10-1-1982

Act of State Doctrine: Determining its Viability in a Suit Involving an Expropriation by Cuba of Foreign-Owned Assets

Kyle A. Silverman

CASENOTE

Act of State Doctrine: Determining its Viability in a Suit Involving an Expropriation by Cuba of Foreign-Owned Assets

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

In a suit brought by Banco Nacional de Cuba, a Cuban state-owned bank, against Chase Manhattan Bank (Chase), Banco Nacional sought to recover an amount in excess of $9.7 million on claims whose validity was not contested by Chase.[1] Chase asserted several counterclaims based upon the expropriation of its property by the Cuban government following the Cuban revolution.[2] In its counterclaims, Chase sought damages for the expropriation of branch banking assets owned by Chase in its own right, and railroad equipment owned by Chase as trustee for certain American investors.[3] The United States District Court for the Southern District of New York entered judgment in favor of Banco Nacional on its claim, less an amount in excess of $6.9 million allowed as a setoff on account of Chase's counterclaim for the expropriation of its Cuban bank branches.[4] The district court dismissed the remaining counterclaims.[5] On appeal, the United States Court of Appeals for the Second Circuit, *held*, affirmed as modified: Adjudication of a counterclaim against a foreign soverign plaintiff for expropriation of the defendant's property is not barred by the act of state doctrine if (1) the Executive Branch has provided a *"Bernstein"* letter[6] advising the court that it believes that the act of state doctrine need not be applied, (2) there is no showing that an adjudication of the counterclaim will conflict with delicate foreign relations, and

1. Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 877 (2d Cir. 1981).
2. *Id.* at 877.
3. *Id.*
4. Banco Nacional de Cuba v. Chase Manhattan Bank, 505 F. Supp. 412, 429 (S.D.N.Y. 1980).
5. *Id.*
6. *See infra* note 26.

(3) the counterclaim is asserted only as a set-off and does not seek affirmative relief.[7] *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875 (2d Cir. 1981).

In *Banco Nacional de Cuba*, the Second Circuit reached the same result that the United States Supreme Court had reached nine years earlier in *First National City Bank v. Banco Nacional de Cuba*.[8] In *First National*, the Court held that the act of state doctrine did not bar the judicial examination of a counterclaim filed by a United States bank against a Cuban bank seeking damages as a result of the expropriation of property owned by the United States bank in Cuba, where a letter from a Department of State legal advisor suggested that the doctrine need not be applied.[9] The decision in *Banco Nacional de Cuba v. Chase Manhattan Bank* is one of the most recent pronouncements on the act of state doctrine, a doctrine that has followed a long and circuitous path.

This note will provide an in-depth examination of the *Chase Manhattan* case, beginning with a review of the factual setting, followed by an account of the history of the act of state doctrine, and the interpretation given it by the Second Circuit in the *Chase* decision. The note concludes with an analysis of the court's decision and its probable implications for the future.

I. Factual Background

The Cuban revolution resulted in the institution of a new national government on January 1, 1959.[10] The new regime regarded itself as the lawful successor to the pre-existing government and quickly instituted substantial changes in Cuba by building on pre-existing laws and institutions. Through the enactment of various statutes and decrees, the new government sought to diminish the role of foreign enterprise in Cuba and to concentrate the means of production in the hands of the Cuban government. Implementation of the policies of the new government resulted in the substantial expropriation of foreign-owned properties, including Chase's branch banks and the railroad equipment owned by Chase as

7. 658 F.2d at 884.

8. 406 U.S. 759 (1972).

9. *Id.* at 762.

10. The revolution resulted in the overthrow of the Batista regime and the installation of a new government under the leadership of Fidel Castro, Che Guevera, and others. *See generally* H. Mathews, Revolution in Cuba (1975).

trustee.[11]

Banco Nacional, which had functioned as the central bank of Cuba since 1948, was granted additional powers and played a significant part in the reconstruction of the Cuban economy after the revolution. Under Resolution No. 2,[12] Banco Nacional was designated to take over the assets of Chase and several other banks. Banco Nacional was subsequently placed in control of the assets and businesses of the remaining private banks, and thereafter, became wholly owned and operated by the Cuban government.[13]

Chase loaned $30 million to the predecessor of Banco Nacional in 1958, secured by United States Government bonds having a value in excess of $30 million.[14] On September 17, 1960, the date on which Cuba expropriated Chase's branches, the unpaid balance of the loan was $10 million. Within days of the expropriation, Chase sold the collateral securing the loan for more than $17 million. Chase applied the proceeds against the outstanding loan balance and held a surplus in excess of $7.2 million. After notification that the surplus would be retained to offset Chase's losses resulting from the expropriation, Banco Nacional brought suit seeking the surplus amount and various sums in excess of $2.5 million that it had on deposit with Chase on September 17, 1980, which Chase had also refused to repay.

