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I. INTRODUCTION

In recent years, we have seen the Berlin Wall collapse, the once mighty Soviet Union disintegrate into a fragment of its former self, and South Africa begin a new era without apartheid. For the first time in decades, the world seems safe.

Problems, however, still exist. The Bosnia-Hercegovina conflict, China and Taiwan, Saddam Hussein and Iraq, Kuwait, Syria, Iran, Colonel Muammar al-Qadhafi and Libya, and North Korea and South Korea, to name a few. Despite these isolated conflicts, an expropriation should be a thing of the past; however, it is not.

In 1995, U.S. Senator Edward M. Kennedy (D-Mass.) and Senator Daniel Patrick Moynihan (D-N.Y.) proposed Amendment 448 to House Bill 1158, the Emergency Supplemental Appropriations Act, which discussed the Senate's concern that taxpayers should not be able to avoid taxes by renouncing their U.S. citizenship.[1] What is noteworthy is the *Forbes* article that was read into the record by Senator Kennedy, explaining the threat of expropriation:

> Offshore money is growing faster than any other part of the financial services industry. It's multiplying at a double-digit rate of growth.
>
> . . . .
>
> Wealthy Europeans, Latin Americans, Asians and Middle Easterners are Merrill [Lynch's] principal clients here. They want to buffer their fortunes against *expropriation, political unrest, [and] economic instability.*
>
> . . . .
>
> Today, many wealthy Kuwaitis have trusts offshore to protect their fortunes from Saddam Hussein . . . .[2]

Therefore, the threat of expropriation still exists.[3]

With the possibility of an expropriation, multinational investors should conduct their "due diligence" before investing in a foreign jurisdiction. Accordingly, this Article will provide an overview of the expro-

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1. *See Kennedy Amendment on Expatriate Tax Loophole Passes* 95 TAX NOTES INT'L 78-12 (Aug. 24, 1995). This Amendment was incorporated into the Health Insurance Portability and Accountability Act of 1996 and signed into law by President Clinton in August 1996. *See* H.R. 3103, 104th Cong. (1996).

2. *Id. See also* Robert Lenzner & Philippe Mao, *The New Refugees*, FORBES, Nov. 21, 1994, at 131, 134 (emphasis added).

3. *See Partial Text: Western Samoa 'International Companies Act 1987 (Incorporating Amendments to March 1996),'* Pt. X, 96 TAX NOTES INT'L 164-30 (Aug. 22, 1996). It provides for the incorporation of international companies and registration of foreign companies that want a permanent establishment in Western Samoa. Note that section 228B defines "expropriation" as "any act of confiscation, compulsory acquisition, nationalization or any similar act . . . where any foreign government expropriates any membership interest of a member of an international company . . . ." *Id.* Clearly, expropriation is not a dinosaur of the past.

priation nightmare, the Act of State Doctrine, sanctions against an expropriation, asset protection techniques to minimize an expropriation, and the tax consequences of an expropriation. Although the expropriation scene has been silent for some time, one thing is certain—history repeats itself.

A. *The Problem*

Expropriation occurs when a foreign country seizes on investment through direct governmental interference, such as by military takeover, by mandated national ownership of all or partial particular ventures, or by indirect means. Indirect means may include creeping or constructive interferences, such as the imposition of currency restrictions, the enactment of income or estate taxes,[4] and the taking of property,[5] or corporate or trust assets of U.S. nationals without prompt, adequate, and effective compensation.[6]

For example, ABC corporation ("ABC"), a U.S. corporation, operates a clothes manufacturing facility in country *X*. When ABC opened its facility in country *X*, the government was stable. Country *X*, however, is now embroiled in the midst of civil strife and its economic structure is fragile. The government regime begins to heed the call for nationaliza-

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4. *See* Robert C. Lawrence III, *International Tax & Estate Planning: A Practical Guide for Multinational Investors* § 5, at 5-1, 5-2 (3d ed. 1996). Lawrence describes these "extraordinary events" as including "direct governmental interferences, such as military takeovers, expropriation or mandated national ownership of all or part of particular ventures; and indirect, creeping, or constructive interferences, such as the imposition of currency restrictions or the enactment of onerous income or estates taxes." *Id.* at 5-1.

5. *See id.* at 5-8 (stating that "'property' includes real or personal tangible property, intangible property and any interest in such property. Assets of a corporation or a trust clearly fall within this definition.") (footnotes omitted). For a more thorough discussion of the treatment of corporate assets in the international context, see generally *Bond v. Hume*, 243 U.S. 15 (1917); S. FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW 206-11 (1953); Frank G. Dawson & Burns H. Weston, *"Prompt, Adequate and Effective:" A Universal Standard of Compensation?*, 30 FORDHAM L. REV. 727 (1962); George Nebolsine, *The Recovery of the Foreign Assets of Nationalized Russian Corporations*, 39 YALE L.J. 1130 (1930); Allan R. Tessler, Note, *International Law, Conflict of Laws: The Act of State Doctrine*, 47 CORNELL L.Q. 659 (1962).

6. *See* Monroe Leigh, *Expropriation of Foreign Owned Investment—Recent Trends*, *in* PRIVATE INVESTORS ABROAD 197, 198-224 (1972); Kenneth J. Vandevelde, *Reassessing the Hickenlooper Amendment*, 29 VA. J. INT'L L. 115, 120 (1988). Lawrence defines the term expropriation to refer to the:

> taking of property other than for a proper, recognized public purpose or under circumstances where the owner is not provided with prompt, adequate or effective compensation . . . . [T]he acts constituting . . . 'expropriation' are taken pursuant to the sovereign's exercise of rights analogous to those connoted by the Anglo-American concept of 'eminent domain.'

Lawrence, *supra* note 4, at 5-2.

tion,[7] and subsequently takes over the operations of ABC, either expressly or implicitly.[8] What was once a U.S. corporation operating *in* country *X*, is now being operated *by* government *X*—the expropriation has occurred.[9] Consequently, government *X* now runs the operations of ABC, senior management of ABC are replaced by hand-selected executives of country *X*, and the former U.S. corporation operating in country *X* ceases to have connections with its U.S. parent.

For ABC, the expropriation is a sobering event. First, the costs associated with developing the physical plant will be lost since there is no "return of" its capital investment.[10] The lost investment capital can be substantial, depending on the type of industry. In some cases, expropriations have exceeded fifty million dollars.[11] Moreover, initial capital investments were probably from borrowed funds and the expropriation caused the loans to be declared in default (assuming the U.S. corporation was unable or unwilling to meet its debt obligations). In essence, the expropriation could trigger a domino effect on the U.S. corporation and damage its credit rating.[12]

Second, U.S. workers in country *X* will probably become unemployed due to the expropriation.[13] Typically, the foreign country that

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7. "Nationalization," generally means to change from private to governmental control. Lawrence defines an act of nationalization to represent:

> [A] sovereign's exercise of rights analogous to those connoted by the Anglo-American concept of 'eminent domain' . . . [which] purport[s] to justify a sovereign's presumably 'inherent' right to take, or to authorize the taking of, private property for public use without the owner's consent, under which private rights are subordinated to the governments.

