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On July 6, 1960, the government of Cuba enacted Law No. 851, nationalizing all businesses in Cuba owned by United States citizens. In September 1960, acting pursuant to Law No. 851, Banco Nacional de Cuba, the central bank of Cuba, took over the two Cuban branches of Chase Manhattan Bank. Chase responded by selling $17.2 million in securities pledged by Banco Nacional to secure an outstanding $10 million loan from Chase and by retaining the surplus to offset the loss of its Cuban branches, which it valued at $8.6 million. Banco Nacional then brought suit in the Southern District of New York to recover $7.2 million in surplus collateral and its $2.5 million deposit with Chase. Chase counterclaimed for the expropriation of its Cuban branches, asking for a setoff against Banco Nacional's claim. The district court permitted the setoff for

2. The nationalizations that followed the Cuban Revolution have generated extensive litigation before the United States Foreign Claims Settlement Commission and United States courts. The Cuban nationalizations actually occurred in three major waves. The first wave began with the Agrarian Reform Act of 1959, which authorized the seizure of large land holdings in Cuba for distribution to landless peasants. The second occurred after Cuba enacted Law No. 851 in retaliation for President Eisenhower's decision to reduce Cuba's sugar import quota. The enactment of Laws Nos. 890 and 891 on October 13, 1960, marked the last wave. These last decrees primarily affected Cubans, because the Cuban government had seized most American-owned property under either the Agrarian Reform Act or Law No. 851. See Rafat, Legal Aspects of the Cuban Expropriation of American-Owned Property, 11 St. Louis U.L.J. 45, 45-48 (1966).
3. This Comment uses the word "expropriation" interchangeably with "deprivation" and "nationalization." In general, these terms refer to any "state action against private alien wealth over which States claim jurisdictional competence, totally or partially depriving alien owners of title or control." Dawson & Weston, "Prompt, Adequate and Effective": A Universal Standard of Compensation?, 30 Fordham L. Rev. 727, 727 n.1 (1962).
4. Chase asserted a second counterclaim as trustee for $4 million of railroad equipment that it had leased to two Cuban railroad companies nationalized on October 13, 1960. Both the district court and the appellate court rejected this counterclaim because Banco Nacional was not an "opposing party" to the counterclaim, as required by Fed. R. Civ. P. 13(b). Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 885-87 (2d Cir. 1981).

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Chase's loss of its Cuban branches, which the court valued at $6.9 million, and granted Banco Nacional judgment for $2.8 million. On appeal, Banco Nacional argued that international law does not require a sovereign state to pay full compensation for an act of expropriation pursuant to its sovereign power to reform its social and economic structure, and that the district court erroneously valued the expropriated branches according to their value as going concerns. The Court of Appeals for the Second Circuit rejected Banco Nacional's first objection to the lower court's judgment, holding that Chase was entitled under international law to compensation equal to the full value of its expropriated Cuban branches. The court nevertheless reduced Chase's setoff to $5.4 million in accordance with Banco Nacional's second objection, finding that Chase would receive full compensation under the above standard by valuing the expropriated branches at their net asset value rather than their going concern value. Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875 (2d Cir. 1981).

When a question of right based on international law is before a United States court, that court must ascertain and administer the international law as part of United States law. Treaties and custom are the principal sources of international law. The United States Supreme Court has recognized this by directing courts to apply "the customs and usages of civilized nations" as international law when no treaty exists.  

7. Id. at 892-93.
8. Id. at 894. The Cuban Assets Control Regulations have frozen all Cuban assets in the United States. See 31 C.F.R. § 515.201 (1981). As a result, the court ordered the proceeds of Banco Nacional's recovery paid over to federal authorities pursuant to the Cuban Assets Control Regulations. See 658 F.2d at 894.
10. 1 L. OPPENHEIM, INTERNATIONAL LAW § 19, at 29 (8th ed. 1955). This priority is implicitly recognized in article 38 of the Statute of the International Court which directs the International Court to first apply "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states." After conventional law, the statute then directs the International Court to apply "international custom as evidence of a general practice accepted as law." U.N. CHARTER, STAT. OF L.C.J. art. 38.
11. The Paquette Habana, 175 U.S. 677, 700 (1900). In The Paquette Habana, the masters of two Spanish fishing vessels sued to recover the proceeds of the sale of the vessels after their capture by a United States blockading squadron off the coast of Cuba during the Spanish-American War. The Court held that the seizure violated international law, declaring that "[b]y an ancient usage among civilized nations, . . . coast fishing vessels, pursuing their voca-
Since no treaty recognized by both the United States and Cuba controls the issue of compensation for expropriated property, a court must resort to the customary international law for the applicable standard of review. As a source of international law, custom refers to the habitual behavior of states acting under the conviction that such behavior is obligatory or proper under international law. Custom requires uniformity in the practice of states as evidenced by their domestic laws, treaties, and actions. It establishes an international norm when such uniformity of practice becomes sufficiently widespread that it creates reasonable community-wide expectations associated with legal prescription. The generally accepted view is, however, that customary international law is not binding on any state refusing to accept it. But when a customary practice establishes an international norm between two countries acknowledging it, it assumes the full force of international law.

