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NOTE, THROWING A MONKEY WRENCH INTO THE WHEELS OF INTERNATIONAL FINANCE: *WELLS FARGO ASIA LTD. v.* *CITIBANK, N.A.*

*Edmund W. Sim**

I. INTRODUCTION

Since World War Two, American banks have greatly expanded their foreign operations.¹ As the scope of United States political, military, and economic influence stretched into both familiar and unfamiliar lands, American financial institutions followed.² During this expansion, U.S. banks initially concentrated their efforts in Western Europe and the industrialized countries of the Pacific Rim.³ As competition with foreign banking institutions increased, however, American banks seeking new markets moved into developing nations.⁴ Unfortunately for the American financial community, as the United States and its allies suffered from military and economic reversals, so did U.S. banks. In Cuba, Vietnam, Mexico, and other Third World nations, governments seized bank assets and restricted bank operations, resulting in much litigation.⁵ Litigants have contended that for-

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1. U.S. commercial banks opened their first overseas office in 1887. P. OPPENHEIM, *INTERNATIONAL BANKING* 20 (5th ed. 1987). By 1950, 7 member banks of the Federal Reserve System had 95 overseas branches. U.S. Board of Governors of the Federal Reserve System, 37th Annual Report 32 (1950). In 1960, 8 member banks controlled 124 foreign branches. U.S. Board of Governors of the Federal Reserve System, 47th Annual Report 93 (1960). As of December 31, 1988, 147 member banks operated more than 854 branches outside U.S. borders. U.S. Board of Governors of the Federal Reserve System, 75th Annual Report 178 (1988).

2. See P. OPPENHEIM, *supra* note 1, at 20 (stating that U.S. banks now have branches in almost every foreign market).

3. As of 1984, U.S. banks maintain one third of their 2,246 foreign offices in the Federal Republic of Germany, the United Kingdom of Great Britain and Northern Ireland, Belgium, and Spain. About fifteen percent of American foreign offices operate in Hong Kong, Australia, and Japan. Hicks, *Citicorp Has Largest Foreign Banking Network*, *Am. Banker*, Oct. 24, 1984, at 2, col. 1.

4. Note, *Foreign Branches of U.S. Banks — A Proposal for Partial Suspension During Periods of Unrest*, 7 *FORDHAM INT'L L.J.* 118, 119 (1983) [hereinafter *Partial Suspension*] (describing the expansion of American banks abroad); see Trigaux, *1913 Act Unleashed Banks from U.S. Shores*, *Am. Banker*, July 28, 1983, at 8, col. 1 (describing U.S. banking operations in less developed countries).

5. See, e.g., *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (involving the right to set off claims for expropriated assets against the Cuban government); *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir. 1981) (plaintiffs demanded repayment in New York for deposits in South Vietnamese branch after the North

eign countries have limited the outflow of their currencies, have greatly devalued exchange rates, and have outright expropriated the bank branch and its assets. Recent cases have focused on these and related issues, including choice of law and foreign affairs questions.

The United States Supreme Court has recently granted *certiorari* to *Wells Fargo Asia Ltd. v. Citibank, N.A.*, a case which poses the question of which law governs transactions involving "Eurodollars," or U.S. dollars carried in banking institutions outside of the United States.⁶ The case also provides the High Court with the opportunity to adopt a uniform approach to foreign bank branch liability cases.⁷ Facially, it resembles previous cases: a Third World government's actions (a Philippine banking regulation) prevent an American bank from honoring a deposit request. Still, while *Wells Fargo* raises interesting issues similar to those raised in earlier cases, the Court's decision in this case could have more far-reaching effects. First, a resolution of this case could force the Eurodollar banking system to shift from its currently informal transactional methods to a more mechanical and less flexible process.⁸ Second, the Court could use the case to end the current conflicts as to whether and how the Federal Courts of Appeals should consider the Act of State doctrine in determining the proper situs test for cases involving actions by foreign governments that affect intangible assets.⁹

This note attempts to illustrate concisely the issues and potential ramifications of *Wells Fargo*. After describing the complex factual and procedural histories of the case, the note briefly surveys the various approaches to the Act of State doctrine and suggests that the Court

Vietnamese takeover of Saigon), *cert. denied*, 459 U.S. 976 (1982); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985) (involving drastic change in Mexican exchange rates after Mexican government's nationalization of banks); *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47 (2d Cir. 1965) (Iraqi government sought the assets of deceased Iraqi King Faisal II, whose assets it claimed to have expropriated), *cert. denied*, 382 U.S. 1027 (1966); *Allied Bank Int'l v. Banco Credito Agrícola de Cartago*, 733 F.2d 23 (2d Cir. 1984), *rev'd and remanded on rehearing*, 757 F.2d 516 (U.S. banks sued for repayment of debt owed by Costa Rican banks, who claimed that their ability to pay was precluded by Costa Rican government's suspension of all debt repayments), *cert. denied*, 473 U.S. 934 (1985).

6. See *infra* note 16 and accompanying text.

7. *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 852 F.2d 657 (2d Cir. 1988), *cert. granted*, 110 S. Ct. 537 (Dec. 4, 1989) (No. 88-1260).

8. The Eurodollar interbank lending market is mostly undocumented. Usually, dealers arrange transactions for banks by means of telephone or telex communications, followed by an exchange of confirmations between the banks involved. R. WEISWEILLER, *MANAGING A FOREIGN EXCHANGE DEPARTMENT* 3 (1985).

9. See Comment, *The Continued Viability of the Act of State Doctrine in Foreign Branch Bank Expropriation Cases*, 3 AM. U.J. INT'L L. & POL'Y 99, 127 (1988) [hereinafter *Foreign Branch Expropriation*] (noting that the current disagreement among and within the Federal Courts of Appeals on the appropriate situs determination test leads to disparate results and promotes forum shopping).

should consider Act of State issues in *Wells Fargo*. Next, it examines the lower courts' analyses of the case and what effects their rulings would have if the Court were to adopt them. Due to the resulting legal confusion that the lower courts' decisions would wreak on the Eurodollar community, *Wells Fargo* should not remain as precedent. Currently, *Wells Fargo* would subject these deposits to the laws of New York. The Court should reject the lower courts' narrow reasoning and instead decide *Wells Fargo* in light of the Act of State issues involved, especially by addressing questions of debt situs determination raised by previous cases. Upon examination of the various approaches to debt situs determination, the Court should adopt the incidents of the debt test, an approach that is both more equitable to bank expropriation cases and more consistent with the tenets of the Act of State doctrine. Since banks have always assumed that Eurodollar deposits are situated, or have their "situs," in the host country of a branch office, the situs of the debt in *Wells Fargo* should be Manila. Philippine law would then decide the case. Yet, even if Philippine law were to govern the outcome of *Wells Fargo*, plaintiff Wells Fargo Asia Limited ("WFAL") might still prevail.

II. FACTS

Wells Fargo Asia Limited operates as a Singapore-based subsidiary of Wells Fargo Bank, N.A., the San Francisco-based bank.¹⁰ With operations that span the globe, Citibank, N.A., ranks as the largest bank in the United States.¹¹ On June 10, 1983, Citibank's branch office in Manila ("Citibank/Manila") informed an independent broker, Astley & Pearce, that it wanted to borrow U.S. dollars that day via the interbank lending market. Through oral negotiations with Astley & Pearce,¹² WFAL placed two six-month non-negotiable U.S. \$1,000,000 deposits with Citibank/Manila.¹³ These deposits were to earn ten percent interest and to mature six months later on December 9 and 10, 1983.¹⁴ At the time of deposit, deposits made in domestic U.S. banks received 8.85 percent interest, while Eurodollar deposits

10. As of June 30, 1988, Wells Fargo Bank, N.A., was the eighth largest commercial bank in the United States, with \$33,328,533,000 in deposits. 1989 AMERICAN BANKER TOP NUMBERS 12.

11. In the same survey, Citibank, N.A., stood as America's largest commercial bank, with \$104,888,000,000 in deposits. *Id.*

12. *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 852 F.2d 657, 658 (2d Cir. 1988) [hereinafter *Wells Fargo*].

13. *Id.*

14. *Id.*

made with Citibank's various worldwide offices received ten percent.¹⁵

Through its inquiry with Astley & Pearce, Citibank/Manila had reentered the Eurodollar interbank lending market to obtain funds.¹⁶ The global Eurodollar interbank market serves at least four goals for banks. First, it operates as an efficient market system enabling funds to flow from investors to investment opportunities. Second, it allows banks to buy and sell currencies to hedge their foreign exchange and exposure risks. Third, the market functions as a source of lending funds when banks need to adjust their balance sheets. Finally, the market allows banks to avoid the United States banking regulatory system.¹⁷ Today, Eurodollar transactions have become an increasing part of the daily business of major international banks, including WFAL and Citibank/Manila.

The written documentation of the parties' Eurodollar transaction consisted of several confirmations and computer-generated telex messages sent among themselves and the independent broker. Financial institutions typically make Eurodollar transactions in this manner, relying heavily on practice and undocumented contacts.¹⁸ The broker's telexed confirmation stated that payment was to be made to "Citibank, N.A., New York Account Manila." Repayment was to go to "Wells Fargo International, New York Account . . ." ¹⁹ On June 14,

15. During litigation, both parties agreed that one reason for this difference was that banks operating overseas did not have to comply with reserve requirements imposed by the Federal Reserve Board or the Federal Deposit Insurance Corporation on banks operating in the United States. *Id.* See 35 Fed. Reg. 2768 (1970) (stating that this exemption was necessary to promote the competitiveness of foreign branches); Reserve Requirements of Depository Institutions, 12 C.F.R. §§ 204.1-124 (1989). The Federal Reserve Board has reaffirmed that principle in recent opinions. Deposits Payable Outside United States — Guarantee by U.S. Bank, 1 Fed. Res. Reg. Serv. ¶ 2-330.1 (Staff Op. July 29, 1983); Deposits Payable Outside the United States — CD Issued in United States, 1 Fed. Res. Reg. Serv. ¶ 2-521.1 (Staff Op. Mar. 21, 1983).

16. "Eurodollar" deposits commonly refer to deposits denominated in U.S. dollars carried by a banking institution located outside of the United States. J. GRABBE, *INTERNATIONAL FINANCIAL MARKETS* 14 (1986). More accurately, WFAL's deposits should be termed "Asiadollars," as they were U.S. dollars traded in the Eurocurrency market operating around the money center of Singapore. See R. WEISWEILLER, *supra* note 8, at 99. The district court also described these Asia-based deposits as "Asiadollars." *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 612 F.Supp. 351, 352 (S.D.N.Y. 1985) [hereinafter *Wells Fargo I.*].

17. Saunders, *The Eurocurrency Interbank Market: Potential for International Crises?*, *BUS. REV.*, Jan./Feb. 1988, at 18 (Federal Reserve Bank of Philadelphia).

18. Documentation for Eurodollar deposits may not contain an express choice of law clause; any express terms are stated in the telex communications and later confirmed by mail. Such telex communications usually contain only the identity and location of the borrower and lender; the amount, interest rate and maturity date of the deposit, and, on occasion, payment instructions on maturity. Hoffman & Deming, *The Role of U.S. Courts in the Transnational Flow of Funds*, 17 *N.Y.U.J. OF INT'L L. & POL.* 493, 499 (1985) [hereinafter *Transnational Flow*].

