

FLIPPING THE ACT OF STATE PRESUMPTION:  
PROTECTING AMERICA’S INTERNATIONAL INVESTORS  
FROM FOREIGN NATIONALIZATION PROGRAMS

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## I. INTRODUCTION

At his January 2007 inauguration, Venezuelan President Hugo Chavez reaffirmed his commitment to a radical nationalization program as he proclaimed: “Socialism or death, I swear it!”<sup>1</sup> This march towards nationalization has serious implications on American business interests. On January 8, 2007, Chavez announced his plan to nationalize CA Nacional Telefonos de Venezuela (CANTV), the country’s telephone company, and Electricidad de Caracas, Venezuela’s largest electric company.<sup>2</sup> Both of these corporations were partially owned by American companies.<sup>3</sup> On February 1, 2007, Chavez announced that Venezuela would take majority control of all key oil projects in the Orinoco River basin by May 1—a move that would expropriate property from BP, Exxon Mobil, Chevron, ConocoPhillips, Total, and Statoil.<sup>4</sup> Simply put, the Venezuelan government has been explicit and conspicuous in its desire to expropriate American property.

For American policy makers, the Venezuelan nationalization threat represents another chapter in the ongoing attempt by foreign governments to show financial independence by expropriating private property.<sup>5</sup> Since the Russian Revolution of 1917, and especially after World War II, an increasing number of nations have promulgated decrees nationalizing or expropriating the property of American corporations, companies, or other business entities.<sup>6</sup> The Cuban Revolution of 1959 and the Iranian Revolution of 1979 vividly showcased the ease with which a foreign government can engage in this

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1. Simon Romero, *Chavez Begins New Term Vowing Socialism*, N.Y. TIMES, Jan. 11, 2007, at A16.

2. Peter Wilson, *Chavez Vexes Venezuela’s Investors*, BUS. WK. ONLINE, Feb. 5, 2007, [http://www.businessweek.com/globalbiz/content/feb2007/gb20070205\\_643096.htm?chan=search](http://www.businessweek.com/globalbiz/content/feb2007/gb20070205_643096.htm?chan=search). CA Nacional Telefonos de Venezuela and Electricidad de Caracas account for fifty percent of the Venezuelan stock exchange’s daily trading. *Id.*

3. *U.S. Investment in Venezuela Down in ‘06*, ASSOCIATED PRESS, Feb. 8, 2007, available at <http://www.petroleumworld.com/story07020910.htm>.

4. Wilson, *supra* note 2.

5. See Stephen J. Kobrin, *Expropriation as an Attempt to Control Foreign Firms in LDCs: Trends from 1960 to 1979*, 28 INT’L STUD. Q. 329, 329 (1984) (discussing expropriation as a means to gain control of economic actors).

6. Donald T. Kramer, *Modern Status of the Act of State Doctrine*, 12 A.L.R.FED. 707, § 6[a] (1972).

institutionalized theft. With Hugo Chavez's rise to power, the threat of foreign nationalization once again looms on the horizon.<sup>7</sup>

More alarming than Chavez's designs on American property, however, is the American government's traditional acquiescence to foreign expropriations. The Act of State doctrine,<sup>8</sup> which holds that "the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory,"<sup>9</sup> has generally barred aggrieved American investors from filing a claim against foreign governments who engage in nationalization programs.<sup>10</sup> Because an expropriation decree constitutes an official act of state, the courts of the United States will not hear cases about the aggrieved party's losses. American courts thus shield foreign governments from potential civil litigation and deny Americans the chance to obtain compensation for their loss.

This Article argues that the current Act of State doctrine is a muddled law that offers no real help to victims of foreign nationalization. The current case law oscillates between judicial deference to the Executive and the desire to maintain the Judiciary's ability to equitably compensate aggrieved parties. As a result, the current rule is a piecemeal jumble pieced together from the reasoning in three drastically different plurality opinions.<sup>11</sup> Despite this muddled theoretical basis for the Act of State doctrine, the courts have been nearly unanimous in their determination that the nationalization of property constitutes an Act of State. An aggrieved investor who finds his assets nationalized by a foreign government has no recourse in American courts—the only source of relief would stem from

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7. See *The Return of Populism*, THE ECONOMIST, Apr. 15, 2006, at 48 (discussing the return of populism in Latin America and its connection with nationalism).

8. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416–17 (1964) (discussing generally the history of the Act of State doctrine).

9. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

10. The Act of State doctrine is thus distinct from the doctrine of sovereign immunity—the Act of State doctrine bars the substantive review of another country's laws while sovereign immunity is a grant of status bestowed upon foreign diplomats while traveling. See *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004) (describing the FSIA); *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 133, 138–44 (1812) (setting up the basis for American sovereign immunity doctrine). See generally Marianne D. Short & Charles H. Brower, *The Taming of the Shrew: May the Act of State Doctrine and Foreign Sovereign Immunity Eat and Drink as Friends?*, 20 HAMLIN L.R. 723, 723–30 (1997) (discussing the differences between sovereign immunity and the Act of State doctrine).

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

benefits secured through the Executive Branch's diplomatic endeavors.<sup>12</sup>

This situation leaves American investors unnecessarily exposed. To remedy the status quo, this Article argues for a change in the current law: (1) first, the Supreme Court should find that foreign expropriations without just compensation violate international law, thus exposing such expropriations to judicial scrutiny, and (2) the courts should find Executive Branch declarations that any expropriation litigation would not adversely affect American foreign policy interests controlling, thus protecting the President's power to conduct foreign affairs. By incorporating these two changes into the current law, the United States could protect American investors while still placing primacy on the Executive's foreign policy powers. Part I of this Article discusses the birth of the Act of State doctrine and the conflicting judicial and legislative attempts at controlling the doctrine. Part II highlights the internal inconsistencies within the jurisprudence. Part III recommends two changes to the doctrine that would best protect American interests both domestically and internationally.

## II. THE BEGINNINGS OF A CONVOLUTED DOCTRINE

The development of the Act of State doctrine in the twentieth century has been a convoluted trek through both case law and statute. From the beginning, courts have given competing rationales for the refusal to judge another country's laws. With this inconsistent foundation, it should come as no surprise that subsequent cases gave seemingly conflicting results in similar situations. To truly understand the Act of State doctrine, then, one must follow its evolution from the beginning.

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12. See *Sabbatino*, 376 U.S. at 422-23 (“[T]he usual method for an individual to seek relief [from the actions of a foreign government] is to exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal.”).

A. *The Act of State Doctrine's Identity Crisis in Sabbatino: The Rationale Behind the Doctrine*

1. The Doctrine Has Been Described as Both a Product of International Comity and a Safeguard for the Separation of Powers

The modern seminal case in the Act of State doctrine is *Banco Nacional de Cuba v. Sabbatino*, where the Supreme Court found that an American commodity broker could not sue a Cuban corporation based on the nationalization of the broker's assets in Cuba following the Cuban revolution.<sup>13</sup> Reaffirming the traditional articulation of the Act of State doctrine given in *Underhill v. Hernandez*,<sup>14</sup> the *Sabbatino* Court gave two different theoretical bases for the doctrine: (1) the doctrine was a necessary act of international comity exercised out of respect for other nations,<sup>15</sup> and (2) the doctrine had "constitutional underpinnings" based in the separation of powers.<sup>16</sup> Each of these rationales has been relied upon in multiple cases since *Sabbatino* announced these wholly independent theories.

The principle of comity is based on the idea that, in order to maintain good working relationships between the nations of the world, each individual government should not find the actions of other governments illegal.<sup>17</sup> *Sabbatino* argued:

The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of a court . . . for its [sic] rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by

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13. *Id.* at 401–02.

14. 168 U.S. at 252 ("Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.").

15. *Sabbatino*, 376 U.S. at 417.

16. *Id.* at 423.

17. See *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895) ("[Comity] is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."). See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 101 cmt. e (1987) (explaining that the definition of comity in *Hilton v. Guyot* is well-known).

the courts of another *would very certainly 'imperil the amicable relations between governments and vex the peace of nations.'*<sup>18</sup>

Comity is thus a prudential doctrine meant to facilitate the orderly intercourse of nations<sup>19</sup> and not a rule required by a substantive rule of international law.<sup>20</sup> Even though there is no international treaty or *jus cogens* principle<sup>21</sup> behind the Act of State doctrine, some courts' discussions of the doctrine have mistakenly treated comity as binding international law.<sup>22</sup>

The second major rationale for the Act of State doctrine is that the doctrine has "constitutional underpinnings"<sup>23</sup> because it "arises out of the basic relationships between branches of government in a system of separation of powers."<sup>24</sup> Interestingly, after acknowledging that "[t]he text of the Constitution does not require the act of state doctrine,"<sup>25</sup> the Court in *Sabbatino* makes a constitutional separation of powers argument based on the "competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community."<sup>26</sup> Allowing the judiciary to hear cases on the validity of other nations' laws, *Sabbatino* argues, would risk the judicial undermining of broad executive foreign

18. *Sabbatino*, 376 U.S. at 417–18 (emphasis added) (quoting *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303–304 (1918)).