Lawrence, *supra* note 4, at 5-2 to 5-3.

8. The term "expressly" refers to a written proclamation by the foreign government that an expropriation has occurred; the term "implicitly" refers not to written authority, but to the replacement of existing management with handpicked management by the foreign government.

9. *See* Charles N. Brower, *Current Developments in the Law of Expropriation and Compensation: A Preliminary Survey of Awards of the Iran-United States Claims Tribunal*, 21 INT'L LAW. 639, 643 (1987).

Lawrence defines expropriation as the:

> taking of property other than for a proper, recognized public purpose or under circumstances where the owner is not provided with prompt, adequate, or effective compensation . . . . [T]he most recent American example of such interference occurred in January 1986, after allegations surfaced of State sponsorship of international terrorism by the Libyan government. The United States responded with a trade embargo and also "froze" Libyan assets within the United States or within the possession or control of United States "persons."

Lawrence, *supra* note 4, at 5-2 & n.2. *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 414 reporter's note 9 (1987) (discussing sanctions against Libya); Leigh, *supra* note 6, at 211-18 (ex

10. *See* discussion *infra* Part IV, regarding tax treatment under the Internal Revenue Code.

11. *See infra* note 41.

12. *See* Brower, *supra* note 9, at 645-52.

13. *See id.*

caused the expropriation will replace key employees with hand-selected locals.[14] Additionally, displacement costs associated with an expropriation are costly to the corporation.[15] Once the expropriation has occurred, concern for the U.S. employees becomes a major issue, since the expropriation often occurs in the midst of civil strife.[16] Once employees are located and safety is provided, then safe passage back to the United States becomes paramount.[17]

Finally, after the expropriation, ABC will face the problem of whether Country *X* will provide prompt, adequate, and effective compensation for the expropriation.[18] Admitting that an expropriation has occurred is one thing, but obtaining adequate compensation is another.[19] Some countries will admit to an expropriation, yet avoid any form of compensation. Furthermore, negotiated settlements usually take years, and generally, the final compensation does not equal the book value of the loss suffered by the U.S. corporation.

II. The Act of State Doctrine

The Act of State Doctrine ("State Doctrine") generally prohibits an American court from adjudicating the validity of a foreign act committed by a foreign nation within its own territory,[20] unless the act committed falls within an exception to the doctrine.[21] The purpose of the State

14. *See id.* at 642-43.

15. Costs borne by the U.S. corporation resulting from the expropriation may include costs for relocating personnel, moving family belongings, and providing safety of passage back to the United States.

16. *See* Brower, *supra* note 9, at 640-43.

17. *See id.* A foreign country may prohibit former employees from leaving and could also put former employees under "house arrest".

18. *See infra* Section III.

19. *See infra* text accompanying note 46. IT&T had an expropriation loss valued between $6 million to $8 million, yet only $400,000 in compensation was granted to IT&T.

20. The Act prevents U.S. courts from evaluating the merits of a foreign expropriation of property of U.S. nationals, no matter how arbitrary or despotic the law authorizing the confiscation may be. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 438-39 (1964). Lawrence explains that:

> [the] act of state doctrine, which in its simplest form, is the principle that the courts of one sovereign will not examine the validity of public acts committed by another recognized sovereign within its own territory. An act of state is a public act committed within the sovereign's territorial limits by the government or by a person whose authority derives from the government.

Lawrence, *supra* note 4, at 5-46.

21. The Act does not apply under the following circumstances: (1) if the United States is at war with a foreign nation or does not recognize it; (2) if suit is filed to enforce a foreign nation's criminal laws; (3) if the act was not performed within foreign nations' territory; (4) if a treaty covers the controversy; and (5) if a "clear" violation of international law occurred. *See* Jack E. Sands, Comment, *International Law—Act of State Doctrine*: First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972), 49 WASH. L. REV. 213, 223-24 (1973).

Doctrine is two-fold: (1) it allows the President of the United States to conduct foreign policy without judicial interference;[22] and (2) it prohibits imposition of Western idealogies on non-Western nations.[23] The State Doctrine is determined exclusively by federal law.[24]

The State Doctrine has been applied to determine the deductibility of foreign expropriation losses of personal assets pursuant to section 165(c)(3) of the Internal Revenue Code, while the policy of the doctrine precludes characterizing an expropriation act as a theft, resulting in nondeductibility.[25]

A. *Exceptions to the Act of State Doctrine*

There are several exceptions to the State Doctrine. These include the Recognition Doctrine, the *Bernstein* Exception, the Hickenlooper Amendment, Second Circuit decisions, and the Foreign Sovereign Immunities Act.[26]

1. THE RECOGNITION DOCTRINE

Under the Recognition Doctrine, when the forum sovereign does not recognize the foreign government as the true (i.e., de jure) government, then the courts of that foreign sovereign are not bound by the State Doctrine.[27] In the United States, the executive branch, through the State Department, is the appropriate authority to extend recognition to a foreign government.[28]

2. THE *BERNSTEIN* EXCEPTION

Under the *Bernstein* Exception, the State Doctrine is inapplicable if the executive branch does not object to a lower court's examination of a foreign sovereign's actions.[29] This policy was first discussed in *First National City Bank v. Banco National de Cuba*,[30] wherein the U.S. Supreme Court held that "where the Executive Branch, charged as it is

22. *See Sabatino*, 376 U.S. at 423.
23. *See id.*
24. *See id.* at 424-25 (stating that "an issue concerned with a basic choice regarding competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.") (footnote omitted).
25. *See* discussion *infra* Part IV.
26. *See* Lawrence, *supra* note 4, at 5-62 to 5-83.
27. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 205 (1987).
28. *See* U.S. CONST. art. II, § 2; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 204.
29. *See* Lawrence, *supra* note 4, at 5-65.
30. 406 U.S. 759 (1972). *See* Lawrence, *supra* note 4, at 5-65 to 5-67.

with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts."[31]

Subsequent case law has further established this exception to the State Doctrine, thereby permitting the courts to hear disputes regarding the validity of a foreign sovereign's actions.[32] It should be noted that the executive branch or State Department should issue a "*Bernstein* Letter" to the court indicating no objection to a U.S. court's jurisdiction.[33]

3. THE HISTORY OF THE HICKENLOOPER AMENDMENT

Under the Hickenlooper Amendment, U.S. courts, whether state or federal, cannot use the State Doctrine as a basis for declining to hear a case.[34] The Hickenlooper Amendment, however, is not applicable in several circumstances: when the act of state does not violate international law;[35] when the matter involves contract claims;[36] and when the executive branch determines that foreign policy concerns preempt the application of the State Doctrine.[37]

Historically, the Hickenlooper Amendment, "broadly stated, requires the President to suspend foreign assistance to any country which expropriates the investment of U.S. nationals without paying prompt, adequate and effective compensation."[38] The Hickenlooper Amendment was the result of previous attempts to deal with expropriation of U.S. property abroad. Prior to the Hickenlooper Amendment,

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31. *First National City Bank*, 406 U.S. at 768.

