it failed to live up to its duty to prevent the harm or punish the wrongdoer in its capacity as guardian of the public. *Id.* at 324. The state cannot avoid responsibility by placing the blame on non-state actors; it will be responsible for injuries arising from both its own actions and its failure to control others. *Id.*

59. *See* ILC Draft Articles, *supra* note 51, art. 27-28. When more than one state is involved in an activity that causes injury to an alien, causation theory is helpful in determining whether the act of one state may relieve the territorial sovereign of liability by breaking the chain of causation. Strauss, *Causation As An Element of State Responsibility*, 16 L. & POL'Y INT'L BUS. 893, 922-23 (1984). This theory also takes into account the lawfulness of the acts committed. Thus, if the first state commits an

cion.[60] The ILC's draft articles provide guidelines for certain situations,[61] but it is difficult to anticipate the variations that may arise.

The major areas of uncertainty in applying state responsibility law concern the breach of alleged obligations and the imputability of wrongful acts to the state.[62] Not all states agree as to what their duties are with respect to each other. When nations cannot agree upon their duties under international law, they will not agree on whether a breach has occurred, and hence, whether a remedy must be offered.[63] There is particularly acute disagreement over the issue of compensation for the expropriation of alien property.[64]

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unlawful act, to which the second state lawfully responds, the second state will not be liable for injuries resulting from its conduct. *Id.* at 924. The first state will be held responsible because its unlawful act was the "proximate" cause of the injury. *Id.* The deficiency of this approach is the same as that afflicting the whole of state responsibility law, that is, when is state conduct "unlawful" under international law? For a discussion of the dispute over the duty to compensate for expropriations, *see infra* notes 65-92 and accompanying text.

60. ILC Draft Articles, *supra* note 51, art. 28(1)-(2). Not only will the territorial sovereign be exculpated of liability for coerced acts, or acts committed under the control or direction of foreign governments, but responsibility will shift to the intervening foreign state. *Id.* It is also possible for both states to incur responsibility under these circumstances. *Id.* art. 28(3).

61. *See* ILC Draft Articles, *supra* note 51, which provide that the conduct of the following may be imputed to the state for the purpose of allocating responsibility: official state organs, such as legislative, executive, and judicial branches of government, *id.* art. 5-6, even if they exceed their competence, *id.* art. 10; organs that are "not part of the formal structure of the state. . .but which [are] empowered. . .to exercise elements of the governmental authority," *id.* art. 7 (2); persons "acting on behalf" of the state, *id.* art. 8(a), or "exercising elements of the governmental authority in the absence of the official authorities," *id.* art. 8(b); organs "placed at the disposal of a state by another state or by an international organization," *id.* art. 9; insurrectional movements which become the new government of the state. *Id.* art. 15.

In contrast, a state will *not* be held responsible for the acts of: persons not acting on behalf of the state, *id.* art. 11; organs of another state acting for their own sovereign in the territory of the state, *id.* art. 12; organs of an international organization acting for that organization, *id.* art. 13; organs of an unsuccessful insurrectional movement. *Id.* art. 14.

62. C.F. AMERASINGHE, *supra* note 22, at 49-55; Christenson, *supra* note 53, at 321-22; Strauss, *supra* note 59, at 902-03.

63. *See* R. LILLICH, SRIA, *supra* note 22, at 14-16. The ILC's draft articles on state responsibility provide no guidance on the substantive obligations imposed by international law; they merely set forth the legal consequences of breaches of obligations. *Id.*

64. *Compare* Arechaga, *supra* note 12 (states have no duty under international law to compensate aliens for expropriated property) *with* Muller, *Compensation for Nationalization: A North-South Dialogue*, 19 COLUM. J. TRANSNAT'L L. 35 (1981) (the widely-ac-

### C. *The Dispute Over Compensation*

The right of a sovereign state to control its resources is an established principle of international law.[65] Accordingly, a state may dispose of property within its jurisdiction as it sees fit, whether the property is owned by its nationals or by nationals of other states.[66] Thus, expropriations[67] are not *per se* illegal under international law.[68] However, if the expropriation does not fulfill certain requirements, it will be regarded as contrary to international law.[69] Under the "classical" standard,[70] expropriations are lawful if three conditions are met: 1) the taking was for a public purpose;[71] 2) the action did not discrim-

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cepted rule is that states have a duty under international law to compensate aliens for expropriations).

65. *See* Resolution on Permanent Sovereignty Over Natural Resources, G.A. Res. 1803, (XVII), 17 U.N. GAOR Supp. (No. 17) at 15, U.N. Doc. A/5217 (1962) [hereinafter Res. 1803], in which the United Nations reaffirmed "the inalienable right of all states freely to dispose of their natural wealth and resources in accordance with their national interests." The United States takes the same position. *See Hanson Co. v. United States*, 261 U.S. 581, 587 (1923); RESTATEMENT, *supra* note 53, § 206 (Tent. Draft No. 2 1982).

66. I. BROWNLIE, PRINCIPLES *supra* note 12, at 531-33; *see also* Res. 1803, *supra* note 65 ("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.").

67. Brownlie defines expropriations as "deprivation by state organs of a right of property . . . followed by transfer to the territorial state or to third parties." I. BROWNLIE, PRINCIPLES, *supra* note 12, at 532. Where the expropriation is part of large-scale social or economic reform, it is often referred to as "nationalization." *Id.* Since nationalizations are for the most part a "species of expropriations," C.F. AMERASINGHE, *supra* note 22, at 129, the terms will be used interchangeably here.

68. I. BROWNLIE, PRINCIPLES, *supra* note 12.

69. *See* Arechaga, *supra* note 12; Garcia-Amador, *supra* note 49.

70. *See infra* notes 76-80 and accompanying text for the views of nations which reject the traditional standard regarding expropriations.

71. R. LILLICH, INT'L CLAIMS, *supra* note 54, at 137-38; *see also* Note, *International Law of Expropriation of Foreign Owned Property: The Compensation Requirement and the Role of the Taking State*, 6 LOYOLA INT'L & COMP. L.J. 355, 356 (1983) [hereinafter Note, *Compensation and the Taking State*].

Because the decision to expropriate is an exercise of sovereign discretion, the public purpose requirement is merely a way of ensuring that takings serve legitimate rather than capricious ends. C.F. AMERASINGHE, *supra* note 22, at 135-38; R. LILLICH, INT'L CLAIMS, *supra* note 54, at 137-39. In the absence of clear norms as to what objectives will justify expropriations, this requirement will rest on subjective, *ad hoc* criteria. *Id.*; *see also* RESTATEMENT, *supra* note 53, § 712 comment c (Tent. Draft No. 7 1986) ("[t]he public purpose limitation has not figured prominently in international claims practice, perhaps because the concept of public purpose is broad and not subject to effective re-examination by other states").

inate against aliens;[72] and 3) the state provided "prompt, adequate, and effective" compensation.[73]

The most controversial question regarding expropriations is whether and in what manner a state must compensate aliens for the deprivation of their property.[74] Although a majority of states agree that some compensation should be offered, most do not accept the classic "prompt, adequate, and effective" standard.[75] Less developed, economically fragile states cannot bear the heavy burden of this standard.[76] From their perspective, the form and amount of compensation should depend upon a nation's ability to pay as well as the type of expropriation.[77] Thus, if a large-scale nationalization program is implemented as a measure of social reform, less stringent compensation requirements should be imposed.[78] In addition, some commentators have argued that a state need not compensate for expropriations unless it has been unjustly enriched.[79] Under this theory, a state has no duty to compensate if it does not enjoy an increase in wealth, even though aliens have suffered losses.[80]

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72. *See* C.F. AMERASINGHE, *supra* note 22, at 138-42; I. BROWNLIE, PRINCIPLES, *supra* note 12, at 539; Note, *Compensation and the Taking State*, *supra* note 71. The United States regarded the 1960 Cuban nationalization of foreign assets as illegal under international law because it unfairly discriminated against aliens, chiefly United States citizens. *See* C.F. AMERASINGHE, *supra* note 22, at 138-42. The illegality of such action was the basis for disregarding the act of state doctrine and hearing claims against Cuba in United States courts under the Hickenlooper Amendment. *See infra* notes 105-09 and accompanying text.

