



NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION

Volume 6 | Number 3

Article 10

Summer 1981

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Recommended Citation

Mary G. Boney Bellamy, *Banco Nacional de Cuba v. Chase Manhattan Bank: A Move toward More Favorable Valuation for the Expropriating Nation*, 6 N.C. J. INT'L L. & COM. REG. 527 (2016).

Available at: <http://scholarship.law.unc.edu/ncilj/vol6/iss3/10>

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***Banco Nacional de Cuba v. Chase Manhattan Bank:* A Move Toward More Favorable Valuation for the Expropriating Nation**

During the Cuban Revolution of 1959 and 1960, the government of Cuba, headed by Fidel Castro, Che Guevera, and others, nationalized the economy of Cuba.¹ The Cuban nationalization process has been termed "one of the most sweeping reforms of ownership of the means of production and distribution in history."² As a result of nationalization, the Cuban economy shifted from one of private enterprise to an economy of "state capitalism."³ This dramatic transformation obviously affected foreign entities doing business with Cuba.

As part of the nationalization process, commercial banks were expropriated. Banco Nacional de Cuba was made "sole official licensor of all foreign payments and any remissions of profits earned in Cuba by alien owned enterprises."⁴ Furthermore, certain currency regulations were imposed and international trade was restricted.⁵ Three days after Cuba nationalized the U.S. banks, Chase Manhattan Bank (Chase) sold collateral worth \$17,000,000 for a bank loan it had made to Cuba in 1958.⁶ This sale resulted in a seven million dollar surplus for Chase, because the collateral was at that point worth more than the remaining debt owed Chase.⁷ In *Banco Nacional de Cuba v. Chase Manhattan Bank*⁸

¹ See generally M. GORDON, *THE CUBAN NATIONALIZATIONS: THE DEMISE OF FOREIGN PRIVATE PROPERTY* (1976); H. MATTHEWS, *REVOLUTION IN CUBA* (1975).

² M. GORDON, *supra* note 1, at 108.

³ *Banco Nacional de Cuba v. Chase Manhattan Bank*, 505 F. Supp. 412, 419 (S.D.N.Y. 1980).

⁴ *Id.*

⁵ See generally M. GORDON, note 1 *supra*.

⁶ 505 F. Supp. at 423.

⁷ *Id.* The original loan to Banco Nacional was for \$30,000,000, but this amount had been reduced by partial payments to \$10,000,000 at the time of nationalization. *Id.*

⁸ 658 F.2d 875 (2d Cir. 1981), *affg as modified*, 505 F. Supp. 412 (S.D.N.Y. 1980). *Banco* and the case of *Banco Para el Comercio Exterior de Cuba v. First Nat'l City Bank*, 505 F. Supp. 412 (S.D.N.Y. 1980), *rev'd and remanded*, 658 F.2d 913 (2d Cir. 1981), were decided together in the lower court though they were not consolidated and were decided separately on appeal. Both cases present related issues of fact and law. The lower court decision was joint as the post-trial hearings were conducted jointly. The two cases were originally heard by the late Judge Bryan in the district court. They were two of a larger number of cases which the Second Circuit has recently decided. The other cases include: *First Nat'l Bank of Boston (Int'l) v. Banco Nacional de Cuba*, 658 F.2d 895 (2d Cir. 1981); *Banco Nacional de Cuba v. Chemical Bank New York Trust Co.*, 658 F.2d 903 (2d Cir. 1981); *Banco Nacional de Cuba v. Irving Trust Co.*, 658 F.2d 903 (2d Cir. 1981); and *Banco Nacional de Cuba v. Manufacturers Trust Co.*, 658 F.2d 903 (2d

(*Banco*), Banco Nacional sought recovery of this collateral surplus plus some two and one-half million dollars of its deposits that were frozen in the United States the day following bank nationalization.⁹ Chase conceded that it owed Banco Nacional a total of \$9,793,021.70, but decided to set-off this sum against claims for its expropriated assets.¹⁰ In *Banco*, the Federal District Court for the Southern District of New York, and most recently the Second Circuit Court of Appeals, were confronted with the problem of determining what value should be accorded expropriated U.S. banking assets as a "set-off" against the Cuban assets frozen in the United States.

The lower court determined that Cuba must fully compensate Chase for its expropriated assets, because international law had been violated by the expropriation.¹¹ That court held that the proper measure of the value of the expropriated banking assets was their market value as a "going concern," because Cuba did not liquidate the banks but continued to use them as banks.¹² Furthermore, the district court stated that the market value of the assets was that amount which the U.S. Government would pay under an eminent domain proceeding.¹³ This value was determined on the basis of circumstances as they existed shortly before bank nationalization.¹⁴ By so holding, the lower court followed the classical doctrine of "prompt, adequate and effective compensation" as enunciated by the U.S. State Department.¹⁵

On appeal, the Second Circuit discussed four alternate standards for compensation. They included: (1) no compensation, (2) partial compensation, (3) appropriate compensation, and (4) full compensation.¹⁶ The Second Circuit found that no compensation or partial compensation did not reflect international law.¹⁷ The court awarded compensation which it felt represented both "appropriate" and "full compensation."¹⁸ Though the Second Circuit affirmed the lower court decision, it did so

Cir. 1981). The last three cases were consolidated for argument and were decided in one opinion on appeal.

Past litigation regarding the Cuban expropriations has been extensive. Cases most relevant to the instant discussion include: *Banco Nacional de Cuba v. First Nat'l City Bank*, 270 F. Supp. 1004 (S.D.N.Y. 1967), *rev'd*, 431 F.2d 394 (2d Cir. 1970), *vacated and remanded*, 400 U.S. 1019 (1971), *on remand*, 478 F.2d 191 (2d Cir. 1973); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), *on remand sub nom. Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957 and 272 F. Supp. 836 (S.D.N.Y. 1965), *aff'd*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

⁹ See 31 C.F.R. § 515 (1980), which is part of the Cuban Assets Control Regulations.

¹⁰ *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 879 (2d Cir. 1981).

¹¹ 505 F. Supp. at 434-35.

¹² *Id.* at 445.

¹³ *Id.* See *United States v. Miller*, 317 U.S. 369, 374 (1943).

¹⁴ 505 F. Supp. at 448.

¹⁵ 3 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 658-59 (1942); *contra*, de Arécha-ga, *State Responsibility for the Nationalization of Foreign Owned Property*, 11 N.Y.U.J. INT'L L. & POL. 179 (1978).

¹⁶ 658 F.2d at 891.

¹⁷ *Id.*

¹⁸ *Id.* at 892.

with modification. The appellate court refused to allow set-off for the value of the U.S. banks as "going concerns,"¹⁹ indicating that awards for the expropriated banks as going concerns took "insufficient account of the acknowledged state of the Cuban economy following the revolution."²⁰

The lower court refused to award pre-judgment interest on the value awarded to Banco Nacional.²¹ This was an extremely important holding because so much time had elapsed since the expropriation that the interest on the frozen assets amounted to much more than the principal.²² The appellate opinion is unclear as to the interest issue. The Second Circuit awarded "such pre-judgment interest as may be appropriate."²³ Because the lower court had earlier refused to grant any interest, what is meant by the words of the appellate opinion remains to be determined.