32. *See* Lawrence, *supra* note 4, at 5-65 to 5-67 & nn.275-287 therein.

33. *See id.* at 5-66 to 5-67, 5-74; *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 844 (2d Cir. 1981). The court stated that:

> [W]here (1) the Executive Branch has provided a *Bernstein* letter advising the courts that it believes [the] 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.

Id. at 884 (footnote omitted).

34. *See* Lawrence, *supra* note 4, at 5-67 to 5-68 & n.288 therein.

35. *See id.* at 5-68 & n.291 (citing Menendez v. Saks & Co., 485 F.2d 1355 (2d Cir. 1973), *rev'd on other grounds*, 425 U.S. 682 (1976); Maltina Corp. v. Cawy Bottling Co., 462 F.2d 1021 (5th Cir. 1972)).

36. *See* Lawrence, *supra* note 4, at 5-68 & n.292 (citing Occidental of UMM Al Qaywayn, Inc. v. Cities Serv. Oil Co., 396 F. Supp. 461 (W.D. La. 1975); French v. Banco Nacional de Cuba, 242 N.E.2d 704 (N.Y. 1968).

37. *See* Lawrence, *supra* note 4, at 5-68 & n.293 (citing Banco Nacional de Cuba v. Farr, 243 F. Supp. 957 (S.D.N.Y. 1965).

38. Vandevelde, *supra* note 6, at 115.

U.S. policy over the past 150 years has been to protect investments of U.S. businesses in foreign countries. The mechanism for protection focused on four fronts: (1) diplomatic, (2) military, (3) legal, and (4) economic remedies.[39] The common theme among the remedies was that each required some form of intervention by the U.S. government.[40]

The U.S. foreign policy response to expropriation changed in 1959, when Fidel Castro gained power in Cuba and immediately expropriated approximately one billion dollars in U.S. property.[41] In a proactive measure to prevent further expropriations, Congress added a new subsection 503(b) to the Mutual Security Act of 1954,[42] which required the President to suspend assistance under the State Doctrine to any nation which expropriated property owned by U.S. persons and that had not discharged its obligation under international law within six months of the expropriation.[43] This remedy required the U.S. government to intervene in order to be effective. Adopting this provision to the Mutual Security Act of 1954 was the pivotal point for "legislatively mandated government involvement in investment disputes" which still continues today.[44]

39. *See* Vandevelde, *supra* note 6, at 116.

40. *See id.* at 125.

41. *See id.*; *see also* Micheline Maynard *U.S., Canada Face Off Over Cuba Policy*, USA TODAY, July 15, 1996, at 3B (identifying some of the U.S. companies that are seeking settlements from Cuba regarding that government's expropriation of their businesses over three decades ago). According to this article, "[d]ozens of U.S. companies filed claims against Cuba more than three decades ago after Fidel Castro's government confiscated their property." *Id.* The following is a list of some of the claims that have been certified by the U.S. government. The amounts reflect the original claims. The companies are entitled to 6% annual interest on their claims, from the day the claim arose (which would be from 1959 to the early 1960s) to the date of settlement with the Cuban government. The certified claims (in millions) are as follows: American Brands $10.6, Amstar $81.0, Boise Cascade $11.7, Coca-Cola $27.5, Colgate-Palmolive $14.4, Continental Can $8.9, DuPont $3.0, Firestone Tire & Rubber $1.1, Ford Motor $0.2, General Dynamics $10.4, General Electric $5.4, General Motors $3.8, Goodrich, B.F. $2.2, Goodyear Tire & Rubber $5.1, Hilton International $1.9, IBM World Trade $6.4, IT&T $47.6, International Paper $1.1, King Ranch $1.7, Navistar $8.3, Lone Star Cement $24.9, Moa Bay Mining $88.3, Owens Illinois $5.1, Pepsi-Cola Metro Bottling $1.6, PepsiCo $0.2, Procter & Gamble $5.0, Reynolds Metals $3.4, Sears $3.7, Sherwin Williams $2.2, Bristol-Meyers Squibb $1.5, Standard Brands $1.4, Standard Oil $71.6, Sterling Drug $1.3, Swift & Co. $5.5, Texaco $50.1, Texaco (Latin America) $5.1, U.S. Rubber $9.5, Warner-Lambert $1.6, Wilson International $0.2, and Woolworth $9.2. *See id.* The total is $543.7 million. At 6% annual interest compounding from 1959 through 1996, the amount is $5.3 billion.

42. *See* Vandevelde, *supra* note 6, at 125 & n.59, (noting that this addition is found in the Mutual Security Act of 1954, Pub. L. No. 83-665, 68 Stat. 832 (codified as amended at 22 U.S.C. § 1755 (1959)), *repealed by* Foreign Assistance Act of 1961 § 642(a)(2), Pub. L. No. 87-195, 75 Stat. 424, 460 (codified at 22 U.S.C. § 2151), and that it provided assistance to foreign nations to assure self government and freedom from domination by other nations).

43. *See id.*

44. *Id.* at 126-27.

a. The Hickenlooper Amendment

Following the expropriation of U.S. property by the government of Cuba, the government of Brazil, on February 16, 1962, issued a decree expropriating property belonging to a subsidiary of IT&T.[45] Although IT&T lost between six million to eight million dollars, only $400,000 in compensation was granted to IT&T for the expropriation.[46]

As a result, corporate-America campaigned to terminate foreign assistance to foreign countries engaging in uncompensated expropriation. Major participating corporations included Standard Oil (N.J.), United Fruit, Texaco, IT&T, the American Petroleum Institute, the National Foreign Trade Council, and the U.S. Chamber of Commerce.[47]

Concurrently, U.S. Senator Bourke Hickenlooper of Iowa, who was the ranking Republican on the Senate Foreign Relations Committee, added an "amendment requiring the President to suspend assistance under the Foreign Assistance Act to any State which expropriated the property of a U.S. national unless within six months it took steps determined by the President to be 'appropriate' to discharge its responsibility for compensation under international law."[48] The Hickenlooper Amendment was signed into law on August 1, 1962,[49] and like the Mutual Security Act, intended to stop future expropriations. However, it denied the President the power to waive its provisions, thereby creating a stricter remedy than the Mutual Security Act, which authorized presidential waivers.[50]

In 1963, the Hickenlooper Amendment was further expanded to extend expropriation status when contracts were repudiated or nullified.[51] Additionally, the Hickenlooper Amendment now applied to the Foreign Assistance Act of 1961,[52] and to any other acts having the effect of an expropriation of property.[53] Furthermore, value determinations and advisory reports were to be made to the President within ninety days.[54] Finally, the revised amendment required that "speedy compen-

45. *See id.* at 127 n.67.

