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Ronald Mok

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COMMENT

EXPROPRIATION CLAIMS IN UNITED STATES COURTS: THE ACT OF STATE DOCTRINE, THE SOVEREIGN IMMUNITY DOCTRINE, AND THE FOREIGN SOVEREIGN IMMUNITIES ACT. A ROAD MAP FOR THE EXPROPRIATED VICTIM

I. INTRODUCTION

As American corporations and individuals increase their investments abroad, they are inevitably subject to political risks. Foreign countries often infringe on the property interests of the American investor. The taking of property by foreign sovereigns, under the guise of either eminent domain or nationalization, gives rise to litigation involving the legality of expropriation. "Unfortunately, the courts in the United States have not always done well in handling issues of international law, particularly in the expropriation context."¹

The United States courts are unwilling to adjudicate expropriation claims because of the act of state doctrine, the assertions of foreign sovereigns to immunity, and other related jurisdictional and political issues which limit the courts' power. This article will analyze these limitations on the courts' power. It will focus on the history and rationales of both the act of state doctrine and the theory of foreign immunities as shown by case law. It will then examine whether a claimant whose property has been expropriated can sue the foreign sovereign in the courts of the United States. This article provides an overview of the factors that an expropriated victim will encounter in suing a

¹ Symposium, *Adjudication of Foreign Expropriations in U.S. Courts*, 77 AM. SOC'Y INT'L L. PROC. 335 (1985).

foreign sovereign. The goal is to provide information in furtherance of the understanding of the act of state doctrine, the sovereign immunity doctrine, the foreign sovereign immunities statute, and other issues that can stand in the way of an expropriated claimant.

Part II of the article begins with an historical approach to the background of the act of state doctrine and the sovereign immunity doctrine. It will show the definitions, origins, policies, and the comparisons of each doctrine.

Part III provides the substantive analysis, starting with the international law on expropriation and the Executive Branch's view towards bringing a foreign sovereign into the United States courts. The discussion examines the Cuban expropriation cases which provide the impetus for the legislation limiting the act of state doctrine by the Hickenlooper Amendment,² and the codification of the sovereign immunity doctrine by the Foreign Sovereign Immunities Act.³ The Hickenlooper Amendment and the FSIA will be introduced and analyzed,⁴ along with case law to show the interactions and interpretations of these statutes with the act of state and the sovereign immunity doctrines.

Lastly, this article presents a synthesis of existing case law, explaining the subtleties presented by the cases, and evaluating the courts' performances in adjudicating expropriation claims. It is the author's final assessment that most expropriation victims will not be able to obtain relief from the United States judiciary due to its inclination to apply the act of state doctrine and its inconsistent interpretation of the FSIA.

II. BACKGROUND

A. *The Act of State Doctrine*

The act of state doctrine took root in England as early as 1674, and sprouted in the jurisprudence of the United States in

² 22 U.S.C. § 2370(e)(2) (1994) [hereinafter Hickenlooper Amendment]. See *infra* note 86.

³ 28 U.S.C. §§ 1330, 1602-1611 (1994) [hereinafter FSIA]. See *infra* notes 126, 132, 133.

⁴ For a pertinent article concerning the interaction of the act of state doctrine and the FSIA, see Ifeanyi Achebe, *The Act of State Doctrine and Foreign Immunities Act of 1976: Can They Coexist?* 13 MD J. INT'L L. & TRADE 247 (1989).

the late eighteenth and early nineteenth centuries.⁵ The act of state doctrine holds that "the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government . . . in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law."⁶ In 1812, Justice Marshall in *The Schooner Exchange v. M'Faddon*⁷ articulated the concept of the act of state doctrine, though he did not specify it as such. There, the plaintiff sought attachment of a ship he claimed was forcibly taken from him by order of Napoleon, the Emperor of France.⁸ The Supreme Court held that a nation's limitation on jurisdiction is its implied consent to waive its jurisdiction,⁹ and justified the waiver of jurisdiction on diplomatic and policy grounds.¹⁰ The act of state doctrine can be explained as follows:

Every sovereign [s]tate is bound to respect the independence of every other sovereign [s]tate, 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 sovereign powers as between themselves.¹¹

In 1918, the act of state doctrine was used to validate the takings of property by the Mexican government. In *Oetjen v. Central Leather Co.*,¹² the plaintiff, the assignee of the original owner, sought to replevy property that the Mexican government seized from the original owner.¹³ The Supreme Court held that

⁵ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964). For comparisons of the usage of the act of state doctrine in other countries, see the list of citations found in *Sabbatino*, 376 U.S. at 421 n.21.

⁶ *Id.* at 428.

⁷ 11 U.S. (7 Cranch) 116 (1812).

⁸ *Id.* Because the ship sailed into a United States seaport during a storm, the plaintiff attempted to invoke a United States court's jurisdiction. *Id.* at 118.

⁹ *Id.* at 146.

¹⁰ *Id.*

¹¹ *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). This explanation is cited with approval in *Sabbatino* as "[t]he classic American statement of the act of state doctrine." 376 U.S. at 416.

¹² 246 U.S. 297 (1918).

¹³ *Id.* at 299-301. In the Mexican revolution, the army assessed a military contribution on the original owner, who refused to pay. *Id.* The army subse-

under the political question and the act of state doctrines, "the conduct of one independent government cannot be successfully questioned in the courts of another" even if the court has the custody of the property in question.¹⁴ This is because both doctrines are based on the "highest considerations of international comity and expediency,"¹⁵ and "[t]o permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another"¹⁶ will result in hostile foreign relations.¹⁷

In *Ricaud v. American Metal Co.*,¹⁸ the plaintiff, a purchaser from the original owner before the expropriation, sued to recover his property.¹⁹ The Court clarified that the act of state doctrine "does not deprive the courts of jurisdiction once acquired over a case."²⁰ If the foreign government took action in confiscating property, such act or the result of such act must be accepted by the United States courts. The Court opined that "[t]o accept a ruling authority and to decide accordingly is not a surrender or abandonment of jurisdiction but is an exercise of it."²¹ The Court exercised jurisdiction and accepted the Mexican government's taking of property to deprive the plaintiff of ownership.²² The act of state doctrine can be rationalized as:

quently seized and sold the property to a predecessor in interest of the defendant. *Id.* The plaintiff alleged that he is the original owner's assignee. *Id.*

¹⁴ *Id.* at 303.

¹⁵ *Id.* at 303-304. The Court cited *Underhill* and *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1908), to support the application of the act of state doctrine. *Id.* at 303.

¹⁶ *Oetjen*, 246 U.S. 297, 303 (1918).

¹⁷ *Id.*

¹⁸ 246 U.S. 304 (1918).

¹⁹ *Id.* at 306-310. The expropriation occurred in September, 1913, during the Mexican Revolution, where a Mexican Army General allegedly took lead bullions from the plaintiff's successor in interest, a Mexican corporation that was the original owner. *Id.* To raise money for the revolution to buy weapons, the Army General subsequently sold the lead bullions to the defendants. *Id.* The plaintiff's contention is that he bought from the original owner in June, 1913. *Id.* at 305-308.

²⁰ *Id.* at 309.

²¹ *Id.*

²² *Ricaud*, 246 U.S. 304, 307-310. Assuming that the facts as alleged by the plaintiff as true, as the Court did, the plaintiff's chain of title can be traced back to the original owner, and since it received its title first in time, before the Mexican government seized the property, the plaintiff ought to be the rightful owner. *Id.* at 305-310.

[A] judicially accepted limitation on the normative adjudicative processes of the courts, springing from the thoroughly sound principle that on occasion individual litigants may have to forgo decision on the merits of their claims because the involvement of the courts in such a decision might frustrate the conduct of the Nation's foreign policy.²³

The rationale of the doctrine is "grounded on judicial concern that application of the customary principles of law to judge the acts of a foreign sovereign might frustrate the conduct of foreign relations by the political branches of the government."²⁴ The notion is that, if the court deals with the foreign sovereign in one way, and the Executive Branch conducts its foreign relations in conflict with what the court decided, there will be no unity in conducting foreign affairs. This stems from the separation of powers inherent in the federal system.²⁵

These cases show that if a foreign sovereign is involved in the expropriation, the traditional form of the act of state doctrine validates what the sovereign did through judicial restraint and refusal to extend jurisdiction. The effect of the doctrine is to deprive the true owner of his or her property interest. Regardless of how unfair the taking was, the courts will not question the merits of the foreign sovereign's expropriation. As a result, the principles of equity and fairness are not considered in the determination because the courts refrain from deciding at all.

B. *The Sovereign Immunity Doctrine*

Sovereign immunity is very similar to the act of state doctrine in that both doctrines have a common source originating from *The Schooner Exchange*²⁶ case. "[B]oth the act of state and the sovereign immunity doctrines are judicially created to effectuate general notions of comity among nations and among the respective branches of the Federal Government."²⁷ The general rule is that "sovereigns are not presumed without explicit declaration to have opened their tribunals to suits against other sov-

²³ *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 769 (1972).

²⁴ *Id.* at 767.

²⁵ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

²⁶ 11 U.S. (7 Cranch) 116 (1812).

²⁷ *First Nat'l City Bank*, 406 U.S. at 762.

ereigns.”²⁸ The effect of applying the sovereign immunity doctrine is that a foreign sovereign is free from being haled into court as a defendant.²⁹

The sovereign immunity doctrine was in existence as early as 1781, and has since become “part of the fabric” of American jurisprudence.³⁰ The Supreme Court noted that “the privileged position of a foreign state [from being sued] is not an explicit command of the Constitution . . . [but] [i]t rests on considerations of policy given legal sanctions by [the] Court.”³¹

The Supreme Court’s use of the sovereign immunity doctrine in allowing foreign expropriation of American property can be seen in the maritime cases. In deciding *The Schooner Exchange*,³² the Supreme Court used the sovereign immunity doctrine to absolve France of wrongdoing and rationalize its finding that the military ship in question was immune from attachment.³³ In 1926, the Supreme Court decided *Berizzi Bros. Co. v. The Pesaro*.³⁴ That case arose out of a contract claim by the plaintiff seeking an action *in rem* to arrest a ship owned by the government of Italy, but the Court held that “merchant ships owned and operated by a foreign government have the same immunity that war ships have.”³⁵ Thus, any property owned by a foreign government, whether its usage is for military or commercial purposes, is immune from attachment and execution. In a similar case in 1943, in *Ex Parte Republic of Peru, The Ucayali*,³⁶ the Court held that “the judicial seizure of

²⁸ *Id.* at 763 (citing *The Paquete Habana*, 175 U.S. 677 (1900)).

²⁹ *National City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 358 (1955).

³⁰ *Id.* The Court pointed to *De Moitez v. The South Carolina*, 17 F.Cas. 574 (Adm. Pa. 1781). *Id.*

³¹ *Id.* at 359.

³² See *supra* notes 7-10 and accompanying text.

³³ For an overview of the factors leading to the Court’s decision, see generally 11 U.S. (7 Cranch) 116, 135-147 (1812). In the *Schooner Exchange* case, the Court gives deference to France. *Id.* Justice Marshall phrased the issue as “whether an American citizen can assert, in an American court, a title to an armed national vessel” *Id.* at 135. The emphasis seemed to be on the military, as opposed to the commercial, status of the ship; this distinction is misplaced, however, as *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562 (1926), shows that a foreign sovereign owned commercial ship has immunity from attachment as well. See *infra* text accompanying notes 34 and 35.