During the twentieth century, scholars have identified at least five different standards of compensation for expropriated alien-owned property, all of which various countries have
claimed represent customary international law. The first standard, commonly identified with the Soviet bloc countries, denies the obligation of a nationalizing state to pay compensation to a deprived alien. The Soviet bloc countries consider the act of expropriation to be the exclusive internal concern of the nationalizing state, and hence not subject to review before international tribunals. Although this standard is rarely used outside the communist world, Mexico adopted essentially this position in its dispute with the United States over the Mexican agrarian and oil expropriations. Recognizing, however, the almost universal acknowledgment of the principle of compensation in the noncommunist world, most writers have concluded that a standard imposing no duty on a nationalizing state to pay at least some compensation is not sufficiently uniform to create the reasonable community-wide expectations necessary to acquire the status of customary international law.

17. The classical standard of customary international law which prevailed until the early decades of this century was one of “[r]estitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear.” Chorzow Factory (Ger. v. Pol.), 1928 P.C.LJ., ser. A., No. 17, at 47 (Judgment of Sept. 13).

18. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 185 reporter’s note 3 (1965) [hereinafter cited as RESTATEMENT].

19. The Hungarian delegate to the United Nations summed up the Communist position: “Any decision relating to whether and how much compensation should be paid was essentially an internal affair of the state concerned, which therefore was sole judge in the matter and could brook no outside interference whatever in the exercise of its sovereignty.” 17 U.N. GAOR C.2 (846th mtg.) at 297, U.N. Doc. A/C.2/SR.846 (1962).

20. Rafat, Compensation for Expropriated Property in Recent International Law, 14 VILL. L. REV. 199, 202 (1969). In 1925, acting under provisions of the Mexican Constitution, which declared that the Mexican government owned all national lands, Mexico enacted a land reform law limiting the amount of land which any foreign land owner could hold. As a result, land of American owners that exceeded the statutory limit was seized. By executive decree in 1938, Mexico also seized all foreign-owned oil properties in Mexico. The United States Secretary of State, Cordell Hull, intervened on behalf of the deprived American land owners and oil companies by sending a note to the Mexican Foreign Minister demanding “prompt, adequate, and effective payment” for the seized properties. Mexico argued that no international law obligated it to pay compensation for extensive takings of this nature and that any recovery would have to be determined under Mexican law. Mexico eventually settled the disputes with the United States by agreeing to pay $40 million to the American landowners and $24 million, plus interest, to the American oil companies. See Dawson & Weston, supra note 3, at 740-41. See also Hudson, The Expropriation of Oil Properties by Mexico, 32 AM. J. INT’L L. 519 (1938).


Even though the Soviet bloc countries claim to reject the principle of compensation, they do at least accept the need for compensation both in their domestic legislation and in their international agreements. See Seid-
The developing countries of Latin America generally espouse a position closely related to the Soviet bloc standard. These countries maintain that international law imposes no duty on a nationalizing state to pay compensation apart from its general duty under international law to grant a deprived alien property owner equality of treatment with its own nationals. Under this view, a claim for compensation arises under international law only if the nationalizing state pays compensation to its own nationals under similar circumstances. The continued vitality of the Latin American position is doubtful, however, due to Latin America's recent support of United Nations resolutions basing the right to compensation on internationally developed criteria as a matter of international right, rather than on purely local criteria as a matter of local right.

The United States adopted the so-called orthodox position enunciated in the celebrated note from Secretary of State Cordell Hull to the Mexican Foreign Minister during the controversy over the Mexican oil and agrarian expropriations. The Hull note stated that "under every rule of law and equity,

Hohenweldern, Communist Theories on Confiscation and Expropriation: Critical Comments, 7 AM. J. COMP. L. 541 (1959). See also G. WHITE, supra, at 233-34; Katzarov, The Validity of the Act of Nationalisation in International Law, 22 MOD. L. REV. 639, 647 (1959). Although the Soviet Union engaged in extensive nationalizations following the Bolshevik Revolution without acknowledging a duty to afford compensation for nationalized alien property, most of the nationalization laws enacted between 1945 and 1949 in East European communist countries did provide for some compensation. See Dawson & Weston, supra note 3, at 742. Virtually all these communist countries, including the Soviet Union, have entered into international claims settlement agreements with the United States and other countries under which they have agreed to pay some compensation for nationalized alien-owned property. See generally Doman, Postwar Nationalization of Foreign Property in Europe, 48 COLUM. L. REV. 1225 (1948); Doman, Compensation for Nationalized Property in Post-War Europe, 3 INT'L L. Q. 323 (1950). Most of these countries have also accepted a duty to compensate for takings of alien-owned property in their bilateral trade agreements with several Western countries. See Committee on Int'l Law, The Compensation Requirement in the Taking of Alien Property, 22 REC. A.B. CTRY N.Y. 195, app. III, pt. B (1967) (from 1945 to 1967 over 50 treaties between communist and Western countries recognized the duty to pay compensation).

22. RESTATEMENT, supra note 18, § 185 reporter's note 2. The equality of treatment standard has been the position of a number of authorities who conclude that there is no absolute rule of international law forbidding the taking of an alien's property without compensation. E.g., J. BRIEFLY, THE LAW OF NATIONS 284-65 (6th ed. 1953); S. FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW 210 (1953); Williams, International Law and the Property of Aliens, 9 BRIT. Y.B. INT'L L. 1 (1928).


no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor.\textsuperscript{25} The trinity of "prompt, adequate, and effective" compensation requires that compensation be paid within a reasonable time, in an amount equal to the full value of the property taken, and in a medium of exchange realizable by the deprived alien.\textsuperscript{26} In 1963, the United States codified the orthodox position in the Hickenlooper Amendment, which requires the President to suspend foreign aid to any country nationalizing property of United States citizens without provision for "speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof."\textsuperscript{27}

Some of the most preeminent scholars of international law\textsuperscript{28} contend that modern international claims settlement practice has modified the orthodox standard, at least in the context of the modern extensive expropriation in pursuance of a major reform of a country's social and economic structure.\textsuperscript{29} Under this fourth standard, customary international law requires payment of only partial compensation to the deprived


\textsuperscript{26} RESTATEMENT, supra note 18, at § 187.