73. Note, *Compensation and the Taking State*, *supra* note 71; I. BROWNLIE, PRINCIPLES, *supra* note 12, at 533. While in theory adhering to the "prompt, adequate and effective standard," states have in practice settled for "partial" payments spread over long periods of time. *Id.* at 544; R. LILLICH, INT'L CLAIMS, *supra* note 54, at 216; Muller, *supra* note 64, at 46.

Installment payments are generally acceptable as long as the payment period does not exceed ten years. Muller, *supra* note 64, at 47. The "effectiveness" of the payment depends upon the currency used. R. LILLICH, INT'L CLAIMS, *supra* note 54, at 240. Claimant states insist on payment in their own or some other stable currency. *Id.* at 242. Government bonds may be acceptable, if they are marketable and due to mature in the near future. Muller, *supra* note 64, at 47.

74. *See* Clagett, *supra* note 12; Garcia-Amador, *supra* note 49, at 20.

75. *See* I. BROWNLIE, PRINCIPLES, *supra* note 12, at 544; Arechaga, *supra* note 12, at 184; Muller, *supra* note 64, at 37.

76. Note, *Compensation and the Taking State*, *supra* note 71, at 359.

77. *Id.*; Arechaga, *supra* note 12, at 184.

78. I. BROWNLIE, PRINCIPLES, *supra* note 12, at 538; Muller, *supra* note 64, at 45.

79. Arechaga, *supra* note 12, at 182.

80. *Id.*

As a majority of nations reject the "prompt, adequate, and effective" standard, many legal scholars maintain that it is not a viable tenet of customary international law.[81] Nevertheless, the Western developed nations continue to support the standard.[82]

More troublesome is the issue of whether expropriations are actually within the scope of international law. Until 1974, the declarations and resolutions of the United Nations reaffirmed the traditional duty of states under international law to compensate for expropriations of alien property.[83] However, in 1974, the United Nations adopted the Charter of Economic Rights and Duties of States, part of the New International Economic Order (NIEO).[84] The NIEO provides that compensation should be paid, but leaves the decision to the discretion of the nationalizing state.[85] Compensation for expropriations of alien property is not a duty under the terms of the NIEO,[86] and any disputes regarding compensation are settled according to

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81. *See Id.* at 184; Note, *Compensation and the Taking State*, *supra* note 71, at 359. *But cf.* Clagett, *supra* note 12, at 74. *See also supra* note 35 for a discussion of the consensual basis of international law.

82. I. BROWNLIE, PRINCIPLES, *supra* note 12, at 533; Clagett, *supra* note 12; 1975 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW at 488. The following states voted against the Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX) 29 U.N. GAOR Supp. (No. 31) 50, U.N. Doc. A/9631 (1975) [hereinafter Res. 3281], which rejected the traditional standard of compensation supported by Western nations: Belgium, Denmark, Federal Republic of Germany, Luxembourg, United Kingdom, United States. *See* 1974 U.N.Y.B. 404.

83. U.N. CHARTER; Res. 1803, *supra* note 65; Res. 2625, *supra* note 30. This was in spite of growing opposition by less developed countries to the compensation requirement, which they charged was instituted by "exploiting imperialistic powers to promote their interests." *See* Jessup, *Responsibility of States*, *supra* note 23, at 419. In essence, the argument was that capital-exporting nations formulated the compensation standard to protect the financial interests of their nationals who profitted by tapping the resources of undeveloped colonies and weak states. *Id.* As these states tried to gain more control over their resources and thereby reduce their dependence on foreign powers, they resorted to expropriation of assets within their jurisdiction. The compensation requirement promulgated by Western developed states stood as a major obstacle to the achievement of these goals. *See* Arechaga, *supra* note 12, at 181 ("the assertion of the existence of a duty of restitution of a nationalized undertaking would be tantamount to a denial of the right to nationalize"); *see also* I. BROWNLIE, PRINCIPLES, *supra* note 12, at 537; Muller, *supra* note 64, at 45.

84. Res. 3281, *supra* note 82. Rather than an economic agenda, the NIEO is an attempt to restructure the entire existing international order. *See* Garcia-Amador, *supra* note 49, at 14-15.

85. Res. 3281, *supra* note 82; Garcia-Amador, *supra* note 49, at 29; Note, *Compensation and the Taking State*, *supra* note 71, at 361-62.

86. Arechaga, *supra* note 12, at 186; Garcia-Amador, *supra* note 49, at 29.

domestic rather than international law.[87]

The NIEO has been criticized as a repudiation of international law insofar as it takes the whole subject matter of expropriations outside the scope of international law and places it within the domestic jurisdiction of the taking state.[88] If the taking state did not compensate for expropriating property, it would not be guilty of a wrongful act under international law,[89] although the sovereign of the injured alien could publicly protest such action.

Thus, the current debate over expropriations centers on both the adequacy of compensation and the applicability of international law.[90] Nations that support the NIEO emphasize domestic discretion regarding compensation for expropriations.[91] Western developed nations maintain the traditional view that expropriations are subject to international law, which requires that a state provide prompt, adequate and effective compensation.[92] This conflict is likely to cause disputes between states over the proper remedies for expropriations and inconsistent results in the resolution of these situations.

## II. *SEEKING RELIEF FOR FOREIGN PROPERTY LOSS IN UNITED STATES COURTS: THE DOMESTIC PERSPECTIVE ON TAKINGS OF PROPERTY*

The United States recognizes that, as an exercise of sovereignty, a nation may expropriate or nationalize alien property within its territory.[93] However, the United States maintains

87. Garcia-Amador, *supra* note 49, at 41-43. This has been called a resurrection of the Calvo Doctrine, whereby the national standard of treatment for aliens prevails. *Id.*

88. *See* Arechaga, *supra* note 12, at 186.

89. *Id.* at 187; Note, *Compensation and the Taking State*, *supra* note 71, at 356.

90. Garcia-Amador, *supra* note 49, at 57; Muller, *supra* note 64, at 36.

91. Arechaga, *supra* note 12, at 181; Muller, *supra* note 64, at 37.

92. *See supra* notes 73, 82 and accompanying text; *see also* Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 887-93 (2d Cir. 1981) (discussing various views on the standard of compensation for expropriations, and "reject[ing] the position espoused by some states that property may be expropriated without an obligation on the part of the nationalizing state to pay any compensation therefor.").

93. *See generally* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972). To be lawful, however, expropriations must be for a public purpose, non-discriminatory against aliens, and adequately compensated. RESTATEMENT, *supra* note 53, § 712 (Tent. Draft No. 7 1986).

that "prompt, adequate and effective" compensation[94] must be provided by the taking state, or else the expropriation violates international law.[95] Furthermore, under the Hickenlooper Amendment to the Foreign Assistance Act,[96] the United States allows its nationals to seek redress in its courts against a foreign sovereign that provides inadequate or no compensation for an expropriation of property.[97]

United States citizens also have a constitutional right to compensation from the United States government if it takes their property.[98] This right applies whether the property taken is located in the United States or in a foreign territory.[99] When the property is located abroad, adjudication of the claim under domestic law may also affect the interests of the foreign sovereign in whose territory the property was located.[100] In such cases, international legal principles of intervention, comity and state responsibility inevitably come into play. In addition, the claim may not even be resolved in a United States court because of justiciability doctrines that prevent adjudication of

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94. This phrase was coined by Secretary of State Cordell Hull in his protest letter to Mexico concerning compensation for the nationalization of United States citizens' property in the 1930's. *See supra* note 12; RESTATEMENT, *supra* note 53, § 712 reporter's note 1 (Tent. Draft No. 7 1986); *see also* 1975 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 489, in which the State Department reaffirmed the Hull Doctrine standard.