³⁴ 271 U.S. 562 (1926).

³⁵ *Id.* at 576.

³⁶ 318 U.S. 578 (1943).

the vessel of a friendly sovereign state is so serious a challenge to its dignity, and may so affect our friendly relations with it",³⁷ that foreign sovereign immunity must be granted unless the Executive Branch says otherwise.³⁸

In 1945, *Republic of Mexico v. Hoffman*³⁹ indicated a more restrictive view of sovereign immunity in a tort action. The Supreme Court held that in an *in rem* action based on a judicial seizure of a foreign government's property, a court must dismiss the case if the Executive Branch advises the court of the foreign sovereign's immunity.⁴⁰ If the Executive Branch expresses no specific view on the matter, the court may decide whether there is immunity in accordance with United States governmental policies, which may be reflected from past positions endorsed by the State Department.⁴¹ Under the facts of *Hoffman*, a ship was seized pursuant to an *in rem* proceeding.⁴² The Court held that even though Mexico owned the ship, it was not immune because it did not possess the ship. There must be formal governmental action by the foreign government to take the property.

Only *The Schooner Exchange*⁴³ involved an expropriation claim, but the other cases show the contour of the sovereign immunity doctrine. The factors in the sovereign immunity doctrine analysis are similar to those of the act of state doctrine. They involve consideration of comity and the risk of inter-branch conflicts in the United States foreign relations area. Like the act of state doctrine, if a foreign sovereign is involved in the expropriation and if the foreign sovereign is entitled to immunity, the courts will not have jurisdiction. The effect of applying either doctrine is the same: the property interest of the true owner will not be enforced in the United States courts.

³⁷ *Id.* at 588.

³⁸ *Id.* The Court quoted *United States v. Lee*, 106 U.S. 196 (1882), as its authority for judicial deference to the political branches of the government. *Id.*

³⁹ 324 U.S. 30 (1945).

⁴⁰ *Id.* at 34-36.

⁴¹ *Id.* at 36.

⁴² *Id.* at 31. Plaintiff's cause of action is a libel in rem, based on tort, seeking attachment of a Mexican ship that involved in a collusion with his ship. *Id.*

⁴³ 11 U.S. (7 Cranch) 116 (1812).

C. *Distinctions Between the Act of State and the Sovereign Immunity Doctrines*

The act of state doctrine can be viewed in terms of justiciability and concerns the "appropriateness of the subject matter for judicial resolution."⁴⁴ It requires "that a court, after exercising jurisdiction, decline to review certain issues, in particular, the validity or propriety of foreign acts of state."⁴⁵ It is an affirmative defense by the sovereign. In contrast, the sovereign immunity doctrine is akin to jurisdiction and "concerns the court's power over the parties"⁴⁶ It is "jurisdictional in nature, [i]f sovereign immunity exists, then the court lacks both personal and subject matter jurisdiction to hear the case"⁴⁷

Even though these doctrines are different, it must be emphasized that the issues involved in analyzing whether to apply these doctrines overlap. The issues of respecting the dignity and independence of the sovereigns, and the avoidance of inter-branch conflict in foreign relations are at the heart of each doctrine.⁴⁸ Because these issues form the basis of each doctrine, the application of each doctrine is very fact-specific and involves analyzing the potential harm to United States foreign relations if a court is to decide the expropriation claim. Nonetheless, the doctrines' rationales justify their continued vitality. Having thus established the definitions and the rationales of both doc-

⁴⁴ First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 774 (1972) (Powell, J., concurring).

⁴⁵ De Sanchez v. Banco Central de Nicar., 770 F.2d 1385, 1389 (5th Cir. 1985) (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421-23 (1964)). See W.S. Kirkpatrick v. Environmental Tectonics, 493 U.S. 400, 406 (1990) (holding that "[a]ct of state issues only arise when a court *must decide* - when the outcome of the case turns upon - the effect of official action by a foreign sovereign."); see also Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), *rev'd on other grounds on remand sub nom.* Banco Nacional de Cuba v. Farr, 383 F.2d 166, 180 (2d Cir. 1967) (stating that the act of state is a rule of discretion, a judicial abstention policy "based on the [court's] estimation of the political effects that would follow from a judicial review of acts of foreign states . . .").

⁴⁶ First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 774 (1972) (Powell, J., concurring).

⁴⁷ De Sanchez, 770 F.2d at 1389.

⁴⁸ See, e.g., Asociacion De Reclamantes v. United Mexican States, 561 F. Supp. 1190, 1198-99 (D.D.C. 1983) (quoting Int'l Ass'n of Machinists & Aerospace Workers v. Org. of Petroleum Exporting Countries, 649 F.2d 1354, 1359 (9th Cir.), *cert. denied* 454 U.S. 1163 (1982)), *aff'd*, 735 F.2d 1517 (D.C. Cir. 1984).

trines, the analysis turns to the codification of these doctrines and their effect on an expropriated victim.

III. ANALYSIS

From the maritime cases above, especially *Republic of Mexico v. Hoffman*,⁴⁹ there is a trend towards narrowing the act of state doctrine, and towards the erosion of absolute sovereign immunity. In 1964 this trend led to a codification to limit the act of state doctrine in expropriation cases through the Hickenlooper Amendment.⁵⁰ The limitations on sovereign immunity were codified in 1976 in the FSIA.⁵¹ The Hickenlooper Amendment provides an exception to the act of state doctrine, whereas the FSIA provides exceptions to the sovereign immunity doctrine. The following sets out the international law on expropriation, the Executive Branch's view on this issue, and traces the cases that led to the Hickenlooper Amendment and the FSIA. Additionally, the case law will supply insights on the Hickenlooper Amendment and the FSIA, both statutes that continue to affect an expropriated victim when attempting to sue a foreign sovereign for the loss of his or her property in a United States court.

A. *The International Law on Expropriation*

The procedural issues of the act of state doctrine (justiciability) and the sovereign immunity doctrine (jurisdiction) as encompassed in the Hickenlooper Amendment and the FSIA, are closely connected with the substantive issue of whether the taking of property violates international law. This is so because there is no relief unless the expropriation was a violation of

⁴⁹ 324 U.S. 30 (1945). See also *In re Muir*, 254 U.S. 522 (1921) (holding that there is no immunity where a privately owned ship was performing public service for the British government); *The Gul Djemal*, 264 U.S. 90 (1924) (holding that there is no immunity where a ship owned by the Turkish government was seized for in rem jurisdiction because it was engaged in private charter and was sailing for commercial, not military purposes).

⁵⁰ 22 U.S.C. § 2370(e)(2) (1994). See *infra* note 86. See, e.g., *Banco Nacional de Cuba v. Farr*, 383 F. Supp. 166 (2d Cir. 1967).

⁵¹ 28 U.S.C. §§ 1330, 1602-1611 (1994). See *infra* notes 126, 132, 133. See generally *Verlinden B.V. v. Central Bank of Nig.*, 461 U.S. 480 (1983); *Argentine Republic v. Amerada Hess Shipping*, 488 U.S. 428 (1989).

law.⁵² Therefore, the relevant inquiry should focus on the treatment of expropriation under international law.

Though there is considerable disagreement in the international community on the precise international law of expropriation, there is agreement among international tribunals, arbitration boards, scholars, and commentators that a taking will violate international law if it is not for a public purpose, "is discriminatory, or does not provide for prompt, adequate, and effective compensation."⁵³ This standard of international law gained support, and is defined in the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 712 as follows: "A state is responsible under international law for injury resulting from: (1) a taking by the state of the property of a national of another state that (a) is not for a public purpose, or (b) is discriminatory, or (c) is not accompanied by provision for just compensation"⁵⁴

B. *The Department of State Letters*

Establishing the international law on expropriation does not end the inquiry. Before the enactment of the Hickenlooper Amendment and the FSIA, an expropriation victim attempting to sue a foreign sovereign in a United States court will also need to address the problem posed by the United States' governmental structure. Because foreign relations are uniquely in the realm of the political branches,⁵⁵ the courts are extremely deferential to the other branches of the Federal Government when deciding whether to apply the act of state and sovereign immunity doctrines.⁵⁶ Prior to the enactment of the Hickenlooper

⁵² See, e.g., *De Sanchez v. Banco Cent. de Nicar.*, 770 F.2d 1385, 1395-96 (5th Cir. 1985).

⁵³ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 429 n.27-30 (1964). The Supreme Court cited various international law cases, United Nations Arbitrations Awards cases, United States Department of States Letters, and the Restatement of Foreign Relations Law of the United States for this principle. *Id.*

⁵⁴ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (1987), quoted in *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 712 (9th Cir. 1992).

⁵⁵ See, e.g., *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) (stating that the Constitution committed foreign relations to the Executive and Legislative Branches of the Federal Government).

⁵⁶ See, e.g., *Oetjen*, 246 U.S. at 302 (Act of State - deference to political branches), *Ricaud v. American Metal Co.*, 246 U.S. 304, 309 (1918) (Act of State -

Amendment, the Executive Branch's policy towards applying the act of state doctrine varied on a case-by-case basis, as can be seen in the Bernstein Letters.⁵⁷ Likewise, before the FSIA, the Executive Branch's policy in extending sovereign immunity to only the public acts of a foreign state can be seen in the Tate Letter in 1952.⁵⁸ With the Hickenlooper Amendment and the FSIA, Congress reduced the need for the courts to consult with the Executive Branch's Department of State.⁵⁹ The next stage of the analysis concentrates on the development of the Hickenlooper Amendment and the FSIA.

C. *Case Law — Limiting the Sovereign Immunity Doctrine, Before the Hickenlooper Amendment and the FSIA*

*National City Bank of New York v. Republic of China*⁶⁰ began the limitation on the absolute sovereign immunity doc-

recognition of a foreign government dependent on political branches), *Underhill v. Hernandez*, 168 U.S. 250, 253 (1897) (Act of State and Sovereign Immunity - consultation with the Department of State), *Ex Parte Republic of Peru*, *The Ucayali*, 318 U.S. 578, 588 (1943) (Sovereign Immunity - courts may follow the action of the political branch), *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34-36 (1945) (Sovereign Immunity - following the Executive Branch), *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 699 n.14 (1976), citing *Republic of Mexico v. Hoffman*, 324 U.S. 30, 40-42 (1945) (J. Frankfurter, concurring) (Sovereign Immunity - courts following political branches' positions).

⁵⁷ Bernstein Letters are letters issued by the Executive Branch's Department of State that express its view as to whether the courts should apply the act of state doctrine in any particular case in question. See *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246 (2d Cir. 1947), and *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954). See *infra* note 92.

⁵⁸ Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to Attorney General (May 19, 1952), reprinted in *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711 (1976). The Tate Letter expressed the restrictive theory of sovereign immunity, in which the foreign government is entitled to immunity only for its public acts, but not for its private, commercial acts. *Id.*

⁵⁹ The goal of the Hickenlooper Amendment is to ensure that an expropriated victim can have his case adjudicated and the goal of the FSIA is to ensure that the adjudication is based solely on legal grounds and not political grounds. *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 175 (2d Cir. 1967). See generally *Verlinden B.V. v. Central Bank of Nig.*, 461 U.S. 480, 488 (1983).

