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Recent Decisions

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RECENT DECISIONS

CONSTITUTIONAL LAW—GRANDFATHER CLAUSE IN INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT PERMITS THE PRESIDENT TO BAN TRAVEL TO CUBA WITHOUT DECLARING AN EMERGENCY, *Regan v. Wald*, 104 S. Ct. 3026 (1984).

I. FACTS AND HOLDING

Plaintiffs, United States citizens who wished to travel to Cuba, brought suit against the Secretary of the Treasury claiming that United States regulations banning travel to Cuba lacked statutory authority and were unconstitutional.[1] In promulgating the regulations in 1982,[2] the President had failed to declare a peacetime emergency as required by the International Emergency Economic Powers Act (IEEPA).[3] Plaintiffs asserted that the absence of emergency executive authority rendered the regulations invalid.[4] Alternatively, plaintiffs asserted that even if statutory authority existed for the President's actions, the regulations presented an

1. Regan v. Wald, 104 S. Ct. 3026, 3029-30 (1984).

2. In 1982, existing Treasury Department regulations were amended to prohibit all travel to Cuba except for official visits, news gathering, professional research, and visits to close relatives. 31 C.F.R. § 515.560(a)(1)(1984). General tourist and business travel were specifically prohibited. *Id.* § 515.560(a)(3). General travel to Cuba had been permitted under regulations promulgated six years earlier. *See* 31 C.F.R. § 515.560 (1977) (repealed 1984).

3. Act of Dec. 28, 1977, Pub. L. No. 95-223, §§ 201-208, 91 Stat. 1625, 1626-29 (codified at 50 U.S.C. §§ 1701-1706 (1982)). Enacted in 1977, IEEPA superseded the Trading With the Enemy Act (TWEA), 50 U.S.C. app. § 1-44 (1982). TWEA, originally enacted in 1917 and amended in 1941, gave the President broad emergency powers in times of both war and peace. In 1977 Congress essentially left the President's TWEA wartime powers unchanged, but required the President to declare peacetime emergencies under IEEPA, 50 U.S.C. § 1701 (a), and report to Congress every six months on actions taken after the declaration. *Id.* § 1703(c).

4. Because peacetime powers under TWEA had been repealed and the President had not followed the procedural requirements of IEEPA, plaintiffs claimed there was no statutory authority for the regulations. *Wald*, 104 S. Ct. at 3032.

unconstitutional burden on their fifth amendment liberty to travel abroad.[5] Defendant[6] acknowledged that the President had not followed IEEPA's declaration procedures. He claimed, however, that the President's authority in this case arose from a grandfather clause in IEEPA that allows the President to continue asserting emergency authorities being exercised in 1977 without declaring a new emergency.[7] Defendant reasoned that because in 1977 the President had been regulating certain travel-related transactions between United States citizens and Cuba, the President's authority to issue further travel-related restrictions, such as a travel ban, had been preserved.[8] The United States District Court for the District of Massachusetts denied the plaintiff's motion for a preliminary injunction.[9] On appeal, the United States Court of Appeals for the First Circuit, while not reaching the constitutional issue,[10] held that because the President was not asserting his *specific* authority to ban travel to Cuba in 1977, the grandfather clause did not provide a source of authority for a future travel ban.[11] On writ of certiorari to the United States Supreme Court, *reversed. Held*: (1) Presidential authority existed to prevent plaintiffs' travelling to Cuba after enactment of IEEPA because the President had been regulating certain travel-related transactions on the date specified by the statute's grandfather clause, thus preserving authority to issue general travel restrictions at a later date; (2) the need to curtail the flow of hard currency to a country supporting armed violence and terrorism in the Western Hemisphere provides an adequate basis for restricting an individual's fifth amendment liberty to travel to that country.

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5. *Id.* at 3038.

6. Because the regulations banning travel to Cuba had been promulgated by the Treasury Department, Donald T. Regan, Secretary of the Treasury, was the named defendant.

7. 104 S. Ct. at 3032-33.

8. *Id.*

9. *Id.* at 3030.

10. Plaintiff claimed that IEEPA was unconstitutional if it was construed to permit the President to ban travel abroad. Because the First Circuit did not construe the IEEPA to permit a travel ban, the constitutional issue became moot. Wald v. Regan, 708 F.2d 794, 795 (1st Cir. 1983), *rev'd*, 104 S. Ct. 3026 (1984).

11. 708 F.2d at 800.

II. LEGAL BACKGROUND

A. Statutory Authority

Congress enacted the Trading With the Enemy Act (TWEA)[12] in 1917 to enable the President to respond to economic emergencies during wartime. Section 5(b) of the Act gave the President wartime powers to "investigate, regulate, or prohibit" any transactions between the United States and foreign countries or their residents.[13] In 1933, Congress amended the Act to authorize the Executive to invoke its special powers during peacetime emergencies, enabling President Roosevelt to proclaim the 1933 Bank Holiday.[14] A 1941 amendment augmented executive power to block certain transnational transactions, authorizing the President to "vest" or "liquidate" the property involved.[15] The four emergencies[16] technically in effect under the TWEA were termi-

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12. Trading With the Enemy Act, ch. 106, 40 Stat. 411 (1917) (current version at 50 U.S.C. app. §§ 1-44 (1982)) [hereinafter cited as TWEA]. For discussions of the early history of TWEA, see Hand, Jr., *The Trading With the Enemy Act*, 19 COLUM. L. REV. 112 (1919); Comment, *The Trading With the Enemy Act*, 35 YALE L.J. 345 (1926). For discussion of the later development of TWEA, see *Emergency Controls on International Economic Transactions: Hearings before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations*, 95th Cong., 1st Sess. 2-20 (1977)(statement of Prof. Andreas F. Lowenfeld); *id.* at 20-31 (statement of Prof. Harold G. Maier) [hereinafter cited as *Hearings*].

13. TWEA, *supra* note 12, § 5(b), 40 Stat. at 415 (amended 1977).

14. The 1933 Bank Holiday was the first dramatic act of the Roosevelt Administration. President Roosevelt was inaugurated on Saturday, March 4, 1933, as the collapse of the entire United States banking system appeared imminent. In his inaugural speech the new President declared, "the only thing we have to fear is fear itself." The next day he proclaimed a national bank holiday and called Congress to meet in special session the following Thursday. On Thursday, March 9, Congress passed legislation ratifying the bank holiday and the numerous other executive actions taken during the interval. Act of Mar. 9, 1933, ch. 1, § 1, 48 Stat. 1 (codified at 12 U.S.C. § 956 (1982)). The Act also granted the President section 5(b) powers "during the time of war or any other period of national emergency declared by the President." *Id.* § 2, 48 Stat. 1 (amended 1977). The following Sunday evening, March 12, 1933, President Roosevelt delivered his first fireside chat explaining how the reopening of the banks would be managed and what the public could do to help make the process orderly. The next day he legalized beer. *See generally* F.L. ALLEN, SINCE YESTERDAY (1939).

15. Act of Dec. 18, 1941, ch. 593, § 301, 55 Stat. 838, 839-40 (codified as amended at 12 U.S.C. § 95(a)(1) & 50 U.S.C. app. § 5(b)(1) (1982)).

16. President Nixon's Balance of Payments Emergency, Proclamation No. 4074, 3 C.F.R. 80 (1971), *reprinted in* 85 Stat. 926 (1971); President Nixon's

nated in 1976 by the passage of the National Emergency Act (NEA).[17] President Truman's emergency declaration issued at the start of the Korean Conflict in 1950,[18] has served as a source of authority for Presidents to control transactions with all communist nations. Pursuant to this ongoing "emergency," the Kennedy Administration issued regulations prohibiting transactions with, and travel to, Cuba.[19] These regulations remained in effect until early 1977, when the Treasury Department promulgated regulations permitting travel to Cuba.[20] Thus, travel to Cuba was permitted when Congress enacted IEEPA to limit Presidential powers under the TWEA.[21] Passage of IEEPA essentially reenacted the authority of TWEA with several important limiting provisions.[22] IEEPA requires the President to declare peacetime emer-

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Postal Strike Emergency, Proclamation No. 3972, 3 C.F.R. 473 (1970), *reprinted in* 84 Stat. 2222 (1970); President Truman's Korean Emergency, Proclamation No. 2914, 3 C.F.R. 71 (1950), *reprinted in* 64 Stat. A454 (1950); and President Roosevelt's Bank Emergency, Proclamation No. 2039, 3 C.F.R. 120.1 (1982), *reprinted in* 48 Stat. 1691 (1933), were still in effect in 1976.

17. National Emergency Act, 50 U.S.C. §§ 1601, 1621-22, 1631, 1641, 1651 (1982). The National Emergency Act and IEEPA were part of a common statutory scheme designed to limit Presidential powers. The NEA terminated the four existing Presidentially declared emergencies and established procedures for the declaration of future emergencies. The NEA requires emergencies to be officially declared by publication in the Federal Register, 50 U.S.C. § 1621(a), and allows emergencies to be terminated by Congressional concurrent resolutions or by Presidential proclamations. *Id.* § 1622(a). IEEPA addresses the actions that a President may take once an emergency is declared, and defines the types of Presidential actions that require an emergency declaration. *See* 50 U.S.C. § 1701-1706. For an extensive discussion of the NEA, see Note, *The National Emergency Dilemma: Balancing the Executive's Crisis Powers with the Need for Accountability*, 52 S. CAL. L. REV. 1453 (1979).

18. *See supra* note 16.

19. 31 C.F.R. § 515.201(b) (1964).

20. 31 C.F.R. §§ 515.560-.561 (1977). The new regulations exempted travel-related transactions from the general ban on transactions with Cuba in the earlier regulation. Specifically, the 1977 regulations were enacted to permit "persons who visit Cuba to pay for their transportation and maintenance expenditures (meals, hotel bills, taxis, etc.) while in Cuba." 42 Fed. Reg. 16,621 (1977).

21. Wald v. Regan, 708 F.2d 794, 796. The regulations repealing the travel ban were issued in March 1977, *see* 31 C.F.R. §§ 515.560-.561 (1977), and Congress set July 1, 1977, as the effective date of the grandfather clause for regulations enacted under TWEA. *See* Act of Dec. 28, 1977, *supra* note 3, § 101(b), 91 Stat. at 1625.

22. For discussion of the purpose and impact of IEEPA, see Note, *The International Emergency Economic Powers Act: A Congressional Attempt to*

gencies[23] and to consult with Congress every six months for the duration of any declared emergency.[24] Because Congress did not

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Control Presidential Emergency Power, 96 HARV. L. REV. 1102 (1983); Note, *Presidential Emergency Powers Related to International Economic Transactions: Congressional Recognition of Customary Authority*, 11 VAND. J. TRANSNAT'L L. 515 (1978).

23. 50 U.S.C. § 1701(a) (1982).

24. *Id.* § 1703(c). Other limiting aspects of IEEPA include the deletion of Presidential powers to "vest property," "regulate domestic transactions," and "seize documents." The President had held these powers in peacetime emergencies under the TWEA. *See supra* note 15 and accompanying text.

The first major test for IEEPA's limiting provisions came in the aftermath of the Iranian hostage crisis. Pursuant to a declared emergency, President Carter ordered the Secretary of the Treasury to issue regulations that suspended the attachment of Iranian assets by United States courts. 31 C.F.R. 535.218 (1984). The President also ordered that the assets be transferred to a security account. Exec. Order No. 12,279, 46 Fed. Reg. 7919. This account ultimately was to be disbursed at the behest of an international tribunal. 31 C.F.R. § 535.212 (1984). Dames & Moore International had obtained attachments on certain Iranian assets in a United States district court after an Iranian instrumentality had breached a contract for power plant feasibility studies. Dames & Moore v. Regan, 453 U.S. 654, 664 (1981). Dames & Moore argued that the deletion by IEEPA of the executive's power to "vest property" prohibited the President from transferring assets to the tribunal. *Id.* at 672 n.5. The Court, noting IEEPA's reaffirmation of the President's powers to "compel, nullify and void transfers of property," placed little significance on the deletion of the vesting provision. *Id.* The Court held that IEEPA granted the President the *authority to transfer assets abroad*, *id.* at 674, and that the general tenor of IEEPA and other executive power legislation, combined with the President's authority to conclude executive agreements, provides the President with the *authority to suspend* proceedings in United States courts. *Id.* at 686.

