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***Allied Bank III* and United States Treatment of Foreign Exchange Controls: The Effects of the Act of State Doctrine, The Principle of Comity, and Article VIII, Section 2(b) of the International Monetary Fund Agreement**

I. INTRODUCTION

On March 18, 1985, the United States Court of Appeals for the Second Circuit in *Allied Bank International v. Banco Credito Agricola de Cartago*¹ vacated an earlier decision that allowed a foreign state to defer unilaterally its external debt payments.² This disposition rested on the court's construction and application of the act of state doctrine and the principle of comity.³ The traditional expression of the act of state doctrine states that a U.S. court will not adjudicate claims involving the validity of a foreign state's public acts committed within its territory.⁴ The principle of comity provides that a U.S. court should apply a foreign law where the United States and a foreign state have jurisdiction to prescribe the applicable law, but only if that foreign law is consistent with U.S. law and public policy.⁵ In *Allied Bank* the court of appeals held that neither the act of state doctrine nor the principle of comity supported giving extraterritorial effect to a Costa Rican unilateral payments moratorium.⁶ International financial institutions heralded this decision as restoring legal recourse for lenders against foreign borrowers which default on loan repayments because of governmental restrictions.⁷ Nevertheless, the *Allied Bank* decision presents a troubling prece-

¹ 757 F.2d 516 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 30 (1985).

² *Id.* at 523.

³ *Id.* at 521-23.

⁴ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964); RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 41-43 (1965). For a discussion of the act of state doctrine, see *infra* notes 34-48 and accompanying text.

⁵ See, e.g., *Clarkson Co., Ltd. v. Sheehan*, 544 F.2d 624, 629 (2d Cir. 1976); *Kenner Products Co. v. Societe Fonciere et Francerie Agache-Willot*, 532 F. Supp. 478, 479 (S.D.N.Y. 1982); *Cornfeld v. Investors Overseas Services, Ltd.*, 471 F. Supp. 1255, 1258-59 (S.D.N.Y. 1979), *aff'd*, 614 F.2d 1286 (2d Cir. 1979). For a discussion of the principle of comity, see *infra* text accompanying notes 49-60.

⁶ *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 522 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 30 (1985) [hereinafter cited as *Allied Bank III*].

⁷ See *The Wall St. J.*, March 19, 1985, at 4, col. 1. Generally, a lender may exercise legal and contractual remedies against a borrower who fails to make payments or perform other obligations under a loan agreement. Events of non-payment or non-performance are usually detailed in a list of "events of default" contained in the loan agreement. See Delaume, *Special Risk and Remedies of Inter-*

dent concerning the manner in which remedial measures undertaken by foreign governments in the context of the international debt crisis⁸ should be treated under U.S. law.

The *Allied Bank* case involved debts owed to a syndicate of U.S. and foreign banks by three banks that the Republic of Costa Rica wholly owned.⁹ The Costa Rican banks had issued promissory notes, accompanied by side letter agreements, to the syndicate.¹⁰ The agreements did not specify a governing law,¹¹

national Sovereign Loans in DEFAULT AND RESCHEDULING: CORPORATE AND SOVEREIGN BORROWERS IN DIFFICULTY [hereinafter cited as *DEFAULT AND RESCHEDULING*] 89, 91 (D. Suratgar ed. 1984). The major event of default is failure by the borrower to pay principal and interest when due; other events include breaches of any representations or warranties made by the borrower, violation of any covenants, occurrence of default on other debt obligations, inability of the borrower to use resources of the International Monetary Fund, and "extraordinary situations". *Id.* at 92-100. Loan agreements may stipulate that imposition of a unilateral payments moratorium is an event of default. See Ryan, *Defaults and Remedies under International Bank Loan Agreements with Foreign Sovereign Borrowers—A New York Lawyer's Perspective*, 1982 U. ILL. L. REV. 89 (1982). Remedies available to a lender upon a default include: terminating the loan commitment and declaring due and payable all outstanding loans; bringing a court action for specific performance, a set-off against the borrower's assets, or a money judgment; or arbitrating the dispute. See Delaume, *supra* this note, at 97-100; Ryan, *supra* this note, at 89. A lender usually exercises one of these remedies only after less drastic measures fail, such as negotiating a rescheduling of the borrower's debt obligations. See Delaume, *supra* this note, at 97-98; Ryan, *supra* this note, at 105. See also Ryan, *Defaults and Remedies in SOVEREIGN LENDING: MANAGING LEGAL RISK* 157-87 (M. Gruson & R. Reisner eds. 1984).

⁸ The "international debt crisis" generally refers to debt servicing difficulties resulting from balance of payments problems in many developing countries. See IMF, OCCASIONAL PAPER NO. 25, RECENT MULTILATERAL DEBT RESTRUCTURINGS WITH OFFICIAL AND BANK CREDITORS I (1983) [hereinafter cited as IMF (1983)]. The balance of payments refers to a measure of the transactions of a nation's economy with the rest of the world. The overall balance of payments equals the sum of the current account — which measures trade in goods and services, including interest owed on debts, and transfer payments, such as gifts and grants — plus the capital account, which measures the purchase and sale of assets. See DORNBUSCH & FISCHER, *MACROECONOMICS* 627-28 (1981); MAYER, DUESENBERY & ALIBER, *MONEY, BANKING AND THE ECONOMY* 687-91 (1981) [hereinafter cited as MAYER]. Developing nations' balance of payments problems have resulted primarily from inappropriate domestic economic management, adverse external developments including the world recession and soaring real interest rates in the early 1980s, and spiralling growth of external debts to finance current account deficits. See generally BARTH & PELZMAN, *INTERNATIONAL DEBT: CONFLICT AND RESOLUTION* 1-10 (1984); CLINE, *INTERNATIONAL DEBT AND THE STABILITY OF THE WORLD ECONOMY* 13-31 (1981); KOJM, *THE PROBLEM OF INTERNATIONAL DEBT* (1984); Goldstein, *The Continuing World Debt Crisis*, 3 INT'L TAX & BUS. LAW. 119 (1985); Lipson, *The International Organization of Third World Debt*, 35 INT'L ORG. 603 (1981); Comment, *On Third World Debt*, 25 HARV. INT'L L. J. 83, 83-98 (1984); de Larosiere, *Adjustment Burden Is Manageable With Needed Finance and Recovery*, IMF Survey, May 21, 1984, at 145, 145-46; Weisner, *Domestic and External Causes of the Latin American Debt Crisis*, FIN. & DEVEL., March 1985, at 24. For a comprehensive reference to other sources, see *International Monetary Fund and Debt Crisis: A Selected Bibliography*, 17 N.Y.U. J. INT'L L. & POL'Y 751 (1985).

⁹ *Allied Bank III*, 757 F.2d at 518. Allied Bank served as agent for the syndicate. *Id.* For discussions on loan syndications and the duties of agent banks, see generally Mudge, *Sovereign Debt Restructure: A Perspective of Counsel to Agent Banks, Bank Advisory Groups and Servicing Banks*, 23 COLUM. J. TRANSNAT'L L. 58 (1985); Clark & Farrar, *Rights and Duties of Managing and Agent Banks in Syndicated Loans to Government Borrowers*, 1982 U. ILL. L. REV. 229 (1982).

¹⁰ *Allied Bank III*, 757 F.2d at 518 n.1.

¹¹ *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 733 F.2d 23, 24 (2d Cir. 1984) (available

but provided that the Costa Rican banks would make debt payments in New York City with United States currency and that New York and Costa Rica had concurrent jurisdiction over contractual disputes.¹² The agreements further listed the nonpayment of interest and principal within thirty days of the due date of payment as an event of default, but stipulated that the syndicate would excuse default for ten days if the failure to pay resulted from the refusal of the Central Bank of Costa Rica to provide U.S. currency to the debtor banks.¹³

The banks made payments on schedule until August 1981, at which time the Costa Rican government responded to severe economic problems by imposing controls on foreign exchange transactions.¹⁴ The Central Bank, which decreed that it would authorize only repayments of external debts owed to multilateral agencies,¹⁵ thereafter denied the debtor banks' applications for U.S. currency.¹⁶ Consequently, the banks defaulted, and the syndicate sued to enforce accelerating full payment of the outstanding principal and interest.¹⁷

On July 8, 1983, a federal district court in *Allied Bank I* denied a motion for summary judgment submitted by Allied Bank, reasoning that the act of state doctrine would bar adjudicating the default action.¹⁸ On July 22, 1983, Allied Bank's action was dismissed upon an agreement with the Costa Rican banks that no issues of fact remained.¹⁹ In September 1983, the government of Costa Rica and its Central Bank signed a refinancing agreement with international bank creditors restructuring its external debt.²⁰ Only one bank in the syndicate refused to accept the agreement,²¹ and on behalf of that bank Allied Bank

on LEXIS, Genfed library, Cases file), *rev'd*, 757 F.2d 516 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 30 (1985) [hereinafter cited as *Allied Bank II*]. Although this opinion is not contained in the bound Federal Reporter 2d, reference to it throughout this comment is necessary.

¹² *Allied Bank II*, 733 F.2d at 24.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Allied Bank III*, 757 F.2d at 519.

¹⁶ *Id.*

¹⁷ *Id.* The loan agreement listed the non-payment of interest and principal within thirty days of the due date of payment as an event of default, but stipulated that the syndicate would excuse default for ten days if the failure to pay resulted from the refusal of the Central Bank of Costa Rica to provide U.S. currency to the banks. *Allied Bank II*, 733 F.2d at 24.

¹⁸ *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 566 F. Supp. 1440, 1444 (S.D.N.Y. 1983), *aff'd on other grounds*, 733 F.2d 23 (2d Cir. 1984), *rev'd*, 757 F.2d 516 (2d Cir. 1985), *cert. denied* 106 S. Ct. 30 (1985) [hereinafter cited as *Allied Bank I*].

¹⁹ *Allied Bank III*, 757 F.2d at 519.

²⁰ *Id.* Restructuring agreements consist of either refinancing agreements and rescheduling agreements or both. Refinancing refers to the provision of new funds equal to the payments due in a certain period. Rescheduling refers to the extension of an existing debt payment schedule over a longer period of time. See IMF (1983), *supra* note 8, at 17.

²¹ *Allied Bank III*, 757 F.2d at 519. The non-consenting bank reportedly was owed approximately one-quarter of the debt covered by the loan agreements. Tigert, *Allied Bank International: A United States Government Perspective*, 17 N.Y.U. J. INT'L. L. & POL'Y 511, 516 (1985).

appealed to the Second Circuit Court of Appeals.²² On April 23, 1984, the court of appeals in *Allied Bank II* affirmed the dismissal on the ground that regardless of the act of state doctrine, the principle of comity required giving the Costa Rican foreign exchange controls extraterritorial effect.²³ In vacating this judgment, the court in *Allied Bank III* reversed both the district court's act of state analysis and its own comity analysis.²⁴

Instead of clarifying the act of state doctrine and the principle of comity, however, the court of appeals muddled its construction and application and confused the treatment under U.S. law of foreign states' exchange controls.²⁵ These disturbing problems are manifest throughout the *Allied Bank* cases and in *Libra Bank Ltd. v. Banco Nacional de Costa Rica*,²⁶ an earlier decision in which a federal district court also denied according extraterritorial effect to the Costa Rican foreign exchange controls.²⁷ The *Allied Bank I*, *Allied Bank III*, and *Libra Bank* courts each contorted the formulation of the act of state doctrine without regard to its purpose.²⁸ Furthermore, the *Allied Bank III* and *Libra Bank* courts each undermined the principle of comity by exhibiting a biased predisposition against the Costa Rican exchange controls, despite their imposition to alleviate a national economic emergency.²⁹ Most importantly, whereas the *Libra Bank* court left uncertain whether Article VIII, Section 2(b) of the Articles of Agreement of the International Monetary Fund³⁰ could mandate the extraterritorial

²² *Allied Bank III*, 757 F.2d at 519.

²³ *Allied Bank II*, 733 F.2d at 24.

²⁴ *Allied Bank III*, 757 F.2d at 518-19.

²⁵ The *Allied Bank* decisions have stirred several critical commentaries, undoubtedly with more yet to come. For a criticism of *Allied Bank III*, see Note, *The Resolution of Act of State Disputes Involving Indefinitely Situated Property*, 25 VA. J. INT'L L. 901 (1985) [hereinafter cited as Note, *Resolution of Act of State Disputes*]. For criticisms of *Allied Bank II*, see Ebenroth & Teitz, *Winning (or Losing) by Default: Act of State, Sovereign Immunity and Comity In International Business Transactions*, 19 INT'L LAW. 225 (1985); Frumkin, *The Act of State Doctrine and Foreign Sovereign Defaults on United States Bank Loans: A New Focus For A Muddled Doctrine*, 133 U. PA. L. REV. 469 (1985); Zaizeff & Kunz, *The Act of State Doctrine and the Allied Bank Case*, 40 BUS. LAW. 449 (1985).

²⁶ 570 F. Supp. 870 (S.D.N.Y. 1983).

²⁷ See *id.* at 875, 897.

²⁸ See *infra* notes 155-80 and accompanying text.

²⁹ See *infra* notes 211-29 and accompanying text.

³⁰ ARTICLES OF AGREEMENT OF THE INTERNATIONAL MONETARY FUND, December 27, 1945, 60 Stat. 1401, T.I.A.S. No. 1501, 2 U.N.T.S. 39, amended by 20 U.S.T. 2775, T.I.A.S. No. 6748, 726 U.N.T.S. 266 (May 31, 1968), amended by 29 U.S.T. 2203, T.I.A.S. No. 8937, U.N.T.S. (April 30, 1978) [hereinafter cited as FUND AGREEMENT]. For a statement of Article VIII, Section 2(b), see *infra* note 62 and accompanying text.

Established as a result of the Bretton Woods Conference in 1945, the International Monetary Fund (IMF) "seeks to promote monetary, financial, and economic stability in the world . . ." IMF, OCCASIONAL PAPER No. 26, THE FUND, COMMERCIAL BANKS, AND MEMBER COUNTRIES I (1984) [hereinafter cited as IMF (1984)]. It provides rules for changes in exchange rate parities and for exchange controls affecting international payments, and, through membership quotas and special borrowing arrangements, maintains a pool of national currencies from which members with balance of payments problems may obtain temporary financing. See MAYER, *supra* note 8, at 662. As of August 1984, its membership

enforcement of a foreign state's exchange control regulations,³¹ the *Allied Bank III* court altogether skirted determining the applicability of Article VIII, Section 2(b), in the context of the act of state and comity issues on appeal.³² Thus, while the *Allied Bank III* decision ostensibly portends to reestablish certainty in international lending, its critical shortcomings underscore that it may only perpetuate the uncertainties associated with the prospect that a foreign nation may, through exchange controls or otherwise, impose a moratorium on external debt payments.³³

This comment examines the complex problems exposed in *Allied Bank III* involving the interrelationships of the act of state doctrine, the principle of comity, and Article VIII, Section 2(b) of the Fund Agreement. After providing a brief overview of these defenses, this comment presents the courts' analyses in the *Allied Bank* cases and *Libra Bank*. It then critiques the *Allied Bank III* court's formulation and application of the act of state doctrine and the principle of comity, and proposes the manner in which the court should have construed Article VIII, Section 2(b). While this comment concludes that the act of state doctrine should not shield a foreign state's unilateral payments moratorium, it nonetheless cautions that despite *Allied Bank III*, Article VIII, Section 2(b) may

includes 147 nations. IMF Survey, August 20, 1984, at 241. For discussions concerning the structure and operations of the IMF, see generally AINLEY, IMF: PAST, PRESENT AND FUTURE (1979); IMF, IMF PAMPHLET SERIES NO. 37, THE INTERNATIONAL MONETARY FUND: ITS EVOLUTION, ORGANIZATION, AND ACTIVITIES (4th ed. 1984); Gold, *Public International Law in the International Monetary System*, 38 Sw. L. J. 799 (1984); Robichek, *The International Monetary Fund: An Arbiter in the Debt Restructuring Process*, 23 COLUM. J. TRANSNAT'L L. 143 (1984).

³¹ See *infra* notes 103-06 and accompanying text.

³² The debtor banks did not raise an independent Article VIII, Section 2(b) defense, but, in their comity defense, did cite the Article for the proposition that "the United States has specifically recognized the legitimate needs of countries to regulate their national currency and impose severe restrictions upon currency exchange, even if in so doing private contracts are interfered with." Brief for Appellees at 28, *Allied Bank International v. Banco Credito Agricola de Cartago*, 757 F.2d 516 (2d Cir. 1985). As a general rule, a federal appellate court will not consider an issue not raised below, except where the proper resolution is beyond doubt or failure to consider the issue would result in an injustice. *E.g.*, *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1975); *Schmidt v. Polish People's Republic*, 742 F.2d 67, 70 (2d Cir. 1984). Had *Allied Bank* raised the Article VIII, Section 2(b) issue, the court could have properly resolved it since failure to do so may have risked denying the extraterritorial effect of exchange controls that were legitimate under U.S. and international law. Yet even without having had the issue raised, the court should have considered the applicability of Article VIII, Section 2(b), as a matter of law, in both its act of state and comity analyses, that is, as part of the issues actually raised. See *infra* notes 139-51, 205-10, and 230-37 and accompanying text.

