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The Hickenlooper Amendments: Peru's Seizure of International Petroleum Company As a Test Case

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THE HICKENLOOPER AMENDMENTS: PERU'S SEIZURE OF INTERNATIONAL PETROLEUM COMPANY AS A TEST CASE

During 1968 and early 1969 several Latin American countries expropriated American owned property within their borders.[1] In some cases compensation has been made or guaranteed by the foreign governments. However, in at least one notable expropriation situation, the seizure of all the assets of the International Petroleum Company (IPC)[2] by the government of Peru, compensation has not been made or guaranteed. The Hickenlooper Amendments to the 1961 Foreign Assistance Act are intended to insure that American owners are compensated for expropriated property.[3] The purpose of this comment is to examine the legal effects of these Amendments on the rights of IPC to compensation for the expropriated property. The Amendments' impact on the existing foreign commercial interests of American property owners will also be examined.[4]

I. The Peruvian Seizure of IPC

The seizure of IPC's assets was preceded by a long history of antagonism between the Company and several Peruvian administrations. The current dispute between IPC and the present military junta of General Juan Velasco Alvaredo derives from the unique type of ownership claimed by IPC in northern Peruvian oilfields. Ownership of property in Latin America extends, almost universally, only to the surface; the subsoil is owned by the state and is worked on a concession granted by the state.[5] However, IPC claims full title on the basis of a deed in fee simple, given in 1826 by Simon Bolivar to a citizen of Peru, which included rights to both the surface and

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[1] For example, in June, 1969, Peru issued a land reform decree, calling for an immediate takeover of the sugar holdings of Grace & Company. Peru also informed the International Telephone and Telegraph Company that its property would be nationalized in mid-August. In Chile, President Frei agreed with the Anaconda Chemical Company on a nationalization plan. Anaconda agreed soley to avoid outright expropriation. Other examples are readily available. See 67 U.S. News & World Rep., July 14, 1969, at 68-69; Fortune, October, 1969, at 99.

[2] IPC is incorporated in Canada, but 99.942% is owned by the American-incorporated Standard Oil Company (N.J.). All of IPC's principal oilfields and refineries are located in Peru; its management headquarters are in Coral Gables, Florida. See Hearings on United States Relations with Peru Before the Subcomm. on Western Hemisphere Affairs of the Senate Comm. on Foreign Relations, 91st Cong., 1st Sess. 98 (1969) [hereinafter cited as 1969 Hearings].

[3] 22 U.S.C. §§ 2370(e) (1) & (2) (1964).

[4] The present inquiry is based largely on statutory interpretation since the 1962 Amendment has been applied only once, 1969 Hearings at 55, and the 1964 Amendment has also had little application. See Banco Nacional de Cuba v. First Nat. City Bank, 270 F. Supp. 1004 (S.D.N.Y. 1967); F. Palicio y Compania, S. A. v. Brush, 256 F. Supp. 481 (S.D.N.Y. 1966); Present v. United States Life Ins. Co., 96 N.J. Super. 285, 232 A.2d 853 (1967).

[5] 1969 Hearings at 86.

the subsoil of the oilfields.[6] The property was subsequently transferred twice more before it was sold in 1888 to a group of British citizens who leased it to the London and Pacific Petroleum Company which subleased the property to IPC. In 1922, a dispute between the British citizens and Peru over ownership of the subsoil was apparently settled by an arbitral award which recognized the British citizens' ownership of the subsoil and settled important questions of taxation. In 1924, IPC bought the land outright.[7]

The dispute over ownership rights continued sporadically after IPC became the owner of the oilfields.[8] In July, 1968, IPC proposed a solution which was accepted with certain changes by the government of Fernando Belaunde Terry, the elected President of Peru. However, political opponents of Terry felt that the final agreement was unfavorable to Peruvian interests, and on October 3, 1968, overthrew the government and replaced it with the present military junta. On October 4, the military junta annulled the agreement by decree[9] and a few days later it expropriated IPC's assets. Four months later, the junta presented IPC with a bill for $690.5 million claiming it was a debt owed to the government for the illegal extraction of oil.[10] The junta is apparently willing to credit the value of IPC's plant to reduce the debt.[11]

IPC has unsuccessfully employed various methods under Peruvian law to recover the value of the plant; its latest appeal has re-

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[6] Id. at 98. The deed was granted in 1826 in payment of a debt incurred in Peru's War of Independence. The New Republic, April 12, 1969, at 15. Apparently IPC is the only landowner in Peru claiming the ownership of both surface and subsoil. 1969 Hearings at 86.