95. RESTATEMENT, *supra* note 53, § 712 (Tent. Draft No. 7 1986); *see also* Hickenlooper Amendment to the Foreign Assistance Act, 22 U.S.C. § 2370(e)(1), which states that international law requires "speedy compensation . . . in convertible foreign exchange, equivalent to the full value of" expropriated property.

96. 22 U.S.C. § 2370(e)(1)-(2) (1982). This section is named after Senator Hickenlooper, who proposed the amendment. It is also sometimes called the Sabbatino Amendment, referring to the Supreme Court's decision in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), which was overruled by the Amendment. *See Chase Manhattan*, 658 F.2d at 882 n.10.

97. *See* 22 U.S.C. § 2370(e)(2) (1982), which provides that the act of state doctrine will not bar judicial review in United States courts of claims against foreign sovereigns for uncompensated expropriations of United States citizens' property.

98. U.S. CONST. amend. V; *see also* A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 1-3 (1977); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 463-65 (1978).

99. *See* Turney v. United States, 115 F. Supp. 457, 464-65 (Ct. Cl. 1953); L. HENKIN, *supra* note 93; RESTATEMENT, *supra* note 53, § 721(a) ("any exercise of authority by the United States in the conduct of foreign relations is subject to the Bill of Rights and other constitutional restraints protecting individual rights.").

100. *See generally*, Langenegger v. United States, 756 F.2d 1567 (Fed. Cir.), *cert. denied*, 106 S. Ct. 78 (1985); Ramirez v. Weinberger, 745 F.2d 1500 *vacated sub nom.* Weinberger v. Ramirez, 105 S. Ct. 2353 (1985), *on remand* 788 F.2d 143 (D.C. Cir. 1986).

sensitive political and foreign policy matters.[101]

### A. *Suing the Foreign Sovereign: The Act of State Doctrine and the Hickenlooper Amendment*

Traditionally, United States courts will not exercise jurisdiction in suits brought by United States citizens against foreign sovereign nations.[102] This justiciability rule, known as the act of state doctrine,[103] is based on principles of international comity, the respect for the rights accorded all sovereign nations.[104]

In 1964, in reaction to the Cuban nationalization of alien property, the United States Congress enacted the Hickenlooper Amendment[105] to the Foreign Assistance Act,[106] which created an exception to the act of state doctrine. Under the Hickenlooper Amendment, United States courts may adjudicate claims against foreign governments that expropriated United States citizens' property in violation of international law.[107] The Amendment provides that states that expropriate property are obligated under international law to provide "speedy compensation for such property in convertible foreign exchange, equivalent to the full value" of the property.[108] Thus, the United States standard of compensation for expropriations by foreign states is essentially identical to the standard for domestic takings under the fifth amendment to the

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101. *See infra* notes 123-29 and accompanying text.

102. *See generally* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805 (1964). This did not deprive individuals with claims against other countries. The traditional avenue of diplomatic protection was always available, although that procedure left to government discretion whether or not to assert the individual's claim. *See* Jessup, *Responsibility of States*, *supra* note 23, at 908 (the State Department often declines to bring claims of United States citizens against other nations, "due, not to the demerits of the claims, but to some overriding policy of fostering friendly relations.").

103. *See Sabbatino*, 376 U.S. at 416; Note, *Rehabilitation and Exoneration of the Act of State Doctrine*, 12 N.Y.U. J. INT'L L. & POL. 599 (1980).

104. *Id.* It is sometimes said that one of the privileges of state sovereignty is the right to immunity from the jurisdiction of foreign courts. *See* Trindade, *Domestic Jurisdiction and Exhaustion of Local Remedies: A Comparative Analysis*, 16 INDIAN J. INT'L L. 187 (1976).

105. 22 U.S.C. § 2370(e)(1)-(2) (1982).

106. Foreign Assistance Act, 22 U.S.C. ch. 32 §§ 2151-2443 (1982).

107. 22 U.S.C. § 2370(e)(2) (1982).

108. *Id.* § 2370(e)(1).

Constitution.[109] Even if the expropriating state adheres to a different standard of compensation for expropriations, it will be subject to suit in United States courts if it does not meet the United States standard.

The Hickenlooper Amendment also requires the President to suspend aid to nations that have unlawfully nationalized, expropriated, or seized control of United States citizens' property.[110] If national security interests required otherwise, however, the President may waive this provision.[111]

Most cases that have relied on the Hickenlooper Amendment's exception to the act of state doctrine involved proceeds within United States jurisdiction that were traceable to property expropriated abroad.[112] If the foreign state tried to market the proceeds of expropriated property in the United States, the proceeds could be attached as a basis of jurisdiction, and a court could adjudicate the claim notwithstanding the act of state doctrine.[113] Likewise, if property within United States jurisdiction were the target of expropriation by a foreign state, the dispute could also be heard by United States courts under the Hickenlooper Amendment.[114]

In *Ramirez v. United States*, the United States Court of Appeals for the District of Columbia Circuit invoked the Hick-

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109. *See* RESTATEMENT, *supra* note 53, § 712 comments c-d (Tent. Draft No. 7 1986).

110. 22 U.S.C. § 2370(e)(1)(c) (1982).

111. *Id.*; *see also* Ramirez v. Weinberger, 745 F.2d 1500, 1550 (D.C. Cir. 1984) (Scalia, J., dissenting).

112. *See e.g.*, Compania de Gas de Nuevo Laredo v. Entex, Inc., 686 F.2d 322 (5th Cir. 1982) (Hickenlooper Amendment does not apply to case when the expropriated property or its proceeds are not subsequently located in the United States at the time of suit), *cert. denied*, 460 U.S. 1041 (1983); Banco Nacional de Cuba v. First Nat'l City Bank, 431 F.2d 394, 402 (2d Cir. 1970) (Hickenlooper Amendment only applies when the expropriated property is being marketed in the United States), *vacated on other grounds sub nom.* First Nat'l City Bank v. Banco Nacional de Cuba, 400 U.S. 1019 (1971); United Mexican States v. Ashley, 556 S.W.2d 784 (Tex. 1977) (Hickenlooper Amendment not applicable where neither expropriated property nor its proceeds are in the United States).

The legislative history of the Amendment indicates that its purpose was to "discourage foreign expropriations by making sure that the United States cannot become a 'thieves market' for the product of foreign expropriations." *See* 110 Cong. Rec. 19555, 19559 (1964). In addition, foreign investment would be promoted because individuals would be guaranteed their "day in court" in case of conflicts with foreign sovereigns. *Id.*; *see also Chase Manhattan*, 658 F.2d at 882 n.10.

113. *See, e.g., First Nat'l*, 431 F.2d at 400.

114. *Id. See also Compania de Gas*, 686 F.2d at 327.

enlooper Amendment to hear a case involving property expropriated in and still remaining in the foreign jurisdiction.[115] This was the first time a court had used the Amendment as a basis for disregarding the act of state doctrine when there were no proceeds of expropriated property in United States jurisdiction.[116] The *Ramirez* decision created a split in the federal circuit courts that remains unresolved since the United States Supreme Court vacated the decision on other grounds, without considering the merits of the case.[117]

### B. *Suing the United States for Foreign Property Loss: Fifth Amendment Liability*

The United States Constitution provides that private property shall not "be taken for public use, without just compensation."[118] This guarantee applies to government action both in the United States and abroad.[119] Thus, a United States citizen whose rights are violated by the United States Government while he is in a foreign territory has a cause of action under domestic law.[120] The same analysis used in domestic takings of property applies to foreign takings by the United States.[121]

In domestic eminent domain cases, judicial review of government action is limited to determining whether a true public purpose justified the taking and whether the means used, that is, the taking of the particular property, was a reasonable way

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115. *Ramirez*, 745 F.2d at 1541 n.180.