³³ More specifically, the decision exacerbates country risk. When making loans to foreign borrowers, banks assess both credit risk and country risk associated with a particular transaction. Credit risk is an assessment of the financial strength of a particular borrower. Country risk reflects the risk that a borrower will default because of a foreign government's inability or unwillingness to provide its entities or nationals with the foreign exchange needed to make external debt payments. See IMF (1984), *supra* note 30, at 7; Walter, *Country Risk and International Bank Lending*, 1982 U. ILL. L. REV. 71, 72 (1982). Lending to foreign governments involves only country risk, as credit risk is eliminated because a national government has the power to create money. See Walter, *supra* this note, at 72.

command the extraterritorial enforcement of certain payments moratoria effected through exchange controls approved by the IMF.

II. BACKGROUND

A. *The Act of State Doctrine*

Although originating as a corollary to the doctrine of sovereign immunity, the act of state doctrine emerged as a distinct principle, focusing on the immunity accorded to the acts of a foreign sovereign rather than to the foreign sovereign itself.³⁴ In its early development, the act of state doctrine was construed as preserving comity, or amicable relations, among nations by preventing U.S. courts from judging the validity of a foreign sovereign's acts.³⁵ In *Banco Nacional de Cuba v. Sabbatino*,³⁶ the U.S. Supreme Court shifted the focus of the act of state doctrine from comity to its "constitutional underpinnings" based on the separation of powers between the judicial and political branches of the federal government.³⁷ According to the *Sabbatino* Court, the act of state doctrine, which is strictly a matter of federal law,³⁸ derives from neither international law nor the Constitution, but manifests respect for the competency of the political branches in the conduct of foreign affairs.³⁹

Yet, throughout the development of the act of state doctrine, the U.S. Supreme Court has never explicated a clear test for determining its applicability.⁴⁰

³⁴ See Note, *The Act of State Doctrine: Antitrust Conspiracies To Induce Foreign Sovereign Acts*, 10 N.Y.U. J. INT'L L. & POL'Y 495, 497-98 (1978). See also Note, *Rehabilitation and Exoneration of the Act of State Doctrine*, 12 N.Y.U. J. INT'L L. & POL'Y 599, 600-03 (1980) [hereinafter cited as Note, *Rehabilitation*].

³⁵ See, e.g., *Oetjen v. Central Leather Company*, 246 U.S. 297 (1918); *Underhill v. Hernandez*, 168 U.S. 250 (1897). In *Oetjen* the U.S. Supreme Court explained:

The principle that the conduct of one independent government cannot be successfully questioned in the courts of another . . . rests at last upon the highest consideration of international comity and expediency. To permit the validity of the acts of one sovereign to be reexamined and perhaps condemned by courts of another would certainly imperil the amicable relations between governments and vex the peace of nations.

Oetjen, 246 U.S. at 303-04.

³⁶ 376 U.S. 398 (1964).

³⁷ *Id.* at 423.

³⁸ *Id.* at 427.

³⁹ *Id.* at 427-28. The U.S. Constitution contemplates that courts may have jurisdiction over claims involving foreign states. It provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, under their Authority; . . . to Controversies . . . between a State, or Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const., Art. III § 2.

⁴⁰ Consequently, many commentators have considered what should be the proper method to apply the act of state doctrine. See, e.g., Mathias, *Restructuring the Act of State Doctrine: A Blueprint for Legislative Reform*, 12 L. & POL'Y INT'L BUS. 369 (1980); Comment, *Applying an Amorphous Doctrine Wisely: The Viability to the Act of State Doctrine After the Foreign Sovereign Immunities Act*, 18 TEX. INT'L L. J. 547 (1983) [hereinafter cited as Comment, *Applying an Amorphous Doctrine*]; Comment, *Foreign Sovereign Immunity And The Act Of State: The Need For A Commercial Act Exception To The Commercial Act Exception*,

The *Sabbatino* Court, seeking not to establish “an inflexible and all-encompassing rule”,⁴¹ broadly stated that the doctrine’s applicability depends on a “balance of considerations” sensitive to the effect of adjudication on the separation of powers.⁴² However, two later cases⁴³ evince the lack of definitive guidance in *Sabbatino*, presenting three views of how to effectuate the policy which underlies the act of state doctrine: judicial abstention from claims which would result in the judicial branch’s interference in U.S. foreign policy.⁴⁴ The tests expressed in these decisions present a rule-oriented approach based on categorical exceptions to the general rule that the act of state doctrine precludes adjudication of any claim involving the acts of a foreign state;⁴⁵ a balancing approach intended to prevent, strictly as a matter of prudence, a court’s interference with the executive branch’s conduct of foreign affairs;⁴⁶ and a balancing approach derived from the domestic political question doctrine.⁴⁷ As a consequence of the

17 U.S.F. L. REV. 763 (1983); Note, *Judicial Balancing of Foreign Policy Considerations: Comity and Errors Under the Act of State Doctrine*, 35 STAN. L. REV. 327 (1982) [hereinafter cited as Note, *Judicial Balancing*].

⁴¹ *Sabbatino*, 376 U.S. at 428.

⁴² *Id.*

⁴³ *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976); *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972).

⁴⁴ See *infra* notes 45–46 and accompanying text.

⁴⁵ In *Dunhill*, a plurality favored a commercial act exception. See *Dunhill*, 425 U.S. at 705–06. In *City Bank*, a plurality endorsed an exception whereby a court should defer to the executive branch’s express representation that the act of state doctrine should not apply to a particular claim. See *City Bank*, 406 U.S. at 768. For a discussion of the commercial act exception enunciated in *Dunhill*, see *infra* notes 75–79 and accompanying text. For a discussion of the “*Bernstein* exception” supported in *City Bank*, see *infra* note 188.

⁴⁶ See *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 715 (1976) (Powell, J., concurring) (“it is the duty of the judiciary to decide for itself whether deference to the political branches of Government requires abstention”); *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 776 (1972) (Powell, J., concurring) (“the basic notion of the act of state doctrine . . . requires a balancing of the roles of the judiciary and the political branches”).

⁴⁷ See *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 727 (1976) (Marshall, J., dissenting) (“the act of state doctrine reflects the notion that the validity of an act of a foreign sovereign is, under some circumstances, a ‘political question’ not cognizable in our courts”); *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 787–88 (1972) (Brennan, J., dissenting) (“the validity of a foreign act of state in certain circumstances is a ‘political question’ not cognizable in our courts”). As expressed in *Baker v. Carr*, 369 U.S. 186, 217 (1962), justiciability of claims involving political questions depends on a balancing of factors comprised of a

textually demonstrable constitutional commitment of the issue to a coordinate political department; . . . a lack of judicially discoverable and manageable standards for resolving it; . . . the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; . . . the impossibility of a court’s undertaking independent resolution without expressing lack of respect due to coordinate branches of the government; . . . an unusual need for unquestioning adherence to political decision already made; [and] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

See also *Northrup Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1046 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 156 (1983) (referring to the act of state doctrine as the “foreign counterpart of the political question”).

failure to provide a clear test, the lower courts have displayed a lack of uniformity in defining when the act of state doctrine should apply.⁴⁸

B. *The Principle of Comity*

The principle of comity refers not to a rule of law, but to a matter of “practice, convenience, and expediency”⁴⁹ by which a U.S. court may give effect in the United States to a foreign state’s acts that are consistent with the “policy and law of the United States”.⁵⁰ Comity entails more than simple courtesy and goodwill, but does not impose an absolute obligation on U.S. courts.⁵¹ Rather, comity involves a “due regard both to international duty and convenience” and to the rights of persons protected by U.S. laws.⁵² It is consistent with the principle that under international law, in the absence of an agreement, the effect of a nation’s law is limited to the nation’s territory⁵³ and, accordingly, that the effect of a foreign state’s acts in the United States depends on voluntary recognition of those acts by U.S. courts.⁵⁴

Although courts have often considered the principle of comity as a component in the act of state analysis relating to claims involving property located outside the acting foreign state,⁵⁵ the principle of comity serves an independent function.⁵⁶ The act of state doctrine derives from the notion of a separation of powers among the branches of the federal government in the conduct of foreign affairs.⁵⁷ Even though the act of state doctrine cautions against the adjudication of claims that could disrupt international comity in the sense of amicable relations among nations,⁵⁸ the principle of comity is a misnomer for a conflicts of laws rule which allows a forum state to disregard foreign laws repugnant to its

⁴⁸ For a discussion of the waiving between rule-oriented and balancing approaches in the lower courts, see Comment, *Applying an Amorphous Doctrine*, *supra* note 40, at 558–70.

⁴⁹ *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3rd Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972).

⁵⁰ *Republic of Iraq v. First Nat’l City Bank*, 353 F.2d 47, 51 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966). See also *United Bank Ltd. v. Cosmic Int’l Corp.*, 542 F.2d 868, 872 (2d Cir. 1976).

⁵¹ See, e.g., *Sabbatino*, 376 U.S. at 409; *Somportex*, 453 F.2d at 440; *Pilkington Brothers P.L.C. v. AFG Industries Inc.*, 581 F. Supp. 1039, 1043 (D. Del. 1984).

⁵² *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895). See also *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 948 (D.C. Cir. 1984); *Somportex*, 453 F.2d at 440.

⁵³ *Hilton v. Guyot*, 159 U.S. 113, 163 (1895).

⁵⁴ *Id.* at 202–03. See also *Zaitzeff & Kunz*, *supra* note 25 at 450.

⁵⁵ See, e.g., *Banco Nacional de Cuba v. Chemical Bank New York*, 658 F.2d 903, 908 (2d Cir. 1981); *Bandes v. Harlow & Jones, Inc.*, 570 F. Supp. 955, 960 (S.D.N.Y. 1983); *Libra Bank*, 570 F. Supp. at 877–88. See also RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 43 (1965).

⁵⁶ Recent cases recognize this important distinction. See *Drexel Burnham Lambert Group, Inc. v. A. W. Galdari*, 777 F.2d 877, 881 (2d Cir. 1985); *Allied Bank III*, 757 F.2d at 520–22.

⁵⁷ See *Sabbatino*, 376 U.S. at 423. Confusion between the act of state doctrine and choice of law principles nevertheless is evident in *Allied Bank III*. See *infra* notes 154–56 and accompanying text.

⁵⁸ See *Sabbatino*, 376 U.S. at 428, 430–33.

own laws and public policy.⁵⁹ The principle of comity, which might be better understood as the doctrine of public policy in an international setting, promotes comity in the sense of goodwill only inasmuch as it may permit a U.S. court to apply laws of a foreign nation, avoiding an unnecessary, albeit justifiable, derogation of the foreign state's authority.⁶⁰

C. *Article VIII, Section 2(b) of the Fund Agreement*

Article VIII, Section 2(b) of the Fund Agreement generally provides for the extraterritorial enforcement of an IMF member's exchange control regulations, but its scope and effect has sparked more controversy among courts and commentators than has any other Fund Agreement provision.⁶¹ It states:

Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member.⁶²

As interpreted by the IMF, this provision operates to deny parties whose exchange contracts violate legitimate exchange controls "assistance of the judicial or administrative authorities of other members . . . , for example by decreeing performance of the contracts or by awarding damages for their non-performance."⁶³ The IMF interpretation further states that Article VIII, Section 2(b) supersedes the private international law of exchange controls⁶⁴ under which exchange controls can affect the performance of a contract only if the imposing nation provides the governing law of the contract.⁶⁵ According to the IMF, contracts within the scope of Article VIII, Section 2(b) should not be enforced

⁵⁹ See Tigert, *supra* note 21, at 523. Cf. RESTATEMENT (SECOND) CONFLICTS OF LAWS §§ 6, 188 (1965).

⁶⁰ See *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

⁶¹ Gold, *Foreword*, 7 HOUS. J. INT'L L. 1, 10 (1985); Williams, *Extraterritorial Enforcement of Exchange Control Regulations Under the International Monetary Fund Agreement*, 15 VA. J. INT'L L. 319, 321 (1975) [hereinafter cited as Williams (1975)].

⁶² FUND AGREEMENT, *supra* note 30, Art. VIII, § 2(b). The second sentence of Article VIII, Section 2(b) reads: "In addition, members may, by mutual accord, cooperate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures are consistent with this Agreement." The second sentence simply permits members to reach agreement among themselves to ensure the effectiveness of legitimate exchange controls. See GOLD, IMF PAMPHLET SERIES NO. 21, INTERNATIONAL CAPITAL MOVEMENTS UNDER THE LAW OF THE INTERNATIONAL MONETARY FUND 30 (1977).

⁶³ International Monetary Fund, Decision No. 446-4 (1949), *reprinted in* INTERNATIONAL MONETARY FUND, SELECTED DECISIONS OF THE EXECUTIVE DIRECTORS AND SELECTED DOCUMENTS 233 (10th issue 1983) [hereinafter cited as SELECTED DECISIONS]. Decision No. 446-4 is also reprinted in Ebenfoth & Teitz, *supra* note 25, at 247.

⁶⁴ Decision No. 446-4, *supra* note 63. See also 2 DICEY & MORRIS, THE CONFLICT OF LAWS 1023-26 (J.H.C. Morris 10th ed. 1980); Williams (1975), *supra* note 61, at 383-84.

⁶⁵ For a discussion of the private international law of exchange controls, see MANN, THE LEGAL ASPECT OF MONEY 407 (4th ed. 1982).

“notwithstanding that under the private international law of the forum, the law under which the foreign exchange control regulations are maintained or imposed is not the law which governs the exchange contract or its performance.”⁶⁶ Thus, instead of simply a conflicts of law rule, Article VIII, Section 2(b) is a rule of substantive law applicable as part of the governing law of an exchange contract, regardless of the forum in which an action on the contract is brought.⁶⁷ Defining the proper scope and effect of this rule of substantive law, which is part of the national law of all member countries,⁶⁸ including the United States,⁶⁹ has been highly controversial.⁷⁰

III. *LIBRA BANK AND THE ALLIED BANK CASES*

A. *Allied Bank I*: The District Court Decision

To support the denial of Allied Bank’s motion for summary judgment on the basis of the act of state doctrine, the district court focused on the public, rather than the commercial, nature of Costa Rica’s payments moratorium and the governmental function that the payments moratorium served.⁷¹ In the court’s view, Costa Rica’s use of exchange controls constituted a common governmental response to a national economic emergency.⁷² Accordingly, the court reasoned that forcing the Costa Rican banks to make payments in violation of the exchange controls would interject the judicial branch of the United States into the public acts of Costa Rica.⁷³ The court concluded that because such interference would risk straining relations between the United States and Costa Rica, the act of state doctrine would bar the Allied Bank syndicate’s claim.⁷⁴

The governmental function–commercial act dichotomy on which *Allied Bank I* turned–derives from *Alfred Dunhill of London, Inc. v. Republic of Cuba*,⁷⁵ a 1976 U.S. Supreme Court decision in which a three-justice plurality enunciated a

⁶⁶ Decision No. 446–4, *supra* note 63.

⁶⁷ MANN, *supra* note 65, at 374–75; Williams (1975), *supra* note 61, at 383–84. See also GOLD, IMF PAMPHLET SERIES NO. 3., THE INTERNATIONAL MONETARY FUND AND PRIVATE BUSINESS TRANSACTIONS: SOME LEGAL EFFECTS OF THE ARTICLES OF AGREEMENT 23 (1965) [hereinafter cited as GOLD (1965)].

⁶⁸ Decision No. 446–4, *supra* note 63.

⁶⁹ 22 U.S.C. § 286h (1982) (“the first sentence of Article VIII, section 2(b) . . . shall have full force and effect in the United States”).

⁷⁰ For a proposed analysis of the scope and effect of Article VIII, Section 2(b), see *infra* notes 239–82 and accompanying text.

⁷¹ *Allied Bank I*, 566 F. Supp. at 1443.

⁷² *Id.*

⁷³ *Id.* at 1444.

⁷⁴ *Id.*

⁷⁵ 425 U.S. 682 (1976).

commercial act exception to the act of state doctrine.⁷⁶ The *Dunhill* plurality refused to include within the definition of an act of state "the repudiation of a purely commercial obligation owed by a sovereign or by one of its commercial instrumentalities."⁷⁷ The plurality reasoned that allowing a foreign state to repudiate its commercial obligations under the protection of the act of state doctrine would afford the foreign state greater immunity from judicial remedies than is available under the restrictive view of sovereign immunity.⁷⁸ The plurality nevertheless recognized that the act of state doctrine should bar claims involving the validity of a foreign state's exercise of its "governmental authority" within its own territory.⁷⁹ At the time of *Allied Bank I*, the Second Circuit Court of Appeals appeared to have endorsed this rule-oriented governmental function-commercial act dichotomy.⁸⁰ Accordingly, by focusing on the public nature and governmental function of the exchange controls in *Allied Bank I*, the district court distinguished *Dunhill* and avoided the commercial act exception.⁸¹

B. *Libra Bank*

The *Libra Bank* decision preceded *Allied Bank I* by two days, but it was later amended to incorporate an Article VIII, Section 2(b) analysis. Both cases involved roughly identical facts. In *Libra Bank*, a syndicate of U.S. and foreign banks, for which *Libra Bank* served as representative, made loans in 1980 to a Costa Rican bank, which the Costa Rican government wholly owned.⁸² The bank

⁷⁶ *Id.* at 695. In *Dunhill*, a U.S. cigar importer sought recovery of excess payments made to Cuban cigar manufacturers for transactions entered into before the nationalization of the manufacturers. The operators of the nationalized plants refused to reimburse the importer. *Id.* at 684-90. Reasoning that the refusal by the operators, agents of the Cuban government, was committed in the conduct of purely commercial operations, the plurality concluded that the claim involved no act of state. *Id.* at 706.