19. See *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 544 n.27 (1987) ("Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states.").

20. See *Sabbatino*, 376 U.S. at 421 (holding that the Act of State doctrine was not "compelled either by the inherent nature of sovereign authority . . . or by some principle of international law" (citations omitted)). See also *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 123 (1812) (stating that the United States must respect the independence and sovereignty of all states); *Liu v. Republic of China*, 892 F.2d 1419, 1431 (9th Cir. 1989) ("The act of state doctrine is not a jurisdictional limit on courts, but rather is a 'prudential doctrine designed to avoid judicial action in sensitive areas.'" (quoting *Int'l Ass'n of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354, 1359 (9th Cir. 1981))).

21. See Jens David Ohlin, *Applying the Death Penalty to Crimes of Genocide*, 99 AM. J. INT'L L. 747, 773–74 (2005) ("These international norms are allegedly so imperative that no state should be allowed to exempt itself by claiming persistent objector status.").

22. See, e.g., *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1084–85 (9th Cir. 2003) (holding international comity doctrine results in dismissal of claim brought against mining company under Alien Tort Claims Act), *withdrawn and superseded on reh'g by Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007).

23. *Sabbatino*, 376 U.S. at 423.

24. *Id.*

25. *Id.*

26. *Id.* at 425.

policy goals<sup>27</sup> and the possibility of promulgating contradictory judgments on the same point of international law.<sup>28</sup>

While the separation of powers argument echoes some of the considerations embodied in the political question doctrine,<sup>29</sup> the Supreme Court has explicitly rejected the contention that determining the validity of a foreign act of state is a nonjusticiable political question.<sup>30</sup> Indeed, in political question cases the court simply dismisses the case without evaluating the issue; in Act of State cases, the Court presumes the foreign law is valid and enforces the validity of that law against the interests of the party filing suit.<sup>31</sup>

27. *Id.* at 432.

28. *Id.* at 425 (describing this problem as “the potential dangers [if] *Erie* [were] extended to legal problems affecting international relations”).

29. See *Baker v. Carr*, 369 U.S. 186, 217 (1962). In *Baker*, the Court gave six factors that each independently require dismissal of the case if the factor is “inextricable from the case at bar.” *Id.* Four of the factors are arguably applicable to the Act of State doctrine: (1) “constitutional commitment of the issue to a coordinate political department,” (2) “the impossibility of a court’s undertaking independent resolution without expressing lack of respect due coordinate branches of government,” (3) “an unusual need for unquestioning adherence to a political decision already made,” and (4) “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Id.* See also *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1079 (9th Cir. 2003) (discussing the political question doctrine in the Act of State context), *withdrawn and superseded on reh’g by Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007).

30. See *Sabbatino*, 376 U.S. at 461–62 (“Without doubt political matters in the realm of foreign affairs are within the exclusive domain of the Executive Branch . . . . But this is far from saying that the Constitution vests in the executive exclusive absolute control of foreign affairs or that the validity of a foreign act of state is necessarily a political question.” (citation omitted)).

31. See Malvina Halberstam, *Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law*, 79 AM. J. INT’L L. 68, 74 (1985) (stating that “[t]he act of state doctrine is nota doctrine of judicial self-restraint or abstention, comparable to the political question doctrine” and discussing how the Court in *Sabbatino* did not dismiss the case as it would normally do with a case involving a political question, but rather upheld and enforced the Cuban decree). Because of American courts’ enforcement of foreign decrees, Louis Henkin has argued that the Act of State doctrine is actually a federal choice-of-law rule. See generally Louis Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT’L L. 175 (1967). Frederic L. Kirgis, in *Understanding the Act of State Doctrine’s Effect*, 82 AM. J. INT’L L. 58, 58 (1988), restated Henkin’s argument as follows:

[T]he effect of declining to apply it in any given case is simply to remove it as the controlling choice-of-law rule. In the absence of a statutory directive, the court would then use its normal choice-of-law approach to select the governing law. It might look to international law principles, but only insofar as they are incorporated into federal statutory or common law in the United States, and only if the choice-of-law process selects U.S. law. On the other hand, if the act of state doctrine is applied, its effect is either to choose the foreign law and preempt any escape device, or . . . to preclude the application of United States regulatory law (such as U.S. antitrust law) to conduct that stems from a foreign governmental act.

The fundamental basis for the Act of State doctrine thus rests either in the desire to safeguard smooth international relations or in the “constitutional underpinnings” of the Executive’s foreign policy power. Courts, in deciding Act of State cases, have relied exclusively on comity reasoning, exclusively on the separation of powers argument, or on both.<sup>32</sup> This variance in the rationales is symptomatic of the Supreme Court’s approach to the doctrine in *Sabbatino*; the Court could not come up with a cohesive reason why the doctrine was required so it supplied several different nonbinding sources. Courts now pick from the notions of “international goodwill” and “constitutional underpinnings” to explain the use of the doctrine.

## 2. *Sabbatino* Held that International Law Did Not Control Cases Where a Government Had Expropriated Property Without Just Compensation

Underlying the *Sabbatino* decision was the assumption that international law was silent on the issue of whether expropriations warranted just compensation.<sup>33</sup> This assertion was based largely on the idea that if the Communist bloc did not embrace conceptions of private property, then there could be no consensus in international law:

There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state’s power to expropriate the property of aliens. There is, of course, authority . . . for the view that a taking is improper under international law if it is not for a public purpose, is discriminatory, or is without provision for prompt, adequate, and effective compensation. However, Communist countries,

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When viewed as a choice-of-law rule, the Act of State doctrine is a deviation from the general rule that “a court of the United States, where appropriate jurisdictional standards are met, will decide cases before it by choosing the rules appropriate for decision from among various sources of law including international law.” *First Nat’l City Bank v. Banco Nacional de Cuba (Citibank I)*, 406 U.S. 759, 763 (1972) (citing *The Paquete Habana*, 175 U.S. 677 (1900)).

32. Compare *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 697 (1976) (“The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations.” (citing *Sabbatino*, 376 U.S. at 427–28)), with *Citibank I*, 406 U.S. at 764–66 (supporting the Act of State doctrine on both comity and separation of power grounds).

33. See *Sabbatino*, 376 U.S. at 421–22 (“That international law does not require application of the doctrine is evidenced by the practice of nations. . . . If international law does not prescribe use of the doctrine, neither does it forbid application of the rule even if it is claimed that the act of state in question violated international law.”).

although they have in fact provided a degree of compensation after diplomatic efforts, commonly recognize no obligation on the part of the taking country.<sup>34</sup>

*Sabbatino* also questioned the level of international consensus on property rights because some developing countries refused to adhere to the property regimes of “imperialist” Western countries.<sup>35</sup> With no international consensus on the status of property rights, *Sabbatino* argued, there was simply no way to operationalize the notion of an international standard of just compensation for American courts to use.<sup>36</sup>

*Sabbatino*’s treatment of international law was symptomatic of the nation-centric lens the Court used: “The traditional view of international law is that it establishes substantive principles for determining whether one country has wronged another.”<sup>37</sup> The Court wrote *Sabbatino* at a time when international law was beginning to recognize a distinction between public international law, which regulates the conduct of nations, and private international law, which regulates the conduct of individuals in transnational situations.<sup>38</sup> Just as human rights law has accepted the importance of individual responsibility in the violations of international law,<sup>39</sup> private law has begun to realize

34. *Id.* at 428–29 (citations omitted). *See also* Callejo v. Bancomer, S.A., 764 F.2d 1101, 1116–17 (5th Cir. 1985) (“In essence, the [*Sabbatino*] Court held that international law generally does not provide ‘judicially discoverable and manageable standards for resolving’ cases.” (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962))) (citations omitted).

35. *See* 376 U.S. at 429–30 (“Certain representatives of the newly independent and underdeveloped countries have questioned whether rules of state responsibility toward aliens can bind nations that have not consented to them and it is argued that the traditionally articulated standards governing expropriation of property reflect ‘imperialist’ interests and are inappropriate to the circumstances of emergent states.” (citation omitted)).

36. *Id.* at 428.

37. *Id.* at 422.

38. *See* Benedicte Fauvarque-Cosson, *Comparative Law and Conflict of Laws: Allies or Enemies? New Perspectives On an Old Couple*, 49 AM. J. COMP. L. 407, 410–12 (2001) (discussing the role of private and public international law in development of conflict of laws in Europe); Dr. Dan Jerker B. Svantesson, *Borders On, or Borders Around—The Future of the Internet*, 16 ALB. L.J. SCI. & TECH. 343, 353 (2006) (“The rules of private international law have developed, been modified and changed continuously since rules of private international law were first created.”).