116. *See supra* note 112.

117. *See infra* note 168.

118. U.S. CONST. amend. V; *see also supra* note 98.

119. *See supra* note 99.

120. Reid v. Covert, 354 U.S. 1, 5-14 (1957); RESTATEMENT, *supra* note 53, § 721, comment g.

121. Turney v. United States, 115 F. Supp. 457 (Ct. Cl. 1953). Under United States law, a government taking of private property is lawful if three conditions are met: the taking is for a legitimate public purpose, the means used are rational, and compensation is paid. Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 241-43 (1984); *see also* A. ACKERMAN, *supra* note 98. The legislature has broad discretion to determine when a taking will serve a public purpose, *see Hawaii Housing*, 467 U.S. at 239-44, and the property taken need not be put to use for the general public in order to fulfill the public use requirement. Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984); Regional Rail Reorg. Cases, 419 U.S. 102 (1974). Indeed, even if the government does not take a possessory interest in the property, but transfers it to other parties, the action is lawful if a legitimate public purpose is thereby served. *Hawaii Housing*, 467 U.S. at 243-44.

of achieving the end goal.[122] When the United States takes property from its citizens in a foreign jurisdiction, valid claims for compensation under the fifth amendment may be hampered by prudential considerations that preclude justiciability. The political question doctrine, for example, requires judicial deference to executive discretion in political matters.[123] Foreign policy, in particular, is rarely regarded as a proper subject for judicial review.[124] The Executive's treaty-making power is therefore exempt from judicial review, even if treaty agreements affect individual citizens' property interests.[125] Similarly, if United States involvement in the foreign territory is covert, or if relations with a foreign sovereign are politically sensitive, a court may decline to consider the merits of the case.[126]

Determining the United States' role in a foreign taking may require an examination of the activities of the territorial sovereign, which is generally prohibited by the act of state doctrine.[127] Courts have held that the doctrine may be waived under the Hickenlooper Amendment in cases in which proceeds of expropriated property are in the United States.[128] However, the courts are split on whether the Amendment permits review of foreign acts of state when the expropriated

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122. *Hawaii Housing*, 467 U.S. at 242-43; National Bd. of YMCA v. United States, 395 U.S. 85 (1969).

123. The most definitive explanation of this doctrine was set forth in Baker v. Carr, 369 U.S. 186, 196-98 (1962). The underlying premise is that " 'political questions' . . . concern matters as to which departments of government other than the courts, or perhaps the electorate as a whole, must have the final say." L. TRIBE, *supra* note 98, at 72; *see also* Henkin, *Is There a "Political Question" Doctrine?* 85 YALE L.J. 597 (1976).

124. *See* Haig v. Agee, 453 U.S. 280, 292 (1981); Crockett v. Reagan, 558 F. Supp. 893, 898 (D.D.C. 1982), *aff'd*, 720 F.2d 1355, 1356-57 (D.C. Cir.), *cert. denied*, 467 U.S. 1251 (1984). *But see* Ramirez v. Weinberger, 745 F.2d 1500, 1515 (D.C. Cir. 1984) ("The Executive's power to conduct foreign relations free from the unwarranted supervision of the Judiciary cannot give the Executive *carte blanche* to trample the most fundamental liberty and property rights of this country's citizenry."), *vacated on other grounds sub nom.* Weinberger v. Ramirez, 105 S. Ct. 2353 (1985), *on remand* 788 F.2d 143 (D.C. Cir. 1986).

125. Shanghai Power Co. v. United States, 4 Ct. Cl. 237 (1983), *aff'd*, 765 F.2d 159 (Fed. Cir.), *cert. denied*, 106 S. Ct. 279 (1985); *see also* RESTATEMENT, *supra* note 53, § 721.

126. *See* Flynn v. Schultz, 748 F.2d 1186, 1192 (7th Cir. 1984), *cert. denied*, 106 S. Ct. 94 (1985).

127. *See supra* note 102-104 and accompanying text.

128. *See supra* note 112-114 and accompanying text.

property remains in the foreign situs.[129] If the act of state doctrine is not waived, United States courts will not exercise jurisdiction over the claim.

In addition to justiciability barriers, United States courts have held that exigencies of war may exculpate the United States of liability to its citizens for loss of property abroad, even when there was clear involvement in the taking.[130] For example, United States courts have held that the United States was not liable for property loss resulting from the directives of Allied Occupation Forces in post-World War II Germany and Japan, although the United States participated in the decision and policy-making that prompted the takings.[131] In those cases, the territorial sovereign bore responsibility for paying the costs of post-war rehabilitation, including compensation to individuals deprived of their property.[132] The courts also stressed that the takings primarily benefitted the territorial sovereign and not the United States.[133]

In the post-World War II cases, a crucial factor was that the United States never took possession of the property located in the foreign jurisdiction.[134] The importance of this aspect of fifth amendment liability has been significantly diminished in recent cases in which the "public use" requirement was held to include situations in which the government never actually took possession.[135] This change in the constitutional analysis of government liability is especially relevant to claims regarding loss of foreign property. The broadened classification of takings increases the types of activities that may lead to liability, including situations where it is harder for the United States to actually take possession of property. Accordingly, recent foreign takings cases have held that a compensable taking exists when government action deprives an owner of the use of his property, or "makes it possible for someone else to obtain

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129. *See* Ramirez v. Weinberger, 745 F.2d 1500, 1573 (D.C. Cir. 1984), *vacated sub nom.* Weinberger v. Ramirez, 105 S. Ct. 2353 (1985), *on remand* 788 F.2d 143 (D.C. Cir. 1986).

130. *See* Best v. United States, 292 F.2d 274, 279 (Ct. Cl. 1961); Anglo Chinese Shipping Co. v. United States, 127 F. Supp. 553, 556-57 (Ct. Cl. 1955).

131. *See Best*, 292 F.2d at 276-79; *Anglo Chinese Shipping*, 127 F. Supp. at 556-57.

132. *See Best*, 292 F.2d at 279; *Anglo Chinese Shipping*, 127 F. Supp. at 556-57.

133. *See Anglo Chinese Shipping*, 127 F. Supp at 556-57.

134. *Id.*

135. *See supra* note 121 and accompanying text.

the use or benefit of another person's property."[136] This analysis also suggests that treaty agreements that "extinguish" claims against foreign sovereigns, in which possession is not in issue, constitute takings.[137]

A modern test of liability for foreign takings was set forth in the 1985 decision, *Langenegger v. United States*.[138] The court ruled that the United States would be liable if the plaintiff could prove "direct and substantial" United States involvement in the foreign taking.[139] A finding of direct and substantial involvement depends on the nature of the activity and the level of benefit derived by the United States.[140] While the court held that "diplomatic persuasion" did not constitute sufficient involvement, it did not specify activities that would sustain a charge of liability.[141]

### C. *Multiple-State Involvement in Takings of Property: Two Recent Cases*

The expropriation of alien property precipitates a state-to-state conflict in which individuals must rely on their sovereign government to bring their claims and obtain relief.[142] In addition, United States citizens have a constitutional right to compensation when their property is taken by their own government.[143] Until recently, claims against the United States for foreign takings arose in a wartime context.[144] Such precedent is ill-equipped to resolve cases of foreign takings that occur in peacetime. The *Ramirez* and *Langenegger* decisions represent a new phase in United States domestic law in which the courts have struggled to define the scope of United States liability for

136. Aris Gloves v. United States, 420 F.2d 1386, 1391 (Ct. Cl. 1970); *see also* Langenegger v. United States, 756 F.2d 1565 (Fed. Cir. 1984), *cert. denied*, 106 S. Ct. 78 (1985).