\textsuperscript{29} The orthodox position should be rejected in the context of extensive deprivation. Actually, international law has probably never required strict adherence to the orthodox trinity in the case of extensive deprivation, at least as the drafters of the Hickenlooper Amendment understood the orthodox position. See Panel: The Taking of Property: Evaluation of Damages, 62 AM. SOC'Y INT'L L. PROC. 35, 43-44 (1968). Courts have modified the principle of "speedy" compensation so that deferred compensation is now accepted in the extensive deprivation context. See, e.g., N.V. Verinegde Deli-Maatschappijen v. Deutsch-Indonesische Tabak-Handelsgesellschaft, 28 LL.R. 16 (Bremen, W. Ger. Ct. App. 1959) (holding that the time and amount of compensation must be made in accordance with the conditions in the expropriating state). The lump sum settlement practice of the twentieth century and the large body of informed publicists who assert that partial compensation has become the modern norm undermine the principle that full compensation is required. See authorities cited supra note 28. And even the "effective" nature of payment is a matter of considerable contemporary uncertainty. See Dawson & Weston, supra note 3, at 739; Muller, Compensation for Nationalization: A North-South Dialogue, 19 COLUM. J. TRANSNAT'L L. 35, 48-49 (1981).
The partial compensation standard recognizes that, if the orthodox requirement of full compensation were applied to extensive expropriations, it would give the developed countries a veto over attempts by developing states to undertake fundamental reform of their economic and social structures. Moreover, adherents of partial compensation argue that their view is more consistent than the orthodox position with contemporary international practice. To substantiate their argument, partial compensation supporters rely on the predominant post-World War II practice of settling international claims controversies involving extensive expropriations through the use of the lump sum settlement device rather than through international adjudication. The postwar lump sum settlements between capital exporting states negotiating on behalf of their deprived nationals and the nationalizing states demonstrate that even the Western market states have settled for less than full value of the expropriated property in a substantial number of cases. Nevertheless, the partial compensation view is merely a generalization of past state practice rather than a statement of an accepted legal standard that is capable of reconciling postwar settlement agreements, which have ranged from minimal compensation in some cases to almost full compensation in others.

30. This was essentially the position argued by Banco Nacional in *Chase Manhattan*, 658 F.2d at 892.
33. Although the lump sum settlement practice has some antecedents in the prewar period, the unprecedented number of nationalizations marking the immediate post-World War II period in Europe established the practice. Since World War II, states have concluded more than 150 lump sum agreements representing about 95 percent of the international claims practice during the period. 1 R. LILICH & B. WESTON, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS 4 (1975).
34. *Id.* at 239. These agreements demonstrate that the lump sum compensation provided by Western countries has failed to meet the orthodox test of adequacy. For example, the United States-Rumanian settlement netted the United States $24,526,370, of which $22,020,370 came from Rumanian assets frozen in the United States, to satisfy claims adjudicated by the Foreign Claims Settlement Commission at $84,729,291. Dawson & Weston, *supra* note 3, at 743. The largest percentage recovered by postwar French lump sum settlements was 60.6 percent of "recognized claims." B. WESTON, INTERNATIONAL CLAIMS: POSTWAR FRENCH PRACTICE 179 (1971).
35. See Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d at 892. Not every lump sum settlement agreement resulted in partial compensation.
In 1962, the United Nations General Assembly debated these diverse standards in connection with Resolution 1803 entitled "Declaration on Permanent Sovereignty Over Natural Resources." The resulting compromise resolution created a fifth standard for measuring the extent of the duty under international law to pay compensation for expropriated property. Paragraph 4 of Resolution 1803 provides:

Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.

Approval was overwhelming; only France and South Africa voted against the resolution, with most communist countries, including Cuba, abstaining. Paradoxically, the compromise resolution purported to state a new requirement of "appropriate" compensation for expropriated property, while simultaneously reaffirming adherence to international law. This ambiguity allowed some Western diplomats to argue that the reference to international law reaffirmed the orthodox position and that appropriate compensation meant "prompt, adequate, and effective" compensation.

In 1974, the United Nations General Assembly adopted Resolution 3281, the Charter of Economic Rights and Duties of States. Article 2, paragraph 2(c) of Resolution 3281 declares that all states have the right to nationalize property within

For example, in the Anglo-Iranian Consortium Agreement of 1954, it is arguable that the Anglo-Iranian Oil Co. received full compensation for losses stemming from the 1951 Iranian nationalization of its oil industry. See, e.g., Rafat, supra note 20, at 232. On the other hand, in the Franco-Bulgarian settlement of 1955, the French recovered only 4.59 percent of the value of its claims against Bulgaria, as determined by France's Bulgarian claims program. B. Weston, supra note 34, at 179.

37. Id. (emphasis added).
their jurisdictions "in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent." In contrast to Resolution 1803, however, the General Assembly adopted Resolution 3281 with most Western countries, including the United States, opposed or abstaining. Resolution 3281 deleted the reference to international law contained in Resolution 1803 and appeared to authorize the nationalizing state to determine unilaterally the appropriate compensation.