⁶⁰ 348 U.S. 356 (1955). The plaintiff, an agency of the government of China, deposited funds with the defendant, a New York bank. *Id.* at 357. The plaintiff sought to withdraw the deposits, but the defendant refused to pay. *Id.* The plaintiff then sued in the district court, and the defendant New York bank counter-claimed, alleging that the plaintiff previously owed it some debt. *Id.*

trine.⁶¹ The Supreme Court stated that advice from the State Department is to be accorded "significant weight" by the judiciary.⁶² The Court reasoned that if the foreign sovereign sought the jurisdiction of the United States court initially, it was equitable to hold the sovereign liable on the counterclaim.⁶³ A foreign government cannot initially seek the assistance of our law, yet resist justice by claiming immunity against a counterclaim.⁶⁴ The consideration of fair dealing overrides the minimal damage to foreign relations in such a situation and "a counterclaim based on the subject matter of a sovereign's suit is allowed to cut into the doctrine of immunity."⁶⁵ Moreover, the sovereign immunity doctrine must be considered in light of fundamental fairness.⁶⁶ The Court's decision in this case is codified in the FSIA section 1607(c).⁶⁷

D. *Case Law — The Precursors to the Hickenlooper Amendment and the FSIA*

Decisions by the Supreme Court prompted Congress to legislate by limiting the act of state and the sovereign immunity doctrines with the Hickenlooper Amendment and the FSIA, respectively. By examining the path that led to the legislation, one can stand to gain a clearer understanding. The following cases trace these Supreme Court decisions.

1. *The Cuban Expropriation Cases*⁶⁸

The progress towards limiting the act of state and the sovereign immunity doctrines come in a series of decisions that

⁶¹ *Id.*

⁶² *Id.* at 360. The Court was referring to the Tate Letter. *Id.* at 360-361. See *supra* note 58.

⁶³ 348 U.S. 356, 364-66.

⁶⁴ *Id.* at 361-62.

⁶⁵ *National City Bank of New York v. Republic of China*, 348 U.S. 356, 364 (1955).

⁶⁶ *Id.* See generally *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 438 (1964).

⁶⁷ 28 U.S.C. § 1607(c) (1994). See *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620 n.7 (1983) and *infra* note 133.

⁶⁸ See generally, Mary W. Kenny, *Expropriation of Offshore Branches of American Banks Located in Foreign Tax Havens*, 14 INT'L LAW. 286 (1980), and Paul N. Filzer, *The Continued Viability of the Act of State Doctrine in Foreign Branch Bank Expropriation Cases*, 3 AM. U. J. INT'L L. & POL'Y 99 (1988).

arose from Cuba's expropriation of United States corporations' property. The cases are *Banco Nacional de Cuba v. Sabbatino*,⁶⁹ *First National City Bank v. Banco Nacional de Cuba*,⁷⁰ *Alfred Dunhill of London, Inc. v. Republic of Cuba*,⁷¹ and *First National City Bank v. Banco Para El Comercio Exterior de Cuba*.⁷² The facts of each case are similar. Each involved the Cuban government's confiscation of properties owned by United States corporations. The Cuban government or its instrumentality sued the United States defendants, who sought dismissal or counterclaimed as a setoff for the properties taken.

a). *Banco Nacional de Cuba v. Sabbatino*⁷³

The seminal case of *Banco Nacional de Cuba v. Sabbatino*⁷⁴ led to legislation through the enactment of the Hickenlooper Amendment. In *Sabbatino*, the issue was whether the act of state doctrine precluded United States courts from examining the validity of a discriminatory and non-compensated taking which violated international law.⁷⁵ The Supreme Court held that international law does not mandate or forbid the use of the act of state doctrine even if the taking violated international law, and the usual method for an individual to seek relief is to exhaust local remedies, to sue in an international tribunal, or to seek diplomatic efforts by the Executive Branch.⁷⁶ The United States Constitution does not require the act of state doctrine,

⁶⁹ 376 U.S. 398 (1964).

⁷⁰ 406 U.S. 759 (1972).

⁷¹ 425 U.S. 682 (1976).

⁷² 462 U.S. 611 (1983).

⁷³ 376 U.S. 398 (1964). See generally Monroe Leigh, *Sabbatino's Silver Anniversary and the Restatement: No Cause for Celebration*, 24 INT'L LAW. 1 (1990).

⁷⁴ 376 U.S. 398 (1964). The plaintiff, a Cuban bank which is an instrumentality of the Cuban government, sued a United States importer and a court appointed temporary receiver of an expropriated Cuban corporation for the conversion of bills of lading and funds. *Id.* at 401-07. Cuba expropriated a shipment of sugar that was owned by a Cuban corporation, a subsidiary of the United States importer. *Id.* The expropriation discriminated against United States nationals, did not provide for adequate compensation, and was in retaliation for a United States imposed sugar quota. *Id.* at 401, 429, 433.

⁷⁵ *Id.* at 400, 415, 420-31.

⁷⁶ *Id.* at 422-23. Specifically, the Court opined that the Executive Branch's expertise in diplomacy can assure that United States citizens who are harmed are compensated fairly through agreements with United Nations, or through economic and political sanctions. *Id.* at 431. The Court noted that the President can pres-

but the rationale of doctrine is based upon the separation of powers.⁷⁷ The Court held that "the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary"⁷⁸ to decide accordingly, without conflicting with the political branches of the government.⁷⁹ It stated that "the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches."⁸⁰ Thus, where there is no agreement among the various branches of the government as to the applicable rule of law,⁸¹ the act of state doctrine applies to presume the validity of the act of the foreign sovereign.

The Court noted that the alternative means of redress by the Executive Branch is more effective than the judiciary piecemeal approach,⁸² and hinted that the Bernstein Letter does not provide an exception to the act of state doctrine.⁸³ It then distinguished *National City Bank of New York v. Republic of China*⁸⁴ because that case focused on the sovereign immunity doctrine, as opposed to the act of state doctrine.⁸⁵

In reaction to the Supreme Court's *Sabbatino* decision, Congress enacted the Hickenlooper Amendment.⁸⁶ The legisla-

sure the foreign government by manipulating the use of foreign aid and economic embargos. *Id.* at 435-36.

⁷⁷ *Id.* at 423. The Court held that in terms of conflict of laws, federal law applies. *Id.* at 426. The Court also stated that the act of state doctrine is binding upon federal and state courts, but was not mandated by the Constitution or by international law. *Id.* at 421-23.

⁷⁸ *Id.* at 428.

⁷⁹ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1972).

⁸⁰ *Id.*

⁸¹ See generally *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). See *supra* note 53 and accompanying text and *infra* note 157.

⁸² *Id.* at 432. See *supra* note 76.

⁸³ *Id.* at 436. See *supra* note 57 and accompanying text.

⁸⁴ *Sabbatino*, 376 U.S. at 438 (distinguishing *National City Bank of N.Y. v. Republic of China*, 348 U.S. 356 (1955)). The *Sabbatino* Court also reasoned that since the *Bank of N.Y.* case involved the inapplicability of the sovereign immunity doctrine in a counterclaim against the foreign government, the choice of law rules from that case - that the forum should apply its local law - was irrelevant in the act of state doctrine analysis. *Id.*

⁸⁵ 376 U.S. at 438.

⁸⁶ 22 U.S.C. § 2370(e)(2) (1994). The relevant portion of the law states that:

[N]o court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or

tive intent of the Amendment was to reverse the presumption of the application of the act of state doctrine.⁸⁷ In addition, Congress sought to "discourage illegal confiscations by foreign governments in violation of international law"⁸⁸

In light of the Hickenlooper Amendment, when the case was on remand from the Supreme Court, the Court of Appeals held that under the Hickenlooper Amendment, the act of state doctrine is inapplicable where the expropriation by the foreign government violated international law and where the President did not oppose adjudication on the merits.⁸⁹

*b). First National City Bank v. Banco Nacional de Cuba*⁹⁰

The Supreme Court again addressed the act of state doctrine in *First National City Bank v. Banco Nacional de Cuba*.⁹¹ This case presented two issues illustrating the scope of the Hickenlooper Amendment. First, the case addressed whether the Hickenlooper Amendment applied to preclude the act of state doctrine; second, it discussed whether the act of state doc-

other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of . . . international law . . . [but the law] . . . shall not be applicable . . . [if] the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States

Id.

⁸⁷ *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957, 963 (S.D.N.Y., 1965) (quoting S. REP. No. 1188, Part I, 88th Cong., 2d Sess. 24 (1964), reprinted in U.S.C.C.A.N. 3852), *aff'd*, 383 F.2d 166, 174 (2d Cir. 1967).

⁸⁸ 243 F. Supp. at 966.

⁸⁹ *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967).

⁹⁰ 406 U.S. 759 (1972).

⁹¹ *Id.* Specifically, this case is important to illustrate the scope of the Hickenlooper Amendment and for its holding that the act of state doctrine is inapplicable where the Court was advised by the Executive Branch not to apply the doctrine. Under the facts of the case, the plaintiff, a Cuban bank, needed a loan and had pledged collateral to the defendant, a New York Bank. *Id.* at 760. Upon Cuba's expropriation of the defendant's branches located in Cuba, the defendant sold the collateral for an amount in excess of the loan. *Id.* at 760, 778-79. The dispute concerned the issue of whether the defendant New York bank could assert a counterclaim as a setoff as against the plaintiff Cuban bank the money from the sale of the collateral. *Id.* at 779 n.3.

trine should apply if the Executive Branch issued a Bernstein Letter.⁹²

With respect to the first issue, the Court held that the Hickenlooper Amendment is applicable only if the specific expropriated property is in question, but is inapplicable to an unrelated property.⁹³ On the second issue, the plurality opinion in this case generated heated debates concerning the amount of deference to be accorded to the Bernstein Letters.⁹⁴ One can argue that a Bernstein Letter provides an exception to the act of state doctrine.⁹⁵ The rationale is that there will be no inter-branch conflict in the conduct of foreign relations if the Executive Branch tells the Court not to apply the doctrine by issuance of a Bernstein Letter, because the justification for the doctrine, prevention of embarrassment of the political branch in conducting foreign relations, is eliminated.⁹⁶ Ultimately, the plurality of the Court held that suggestions from the Executive Branch in a Bernstein Letter were not exceptions to the act of state doctrine.⁹⁷

⁹² 406 U.S. 759 (1972). The Bernstein Letter exception to the act of state doctrine was an undecided issue in *Sabbatino*. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 419-20 (1964); see *supra* note 83 and accompanying text. In the instant case, the Department of State's Legal Advisor sent a Bernstein Letter indicating that the Executive Branch determined that applying the act of state doctrine would not further the foreign relations of the United States. *Banco Nacional de Cuba v. First Nat'l City Bank of N.Y.*, 442 F.2d 530, 536-38 (2d Cir. 1971). See *supra* note 57.

⁹³ *First Nat'l City Bank of N.Y. v. Banco Nacional de Cuba*, 406 U.S. 759, 780 n.5 (1972) (Brennan, J., dissenting) (examining legislative history and quoting *Hickenlooper Amendment, 1965: Hearings on H.R. 7750 Before the House Committee on Foreign Affairs*, 89th Cong., 1st Sess. 578 (1965) (colloquy between Professor Olmstead and Congressman Fraser)).