137. *But see* Shanghai Power Co. v. U.S., 4 Ct. Cl. 237 (1983), *aff'd*, 765 F.2d 159 (Fed. Cir.), *cert. denied*, 106 S. Ct. 279 (1985).

138. 756 F.2d 1565; *see infra* notes 169-185 for a more detailed discussion of this case.

139. *Langenegger*, 756 F.2d at 1571-72.

140. *Id.*

141. *Id.* at 1572.

142. *See supra* notes 47-49 and accompanying text.

143. *See supra* notes 98-99 and accompanying text.

144. *See, e.g.*, Aris Gloves v. United States, 420 F.2d 1386, (Ct. Cl. 1970); Anglo Chinese Shipping Co. v. United States, 127 F. Supp 553 (Ct. Cl. 1955); Gray v. United States, 21 Ct. Cl. 340 (1886).

taking its citizens' property located in friendly nations in peacetime circumstances.[145] This task is complicated by both the changing standards of constitutional liability and the uncertainty of the international law of state responsibility and expropriations. It is likely that the uncertainties of international law will cause United States claimants to assert United States liability whenever possible. For this reason, the cases discussed below are of significant import, both in the international and domestic legal context.

### 1. Ramirez v. Weinberger

Ramirez, a United States citizen, owned a multi-million dollar cattle ranch and meat-packing company on a 14,000 acre tract of land in Honduras. In early 1983, the United States Department of Defense selected Ramirez's land without his knowledge as the site for a Regional Military Training Center (Training Center) to train soldiers from El Salvador.[146] Several months later, the Honduran Government released an official statement acknowledging the establishment of the Training Center and the presence of foreign military advisers. After Ramirez had brought suit in a United States court seeking to enjoin the United States from using his property, Honduras officially requested expropriation of Ramirez's land for the Training Center.[147] However, the Honduran Government neither ratified the request, as required by official procedure, nor offered compensation.[148] Soon after the Training Center was completed, soldiers began military manuevers, which caused Ramirez's business to cease operating.[149] Neither the Honduran nor the United States Governments indicated that compensation would be forthcoming.[150]

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145. *See* Ramirez v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984), *vacated sub nom.* Weinberger v. Ramirez, 105 S. Ct. 2353 (1985), *on remand* 788 F.2d 143 (D.C. Cir. 1984); Langenegger v. United States, 756 F.2d 1565 (Fed. Cir. 1984), *cert. denied*, 106 S. Ct. 78 (1985).

146. 745 F.2d at 1507-08. Ramirez was never informed of the decision to use his land as a Military Training Center. The Army Corp of Engineers simply came upon his land with work crews and began construction. The United States Embassy in Honduras and the State and Defense Departments in Washington, D.C. refused to see him. *Id.*

147. *Id.* at 1509, 1535.

148. *Id.* at 1535.

149. *Id.* at 1507.

150. *Id.* at 1508-09, 1535.

Ramirez sued the United States, claiming that it was responsible for taking his property and that, in the absence of formal expropriation and adequate compensation, the act violated the United States Constitution.[151] The Government sought to bar the case at the outset on grounds of nonjusticiability, arguing that the political question doctrine barred judicial review because the case required scrutiny of sensitive foreign policy matters, an area in which the courts should defer to the discretion of the executive branch.[152] The district court dismissed the case under the political question doctrine.[153] The District of Columbia Circuit reversed, stating that the case only required the court to interpret the Constitution, not to pass judgment on the President's foreign policy.[154]

On appeal to the Circuit Court, the United States Government raised a second defense, namely, that the act of state doctrine barred review because the Training Center project was an act of the Honduran Government.[155] The District of Columbia Circuit rejected the act of state argument because the plaintiff's claim did not require the court to sit in judgment on the activities of the Honduran government with regard to the seizure of the property.[156] Moreover, the Honduran Government's expropriation decree did not constitute a completed expropriation and, in the absence of conclusive foreign official action, there was no act of state.[157] Furthermore, even a "limited degree of complicity by Honduran military officials" with the United States would not absolve the United States of liability for its own constitutional violations.[158]

The final blow to the act of state defense was the court's

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151. *Id.* at 1525 n.102, 1529.

152. 568 F. Supp. at 1238.

153. *Id.* at 1238-40.

154. 745 F.2d at 1512-13. Moreover, the court ruled that the political question doctrine did not exclude from judicial review anything done by United States officials to their citizens on foreign soil. *Id.* at 1515. This views corresponds with the long-standing principle that the United States government must act within constitutional bounds towards its citizens both at home and abroad. *See supra* note 99 and accompanying text.

155. 745 F.2d at 1509.

156. *Id.* at 1542 (quoting Underhill v. Hernandez, 168 U.S. 250 (1897)).

157. *Id.* at 1534-35.

158. *Id.* at 1530.

interpretation of the Hickenlooper Amendment.[159] The court reasoned that, if the expropriation was an act of the Honduran Government, Honduras had violated international law by not providing compensation. Under such circumstances, the Hickenlooper Amendment would allow judicial review of Ramirez's claim, notwithstanding the act of state doctrine, and the United States would have to suspend military and financial assistance to Honduras.[160] Rather than find that the United States had willingly violated the Hickenlooper Amendment by continuing aid to Honduras, the court reasoned that the United States must realize that Honduras had not seized the property in question.[161] Thus, Honduras had not violated international law and the United States would not have to suspend aid to Honduras.[162]

The three dissenting opinions in *Ramirez* objected to the attribution of responsibility to the United States for the sovereign act of another, independent State.[163] One dissenting judge considered Honduras' expropriation decree as evidence of an act of state even though the expropriation procedure required more than just the decree.[164] Finding the United States wholly responsible for the Training Center was a "flagrant affront to the sovereignty of Honduras," and implied that the United States unduly influenced the government of another nation.[165] This dissent distinguished *Ramirez* from the hostile expropriations that prompted passage of the Hickenlooper Amendment.[166] In addition, the Hickenlooper Amendment provided for presidential waiver when national security interests were at stake.[167] Furthermore, before *Ramirez*, courts had

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159. 22 U.S.C. § 2370(e)(1)-(2) (1982). *See supra* notes 105-117 and accompanying text for a discussion of the Hickenlooper Amendment.

160. 745 F.2d at 1541. *See also* 22 U.S.C. § 2370(e)(2) (1982). Unlike previous cases involving the Hickenlooper Amendment, *see supra* note 112, the *Ramirez* majority did not consider the location of the expropriated property as relevant to whether the Hickenlooper Amendment was applicable. This approach strictly construes the statutory language, while ignoring legislative history and legal precedent.

161. 745 F.2d at 1539.

162. *Id.*

163. *See* 745 F.2d at 1545-1550 (Tamm, C.J., dissenting), 1550-1566 (Scalia, J., Bork, J., and Starr, J., dissenting), and 1566-1574 (Starr, J. and Scalia, J., dissenting).

164. *Id.* at 1568-69 (Starr, J., and Scalia, J., dissenting).

165. *Id.* at 1572 (Starr, J., and Scalia, J., dissenting).

166. *Id.* at 1573 (Starr, J., and Scalia, J., dissenting).