46. *See id.*

47. *See id.* at 127 (citing Juan de Onis, *Brazilians Seize U.S. Phone System*, N.Y. TIMES, Feb. 17, 1962, at A1).

48. *Id.* at 128.

49. *Id.* at 129. Senator Hickenlooper commented, with respect to recent expropriations, that "[i]f we do not do something to stop that kind of nonsense, or see that payment is made for property when it is seized, we shall see a wave of expropriation of property of Americans going throughout the world like a prairie fire." 108 CONG. REC. 9940 (1962).

50. *See* Vandevelde, *supra* note 6, at 129.

51. *See id.* at 131-32.

52. *See id.* at 132.

53. *See id.*

54. *See id.*; *see also* 109 CONG. REC. 20,215 (1963).

sation for such property [be] in convertible foreign exchange, equivalent to the full value thereof."[55] In effect, this "modification precluded any argument that equitable compensation was less than full value."[56]

b. Criticism of the Hickenlooper Amendment

The major criticism of the Hickenlooper Amendment is that it favors private industry and wealth over the public interest of the United States.[57] Essentially, private wealth of corporations is given greater priority over the national interest of the United States. For example, a renegade official of a foreign country could expropriate property owned by U.S. nationals, knowing that his government will not pay compensation, resulting in strained foreign policy between the two countries due to the potential enforcement of the Hickenlooper Amendment. Even though the Hickenlooper Amendment can be waived, it probably will be politically difficult for the President to do so.[58] Moreover, even if the President exercises the waiver, there is no guarantee that it will reduce the foreign policy conflict.[59]

The political problem with the Hickenlooper Amendment is that it requires the United States to become embroiled in a dispute between a U.S. investor and a foreign country. Therefore, in light of this problem, some commentators argue that the cost of doing business in a foreign country requires U.S. investors to follow *caveat emptor* principles.[60]

c. The Gonzalez Amendment

From 1963 to 1971, the Hickenlooper Amendment was the primary sanction against expropriation. During this period, Congress and the business community essentially felt that no additional legislation would be needed to deal with expropriation due to the Hickenlooper Amendment. Yet by 1971, the amendment was insufficient for the expropriations that were occurring in Latin America.[61]

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55. *Id.*

56. *Id.*

57. *See id.* at 157 (citing Richard B. Lillich, *The Protection of Foreign Investment and the Foreign Assistance Act of 1962*, 17 RUTGERS L. REV. 405, 423-27 (1963)).

58. *See id.* at 159.

59. *See id.* at 159-60.

60. "Caveat Emptor" is Latin for "let the buyer beware." Senator Dodd, in testimony regarding Senator Jesse Helms' amendment to terminate assistance to Costa Rica unless a settlement was reached regarding an expropriation matter, correctly observed that "it seems . . . we are turning the U.S. Senate into a small claims court." 134 CONG. REC. S8993-9003 (daily ed. July 7, 1988); *see also* Matthew H. Adler, *Congressional Involvement in Expropriation Cases: A Case Study of the "Factfinding Process,"* 21 LAW & POL'Y INT'L BUS. 211, 235 (1989).

61. *See* Vandevelde, *supra* note 6, at 134-35; *see generally* John E. Huerta, *Peruvian Nationalization and the Peruvian-American Compensation Agreements*, 10 N.Y.U. J. INT'L L. &

In 1971, Congress was asked to authorize additional funds for the Inter-American Development Bank, the Asian Development Bank, and the International Development Association.[62] During Congressional debate, "complaints [were made] about the Administration's unwillingness to suspend assistance to Chile or Peru under the Hickenlooper Amendment."[63] Congressman Henry Gonzalez of Texas, during markup by the House Banking and Currency Committee, added an amendment to the three bills which would limit financial assistance to countries not cooperating with the United States in providing adequate compensation for an expropriation:

> [The bill] required the Secretary of the Treasury[64] to instruct the U.S. Executive Directors of the World Bank, the Assistant Development Bank, and the Inter-American Development Bank to vote against any loan or other utilization of bank funds for the benefit of a country which repudiated a contract with or expropriated the property of a U.S. national unless the President determined that (1) an arrangement for prompt, adequate and effective compensation had been made; (2) the parties had submitted the dispute to arbitration under the rules of the International Convention for the Settlement of Investment Disputes; or (3) good faith negotiations were in progress aimed at providing prompt, adequate and effective compensation.[65]

Similar to the Hickenlooper Amendment, the Gonzalez Amendment did not have a Presidential-waiver provision.[66] It was also harsher than the Hickenlooper Amendment. First, the expropriating states had to take specified action, in contrast with the appropriate steps contained in the Hickenlooper Amendment. Second, the Gonzalez Amendment did not allow expropriating states a reasonable time to take specific action, unlike the Hickenlooper Amendment.[67] The bills became law, effective on March 10, 1972.[68]

4. THE FOREIGN SOVEREIGN IMMUNITIES ACT

Another exception to the Act of State Doctrine is the Foreign Sov-

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POL. 1 (1977) (describing Peruvian expropriation of U.S. property between 1968 and 1973, and subsequent settlement of resulting claims).

62. *See* Vandevelde, *supra* note 6, at 136.

63. *Id.* at 136 (footnote omitted).

64. The reference to the Secretary of the Treasury was replaced by a reference to the President. *See Joint Explanatory Statement of the Committee of Conference*, H.R. REP. NO. 770, at 1, *reprinted in* 1972 U.S.C.C.A.N. 2002, 2009-10.

65. Vandevelde, *supra* note 6, at 136 (citation omitted).

66. *See id.* Congress later granted the President the power to waive enforcement of the Hickenlooper Amendment in 1973. *See id.* at 140 & nn.139, 141-42 (citing 119 CONG. REC. 32,240, 38,014 (1973)).

67. *See id.* at 136-37.

68. *See id.* at 137.

ereign Immunities Act ("FSIA"), passed by Congress in 1976.[69] Under FSIA, four public policy concerns were incorporated: (1) a policy to restrict the sovereign immunity doctrine; (2) a policy to authorize the judiciary, not the executive branch, to determine when sovereign immunity should be granted to a foreign sovereign; (3) a policy to eliminate *in rem* and *quasi in rem* jurisdiction, and to grant *in personam* jurisdiction in all suits against foreign states, provided such actions are within FSIA; and (4) a policy to eliminate punitive damages against foreign sovereigns.[70]

Under FSIA, there is a long-arm statute feature similar to the one enacted in the District of Columbia, but it does not have the scope of a traditional state long-arm statute.[71] Like the traditional long-arm statute, the constitutional minimum contacts to obtain jurisdiction are required.[72] Once the foreign sovereign comes within the jurisdiction of the U.S. courts, the sovereign is treated like a domestic sovereign.[73]

III. EXPROPRIATION

A. *The Expropriation Test*

As previously explained, expropriation occurs when a foreign country takes the investment of U.S. nationals without prompt, adequate, and effective compensation.[74] Historically, this policy was developed during "the 1930's [when] Secretary of State Cordell Hull enunciated in a diplomatic note to Mexico the formulation that has become the cornerstone of the U.S. government's modern expropriation policy: expropriation is unlawful under customary international law unless accompanied by 'prompt, adequate and effective' compensation."[75] Mexico disputed the U.S. policy, but it was supported by European States.[76]

The first prong of the expropriation test deals with the term "prompt," which requires that "payment be made before or at the time of expropriation and that payment occur upon expeditious completion of

69. *See* Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 26 U.S.C.); Lawrence, *supra* note 4, at 5-75 to 5-76.