19. *Wells Fargo I.*, *supra* note 16, at 354. The full text reads:

Borrower: Citibank, N.A. Manila
Lender: Wells Fargo Asia Ltd., Singapore

We hereby confirm having negotiated the following deposit/placement on your behalf:

WFAL confirmed the deposit and instructed Wells Fargo/New York to pay to Citibank/New York the deposit amount, thus paying the deposit through its New York offices. This followed normal procedure for dollar-denominated Eurodollar transactions.²⁰

Telexes accompanied the confirmations. Citibank/Manila's telex stated:

Please remit US Dlr 1,000,000 to our account with Citibank New York. At maturity we remit US Dlr 1,049,444.44 to your account with Wells Fargo Bank Intl Corp NY through Citibank New York.²¹

WFAL's telex read:

We shall instruct Wells Fargo Bk Int'l New York our correspondent please pay to our a/c with Wells Fargo Bk Int'l New York to pay to Citibank NA customer's correspondent USD 1,000,000.²²

Astley & Pearce's confirmation stated:

Settlement — Citibank NA NYC AC Manila

Repayment — Wells Fargo Bk Intl NYC Ac Wells Fargo Asia Ltd Sgp No 003-023645.²³

These telexes which were sent among the parties and the broker, along with a statement of "Terms and Conditions" sent by Citibank/Manila to WFAL after the deposits were recorded, constitute the en-

Amount: US\$1,000,000.00
 Rate: 10%
 Term: 178 das.
 From: 14-06-83 To: 09-12-83

* * * * *

Pay: Citibank, N.A. New York Account Manila
 Repay: Wells Fargo International, New York
 Account: Wells Fargo Asia Ltd., Singapore
 Account # 003-023645

(the second telex message was identical, except that the term was 181 days and the maturity date was Dec. 12, 1983)

A telex sent by Astley & Pearce to Wells Fargo similarly stated:

We confirm having arranged the following for your account and risk —

Principal: US\$1,000,000
 Rate: 10
 From: 14/06/83 To: 9/12/83
 14/06/83 12/12/83

Instructions:

Settlement — Citibank NA NYC Ac Manila
 Repayment — Wells Fargo Bk Intl NYC
 Ac Wells Fargo Asia Ltd Sgp No 003-023645

Wells Fargo Asia Ltd. v. Citibank, N.A., 695 F.Supp. 1450, 1452 (S.D.N.Y. 1988) [hereinafter *Wells Fargo III*].

20. The Clearing House Interbank Payments System (CHIPS), operated in New York City by the New York Clearing House Association, handles more than ninety percent of all international interbank dollar deposits. Foorman & James, *Balanced Banks Have a CHIP on Both Shoulders*, INT'L FIN. L. REV. at 26-27 (July 1987) [hereinafter *CHIP*].

21. Wells Fargo, *supra* note 12, at 659.

22. *Id.*

23. *Id.*

tirety of the written communications between the banks. The Terms and Conditions statement is important, for it stated:

The bank shall have no responsibility for or liability to the undersigned for . . . the unavailability of such funds due to restrictions on convertibility, requisitions, involuntary transfers, distraints of any character . . . or other similar causes beyond the bank's control.²⁴

Through this document, Citibank attempted to transfer some of the risks of carrying the deposit, such as natural catastrophes or bank robberies, to WFAL.

Before the date of maturity arrived, a tragic event "beyond the bank's control" occurred. Gunmen assassinated Philippine opposition leader Benigno Aquino at Manila's international airport in August 1983. During the chaotic aftermath, investors withdrew millions of dollars in Filipino capital from the country.²⁵ To avert a banking crisis, on October 15, the Central Bank of the Philippines issued a "Memorandum to Authorized Agent Banks" ("MAAB") which forbade payment of the principal of certain foreign currency obligations without the Central Bank's prior approval. The decree read in full:

Any remittance of foreign exchange for repayment of principal on all foreign obligations due to foreign banks and/or financial institutions, irrespective of maturity, shall be submitted to the Central Bank thru the Management of External Debt and Investment Accounts Department (MEDIAD) for prior approval.

Accordingly, total obligations to foreign banks/financial institutions as of the end of business hours in New York City on October 14, 1983, shall not be reduced without prior Central Bank approval.

These measures shall apply to payments value dated during the period October 17, 1983 to January 16, 1984.

Appropriate sanctions shall be imposed on banks which fail to strictly comply with this directive.²⁶

According to Citibank, the MAAB had effectively frozen its Manila branch deposits.²⁷ Citibank/Manila made no written demands seeking approval of payment prior to the maturity date of the WFAL deposits.²⁸ Citibank/Manila did not pay WFAL's deposits when they

24. Wells Fargo I, *supra* note 16, at 354.

25. *Debt Management — Winning Back Confidence*, EUROMONEY, Sept. 1986, at 28 (Supplement) (survey sponsored by Philippine Ministry of Finance and the Central Bank of the Philippines) (available on NEXIS) ("[T]he assassination of Benigno Aquino Jr. at Manila International Airport demolished confidence in the Marcos government and accelerated capital flight. Within weeks, the country literally ran out of foreign exchange.").

26. Wells Fargo I, *supra* note 16, at 355. Eventually, the Philippines negotiated a "rescue package" with the International Monetary Fund and other creditors. See *Debt Management — Winning Back Confidence*, *supra* note 25.

27. Wells Fargo I, *supra* note 16, at 355.

28. *Id.*

matured in early December; in response, on February 10, 1984, WFAL commenced litigation in the United States District Court for the Southern District of New York.²⁹ On February 20, 1984, Citibank applied to the Central Bank for permission to pay certain deposits. The Central Bank granted the request on March 23, 1984, but only to the extent of repayment with Citibank/Manila's non-Philippine assets: *i.e.*, branch assets not carried in its Philippine accounts.³⁰ Citibank paid this amount, \$934,000 (forty-six percent of the amount due), to WFAL, but WFAL continued its action against Citibank.

III. PROCEDURAL HISTORY

The ensuing litigation proceeded sluggishly. Both parties attempted to show that Eurodollar practices and custom supported their positions. WFAL sought repayment by Citibank/Manila from parent Citibank N.A.'s assets in New York. First, WFAL contended that the Terms and Conditions did not contemplate that WFAL would assume the "sovereign risk," or the risk that action by the Philippine government would prevent repayment of the debt.³¹ Hence, Citibank assumed the risk that the Philippines would place currency restrictions on its Manila branch.³² Second, WFAL argued that the deposits were payable in New York and thus had their situs in New York. This would preclude Citibank from asserting the Act of State doctrine as an affirmative defense.³³

Citibank countered that the Central Bank's actions were part of the sovereign risk, or "causes beyond the bank's control," assumed by WFAL under the Terms and Conditions.³⁴ The differential in interest rates between domestic deposits and Eurodollar deposits reflected that assumption of sovereign risk; according to Citibank, every Eurodollar depositor understood that greater risk accompanied the higher yields.³⁵ Citibank also contended that the Act of State doctrine precluded judicial review of the MAAB, as it was a foreign governmental

29. *Id.*

30. *Id.*

31. *Id.* at 352. Both parties agreed that under the Terms and Conditions, Citibank/New York would be liable for acts of a third person (such as a bank robber) or for acts of nature. *Id.* at 352-53.

32. *Id.* at 352.

33. *Id.* at 356-57.

34. Citibank contended that since Eurodollar deposits did not need to be backed by reserves because of the U.S. government's refusal to apply such restrictions to such deposits, Eurodollar depositors understood that their deposits were governed by the local law of the foreign branch and thus subject to sovereign risk. *Id.* at 356.

35. *Id.*

action beyond the scope of American courts.³⁶ Judge Whitman Knapp found that the issues deserved a full trial and rejected WFAL's motion for summary judgment.³⁷

In December 1986, Judge Knapp tried the case without a jury.³⁸ Citibank still maintained that the debt was situated in Manila and governed by Philippine law.³⁹ Also, Citibank continued to contend that the higher interest rates reflected the sovereign risk assumed by WFAL.⁴⁰ But the court rejected this reasoning and accepted WFAL's counterargument, acknowledging that the higher rate of interest applied to all of Citibank's foreign branches uniformly, regardless of their locations. Hence, branches located in "unstable" nations gave the same interest rates for Eurodollar deposits as did those located in "stable" nations.⁴¹

The trial court's central reasoning is notable. According to Judge Knapp's memorandum opinion, WFAL, in addition to asserting that parent Citibank, N.A., had "accepted the risk" of liability by Citibank/Manila, "now contends that it must prevail even if we assume that the Deposits are payable only in Manila and are governed by Philippine law."⁴² The court then applied Philippine law, which it found to allow recovery by WFAL against all of Citibank/Manila's deposits, whether carried in local (Filipino) or nonlocal (New York) accounts.⁴³ First, the court found that the Central Bank had deemed such use of non-Filipino assets beyond its control; hence the MAAB did not affect payment to WFAL from Citibank's global assets.⁴⁴ To support that proposition, WFAL had introduced a telex from the Central Bank stating that it disavowed any objection to any judgment of a non-Philippine court that would use Citibank's non-Philippine assets to fulfill its obligation to WFAL.⁴⁵ Then, since Philippine law considered an

36. *Id.*

37. *Id.* at 358.

38. *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 660 F.Supp. 946 (S.D.N.Y. 1987) [hereinafter *Wells Fargo II*].

39. *Id.* at 947.

40. *Wells Fargo I*, *supra* note 16, at 356.

41. *Wells Fargo II*, *supra* note 38, at 950.

42. *Id.* at 947.

43. *Id.* at 948-50.

44. The court relied on testimony from WFAL's expert witness on Philippine law. *Id.* It concluded that the purpose of the MAAB was to restrict capital flow from the Philippines. Payment from accounts outside of the Philippines would not offend the government. *Id.*

45. The Philippine Central Bank's telex message read in part:

If there is a judgment by a court or an extrajudicial settlement to the effect that a foreign currency [sic] deposit placed with a foreign currency deposit unit ("FCDU") of the Philippine branch of a foreign bank is recoverable from a non Philippine office of such foreign bank and if such liability is satisfied from assets held outside the Philippines and does not result,

obligation of a branch to be an obligation of the whole, the court held Citibank, N.A., liable to WFAL for the deposit.⁴⁶

On March 25, 1988, the United States Court of Appeals for the Second Circuit remanded the opinion to the district court,⁴⁷ asking the trial court whether its trial judgment was based primarily upon the conclusion that WFAL and Citibank/Manila had agreed that the deposits were collectible only in Manila or upon the conclusion that Philippine law governed the case.⁴⁸ On remand, the trial court replied that it had considered Philippine law to be "potentially" applicable only after WFAL had stated it would prevail, even if the situs of the debt were Manila and Filipino law governed.⁴⁹ The trial court had made such an examination of Philippine law based on the evidence previously submitted (two affidavits by Philippine lawyers) by the parties.⁵⁰ However, upon its appeal to the Second Circuit, Citibank presented "a wealth of material on Philippine law which it had never brought to" the trial court's attention.⁵¹ The district court stated that it had never "decided" that Philippine law applied to the case, but that it only "assumed" that Philippine law governed the case.⁵²

Continuing its response, the trial court interpreted the concept of collectibility to be distinct from that of repayment; therefore, it bifurcated its analysis.⁵³ Looking to the place of repayment, the court ex-

directly or indirectly, in a net outflow of foreign currency from the Philippines the Central Bank of the Philippines is of the view that the satisfaction of payment of such deposit liability would not be inconsistent with [the Decree].

Id. at 949-50.

46. *Id.* The court also found that no relevant custom or practice in international banking was established by either party. *Id.* at 950. Citibank attempted to show that since Eurodollar deposits were exempted from reserve requirements, the banking community worked on the premise that such deposits were payable only at the branch where made. The court found that question, as well as Citibank's impossibility defense, moot. *Id.* The Act of State doctrine was also not applicable, since Philippine law was not offended by payment from non-Philippine accounts. *Id.*

47. *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 847 F.2d 837 (2d Cir. 1988).

48. In the trial court's language, the Court of Appeals had remanded the case, "finding it unclear whether [the trial court's] opinion disposing of this case had found that the parties had agreed that the deposits were collectible only at Citibank's Manila branch or whether [it] had held that Philippine law governed this action." *Wells Fargo III*, *supra* note 19, at 1450-51.

49. *Id.* at 1451.

50. *Id.*

51. *Id.*

52. *Id.* at 1451 n.2.

53. In the court's language:

[R]epayment and collection describe two distinct concepts. Repayment refers to the location where the wire transfers effectuating repayment at maturity were to occur. Collection refers to the place or places where plaintiff was entitled to look for satisfaction of its deposits in the event that Citibank should fail to make the required wire transfers at the place of repayment.