⁷⁷ *Id.* at 695.

⁷⁸ *Id.* at 699. Since 1952, the United States has followed the restrictive view of sovereign immunity, according to which a foreign sovereign is immune from the jurisdiction of U.S. courts in actions based on its public acts (*jure imperii*), but is not immune with regard to private or commercial acts (*jure gestionis*). See Letter of Jack B. Tate, Acting Legal Adviser, to Acting Attorney General, 26 DEP'T STATE BULL. 984 (1952). The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1601 *et seq.* (1982), codifies the restrictive view of sovereign immunity. In contrast, under the absolute theory of sovereign immunity, a foreign sovereign cannot, without its consent, be denied immunity from the jurisdiction of courts of another sovereign. *E.g.*, *Berizzi Brothers Co. v. S.S. Pesaro*, 271 U.S. 562 (1926) (allowing immunity to a merchant vessel owned and operated by a foreign government). See generally STEVENSON, BROWN & DAMROSCH, UNITED STATES LAW OF SOVEREIGN IMMUNITY (1983); Hill, *A Policy Analysis of the American Law of Sovereign State Immunity*, 50 FORDHAM L. REV. 155 (1981).

⁷⁹ *Dunhill*, 425 U.S. at 706.

⁸⁰ See *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 73 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977); *Zaitzeff & Kunz*, *supra* note 25, at 466. The Second Circuit Court of Appeals has recently disavowed that it ever adopted the commercial act exception. *Braka v. Bancomer, S.N.C.*, 762 F.2d 222, 225 (2d Cir. 1985).

⁸¹ *Allied Bank I*, 566 F. Supp. at 1444.

⁸² *Libra Bank*, 570 F. Supp. at 874.

defaulted on debt payments in August 1981 after Costa Rica effected its payments moratorium through exchange control regulations.⁸³ In the initial decision, the district court granted summary judgment to the Libra Bank syndicate and ordered the Costa Rican bank to repay all principal and interest due on promissory notes executed in favor of the syndicate.⁸⁴

The *Libra Bank* court's act of state analysis rested on the categorical exception to the act of state doctrine referred to as the "territorial limitation".⁸⁵ The territorial limitation restricts the preclusive effect of the act of state doctrine to claims that would require a U.S. court to examine the validity of a foreign state's act the object of which may be accomplished solely within its territory.⁸⁶ This construction confines the scope of the act of state doctrine to the literal terms of its traditional formulation.⁸⁷ Furthermore, it permits a U.S. court to examine the validity of a foreign state's act which requires extraterritorial enforcement.⁸⁸

While recognizing that analysis under the territorial limitation pivots on identifying the situs of the debt or other property purportedly affected by a foreign state's act,⁸⁹ the *Libra Bank* court departed from a "formalistic" situs approach.⁹⁰ Under a traditional situs analysis, the act of state doctrine applies if the property involved was located in the foreign state at the time of the act, but property is deemed to have that situs only if the foreign state had dominion and control over it.⁹¹ When the foreign state's act affects a debt, the foreign state is deemed to exercise dominion and control only if it has the power to enforce and collect the debt.⁹² This power depends on jurisdiction over the debtor.⁹³ The *Libra*

⁸³ *Id.* at 875.

⁸⁴ *Id.* at 874. The court ordered the Costa Rican bank to repay the loan principal in four successive monthly installments plus interest due at the time of the default and interest accrued after the default pursuant to the loan agreements between the bank and the Libra Bank syndicate. *Id.* at 887-91.

⁸⁵ *Id.* at 877, 881-82. For a history of the territorial limitation, see Note, *Rehabilitation*, *supra* note 34, at 623-31.

⁸⁶ See, e.g., *Banco Para el Comercio Exterior de Cuba v. First Nat'l City Bank*, 744 F.2d 237, 241-42 (2d Cir. 1984); *Garcia v. Chase Manhattan Bank, N.A.*, 735 F.2d 645, 650 (2d Cir. 1984); *First Nat'l Bank of Boston v. Banco Nacional de Cuba*, 658 F.2d 895, 901 (2d Cir. 1981); Note, *Rehabilitation*, *supra* note 34, at 631.

⁸⁷ See *supra* note 4 and accompanying text.

⁸⁸ See, e.g., *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854, 862-63 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982); *Banco Nacional de Cuba v. Chemical Bank New York Trust Co.*, 658 F.2d 903, 908 (2d Cir. 1981); *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47, 51 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1965).

⁸⁹ *Libra Bank*, 570 F. Supp. at 877-81.

⁹⁰ *Id.* at 884.

⁹¹ See, e.g., *United Bank Ltd. v. Cosmic Int'l, Inc.*, 542 F.2d 868, 874 (2d Cir. 1972); *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706, 714 (5th Cir. 1968), *cert. denied*, 393 U.S. 924 (1968).

⁹² E.g., *Garcia*, 735 F.2d at 650 n.5; *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150, 1160 (2d Cir. 1982); *Menendez v. Saks & Co.*, 485 F.2d 1355, 1364 (2d Cir. 1973), *rev'd on other grounds sub nom. Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976).

⁹³ E.g., *Garcia*, 735 F.2d at 650 n.5; *United Bank Ltd. v. Cosmic Int'l, Inc.*, 542 F.2d 868, 873-74

Bank court recognized that, under the traditional situs analysis, when a debtor has defaulted and is domiciled in the foreign state imposing a payments moratorium, the debt, or the "legal right to repayment of the debt owed",⁹⁴ would be located in the foreign state, since that state would have jurisdiction over the debtor.⁹⁵ To avoid the preclusive effect of the act of state doctrine, the court limited the applicability of the traditional situs analysis to the factual context in which a foreign state attempts "to seize for itself a debt to another".⁹⁶

In order to apply the territorial limitation in the context of a payments moratorium, the *Libra Bank* court fashioned a contacts approach focusing on whether adjudication would "frustrate the foreign state's reasonable expectations of dominion over the legal rights involved therein so as to vex our amicable relations with that foreign nation."⁹⁷ Under this approach, when a state's objec-

(2d Cir. 1972). See also *Harris v. Balk*, 198 U.S. 215, 222 (1905) (establishing that a debt follows the debtor).

Several courts have explained the concept of dominion as the ability to perform a "*fait accompli*". Under this view, a debt is located in a state only if that state's acts come to "complete fruition" within its territory, without assistance by a forum state besides itself. See, e.g., *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021, 1028 (5th Cir. 1972), cert. denied, 409 U.S. 1060 (1972); *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 714, 715-16 (5th Cir. 1968), cert. denied, 393 U.S. 924 (1968). See also *Garcia*, 735 F.2d at 650 n.5. Accordingly, this view holds that the simple "documentary execution of whatever legal action the foreign state takes toward the property or its national" does not automatically warrant application of the act of state doctrine to claims regarding the legal rights in the property purportedly affected. *Maltina Corp.*, 462 F.2d at 1025 n.3. See also RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 43 comments a and b (1965) (an act requiring participation or acquiescence by another state is not "fully executed" by the state declaring the act).

⁹⁴ *Libra Bank*, 570 F. Supp. at 878.

⁹⁵ *Id.* at 881.

⁹⁶ *Id.* The court reasoned that in a default situation, a creditor has a choice of suing in the debtor's domicile or wherever the debt is located. *Id.* In contrast, the jurisdiction-over-the-debtor rule developed in situations in which a foreign state had purportedly expropriated property, the rights to which existed outside its jurisdiction. See, e.g., *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir. 1981), cert. denied, 459 U.S. 976 (1982) (Vietnamese expropriation decree did not affect debt owed by U.S. bank outside Vietnam); *United Bank Ltd. v. Cosmic Int'l, Inc.*, 542 F.2d 868 (2d Cir. 1976) (Bangladesh expropriation decree did not reach debt owed by U.S. corporation in New York). The *Libra Bank* court, however, did not establish a rule placing the situs of a debt in the creditor's domicile, a rule which courts have consistently rejected. See *United Bank*, 542 F.2d at 874. Cf. *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985) (act of state doctrine applied where Mexico, the acting state, had jurisdiction over the debtors who owed payments on certificates of deposit in Mexico, despite the creditors being U.S. nationals); *Braka v. Bancomer, S.N.C.*, 762 F.2d 222 (2d Cir. 1985) (same act of state analysis). Rather, in concluding that concurrent jurisdiction of the United States and an acting foreign state does not preclude locating the situs of a debt in the United States for act of state purposes, the court recognized that jurisdiction over the debtor does not determine the situs of a debt, but is necessary for the foreign state to exercise complete dominion over the debt, or property, involved. See *Libra Bank*, 570 F. Supp. at 881. Cf. *Weston Banking Corp. v. Turkiye Garanti Bankasi*, 57 N.Y.2d 315, 442 N.E.2d 1195, 456 N.Y.S.2d 684 (1982) (concurrent jurisdiction of New York and Turkey did not preclude locating the debt in New York for act of state purposes).

⁹⁷ *Libra Bank*, 570 F. Supp. at 884. Other courts have also referred to a foreign state's expectations of dominion as the concern underlying the territorial limitation. See *United Bank Ltd. v. Cosmic*

tively reasonable expectations of dominion are low because the legal incidents of a debt place it outside the state, the risk of affronting the foreign state is reduced, and, therefore, the act of state doctrine should not apply.⁹⁸ Applying this approach, the court held that the act of state doctrine did not apply since significant incidents of the debt owed to the Libra Bank syndicate placed its situs in the United States.⁹⁹

Turning to a comity analysis, the court denied giving "effect to the Costa Rican decrees since a foreign state's effective confiscation of property, without compensation, is repugnant to the Constitution and laws" of the United States.¹⁰⁰ For act of state purposes, the court had labeled the moratorium as only "the attempt by a foreign nation to avoid payment of a debt which *it* concededly owes to its creditors."¹⁰¹ For comity purposes, though, the court characterized the Costa Rican payments moratorium as an attempted confiscation and rejected the argument that the moratorium attempted to defer debt payments without extinguishing the underlying debt.¹⁰²

In amending its decision, the court held that Article VIII, Section 2(b) of the Fund Agreement did not support the Costa Rican bank's motion to reargue.¹⁰³ Three alternative reasons, each reflecting a different construction of Article VIII, Section 2(b) were provided. First, the court reasoned that international loan agreements are not exchange contracts within the meaning of the provision.¹⁰⁴ Second, the court, assuming *arguendo* that international loan agreements are exchange contracts, reasoned that exchange controls imposed after the formation of a valid contract do not render unenforceable the contractual obligation to perform.¹⁰⁵ Third, assuming *arguendo* that intervening exchange

International, Inc., 542 F.2d 868, 875 (2d Cir. 1976); *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021, 1028-29 (5th Cir. 1972), *cert. denied* 409 U.S. 1060 (1972).

⁹⁸ *Libra Bank*, 570 F. Supp. at 883-84. The court nonetheless recognized that "[w]ithin its territorial boundaries, the foreign state has reasonable expectations of complete dominion over property", and any acts by U.S. courts declaring expropriations of property solely within the foreign state's jurisdiction would clearly affront the foreign sovereign. *Id.* at 883.

⁹⁹ *Id.* at 884. The court had earlier recited incidents placing the debt in the United States: the debtor consented to the jurisdiction of U.S. courts; a U.S. court had jurisdiction over the debtor; New York provided the governing law of the loan agreements; the debtor was to make all payments in New York City; the promissory notes stated the debtor's unconditional obligation to perform; and the debtor had substantial assets located in the United States at the time Costa Rica imposed its exchange controls. *Id.* at 881-82.

¹⁰⁰ *Id.* at 882.

¹⁰¹ *Id.* at 880-81.

¹⁰² *Id.* at 878. The court concluded that the Costa Rican payments moratorium was legally indistinguishable from the decrees at issue in *Republic of Iraq v. First National City Bank*, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966), by which the Republic of Iraq purported to confiscate all assets of its deposed monarch, including accounts with a New York trust company.

¹⁰³ *Id.* at 896-97.

¹⁰⁴ *Id.* at 900.

¹⁰⁵ *Id.*

controls do affect performance of a valid executory contract, the court reasoned that the Costa Rican banks failed to prove that the Costa Rican exchange controls were imposed consistently with the Fund Agreement, by showing either that the IMF approved the restrictions on current transactions or that the controls only affected capital, not current, transactions.¹⁰⁶

C. Allied Bank II: *The Appeal*

The court of appeals affirmed the dismissal of Allied Bank's claim on the basis of comity alone,¹⁰⁷ reasoning that Costa Rica's payments moratorium did not amount to a confiscation of property¹⁰⁸ but was consistent with U.S. bankruptcy laws¹⁰⁹ and U.S. foreign policy.¹¹⁰ Implicitly overruling the comity analysis in *Libra Bank*,¹¹¹ the court characterized the moratorium as "merely a deferral of payments while [Costa Rica] attempted in good faith to renegotiate its obligations."¹¹² The court analogized the moratorium to provisions under the U.S. Bankruptcy Code which afford insolvent businesses and municipalities an automatic stay of collection actions in order to institute a plan for the reorganization of debts.¹¹³ Furthermore, the court relied¹¹⁴ on *Canadian Southern Railway Company v. Gebhard*,¹¹⁵ an 1883 U.S. Supreme Court decision recognizing as a matter of comity¹¹⁶ a reorganization plan, approved by the Canadian Parliament, for an insolvent government-owned Canadian corporation.¹¹⁷ The court additionally concluded that U.S. foreign policy, indicated by the restructuring of Costa Rica's official debts by the United States and other government creditors¹¹⁸

¹⁰⁶ *Id.* at 901-02. For a discussion of capital and current transactions within the context of the requirement that exchange controls be imposed or maintained consistently with the Fund Agreement, see *infra* notes 268-69 and accompanying text.

¹⁰⁷ See *Allied Bank II*, 733 F.2d at 27.

¹⁰⁸ *Id.* at 26.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 26-27.

¹¹¹ See *supra* notes 100-02 and accompanying text.

¹¹² *Allied Bank II*, 733 F.2d at 26.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ 109 U.S. 527 (1883).

¹¹⁶ See *id.* at 539.

¹¹⁷ *Id.* at 535.

¹¹⁸ In January 1983, the United States and several other nations signed a Paris Club Agreed Minute. *Allied Bank II*, 733 F.2d at 25. The Paris Club refers to an informal meeting of representatives of a debtor nation seeking debt relief and its governmental creditors, which is convened only at the request of the debtor nation. A Paris Club meeting, which follows no written procedures but which is organized under the auspices of the French Finance Ministry, produces an Agreed Minute, a non-binding document that provides a guide for later binding agreements between the debtor nation and each creditor government. See Meissner, *Thoughts on More Comprehensive Procedures for Rescheduling of Sovereign Debt* in PRACTISING LAW INSTITUTE, COMMERCIAL LAW & PRACTICE HANDBOOK SERIES No. 318, THE INTERNATIONAL DEBT PROBLEM AND ITS IMPACT ON FINANCE AND TRADE 135 (1984); IMF (1983),

and by congressional support for continued aid to Costa Rica,¹¹⁹ mandated recognition of the payments moratorium¹²⁰ and restructuring of all commercial bank debt owed by Costa Rica.¹²¹

D. Allied Bank III: *The Rehearing*

To reverse the act of state analysis of *Allied Bank I*, the court of appeals in rehearing the case determined that for purposes of the territorial limitation to the act of state doctrine, the property affected by Costa Rica's payments moratorium had a U.S. situs.¹²² The property involved was the syndicate's right to receive loan repayments from the Costa Rican banks.¹²³ The court of appeals first determined that this property did not have a Costa Rican situs, since, in the court's view, Costa Rica could not wholly accomplish within its dominion a taking of the syndicate's property.¹²⁴ Alternatively, to obtain the same result under an "ordinary situs analysis",¹²⁵ the court reasoned that U.S. contacts with the debt¹²⁶ and U.S. interests in enforcing the debt¹²⁷ outweighed Costa Rica's concurrent jurisdiction over the agreements and interest in having its moratorium prevent the payments owed to the Allied Bank syndicate.¹²⁸ Accordingly, the court concluded that, since the taking did not occur in Costa Rica, the act of state doctrine did not apply.¹²⁹

supra note 8, at 15. See generally Reiffel, *The Paris Club, 1978-1983*, 23 COLUM. J. TRANSNAT'L L. 83 (1984); Camdessus, *Governmental Creditors and the Role of the Paris Club*, in DEFAULT AND RESCHEDULING, *supra* note 7, at 125. Private sector creditors, including banks and other commercial lending institutions, normally restructure debts of a debtor nation initiating negotiations for debt relief through an informal forum referred to as the London Club. See Hudes, *Coordination of Paris Club and London Club Reschedulings*, 17 N.Y.U. J. INT'L. L. & POL'Y 553, 560-62 (1985). Negotiations produce a term sheet, which resembles a Paris Club Agreed Minute in that it serves as a non-binding understanding outlining restructuring arrangements. See Meissner, *supra* this note, at 138.

¹¹⁹ *Allied Bank II*, 733 F.2d at 25.

¹²⁰ *Id.* at 27.

¹²¹ See *id.*

¹²² *Allied Bank III*, 757 F.2d at 523.