Chase counterclaimed, alleging that at the time of the expropriation, it maintained four Cuban bank branches, valued at more than $8.6 million. Chase averred that the branches had been expropriated in violation of international law and sought full recovery from Banco Nacional as the alter ego of the Cuban government. Chase did not seek affirmative relief on its counterclaims, which exceeded the amount claimed by Banco Nacional, but merely requested that Banco Nacional's complaint be dismissed.[15]

The district court found that Banco Nacional was an alter ego

---

11. Chase's Cuban bank branches were expropriated under the authority of Executive Power Resolution No. 2, issued pursuant to Cuban Law No. 851, July 6, 1960. This resolution is set out in Banco Nacional de Cuba v. First Nat'l City Bank, 270 F. Supp. 1004, 1009 n.6 (S.D.N.Y. 1967).

12. *See supra* note 11.

13. Law No. 891 provided for the nationalization of nearly all of the remaining banks.

14. The loan was initially extended to Banco de Desarrallo Economico y Social, a corporate agency of Cuba. The agency was subsequently dissolved by the Cuban government and Banco Nacional succeeded to its rights and obligations, including the obligation to pay the loan.

15. 658 F.2d at 879.

of the Cuban government,[16] that the counterclaim was justiciable, and that Chase was entitled to a set-off on its counterclaim of an amount in excess of $6.9 million.[17] This amount included damages in excess of $1.4 million awarded to Chase for the going concern value of its expropriated branches. The court dismissed Chase's counterclaims as railroad equipment trustee on the ground that such counterclaims were not permissible under rule 13 of the Federal Rules of Civil Procedure.[18]

II. The Historical-Legal Background of the Act of State Doctrine

The act of state doctrine is derived from English common law and precludes United States courts from inquiring into the validity of public acts of a recognized foreign government within its own territory.[19] This preclusion extends to executive, legislative, and judicial acts.[20] Chief Justice Fuller's statements in his opinion for a unanimous Court in *Underhill v. Hernandez*,[21] represent the traditional American interpretation of the act of state doctrine:

> Every sovereign state is bound to respect the independence of every other state, and the courts of one country will not sit in judgment on the acts 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.[22]

In two subsequent cases,[23] the Supreme Court reaffirmed its adherence to the act of state doctrine as enunciated in *Underhill*. The act of state doctrine has traditionally been viewed as a princi-

---

16. 505 F. Supp. at 428.

17. *Id.* at 429.

18. *Id.* at 435-36.

19. *See generally* Simmons, *Sabbatino Case and the Act of State Doctrine*, 14 Int'l & Comp. L.Q. 452 (1965).

20. Restatement (Second) of the Foreign Relations Law of the United States § 47, comment d (1965) [hereinafter cited as Restatement].

21. 168 U.S. 250 (1897).

22. *Id.* at 252. *See generally* Henkin, *Act of State Today: Recollections in Tranquility*, 6 Colum. J. Transnat. L. 175 (1967).

23. Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Ricaud v. American Metal Co., 246 U.S. 304 (1918). Although *Oetjen* and *Ricaud* reaffirmed Underhill in unambigous terms, Justice White, in what was to become a famous dissent, asserted that these cases only tangentially involved the act of state doctrine. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 442 (1964) (White, J., dissenting).

ple of comity required by international law.[24] Thus, until recently, the Court favored an absolute application of the act of state doctrine, even if the act involved was alleged to be violative of international law.

The inadequacy of the act of state doctrine was suggested by Judge Learned Hand in his decisions in the two *Bernstein* cases.[25] The decision in the second case, *Bernstein v. N.V. Nederlandsche-Amerikaansche (Bernstein II)*,[26] gave rise to what became known as the "Bernstein exception." In *Bernstein II*, Judge Hand, speaking for the Second Circuit, declined to apply the act of state doctrine and allowed the plaintiff to challenge the validity of the expropriation of his property by the German Nationalist-Socialist Government because a letter from the State Department requested that the act of state doctrine not be applied.[27]