It is particularly noteworthy that although IEEPA was originally conceived to limit executive power, the Court characterized it as part of a "sweeping and unqualified" grant of executive power. *Id.* at 671 (quoting Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth., 651 F.2d 800, 807 (1st Cir. 1981)). Oddly, although the Court expanded IEEPA into a source of implied Presidential powers, *id.* at 677, it sought to limit its holding by emphasizing the extraordinary nature of the hostage crisis. *See id.* at 688. For an excellent discussion of *Dames & Moore*, see Marks & Grabow, *The President's Foreign Economic Powers After* Dames & Moore v. Regan: *Legislation By Acquiescence*, 68 CORNELL L. REV. 68 (1982). *See also* Recent Decision, *Executive Power—President Has the Power to Block and Transfer Iranian Assets, Nullify Prejudgment Attachments, and Suspend Claims of United States Nationals in Implementing Executive Agreement for Release of Hostages*, 15 VAND. J. TRANSNAT'L L. 347 (1982); Recent Development, *Claims Settlement: Executive Action Limiting Suits Against Iran*—Dames & Moore v. Regan, 22 HARV. INT'L L.J. 661 (1981); Note, *The United States—Iranian Hostage Agreement: A*

wish to force the President to redeclare existing emergencies in order to maintain long standing policies, it inserted a grandfather clause in IEEPA that permits the President to maintain certain authorities granted under the TWEA without requiring compliance with the statute's new procedural mandates.[25] Because a broad grandfather clause would have defeated the Act's purpose, and a narrow one would have necessitated a redeclaration of emergencies, Congress sought to draft a limited provision that extended only existing uses of international emergency authorities.[26] The clause provides:

> [T]he authorities conferred upon the President by section 5(b) of the Trading With the Enemy Act . . ., which were being exercised with respect to a country on July 1, 1977, as a result of a national emergency declared by the President before such date, may continue to be exercised with respect to such country . . . .[27]

The use of the phrase "authorities . . . being exercised with respect to a country on July 1, 1977," could be subject to conflicting interpretations. First, the clause might be interpreted to preserve only specific authorities in use on that date, such as the trade embargo to Cuba. Alternatively, the clause might be construed to preserve *all* possible authorities granted under the TWEA as long as *some* authority was being used with respect to a given country on that date. Under the latter, the less restrictive view, the existence of one type of restriction in connection with a country, such as a trade embargo, would preserve Presidential authority to issue additional restrictions, such as an assets freeze. The alternative interpretations were the subject of discussion at hearings on the bill before the House Subcommittee on International Economic Policy.[28]

Some elements of IEEPA's legislative history clearly appear to support the more restrictive reading of the grandfather clause. Testifying before the House Committee on International Rela-

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Study in Presidential Powers, 15 CORNELL INT'L L.J. 149, 162 (1982); *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 93, 191 (1981).

25. *See Revision of Trading With the Enemy Act: Markup Before the House Comm. on International Relations*, 95th Cong., 1st Sess. 9 (1977) (statement of Jonathan Bingham, Chairman, Subcomm. on International Economic Policy and Trade) [hereinafter cited as *Markup*].

26. *Id.*

27. 50 U.S.C. app. § 5 (note) (1982).

28. *See Markup, supra* note 25, at 21-22.

tions in 1977, C. Fred Bergsten, the Carter Administration's spokesman for the bill, assured Representative Cavanaugh that only currently employed "specific uses of authority" would be grandfathered.[29] He also assured Cavanaugh that authorities included in the TWEA but not currently exercised against a country could not be employed later against that country.[30] The Subcommittee on International Economic Policy and Trade's deletion of a broader grandfathering provision also supports a narrow reading of the ultimate grandfather clause. An early draft preserved authorities already being exercised with respect to a set of circumstances *and* "any other authority conferred upon the President by [the TWEA] . . . to deal with the same set of circumstances."[31] Preservation of the clause "any other authority" in addition to "authorities currently in use" clearly would have supported a broad interpretation of the grandfather clause. The calculated deletion of the clause "any other authority," however, implies that Congress intended to preserve only specific authorities in use in 1977.[32]

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29. The exchange between Bergsten and Cavanaugh reads as follows:

> MR. CAVANAUGH. . . . Mr. Bergsten, would it be your understanding that [the grandfather clause] would strictly limit and restrict the grandfathering of powers . . . to those specific uses of authorities granted in 5(b) being employed as of June 1, 1977.MR. BERGSTEN. Yes, sir.MR. CAVANAUGH. And it would preclude the expansion by the President of the authorities that might be included in 5(b) but are not being employed as of June 1, 1977.MR. BERGSTEN. That is right.

Id. at 21.

30. *See id.*

31. *Wald,* 104 S. Ct. at 3043 (Blackmun, J., dissenting) (quoting Subcommittee Working Draft of June 8, 1977, 95th Cong., 1st Sess., § 101(b)).

32. An exchange between Subcommittee Staff Director Roger Majak and Representative Bingham may indicate that the committee perceived the "current authorities" clause, which survived, as a grandfathering of specific actions while the "any other authority" clause, which was deleted, was perceived as a grandfathering of the authority to take specific actions not currently in use. Majak's explanation of the clause that the committee voted to delete was as follows:

> [W]ith respect to any uses of 5(b) authorities for any presently existing situation, not only could the President use those particular authorities that he is now using, but any others which are conferred by section 5(b).
>
> So, if the President is presently using asset controls toward a particular country, but is not using, let us say, currency controls, he nonetheless could use, at some later date if he so desired, currency controls with respect to that situation.

Alternatively, other aspects of IEEPA's legislative history support a broader reading of the grandfather clause. The House Report explained that the purpose of the clause was to leave intact any existing uses of Presidential emergency authority.[33] Representative Bingham, Chairman of the Subcommittee on International Economic Relations, echoed this emphasis on maintaining all existing emergency authorities by stating that "existing embargoes . . . are not affected in any way by this legislation."[34] In addition, the Senate Report noted that the grandfather clause would allow the President to continue to "control transactions with certain countries."[35]

Although the travel ban to Cuba was abrogated in 1977, both the Carter and Reagan Administrations quickly issued regulations restricting travel to Cuba. The Carter Administration banned trips to Cuba for the purpose of transporting Cuban nationals,[36] and the Reagan Administration reinstituted a general travel ban with exceptions for journalists, academics, and relatives of Cubans.[37] Adopting the broad interpretation of IEEPA's grandfather clause, both Administrations relied on the TWEA for authority and ignored the procedural mandates of the IEEPA in promulgating new regulations. Because the Cuban travel ban was not in effect when the Congress enacted IEEPA, these actions provided the first tests for the competing interpretations of the grandfather clause.

Interpreting a clause that partially preserves an otherwise superseded statute is crucial. If the clause is interpreted broadly, the superseded statute will remain as effective law and the newly

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Hearings, *supra* note 12, at 167. Because the authority to use asset controls and the authority to use currency controls apparently were perceived as separate types of authority, use of only one of these authorities at the time the bill was enacted would not grandfather the use of the other. An alternate interpretation would categorize the authority to promulgate sanctions against a country as a single type of authority. If that authority was being exercised in one manner (e.g., currency controls) at the time of enactment, it could later be exercised in another manner (e.g., assets controls). *See supra* text accompanying notes 27-28.

33. *See* H.R. REP. No. 459, 95th Cong., 1st Sess. 9-10 (1977).

34. 123 CONG. REC. 38,166 (1977).

35. S. REP. No. 466, 95th Cong., 1st Sess. 4, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 4540, 4543.

36. 31 C.F.R. § 515.415(a) (1984). This regulation was issued during the 1980 "freedom flotilla" in which United States boatowners ferried Cuban nationals from the port of Mariel, Cuba, to destinations in South Florida.

37. *See supra* note 2.

enacted measure loses significance. Both the First Circuit in the instant case[38] and the Eleventh Circuit in *United States v. Frade*,[39] adhered to the narrow interpretation of the grandfather clause and invalidated the regulations prohibiting the transport of Cuban nationals. Thus, in reviewing the instant case, the Supreme Court faced two narrow readings of the grandfather clause by separate circuit courts.

B. Constitutional Right of Foreign Travel

In *Kent v. Dulles*,[40] the Supreme Court first recognized the right to travel to foreign countries as a liberty protected by the Due Process Clause. In *Kent*, the Court struck down the Eisenhower Administration's regulations denying passports to Commu-

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38. *See supra* note 10 and accompanying text. While relying heavily on the IEEPA's legislative history, the First Circuit also concluded that Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952), compelled a narrow reading of the clause. In his concurrence in *Youngstown Sheet & Tube*, Justice Jackson established a lasting conceptual framework for analyzing challenges to executive power. While not intended to be rigidly applied, the framework separated uses of executive power into three categories. In the first category, instances in which the President acts pursuant to the express or implied will of Congress, his authority is at its maximum. *Id.* at 635. In the second category, instances in which the President acts in the absence of either a congressional grant or denial of authority, the President must rely on powers granted to him by the Constitution. *Id.* at 637. In the second category there may be a "twilight zone" where the President and Congress exercise concurrent authority. *Id.* In the third category, instances in which the President takes measures contrary to the express or implied will of Congress, his power is at its minimum. *Id.* at 637.

When uses of executive power have been characterized as belonging in the first category, the actions have been upheld. *See, e.g.*, Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 273 & n.5 (1974); *cf.* Dames & Moore v. Regan, 453 U.S. 654, 668-69, 675 (1981). Executive actions also have been upheld where there has been no expansion of congressional will. *See, e.g.*, Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth., 651 F.2d 800, 813-14 (1st Cir. 1981). Executive actions contrary to congressional intent have been struck down. *See, e.g.*, Halperin v. Kissinger, 606 F.2d 1192, 1200 (D.C. Cir. 1979), *aff'd in part, cert. dismissed in part*, 452 U.S. 713 (1981) (per curiam).

The First Circuit characterized the instant travel restrictions as belonging in Justice Jackson's third category. Because the President's power was thus at its minimum, the statute allegedly authorizing a Presidentially instituted travel ban should be read narrowly. Wald v. Regan, 708 F.2d 794, 800.

39. 709 F.2d 1387, 1397-1403 (11th Cir. 1983).

40. 357 U.S. 116 (1958). For a discussion of the origins of the right of foreign travel, see Note, *Area Restrictions and the Right to Travel Abroad*, 8 U.C.D. L. REV. 401 (1975).

nist Party members. The Court held that an individual's right to travel is a liberty that cannot be denied solely on the basis of association.[41] The *Kent* Court seemed swayed by the executive rather than legislative origin of the impediment, implying that Congress may have greater power to restrict travel.[42] Six years later in *Aptheker v. Secretary of State*,[43] however, the Court invalidated an act of Congress preventing Communists from obtaining passports. The Court essentially held that the Act constituted a denial of liberty without substantive due process because the restriction was not drawn narrowly enough to prevent the alleged evil.[44]

Shortly after the *Aptheker* decision the Court declined to expand further the trend toward a broader right of foreign travel by rejecting a challenge to the 1962 regulations banning travel to Cuba. In *Zemel v. Rusk*[45] it reasoned that restrictions based on a traveler's destination are not as suspect as restrictions based on a traveler's political association.[46] The tension between the United States and Cuba in the months following the 1962 Cuban missile crisis constituted a sufficiently rational basis for the Government to restrict its citizens' liberty to travel to Cuba. The impact of *Zemel* was blunted, however, when later decisions refused to uphold criminal sanctions against citizens who traveled to Cuba in defiance of the ban.[47]

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41. 357 U.S. at 130.

42. *Id.* at 128.

43. 378 U.S. 500 (1964).

44. *See id.* at 512-14. The decision did not define precise constitutional grounds for overturning the statute. At the time of the decision, use of substantive due process via Lochner v. New York, 198 U.S. 45 (1905), was out of favor. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, §§ 8-1 to 8-7 (1978). Furthermore, use of the equal protection clause to protect fundamental rights had barely emerged. *See generally* Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). The 1964 Court thus applied a blurred first amendment freedom of association gloss to aid what was essentially a fifth amendment substantive due process holding. *See* 578 U.S. at 508-10. The holding might have been clearer had the case been decided subsequent to the recognition of fundamental rights under the equal protection and due process clauses. *See* Note, *Constitutional Protection of Foreign Travel*, 81 COLUM. L. REV. 902, 904-07 & nn.14-28 (1981).

45. 381 U.S. 1 (1965).

46. *See id.* at 14-15.

47. In United States v. Laub, 385 U.S. 475 (1967), the Court found no criminal violation under the Passport Act of 1926, 22 U.S.C. § 211(a) (1982), or the Immigration and Nationality Act of 1952, 8 U.S.C. § 1185 (1982), after 58

Recent Supreme Court decisions have followed *Zemel*'s refusal to apply a strict level of scrutiny to laws that inhibit an individual's right to travel abroad. *Califano v. Aznavorian*[48] considered a challenge to Social Security Act amendments that eliminated disability benefits during periods when an otherwise eligible recipient is abroad for more than thirty days. The Court noted that the restrictions did not have as strong an impact on foreign travel as the passport restrictions at issue in *Zemel* and *Aptheker*, and held that the problems in monitoring recipient needs abroad provided a rational basis for the Act's chilling effect on foreign travel.[49] Most recently, a former CIA agent who had purposely exposed fellow agents brought suit to contest the State Department's revocation of his passport on grounds of national security. The Court, in *Haig v. Agee*,[50] held that national security interests provided an adequate basis for restricting the former agent's movements abroad. The Court distinguished *Aptheker* on the basis that the agent's actions in the case before it were a proven danger while in *Aptheker* Communist Party membership could not support a presumption of danger.[51] Nevertheless, *Haig* reveals a current tendency to construe the travel rights defined in *Aptheker* as narrowly as possible.

Taken together, the foreign travel cases appear to apply a strict level of scrutiny only to travel restrictions that inhibit the exercise of an individual's first amendment rights. The cases do not indicate a willingness to expand the right of foreign travel to instances in which travel rights restrictions are not accompanied by restrictions on the exercise of more "traditional" constitutional rights. In the instant decision the Court faced for the first time a

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United States citizens travelled to Cuba without passports validated for that purpose. Because the Immigration Act only speaks of the need of a passport for entering or leaving the United States, *id.* § 1185(b), the Court recognized no criminal prohibition against entering Cuba without a passport or against entering Cuba from countries other than the United States. 385 U.S. at 481-82. Shortly after *Laub*, an individual who had traveled to North Vietnam in defiance of a State Department prohibition sought to enjoin the State Department from revoking his passport. Lynd v. Rusk, 389 F.2d 940 (D.C. Cir. 1967). The District of Columbia Circuit held that the issuance of a passport could be conditioned on not taking *the passport* into a given country, but it could not be conditioned on a promise not *to travel* to that country. *Id.* at 945-47.

48. 439 U.S. 170 (1978).

49. *Id.* at 177.

