Requiem for Hickenlooper

The late Senator Bourke B. Hickenlooper's most famous legislative initiative—the so-called Hickenlooper Amendment to the Foreign Assistance Act[1]—has been defused, if not actually repealed, by a single-sentence section contained in the Foreign Assistance Act of 1973.[2] Although its "apparent demise"[3] had been prophesied for some time,[4] the suddenness with which Congress finally administered the *coup de grâce* stunned most foreign investment observers and probably accounts for their failure to have proper obituary notices ready.

Enacted in the wake of the Cuban nationalizations, when Congress was "frustrated by the apparent inability or unwillingness of the executive branch to invoke traditional diplomatic strategies to prevent further assaults upon United States property abroad,"[5] the Hickenlooper Amendment, as readers of this *Journal* will recall, required the President to suspend foreign aid to any country taking the property of, or repudiating or nullifying contracts with, any U.S. citizen unless "appropriate steps" were taken by that country within six months to assure "speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof, as required by international law. . . ."[6] The amendment, moreover, was mandatory in nature, leaving the President no discretion to

[1] 22 U.S.C. §2370(e)(1) (1970). For the background and legislative history of the amendment, with an analysis and critique of its provisions, *see* the chapter on *The Hickenlooper Amendment* in R. Lillich, The Protection of Foreign Investment: Six Procedural Studies 117–46 (1965) [hereinafter cited as Lillich]. The amendment should not be confused with the second Hickenlooper Amendment, more properly called the Sabbatino Amendment, which the late Senator sponsored in 1964 to overturn the Supreme Court's "act of state" holding in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). *See* Lillich 97–111.

[2] Pub. L. No. 93-189 87 Stat. 722 (1973), *amending* 22 U.S.C.A. §2370(e)(1) (codified at Supp. 1974).

[3] Eder, *Expropriation: Hickenlooper and Hereafter*, 4 Int'l. Lawyer 611, 636 (1970). For a modest rejoinder to portions of this article, see Furnish, *Eder's Hickenlooper: Some Clarifications Regarding Peru and Other Matters*, 5 *id.* 348 (1971).

[4] *See, e.g.*, Senator Javits's observation that "I think its chances for repeal are good," in *United States Relations With Peru, Hearings Before the Subcomm. on Western Hemisphere Affairs of the Senate Comm. on Foreign Relations*, 91st Cong., 1st Sess. 81 (1969) [hereinafter cited as *Hearings*].

[5] F. Dawson & I. Head, International Law, National Tribunals and the Rights of Aliens 53 (1971).

[6] *See* note 1 *supra*. The amendment, of course, "defines international law as seen by the United States," and hence, in the opinion of this writer, actually establishes "a standard that goes well beyond international law." *Hearings* 83. *See also* Lillich 130–32.

continue aid even if in his opinion its continuation was essential to the national interest.[7]

Despite the early expectations of the business community,[8] the amendment, for a host of reasons, never has proved a sound or effective method of protecting foreign investment.[9] Invoked only once, against Ceylon in 1963,[10] its effects actually have been so counterproductive that, in the case of IPC's dispute with Peru in 1969, President Nixon stretched the statute to its limits—and perhaps beyond—to avoid having to apply it.[11] Since then the amendment has been regarded pretty much as dead letter, to the great distress of those commentators who attribute subsequent nationalizations in Chile and elsewhere throughout Latin America to the failure to invoke its mandatory sanctions against Peru.[12] Nevertheless, it has remained on the statute books, playing into the hands of nationalist leaders anxious to score anti-Yankee points by proclaiming that the United States extends foreign aid only to protect its private foreign investments.

Although this writer once thought the Hickenlooper Amendment, like God or motherhood, to be a fact of political life,[13] when corporation officials joined academic researchers in denouncing it, the proverbial hand-

[7] *Id.* at 123–24. The mandatory nature of the amendment clearly was intended to tie the President's hands. As the late Senator subsequently related, "I insisted that the prohibition under Section 620(e)(1) be absolute and not subject to any waiver; and Congress agreed." Hickenlooper, *The International Rights of Property—Some Observations*, 2 INT'L. LAWYER 51, 55 (1967).

[8] *See, e.g.*, Olmstead, *Foreign Aid as an Effective Means of Persuasion*, 58 ASIL PROC. 205 (1964).