70. *See* H.R. REP. NO. 1487 (1976); Lawrence, *supra* note 4, at 5-76.

71. *See* Lawrence, *supra* note 4, at 5-76 & n.320 (citing 28 U.S.C.A. § 1603(e) (West 1996)); Thomas P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica, 614 F.2d 1247 (9th Cir. 1980)).

72. *See* Lawrence, *supra* note 4, at 5-76 & n.321 (citing Robert B. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33 (1978)).

73. *See id.* at 5-76.

74. *See* Vandevelde, *supra* note 6, at 5-76.

75. *Id.* (footnote omitted).

76. *Id. See also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 519 (3d ed. 1979).

formalities."[77] The second prong deals with "adequate" compensation, which has been defined as the fair market value of the property at the date of expropriation.[78] The final prong is "effective" compensation, which requires payment be made in a "freely convertible currency to allow the investor to repatriate the payment."[79] Determining whether an expropriation has occurred is not easily accomplished. In addition to the three-prong test, a company must allege that the foreign country is liable for the conduct, and, if so, it must determine the date of expropriation.[80]

1. A CASE HISTORY OF THE EXPROPRIATION PROCESS

In the Iran-United States Claims Tribunal ("Tribunal"),[81] which was implemented to resolve disputes regarding the "expropriations or other measures affecting property rights,"[82] it became apparent that many cases before the Tribunal involved a "gray area of expropriation in which no formal taking is announced by the host government, but the [U.S. corporation] argues that the property has been seized de facto."[83]

2. UNREASONABLE INTERFERENCE

In most cases, the Tribunal consistently stated that unreasonable interference with the use and enjoyment of the "incident of ownership" constituted a compensable taking.[84] The various decisions focused on the "reality of the impact of the alleged expropriations."[85] Before the Tribunal will find an expropriation, it must find that there was an unreasonable interference with property rights caused by actions attributable to the foreign government.[86] In cases before the Tribunal, unreasonable interference was deemed to include three areas of property: (i) tangible property; (ii) bank accounts; and (iii) loss of a business entity.[87]

a. Tangible Property

In dealing with tangible property, the physical seizure of property

77. *See* Vandevelde, *supra* note 6, at 120.
78. *See id.*
79. *Id.* at 121 (footnote omitted).
80. *See* Brower, *supra* note 9, at 643.
81. The Iran-United States Claims Tribunal was created on January 19, 1981, by the United States of America and the Islamic Republic of Iran to resolve expropriation disputes. *See id.* at 639.
82. *See id.* (footnote omitted).
83. *Id.* at 643.
84. *See* Brower, *supra* note 9, at 643-44.
85. *Id.* at 644.
86. *See id.*
87. *See id.*

by Iran constituted an expropriation.[88] In *Dames & Moore v. Iran*,[89] the claimant was successful by establishing that the rented warehouse used for business was converted to public use (war refugee emergency housing) and that the claimant's property was kept by the Iranian Army. The Tribunal held that "the dislocation of ownership rights was complete and constituted an unreasonable interference amounting to a taking even in the absence of a formal decree."[90] The important point of this case is that no formal decree by Iran existed, yet an expropriation had occurred and compensation was therefore granted to the claimant for its property.

b. Bank Accounts

Unreasonable interference regarding bank accounts occurred when the claimants were unable to withdraw or obtain their funds held in the Iranian bank on departure from Iran. Theories of liability utilized by the claimants included expropriation, breach of contract, unjust enrichment, and breach of applicable treaties.[91] The Tribunal relied on the unreasonable interference with the use or control of the property standard.[92] Yet, the Tribunal also required the claimants to show a "high degree of interference" by Iran before finding expropriation existed.

In *American Bell International, Inc. v. Iran*,[93] the claimant had a bank account in which funds could only be disbursed upon joint signatures by the claimant's designated agent and a "representative of an Iranian governmental entity with which the claimant had been doing business prior to the Revolution."[94] The claimant could not get the representative to execute the necessary documents to close the account and release the funds. The Iranian representative demanded that the funds be transferred into an account under the sole control of the Iranian Government. The Tribunal found that an expropriation of funds had occurred, since the claimant did not voluntarily consent to the taking of the funds. It further found that the "compensable taking or appropriation under any applicable law—international or domestic—is inevitable, unless there is clear justification for the seizure."[95] Fortunately for the claimant, the Iranian Government could not establish any justification for the taking. The Tribunal made it clear that an expropriation will not occur when a

88. *See id.* at 645.
89. 4 IRAN-U.S.C.T.R. 212 (1983).
90. Brower, *supra* note 9, at 645 (citing Starrett Hous. Corp. v. Iran, 4 IRAN-U.S.C.T.R. 122, 223 (1983)).
91. *See* Brower, *supra* note 9, at 645.
92. *See id.* at 646 (citing Harza Eng'g Co. v. Iran, 1 IRAN-U.S.C.T.R. 499, 504-06 (1981-82)).
93. *See* Brower, *supra* note 9, at 646.
94. *Id.*
95. *Id.* (footnote omitted).

bank is nationalized, since it affects only the ownership and not the bank account liabilities.[96] It appears that if the claimant had dominion and control over the funds, then the transfer would not constitute an expropriation.

c. Loss of Business Entity

Unreasonable interference in the loss of a business entity or commercial operation in Iran constituted "de facto" expropriation.[97] Expropriation had occurred when the owner's management or directors had been replaced by the Iranian Government. Essentially, the standard was whether the former managers or directors were able to participate in management.[98]

The Tribunal has held that an expropriation occurs when the owner no longer receives financial information and income distributions.[99] The Tribunal also found that the scope of the management function is a critical factor in determining whether an expropriation had occurred. It held that "when the Government-appointed managers have complete authority to run the business, displacing the former management and precluding the owner from selecting any representative," then an expropriation has occurred.[100] Thus, it appears that the Tribunal looked to the actual impact on the owners to determine expropriation status, and ignored the outward intent of the government's actions.