Banco is significant because it is one of the first two of the numerous Cuban expropriation cases litigated in the U.S. court system to have actually reached the central issue of the value of the expropriated assets.²⁴ Much of the other litigation has centered on the Act of State Doctrine²⁵ and the Hickenlooper Amendment.²⁶ In this case, however, an in-depth

¹⁹ *Id.* at 893.

²⁰ *Id.*

²¹ 505 F. Supp. at 449.

²² *Id.*

²³ 658 F.2d at 894.

²⁴ The other case which reached the valuation issue is *Banco Para el Comercio Exterior de Cuba v. First Nat'l City Bank*, 505 F. Supp. 412 (S.D.N.Y. 1980), *rev'd*, 658 F.2d 913 (2d Cir. 1981). Although these are the first U.S. court cases to reach the valuation issue, the Foreign Claims Settlement Commission has made numerous valuations of expropriated Cuban assets. *See* In the Matter of the Claim of The Chase Manhattan Bank, N.A., F.C.S.C. Decision No. CU-6295, at 2 (Oct. 20, 1971), which awarded Chase going concern value for its nationalized branches. *See also* 1972 FCSC Ann. Rep. 125-412; 1970 FCSC Ann. Rep. 25-83; 1969 FCSC Ann. Rep. 24-82.

²⁵ *See, e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), *on remand sub nom.* *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957 and 272 F. Supp. 836 (S.D.N.Y. 1968).

²⁶ 22 U.S.C. § 2270(e)(2) (1976) (originally enacted as Foreign Assistance Act of 1964, Pub. L. No. 88-633, § 301(d)(4), 78 Stat. 1009 amended by Foreign Assistance Act of 1965, Pub. L. No. 89-171, § 301(d)(2), 79 Stat. 653). The Hickenlooper Amendment was enacted to reverse the Supreme Court's holding in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), *on remand sub nom.* *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957 and 272 F. Supp. 836 (S.D.N.Y. 1965), *aff'd*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968). In *Sabbatino*, the Supreme Court upheld immunity for Cuba under the Act of State Doctrine. 376 U.S. at 439. This doctrine as enunciated in *Underhill v. Hernandez*, 168 U.S. 250 (1897), states that [e]very 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 acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves. 168 U.S. at 252.

When Cuba initiated the *Banco* action, it probably assumed that it would have complete immunity under the Act of State Doctrine. The Hickenlooper (*Sabbatino*) Amendment to the Foreign Assistance Act, however, created a presumption that courts could proceed with an adjudication on the merits unless the President declared that application of the Act of State Doctrine was necessary to U.S. foreign policy interests. The Act also suspended aid to nations not complying with U.S. norms of expropriation compensation. 22 U.S.C. § 2370(g) (1976). *Sabbatino, on remand sub nom.*, *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967), was decided pursuant to the Hickenlooper Amendment, thereby rejecting Cuban immunity under

analysis was conducted by the courts with regard to the actual value of the expropriated assets.

The courts examined three Cuban laws relevant to the expropriated banks. These laws legally enabled Cuba to expropriate the assets of the U.S. banks. They were: Article 24 of the "Fundamental Law,"²⁷ Law No. 851,²⁸ and the "Bank Nationalization Law."²⁹ Article 24 of the "Fundamental Law" (the Cuban Constitution), which was passed in February 1959, prohibited confiscation by the state of foreign property "except by competent judicial authority and for justifiable reasons . . . and always after payment of adequate indemnity."³⁰ This provision for compensation, however, did not apply to any property owned by Batista, president of the former government, or any of his collaborators who might have been responsible for economic crimes or who had been unjustly enriched.³¹ "Non-compliance with these requirements shall give the person whose property has been expropriated the right to protection by the courts and, if the case warrants, to restitution of his property."³² This initial provision for expropriation was followed by several others. In early July 1960, Cuban Law No. 851,³³ providing for the nationalization of Cuban businesses and properties owned by U.S. citizens, was passed. Pursuant to this law, and Resolution 2 of Law No. 851 enacted thereunder, U.S. banking operations were confiscated on September 16, 1960.³⁴

On October 13, 1960, following the actual nationalization, the Cuban "Bank Nationalization Law"³⁵ was passed. The preamble indicates that nationalization was part of an overall scheme aimed at restructuring the whole banking system. Under this law, Banco Nacional became the legal successor of the U.S. banks which "were declared dissolved and extinguished."³⁶ Article 5 of that law provides for a right of indemnity under a system selected by the President of Banco Nacional as of Decem-

the Act of State Doctrine. 383 F.2d at 171-72. This was later reaffirmed in the case of *Alfred Dunhill of London, Inc. v. Republic of China*, 425 U.S. 682, 706 (1976).

²⁷ LEY PRIMERA, CONSTITUCION, art. 24 (1959) (Cuba). The current constitution states:

The expropriation of property for reasons of public benefit or social interest and with due compensation is authorized.

The law establishes the method for the expropriation and the bases on which the need for and usefulness of this action are to be determined as well as the form of compensation, taking into account the interest and the economic and social needs of the person whose property has been expropriated. LEY PRIMERA, CONSTITUCION, art. 25 (Cuba).

²⁸ Ley No. 851, 6 Jul. 1960.

²⁹ Ley No. 891, 13 Oct. 1960.

³⁰ LEY PRIMERA, *supra* note 27, art. 24.

³¹ *Id.*

³² *Id.*

³³ Ley No. 851, 6 Jul. 1960.

³⁴ Resolucion No. 2, 17 Sept. 1960. Following passage of this Resolution, the United States ended diplomatic relations and stopped transfer of funds pursuant to 31 C.F.R. § 515 (1980).

³⁵ Ley No. 891, 13 Oct. 1960.

³⁶ 505 F. Supp. at 422.

ber 31, 1960.³⁷ In spite of the promised indemnity under these laws, no system was ever devised³⁸ and no compensation has ever been paid by Cuba.³⁹

Because no compensation was made, Chase asserted, and was awarded in district court, a set-off for the alleged value of its four Cuban branches, an amount which included both goodwill and going business value. On appeal, Chase asserted that the valuation fixed by the lower court was too low in spite of the fact that the award was made for going concern value. Chase's claim of right to set-off was based alternatively on either conversion constituting a violation of international law or on implied contract.⁴⁰ The Second Circuit affirmed Chase's claim based on the conversion theory, and as such did not address the "fall back" theory of implied contract.⁴¹ Going concern value was not allowed as part of the appellate award, however.

The defendant U.S. bank acknowledged that it could not proceed affirmatively against Banco Nacional or the Cuban Government because of the Act of State Doctrine and sovereign immunity. *National City Bank v. Republic of China*⁴² held, however, that if a foreign country seeks redress in U.S. courts, counterclaims are permissible.⁴³ The *Republic of China* holding is reinforced by 28 U.S.C. § 1607,⁴⁴ which specifically denies immunity to a foreign state proceeding affirmatively in U.S. courts. It is important to note, however, that this statute permits counterclaims only "to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state."⁴⁵ Because of this limitation on recovery by the U.S. banks, Banco Nacional had nothing to lose by initiating this litigation—at worst it would not recover the assets already taken by Chase.

³⁷ *Id.* at 422-23.

³⁸ *Id.* at 445.

³⁹ The parties stipulated that payment was not made. 658 F.2d at 878.