Id. at 1451.

amined the telex agreements; based on the references to New York, it found that the parties had agreed that the deposit would be repayable in New York.⁵⁴ The court then turned to the question of where the deposit would be collectible. However, the court found nothing in the telexes nor in Eurodollar practices and custom to be conclusive on that issue.⁵⁵ The court then applied both federal and New York choice of law rules to find that New York law should apply.⁵⁶ The court felt that comprehensive application of New York banking law to the Eurodollar market would give that system more uniformity.⁵⁷ Crucial to the district court's choice of New York law were the facts that the deposits were made in U.S. dollars via New York correspondent banks, and that Citibank was a New York-based bank.⁵⁸ The trial court concluded that all of Citibank's global assets could be reached by WFAL under New York law,⁵⁹ rejecting Citibank's defense of impossibility.⁶⁰

On appeal from remand, the Second Circuit upheld the trial court's opinion.⁶¹ The appellate court agreed with the lower court's reasoning, based on the content of the telex messages, that Citibank/Manila and WFAL had jointly decided that repayment would be in New York.⁶² The court deemed such an agreement to be valid under both New York and Philippine law.⁶³ The court also presumed that the absence of an agreement as to where the deposit would be collected

54. *Id.* at 1454.

55. *Id.*

56. Using New York choice of law rules, the court determined which jurisdiction had "the greatest interest in the litigation," based on interests and contacts involved in the case. *Id.* at 1454. The court noted that similar considerations existed in federal choice of law rules. *Id.*

57. The district court noted:

Since Eurodollar transactions denominated in U.S. dollars customarily are cleared in New York, the rationale for application of New York law becomes even stronger. If the goal is to promote certainty in international financial markets, it makes sense to apply New York law uniformly, rather than conditioning the deposit obligations on the vagaries of local law, and requiring each player in the Eurodollar market to investigate the law of numerous foreign countries in order to ascertain which would limit repayment of deposits to the foreign branch's own assets.

Id. (citations omitted).

58. *Id.*

59. *Id.* (citing *Perez v. Chase Manhattan Nat'l Bank, N.A.*, 61 N.Y.2d 460, 468, 463 N.E.2d 5, 7, 474 N.Y.S.2d 689, 691, *cert. denied*, 469 U.S. 966 (1984)). The court did state that New York courts would defer to Philippine law if the case involved either expropriation or taxation of WFAL's deposit. *Id.* at 1454-55.

60. Since Citibank could still use non-Philippine assets to repay WFAL, it was not impossible for Citibank to fulfill its obligations. *Id.* at 1455.

61. Wells Fargo, *supra* note 12, at 660.

62. *Id.* at 660-61.

63. See CIVIL CODE OF THE PHILIPPINES art. 1159 (1980) ("Obligations arising from contracts have the force of law between the contracting parties and should be complied with in good faith.").

meant that it would be collectible in New York.⁶⁴ Since the "agreement" governed the choice of law, the situs of the debt was not Manila; in any event, the MAAB did not affect Citibank's ability to repay WFAL.⁶⁵

Citibank petitioned the United States Supreme Court for *certiorari*.⁶⁶ On April 17, 1989, the High Court asked the Justice Department for the federal government's views in both *Wells Fargo* and another case involving both issues of foreign branch liability and an appearance of Citibank as a defendant, *Trinh v. Citibank N.A.*⁶⁷ The Court granted *certiorari* to *Wells Fargo* on December 4, 1989.⁶⁸

IV. GENERAL PRINCIPLES OF LAW INVOLVED

A. *Home Office Liability and the Separate Entity Doctrine*

Under basic corporations law, courts will hold the home office liable for all of the obligations of its branch offices.⁶⁹ The official referee in *Sokoloff v. National City Bank*, one of the earliest foreign bank branch liability cases, restated this principle:

[W]hen considered with relation to the parent bank, they [foreign branches] are not independent agencies; they are, what their name imports, merely branches, and are subject to the supervision and control of the parent bank, and are instrumentalities whereby the parent bank carries on its business, and are established for its own particular purposes, and their business conduct and policies are controlled by the parent bank, and their property and assets belong to the parent bank, although nominally held in the names of the particular branches *Ultimate liability for a debt of a branch would rest upon the parent bank.*⁷⁰

64. *Wells Fargo*, *supra* note 12, at 661 ("Since the court found here that there was no separate agreement restricting where the deposits could be collected, and we are aware of nothing in the record that contradicts that finding, we conclude that WFAL was entitled to collect the deposits out of Citibank assets in New York"). One could contend that this conclusion resulted from the appellate court's limited powers of review, as it was unable to make a different legal conclusion without evidence suggesting otherwise.

65. *Id.*

66. *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 852 F.2d 657 (2d Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 3507 (U.S. Jan. 25, 1989) (No. 88-1260).

67. *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 852 F.2d 657 (2d Cir. 1988), *briefs of the Solicitor General requested*, 109 S. Ct. 1740 (Apr. 17, 1989) (No. 88-1260). *See also* *Trinh v. Citibank, N.A.*, 850 F.2d 1164 (6th Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 3455 (U.S. Dec. 20, 1988) (No. 88-1031). For a discussion of *Trinh*, see *infra* notes 155-62 and accompanying text.

68. *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 852 F.2d 657 (2d Cir. 1988), *cert. granted*, 110 S. Ct. 537 (Dec. 4, 1989) (No. 88-1260).

69. Heining, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches*, 11 LAW & POL'Y IN INT'L BUS. 903, 924-30 (1979).

70. 130 Misc. 66, 73, 224 N.Y.S. 102, 114 (Sup. Ct. 1927), *aff'd mem.*, 223 A.D. 754, 227 N.Y.S. 907, *aff'd*, 250 N.Y. 69, 164 N.E. 745 (1928) (emphasis added) (citations omitted) (court holding that bank's home office is ultimately liable for deposits placed in foreign branches upon the wrongful failure of the foreign branch to repay the deposit on demand).

However, the "separate entity" doctrine, developed from the realities of banking law, limits this to a great extent. Historically, banks did not have the sophisticated communications facilities of today. Bowing to the inability to verify financial information, the common law held that a bank that accepts a deposit at one branch is not required to return the deposit or to honor a check drawn upon it at another branch.⁷¹ From this principle, courts have developed the theory that the bank branch operates as a separate entity governed by the law of the branch's locality.⁷² Heininger, author of the seminal work on foreign bank branch liability cases, summarized the modern concept of the separate entity doctrine:

The separate entity doctrine makes clear that the home office of a bank is not automatically held liable for obligations undertaken at its foreign branches. Since a deposit placed in a foreign branch is generally considered to be payable at the branch, it is not within the territorial jurisdiction of a U.S. court (for purposes of garnishment or attachment). Instead, the deposit is said to be situated in the jurisdiction where the branch is located, and that country's laws or actions may affect the disposition of the deposit.⁷³

Although a few courts have questioned the doctrine's viability in a modern era of electronic communications, the separate entity doctrine remains a part of American jurisprudence.⁷⁴

B. Act of State Doctrine

In United States courts, the theory that foreign branches exist as separate entities governed by their local laws — and that the judicial branch should give effect to such laws — is strengthened to some extent by the Act of State doctrine. The relatively ancient doctrine re-

71. See Heininger, *supra* note 69, at 930 n.107 and accompanying text.

72. See Heininger, *supra* note 69, at 930-35 (describing how the separate entity doctrine evolved from the principle that deposits are payable only on demand at the branch where deposit was originally made). The policy aspects of the doctrine were expressed in *United States v. First Nat'l City Bank*:

Unless each branch of a bank is treated as a separate entity for attachment purposes, no branch could safely pay a check drawn by its depositor without checking with all other branches and the main offices. . . . This would place an intolerable burden upon banking and commerce, particularly where the branches are numerous, as is often the case. 321 F.2d 14, 21 (2d Cir. 1963) (quoting *Cronan v. Schilling*, 100 N.Y.S.2d 474, 476 (Sup. Ct. 1950), *aff'd mem.* 282 A.D. 940, 126 N.Y.S.2d 192 (1953)), *rev'd on other grounds*, 379 U.S. 378 (1965).

See also *Pan-American Bank & Trust Co. v. Nat'l City Bank of New York*, 6 F.2d 762, 767 (2d Cir. 1925) ("the branch is not a mere 'teller's window'; it is a separate entity"), *cert. denied*, 269 U.S. 554. However, if a branch office closes voluntarily or wrongfully refuses a demand for repayment, the home office is liable for the deposits of the branch office. See, e.g., *Vishipco*, *supra* note 5; *Sokoloff*, *supra* note 70.

73. See Heininger, *supra* note 69, at 943.

74. For a summary discussion, see Heininger, *supra* note 69, at nn.165-77 and accompanying text.

flects the judicial branch's sentiments that "[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."⁷⁵ Based on more elaborate reasoning adopted by the Supreme Court in *Banco Nacional de Cuba v. Sabbatino*, American courts should not judge the merits of an "Act of State" — legal action by a foreign government — if to do so would anger that government.⁷⁶ In cases involving the actions of a foreign state, judicial evaluation of the foreign state's action might antagonize the foreign government and consequently frustrate the U.S. executive branch's foreign policy goals.⁷⁷ Unsure of its competency in international relations and the resulting implications for the separation of powers, the Court has noted that its "engagement in the task of passing on the validity of foreign [A]cts of [S]tate may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere."⁷⁸ Thus, under this federal common law principle, constitutional and foreign policy concerns could restrain judicial intervention in bank liability cases resulting from foreign government actions.⁷⁹ As applied to foreign bank branch liability cases, the Act of State doctrine would prevent a court from examining the merits of a foreign government's expropriation of a bank branch: the court will have to presume that the foreign state's act is legally justified.⁸⁰

75. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

76. 376 U.S. 398, 416-29 (1964). For a more detailed exploration of the doctrine, see generally, *Foreign Branch Expropriation*, *supra* note 9; Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT'L L. 175 (1967) (summarizing the legal mood at the time of *Sabbatino* and criticizing legislative attempts to "repeal" the holding); Note, *Rehabilitation and Exoneration of the Act of State Doctrine*, 12 N.Y.U.J. INT'L L. & POL. 599 (1980) (criticizing *Sabbatino* for confusing the Act of State doctrine).

For a dramatic proposed reform of the Act of State doctrine, see Knight, *International Debt and the Act of State Doctrine: Judicial Abstention Reconsidered*, 13 N.C.J. INT'L L. & COM. REG. 35 (1988) (contending that judicial abstention itself affects U.S. foreign policy and that courts should aggressively seek the involvement of the executive branch in international debt cases).

77. The High Court stated:

The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals for itself and for the community of nations as a whole in the international sphere.

Sabbatino, 376 U.S. at 423.

Some feel that the Court needlessly uses *Sabbatino* in many cases. See, e.g., Comment, *Making Cuba Pay: Satisfaction of Nationalization Claims Against Cuba — First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 10 BROOKLYN J. INT'L L. 515, 536-37 (1984) (indirect use of *Sabbatino* was unjustified in the case and led to cursory analysis of nationalization at issue).

78. *Sabbatino*, 375 U.S. at 423.

79. *Id.* at 423-24 (stating that the Constitution was not directly involved, but that "'constitutional' underpinnings" were implicated by separation of powers issues).

80. For an example of judicial analysis of foreign government expropriation, see *infra* notes

Through the years, the judicial and legislative branches have attempted to develop exceptions to the Act of State doctrine. Keying on language in *Sabbatino* and subsequent Supreme Court cases, some judicial exceptions have been advocated, including the *Bernstein* letters,⁸¹ the treaty exception⁸² and the commercial activities exception.⁸³ However, since the Supreme Court has either implicitly or explicitly rejected these exceptions, they have fallen into disuse among the courts.⁸⁴ Congressional attempts to limit use of the Act of State doc-

155-62 and accompanying text (analyzing *Trinh v. Citibank, N.A.*, 850 F.2d 1164 (6th Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 3455 (U.S. Dec. 20, 1988) (No. 88-1031)).

81. See *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954). In *Bernstein*, a Jewish German sued Dutch entities holding property seized by Nazi Germany during World War II. *Id.* During litigation, the U.S. State Department sent a letter to plaintiff's counsel stating that the Act of State doctrine was not implicated in cases involving Nazi expropriations. That letter is reproduced in full at 20 DEP'T STATE BULL. 592-93 (1949).