¹²³ *Id.* at 521.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* The contacts listed by the court were that the debtor banks consented to jurisdiction in New York, the debtor banks agreed to make payments in New York City in United States dollars, Allied Bank, the syndicate's agent, is a New York Bank, and some of the negotiations for the loans took place in the United States. *Id.*

¹²⁷ *Id.* at 521-22. The court identified the U.S. interests: maintaining New York's status as a world financial center; maintaining New York's role as "the international clearing center for United States dollars"; maintaining the high level of lending by U.S. banks to foreign debtors; and ensuring "creditors entitled to payment in the United States in United States dollars under contracts subject to the jurisdiction of United States courts" that their rights will be protected "in accordance with recognized principles of contract law". *Id.* at 521-22.

¹²⁸ *Id.* at 522.

¹²⁹ *Id.*

In order to vacate the comity analysis in *Allied Bank II*, the court next held that the Costa Rican payments moratorium was contrary to U.S. foreign policy and principles of contract law.¹³⁰ According to the court, the “unilateral attempt to repudiate private, commercial obligations” was inconsistent with the “orderly resolution of international debt problems” contemplated by U.S. policies,¹³¹ including reliance on the IMF to coordinate the restructuring of private debt.¹³² Furthermore, the court recognized that giving effect to the moratorium would vitiate the specific provision in the loan agreements that failure by Costa Rica’s Central Bank to provide U.S. currency for debt payments would not permanently excuse the Costa Rican banks’ obligation to make loan repayments.¹³³ Yet, while the court held that the moratorium did not excuse the obligation to make repayments for more than ten days, it recognized that the moratorium affected the “potential enforceability of the judgment.”¹³⁴

IV. AN ANALYSIS OF *ALLIED BANK III*

A. *Introduction*

Due to the interrelationships and complexities of the act of state doctrine, the principle of comity, and Article VIII, Section 2(b) of the Fund Agreement, the following analysis of whether a foreign state, after *Allied Bank III*, can legally defer external debt payments without its creditors’ consent proceeds on three

¹³⁰ *Id.* at 522.

¹³¹ *Id.* The court also interjected that the moratorium was contrary to the interests of the United States as a major source of private international credit. *Id.*

¹³² *Id.* In an amicus brief advocating a reversal, the U.S. government identified a five-point strategy for dealing with nations having debt servicing problems: (1) economic adjustment by borrowing countries designed to stabilize their economies and restore sustainable external positions; (2) an IMF adequately equipped to help borrowers design economic adjustment programs and provide balance of payments financing on a temporary basis while adjustments are made; (3) readiness of governmental monetary authorities in creditor countries to provide short-term liquidity support, when essential to assist selected borrowers that are formulating IMF-supported adjustment plans; (4) encouragement to private markets to provide prudent levels of financing to borrowing countries in the process of implementing such plans; and (5) resumption of sustainable, non-inflationary economic expansion and maintenance of open markets for trade, both in industrial countries and in developing countries having debt problems. Amicus Brief for the United States at 10 n.6, *Allied Bank International v. Banco Credito Agricola de Cartago*, 757 F.2d 523 (2d Cir. 1985) [hereinafter cited as U.S. Amicus Brief]. The New York Clearing House Association, a banking group, and The Rule of Law Committee joined by The National Foreign Trade Council, Inc., both representing international trade and investment interests, also submitted amicus briefs opposing the *Allied Bank II* decision. For a discussion of the U.S. government and New York Clearing House Association briefs, see Brown, *Enforcing Sovereign Lending*, INT’L FIN. L. REV., July 1984, at 5. For an elaboration on the U.S. debt resolution strategy, see Tigert, *supra* note 21, at 511–12.

¹³³ *Allied Bank III*, 757 F.2d at 522.

¹³⁴ *Id.*

levels.¹³⁵ While the discussion tracks the *Allied Bank III* opinion, it first examines the court of appeals' evasion of Article VIII, Section 2(b) within the act of state and comity analyses.¹³⁶ It next scrutinizes the court's formulation and application of the act of state doctrine and the principle of comity.¹³⁷ The discussion then concludes with a proposed construction of Article VIII, Section 2(b), the adoption of which would have made the act of state and comity analyses in *Allied Bank III* unnecessary.¹³⁸

B. Act of State Analysis

1. Applicability of Article VIII, Section 2(b) of the Fund Agreement

In *Sabbatino* the U.S. Supreme Court stated that in the presence of "a treaty or other unambiguous agreement regarding controlling legal principles" pertinent to a particular claim, the act of state doctrine should not apply.¹³⁹ It follows that under *Sabbatino*, determining the applicability of controlling legal principles should be the antecedent step in any act of state analysis. What is not immediately clear under *Sabbatino*, though, is whether the provisions of a treaty must be unambiguous in order to supplant application of the act of state doctrine itself.¹⁴⁰ On one hand, the Court stated that

the greater degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed upon principle to circum-

¹³⁵ Some recent commentaries on the *Allied Bank* decisions have focused only on the act of state doctrine, but, as in *Allied Bank III*, have neglected Article VIII, Section 2(b) and thus have not fully evaluated the potential legitimacy of payments moratoria effected through exchange controls. See Frumkin, *supra* note 25, at 469; Note, *Resolution of Act of State Disputes*, *supra* note 25, at 901; Comment, *Debt Situs and The Act of State Doctrine: A Proposal For A More Flexible Standard*, 49 ALB. L. REV. 647 (1985) [hereinafter cited as Comment, *Debt Situs*].

¹³⁶ For the act of state analysis, see *infra* notes 139–51 and accompanying text. For the comity analysis, see *infra* notes 205–10 and accompanying text.

¹³⁷ For the act of state analysis, see *infra* notes 152–204 and accompanying text. For the comity analysis, see *infra* notes 211–37 and accompanying text.

¹³⁸ See *infra* notes 238–82 and accompanying text.

¹³⁹ *Sabbatino*, 376 U.S. at 428. One commentator asserts for this principle to apply, the foreign state's act must amount to a "taking" of property. Gold, *Exchange Control: Act of State, Public Policy, The IMF's Articles of Agreement, and Other Considerations*, 7 HOUS. J. INT'L L. 13, 49–50 (1984) [hereinafter cited as Gold, *Exchange Control*]. Others, however, recognize that in general a treaty supplants the act of state doctrine. E.g., Ebenroth & Teitz, *supra* note 25, at 249; Williams (1975), *supra* note 61, at 387. For an argument against characterizing a payments moratorium as a taking, see *infra* notes 223–29 and accompanying text.

¹⁴⁰ See Gold, *Exchange Control*, *supra* note 139, at 51 n.83. Gold states that, although *Sabbatino* requires an unambiguous treaty, whether the decision refers to the existence of a clearly applicable treaty or the clarity of the provisions of such a treaty is not resolved. *Id.*

stances of fact rather than on the sensitive task of establishing a principle inconsistent with the national interest or with international justice.¹⁴¹

On the other hand, according to the Court, a significant division of international opinion over the international law that covers a litigated issue justifies applying the act of state doctrine.¹⁴² The *Sabbatino* Court, however, directed this latter observation toward the absence of uniform principles of customary international law, rather than in reference to an ambiguous treaty.¹⁴³ Furthermore, if a court applies the act of state doctrine simply because unclear treaty provisions are difficult to construe, it would eschew established principles of interpretation developed to glean the intent of signatories to ambiguous treaties.¹⁴⁴ Courts should, therefore, understand *Sabbatino* to foreclose the use of the act of state

¹⁴¹ *Sabbatino*, 376 U.S. at 428.

¹⁴² See *id.* at 428–30. The *Sabbatino* Court held:

[t]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

Id. at 428. The Hickenlooper Amendment to the Foreign Assistance Act of 1964, 22 U.S.C. § 2370(e)(2) (1982) (amending the Foreign Assistance Act of 1961) in effect reverses the *Sabbatino* holding to the extent that the statute prohibits application of the act of state doctrine where a claim asserts that an expropriation violates international law, which Congress construes as requiring compensation for confiscated property.

¹⁴³ See *Sabbatino*, 376 U.S. at 428–30.

¹⁴⁴ Courts recognize that treaties, like other contracts, may require interpretation to effectuate their purposes. See, e.g., *Baccardi Corp. v. Domenesch*, 311 U.S. 150, 163 (1940); *Board of County Commissioners of Dade County v. Aerolineas Peruansas, S.A.*, 307 F.2d 802, 806 (5th Cir. 1962), *cert. denied*, 371 U.S. 961 (1962). The *Sabbatino* Court may have additionally recognized that such interpretative tasks do not implicate the act of state doctrine. In the Court's view, the shifting interpretations of customary international law, due to divergent ideologies in capital importing and capital exporting nations, justified applying the act of state doctrine to bar challenging a foreign state's expropriation decree. See *Sabbatino*, 376 U.S. at 428–30. The Court nonetheless recognized, "[t]here are, of course, areas of international law in which consensus as to standards is greater and which do not represent a battleground of conflicting ideologies. This decision in no way intimates that the courts of this country are broadly foreclosed from considering questions of international law." *Id.* at 430 n.34. Inasmuch as a treaty represents a meeting of the minds of its signatories, a treaty's provisions should not present "a battleground of conflicting ideologies". Rather, a treaty should represent a consensus of purposes the effectuation of which may call for a court's interpretation of them. Nevertheless, courts have recently used the act of state doctrine to avoid the task of treaty interpretation for ambiguous provisions. See *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1118 (5th Cir. 1985) (application of a treaty to supplant the act of state doctrine "depends on pragmatic considerations, including both clarity of the relevant principles of international law and the potential implications of a decision on our foreign policy"); *Ethiopian Spice Extraction Co. v. Kalamazoo Spice Extraction Co.*, 543 F. Supp. 1224, 1230 (W.D. Mich. 1982), *rev'd sub nom. Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia*, 729 F.2d 422, 423 (6th Cir. 1984) (act of state doctrine was not supplanted by a treaty the pertinent provision of which was "inherently general, doubtful, and susceptible of multiple interpretation").

doctrine as a means to avoid treaty interpretation, however difficult that task may be.¹⁴⁵

Under this view of *Sabbatino*, the court of appeals in *Allied Bank III* should have determined the applicability of Article VIII, Section 2(b) of the Fund Agreement as the antecedent step in its act of state analysis. Since the Fund Agreement is a treaty,¹⁴⁶ Article VIII, Section 2(b), if applicable, should have governed the extraterritorial enforcement of Costa Rica's exchange controls and thus should have superseded the act of state doctrine.¹⁴⁷ While the *Libra Bank* court recognized Article VIII, Section 2(b) as an independent defense,¹⁴⁸ its ambivalence in construing the provision's applicability¹⁴⁹ exhibited the critical need for the court of appeals to clarify the treatment of exchange controls under the Fund Agreement.¹⁵⁰ By avoiding Article VIII, Section 2(b), the court of appeals not only failed to resolve this uncertainty, but also forced itself to examine the second step in the act of state analysis, which consists of determining the applicability of the act of state doctrine itself.¹⁵¹

2. Rethinking the Act of State Analysis

While the court of appeals in *Allied Bank III* should have applied Article VIII, Section 2(b) to determine the unenforceability of the loan agreements after Costa Rica imposed exchange controls,¹⁵² courts faced with claims involving a foreign state's unilateral debt restructuring attempts will nevertheless need to examine the applicability of the act of state doctrine. With respect to the effect of exchange controls, a court, favoring a restrictive reading of Article VIII, Section 2(b), may conclude that the provision altogether does not provide the rule of decision.¹⁵³ Alternatively, a court may conclude that because Article VIII, Section 2(b) prescribes unenforceability only and not enforceability, a

¹⁴⁵ One commentator, advocating that the act of state doctrine does not bar courts from interpreting ambiguous international law, states, "[t]he difficulty of a judicial task is no excuse for eschewing that task This is so in the development of international law as well." Mathias, *supra* note 40, at 399.

¹⁴⁶ See *supra* note 30.

¹⁴⁷ Ebenroth & Teitz, *supra* note 25, at 249. See also Williams (1975), *supra* note 61, at 387 (arguing that Article VIII, Section 2(b) supplants the act of state doctrine).

¹⁴⁸ *Libra Bank*, 570 F. Supp. at 896 n.1.

¹⁴⁹ See *supra* notes 99–101 and accompanying text.

¹⁵⁰ Confusion concerning the effect of the Fund Agreement and the treatment of exchange controls under U.S. law continues. In dictum, the U.S. Court of Appeals for the Fifth Circuit stated in *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1118–19 (5th Cir. 1985), that Article VIII, Section 2(a) of the Fund Agreement is too ambiguous to supplant the act of state doctrine in a claim involving Mexican exchange controls. This decision evinces the need for a clarification of the applicability of the Fund Agreement, and dramatizes that the confused treatment of exchange controls will persist, unless courts cease using the act of state doctrine as an excuse from treaty interpretation.

¹⁵¹ See *supra* notes 122–34 and accompanying text.

¹⁵² See *supra* notes 139–51 and accompanying text.

¹⁵³ Gold, *Exchange Control*, *supra* note 140, at 48.

contract may not be enforceable due to the act of state doctrine, despite the absence of a mandate under Article VIII, Section 2(b) to give the acting foreign state's exchange controls extraterritorial effect.¹⁵⁴ With respect to a foreign state's attempt to impose a unilateral payments moratorium through a means other than exchange controls,¹⁵⁵ a court may conclude that, without directly restricting the availability or use of foreign exchange, a foreign state's conduct does not amount to a restriction proscribed in Article VIII, Section 2(a) of the Fund Agreement¹⁵⁶ and, therefore, may implicate the act of state doctrine. Courts determining the applicability of the act of state doctrine, however, should beware the flaws of the act of state analysis in *Allied Bank III*.¹⁵⁷

A fundamental flaw in *Allied Bank III* consists of the transformation of the act of state doctrine into a choice-of-law rule through the court of appeals' adherence to the rigid territorial limitation.¹⁵⁸ Under its ordinary situs analysis, the court of appeals based its situs determination on the grounds that the United States, not Costa Rica, had more significant contacts with the loan agreements and underlying debt and had overwhelming interests in enforcement of the debt obligations in dispute.¹⁵⁹ The *Libra Bank* court similarly reached its act of state conclusion by locating the situs of the debt on the basis of its contacts with the United States.¹⁶⁰ These approaches in essence amount to choice-of-law rules for ascertaining the governing law of a contract.¹⁶¹ This merger of legal con-

¹⁵⁴ *Id.* at 49.

¹⁵⁵ Developing countries in Latin America have expressed the possibility of simply withholding interest payments to commercial banks. Wall St. J., December 23, 1985, at 19, col. 1. Such withholding is distinguishable from an outright repudiation of debts, as Fidel Castro of Cuba has urged upon unresponsive debtor nations. See BUS. WK., November 4, 1985, at 49. In the case of a repudiation, the Hickenlooper Amendment would preclude application of the act of state doctrine. See *supra* note 142. For a discussion differentiating between deferrals and repudiations, see *infra* notes 223-29 and accompanying text.

¹⁵⁶ FUND AGREEMENT, *supra* note 30, art. VIII, § 2(a). For a definition of the scope of Article VIII, Section 2, see *infra* note 268 and accompanying text.

¹⁵⁷ See *infra* notes 158-75 and accompanying text.

¹⁵⁸ Courts and commentators often consider the act of state doctrine as merely a choice-of-law rule, possibly in recognition that the effect of its application is to enforce a foreign state's act. See, e.g., Callejo v. Bancomer, S.A., 764 F.2d 1101, 1114 (5th Cir. 1985) (act of state doctrine is a "super-choice-of-law rule"); Comment, *Debt Situs*, *supra* note 135, at 650 (act of state doctrine is a "mandatory choice of law rule").

¹⁵⁹ See *supra* notes 125-28 and accompanying text.

¹⁶⁰ See *supra* notes 97-99 and accompanying text.

¹⁶¹ In the absence of a governing law clause, courts applying New York law follow a "grouping of contacts" approach by which a contract is deemed governed by the substantive law of the jurisdiction "which has the most significant contacts with the matter in dispute." *Auten v. Auten*, 308 N.Y. 155, 160, 124 N.E.2d 99, 102 (1954). Alternatively, a government interest approach may supply the governing law of a contract according to the jurisdiction having the greatest interest in the disputed matter. *Krauss v. Manhattan Life Insurance Co.*, 643 F.2d 98, 101-02 (2d Cir. 1981). See generally Gruson, *Controlling Choice of Law in SOVEREIGN LENDING: MANAGING LENDING RISK* 53-54 (M. Gruson & R. Reisner eds. 1984); Gruson, *Governing-Law Clauses in International and Interstate Commercial Agreements—New York's Approach*, 1982 U. ILL. L. REV. 207, 209-10 (1982) [hereinafter cited as Gruson

cepts, however, fails to distinguish between the separate functions served by the act of state doctrine and choice-of-law principles. Choice-of-law principles are intended to effectuate the expectations of contracting parties as to which body of substantive law governs their contractual rights and obligations.¹⁶² In contrast, the act of state doctrine is a prudential policy¹⁶³ derived from the notion of a separation of powers.¹⁶⁴ Rather than considering contractual expectations, the act of state doctrine is concerned with the justiciability of claims the adjudication of which could interfere with U.S. foreign policy conducted by the political branches of the federal government.¹⁶⁵ The *Allied Bank III* court nevertheless failed to make this distinction.¹⁶⁶

The resulting conceptual merger risks thwarting an objective of the act of state doctrine, which is to prevent a court from disrupting U.S. foreign affairs by affronting a foreign sovereign.¹⁶⁷ The court of appeals' situs determination method, based on a subjective balancing of interests, could especially be deemed to exhibit an unfair judicial proclivity in favor of U.S. private interests. Although the governmental interest analysis approach for determining choice-of-law calls for a balancing of conflicting interests of states affected by an event underlying a claim,¹⁶⁸ an act of state analysis is simply an affirmation of, and need not replicate, a choice-of-law analysis.¹⁶⁹ Interest balancing as part of the act of state analysis not only is conceptually repetitious, but could lead to a derogation of a foreign state's interests, affronting the foreign sovereign involved and, therein, risking disruption of U.S. foreign affairs contrary to the purpose of the act of state doctrine. Yet the merger of the act of state doctrine and choice-of-law principles fosters such an anomolous outcome as it confuses private parties'

(1982)]. In *Allied Bank III*, the court may have confused the choice-of-law and act of state analyses because the loan agreements did not stipulate a governing law. See *supra* note 11 and accompanying text.