50. 453 U.S. 280 (1981).

51. *Id.* at 305-06.

challenge to travel restrictions that did not concurrently discriminate in violation of an individual's fundamental rights.

III. INSTANT DECISION

In construing the proper scope of IEEPA's preservation of Presidential authorities, the Court[52] relied on IEEPA's legislative history supporting a broad reading of the Act's grandfather clause. Based on evidence that the drafters did not intend the grandfather clause to affect existing embargoes or to create controversy,[53] the Court refused to interpret the clause to require that an emergency be declared before changing United States policy toward Cuba. The Court also noted that both the statute and the legislative history consistently refer to the grandfathering of "authorities" rather than the grandfathering of "prohibitions" or specific "restrictions."[54] Because the ordinary meaning of the term "authorities" seems to refer to the power to create restrictions, the Court reasoned that in preserving "authorities," Congress intended to preserve the President's power to create further restrictions.[55] Thus, the President's authority to regulate contacts between the United States and Cuba was being exercised in some form[56] on the date set by the grandfather clause, and the Court held that the President could extend that authority to declare a ban on travel to Cuba.

The Court then turned to the constitutional issue and acknowledged a citizen's right to travel abroad under the due process clause of the fifth amendment.[57] Although this right, as established by *Kent* and *Aptheker*, had prevented the state from burdening a person's ability to travel abroad on the basis of individual political beliefs, the Court noted that *Zemel* had upheld

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52. Justice Rehnquist delivered the opinion of the Court.

53. Regan v. Wald, 104 S. Ct. 3026, 3037 (1984) (quoting Rep. Bingham). *See supra* note 34 and accompanying text.

54. 104 S. Ct. at 3036-37.

55. *Id.* at 3036 & n.21.

56. The Court noted that although most forms of travel to Cuba were permitted on July 1, 1977, certain travel-related restrictions were in effect on that date. Scheduled air and sea travel to Cuba from points in the United States were banned, and individuals traveling to Cuba were required to keep a record of all expenses. *Id.* at 3031 n.6, 3034. Because these regulations were in place on July 1, 1977, the President was exercising his authority to regulate travel to Cuba on that date.

57. *Id.* at 3038.

universal application of travel area restrictions. Plaintiffs attempted to distinguish *Zemel*, which the Court had decided during the missile crisis era of heightened tension between the United States and Cuba. Plaintiffs argued that the tension which had provided the rational basis for burdening foreign travel in *Zemel* no longer existed.[58] The instant Court, however, found that Cuba's current economic and military backing of armed violence abroad[59] provided an adequate basis for continued restrictions on travel to Cuba. Furthermore, the travel ban was a sufficiently rational means for preventing the flow of hard currency to a nation that funds terrorist activity in the Western Hemisphere.[60]

The four dissenting justices[61] relied on evidence supporting a restrictive reading of the grandfather clause and argued that the President's actions were precluded by statute. Therefore, they did not reach the constitutional issue. The dissent argued that the drafters intended the savings clause to grandfather only specific prohibitions in place on the specified date because a clause that would have grandfathered currently unused authorities had been eliminated at the subcommittee stage.[62] The dissent also noted that the Administration's sponsor for the bill at the time of its passage had assured Representatives that only currently em-

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58. *Id.* at 3039.

59. The Court relied on a declaration by Thomas O. Enders, Assistant Secretary of State for Inter-American Affairs, in reaching the conclusion that Cuba's promotion of foreign revolutions poses a significant danger to the United States. *Id.*

60. The Court reasoned that hard currency brought into Cuba by travelers could be used to finance Cuba's military adventurism abroad. *Id.*

61. Justice Blackmun wrote a dissenting opinion that was joined by Justices Brennan, Marshall, and Powell. *Id.* at 3040 (Blackmun, J., dissenting).

62. *See supra* note 32 and accompanying text. The Court used an exchange between Rep. Bingham and Leonard E. Santos, a Treasury Department attorney, to discount the importance of the deletion of the second part of the grandfather clause. Mr. Santos stated that the President was already exercising all of his authorities under section 5(b) of the TWEA; therefore, it was unnecessary to grandfather authorities not already being used. The Court asserted that the clause may have been deleted as surplusage. 104 S. Ct. at 3036 n.20. The dissent was not persuaded by the Court's attempt to minimize the significance of the deletion. The dissent stated that it was "nonsensical to assume that Mr. Santos meant, or that Representative Bingham could have understood him to mean, that *all* § 5(b) powers were being exercised with respect to the countries that were currently the subject of regulations promulgated under § 5(b)." *Id.* at 3044 n.4 (Blackmun, J., dissenting). The dissent found Santos' statement to be too "ambiguous and confusing" to affect the "clear import of the deletion." *Id.*

ployed "specific uses of authorities" would be grandfathered.[63] Last, although the majority looked to the ordinary meaning of the term "authority" in interpreting the grandfather clause, the dissent looked to the statute's general purpose to restrict the use of Presidential emergency authorities to true emergency situations.[64] Hence, the dissent would have held that because the travel ban was not a specific use of authority in place on July 1, 1977, the President was obligated to follow IEEPA's procedural requirements before instituting the travel restrictions.[65]

IV. COMMENT

The instant case may signal a waning of the narrow emergency executive authorities instituted by IEEPA and a reemergence of the broad powers established by the TWEA. Both *Dames & Moore* and the instant case show a willingness to interpret IEEPA's restrictions to favor unfettered Presidential authority.[66] In order to find authority for the President's actions, the Court forsook the supportable narrow reading of IEEPA's grandfather clause that was preferred by the First and Eleventh Circuits,[67] and by the dissenters in the instant case. Considering the Supreme Court's traditional deference to the President in foreign policy matters,[68] the willingness of four justices to challenge the President casts doubt upon the Presidential action.

The majority's strained deference to the President has several

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63. *Id.* at 3044 (Blackmun, J., dissenting); *see supra* note 29 and accompanying text.

64. 104 S. Ct. at 3045 (Blackmun, J., dissenting).

65. *See id.* at 3049.

66. *Dames & Moore* permitted the President to nullify attachments on assets and transfer the assets to a foreign bank despite the deletion from the IEEPA of the President's power to "vest" property. *See supra* note 24. The instant case and *Dames & Moore* may indicate that the Court will go to some lengths to minimize the effect of other IEEPA restrictions that have not yet been tested. The IEEPA removed the President's powers to seize records and regulate purely domestic transactions. *See* H.R. REP. No. 459, *supra* note 33, at 13. These are important restrictions that the Court may interpret to favor the President.

67. *See supra* notes 38-39 and accompanying text.

68. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936) ("[W]e are here dealing [with] . . . the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress . . . ."). *See generally* L. TRIBE, *supra* note 44, §§ 4-2 to 4-3.

unsettling implications. First, the instant Court's broad reading of the grandfather clause may allow the President free rein in dealing with some countries while remaining restrictions limit his powers with regard to other countries. For example, after the instant decision, the President need not heed IEEPA when dealing with Cuba, China,[69] Vietnam, North Korea—countries with which the United States relations have stabilized or improved in recent years but which were the subject of emergency actions in 1977. By contrast, the President must follow IEEPA when taking actions against Afghanistan, Poland, or Libya—countries not subject to emergency actions on July 1, 1977[70] but where recent events have required more immediate executive action than any in the former, exempt nations.[71] There seems to be no valid policy reason to distinguish between the two groups of countries when interpreting the scope of the President's power to conduct United States foreign relations.

Second, resolving the statutory question in favor of the President also may upset the Constitutional balance of executive and legislative power set forth by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*.[72] Justice Jackson posited that a President's power is at its lowest ebb when exercised against the express or implied will of Congress.[73] Under Justice Jackson's

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69. Presidentially imposed restrictions on trade with China were relaxed in 1971, Relaxation of Controls on Current Transactions with the Peoples Republic of China, 36 C.F.R. §§ 500.545-.547 (1972), but a freeze on Chinese assets was still in effect on July 1, 1977. Because the President was exercising *some* authority with regard to China on that date, his power to issue further regulations concerning China might be preserved under the Court's reading of the grandfather clause. The instant decision, therefore, apparently would permit the President to institute far reaching sanctions against China, including a total trade and travel ban, without declaring an emergency or consulting with Congress under the IEEPA. *See* Regan v. Wald, 104 S. Ct. at 3048 (1984) (Blackmun, J., dissenting). Under the Senate Report on the IEEPA the grandfather clause would not permit an expansion of the freeze on Chinese assets. *See* S. Rep. No. 466, *supra* note 35, at 4. The instant Court, however, did not give credence to that portion of the Senate Report. *See* 104 S. Ct. at 3048 (Blackmun, J., dissenting).

70. *See* 104 S. Ct. at 3047 (Blackmun, J., dissenting).

71. The Soviet invasion of Afghanistan in December 1979, the aerial conflict between United States and Libyan fighters in July 1981, and the imposition of martial law in Poland in December 1981, were three recent foreign crises that elicited prompt executive responses.

72. 343 U.S. 579 (1952).

73. *See supra* note 38.

analysis, a statute enacted to limit Presidential power should not be interpreted with a presumption in favor of the President. The Court, therefore, appears to defy Justice Jackson's approach by straining to interpret IEEPA in favor of the President.[74]

Last, the instant decision limits the fifth amendment right of foreign travel established in *Kent* and *Aptheker*. When compared with the three previous Supreme Court decisions that have upheld restrictions on foreign travel, the rational basis offered by the majority in the instant decision is relatively weak.[75] In particular, the rational basis in *Zemel* for upholding travel restrictions to Cuba just months after the missile crisis was far stronger than the basis for such restrictions decades later in 1984. Furthermore, the travel ban does not bear a close relationship to its apparent goal of inhibiting the funding of Cuban adventurism. For example, the need to limit Cuba's access to hard currency has not deterred the Administration from permitting 42,500 Americans to bring cash into Cuba under exceptions for journalists, academics, and relatives of Cubans.[76] Thus, regulations that restrict the relatively few people who wish to travel to Cuba for other reasons bear a very tenuous relationship to the goal of preventing the flow of currency to Cuba. The refusal to apply more than perfunctory scrutiny in the instant case suggests that the Court will not strike down future restraints on foreign travel except under circumstances where, as in *Aptheker*, the restraints are based on an individual's political affiliations. It is unlikely that Congress will be able to overcome the instant Court's reluctance to find a firm constitutional basis for the right to travel abroad as long as the Court

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74. *See* Wald v. Regan, 708 F.2d 794, 800 (1st Cir. 1983).

75. The three prior cases are *Zemel*, *Agee*, and *Aznavorian*. In *Zemel*, a stronger rational basis existed for banning travel to Cuba in 1962, when Cuba was on the brink of war with the United States, than at the time of the instant case. A strong rational basis also existed in *Agee*: the need to restrict the movements of a former CIA agent who had a proven history of exposing covert operations. In *Aznavorian*, the difficulties of administering disability programs abroad were sufficient to justify a minor burden on foreign travel. *See supra* notes 45-51 and accompanying text. The instant case, therefore, arguably presented the least compelling rational basis for a heavy burden on foreign travel.

76. Since 1982, 40,000 people have traveled to Cuba under the family exception, and 2,500 have visited under the journalism and research exception. Lewis, *Big Brother Says No*, N.Y. Times, Sept. 17, 1984, at A19, col. 1.

will interpret legislation to favor broad Presidential authority to impose travel restraints.

Jonathan F. Mack

JURISDICTION — BANK MAY NOT ASSERT ACT OF STATE DOCTRINE AS DEFENSE IN ACTION ON CERTIFICATE OF DEPOSIT. *Garcia v. Chase Manhattan Bank, N.A.*, 735 F.2d 645 (2d Cir. 1984).

I. FACTS AND HOLDING

Plaintiff Garcia, a Cuban citizen prior to the Cuban revolution, sued[1] Chase Manhattan Bank (Chase) to recover payment on two certificates of deposit[2] issued by Chase's Cuban branch in Vedado. Garcia and her late husband[3] had purchased the certificates of deposit in 1958. Prior to their purchase, the depositors had expressed concern for the safety of their money because of the uncertain political climate then existing in Cuba.[4] Chase officials had assured them that Chase's New York office would guar-

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1. Plaintiff, Juanita Gonzalez Garcia, originally brought suit in the federal district court in Puerto Rico. The suit was transferred to a federal district court in New York pursuant to the venue provision of the banking title to the United States Code. Garcia v. Chase Manhattan Bank, N.A., 735 F.2d 645, 647-48 (2d Cir. 1984). The provision states that any action against a national bank may be brought in the federal district in which the bank's principal place of business is located. 12 U.S.C. § 94 (1982).

2. When a bank receives a sum of money for deposit that the bank promises to pay to the depositor at a specified later date, the bank's written acknowledgment of its receipt of the deposit is called a certificate of deposit. The transaction between the bank and the depositor creates a debtor-creditor relationship between the two parties. The certificate of deposit represents a loan by the depositor to the bank. *Garcia*, 735 F.2d at 649. *See generally* 5B MICHIE ON BANKS AND BANKING § 313 (1983). Because a certificate of deposit is payable at a time stipulated by the bank and the depositor, the certificate usually includes the date that it first becomes payable by the bank. Technically, the certificate of deposit is due when the depositor makes a demand for payment. *Id.* § 326a. Garcia and her late husband had purchased one certificate of deposit for 100,000 pesos, payable on March 10, 1959. They later had purchased another for 400,000 pesos, payable on March 16, 1959. 735 F.2d at 646-47.

3. Plaintiff's husband, Jose Lorenzo Perez Dominguez, was a wealthy businessman and retired Cuban army colonel. *Id.* at 646.