In *Bernstein v. Van Heyghen Treres Societe Anonyme (Bernstein I)*,[28] a case involving the same facts, Judge Hand, while recognizing the "odious nature" of the German law,[29] nevertheless upheld the act of state defense since, unlike *Bernstein II*, the Executive had given no indication of a "positive intent" to relax the otherwise applicable act of state doctrine.[30] *Bernstein II* thus holds that application of the act of state doctrine is not required when the government of the state in question no longer exists, and when the Executive Branch suggests to the court that the doctrine not be applied.[31] The *Bernstein* exception enabled the courts to circumvent their previous inflexible adherence to the absolute application of the act of state doctrine, and foreshadowed the demise of the absolute approach to the doctrine. Further emasculation of

---

24. *Oetjen, supra* note 23 at 303-04 (1918); American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909); Underhill v. Hernandez, 128 U.S. 250, 252 (1897).

25. *See infra* notes 26 and 28.

26. 210 F.2d 375 (2d Cir. 1954).

27. The letter provided in part:

> The policy of the Executive, with respect to claims asserted by the United States for the restitution to identifiable property . . . is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.

Jurisdiction of U.S. Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers, Dept. of State Press Release No. 296 (Apr. 27, 1949), *in* 20 DEPT. OF STATE BULL. 592, 593 (1949).

28. 163 F.2d 246 (2d Cir.), *cert. denied*, 332 U.S. 772 (1947).

29. *Id.* at 249.

30. *Id.* at 251.

31. *See* Delson, *The Act of State Doctrine-Judicial Defense or Abstention?*, 66 AM. J. INT'L L. 82, 87-91 (1972).

the act of state doctrine took place in the subsequent case of *Banco Nacional de Cuba v. Sabbatino*.[32]

Sabbatino arose out of the Cuban government's expropriation of the Cuban assets of an American commodities broker who had contracted to purchase Cuban sugar.[33] Justice Harlan, speaking for an eight-man majority, departed from the long-standing absolute approach to the act of state doctrine. He concluded that the doctrine was required neither by comity nor by international law, as the earlier opinions seemed to imply,[34] but rather, that it is self-imposed for policy reasons.[35] By asserting the appropriateness of judicial discretion in the decision whether to apply the act of state doctrine, Justice Harlan cast the *Bernstein* exception in a completely different light. Although he declined to rule specifically on the continued validity of the exception,[36] Harlan redefined the act of state doctrine in terms that rendered the exception unnecessary.

In Justice Harlan's view, as issues of international law become the subject of disagreement among countries, court decisions can have a deleterious impact upon foreign relations. Specifically, any examination of the validity of another nation's expropriation of the property of a foreigner would require adjudication of sensitive issues relating to "the practical and idealogical goals of the various members of the community of nations."[37] Concluding that it could easily risk interference with the Executive Branch's conduct of foreign policy by rendering judgment on questions arising in so uncertain an area, the Court held that the act of state doctrine foreclosed inquiry into the Cuban expropriation even if the

---

32. 376 U.S. 398 (1964).

33. The facts of this case may be briefly summarized. Farr, Whitlock & Co., an American commodities broker, contracted to purchase Cuban sugar from a Cuban corporation whose corporate stock was owned primarily by United States residents. Before the shipment could leave Cuba, all of the corporate assets were expropriated. The cargo was not allowed to leave until Farr, Whitlock had entered into new contracts with Banco Nacional. Farr, Whitlock somehow obtained possession of the bills of lading without making payment to Banco Nacional and sold them to its own customer. Banco Nacional brought suit, alleging conversion of the bills of lading. The suit was brought against Sabbatino, who had been appointed as Temporary Receiver of the New York assets of the Cuban corporation affected by the expropriation decree. 376 U.S. at 427-37.

34. *Id.* at 421.

35. *Id.* at 437.

36. The Court saw no need to consider the Second Circuit's holding in *Bernstein* since the State Department, in a brief amicus curiae, had urged that the act of state doctrine be applied. 376 U.S. at 420.

37. *Id.* at 430.

expropriation was violative of international law.[38]

Sabbatino encourages flexible balancing of interests in light of current developments in international law. If international law has not developed to the point of firm agreement between the parties, the court ought to apply the act of state doctrine rather than preempt the State Department in its conduct of foreign policy.

Despite its injection of flexibility and discretion into the decision whether to apply the newly circumscribed act of state doctrine, *Sabbatino* permits no reading other than an intent to foreclose adjudication in United States courts of all cases involving expropriations not governed by treaties.[39] *Sabbatino,* nevertheless, represents a further refinement of the act of state doctrine since it challenges the judiciary to consider in each case whether international law is sufficiently well-developed to justify departure from the doctrine.