⁴⁰ Chase also asserted set-off as trustee for U.S. investors owning leased railroad equipment in possession of two Cuban railroads. Both railroads were expropriated during the revolution, and Chase claimed four million dollars as set-off. This claim was disallowed under Federal Rule of Civil Procedure 13(b) because Chase asserted the claim in its fiduciary capacity, while it was being sued in its corporate capacity. *Id.* at 885-86; 505 F. Supp. at 435-36, 440.

⁴¹ 658 F. 2d at 880 n.9.

⁴² 348 U.S. 356 (1955).

⁴³ *Id.* at 363.

⁴⁴ 28 U.S.C. § 1607 (1976) states:

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

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

⁴⁵ 28 U.S.C. § 1607(c) (1976).

In district court, Banco Nacional raised several defenses to the counterclaims.⁴⁶ First, Banco Nacional asserted that it was a separate entity from the Cuban Government and therefore was not liable for obligations of the Cuban Government resulting from the expropriations.⁴⁷ The lower court rejected this argument, finding that Banco Nacional was an alter ego of the Cuban Government.⁴⁸ This finding was not challenged on appeal.⁴⁹ Second, Banco Nacional claimed that even if it and the government of Cuba are "indistinguishable entities," any claims against it were nonjusticiable because of sovereign immunity and the Act of State Doctrine.⁵⁰ Relying on the Supreme Court's split decision in *First National City Bank v. Banco Nacional de Cuba*,⁵¹ the Second Circuit found the claim to be justiciable, because it met all possible requirements of the separate opinions in that case.⁵² These requirements included the fact that:

- (1) the Executive Branch has provided a *Bernstein* letter advising the courts that it believes act of state doctrine need not be applied,
- (2) there is no showing that an adjudication of the claim will interfere with delicate foreign relations, and
- (3) the claim against the foreign sovereign is asserted by way of counterclaim and does not exceed the value of the sovereign's claim.⁵³

Banco Nacional also argued that, based on contemporary practice, "at best, all that is necessary is *partial* payment for the value of the property taken."⁵⁴ Banco Nacional pointed out that much of the post-World War II precedent in the compensation-valuation area was found in lump-sum agreements. Generally speaking, these agreements provided compensation equivalent to only forty to sixty percent of the value of a plaintiff's claim.⁵⁵ Both courts rejected the lump-sum agreements as a justification for partial payment, distinguishing the agreements as a product of diplomatic bargaining, not appropriate for use in a judicial determination of the value of expropriated assets.⁵⁶ As the Second Circuit pointed out, adjudication should not be confused with compromise.⁵⁷ Banco Na-

⁴⁶ The defenses relevant to Chase as trustee will not be discussed. See discussion at 658 F.2d at 885-87.

⁴⁷ 505 F. Supp. at 429.

⁴⁸ *Id.*

⁴⁹ 658 F.2d at 880 n.6.

⁵⁰ *Id.* at 880.

⁵¹ 406 U.S. 759 (1972).

⁵² 658 F.2d at 881-85.

⁵³ *Id.* at 884. Sovereign immunity was held not to be a valid defense in *National City Bank v. Republic of China*, 384 U.S. 356 (1955). Act of State also fails as a defense as discussed note 26 *supra*.

⁵⁴ 505 F. Supp. at 432.

⁵⁵ Richard Lillich testified before Judge Bryan that lump-sum agreements were generally 40 to 60% of the value of the claims. *Id.* For a discussion of lump-sum agreements, see R. LILLICH & B. WESTON, *INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS* (1975).

⁵⁶ 505 F. Supp. at 433. The court also noted that expropriating countries would probably refuse to settle for a figure of full payment.

⁵⁷ 658 F.2d at 892.

cional initiated this judicial action and as such should not expect the court to be bound by nonjudicial settlements. Having rejected Banco Nacional's defenses, the courts proceeded to deal with the issue of compensation for the expropriated assets.

Both courts first determined the standard of compensation to be used. As the Supreme Court in *Banco Nacional de Cuba v. Sabbatino*⁵⁸ had pointed out, there is a huge discrepancy in international law between the views of the developed nations and the developing nations as to what constitutes just compensation:

The disagreement as to relevant international law standards reflects an even more basic divergence between the national interests of capital importing and capital exporting nations and between the social ideologies of those countries that favor state control of a considerable portion of the means of production and those that adhere to a free enterprise system.⁵⁹

The classical doctrine of compensation, as stated by Secretary of State Hull in 1938, is that "no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor."⁶⁰ In 1962, however, the United Nations passed a resolution providing for a different standard of compensation. U.N. General Assembly Resolution 1803 (XVII)⁶¹ on Permanent Sovereignty over Natural Resources states that "appropriate compensation" must be made "in accordance with international law."⁶² In the past, the United States has interpreted the U.N. standard under Resolution 1803 to mean "prompt, adequate, and effective" compensation.⁶³ This interpretation is in accord with both Hull's statement of U.S. policy⁶⁴ and the *Restatement (Second) of Foreign Relations Law of the United States*⁶⁵ (Restatement) which requires "full payment."⁶⁶ In the past, the United States has thus taken a stand demanding a high degree of compensation.

⁵⁸ 376 U.S. 398 (1964).

⁵⁹ *Id.* at 430.

⁶⁰ G. HACKWORTH, *supra* note 15, at 658-59. For an analysis of the classical compensation standard and early opposition trends, see F. Garcia-Amador, Fourth Report on International Responsibility, U.N. Doc. A/CN.4/119 (1959).

⁶¹ G.A. Res. 1803, 17 U.N. GAOR, Supp. (No. 17) 17, U.N. Doc.A/5217 (1962), reprinted in 57 AM. J. INT'L L. 710 (1963).

⁶² *Id.*

⁶³ Lillich, *The Valuation of Nationalized Property in International Law: Toward a Consensus or More "Rich Chaos"?*, in 3 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 183, 185 (R. Lillich ed. 1975).

⁶⁴ G. HACKWORTH, *supra* note 15, at 658-59.

⁶⁵ RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 185-188 (1965).

⁶⁶ *Id.* § 185. Both the district court and the court of appeals found that a violation of international law existed. 658 F.2d at 891; 505 F. Supp. at 429. The two courts differed as to the resulting compensation due for such a violation. The lower court required full and prompt compensation. 505 F. Supp. at 433. The Second Circuit hinted that "appropriate compensation" might be all that was due, though the court stated that in the instant case "appropriate" and "full" compensation were synonymous. 658 F.2d at 892-93.

Pursuant to the Restatement on Foreign Relations Law, if no violation had been found, only "just" compensation would have been required. RESTATEMENT, *supra* note 65, at § 186.