Because four of the five standards discussed above in regard to expropriated property lack sufficient contemporary precedents or legal significance to constitute a modern customary practice of international law, the duty of appropriate compensation enunciated in Resolutions 1803 and 3281 is the only widely recognized limitation on state action against foreign-owned property. Although authorities disagree about the legal effect of General Assembly resolutions, few deny their impact on customary international law insofar as they create community-wide expectations that may produce legal prescription. That is, reasonable expectations are created not only by uniformities in the conduct of states, but also by uniformities in their statements or formal declarations. These declarations play an especially significant role in creating reasonable expectations if there is some correlation between what states say and what states do. Thus, when there is concomitant state practice, the norm generating influence emanating from a statement cast in the form of a formal United Nations declaration may create the expectation that it has become binding on states as customary international law.

41. Id.
42. The final vote was 120 for, 6 against, and 10 abstentions. 29 U.N. GAOR (2315th plen. mtg.) at 44-45, U.N. Doc. A/PV.2315 (1974) (provisional record).
43. But see deArechaga, State Responsibility for the Nationalization of Foreign Owned Property, 11 N.Y.U. J. INT'L L. & Pol. 179, 187-88 (1978) (argues that Resolution 3281 initially gives the nationalizing state the right to determine the appropriate compensation, and that an aggrieved party retains the right to declare an international controversy and to seek resolution under the appropriate international machinery agreed to by the parties).
44. See supra text accompanying notes 16-35.
47. A United Nations "declaration" is of greater solemnity and significance than a recommendation. In view of its greater importance,
In this regard, the lump sum settlements provide the required concomitant state practice to raise Resolutions 1803 and 3281 to the level of customary international law. In contrast to the partial compensation formulation of the lump sum settlements, the appropriate compensation formula provides an accepted legal norm that, because of its greater flexibility, can be reconciled with the entire range of lump sum settlements. Since there is, therefore, a state practice established by the lump sum settlements to justify reliance on an internationally recognized right to appropriate compensation, Resolutions 1803 and 3281 satisfy the conditions creating an international custom. Courts should acknowledge this state practice as evidence of a new customary international norm so that judicial adjudication will correspond with the expectations engendered by the practice.

The legal status of Resolutions 1803 and 3281 in relation to the contesting parties in a particular dispute depends upon whether both parties have accepted the resolutions as establishing a customary international norm applicable to the matter.
in dispute.\textsuperscript{52} Faced with a similar problem in a dispute over Libya's nationalization of properties owned by two international oil companies, an international arbitral tribunal resolved the question of the applicability of Resolutions 1803 and 3281 to the case by ascertaining the degree of support demonstrated by other Western and developing countries for each resolution.\textsuperscript{53} The arbitrator found that a majority of Western and developing countries supported Resolution 1803, whereas Resolution 3281 had no support among Western countries, and therefore concluded that only Resolution 1803 was applicable to the parties as customary international law.\textsuperscript{54}

Applying a similar approach to the parties in \textit{Chase Manhattan}, there is sufficient support for applying the Resolution 1803 formulation of appropriate compensation, but not the Resolution 3281 version. Cuba and most of the other communist countries abstained in voting for Resolution 1803\textsuperscript{55} and supported Resolution 3281.\textsuperscript{56} In contrast, most Western countries, including the United States, did not support Resolution 3281.\textsuperscript{57} Although it is arguable that Cuba should not be held to Resolution 1803 on the theory that a state's decision not to object to the practice of another state does not demonstrate that state's acceptance of the practice as law, Cuba's actual practice has been consistent with the principle of "appropriate compensation . . . in accordance with international law."\textsuperscript{58} Cuba's bilateral agreements with other Western states concerning the nationalizations arising out of the Cuban revolution establish that it has at least tacitly consented to Resolution 1803.\textsuperscript{59} Thus, in disputes between Western countries and Cuba, courts should use Resolution 1803 as the standard to determine a state's duty under international law to provide compensation for expropriated property.

No United States court prior to \textit{Chase Manhattan} had decided which of the competing positions represents the control-

\textsuperscript{52} See supra text accompanying note 14.
\textsuperscript{53} Texaco Overseas Petroleum Co. v. The Gov't of the Libyan Arab Republic, \textit{reprinted in} 17 Int'l Legal Materials 1 (1978) (Dupuy, Arb.).
\textsuperscript{54} Id. at 29-30.
\textsuperscript{55} See supra text accompanying note 38.
\textsuperscript{57} See supra text accompanying note 42.
\textsuperscript{58} See supra text accompanying note 37.
\textsuperscript{59} See, e.g., infra note 94. For a discussion of tacit consent as a basis for binding a state to a customary practice, see 1 L. OPPENHEIM, supra note 10, § 16, at 25.
ling standard in international law. The Chase Manhattan court declined to apply either the Soviet bloc or Latin American standards, because they conflict with the more generally accepted view that international law requires the payment of some compensation. The court also rejected the partial compensation standard, because it relies on negotiated lump sum agreements that are based on compromise rather than adjudication. According to the court, the use of negotiated agreements in determining a compensation standard would be analogous to using the results of settlements in domestic tort cases to determine the tort victim's substantive rights. The court also reasoned that a partial compensation standard would deprive the nationalizing state of any incentive to resolve expropriation disputes in a nonadjudicative manner and, hence, lower still further the amount recovered by claimant states through negotiated agreements. Regarding whether international law required full or appropriate compensation, the court concluded that appropriate compensation probably "would
come closest to reflecting what international law requires." But the court did not rest its decision on this conclusion, because it found full and appropriate compensation indistinguishable in this case. Reasoning that appropriate compensation did not necessarily exclude the possibility of requiring full compensation in some cases, the court decided that here full compensation was appropriate. Although the court denied Chase as much as it had sought, the court nevertheless considered the bank fully compensated in the sense that its compensation was "neither more nor less than [was] appropriate in the circumstances."