[7] For a full statement of the background and current situation of IPC in Peru see Memorandum from Standard Oil Co. (N.J.), "The La Brea Y Parinas Controversy—A Resume," March, 1969 [hereinafter cited as 1969 Memorandum]. For an accurate statement of the facts see Fortune, March, 1969, at 55; The New Republic, April 12, 1969, at 15. For a detailed discussion of the arbitral award, see 1969 Hearings at 108.

[8] In 1957, IPC attempted to change its unique type of ownership by giving up this ownership in exchange for a grant of concession. The government of Peru would not accept this proposal. In 1963, a law was passed which retroactively annulled the 1922 arbitral award and all enabling legislation leading to the award. In July, 1967, the Peruvian Congress declared the mineral rights at the IPC oilfields to be the property of the government. 1969 Hearings at 99.

[9] See 1969 Memorandum at 15, where Peruvian Decree Law No. 3 of Oct. 4, 1968 is discussed.

[10] The "debt" purportedly represents the value of the crude oil and natural gas. produced by the oilfields from 1924 until 1968. Thus, the Peruvian government claimed that IPC had been illegally extracting oil for 44 years. See Fortune, March, 1969, at 55. IPC has been the largest taxpayer in Peru and has paid taxes to the Peruvian government continually for 44 years. These taxes have been accepted and used by the government. See 1969 Memorandum at 25.

[11] The value of the physical plant has been set at $71 million by the Peruvian government. A check for this amount was recently deposited by the Peruvian government in the government bank as "compensation" to IPC for its property. However, the money was immediately attached by the Peruvian government and applied against the $690.5 million "debt." Thus, it is questionable whether there has been any actual compensation. See 1969 Hearings at 104.

cently been rejected by Peru's Ministry of Energy and Mines. This appeal was the last avenue of redress for IPC under current Peruvian law.[12] President Nixon has engaged the services of Ambassador John Irwin in an effort to resolve the dispute through negotiations. Progress thus far has been negligible and hopes for a solution acceptable to both sides are dwindling.[13]

Considering the facts of the IPC case, it is probable that Peru will not adequately compensate the Company for its holdings and the Hickenlooper Amendments may come into operation. The Amendments will be examined to determine whether Peru has violated them and, if so, what the practical results of their application to this case might be. The effectiveness of the Amendments as attempts to protect private foreign investment will be evaluated and their interrelationship considered.

II. THE 1962 HICKENLOOPER AMENDMENT[14]

The 1962 Hickenlooper Amendment requires the President to sever United States aid to governments which expropriate American owned property without compensation.[15] The enactment of the Hickenlooper Amendment of 1962 was probably the immediate result of the taking of the Brazilian holdings of the International Telephone and Telegraph Company by the government of Brazil.[16] The Senate determined that although such expropriations might occur for justifiable reasons, a new amendment to the Foreign Assistance Act was needed to protect American property owners against "arbitrary" seizures.[17] A collateral purpose of the 1962 Amendment was to encourage more American investment in less developed countries by establishing increased security for American holdings.[18] The purpose of the

[12] Peruvian law, however, is not stable. Some believed that the recent administrative proceeding could not occur until IPC paid the entire $690.5 million to the court. This was apparently changed by the Peruvian government according to Secretary of State Rogers who, on April 7th, was still not certain of the proper legal procedure. For the report of the news conference where he discussed the IPC affair see 60 Dep't State Bull. 357, 363 (1969).

[13] For a discussion of Ambassador Irwin's mission and progress see 60 Dep't State Bull. 357, 406.

[14] The first Hickenlooper Amendment was passed in 1962 and will hereinafter be referred to as the 1962 Amendment; the second, passed in 1964, will be termed the 1964 Amendment.

[15] 22 U.S.C. § 2370(e)(1) (1964). If the President took this action in the IPC case, Peru would lose direct foreign assistance of $34 million per year. In addition, preferential purchases of Peruvian sugar subsidize the country to the extent of $45 million per year. 66 U.S. News & World Rep., March 3, 1969, at 68. The flow of new investments into Peru has virtually ceased pending the outcome of the IPC situation. Approximately $600 million in new investments have been postponed by United States companies alone. 67 U.S. News & World Rep., July 14, 1969, at 68.