39. *See* Richard B. Bilder & John P. Groarke, *Individual Responsibility in International Law for Serious Human Rights Violations by Lyal S. Sunga*, 88 AM. J. INT’L L. 205, 205 (1994) (book review). Prior to 1945, members of the armed forces were rarely held personally responsible under the law of war for the acts they committed in contravention of the rules of warfare if they followed the orders of a superior. But after World War II, the international community concluded that a new deterrent was required to prevent the type of genocide and war crimes that claimed the lives of millions: individual responsibility for war crimes under the law of war. *See id.* at 205–06 (“Nuremberg was a

the importance of individualized adjudications in international transactions.<sup>40</sup> Thus, *Sabbatino's* treatment of international law is a function of an increasingly anachronistic conception of private international law.

B. *An Act of State See-Saw: The Hickenlooper Amendment and the Judicial Containment of the Amendment*

In 1964, Congress responded to *Sabbatino* by passing the Hickenlooper Amendment to the Foreign Assistance Act.<sup>41</sup> The Hickenlooper Amendment barred courts from using the Act of State doctrine when a challenged act of that state was “in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection.”<sup>42</sup> A purely textual reading of this provision

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defining moment in human rights law because, under the [Nuremberg] Charter, ‘the norm of exclusive state responsibility in international law for war crimes gave way to the principle of individual responsibility.’” (quoting LYAL S. SUNGA, *INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS* 35 (1992)). See also George Manner, *The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War*, 37 AM. J. INT’L L. 407, 417 (1943) (discussing the principle of *respondere superior* as it relates to war crimes).

40. See Gordon A. Christenson, *Federal Courts and World Civil Society*, 6 J. TRANSNAT’L L. & POL’Y 405, 433–34 (1997) (discussing the increasing importance of international private law in civil litigation). But see Major Darren. C. Huskisson, *The Air Bridge Denial Program and the Shootdown of Civil Aircraft Under International Law*, 56 A.F. L. REV. 109, 165 (2005) (“[I]nternational law lacks teeth, especially when dealing with individual perpetrators . . . .”); Kyle Rex Jacobson, *Doing Business with the Devil: The Challenges of Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes and Crimes Against Humanity*, 56 A.F. L. REV. 167, 220 (2005) (“As a whole, states have eschewed applying international law in domestic courts, even if there is some promise in U.S. and Dutch courts.”).

41. 22 U.S.C. § 2370(e)(2) (2000).

42. *Id.* The relevant portion of the amendment reads:

*Notwithstanding any other provision of law, no 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 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 the principles of international law, including the principles of compensation and the other standards set out in this subsection: Provided, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which 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 and a suggestion to this effect is filed on his behalf in that case with the court.*

*Id.* (emphasis added).

suggests that it rejected *Sabbatino's* use of the Act of State doctrine in cases where countries expropriated assets without any compensation because such an expropriation violates the international law supporting just compensation.<sup>43</sup>

The Hickenlooper Amendment's guarantee of a determination on the merits, however, has been eviscerated by a narrow definition of "in violation of the principles of international law."<sup>44</sup> Simply put, the courts have refused to find that an expropriation of assets in a foreign country by a foreign act of state violates the principles of international law.<sup>45</sup> Even though the arbitrary confiscation of assets "is contrary to our public policy and shocking to our sense of justice and equity,"<sup>46</sup> the courts have held the Hickenlooper Amendment applicable only in situations where property is expropriated by a foreign sovereign and the expropriated property or its proceeds are located in the United States.<sup>47</sup> Indeed, even the Restatement (Third) of Foreign Relations bars the Act of State doctrine only in "claims to specific property located in the United States."<sup>48</sup> By

43. See G.A. Res. 1803 (XVII), ¶ 16, U.N. Doc. A/RES/1803(XVII) (Dec. 14, 1962) ("In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.")

44. 22 U.S.C. § 2370(e)(2).

45. See *Glen v. Club Méditerranée*, 450 F.3d 1251, 1253–57 (11th Cir. 2006) (finding that the Act of State doctrine barred evaluation of the Cuban government's nationalization of the plaintiff's property); *Callejo v. Bancomer*, 764 F.2d 1101, 1104 (5th Cir. 1985) (finding that the Act of State doctrine barred evaluation of Mexican government's nationalization of all privately owned banks); *Braka v. Bancomer*, 762 F.2d 222, 222 (2d Cir. 1985) (same). Cf. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964) ("[T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government.")

46. *Vladikavkazsky Ry. Co. v. N.Y. Trust Co.*, 189 N.E. 456, 460 (N.Y. 1934).

47. *United Mexican States v. Ashley*, 556 S.W.2d 784, 786 (Tex. 1977). See also *Menendez v. Saks & Co.*, 485 F.2d 1355, 1364, 1372 (2d Cir. 1973) (applying the Hickenlooper Amendment when the property is in the United States), *rev'd on other grounds sub nom. Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682 (1976); *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 882 n.10 (2d Cir. 1981) ("[T]he [Hickenlooper] Amendment was intended to afford American firms a 'day in court' if some entity attempted to market their expropriated Cuban property in the United States, and was not intended to permit a setoff in all cases"); *Banco Nacional de Cuba v. First Nat'l City Bank of N.Y.*, 431 F.2d 394, 399–402 (2d Cir. 1970) (denying a company's power to seize a foreign state's assets if that state nationalizes American property), *rev'd on other grounds*, *First Nat'l City Bank v. Banco Nacional de Cuba (Citibank I)*, 406 U.S. 759 (1972); Halberstam, *supra* note 31, at 70–71 ("While some lower courts have limited the Hickenlooper Amendment to property located in the United States, and there is legislative history to support the narrow construction adopted by the *Restatement*, there is also legislative history to the contrary.")

48. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 429 (Tentative Draft No. 4, 1983). While § 429 constitutes the rough cognate of the Hickenlooper amendment in

implication, then, American courts have essentially endorsed the notion that expropriating property without just compensation is part of international law.

### III. THE EVOLUTION OF THE ACT OF STATE DOCTRINE FOLLOWING *SABBATINO* AND THE HICKENLOOPER AMENDMENT HAVE PRODUCED A MUDDLED JURISPRUDENCE

The subsequent Act of State doctrine has been an unpredictable sequence of cases that led to seemingly conflicting holdings. The divergent results are symptomatic of a doctrine with no settled foundation; judges are forced to rule on cases with no clear doctrinal basis.

#### A. Citibank I

Possibly the clearest example of the Act of State doctrine's convoluted status was Supreme Court's holding in *First National City Bank v. Banco Nacional de Cuba (Citibank I)*.<sup>49</sup> In that case, Citibank sought a setoff for the expropriation of its Cuban branches that were seized pursuant to Cuba's Law No. 851—the law allowing for the nationalization of American assets in Cuba.<sup>50</sup> These facts were strikingly similar to *Sabbatino*, where an American commodity broker sought a setoff for the expropriation of his Cuban assets that were seized pursuant to Cuba's Law No. 851.<sup>51</sup> *Citibank I*, however, resulted in a diametrically different holding than *Sabbatino*—the Court found that the Cuban bank was barred from using the Act of State doctrine against Citibank.<sup>52</sup>

The majority in *Citibank I* was actually a group of three plurality opinions, each barring the use of the Act of State doctrine for different reasons. Justice Rehnquist, joined by Chief Justice Burger and Justice White, barred the Act of State doctrine because the court had received an explicit policy statement from the Executive Branch stating: “The Department

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the Restatement (as opposed to the expansive Act of State doctrine embodied in § 428), the Hickenlooper Amendment is not limited by its terms to specific property in the United States. Halberstam, *supra* note 31, at 70. Section 429's narrow limitation on the Act of State doctrine reflects the judiciary's gradual evisceration of the Hickenlooper amendment.

49. 406 U.S. 759 (1972).

50. *Id.* at 780 n.4 (Brennan, J., dissenting).

51. *Id.*

52. *Id.* at 768.

of State believes that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases."<sup>53</sup> With this clear Executive mandate, the three justices found that they could safely evaluate the legitimacy of a foreign law without interfering with the President's conduct of foreign affairs.<sup>54</sup> Justice Douglas, on the other hand, found that *Citibank I* was controlled not by *Sabbatino* but rather by *National City Bank v. Republic of China*.<sup>55</sup> In *National City Bank v. Republic of China*, the Court found that a foreign nation who files suit in American court cannot subsequently use the Act of State doctrine to bar counterclaims.<sup>56</sup> For Justice Douglas, *Citibank I*'s holding was mandated by notions of "fair dealing."<sup>57</sup> Finally, Justice Powell barred the use of the Act of State doctrine because he found *Sabbatino*'s breadth unacceptable. According to Justice Powell, the Act of State doctrine should be barred unless the Court believes "that an exercise of jurisdiction would interfere with delicate foreign relations conducted by the political branches."<sup>58</sup>

The *Citibank I* decision thus resulted in a result diametrically opposed to *Sabbatino* without a clear articulation of the reason for the variance. Courts deciding foreign expropriation cases were left to find some meaningful difference between two opinions based on the same law. Additionally, subsequent courts could no longer base the use of the Act of State doctrine, at least in Cuban cases, on comity grounds. *Citibank I* had already found Law No. 851 invalid, so subsequent reaffirmations of that finding would not undermine American-Cuban relations. The doctrinal problems *Citibank I* presented will be discussed in Part II(c) (i).