4. Acting on the recommendation of a friend, Garcia and Dominguez had negotiated the purchase at Chase's Cuban branch bank in Vedado. Two Chase officials, responding to Dominguez's concern for his money, had explained that the deposit would be a private contract between the bank and the depositors and had assured him that the certificates of deposit would act as insurance for his money. *Garcia*, 735 F.2d at 646.

antee the certificates and that the depositors could present the certificates for payment at any one of Chase's worldwide branch banks.[5] After taking power in early 1959, the revolutionary Cuban Government had issued a decree freezing bank accounts in general[6] and later, by specific order, had closed the couple's certificate of deposit account.[7] In compliance with the orders, Chase had paid the Cuban Government the value of the two certificates.[8] In 1960 Chase's Cuban branches were nationalized and their assets and liabilities were assumed by the National Bank of Cuba.[9]

Garcia initiated the instant action following her husband's death in 1975.[10] Chase defended by arguing that its debt to Garcia effectively had been cancelled when, prior to Garcia's presentment of the certificates for payment, the Cuban Government had closed Garcia's account and forced Chase to pay the value of the deposits.[11] The bank argued further that the act of state doctrine precluded the court from examining the validity of the Cuban Government's actions. Unpersuaded by Chase's arguments, the district court upheld the jury's verdict that Chase was liable to

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5. The couple had purchased the certificates of deposit with pesos. Chase officials, however, had stated that repayment made in New York would be made in United States dollars because dollars were the currency used by the bank. During this time, pesos had been equal in value to dollars. *Id.*

6. Cuban Law No. 78, enacted in February 1959, provided in part:

> Article 5. The Minister [of Recovery of Misappropriated Property] shall decree the precautionary measures which may be necessary in order to assure the purpose pursued by this Law, and particularly the following:
>
> a) the freezing of bank accounts, the sealing and opening of safe deposit boxes in banks or in other private institutions.

735 F.2d at 647 n.1.

7. The order authorizing the closing of the couple's account was dated July 16, 1959. 735 F.2d at 647.

8. *Id.*

9. *Id.*

10. Although Dominguez left Cuba shortly after the revolution, Garcia did not leave Cuba until 1964. Prior to his death, Dominguez had inquired through Chase's branch bank in Madrid regarding the status of the certificates of deposit. Chase had reported the actions taken by the Cuban Government and had suggested that Dominguez address further inquiries to the National Bank of Cuba. After Dominguez's death, Garcia found the certificates of deposit in Dominguez's safety deposit box. Through written correspondence, Chase responded to Garcia's inquiry regarding the status of the certificates by referring Garcia to the National Bank of Cuba. *Id.* at 647.

11. *Id.* at 649.

the plaintiff for the amount of the deposit. On appeal to the Court of Appeals for the Second Circuit, *affirmed. Held*: When pursuant to private agreement a bank issues certificates of deposit to protect its customer's money, but subsequently pays the value of the certificates to a third party foreign government, the act of state doctrine does not shield the bank from liability to its customer who retains possession of the certificates of deposit.

II. LEGAL BACKGROUND

The act of state doctrine provides that United States courts will not examine the validity of the acts of a foreign government that occur within that government's own territory.[12] The Supreme Court first articulated the doctrine in 1897 in *Underhill v. Hernandez*,[13] and initially applied it to disputes stemming from a foreign government's confiscation of personal property within its borders. In *Oetjen v.Central Leather Co.*,[14] the Court ruled that

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12. The act of state doctrine has been summarized as follows:

> Except as otherwise provided by statute or the [rule] stated in . . . § 43, a court in the United States, having jurisdiction . . . to determine a claim asserted against a person in the United States or with respect to a thing located there, or other interest localized there, will refrain from examining the validity of an act of a foreign state by which that state has exercised its jurisdiction to give effects to its public interests.

RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 41 (1965). Rule 43 provides in part:

> (1) The rule stated in § 41 does not prevent examination of the validity of an act of a foreign state with respect to a thing located, or an interest localized, *outside of its territory if the act has not been fully executed in accordance with applicable law.*

Id. § 43 (emphasis added). For a discussion of application of the act of state doctrine to limit the liability of banks for deposits in their foreign branches, see Heininger, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches*, 11 LAW & POL'Y IN INT'L BUS. 903, 950-73 (1979).

13. 168 U.S. 250 (1897). Underhill, a United States citizen brought suit against the leader of a revolutionary army in Venezuela to recover damages for his forced detention there and for assaults made on him by soldiers of the Venezuelan army. Because the acts of the defendant occurred within Venezuela and were considered the acts of the Venezuelan Government, the Court concluded that United States courts had no jurisdiction to review their validity. The Court emphasized that each state must respect the sovereignty of all other states and that the courts of one sovereign state or government must not sit in judgment on the acts of any other sovereign state or government when the disputed acts occur within the territorial limits of the other sovereign state. *See id.* at 252.

14. 246 U.S. 297 (1918).

the act of state doctrine did not allow United States courts to reexamine a Mexican revolutionary leader's confiscation and subsequent sale of certain animal hides because these acts were acts of the Mexican Government.[15] In a companion case, *Ricaud v. American Metal Co.*,[16] the Court refused to examine the validity of the Mexican Government's confiscation and subsequent resale of lead bullion.[17] Instead, it accepted the Mexican Government's action as a policy decision and restated its *Underhill* ruling that United States courts may not sit in judgment on the validity of acts of a foreign government conducted within its own territory.[18] In its 1964 decision in *Banco Nacional de Cuba v. Sabbatino*,[19] the Court outlined what has become the current judicial approach to legal disputes arising from the acts of a foreign sovereign. The Court ruled that in the absence of a treaty or other unambiguous agreement reflecting controlling legal principles, the judiciary would not examine the validity of the Cuban Government's expropriation[20] of the assets of a Cuban corporation within its own territory that were the subject of contract with a United States commodities broker,[21] even if the confiscation violated international law.[22]

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15. *Id.* at 303-04. The Mexican revolutionary military leader had confiscated the animal hides from a Mexican business as compensation for a mandatory military contribution and later sold the hides to a Texas corporation. The assignee of the Mexican business then sued the Texas corporation to recover the hides. *Id.* at 299-300.

16. 246 U.S. 304 (1918).

17. The plaintiff was a United States corporation that had purchased the bullion prior to its confiscation. The defendant had purchased the bullion from the Mexican Government. *Id.* at 305-06.

18. *Id.* at 309.

19. 376 U.S. 398 (1964).

20. Cuban Law No. 851 nationalized all property in Cuba in which United States citizens owned any interest. Cuba enacted the law in response to a United States statute that ordered a reduction of the import quota for Cuban sugar. *Sabbatino*, at 401 & n.3.

21. After its confiscation of the corporation's assets, the Cuban Government forced the United States broker to enter into new contracts to buy sugar from the Government. The broker signed the new contracts to obtain delivery of the sugar shipment, which was then in Cuban territorial waters on its way to the United States. *See* Heininger, *supra* note 12, at 950-52. When the broker later refused to pay on the new contracts, a Cuban Government agent sued in district court to recover payment for the sugar.

22. 376 U.S. at 428. The Court concluded that although the expropriation of the Cuban corporation was offensive to United States public policy, the act of

The Supreme Court first applied the act of state doctrine to disputes over bank transactions in its 1937 decision, *United States v. Belmont*.[23] The Soviet Government had dissolved a private Russian corporation and expropriated its assets, subsequently assigning the corporation's deposits with a New York banker to the United States Government.[24] The Court ruled that the act of state doctrine precluded judicial examination of the legality of the Soviet Government's action.[25] The district court had held that the disputed bank deposit was property located in the State of New York and not an intangible property right located within Soviet territory.[26] To recognize the assignment, therefore, would effectively confiscate property and violate the public policy of the State of New York. In reversing the lower court decision the Supreme Court did not decide the situs of the debt, but held that New York's public policy did not override an effective international agreement between the United States and the Soviet Union.[27] Therefore, the United States held indisputable legal title to the deposit because the act of state doctrine prohibited the defendant's challenge to the validity of the assignment.[28]

Although the *Belmont* Court focused only on the validity of the Soviet assignment to the United States, courts generally determine the location of the confiscated property before deciding whether the act of state doctrine will apply. The initial inquiry is necessary because the act of state doctrine applies only when the property is located within the territory of the foreign govern-

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state doctrine nonetheless applied in the case. *Id.* at 436-37. *See generally* Comment, *The Act of State Doctrine—Its Relation to Private and Public International Law*, 62 COLUM. L. REV. 1278 (1962).

23. 301 U.S. 324 (1937).

24. *Id.* at 326. The United States Government sued Belmont to recover the deposit. *Id.* at 325-26.

25. *Id.* at 328.

26. *Id.* at 327. Presumably, the district court believed that the act of state doctrine did not apply because the doctrine precluded the court's review of the validity of the foreign government's acts only when the acts occurred within the foreign country.

27. The Court found that the assignment of the Russian corporation's assets, together with other agreements between the United States and Soviet Governments, was a single transaction resulting in an international agreement with a foreign government that also recognized the validity of the acts of the foreign government. *See id.* at 330.

28. *Id.* at 332.

ment.[29] Courts can easily determine the situs of real property or tangible property, such as the animal hides in *Oejtan* and the lead bullion in *Ricaud*. Deciding the location of intangible property,[30] however, is much more difficult. Courts generally equate the location of intangible property with the location of its owner because a debt is an intangible property right of the debtor. In *Harris v. Balk*,[31] for example, the Supreme Court held that the situs of a debt is wherever the debtor may be found.[32]

In *Republic of Iraq v. First National City Bank*,[33] the Second Circuit applied the general rule for intangibles to a dispute resulting from a foreign sovereign's attempted confiscation of property located within the United States. The court held that the Iraqi Government's attempt to confiscate the former King of Iraq's United States bank account was valid only if the act was consistent with United States law and policy.[34] Eight years later in *Menendez v. Saks & Co.*,[35] the Second Circuit applied the reasoning of *Republic of Iraq*, explaining that pursuant to the act of state doctrine, a debt is located outside of the foreign state unless that state has the power to enforce or collect the debt.[36] The court thus held that the act of state doctrine did not protect a foreign

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29. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 43 (1965).

30. Intangible property is defined as property without intrinsic or marketable value but with representative or evidentiary value for such items as certificates of stock, bonds, promissory notes and certificates of deposit. *See* BLACK'S LAW DICTIONARY 726 (5th ed. 1979).

31. 198 U.S. 215 (1905).

32. *Id.* at 222. The stated objective of the rule was to prevent the debtor from having to pay the same debt twice. *Id.* at 226.

33. 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966).

34. 353 F.2d at 51. Subsequent to the King's death in Iraq, the new Government of Iraq issued a decree confiscating all property of the former King, including a bank account and stock held by The Irving Trust Company in New York. Although the Iraqi Government notified Irving Trust of its claim to the former King's property, the bank transferred the property to the defendant administrator of the former King's estate. *Id.* at 50.

35. 485 F.2d 1355 (2d Cir. 1973), *rev'd on other grounds sub nom.* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976). In *Menendez*, Cuban interventors, who had acquired interests in Cuban cigar companies after the expropriation of the companies by the Cuban Government, attempted to recover payments for cigar shipments from United States importers. The original owners of the cigar companies also asserted claims against the payments for the cigar shipments. *Id.* at 1360-61.

36. 485 F.2d at 1364.

state's attempted seizure of debts owed by persons outside the territorial limits of the foreign state.[37] The two Second Circuit decisions demonstrate the consistent refusal of United States courts to apply the act of state doctrine to the confiscation of extraterritorial property by foreign governments.[38]

In addition to the territorial limits upon its application, the act of state doctrine is subject to certain exceptions. In *French v. Banco Nacional de Cuba*,[39] for example, a New York appellate court reviewed the exception established by the Hickenlooper Amendment,[40] which requires United States courts to settle claims to property confiscated by foreign governments in violation of principles of international law. The court found that the claim by a United States citizen who had acquired bank certificates from a Cuban bank, which later refused to honor the certificates in exchange for United States dollars, did not constitute a confiscation of property by a foreign government. Because the court found the Cuban Government's action was a breach of contract and not a confiscation of property in violation of international law, the court concluded that the Hickenlooper Amendment did not preclude application of the act of state doctrine.[41]

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37. *Id.* at 1364-65.

38. *See, e.g.*, United Bank Ltd. v. Cosmic Int'l, Inc., 542 F.2d 868 (2d Cir. 1976) (doctrine not applicable to claims of Bangladesh Government to balance due on goods shipped to New York by East Pakistani corporation prior to its expropriation); Maltina Corp. v. Cawy Bottling Co., 462 F.2d 1021 (5th Cir.), *cert. denied*, 409 U.S. 1060 (1972) (doctrine not applicable to claim of Cuban Government to trademark registered with the United States Patent Office and owned by expropriated Cuban brewery); Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968) (doctrine not applicable to claim of interventor, appointed by Cuban Government to run expropriated Cuban corporation, to payments owed by United States corporation for prior tobacco shipments).

39. 23 N.Y.2d 46, 242 N.E.2d 704, 295 N.Y.S.2d 433 (1968).

40. 22 U.S.C. § 2370(e)(2) (1982). Enacted in 1964 in response to the *Sabbatino* decision, the Hickenlooper Amendment was intended to apply to any claims of title or other right to property based upon a confiscation or taking after January 1, 1959, by an act of state in violation of principles of international law. *See* Heininger, *supra* note 12, at 953-54 & n.223. *See generally* Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT'L L. 175, 178-83 (1967).