Though the United States continues to advocate "full" or "prompt, adequate, and effective" compensation, the growing power of the Third World has made this view increasingly difficult to maintain.⁶⁷ It certainly cannot be relied upon today in a dispute between capital-importing and capital-exporting countries.⁶⁸ The Supreme Court in *Banco Nacional de Cuba v. Sabbatino*⁶⁹ observed as follows:

Communist countries, although they have in fact provided a degree of compensation after diplomatic efforts, commonly recognize no obligation on the part of the taking country. Certain representatives of the newly independent and underdeveloped countries have questioned whether rules of state responsibility toward aliens can bind nations that have not consented to them and it is argued that the traditionally articulated standards governing expropriation of property reflect "imperialist" interests and are inappropriate to the circumstances of emergent states.⁷⁰

Richard Lillich, Professor of Law at the University of Virginia and noted author in the area of international claims, states, in *The Valuation of Nationalized Property in International Law*, that the United States would be very happy today if the United Nations would merely reaffirm its "appropriate compensation" standard.⁷¹ Lillich thinks that the United States made a "major tactical error" when it refused to "acknowledge the judicial importance of Resolution 1803 (XVII)."⁷² Even in the early 1960's commentators such as Dawson and Weston wrote that "full" compensation was not by any means a binding rule of international law:

Far from being a "rule" of international law in the extensive deprivation context, the demand for "full" or "prompt, adequate, and effective" compensation would appear to be little more than a preference assumed for bargaining purposes—an element of legal mythology to which spokesmen pay ritualistic tribute and which has little meaning in effective policy.⁷³

In the past, the United States has refused to compromise its position by accepting "appropriate" compensation.⁷⁴ Ironically, the United States is now in a worse situation than it might have been had it been willing to compromise in the past.⁷⁵ As previously noted, Communist countries typically hold today that *no* compensation need be paid for assets they expropriate.⁷⁶ "International law seeks to harmonize . . . these distinct, yet interdependent interests to achieve . . . stability."⁷⁷

⁶⁷ de Aréchaga, *supra* note 15, at 181.

⁶⁸ Lillich, *supra* note 63, at 184-85.

⁶⁹ 376 U.S. 398 (1964).

⁷⁰ *Id.* at 429-30.

⁷¹ Lillich, *supra* note 63, at 184-85.

⁷² *Id.* at 185.

⁷³ Dawson & Weston, *Prompt, Adequate and Effective: A Universal Standard of Compensation?*, 30 *FORDHAM L. REV.* 727, 757 (1962).

⁷⁴ Lillich, *supra* note 63, at 185.

⁷⁵ *Id.*

⁷⁶ Note, *Real Property Valuation for Foreign Wealth Deprivations*, 54 *IOWA L. REV.* 89, 91 (1968).

⁷⁷ Dawson & Weston, *supra* note 55, at 728.

Because of the emergence of the developing countries, particularly since the Second World War,⁷⁸ and the hard-line stance taken by Communist countries, this harmonization has become increasingly difficult to achieve.⁷⁹

The United States lost more ground in 1972 when the United Nations Counsel on Trade and Development (UNCTAD) passed Resolution 88 (XII) concerning permanent sovereignty over natural resources.⁸⁰ It stated that "it is for each State to fix the amount of compensation."⁸¹ Two years later, with passage of the Charter of Economic Rights and Duties,⁸² the United Nations modified its earlier standard of "appropriate compensation" to a standard of "appropriate under the circumstances."⁸³ Resolution 3171 (XXVIII) on Permanent Sovereignty over Natural Resources⁸⁴ "[a]ffirms that the application of the principle of nationalization . . . implies that each State is entitled to determine the amount of possible compensation and the mode of payment. . . ."⁸⁵ According to these documents, each state is now free to determine its own standard of compensation. The Declaration on the Establishment of a New International Economic Order,⁸⁶ adopted in 1974, goes even further, reaffirming a state's *inalienable* right to nationalize, while making no mention of compensation with the exception of the right of developing states to be paid "full" compensation for their exploited natural resources. These U.N. resolutions, however, hardly settle the dispute on the international standard of compensation.⁸⁷ All four of these Resolutions were the product of Third World efforts; thus, there remains a sharp disagreement between the developed and developing countries as to what is the international standard of compensation.⁸⁸ Of course, as Lillich observes, no single rule can be stated that would provide just compensation in all cases.⁸⁹ Furthermore, it is not desirable to have either a

⁷⁸ Feuer, *Réflexions sur la Charte des droits et devoirs économiques des états*, 79 REVUE GENERALE DE DROIT INT'L PUBLIC 273, 274-75 (1975).

⁷⁹ See generally Note, note 76 *supra*.

⁸⁰ 12 U.N. TCOR, Supp. 1, at 1, U.N. Doc. TD/B/421 (1972), reprinted in 11 INT'L LEGAL MATERIALS 1474-75 (1972). The vote was 39-2-23, with abstention by the developing countries and opposition by the United States and Greece.

⁸¹ *Id.*

⁸² G.A. Res. 3281, 29 U.N. GAOR, Supp. (No. 31) 50, U.N. Doc. A/9631 (1974).

⁸³ *Id.* art. 2(c).

⁸⁴ U.N. Doc. A/RES/3171 (XXVIII) (1974), reprinted in 68 AM. J. INT'L L. 381-83 (1974).

⁸⁵ *Id.* Cuba has not established its own standard of compensation although it has passed laws enabling it to do so. See text accompanying notes 35-37 *supra*.

⁸⁶ U.N. Doc. A/RES/3201 (S-VI) (1974), reprinted in 13 INT'L LEGAL MATERIALS 715-19 (1974) and 68 AM. J. INT'L L. 798-801 (1974).

⁸⁷ Brower & Tepe, *The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law*, 9 INT'L LAWYER 295 (1975).

⁸⁸ For example, Belgium, Denmark, West Germany, Luxembourg, the United Kingdom, and the United States all voted against the Charter of Economic Rights and Duties, note 82 *supra*. Austria, Canada, Spain, France, Israel, Italy, Ireland, Japan, Norway, and the Netherlands all abstained from the vote. FEUER, *supra* note 78, at 300.

⁸⁹ Lillich, *supra* note 63, at 197.

single standard of compensation or valuation.⁹⁰ Orrego Vicuña, Professor of International Law at the University of Chile and Director of the Institute of International Studies, has pointed out that "there is no purpose in establishing a single or rigid standard."⁹¹ Competing interests must always be weighed in light of the individual case. International law by its very nature requires flexibility and balancing. Any "international norms should provide for alternative valuation standards that could be applied in accordance with particular circumstances and the kind of property affected."⁹² This approach of a "plurality of well-defined standards" entails many variables.⁹³

A large number of valuation methods exist today.⁹⁴ These include capitalized market value (which includes value as a going concern), replacement value, book value, and sales value of real assets.⁹⁵ Use of capitalized market value presumes that a government is like an investor bidding for a take-over of a business on a stock exchange.⁹⁶ "[C]apitalized market value is based on the expected profitability of the operation as a going concern (going business value), with an appropriate time discount factor."⁹⁷ This theory rests on the idea that

the value of an appropriated asset (or investment), both to the deprived owner and to the depriving authority, will depend more or less on the future earnings (or benefits) that each would expect to obtain, and on the burdens that each would hope to avoid, as a result of that ownership.⁹⁸

⁹⁰ Vicuña, *The International Regulation of Valuation Standards and Processes: A Reexamination of Third World Perspectives*, in 3 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW, 131, 146-47 (R. Lillich ed. 1975).

⁹¹ *Id.* at 146.

⁹² *Id.* at 146-47.

⁹³ *Id.* at 134.

⁹⁴ Several methods actually used in the past are discussed in M. WHITEMAN, 8 DIGEST OF INTERNATIONAL LAW 1143-63 (1967).