The ability to continue management of a corporation even though the owner's rights to income are cut off, however, will not constitute an expropriation. In *Foremost Tehran, Inc. v. Iran*,[101] the Tribunal found no expropriation even though: (1) expatriate personnel were expelled from Iran; (2) the claimant did not receive dividends from the corporation; (3) the company's two representatives were forced to leave the board of directors; and (4) financial information was not provided to the claimant. The Tribunal held that the claimant's attempts to participate in the management of the company by its two minority directors on the seven-person board of directors nullified its claims of expropriation. The Tribunal did, however, award "cash dividends that had not been

96. *See id.* (citing William L. Pereira Assocs., Iran v. Iran, 5 IRAN-U.S.C.T.R. 198 (1984)).

97. De facto expropriation means a matter of conduct or practice not founded upon law.

98. *See* Brower, *supra* note 9, at 648 (citing Starrett Hous. Corp. v. Iran, 4 IRAN-U.S.C.T.R. 122, 155 (1983)).

99. *See id.* at 648 (citing Tippetts v. TAMS-AFFA Consulting Eng'rs of Iran, 6 IRAN-U.S.C.T.R. 219, 224-26 (1984)).

100. *Id.* at 649.

101. *Id.* at 651.

paid but declared, up to the jurisdictional cutoff point of January 19, 1981."[102]

3. INTENTIONAL CONDUCT BY THE EXPROPRIATING GOVERNMENT

In addition to establishing an unreasonable interference, the "claimant must establish that such government intentionally took action to assert control over the property."[103] Unreasonable interference can occur, but it is extremely critical that a nexus be established between the unreasonable interference and the conduct of the government regarding dominion and control over a claimant's property.

For example, in *Sea-Land Service, Inc. v. Iran*,[104] the claimant operated a container transport service and entered into an agreement with the Iranian Transportation Company ("ITC"). The ITC failed to provide pilots, tugboats, and refused to arrange for customs, health, and immigration clearances. It also dismissed the entire non-Iranian workforce and prohibited any discipline or discharge of the Iranian workforce. Sea-Land first suspended its service to ITC, until finally terminating it. The Tribunal was aware that the claimant's ability to operate its business was severely frustrated; yet, it stated that " [a] finding of expropriation would require, at the very least, that the Tribunal be satisfied that there was deliberate governmental interference with the conduct of Sea-Land's operation, the effect of which was to deprive the Sea-Land of the use and benefit of its investment."[105] Though accepting the claimant's allegations, the Tribunal found that the government did not intentionally act against the claimant. Essentially expropriation was not found despite inaction and omissions by the ITC.

In contrast, an expropriation was found in both *Computer Sciences Corp. v. Iran*[106] and *William L. Pereira Associates, Iran v. Iran*.[107] In *Computer Sciences Corp.*, the Iranian Revolutionary Committee "entered the premises of its business, ordered the departure of all of its employees, and physically seized its assets stored therein."[108] The Tribunal noted that public international law dictated that the Iranian Government "was responsible for the confiscatory actions of the committee."[109] But the "Tribunal did not discuss the relationship of the committee to the Government of Iran, [and] . . . accepted that [the] rela-

102. *Id.* at 652.
103. *Id.*
104. 6 IRAN-U.S.C.T.R. 149 (1984).
105. *Id.* at 166 (emphasis added).
106. *See* Brower, *supra* note 9, at 653.
107. 5 IRAN-U.S.C.T.R. 198 (1984).
108. Brower, *supra* note 9, at 653.
109. *Id.*

tionship was direct and that the [Iranian Revolutionary Committee] was a legitimate organ of the Government."[110] However, in *William L. Pereira*, where Revolutionary Guards issued a notice of confiscation for the contents of the claimant's business office, the Tribunal did not presume a direct relationship. Nevertheless, it held that the notice of confiscation created a sufficient nexus to find the government responsible.

4. EXPROPRIATION BY A DE JURE OR DE FACTO GOVERNMENT

These cases demonstrate that the Tribunal found expropriation in either a de jure[111] or de facto[112] context regarding a government and nongovernmental entity.[113] In addition to the three-prong test[114] and allegations that the foreign country is liable for the alleged conduct, the date of expropriation becomes critical, since valuations can fluctuate during times of social, economic, and political upheaval.[115]

5. FIXING THE DATE OF AN EXPROPRIATION FOR VALUATION PURPOSES

If the government issues a formal decree, then the decree date will be utilized in determining valuation of damages for expropriation purposes. For example, in *William L. Pereira*, the Revolutionary Guards issued a notice of confiscation, therefore, the expropriation date was fixed as of the date of the taking.[116] However, fixing the date for expropriation becomes difficult when no formal decree is delivered and the claimant loses dominion and control over its property over time. In such a situation, the Tribunal has looked to when the owner's access has been blocked or when the interference becomes an unreasonable deprivation.[117] In any event, the test is ultimately a factual issue, requiring the Tribunal to interpret the facts as presented.

B. *Compensation Standards*

Once an expropriation has been established, compensation to the claimant is the end to a long, unfortunate saga. Compensation involves two elements: (1) the type of remedy available;[118] and (2) the scope of that remedy.[119]

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110. *Id.*
111. De jure means government action as a matter of law.
112. *See supra* notes 97-99.
113. *See* Brower, *supra* note 9, at 654.
114. *See supra* Part III.A.
115. *See* Brower, *supra* note 9, at 656-58.
116. *See William L. Pereira*, 5 IRAN-U.S.C.T.R. at 226-27.
117. *See* Brower, *supra* note 9, at 657.
118. *See id.* at 658.
119. *See id.*

1. REMEDIES

Remedies available to the claimant when property has been expropriated include restitution, specific performance, substitution, punitive damages, or any other remedies which could indemnify the claimant.[120] In cases before the Tribunal, the decisions focused on return of the value of the property interest lost to the claimant. The remedies of restitution and specific performance are not realistic, since enforcement mechanisms are not functional.[121] Requests for punitive damages are virtually non-existent.[122]

The scope of compensation involves whether the expropriating government must pay full value or partial value as compensation. In dealing with this matter, the Tribunal was faced with two issues: (1) determining which law was appropriate—Iranian law, treaty law, or international law; and (2) the content of that law.[123] The underlying principle of all awards was that full compensation must be paid by the expropriating state. Whether the compensation was determined under Iranian law, treaty law, or international law, the principle of full compensation was applied.