[9] *See generally* LILLICH 134–46. For an exhaustive study of the amendment's lack of success in preventing nationalizations, *see* T. Brewer, The Hickenlooper Amendment and Congressional-Executive Relations in Foreign Aid Policy (unpublished thesis, Amherst College, 1968).

[10] 48 DEPT. STATE BULL. 328 (1963). *See* Amerasinghe, *The Ceylon Oil Expropriations*, 58 AJIL 445 (1964).

[11] In 1969 this writer observed that "the Secretary of State is to be congratulated for stretching the statute to bring resort to Peruvian administrative remedies and the ongoing negotiations under the rubric of 'appropriate steps' sufficient to defer the amendment's invocation." *Hearings* 64. Subsequently, administrative remedies were exhausted and negotiations broke down, undercutting the above rationale for nonapplication of the amendment, yet at least formally it never was invoked. Department of State officials have informed the writer that IPC's claim may have been settled by the United States-Peruvian Claims Agreement of February 19, 1974, T.I.A.S. No. 7792; 68 AJIL 583 (1974); 13 ILM 392 (1974).

[12] *See, e.g.*, Eder, *supra* note 3, at 621–27. While Eder concludes that "the failure of the United States Government to apply the Hickenlooper sanctions has been disastrous," *id.* at 627, he frankly acknowledges the difficulties he has with substantiating this conclusion and relies heavily upon his authority as a veteran Latin American hand.

> Can it be proven that the [subsequent nationalizations] were the result of the failure of the United States to carry out the clear mandate of Congress in 1968 [*sic*]? That it was not merely *post hoc* but *propter hoc*? Obviously not—there is evidence but not proof. But there has been enough experience in Latin America, and in actual negotiation with Latin American left-wing and military governments, to know that while it may be argued that it is wise to speak softly and carry a big stick, when the big stick turns out to be *papier maché*, it is worse than no stick at all.

Id. at 621.

[13] *Hearings* 80. *See also* LILLICH 145.

writing was on the wall.[14] Thus, at the Annual Meeting of the American Society of International Law in 1972, the Vice President of the Council of the Americas, to the surprise of most and the consternation of many of his listeners, remarked that "only a few of the U.S. companies with which he is familiar support *application* of the Hickenlooper Amendment. . . ." [15] By 1973 this view had matured into a call for the amendment's outright repeal, a call which for the first time fell upon receptive congressional ears.[16]

In the event, a provision in the foreign aid bill recommended by the House Committee on Foreign Affairs striking the amendment entirely proved too strong medicine for Congress,[17] which instead prescribed a milder, yet scarcely less effective, remedy: making the Hickenlooper Amendment's application discretionary rather than mandatory.[18] This

[14] While there may be some truth in Eder's observation that "it is probably because of the silence of American corporation officials as to the efficacy of the Hickenlooper Amendment that academic researchers claim [it has] been ineffectual," Eder, *supra* note 3, at 628, he overstates his case and, in any event, now has been hoisted on his own petard. *See* text at and accompanying notes 15 & 16 *infra*.

[15] Hobbing, *Effect of the Copper Cases on Business Attitudes Toward Investment in Chile and Latin America*, ASIL PROC. 66 AJIL (No. 4) 221, 222 (1972) (emphasis added).

[16] *See* HOUSE COMM. ON FOREIGN AFFAIRS, MUTUAL AID AND COOPERATION ACT OF 1973, H.R. REP. No. 93-388, 93d Cong., 1st Sess. 45 (1973):

> [T]he committee is advised that those most directly involved with the issue of expropriations—the U.S. business community—have spoken out strongly in opposition to the continuation of this provision. For example, the board of trustees of the Council of the Americas, which is composed of the 200 major U.S. companies which represent 90 percent of U.S. direct investment in Latin America, has urged that this provision be eliminated.

[17] H.R. 9360, the bill reported out by the Committee, repealed the Hickenlooper Amendment in its entirety. *Id.* at 44–45 & 83–84. On the floor of the House, however, an amendment proposed by Congressman Gonzalez of Texas reinstating it, albeit in somewhat different language, easily passed. 119 CONG. REC. H6718 (daily ed. July 26, 1973). The entire bill then passed by a vote of 278–102. *Id.* at H6721. Meanwhile, S. 1443, passed by the Senate, made no mention of the Hickenlooper Amendment at all. The final language of the Foreign Assistance Act of 1973, providing for discretionary application of the amendment, emerged from the Conference Committee. *Id.* at H10158 (daily ed. Nov. 27, 1973).