⁹⁵ Girvan, *Expropriating the Expropriators: Compensation Criteria from a Third World Viewpoint*, in 3 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 149, 166-68 (R. Lillich ed. 1975). The Chilean copper case, which involved the 1971 nationalization of U.S. copper companies in Chile, used book value less excess profits. This was in accord with the valuation allowed by a Chilean Constitutional Amendment, yet was arguably below the award required by international law. Lillich, *International Law and the Chilean Nationalizations: The Valuation of the Copper Companies*, in 2 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 120, 121 (R. Lillich ed. 1973).

The U.S. Foreign Claims Settlement Commission (FCSC) has been active in determination of expropriated property values. See 95 CONG. REC. 8836-56 (1949) for the legislative history of the formation of the FCSC. See also, Lillich, *The Valuation of Nationalized Property by the Foreign Claims Settlement Commission*, in 1 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 95, 100 (R. Lillich ed. 1972). The FCSC determines expropriated property values based on a system "most" appropriate to the property and equitable to the claimant, including, but not limited to (i) fair market value, (ii) book value, (iii) going concern value, or (iv) cost of replacement. 22 U.S.C. § 1643(b)(A) (1976). In reality, however, the FCSC often does not reveal the valuation methods it uses. Smith, *Real Property Valuation for Foreign Wealth Deprivations*, in 1 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 133 (R. Lillich ed. 1972).

⁹⁶ Girvan, *supra* note 95, at 166 n.29.

⁹⁷ *Id.*

⁹⁸ Weigel & Weston, *Valuation Upon the Deprivation of Foreign Enterprise: A Policy-Oriented*

Going business value includes capital, physical assets, and goodwill. Goodwill was defined in this case by the district court as

the pure dollar value of the right to receive the stream of income after the necessary capital has been invested to enable the purchaser to continue in the business. It is the "premium" which the purchaser of a profitable business pays, over and above the value of the tangible components necessary to the operation of the business.⁹⁹

Three basic factors which generally can be considered to constitute goodwill are: (1) excess value, (2) favorable customer relations, and (3) the privilege of continuance.¹⁰⁰ The first two are factual considerations while the third is a legal concept. These three factors are influenced by such variables as "location; manufacturing efficiency; satisfactory relations between the employees and the management; adequate sources of capital and a credit standard . . . advertising; monopolistic privileges; and in general, good business management."¹⁰¹ All of these factors make actual valuation of goodwill a very difficult process.

The major criticism of use of the capitalized market value method of valuation is that capitalized market value includes the profits of the business.¹⁰² Consideration of profits in determining the value of an expropriated business is objectionable to Third World countries, especially with regard to businesses engaged in the exploitation of natural resources, where the profit comes from use of minerals that the state itself really owns.¹⁰³ In that situation, Third World countries are especially reluctant to award compensation for goodwill. The capitalized market value method is considered more favorable to the Developed World, although the "purchasing government" can regulate the "selling" company's profits by mere regulation of its tax rate.¹⁰⁴ Another problem inherent in this method is that each party will value the earnings differently.

A second method used is replacement value, which is the cost of replacing the fixed assets that a company loses to expropriation.¹⁰⁵ This method, too, is considered favorable to the Developed World, because the company is compensated to the extent necessary for replacement of its lost fixed assets.¹⁰⁶ No compensation, however, is awarded for goodwill.

Book value and sales value of real assets are considered to be methods of valuation favorable to the Developing World because they usually lead to low figures.¹⁰⁷ Book value is the equivalent of total assets minus

Approach to the Problem of Compensation Under International Law, in 1 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 3, 19 (R. Lillich ed. 1972).

⁹⁹ 505 F. Supp. at 460.

¹⁰⁰ Comment, *An Inquiry into the Nature of Goodwill*, 53 COLUM. L. REV. 660, 661 (1953).

¹⁰¹ H. FINNEY & H. MILLER, PRINCIPLES OF ACCOUNTING 216-17 (6th ed. 1953).

¹⁰² Girvan, *supra* note 95, at 166.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 167.

¹⁰⁵ Smith, *supra* note 95, at 155-56.

¹⁰⁶ *Id.*

¹⁰⁷ Girvan, *supra* note 95, at 167-68.

total liabilities.¹⁰⁸ Several problems exist with the use of this method. First, if assets are overestimated or underestimated, the value will be greater or less than the market value of the company. Also, if liabilities are not estimated correctly, the book value will not be correct.¹⁰⁹ Furthermore, calculations of book value are based on the assumption that the company is a going concern,¹¹⁰ but make no award for the value of the business as a going concern. In addition, depreciation can play an important role with this method.¹¹¹ If a company's assets are old, they may be worth little or nothing on the books while at the same time having substantial market value. After examining the use of this method in nationalization settlements, one commentator concluded that

generally accepted principles of accounting result in a book value of owner's equity that usually is less than fair value, occasionally is greater than fair value, and only by coincidence is equal to fair value. Book value is not intended to be an equitable basis for settling nationalization claims and should not be used for that purpose.¹¹²

If sales value of real assets is employed as a valuation method, a company will usually receive even less compensation than if book value is used. Under this theory, physical assets are valued as they would be on the market.¹¹³ This means that, for example, machinery in a factory would at best be valued as second-hand and at worst as scrap.¹¹⁴ Furthermore, the land value is sharply depressed in many cases because of problems inherent in dealing with an unstable government.

The various methods of valuation represent three different views as to the value for which compensation should be given after an expropriation: the value to the taker, the value to the original owner, and the market value.¹¹⁵ Developed countries have traditionally sought recompense in terms of value to the original owner. The *Chorzow Factory case*¹¹⁶ has long been relied upon by the developed world as its standard for valuation. *Chorzow* states that for an illegal act, "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would in all probability, have existed if that act had not been committed."¹¹⁷ In the past, the United States has accepted this case as valid law.¹¹⁸ Leading authorities, such as de Aréchaga, former President of the International Court of Justice, however, have stated that the *Chorzow* doctrine has been "deprived of [its] relevance" in the

¹⁰⁸ McCosker, *Book Values in Nationalization Settlements*, in 2 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 36, 36 (R. Lillich ed. 1973).

¹⁰⁹ *Id.* at 57.

¹¹⁰ *Id.* at 40.

¹¹¹ Girvan, *supra* note 95, at 167.

¹¹² McCosker, *supra* note 108, at 51.

¹¹³ Girvan, *supra* note 95, at 168.

¹¹⁴ *Id.*

¹¹⁵ Smith, *supra* note 95, at 141.

¹¹⁶ [1928] P.C.I.J., ser. A, No. 17.

¹¹⁷ *Id.* at 47.