On the question of the branches' value, the court concluded that full compensation would not include a premium for the going concern value. Given the economic and political conditions in Cuba at the time of the expropriation, including measures enacted to abolish private banking in Cuba, the court considered it unlikely that the branches would have been able to make a profit, and, hence, an award based on the future earnings of the branches would be "highly speculative."

Although it correctly rejected the other standards, the Second Circuit in Chase Manhattan failed to give proper consideration to the term "appropriate" as used in Resolution 1803. The court's sole contribution was the obvious observation that the terms "appropriate" and "full" compensation were not necessarily mutually exclusive. The court avoided, however, the more difficult task of identifying the factors that place a case in

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65. Id.
66. Id.
67. Id. at 893.
68. The going concern value of an on-going enterprise is a separate measure of its value, apart from alternative measures such as book value and replacement cost. An enterprise's value under the going concern method is measured by the present value of the income stream which that enterprise is expected to generate over the foreseeable future. The present value is calculated by discounting the expected earnings of the enterprise. This may be expressed as follows:

\[
P = \frac{E}{(1 + r)^i}
\]

E equals the earnings of the enterprise over i periods and r equals the rate of return on an investment in that enterprise. Weigel & Weston, supra note 32, at 21. The premium for going concern value at issue in Chase Manhattan refers to the excess of the amount determined under the above formula over the market value of the branches' net assets. See Banco Nacional de Cuba v. Chase Manhattan Bank, 505 F. Supp. 412, 460 (S.D.N.Y. 1980), modified, 658 F.2d 875 (2d Cir. 1981).
69. 658 F.2d at 894.
70. Id. at 892.
this unique category, which overlaps both appropriate and full compensation.

The court should have started its analysis by examining the term "appropriate" in the context of Resolution 1803. The Resolution provides that appropriate compensation shall be paid "in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law." This phrase illustrates the delicate balance sought by the drafters between preserving the sovereign right of states to control their natural resources and protecting the rights of foreign investors. The predominant role of the domestic laws of the nationalizing state is indicated by the requirement that the compensation be "in accordance" with the nationalizing state's laws. In addition, the history of the Resolution emphasizes that the law of the nationalizing state applies in any dispute concerning the amount of compensation payable. The sovereignty of the nationalizing state, however, is limited by the requirement that compensation also comply with international law. Nevertheless, this does not mean that compensation must be prompt, adequate, and effective. Resolution 1803 was a compromise that did not adopt

71. See supra text accompanying note 37.

72. For example, the United Nations representative from the United Kingdom described Resolution 1803 as "a creditable effort to achieve a proper balance between safeguarding the sovereign rights of people over their natural resources and the legitimate interests of those prepared to invest capital." 17 U.N. GAOR C.2 (834th mtg.) at 228, U.N. Doc. A/C.2/SR.834 (1962).

73. Resolution 1803 stemmed from a draft submitted by the Chilean delegation to the United Nations Commission on Permanent Sovereignty Over Natural Resources, established by G.A. Res. 1314, 13 U.N. GAOR Supp. (No. 18) at 27, U.N. Doc. A/4090 (1958). The Chilean representative to the Commission, Mr. Schweitzer, described the significance of the domestic law of the nationalizing state to the determination of compensation. He believed that the resolution would require "that disputes concerning compensation . . . be settled in accordance with the laws of the country in which the nationalization, expropriation, or requisitioning was carried out." 17 U.N. GAOR Commission on Permanent Sovereignty Over Natural Resources (29th mtg.) at 3, U.N. Doc. A/AC.97/SR.29 (1962).

The third sentence of paragraph 4 of Resolution 1803, see supra text accompanying note 37, requires that in any controversy the national jurisdiction of the expropriating state shall be exhausted. This prescription presumably adopts the "local remedies" rule, requiring aggrieved parties to exhaust their local remedies before they may invoke the jurisdiction of the international courts. This implies, therefore, that international remedies are preserved. See 17 U.N. GAOR C.2 (846th mtg.) at 298, U.N. Doc. A/C.2/SR.846 (1962) (statement of Mr. Rajaonarivony). The rule of decision in such cases, however, should be provided by the domestic law of the nationalizing state, subject only to the requirement that the compensation so determined also conform to international standards. See infra note 75 and accompanying text.