41. *French*, 23 N.Y.2d at 62, 242 N.E.2d at 715, 295 N.Y.S.2d at 448-49. After reviewing a Senate report, the *French* court concluded that Congress intended banks, insurance companies, and other financial institutions to use the act of state doctrine as a defense to multiple liability on any contract, deposit, or

United States courts generally have refused to apply the act of state doctrine to suits arising from the expropriation of bank deposits by foreign governments. In *Russek v. Angulo*, [42] decided in 1921, a Texas state court granted recovery to a Mexican citizen whose certificate of deposit issued by private Mexican bankers had been expropriated by the revolutionary Mexican Government. The defendant bankers argued that when they paid the Mexican Government the amount of the deposit, they were relieved of any further obligation to the certificate holder. Moreover, because the payment had been made in response to a formal decree by the Mexican Government,[43] the defendants contended that the expropriation was an act of state, immune from examination in United States courts. Although the Mexican Government had not presented the certificate of deposit in exchange for payment, it had authorized the bankers to retain the certificate without making additional payment upon any later presentation.[44] The court ruled, nevertheless, that the Mexican Government's act did not relieve the bankers from liability to the owner of the certificate of deposit because the Government had confiscated property owned by the *bankers*.[45] The court found the following facts significant to its holding: (1) the Mexican Government had confiscated the certificate of deposit prior to the date it was payable to the owner;[46] (2) the bankers had merely paid their own funds to the Mexican Government because the certificate had created a debtor-creditor relationship between the bankers and the owner;[47]

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insurance policy expropriated by a foreign government. *Id.* at 61, 242 N.E.2d at 714, 295 N.Y.S.2d at 448.

42. 236 S.W. 131 (Tex. Civ. App. 1921).

43. *See id.* at 132. The Mexican Government asserted that the owner of the certificate of deposit was a political enemy. When the bankers refused initially to pay on the deposit because the money was in a Texas bank, the Mexican Government threatened to imprison them. The bankers then obtained the money from the Texas bank and paid it to the Government. *Id.* at 133.

44. *Id.*

45. The court implied that the act of state doctrine would, in a proper case, preclude the court's examination of a foreign government's confiscation of the property of one of its citizens. *See id.*

46. Although the Mexican Government on May 8, 1920, demanded payment on Angulo's deposit with the bankers, the certificates of deposit did not become payable to Angulo until June 13, 1920. *Id.* at 132-33.

47. The court rejected testimony by Mexican lawyers who argued that, subsequent to confiscation of the certificates, the private bankers would not be liable for the certificates under Mexican law. *Id.* at 134; *see also supra* note 2.

and (3) the bankers never introduced into evidence the Mexican statute that allegedly extinguished their liability on the debt.[48] Although *Russek* has not been expressly overruled, the unusual factual situation and the court's implication that the act of state doctrine might otherwise have applied[49] limit the decision's precedential value. No court outside of Texas had cited it as authority prior to the instant decision.[50]

Similarly, in *Sokoloff v. National City Bank*,[51] another early decision, a New York state court enforced a New York bank's liability to a Russian citizen on a deposit account opened in the bank's New York offices but maintained at the bank's Russian branch. The Soviet Government had issued decrees expropriating the assets of the Russian branch and later confiscated the accounts of its depositors.[52] The court ruled that the expropriation was not protected by recognized principles of international law because at the time the United States did not officially recognize the Soviet Government.[53] The court therefore concluded that acts of the unrecognized Soviet Government did not release the bank from liability for the funds in the depositor's account or for funds that the bank failed to transfer for the depositor.[54]

In a more recent decision, *Vishipco Line v. Chase Manhattan Bank, N.A.*,[55] the Second Circuit found a New York bank liable for deposit accounts maintained by Vietnamese corporations and

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48. *See supra* note 45.

49. *Russek*, 236 S.W. at 134.

50. *See, e.g.*, Thompson v. Thompson, 149 Tex. 632, 652, 236 S.W.2d 779, 790-91 (1951); Barreda v. Milmo Nat'l Bank, 241 S.W. 743, 749 (Tex. Civ. App. 1922). *See generally* Comment, *International Law—The Effect Upon Private Property Rights of the Acts and Decrees of Revolutionary Governments and Revolutionary Factions*, 41 TEX. L. REV. 226, 230 (1926).

51. 250 N.Y. 69, 164 N.E. 745 (1928).

52. The depositor had requested the Russian branch to transfer funds to a second account in the depositor's name located in another Russian city, but the bank, without notifying the depositor, failed to make the transfer. *Id.* at 79, 164 N.E. at 749. The bank later was unable to determine the status of the transfer because the revolutionary Soviet Government, by a decree issued on December 17, 1917, merged all Russian banks with its State Bank. *See* Heininger, *supra* note 12, at 928. By a later decree, the Soviet Government also confiscated the accounts of the bank depositors. *Id.* at 929.

53. *Sokoloff*, 250 N.Y. at 80, 164 N.E. at 749. The new Soviet Government was not recognized by the United States until November 16, 1933. *See* Heininger, *supra* note 12, at 928.

54. *See Sokoloff*, 250 N.Y. at 80-81, 164 N.E. at 748-49.

55. 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982).

a certificate of deposit held by a Vietnamese private citizen. The disputed deposit agreements had been negotiated with Chase's Saigon branch.[56] Anticipating the city's capture by communist armies, Chase had closed its Saigon branch in April 1975 without prior notice to depositors.[57] On May 1, 1975, the new communist government had issued a decree that confiscated industrial and commercial establishments in Vietnam, including all banks. Chase argued that the assets of its corporate depositors, including the plaintiffs' bank accounts, had been confiscated.[58] The court, however, rejected this contention because the expropriation order included only the physical assets of the corporate depositors and failed to affect the debts Chase owed its depositors.[59] Emphasizing that Chase had abandoned its banking operations and terminated its separate corporate identity in Saigon before the May 1975 decree,[60] the court concluded that when the expropriation decree was issued the deposits no longer existed in Vietnam. The court, therefore, followed the general rule that the situs of the debt is the situs of the debtor,[61] and found that by its confiscation the Vietnamese Government could not have enforced payment of the deposit accounts because it retained no jurisdiction over Chase.[62] Consequently, the Second Circuit rejected application of the act of state doctrine as a defense and concluded that Chase's own act, the abandonment of its Saigon branch, had converted the bank deposits into extraterritorial property.[63]

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56. The corporate plaintiffs had maintained deposit accounts denominated in Vietnamese piastres at Chase's Saigon branch. Another plaintiff, a Vietnamese citizen, had purchased a six-month certificate of deposit for two hundred million piastres payable on May 27, 1975. *Id.* at 856-57.

57. *Id.* at 857. Following a determination by officials in Chase's New York offices that Saigon would soon fall to the Communists, Chase terminated its operations at the Saigon branch. Chase, therefore, could not pay the certificate of deposit to the plaintiff Vietnamese citizen at its Saigon branch when the certificate subsequently matured. *See supra* note 56.

58. *Vishipco,* 660 F.2d at 862.

59. A Vietnamese law expert testified to the interpretation of the printed text of a radio broadcast announcing the confiscation of maritime transportation facilities and determined that the confiscation reached the bank accounts of the depositors. The court, however, determined that the plain meaning of the statement indicated confiscation of physical assets only. *Id.* at 861-62.

60. *Id.* at 862.

61. *See supra* notes 30-32 and accompanying text.

62. *Vishipco,* 660 F.2d at 862.

63. *See id.* Based on its finding that the certificate of deposit issued by the

On facts similar to those of the instant decision, a New York state court held in *Perez v. Chase Manhattan Bank, N.A.*,[64] that the Cuban Government's confiscation of a Cuban national's account with the bank's Cuban branch relieved the bank of further liability to the depositor. The plaintiff,[65] the wife of a former Cuban Government official, had purchased five certificates of deposit from Chase's branch in a suburb of Havana. After the Cuban Government confiscated the deposits, the depositor presented her certificates and demanded payment.[66] The court determined that the act of state doctrine precluded examination of the Cuban Government's confiscation and that the confiscation order negated Chase's liability to the depositor.[67] Important to the court's determination were the following findings: (1) the situs of the debt was in Cuba because Chase's Cuban branches conducted normal operations at the time of the confiscation; (2) although Chase's debt to the depositor was payable at any of Chase's branches outside of Cuba, the certificates of deposit also were payable in Cuba; and (3) in accordance with the general rule regarding the situs of intangible property,[68] the Cuban Government had the power to collect the debt on the certificates of deposit, which were within Cuban territory.[69] Because the certificates were within Cuba and the depositor was a Cuban citizen, the court determined that a confiscation by the Cuban Government of property owned by one of its own citizens did not violate principles of

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Saigon branch had not matured on the date Chase ceased its Saigon operations, *see supra* notes 56-57, the court stated that the depositor was entitled to assert its claim on the certificate against the home office of the bank. The court reasoned that the situs of the deposit accounts was at Chase's New York home office once Chase no longer operated its Saigon branch. *Vishipco*, 660 F.2d at 862-63; *see* Heininger, *supra* note 12, at 975.

64. 61 N.Y.2d 460, 463 N.E.2d 5, 474 N.Y.S.2d 689, *cert. denied*, 105 S. Ct. 366 (1984).

65. The bank depositor, now deceased, was the former Rosa Manas y Pineiro. The action was brought before the court in the name of Esther G. M. Perez, administratrix of the estate of the bank depositor. *Id.* at 465, 463 N.E.2d at 6, 474 N.Y.S.2d at 691.

66. The depositor initially demanded payment on the certificates of deposit, which were payable in 1959, at Chase's New York office in January 1974. The depositor then resided in the United States. *Id.* at 465-67, 463 N.E.2d at 6-7, 474 N.Y.S.2d at 690-91.

67. *Id.* at 473, 463 N.E.2d at 11, 474 N.Y.S.2d at 695.

68. *See supra* notes 30-32 and accompanying text.

69. *See Perez*, N.Y.2d at 469-71, 463 N.E.2d at 8-9, 474 N.Y.S.2d at 692-93.

international law. Consequently, the *Perez* court concluded that the Hickenlooper Amendment[70] did not preclude judicial review.[71] Contrary to the state court's decision in *Perez*, in the instant case the Second Circuit adopted the position taken by the courts in *Russek*, *Sokoloff*, and *Vishipco*, and refused to apply the act of state doctrine to a foreign government's confiscation of a bank account.

III. THE INSTANT DECISION

The court of appeals initially determined that the New York statute of limitations did not bar plaintiff's claim.[72] The court then considered Chase's argument that the Cuban Government had relieved it of liability by closing the account and expropriating the equivalent amount of funds from the bank, thereby cancelling the debt on the certificates of deposit.[73] Chase asserted further that the act of state doctrine prevented the court's examination of the validity of the Cuban Government's actions.[74] The court, however, rejected Chase's assertions and ruled that Chase had paid the Cuban Government from its own funds because the funds had not been set aside specifically for Garcia's deposit account.[75] Relying on *Russek*, the court concluded that forced payment of an equivalent sum of Chase's own funds did not extinguish Chase's debt to Garcia.[76] The court noted that a bank cannot be forced to pay a certificate of deposit unless the certificate is presented to the bank when payment is demanded.[77] It reasoned that Chase had acted at its own peril by paying the funds to the Cuban Government when the Government had not

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70. *See supra* note 40 and accompanying text.

71. *Perez*, 61 N.Y.2d at 472, 463 N.E.2d at 10, 474 N.Y.S.2d at 694.

72. *Garcia*, 735 F.2d at 648. The court rejected Chase's argument that the six year limitations period started when Chase "repudiated" the debt owed to the plaintiff. *Id.* Chase contended that letters sent to Dominguez and Garcia in 1964 and 1968, advising them that the Cuban Government had confiscated the deposit accounts, operated as an unequivocal repudiation of its liability on the certificates of deposit. *Id.*

73. *Id.* at 649.

74. *Id.*

75. *Id.*

76. The court argued by analogy that a gunman's demand to Chase to pay a sum equivalent to Garcia's debt clearly would not extinguish Chase's debt to Garcia. *Id.*

77. *Id.* (citing 5B MICHIE ON BANKS AND BANKING § 326a (1983)).

presented the certificates.[78]

The court next discussed its rationale for finding the act of state doctrine inapplicable. Although the court conceded that the Cuban Government validly could seize Chase's debt to Garcia if the situs of the debt were in Cuba, it stated that had the debt been seized it still would have ruled in Garcia's favor.[79] In the court's opinion, Garcia entered an agreement with Chase to ensure that she would receive payment on the certificates of deposit regardless of intervening events. Relying on *Vishipco*, the court concluded that Chase had "accepted the risk that it would be liable elsewhere" for the debt incurred by its Cuban branch.[80] It emphasized that Chase had agreed to honor the certificates of deposit at any of its branches.[81] Although the court predicated its decision on Chase's contractual agreement to ensure the safety of Garcia's money, it noted that its decision was consistent with the policy considerations underlying the act of state doctrine.[82] Because the dispute at issue in the case was between a United States bank and its depositor, the court ruled that its resolution did not challenge the validity of the Cuban Government's actions in the instant case.[83] Chase, therefore, could not assert the act of state doctrine as a defense.