¹¹⁸ 505 F. Supp. at 446-47.

contemporary world.¹¹⁹ De Aréchaga's contention is based on the idea that today nationalization or expropriation is a "sovereign right of the State and . . . consequently entirely lawful."¹²⁰ Thus, "the general rules of State responsibility that govern unlawful acts can no longer be applied."¹²¹ Both de Aréchaga and the Third World generally espouse the view that the key to valuation should be "the beneficial gain which has been obtained by the nationalizing State."¹²²

Into this unsettled area of compensation and valuation came the *Banco* case. The *Banco* court had to choose which standards it would use. The Second Circuit agreed with the district court's statement that *Sabbatino*¹²³ required international law, not local law, be applied.¹²⁴ The two courts differed as to the interpretation of international law, however. The lower court noted that it "should avoid identifying as a principle of international law, what is actually only a policy of our nation."¹²⁵ Yet, the district court chose to apply what is clearly the U.S. standard, noting that "[a]s a district court, we are not free to overlook or neglect the interpretation of international law reiterated a hundred times over in the American courts simply because some other nations in public debate and diplomatic correspondence, have expressed a different view."¹²⁶ The Second Circuit, as discussed *infra*, took a more liberal stand. The expropriation was held by the district court to constitute a violation of international law and therefore "American citizens in Cuba are and were entitled to full and prompt recompense for their private property seized, to be made in funds convertible to dollars."¹²⁷ This standard included recovery for the banking assets as a going concern. The lower court supported the use of going concern value with its finding that Cuba had continued to use Chase's branches as banks, rather than liquidating them.¹²⁸ In addition, the district court observed that "[t]he applicable value will be that which our own Government would pay to a domestic corporation under our laws of eminent domain."¹²⁹ Under eminent domain proceedings, the U.S. Government uses going concern value in its determination of awards.¹³⁰ The standard is market value, "what a will-

¹¹⁹ de Aréchaga, *supra* note 15, at 181.

¹²⁰ *Id.* at 180.

¹²¹ *Id.* at 181. Other Third World perspectives are discussed in Vicuña, note 90 *supra*.

¹²² de Aréchaga, *supra* note 15, at 182. Under this principle, de Aréchaga stated that no compensation is due if an expropriated business is totally suppressed for policy reasons. *Id.* It is only for the extent to which a State has been unjustly enriched that de Aréchaga thinks compensation is required. *Id.*

¹²³ *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 59-61 (2d Cir. 1962).

¹²⁴ 505 F. Supp. at 435; 658 F.2d at 887-88.

¹²⁵ 505 F. Supp. at 435.

¹²⁶ *Id.* at 432.

¹²⁷ The court relied on such sources as the RESTATEMENT, note 65 *supra*, the *Chorzow Factory* case, note 116 *supra*, the Hickenlooper Amendment, note 26 *supra* and 22 U.S.C. § 1643(b)(A) (1976).

¹²⁸ 505 F. Supp. at 445.

¹²⁹ *Id.*

¹³⁰ See *United States v. Miller*, 317 U.S. 369, 374 (1943).

ing buyer would pay in cash to a willing seller."¹³¹

Another important issue was discussed by the lower court with regard to valuation: whether or not the conduct of the Cuban Government prior to the nationalization should be taken into account.¹³² According to the *Restatement*, "full value must be determined as of the time of the taking, unaffected by the taking, by other related takings, or by conduct attributable to the taking state and having the effect of depressing the value of the property in anticipation of the taking."¹³³ Banco Nacional argued that it was unrealistic for the court to act as if the Cuban Revolution never occurred. On appeal, the Second Circuit agreed, although the lower court awarded valuation based on circumstances as they existed shortly before the time of nationalization.¹³⁴

With these standards in mind, the district court began its computation of actual damages to defendant resulting from the expropriation. Defendant asserted two basic theories of recovery. The first was a separate entity or contract theory, under which the Cuban branches of Chase were treated as a subsidiary of the New York bank and a debtor-creditor relationship was established.¹³⁵ Under this theory, defendant alleged that approximately six million dollars were owed to Chase by its former Cuban branches.¹³⁶ Under an alternative theory, the conversion or single entity theory, defendant alleged over eight million dollars as set-off.¹³⁷ The single entity theory was based on the idea that the Cuban branches were the property of the home bank and therefore plaintiff owed compensation to defendant for conversion. This theory included recovery for the asset as a going concern. After discussion of both theories, the lower court stated that it mattered little whether the claim was posited on either of these two theories, or on a reverse condemnation theory or on an alleged violation of international law theory¹³⁸ because Chase was entitled to "full, fair and prompt recompense" in any case.¹³⁹

¹³¹ *Id.*

¹³² The Cuban Revolution and threat of nationalization had a prior depressing effect on the value of the banking assets. 505 F. Supp. at 446.

¹³³ RESTATEMENT, *supra* note 65, § 188, Comment b. This part of the RESTATEMENT appears to echo the *Chorzow* decision, [1928] P.C.I.J., ser. A, No. 17.

¹³⁴ 505 F. Supp. at 447. This award was in accordance with the idea that defendant would receive compensation

only if and to the extent that the events which led to those losses were actions of the Cuban Government in violation of international law, typically including confiscation, and the chilling of the value of the asset prior to seizure which occurred when confiscation became a foreseeable certainty. *Id.* at 447-48.

Therefore, the lower court made no award for losses resulting from secular change in Cuba. *Id.* at 448.

¹³⁵ 505 F. Supp. at 451.

¹³⁶ Assuming recovery were allowed under this theory, plaintiff alleged recovery should only be \$370,720. *Id.* at 453.

¹³⁷ Under this second theory, Banco Nacional asserted that set-off should be \$3,338,326. *Id.* at 452.

¹³⁸ *Id.*

¹³⁹ *Id.*

The district court decided to award damages on the basis of the theory that yielded greater damages, the conversion or single entity theory.¹⁴⁰ This decision was affirmed with modifications on appeal.¹⁴¹ The conversion theory involves nine items of damages. Banco Nacional and Chase agreed that there should be set-off for stated capital, unremitted profits, and contribution to retirement and thrift incentive plans, although they disagreed as to the amount that should be allowed for each.¹⁴² Banco Nacional disputed Chase's demand for a set-off for unearned discount, reserve for taxes, charged-off loans, reimbursement to personnel for losses suffered, banking houses and real estate appreciation over book value, and going concern value or goodwill.

The lower court rapidly disposed of the issues of unearned discount, reserve for taxes, charged-off loans, and reimbursement for personnel for losses. Stating that unearned discount¹⁴³ was not an asset of the branches until actually earned, the lower court refused set-off for that item.¹⁴⁴ Reserve for taxes was also denied as an item of damages.¹⁴⁵ The federal district court found that this was a reserve for taxes already incurred but not yet paid. The Cuban Government was therefore due this item in any event. A third item, charged-off loans, also was denied defendant as set-off.¹⁴⁶ This item was based on losses arising from uncollectible loans made by the bank prior to the confiscation. Because Chase had not been able to collect on these loans in the past, the court refused to assume that Banco Nacional had collected or would in the future be able to collect such loans, absent any evidence to that effect.¹⁴⁷ The fourth item disallowed by the court was reimbursement to personnel. The district court refused set-off for any claim that originally belonged to a third party and was acquired by a defendant in anticipation of litigation. The rationale offered for this decision was that it might increase claims against foreign states and nullify the Act of State Doctrine.¹⁴⁸ This concern overshadowed the moral and possibly legal obligation of Chase to reimburse its employees.¹⁴⁹

The books and records of Chase Manhattan Bank indicated that

¹⁴⁰ 505 F. Supp. at 453.

¹⁴¹ 658 F.2d at 880 n.9.

¹⁴² 505 F. Supp. at 454-58.

¹⁴³ "Unearned discount" is defined by the court as prepaid interest by borrowers not earned by the bank as of the date of the taking, but which would be earned over the balance of time for the loans outstanding. *Id.* at 458.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 459.