### B. The Bernstein Exception

Justice Rehnquist's discussion of Executive Branch policy declarations in *Citibank I* warrants further discussion. The Second Circuit developed the use of State Department declarations, known as Bernstein letters, in two related cases following World War II. In *Bernstein v. Van Heyghen Freres Societe*

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53. *Id.* at 764.

54. *Id.* at 767-68.

55. *Id.* at 770-71 (Douglas, J., concurring).

56. 348 U.S. 356, 364-66 (1955).

57. 406 U.S. at 772 (Douglas, J., concurring).

58. *Id.* at 775 (Powell, J., concurring).

*Anonyme (Bernstein I)*, a plaintiff argued that the Nazi government had expropriated a ship from him during World War II.<sup>59</sup> Judge Learned Hand, writing for the Second Circuit Court of Appeals, found that the case was barred by the Act of State doctrine.<sup>60</sup> However, Judge Hand also noted that there was an “open question” of whether the Executive, “which is the authority to which we must look for the final word in such matters, has declared that the commonly accepted doctrine which we have just mentioned, does not apply.”<sup>61</sup> This open question was answered in *Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij (Bernstein II)*, where the Second Circuit found that the Act of State doctrine was barred in a case factually similar to *Bernstein I* because the State Department had submitted a letter stating that “the Executive . . . is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.”<sup>62</sup> At least for the Second Circuit, an explicit waiver from the Executive that barring the Act of State doctrine would not prejudice Executive foreign policy efforts was sufficient to mitigate separation of power concerns.

The Supreme Court, however, has been more skeptical of the *Bernstein* exception. The Court in *Sabbatino* received several letters from the State Department that “were intended to reflect no more than the Department’s then wish not to make any statement bearing on this litigation.”<sup>63</sup> The Court refrained from ruling on the status of the *Bernstein* exception, finding that the Executive’s failure to express concern over potential litigation

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59. 163 F.2d 246, 246 (2d Cir. 1947).

60. *Id.* at 248–49.

61. *Id.* at 249.

62. 210 F.2d 375, 376 (2d Cir. 1954).

63. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 420 (1964). The Court relied primarily on two State Department letters. The first, from the Legal Adviser to the State Department Abram Chayes, stated:

The Department of State has not, in the *Bahia de Nipe* case or elsewhere, done anything inconsistent with the position taken on the Cuban nationalizations by Secretary Herter. Whether or not these nationalizations will in the future be given effect in the United States is, of course, for the courts to determine. Since the *Sabbatino* case and other similar cases are at present before the courts, any comments on this question by the Department of State would be out of place at this time. As you yourself point out, statements by the executive branch are highly susceptible of misconstruction.

*Id.* The second letter, from Under Secretary for Economic Affairs George Ball, stated, “Our conclusion, in which the Secretary concurs, is that the Department should not comment on matters pending before the courts.” *Id.*

was insufficient to constitute a valid bar to the Act of State doctrine.<sup>64</sup>

The Supreme Court was even more overt in its hostility towards the Bernstein exception in *Citibank I*. While the three judges who signed the Rehnquist opinion supported the exception and found a Bernstein letter sufficient to distinguish *Sabbatino* and *Citibank I*,<sup>65</sup> the remaining six justices rejected the use of the Bernstein exception.<sup>66</sup> The four dissenters, Justices Brennan, Stewart, Marshall, and Blackmun, vilified the Bernstein exception, stating, “It is highly questionable whether the examination of validity by the judiciary should depend on an educated guess by the Executive as to probable result and, at any rate, should a prediction be wrong, the Executive might be embarrassed in its dealings with other countries.”<sup>67</sup> Thus, a tally of the Supreme Court votes in 1964 would have found rejection of the Bernstein exception to the Act of State doctrine.<sup>68</sup>

Currently, federal courts generally find Bernstein letters persuasive articulations of the Executive’s opinion but refrain from granting the letters the dispositive status bestowed in Rehnquist’s *Citibank I* opinion. The Supreme Court, in the 2004 case of *Republic of Austria v. Altmann*, suggested that “should the State Department choose to express its opinion on the

64. *Id.* at 419–20.

65. See *First National City Bank v. Banco Nacional de Cuba (Citibank I)*, 406 U.S. 759, 767 (1972) (“The Court in *Sabbatino* . . . concluded that any exception to the act of state doctrine based on a mere silence or neutrality on the part of the Executive might well lead to a conflict between the Executive and Judicial branches. Here . . . the Executive Branch has expressly stated that an inflexible application of the act of state doctrine by this Court would not serve the interests of American foreign policy.”).

66. See *id.* at 772–73 (Douglas, J., concurring) (stating that the political question doctrine, not the Bernstein exception, applies to the case at bar); *id.* at 773 (Powell, J., concurring) (stating that not only does the reasoning of *Sabbatino* explicitly reject the Bernstein exception, but also that the Bernstein exception seems to conflict with the doctrine of separation of powers); *id.* at 784 (Brennan, J., dissenting) (“*Sabbatino* itself explained why in these circumstances the representations of the Executive in favor of removing the act of state bar cannot be followed.”).

67. *Id.* at 784 (Brennan, J., dissenting) (quoting *Sabbatino*, 376 U.S. at 491–92).

68. The dissenters in *Citibank I* reiterated their condemnation of the Bernstein exception in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 724–25 (1976). In *Dunhill*, the dissenters argued that:

[S]ix Members of the Court in [*Citibank I*] disapproved finally the so-called Bernstein exception to the act of state doctrine, thus minimizing the significance of any letter from the Department of State. Whether the act of state question in this case is viewed as being confined to a single dispute or as extending to a broad class of disputes, the task of defining the role of the Judiciary is for this Court, not the Executive Branch.

*Id.* (citations omitted).

implications of exercising jurisdiction, . . . that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.”<sup>69</sup>

The Second,<sup>70</sup> Third,<sup>71</sup> Sixth,<sup>72</sup> Ninth,<sup>73</sup> and Eleventh<sup>74</sup> Circuits have all expressed this same limited opinion of Bernstein letters. The current status of the Bernstein exception raises serious questions as to the Act of State doctrine’s internal consistency. The doctrine is often defended on the grounds of protecting the Executive’s foreign policy prerogative, but courts have found the Executive’s explicit articulation of its foreign policy not to be dispositive in applying the Act of State doctrine.<sup>75</sup> Essentially, the courts are telling the Executive whether the litigation will affect the Executive’s ability to carry out foreign policy. When seen from this perspective, the courts’ treatment of the Bernstein exception seems less like a good faith effort to preserve the separation of powers and more like a paternalistic assessment of the Executive’s ability to engage in foreign affairs.

#### *C. A Muddled Jurisprudence: Two Case Studies in the Act of State Doctrine*

The effect of this oscillation in the Act of State doctrine was substantial judicial uncertainty and a doctrine in dire need of

69. *Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004).

70. *See Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 884–85 (2d Cir. 1981) (giving Bernstein letters deference).

71. *See Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1062 (3d Cir. 1988) (“[The State Department’s legal conclusions] are not controlling on the court. But the Department’s factual assessment of whether fulfillment of its responsibilities will be prejudiced by the course of civil litigation is entitled to substantial respect.” (citation omitted)).

72. *See Kalamazoo Spice Extraction Co. v. Provisional Military Gov’t of Socialist Ethiopia*, 729 F.2d 422, 424 (6th Cir. 1984) (taking notice that although a “plurality of the Court in *Citibank* recognized the ‘Bernstein exception’ as a basis for a court to exercise jurisdiction over the acts of a foreign sovereign committed within that sovereign’s borders,” the exception may have “doubtful utility since a majority of the Court did not approve its use”).

73. *See Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1081 n.8 (9th Cir. 2003) (“[T]he act of state doctrine also involves a determination of the political repercussions of judicial action, and in that context courts have held that statements of interest, although entitled to respect, are not conclusive.”), *withdrawn and superseded on reh’g by Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1210 (9th Cir. 2007) (holding that statements of intent from the State Department should be given “serious weight”).

74. *See Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1236 (11th Cir. 2004) (“This statement of interest from the executive is entitled to deference . . . . A statement of national interest alone, however, does not take the present litigation outside of the competence of the judiciary.”).

75. *See supra* notes 70–74.

revision. This Article will now chronicle two case studies that highlight the problems of the Act of State doctrine: (1) the Second Circuit's *Citibank I*-derived amalgam rule, and (2) the circuit split over how to handle the Mexican nationalization of the banking industry.