Thus, if the executive branch, acting through the State Department, concludes that judicial consideration of the foreign government's action would not hinder its foreign policy goals and informs the court thereof, the court is free from the Act of State restrictions. *Bernstein*, 210 F.2d at 376.

82. If the challenged actions of a foreign government are covered in a treaty between the United States and the foreign state, the court should not apply the Act of State doctrine. See *Sabbatino*, 376 U.S. at 428. For an application of the treaty exception, see *Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 729 F.2d 422, 428 (6th Cir. 1984) (court cited the 1953 Treaty of Amity between the United States and Ethiopia as justification for not applying the Act of State doctrine); Note, *A Treaty Exception to the Act of State Doctrine: A Framework for Judicial Application*, 4 B.U. INT'L L.J. 201 (1986) (summarizing *Kalamazoo Spice* and concluding that courts are competent to apply the treaty exception).

83. If the foreign government is acting within its sovereign capacity, its actions must be recognized as valid. *Alfred Dunhill of London, Inc., v. Cuba*, 425 U.S. 682, 704-06 (1976). However, if the foreign state is acting in a proprietary capacity, the court does not have to defer to the foreign government, and the Act of State doctrine is not applicable. *Id.* at 704, 707. For more on *Dunhill*, see generally Comment, *Alfred Dunhill of London v. Republic of Cuba: International Law Redivivus*, 10 INT'L LAW. 471, 471 (1976) (stating that, but for one more step of logic, the Court could have overturned *Sabbatino*); Friedman & Blau, *Formulating a Commercial Exception to the Act of State Doctrine: Alfred Dunhill of London, Inc., v. Republic of Cuba*, 50 ST. JOHN'S L. REV. 666 (1976) (article written by counsel to Alfred Dunhill of London, Inc., supporting an expanded commercial activities exception).

84. The *Bernstein* exception was not fully accepted in *Alfred Dunhill*, 425 U.S. at 696-711 (despite a letter from the State Department's Legal Adviser stating that judicial examination of the legality of any Cuban act involved would not adversely affect the executive branch's overall foreign policy goals, the Supreme Court refused to apply the Act of State doctrine for other reasons). See also Bazylar, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 369-70 n.274 (1986) (noting the reluctance of the State Department to issue *Bernstein* letters; the department receives two to three requests for such letters annually, but as of 1986, it has issued only seven *Bernstein* letters).

Courts have not favored the treaty exception, either. See, e.g., *International Association of Machinists & Aerospace Workers v. Organization of Petroleum Exporting Countries*, 649 F.2d 1354, 1360 (9th Cir. 1981) (rejecting the treaty exception to the Act of State doctrine, court ruled that the Act of State doctrine precluded plaintiff's claim that defendant engaged in fixing of oil prices in violation of the Sherman Antitrust Act), *cert. denied*, 454 U.S. 1163 (1982).

Very few courts have actually applied the commercial activities exception. See Leacock, *The Commercial Activity Exception to the Act of State Doctrine Revisited: Evolution of a Concept*, 13 N.C.J. INT'L L. & COM. REG. 1, 18 (1988) (explaining that since the commercial activities exception was raised by only a plurality of the Supreme Court, lower federal courts are not required to

trine have included the Hickenlooper Amendment, which precludes U.S. courts from using the Act of State doctrine to refrain from judging the merits of a case involving a claim of title or other property rights taken in violation of international law.⁸⁵ However, the courts have similarly cut back on these legislative attempts to rein in the doctrine by narrowly interpreting the statutes.⁸⁶ For example, one court concluded that the Hickenlooper Amendment applied strictly to property rights and not to contractual rights (such as a bank deposit).⁸⁷

In reality, the Act of State doctrine itself is limited only by the extent to which U.S. courts prefer to exercise judicial restraint. An attempt by a foreign government to act beyond its boundaries, in violation of U.S. law, will not be upheld by a U.S. court.⁸⁸ For example,

address the issue). The Supreme Court itself did not fully accept the commercial activities exception. *Dunhill*, 425 U.S. at 715 (Stevens, J., concurring) (declining to accept the commercial activity exception); *Id.* (Powell, J., concurring) (stating that in cases involving political acts, the courts should abstain from intervening for foreign policy reasons); *Id.* at 716-37 (Marshall, Brennan, Stewart & Blackmun, JJ., dissenting) (rejecting the commercial activities exception).

Members of the High Court have contended that these broad exceptions to the Act of State doctrine contradict the case-by-case approach adopted by the Court in *Sabbatino*. *Dunhill*, 425 U.S. at 728 (Marshall, J., dissenting). The exceptions also confuse the legal picture. Note, *An Approach to Acts of State, Empresa Cubana Exportadora de Azucar y Sus Derivados v. Lamburn & Co.*, 7 N.C.J. INT'L L. AND COM. REG. 409, 409 (1982) ("various 'exceptions' [have] led to considerable uncertainty in the courts as to the parameters of the [A]ct of [S]tate doctrine").

85. *Sabbatino* was widely criticized. Ebenroth & Teitz, *Winning (or Losing) by Default: The Act of State Doctrine, Sovereign Immunity and Comity in International Business Transactions*, 19 INT'L LAW. 225, 228 (1985). In the aftermath of *Sabbatino*, Congress attempted to force the Court to retreat from the *Sabbatino* holding with the "Hickenlooper Amendment," Foreign Assistance Act of 1964, Pub. L. No. 88-633, § 301(d)(4), 78 Stat. 1009, 1013 (codified at 22 U.S.C. § 2370(e)(2) (1982)) [hereinafter Hickenlooper Amendment].

86. The judicial branch has narrowly interpreted the Hickenlooper Amendment, greatly reducing its applicability. See Comment, *Limiting the Act of State Doctrine*, 23 VA. J. INT'L L. 103, 114 n.61 (1983) (noting that several banking and insurance interests had insisted on the inclusion of several provisions narrowing the scope of the amendment before its passage, perhaps allowing courts to justify their narrow interpretation of the amendment); Note, *The Harvest of Sabbatino: Vishipco Line v. Chase Manhattan Bank*, 8 N.C.J. INT'L L. & COM. REG. 87, 97 (1982) [hereinafter *Harvest of Sabbatino*] (noting that some courts have applied the amendment only when the expropriated property is brought into this country).

87. *French v. Banco Nacional de Cuba*, 23 N.Y.2d 46, 57, 242 N.E.2d 704, 710, 295 N.Y.S.2d 433, 441-42 (1968).

88. *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47, 50-51 (2d Cir. 1965), *cert. denied*, 372 U.S. 1027 (1966). In a case involving trademarks owned by a Hungarian company, *Zwack v. Kraus Bros. & Co.*, the court noted that:

It is clear that the Hungarian government could not directly seize the assets which have a situs in the state of the forum [the U.S.]. To allow it to do so indirectly through confiscation of firm ownership would be to give its [expropriation] decree extraterritorial effect and thereby emasculate the public policy of the forum against confiscation. This we decline to do.

237 F.2d 255, 259 (2d Cir. 1956). See also *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854, 862-63 (2d Cir. 1981) (finding that debts in question were situated outside of Vietnam at the time of uncompensated Vietnamese expropriation; thus, the Act of State doctrine was not applicable), *cert. denied*, 459 U.S. 976 (1982).

Judicial analysis of a foreign state's actions outside the state's territory will not offend the state's territorial sovereignty. Recent Decision, *Act of State — Foreign Expropriation Decrees —*

U.S. law and policy does not condone expropriation of property without prompt, adequate, and effective compensation.⁸⁹ Hence, the court would be free to rule on the validity of such an action.⁹⁰ A similar situation exists with respect to sovereign actions of a foreign government unrecognized by the United States government when these acts violate U.S. or international law.⁹¹ Because of such rationales, courts will not apply the Act of State doctrine in situations where the object of the foreign government's actions exists beyond the foreign state's boundaries. Thus, the situs of the object — its legal "location" at the time of action — becomes very important.

C. *Situs Determination*

With an obligation as intangible as a debt, the situs of the disputed intangible obligation often looms as a determinative, if not the most crucial, factor.⁹² Unless the situs of a debt is already stipulated by previous agreement⁹³ (as the lower courts in *Wells Fargo* have ruled), the court will rely upon one of three situs tests: the domicile test, the complete fruition test, or the incidents of the debt test. The choice of test depends on the particular court involved, a factor which encour-

Act of State Doctrine Does Not Enable Foreign Sovereign to Confiscate Debts with Situs in the United States, 17 VA. J. INT'L L. 567, 573 (1977) (noting that this principle predates *Sabbatino*).

89. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (1986) (summarizing the principles and policy considerations supporting the U.S. position).

90. See *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854, 862-63 (2d Cir. 1981) (citing *Heininger*, *supra* note 69, at 975), *cert. denied*, 459 U.S. 976 (1982).

91. See, e.g., *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 293 F.Supp. 892, 909 (S.D.N.Y. 1968) ("A foreign state for such purposes [of the Act of State doctrine] is an entity recognized by our Government, which has a defined territory and population under control of its government."), *modified*, 433 F.2d 686, 708 (2d Cir. 1970) (with respect to damages), *cert. denied*, 403 U.S. 905 (1971). See also *Heininger*, *supra* note 69, at 979-86. U.S. courts have applied the Act of State doctrine to acts of an unrecognized government when the political branches of the United States consider that government to be the *de jure* government of that state. *Sokoloff v. Nat'l City Bank*, 130 Misc. 66, 224 N.Y.S. 102 (Sup. Ct. 1927), *aff'd mem.*, 223 A.D. 754, 227 N.Y.S. 907, *aff'd*, 250 N.Y. 69, 81, 145 N.E. 917, 918-19 (1928). U.S. courts also have found that although the political branches have refused to recognize a government as the *de jure* government of a foreign state, that government may nevertheless have a *de facto* existence recognizable for judicial purposes. *M. Salimoff & Co. v. Standard Oil Co.*, 262 N.Y. 220, 227, 186 N.E. 679, 682 (1933) ("To refuse to recognize that Soviet Russia is a government regulating the internal affairs of the country is to give to fictions an air of reality which they do not deserve.").

92. See Note, *Act of State: The Fundamental Inquiry of Situs Determination for Expropriated Intangible Property: Braka v. Bancomer, S.N.C.*, 11 N.C.J. INT'L L. & COM. REG. 121, 124-25 (1986) (noting that situs determination is crucial to determining the applicability of the Act of State doctrine) [hereinafter *Fundamental Inquiry*].

93. *Wells Fargo*, *supra* note 12, at 660; *Wells Fargo III*, *supra* note 19, at 1451. See, e.g., *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 733 F.2d 23 (2d Cir. 1984), *rev'd & remanded on rehearing*, 757 F.2d 516, 521-22 (situs of debt was New York, as the deposit agreement stipulated New York as location for repayment), *cert. denied*, 473 U.S. 934 (1985).

ages forum shopping.⁹⁴ The High Court could end this practice with a definitive ruling in *Wells Fargo*.⁹⁵

Federal courts use the following three tests:

1. Domicile Test

The domicile test dates back to *Harris v. Balk*, a 1905 Supreme Court debtor-creditor case.⁹⁶ Under traditional jurisdiction principles, the power of a state court to extend personal service on a debtor required that the debtor be physically within the territorial limits of that state.⁹⁷ Based on that reasoning, the *Harris* court concluded that when a debtor is present within a state, that state has jurisdiction over it.⁹⁸ Therefore, the situs of the debt moves with a transient debtor, as the debtor travels from state to state.⁹⁹ Application of the domicile test in a bank liability case means that the situs of the debt is that of the foreign branch if the branch has been expropriated and was operating at the time of expropriation.¹⁰⁰ Since the debt would be located in the foreign country when the government expropriated or regulated the debt, the Act of State doctrine would restrict a court from judging that government's action. If the foreign branch has ceased operation, however, the situs would no longer be the foreign country. Rather, the object in question would "bounce" back to the home office in the United States; the Act of State doctrine would not apply since the government action would not affect the debt.¹⁰¹

94. The circuits are split as to which test is appropriate. Compare *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985) (court applied the incidents of the debt test in case involving Mexican exchange control regulations) with *Braka v. Bancomer, S.N.C.*, 762 F.2d 222 (2d Cir. 1985) (court applied the complete fruition test in situation similar to *Callejo*). But even within circuits, disagreement exists. Compare *Grass v. Credito Mexicano, S.A.*, 797 F.2d 220 (5th Cir. 1986) (incidents of debt test not used), *cert. denied*, 107 S. Ct. 1575 (1987) with *Callejo*, 764 F.2d 1101 (incidents of debt test applied); compare *Braka*, 762 F.2d 222 (complete fruition test used) with *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir. 1981) (domicile test applied) *cert. denied*, 459 U.S. 976 (1982).