⁹⁴ *Id.* at 768, 773, 777. Three Justices opined that there is a Bernstein exception to the act of state doctrine, whereas, two concurring Justices and four dissenting Justices, opined that there is no Bernstein exception. *Id.*

⁹⁵ *Id.* at 768.

⁹⁶ *Id.* at 765. The Court distinguished *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), because in *Sabbatino* the Executive Branch declined to comment on whether the act of state doctrine should apply. See *supra* note 83 and accompanying text.

⁹⁷ *Id.* at 776-793 (Brennan, J., dissenting). The concurring and the dissenting opinions gathered enough votes on rejecting the Bernstein Letter as an exception to the act of state doctrine. *Id.* In part, because of the divided opinions in this case, Congress codified the restrictive theory of sovereign immunity from the Tate Letter, in the FSIA. See *supra* note 58.

c). *Alfred Dunhill of London, Inc. v. Republic of Cuba*⁹⁸

In *Alfred Dunhill*,⁹⁹ the Supreme Court reviewed the act of state doctrine and the Hickenlooper Amendment in the context of commercial litigation. The Supreme Court held that the foreign government has the burden of proving the act of state doctrine applied, although there was no consensus among the justices on the issue of whether there is a commercial activity exception to the act of state doctrine.¹⁰⁰ Nonetheless, the Court held that if the foreign state failed to prove that it acted in a public and sovereign capacity, rather than in a private and commercial capacity, the act of state doctrine does not apply.¹⁰¹ In addition, the Supreme Court held that the Hickenlooper Amendment is inapplicable to a contractual claim.¹⁰² This decision had the effect of narrowing the act of state doctrine.

d). *First National City Bank v. Banco Para El Comercio Exterior de Cuba*¹⁰³

The Supreme Court used its equity power to compensate the expropriated victim in *First National City Bank v. Banco Para El Comercio Exterior de Cuba*.¹⁰⁴ The issue was whether a United States court would exercise its equity power to pierce the corporate veil of an entity that had expropriated a United

⁹⁸ 425 U.S. 682 (1976).

⁹⁹ *Id.* The properties in dispute are the accounts payable which arose from shipments of cigars. *Id.* at 685-686. The plaintiffs, the former owners of the expropriated property and the Cuban government, sued the defendants, American importers of the cigars. *Id.* The American importers counterclaimed as against the Cuban government a setoff of the amount that they mistakenly paid to Cuba. *Id.* at 685-88.

¹⁰⁰ *Id.* at 691-94. Four justices opined that the commercial exception to the sovereign immunity doctrine, pursuant to the Tate Letter, applies equally to the act of state doctrine. *Id.* at 695-706. Four dissenting justices rejected that there is a commercial activity exception to the act of state doctrine. *Id.* at 724-725.

¹⁰¹ *Id.*

¹⁰² *Alfred Dunhill*, 425 U.S. 682, 689 n.4 (holding that the Hickenlooper Amendment does not apply to contractual claims involving expropriated property). *But see, e.g.,* West v. Multibanco Comermex, S.A., 807 F.2d 820, 829-30 (9th Cir. 1987) (holding that contractual claims are included within the Hickenlooper Amendment); *see infra* note 153.

¹⁰³ 462 U.S. 611 (1983).

¹⁰⁴ *Id.* The plaintiff, a Cuban bank, sued the defendant, a United States bank, on an unpaid letter of credit. *Id.* at 613-20. The defendant United States bank counterclaimed, but did not seek affirmative recovery as a setoff for its expropriated branches in Cuba. *Id.* at 616.

States corporation's property.¹⁰⁵ The plaintiff Cuban bank argued that because it was a separate entity from the Cuban government, it could not be held liable for that government's expropriations.¹⁰⁶ On the basis of fundamental fairness, the Court held that the presumption of the separate legal entity would be disregarded.¹⁰⁷ The Court also interpreted the FSIA and held the plaintiff liable on the defendant's counterclaim.¹⁰⁸

2. *Implications and Effects of the Cuban Expropriation Cases*

The Cuban expropriation cases spanned from 1961 to 1987.¹⁰⁹ They provided extensive treatment of the act of state and the sovereign immunity doctrines. The cases can be summarized as follows: the Supreme Court's comprehensive discussion of the act of state doctrine in *Sabbatino*¹¹⁰ continued to be valid, even if its specific holding was overruled by the Hick-enlooper Amendment.¹¹¹ There is no Bernstein Letter exception to the act of state doctrine according to *First National City Bank v. Banco Nacional de Cuba*.¹¹² *Alfred Dunhill*¹¹³ stands for the proposition that the foreign government has the burden of proving the act of state doctrine.¹¹⁴ However, as a result of the divided opinions in *Banco Nacional de Cuba* with regard to the Bernstein Letter exception to the act of state doctrine and *Alfred Dunhill* with regard to the Tate Letter's restrictive theory of sovereign immunity,¹¹⁵ Congress enacted the FSIA. In

¹⁰⁵ *Id.* at 613, 628-34.

¹⁰⁶ *Id.* at 633.

¹⁰⁷ *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 630-34. The Court held that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626. However, "Cuba cannot escape liability for acts in violation of international law simply by retransferring the assets to separate juridical entities." *Id.* at 633.

¹⁰⁸ *Id.* at 630. The Court focused on 28 U.S.C. § 1607(c) and noted that "[t]he language and the history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality" *Id.* at 620; see *infra* note 133.

¹⁰⁹ The cases range from *Banco Nacional de Cuba v. Sabbatino*, 193 F. Supp. 375 (S.D.N.Y., 1961) to *Banco Nacional de Cuba v. Chemical Bank N.Y. Trust Co.*, 822 F.2d 230 (2d Cir. 1987).

¹¹⁰ 376 U.S. 398 (1964).

¹¹¹ See *supra* notes 86-89 and accompanying text.

¹¹² 406 U.S. 759 (1972).

¹¹³ 425 U.S. 682 (1976).

¹¹⁴ *Id.* at 681-84.

¹¹⁵ See *supra* notes 94-97, 100 and accompanying text.

the adjudication of expropriation claims, a separate legal entity will be disregarded if equity so requires, according to *First National City Bank v. Banco Para El Comercio Exterior de Cuba*.¹¹⁶ The common thread among these cases is that the expropriated United States litigants are defendants, and their claims for expropriation arise only as counterclaims or offsets to the original claims by the Cuban government or its instrumentalities.¹¹⁷

In short, *Sabbatino* led to the enactment of the Hickenlooper Amendment.¹¹⁸ In *First National City Bank v. Banco Nacional de Cuba* and *Alfred Dunhill*, the Court interpreted the Hickenlooper Amendment.¹¹⁹ *First National City Bank v. Banco Para El Comercio Exterior de Cuba* suggested that equity principles can help the expropriation victim.¹²⁰ Collectively, the Cuban expropriation cases led to the enactment of the FSIA.¹²¹ The next stage of the analysis describes the FSIA and its effect on the expropriated victims.

E. *The Foreign Sovereign Immunities Act (FSIA)*¹²²

The Supreme Court's comment in *Sabbatino*¹²³ not only led to Congressional reaction by enacting the Hickenlooper Amendment to limit the act of state doctrine, but also led to further codification of the doctrine of sovereign immunity.¹²⁴ In attempting to address the issue of whether a foreign sovereign is entitled to immunity, the FSIA has been severely criticized as a legislative muddle because its statutory drafting and construction is confusing.¹²⁵ The purpose of the FSIA is stated in sec-

¹¹⁶ 462 U.S. 611 (1983).

¹¹⁷ See *supra* notes 74, 91, 99, and 104.

¹¹⁸ See *supra* note 86 and accompanying text and text accompanying notes 87-88.

¹¹⁹ See *supra* text accompanying notes 93 and 102.

¹²⁰ See *supra* text accompanying note 104 and note 107 and accompanying text.

¹²¹ See *supra* text accompanying note 115.

¹²² 28 U.S.C. §§ 1330, 1602-1611 (1994). See generally, Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 INT'L & COMP. L.Q. 302 (1986).

¹²³ 376 U.S. 398 (1964). See *supra* text accompanying notes 78-80.

¹²⁴ 28 U.S.C. §§ 1330, 1602-1611 (1994).

¹²⁵ See *Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094, 1105 (S.D.N.Y. 1982), where the court described the FSIA as a "statutory labyrinth that, owing to the numerous interpretive questions engendered by its bizarre structure and its

tion 1602 of the United States Code.¹²⁶ The FSIA codified the restrictive theory of sovereign immunity pursuant to the Tate Letter,¹²⁷ and is a limitation of the absolute sovereign immunity doctrine.¹²⁸ In addition, FSIA eliminates the potential inter-branch conflicts and the piecemeal approach in diplomatic considerations, as evidenced by the judicial deference to the Department of State Letters.¹²⁹ One of the chief purposes of the FSIA is to promote uniformity of procedures of the United

many deliberately vague provisions, has during its brief lifetime been a financial boon for the private bar but a constant bane of the federal judiciary." *Id.* In addition, the court noted that FSIA is "obtuse" and that it requires determination "of a laundry list of purposefully ambiguous 'exceptions,' several of which were apparently drafted without any regard for the jurisdictional consequences . . . all of which present interpretative problems of varying degrees of difficulty." *Id.* at 1106.

¹²⁶ 28 U.S.C. § 1602 (1994). The relevant portion of the law provides that: Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgements rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States

Id.

¹²⁷ See *supra* note 58; *Verlinden B.V. v. Central Bank of Nig.*, 461 U.S. 480, 488 (1983). See also *Republic of Arg. v. Weltover, Inc.*, 119 L.Ed.2d 394, 404-05 (1992); *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 256 (7th Cir. 1983); *Asociacion De Reclamantes v. United Mexican States*, 561 F. Supp. 1190, 1194 (D.D.C. 1983), *aff'd*, 735 F.2d 1517 (D.C. Cir. 1984) ((quoting H.R. REP. NO. 1487, 94th Cong., 2d Sess., 1976, reprinted in U.S.C.C.A.N. 6604, 6605) (the FSIA: would codify the so-called 'restrictive' principle of sovereign immunity, as presently recognized in international law . . . the immunity of a foreign state is 'restricted' to suits involving a foreign state's public acts (*jure imperii*) and does not extend to suits based on commercial or private acts (*jure gestionis*). This principle was adopted by the Department of State in 1952 . . . [and] . . . is regularly applied against the United States in suits against the U.S. Government in foreign courts.)).

United Mexican States, 561 F. Supp. 1190, 1194.

¹²⁸ *Verlinden B.V.*, 461 U.S. 480, 486-87. According to the Court in *Verlinden*:

Until 1952, the State Department ordinarily requested immunity in all actions against friendly sovereigns. But in the so-called Tate Letter, (footnote omitted) the State Department announced its adoption of the "restrictive" theory of foreign sovereign immunity. Under this theory, immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts.

Id. See *supra* note 58.

¹²⁹ *Id.* at 488. See *Asociacion De Reclamantes v. United Mexican States*, 561 F. Supp. 1190, 1194 (D.D.C. 1983).