Justice White, the sole dissenter in *Sabbatino,* railed against inflexible operation of the act of state doctrine, but seemed convinced that the international law of expropriation was well-developed. Traditionally, international law imposes three conditions which must be met in any expropriation: it must serve some public purpose, there must be nondiscrimination in the taking, and compensation must be fair and prompt.[40] Justice White relied upon this traditional view. Justice Harlan, however, relegated these requirements to the status of customary international law, which, in his view, was insufficient to preclude application of the doctrine.[41]

While the proceedings for the entry of judgment on remand were still pending in *Sabbatino,* Congress enacted the Hickenlooper Amendment.[42] This amendment, in effect, reversed the Supreme Court's decision in *Sabbatino* by providing that no United States court should refrain from determining under international law whether a foreign act of expropriation is proper unless the President suggests otherwise. Following enactment of the Hickenlooper Amendment, the district court entered judgment for Banco Nacional, holding that the amendment had removed the bar interposed on Cuban expropriations by the act of state doctrine.[43]

---

38. *Id.* at 428.
39. *Id.*
40. RESTATEMENT, *supra* note 20, § 185.
41. 376 U.S. at 428.
42. 22 U.S.C. § 2270(e)(2) (1976).
43. Banco Nacional de Cuba v. Farr, 243 F. Supp. 957 (S.D.N.Y. 1965), *aff'd,* 383 F.2d

The decision of the United States Supreme Court in *First National City Bank v. Banco Nacional de Cuba*[44] represents an incursion upon the Court's previous ruling in *Sabbatino*. *First National* involved a claim by Banco Nacional and a counterclaim by First National in a factual setting similar to that in *Chase*.[45] After hearing the case a second time,[46] the Supreme Court, in a complex decision, allowed First National's counterclaim.[47] Although five members of the Court voted to reverse, only the opinion of Justice Rehnquist, joined by two other Justices, explicitly adopted the *Bernstein* exception. Rehnquist stated that the act of state doctrine does not apply when the "Executive Branch expressly represents to the Court that the doctrine would not advance the interests of American foreign policy."[48] Rehnquist was thus able to distinguish the Court's position from that in *Sabbatino* because of the presence in *First National* of the statement of State Department policy to the effect that the act of state doctrine should not be applied in "this or like cases."[49] Justice Rehnquist relied upon the assertion that "the Supreme Court has recognized the extensive competence of the Executive in the field of foreign affairs quite as emphatically as it has recognized the act of state

---

166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

44. 406 U.S. 759 (1972).

45. First National had loaned $15 million to a predecessor of Banco Nacional on July 2, 1958. United States government bonds were pledged as collateral. With only $5 million of the loan repaid (and the same amount of collateral retained), the Cuban government expropriated First National's branch offices in Cuba on September 16, 1960. A week later, First National sold the remaining collateral for approximately $1.8 million. Banco Nacional then brought suit to recover the excess, after which, First National counterclaimed. *Id.* at 760-61.

46. The district court granted summary judgment to First National, holding that *Sabbatino* had been legislatively overruled by the Hickenlooper Amendment. First Nat'l City Bank v. Banco Nacional de Cuba, 220 F. Supp. 1004, 1007 (S.D.N.Y. 1967). The court of appeals reversed, holding that the Hickenlooper Amendment did not govern the dispute, but rather, that Congress intended the amendment to apply to expropriated property subsequently marketed in the United States. Banco Nacional de Cuba v. First Nat'l City Bank, 431 F.2d 394, 399-402 (2d Cir. 1970). While a petition for certiorari was pending, the State Department advised the Supreme Court that the act of state defense should not be applied. The Supreme Court granted certiorari and remanded the case to the court of appeals for consideration of the State Department's views. First Nat'l City Bank v. Banco Nacional de Cuba, 400 U.S. 1019 (1971). The court of appeals adhered to its original judgment in a split decision. Banco Nacional de Cuba v. First Nat'l City Bank, 442 F.2d 530 (2d Cir. 1971). The Supreme Court again granted certiorari. First Nat'l City Bank v. Banco Nacional de Cuba, 404 U.S. 820 (1971).

47. 406 U.S. at 762.

48. *Id.* at 768.