[16] S. Rep. No. 1535, 87th Cong., 2d Sess. 25 (1962). The 1962 Amendment was also the result of the vast number of American holdings which were expropriated by the government of Cuba without compensation. See 1969 Hearings at 55.

[17] S. Rep. No. 1535, 87th Cong., 2d Sess. 36-37 (1962).

[18] Id. at 37. For further indications of the Congressional intent see Hearings on the

Senate, then, was two-fold: to make certain that American taxpayers were not rewarding unfair and uncompensated expropriations of American owned property by foreign governments, and to encourage more American investment in the underdeveloped countries by assuring potential investors that the United States would exert all possible pressure to insure the security of their property.

For the 1962 Hickenlooper Amendment to be applicable to the Peruvian situation, two prerequisites must be met. First, the Amendment requires that one of three substantive subsections be violated. Secondly, if such a violation occurs, it is necessary that the offending government fail to take "appropriate steps" to discharge its obligations under international law, including speedy compensation for the confiscated property.

Subsection A of the 1962 Hickenlooper Amendment provides that a violation occurs if the government of a country "has nationalized or expropriated or seized ownership or control of property owned by any United States citizen. . . ."[19] No formal declaration of expropriation is necessary, as the Senate Foreign Relations Committee recognized the necessity of preventing not only formal, outright expropriation without compensation, but also "creeping expropriation" which is more difficult to detect and, consequently, to control.[20] It is clear that the physical takeover of the IPC plant is the type of action which the 1962 Hickenlooper Amendment sought to prevent and is violative of the terms of subsection A. The language of the statute as well as the legislative intent lead to the conclusion that Peru has violated Subsection A of the 1962 Amendment by seizing control of IPC's plant.[21]

Peru's assertion of the "debt" of $690.5 million also amounts to a violation of Subsection A of the 1962 Amendment. It is an example of "creeping expropriation" sought to be avoided by the Senate Committee. Even if Peru credits IPC for the full value of its plant to offset part of the "debt", the result would still be the nationalization, expropriation or seizure of control of its plant since IPC would receive no actual compensation. This interpretation accords with the Senate Foreign Relations Committee's desire that the term "confiscation" be "construed broadly and not in a narrow technical sense."[22]

The government of Peru, moreover, has explicitly stated that it was expropriating the property.[23] This is tantamount to an admission that subsection A has been violated. The Peruvian government has claimed, however, that IPC did not have clear title to the land, and, therefore, the taking of the land was not expropriation since the state

Foreign Assistance Act of 1965 Before the House Comm. on Foreign Affairs, 89th Cong., 1st Sess. 991-1079 (1965).

19 22 U.S.C. § 2370(e)(1)(A) (1964).

20 See S. Rep. No. 588, 88th Cong., 1st Sess. 29 (1963).

21 See 1969 Hearings at 101.

22 S. Rep. No. 588, 88th Cong., 1st Sess. 29 (1963).

23 See 1969 Hearings at 101.

already owned the land.[24] It is submitted, however, that the facts indicate IPC did possess title to the land.[25] Moreover, the Peruvian government's recognition of IPC's ownership for over 44 years should estop Peru from asserting ownership at the present time.[26] For the purposes of this comment, therefore, it will be assumed that IPC possessed clear title to the land.

Peru also violated Subsection B of the 1962 Hickenlooper Amendment which severs aid to a country which has "taken steps to repudiate or nullify existing contracts or agreements with any United States citizen. . . ."[27] The Senate Foreign Relations Committee desired to promote stability in contracts between foreign governments and American owners.[28] Subsection B seeks to prevent disregard by foreign governments of contracts and agreements with American companies. Peru, however, has annulled such an existing contract with IPC. An agreement intended to settle the question of IPC's property rights in Peru was made and signed by the government of Peru on August 12, 1968.[29] After the takeover by the military junta, the agreement was annulled by military decree.[30] This action was a clear violation of Subsection B of the 1962 Amendment.