167. *Id.* at 1573 n.9.

invoked the Hickenlooper Amendment only when claimants' property was within United States jurisdiction at the time of suit.[168]

### 2. Langenegger v. United States

Langenegger, a United States citizen, owned a coffee plantation in El Salvador.[169] In 1980, the El Salvadoran Government instituted an agrarian reform program which permitted the Government to expropriate all privately held land of over 1235 acres.[170] All affected landowners received long-term Salvadoran bonds as compensation.[171] These non-negotiable bonds were, however, not equivalent to the value of the land and were essentially worthless.[172]

Langenegger sued the United States Government, charging it with responsibility for the loss of his property.[173] Specifically, he argued that the expropriation was a result of United States coercion because United States military and financial support to El Salvador was conditioned on adoption of an agrarian reform program as well as various other reforms.[174]

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168. *Id.* at 1573-74. The case was appealed to the Supreme Court in October 1984. Later that month, while certiorari was pending, the United States Congress passed a specific bill to halt funds for the RMTC until the Honduran government "provided a site," "assumed responsibility for any competing claims" to the land and "recognizes the need to compensate as required by international law the United States citizen who claims injury from the establishment and operation of the existing Center . . ." Pub. L. No. 98-473, 98 Stat. 1894, 98th Cong. 2d Sess. Oct. 12, 1984. The Supreme Court thereafter vacated the decision in light of this bill, without issuing an opinion as to the soundness of the D.C. Circuit's reasoning. *See* 105 S. Ct. 2353.

169. *See* Langenegger v. United States, 756 F.2d 1565, 1567 (Fed. Cir. 1984), *cert. denied*, 106 S. Ct. 78 (1985).

170. *Id.* The expropriated properties were converted into cooperatives run by those who previously worked the estates. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *See* Pub. L. No. 99-83, 99 Stat. 237, at 983-985, *reprinted in* 1985 U.S. CODE CONG. & AD. NEWS 158, which appropriated $79.6 million to El Salvador for fiscal year 1986-87, and in which Congress stated as one of its "expectations": "The Government of El Salvador will make demonstrated progress . . . in implementing the land reform program." *Id.*

The effectiveness of the alleged coercion stemmed from the fact that the United States backed Duarte when he was a revolutionary trying to gain control over the El Salvadoran government. Duarte depended on continued United States support in order to stay in power. Backing Duarte furthered United States interests in fending off a Marxist revolution, thus fostering political stability.

At the very least, the agrarian reform program was a joint venture between El Salvador and the United States, and the latter was responsible to its own citizens for its part in causing them injuries.[175]

The United States Court of Claims granted summary judgment in favor of the United States,[176] finding the case nonjusticiable due to the sensitive political and foreign policy questions involved,[177] and citing the lack of fifth amendment liability.[178] However, the Court of Appeals for the Federal Circuit disagreed with the Court of Claims on both the political question and fifth amendment analyses.[179] Ascertaining responsibility and compensation for eminent domain claims is a judicial function, the court held, even if the taking occurs abroad or involves foreign policy matters.[180] The court need not inquire into El Salvador's motives, but only consider whether United States involvement was substantial enough to warrant liability under the fifth amendment.[181]

The Federal Circuit further held that fifth amendment liability exists even if the United States action is not the "final direct cause" of the property loss, and even if the property is not taken for use by the United States Government.[182] The court reasoned that the government has effectuated a taking if it either deprives the owner of his interest in the property or

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175. *See* Langenegger v. United States, 5 Ct. Cl. at 232-33 (1984).

176. *Id.* at 237.

177. *See Id.* at 233-36. The court rejected the allegation of undue influence on Salvadoran affairs because such a charge suggested that the two nations "dealt not as sovereign equals, but as master and servant." *Id.* at 235. In addition, the court refused to review the validity of a foreign act of state. *Id.* at 234 n.5.

178. *Id.* at 231-32. The court relied on Anglo Chinese Shipping Co. v. United States, 127 F.Supp. 553 (Ct. Cl. 1955), in which the United States was not held liable for a taking of property which it had ordered, because it was for Japan's benefit. The *Langenegger* court reasoned that, since the United States did not "directly" benefit from the El Salvadoran agrarian reform program, it did not incur fifth amendment liability. In addition, the joint venture theory was rejected because it was heretofore used mainly to redress violations of criminal rights protected by the fifth amendment, not property rights. *Id.* at 232-33.

179. 756 F.2d at 1568-69 (Fed. Cir. 1984).

180. *Id.* at 1569.

181. *Id.*

182. *Id.* at 1570. The Court of Appeals thus rejected the Claims Court's reliance on Anglo Chinese Shipping Co. v. United States, 127 F. Supp. 553 (Ct. Cl. 1955), updating it with the approach taken in more recent fifth amendment cases. *See supra* notes 121-122 and accompanying text.

enables another party to obtain the use or benefit of the property.[183] The test for determining liability consists of two factors: the nature of involvement and the benefit obtained by the United States.[184]

The circuit court ultimately ruled that the facts in *Langenegger* did not support fifth amendment liability. "Diplomatic persuasion" did not constitute sufficient involvement, and "hemispheric stability" was not a sufficient benefit to hold the United States responsible for Langenegger's loss of property under the agrarian reform program.[185]

Although the *Langenegger* decision did not address the applicability of the Hickenlooper Amendment to claims involving expropriated property remaining in foreign jurisdictions, the same question raised by the District of Columbia Circuit in *Ramirez* also arises in *Langenegger*. Given that the United States Government's defense in *Langenegger* is that the uncompensated expropriation of the coffee plantation was an act of state by the El Salvadoran Government, the Hickenlooper Amendment would require the United States Government to suspend further assistance to El Salvador.[186] However, finding the United States responsible for the taking not only obligates the United States government to compensate, but also is an admission of control over El Salvadoran internal affairs.[187] Moreover, use of a Presidential waiver of the Hickenlooper Amendment in this case, as the *Ramirez* dissents advocate, undercuts an essential purpose of the provision, which is to safeguard United States investments abroad.[188] Foreign investments are most vulnerable to expropriation in periods of political unrest

183. *Id.*

184. *Id.* at 1570-71.

185. *Id.* at 1572. Langenegger's claim was dismissed without prejudice to a showing that he could not satisfy his claim through international arbitration. *Id.* at 1573. El Salvador had agreed to abide by the Carribbean Basin Economic Recovery Act, Pub. L. No. 98-67, Title II, 97 Stat. 384 (1983), whereby disputes would be settled by international arbitration. However, Langenegger was free to reassert his claim in a United States court if resort to arbitration was unavailing. 756 F.2d at 1573. It is possible that, if the arbitration offered compensation at a standard below that required by the United States, the claim could be heard in a United States court under the Hickenlooper Amendment.

186. *See supra* notes 110-111 and accompanying text.

187. *See supra* notes 30-34 and accompanying text for a discussion of intervention into territorial sovereignty.

188. *See supra* note 112 and accompanying text.

in unstable and developing countries such as El Salvador. Presidential waiver in such situations would be a back-door method of dealing with the problem, and does not speak well of the Amendment's enforceability when put to the test.

## III. *SETTING THE STANDARD: WHEN IS THE UNITED STATES RESPONSIBLE TO ITS CITIZENS FOR FOREIGN PROPERTY LOSS?*

The two major questions presented by *Ramirez* and *Langenegger* are: 1) whether the act of state doctrine is waived under the Hickenlooper Amendment in cases in which the expropriated property remains in a foreign jurisdiction, and 2) whether the United States will incur responsibility to its citizens when its involvement in the internal affairs of another country causes loss of their property.

### A. *Reappraising The Scope of the Hickenlooper Amendment*

The Hickenlooper Amendment was enacted to reverse the holding of *Sabbatino*, in which the Supreme Court refused to review a claim by a United States citizen against the Cuban government for expropriating his property.[189] This exception to the act of state doctrine is best understood in the context of its creation, that is, as a reaction to the belligerant act of a hostile state, which had discriminatorily expropriated the property of United States citizens.[190]

The Hickenlooper Amendment was received with some apprehension about the far-reaching effects of opening the courts to claims against foreign sovereigns.[191] The bill's proponents assured that it was to be a narrow exception, limited to the rare cases in which there was property in United States jurisdiction that was traceable to the property expropriated abroad.[192] Jurisdiction over the res provided some justification for hearing the claim.[193] Curiously, however, the statute itself fails to require that the property be within United States juris-

189. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 439 (1964); Banco Nacional de Cuba v. First Nat'l City Bank, 431 F.2d 394, 400 (2d Cir. 1970).