49. The position of the State Department in *First National* was in marked contrast to its position in *Sabbatino*. In *First National*, the Solicitor General expressed a clear desire that the case be heard. *See infra* note 54.

doctrine."[50]

To avoid relegating the Judiciary to the whims of the State Department, Justice Rehnquist further distinguished *First National* from *Sabbatino* on the basis of a questionable analogy between the act of state doctrine and sovereign immunity, stating that both "are judicially created to effectuate general notions of comity among nations and among the respective branches of the government."[51] Relying upon *National City Bank v. Republic of China*,[52] Justice Rehnquist felt that First National could assert its counterclaim without regard to either sovereign immunity or the act of state doctrine.

Justice Douglas, expressing the same concern in his concurrence, concluded that a foreign sovereign voluntarily entering United States courts in order to avail itself of United States laws should not be able to invoke the act of state doctrine as a defense against counterclaims asserted against it. He found that the same considerations of "fair dealing" in *Republic of China*[53] were present in *First National*, and required "recognition of any counterclaim or setoff that eliminate[d] or reduce[d] that claim."[54] Justice Douglas asserted that such "fair dealing" dictates that the act of state doctrine be set aside when the counterclaim or set-off does not exceed the claim asserted by the sovereign.

Justice Powell, in his concurring opinion, felt that *Republic of China* was not dispositive because the Court in that case dealt with the question of jurisdiction over the parties to hear a counterclaim "asserted against a sovereign state voluntarily entering our courts," and not, as in *First National*, with the "justiciability" or "appropriateness of the subject matter for judicial resolution."[55] Powell felt that the Court in *Sabbatino* went too far; he stated that he would have joined the dissent had he been a member of that Court. Justice Powell would apply the act of state doctrine only upon a showing by the Executive or upon the court's own finding that a failure to apply the doctrine would interfere with "delicate

50. 406 U.S. at 767.

51. *Id.* at 762.

52. 348 U.S. 356 (1965).

53. *Republic of China* sharply curtailed the absolute approach to sovereign immunity by holding that a defendant, sued in a United States court by a foreign sovereign, may assert a counterclaim or setoff unrelated to the subject matter of the original suit. *Id.* at 364.

54. 406 U.S. at 772 (Douglas, J., concurring).

55. *Id.* at 773-74 (Powell, J., concurring).

foreign relations conducted by the political branches."[56]

Justice Brennan, in a dissent joined by three other Justices, accepted the Court's reasoning in *Sabbatino*. He rejected the view held by the majority that the act of state bar should be removed in cases where the Executive Department would not be subjected to embarassment. Characterizing that view as "mechanical and fallacious," Brennan stated that it necessitated an abdication of judicial responsibility.[57] Emphasizing the fact that the act of state doctrine is based upon "the proper distribution of functions between the judicial and political branches of the government on matters bearing upon foreign affairs,"[58] Brennan concluded that any determination of the legality of the act of a foreign sovereign within its boundaries would amount to a "political question," requiring judicial abstention when that act involved an area of customary law upon which there is a lack of consensus, as in the case of expropriation.[59]

Justice Brennan's argument appears to be valid, since, notwithstanding the consensus among nations that there exists a duty to compensate aliens upon the expropriation of their property, there is no consensus on either the rationale for such a duty or the appropriate standard of compensation. There appear to be at least three distinct positions on the degree of compensation thought necessary to compensate an alien for the expropriation of his property.[60]

The first of these positions is the traditional view, espoused by the United States and most Western nations. According to this view, there is an objective international law standard which mandates that the compensation be prompt, adequate, and effective.[61] The second view, supported by the Latin American nations, denies compensation to foreigners to the same extent that nationals of the expropriating state are denied such compensation.[62] Those sub-

---

56. *Id.* at 775.

57. *Id.* at 778 (Brennan, J., dissenting).

58. *Id.* at 785 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 (1964)).

59. *Id.* at 787-88.

60. *See generally* Fatouros, *International Law and the Third World*, 50 VA. L. REV. 738, 807-11 (1964).

61. This view is found in the Harvard Draft Convention on the International responsibility of States For Injuries to Aliens, *reprinted in* Sohn & Baxter, *Responsibility of States For Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545, 553 (1961). This view is also found in the RESTATEMENT, *supra* note 20, § 187.