The dissent believed that the act of state doctrine precluded Chase's liability in the instant case,[84] reasoning that the applicability of the doctrine depended on the power of the Cuban Government to enforce or collect the debt within Cuba.[85] Reviewing the case, the dissent found that the majority had inadequately considered several crucial facts: (1) the debt owed to Garcia was collectible in Cuba; (2) the agreement between Garcia and the bank was not intended to guarantee Garcia's deposit against confiscation by the Cuban Government; and (3) the Government had confiscated Garcia's assets independently of its later seizure of Chase's own assets and liabilities in the bank's Cuban branches.[86]

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78. 735 F.2d at 649.
79. *Id.* at 650.
80. *Id.* (quoting Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 863 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982)).
81. *Id.* at 651.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*

Contrary to the majority's finding that the agreement between Chase and the plaintiff insured the safety of plaintiff's money against confiscation, the dissent, relying on the jury determination,[87] found that the parties had not contemplated a guarantee against subsequent government confiscation of the plaintiff's funds.[88] The dissent concluded, therefore, that the parties to the agreement never intended that Chase would absolutely insure the plaintiff's deposit.

The dissent found that a debt, although a single obligation, may have more than one situs.[89] Relying on *Harris v. Balk*,[90] the dissent concluded that a debt, because it is a single obligation, is extinguished once it is collected pursuant to a valid decree.[91] Consequently, the dissent would rule that having previously paid the debt in compliance with a valid decree of the Cuban Government, Chase was not required to pay the same debt a second time to Garcia.[92] Furthermore, the dissent found it significant that Cuba was never excluded by the parties as a place of payment to Garcia on the certificates of deposit.[93] Prior to the Cuban Government's expropriation of Chase's Cuban branch banks in September 1960, Garcia's certificates had been payable in Cuba under the terms of the deposit agreement. The dissent reasoned that the Cuban Government could confiscate payment of the debt because Garcia could exercise the option to obtain payment in Cuba.[94] Garcia could collect on the debt only by presenting the certificates of deposit to Chase for payment. The dissent concluded, therefore, that the act of state doctrine prevented an examination of the validity of the Cuban Government's implicit determination that it need not present the certificates of deposit prior to confiscating the debt owed to Garcia.[95]

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87. The dissent reasoned that answers given by the jury to interrogatories supported a finding that the parties did not contemplate that their agreement covered confiscation of the debt by the Cuban Government. *Id.* at 652 & n.*.

88. *Id.* at 652.

89. *Id.*

90. *See supra* notes 31-32 and accompanying text.

91. *See Garcia*, 735 F.2d at 653.

92. *See id.* The dissent implicitly adopted the *Harris* court's stated objective. *See supra* note 32.

93. *Garcia*, 735 F.2d at 652.

94. *Id.*

95. *Id.*

IV. COMMENT

The court of appeals' conclusion that the act of state doctrine was inapplicable to the Cuban Government's confiscation in the instant case is completely out of harmony with prior decisions on similar facts. The court failed to acknowledge significant distinctions between the instant decision and previous cases, such as *Russek*, *Sokoloff*, and *Vishipco*, in which courts refused to apply the act of state doctrine in disputes arising out of a foreign government's expropriation of bank deposits.[96]

The instant opinion relied on *Russek* to rule that the Cuban Government confiscated funds belonging to Chase, rather than the funds on deposit in Garcia's account with Chase. A sixty-year old decision by a Texas state court that no court outside of Texas had previously cited[97] is not very convincing authority for an issue of federal jurisdiction. In *Russek* the disputed certificate of deposit had not matured at the time of confiscation, and existence of the Mexican statute that allegedly relieved the bankers of liability was never proven to the satisfaction of the court. Although the rationale underlying its decision is vague, the *Russek* court could reasonably have concluded that the bankers had paid their own funds to the Mexican Government because they obtained the money for payment from a Texas bank. If the deposit with the bankers was located in the Texas bank, the *Russek* court correctly refused to apply the act of state doctrine because the seized property was not located within Mexican territory. In the instant case, however, the majority implicitly found that the situs of the certificates of deposit was outside Cuba because Chase had agreed to honor the certificates at any of its worldwide branches.[98] The dissent, on the other hand, correctly noted that although the certificates were payable at any Chase bank worldwide, they also were payable at Cuban branches at the time of confiscation by the Cuban Government.[99] Thus, if the certificates were payable in Cuba, and both Chase and Garcia were in Cuba, then the Cuban Government's confiscation of the certificates constituted an act of state. Unlike *Russek*, therefore, the act of state doctrine controlled the instant decision.

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96. *See supra* notes 42-63 and accompanying text.
97. *See supra* notes 49-50 and accompanying text.
98. *See supra* text accompanying note 5.
99. *See supra* text accompanying notes 96-97.

The *Sokoloff* court rejected the applicability of the act of state doctrine primarily because the Soviet Government was not recognized by the United States when the bank deposits had been confiscated. In *Sokoloff*, the Soviet Government initially had confiscated only the bank's assets, but later confiscated the accounts of all Soviet citizens. Contrary to the circumstances of *Sokoloff*, in the instant case the new Cuban Government had been duly recognized by the United States and had confiscated Garcia's account before it confiscated Chase's assets.[100] Thus, the primary reason for the *Sokoloff* court's rejection of the act of state doctrine has minimal relevance to the instant situation.

Nor is the *Vishipco* decision any more relevant to the instant dispute.[101] In *Vishipco*, Chase had ceased all operations at its Saigon branch prior to confiscation of the bank's assets and deposits. Adhering to the general rule controlling the situs of intangible property, the *Vishipco* court correctly concluded that the act of state doctrine was inapplicable because the Vietnamese Government could not confiscate the bank deposits if Chase no longer operated in Vietnam. Unlike *Vishipco*, in the instant case Chase's Cuban branch banks operated normally into the year following the confiscation of Garcia's account. Chase, the debtor of Garcia, had maintained its presence in Cuba and remained subject to the jurisdiction of the Cuban Government when it complied with the expropriation decree. As the dissent correctly perceived, the act of state doctrine precluded an examination of the Cuban Government's confiscation of Chase's debt to Garcia.

In the instant case, Chase and Garcia had agreed that Chase would pay the certificates of deposit at any of its branches worldwide. Chase's debt, therefore, was potentially payable both inside and outside Cuba. Because application of the act of state doctrine usually depends on whether the property is located within or outside the territorial jurisdiction of the foreign government,[102] the instant court faced an unusual dilemma. It had to decide as a matter of first impression whether a bank debt payable both at the bank's branches within the country and at any branch worldwide remained payable to the depositor after the bank made payment under a direct government order. The dissent correctly stated that the applicability of the act of state doctrine in the

100. *See supra* notes 51-54 and accompanying text.
101. *See supra* notes 55-63 and accompanying text.
102. *See supra* note 12.

instant case depends on the power of the Cuban Government to collect the debt. The majority sidestepped the dilemma and imposed liability on the basis of the agreement between Chase and Garcia, characterizing it as an agreement to guarantee the safety of Garcia's money.[103] Unfortunately, the court did not take into account the political climate in Cuba at the time the plaintiff had entered into the deposit agreement with Chase. Garcia and her husband were associated with the Batista Government, which was losing a revolutionary insurrection. The court emphasized that Chase had entered a private agreement with Garcia to insure the safety of Garcia's money. Chase's guarantee had provided insurance only to the extent that Chase, a neutral entity in Cuba, could facilitate conversion of Garcia's Cuban pesos into United States currency[104] without Cuban Government interference. As a practical matter, Garcia and her husband could not depart Cuba with large amounts of Cuban currency in their possession. Given that inability, Chase's obligation was intended merely to make the deposited funds available for withdrawal at any of its worldwide branches, including those in Cuba. Implicit in any guarantee by Chase was that Chase would only make payment once against the deposit. Consequently, Chase offered protection to Garcia's funds by insuring the validity of the certificates, which were purchased in Cuban currency, against any subsequent deterioration of relations between the United States and Cuba and the devaluation or resulting worthlessness of the Cuban pesos. Expropriation of Garcia's individual account, however, was not anticipated. As the subsequent nationalization of Chase's Cuban branches demonstrated, the bank was unable to protect its own assets, let alone the assets of the depositor. Thus, the court could reasonably have concluded, as did the dissent, that because Chase and Garcia had failed to contemplate the confiscation by the Cuban Government, the parties had never intended that Chase would absolutely insure Garcia's deposit.

Although the court of appeals does not discuss the effect of the Hickenlooper Amendment on the act of state doctrine, the *Perez* court correctly decided that the amendment was inapplicable when the Cuban Government expropriated property owned by Cuban citizens and located within Cuba.[105] Consequently, the

103. *See supra* text accompanying notes 80-82.
104. *See supra* note 5 and accompanying text.
105. *See supra* notes 70-71 and accompanying text.

amendment, characterized as an exception to the act of state doctrine, cannot preclude an application of the act of state doctrine in the instant case, implicitly or otherwise.

The majority claimed to be reaching a result consistent with the policy underlying the act of state doctrine. One major policy is to avoid adjudications of the validity of an act of a foreign government occurring within its own territory. The court found that it had not examined the acts of the Cuban Government, but merely resolved a private dispute between Chase and the plaintiff Garcia.[106] To reach the conclusion that the Cuban Government had marched into Chase's Cuban branch, armed with a decree in the manner of an armed gunman,[107] and forced Chase to relinquish plaintiff's deposit without protest, the court conducted exactly the kind of examination the doctrine condemns. Because it required Chase to suffer the consequences of this encounter with the Cuban Government, the court necessarily concluded that the Government did not exercise sufficient authority to confiscate plaintiff's deposit.

The instant court argued that a bank cannot be compelled to redeem a certificate of deposit without obtaining the certificate, and that the bank acts at its own peril if it does redeem without obtaining either the certificate or a properly executed release.[108] Ordinarily, this would be true. In the instant case, however, Chase failed to obtain the certificates because the Cuban Government demanded payment on behalf of one of its citizens and pursuant to a presumably valid decree. Under these extraordinary circumstances it is hardly reasonable to require that Chase conform to ordinary commercial practices.

Prior decisions have rejected application of the act of state doctrine when the courts determined that the debt was located outside the foreign country and its collection merely attempted by the foreign government or its instrumentality.[109] The debt in the instant case, like the debts disputed in the prior decisions, had a situs outside the foreign country, but the expropriation of the deposit was effectively a *fait accompli.* Contrary to prior decisions, the instant court had to determine the applicability of the act of state doctrine to a disputed debt with more than one situs.

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106. *See supra* note 83 and accompanying text.
107. *See supra* note 76 and accompanying text.
108. *See supra* notes 77-78 and accompanying text.
109. *See supra* notes 33-38 and accompanying text.

Furthermore, the debt had been collected by a governmental decree entitled to a presumption of validity in the courts of the United States. The instant decision establishes an influential precedent that could undermine the presumption favoring governmental acts that successfully take extraterritorial property. That outcome would ignore the fundamental purposes of the act of state doctrine and erroneously impose double liability on banks that find themselves in a predicament like the one that faced Chase.

Jesse T. Wilkins

JURISDICTION—COMMERCIAL ACTIVITY AS APPLIED TO THE FOREIGN SOVEREIGN IMMUNITIES ACT AND THE ACT OF STATE DOCTRINE. *Braka v. Bancomer, S.A.*, 589 F. Supp. 1465 (S.D.N.Y. 1984).

I. FACTS AND HOLDING

Plaintiffs, United States citizens, brought suit against Bancomer, a Mexican bank, for breach of contracts of deposit and violations of securities laws.[1] Beginning in 1981, plaintiffs purchased peso- and dollar-denominated certificates of deposit issued by Bancomer's Mexico City office. The certificates fixed Mexico City as the place of deposit and payment of principal and interest; they were to be repaid in United States dollars upon maturity in September 1982 and February 1983.[2] During the summer of 1982 falling oil prices precipitated a severe economic crisis for the Mexican Government.[3] To stabilize the currency and reduce the flow of foreign exchange, the Mexican Government issued a series of decrees between September and December of 1982. The decrees nationalized all private Mexican banks, including Bancomer; required that all domestic obligations for payments in foreign currency be performed by delivering an equivalent amount in pesos at the official exchange rate; and established official rates of exchange for repayment of dollar-denominated certificates of deposit.[4] Because the official exchange rate was lower than the prevailing market exchange rate, plaintiffs contended that Bancomer's repayment of the obligation in pesos instead of United States dollars constituted a breach of contract that caused them to suffer damages of $994,800.[5] Bancomer argued that under the Foreign Sovereign Immunities Act (FSIA)[6] the district court did not have jurisdiction to hear the case, and that even if jurisdiction existed the act of state doctrine precluded the court from

1. Braka v. Bancomer, S.A., 589 F. Supp. 1465 (S.D.N.Y. 1984).
2. *Id.* at 1466.
3. *Id.* at 1467. For a complete discussion of the Mexican economic crisis and its aftermath, see Special Project, *Legal Issues Arising from the Mexican Economic Crisis*, 17 VAND. J. TRANSNAT'L L. 367 (1984).
4. 589 F. Supp. at 1467.
5. *Id.*
6. 28 U.S.C. §§ 1602-1611 (1982).

adjudicating the dispute.[7] The District Court for the Southern District of New York dismissed the case for failure to state a cause of action. *Held*: Although the court did have jurisdiction to hear the case because Bancomer's breach of the contract was a commercial act and therefore fit within the commercial exception of the FSIA, the Mexican decrees requiring payment of the obligation at official exchange rates were sovereign acts, whose legality could not be questioned in United States courts under the act of state doctrine.[8]

II. LEGAL BACKGROUND

A. The Commercial Activities Exception to the Foreign Sovereign Immunities Act

The doctrine of sovereign immunity denies a domestic court jurisdiction to hear a claim against a foreign state[9] by virtue of the defendant's status as a sovereign.[10] There are two conflicting theories of sovereign immunity. Under the absolute theory, a sover-

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7. The plaintiffs argued that the court could hear the case under the Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2) (1982), even if the act of state doctrine applied. The Hickenlooper Amendment provides that a United States court can hear a case even if the act of state doctrine would apply when the foreign state has violated international law. The court noted that under French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 55-56, 295 N.Y.S.2d 433, 442-43, 242 N.E.2d 704, 710-11 (1968), a law that changes either the value or character of the currency to be paid under a contract is not a "confiscation" or a "taking." The court also noted that foreign exchange controls are accepted under international law and thus, found the Hickenlooper Amendment inapplicable. *Braka*, 589 F. Supp. at 1472-73; *see* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 198 (1965).