95. Dilworth, *Effect of Expropriation and Exchange Controls on U.S. Banks' Home Office Liability For Foreign Branch Obligations — Act of State — Situs of Intangible Property*, 83 AM. J. INT'L. L. 573, 579-80 (1989) (commentator noting that the highly fact-specific approaches involved in *Wells Fargo*, *supra* note 12, and *Trinh v. Citibank, N.A.*, 850 F.2d 1164 (6th Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 3455 (U.S. Dec. 20, 1988), give little guidance to the bar).

96. 198 U.S. 215 (1905).

97. *Id.* at 221. See also E. SCOLAS & P. HAY, *CONFLICT OF LAWS* 235-36 (1984) (summarizing *Harris*).

98. *Harris*, 198 U.S. at 222-23.

99. *Id.* at 222.

100. See *Perez v. Chase Manhattan Bank, N.A.*, 61 N.Y.2d 460, 474-77, 463 N.E.2d 5, 10-11, 474 N.Y.S.2d 689, 695-97 (holding that since defendant bank's Cuban branches were operating at the time of their expropriation, situs of plaintiff's deposits was Cuba), *cert. denied*, 469 U.S. 966 (1984).

101. See *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854, 863 (2d Cir. 1981) (court finding that since Chase Manhattan had terminated its operations in Saigon, it no longer

The Second Circuit applied the domicile test in *Vishipco Line v. Chase Manhattan Bank, N.A.*¹⁰² Plaintiff, a South Vietnamese corporation, had purchased a certificate of deposit (CD) from Chase Manhattan's branch in Saigon.¹⁰³ Approximately one week before the fall of Saigon, the bank closed the branch and evacuated its personnel without warning its depositors.¹⁰⁴ The Vietnamese government confiscated the bank branch soon thereafter.¹⁰⁵ The court found that the situs of the debt was no longer Vietnam because Chase Manhattan had "abandoned" its Saigon branch before the expropriation.¹⁰⁶ Therefore, the court concluded that the Vietnamese action did not affect the bank's obligations to the plaintiff. Thus, *Vishipco Line* shows how the domicile test mechanically depends on only one factual conclusion; unfortunately, such reliance can lead a court to overlook other important considerations in a foreign branch liability case.¹⁰⁷

2. Complete Fruition Test

Courts can alternatively use the complete fruition test, sometimes described as a "common sense" test.¹⁰⁸ Under the test, the situs of expropriated property depends on whether a U.S. court determines that a taking came to "complete fruition within the dominion of the [foreign] government."¹⁰⁹ This test has two prongs. First, both the

had a presence in Vietnam nor was subject to Vietnam's jurisdiction; thus, situs of debt was not Vietnam and Act of State doctrine was not applicable), *cert. denied*, 459 U.S. 976 (1982); *Harvest of Sabbatino*, *supra* note 86; *Partial Suspension*, *supra* note 4.

102. 660 F.2d 854. For a more detailed analysis of the case, see *Partial Suspension*, *supra* note 4; *Harvest of Sabbatino*, *supra* note 86.

103. The deposit received 23.5 percent interest and was repayable in Vietnamese currency. 660 F.2d at 857.

104. *Id.*

105. *Id.*

106. Citing both *Harris v. Balk*, 198 U.S. 215 (1905), and *Heininger*, *supra* note 69, the court stated: "Since Chase had abandoned its Saigon branch at the time of the Vietnamese decree, and since it had no separate corporate identity in Vietnam which would remain in existence after its departure, the Vietnamese decree could not have had any effect on its debt to the corporate plaintiffs." *Id.* at 862.

107. See *infra* notes 198-201 and accompanying text.

108. Cf. Comment, *The Act of State Doctrine*, 10 BROOKLYN J. INT'L L. 243, 250-51 (1984) (stating that common sense dictates that a U.S. court should not consider a foreign state's actions that come to complete fruition within that state, because the court's opinion on a *fait accompli* is irrelevant). See also *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 733 F.2d 23 (2d Cir. 1984), *rev'd and remanded on rehearing*, 757 F.2d 516, 521 (stating that an expropriating state is unlikely to follow a U.S. judicial opinion contrary to its own actions, especially in a *fait accompli*), *cert. denied*, 473 U.S. 934 (1985).

109. *Allied Bank*, 757 F.2d at 521. For further exploration of the case, see generally Comment, *Allied Bank International v. Banco Credito Agricola de Cartago: Applying the Act of State Doctrine to Actions Against Foreign Debtors*, 13 BROOKLYN J. INT'L L. 183, 184 (1987) (contending that a situs test in the case was irrelevant, and that courts should directly consider Act of State concerns); Note, *Allied's Flawed Application of the Act of State Doctrine: Impropriety of the*

creditor and depositor must be present within the jurisdiction of the expropriating government.¹¹⁰ Second, the object or debt in dispute must have its situs within the realm of the foreign state.¹¹¹ When applying the complete fruition test to determine the situs of a debt, courts focus on provisions of the deposit contract to see if the twin prongs have been met.¹¹² If both prongs are satisfied, the court will deem the expropriating state to have jurisdiction over the debtor, and the Act of State doctrine will prevent the court from further consideration of the matter.¹¹³

The Second Circuit applied the complete fruition test in *Braka v. Bancomer, S.N.C.*¹¹⁴ Plaintiffs had purchased dollar- and peso-denominated CDs from Bancomer, then a privately owned Mexican bank.¹¹⁵ The CDs stated in their terms of deposit that Mexico was both the place of deposit and the place of payment of principal and interest.¹¹⁶ Before the CDs matured, the Mexican government nationalized all of Mexico's banks and imposed an official exchange rate set at approximately one-half the market exchange rate.¹¹⁷ The court focused on the terms of the CDs, emphasizing that they stipulated Mexico as the place of repayment.¹¹⁸ Thus, the CDs were subject to effects of the Mexican government's actions; applying the complete fruition test, the court found their situs to be Mexico.¹¹⁹ In the court's judgment, "to intervene to contradict the result of the [Mexican] exchange controls would be an impermissible intrusion into the governmental activities of a foreign sovereign."¹²⁰ *Braka* illustrates how the com-

Doctrine in International Finance, 20 CORNELL INT'L L.J. 253, 254 (1987) (stating that the court adopted an "inaccurate formula of debt situs incompatible with the [A]ct of [S]tate doctrine's constitutional underpinnings").

110. See *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706, 713-16 (5th Cir.) (holding, in part, that since defendant was a Florida-based corporation with no presence in Cuba at the time of expropriation, Cuba was not able to perform a *fait accompli*, thus precluding use of Act of State doctrine), *cert. denied*, 393 U.S. 934 (1968).

111. See *Allied Bank*, 757 F.2d at 521-22 (concluding that since situs of debt was in New York at the time of the Costa Rican exchange regulations, the Costa Rican government was not able to perform a *fait accompli*; hence, the Act of State doctrine was not applicable).

112. See *Braka v. Bancomer, S.N.C.*, 762 F.2d 222, 224-25 (2d Cir. 1985) (court relying on contractual provisions of certificates of deposits issued by the bank for situs determination).

113. In such a case, the party injured by an Act of State must seek relief from the political branches. Comment, *The Act of State Doctrine and Foreign Sovereign Defaults on United States Bank Loans: A New Focus for a Muddled Doctrine*, 133 U. PA. L. REV. 469, 495 (1985).

114. 762 F.2d 222. For further exploration of the case, see *Fundamental Inquiry*, *supra* note 92.

115. *Id.* at 223.

116. *Id.*

117. *Id.*

118. *Id.* at 224.

119. *Id.* at 225.

120. *Id.*

plete fruition test focuses on the terms of a deposit agreement. However, the complete fruition test's narrow factual approach may fail to account for factors not embodied within the four corners of the contract.¹²¹

3. Incidents of the Debt Test

Frustration with the limitations of the complete fruition test and its narrow focus on the terms of the deposit contract has led to the Fifth Circuit's development of the incidents of the debt test in *Callejo v. Bancomer, S.A.*¹²² The test looks at "where the incidents of the debt, as a whole, place it."¹²³ A court applying the test to determine if the situs is the United States or a foreign state would consider a number of factors, including where the deposit was carried, the place of repayment, the subjective intent of the parties, and the extent of involvement of the American regulatory agencies.¹²⁴ One commentator adds that the currency denomination could be an additional incident to consider.¹²⁵ In this manner, the incidents of the debt test does not restrict itself to the text of the deposit agreement. If after considering these factors, the court judges that the interests of the foreign state outweigh those of the United States, then the situs of the debt will be the foreign state and the Act of State doctrine will prevent the court from ruling on the foreign state's action.¹²⁶ If not, then the situs of the debt is the U.S., outside the foreign nation's territory; the court will not apply the Act of State doctrine. Thus, the incidents of the debt test allows the court to account fully for the interests of the foreign government and avoid antagonizing it.¹²⁷ It also gives the court

121. See *infra* notes 202-06 and accompanying text.

122. *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1123-24 (5th Cir. 1985). See generally Note, *Callejo v. Bancomer, S.A.: The Need for a Commercial Activity Exception to the Act of State Doctrine*, 7 NW. J. INT'L L. & BUS. 413 (1985) (the note does not discuss the incidents of the debt test specifically, but describes how *Callejo* illustrates the need for a strong commercial activities exception to the Act of State doctrine).

123. *Callejo*, 764 F.2d at 1123.

124. *Id.*

125. A sovereign country expects more control over its own currency and may also expect more control over debts denominated in such currency. See Note, *The Act of State Doctrine: Resolving Debt Situs Confusion*, 86 COLUM. L. REV. 594, 613 (1986) [hereinafter *Debt Situs Confusion*]. However, some countries, such as the United States and Japan, expect no such control over debts denominated in their currency, as demonstrated by the existence of the Eurodollar and Euroyen markets. *Id.*

126. *Callejo*, 764 F.2d at 1124-26 (court finding that Mexico's interests in the debt outweighed those of the U.S.; hence, a U.S. court's consideration of the merits of the Mexican government's actions would antagonize Mexico).

127. One commentator has contended that the Fifth Circuit "abruptly abandoned the incidents of the debt test" in *Grass v. Credito Mexicano*, 797 F.2d 220 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1575 (1987). See *Foreign Branch Expropriation*, *supra* note 9, at 125 n.163. The

enough flexibility to consider the myriad realities of the commercial world.¹²⁸

Like *Braka*, *Callejo* also involved plaintiffs who purchased CDs from Bancomer before the Mexican nationalization.¹²⁹ After the Mexican currency regulations, Bancomer notified the Callejos that it would repay them under the official exchange rate. The Callejos claimed that the Act of State doctrine should not be used. They argued that situs of the CDs was Texas, since they had ordered their Dallas bank to wire funds to a bank in Laredo, Texas, where Bancomer's accounts would be credited. Hence, the Mexican regulations would not apply.¹³⁰ The court rejected this argument. After formulating the incidents of the debt test, the court concluded that these incidents clearly placed the debt in Mexico: the CDs were issued by Bancomer in Nuevo Laredo, Mexico, and their terms called for payment in Mexico.¹³¹

Cases like *Vishipco*, *Braka*, and *Callejo* show that in a variety of contexts, U.S. courts have applied different situs determination tests. The conflicting uses of the tests among and within the circuits have confused the banking industry. Many of these cases seem to rely on highly fact-specific analyses — such as whether the branch was operational or what the deposit contract said — treating situs determination as a factual question.¹³² Determining where a tangible object has its situs does involve a question of fact.¹³³ As the courts originally developed the domicile and complete fruition tests in cases involving tangible property, perhaps the fact-specific approach was necessary.¹³⁴

appellate court did not go through situs determination at all. *Grass*, 797 F.2d at 221. This would reflect the conflict within the Fifth Circuit as to the proper test.