### 1. The Second Circuit in *Chase Manhattan* and *Chemical Bank*

In the aftermath of *Citibank I*, the federal courts were forced to navigate the murky waters of the Act of State doctrine with little more than several fragmented plurality opinions as a guide. A close examination of how the Second Circuit dealt with *Citibank I* is illustrative of the inherent complexity in modern Act of State jurisprudence because the Second Circuit hears a disproportionate amount of Act of State cases and has served as a pioneer in much of the doctrine.<sup>76</sup> The Second Circuit dealt with facts that were substantially similar to *Citibank I* in both *Banco Nacional de Cuba v. Chemical Bank New York Trust Co.*<sup>77</sup> and *Banco Nacional de Cuba v. Chase Manhattan Bank*,<sup>78</sup> two cases involving a Bernstein letter, a counterclaim limited to a setoff, and no showing that examination of Cuban government's acts would interfere with U.S. foreign relations. Despite the lack of any coherent majority opinion in *Citibank I*, the Second Circuit felt "bound to reach the same result as *Citibank I* where there is no significant difference in circumstance."<sup>79</sup> Consequently, the *Chase Manhattan* court fashioned a "phenomenological rule" for use in Act of State cases:

[W]here (1) the Executive Branch has provided a Bernstein letter advising the courts that it believes act of state doctrine need not be applied, (2) there is no showing that an adjudication of the claim will interfere with delicate foreign relations, and (3) the claim against the foreign sovereign is asserted by way of counterclaim and does not exceed the value of the sovereign's claim, adjudication of the counterclaim for expropriation of the defendant's property is not barred by the act of state doctrine.<sup>80</sup>

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76. Kirgis, *supra* note 31, at 58.

77. 822 F.2d 230 (2d Cir. 1987).

78. 658 F.2d 875 (2d Cir. 1981).

79. *Id.* at 884.

80. *Id.*

Using this rule, the Second Circuit found that the Act of State doctrine was barred in both *Chase Manhattan* and *Chemical Bank*.<sup>81</sup>

The precedential value of *Citibank I* is thus an amalgam rule of the three majority opinions, each based on wholly independent criteria and never meant to function together as a cohesive test. The first two prongs of the *Chase Manhattan* test are redundant and potentially conflicting attempts to protect the separation of powers. The first prong, concerning the Bernstein letter, entrusts the Executive with the task of determining whether evaluating the foreign law would hurt American foreign policy while the second prong, concerning an adjudication of whether litigation would interfere with foreign relations, entrusts this same determination to the Judiciary.<sup>82</sup> If the two branches came to conflicting decisions, which branch would persevere? This problem is symptomatic of the origin of these two prongs: Justices Rehnquist and Powell fundamentally disagreed on who should make the determination of whether the Act of State doctrine should be barred.<sup>83</sup> The *Chase Manhattan* court took two conflicting positions and squeezed them into a single standard. Finally, the third prong of the *Chase Manhattan* test is not based on either international comity or the separation of powers. Instead, the third prong of the *Chase Manhattan* test is based on the same grounds Justice Douglas' *Citibank I* opinion was based—"fair dealing."<sup>84</sup> Simply put, a foreign government's status as plaintiff or defendant bears not at all on comity or separation of power concerns, and notions of "fair dealing" do not belong in the decision to bar the Act of State doctrine.<sup>85</sup> Nevertheless, this novel and unfounded criterion in the Act of State doctrine exists alongside the two other prongs of the *Chase Manhattan* test.

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81. Kirgis, *supra* note 31, at 59.

82. *Chase Manhattan*, 658 F.2d at 884.

83. Compare *First Nat'l City Bank v. Banco Nacional de Cuba (Citibank I)*, 406 U.S. 759, 768 (1972) (Rehnquist, J.) (concluding that the Act of State doctrine should not be applied by the courts when the Executive branch "expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy"), with *id.* at 775–76 (Powell, J., concurring) (arguing that he is uncomfortable with any requirement that the judiciary must receive the permission of the Executive branch before invoking its jurisdiction).

84. *Chase Manhattan*, 658 F.2d at 883.

85. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 437–38 (1964) (arguing that, when deciding the appropriateness of the Act of State doctrine, the foreign government's status as a plaintiff was immaterial).

## 2. The Circuit Split over the Mexican Nationalization of Private Banks

In 1982, Mexican President Jose Lopez Portillo announced the nationalization of all private banks in Mexico.<sup>86</sup> Mexico was in the middle of a profound economic crisis: inflation was consistently above 60%; more than half the population was unemployed or working at marginal unskilled jobs like selling goods on the street; the value of the peso had fallen 80% in eight months; and Mexico was on the verge of national bankruptcy because it could no longer meet the payments on its \$80 billion foreign debt.<sup>87</sup> To solve this problem, Lopez Portillo ordered the nationalization of all banks and a freeze on the \$12 billion dollars in Mexican banks. Dollars could be converted to pesos and withdrawn from the country, but Lopez Portillo mandated an exchange rate that was well below the international exchange rate.<sup>88</sup> The Mexican nationalization spawned extensive litigation in the United States; this litigation ultimately resulted in a circuit split as different judges attempted to apply the Act of State doctrine.

A particularly contentious issue was the treatment of Mexican certificates of deposit (CD's). Because of an artificially high peso-to-dollar exchange rate, dollar-denominated CD's lost substantial value when converted into pesos. As a result, a number of Americans filed suit against Mexican banks for an unlawful taking without due compensation. This article now looks at how three Courts of Appeals reached different conclusions on the Mexican CD issue.

In *West v. Multibanco Comermex, S.A.*, the Ninth Circuit found that the Act of State doctrine was barred because the expropriation of the CD's constituted a "taking . . . in violation of the principles of international law"<sup>89</sup> under the Hickenlooper Amendment.<sup>90</sup> In reaching its decision, the Ninth Circuit took

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86. See Terry McKinley & Diana Alarcón, *Mexican Bank Nationalization*, 20 LATIN AM. PERSPECTIVES 80, 80 (1993) (reviewing RUSSELL N. WHITE, STATE, CLASS, AND THE NATIONALIZATION OF THE MEXICAN BANKS (1992)).

87. Charles Alexander, *A Freeze Play at the Banks*, TIME, Sept. 13, 1982, at 72.

88. Monroe Leigh, *Judicial Decisions*, 81 AM. J. INT'L L. 660, 660 (1987). American investors were caught by surprise by the expropriation; firms like Citibank and Bank of America had each loaned Mexico as much as \$2.5 billion. Alexander, *supra* note 87.

89. 807 F.2d 820, 829 (9th Cir. 1987) (quoting the Hickenlooper Amendment, 22 U.S.C. 2370(e)(2) (1982)).

90. *Id.* at 829–31.

an expansive view of what constituted a “violation of international law” by relying on legislative history of the Hickenlooper Amendment.<sup>91</sup> On the merits, the court found that “Mexico’s institution of exchange controls was an exercise of its basic authority to regulate its economic affairs”<sup>92</sup> and that the Mexican government had engaged in reasonable regulation.<sup>93</sup> While the plaintiffs were not entitled to compensation, *West* was revolutionary in its broad interpretation of the Hickenlooper Amendment.

The Fifth Circuit, in *Callejo v. Bancomer, S.A.*,<sup>94</sup> and the Second Circuit, in *Braka v. Bancomer, S.N.C.*,<sup>95</sup> found that the Act of State doctrine barred review of the Mexican nationalization of CD’s held in Mexican banks. In *Braka*, the Second Circuit found that an adjudication on the merits “would clearly be an impermissible ‘inquiry into the legality, validity, and propriety of the acts and motivation of foreign sovereigns acting in their governmental roles within their own boundaries;’”<sup>96</sup> the Fifth Circuit, in deciding *Callejo*, agreed with the Second Circuit’s conclusion.<sup>97</sup> *Callejo* directly challenged *West*’s broad definition of “in violation of international law,”<sup>98</sup> arguing that the courts were unable to determine whether an intrastate expropriation violated the law of nations.<sup>99</sup> For the *Callejo* court, the validity of intrastate expropriation was a political question: “In essence . . . international law generally does not provide ‘judicially discoverable and manageable standards for resolving’ cases.”<sup>100</sup>

91. *Id.* at 830. *West* did not address the holding in *Sabbatino* that “the . . . Judicial Branch . . . will not examine the validity of a taking of property within its own territory by a foreign sovereign government.” *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964). Instead, the crux of the *West* opinion focused on the showing that intangible contract rights constituted property under the Hickenlooper Amendment. *See West*, 807 F.2d at 829–31.

92. *West*, 807 F.2d at 832.

93. *Id.* at 832–33.

94. 764 F.2d 1101, 1114–25 (5th Cir. 1985).

95. 762 F.2d 222, 224 (2d Cir. 1985).

96. *Id.* at 225 (citing *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1380 (5th Cir. 1980)).

97. *Callejo*, 764 F.2d at 1116–20.

98. *West*, 807 F.2d at 830.

99. *Callejo*, 764 F.2d at 1116–18.

100. *Id.* at 1117 (citations omitted). *See also* *First National City Bank v. Banco Nacional de Cuba (Citibank I)*, 406 U.S. 759, 788 (1972) (Brennan, J., concurring) (holding that the validity of a foreign act of state is a “political question” because of lack of consensus on international law). The *Callejo* court cited *Baker v. Carr*, 369 U.S. 186 (1962), in describing the judicial incompetence in judging the validity of an intrastate expropriation under international law. 764 F.2d at 1117.