¹⁶² See Gruson (1982), *supra* note 161, at 207. See also REESE & ROSENBERG, *CASES AND MATERIALS IN CONFLICT OF LAWS* 576 (8th ed. 1984).

¹⁶³ *International Association of Machinists v. OPEC*, 649 F.2d 1354, 1359 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

¹⁶⁴ *Sabbatino*, 376 U.S. at 423.

¹⁶⁵ See *id.* at 427-28. The linkage of the act of state doctrine to the political question doctrine recognizes that the act of state doctrine concerns justiciability and the allocation of powers between the branches of government. See *supra* note 47 and accompanying text.

¹⁶⁶ See *supra* notes 125-28 and accompanying text.

¹⁶⁷ See *Sabbatino*, 376 U.S. at 428. See also *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 607 (9th Cir. 1976) ("The touchstone of *Sabbatino*—the potential for interference with our foreign relations—is the crucial element in determining whether deference should be accorded in any given case").

¹⁶⁸ See Gruson (1982), *supra* note 161, at 210.

¹⁶⁹ Even if the foreign law applied, the act of state doctrine could nevertheless be applicable. See *Johansen v. Confederation Life Association*, 447 F.2d 175, 180 (2d Cir. 1971) (even if Cuban law governs the disposition of a contractual claim, the act of state doctrine would apply if the court's decision could necessarily nullify a Cuban decree or regulation).

contractual expectations with a foreign state's sensitivities with respect to a U.S. court's effect on its national policies and interests.

Besides the problem of a merger of legal concepts, a related fundamental flaw in *Allied Bank III*, as well as in *Libra Bank*, concerns application of the territorial limitation as a rigid rule to determine whether adjudicating a claim would affront a foreign sovereign, implicating the act of state doctrine. Derived from the traditional statement of the act of state doctrine,¹⁷⁰ the territorial limitation embodies the presumption that if a foreign state's act affects the legal rights to property outside its territory, a U.S. court's refusal to give effect to that act will not affront the foreign state.¹⁷¹ While the traditional statement is a common sense recognition of where territorial sovereignty justifies application of the act of state doctrine,¹⁷² the presumption embodied in the territorial limitation is patently illogical.¹⁷³ While as a matter of customary international law a nation's laws have no effect beyond the nation's territory,¹⁷⁴ a foreign state's interests may nevertheless extend beyond its boundaries. With transnational interdependencies created by international financial markets and trade, a foreign state's regulation of persons or conduct within its own territory may necessarily have effects beyond its borders. Contrary to the presumption of the territorial limitation, for a U.S. court to adjudicate the validity of a foreign state's acts having extraterritorial effect could, under certain circumstances, affront the acting foreign state.¹⁷⁵ The rule-oriented territorial limitation, however, precludes further inquiry into factors which, for act of state purposes, could caution against the adjudication of a claim that in the interests of U.S. foreign policy the political branches of the government should resolve.

Complete deference to, or disavowal of, a foreign state's acts based on the governmental function-commercial act dichotomy, as in *Allied Bank I*,¹⁷⁶ simi-

¹⁷⁰ See *supra* text accompanying note 4.

¹⁷¹ See *supra* note 88 and accompanying text.

¹⁷² On this point, the act of state doctrine and the doctrine of sovereign immunity converge. In defining the concept of sovereign immunity, the U.S. Supreme Court in *Schooner Exchange v. M'Faddon*, 11 U.S. 478, 481 (1812), stated, "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."

¹⁷³ More technically, the presumption embodied in the territorial limitation presents the fallacy of denying the antecedent. The logic pattern of the presumption is as follows: if a foreign state accomplishes an act within its own territory, adjudication by a U.S. court would affront the foreign sovereign; the foreign state did not accomplish the act within its own territory; therefore, adjudication by a U.S. court would not affront the foreign sovereign. See generally CARNEY & SCHEER, *FUNDAMENTALS OF LOGIC* 201-03 (3d ed. 1980).

¹⁷⁴ See *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984).

¹⁷⁵ A commentator, criticizing the retention of the territorial limitation in revising the *RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES* (1965), states, "the doctrine does not just apply to the acts of foreign sovereigns within their own territory. Rather, it applies to acts, wherever undertaken, that express the public policy of a sovereign as to persons or conduct within its territory." Rosenthal, *Jurisdictional Conflicts Between Sovereign Nations*, 19 INT'L LAW. 487, 499 (1985).

¹⁷⁶ See *supra* notes 71-81 and accompanying text.

larly suffers from rigidity. This approach, though, would encourage expansion of the preclusive effect of the act of state doctrine: to implicate the act of state doctrine, a foreign state could simply identify the public, as opposed to commercial, nature of its acts and contrive governmental functions that they purportedly serve. Furthermore, it could support application of the act of state doctrine where claims involve acts dealing with finance and trade, such as the exchange controls in *Libra Bank*¹⁷⁷ and the *Allied Bank* cases,¹⁷⁸ which are of a mixed public and commercial nature.¹⁷⁹ To devise more rules to clarify the government function–commercial act dichotomy, however, would only obscure the flexibility sought by the *Sabbatino* Court in formulating and applying the act of state doctrine.¹⁸⁰

In order to attain the ultimate goal of the act of state doctrine—to preserve a uniform national foreign policy conducted by the political branches without interference by the judiciary—¹⁸¹ courts should abandon the rule-oriented act of state analyses and implement a flexible, two-part approach. Under this proposal to determine the applicability of the act of state doctrine,¹⁸² a court should determine, first, whether adjudication would likely affront the foreign state the acts of which are at issue in a claim and, second, whether adjudication would likely interfere with policies of the executive branch specifically addressing the nature of the claim involved.¹⁸³ The first inquiry concerning comity in the sense

¹⁷⁷ See *supra* text accompanying note 83.

¹⁷⁸ See *supra* notes 14–17 and accompanying text.

¹⁷⁹ On one hand, it has been recognized that “[c]ontrol of the national currency and of foreign exchange is a necessary attribute of sovereignty.” *Naamloze Venootschap Suiker-Fabrick v. Chase*, 111 F. Supp. 833, 845 (S.D.N.Y. 1953). On the other hand, declaring a halt to the repayment of external debt constitutes an act that an individual debtor can perform, thereby indicating that exchange control regulations effecting a payments moratorium are not inherently sovereign acts but may be of a commercial nature. See *Zaitzeff & Kunz, supra* note 25, at 480.

¹⁸⁰ The *Sabbatino* Court sought to avoid “an inflexible and all-encompassing rule”. *Sabbatino*, 376 U.S. at 428.

¹⁸¹ See *Sabbatino*, 376 U.S. at 423.

¹⁸² The inapplicability of controlling legal principles presupposes the necessity of proceeding to this step in the act of state analysis. See *supra* notes 139–51 and accompanying text.

¹⁸³ Despite its failure to adumbrate a clear test, the *Sabbatino* Court in essence adhered to a two-part analysis. After addressing how judicial action evaluating the validity of a foreign state’s expropriation decree could affront the foreign state, the Court next considered how adjudication resulting in such an affront could impair the executive branch’s negotiations for settling on compensation for expropriated property. See *Sabbatino*, 376 U.S. at 428–32. Furthermore, in *Associated Container Transportation (Australia) Ltd. v. United States*, 705 F.2d 53, 61–62 (2d Cir. 1983), the U.S. Court of Appeals for the Second Circuit, although in a claim not involving a debt or the situs of property, followed an act of state analysis considering whether adjudication would either frustrate policies of the U.S. Justice Department or affront a foreign nation by inquiring into the validity or motives of its acts. See also *International Association of Machinists v. OPEC*, 649 F.2d 1354, 1360–61 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) (act of state analysis considering effects of adjudicating antitrust claim on U.S. relations with OPEC nations and on U.S. policies dealing with the oil question).

of amicable international relations balances factors¹⁸⁴ gauging whether the acting foreign state has objectively reasonable expectations¹⁸⁵ that its acts will be accorded extraterritorial enforcement and whether adjudication of a claim involving those acts should be avoided.¹⁸⁶ Primary, although not exclusive, factors for this evaluation should include whether the foreign state had dominion over contacts with the event underlying the legal claim at issue; whether not applying foreign law would seriously impair the foreign state's important, legitimate governmental interests; and whether giving effect to the foreign state's act would

¹⁸⁴ Generally, courts outside the Second Circuit have favored a balancing approach to evaluate the risk that adjudication of a claim would disrupt international relations by affronting a foreign sovereign. See, e.g., *Compania de Gas de Nuevo Laredo v. Entex, Inc.*, 686 F.2d 322, 325 (5th Cir. 1982); *Int'l Association of Machinists v. OPEC*, 649 F.2d 1354, 1360-61 (9th Cir. 1981), cert. denied, 454 U.S. 1163 (1982). The Second Circuit Court of Appeals recently has also expressed its favor for a balancing approach. See *Associated Container Transportation (Australia) Ltd. v. United States*, 705 F.2d 53, 61 (2d Cir. 1983). See also *Rasoulzadeh v. Associated Press*, 574 F. Supp. 854, 860 (S.D.N.Y. 1983) (interpreting decisions by the Second Circuit Court of Appeals as not requiring a rigid, rule-oriented act of state analysis). Commentators, however, have criticized a balancing approach as allowing courts to make decisions affecting foreign policy, which the act of state doctrine was intended to avoid. See, e.g., Henckin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805, 826 (1964); Note, *Judicial Balancing*, *supra* note 40, at 328-29.

¹⁸⁵ Whereas in *Allied Bank III* the court of appeals focused on whether Costa Rica had dominion over the debts in dispute, the *Libra Bank* court recognized that whether a judicial act could affront a foreign state depends on expectations of dominion, rather than dominion *per se*. See *Allied Bank III*, 757 F.2d at 521; *Libra Bank*, 570 F. Supp. at 883. The *Libra Bank* court interpreted Costa Rica's expectations in light of "the principle of objective reasonableness underlying the territorial limitation". *Libra Bank*, 570 F. Supp. at 884. This principle should counsel against deferring to the subjective expectations of a foreign state when such deference, due to its detrimental impact on international comity in general, would be unreasonable.

¹⁸⁶ This inquiry would not alter the result contemplated by the traditional statement of the act of state doctrine, so long as it is not attenuated to support a rigid territorial limitation. This outcome would be consistent with established notions of sovereignty. See *supra* note 170.

Furthermore, this inquiry is distinguishable from an analysis of whether a court should exercise its enforcement jurisdiction. See RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965). The latter analysis arises where the United States and another nation prescribe conflicting laws by which a person cannot simultaneously abide, and a U.S. court must decide whether U.S. interests justify enforcing the U.S. law, despite the competing interests of the foreign nation and the hardship such enforcement would cause for persons within each nation's jurisdiction. See *id.* This comment proposes, however, that U.S. interests should not factor into the act of state analysis, since the act of state analysis focuses on the reaction of the foreign state. See *supra* notes 166-67 and accompanying text. Moreover, the question of whether a court should exercise jurisdiction arises only after a court determines that the act of state doctrine does not preclude subject matter jurisdiction. See *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1294 (3d Cir. 1979). It focuses on not only U.S. interests in exercising enforcement jurisdiction, but also on the enforceability of any judgment. See *id.* at 1297-98.

Two recent commentaries on the *Allied Bank* decisions have nevertheless merged the separate analyses. One proposes that, as a prerequisite to analyzing the separation of powers concerns underlying the act of state doctrine, a U.S. court must determine that the United States has exclusive jurisdiction over disputed property. See Note, *Resolution of Act of State Disputes*, *supra* note 25, at 929. The other asserts that for act of state purposes adjudicating a claim does not risk affronting a foreign sovereign if a U.S. court is able to grant enforceable relief. See Frumkin, *supra* note 25, at 470, 493.

undermine international comity in general.¹⁸⁷ The second inquiry recognizes the competence of the executive branch in areas in which it has formulated clear foreign policies.¹⁸⁸ Furthermore, it is distinguished from a comity analysis. Whereas a comity analysis evaluates whether a foreign state's acts in themselves are consistent with U.S. law and policy,¹⁸⁹ this second inquiry considers whether adjudication of a claim involving those acts would frustrate U.S. foreign policy. Under this proposed act of state analysis, preservation of a separation of powers in matters of foreign policy would require application of the act of state doctrine upon an affirmative answer to either inquiry.¹⁹⁰

3. An Example Applying the Proposed Test

Assuming *arguendo* that the court of appeals had to determine the applicability of the act of state doctrine to Allied Bank's claim, the primary factors for analysis in the first inquiry of the proposed approach would have evinced that adjudication of the claim would not so affront Costa Rica as to implicate the act of state doctrine. As a general rule, the location of property remains determinative as to whether Costa Rica had complete dominion over the debt.¹⁹¹ Following the reasoning in *Libra Bank*, recognizing that jurisdiction over a debtor does not

¹⁸⁷ This inquiry does not constitute a choice-of-law analysis. For example, the choice-of-law analysis adopted in the RESTATEMENT (SECOND) CONFLICTS §§ 6, 188 (1971) applies the law of the state with the "most significant relationship" to the particular issue involved, which is identified by evaluating the policies and contacts with the states that could supply the controlling law. In contrast, the proposed act of state inquiry has an asymmetrical focus, centering on only the expectations of the acting foreign state, not the U.S. forum.

¹⁸⁸ The degree to which a court should defer to recommendations by the executive branch concerning applicability of the act of state doctrine has been a controversial issue. An exception to the act of state doctrine, according complete deference to U.S. State Department suggestions, originated in *Bernstein v. N. V. Nederlandsche-Amerikaansche*, 210 F.2d 375 (2d Cir. 1954). In *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 756, 768 (1972), a three-justice plurality endorsed the "Bernstein exception". The remaining six justices, two concurring separately in the judgment and four dissenting, unequivocally rejected the *Bernstein* exception. *See id.* at 770-77. This latter view holds the act of state doctrine as a matter of judicial abstention and recognizes that a policy of complete deference would violate the separation of powers notion, which the act of state doctrine is intended to preserve, by eliminating an independent judiciary. Delson, *The Act of State Doctrine—Judicial Deference or Abstention?*, 66 AM. J. INT'L L. 82, 93 (1972).

¹⁸⁹ *See supra* note 5 and accompanying text.

¹⁹⁰ To give full effect to the separation of powers notion underlying the act of state doctrine, a court should not be able to balance the two inquiries and, thereby, in effect have oversight power concerning U.S. foreign policies which would militate against applying the act of state doctrine, despite a reasonable likelihood that adjudication would affront the foreign state involved. The Hickenlooper Amendment operates as an exception to this approach, since it may be applicable despite the risk of an affront to an expropriating state. For a discussion of the Hickenlooper Amendment, *see supra* note 142. This approach nonetheless recognizes that the act of state doctrine is in itself an exception to the constitutional allocation of power to the judiciary. *See Sabbatino*, 376 U.S. at 423.

¹⁹¹ *See Allied Bank III*, 757 F.2d at 521; *Libra Bank*, 570 F. Supp. at 881-82, 884.

determine the situs of a debt that has substantial incidents elsewhere,¹⁹² the situs of the debt owed the syndicate could have been attributed to New York on the basis of the contacts, not the interests, involved.¹⁹³ The parties to the loan agreements consented to the jurisdiction of New York courts,¹⁹⁴ the debts were payable in New York in U.S. currency,¹⁹⁵ and New York law most likely provided the governing law of the loan agreements.¹⁹⁶ As to whether denying extraterritorial effect to Costa Rica's exchange controls would seriously impair Costa Rican interests in responding to the national economic crisis, the court could have considered whether Costa Rica had more established alternatives for obtaining debt relief. While Costa Rica's payments moratorium, despite its effect on commercial obligations, served a legitimate governmental function in attempting to ameliorate national economic problems,¹⁹⁷ the established process for debt restructuring relies on negotiated, cooperative settlements between debtor nations and their creditors,¹⁹⁸ not forced restructuring as sought by Costa Rica. Furthermore, as to the effect that Costa Rica's acts would have on international comity, the court could have found that imposition of a unilateral payments moratorium would implicate the concern underlying the commercial act exception.¹⁹⁹ As this concern recognizes that affording a foreign sovereign

¹⁹² See *supra* notes 96–99 and accompanying text.

¹⁹³ This conclusion concurs with the situs determination in *Allied Bank III*, as well as in *Libra Bank*. See *Allied Bank III*, 757 F.2d at 522; *Libra Bank*, 570 F. Supp. at 882. Cf. Tigert, *supra* note 21, at 525 (a foreign state should have no reasonable expectations that its law will "be given effect over performance owed by their nationals in another state's territory under the express terms of contracts enforceable in the other state's courts"). One commentator has placed the debts in Costa Rica because Costa Rica had exclusive jurisdiction over the debtor banks. See Note, *Resolution of Act of State Disputes*, *supra* note 25, at 934–35. This rationale, however, fails to recognize that jurisdiction over the debtor is necessary for dominion over a debt, but in itself does not determine the situs of the debt. See *supra* note 96.