74. See supra text accompanying note 39.
the position of either the developed or developing countries. The reference to international law requires only that the compensation be in accordance with the principles of customary international law.\textsuperscript{75} As the lump sum settlement practice has demonstrated, customary international law has demanded less than prompt and adequate compensation for most of this century.\textsuperscript{76}

The reference to municipal and international law in defining appropriate compensation is a by-product of an attempt by the drafters to reconcile the twin aims of Resolution 1803. These aims are to accommodate "the national interest of every state in exercising authority over and regulating the use of all forms of property within its territorial competence, and the common interest of the international community in fostering the maximum production and flow of wealth across state boundaries."\textsuperscript{77} These twin policy objectives, however, are manifestly conflicting, because the best way to stimulate the flow of capital across state boundaries is to provide full compensation,

\textsuperscript{75} The Chilean representative offered the only explanation of the words "in accordance with international law" during the United Nations debate of Resolution 1803. The following statement responded to a Soviet argument that the Chilean draft unduly limited the sovereignty of states:
As to the right to compensation for nationalization, expropriation or requisitioning, the proposal merely indicated that that right should be exercised in accordance with the domestic law of the state concerned and 'in accordance with international law.' A draft resolution, however, had to include such a clause, for the General Assembly had recommended that the sovereign right of every State to dispose of its wealth and its natural resources should be respected also in conformity with international law.

\textsuperscript{76} The role of international law in the determination of compensation was also debated in connection with Resolution 3281. See supra text accompanying notes 40-43. The developed countries argued that the decision of the expropriating country must satisfy standards imposed by international law, including "generally accepted practice as well as bilateral or multilateral agreements concluded by the expropriating country." 29 U.N. GAOR C.2 (1638th mtg.) at 384, U.N. Doc. A/C.2/SR.1638 (1974).

\textsuperscript{77} Dawson & Weston, supra note 3, at 728 (footnote omitted). The mandate to the Commission on Permanent Sovereignty Over Natural Resources was to make recommendations for the strengthening of that sovereignty, but that, in carrying out its mandate, "due regard [was to] be paid . . . to the importance of encouraging international co-operation in the economic development of underdeveloped countries." G.A. Res. 1314, 13 U.N. GAOR Supp. (No. 18) at 27, U.N. Doc. A/4090 (1958).
whereas partial or no compensation is the best way to promote the interest of the state exercising its sovereign right of nationalization.\textsuperscript{78} A number of writers have suggested that the determination of the appropriate compensation involves a two-step analysis.\textsuperscript{79} The first step involves valuing the expropriated property according to a measure that translates the victim's loss into monetary terms. This decision—the valuation decision—should promote the common interest of encouraging foreign investment.\textsuperscript{80} The second step requires a determination of the compensation that the nationalizing state owes the deprived alien for the previously valued loss. This decision—the compensation decision—should reconcile the objective of encouraging foreign investment with the competing objective of protecting the nationalizing state's right to exercise sovereignty over property within its borders.

The first step, the valuation decision, has often been as controversial as the compensation decision,\textsuperscript{81} because the former is as analytically important to the final liability of the nationalizing state as the latter. Most developed states in lump sum negotiations argue that international law still adheres to the orthodox full compensation standard.\textsuperscript{82} To accommodate the orthodox requirement of full compensation demanded by developed states, most developing states have sought a valuation of expropriated property recognizing nontechnical social and political variables, such as whether the nationalizing state is a capital-importing or a capital-exporting state.\textsuperscript{83} Hence, the debate over valuation standards centers on whether such nontechnical variables should be considered in the valuation decision. If, however, only appropriate compensation is required, rather than compensation representing full value, the valuation decision should exclude nontechnical factors, because they can be more appropriately considered in the compensation decision.\textsuperscript{84} Under a two-step analysis, the valuation decision merely establishes a benchmark from which the nontechnical


\textsuperscript{79} See, e.g., Smith, \textit{Real Property Valuation for Foreign Wealth Deprivation}, in 1 \textsc{The Valuation of Nationalized Property} 134-37 (R. Lillich ed. 1972); Muller, supra note 29, at 38.

\textsuperscript{80} See infra notes 87-91 and accompanying text.

\textsuperscript{81} See infra notes 87-91 and accompanying text.


\textsuperscript{83} See Muller, supra note 29, at 42-44.

\textsuperscript{84} See id. at 44-46.

\textsuperscript{84} See Smith, supra note 79, at 136.
socioeconomic or political variables, the compensation factors, are deducted. This two-step approach allows the adjudicator to isolate and to consider separately the factors essential to the accomplishment of the twin policy aims underlying "appropriate compensation . . . in accordance with international law." 85

Even if the valuation standard excludes nontechnical variables, the question remains as to which technical valuation standard to adopt for valuing nationalized property. There are essentially four standards: fair market value, replacement cost, book value, and going concern value. 86 If the valuation decision is to foster the maximum flow of wealth abroad, the loss caused by the expropriation of a foreign investment must be measured by the real loss to the investor. The real risk that concerns foreign investors is the risk of losing the opportunity to do business in the future, an opportunity that expropriation denies them. 87 Replacing lost assets through some measure of replacement cost or book value method does not restore the lost opportunity. 88 A market valuation is likewise inadequate, because a competitive market for expropriated assets does not likely exist. 89 Granting the foreign investor going concern value, however, assures the investor the expected fruits of the investment. 90 Only going concern value maximizes the investor's incentive to invest abroad, enhancing the probability that wealth will flow across state boundaries. 91

After determining the value of the expropriated property, the second step is to decide how much of that value is appropriately compensable given the socioeconomic and political factors involved in the expropriation. 92 Because nationalizations of foreign-owned property occur under a variety of circum-