Congress also refused to follow the Committee's recommendation to repeal Section 5 of the Fishermen's Protective Act of 1967, 22 U.S.C.A. §§ 1971–1979 (Supp. 1974), and the related provision found in 22 U.S.C. § 2370(o) (1970). *See* HOUSE COMM. ON FOREIGN AFFAIRS, *supra* note 16, at 45–46, 68, 85 & 100. Under Section 5(b) of this imaginative act, if a foreign country refuses to pay compensation for its seizure of a U.S. fishing vessel in international waters foreign aid is not terminated but the amount of the claim is deducted "from any funds appropriated by Congress and programed for the current fiscal year for assistance to the government of such country under the Foreign Assistance Act of 1961 unless the President certifies to Congress that it is in the national interest not to do so in the particular instance. . . ." 22 U.S.C.A. § 1975(b) (Supp. 1974). For a brief description of this enlightened but overlooked approach, which this writer once believed "warrant[ed] further study and possible incorporation into the original Hickenlooper Amendment," *see Hearings* 65.

[18] *See* text at and accompanying note 7 *supra*. Congress thus fulfilled this writer's 10 year old prediction that "the only remedial change in the amendment which could possibly obtain congressional approval would be one making its application discretionary and not mandatory. This single change would eliminate many, if not all of the problems. . . ." LILLICH 145.

change was effectuated by the simple expedient of deleting the amendment's no-waiver clause and inserting in its place a provision that the amendment "shall not be waived with respect to any country unless the President determines and certifies that such a waiver is important to the national interests of the United States." [19] By this change the amendment to the amendment gives the President the same discretion accorded him under other provisions of the Foreign Assistance Act.[20]

Ten years ago this writer concluded that the

> [r]evision of the Hickenlooper Amendment in this way would not seriously weaken either the belief abroad that the United States is determined to protect its foreign investments or their actual protection. Yet it would restore to the President the flexibility he needs to balance this objective along with others in formulating over-all United States foreign policy toward countries which are embroiled in social, economic, and political change. [21]

Assuming that the Department of State makes it plain that it intends to back U.S. foreign investors firmly when their property is taken by a foreign country without the payment of just compensation,[22] even to the extent of recommending that the President in a given case *not* waive the provisions of the amendment, there is no reason to modify this conclusion today.[23] It is too much, of course, to expect foreign or domestic critics of private foreign investment to praise the United States for defusing the Hickenlooper Amendment, given the atmosphere in which debate on the "new international economic order" is conducted at present. Nevertheless, international lawyers in this country should not be reticent in extending their congratulations to Congress for taking a step as constructive as it was overdue.

R. B. LILLICH

[19] *See* note 2 *supra*. Such certification, moreover, must be reported immediately to Congress. *Id.*

[20] *See, e.g.*, 22 U.S.C. §§ 2370(a) & (c) (1970). *See also* text accompanying note 17 *supra*. Senator Hickenlooper had argued, of course, that "it is only because the amendment is mandatory in its application that it is different from other restrictions of a discretionary nature contained in the Foreign Assistance Act, and it has real deterrent effect." Hickenlooper, *supra* note 7, at 57.

[21] LILLICH 146.

[22] Just what is just compensation, of course, is a much debated question. *See generally* 1 & 2 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW (R. Lillich ed. & contrib. 1972 & 1973). A third and final volume of essays under the same title will be published during 1975 by the University Press of Virginia.

[23] Even supporters of the amendment acknowledge that if the Department of State were to provide such firm backing "it should make little difference to investors whether or not the Hickenlooper Amendments remain on the statute books. . . ." Eder, *supra* note 3, at 628. *Cf.* HOUSE COMM. ON FOREIGN AFFAIRS, *supra* note 16, at 45:

> The committee believes that the striking of the Hickenlooper amendment would in no way result in denying the United States the opportunity and the flexibility to invoke retaliatory action with regard to our assistance programs if the President and the State Department felt that such an approach would bring about just compensation to expropriated companies by way of negotiations.