¹⁹⁴ *Allied Bank III*, 757 F.2d at 521.

¹⁹⁵ *Id.* at 518–19.

¹⁹⁶ Although the loan agreements did not stipulate a governing law, one commentary has concluded that "the facts that the loan was denominated in dollars, payable in New York, partially negotiated in New York, and the debtors submitted to jurisdiction in New York are sufficient to justify the choice of New York law." Zaitzeff & Kunz, *supra* note 25, at 478 n. 135. This result reflects the "grouping of contacts" approach for determining the choice of a governing law. See *supra* note 161.

¹⁹⁷ Recent cases have recognized the sovereign function served by imposing exchange controls to combat balance of payments problems in the context of the international debt crisis. See *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1116 (5th Cir. 1985) ("The power to issue exchange control regulations is paradigmatically sovereign in nature"); *Braka v. Bancomer, S.N.C.*, 762 F.2d 222, 225 (2d Cir. 1985) ("action, taken by the Mexican government for the purpose of saving its national economy from the brink of monetary disaster" is an exercise of sovereign power). It is reasonable to presume that other means to effect a payments moratorium may also serve a sovereign function. See RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 198 (1965) ("Conduct attributable to a state and causing damage to an alien does not depart from the international standard of justice . . . if it is reasonably necessary in order to control the value of the currency or to protect the foreign exchange resources of the state.").

¹⁹⁸ For a discussion of this debt resolution strategy, see *supra* note 132.

¹⁹⁹ For a discussion of the commercial act exception, see *supra* notes 75–79 and accompanying text.

unlimited power to alter commercial obligations would destabilize international financial and trade relations and thus disrupt comity,²⁰⁰ the court could have concluded that giving effect to a unilateral payments moratorium would undermine international comity in general. As these factors would not have indicated that Costa Rica has objectively reasonable expectations that its unilateral payments moratorium would have extraterritorial effect at the expense of stability in world finance and trade, a conclusion could have been drawn that adjudicating Allied Bank's default claim would not have affronted Costa Rica.

Under the second inquiry of the proposed analysis, an examination of U.S. foreign policy would have found that adjudication would not have violated the separation of powers. The executive branch supports the resolution of debt servicing problems through cooperative efforts by debtor nations, creditor governments, and commercial lenders.²⁰¹ This strategy encourages continued financing by commercial lenders²⁰² and advocates voluntary, not mandatory, debt restructurings.²⁰³ Costa Rica's payments moratorium, however, was a unilateral attempt to restructure external debt, and, if given extraterritorial effect, would jeopardize essential new lending to debtor nations.²⁰⁴ Since Costa Rica's acts were contrary to the debt resolution strategy, adjudicating Allied Bank's claim would not have interfered with, but would have bolstered, U.S. foreign policy. This example suggests, therefore, that under the proposed two-part act of state

²⁰⁰ See *Dunhill*, 425 U.S. at 703-04. In support of this concern, the *Dunhill* Court reasoned that refusal to resolve commercial claims against foreign states would result in injuries to private businessmen and to international commerce, results which restrictive sovereign immunity seeks to avoid. *Id.* at 703-04.

²⁰¹ See *supra* note 132. In October 1985, the U.S. government announced an initiative, known as the "Baker plan", to resolve the international debt crisis. The Baker plan is similar to the strategy endorsed by the United States at the time of *Allied Bank III*, which encouraged debtor nations to meet their debt servicing needs by implementing economic austerity programs designed to create trade surpluses and by obtaining short-term commercial financing. The Baker plan advocates fostering faster economic growth in developing countries through new long-term lending by commercial lenders and international organizations including the World Bank and the IMF. It nonetheless contemplates that the effectiveness of new lending depends on undertaking by debtor nations of structural and policy changes aimed at reducing inflation, discouraging the outflow of capital, and promoting direct foreign investment and trade; and that the IMF will continue its coordinating, supervisory role in the debt resolution process. See generally *Risky Medicine*, Wall St. J., November 19, 1985, at 1, col. 6; *Showdown over Latin Debt*, TIME, October 14, 1985, at 62-63; *U.S. Proposal on World Debt Faces Hurdles*, Wall St. J., October 8, 1985, at 35, col. 1.

²⁰² See *supra* notes 132 and 201.

²⁰³ See U.S. Amicus Brief, *supra* note 132, at 6.

²⁰⁴ See Ebenroth & Teitz, *supra* note 25, at 251; Gold, *Exchange Control*, *supra* note 139, at 38. One commentator perceives that adjudication would interfere with U.S. foreign policy, since allowing "rogue banks", banks not consenting to a negotiated restructuring proposal, to sue would disrupt the cooperation essential to the rescheduling process. See Note, *Resolution of Act of State Disputes*, *supra* note 25, at 934. This argument fails to recognize that appropriate clauses in syndication loan agreements can limit minority dissenters' rights. See Tigert, *supra* note 21, at 521. Furthermore, in order to avoid debt restructurings mandated by U.S. foreign policy even without a limitation on dissenters' rights, commercial lenders could withdraw from new financing and cause a retrenchment in loans contrary to U.S. foreign policy aims. See Ebenroth & Teitz, *supra* note 25, at 251.

analysis, the act of state doctrine would be inapplicable in claims concerning debtor nations' unilateral debt restructurings.

C. Comity Analysis

1. Article VIII, Section 2(b) As Law

Had the *Allied Bank III* court determined that Article VIII, Section 2(b) of the Fund Agreement should govern the extraterritorial effect of exchange controls under U.S. and international law,²⁰⁵ it could have altogether avoided its comity analysis.²⁰⁶ Prior to adoption of the Fund Agreement, courts often refused to give extraterritorial effect to a foreign state's exchange controls on the basis that such regulations opposed the public policy of the forum.²⁰⁷ With the adoption of the Fund Agreement, Article VIII, Section 2(b) has become part of the national law of member states,²⁰⁸ and, if applicable, mandates the members' recognition of foreign exchange controls maintained or imposed consistently with the Fund Agreement.²⁰⁹ Instead of being subordinate to the principle of comity, Article VIII, Section 2(b) provides a rule of decision itself.²¹⁰

²⁰⁵ See *supra* notes 30 and 69 and accompanying text.

²⁰⁶ In *Libra Bank*, the district court did recognize that the defense based on Article VIII, Section 2(b) "is actually distinct from the arguments based upon the act of state doctrine", which it had construed to incorporate a comity analysis. *Libra Bank*, 570 F. Supp. at 896 n.1.

²⁰⁷ See *Williams* (1975), *supra* note 61, at 373-74. These results followed the established principle "that in the absence of treaty provisions to the contrary, courts will not entertain actions for enforcement, either directly or indirectly, of penal, revenue or public laws of a foreign state or of a law founded upon an act of a foreign state." *Id.* at 373. Other cases in which courts have denied giving effect to a foreign state's exchange controls have been decided on choice-of-law grounds. See *Central Hanover Bank & Trust Co. v. Siemens & Halske Aktiengesellschaft*, 15 F. Supp. 927 (S.D.N.Y. 1936), *aff'd*, 84 F.2d 993 (2d Cir. 1936), *cert. denied*, 299 U.S. 585 (1936); *Zaitzeff & Kunz*, *supra* note 25, at 459-60. In a leading New York case, this view prevailed, but the court also concluded that Article VIII, Section 2(b) did not apply. See *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.*, 37 N.Y.2d 220, 333 N.E.2d 168 (1975), *cert. denied*, 423 U.S. 866 (1975). Presuming the applicability of Article VIII, Section 2(b), however, construing the provision as part of the substantive law of the forum eliminates the relevance of choice-of-law principles. See *supra* notes 66-67 and accompanying text.

²⁰⁸ See *supra* note 68 and accompanying text.

²⁰⁹ See *GOLD* (1965), *supra* note 65, at 23-24; *Gold, Exchange Control*, *supra* note 139, at 39-40; *Williams* (1975), *supra* note 61, at 376; Note, *United States Enforcement of Foreign Exchange Control Laws—A Rule In Transition?*, 10 N.Y.U. J. INT'L L. & POL'Y 535, 539-40 (1978). U.S. courts have recognized that exchange controls imposed consistently with the Fund Agreement should be given effect on public policy grounds. See, e.g., *Southwestern Shipping Corp. v. National City Bank*, 6 N.Y.2d 454, 463, 160 N.E.2d 836, 841, 190 N.Y.S.2d 352, 359 (1959), *cert. denied*, 361 U.S. 895 (1959); *Perutz v. Bohemian Discount Bank In Liquidation*, 304 N.Y. 533, 537, 110 N.E.2d 6, 7-8 (1953). See also *Menendez v. Saks & Co.*, 485 F.2d 1355, 1366-67 (2d Cir. 1973), *rev'd on other grounds sub nom. Alfred Dunhill of London, Inc.*, 425 U.S. 682 (1976). In *Menendez*, the Second Circuit Court of Appeals stated that one nation will not enforce the revenue laws, including exchange controls, of another nation, unless an agreement between the nations prescribes enforcement; and then recognized that Article VIII of the Fund Agreement "evidenced a commitment on the part of the signatory nations to enforce each other's exchange controls as a matter of international cooperation." *Menendez*, 485 F.2d at 1366.

²¹⁰ See *Ebenroth & Teitz*, *supra* note 25, at 247.

2. Article VIII, Section 2(b) As Public Policy

As a matter of construction, the *Allied Bank III* court properly examined U.S. foreign policy in its comity analysis.²¹¹ To ascertain whether giving extraterritorial effect to a foreign state's acts would unduly burden the interests of U.S. nationals,²¹² comity analysis considers whether foreign acts are consistent with "the policy and law of the United States".²¹³ This analysis examines the forum's public policy.²¹⁴ Two U.S. Supreme Court decisions, *United States v. Belmont*²¹⁵ and *United States v. Pink*,²¹⁶ suggest that for comity purposes public policy encompasses foreign policy. First, in both cases the Court held that international compacts or agreements entered into by the executive branch, as well as treaties approved by the U.S. Senate, are determinative of U.S. public policy.²¹⁷ Second, both decisions infer that public policy demands state action consistent with foreign policy conducted by the political branches.²¹⁸ The policy underlying the principle of comity, which is to protect U.S. interests, is consistent with this inference. As U.S. law, domestic policy, and foreign policy in total preserve and promote the interests of U.S. nationals, restricting comity analysis to an evaluation of only U.S. law and domestic policy, excluding foreign policy, could make U.S. interests vulnerable to foreign acts that disadvantage the United States and leave persons protected by U.S. law without legal recourse.²¹⁹ In *Allied Bank III*,

²¹¹ See *supra* notes 130–32 and accompanying text.

²¹² See *supra* note 52 and accompanying text.

²¹³ See, e.g., *United Bank Ltd. v. Cosmic Int'l Corp.*, 542 F.2d 868, 872 (2d Cir. 1976); *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47, 51 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966).

²¹⁴ See *supra* note 5 and accompanying text.

²¹⁵ 301 U.S. 324 (1937).

²¹⁶ 315 U.S. 203 (1942).

²¹⁷ *Pink*, 315 U.S. at 230–31; *Belmont*, 301 U.S. at 331. Both cases involved the extraterritorial effect of a 1918 decree by which the Soviet government nationalized and appropriated Russian corporations' property wherever situated. Consequently, this issue called for determining the effect of the 1933 Litvinov Assignment, by which the Soviet government released and assigned to the United States all amounts due to the Soviet government from U.S. nationals, including properties confiscated pursuant to the 1918 decree.

²¹⁸ See *Pink*, 315 U.S. at 233–34; *Belmont*, 301 U.S. at 331–32. In *Pink*, the Court stated "No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies, whether they be expressed in constitutions, statutes, or judicial decrees."

Pink, 315 U.S. at 233.

²¹⁹ One commentary advocates limiting the comity analysis to U.S. law and domestic policy, on the ground that a comity analysis hinged on foreign policy would discriminate against unfriendly nations. See Zaitzeff & Kunz, *supra* note 25, at 477. To avoid such anomalous results, courts could consider foreign policy amounting to legal policy rather than strictly political policy. Concerning English law, for example, one author states that public policy, which does not include political policy, refers to an "indefinite concept" relating to matters regarded by the government "as clearly of fundamental concern to the state and society at large." GRAVESON, *THE CONFLICT OF LAWS* 570 (5th ed. 1965). Such a distinction would be consistent with *Pink* and *Belmont* insofar as those cases concerned agreements

therefore, the court of appeals properly evaluated Costa Rica's acts in light of the U.S. debt crisis strategy since that strategy comprises an informal multilateral accord to which the United States is a party.²²⁰ More broadly, since U.S. foreign policy adopts that strategy, the court's comity analysis properly subsumed it within public policy so that the court would reach a consistent outcome.

Nevertheless, the downside of reliance on foreign policy is that it politicizes the comity analysis. This politicization, as exemplified in *Allied Bank III*, could be deemed to evince the predisposition of U.S. courts toward preserving the commercial and financial power of the United States, even at the expense of the economic stability of a debtor nation.²²¹ If debtor nations perceive such a proclivity in U.S. courts as perpetuating an oppressive U.S. hegemony over the debt resolution process, those nations could have inspiration to implement their own debt relief initiatives, including unilateral payments moratoria, despite legal repercussions in the United States: such initiatives would effectively undermine the U.S. debt crisis strategy.²²²

The spectrum of characterizations of Costa Rica's payments moratorium manifests the degrees to which the proclivity in favor of U.S. interests colored the reasoning of the courts. The *Allied Bank III* court branded the payments moratorium an attempted repudiation of the debts owed.²²³ The *Libra Bank* court similarly labeled it an "effective confiscation" for comity purposes,²²⁴ but, for act of state purposes, recognized that it did not constitute a repudiation of the debt owed.²²⁵ The *Allied Bank II* court viewed it, not as a repudiation, but as a deferral of repayment of the loans extended by the syndicate.²²⁶ While the *Allied Bank III* and *Libra Bank* courts principally focused on the interference with the syndicate's rights to debt payments caused by the moratorium, the *Allied Bank*

executed as part of U.S. foreign policy which the U.S. Supreme Court considered as determinative of law as a treaty. See *Pink*, 315 U.S. at 222-23; *Belmont*, 301 U.S. at 331.

²²⁰ The strategy was endorsed by seven Heads of State at the Williamsburg (Va.) Economic Summit meeting in 1983 and reaffirmed at the London Economic Summit in June 1984. INTERNATIONAL FINANCE: THE NATIONAL ADVISORY COUNCIL ON INTERNATIONAL AND FINANCIAL POLICIES ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS FOR FISCAL YEAR 1984 36 (1985).

²²¹ See Ebenroth & Teitz, *supra* note 25, at 251-52. The deference to the certainty of contract under the comity analysis in *Allied Bank III* further could be interpreted to expose an unfair bias. Such absolute deference would permit private parties to immunize by contract their rights and obligations from the effect of any foreign law, even though the principle of comity embodies a recognition that a foreign law may supersede private contractual provisions when public policy so demands. See *supra* notes 49-52 and accompanying text.

²²² Developing countries, expressing dissatisfaction with efforts, including the Baker plan, to resolve the international debt problem, have proposed, but have not implemented, their own debt resolution plan and have threatened to withhold interest payments to commercial banks unless their plan receives consideration from their creditors. Wall St. J., December 23, 1985, at 19, col. 1.

²²³ *Allied Bank III*, 757 F.2d at 522.

²²⁴ *Libra Bank*, 570 F. Supp. at 882.

²²⁵ *Id.* at 880.

²²⁶ *Allied Bank II*, 733 F.2d at 26.

II court considered the conduct effecting the moratorium.²²⁷ Under the former approach, the courts forced the moratorium to fit within the genus of an expropriation, despite the circumstances of its imposition, apparently accommodating their predisposition in favor of the creditor banks.²²⁸ In contrast, the *Allied Bank II* court did not obscure the character of Costa Rica's conduct, recognizing that the exchange controls were of a remedial nature.²²⁹

Had the court of appeals in *Allied Bank III* simply focused on the medium by which Costa Rica effected its payments moratorium, it would have been directed through the comity analysis to determine the applicability of Article VIII, Section 2(b) of the Fund Agreement, which, as a codification of international law, should provide for an objective analysis. The application of Article VIII, Section 2(b) would have overcome the error committed by the *Allied Bank II* court in its evaluation of the remedial nature, rather than the form, of Costa Rica's conduct.²³⁰ Although the court discerned that the exchange controls served a remedial function analogous to a bankruptcy procedure,²³¹ it failed to recognize that unilateral debt restructuring by an insolvent debtor is inconsistent with U.S. bankruptcy laws. These laws, for example, provide for creditor participation in the formulation of the debtor's reorganization plan²³² and a neutral arbiter to approve and supervise its implementation.²³³ In contrast, Article VIII,

²²⁷ See Ebenroth & Teitz, *supra* note 25, at 244-45. The *Allied Bank I* court, for act of state purposes, similarly focused on the imposition of exchange controls. See *supra* notes 71-72 and accompanying text.

²²⁸ By characterizing the payments moratorium as an expropriation, the *Libra Bank* court made applicable *Sabbatino* and the progeny of cases limiting the act of state doctrine to expropriations accomplished within the territory of the acting foreign state. See *Libra Bank*, 570 F. Supp. at 877-80. See also Ebenroth & Teitz, *supra* note 25, at 244. The characterization by the *Allied Bank III* court was not essential to its comity analysis, but may nonetheless reflect the court's predisposition against the exchange controls. See *Allied Bank III*, 757 F.2d at 522.