62. This position can be analogized to the Calvo doctrine, which proposed equal treat-

scribing to the third view maintain that, at least with respect to non-discriminatory expropriations, the alien property owner must satisfy himself with "partial" compensation which would take into account the resources and paying capacity of the paying state.[63]

Actions taken by the General Assembly of the United Nations on the subject of compensation for expropriation of foreign-owned property further illustrate the lack of a coherent international standard.[64] United Nations General Assembly Resolution 1803 (XVII) includes a clause in paragraph 4 stating that the "owner [of expropriated property] shall be paid appropriate compensation . . . in accordance with international law."[65] Eleven years after Resolution 1803 was adopted, a completely different approach was taken at the XXVIII Session of the General Assembly. Through the adoption of Resolution 3171,[66] the General Assembly deleted *all* references to international law in the determination of appropriate compensation. Under Resolution 3171, only local law governs the determination of compensation, if any, and the method of payment. *Banco Nacional de Cuba v. Chase Manhattan Bank* reached the Second Circuit on appeal from the District Court for the Southern District of New York with the foregoing interpretations given the act of state doctrine and the "proper" standard of compensation to be given to aliens who undergo expropriation of their property.

III. THE CHASE OPINION

The court in *Chase,* in adjudicating the justiciability of Chase's counterclaims, amalgamated the views of the majority and concurring opinions in *First National,* concluding 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)

---

ment under which aliens could not claim any greater measure of protection than nationals. *See* C. CALVO, 6 LE DROIT INTERNATIONAL 231 (5th ed. 1885). *See generally* Garcia-Amador, *The Proposed New Economic Order: A New Approach to the Law Governing Nationalization and Compensation,* 12 LAW. AM. 1, 2-5 (1980).

63. *See* Rafat, *Compensation For Expropriated Property in Recent International Law,* 14 VILL. L. REV. 199, 201-08 (1969).

64. The court in *Chase* analyzed the actions taken by the United Nations General Assembly. 658 F.2d at 889-91.

65. G.A. Res. 1803, 17 U.N. GAOR, Supp. (No. 17) at 17, U.N. Doc. A/5217 (1962).

66. U.N. Doc. A/RES/3171 (XXVIII) (1974).

> 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.[67]

The court went on to hold that Chase's counterclaim was justiciable since all three conditions had been met.[68] Since *Chase* and *First National* were factually similar,[69] the *Chase* court apparently felt secure in applying the precepts set forth by the majority and concurring opinions in *First National,* despite the disparate views of the Justices in that case.[70] The three conditions enunciated in *Chase* that must be met to preclude application of the act of state doctrine emanate directly from the views expressed by Justices Rehnquist, Powell, and Douglas in *First National.* The first condition has its source in Justice Rehnquist's majority opinion in *First National.* The second condition arises from the view taken by Justice Powell while the third condition is that formulated by Justice Douglas.

Each of the three conditions set forth in *Chase* must be met individually to preclude application of the act of state doctrine. This is evidenced by other recent decisions of the Second Circuit. In *First National Bank of Boston v. Banco Nacional de Cuba,*[71] a suit decided by the Second Circuit on the same day that *Banco Nacional* was decided, suit was brought against Banco Nacional by the assignee of a national bank to recover unreimbursed payments made by its assigner on letters of credit issued by its Cuban branches prior to expropriation by the Cuban government. The court held that the act of state doctrine applies where an American bank initiates the claim and seeks affirmative relief.[72] Because the first condition was not satisfied, the act of state doctrine was applied. Similarly, in another case[73] decided on the same day as

---

67. 658 F.2d at 884.

68. *Id.*

69. Both cases involved counterclaims by American banks against Banco Nacional for damages as a result of the Cuban expropriation of their assets.

70. The *Bernstein* exception was adopted by Justices Rehnquist, Burger, and White. It was expressly rejected by the other six Justices. Justice Douglas' view that *Republic of China* controlled was not adopted by any other member of the Court, although two Justices saw that situation as analogous. Justice Powell's view that the act of state doctrine should be applied only when failure to apply it would interfere with foreign relations was his view alone.

71. 658 F.2d 895 (2d Cir. 1981).

72. *Id.* at 902.

73. Banco Nacional de Cuba v. Chemical Bank New York Trust Co., 658 F.2d 903 (2d

Banco Nacional, involving a suit by Banco Nacional against three United States trust companies to recover funds allegedly owed by the defendants, the Second Circuit held that the defendant's counterclaims were not justiciable since the record did not contain a *Bernstein* letter stating the views of the State Department. The failure to satisfy the first condition expressed in *Chase* thus triggered the application of the act of state defense.[74]

The three conditions necessary to preclude application of the act of state doctrine were met in *Chase.* Therefore, Chase was allowed to assert its branch counterclaim. The first condition was satisfied since there were three State Department communications pertinent to the Executive Branch's views.[75] The court went on to hold, in a rather perfunctory manner, that the second[76] and third[77] conditions were also satisfied.