8. 589 F. Supp. at 1474. The plaintiffs also argued that Bancomer failed to register a security in violation of 15 U.S.C. § 77e (1982) and misrepresented the sale of a security in violation of 15 U.S.C. § 77q. 589 F. Supp. at 1467. The court did not reach these issues after holding that the plaintiffs' claim was barred by the act of state doctrine. *Id.* at 1474. The Ninth Circuit recently held that a Mexican certificate of deposit does not constitute a security. *See* Wolf v. Banco Nacional de Mexico, 739 F.2d 1458 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 784 (1985); *see also* Special Project, *supra* note 3, at 447-63 (1984) (commenting on *Wolf*).

9. Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 725-26 (1976). (Marshall, J., dissenting); *see* National City Bank v. Republic of China, 348 U.S. 356, 358-59 (1955); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 65 (1965).

10. H.R. REP. No. 1487, 94th Cong., 2nd Sess. 8, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604, 6606.

eign state must consent in order to be sued in the courts of another sovereign state;[11] the restrictive theory exempts a sovereign's public or governmental acts from consequential suits, but not its commercial or proprietary acts.[12]

Traditionally, courts in the United States have relied heavily on the suggestions of the State Department in deciding whether to grant sovereign immunity.[13] The policy of judicial deference continued after 1952 when the State Department adopted the restrictive theory of sovereign immunity in what became known as the Tate Letter.[14] In 1976 Congress enacted the FSIA which codified the restrictive theory of sovereign immunity.[15] The FSIA gives federal and state courts the power to decide claims of sovereign immunity by foreign states[16] and provides an exception granting jurisdiction "in any case in which the action is based upon a commercial activity carried on in the United States by the foreign state."[17]

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11. *Dunhill,* 425 U.S. at 711; *see* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 69, reporters' notes at 214 (1965).

12. *Dunhill,* 425 U.S. at 698.

13. National City Bank v. Republic of China, 348 U.S. 356, 360-61 (1955).

14. *Dunhill,* 425 U.S. at 698. See *id.* at 711-15 for a reproduction of the Tate Letter.

15. *See* 28 U.S.C. §§ 1602-1611 (1982). The FSIA was held to be constitutional in Verlinden B.V. v. Central Bank of Nig., 103 S.Ct. 1962, 1970-73 (1983).

16. 28 U.S.C. § 1602. "Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." *Id. See generally Verlinden,* 103 S.Ct. at 1968-69 (discussing the history of the doctrine of sovereign immunity and the effect of the FSIA on the courts).

17. 28 U.S.C. § 1605(a)(2). In Texas Trading & Milling Corp. v. Federal Republic of Nig., 647 F.2d 300 (2d Cir. 1981), *cert. denied,* 454 U.S. 1148 (1982), the court noted that section 1605(a)(2) calls for the resolution of five questions:

> 1) Does the conduct the action is based upon or related to qualify as "commercial activity"?
>
> 2) Does that commercial activity bear the relation to the cause of action and to the United States described by one of the three phrases of § 1605(a)(2), warranting the court's exercise of subject matter jurisdiction under § 1330(a)?
>
> 3) Does the exercise of this congressional subject matter jurisdiction lie within the permissible limits of the "judicial power" set forth in Article III?
>
> 4) Do subject matter jurisdiction under § 1330(a) and service under § 1608 exist, thereby making personal jurisdiction proper under § 1330(b)?
>
> 5) Does the exercise of personal jurisdiction under § 1330(b) comply with the due process clause, thus making personal jurisdiction proper?

The FSIA defines a commercial activity as a "regular course of commercial conduct or a particular commercial transaction or act."[18] The definition requires that a court look to the nature of the conduct or transaction in question rather than to its purpose to determine whether the foreign state has engaged in commercial activity.[19] In *Najarro de Sanchez v. Banco Central de Nicaragua*,[20] for example, the plaintiffs demanded that the issuer, a private Nicaraguan bank, repay their certificate of deposit in United States dollars. Because Nicaraguan law required that all disbursements of foreign currency were to be made through Nicaragua's central bank in order to maintain official rates of exchange, the central bank issued a check for United States dollars directly to the plaintiffs. Before the plaintiffs could cash the check, however, the central bank stopped payment.[21] Although the district court admitted that the relationship between the plaintiff and Banco Nacional was commercial, it held that the central bank's role in the transaction was to monitor foreign currency transactions and therefore was undertaken in a governmental capacity.[22] In other words, the nature of issuing a check in a foreign currency was governmental even though the underlying purpose for repaying the obligation could be considered commercial.[23]

The legislative history of the FSIA provides little guidance in defining exactly what activities are commercial; it states only that the definition includes sales or purchases from United States concerns and any indebtedness a foreign state might incur within the United States or from a United States lender.[24] Generally, courts have looked at three factors to determine whether an activity is

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647 F.2d at 308.

18. 28 U.S.C. § 1603(d).

19. *Id.*

20. 515 F. Supp. 900 (E.D. La. 1981).

21. *Id.* at 901.

22. *Id.* at 909-10.

23. Obviously, the nature/purpose distinction generally arises when the nature of the transaction is commercial even though its purpose is governmental. The *de Sanchez* case shows, however, that when the nature of the transaction is governmental, the commercial exception of the FSIA does not apply even though the underlying purpose of the transaction could be construed as commercial. The case also demonstrates that a court must first define the act that allegedly injured the plaintiff before deciding whether that act is commercial. *See* Note, *Foreign Sovereign Immunity and Commercial Activity: A Conflicts Approach*, 83 COLUM. L. REV. 1440, 1482 (1983).

24. H.R. REP. No. 1487, *supra* note 10, at 17, *reprinted* at 6615-16.

commercial: 1) whether the activity was carried on for profit;[25] 2) whether a private person could engage in this type of activity;[26] and 3) whether there was a contract.[27] The most important of the three factors is the existence of a contract; some courts have characterized activity as commercial solely on the basis of this factor.[28] These courts believe that a contract implies a certain degree of voluntariness and consent to jurisdiction on the part of the foreign state.[29] Moreover, the nonsovereign nature of a contract between a private party and a sovereign state is accepted under international law.[30]

One court has limited the scope of the commercial activities exception to exclude acts that a commercial enterprise of a foreign government had been compelled to perform. In *Arango v. Guzman Travel Advisors Corp.*,[31] the plaintiffs had purchased a package tour of the Dominican Republic, but they were denied entry upon arrival at Santo Domingo airport because government officials considered them to be undesirable aliens. The plaintiffs were forced to leave the country immediately on a flight to Puerto Rico.[32] Among their claims the plaintiffs charged Dominicana, the Dominican-owned airline, with false imprisonment and battery. The court dismissed these claims, concluding they did not fit within the commercial activities exception because Dominicana had been "impressed into service . . . by Dominican immigration officials pursuant to that country's laws" and had "acted merely as an arm" of the Dominican Government.[33] Thus, Dominicana was entitled to the same immunity from liability arising from performing a governmental function that the Dominican Govern-

25. *de Sanchez*, 515 F. Supp. at 909; Castro v. Saudi Arabia, 510 F. Supp. 309, 312 (W.D. Tex. 1980); United Euram Corp. v. U.S.S.R., 461 F. Supp. 609, 611 (S.D.N.Y. 1978); *see* Note, *supra* note 23, at 1482. Generally when a court examines the transaction to determine if it was carried on at a profit, the focus is on the private individual instead of the foreign state. *Id.* at 1484.

26. *Texas Trading & Milling Corp.*, 647 F.2d at 308-10; de Letelier v. Republic of Chile, 567 F. Supp. 1490, 1500 (S.D.N.Y. 1983); *see* Note, *supra* note 23, at 1482-83.

27. *Texas Trading & Milling Corp.*, 647 F.2d at 308-10; *In re* Sedco Inc., 543 F. Supp. 561, 566 (S.D.Tex. 1982); *see* Note, *supra* note 23, at 1483.

28. *See Texas Trading & Milling Corp.*, 647 F.2d at 309.

29. Note, *supra* note 23, at 1491.

30. *Id.* at 1492.

31. 621 F.2d 1371 (5th Cir. 1980).

32. *Id.* at 1373-74.

33. *Id.* at 1379.

ment itself would enjoy.[34]

The application of the commercial activities exception to commercial enterprises complying with the order of a foreign sovereign grew more complicated following *Frankel v. Banco Nacional de Mexico*.[35] On facts virtually identical to those in the instant case,[36] the District Court for the Southern District of New York held that the recently nationalized Mexican bank was immune from suit under the FSIA. The court noted that the only action that was a breach of the deposit contract was Banco Nacional's compliance with the currency control rules and regulations.[37] The court stated further that promulgation of currency control laws is a governmental act.[38] Focusing exclusively upon the Mexican currency controls, the court concluded, "[t]his is precisely the type of governmental activity that cannot be subjected to judicial scrutiny under . . . the FSIA."[39] The *Frankel* court did not analyze

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34. *Id.* The court did allow a breach of contract claim stating that the claim was plainly derived from the defendant's commercial activity and was not barred by the FSIA. *Id.* at 1379-80. The court in *Arango* could have reached the same conclusion to dismiss the claims without exploring whether or not there was commercial activity, because the FSIA does not appear to grant jurisdiction to hear cases concerning tortious acts committed outside of the United States. *See* H.R. REP. No. 1487, *supra* note 10, at 20-21, *reprinted* at 6619 (stating that noncommercial torts must be committed within the United States to fall within the jurisdictional grant of the FSIA). *See generally* 28 U.S.C. § 1605 (general exceptions to the jurisdictional immunity of a foreign state). *Arango* was criticized in de Letelier v. Republic of Chile, 567 F. Supp. 1490, 1501 (S.D.N.Y. 1983).

35. No. 82-6457 (S.D.N.Y., May 31, 1983).

36. *See id.*, slip op. at 2.

37. *Id.* at 4.

38. *Id.*

39. *Id.* The *Frankel* decision has been followed by Callejo v. Bancomer, S.A., No. 3-82-1604-05-D (N.D. Tex. Feb. 27, 1984), *cited in Braka*, 589 F. Supp. at 1468-69. In Allied Bank Int'l v. Banco Credito Agricola de Cartago, 566 F. Supp. 1440 (S.D.N.Y. 1983), the court reached the opposite conclusion, holding the breach of the debt obligation was within the commercial exception to the FSIA. In *Allied Bank* the plaintiffs had loaned money to Banco Credito, a Costa Rican bank. Costa Rica imposed restrictions on foreign exchange transactions, and Banco Credito was prohibited by Costa Rica's central bank from paying the debt owed to the plaintiff. In a suit to enforce the obligation, the court noted that under 28 U.S.C. § 1605(a)(2) a foreign state is not immune from jurisdiction when the lawsuit is based upon an act outside the United States in connection with a commercial activity within the United States. 566 F. Supp. at 1443. The court held that the execution of the notes, upon which the suit was based, was a commercial activity and, therefore, that the commercial activity exception ap-

plaintiffs' claim that Banco Nacional breached a contract "in the course of its purely commercial banking activities," nor did it examine the language of the contract itself to establish the situs of the debt.[40] The court added in a footnote that the claim would also be barred by the act of state doctrine.[41] In the instant decision a court again was asked to determine the proper scope of judicial review under the FSIA when ordinary commercial obligations are altered by the order of a sovereign.

B. The Act of State Doctrine

The act of state doctrine precludes judicial examination of the validity of a foreign sovereign's act, based upon the principle that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[42] The doctrines of foreign sovereign immunity and act of state both address considerations of comity and separation of powers, but they apply in different situations and serve different functions. Sovereign immunity conditions the jurisdiction of the court, while the act of state doctrine applies to the issues in the case. In addition, foreign sovereign immunity concerns actions of a foreign state within the forum state, whereas the act of state doctrine focuses on a foreign state's actions within its own territory.[43] Although

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plied to the case. *Id.*

40. *Frankel*, slip op. at 4.

41. *Id.* at 4 n.4.

42. Underhill v. Hernandez, 168 U.S. 250, 252 (1897); *see also* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 763 (1972) ("The doctrine precludes *any* review whatsoever of the acts of the government of one sovereign state done within its own territory by the courts of another sovereign state." (emphasis added)); Note, *Judicial Balancing of Foreign Policy Considerations: Comity and Errors Under the Act of State Doctrine*, 35 STAN. L. REV. 327, 329 (1983).

43. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 428, reporter's note 9 at 11-12 (Tent. Draft No. 4, 1983).