²²⁹ This recognition is consistent with the principle that a foreign state can take steps necessary to protect its exchange resources. See RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 198 (1965). See also RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 199 (1965) ("Conduct attributable to a state and causing damage to an alien does not depart from the international standard of justice . . . if it is reasonably necessary to conserve life or property in the case of disaster or other serious emergency.").

²³⁰ See *supra* notes 113-17 and accompanying text.

²³¹ See *supra* notes 112-13 and accompanying text.

²³² The United States Bankruptcy Code provides for the appointment of a creditor committee which may assist an insolvent debtor in formulating a plan for reorganization of its debts. See U.S. Bankruptcy Code, 11 U.S.C. § § 1102-03 (1982). See also U.S. Bankruptcy Code, 11 U.S.C. § 1109(b) (1982) (any party of interest has a right to address a court before a reorganization plan takes effect).

²³³ The United States Bankruptcy Code provides for judicial supervision to ensure fair treatment of creditors. See U.S. Bankruptcy Code, 11 U.S.C. § 943 (1982) (a court must approve municipal reorganization plans); 11 U.S.C. § 943(b)(6) (1982) (municipal reorganization plan must be in the best interests of creditors and be feasible); 11 U.S.C. § 1123(a)(4) (1982) (reorganization plans must provide for equal treatment of claims and among classes of creditors); 11 U.S.C. § § 1128-29 (1982) (a court must confirm any reorganization plan).

Section 2(b) specifically addresses the legitimacy of exchange controls in member states,²³⁴ and its operation would afford a debtor state a reprieve analogous to a stay of collection actions available under U.S. bankruptcy law.²³⁵ Although U.S. foreign policy does not expressly endorse Article VIII, Section 2(b),²³⁶ its applicability would, nonetheless, be consistent with the U.S. debt resolution strategy. Since this strategy supports an IMF equipped to oversee a debtor nation's debt resolution efforts,²³⁷ the court of appeals could have inferred that U.S. foreign policy endorses the Fund Agreement, including Article VIII, Section 2(b), from which the IMF derives its authority. Had the court properly focused on the legitimacy of exchange controls as remedial devices under Article VIII, Section 2(b), its decision could have clarified that Article VIII, Section 2(b), independent of the principle of comity, ultimately should determine the extraterritorial enforcement of exchange controls.

D. *Applicability of Article VIII, Section 2(b) of the Fund Agreement*

The court of appeals in *Allied Bank III*, had it chose to determine the applicability of Article VIII, Section 2(b) of the Fund Agreement, could have reevaluated the provision's scope and effect under established principles of treaty interpretation.²³⁸ A treaty, whether construed strictly or liberally, should always

The *Allied Bank II* court's reliance on the *Canadian Southern* decision was similarly misplaced. For a discussion of the court's analysis, see *supra* notes 109–12 and accompanying text. In *Canadian Southern*, a majority of bondholders had approved the reorganization plan before its passage by the Canadian Parliament. 109 U.S. at 535. Moreover, the U.S. Supreme Court's recognition of the act passed by the Canadian Parliament accepted that Canada properly exercised its right to regulate the internal legal relations of the corporation the existence of which derived from its laws. See *id.* at 537. See also *Second Russian Insurance Co. v. Miller*, 268 U.S. 552, 560 (1925) (limiting *Canadian Southern* to signify that "the legal relations of the members of a corporation and to each other must be regulated and controlled by the jurisdiction in which the corporation is organized"). The Costa Rican exchange controls did not directly regulate the internal affairs of Costa Rican corporations, but only prevented Costa Rican nationals from obtaining foreign exchange to meet external debt payment obligations. See *supra* notes 14–16 and accompanying text.

²³⁴ For the manner in which the court should have construed Article VIII, Section 2(b), see *infra* notes 238–82 and accompanying text.

²³⁵ The United States Bankruptcy Code provides for an automatic stay of all types of collection proceedings against a debtor upon the commencement of any voluntary or involuntary bankruptcy case. U.S. Bankruptcy Code, 11 U.S.C. § 362 (1982).

²³⁶ The amicus brief filed by the U.S. government in the rehearing of *Allied Bank II* did not refer to Article VIII, Section 2(b). For a statement of the U.S. debt resolution strategy, see *supra* note 132.

²³⁷ See *supra* notes 132 and 201.

²³⁸ There are various methods by which Article VIII, Section 2(b) can be interpreted. One commentator remarks that, to interpret the Article,

one must take into account its wording; its context within the IMF Agreement; its negotiating history; its formal interpretation by the Fund; other IMF actions respecting the subsection; the extensive practice under it, including the many national court decisions in its 40-year history; and the rich scholarly commentary regarding its scope and analyzing decisions applying it.

be interpreted to effectuate its manifest purposes.²³⁹ When a treaty is amenable to two conflicting interpretations, whereby one restricts and the other expands the rights that may be claimed under it, the liberal construction is preferred.²⁴⁰ Consistent with a liberal construction, a treaty's applicability should conform to changing circumstances, rather than be restricted by its literal terms.²⁴¹ A consideration of Article VIII, Section 2(b) in light of these principles supports a liberal construction of its scope and effect,²⁴² abandoning the restrictive view preferred in *Libra Bank*.²⁴³ Furthermore, a liberal construction would effectuate the purposes of the Fund Agreement²⁴⁴ and conform the provision's meaning

EDWARDS, INTERNATIONAL MONETARY COLLABORATION 477-78 (1985). In general, courts have tended to support interpretations of Article VIII, Section 2(b) without policy justification. See GOLD, THE FUND AGREEMENT IN THE COURTS: VOLUME II 5-6 (1982) [hereinafter cited as GOLD, VOLUME II]. Commentators, in general, give broader reading to the provision by focusing on its intent, legislative history, literal terms and correlation with the Fund Agreement. See, e.g., MANN, *supra* note 67, at 383-91; Williams (1975), *supra* note 61, at 322-32.

²³⁹ See, e.g., *Baccardi Corp. v. Domenesch*, 311 U.S. 150, 163 (1940); *Factor v. Laubheimer*, 290 U.S. 276, 293-94 (1933); *Reed v. Wisner*, 555 F.2d 1079 (2d Cir. 1977), *cert. denied*, 434 U.S. 922 (1977). See also RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 147(b) (1965) (courts should interpret international agreements to effect their stated purposes).

²⁴⁰ See, e.g., *Baccardi Corp. v. Domenesch*, 311 U.S. 150, 163 (1940); *United States v. A. L. Burbank & Co., Ltd.*, 525 F.2d 9, 14 (2d Cir. 1975), *cert. denied*, 426 U.S. 934 (1976); *Maschinenfabrik Kern, A.G. v. Northwest Airlines, Inc.*, 562 F. Supp. 232, 236 (D.C. Cir. 1983).

²⁴¹ See, e.g., *Reed v. Wisner*, 555 F.2d 1079, 1088 (2d Cir. 1977), *cert. denied*, 434 U.S. 922 (1977); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 35 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1975); *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804, 812 (2d Cir. 1966). In *Day*, the Second Circuit Court of Appeals stated:

Those called upon to construe a treaty should . . . strive to "give the specific words of a treaty a meaning consistent with the genuine shared expectations of the contracting parties" These expectations can, of course, change over time. Conditions and new methods may arise not present at the precise moment of drafting. For a court to view a treaty as frozen in the year of its creation is scarcely more justifiable than to regard the Constitutional clock as forever stopped in 1787.

Day, 528 F.2d at 35. In *Eck*, the court stated that the inquiry to discern and to articulate a treaty provision's purpose should not be limited to the provision's literal terms, as the terms may not reflect the provision's purpose as conformed to changed conditions since its adoption. *Eck*, 360 F.2d at 812. The court stated:

It would be inconsistent with the "wise counsel to reject the tyranny of the literalness," . . . if the court . . . did not seek to interpret the provision so as to effectuate its purpose, even if this requires departing from in some measure from the letter and reading of the language in a practical rather than literal fashion.

Id.

²⁴² See *infra* notes 260-70 and accompanying text.

²⁴³ This preference is evident in the court's first two alternative views of Article VIII, Section 2(b). See *supra* notes 104-05 and accompanying text.

²⁴⁴ Article I of the Fund Agreement states the purposes of the Fund Agreement:

- (i) To promote international monetary cooperation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems.
- (ii) To facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income

to the IMF's supervisory, coordinating role in the debt resolution process.²⁴⁵ Had the court of appeals adopted such an interpretation, it would have resolved the ambivalence of the *Libra Bank* court's construction of Article VIII, Section 2(b),²⁴⁶ thereby reducing the uncertainty as to the effect of exchange controls on international financial transactions.²⁴⁷

The applicability of Article VIII, Section 2(b) primarily depends on which contracts come within its purview and the effect of exchange controls imposed after the formation of a valid executory contract. Restricting the term "exchange contracts" to contracts for the actual exchange of currencies,²⁴⁸ the *Libra Bank* court concluded that to define international loans as exchange contracts "does violence to the text of the section."²⁴⁹ In contrast, many commentators liberally

and to the development of the productive resources of all members as primary objectives of economic policy.

(iii) To promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation.

(iv) To assist in the establishment of a multilateral system of payments in respect of current transactions between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade.

(v) To give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity.

(vi) In accordance with the above, to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members.

FUND AGREEMENT, *supra* note 30, Art. I.

²⁴⁵ The IMF plays a key role in the debt resolution process. See *supra* notes 132 and 197. Generally, the IMF serves three functions in this process: it assists in formulating debtor nation's economic adjustment programs the implementation of which is a condition to receiving IMF financing; it provides financing to debtor nations with balance of payments difficulties and, by threatening not to provide financing without cooperation by commercial banks, persuades commercial banks to provide new external financing. See Hudes, *supra* note 118, at 563; Robichek, *supra* note 30, at 146. See also Saugen, *Managed Lending: An Assessment of the Current Strategy Toward LDC Debt*, 17 N.Y.U. J. INT'L L. & POL'Y 533, 534-36 (1985).

²⁴⁶ See *supra* notes 103-06 and accompanying text.

²⁴⁷ The IMF could resolve the questions concerning Article VIII, Section 2(b): the Executive Board of the IMF has the authority to settle any question of interpretation of the Fund Agreement arising between members. FUND AGREEMENT, *supra* note 30, Art. XXIX(a). One commentator states that it is generally held that interpretative decisions of the IMF are binding on the courts and administrative bodies of members. EDWARDS, *supra* note 238, at 37. Whether IMF interpretative decisions are binding or merely persuasive authority, however, is a matter that is much more controversial than the author perceives. See, e.g., *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1119 n.26 (5th Cir. 1985) (although not determining whether IMF interpretations are binding on signatory nations, the court employed an IMF interpretation "merely as persuasive rather than binding authority"); *Braka v. Bancomer, S.A.*, 589 F. Supp. 1465, 1473 (S.D.N.Y. 1984), *aff'd*, 762 F.2d 222 (2d Cir. 1985) (citing IMF interpretation as to matter of fact, but not applying as the rule of decision the provision of the Fund Agreement to which the interpretation pertained); *Banco do Brasil, S.A. v. A. C. Israel Commodity Co.*, 12 N.Y.2d 371, 376, 190 N.E.2d 235, 236-37, 239 N.Y.S.2d 872, 874 (1963), *cert. denied*, 376 U.S. 906 (1964) (using IMF interpretation to support the court's construction of Article VIII, Section 2(b)); Williams (1975), *supra* note 61, at 329-30.

²⁴⁸ See *Libra Bank*, 570 F. Supp. at 897-900.

²⁴⁹ *Id.* at 899. *Accord*, *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda), Ltd.*, 37 N.Y.2d 220, 229,

construe exchange contracts as contracts affecting the balance of payments of the member whose currency is involved.²⁵⁰ While one leading commentator maintains that a member's currency is involved if its balance of payments is in any way affected,²⁵¹ other commentators construe currency as meaning foreign exchange and argue that a currency is involved if the performance of a contract necessarily contemplates an increase in, or depletion of, the member's foreign exchange reserves.²⁵² Under either liberal construction on this point, international loan agreements payable in the United States in U.S. currency would come within the scope of Article VIII, Section 2(b).²⁵³ Yet, even if loan agree-

333 N.E.2d 168, 174, 371 N.Y.S.2d 892, 900 (1975), *cert. denied*, 423 U.S. 866 (1975); *Banco do Brasil, S.A. v. A. C. Israel Commodity Co.*, 12 N.Y.2d 371, 376, 190 N.E.2d 235, 236, 239 N.Y.S.2d 872, 874 (1963), *cert. denied*, 376 U.S. 906 (1964). See also Nussbaum, *Exchange Control and the International Monetary Fund*, 59 YALE L.J. 421, 426 (1950) ("exchange contracts" should be limited to "transactions which have as their immediate object 'exchange', that is, international media of payment").

²⁵⁰ See, e.g., GOLD, VOLUME II, *supra* note 238, at 425; MANN, *supra* note 67, at 384-91; Williams (1975), *supra* note 51, at 321; Meyer, *Recognition of Exchange Controls After the International Monetary Fund Agreement*, 62 YALE L.J. 867, 868 (1953). Generally, European courts have endorsed a broad view of the meaning of exchange contracts. See Williams, *Foreign Exchange Control Regulation and the New York Court of Appeals: J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda), Ltd.*, 9 CORNELL INT'L L. J. 239, 246 (1976) [hereinafter cited as Williams (1976)]. For recent comparative studies of Article VIII, Section 2(b), see Krasnostein, *The Use of Multi-Currency and Multi-International Jurisdiction Stability Agreements Under Article VIII, Section 2(b) of the International Monetary Fund Articles of Agreement*, 12 SYR. J. INT'L L. & COM. 15 (1985); Note, *The Unenforceability of International Contracts Violating Foreign Exchange Regulations: Article VIII, Section 2(b) of the International Monetary Fund Agreement*, 25 VA. J. INT'L L. 967 (1985) [hereinafter cited as Note, *Unenforceability*].

²⁵¹ Gold, *The Fund Agreement in the Courts—XIX*, 31 IMF STAFF PAPERS 179, 192 (1984). Gold states that confusion concerning the scope of the Article "would not arise if 'exchange contracts' were understood to be contracts that affect the balance of payments of a country while the words 'involve the currency' point to the country whose balance of payments, and therefore, its currency, is affected." *Id.*

²⁵² See, e.g., EDWARDS, *supra* note 238, at 488; MANN, *supra* note 65, at 391-92; Williams (1975), *supra* note 61, at 349. Gold earlier maintained this view and focused on whether a contract affected, in an economic sense, a member's exchange resources. See GOLD (1965), *supra* note 67, at 25. Williams holds that a member's currency is involved when either the contract is entered into by a resident of the member or the contract deals with assets located within the member's territory; but this formulation presents the problem of locating the situs of a debt. See Williams (1975), *supra* note 61, at 349-50. Mann provides a more specific, although more limited, position, stating that "the involvement of the currency must . . . be due to the particular exchange contract in issue." MANN, *supra* note 65, at 392. Edwards provides a restrictive reading, focusing on a member's exchange resources but not interpreting currency in a broad economic sense: he proposes that a currency is involved if either the contract in dispute contains an express or implied term providing for that currency to be the currency of payment, or the performance of the contract "in fact" makes necessary payment or transfer of that currency. EDWARDS, *supra* note 238, at 488.

²⁵³ See EDWARDS, *supra* note 238, at 489; Gold, *supra* note 251, at 192; Williams (1975), *supra* note 61, at 338. Edwards recognizes that for purposes of the second prong of his proposed test, "whether it is necessary in fact to use a particular currency in order to perform the contract is to be determined on the facts of each case." EDWARDS, *supra* note 238, at 489. If a debtor has sufficient assets in the United States to satisfy a debt obligation, the Edwards test does not make clear whether the loan agreement underlying the debt would involve the currency of a member of which the debtor is a national. See *id.*

ments do constitute exchange contracts, a narrow view of Article VIII, Section 2(b), as in *Libra Bank*,²⁵⁴ limits the provision's applicability to the original validity of a contract.²⁵⁵ In contrast, a liberal construction of the provision allows intervening exchange controls to render valid obligations to perform under executory contracts unenforceable.²⁵⁶ This view suspends, but does not void, the obligations to perform.²⁵⁷ Therefore, although *Libra Bank* exemplifies judicial reluctance to expand the applicability of Article VIII, Section 2(b), the liberal interpretation of its scope and effect — both including international loan agreements within the meaning of exchange contracts and allowing intervening exchange controls to suspend the performance of valid contracts — is supported as a matter of treaty interpretation.²⁵⁸

A liberal construction would help to effectuate the objective of the Fund Agreement “[t]o shorten the duration and lessen the degree of disequilibrium in the international balance of payments of members”.²⁵⁹ Debtor nations' balance of payments problems, collectively accounting for the international debt crisis, while precipitated by factors which include explosive growth in international lending, persist because of, among other reasons, spiralling debt servicing burdens.²⁶⁰ Allowing a suspension of debt servicing through operation of Article VIII, Section 2(b) would provide debtor nations with a reprieve, under the Fund Agreement, from the burden that may have necessitated the call for emergency debt relief.²⁶¹ A payments moratorium given effect under Article

²⁵⁴ *Libra Bank*, 570 F. Supp. at 900.