In holding that the act of state doctrine did not apply to preclude Chase's counterclaim, the court necessarily had to, and indeed did, find that the issue of damages was justiciable.[78] The court concluded that the issue as to the justiciability of those damages was foreclosed by the decision in *First National.*[79] Consequently, any argument to the effect that there is no appropriate standard for compensation as a result of foreign expropriation is necessarily foreclosed. Such a finding is mandated whenever the third condition expressed in *Chase* is imposed, since "the very conclusion that justiciability turn[s] on the amount of the counterclaim necessarily contemplate[s] that valuation issues [are] to be decided."[80]

In determining Chase's damages for the expropriation of its branches, the court attempted to determine the "proper" standard

---

Cir. 1981). This was a consolidation of three cases.

74. *Id.* at 921.

75. 658 F.2d at 884. The first is the letter dated November 17, 1970, written during the *First National City Bank v. Banco Nacional de Cuba* litigation. *See supra* text at 336. A second letter was written by the State Department to Chase's counsel stating that the Department continued to hold the view expressed in the November 17, 1970, letter with respect to "this or like cases." The third communication was a June 11, 1980, confirmation by the Department that it still held the prior views as expressed in the two previous letters. The Department also stated that the *Chase* opinion appeared to be a case like *First National.*

76. *Id.* at 884-85.

77. *Id.* at 885.

78. *Id.*

79. *Id.*

80. *Id.*

of compensation.[81] The court also recognized that it had to apply principles of international law.[82] Despite the court's awareness of the lack of an explicit international standard of expropriation,[83] it nevertheless summarily concluded that the "instant case . . . presents fewer difficulties than some we might envision insofar as the selection of a standard of compensation is concerned."[84]

The court stated that there were four choices from which it could choose, namely, the three standards prevalent in current international law and a fourth standard of "appropriate" compensation.[85] The court, in concluding that "in the circumstances of the present case, there is probably no difference between the last two [appropriate compensation and full compensation],"[86] seems to have been overzealous in its attempt to define "appropriate compensation." The court's sole support for its conclusion is the position adopted by the *Restatement (Second) of the Foreign Relations Law of the United States.*[87] Notwithstanding the definition given in the *Restatement,* the court appears to have given little consideration to the international community's definition of "adequate compensation," especially in light of the United Nations resolutions subsequent to Resolution 1803. The court's position is further weakened by the fact that the United States ambassador, prior to the adoption of Resolution 1803, did not specify that "adequate" meant "full" compensation.[88]

The court went on to reject the view that no compensation

---

81. The court of appeals had previously determined that Chase could not assert its counterclaim as trustee for the owners of the railroad equipment since the "opposing" party requirement of Fed. R. Civ. P. 13(b) had not met. The requirement was not met because Banco Nacional did not sue Chase in its capacity as trustee or assert any claims against the trust. *Id.* at 893-94.

82. 658 F.2d at 887-88.

83. *Id.* at 891.

84. The court stated that "the overview of the actions of [the] members of the General Assembly presents at best, a confusing picture as to what the consensus may be as to the responsibilities of an expropriating state to pay "appropriate compensation,' and just what that term may mean." *Id.* at 891.

85. *Id.*

86. The "full compensation" standard is also known as the "Hull" doctrine. The term originates from a dispute between the United States and Mexico over Mexican agrarian and oil expropriations in 1938. United States Secretary of State, Cordell Hull, in a note dated April 30, 1940, to the Mexican Foreign Minister, stated the point of view of the United States government in these terms: "[T]he right to expropriate property is coupled with and conditional on the obligation to make *adequate, effective,* and *prompt* compensation" (emphasis added).

87. RESTATEMENT, *supra* note 20, §§ 187-88.

88. 658 F.2d at 889.

must be paid, stating that "we regard so much of the General Assembly resolutions as purport to allow expropriating states to determine the existence and scope of their duties to compensate aliens as not correctly reflecting internatonal law."[89] The court, in its cursory examination, appears to have ignored the overwhelming support the United Nations resolutions received.[90] The court also disposed of the view that an expropriating state need never pay more than partial compensation. The sole support for that conclusion is the fallacious reasoning underlying Banco Nacional's argument. Banco Nacional had argued that "because a negotiated settlement will not result in full payment, an expropriation victim has no right to more than partial compensation."[91] Notwithstanding the weaknesses in Banco Nacional's argument, the court apparently failed to take into account other arguments supporting the "partial compensation" standard.[92]

The court finally concluded that the "full compensation" standard is the proper standard to be used, at least in the instant case.[93] In effect, the court applied the traditional compensation standard ("full compensation") and concluded that, at least on the facts of the instant case, that standard is the same as the international standard of "appropriate compensation."