2. THE METHODOLOGY OF DAMAGE CALCULATIONS

The method of calculating damages is significant in determining compensation. The Tribunal correctly considered economic conditions in ascertaining damages. For example, budget analysis and forecasting requires the analyst to consider future market conditions or trends in fixing valuations. The analyst is forced, by common business practice, to realistically assess future performance. This concept, as applied in the Tribunal cases, required market analysis of future economic trends. In *American International Group, Inc. v. Iran*,[124] the Tribunal stated that political, social, and economic factors had to be considered; thus, it held that valuation principles dictated that awards be reduced to reflect negative forecasts of business earnings.[125]

Calculating damages is industry-specific and the type of expropriated property will determine the amount of the award. For example, future profits for an expropriated industrial facility[126] and expropriation of a service sector entity[127] are viewed and treated differently. Risk

120. *See id.*
121. *See id.*
122. *See id.*
123. *See* Brower, *supra* note 9, at 659.
124. 4 IRAN-U.S.C.T.R. 96 (1983).
125. *See id.*
126. *See* Brower, *supra* note 9, at 666-67.
127. *See id.*

assessment requires that a greater value be placed on the industrial business. However, a service sector entity is subject to unstable local economies, and is, therefore, viewed to be at much greater risk in a post-revolutionary environment.[128]

Many financial theories abound regarding valuation of existing businesses. Financial models include the analysis of price/earnings ratios, discounted cash flow analysis, actual share prices, and other criteria.[129] The Tribunal did not reject any of the valuation methods. Instead, two considerations were of major significance: (1) the theory presented must be realistic and consider all relevant economic factors affecting income; and (2) the claimant should also have utilized two or more models to corroborate the initial valuation determination.[130] The Tribunal's requirement, that valuations be upheld if corroborating valuation models are used, follows sound appraisal practices.

IV. TAX CONSEQUENCES

A. *The Tax Consequences of an Expropriation*

Once the dust has settled, the effected taxpayer must confront the tax consequences of an expropriation. A foreign expropriation loss is defined as being a loss "sustained by reason of the expropriation, intervention, seizure, or similar taking of property by the government of any foreign country, any political subdivision thereof, or any agency or instrumentality of the foregoing."[131] Sections 165, 166, 1011 and 1231 of the Internal Revenue Code ("Code") are the operative provisions in analyzing the tax implications of an expropriation.

1. CODE SECTION 165

Code section 165(a) provides for deductibility of losses not compensated for by insurance or otherwise.[132] Under section 165(b), "the basis for determining the amount of the deduction for any loss shall be the adjusted basis provided in section 1011 for determining the loss from the sale or other disposition of property."[133] If the taxpayer is an individual the deduction will be limited to:

> (1) losses occurred in a trade or business; (2) losses incurred in any transaction entered into for profit, though not connected with a trade

128. *See id.* at 666.
129. *See id.* at 667; *see also* Starrett Hous. Corp. v. Iran, 4 IRAN-U.S.C.T.R. 122, 157 (1983) (authorizing expert to use discounted cash flow methods).
130. *See* Brower, *supra* note 9, at 667.
131. I.R.C. § 1351(b) (1996).
132. *See id.* § 165(a).
133. *Id.* § 165(b).

> or business; and (3) . . . losses of property not connected with a trade or business entered into for profit, if the losses arise from fire, storm, shipwreck, or other casualty, or from theft.[134]

In addition, Treasury Regulation section 1.165-1(b)[135] states that a loss, to be allowable as a deduction, must be evidenced by closed and completed transactions, fixed by identifiable events, and actually sustained during the taxable year.[136] In determining when a loss through confiscation has been sustained for federal income tax purposes, the Internal Revenue Service ("IRS") will recognize the first act of confiscation as the identifiable event evidencing a closed and completed transaction.[137] Determining when the loss occurred during a taxable year is a question of fact.[138] Thus, the relevant inquiry does not focus on the legal consequences of the seizure, but on whether the owner was dispossessed.[139] Moreover, the critical inquiry focuses on the year the taxpayer loses control and possession of the property.[140] Finally, the burden of proof is on the taxpayer to establish a deductible loss and the amount of loss.[141] Accordingly, foreign expropriation losses of trade or business assets held for investment are deductible,[142] while losses of personal assets are not deductible,[143] but subject to the general rule allowing deductions for losses of personal assets arising from fire, storm, shipwreck or other casualty, or from theft.[144]

The first three parts of section 165(c)(3) are fairly straight forward; however, much controversy exists over the "other casualty" and "theft" part of section 165(c)(3), and whether losses sustained from foreign

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134. *Id.* § 165(c).

135. *See* Treas. Reg. § 1.165-1(b) (1992).

136. *See* Rev. Rul. 62-197, 1962-2 C.B. 66. *See also* Boehm v. IRS, 326 U.S. 287, 291-92 (1945); United States v. S.S. White Dental Mfg. Co., 274 U.S. 398 (1927).

137. *See* Rev. Rul. 72-7, 1972-1 C.B. 52. In the Cuban expropriation matters, the taxpayer had the burden of establishing that the expropriation occurred and the date thereof in order to substantiate a deduction for the loss. The IRS took the position that an officially published expropriation decree would be prima facie evidence of the Cuban confiscation. *See id. See also Foreign Expropriation Losses Incurred Prior to U.S. Residency Not Deductible, Rules Tax Court,* 93 TAX NOTES INT'L 183-11 (Sept. 22, 1993) (noting that "confiscation of personal, nonbusiness property does not give rise to theft or casualty losses under section 165(c)(3).").

138. *See* Robert P. Ruwe, *Couple Who Fled Iran to Prove Year in Which Property Loss Occurred,* 92 TAX NOTES INT'L 45-7 (Oct. 7, 1992); *see also Boehm,* 326 U.S. at 291-92; *Korn v. IRS,* 524 F.2d 888, 890 (9th Cir. 1975); George P. Kazen, *Fifth Circuit Allows Deduction for Iranian Expropriation,* 91 TAX NOTES INT'L 47-26 (Nov. 20, 1991).

139. *See* Rozenfeld v. IRS, 181 F.2d 388, 390-91 (2d Cir. 1950).

140. *See S.S. White Dental Mfg. Co.,* 274 U.S. at 401-03; Riba v. IRS, 54 T.C. 1347 (1970).

141. *See* Burnet v. Houston, 283 U.S. 223, 227 (1931).

142. *See* I.R.C. § 165(c)(2) (1966).

143. *See* Alan Epstein, Note, *Foreign Expropriation Losses of Personal Assets: Should a Deduction Be Allowed Under Internal Revenue Code Section 165(c)(3)?,* 40 TAX LAW. 211 (1986).

144. *See* I.R.C. § 165(a), (c).

expropriation of personal assets are considered "other casualties." Yet, "[t]he judiciary's rigid application of the 'other casualty' and 'theft' prongs of section 165(c)(3) to the foreign expropriation losses of personal assets [has] result[ed] in nondeductibility."[145]

2. CODE SECTION 166

Section 166(a)(1) of the Code provides a deduction for "any debt which becomes worthless within the taxable year."[146] The amount of the deduction for the bad debt is determined by using the "adjusted basis provided in section 1011 for determining the loss from the sale or other disposition of property."[147] A bona fide debt is defined as a debt "arising from a debtor-creditor relationship based upon a valid and enforceable obligation to pay a fixed or determinable sum of money."[148] The IRS relies on the following principles to determine when such a loss has been sustained by a U.S. taxpayer: (1) when an act of confiscation has deprived the taxpayer of ownership and control over the business, with little chance of being compensated; and (2) when the identifiable event indicates a closed and completed transaction has occurred.[149] The burden of proof is on the taxpayer to establish the act and date.