²⁵⁵ This view, which is supported by the use of the present tense in the provision, regards the purpose of Article VIII, Section 2(b) as preventing enforcement of contracts that were intended at the time of their formation to evade or avoid a member's exchange controls. MANN, *supra* note 67, at 377–78. This view, however, renders irrelevant all events subsequent to the formation of an executory contract, and consequently, it would permit enforcement of the exchange controls of a nation that has withdrawn from the IMF, even though the Fund Agreement is intended to benefit only IMF members. Gold, *supra* note 251, at 193.

²⁵⁶ See Gold, *supra* note 251, at 193; Williams (1975), *supra* note 61, at 364–67; Meyer, *supra* note 250, at 893. Two recent cases infer recognition of not only intervening exchange controls, but also a broad interpretation of the meaning of exchange contracts. See *Braka v. Bancomer, S.A.*, 589 F. Supp. 1465, 1473 (S.D.N.Y. 1984), *aff'd*, 762 F.2d 222 (2d Cir. 1985) (the possibility that certificates of deposit may be rendered unenforceable by later Mexican exchange controls indicated that the U.S. creditors “accepted the risks attending foreign investments”); *Weston Banking Corp. v. Turkiye Garanti Bankasi*, 57 N.Y.2d 315, 326, 442 N.E.2d 1195, 1200, 456 N.Y.S.2d 684, 689 (1982) (court would have considered the applicability of Article VIII, Section 2(b) had Turkish exchange controls suspended all external debt payments in foreign exchange, even though the controls were enacted after the parties executed the promissory notes in dispute).

²⁵⁷ See GOLD (1965), *supra* note 67, at 23; Williams (1975), *supra* note 61, at 364. For the IMF interpretation concerning the unenforceability of contracts under Article VIII, Section 2(b), see *supra* note 66 and accompanying text.

²⁵⁸ See *supra* note 8.

²⁵⁹ FUND AGREEMENT, *supra* note 30, art. I(vi).

²⁶⁰ See *supra* note 8.

²⁶¹ Gold, *supra* note 251, at 193. See Williams (1975), *supra* note 61, at 366–68.

VIII, Section 2(b) would thereby allow a debtor nation to restrict destabilizing outflows of capital,²⁶² and afford the debtor nation an opportunity to eradicate economic and structural problems contributing to its payments imbalances.²⁶³

Moreover, a liberal construction of Article VIII, Section 2(b) would be consistent with the objective "[t]o promote international monetary cooperation" through the auspices of the IMF and the Fund Agreement.²⁶⁴ Article VIII, Section 2 of the Fund Agreement²⁶⁵ establishes a legal regime, focused on the supervisory role of the IMF, for determining the legitimacy of foreign exchange controls.²⁶⁶ Article VIII, Section 2(b) provides for the extraterritorial enforcement of exchange controls imposed consistently with the Fund Agreement.²⁶⁷ The requirement of consistency relates back to Article VIII, Section 2(a), which

²⁶² Retention of capital would protect a member's exchange resources. See Williams (1975), *supra* note 61, at 366. It could also ameliorate the member's balance of payments difficulties inasmuch as capital outflows, usually encouraged by overvaluation of the debtor nation's currency and by inflationary pressures in the debtor nation's economy, exacerbate payments imbalances. See IMF (1983), *supra* note 8, at 7. For a definition of balance of payments, see *supra* note 30.

²⁶³ The need for such a grace period is recognized by the IMF in its policy statement regarding the imposition of exchange controls for balance of payments purposes:

If members, for balance of payments reasons, propose to maintain or introduce measures which require approval under Article VIII, the Fund will grant approval only where it is satisfied that the measures are *necessary* and that their use will be *temporary* while the member is seeking to eliminate the need for them. (Emphasis added)

International Monetary Fund, Decision No. 1034-(60/27), *reprinted in* SELECTED DECISIONS, *supra* note 63, at 241. Recognition of the need for a grace period during which a debtor nation can implement structural and policy changes essential to restoring sustained debt servicing capability also underlies the concept of debt restructuring. See Meissner, *supra* note 118, at 138-39. Furthermore, affording a debtor nation to suspend debt obligations with the support of Article VIII, Section 2(b) would ensure temporary debt relief through a reprieve analogous to a stay of collection proceedings under U.S. bankruptcy law, rather than forcing the debtor nation to rely on voluntary debt restructurings. For a discussion of the stay under U.S. bankruptcy law, see *supra* note 235 and accompanying text.

²⁶⁴ FUND AGREEMENT, *supra* note 30, art. I(i). Commentators supporting a liberal construction of Article VIII, Section 2(b) cite the promotion of international monetary cooperation as the paramount purpose which an interpretation of the provision should effectuate. See MANN, *supra* note 67, at 384; Williams (1976), *supra* note 250, at 246. In contrast, a recent commentator, advocating retaining a restrictive interpretation of Article VIII, Section 2(b) to promote "relative certainty of the interpretation of contracts", reasons that such "certainty of interpretation can preserve New York's position as the [world's] leading financial center." Note, *Unenforceability*, *supra* note 250, at 998-99. This reasoning only undermines the goal of international monetary cooperation as it tends to advance U.S. financial hegemony at the expense of legitimate economic concerns of other member nations.

²⁶⁵ As of January 1984, approximately three-fifths of the IMF's membership had not accepted all the obligations under Article VIII, but instead, relied on the "transitional arrangements" of Article XIV of the Fund Agreement, which allow a member "to maintain and adapt to changing circumstances the restrictions on payments and transfers for current international transactions that were in effect on the date on which it became a member." EDWARDS, *supra* note 238, at 20. The IMF interpretation of Article VIII, Section 2(b) states, however, that Article VIII, Section 2(b) binds all members, including those nations relying upon the Article XIV transitional arrangements. *Id.* at 478. For a discussion of the IMF interpretation of Article VIII, Section 2(b), see *supra* notes 63-68 and accompanying text.

²⁶⁶ For an analysis of Article VIII, Section 2 of the Fund Agreement, see generally EDWARDS, *supra* note 238, at 389-422.

²⁶⁷ See *supra* text accompanying note 30.

prohibits members from imposing, without IMF approval, "restrictions on the making of payments and transfers for current international transactions."²⁶⁸ As defined in the Fund Agreement, payments for current international transactions include payments of interest on loans and moderate amounts for the amortization of loan principal.²⁶⁹ The regime of Article VIII, Section 2, therefore, contemplates that the IMF must approve a member's moratorium on payments of interest or moderate amounts of amortization effected through exchange controls in order for the moratorium to have extraterritorial effect.²⁷⁰

²⁶⁸ FUND AGREEMENT, *supra* note 30, art. VIII, § 2(a). This provision proscribes government action that may delay, limit, or prevent any of the acting country's residents from obtaining a foreign currency issued by an IMF member that the resident needs for making payments to nonresidents in settlement of current international transactions. International Monetary Fund, Decision No. 3153-(70/95), *reprinted in* SELECTED DECISIONS, *supra* note 63, at 243. See EDWARDS, *supra* note 238, at 391. Similarly, the IMF has defined a "restriction" on current international transactions as any "direct governmental limitation on the availability or use of exchange as such." International Monetary Fund, Decision No. 1034-(60/27), *reprinted in* SELECTED DECISIONS, *supra* note 63, at 241. The definition of "payments for current transactions" includes:

- (1) all payments due in connection with foreign trade, other current business, including services, and normal short-term banking and credit facilities;
- (2) payments due as interest on loans and as net income from other investments;
- (3) payments of moderate amount for amortization of loans or for depreciation of direct investments; and
- (4) moderate remittances for family living expenses.

FUND AGREEMENT, *supra* note 30, art. XXX(d). In contrast to the treatment of current transactions, members may impose, without IMF approval, controls on international capital movements but only in a manner which does not restrict payments for current transactions and which does not "unduly delay transfers of funds in settlement of commitments." FUND AGREEMENT, *supra* note 30, art. VI, § 3.

²⁶⁹ FUND AGREEMENT, *supra* note 30, art. XXX(d). Although economists often treat amortization of loans as a "capital" item, the regularity of amortization payments and the financial disruption which would result from their interruption justify treating them as current payments for exchange regulation purposes. EDWARDS, *supra* note 238, at 395 n.55. The determination of what constitutes a "moderate amount" of amortization, though, may require gleaning standards from local experience and commercial practice. See Santucci, *Sovereign Debt Resolution Through The International Monetary Fund: An Alternative to the Allied Bank Decision*, 14 DENV. J. INT'L L. & POL'Y 1, 17 (1985).

²⁷⁰ A controversy exists as to whether the IMF has exclusive authority to determine consistency for purposes of Article VIII, Section 2(b). Edwards states that the IMF has exclusive power derived from Article XXIX of the Fund Agreement, which provides that any question of interpretation of the provisions of the Fund Agreement arising between members must be submitted to the IMF for a decision. EDWARDS, *supra* note 238, at 481-82. Williams maintains, however, that a court may independently make a consistency determination. Williams (1976), *supra* note 250, at 247-48. In support of the latter view, the *Libra Bank* court placed the burden of proof on the debtor banks claiming the Article VIII, Section 2(b) defense to show that Costa Rica's exchange controls were either approved by the IMF or only affecting capital transactions. See *Libra Bank*, 570 F. Supp. at 901-02. In contrast, in *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1118-20 (5th Cir. 1985), the Fifth Circuit Court of Appeals, after concluding that the ambiguous differentiation between current and capital transactions in the Fund Agreement precluded it from making its own consistency determination, relied on as persuasive authority the IMF's consistency determination. In support of this moderate position, Gold suggests that in order to eliminate the risk of denying the effect of legitimate exchange controls simply because a party failed to meet the burden of proof, courts as a matter of prudence should rely on the IMF's consistency determination. See Gold, *supra* note 251, at 200.

In addition, a liberal construction of Article VIII, Section 2(b) would conform to the role performed by the IMF in the debt resolution process.²⁷¹ Through the Fund Agreement, the IMF is charged with the responsibility of monitoring the international monetary system to ensure its orderly operation.²⁷² Accordingly, the IMF works to eradicate monetary disequilibria without disrupting national or world economic growth and stability.²⁷³ In the context of the international debt crisis, the IMF carries out its responsibility by performing a pivotal role in resolving monetary disturbances in a cooperative and constructive manner.²⁷⁴ Most significantly, the debt resolution process depends on the IMF to assist in formulating and overseeing the economic adjustments implemented by debtor nations having debt servicing difficulties.²⁷⁵ The IMF's authority and ability to act derive from the Fund Agreement.²⁷⁶ To restrict the scope and effect of the IMF's authority to regulate exchange controls as contemplated in Article VIII, Section 2(b) undermines the IMF's ability to foster international monetary stability through cooperation and development.²⁷⁷ Conversely, though, a liberal construction of Article VIII, Section 2(b) would enhance the IMF's ability to supervise all actions affecting the international monetary system while encouraging world economic growth and stability.²⁷⁸

While a liberal construction of Article VIII, Section 2(b) would not eliminate the risk that a foreign state may impose a payments moratorium through exchange controls,²⁷⁹ it would contribute a measure of certainty to international

²⁷¹ For a discussion of the U.S. debt resolution process, see *supra* notes 132 and 201.

²⁷² FUND AGREEMENT, *supra* note 30, art. IV, § 3(a).

²⁷³ See Silard, *Exchange Controls and External Indebtedness: Are the Bretton Woods Concepts Still Workable? A Perspective From the International Monetary Fund*, 7 HOUS. J. INT'L L. 53, 69 (1985); Tseng, *The Effects of Adjustment*, FIN. & DEVEL., December 1984, at 4.

²⁷⁴ See Silard, *supra* note 269, at 69.

²⁷⁵ See *supra* notes 132 and 201.

²⁷⁶ See Silard, *supra* note 273, at 69.

²⁷⁷ See *id.*

²⁷⁸ Many commentators propose that the most effective method for resolving the international debt crisis would be to create a formal mechanism for providing emergency debt relief and ordering the rights and duties of debtor nations and creditors in debt restructurings. See, e.g., Debevoise, *Exchange Controls and External Indebtedness: A Model Proposal for A Deferral Mechanism Employing the Bretton Woods Concepts*, 7 HOUS. J. INT'L L. 157, 162-68 (1985); Ebenroth & Teitz, *supra* note 25, at 255-56; Suratgar, *The International Financial System and the Management of the International Debt Crisis*, in DEFAULT AND RESCHEDULING, *supra* note 7, at 151, 155-59; Comment, *supra* note 8, at 135-40; Note, *Procedural Guidelines for Renegotiating LDC Debt: An Analogy to Chapter 11 of the U.S. Bankruptcy Reform Act*, 21 VA. J. INT'L L. 305 (1981). For a proposal of other proposed reforms, see generally Hudes, *supra* note 118, at 567-69.

²⁷⁹ The pricing of international loans, through a risk-premium in interest charges, could reflect the risk of any payments disruption due to a payments moratorium effective under Article VIII, Section 2(b). The pricing of a loan is a function of the risk associated with repayment of the loan, and the contracting parties' expectations concerning how courts will respond to actions in default factor into an evaluation of risk. See Hoffman & Deming, *The Role of the Courts in the Transnational Flow of Funds*, 17 N.Y.U. J. INT'L L. & POL'Y 493, 495 (1985). Although this pricing may seem paradoxically to

financial transactions which the scheme of *Allied Bank III* fails to deliver. In *Allied Bank III* the court of appeals stated that Costa Rica's exchange controls, while not excusing the obligations of the Costa Rican banks, could render the judgment against those banks unenforceable.²⁸⁰ In essence, application of Article VIII, Section 2(b) would have obtained the same result in that valid debts would have been recognized, but would not have been enforced.²⁸¹ Yet, in contrast to *Allied Bank III*, a liberal construction of Article VIII, Section 2(b) would protect against the enforcement of exchange controls contrary to the Fund Agreement, and would facilitate the integration of any payments moratorium effected through legitimate exchange controls into a cooperative plan coordinating the debt resolution efforts by the debtor nation and its creditors.²⁸² Therefore, had the court of appeals adopted a liberal construction of Article VIII, Section 2(b), an equivalent outcome could have ultimately been obtained, and confidence in the international monetary system would have been augmented by affirming the direction of the IMF.

V. CONCLUSION

By failing to address the applicability of Article VIII, Section 2(b) of the Fund Agreement within its act of state and comity analyses, the *Allied Bank III* court not only risked denying extraterritorial effect to exchange controls which may have been legitimate under the Fund Agreement, but also perpetuated the uncertainty concerning the provision's scope and effect on international financial transactions. Despite *Allied Bank III*, Article VIII, Section 2(b) should be liberally reconstrued, consistent with established principles of treaty interpretation, to effectuate the purposes of the Fund Agreement and to conform it to the IMF's role in the debt resolution process. A liberal construction recognizes that restricting the IMF's powers under the Fund Agreement undermines the ability of the IMF to eradicate disturbances in the international monetary system, while at the same time encourages national and world economic growth and stability. Although a liberal construction would not eliminate the risk that a foreign state could impose a payments moratorium through exchange controls, it would ensure that such a payments moratorium would provide only emergency debt relief integrated, through the IMF, with all debt resolution efforts.

increase a debtor nation's debt servicing burdens, by hypothesis the debtor nation's debt resolution efforts, overseen by the IMF, would ensure that only prudent new debt obligations be undertaken.

²⁸⁰ *Allied Bank III*, 757 F.2d at 522.

²⁸¹ See *supra* notes 256-57 and accompanying text.

²⁸² To enhance the certainty of such integration, the privilege of being accorded extraterritorial effect of exchange controls could be contingent on the implementation by the debtor nation of an IMF-approved economic adjustment program and, thus, be treated as is the privilege of obtaining IMF financing. See Santucci, *supra* note 269, at 9-15.

The court of appeals' avoidance of Article VIII, Section 2(b) in *Allied Bank III* both resulted from, and lead into, a muddled act of state analysis and a misdirected comity analysis. Had the court recognized that Article VIII, Section 2(b) supplants the act of state doctrine and the principle of comity, it could have avoided the appearance of a discriminatory, nationalistic judicial bias in its act of state and comity analyses. The court's act of state analysis, reflecting the lack of guidance from the U.S. Supreme Court concerning the proper act of state analysis, evinces the need to reformulate the test to determine how to allocate the decision-making power between the judicial and executive branches of the federal government. This comment proposes that the act of state analysis should consist of a two-part test, focusing on the effect that adjudication of a claim would have on comity and U.S. foreign policy. Under such an approach, the act of state doctrine would not preclude adjudication of claims arising from unilateral restructurings of debts located outside the acting foreign state and not effected through exchange controls. Notwithstanding the act of state analysis, the court of appeals' comity analysis disregarded that Costa Rica imposed its payments moratorium through exchange controls and assumed that the moratorium was akin to an expropriation, leading the court to conclude that it was contrary to the U.S. foreign policy against unilateral debt restructurings. Had the court recognized that Article VIII, Section 2(b) should determine the legitimacy of exchange controls and that Costa Rica's payments moratorium served only a remedial function, it could have, consistent with U.S. foreign policy, equipped the IMF with greater ability to respond to debt servicing crises and would have not risked denying extraterritorial effect to exchange controls that may have been legitimate under the Fund Agreement and U.S. law and policy. Thus, although *Allied Bank III* has been heralded as limiting risk in international financial transactions, the decision only confuses the proper treatment of exchange controls under the act of state doctrine, the principle of comity, and Article VIII, Section 2(b) and impedes the ability of the IMF to oversee the resolution of the international debt crisis.

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