The *Callejo* court was unready to join the Ninth Circuit in saying that the expropriation of property without due compensation constitutes a violation of international law.

The circuit split over the Mexican bank nationalization showcased the problems with the current Act of State doctrine. Just as *Citibank I* and *Sabbatino* gave conflicting verdicts in seemingly indistinguishable situations, *Braka* and *Callejo* gave verdicts that irreconcilably conflicted with the holding in *West*. The inability of the Supreme Court and the Courts of Appeals to articulate a coherent doctrine should be indicative of a flawed jurisprudence.

A final note on the issues raised in the Mexican CD cases; each of these cases refrained from establishing a commercial activities exception to the Act of State doctrine.<sup>101</sup> While the Federal Sovereign Immunity Act (FSIA) allows for a commercial activities exception to the doctrine of sovereign immunity,<sup>102</sup> there is no statutory cognate for the Act of State doctrine.<sup>103</sup> The basis for the exception's use is the plurality opinion in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, where four justices endorsed the concept of a congruent Act of State commercial activities exception to mirror the FSIA's exception.<sup>104</sup> Even if a commercial activities exception were embraced, however, it would fall short of protecting all American interests. In order to come within the "direct effects" clause of the exception, a commercial activity must: (1) have a substantial, non-trivial effect, and (2) the activity must be located within the United

101. See *West*, 807 F.2d at 828 n.5 ("The *Dunhill* plurality argued that a 'commercial activities' exception exists to the act of state doctrine. We do not need to reach that issue here."); *Braka*, 762 F.2d at 225 ("Plaintiffs insist we have adopted [the commercial activities] exception . . . . We do not read the dicta in [previously decided] cases as an adoption of the suggested exception."); *Callejo*, 764 F.2d at 1115 ("In the present case, we need not decide whether to adopt the commercial activity exception . . . .").

102. 28 U.S.C. § 1605(a)(2) (2000). The statute provides that a foreign state shall not be immune from the jurisdiction of U.S. courts in any case in which the action is based "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." *Id.*

103. See *W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., Int.*, 493 U.S. 400, 405 (1990) (noting that some courts have suggested a commercial activities exception to the Act of State doctrine); *Glen v. Club Méditerranée*, 450 F.3d 1251, 1254 n.2 (11th Cir. 2006) ("[W]e have unequivocally stated that 'there is no commercial activities exception to the act of state doctrine.'" (quoting *Honduras Aircraft Registry, Ltd. v. Gov't Fund of Honduras*, 129 F.3d 543, 550 (11th Cir. 1997))). Cf. *Short & Brower*, *supra* note 10, at 731 (arguing that Congress was ambivalent on the idea of a commercial activities exception to the Act of State doctrine).

104. 425 U.S. 682, 697-98 (1976).

States.<sup>105</sup> This standard would include international business transactions where “the situs of the legally significant acts, omissions, or events giving rise to the plaintiff’s cause of action” was in the United States,<sup>106</sup> however, expropriated real estate and fixed facilities would not be covered under the “direct effects” clause unless such property was located in the United States.<sup>107</sup> Thus, a commercial activities exception to the Act of State doctrine would only partially protect the victims of an expropriation program.

#### IV. FIXING THE ACT OF STATE DOCTRINE: REVERSING THE PRESUMPTION THAT LITIGATION ALWAYS HURTS THE CONDUCT OF FOREIGN POLICY

For American investors abroad, there are few judicial theories more dangerous than the modern Act of State doctrine. Under the current law, the United States leaves investors who engage in international commerce wholly unprotected from the whims of foreign governments with socialist aspirations. As viscerally repugnant as expropriation without due compensation is in the American conception of justice,<sup>108</sup> the use of the Act of State doctrine has been defended on the grounds of international comity and the separation of powers. This article, however, has catalogued how the doctrine has failed to advance either of these goals in its tangled web of internally inconsistent case law and conflicting verdicts. With the looming threat of Latin American nationalization, the United States should reevaluate its current Act of State doctrine and revise the jurisprudence to better balance the conflicting interests of individual property rights and the conduct of foreign affairs.

In order to “fix” the doctrine, one should first identify the goals of the Act of State policy: (1) to strike the proper balance between the conduct of foreign affairs; and (2) to safeguard private property rights. A better way to balance these two goals would be to recognize the connection between nationalization, litigation, and the law—the loss of private property *always*

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105. Short & Brower, *supra* note 10, at 736–37.

106. *Id.*

107. *See* *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 152–54 (2d Cir. 1991) (discussing what constitutes a “direct effect” sufficient for a United States court to have jurisdiction over an Act of State).

108. *See generally* *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798) (holding that expropriation without compensation violates natural law).

injures private property rights, while litigation would only *sometimes* affect the Executive's conduct of foreign affairs. Thus, evidentiary presumption should be flipped so that the nationalization of private property *always* gives rise to a cause of action that could *sometimes* be barred when litigation would adversely affect the Executive's conduct of foreign policy. By making this change, the courts could protect American property interests and refrain from legitimizing illegal seizures of goods while still protecting the Executive's foreign policy prerogative.

The courts could make both of these changes because *Sabbatino* explicitly held that the Act of State Doctrine is required by neither international law<sup>109</sup> nor the Constitution.<sup>110</sup> The courts have long justified the doctrine as a prudential doctrine meant to advance the policy goals of international comity and the separation of powers.<sup>111</sup> Because the doctrine has failed to advance these goals, it is thus wholly appropriate for the courts to revise the doctrine in order to better achieve its underlying policy motivations. Put another way, the courts should revise a doctrine predicated on international comity and the separation of powers if the doctrine fails to advance international comity and the separation of powers.

Operationalizing a switch in the Act of State presumption requires two steps: (1) the courts should hold that the expropriation of property without due compensation is contrary to international law, and (2) Bernstein letters from the Executive should be controlling on the court.

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109. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421 (1964) (holding that the Act of State doctrine is not "compelled either by the inherent nature of sovereign authority . . . or by some principle of international law" (citations omitted)).

110. *Id.* at 423 ("The text of the Constitution does not require the act of state doctrine . . ."). *Contra* *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum Laden Aboard the Tanker Dauntless Colocotronis*, 577 F.2d 1196, 1200 n.4 (5th Cir. 1978) ("Although in one decision the Court stated both that the doctrine had constitutional underpinnings and the doctrine was not compelled by the Constitution, the better view would be that the doctrine is constitutionally compelled by the concept of separation of powers and placement of plenary foreign relations powers in the executive." (citing *Sabbatino*, 376 U.S. 398)).

111. *See, e.g.*, *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1171 (C.D. Cal. 2005) ("The act of state doctrine is not a jurisdictional limit on courts, but rather a 'prudential doctrine designed to avoid judicial action in sensitive areas.'" (quoting *Liu v. Republic of China*, 892 F.2d 1419, 1431 (9th Cir. 1989) (quoting *Int'l Ass'n of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354, 1359 (9th Cir. 1981))).

A. *Step #1: Reversing the Presumption so that Expropriations Without Just Compensation Are Illegal Under International Law*

The first step in revising the Act of State doctrine would be to reject *Sabbatino's* contention that “[t]here are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state’s power to expropriate the property of aliens.”<sup>112</sup> The validity of this statement in 1964 was questionable; the statement in 2007 fails completely.<sup>113</sup> The United Nations General Assembly has overwhelmingly approved of the importance of due compensation in expropriation: “Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest . . . . In such cases the owner *shall be paid appropriate compensation . . . .*”<sup>114</sup> The importance of defining international law in this way is paramount—if expropriation without due compensation violates international law, then the use of the Act of State doctrine is barred because of the Hickenlooper Amendment.<sup>115</sup> This article argues that three reasons support a rejection of *Sabbatino's* estimation of expropriation under international law: (1) the Communist bloc has fallen, (2) the Iranian-United States Claims Tribunal has applied international law to find expropriation illegal under international law, and (3) a proper reading of the Hickenlooper Amendment’s legislative history reveals that such expropriations should fall under the statute.

First, *Sabbatino's* argument that uncompensated expropriations did not defy international law was largely based on the idea that Communist countries had rejected the private property regime.<sup>116</sup> The Communist regimes have failed and the countries of Eastern Europe have embraced private property. Even the People’s Republic of China, the world’s largest bastion of communism, has increasingly embraced the concept of

112. *Sabbatino*, 376 U.S. at 428.

113. See generally G.C. Christie, *What Constitutes a Taking of Property Under International Law?*, 38 BRIT. Y.B. INT’L L. 307 (1962) (discussing various international conceptions of property rights).

114. G.A. Res. 1803 (XVII), ¶ 16, U.N. Doc. A/RES/1803(XVII) (Dec. 14, 1962) (emphasis added).

115. See 22 U.S.C. § 2370(e)(2) (2000) (“[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 . . . in a case in which a claim of title or other property right is asserted by any party . . .”).