190. *Id.*

191. *See First Nat'l*, 431 F.2d at 400-02.

192. *Id.*

193. *Id.*

diction as a predicate for invoking the Amendment.[194] The statute merely requires a foreign expropriation contrary to international law, that is, one that is discriminatory or inadequately compensated.[195]

The *Ramirez* court held that Congress would have included in the Amendment a limitation on the location of the expropriated property at the time of suit if it had contemplated such a requirement.[196] Because the Amendment did not contain this limitation, the court found it applicable to any foreign expropriation that violated international law, regardless of the situs of the property.[197] Such an interpretation clearly contradicts legislative intent.[198] It also could put the President in the undesirable position of suspending aid to a friendly nation that committed an isolated act of expropriation or, as in *Ramirez* and *Langenegger*, actually complied with United States wishes by taking the property in question.

If a United States citizen sues the United States Government for taking property which was located in foreign territory, the foreign sovereign is not hauled into court, so the act of state doctrine is not in issue. Assertion of the act of state doctrine as a defense merely clouds the legal issues and should be dismissed as irrelevant. It is unnecessary to invoke the Hickenlooper Amendment in order to rebut an act of state defense by the United States Government. A court can discern whether the United States was responsible for the taking without scrutinizing the conduct of the territorial sovereign.[199]

The Hickenlooper Amendment need not be broadened beyond legislative intent in order to enable United States citizens to obtain relief from their own government. The solution is simply to acknowledge United States responsibility for its actions in foreign territory. This is not to suggest, of course, that the territorial sovereign is never liable. What is needed is to establish a standard for determining when the United States

194. *See* 22 U.S.C. § 2370(e)(1)-(2) (1982).

195. *Id.*

196. Ramirez v. Weinberger, 745 F.2d 1500, 1541-42 n.180 (D.C. Cir. 1984), *vacated sub nom.* Weinberger v. Ramirez, 105 S. Ct. 2353 (1985), *on remand* 788 F.2d 143 (D.C. Cir. 1986).

197. *Id.*

198. *See supra* note 112 and accompanying text.

199. *See, e.g.*, Langenegger v. United States, 756 F.2d 1565, 1569 (Fed. Cir. 1985), *cert. denied*, 106 S.Ct. 78 (1985).

should be held liable, taking into account both domestic and international legal principles.

### B. *United States Involvement in Foreign Nations As a Basis of Responsibility for Property Loss*

In both *Langenegger* and *Ramirez*, the United States sought to avoid liability by placing responsibility on El Salvador and Honduras, respectively, for the events occurring in those jurisdictions, ostensibly because the nations maintained sovereign control over their territories.[200] The United States Government argued that the expropriations were foreign acts of state, the validity of which could not be determined by United States courts.[201] This position defies the tenets of the international law of state responsibility promulgated by the ILC,[202] and provides a convenient, if unseemly, way of shielding the United States Government from its own citizens whenever it acts in a foreign jurisdiction. Moreover, this position encourages covert involvement in the affairs of other nations, because the United States Government may shift responsibility to the territorial sovereign whenever injuries occur in a foreign jurisdiction. While the United States should not shoulder the burden of reparations each time that it influences a nation to act one way or another, neither should it be categorically exculpated of liability for property loss when it acts in concert with a foreign sovereign.[203]

Article 12 of the ILC's draft articles provides that the terri-

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200. *See supra* notes 155, 177 and accompanying text.

201. *Id.*

202. *See supra* notes 53-61 and accompanying text. The ILC Draft Articles on State Responsibility recognize a number of circumstances in which a state will not be liable for events occurring in its jurisdiction. *See supra* notes 60-61; Corfu Channel Case (U.K. v. Alb.) 1949 I.C.J. 4 (Judgment of Apr. 9) (rejecting a strict territorial test of liability).

203. Following the pattern set by the post-World War II cases, see *supra* notes 130-34 and accompanying text, most claims against the United States seeking compensation for takings of property abroad have not been successful.

A limited degree of success has been achieved in the area of criminal rights violations by United States officials acting through or with foreign officials. *See, e.g.*, Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 154 (D.C. Cir. 1976) (United States held liable for illegal electronic surveillance of its citizens' activities in West Germany on the grounds that "the fourth amendment does apply to actions by foreign officials if United States officials participated in those actions so as to convert them into joint ventures"). *But see* United States v. Hensel, 699 F.2d 18, 23-30 (1st Cir.), *cert. denied*, 461 U.S. 958 (1983) (illegal search of Honduran ship by Canadian officials at United

torial sovereign will not be responsible for the conduct of organs of foreign states acting on behalf of their own government.[204] If the organs are placed at the disposal of the territorial sovereign, however, it will be responsible.[205] If the *Ramirez* court had applied an Article 12 analysis to the facts of the case, it could not find Honduras responsible for the taking of the ranch by United States officials because they were acting on behalf of their own government, not Honduras.[206] The United States officials set up the training center for use by El Salvadoran soldiers, not Honduras, and the Army Corp of Engineers, which presided over the taking of Ramirez's land, was not under the control of the Honduran Government.[207]

From Honduras' perspective, the case for non-liability would seem stronger because the party injured by the taking was a national of that state. Not only did the United States construct the Training Center for its own purposes, but it took land from one of its own citizens to do so. But for the fact that the chain of events occurred in a foreign jurisdiction, the dispute is really one between the United States Government and its citizen.[208] The majority of the *Ramirez* court so viewed the situation,[209] but the United States Government never accepted responsibility, and mooted the case by suspending funding for the project before adjudication by the Supreme Court.[210]

Similarly, if international legal principles of state responsi-

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States' request was a "joint venture" which violated Honduras' rights under international law, not the individual's rights under the fourth amendment).

The United States Court of Claims in *Langenegger* explicitly rejected expansion of the joint venture theory to cases of violations of foreign property rights under the fifth amendment. *See* 5 Ct. Cl. 229, 232 (1984).

204. *See supra* note 61 and accompanying text.

205. *Id.*

206. *See* Ramirez v. Weinberger, 745 F.2d 1500, 1507 (D.C. Cir. 1984), *vacated sub nom.* Weinberger v. Ramirez, 105 S.Ct. 2353, (1985), *on remand* 788 F.2d 143 (D.C. Cir. 1986).

207. *Id.*

208. One wonders whether the Honduran Government would have wanted to become involved in the dispute at all, which it could have regarded as a matter of United States sovereign discretion in the treatment of its own nationals. *See supra* note 43 and accompanying text.

209. *Ramirez*, 745 F.2d at 1529.

210. *See supra* note 168. The United States withdrawal from the situation was less than graceful, however. The bill did not disclaim liability outright, but instead called on Honduras to settle claims to title, clearly intending to sidestep the whole issue of responsibility. *Id.*

bility were applied to the *Langenegger* case, El Salvador would not be responsible for injuries resulting from the agrarian reform program on the grounds of external coercion or control.[211] Article 28 of the ILC draft articles provides that a state will not be liable for its action if it resulted from coercion by another state, or if it was subject to the control of another state in the field of activity of the act.[212] Thus, even though no organs of the United States Government were present in El Salvador as in the *Ramirez* case, and even though the agrarian reform program was instituted by El Salvadoran officials, the element of external coercion—political pressure by the United States—precludes El Salvadoran liability.[213]

Taken alone, mere advice by the United States to El Salvador, suggesting agrarian reform, would not be coercive and no liability should ensue for acts by El Salvador subsequent to such advice. However, when financial and military support on which the nation depends is conditioned upon compliance with the advice, the picture radically changes. In such cases, the foreign sovereign, here, El Salvador, is effectively carrying out the will of the United States. When United States citizens are injured at the will of their own government, they are entitled to some remedy.[214] It is unrealistic to expect reparation from the foreign sovereign for injuries to United States nationals when it is following the directives of the United States. When nationals of one state are injured by a foreign sovereign, their claim for redress is brought by their own government in a state-to-state confrontation.[215] It would be inconsistent for the United States to demand compliance with the conditions of its assistance and, at the same time, assume an adversarial posture to seek reparations on behalf of its citizens for injuries resulting from such compliance. Under such circumstances, seeking

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211. *See supra* note 60 and accompanying text.