In a dispute over a breach of a debt obligation the court must determine the location of the debt before it can address the act of state doctrine. In Garcia v. Chase Manhattan Bank, 735 F.2d 645 (2d Cir. 1984), for example, the plaintiff Garcia bought certificates of deposits in 1958 from Chase only after being assured by bank officers that he could receive payment in United States dollars in any of the bank's branches worldwide. The Cuban Government subsequently nationalized the bank's Cuban branch and confiscated Garcia's account. *Id.* at 646-47. The court noted that if the situs of the debt was in Cuba, the Cuban Government could have validly seized it. *Id.* at 650. In this case, however, the

international law does not require application of the act of state doctrine,[44] the doctrine has a constitutional basis because it helps shape the relationships among the branches of the federal government according to the principle of separation of powers.[45] The act of state doctrine allows the executive and legislative branches to resolve politically sensitive questions without judicial interference.[46] The doctrine, however, is not inflexible. The importance of an issue to United States foreign relations is directly related to the degree of deference the courts will extend to the political branches.[47]

A plurality of the Supreme Court first suggested that a government action having merely commercial consequences would not be protected under the act of state doctrine in *Alfred Dunhill of London, Inc. v. Cuba.*[48] Following the nationalization of the Cuban cigar manufacturing industry in 1960, Dunhill paid a state-owned manufacturer debts owed for cigars sold by the company's previous private management. The former owners sued Dunhill and other importers for the debt. The district court held for the plaintiffs, but found that the importers were entitled to set-off payments already made to the nationalized companies.[49] The district court also held that under quasi-contractual principles, the receipt of the mistaken payments exceeding the amount to which they were entitled for post-intervention shipments obligated the nationalized companies to repay the difference to Dunhill.[50] A

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purpose of the transaction was to avoid such a seizure. The court found that the debt was not in Cuba; thus, the Cuban Government could not have seized it, and the act of state doctrine would not bar a suit to collect the debt. *Id.*; *see also* Allied Bank Int'l v. Banco Credito Agricola de Cartago, 566 F. Supp. 1440 (S.D.N.Y. 1983) (debt located in a foreign country).

44. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421 (1964).

45. *Id.* at 423.

46. International Ass'n of Machinists & Aerospace Workers v. OPEC, 649 F.2d 1354, 1358 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

47. *Sabbatino*, 376 U.S. at 428.

48. 425 U.S. 682 (1976), *aff'g* Menendez v. Faber, Coe & Gregg, Inc., 345 F. Supp. 527 (S.D.N.Y. 1972), *modified sub nom.* Menendez v. Saks & Co., 485 F.2d 1355 (2d Cir. 1973).

49. Menendez v. Faber, Coe & Gregg, 345 F. Supp. at 534-35. The Second Circuit did not disturb this part of the district court's decision. 485 F.2d at 1368-74.

50. *Id.* at 564. The Second Circuit reversed the district court on this point, holding that the act of state doctrine precluded affirmative recovery by Dunhill. 485 F.2d at 1374.

majority of the Supreme Court held that the act of state doctrine did not preclude a United States court from ordering Cuba to pay the obligation because there was no "statute, decree, order, or resolution" or other act of state to which the doctrine could apply.[51] Four members of the majority[52] went on to state that "the concept of an act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities."[53]

The *Dunhill* decision has prompted many courts to recognize a commercial exception to the act of state doctrine.[54] In *Behring International, Inc. v. Imperial Iranian Air Force*,[55] for example, the court distinguished the public or governmental acts of a sovereign from its private or commercial acts.[56] After the Iranian Revolution of 1979 the Iranian Air Force refused to pay the amounts it owed Behring, an international commercial freight service, which then sued to collect the outstanding balance. The court found that the Air Force's repudiation of the debt was a commercial act and therefore the act of state doctrine did not apply.[57]

In addition to judicial recognition of a commercial activities exception, the drafters of the FSIA followed the view expressed by the four justices in *Dunhill*.[58] The House Report quoted from the Solicitor General's amicus brief in *Dunhill*: " 'To elevate the foreign state's commercial acts to the protected status of "acts of state" would frustrate [the restrictive theory of sovereign immunity] by permitting sovereign immunity to reenter through the back door, under the guise of the act of state doctrine.' "[59]

Nevertheless, some courts have refused to recognize a formal

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51. 425 U.S. at 695.

52. Justice Stevens did not join this part of the opinion. *Id.* at 715 (Stevens, J., concurring).

53. *Id.* (opinion of White, J.).

54. *See, e.g.*, Empresa Cubana Exportadora de Azucar y Sus Derivados v. Lamborn & Co., 652 F.2d 231, 238 (2d Cir. 1981); Hunt v. Mobil Oil Corp., 550 F.2d 68, 73 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977); Sage Int'l, Ltd. v. Cadillac Gage Co., 534 F. Supp. 896, 905 (E.D. Mich. 1981); Behring Int'l, Inc. v. Imperial Iranian Air Force, 475 F. Supp. 396, 401 (D.N.J. 1979).

55. 475 F. Supp. 396 (D.N.J. 1979).

56. *Id.* at 401.

57. *Id.*

58. *See* H.R. REP. No. 1487, *supra* note 10, at 20 n.1, *reprinted* at 6619 n.1.

59. *Id.* (quoting Amicus Brief of United States at 41, *Dunhill*).

commercial activity exception to the act of state doctrine.[60] These courts follow only the first part of *Dunhill*[61] and apply the act of state doctrine whenever the state has acted in its sovereign capacity by issuing a statute, decree, or order.[62] For example, in *National American Corp. v. Federal Republic of Nigeria*[63] the district court applied this approach to determine whether a dispute was appropriate for judicial resolution. The Nigerian Government had ordered cement from the plaintiff and numerous other cement suppliers. Subsequently realizing that it had over-ordered cement, the government closed Nigerian ports by decree and refused to pay for cement in transit. The court held that the closing of the port constituted an act of state because it was accomplished by governmental decree;[64] the breach of the contract, however, was "not an extension of closing the port" and therefore was not within the act of state doctrine.[65] In the instant case, the court was asked to look beyond the mere existence of a formal government decree to consider whether the arguably commercial nature of the effects of the act might render application of the act of state doctrine inappropriate.

III. The Instant Opinion

The district court first found that it had jurisdiction because Bancomer's breach of the obligation to pay the plaintiffs in United States dollars was a commercial activity under the FSIA.[66] The court noted that the first step in resolving an FSIA issue, prior to characterizing an act as governmental or commercial, is to define the activity and the act in connection with that activity that produced the claim.[67] In this case the issuance of the certificate of deposit was the activity, and breach of the deposit contract was the act that was the basis of the plaintiffs' claim.[68] By focusing on the acts that were the basis for the contract claim

60. *See, e.g.*, International Ass'n of Machinists & Aerospace Workers v. OPEC, 649 F.2d 1354, 1360 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 606 (9th Cir. 1976).

61. *See supra* note 51 and accompanying text.

62. *See Timberlane Lumber Co.*, 549 F.2d at 606.

63. 448 F. Supp. 622 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979).

64. *Id.* at 641.

65. *Id.* at 640-41.

66. Braka v. Bancomer, S.A., 589 F. Supp. 1465, 1470 (S.D.N.Y. 1984).

67. *Id.* at 1469.

68. *Id.*

instead of separate acts of the Mexican Government, the court rejected the approach taken in *Frankel*.[69] While recognizing that Bancomer was prevented from complying with its contractual obligation by a governmental decree, the court concluded that this alone would not immunize Bancomer from suit as an agent of Mexico.[70]

Although Bancomer was not immune from suit, the court held that the plaintiffs' claims were barred by the act of state doctrine.[71] Because the certificates stated that Mexico City was the location of the debt and that all principal and interest were to be paid in Mexico, the court found that the situs of the debt was Mexico.[72] The court also suggested that the high interest rates paid on the deposits were necessary to induce foreign investors to accept the risk that their deposited dollars would be subject to domestic currency export controls.[73] It noted further that the debt had been discharged under Mexican law because the certificate of deposit had been presented and payment had been made in pesos at the official exchange rate.[74] Mexico's act, therefore, was not a simple repudiation of a commercial debt as in *Dunhill*, but was part of the governmental function of controlling foreign currency through formal executive and legislative decrees.[75] A judgment for the plaintiffs effectively would countermand the Mexican decrees,[76] which persuaded the court that the Mexican Government's allocation of the rights of the parties in this case was shielded from the intrusive scrutiny of the United States judiciary by the act of state doctrine.[77]

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69. *Id.*; *see supra* notes 35-41 and accompanying text.

70. 589 F. Supp. at 1470.

71. *Id.* at 1472.

72. *Id.* at 1471. The court used these features of the deposit contract to distinguish this case from Garcia v. Chase Manhattan Bank, 735 F.2d 645 (2d Cir. 1984). *See supra* note 42.

73. 589 F. Supp. at 1471.

74. *Id.*

75. *Id.* at 1472.

76. *Id.* at 1474.

77. The court found no violation under the Hickenlooper Amendment, *id.* at 1472-73; *see supra* note 7, and did not address the securities issue, *see supra* note 8.

IV. COMMENT

The district court in the instant decision correctly recognized the conceptual distinctions between the FSIA and the act of state doctrine and wisely maintained those distinctions throughout its analysis of a complex factual situation involving both commercial and governmental actions. The court's initial conclusion that Bancomer was subject to suit pursuant to the commercial activities exception of the FSIA is sound. Clearly, Bancomer's breach of the deposit contract satisfied all three factors of the test employed by most courts to determine whether an activity is commercial in nature.[78] First, the activity in *Braka* was carried on for profit. The court noted that the deposits paid a relatively high rate of interest suggesting that the risk of Mexico's imposing foreign exchange controls was foreseeable and already factored into the rate of return of the deposits.[79] Second, because there is nothing particularly public or governmental about issuing a certificate of deposit, the conduct was one in which a private person could engage.[80] Bancomer itself had been a private bank at the time the deposit agreements were concluded.[81] Last and most important, there was a contract between the parties. Independent of the three-factor test, the legislative history of the FSIA specifically states that an "indebtedness incurred by a foreign state" is to be included in the definition of "commercial activities."[82] By contrast, the analysis adopted by the *Frankel* court[83] and supported by the Fifth Circuit's decision in *Arango*[84] creates unnecessary confusion when determining whether a sovereign's commercial activities fit the exception. These cases reason that no commercial activity exists when an entity is forced to follow the law of a foreign sovereign. The problem with this rationale, as is apparent in the instant case, is that the conclusion ignores the nature/purpose distinction required by the FSIA.[85] Although promulgating foreign currency exchange rates is a governmental function, it was only the underlying purpose or reason for Bancomer's breach.

78. *See supra* notes 25-30 and accompanying text.
79. *Braka*, 589 F. Supp. at 1471.
80. *Id.* at 1470.
81. *Id.*
82. *See supra* note 24 and accompanying text.
83. *See supra* notes 35-41 and accompanying text.
84. *See supra* notes 31-34 and accompanying text.
85. *See supra* notes 19-23 and accompanying text.

The nature of the deposit agreement remained inherently commercial and therefore fits within the commercial exception to the FSIA.[86]

In choosing to dismiss plaintiffs' claims under the act of state doctrine, the instant court reaffirmed its view that if a statute, decree, or order by a sovereign state is present, the doctrine will apply.[87] The result probably would have been the same had the court been willing to find a "commercial exception" to the act of state doctrine, as the plaintiffs had urged, because courts have been unwilling to adjudicate the validity of a foreign state's formal statute, decree, or order no matter how purely commercial that act of state might have been.[88] Although the legislative history of the FSIA would appear to support an extension of the commercial exception to the act of state doctrine, courts have wisely withheld express recognition of the exception.[89] An express, judicially-created commercial exception to the act of state doctrine would encourage courts to "sit in judgment" of sovereign acts of the government of another country; a sovereign act would need only be deemed sufficiently "commercial" to be challenged by the United States judiciary. This outcome clearly is not contemplated by the act of state doctrine.[90] To apply the doctrine whenever there is a statute, decree, or order, the approach continued by the instant court, would be more consistent with the purpose of the act of state doctrine. In the absence of a formal sovereign act the doctrine should not be applied unless the case involves a "politically sensitive issue."[91] This approach has been criticized for ignoring "broader policy concerns," and the suggestion has been made that the "inquiry should be to the separation

86. A corollary problem with the approach taken in *Frankel* is that it focuses on the wrong act. In both the instant case and *Frankel*, the plaintiffs sued because of the breach of a deposit contract, not because of the Mexican decrees. The latter acts are the subject of the act of state doctrine.

87. *See supra* notes 60-65 and accompanying text.

88. *See, e.g.*, Empresa Cubana Exportadora de Azucar y Sus Derivades v. Lamborn & Co., 652 F.2d 231, 238 (2d Cir. 1981) (Delaware sugar broker's claim against Cuban expropriation precluded from litigation under the act of state doctrine); Hunt v. Mobil Oil Corp., 550 F.2d 68, 73 (2d Cir.) (expropriation of Libyan oil producer precluded from litigation under the act of state doctrine), *cert. denied*, 434 U.S. 984 (1977).

89. *See supra* notes 57-59 and accompanying text.

90. *See supra* note 42 and accompanying text.

91. *See supra* note 46 and accompanying text.

of powers and foreign relations concerns."[92] Although the Supreme Court has already stated that two of the principles underlying the act of state doctrine are the separation of powers and federal nature of foreign relations, [93] courts should not reexamine the principles in every dispute involving the acts of a foreign government. Because the doctrine is based on separation of powers and foreign relations concerns, an act of Congress would be the appropriate device to distinguish situations when these concerns are present from situations when they are not.[94] The legislative history to the FSIA could be deemed to be such an enunciation of United States policy, but that statement is neither strong enough nor complete enough to give the courts adequate guidance. Until more explicit guidance comes from Congress, the act of state doctrine should be applied strictly on the basis of whether a formal statute, decree, or order of a foreign state precipitated the plaintiff's claim.

Joseph A. DiJulio

92. Sage Int'l, Ltd. v. Cadillac Gage Co., 534 F. Supp. 896, 905 (E.D. Mich. 1981).

93. *See supra* note 44-47 and accompanying text.

94. *See* Note, *supra* note 42, at 353.