116. *Sabbatino*, 376 U.S. at 428–30.

private property and in March 2007 passed a law giving individuals the same legal protection for their property as the state.<sup>117</sup> The collapse of the Communist bloc, and the fundamental change in world politics since the height of the Cold War, constitutes grounds to reassess the *Sabbatino's* estimate of global legal opinion on unjust expropriation.

Second, the way some courts set up by the Executive, outside of *Sabbatino's* constraints, dealt with the Iranian nationalization of American assets in 1979 reflected a holistic change in the way America deals with foreign expropriations.<sup>118</sup> Under the Algiers Declaration of 1981, the United States and Iran agreed to settle all their claims in a single Iran-United States Claim Tribunal (Claims Tribunal).<sup>119</sup> The Claims Tribunal, applying the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), held that international law requires governments to compensate private parties for permanent expropriations:

While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The

117. See *China's Next Revolution: Property Rights in China*, THE ECONOMIST, Mar. 10, 2007, at 9 (describing the growth of private property rights in China, a nation where the private sector accounts for two-thirds of GDP). See also *I'd Rather Be a Hammer*, THE ECONOMIST, Apr. 7, 2007, at 39 (describing a Chinese couple's successful struggle against the government to secure adequate payment for their condemned home).

118. See, e.g., *Am. Int'l Group Inc. v. Islamic Republic of Iran*, 493 F. Supp. 522, 524 (D.D.C. 1980) ("[I]nternational law, as reflected in the treaty, requires prompt, adequate, and effective compensation."), *vacated on other grounds*, 657 F.2d 430 (D.D.C. 1981). Some critics might claim that *American International Group* is distinguishable from most situations because that court based its argument for due compensation on both international law and a commercial Treaty of Amity between the United States and Iran. *Id. Cf. Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 729 F.2d 422, 423 (6th Cir. 1984) (discussing treaty exception of the Act of State doctrine and how the Treaty of Amity and Economic Relations between Ethiopia and the United States was too vague to qualify for the exception). The court in *American International Group*, however, used conjunctive diction in its opinion; that is, it held that the Iranian expropriation violated treaty *and* international law. See *Am. Int'l Group*, 493 F. Supp. at 524 ("[T]he defendants in this case have failed by any interpretation to meet even the minimum standards set by the Treaty and international law.").

119. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, U.S.-Iran, art. II, Jan. 19, 1981, 20 I.L.M. 230.

intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.<sup>120</sup>

This holding was uniformly applied in all of the cases in the Claims Tribunal, forming a robust body of law endorsing the need for due compensation under international law.<sup>121</sup> In *Phelps Dodge Corp. v. Islamic Republic of Iran*, the Claims Tribunal made special note that the “financial, economic and social concerns that inspired the law . . . cannot relieve the [nationalizing government] of the obligation to compensate [the aggrieved private party] for its loss.”<sup>122</sup> For the Claims Tribunal, there was little doubt that international law required the government to compensate parties for expropriated land.

Third, the legislative history of the Hickenlooper Amendment suggests that nationalization programs were exactly the type of property extraction the Amendment was meant to encompass.<sup>123</sup> The drafters of the amendment used expansive language on purpose:

The sponsors of the [Hickenlooper] amendment referred to it as the “Rule of Law” amendment; they viewed it as authorizing courts to apply established law [in] suits challenging expropriations. Congressional intent to overturn *Sabbatino* was never limited to a single narrow class of cases. The purposes of the amendment include the promotion and protection of United States investment in foreign countries (which characteristically has always principally been land, minerals,

120. *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Eng'rs of Iran*, 6 Iran-U.S. Cl. Trib. Rep. 219, 225–26 (1984).

121. See George H. Aldrich, *What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal*, 88 AM. J. INT'L LAW 585, 589–90 (1994) (discussing the Tribunal's decision in *Tippetts* as well as subsequent decisions in which the Tribunal found the Iranian government had deprived owners of their property).

122. 10 Iran-U.S. C.T.R. 121, 130 (1986).

123. See *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1541 n.180 (D.C. Cir. 1984) (“We reject the dissent's suggestion that the word ‘property’ in the statute must invariably be limited to expropriated personal property located in the United States. . . . By no twist of legal imagination can the Supreme Court's reversal . . . constitute approval of the reasoning relied on by the court of appeals with respect to the meaning of the Second Hickenlooper Amendment.”), *vacated and remanded because of subsequent legislation* by *Weinberger v. Ramirez de Arellano*, 471 U.S. 1113 (1985).

and large fixed immovables), and securing the right of a property holder to a court hearing on the merits.<sup>124</sup>

This interpretation of Hickenlooper as the “Rule of Law amendment” better explains the broad terms of the statute: “[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 . . . based upon (or traced through) a confiscation or other taking . . . by an act of that state in violation of the principles of international law, including the principles of compensation . . . .”<sup>125</sup> As the Amendment’s legislative history and the statute’s plain reading reveals, the Hickenlooper Amendment constituted Congress’ reaction to *Sabbatino*’s broad use of the Act of State doctrine—an equally broad prohibition on the Act of State doctrine to protect American property interests.<sup>126</sup>

On a more fundamental level, the *Sabbatino* standard of international law is flawed because the United States should not base its perception of a consensus in international law on several recalcitrant states. Just as the United States should not have viewed women’s legal rights as outside international law in 2000 because Afghanistan and Iran did not recognize them,<sup>127</sup> the United States should not hold equitable compensation for expropriated property as outside of international law in 2007 because Venezuela and other socialist regimes reject its application. The globalization of the world economy, and the macroeconomic benefits this integration has provided, demands that the United States support the growing international support

124. *Id.* See also *Foreign Assistance Act of 1965: Hearings on H.R. 7750 Before the H. Comm. on Foreign Affairs*, 89th Cong., 607–10 (1965) (statement of Cecil J. Olmstead, Assistant to the Chairman of Texaco, Inc.).

125. 22 U.S.C. § 2370(e) (2) (2000).

126. See *West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 830 (9th Cir. 1987) (“[T]he broad, unqualified language of the carefully drafted amendment should not be undermined by the importation of external constraints on interpretation.”).

127. See generally Mahsa Aliaskari, *U.S. Asylum Law Applied to Battered Women Fleeing Islamic Countries*, 8 AM. U. J. GENDER SOC. POL’Y & L. 231 (2000) (discussing U.S. asylum law as it applies to battered women from Islamic countries seeking refugee status in the United States); Shefali Desai, Note, *Hearing Afghan Women’s Voices: Feminist Theory’s Re-Conceptualization of Women’s Human Rights*, 16 ARIZ. J. INT’L & COMP. LAW 805 (1999) (discussing Afghan women’s rights under the Taliban); Alison E. Graves, *Women in Iran: Obstacles to Human Rights and Possible Solutions*, 5 AM. U. J. GENDER SOC. POL’Y & L. 57 (1996) (discussing the treatment of women in Iran).

for the protection of private property.<sup>128</sup> Men like Hugo Chavez should not be allowed to hold international law hostage.

*B. Step #2: Holding that Bernstein Letters Are Controlling on Litigation*

Possibly the most egregious defect with the current Act of State doctrine is that the courts ostensibly use the doctrine to protect the Executive prerogative but regard explicit letters of Executive intent as merely persuasive authority.<sup>129</sup> By recognizing Executive statements as dispositive on the issue of whether to use the Act of State doctrine, the courts could safeguard the President's ability to carry out his Article II powers under the Constitution. The courts should thus endorse the Rehnquist plurality opinion in *Citibank I*.

The Executive branch has been vested with the "plenary and exclusive" foreign policy powers of the federal government.<sup>130</sup> In *United States v. Curtiss-Wright Export Corp.*, the Court cautioned the courts and Congress that their "participation in the exercise of the [foreign policy] power is significantly limited."<sup>131</sup> Based on this fear of intruding on the Executive's foreign policy powers, the Court has long supported Executive agreements when dealing with foreign nationalizations. In *United States v. Pink*<sup>132</sup> and *United States v. Belmont*,<sup>133</sup> the Court upheld the Litvinov Agreement where the United States recognized the Soviet Union in return for the Soviet Union assigning its interests in a Soviet insurance company to the United States. The Soviet Union had nationalized the insurance company following the Russian Revolution of 1917, and the United States used the company's assets to settle American claims against the Soviets.<sup>134</sup> The Court sanctioned the use of Executive agreements to settle controversies over foreign nationalizations because of the President's expansive power to conduct that nation's foreign affairs.<sup>135</sup>

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128. See Sandeep Gopalan, *New Trends in the Making of International Commercial Law*, 23 J.L. & COM. 117, 117–20 (2004) ("After decades of being held hostage to state-centered ideas, international commercial law has finally broken through to become more solution oriented.").

129. See *supra* notes 59–75 and accompanying discussion.

130. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

131. *Id.* at 319.

132. 315 U.S. 203 (1942).

133. 301 U.S. 324 (1937).

134. *Pink*, 315 U.S. at 210–11.

135. *Id.* at 230.