States courts in suits against foreign states.¹³⁰ However, this purpose is defeated because there is no uniformity among the courts in interpreting the statute. The act of state doctrine is a discretionary rule involving considerations of judicial deference, inter-branch conflicts, and implications of foreign relations. As a result the FSIA is also undermined by the act of state doctrine because a court is free to invoke that doctrine to decline hearing a case.¹³¹

The focus of the next stage of the analysis will be on the cases interpreting the act of state doctrine and its exception, the Hickenlooper Amendment. Moreover, the exceptions to sovereign immunity, as codified by FSIA §§ 1605¹³² and 1607,¹³³ will

¹³⁰ Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 INT'L & COMP. L.Q. 302, 305 (1986).

¹³¹ *Braka v. Bancomer, S.N.C.*, 762 F.2d 222 (2d Cir. 1985), *see infra* text accompanying note 144; *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985), *see also infra* text accompanying note 149.

¹³² 28 U.S.C. § 1605 (1994). The relevant portions of the statute are as follows:

(a) A foreign state shall not be immune from the jurisdiction of courts [if either]: . . . (2) . . . the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States [hereinafter commercial activity exception]; (3) . . . rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States [hereinafter illegal taking exception]

Id. There are other exceptions, discussions of which are eliminated because of their limited utility for an expropriation victim. *See, e.g.*, *Asociacion De Reclamantes v. United Mexican States*, 735 F.2d 1517 (D.C. Cir. 1984) (interpreting § 1605(a)(4) and (5)), *Freidar v. Government of Israel*, 614 F. Supp. 395 (S.D.N.Y. 1985) (interpreting § 1605(a)(1)). The analysis of the provisions for the execution of judgment and the attachment of property, § 1609, and its exception, § 1610, while relevant, is beyond the scope of this article.

¹³³ 28 U.S.C. § 1607 (1994). The statute provides that:

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States . . . the foreign state shall not be accorded immunity with respect to any counterclaim . . . (a) for which a foreign state would not be entitled to immunity under section 1605 . . . had such claim been brought in a separate action against that foreign state; or (b) arising out of the transaction . . . that is the subject matter of the claim of

be emphasized, since in order to defeat a foreign government's claim of immunity, an expropriation victim needs to find that one of the exceptions from the statute applies. The FSIA is a jurisdictional statute, because "[a]s a threshold of every action . . . against a foreign state . . . the court must satisfy itself that one of the exceptions applies" ¹³⁴ Furthermore, the FSIA also supplies substantive federal law regarding foreign sovereign immunity. ¹³⁵

F. Case Law — Decisions Under the FSIA

The FSIA places the determination of whether to apply the doctrine of sovereign immunity solely within the power of the courts, thus removing the uncertainty of having to consult with the Executive Branch. ¹³⁶ However, even if the FSIA codified the restrictive theory of sovereign immunity, it did not reduce the scope of foreign sovereign immunity. ¹³⁷ As the following cases show, under the FSIA scheme, the expropriation victims still face difficulties in obtaining jurisdiction and relief.

1. *The Mexican Banks Nationalization Incidents*

As a parallel to the Cuban expropriation cases, the nationalization of Mexican banks and the imposition of an exchange control by the Mexican government in 1982 generated increased litigation involving the act of state doctrine and the FSIA. ¹³⁸ The plaintiffs were United States investors who bought certifi-

the foreign state; or (c) to the extent that the counterclaim does not seek relief exceeding in amount . . . from that sought by the foreign state.

Id. [hereinafter counterclaim exception]. See *supra* text accompanying note 67.

¹³⁴ *Verlinden B.V. v. Central Bank of Nig.*, 461 U.S. 480, 493-94 (1983). See also *Argentine Republic v. Amerasia Shipping*, 488 U.S. 428, 434 (1989) (holding that Congress intended that the FSIA to be the sole basis for obtaining jurisdiction over a foreign state), *accord* *Republic of Arg. v. Weltover Inc.*, 119 L.Ed.2d 394, 403 (1992).

¹³⁵ *Verlinden*, 461 U.S. at 497.

¹³⁶ See, e.g., *Verlinden B.V. v. Central Bank of Nig.*, 461 U.S. 480, 488 (1983).

¹³⁷ See *supra* note 108.

¹³⁸ See, e.g., *Braka v. Bancomer, S.N.C.*, 762 F.2d 222 (2d Cir. 1985); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985); *West v. Multibanco Comermex, S.A.*, 807 F.2d 820 (9th Cir. 1987). See Monroe Leigh, *Foreign Sovereign Immunities Act, Commercial Activity and Expropriation Exceptions, Act of State Doctrine, Second Hickenlooper Amendment, Imposition of Foreign Exchange Controls Not An Expropriation*, 81 AM. J. INT'L L. 660 (1987).

cates of deposit from private Mexican banks.¹³⁹ The Mexican government nationalized the Mexican banks and imposed an exchange control whereby the certificates of deposit were redeemed in pesos and in reduced rates of exchange.¹⁴⁰ Plaintiffs sued on a breach of contract theory, alleging violations of federal securities law¹⁴¹ and illegal taking of property.¹⁴²

In *Braka v. Bancomer, S.N.C.*,¹⁴³ the court held that the act of state doctrine barred the plaintiffs' claim.¹⁴⁴ The court decided the same way in *Callejo v. Bancomer, S.A.*,¹⁴⁵ but in dictum it held that pursuant to the commercial activity exception,¹⁴⁶ the court had jurisdiction over the defendant Mexican bank.¹⁴⁷ The *Callejo* court held that the defendant satisfied the third clause of FSIA section 1605(a)(2)¹⁴⁸ because it carried on a commercial activity elsewhere which caused a di-

¹³⁹ *Braka*, 762 F.2d at 223; *Callejo*, 764 F.2d at 1105; *West*, 807 F.2d at 822.

¹⁴⁰ *Braka*, 762 F.2d at 223; *Callejo*, 764 F.2d at 1104; *West*, 807 F.2d at 822-23.

¹⁴¹ *Braka*, 762 F.2d at 223; *Callejo*, 764 F.2d at 1106.

¹⁴² *West*, 807 F.2d at 823.

¹⁴³ *Braka*, 762 F.2d 222 (2d Cir. 1985). Plaintiffs, United States citizens, bought certificates of deposit from the defendant, a private Mexican bank. *Id.* The funds for these purchases came from the plaintiffs' bank accounts with the defendant in Mexico or from plaintiffs' checks payable from the defendant's New York agent. *Id.* Before the maturity of the certificates, Mexico nationalized all its banks and imposed an exchange control, as a result, plaintiffs' certificates of deposits were devalued. *Id.* at 223.

¹⁴⁴ *Id.* at 225. *But see* *Allied Bank Int'l v. Banco Credito Agricola*, 757 F.2d 516, 522 (2d Cir. 1985) (holding that "acts of foreign governments purporting to have extraterritorial effect . . . should only be recognized if they are consistent with the law and policy of the United States."); *Optopics Laboratory Corp. v. Savannah Bank*, 816 F. Supp. 898, 907 (S.D.N.Y. 1993) (holding that act of state doctrine does not apply if the foreign state's act is contrary to the United States' law and policy).

¹⁴⁵ 764 F.2d 1101 (5th Cir. 1985). Plaintiffs, United States citizens residing in Texas, bought certificates of deposit from defendant, a private Mexican bank, through funds transferred from their bank account in Texas. *Id.* at 1105. Subsequently, the Mexican government imposed an exchange control with the effect of reducing the plaintiffs' certificates' value. *Id.* at 1106.

¹⁴⁶ 28 U.S.C. § 1605(a)(2) (1994); *supra* note 132.

¹⁴⁷ *Callejo*, 764 F.2d at 1107-08. The court announced a two prong test as follows: First, whether the suit is based on a commercial activity by the foreign state, in other words, whether the relevant activity is commercial or sovereign in nature; and secondly, whether the commercial activity have the requisite jurisdictional nexus with the United States. *Id.*

¹⁴⁸ 28 U.S.C. § 1605(a)(2) (1994). The relevant portions of the statute are as follows:

(a) A foreign state shall not be immune from the jurisdiction of courts [if]: . . . (2) . . . the action is based upon . . . an act outside the territory of the

rect and foreseeable effect in the United States. However, the plaintiffs' claims were dismissed because of the act of state doctrine.¹⁴⁹

In comparison, the court in *West v. Multibanco Comermex, S.A.*¹⁵⁰ reached the same result, but on different grounds. First, the Ninth Circuit held that the act of state doctrine presumes the validity of the Mexican government's acts, even if it had jurisdiction according to the FSIA's commercial activity exception.¹⁵¹ Secondly, the court held that the Hickenlooper Amendment¹⁵² applies as an exception to the act of state doctrine,¹⁵³ but that the FSIA's illegal taking exception¹⁵⁴ does not apply. This is so because "[v]alid expropriations must always serve a public purpose; that public purpose . . . may . . . render lawful what otherwise might constitute a 'taking.'"¹⁵⁵ Conversely, the court stated that a taking violates international law

United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

Id.

¹⁴⁹ *Id.* at 1123-24. The court held that the incidents of the debt determine its situs, and in determining the act of state doctrine, the ultimate question is whether the ties of the debt to the foreign state is sufficiently close that the courts will create hostility by not recognizing the acts of the foreign state. *Id.*

¹⁵⁰ 807 F.2d 820 (9th Cir. 1987). Plaintiffs, United States investors, bought certificates of deposits from defendants Mexican banks before Mexico's imposition of exchange control. *Id.* at 822. As a result of Mexico's policy of redeeming the certificates in pesos, plaintiffs suffered losses. *Id.* at 823.

¹⁵¹ *Id.* at 829. The court agreed with *Callejo* that it had jurisdiction pursuant to the commercial activity exception. *Id.* at 825-26. But the plaintiff's breach of contract claim ultimately failed on the merits. *Id.* at 826-27.

¹⁵² 22 U.S.C. § 2370(e)(2) (1994); see *supra* note 86. Apparently, this tangible/intangible property distinction has generated considerable controversy, see Thomas S. Blackburn, Note, *Attachment and Exception Disallowed Pursuant to Intangible Claims*, *Brewer v. Socialist People's Republic of Iraq*, 14 SUFFOLK TRANSNAT'L L. J. 711 (1991) (criticizing *Brewer v. Socialist People's Republic of Iraq*, 890 F.2d 97 (8th Cir. 1989) (holding that employment contract is intangible property and, thereby, declined jurisdiction)).

¹⁵³ *West*, 807 F.2d at 829-30. The court refused to draw the distinction between tangible and intangible property, and held that contractual claims are included within the Hickenlooper Amendment. *Id.* Cf. *De Sanchez v. Banco Cent. de Nicaragua*, 770 F.2d 1385, 1395 (5th Cir. 1985) (dictum stating that the FSIA § 1605(a)(3) and the Hickenlooper Amendment has the same focus on the expropriation of property, therefore FSIA may not apply to intangible property). But see *Intercontinental Dictionary Series v. De Gruyter*, 822 F. Supp. 662, 678 (C.D. Cal., 1993) (holding that computer manuscripts are intangible property, hence not included in FSIA § 1605(a)(3)).

¹⁵⁴ 28 U.S.C. § 1605(a)(3) (1994); see *supra* note 132.