212. *Id.*

213. *See* Langenegger v. United States, 756 F.2d 1565, 1567 (Fed. Cir.), *cert. denied*, 106 S.Ct. 78 (1985). *See also supra* note 60. Domination by foreign nations in certain areas is a common occurrence in international politics, *see* Joyner, *supra* note 42, and does not ordinarily diminish the subjected nation's status of sovereignty. *See supra* note 40 and accompanying text. Theoretical sovereignty notwithstanding, the prevailing views of state responsibility law exculpate states of liability under these circumstances. *See supra* note 60 and accompanying text.

214. *See supra* notes 98-99 and accompanying text.

215. *See supra* notes 47-49 and accompanying text.

reparations would clearly be an abuse of diplomatic protection.[216] As *Langenegger* illustrates, the foreign sovereign would be doubly disadvantaged: first, in complying with conditions set by another government, and second, in offering a standard of treatment for foreign nationals that is superior to what it offers its own citizens. [217]

A corollary issue is the legality of United States involvement in the foreign jurisdiction. If Honduras and El Salvador are not liable for injuries to aliens in their jurisdiction because of intervening acts by the United States, the latter may be liable to those nations for unwanted encroachment on their territories.[218] International law condemns intervention as a violation of sovereignty.[219] Unless the sovereign granted territorial privileges, or, invited the involvement of the foreign sovereign, the acts would be unlawful.[220] Consent cannot be presumed merely because the intervention was successful.[221] The ILC draft articles accordingly relieve the state of responsibility for acts committed under coercion, and even shift responsibility to the intervening state.[222] If this approach does not entirely discourage intervention, it would at least penalize its practice.

Even if Honduras and El Salvador were responsible for expropriating the properties without giving adequate compensation, the question remains whether they would be found in breach of international law.[223] The United States would clearly view an inadequately compensated expropriation as illegal

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216. *See* note 49 and accompanying text. Latin American nations in particular have vehemently objected to the oppressive use of diplomatic protection. *Id.*

217. *See* Guha-Roy, *supra* note 50.

218. *See supra* notes 29-31, 38 and accompanying text.

219. *Id.*

220. *Id.*

221. *See* ILC Draft Articles, *supra* note 51. A state is not responsible for its own acts when they were undertaken in response to foreign intervention or coercion. *Id.* art. 28. To say that the establishment of the RMTC on Honduran soil, or the adoption of an agrarian reform program by El Salvador must have been preceded by the consent of the sovereign simply because it occurred is to ignore the realities of modern international politics. The United Nations recognizes that weaker sovereign states may succumb to the will of the stronger; resistance is not required to show that intervention has occurred. *Id.*; *see supra* note 39 and accompanying text.

222. *See supra* note 61. Since the United States publicly recognizes the sovereignty of El Salvador and Honduras, its conduct on their territory, without their permission, would constitute intervention. *See* 1979 DIGEST OF UNITED STATES PRACTICE IN INT'L LAW at 127-282.

223. *See supra* notes 82-91 and accompanying text.

under international law.[224] However, many international legal scholars dispute the notion of a duty to compensate for expropriations.[225] Most nations have rejected the classic standard of "prompt, adequate and effective" compensation, and have left the question of compensation to the discretion of individual states.[226] Since the failure to compensate is not unlawful, there is no claim against the taking state.[227] Thus, under prevailing tenets of international law, Honduras and El Salvador would not be liable for the claims of Ramirez and Langenegger, either by virtue of intervening acts that preclude responsibility,[228] or by the absence of a duty to compensate aliens for expropriated property.[229]

If international law fails to provide adequate safeguards for alien property rights, United States domestic law should fill the void, at least in the limited number of cases in which involvement in the foreign territory plausibly leads to United States responsibility. A number of policy considerations justify this position. First, the foreign government may legitimately disclaim liability under the principles of state responsibility law, due to external acts or control,[230] leaving the individual without legal remedy under international law. Second, it would be inconsistent to demand reparations from the foreign sovereign for loss of alien property when the individual's own government shares blame for the loss. Third, an embarrassing dispute over compensation could be avoided.[231] Finally, the matter need not be referred to an international forum, which would be likely to focus negatively on the element of unlawful intervention by the United States.

It is possible that assuming responsibility for a wider range of foreign takings might encourage meritless claims when United States involvement in foreign states is tenuous.

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224. *See* RESTATEMENT, *supra* note 53, § 712 (Tent. Draft No. 7 1986); Hickenlooper Amendment, 22 U.S.C. § 2370(e) (1982).

225. *See supra* note 81 and accompanying text.

226. *Id.*

227. *Id.*

228. *See supra* notes 60-61 and accompanying text.

229. *See supra* notes 85-86 and accompanying text.

230. *See supra* notes 60-61 and accompanying text.

231. *See supra* notes 91-92 and accompanying text. That is, if the United States insisted on the "prompt, adequate and effective" standard, while the other nation claims it is not obligated under international law to compensate at all.

In addition, adjudication of these claims vests the courts with authority over delicate foreign policy questions, and the financial burden of compensating such expropriations may be great. However, the burden is unavoidable if the United States is to honor its constitutional obligation to act lawfully toward its citizens, even outside its territory, and to compensate them for property loss for which it is responsible.

## *CONCLUSION*

In the *Langenegger* and *Ramirez* cases, the courts acknowledged the possibility of United States responsibility to its citizens for takings of property occurring in foreign jurisdictions.[232] This is consistent with domestic law, which makes the government liable for constitutional violations both at home and abroad.[233] It is also consistent with international legal principles of state responsibility which would impute liability to a state other than the territorial sovereign if the other state intervened.[234]

The *Langenegger* court determined that United States involvement in that case was insufficient to warrant liability under domestic law. In contrast, the *Ramirez* court found United States liability but stretched the Hickenlooper Amendment beyond legislative intent in an attempt to sidestep the act of state doctrine. While focusing on the domestic legal questions presented by the cases, the courts largely ignored the international scope of the conflicts. Under the international law of state responsibility, Honduras and El Salvador would be relieved of liability.[235] In addition, the conduct of the United States would constitute unlawful intervention.[236]

Claims of United States citizens regarding the expropriation of property in foreign territory for which the United States may share responsibility should be brought in a United States forum. If the claim is brought in an international forum, the injured individual would likely have no remedy under international law,[237] and the United States could be declared guilty of

232. *See supra* notes 156-58, 180-81 and accompanying text.
233. *See supra* note 99 and accompanying text.
234. *See supra* notes 60-61 and accompanying text.
235. *Id.*
236. *See supra* notes 36-38 and accompanying text.
237. That is, because the expropriating state has no duty to compensate, *see*

unlawful intervention in the foreign nation. By assuming responsibility for property loss suffered by its citizens as a result of its involvement in a foreign nation, the United States would fulfill its duty to act fairly toward its citizens, ensure that its nationals are compensated for injuries suffered abroad, and save itself the embarassment of adjudication by potentially hostile international forums.

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*supra* notes 84-86 and accompanying text, and because current state responsibility law exculpates states of liability when coercion or intervention by another state has occurred. *See supra* notes 60-61 and accompanying text.

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