¹⁴⁹ *Id.* See *Cohn v. Lionel Corp.*, 21 N.Y.2d 559, 562-63, 236 N.E.2d 634, 637, 289 N.Y.S.2d 404, 408 (1968) which stated that

[t]he general rule is that, where one is employed or directed by another to do an act in his behalf, not manifestly wrong, the law implies a promise of indemnity by the principal for damages resulting from or expenditures incurred as a proximate consequence of the good faith execution of the agency.

four million dollars should be allocated as capital to the Cuban branches.¹⁵⁰ This figure was reduced by \$391,000 that Chase was able to recover on certain bonds.¹⁵¹ Plaintiff sought to further reduce the capital set-off by deducting loans made by Chase's Cuban branches to Cuban companies, which were guaranteed by parent corporations in the United States. The theory used by Banco Nacional was that Chase could recover from the U.S. guarantors. This idea was rejected by the lower court because it assumed that Banco Nacional collected the debts when it seized the bank branches.¹⁵² In addition, Banco Nacional sought a reduction in capital set-off for unrecorded depreciation in the market value of the branches' securities.¹⁵³ Though testimony was introduced on this issue, the district court found the evidence too speculative and therefore denied Banco Nacional a reduction for this amount.¹⁵⁴

The four million dollar capital figure was increased by almost one hundred thousand dollars for an overdraft by the branches existing at the time of the nationalization. An additional six hundred thousand dollars was added for payments by Chase to beneficiaries of over two hundred international letters of credit seized. Thus, the total set-off allowed for capital was \$4,370,720. The lower court also allowed Chase to write up its banking and real estate assets from their depreciated value to that of an appraisal made some six months prior to nationalization.¹⁵⁵

On appeal, the Second Circuit accepted as a given that Chase was entitled to net asset value.¹⁵⁶ The appellate court noted that despite Banco Nacional's statement in "its brief that Chase's Cuban property 'was actually worthless,' we do not understand Banco Nacional to contend that Chase is not entitled to some compensation for at least the book value of its Cuban assets."¹⁵⁷ The court thereafter focused on whether the award should include going concern value of the Cuban branches.

The lower court discussed going business value at length. The district court awarded compensation on a going concern basis "rather than merely at the value of the sum of the constituent parts."¹⁵⁸ The rationale offered for this decision was that the Cuban Government continued to use the banks as banks. Banco Nacional made the expropriated banks part of the national banking system.¹⁵⁹ Having decided the threshold question concerning going concern value—that an award should in fact be made—the lower court proceeded to actually determine the going

¹⁵⁰ 505 F. Supp. at 454.

¹⁵¹ *Id.* at 454.

¹⁵² *Id.* at 455. Banco Nacional offered no evidence to counter this assumption by the court.

¹⁵³ *Id.* at 455.

¹⁵⁴ *Id.* at 455-56.

¹⁵⁵ *Id.* at 459.

¹⁵⁶ 658 F.2d at 893 n.23.

¹⁵⁷ *Id.*

¹⁵⁸ 505 F. Supp. at 445.

¹⁵⁹ *Id.*

concern value of Chase's branches. The district court distinguished going business value from goodwill, stating that

going business value is that price which a knowledgeable purchaser, trading with a seller at arm's length . . . will pay for the right to continue a going business, and to receive the income stream or cash flow which that business will generate for the foreseeable future.

Goodwill, on the other hand, is the pure dollar value of the right to receive the stream of income after the necessary capital has been invested to enable the purchaser to continue in the business. It is the "premium" which the purchaser of a profitable business pays, over and above the value of the tangible components necessary to the operation of the business.¹⁶⁰

The lower court considered goodwill plus capital and physical assets to constitute going business value. The district court made the determination of set-off for going business value by multiplying a weighted average deposit figure for 1950-60 by three and one-half percent.¹⁶¹ The court considered a variety of other methods. Charles Agemian, a former Executive Vice-President and Comptroller General of Chase, suggested that the going business value be determined as the average of the figures resulting from the use of two different methods. The first method was based on a percentage of deposits, a five year average of deposits multiplied by five percent. In contrast, the second was based on a multiple of earnings. Under this method, the reported earnings of the branches over five years were multiplied by ten. The district court rejected Agemian's average of these two methods as arbitrary, and proceeded to further examine the two methods.¹⁶² Both methods included figures from the pre-revolutionary years, thereby ignoring the depressing effect that the Cuban Revolution had on banks. The district court thought it important that only the 1959 and 1960 figures be considered, because much of the decline in value did not result from violations of international law. Furthermore, the multiples of five percent for the deposit method and ten for the earnings method were considered to be without a sufficient rational basis.¹⁶³

Agemian offered a third calculation, as confirmation of the average of his other two methods, based on straight capitalization of earnings. Average earnings were multiplied by twenty, a figure which the court rejected as "inappropriately high."¹⁶⁴ Agemian's multiples were based on four banks Chase had acquired, none of which the court found adequately reflected the worth of the Cuban branches.¹⁶⁵

¹⁶⁰ *Id.* at 459-60.

¹⁶¹ *Id.* at 464. The percentage "is regarded as an index of the earning capacity of these assets." 1 A. DEWING, FINANCIAL POLICY OF CORPORATIONS 304 (5th. ed. 1953).

¹⁶² 505 F. Supp. at 460-62.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ These included branches in the Clinton section of Manhattan, Staten Island, the Virgin Islands, and the Honduras. *Id.* at 461-62.

In addition to Agemian's testimony as to going concern value, the court also examined a report by a management consulting firm, Thomas H. Barton & Company. The Barton report made its calculations based on expected deposit and earnings growth. The report was based on an assumption of "normal business patterns."¹⁶⁶ Because of this assumption, the district court rejected the Barton report.¹⁶⁷

What the district court finally chose as its valuation method for going concern value was a three and one-half percent multiple of the weighted average deposit figure for 1959-60. The three and one-half percent figure was determined arbitrarily by Judge Bryan, who originally heard the case. Support for this figure, however, is found in the Foreign Claims Settlement Commission's decision in the *Chase* case.¹⁶⁸ The FCSC chose to multiply the average deposits by three and one-half percent although they used the average deposits over a five year time period rather than just for the 1959-60 period. Thus, the position adopted by the district court was similar to that taken in prior treatment of the case.

The district court basically chose a valuation system of book value plus a percentage of the deposits. The three and one-half percent multiple seems logical in this case. Arthur Dewing dealt with the determination of such a percentage in his two volume work, *Financial Policy of Corporations*.¹⁶⁹ He stated,

If the bank is old, and has had a record of honorable dealings in the community and a long-sustained earning power, then this percentage may be as high as 5% or one-twentieth of the deposits. If, on the other hand, the bank was only recently founded, is known to have an incompetent management, no increment of value may be given for the deposits.¹⁷⁰

Considering the circumstances in this case, the three and one-half percent figure seems valid for the 1959-60 era. Chase was a well-respected bank, though the political climate was in too much turmoil for an extremely high award to be made. Thus, the actual system of valuation used by the court appears acceptable.