Although the Second Circuit applied the "full compensation" standard, it denied the amount awarded Chase by the district court for going concern value,[94] thus reducing the amount Chase could setoff against Banco Nacional's claim. The Second Circuit and the district court thus disagreed as to what constitutes "full compensation." The Second Circuit viewed the district court's award to Chase for going concern value as improper, since there was "no warrant for believing that, at a time when aliens were fleeing Cuba and many foreign businesses were being abandoned or nationalized, a potential buyer with his eyes open would have paid Chase a premium in anticipation of its future Cuban earnings."[95]

---

89. *Id.* at 891.

90. The vote on Resolution 3171 was 109 in favor, one against, and seventeen abstaining (including the United States).

91. 658 F.2d at 892.

92. *Id.* at 891.

93. *Id.* at 892.

94. *Id.* at 894. The court stated that the "term "going concern value' generally refers to the proposition that the prospective buyer of a business will be willing to pay a premium over the book value of the assets in the expectation that the earnings of the business will continue and that the new owner will receive that stream of earnings." *Id.* at 893.

95. *Id.*

Other than reducing the amount of setoff allowed Chase for the expropriation of its Cuban branches, the Second Circuit affirmed the decision of the district court in all other respects.[96]

IV. Conclusion

The Second Circuit had to face the compensation issue as a result of the holding in *First National.* According to *Sabbatino,* acts of expropriation were justiciable only if the international law was unambiguous. If the international law was only "customary," then counterclaims based upon a foreign nation's expropriation were thought to be "political," and thus, nonjusticiable. Under the holding in *First National,* however, counterclaims arising from foreign acts of state may be justiciable even in the absence of a dispositive international law of expropriation. Such a result is mandated, since, under the three conditions imposed by *First National,* and adopted by the court in the instant case, an act of foreign expropriation can fall outside the ambit of the act of state doctrine, even if the relevant law is ambiguous. Thus, the court in the instant case had to face the compensation issue and formulate a standard deemed to be compatible with the "international standard," of compensation, if indeed, one exists.

Perhaps the court was bolstered in its conclusions as a result of its original holding in *Sabbatino,* when it concluded that the expropriation in that case was illegal under international law because it not only failed to provide adequate compensation, but because it also involved a retaliatory purpose and discrimination against United States nationals.[97] The Second Circuit in *Sabbatino* contrasted the Cuban expropriation with one involving a "failure to pay adequate compensation . . . when the expropriation is part of a scheme of general social improvement."[98] The latter type of expropriation was said to have stronger support in the international community.

It is likely that the Second Circuit viewed the expropriation of Chase's assets with as much scorn as it did the expropriation in *Sabbatino.* For that reason, it presumably felt justified in using the

---

96. *Id.*

97. Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845 (2d Cir. 1962).

98. *Id.* at 866. Its decision rested on the argument that the act of state doctrine applied to the case, and consequently, barred the United States courts from examining the validity of the Cuban expropriation under international law.

"full compensation" standard.[99] In both cases, the Second Circuit avoided the question of compensation in the context of impersonal and general expropriations, presumably because the international law with regard to such types of expropriation was not as clear cut as it was with "wrongful," i.e. retaliatory and discriminatory expropriations. The Second Circuit was thus able to impose the "full compensation" standard in *Chase* without making any determination as to whether that standard is to be applied in cases involving expropriations that are not "retaliatory" and "discriminatory."

Perhaps the *Chase* decision was shaped more by the international climate than by any other factor.[100] The decision illustrates that courts in the future that decide cases involving foreign expropriations will have at least one, and possibly two, issues to resolve. First, they will have to decide whether the act of state doctrine should be applied, and second, if it is found that the doctrine should apply, the proper amount of compensation to award to the party whose property was expropriated.

KYLE A. SILVERMAN

99. In both cases, the expropriation of assets owned by United States banks resulted as an immediate response to the United States' enactment of a statute repealing the Cuban sugar quota. As a result, the expropriations were seen as retaliatory acts. They were discriminatory in that Canadian-owned banks were not expropriated until a later date.

100. *Sabbatino* occurred during a period of intense foreign crisis. In *Sabbatino*, the State Department urged the application of the act of state doctrine, while in subsequent cases, it urged the preclusion of the doctrine, presumably because of the lack of a foreign crisis.