Subsection C provides that the sanctions of the Amendment be applied to any government which has "imposed or enforced discriminatory taxes or other exactions. . . ."[31] The imposition of the $690.5 million "debt" would appear to be the exaction of such a "discriminatory tax." The "debt" was imposed on the basis of Peru's contention that IPC was a trespasser acting in bad faith, and must, therefore, indemnify Peru for the oil it has extracted since it bought the land in 1924.[32] However, since it has been assumed that IPC owned the land, it is clear that the "debt" represents a discriminatory tax. Thus, while it is not essential to the application of the 1962 Hickenlooper Amendment that all three subsections be violated, arguably, the Peruvian government has violated all three subsections.

Since Peru has clearly violated the substantive subsections of the 1962 Hickenlooper Amendment, the provisions of the Amendment dealing with the steps which Peru must take to avoid the discontin-

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[24] Id. at 99-100.

[25] See pp. 77-78 supra.

[26] Although estoppel against a state is used very rarely, it is submitted that the conduct of Peru, not only in collecting taxes for 44 years, but, more importantly, in listing IPC as having valid title to the oilfields in the Public Registry and in allowing IPC to rely on this recognition of its ownership for over 40 years to the detriment of the Company, constitutes proper grounds to estop Peru from presently claiming title. See generally Annot., 1 A.L.R.2d 338 (1948).

[27] 22 U.S.C. § 2370(e)(1)(B) (1964).

[28] S. Rep. No. 588, 88th Cong., 1st Sess. 29 (1963).

[29] 1969 Memorandum at 9-13.

[30] 1969 Hearings at 101.

[31] 22 U.S.C. § 2370(e)(1)(C) (1964).

[32] Fortune, March, 1969, at 55.

uance of aid are called into operation. This section of the Amendment states that the President shall suspend aid if

> such country . . . fails within a reasonable time (not more than six months after such action . . .) to take appropriate steps, which may include arbitration, to discharge its obligations under international law . . . including speedy compensation . . . [N]o other provision of this chapter shall be construed to authorize the President to waive the provisions of this subsection.[33]

Before determining whether Peru has taken "appropriate steps to discharge its obligations under international law," it must be pointed out that the nature of Peru's obligations under international law is subject to varying interpretations. It is unclear whether the architects of the Hickenlooper Amendment would necessarily be in agreement with various authorities in international law. For example, the Amendment requires speedy compensation to the former owner as an element of international law. Certain international law authorities agree that the acts of a government in depriving an alien of his property must be followed by a grant of adequate compensation.[34] Many international lawyers believe that any compensation which is merely nominal, or is indefinitely postponed, is contrary to international law.[35] The official position of the United States Department of State is that international law demands "just" or "fair" compensation and that standard "cannot be abrogated by local legislation."[36] However, other authorities have stated that there is a serious question whether international law requires compensation at all.[37]

Thus, there is disagreement as to what international law requires in the way of compensation for expropriated property. However, the 1962 Hickenlooper Amendment specifically makes speedy compensation an element of international law, and while

> the U.S. Congress cannot, of course, make international law, it can indicate the Congressional belief as to what international law in a particular area is. This is what it has attempted to do here with respect to compensation for the taking of the property of aliens.[38]

Thus, since Peru has not, as yet, speedily compensated IPC for the expropriated property it is apparent that Peru has not satisfied this

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[33] 22 U.S.C. § 2370(e)(1) (1964).

[34] M. Sorenson, Manual of Public International Law 486 (1968). See G. Schwarzenberger, A Manual of International Law 106 (5th ed. 1967). See also 48 Dep't State Bull. 787 (1963) where a U.N. resolution declaring that an owner must be paid "appropriate compensation" is discussed. See also 60 Dep't State Bull. 406-07 (1969).

[35] See J. Starke, An Introduction to International Law 258 (6th ed. 1962).

[36] 29 Dep't State Bull. 357 (1953).

[37] 1969 Hearings at 77.

[38] Levie, Sequel to *Sabbatino*, 59 Am. J. Int'l L. 369 n.17 (1965).

particular obligation under international law as required by the 1962 Amendment.