On appeal, the Second Circuit refused to allow set-off based on going concern value.¹⁷¹ The appellate court took what it considered to be a more realistic approach to the case. Stating that the lower court's "view takes insufficient account of the acknowledged state of the Cuban economy following the revolution,"¹⁷² the Second Circuit went on to discuss

¹⁶⁶ 505 F. Supp. at 461.

¹⁶⁷ *Id.*

¹⁶⁸ In the Matter of the Claim of the Chase Manhattan Bank, N.A., F.C.S.C., Decision No. CU-6295 (Oct. 20, 1971). The lower court noted that it was not bound by the FCSC decision, although that decision should receive some weight. 505 F. Supp. at 449.

¹⁶⁹ A. DEWING, *supra* note 161, at 304.

¹⁷⁰ *Id.*

¹⁷¹ 658 F.2d at 893.

¹⁷² *Id.*

the effect of nationalization on foreigners. The court also noted the depressing effect the revolution had on Chase's deposits in 1959 and 1960,¹⁷³ and the fact that future earnings of the branches were "highly speculative."¹⁷⁴ The appellate court concluded that "at a time when aliens were fleeing Cuba and many foreign businesses were being abandoned or nationalized [it had "no warrant for believing that"], a potential buyer with his eyes open would have paid Chase a premium in anticipation of its future Cuban earnings."¹⁷⁵ With this decision, the Second Circuit ignored the traditional view espoused by the *Restatement* which requires that "full value . . . unaffected . . . by conduct attributable to the taking State" be awarded.¹⁷⁶ The court took a more liberal view—that the fact that it was the Cuban Government's actions that reduced the banks' worth should not be considered. This holding is in keeping with de Aréchaga's idea that the gain to the nationalizing state should be determinative.¹⁷⁷ He stated that "there is no duty to compensate for loss of good will when the abolition of free market conditions of competition nullifies the value of this intangible asset."¹⁷⁸ This statement is, in effect, a synopsis of the Second Circuit's rationale for refusing set-off for going concern value in the instant case.

The appellate court accepted the amount determined by the lower court to be going concern value without discussion. Presumably, this implies acceptance of the lower court's actual valuation figure for going concern, because the Second Circuit reduced the lower court's award by \$1,426,600—the amount originally awarded for going concern value.¹⁷⁹

The lower court awarded almost seven million dollars as set-off to Chase.¹⁸⁰ Because Chase conceded indebtedness to Banco Nacional of some \$9,794,020, after the lower court set-off was subtracted, Chase owed Banco Nacional \$2,889,150.¹⁸¹ It is important to note that the lower court never added up the figures or stated that Chase owed Banco Na-

¹⁷³ *Id.* at 894.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ RESTATEMENT, *supra* note 65, § 188, Comment b.

¹⁷⁷ See text accompanying notes 119-22 *supra*.

¹⁷⁸ See de Aréchaga, *supra* note 15, at 182.

¹⁷⁹ 658 F.2d at 894.

¹⁸⁰ 505 F. Supp. at 464.

Table of Set-off Items Awarded
by District Court

Capital, net of adjustments	\$4,370,720
Unremitted profits	923,320
Contributions to Retirement and Thrift Incentive Plans	129,372
Banking Houses and real estate appreciation over book value	54,858
Premium or Goodwill	<u>1,426,600</u>
Total	\$6,904,870

Id.

¹⁸¹ The court refused to make an award in pesos as Banco Nacional requested. *Id.* at 464-65.

cional almost three million dollars. The lower court appeared reluctant to admit that a U.S. bank was being placed in such a position. The Second Circuit showed no such reluctance, openly stating that judgment should be entered for Banco Nacional in the amount of \$4,315,750.¹⁸²

The federal district court also refused to award pre-judgment interest on the money Chase owed Cuba. The *Banco* court stated that under *Erie*¹⁸³ principles, the determination of an award was to be made under New York law.¹⁸⁴ In New York, the state courts ordinarily only "award pre-judgment interest on money from the time when the money becomes due and payable."¹⁸⁵ Because 31 C.F.R. § 515¹⁸⁶ expressly prohibits any payments to Cuba, the debt was at no time payable. Thus, the lower court awarded no interest. The Second Circuit left the interest issue confused, dealing with the issue in one sole phrase. It stated that "[w]e remand for entry of judgment for Banco Nacional in the amount of \$4,315,750, plus such pre-judgment interest as may be appropriate."¹⁸⁷ This phrase hints at the idea that interest may be awarded in spite of the lower court's decision. The interest issue is very important because if disbursement were permitted, the interest would more than double the four and one-third million dollar debt owed Banco Nacional.

In conclusion, this case represents a break-through in the Cuban expropriation cases, as one of the first cases in a U.S. court in which an actual value has been assigned to property expropriated by Cuba. Although the lower court awarded "full compensation," it refused to blindly follow the U.S. bank's valuation figures. The district court closely scrutinized the methods available and arrived at what it thought to be a reasonable figure. The Second Circuit refused to follow the traditional U.S. view of compensation. Though the court stated it was awarding both "appropriate and full compensation,"¹⁸⁸ the court certainly does not seem to have awarded what the United States has traditionally considered to be "full" compensation. By denying award for going concern value, the appellate court, in effect, refused to follow the *Chorzow Factory* case. Instead of following the traditional U.S. view that compensation should be in terms of value to the original owner, the Second Circuit chose to make its award in terms of value to the taker. With its decision, the Second Circuit chose to follow a more liberal viewpoint

¹⁸² 658 F.2d at 894. "Payment is to be made in accordance with 31 C.F.R. Part 515, to await such disbursement as may be permitted by the appropriate authorities." *Id.*

¹⁸³ *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

¹⁸⁴ 505 F. Supp. at 448. The court noted that the "[t]he debt sued upon is here, the defendants are here, and New York was the place where Chase . . . should have credited Banco Nacional with the sums due in these sections." *Id.*

¹⁸⁵ *Id.* *Accord*, *Gray v. Prudential Ins. Co.*, 46 N.Y.S.2d 850 (Sup. Ct. 1943), *rev'd on other grounds*, 267 A.D. 688, 48 N.Y.S.2d 82 (1944). *See* *Wheelock v. Tanner*, 39 N.Y. 481, 504 (1868); *Moscow Fire Ins. Co. v. Heckschert & Gottlieb*, 260 A.D. 646, 648, 23 N.Y.S.2d 424 (1940), *aff'd*, 285 N.Y. 674, 34 N.E.2d 277 (1941).

¹⁸⁶ 31 C.F.R. § 515.201 (1980).

¹⁸⁷ 658 F.2d at 894.

¹⁸⁸ *Id.* at 892-93.

than U.S. courts had previously done. The Second Circuit, however, had a strategic advantage in the instant case which should not be ignored. As noted previously, any amounts recovered by Cuba in actions in the United States are currently frozen pursuant to 31 C.F.R. § 515.¹⁸⁹ Thus, the ultimate responsibility for paying Cuba the \$4.3 million does not rest with the Second Circuit Court of Appeals. Because further congressional action is necessary before payment will be made, the Second Circuit can espouse a liberal viewpoint without bearing ultimate responsibility for the action. Therefore, although this case purports to award Banco Nacional de Cuba over four million dollars, until the congressional freeze on assets is lifted no payment will be forthcoming.

—MARY GRIST BELLAMY BONEY

¹⁸⁹ *Id.* at 880 n.8.