85. See supra text accompanying note 37.
86. Muller, supra note 29, at 39.
87. Weigel & Weston, supra note 32, at 29-32.
88. Id. at 16-17.
89. Id. at 17-18.
90. Id. at 33.
91. The United States Foreign Claims Settlement Commission (FCSC) has relied upon the going concern method to value banks expropriated by Cuba. Lillich, The Valuation of Nationalized Property by the Foreign Claims Settlement Commission, in 1 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 112-15 (R. Lillich ed. 1972). In the case of First National Bank of Boston, the bank argued before the FCSC that profits of a bank are generated less by its physical assets than by the quality of intangibles that do not appear on a balance sheet, because banking is a service-type business. Freidberg & Lockwood, The Measure of Damages in Claims Against Cuba, in 1 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 126 (R. Lillich ed. 1972).
92. See supra text accompanying note 84.
stances, the compensation decision must be flexible and pragmatic. Furthermore, it should attempt to mitigate the harshness that payment of full value would have upon a state's right to nationalize property within its territory. One of the problems is that the compensation decision comprises factors that are difficult to translate into monetary terms. The lump sum agreements, however, are useful in making this compensation decision. They are unique sources of precedent that both judicial and diplomatic decision makers should rely upon for guidance regarding the weight to assign these nontechnical factors. Richard Lillich and Burns Weston found that from the onset of World War II to 1971 there were over 150 agreements

93. Dawson and Weston discuss these factors as follows:

Such inquiry should be essentially pragmatic: What, if any, compensation has been offered by the depriving State and in what form? Will the preferred compensation be sufficient to encourage and maintain investment in the same or other sectors of the depriving State if desired? What is the fair market value of the property taken? What valuation methods were used and was property depreciation considered? Should the value of intangible property be included within the settlement and, if so, of which types? How many alien claimants are involved? Is the depriving State a "capital importing" or a "capital exporting" nation? Is the claimant State a "capital importing" or a "capital exporting" nation? What amounts of foreign exchange are available in each country? What weight should be given to possible currency devaluations? What is the gross national product of the depriving State? What is the earning capacity of the depriving or claimant State vis-a-vis other nations? Has the depriving State a monocultural economy; if so, what are the relevant world market fluctuations? Are nationals of the taking State also deprived? Does the constitution of the depriving State require compensation for its own nationals? Would high compensatory demands be prohibitive to the depriving State? Is it in the interest of the claimant State to promote the social and economic welfare of the depriving State? How diverse are the investments of the claimants State's nationals and how many of these are subject to possible future seizure? Are there assets which the claimant State can seize for compensatory purposes? Can the dispute be partially solved by trading arrangements? Are future profits of the nationalized industry foreseeable and could some indemnification be readily derived therefrom? Is the tax structure of the depriving State such as to enable compliance with the compensation claims? Of what character are the current political relations between the two nations? Given current national sensitivities on both sides, could a more equitable settlement be obtained at a future time? Is a final settlement sought or may the issues be subsequently reopened?

Dawson & Weston, supra note 3, at 751-52.

94. In adjudicating United States claims arising out of the Cuban Revolution, the French-Cuban agreement of 1967 provides a relevant precedent to guide decision makers. Under that agreement, France received 10,861,532 F as final liquidation of all French claims arising out of expropriations by the Cuban government after January 1, 1959. In return, France released Cuba from all further responsibility for claims based on the property, rights, and interests affected by the agreement, and Cuba released all French nationals indemnified under the agreement from all obligations toward the Cuban government con-
representing the judgments of responsible public officials from more than thirty nations on the amount of appropriate compensation in various circumstances. By following the precedent of past agreements, courts would provide uniformity between judicial and diplomatic decisions regarding the appropriate compensation in similar factual situations.

Applying the appropriate compensation standard in a two-step analysis, in which the claimant's compensation equals the full value of its expropriated property less nontechnical variables, ensures that international claims adjudicators will consider these variables separately from the valuation decision. This approach will facilitate international agreement on the proper valuation standards and compel courts to articulate critical nontechnical factors. Moreover, as opposed to a single-step standard requiring full compensation, a two-step standard requiring only appropriate compensation provides courts with the flexibility required to shape an equitable accommodation between the conflicting interests of the claimant and the nationalizing state. Such flexibility is necessary to permit international claims adjudicators to assess the difference in equities between an expropriation of a foreign investment made when there was a colonial or quasi-colonial relationship between the nationalizing state and the investor's state and one made when the nationalizing state was free and independent. Furthermore, viewing appropriate compensation as a two-step process is consistent with current international law as reflected in United Nations resolutions and the practice of states through

cerning such property, rights, and interests. See 2 R. LILlich & B. WESTON, supra note 33, at 343.

A final assessment of the agreement would require knowledge of the adjudicated value of the claims paid by the French Commission. The percentage of adjudicated value paid under past French commissions, however, has varied from a low of 4.59 percent in the case of the Bulgarian claims program to a high of 60.6 percent in the case of the Czechoslovakian claims program. B. WESTON, supra note 34, at 179. In addition, any assessment of the French-Cuban agreement would require an analysis of the value to assign for the waiver of all Cuban claims against French nationals compensated under the agreement. See 1 R. LILlich & B. WESTON, supra note 33, at 219-28.

95. See note 33 supra.


97. Lillich suggested that subsequent United Nations actions may have weakened a state's international obligation to pay appropriate compensation for nationalized property. 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 186-90 (R. Lillich ed. 1975). Since Lillich compiled his collection of essays, however, there have been
lump sum settlements. Finally, the two-step analysis is not inconsistent with United States recognition of the orthodox position, since the orthodox requirement of adequate compensation does not now, and probably never did, require the payment of the full value of the expropriated property in all cases.