Since Peru has not fulfilled its international law obligations under the Hickenlooper Amendment, it remains to be determined whether it has taken "appropriate steps" toward that end. The Peruvian court appeals which IPC lost, as well as the administrative action which it has recently pursued[39] were such "appropriate steps" since a decision favorable to IPC would have prevented the Amendment from becoming operative against Peru.[40] However, these remedies have been exhausted[41] and apparently the only negotiations with respect to the IPC situation are the sporadic discussions between Ambassador Irwin and the Peruvian government. While the Amendment states that arbitration is an "appropriate step," no other guidelines as to what constitutes such steps are provided. It is submitted that the intermittent negotiations between the United States and Peru are not "appropriate steps" since "speedy compensation" has not been forthcoming.[42] Unless IPC and Peru begin arbitration, it appears that at present, no "appropriate steps" are being taken and the decision whether to discontinue financial assistance to Peru is left with the President.

Having determined that the 1962 Hickenlooper Amendment is clearly violated unless "appropriate steps" are taken, it becomes necessary to determine whether the President has discretion in applying the sanctions of the Amendment, or whether he is compelled to discontinue aid. The legislative history of the 1962 Amendment as well as recent statements by the Department of State and the current administration indicate that the Amendment was both intended and is presently interpreted to be mandatory. The Senate Report on the 1962 Amendment states that the President is "required to suspend assistance" if the provisions of the Act have been violated.[43] More recently, the Assistant Secretary of State for Inter-American Affairs has said that although he might question the wisdom of the Amendment, the "law exists and it will be implemented. . . ."[44] The Nixon Administration realizes the mandatory nature of the Amendment as evidenced by Secretary of State Rogers' statement that there is a "deadline, mandated by law, which faces us should Peru fail to take appropriate steps toward a solution."[45] Moreover, this is the only reasonable interpretation of the Amendment, for it

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[39] For a general discussion of the procedures employed by IPC see 1969 Memorandum at 14-24.

[40] 60 Dep't State Bull. 357 (1969).

[41] As has been previously noted, however, Peruvian procedural law is not clear. See note 12 supra.

[42] One authority has stated that the Congressional intent was that all negotiations must be in "good faith" in order to constitute "appropriate steps" under the 1962 Amendment. 1969 Hearings at 72-73.

[43] S. Rep. No. 1535, 87th Cong., 2d Sess. 36 (1962); 1969 Hearings at 55.

[44] 60 Dep't State Bull. 407 (1969).

[45] Id. at 310.

states that the President "*shall* suspend assistance. . . ."[46] (Emphasis added.)

The 1962 Amendment specifies that "appropriate steps" must be commenced within a six month period to avoid the mandatory sanctions of the Amendment. In the IPC case, "appropriate steps" were taken during the six month period. However, since the "appropriate steps" did not result in a satisfactory settlement, and it appears that all good faith bargaining has since terminated, it is arguable that immediate suspension of aid must occur since the six month period has elapsed. This is the only reasonable interpretation of the section because the sanctions of the Amendment could be avoided by merely beginning negotiations within six months and then terminating them.[47]

The only discretion which the President may have under the 1962 Amendment is whether to continue the suspension of aid. The suspension must continue until the "President is satisfied that appropriate steps are being taken . . . ." Thus, the President may then order a resumption of aid, although he need not. However, in the IPC case assistance has not yet been discontinued by the President, although it is likely that he will become bound to discontinue it in light of Peru's clear violations of the Amendment and the lack of "appropriate steps" toward compensation.[48]

III. The 1964 Hickenlooper Amendment

From the standpoint of IPC or any other similarly situated company, it may make no practical difference whether the President invokes the sanctions of the 1962 Amendment. The discontinuance of United States foreign aid to Peru does not guarantee compensation for IPC. The underlying purpose of the 1962 Amendment was to force foreign governments to compensate American owners of expropriated property by threatening suspension of United States foreign assistance. However, strong political and socio-economic factors make it uncertain whether any compensation will be forthcoming in the IPC case, even if the sanctions of the 1962 Amendment are employed.[49]

IPC, however, is not left without a remedy. In 1964, Congress enacted a second Hickenlooper Amendment[50] intended to insure the right to seek compensation for expropriated property in United States

46 22 U.S.C. § 2370(e)(1) (1964).

47 This interpretation also supports the mandatory nature of the Amendment. Thus, if good faith negotiations have terminated, even though commenced within the six month period, the sanctions should be applied. See note 42 supra.

48 It should be noted that it is unlikely that IPC or any other party could force presidential action by a mandamus proceeding.