¹⁵⁵ 807 F.2d at 831. See *supra* text accompanying note 53.

if the confiscation discriminates against aliens,¹⁵⁶ or if it does not provide for just compensation.¹⁵⁷

In sum, the plaintiffs who lost money on their certificates of deposit because of the nationalization of Mexican banks have no relief from the courts of the United States, despite the Hickenlooper Amendment and the FSIA. *Braka* and *Callejo* demonstrate the continued vitality of the act of state doctrine in depriving the expropriation victims of having their day in court, the ineffectiveness of the FSIA in promoting uniformity of procedures, and the courts' inconsistencies in applying the FSIA. The *Callejo* court correctly interpreted the FSIA's commercial activity exception,¹⁵⁸ but that court was able to circumvent the FSIA by invoking the act of state doctrine. *Callejo* shows that a United States court can avoid the difficult issue of having to decide that the foreign government had violated international law by invoking the act of state doctrine. *Callejo* also demonstrates that one of the purposes of the FSIA, to promote uniformity of procedure, is undermined by the act of state doctrine.

The *West* court's interpretation of the Hickenlooper Amendment as an exception to the act of state doctrine was sound. However, its refusal to apply the FSIA's illegal taking exception¹⁵⁹ is not persuasive.¹⁶⁰ Any deprivation of a property interest is a taking, regardless of whether the taking served a public purpose or not.¹⁶¹ Consistent with the Cuban expropriation cases,¹⁶² *Braka*, *Callejo*, and *West* showed that an expropriation victim suing a foreign state in a United States court will need to

¹⁵⁶ *Id.* at 832. See *supra* text accompanying note 53.

¹⁵⁷ *Id.* "An otherwise valid taking is illegal without the payment of just compensation." *Id.* The court also quoted Letter from Cordell Hull, Secretary of State, to the Mexican Ambassador (1940), reprinted in 3 HACKWORTH DIGEST OF INT'L LAW 662: "[T]he right to expropriate property is coupled with and conditioned on the obligation to make adequate, effective, and prompt compensation. The legality of an expropriation is in fact dependent upon the observance of this requirement." See *Banco Nacional De Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 888 (2d Cir. 1981). See *supra* text accompanying note 53.

¹⁵⁸ 28 U.S.C. § 1605(a)(2) (1994); see *supra* note 132.

¹⁵⁹ 28 U.S.C. § 1605(a)(3) (1994); see *supra* note 132.

¹⁶⁰ *West*, 807 F.2d at 831-32. This is so because the court qualified its holding by stating that there is a limit beyond which an exchange control for a public purpose may violate international law. *Id.* at 832.

¹⁶¹ *Id.* at 831. On the contrary, the court stated that "generally" a foreign government's implementation of exchange control is not a taking. *Id.* at 832.

¹⁶² See *supra* part III.D.

surmount two barriers by fitting his or her case within the exceptions. The first barrier is determining whether the Hick-enlooper Amendment acts as an exception to the act of state doctrine. If the claim alleges a taking in violation of international law, then the case is justiciable and can be heard by a court. The second barrier is the sovereign immunity doctrine or the FSIA. If any of the FSIA's exceptions apply, then a court will have jurisdiction.

2. *Other Post-FSIA Expropriation Cases*

To reiterate, prior to exercising jurisdiction over a foreign state, a court must find that one of the exceptions in the FSIA applies.¹⁶³ The next stage of the analysis concentrates on the FSIA and its effect on the courts' decisions regarding expropriation claims.

a). *Gibbons v. Udaras na Gaeltachta*¹⁶⁴

The court's approach in *Gibbons* is a typical way to determine whether any of the exceptions in the FSIA apply to preclude sovereign immunity. The plaintiffs in *Gibbons* sued on the theories of breach of contract, tort, and illegal taking of property, *inter alia*, alleging that the instrumentalities of Ireland had harmed them.¹⁶⁵ The plaintiffs also argued that various FSIA exceptions applied.¹⁶⁶ The court found both the commercial activity exception¹⁶⁷ and the illegal taking excep-

¹⁶³ See *supra* notes 132, 133 and text accompanying note 134.

¹⁶⁴ 549 F. Supp. 1094 (S.D.N.Y. 1982).

¹⁶⁵ *Id.* at 1104. The dispute involved a breach of contract of a joint venture between the plaintiffs and an instrumentality of Ireland in which the business incurred substantial loss. *Id.* The plaintiffs alleged that the defendant, an instrumentality of Ireland, had expropriated their intellectual property. *Id.*

¹⁶⁶ *Id.* at 1106. Specifically, the plaintiffs claimed FSIA § 1605(a)(1), (2) commercial activity exception, or (3) illegal taking exception. *Id.* at 1106-07; see *supra* note 132.

¹⁶⁷ *Id.* at 1115. The court held that the test for commercial activity exception depends on whether the cause of action is based on an act performed in connection with commercial activity, which turns on whether the foreign state engaged in commercial activity, and the relationship of the cause of action and the connected commercial activity had to the United States. *Id.* at 1008-09. The court provided a chart to illustrate this concept. *Id.* at 1108-09, 1112. *Accord* *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1107-08 (5th Cir. 1985); see *supra* note 147.

tion¹⁶⁸ applicable as it went through each FSIA exception. This case shows that a plaintiff claiming expropriations may combine such a claim with other claims to obtain jurisdiction pursuant to the FSIA. Once a court finds that it has jurisdiction, the expropriation claim can proceed on the merits along with the plaintiff's other claims.

*b). Alberti v. Empresa Nicaraguense De La Carne*¹⁶⁹

The plaintiffs in *Alberti* were United States corporations that owned some stocks in a Nicaraguan corporation that had been nationalized by the defendant Nicaraguan government.¹⁷⁰ The Seventh Circuit considered and summarily rejected the plaintiffs' contentions¹⁷¹ under the commercial activity exception¹⁷² and the counterclaim exception.¹⁷³ As for the illegal taking exception,¹⁷⁴ the court explained that "the expropriating nation must provide 'prompt, adequate and effective' compensation, but there is little agreement on the meaning of these terms."¹⁷⁵ The court construed that "prompt" does not mean immediate.¹⁷⁶ Though ultimately the foreign state has the burden to prove immunity, this burden shifts to the plaintiffs if the foreign state has proof that it acted in a public, sovereign capac-

¹⁶⁸ *Gibbons*, 549 F. Supp. at 1107 n.4, 1111 n.7; 28 U.S.C. § 1605(a)(3) (1994); see *supra* note 132.

¹⁶⁹ 705 F.2d 250 (7th Cir. 1983).

¹⁷⁰ *Id.* at 252. After the nationalization, the plaintiffs ordered but refused to pay for shipments of goods from the Nicaraguan corporation, instead, the plaintiffs sued the nationalized Nicaraguan corporation and the Nicaraguan government. *Id.* The plaintiffs sought to recover on the theory of conversion, and to offset the value of the stocks in the nationalized Nicaraguan corporation against the shipment of goods. *Id.*

¹⁷¹ *Id.* at 254.

¹⁷² 28 U.S.C. § 1605(a)(2) (1994); *supra* note 132.

¹⁷³ 28 U.S.C. § 1607 (1994); *supra* note 133. The plaintiffs committed tactical error by seeking a declaratory judgement for the offset of the value of expropriated property against the value of the shipment of goods. *Alberti*, 705 F.2d at 254. Instead, they should have waited until the defendants sued first; as the court noted that when there is a pending trial in a state court, where the defendant brought suit first, the plaintiffs may use the counterclaim exception. *Id.*

¹⁷⁴ 28 U.S.C. § 1605(a)(3) (1994); *supra* note 132.

¹⁷⁵ *Alberti*, 705 F.2d at 255. But see *supra* notes 53 and 157 and accompanying text.

¹⁷⁶ *Id.* at 255.

ity.¹⁷⁷ The plaintiffs failed to sustain this burden, thus the court held for the defendant foreign state.¹⁷⁸ This case shows the similarity of the burden of proof between the act of state doctrine and the FSIA, and that the shifting of the burden of proof may be a pitfall for the expropriation victim.¹⁷⁹ Tactical consideration should also be taken into account to determine whether to sue first, or adopt a wait-and-see posture¹⁸⁰ in order to use FSIA's counterclaim exception.

c). *Kalamazoo Spice Extraction Co., v. Provisional Military Government of Socialist Ethiopia*¹⁸¹

Kalamazoo Spice is one of the few cases where the expropriation victim prevailed. The facts are similar to *Alberti*,¹⁸² except that here, the foreign state sued first, and the expropriated defendant counterclaimed.¹⁸³ There were two issues in *Kalamazoo Spice*. The first was whether the act of state doctrine applies if there is a treaty between the United States and a foreign state.¹⁸⁴ The Sixth Circuit held that where there is a treaty between the United States and the foreign state which provided for "just and effective compensation,"¹⁸⁵ such a treaty sets forth a generally agreed upon method of compensation which provided a controlling legal principle.¹⁸⁶ The court reasoned that under the authority of *Banco Nacional de Cuba v.*

¹⁷⁷ *Id.* at 255-56. Compare *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 691-94 (1976); see *supra* text accompanying notes 100-101 (foreign state has the burden of proof in the act of state doctrine).

¹⁷⁸ *Alberti*, 705 F.2d at 256.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 254. See *supra* note 173.

¹⁸¹ 729 F.2d 422 (6th Cir. 1984), *aff'd on remand*, 616 F. Supp. 660 (D.Mich. 1985).

¹⁸² 705 F.2d 250 (7th Cir. 1983).

¹⁸³ *Kalamazoo Spice Extraction Co.*, 729 F.2d at 423. The defendant, a United States corporation, in a joint venture with the Ethiopian government, owned some stocks of an Ethiopian corporation. *Id.*

¹⁸⁴ *Id.* at 425.

¹⁸⁵ *Id.* at 425. Compare *supra* notes 53 and 157 and accompanying text.

¹⁸⁶ *Id.* at 425-26. Accord *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 429 (1964); see *supra* text accompanying notes 53 and 78. Compare *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 255 (7th Cir. 1983) (stating that there is disagreement as to the meaning of "prompt, adequate, and effective" compensation); see *supra* text accompanying note 175.

Sabbatino,¹⁸⁷ there is a treaty exception to the act of state doctrine.¹⁸⁸ This is because a treaty supplies a legal standard, reduces the possibility of conflict with the Executive Branch, and thus removes the underlying rationales for the act of state doctrine.¹⁸⁹ Hence, this furthered the narrowing of the act of state doctrine.¹⁹⁰

The second issue was the whether the FSIA's illegal taking exception applied.¹⁹¹ The court held that the expropriation victim must prove the three elements in the illegal taking exception: first, there must be rights in property at issue;¹⁹² second, the property must have been taken in violation of international

¹⁸⁷ *Kalamazoo Spice Extraction Co.*, 729 F.2d at 425-26. See *supra* part III.D.1.a; *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

¹⁸⁸ The court reaches this through the specific language from *Sabbatino* stating that the act of state doctrine applies unless there is "a treaty or other unambiguous agreement regarding controlling legal principles" *Kalamazoo Spice Extraction Co.*, 729 F.2d at 425. See *supra* text accompanying notes 6 and 78.