However, elements of the incidents of the debt test are still used. See *Edelmann v. Chase Manhattan Bank, N.A.*, 856 F.2d 322, *amended*, 861 F.2d 1291 (1st Cir. 1988). In *Edelmann*, Judge Wisdom of the Fifth Circuit, sitting by designation, applied a conflict of laws test resembling the incidents of the debt test and found that New York law should govern the debt in issue. 861 F.2d at 1301-02. In addition, the Second Circuit in *Braka v. Bancomer, S.N.C.*, 762 F.2d 222 (2d Cir. 1985), seemed to leave room for a more flexible test that would analyze extrinsic factors as well as contractual ones. See *Fundamental Inquiry*, *supra* note 92, at 128 ("The court seems to reserve application of a situs test that considers policy considerations and factors extrinsic to the credit instrument for facts that might motivate the court to look beyond the parties' contract.").

128. See *infra* notes 170-72 and accompanying text.

129. *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1106 (5th Cir. 1985).

130. *Id.* at 1121. The court also rejected the plaintiff's attempts to invoke the commercial activity and treaty exceptions. *Id.* at 1114-21.

131. *Id.* at 1123-24.

132. The situs of tangible property is a factual question. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 358 (1909) (the Court noting that "sovereignty is pure fact" in a case involving title to lands seized after secession of Panama from Colombia in 1905).

133. *Id.* See also *Dilworth*, *supra* note 95, at 579 n.30.

134. See *Debt Situs Confusion*, *supra* note 125, at 601.

However, the situs of intangible property or of contractual rights (like a deposit) presents a legal question, calling for thorough judicial analysis of the legal relationships involved in the case.¹³⁵

The Court should adapt the Act of State doctrine properly to bank liability cases by moving away from fact-specific situs tests that may distort common understandings in the commercial banking industry. The judicial branch should formulate a single situs determination test applied as a question of law, instead of using all three tests, some of which depend on questions of fact and thereby give the trial court more discretion over the end result. A single situs test that would allow for broader consideration of multiple factors and that would allow for greater oversight by higher courts would benefit the banking industry.

V. DIFFICULTIES WITH THE LOWER COURTS' DECISIONS

However, neither the domicile, the complete fruition, nor the incidents of the debt tests were applied in *Wells Fargo*. Instead, the trial court on remand found that the telexes constituted a deposit agreement with repayment to be made in New York, eliminating the need to use situs tests.¹³⁶ By interpreting fragments from telex messages to be a binding legal document, the lower court avoided making a choice among the situs tests.¹³⁷ The High Court's adoption of this reasoning would lead to a simple, yet unacceptable result. That should not occur.

In rejecting the lower court's reasoning for situs determination, the Supreme Court should take advantage of the opportunity to end the conflict among the circuits as to the appropriate situs determination test. Adoption of the incidents of the debt test would allow the judicial branch to account for the concerns raised by the Act of State doctrine, while also enabling courts to consider the realities of the commercial banking world, instead of narrowly focusing on a few facts. Although continued use of the fact-dependent domicile and complete fruition tests would allow the courts a greater degree of flexibility in exercising their discretion in bank liability cases, the resulting confusion would seriously disrupt the banking industry, which prizes

135. See Dilworth, *supra* note 95, at 579 n.30 and accompanying text.

136. *Wells Fargo III*, *supra* note 16, at 1452-53.

137. Such dependence on the exact terms of the telex messages seems misplaced. Foreign exchange transactions are normally arranged by word of mouth over the telephone, unless telexes are used. T. MCRÆ & D. WALKER, *FOREIGN EXCHANGE MANAGEMENT* 35 (1980). Thus, many aspects of Eurodollar transactions are never recorded.

stability in its operations.¹³⁸

A. *Legal Burdens of Wells Fargo*

The trial court did not fully appreciate these concerns when it based its judgment on the fragmented telex messages. To interpret the telexes as the trial court did would stretch both textual and financial logic. The telexes merely represent confirmations of oral contracts made between the two parties which incorporate implied conditions.¹³⁹ As stated earlier, Eurodollar actors have always presumed that the situs of repayment — governed by the local law — would be in the overseas branch, not the home office.¹⁴⁰ *Wells Fargo* would place the situs at the home office, drastically undermining part of the Eurodollar system's legal foundation.¹⁴¹

The court in *Callejo* avoided such a result by rejecting the plaintiff's contention that the correspondent bank's location dictated where the situs of a debt should be.¹⁴² A correspondent bank is merely a "conduit" for deposits, not their repository, reasoned the court.¹⁴³ As it noted:

To hold otherwise would throw a monkeywrench into the wheels of international finance, whose smooth operation depends in large part on the lubricating influence of correspondent banks. *It would mean that the*

138. See *infra* notes 192-94 and accompanying text.

139. See *supra* note 18.

140. The original Eurodollar customers, Eastern Bloc countries, placed their dollar reserves outside the United States to avoid the reach of U.S. banking regulations. Thus, immediate legal liability for such deposits was to fall outside of the United States. H. RIEHL & R. RODRIGUEZ, *FOREIGN EXCHANGE AND MONEY MARKET EXCHANGES* 9 (1983). Also, the additional interest that Eurodollar depositors receive reflects the risk that they assume by collecting their debts in the foreign country, rather than in the United States: "For example, a U.S. dollar deposit with the Swiss branch of an American bank and a deposit with another branch of the same bank in a less stable country command different rates because of the difference in sovereign risk." *Id.* Citibank made this a major point in its argument. *Wells Fargo I*, *supra* note 16, at 356. However, in this case interest rates among all foreign countries were uniform, albeit higher than in the United States. *Id.*

141. The United States filed an *amicus curiae* brief supporting Citibank, stating: "We believe that Citibank is correct in asserting that the court of appeals misconstrued the parties' deposit agreements. Moreover, that mistake — though seemingly narrow and factbound — could have serious consequences for the international banking community." *Supreme Court to Review Citibank's Liability for Foreign Branch Deposits*, Daily Report for Executives, (BNA) (December 5, 1989) (quoting Brief for the United States as *Amicus Curiae*, *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 852 F.2d 657, *cert. granted*, 110 S. Ct. 537 (Dec. 4, 1989) (No. 88-1260)).

142. *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985). See *supra* notes 129-31 and accompanying text.

143. *Id.* at 1125. The court in *Braka v. Bancomer, S.N.C.*, 762 F.2d 222 (2d Cir. 1985) rejected similar arguments; plaintiffs had contended that since they had made some purchases from defendant bank by sending checks to its New York agency and received some interest payments in New York, New York was the situs of the debt. *Id.* at 224. Instead, the court found that the situs was Mexico because the Mexican government's currency restrictions came to complete fruition in Mexico. See *supra* notes 114-20 and accompanying text.

deposits held by a bank would have different situs depending on the locations of the corresponding banks that first received them. Potentially a bank would have to comply with different laws for different deposits at a single branch. Rather than open this Pandora's box, banks would almost certainly attempt to receive deposits directly, without the services of a correspondent bank.¹⁴⁴

But unlike the *Callejo* court, the *Wells Fargo* court dared to open a Pandora's box of legal complications for the U.S. banking industry when it found the location of the correspondent bank to be determinative. *Wells Fargo's* reasoning would dictate that deposits linked to different correspondent banks would have different situs locations, creating a confusing situation for banks. Finally, while forcing branches into the legal dilemma described above, the court's decision would also subject all Eurodollar transactions with a "base" in New York to its interpretation of New York law.¹⁴⁵

Undoubtedly, over time, U.S. banks could redraft Eurodollar transactions to circumvent the legal effect of the *Wells Fargo* decision. For example, banking lawyers could add governing-law clauses to the standard Eurodollar transaction forms. The choice of law would then be mandated by contract. Yet some courts might not allow Eurodollar actors to shift risks by contract.¹⁴⁶ The resulting legal tangles would mean that Eurodollar depositors with U.S. banks would never be certain as to the legal risks that their deposits entailed.

Alternatively, the banking industry could seek regulatory or legislative help. The U.S. regulatory entities (the Federal Reserve Board and the Federal Deposit Insurance Corporation [FDIC]) could intervene. An attempt to work around *Wells Fargo* through U.S. federal bank regulation, however, might not effectively end the potential legal confusion as additional regulation would not reach deposits already outstanding in the foreign branch offices and could possibly add to the cost of transactions.¹⁴⁷ In addition, Congress has been very reluctant

144. *Callejo*, 764 F.2d at 1125 (emphasis added). Such a result would lead to higher legal and commercial costs. See *supra* notes 129-31 and accompanying text for more discussion of *Callejo*.

145. See *Wells Fargo III*, *supra* note 19.

146. *Vishipco Line v. Chase Manhattan Bank, N.A.*, suggests that no contractual clause could effectively limit the liability of the U.S. home office. 660 F.2d 854, 863-64 (2d Cir. 1981), cert. denied, 459 U.S. 976 (1982). Also, recall that *Trinh v. Citibank, N.A.*, did not give full effect to contractual provisions requiring repayment in Vietnamese currency and only in Saigon or to a *force majeure* clause that could have relieved Citibank of liability. 850 F.2d 1164, 1168, (6th Cir. 1988), petition for cert. filed, 57 U.S.L.W. 3455 (U.S. Dec. 20, 1988) (No. 88-1031). See also *infra* notes 155-62 and accompanying text; Note, *Recent Trends in Branch Expropriation Cases*, 8 SUFFOLK TRANSNAT'L L.J. 45, 71 (1984) (stating that courts might find such clauses to be unconscionable).

147. Some believe that excessive U.S. government regulation caused the U.S. markets to lose the Eurodollar market to London. Szala, *Will U.S. Rules Drive Trading Overseas?* FUTURES:

to regulate the Eurodollar deposits, specifically exempting foreign bank branches from reserve requirements¹⁴⁸ and excluding deposits at foreign branches from the coverage of the FDIC.¹⁴⁹ Since reserve requirements are the principal manner of implementing monetary policy, one could infer that Congress does not deem deposits in foreign bank branches to be vital to the implementation of U.S. monetary policy.¹⁵⁰ Agencies acting against Congressional intent would do so at their political peril.

In sum, the legal and regulatory uncertainty generated by *Wells Fargo* places U.S. banks in a disadvantageous commercial position, as subsequent Eurodollar transactions would reflect higher regulatory and legal costs peculiar to deposits with United States-based banks. Such transactional obstacles would hinder U.S. international banks in an era of heightened competitiveness. The U.S. banking system faces pressures in the Eurocurrency market as Japanese and German banks increase their market presence.¹⁵¹ The global financial system would eventually shift in favor of Euroyen or Euromark transactions not facing the same restrictions that a *Wells Fargo*-burdened U.S. system would. Thus, fears of government regulation in the Eurodollar market abound in the banking industry, as one pessimistic observer noted in an article concerning a proposed extension of FDIC insurance (and premiums) to Eurodollar deposits:

If the new premium is to be assessed against Eurodollars, too, American banks can close down all their overseas branches, because there's no way they'll ever be able to compete. Money center American banks could probably consider closing down the headquarters operations, too, because foreigners who can fund their U.S. loans out of uninsured dollar deposits back home will have a colossal pricing advantage over the banks of the host country.¹⁵²

If upheld, *Wells Fargo* could confirm these fears that our legal and political systems serve as shackles to U.S. competitiveness in a global market. Hopefully, the Court will understand these fears and strike down the lower court's decision.

THE MAGAZINE OF COMMODITIES AND OPTIONS, Aug. 1988, at 35 ("Although the Fed has relaxed some restrictions, the business isn't coming back.").

148. Monetary Control Act of 1980, Pub. L. No. 96-221, § 103, 94 Stat. 132, 136 (codified at 12 U.S.C. § 461(b)(6) (1988)).