49 The complex state of Peruvian politics, society and economics will certainly exert some effect on the results of the present controversy. See the testimony of Mr. Lillich and Mr. Goodwin, 1969 Hearings, supra note 2, at 53-98.

50 22 U.S.C. § 2370(e)(2) (1964). This Amendment is also referred to as the "Sabbatino Amendment" and the "Rule of Law Amendment."

courts.[51] To accomplish this purpose, the Amendment reversed the effects of a recent Supreme Court decision denying recovery in a similar case on the basis of the so-called "act of state" doctrine. In *Banco Nacional de Cuba v. Sabbatino*,[52] the Court found against an American merchant who was attempting to obtain the proceeds from the sale of sugar which had been expropriated from him by the government of Cuba.[53] The Court did not reach the merits, nor did it determine whether the Cuban expropriation was valid under either United States or international law. Its decision was based on an exhaustive discussion and reaffirmation of the "act of state"[54] doctrine which states:

> 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 another done within its own territory.[55]

Thus, under this doctrine federal courts would not judge the acts of a foreign government, including expropriation, and the American owner of confiscated property was left virtually without remedy in United States courts.

The 1964 Hickenlooper Amendment overcomes this disability by providing in part:

> [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 other right is asserted by any party . . . based upon . . . a confiscation or other taking . . . by an act of that state in violation of the principles of international law, including the principles of compensation . . . set out in this subsection. . . .[56]

The 1964 Amendment provides two exceptions to this general rule. Its provisions will not be applicable if the President determines that it is in the foreign policy interests of the nation to apply the "act of state" doctrine, or if the act of the foreign government is not contrary to international law. The question thus becomes whether IPC can successfully bring suit against the Peruvian government in a court

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[51] Senator Hickenlooper has stated: "[b]asically, the amendment is designed to assure that the private litigant is granted his day in court." 110 Cong. Rec. 19547 (1964).

[52] 376 U.S. 398 (1964). For a discussion of the decision see 78 Harv. L. Rev. 143, 300 (1964). See also 21 Vand. L. Rev. 388 (1968).

[53] Over one billion dollars worth of American property has been expropriated in Cuba. J. Pratt, A History of United States Foreign Policy 534 (2d ed. 1965).

[54] 376 U.S. at 427-37.

[55] Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

[56] 22 U.S.C. § 2370(e)(2) (1964). The Amendment has been held constitutional. Banco Nacional de Cuba v. Farr, 383 F.2d 166 (2d Cir. 1967), cert. denied, 390 U.S. 956 (1968).

of the United States under the 1964 Hickenlooper Amendment, and, if so, what the court can award IPC.[57]

To bring suit IPC must demonstrate that it comes within the terms of the 1964 Amendment by proving that it has a "claim of title or other right to property based on a confiscation or other taking"[58] by Peru. The laws promulgated by the Peruvian military junta clearly announced the taking.[59] Moreover, IPC's title to the property seems to have been established; thus, this requirement has been satisfied.

The second prerequisite is that the expropriation must have violated international law. If the court determines that such a violation has not occurred, the 1964 Amendment does not apply and the "act of state" doctrine would be applied.[60] It has been demonstrated that Peru's confiscation of IPC's property did violate international law because the 1962 Amendment makes speedy compensation, equivalent to the full value of the expropriated property, a requirement of international law.[61] The 1964 Amendment specifically adopts the international law standards set out in the 1962 Amendment.[62] Thus, Peru has violated the international law provision of the 1964 Amendment by failing to provide adequate compensation.

The only remaining bar to litigation of IPC's rights in a United States court is the President's discretionary power to invoke the "act of state" doctrine.[63] The President would take such action if it were determined that a trial on the merits would not be in the national interest. If the President had applied the sanctions of the 1962 Amendment, it is probable that it would not be considered to be in the national interest to allow a private suit by IPC in United States courts. Even if the sanctions of the 1962 Amendment are applied against Peru, it is probable that negotiations for compensation will continue. In such a case, the possibility of a United States court judgment against Peru might impede a negotiated settlement with Peru. If, by the time a suit was instituted, it was apparent that a settlement was unlikely, the President would probably allow the case to continue as the danger to negotiations would then be minimal.