¹⁸⁹ *Kalamazoo Spice Extraction Co.*, 729 F.2d at 427.

¹⁹⁰ In effect, there are five possible exceptions to the act of state doctrine. First, the Bernstein Letter exception, where the Executive Branch issues a letter suggesting to the court not to apply the doctrine. See *supra* notes 57 and 92. However, it is doubtful that this exception exist, as *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972) rejected it in a 5-4 opinion. Second, the commercial activity exception, according to *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976). Third, the Hickenlooper Amendment. See *supra* note 86. Fourth, the combination of the Bernstein Letter exception, the absence of interference with United States' foreign relations, and the claim against the foreign sovereign is asserted by way of counterclaim and does not exceed the value of the foreign sovereign's original claim. *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 884 (2d Cir. 1981). Fifth, the treaty exception, according to *Kalamazoo Spice*. In the final analysis, however, this listing of possible exceptions to the act of state doctrine does not contribute towards the analysis of the doctrine, because ultimately the doctrine is discretionary and is based on its underlying rationales of avoidance of inter-branch conflict and international comity. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 728 (1976) (Marshall, J., dissenting). See *supra* text accompanying notes 14 and 23-25. Moreover, the act of state doctrine has close ties with the political question doctrine. *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 787-88 (1972) (Brennan, J., dissenting).

¹⁹¹ 28 U.S.C. § 1605(a)(3) (1994); *supra* note 132. *Kalamazoo Spice Extraction Co., v. Provisional Military Gov't of Socialist Eth.*, 616 F. Supp. 660, 662 (D.Mich. 1985).

¹⁹² *Id.* As for the first element, the court held that even if the property rights at issue is an intangible property, such as stock ownership, it is still within the statute. *Kalamazoo Spice Extraction Co.*, 616 F. Supp. at 663. *Accord West v. Multibanco Comermerx, S.A.*, 807 F.2d 820, 829-30 (9th Cir. 1987) (holding that there is no distinction between tangible and intangible property). *But see Intercontinental Dictionary Series v. De Gruyter*, 822 F. Supp. 662, 678 (C.D. Cal.,

law;¹⁹³ and third, the jurisdictional nexus requisite in the statute must be met.¹⁹⁴ The court held that the foreign state satisfied all of the elements within the illegal taking exception.¹⁹⁵ Therefore, it did not have sovereign immunity.¹⁹⁶

Kalamazoo Spice shows that there is a treaty exception to the act of state doctrine. It also demonstrates the application of the FSIA's illegal taking exception.¹⁹⁷ It is a remarkable case because the expropriation victim triumphed over the foreign sovereign, in spite of the odds imposed by the act of state, the sovereign immunity doctrine, and other obstacles.

d). *De Sanchez v. Banco Central de Nicaragua*¹⁹⁸

The facts of *De Sanchez* are similar to the Mexican banks nationalization incidents.¹⁹⁹ The plaintiff claimed, *inter alia*, that the commercial activity exception,²⁰⁰ or the illegal taking exception²⁰¹ applied. In addressing the commercial activity exception, the Fifth Circuit held that the exception does not apply where the defendant foreign state acts as a sovereignty.²⁰² In

1993) (finding that intangible property is not within the illegal taking exception). See *supra* note 153.

¹⁹³ See discussion *supra* part III.A.

¹⁹⁴ *Kalamazoo Spice Extraction Co.*, 616 F. Supp. at 663.

¹⁹⁵ 28 U.S.C. § 1605(a)(3) (1994); *supra* note 132; *Kalamazoo Spice Extraction Co.*, 616 F. Supp. at 665. The court also applied the equitable principles from *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba* to disregard separate juridical entities between the Ethiopian government and the Ethiopian corporation. *Id.* at 666. See *First Nat'l City Bank*, 462 U.S. 611, 626-33 (1983); see *supra* note 107 and accompanying text.

¹⁹⁶ *Kalamazoo Spice Extraction Co.*, 616 F. Supp. at 662-65.

¹⁹⁷ 28 U.S.C. § 1605(a)(3) (1994); *supra* note 132.

¹⁹⁸ 770 F.2d 1385 (5th Cir. 1985). See also Monroe Leigh, *Sovereign Immunity, Foreign Sovereign Immunities Act, Commercial Activities Exception, Expropriation Exception, Tortious Activity Exception*, 80 AM. J. INT'L L. 658 (1986).

¹⁹⁹ See discussion *supra* part III.F.1. The plaintiff, a Nicaraguan citizen, bought a certificate of deposit from a private foreign bank. *De Sanchez*, 770 F.2d at 1387.

²⁰⁰ 28 U.S.C. § 1605(a)(2) (1994); *supra* note 132.

²⁰¹ 28 U.S.C. § 1605(a)(3) (1994); *supra* note 132.

²⁰² 770 F.2d at 1391-95. The court noted that "[t]he commercial activity exception is the most frequently argued of the sovereign immunity exceptions." *Id.* at 1390. Moreover, the court announced a three part test: first, define the relevant activity involved, focusing on the defendant's acts, and "whether the particular conduct giving rise to the claim . . . constitutes or is in connection with commercial activity . . ."; second, "whether the relevant activity is sovereign or commercial - a label which depends on the nature of the activity rather than on its purpose."; third, "if the activity is commercial in nature . . . whether it had the requisite

addressing the illegal taking exception, the court indicated that it is analogous to the Hickenlooper Amendment.²⁰³ In the context of an expropriation claim, the Hickenlooper Amendment applies to limit the act of state doctrine, whereas the illegal taking exception limits the sovereign immunity doctrine.²⁰⁴ The court noted that a dispute between people of the same nation does not involve international law,²⁰⁵ and where there is no violation of international law, the illegal taking exception does not apply.²⁰⁶

*e). Siderman de Blake v. Republic of Argentina*²⁰⁷

The plaintiffs in *Siderman de Blake* were a family that lived in Argentina.²⁰⁸ Under the direction of a member of the Argentine government, a group of militants terrorized the plaintiffs and stole their property.²⁰⁹ Besides their claims of torture and violations of human rights,²¹⁰ they argued that the commercial activity exception,²¹¹ and the illegal taking exception²¹² precluded sovereign immunity.²¹³ The Ninth Circuit analyzed the commercial activity exception, and agreed with the

jurisdictional nexus with the United States . . . [such as a] commercial activity carried on in the United States . . . acts performed in the United States in connection with commercial activity elsewhere . . . [or] . . . direct effects in the United States of a commercial activity elsewhere." *Id.* at 1391. *See supra* notes 147 and 167.

²⁰³ *See supra* note 86.

²⁰⁴ *De Sanchez*, 770 F.2d at 1395.

²⁰⁵ *Id.* at 1395-96.

²⁰⁶ *Id.*

²⁰⁷ 965 F.2d 699 (9th Cir. 1992). *See* Philippe Lieberman, Note, *Expropriation, Torture, and Jus Cogens Under the Foreign Sovereign Immunities Act: Siderman de Blake v. Republic of Argentina*, 24 U. MIAMI INTER-AM. L. REV. 503 (1993).

²⁰⁸ *Siderman de Blake*, 965 F.2d at 703.

²⁰⁹ *Id.* at 703-04.

²¹⁰ *Id.* at 714-18.

²¹¹ 28 U.S.C. § 1605(a)(2) (1994); *supra* note 132.

²¹² 28 U.S.C. § 1605(a)(3) (1994); *supra* note 132.

²¹³ 965 F.2d at 708.

plaintiffs that it applied.²¹⁴ In addition, the illegal taking exception applied.²¹⁵

IV. SYNTHESIS

Gibbons,²¹⁶ *Kalamazoo Spice*,²¹⁷ and *Siderman de Blake*²¹⁸ are among the relatively few cases where the expropriation victims passed muster. They surmounted the barriers and tight scrutinies imposed by the act of state doctrine, as limited by the Hickenlooper Amendment, and the sovereign immunity doctrine, as codified in the FSIA. These cases show that the facts and merits in the particular circumstances were highly relevant to obtaining jurisdiction under the FSIA scheme. This is so because the FSIA is modeled after American states' long arm statutes,²¹⁹ and because the rationales of the sovereign immunity doctrine focus on the avoidance of inter-branch conflict in foreign relations and the considerations of international comity.

Callejo,²²⁰ *West*,²²¹ and *Gibbons*²²² show that the facts of an expropriation claim are determinative in the FSIA's commercial activity exception²²³ since that exception depends on the sub-

²¹⁴ *Id.* at 708-11. The expropriated plaintiffs put forth evidence that Argentina confiscated their property, which consisted of a hotel in that country. *Id.* Moreover, they alleged that Argentina continued to operate the hotel and profited from American tourists who stayed in the hotel due to its advertisements and solicitations in the United States. *Id.* The court opined that the facts presented a valid claim that the defendant Argentine government had substantial contact and carried on commercial activities so as to fit within the FSIA's commercial activity exception. *Id.*

²¹⁵ *Id.* at 711-12. The illegal taking exception applied because, according to the plaintiffs allegation, Argentina took some assets, including the stock interests of the hotel, from the plaintiffs' family business. *Id.* The Argentina government did this without paying the plaintiffs for their loss. The court also quoted established principles of international law from the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 712. *Id.* See *supra* text accompanying note 54.

²¹⁶ 549 F. Supp. 1094 (S.D.N.Y. 1982). See *supra* part III.F.2.a.

²¹⁷ 729 F.2d 422 (6th Cir. 1984), *aff'd on remand*, 616 F. Supp. 660 (D.Mich. 1985). See discussion *supra* part III.F.2.c.

²¹⁸ 965 F.2d 699 (9th Cir. 1992). See *supra* part III.F.2.e.

²¹⁹ See Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 INT'L & COMP. L.Q. 302, 305 (1986).

²²⁰ 764 F.2d 1101 (5th Cir. 1985). See discussion *supra* part III.F.1.

²²¹ 807 F.2d 820 (9th Cir. 1987). See discussion *supra* part III.F.1.

²²² 549 F. Supp. 1094 (S.D.N.Y. 1982). See discussion *supra* part III.F.2.a.

²²³ 28 U.S.C. § 1605(a)(2) (1994); *supra* note 132.

stantiality of contact.²²⁴ The relevant inquiry is whether the expropriation claim is sufficiently connected with a commercial activity that the foreign state engaged in and whether the claim and the commercial activity have sufficient ties with the United States.²²⁵

In contrast, *Alberti*²²⁶ is a case where the court summarily declined to apply the commercial activity exception²²⁷ because the claim was disconnected from the commercial activity.²²⁸ Whereas in *De Sanchez*,²²⁹ it was clarified that the sovereign or commercial activity distinction is necessary.²³⁰ This simply reflects on the origin of the FSIA, as grounded upon the restrictive theory of sovereign immunity, and manifested in the *Republic of Mexico v. Hoffman*²³¹ case and the Tate Letter.²³² A sovereign state is not entitled to immunity for its commercial acts, as opposed to its sovereign acts.