The principal flaw in the Second Circuit's analysis was its failure to distinguish between the valuation and compensation decisions. Although the court concluded that Chase was entitled to full compensation for the expropriation of its Cuban

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two significant developments that may have changed his pessimistic assessment on the future of an international right to appropriate compensation. The first was the passage of Resolution 3281, which recognized the duty of states to fulfill their international obligations in good faith, including the payment of appropriate compensation for nationalized foreign property. See supra text accompanying notes 40-43. But see Brower & Tepe, The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law, 9 INT'L LAW 295, 305 (1975) (argues that substitution of the precatory "appropriate compensation should be paid" in Resolution 3281 for the mandatory "shall be paid" of Resolution 1803 reduces the international obligation to pay whatever compensation the nationalizing state subjectively thinks appropriate without regard to international standards). The second involves the on-going efforts of the United Nations Intergovernmental Working Group to produce a Code of Conduct for Transnational Corporations, which will include a provision relating to the duty of states toward transnational corporations upon nationalization of their property. A draft of the provision formulated by the Chairman of the Working Group provides:

In the exercise of their sovereignty, States have the right, acting in the public interest, to nationalize property in their territory. Fair and equitable treatment of transnational corporations by the countries in which they operate includes payment of just compensation in the event of nationalization or other taking of their property, such government action being undertaken under due process of law, in accordance with national laws, regulations and administrative practices without discrimination between enterprises in comparable situations and with full regard to international obligations and contractual undertakings to which States have freely subscribed.

6 U.N. ESCOR Commission on Transnational Corporations para. 52, U.N. Doc. E/C.10/AC.2/8 (1978) (footnote omitted). In explaining the phrase "just compensation," the Chairman stated: "The adjective 'just' refers to the final outcome of the compensation process rather than to the particular methods and criteria employed. A just result is to be sought taking into account all relevant circumstances in each case." Id. Annex para. 6. Thus, the Chairman's use of the adjective "just" in place of appropriate was not intended to make a departure from the all-the-circumstances test embodied in the concept of appropriate compensation. Nor does the draft dilute the duty of the nationalizing state to adhere to its international obligations in determining the amount of compensation.


98. See supra text accompanying notes 48-51.

99. See, e.g., RESTATEMENT, supra note 18, at § 188(2), which defines "adequate compensation" as requiring compensation equal to full value "unless special circumstances make such requirement unreasonable."
branches, the court's valuation of those branches was inconsistent with generally accepted valuation techniques. In measuring full value, courts traditionally disregard the impact on the value of the expropriated assets caused by acts of the nationalizing state which result in depressing the value of the nationalized enterprise. The court could have calculated the branches' going concern value by reflecting economic conditions in Cuba unaffected by the Cuban government's nationalization plans. The court's rejection of going concern value, however, was putatively based on conditions in Cuba that were partially due to conduct of the Cuban government, which made the nationalization of American banks in Cuba predictable long before the actual taking occurred. The court's valuation decision, therefore, necessarily reflected an underlying, but unarticulated, awareness of the existence of nontechnical factors making payment of going concern value unfair given Cuba's social and economic conditions.

The court's failure to recognize the two-step nature of the inquiry implicit in the concept of appropriate compensation led the court to the erroneous assumption that appropriate compensation was full compensation in this case. By not distinguishing between valuation and compensation, appropriate compensation will formalistically appear equal to full compensation. When nontechnical factors implicitly influence the valuation decision, a court may claim that the victim is receiving full compensation, although the real value of the expropriated property is somewhat greater than the compensation received.

The court's avowed adherence to full compensation, despite its apparent awareness of the existence of nontechnical variables, was in part dictated by the court's rejection of the

100. In defining the term "full value," the Restatement states:
So far as practicable, full value must be determined as of the time of 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. This does not require, however, disregard of the effect on market values of the state's general power to regulate the use of property or the conduct of business operations.

Id. at § 188 comment b.

101. For example, the district court used a going concern value and calculated that value on the basis of weighted average deposits, which reflected the general economic deterioration in Cuba during 1959-60. The court used a weighted average to avoid reflecting the decline in the branches' deposits caused by anticipation of the nationalization of foreign banks, which by mid-1960 had become obvious to the Cuban public. See Banco Nacional de Cuba v. Chase Manhattan Bank, 505 F. Supp. 412, 461 (S.D.N.Y. 1980).

102. 658 F.2d at 893-94.
lump sum agreements as guideposts in the field of international compensation. In support of its rejection of the lump sum settlement practice, the court relied on an analogy between such lump sum settlements and domestic tort settlements, which, in the court's opinion, are an inadequate basis for determining litigants' substantive rights. Unlike domestic systems characterized by independent decisionmaking and effective enforcement mechanisms as means to protect substantive rights, international law relies primarily on the parties themselves for decisionmaking and enforcement of substantive rights. Thus, because the vital role of lump sum agreements in creating substantive rights under international law is fundamentally different from the litigation-avoidance practice of domestic tort settlements, the Chase Manhattan court's analogy was inappropriate.

Although the Second Circuit probably reached the correct result in Chase Manhattan, it did so without clearly enunciating an analysis supporting that result. Moreover, the decision avoided the difficult task of formulating a workable process for determining appropriate compensation. By using the two-step formula discussed in this Comment, courts can better identify the nontechnical variables that influence the amount of compensation to which a claimant is entitled for expropriated property.

103. See supra text accompanying note 63.