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57 It is possible that the government of Peru might sue IPC for the $690.5 million "debt." If this should occur, IPC would probably counterclaim for the value of the plant as well as raise defenses. In such a situation, there would be no need to apply the 1964 Amendment since Peru would have put itself in court, thereby submitting itself to the jurisdiction of the court. See A. Ehrenzweig & D. Louisell, Jurisdiction in a Nutshell 117 (2d ed. 1968).

58 22 U.S.C. § 2370(e)(2) (1964).

59 1969 Memorandum, supra note 6, at 15.

60 See 23 U. Miami L. Rev. 243, 247 (1969).

61 See p. 82 supra.

62 See 1964 Amendment, p. 85 supra.

63 The President may determine that the "act of state" doctrine is required by the foreign policy interests of the United States and a suggestion to that effect would then be filed in that case with the court. 22 U.S.C. § 2370(e)(2) (1964).

If the President allows the suit to continue, the court will then have to consider whether Peru's probable defense of sovereign immunity requires dismissal of IPC's claim. There has been no clear statement of the effects of this defense on the operation of the 1964 Hickenlooper Amendment. Before its enactment, a foreign country was free to raise a defense of sovereign immunity in any litigation. With the issuance of the Tate Letter in 1952,[64] however, the State Department suggested that the defense of sovereign immunity no longer be considered absolute and it further suggested that the defense be limited to the *jure imperii*, the public governmental functions of a state. Thus, the Tate Letter urged that sovereign immunity should not protect foreign governments from answering in United States courts for *jus gestionis*, their purely commercial undertakings. The State Department position necessitated a case by case examination of the government action involved.[65] Because the taking of IPC's property in Peru was clearly a public governmental function of that country, had it occurred before the passage of the 1964 Amendment, Peru could have successfully raised the defense of sovereign immunity relying on the Tate Letter. It remains to be determined whether the defense is still available in light of the 1964 Amendment.

A United States district court has declared that the right to claim sovereign immunity was not altered by the passage of the 1964 Amendment. *American Hawaiian Ventures Inc. v. M.V.J. Latuharhary*[66] involved a suit by an American corporation against a corporation owned by the Indonesian government which confiscated the plaintiff's rubber plantations. The court stated that "the Amendment does not bear on the threshold question of whether this Court's jurisdiction over Indonesia would be defeated by its right to sovereign immunity for acts of *jure imperii*."[67] The Supreme Court of Pennsylvania has announced that sovereign immunity would be granted any nation at the request of the United States Department of State.[68] In a suit involving a Delaware corporation seeking compensation from Venezuela for the alleged confiscation of property, a vigorous dissent declared that sovereign immunity is a "colossal effrontery, a brazen repudiation of international moral principles, it is a shameless fraud.

[64] It should be noted that usually the law of the place of the wrong controls. However, if foreign policy demands otherwise, the forum law will prevail. In effect, this is what would happen if the Hickenlooper Amendment were applied in the Peruvian situation.

> The Hickenlooper Amendment . . . vitiates the act of state doctrine's bar, allows forum policy to prevail, and states that the forum policy requires compensation for expropriation. Thus, the law of the United States was applied to the acts of the Cuban government within its own territory.

21 Vand. L. Rev. 388, 393 (1968).

[65] 26 Dep't State Bull. 984 (1952).

[66] 257 F. Supp. 622 (D.N.J. 1966).

[67] Id. at 626.

[68] Chemical Natural Resources Inc. v. Venezuela, 420 Pa. 134, 147, 215 A.2d 864, 869 (1966).

. . .",[69] thus indicating the view that sovereign immunity should not be allowed to defeat the purposes of the Amendment.

It is submitted that the defense of sovereign immunity should not be allowed in a case to which the 1964 Hickenlooper Amendment is applicable and which the President allows to proceed. In enacting the 1964 Amendment Congress desired the President to have the only voice which could prevent a hearing on the merits in an expropriation situation. Sovereign immunity should not be allowed to frustrate that intent.[70]

Assuming that the President would not ask for the application of the "act of state" doctrine and the sovereign immunity defense hurdle could be overcome, it is suggested that at a trial in a United States court Peru would counterclaim for $690.5 million, the amount of the alleged "debt." The counterclaim would only be put forth if Peru was convinced that its defense of sovereign immunity would not be accepted, for once a counterclaim is made, sovereign immunity is waived.[71] It has been concluded that IPC had valid title to the land prior to the expropriation and, therefore, the $690.5 million "debt" is invalid.[72]