149. International Banking Facility Deposit Insurance Act, Pub. L. No. 97-110, § 102, 95 Stat. 1513 (1981) (codified at 12 U.S.C. § 1813(l)(5)(A) (1988)).

150. See Note, *Holding U.S. Bank Home Offices Liable for Deposits in Their Foreign Branches*, 11 FORDHAM INT'L L.J. 621, 632 (1988).

151. Before 1984, only 4.2 percent of world official foreign exchange reserves were denominated in Japanese yen. In May 1984, the U.S. and Japan concluded negotiations liberalizing Japanese currency restrictions. See J. GRABBE *supra* note 16, at 55.

152. Mayer, *Massacring the Innocents*, Am. Banker, Feb. 3, 1989, at 1, col. 2.

B. *The Need for a Single Situs Determination Test*

In striking down the lower court reasoning, the Court should also address Act of State concerns. A High Court that limited itself to the simple analysis of the lower jurisdictions would miss a great opportunity to end the ongoing disagreement on the proper situs determination test for bank liability cases as well as to curb the resulting forum-shopping.¹⁵³ Although the tests appear to be similar, a court's discretionary choice of a particular test is determinative of the result in each case.¹⁵⁴ For example, in *Trinh v. Citibank, N.A.*, which had been paired by the High Court with *Wells Fargo* for comment by the Justice Department,¹⁵⁵ use of the domicile test instead of the incidents of the debt test led to vastly differing results.

Trinh, a Vietnamese citizen, placed a deposit with Citibank's Saigon branch during the Vietnam conflict.¹⁵⁶ The terms of the deposit stipulated that Trinh would receive nineteen percent interest (as opposed to the five percent interest then required by U.S. law for domestic U.S. deposits) and the debt would be repayable in South Vietnamese currency only in Saigon.¹⁵⁷ The district court applied the domicile test, finding that since Citibank had "voluntarily" withdrawn its personnel and closed its Saigon branch less than a week before the North Vietnamese conquest of Saigon (and Citibank's branch office), the situs of the debt had reverted to the home office in New York.¹⁵⁸

This result, also illustrated by the earlier case of *Vishipco Line*, presents U.S. banks with the Hobson's choice of either withdrawing their personnel upon notice of imminent danger — and later being held liable for a relocated debt — or maintaining the office under such circumstances and possibly risking the personal safety of bank personnel.¹⁵⁹ If, on the other hand, the district court had applied the incidents of the debt test, the facts of the case would seem to indicate that the situs of the debt was Saigon, and not New York.¹⁶⁰ It would then

153. See *Foreign Branch Expropriation*, *supra* note 9.

154. See *Fundamental Inquiry*, *supra* note 92.

155. See *supra* note 67.

156. *Trinh v. Citibank, N.A.*, 623 F.Supp. 1526 (E.D. Mich. 1985), *aff'd*, 850 F.2d 1164, 1166 (6th Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 3455 (U.S. Dec. 20, 1988) (No. 88-1031).

157. *Trinh*, 850 F.2d at 1166.

158. *Trinh*, 623 F.Supp. at 1533-34.

159. *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982). See *Foreign Branch Expropriation*, *supra* note 9, at 118 (explaining that use of domicile test presents U.S. banks with an awkward situation).

160. *Trinh*, 850 F.2d at 1170-71. See also *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1123-25 (5th Cir. 1985) (explaining the analysis involved in the incidents of the debt test).

follow that the Act of State doctrine would preclude judicial analysis of the Vietnamese nationalization of Trinh's debt and relieve Citibank of its obligations.¹⁶¹ As *Trinh* shows, the court's discretionary choice as to which situs determination test applied, and not the specific facts of *Trinh*, decided whether Trinh could collect from Citibank. Such disparate results could be eliminated in *Wells Fargo* if the High Court, after finding that the telexes did not constitute an agreement as to repayment, would also take up an analysis to see if the Act of State doctrine should apply.¹⁶² If the Court takes this approach, then it could also consider the situs determination issue. Only by this approach could the Supreme Court finally end the conflicts among and within the circuits as to which situs determination test should be used.

Theoretically, the Court could resolve *Wells Fargo* without addressing Act of State concerns and hence avoid the chaos surrounding situs determination. Recall that the Act of State doctrine was developed to avoid conflicts with foreign governments.¹⁶³ However, in *Wells Fargo*, the Philippine Central Bank sent a telex message to WFAL disavowing any objection to the use of Citibank/Manila's non-Filipino assets in a judgment for WFAL.¹⁶⁴ The Court could construe that message as indicative of the Philippine government's consent to the U.S. judicial branch's judgment of this case; hence, the Act of State doctrine need not apply. Although this would allow the Court to avoid the Act of State question, it would be a disturbing precedent. First, the confusion over situs determination tests would remain. Second, the Court has stated that the proper method for foreign governments to express their opinions in pending litigation is to file an *amicus curiae* brief.¹⁶⁵ Third, acceptance of the telex as the definitive

161. See *Perez v. Chase Manhattan Bank, N.A.*, 61 N.Y.2d 460, 473, 463 N.E.2d 5, 11, 474 N.Y.S.2d 689, 695 (stating that application of Act of State doctrine requires court to accept expropriation as a collection of the debt), *cert. denied*, 469 U.S. 966 (1984). For more on *Perez*, see Note, *Debt Situs and the Act of State Doctrine: A Proposal for a More Flexible Standard*, 49 ALBANY L. REV. 647 (1985).

162. See Dilworth *supra* note 95, at 580.

163. See *supra* notes 75-77 and accompanying text.

164. See *supra* note 45 and accompanying text.

165. During the litigation of *Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978), the European Economic Community (EEC) feared that a victory by Zenith would violate Article VI of the General Agreement on Tariffs and Trade (GATT), threatening negotiations in the GATT Tokyo Round. Both the EEC and Japan sent diplomatic notes expressing their views to the U.S. State Department, and asked the Solicitor General to distribute them to the Court (they are reproduced at 17 I.L.M. 934 (1978)). The Clerk of the Supreme Court did distribute the notes, but later told the Solicitor General that the Court's rules did not contemplate future distributions of such notes. The Clerk suggested that an *amicus curiae* brief was the proper method for a foreign government to express its views on a pending case before the Supreme Court. See J. JACKSON & W. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 141 (2d ed. 1986).

opinion of the Philippine government would implicate various separation of powers concerns, which previous courts have attempted to avoid via judicial deference to the political branches.¹⁶⁶ Such action would conjure a myriad of scenarios: rival governments issuing opinions, multiple pronouncements by different entities of a foreign government, and delicate interpretation of obtuse communications. In such situations, a court using foreign government "messages" to avoid full analysis of the Act of State doctrine could cause the U.S. government to speak with more than one voice in foreign affairs.¹⁶⁷ Fortunately, the Court is reluctant to create new exceptions to the Act of State doctrine.¹⁶⁸ Also, the Restatement states that "the doctrine cannot be 'waived' by the foreign state" *per se*.¹⁶⁹ Thus, the Court should reject this shortcut.

C. *The Proper Situs Determination Test*

If the Court were to decide to consider Act of State concerns, it should adopt the best approach to the situs question — the incidents of the debt test.¹⁷⁰ A U.S. court applying the test would be free to consider a variety of factors, including those not specified in the written deposit agreement.¹⁷¹ The Court could fill in the many gaps in the telexes with unwritten clauses arising from standard practices in the Eurodollar trade. The Court could also consider statements like the Central Bank's telex message as evidence of a foreign government's interest in the litigation.¹⁷² In addition, the application of the test, as a question of law, would be more open to judicial review upon appeal,

166. As Professor L. Henkin has noted:

[F]oreign affairs make a difference. The courts are less willing than elsewhere to curb the political branches and have even developed doctrines of special deference to them. They have asserted judicial power to develop doctrines to safeguard the national interest in international relations against both judicial interference and invasion by the States.

FOREIGN AFFAIRS AND THE CONSTITUTION 206-07 (1972) (footnote omitted).

167. *See, e.g., Baker v. Carr*, 369 U.S. 186, 217 (1962) (mentioning the "potentiality of embarrassment from multifarious pronouncements by various departments on one question").

168. *See supra* note 84.

169. However, such statements should be considered by the court in determining whether the Act of State doctrine should apply, as consent may weaken the justification for applying the doctrine. But such consent does not completely eliminate the Act of State concerns. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES, § 443, comment e (1986).

170. *See Dilworth, supra* note 95, at 580; *Debt Situs Confusion, supra* note 125, at 611-17.

171. These incidents include where the debt was carried, the place of payment, intent of the parties regarding choice of law, and involvement of the American banking regulatory system. *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1123-24 (5th Cir. 1985).

172. This would be a proper use of the Central Bank's telex message, rather than as a means to avoid analysis of the Act of State issues involved. *See supra* notes 163-70 and accompanying text. Also, the Restatement states that "indications of consent to adjudication by the courts of another state are highly relevant." *See supra* note 169 and accompanying text.

thus allowing the sensitive field of international banking law to develop under appellate court guidance.

Judicial consideration of the factors, or incidents, enumerated in *Callejo* would seem to indicate that WFAL's deposit was situated in Manila.¹⁷³ One factor is the place where the deposit is carried. Payments in the Eurodollar system are made through a clearinghouse system, with the demand account based in Citibank/New York.¹⁷⁴ However, as one witness stated, no significance should be made of the identity or location of the correspondent bank.¹⁷⁵ The *Callejo* court expressed similar sentiments.¹⁷⁶ In this case, the Court should not consider the correspondent bank's location in New York to be determinative.

Another factor to consider is the intent of the parties as to the law governing the deposit.¹⁷⁷ The trial court's findings aside, neither party had stipulated whether Philippine or New York law should apply.¹⁷⁸ Evidence presented by Citibank and other sources suggest that Eurodollar depositors understood that the deposit was made under Philippine law, the law of the foreign branch.¹⁷⁹ Hence, no intent of the parties beyond general commercial practices could be established.

173. The court derived these factors from previous bank liability cases: *Dunn v. Bank of Nova Scotia*, 374 F.2d 876, 877-78 (5th Cir. 1967) (holding that place where deposit is held, if not stipulated by contract, is the situs of the deposit); *Weston Banking Corp. v. Turkiye Garanti Bankasi, A.S.*, 57 N.Y.2d 315, 324-25, 442 N.E.2d 1195, 1199, 456 N.Y.S.2d 684, 688 (1982) (holding that when parties intend New York law to govern dispute resolution, the situs of the debt is New York); *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 733 F.2d 23 (2d Cir. 1984), *rev'd and remanded on rehearing*, 757 F.2d 516, 521-22 (holding that since defendant bank's promissory notes provided for repayment in New York, New York was the situs of repayment), *cert. denied*, 473 U.S. 934 (1985).

174. *CHIP*, *supra* note 20.

175. *Wells Fargo I*, *supra* note 16, at 354. See also Scanlon, *Definitions and Mechanics of Eurodollar Transactions*, in *THE EURODOLLAR 22* (H. Prochnow ed. 1970) ("The [Eurodollar] market has no specific location. Its physical dimension is essentially a network of international telecommunication media . . .").

176. See *supra* notes 143-44 and accompanying text.

177. *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1123 (5th Cir. 1985).

178. The court of appeals found that silence in the telexes on where the debt was collectible indicated that WFAL could collect the debt from Citibank assets in New York. *Wells Fargo*, *supra* note 12, at 661. But logically, such silence should equally indicate that WFAL could collect the debt from Citibank/Manila assets. See *supra* note 64.