Interestingly enough, the Act of State Doctrine has been argued to bar casualty loss for foreign expropriation. Some commentators claim that the courts have indiscriminately incorporated the State Doctrine into the law of federal income taxation, without expressing any substantive reasoning to support this implication.[150] The logical result would be to analyze foreign expropriation losses on a case-by-case basis with similar treatment given to other types of losses.

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145. *Id.*

146. *Id.* § 166(a)(1).

147. *Id.* § 166(b).

148. Treas. Reg. § 1.166-1(c) (1992).

149. *See* Rev. Rul. 72-1, 1972-1 C.B. 52 (discussing the tax treatment of foreign expropriation losses incurred by domestic corporations, under sections 165, 166, 172 (repealed) and 1231). For a discussion on the tax treatment of foreign expropriation losses incurred by domestic corporations, see Rev. Rul. 62-197, 1962-2 C.B. 66 (discussing the deductibility of losses sustained by reason of confiscation by the Cuban Government of property in Cuba owned by U.S. citizens or domestic corporations). The ruling further provided:

> [It] is the position of the Service that acts of confiscation, whether by way of seizure, intervention in, expropriation, or similar taking of property, by the Cuban Government constitutes identifiable events which, in light of all of the circumstances, have resulted in closed and completed transactions, notwithstanding promises of indemnification.

Id.

150. *See* Rev. Rul. 72-1, 1972-1 C.B. 52.

V. Asset Protection Techniques

A. *Risk Analysis*

The potential for expropriation should always be a major concern for U.S. investors actively investing abroad, and risk analysis is critical when assessing that probability. There are three "defensive" positions legal counsel should implement to avoid expropriation: (1) long-term planning against expropriation; (2) short-term planning against expropriation; and (3) crisis planning while the expropriation is in progress.[151] Similar to underwriting standards utilized by insurance companies, U.S. investors should consider these three categories from a risk-analysis viewpoint. Investment vehicles providing significant returns should be realistically assessed against the back drop of the risks associated with investing in a foreign country.

B. *Long-Term Planning Against Expropriation*

The goal of long-term planning against expropriation is to minimize assets and activities in the foreign country that could be subject to the foreign country's jurisdiction and control.[152] Under this principle, the corporation trades, but does not invest in the foreign country.[153] Furthermore, the corporation could build industrial facilities on a "pay as you go basis and provide management services or casualty services . . . for a fee."[154] Moreover, the corporation could enter into a joint venture with the foreign country.[155]

The corporation could conduct its business through a U.S. branch or other foreign corporation. The net effect is to clearly demonstrate that the "assets of a foreign corporation [in the host foreign country] that have a situs outside the host [foreign] country are not subject to expropriation by the host [foreign] country."[156] This establishes whether those assets are owned by a U.S. corporation or another foreign company.[157] However, international law my prohibit the taking of assets outside the foreign country that are owned by an alien.[158]

The corporation could also protect its supply inventory by maintaining title to the goods in another foreign entity, until the goods arrive

151. *See* Philip R. Stansbury, *Planning Against Expropriation*, 24 INT'L LAW. 677, 678, 683, 686 (1990).
152. *See id.* at 678.
153. *See id.*
154. *Id.*
155. *See id.*
156. *Id.* at 679.
157. *See id.*
158. *See id.*

in the host foreign country.[159] A corporation that runs a lean business by maintaining low inventory supplies will further reduce the risk of expropriation.[160] Additionally diversifying the "core" business into non-subsidiary companies could deprive the foreign country any incentive to expropriate, since the entities are not subsidiaries of the target company.[161]

C. *Short-Term Planning Against Expropriation*

The goal of short-term planning against expropriation is to collect evidence to justify the corporation's case for compensation.[162] This phase of the "defensive" process occurs when expropriation is on the horizon and it is too late to reorganize assets.[163]

Proactive measures include assimilating documents concerning the operation of the corporation in the foreign country from sources "outside" the expropriating country. Once the expropriation has occurred, the documents relating to financial statements, balance sheets, income, cash flow, assets, liabilities, and values belong to the foreign country.[164] To build the corporation's case for compensation, the attorney should work with the business department of the corporation in order to establish a "foundation" for compensation.[165]

An extremely important item that should be collected outside the foreign country is the relevant tax documentation, as this is an area in which foreign government counterclaims often exist, due to large statutory penalties for tax violations.[166] Additionally, the attorney should not overlook environmental, safety, or toxic tort claims, which could be the basis of a counterclaim by the foreign government.[167]

D. *Crisis Planning While the Expropriation Is in Progress*

If the expropriation is in progress, avoid overt conduct which could signal provocation to the foreign government. An appropriate response to the expropriation should be to brief the State and Treasury Department[168] officials in Washington, D.C., and the U.S. embassy in the for-

159. *See id.* at 680.
160. *See id.* at 681.
161. *See id.* at 682.
162. *See id.* at 683.
163. *See id.*
164. Hopefully, the U.S.-based corporation would have a duplicate set of books to avoid this extra precaution.
165. *See id.* at 683.
166. *See id.* at 684.
167. *See id.*
168. *See id.* at 686. The U.S. claimant should contact the Treasury Department, since its

eign country, since their help could avert the expropriation.[169] Plans should also include protection for the expatriate, including removal from the host country.

VI. CONCLUSION

Two reasons exist to explain why expropriations occur: renewed nationalism[170] and retaliation for colonization.[171] Nationalism has been used to validate an expropriation since foreign investments are perceived as threats to the country's culture and lifestyle. Acts of nationalism preserve the past, present, and future of a country's identity.

With the demise of the Cold War and the establishment of a New World Order, one must consider the probabilities of an expropriation.[172] We know that investment capital is needed by emerging[173] countries, and this alone should reduce the possibility of an expropriation.[174] If the New World Order meets the needs of developing countries, how does an expropriation fit into the equation? It does not—at least not in the short term.

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responsibilities include foreign aid, U.S. government guaranteed financing, and international financial institutions.

169. *See id.*

170. "Nationalism" is defined as a concern for or attachment to a particular nation's interests or culture and an advocacy of national independence.

171. "Colonization" is defined as a group of settlers in a new land who remain subject to the parent nation. In the context of this Article, colonization refers to expansion by Western cultures into foreign countries.

172. "New World Order" refers to the decline in Cold War policies (except for the United States *vis-a-vis* Cuba and several foreign countries), the collapse of the Soviet Union, and global goals of peace and cooperation.

173. Emerging countries are countries that have moved to a democratic form of government and away from communism, socialism, and dictatorships, with the immediate need of investment capital to re-tool industry.

174. Reference is to the governments of Iraq, Libya, Syria, and Cuba.