Assuming the court's agreement with this position, it remains to be determined how a judgment against Peru could be enforced. Since the jurisdiction of United States courts extends only to property within United States territory,[73] it is apparent that a judgment in IPC's favor could only be satisfied out of Peruvian property located in the United States. It is questionable, however, whether property of the Peruvian government, other than confiscated property which is shipped into the United States, could be used to satisfy the judgment.[74] However, in situations where the foreign government shipped the confiscated property to the United States, the possibility of satisfaction of a judgment would be increased proportionately. Thus, even assuming the 1964 Hickenlooper Amendment may permit a decision on the merits of the Peruvian seizure, it is unlikely that a decision favorable to IPC would result in adequate compensation.

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[69] Id. at 194, 215 A.2d at 893.

[70] It has been argued that a party who could pass all of the other hurdles of the 1964 Amendment would "founder on the rock of sovereign immunity . . . at the very outset." Lowenfeld, The Sabbatino Amendment—International Law Meets Civil Procedure, 59 Am. J. Int'l L. 899, 907 (1965).

[71] Sovereign immunity can be waived by the bringing of suit by a sovereign or the imposition of a counterclaim. See 420 Pa. at 143, 215 A.2d at 867 (1966).

[72] Although title to land cannot be affected by a judgment of any state not the situs of the land, a United States court can seek to provide compensation for its unlawful taking. See 1 J. Beale, A Treatise on the Conflict of Laws 423 (1935).

[73] See Restatement of Conflict of Laws § 98 (1934). A United States court in dealing with the IPC problem would not attempt to affect the property in Peru in any way. Rather, it would simply allow satisfaction of the judgment out of the property located in the United States.

[74] One authority has suggested that any claims for money be satisfied only out of the actual expropriated property as it is shipped into the United States. For a discussion of this issue see Hearings on the Foreign Assistance Act of 1965 Before the House Comm. on Foreign Affairs, 89th Cong., 1st Sess. (1965).

The interrelationship of the 1962 Amendment with the 1964 Amendment may also prevent IPC from receiving compensation. The applicability or non-applicability of the 1962 Hickenlooper Amendment affects in no theoretical way a court action based on the 1964 Amendment. Even if the President applied the sanctions of the 1962 Amendment, a United States corporation could still bring suit in an American court. However, it is arguable that the "act of state" doctrine of the 1964 Amendment would be applied by the President in a case if negotiations were in progress under the "appropriate steps" section of the 1962 Amendment. If such negotiations were discontinued by the United States, it is arguable that an American court action under the 1964 Amendment should be allowed to proceed. The President may determine, however, that the discontinuance of aid is sufficient leverage to induce compensation or that the foreign policy interests of the nation require the application of the "act of state" doctrine even if the 1962 Amendment sanctions have not been applied.

CONCLUSION

It is probable that the Hickenlooper Amendments will not induce adequate compensation for IPC's property. Although some have argued that the Amendments are ineffective and should be repealed,[75] it is submitted that any consideration of their repeal should be postponed pending the outcome of the IPC situation. At that time the power of the Amendments to induce compensation for expropriated American owned property or to prevent further expropriations without compensation can be adequately assessed. The IPC situation is serving as a test case for Latin American countries contemplating land reform in the future. The repeal of the Amendments may be interpreted by foreign countries as an admission of their ineffectiveness and may result in numerous expropriations of property of American investors without compensation. In the same sense, if the President does not impose the sanctions of the 1962 Amendment and imposes the "act of state" doctrine in an action by IPC under the 1964 Amendment, this will also illustrate their ineffectiveness in light of foreign policy considerations.

At the present time, the Hickenlooper Amendments represent the best compromise for insuring the rights of those individuals and corporations who have undertaken capital investments in foreign countries while maintaining meaningful foreign relations with those countries. It seems clear, however, that the Congressional intent behind the Amendments is weighted in favor of the American investor in foreign countries at the possible expense of foreign relations. The IPC situation indicates that the importance of foreign relations may frustrate this Congressional intent.

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[75] Several of those testifying on the Peruvian situation felt repealing the Amendments might be wise. See generally 1969 Hearings, supra note 2.