The Court most recently acknowledged the importance of Executive involvement to settle foreign expropriations in *Dames & Moore v. Regan*.<sup>136</sup> In *Dames & Moore*, the Court found Executive Order 12294—whereby Iran agreed to release all American hostages in exchange for a lift on the freeze of Iranian assets and the establishment of an Iran-United States Claims Tribunal—constitutional because of the President’s “plenary and exclusive” foreign policy powers.<sup>137</sup> The executive agreement and the Iran-United States Claims Tribunal preempted all claims against the Iranian government that had been filed in the normal federal courts.<sup>138</sup> The Court allowed this intrusion of the Executive into ongoing court cases because of the President’s Constitutional power under Article II.<sup>139</sup>

The authority the Court has granted the Executive in settling nationalization crises via executive agreement should be extended to the Executive’s settling nationalization crises via Bernstein letter. In both cases, the executive has explicitly articulated its foreign policy interests so the Judiciary knows how it should proceed. The nuances of international relations are constantly changing,<sup>140</sup> and the Executive is best able to decide

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136. 453 U.S. 654 (1981).

137. *See id.* at 661, 686.

138. *See, e.g.,* Am. Int’l Group Inc., v. Islamic Republic of Iran, 657 F.2d 430 (D.C. Cir. 1981).

139. *Dames & Moore*, 453 U.S. at 686. *Cf.* Am. Ins. Ass’n v. Garamendi, 539 U.S. 396, 424–26 (2003) (finding a state statute unconstitutional because it “placed the Government at a disadvantage in obtaining practical results from persuading ‘foreign governments and foreign companies to participate voluntarily in organizations such as [the organization set up by the President]’” (quoting Brief for the United States as Amicus Curiae Supporting Petitioners at 15, Am. Ins. Ass’n v. Garamendi, 539 U.S. 396 (2003) (Nos. 02-722, 02-733))).

140. *See Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1120–21 (9th Cir. 2006), *withdrawn and superseded on reh’g* by *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007). In *Sarei*, the Ninth Circuit expressed concern over the Executive’s ability to switch positions on whether a particular case could proceed: “[W]hile the Clinton administration informed the [C]ourt [of Appeals] that the litigation would have no effect on [American] foreign policy, the Bush administration claimed that it would.” *Id.* at 1120. The Ninth Circuit then goes on to say:

The point is not that the executive is unstable, or that our foreign policy shifts with every political wind, but that foreign relations is a notoriously fluid matter, subject to subtle changes in personnel, events, and perceptions on either side of our borders. Conduct of our foreign relations requires constant monitoring and adjustment.

*Id.* The straightforward answer to this proposition is that the Executive is entrusted with foreign affairs *because* the Executive can change its mind so quickly. Global politics changes hourly, and the Executive, not the courts, is the federal agency best equipped to deal with these changes. While *Sarei* posits the Executive’s sudden policy changes as a factor suggesting increased judicial oversight, the reality is that the Executive’s ability to

what is in the nation's national security interests. The courts have long wielded the Act of State doctrine as part of their attempt to protect the Executive; it is time the courts realized that, sometimes, the Executive does not need their protection.

#### V. CONCLUSION: PROVIDING AMERICAN INVESTORS SHELTER FROM THE STORM

For the United States, as a whole, the threat of Bolivarian populism is minimal because a policy of expropriation without due compensation is self-extinguishing—countries cannot sustain these policies because of the adverse economic consequences inherent in nationalizations. At the slightest prospect of a potential expropriation without adequate compensation, foreign investors race out of a country and take their investment dollars with them.<sup>141</sup> As described by the Monterrey Consensus, the final declaration of a 170-nation conference (including the United States) on development, foreign direct investment is a critical component of sustainable growth in the developing world:

Private international capital flows, particularly foreign direct investment, along with international financial stability, are vital complements to national and international development efforts. Foreign direct investment contributes toward financing sustained economic growth over the long term. It is especially important for its potential to transfer knowledge and technology, create jobs, boost overall productivity, enhance competitiveness and entrepreneurship, and ultimately eradicate poverty through economic growth and development.<sup>142</sup>

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make sudden policy changes is exactly why it *must* hold the power to decide whether to bar the Act of State doctrine.

141. Tai-Heng Cheng, *Power, Authority and International Investment Law*, 20 AM. U. INT'L L. REV. 465, 502 (2005):

At a minimum, investors seek basic protections, such as compensation for expropriation. Without basic protections, investors could be reluctant to export capital to foreign states no matter how high the potential returns because profits would be vulnerable to political risks beyond investors' control. For this reason, almost every . . . investment [agreement] contain[s] agreements to arbitrate or litigate in a forum investors regard as neutral.

*Id.* (footnote omitted).

142. United Nations International Conference on Financing for Development, Mar. 18–22, 2002, *Monterrey Consensus on Financing for Development*, ¶ 20 U.N. Doc. A/CONF.198/11 (2002).

Without foreign investment, countries are taxed to domestically finance the often-expensive start-up costs of capital improvements.<sup>143</sup> After an expropriation, it is difficult to regain the trust of the international investment community. For example, in order to recover from the bank nationalization discussed before, Mexico had to endure a decade of harsh reforms that slashed real wages by 50%, drove inflation to 160% and left half the country in abject poverty.<sup>144</sup>

Chavez's decision to expropriate major industries will, in the long run, hurt the Venezuelan economy. Chavez's radical socialism is just another incarnation of the Latin American populism that has repeatedly been shown to undermine sustainable growth "as political leaders looked for short-term solutions to long-term problems and turned from emphasizing production to [wealth] redistribution."<sup>145</sup> Just as nationalizations, or even the perceived possibility of nationalizations, in Peru<sup>146</sup> and Ecuador<sup>147</sup> hurt investment in those countries, Chavez's expropriation aspirations have already sent American investment dollars elsewhere.<sup>148</sup>

Populism's self-defeating nature on a macroeconomic level, however, does little to assuage the fears of an individual American investor in Latin America. The Bush administration

143. *See id.* ¶¶ 20–22 (discussing the role of foreign investment in national and international development efforts).

144. Linda Robinson, *Mexico's New Revolution: President Salinas Uses Free Enterprise to Drive His Country Into the Modern Age*, U.S. NEWS & WORLD REP., July 8, 1991, at 3. *See also Mexican Bank Privatisation; Ready to Go*, THE ECONOMIST, Mar. 9, 1991, at 81–82 (discussing the difficulties in reprivatizing the previously nationalized banks).

145. William Ratliff, *Development and Civil Society in Latin America and Asia*, 565 ANNALS AM. ACAD. POL. & SOC. SCI. 91, 95 (1999). The self-destructive nature of revolutionary populism is especially salient in Latin America. *See id.* ("Latin American governments have traditionally focused more on redistribution of income and wealth than on improving opportunities for productive labor. Although they have invested some in human resource and institutional development, they have usually done so less effectively than Asians.").

146. *See generally* Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Belco Petroleum Corp., 88 F.3d 129 (2d Cir. 1996) (describing the Peruvian nationalization of American oil interests).

147. *See Can't Pay? Won't Pay*, THE ECONOMIST, Jan. 27, 2007, at 73. Ecuador has suffered a number of economic hardships for its perceived propensity to nationalize industries. Ecuador's bonds have already suffered greatly because of the country's friendly relationship with Hugo Chavez. While Ecuador may believe a policy of nationalization is currently in its best interests, in the long-term "emerging markets may regret 'dissing' international investors." *Id.*

148. *See* WORLD ALMANAC & BOOK OF FACTS 2006, 112 (Ken Park ed., World Almanac 2005) (2005) (stating the exponentially lower annual American investment amounts in Venezuela in 1995 following Chavez's socialist rhetoric).

has recently proclaimed 2007 a “year of engagement” between the United States and Latin America.<sup>149</sup> As the United States assumes a growing role in the region, American investment dollars are increasingly at risk with the election of pro-Chavez leaders like Rafael Correa in Ecuador<sup>150</sup> and Evo Morales in Bolivia.<sup>151</sup> Simply put, there is a storm brewing in Latin America that threatens the property of American citizens.

For the American investor, possibly the greatest enemy is the American Act of State doctrine, which serves to bar that investor from any recovery. The United States must recognize the threat of foreign expropriation and protect its citizens. To do this, the American courts must flip the presumption in favor of the Act of State doctrine because only then would Americans who invest abroad benefit from the protection of the American government. Only then would the United States stand with its citizens and not against them.

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149. Letta Tayler, *Reaching Out to the Neighbors*, SEATTLE TIMES, Mar. 7, 2007, at A8; Patrick J. McDonnell, *Latin America Wary of New U.S. Attention*, L.A. TIMES, Feb. 12, 2007, at 4.

150. See Simon Romero, *Ecuador Appears Likely to Rewrite Constitution*, N.Y. TIMES, Apr. 16, 2007, at A6 (discussing President Correa’s proposal to rewrite Ecuador’s Constitution).

151. See Larry Rohter, *Venezuela Wants Trade Group to Embrace Anti-Imperialism*, N.Y. TIMES, Jan. 19, 2007, at A12 (discussing Morales’ alliance with Chavez in Mercosur).