179. *Wells Fargo I*, *supra* note 16, at 356. See, e.g., STAFF OF THE JOINT ECON. COMM., 91ST CONG., 2D SESS., *THE EURO-DOLLAR MARKET AND ITS PUBLIC POLICY IMPLICATIONS 2* (Comm. Print 1970) (noting that investors seeking higher interest rates in the Eurodollar market understand that they receive higher rates because the local country could impose currency restrictions on the deposit); Logan & Kantor, *Deposits at Expropriated Foreign Branches of U.S. Banks*, 1982 U. ILL. L. REV. 333, 335 (states expect foreign bank branches to accept their regulations and laws; hence, customers of foreign bank branches must accept the risks involved with such laws); *Transnational Flow*, *supra* note 18, at 499-500 ("Branches operating in a foreign country are, of course, subject to local laws."); P. OPPENHEIM, *supra* note 1 ("The foreign branch must comply with all the banking rules, exchange controls, and regulations of the host country. . . ."); 35 Fed. Reg. 2768, *supra* note 15 ("A customer who makes a deposit that is

Another issue to examine would be the place of payment.¹⁸⁰ Whether the place of payment should be New York, as the trial court held by finding that the parties had made an agreement, or whether it should be Manila would depend on resolution of the other incidents. This would be preferable to focusing on sentence fragments in a few telex messages.

Finally, a court applying the incidents of the debt test would examine the extent of the U.S. regulatory system's involvement.¹⁸¹ The U.S. regulatory system does not appear to be heavily involved in the Eurodollar system or in the deposits at issue. Eurodollar deposits by nature are designed to avoid direct U.S. regulation.¹⁸² For example, they carry higher rates of interest than domestic deposits.¹⁸³ In addition, federal agency and Congressional actions have excluded foreign bank branch deposits from their regulatory reach.¹⁸⁴ Moreover, while the deposits were denominated in U.S. dollars, that fact does not indicate that the U.S. had strong sovereign interests in these Eurodollar deposits.¹⁸⁵ In *Wells Fargo III*, the court hints that it thought otherwise.¹⁸⁶ This outcome of the incidents of the debt test, which would suggest the situs to be Manila, is supported by history. Eurodollar deposits were created for Eastern European countries with large amounts of reserves in U.S. currency who faced the possibility of strict anti-Communist currency restrictions imposed by the U.S. government. Situating the deposits outside the U.S., with New York as a mere transmission point, allowed these and other countries to get around U.S. regulation.¹⁸⁷ Thus, the historical practice of Eurodollar depositors seems to suggest that the deposit was carried in Manila.

The incidents of the debt test seems to resemble the traditional conflict of laws approach used in domestic law, but the criticisms of that approach do not apply to the incidents of the debt test. Granted, the test has a superficial similarity to the center of gravity test commonly applied in contract cases.¹⁸⁸ That test requires the court to de-

payable solely at a foreign branch assumes whatever risk may exist that the foreign country might impose restrictions on withdrawals.").

180. *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1123 (5th Cir. 1985).

181. *Id.* at 1123-25.

182. Deposits in foreign branches are not subject to reserve requirements set by the Federal Reserve Board or the Federal Deposit Insurance Corporation. *See supra* note 15.

183. *Id.*

184. *See supra* notes 147-50 and accompanying text.

185. *See Debt Situs Confusion, supra* note 125, at 613.

186. *Wells Fargo III, supra* note 19, at 1454.

187. *See H. RIEHL & R. RODRIGUEZ, supra* note 140.

188. *See Fricke v. Isbrandtsen Co.*, 151 F.Supp. 465, 467 (S.D.N.Y. 1957) (stating that Federal courts determine the center of gravity of a contract to resolve a conflict of laws question).

termine which state has the most significant relationship to the subject matter of the dispute.¹⁸⁹ In making this determination, the court looks to the contacts between the subject matter and the states.¹⁹⁰ If such a test were directly applied to bank liability cases, courts would have more flexibility to consider factors in determining the situs.¹⁹¹ Courts would still be able to account for the expectations of the foreign state in its analysis; however, the center of gravity test would give courts much discretion in bank liability cases.¹⁹² Banks would also face more uncertainty in bank liability litigation.¹⁹³ Although the center of gravity test allows for a loose (and uncertain) approach to bank liability cases, the more refined incidents of the debt test focuses more on specific factors involved in these cases.¹⁹⁴ That test also retains the prime objective of avoiding the antagonism of foreign governments.¹⁹⁵ In short, the incidents of the debt test appears to fit the specific issues involved in cases such as *Wells Fargo*.

The Court could apply the other situs determination tests. However, these tests focus too much on narrow factual issues such as the operational status of the branch or the terms of the deposit agreement. Such "tunnel vision" would lead courts to overlook the interests of the states involved and to reach artificial results.

The High Court could adopt the domicile test as the test for bank liability cases and other situations involving intangible assets. Citibank/Manila had not ceased operation. Rather, the MAAB merely restricted repayment of the debt with Philippine assets.¹⁹⁶ At least one witness in the bench trial testified that WFAL might still be able to reach non-Philippine assets of Citibank/Manila.¹⁹⁷ In any event, the debt was neither expropriated nor extinguished by the Philippine Cen-

189. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 188 (1969). See also E. SCOLES AND P. HAY, *supra* note 97, at 656-70 (explaining that the center of gravity approach is more flexible than the test embodied in the First Restatement).

190. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1969).

191. See *Foreign Branch Expropriation*, *supra* note 9, at 138-39.

192. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1969).

193. See *Auten v. Auten*, 308 N.Y. 155, 161, 124 N.E.2d 99, 102 (1954) (stating that the center of gravity test leads to less predictable results).

194. See *Foreign Branch Expropriation*, *supra* note 9, at 137 n.250 (stating that the incidents of the debt test used in *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985), involves quantitative evaluation of the contacts and factors involved, whereas the center of gravity test does not).

195. *Callejo*, 764 F.2d at 1123-24 ("[The incidents of the debt] help to answer the ultimate question in the [A]ct of [S]tate context: Are the ties to the debt to the foreign country sufficiently close that we will antagonize the foreign government by not recognizing its acts?").

196. *Wells Fargo II*, *supra* note 38, at 950.

197. *Id.* at 948-49.

tral Bank. Therefore, use of the domicile test might lead the High Court to decide that Manila was the situs of the debt.

Yet, adoption of the domicile test would force U.S. financial institutions into the Hobson's choice between liability and danger to personnel illustrated *infra* in *Trinh*.¹⁹⁸ Americans abroad, facing dangers from the threat of terrorism and other violence, do not need further exposure mandated by use of the domicile test. In addition, the domicile test does not adequately account for the constitutional concerns that led to the creation of the Act of State doctrine. When formulating the doctrine in *Sabbatino*, the Supreme Court stressed that judicial consideration of foreign expropriations could frustrate the foreign policy goals of the executive branch.¹⁹⁹ However, the domicile test does not consider the expectations of the foreign government or other factors in the debtor-creditor relationship. It looks only at the operations of the foreign branch. Hence, a U.S. court applying the domicile test could ignore the foreign state's expectation of dominion over the subject matter at issue.²⁰⁰ This failure to account for the foreign government's interests in the matter could hinder the executive branch's ability to deal with that foreign government.²⁰¹ Therefore, the domicile test might be a concrete rule of law, but it is a rule that operates at the expense of overall American foreign policy.

Application of the complete fruition test could lead to an inconclusive result. This test focuses on the terms of the deposit agreement,²⁰² but if the Court were to reason that the telexes are not determinative of where the debt was to be repaid, would the telexes be determinative enough under the complete fruition test? This seems questionable. Also, the rationale for the complete fruition test does not seem to apply in *Wells Fargo*. The test was meant to account more fully for the expectations of the foreign state in an expropriation.²⁰³ Judicial analysis of the MAAB would not offend the Philippine government, according to the telex received by WFAL's attorneys.²⁰⁴ Finally, the

198. See *supra* notes 155-62 and accompanying text.

199. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 431-33 (1964).

200. *Libra Bank Ltd. v. Banco Nacional de Costa Rica*, 570 F.Supp. 870, 884 (S.D.N.Y. 1983) (holding that courts can better analyze the interests of the foreign state by considering the facts surrounding the debt in question). See generally, Recent Developments, *Act of State: Treatment of Foreign Defaults in Domestic Courts*, 25 HARV. INT'L L. J. 195 (1984).

201. See *Foreign Branch Expropriation*, *supra* note 9, at 119-20.

202. See *supra* note 112 and accompanying text.

203. *Libra Bank Ltd.*, 570 F.Supp. 870, 884 (stating that consideration of factors surrounding the debt gives the court a better understanding of the foreign government's interests).

204. The Philippine government sent plaintiff a telex specifically disavowing any objection to use of Citibank's non-Philippine assets to fulfill its obligation to WFAL. *Wells Fargo II*, *supra* note 38, at 949. See also *supra* note 45.

complete fruition test is limited to the text of the written agreement, a restriction which leads to the same unrealistic analysis in which the trial court engaged.²⁰⁵ This limited approach would not completely encompass factors that the parties failed to put into the written agreement, including the true expectations of a foreign state.²⁰⁶ Thus, the complete fruition test's narrow scope could lead a U.S. court to overlook a foreign government's interests and to frustrate executive branch foreign policy.

D. *Potential Results Under Philippine Law*

As noted, the incidents of the debt test would probably lead the Court to find Manila to be the situs of the deposit. However, if the Court found that the deposit was situated in Manila, it might not necessarily decide in favor of Citibank/Manila. The Act of State doctrine would not bar judicial review of the Philippine government's actions, given that the Philippine government has given some consent to adjudication.²⁰⁷ The Court would be free to apply its interpretations of Philippine law if it wished to do so. Essentially, the Court could use the same reasoning that the trial court applied in its first opinion. The trial court found convincing the reasoning of WFAL's expert on Philippine law,²⁰⁸ which concluded that the MAAB, which did require Central Bank approval of transfers, did not apply to repayment of the deposit with "non-Philippine assets" — assets carried on the books of the bank's non-Philippine offices.²⁰⁹ Thus, under Philippine law introduced in the litigation, so long as non-Philippine assets were used, Citibank/Manila could repay the deposit without Central Bank approval.²¹⁰ Furthermore, since Philippine law treated Citibank's world-wide operations as a single entity, the whole of Citibank, not Citibank/Manila, might be obligated to WFAL.²¹¹ The Court could conclude that WFAL could collect its deposit from any of Citibank's assets without Citibank's violating the MAAB. Indeed, the trial court found that Citibank "had not satisfied its good faith obligation to seek the [Philippine] government's consent to use the assets booked at Ci-

205. See *supra* note 112.

206. *Libra Bank Ltd.*, 570 F.Supp. at 884.

207. When the sovereign state has consented to adjudication in the courts of another state, the justification for applying the Act of State doctrine is "significantly weaker." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 443, comment e (1986).

208. *Wells Fargo II*, *supra* note 38, at 948.

209. *Id.*

210. *Id.*

211. *Id.* at 948-49, (quoting the Philippine Supreme Court in *National City Bank v. Posadas*, 60 Phil. 630 (1934), *aff'd*, 296 U.S. 497 (1936)).

tibank's non-Philippine offices."²¹² Therefore, the Court could construe the Central Bank's telex to WFAL to constitute such consent. However, the Court may wish to remand this case and let the lower court handle this analysis, which involves these unfamiliar issues of Philippine law. In any event, WFAL might still prevail.

VI. CONCLUSION

The reasoning this note advocates would lead to the same outcome that the trial and appellate courts reached. Citibank, which appears to have resisted payment of the deposit so that it could set a precedent, would still be required to make payment to WFAL. However, it does so without creating the obstacle to commercial banking practices that results from the lower courts' reasoning. Banks would not face the legal uncertainties caused by the case nor would they have to circumvent these uncertainties with costly legal and business practices. This approach would also affirm the superior status of the incidents of the debt test, a methodology for approaching situs determination in Act of State cases involving intangible assets that more accurately reflects the basic tenets of the doctrine and the expectations of foreign governments. At the time of printing, the Supreme Court has not yet issued its opinion in *Wells Fargo*.²¹³ Perhaps it will not adopt this reasoning. But if the Court avoids a fact-specific analysis of the case and undertakes a thorough examination of the Act of State doctrine's mechanics, however, both the parties in this case and the entire financial community will be made better off in the long run.

212. *Wells Fargo III*, *supra* note 19, at 1455.

213. Oral argument was scheduled for Mar. 19, 1990. *Hearing Scheduled*, U.S.L.W.—Daily Edition (Mar. 1, 1990).