The courts in *Gibbons*,²³³ *Kalamazoo Spice*,²³⁴ and *Siderman de Blake*²³⁵ correctly applied the illegal taking exception.²³⁶ The *Kalamazoo Spice* court's explicit listing and holding, and *Siderman de Blake* court's holding, pursuant to the elements of this exception, ought to be considered by future courts encountering this issue. In order to apply the illegal taking exception, a court needs to determine that the expropriation victim's claim is based on some rights in property, that such rights are taken in violation of international law, and that the minimum jurisdictional nexus with the United States exists.

²²⁴ See Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 *Int'l & Comp. L.Q.* 302, 305 (1986).

²²⁵ See *supra* notes 147, 167, and 202.

²²⁶ 705 F.2d 250 (7th Cir. 1983). For a discussion of *Alberti*, see *supra* part III.F.2.b.

²²⁷ 28 U.S.C. § 1605(a)(2) (1994); see *supra* note 132.

²²⁸ 705 F.2d at 254.

²²⁹ 770 F.2d 1385 (5th Cir. 1985). See discussion *supra* part III.F.2.d.

²³⁰ 770 F.2d at 1391-92.

²³¹ 324 U.S. 30 (1945). See discussion *supra* part II.B.

²³² See *supra* part III.B, and note 58 and accompanying text.

²³³ 549 F. Supp. 1094 (S.D.N.Y. 1982). See *supra* part III.F.2.a.

²³⁴ 729 F.2d 422 (6th Cir. 1984), *aff'd on remand*, 616 F. Supp. 660 (D. Mich. 1985). See discussion *supra* part III.F.2.c.

²³⁵ 965 F.2d 699 (9th Cir. 1992). See discussion *supra* part III.F.2.e.

²³⁶ 28 U.S.C. § 1605(a)(3) (1994); *supra* note 132.

On the other hand, the construction of the illegal taking exception²³⁷ given by the court in *West v. Multibanco Comermerx, S.A.*²³⁸ is misleading. It reasoned that if a taking serves a public purpose, it is lawful under international law.²³⁹ This simply is not the international law on expropriation, as international law pursuant to the general agreements among experts and RESTATEMENT²⁴⁰ both indicate that it is a violation of international law if a taking is not for a public purpose, is discriminatory, or is without just compensation.²⁴¹ The key word connecting these requisites is the word "or". The significance of this is that even though the taking is for a public purpose, if no compensation is paid to the expropriation victim for his or her loss, or if the taking is discriminatory against citizens or corporations from a certain country, there is still a violation of international law on expropriation.

Likewise, the *Alberti*²⁴² court's explanation that there is little agreement on the meaning of "prompt, adequate and effective" compensation²⁴³ does not comply with the well established international law on the standard of compensation in the expropriation context.²⁴⁴ The *De Sanchez*²⁴⁵ court is correct in terms of its analogy of the Hickenlooper Amendment²⁴⁶ as an exception to the act of state doctrine with the FSIA's illegal taking exception,²⁴⁷ and its statement that a dispute between people of the same nation does not involve international law.²⁴⁸ The divergence of opinions in interpreting the FSIA's illegal taking ex-

²³⁷ 28 U.S.C. § 1605(a)(3) (1994); *supra* note 132.

²³⁸ 807 F.2d 820 (9th Cir. 1987). See discussion *supra* part III.F.1.

²³⁹ 807 F.2d at 831; see *supra* text accompanying notes 150-157.

²⁴⁰ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (1987); see discussion *supra* part III.A and text accompanying notes 53-54.

²⁴¹ *Id.*

²⁴² 705 F.2d 250 (7th Cir. 1983). See discussion *supra* part III.F.2.b.

²⁴³ 705 F.2d at 255; see discussion *supra* part III.F.2.b, and text accompanying note 175.

²⁴⁴ See Davis R. Robinson, *Expropriation in the Restatement (Revised)*, 78 AM. J. INT'L L. 176 (1984) (explaining that "prompt, adequate, and effective" compensation is the international law on expropriation).

²⁴⁵ 770 F.2d 1385 (5th Cir. 1985). See discussion *supra* part III.F.2.d.

²⁴⁶ See *supra* note 86.

²⁴⁷ 28 U.S.C. § 1605(a)(3) (1994); *supra* note 132. 770 F.2d at 1395; see *supra* text accompanying notes 203-204.

²⁴⁸ 770 F.2d at 1395-96; see *supra* text accompanying note 205.

ception²⁴⁹ suggests that the FSIA has not served its purpose of promoting the uniformity of procedures of the United States courts in suits against foreign states. This problem, combined with the court's discretionary application of the act of state doctrine, makes it impossible to predict whether an expropriated victim can sue a foreign sovereign in a United States court.

As for the counterclaim exception,²⁵⁰ the equity principles embodied in the *National City Bank of New York v. Republic of China*²⁵¹ case are essential. *Alberti*,²⁵² in comparison with *Kalamazoo Spice*,²⁵³ shows that tactically, an expropriation victim may want to wait until the foreign sovereign sues first, so as to use the FSIA's counterclaim exception to defeat the foreign sovereign's immunity. *National City Bank of New York v. Republic of China*²⁵⁴ only applied the principles of equity as an exception to the sovereign immunity doctrine with respect to a counterclaim, but the principles of equity were again used in *First National City Bank v. Banco Para El Comercio Exterior de Cuba*²⁵⁵ to disregard the separate juridical entity status between a foreign government and a corporation essentially controlled by that government.²⁵⁶ These extensions of the equity power of the courts indicate that considerations of fundamental fairness should be evaluated in an expropriation claim. These decisions also suggest that in applying the act of state doctrine, courts should include in their deliberations principles of fundamental fairness to the expropriation victims, in addition to other factors, such as the potentiality of inter-branch conflict and international comity.

*First National City Bank v. Banco Nacional de Cuba*²⁵⁷ illustrates the scope of the Hickenlooper Amendment,²⁵⁸ as does

²⁴⁹ 28 U.S.C. § 1605(a)(3) (1994); *supra* note 132.

²⁵⁰ 28 U.S.C. § 1607 (1994); *supra* note 133.

²⁵¹ 348 U.S. 356 (1955). *See discussion supra* part III.C.

²⁵² 705 F.2d 250 (7th Cir. 1983).

²⁵³ 729 F.2d 422 (6th Cir. 1984), *aff'd on remand*, 616 F. Supp. 660 (D.Mich. 1985).

²⁵⁴ 348 U.S. 356 (1955).

²⁵⁵ 462 U.S. 611 (1983). *See discussion supra* part III.D.1.d.

²⁵⁶ *See also* *Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Eth.*, 616 F. Supp. 660, 666 (D.Mich. 1985).

²⁵⁷ 406 U.S. 759 (1972). *See discussion supra* part III.D.1.b.

²⁵⁸ *See supra* note 91.

Alfred Dunhill,²⁵⁹ *West*,²⁶⁰ and *Kalamazoo Spice*.²⁶¹ They demonstrate that the Hickenlooper Amendment is invaluable to an expropriation victim in overcoming the act of state doctrine.

Finally, the expropriation victim does not have to prove that any of the exceptions pursuant to the Hickenlooper Amendment and the FSIA apply. The burden of proof does not rest on the expropriation victim because the Supreme Court in *Alfred Dunhill*²⁶² held that the foreign sovereign invoking the act of state doctrine has the burden of proof. Similarly, the *Alberti*²⁶³ court held that the sovereign has to prove that it is entitled to immunity. Placing the burden of proof on the foreign sovereign is reasonable because the natural presumption is that an expropriation case is justiciable and that a court will have jurisdiction unless proven otherwise. But this placement of the burden of proof did not provide an expropriation victim with any advantage because of the shifting of burdens.

All of the cases illustrate the varied and inconsistent ways in which courts decide the act of state doctrine and the FSIA issues. They demonstrate the various FSIA exceptions and the ways in which the sovereign immunity doctrine can bar the extension of jurisdiction. Lastly, the cases show how the FSIA is influencing the jurisdictional reaches of the courts to hear expropriation claims. Even if a court has jurisdiction because the facts in any particular case fit within one of the FSIA's exceptions, the act of state doctrine operates to prohibit the expropriation victim from litigating²⁶⁴ unless the Hickenlooper Amendment applies.

In sum, the expropriation victim wishing to sue a foreign sovereign must pass both the FSIA and the Hickenlooper

²⁵⁹ 425 U.S. 682 (1976). See discussion *supra* part III.D.1.c.

²⁶⁰ 807 F.2d 820 (9th Cir. 1987). See discussion *supra* part III.F.1.

²⁶¹ 729 F.2d 422 (6th Cir. 1984), *aff'd on remand*, 616 F. Supp. 660 (D.Mich. 1985); see *supra* part III.F.2.c. Technically, the *Kalamazoo Spice* court did not address the Hickenlooper Amendment, but circumvented the act of state doctrine by the treaty exception - the result is the same, the act of state doctrine no longer bars the expropriation claim.

²⁶² 425 U.S. 682 (1976); see *supra* text accompanying note 100.

²⁶³ 705 F.2d 250 (7th Cir. 1983); see *supra* text accompanying note 177.

²⁶⁴ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 455 C Comment (1987).

Amendment hurdles prior to having his or her case²⁶⁵ judged on the merits. The result of the act of state doctrine and the inconsistent application of the FSIA means that the courts can have plenty of leeway to escape from having to decide an expropriation case which, in turn, means that an expropriation victim will not be compensated for his or her loss. The United States courts, by their unwillingness to adjudicate expropriation claims, has ultimately caused an increased risk of loss in investing abroad by American corporations and individuals.²⁶⁶

V. CONCLUSION

In most expropriation cases, the United States expropriation victims suffered at the hands of the foreign sovereign. Despite the apparently illegal and inappropriate taking in most instances, and despite the extensive codification of the common law by the FSIA, the United States judiciary is reluctant to grant any relief to the victims. The courts are powerless in dealing with foreign affairs, and thus base their decisions on the sovereign immunity and act of state doctrines. The considerations of respect for the foreign government, judicial deference, comity, and the ever elusive "equitable principles" also come into play. This results in plenty of discretion for the courts. How a case will be decided, or whether the court will assert jurisdiction, often depends on the specific facts of a case, the political whirlwinds, and whether the United States has a favorable or hostile foreign relation with that nation. A United States claimant must tread carefully in any expropriation claim against a foreign sovereign power. This is so because of the discretionary nature of the act of state doctrine and the courts' inconsistencies in applying the FSIA's exceptions. As a result, no

²⁶⁵ The ABA and commentators concerned with this subject had advocated abolishing the act of state doctrine. See e.g., *Public Acts of State, the Foreign Sovereign Immunities Act, and the Judiciary*, 83 AM. SOC'Y INT'L L. PROC. 483, 487-92 (1989); Michael J. Bazylar, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325 (1986); and Daniel C.K. Chow, *Rethinking the Act of State Doctrine: An Analysis in terms of Jurisdiction to Prescribe*, 62 WASH. L. REV. 397 (1987).

²⁶⁶ One can, of course, plan the investment so as to reduce the risk of expropriation. For a helpful article on this subject see Philip R. Stansbury, *Planning Against Expropriation*, 24 INT'L LAW. 677 (1990). Alternatively, one can insure against such risk, see S. Linn Williams, *Political and Other Risk Insurance: OPIC, MIGA, Eximbank and Other Providers*, 5 PACE INT'L L. REV. 59 (1993).

road map is sufficient to provide guidance into an uncharted territory.

Ronald Mok*

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