JURISDICTION TO EXPROPRIATE AND THE SHELL GAME OF INTANGIBLE ASSETS

As nations have become more interdependent both culturally and economically their citizens' interests have transcended national boundaries. The ability of a sovereign State to prescribe and enforce laws to regulate this activity within its borders has become a basic tenet of international law.[1] However, limitations do exist on a State's power to enforce laws beyond its borders because it requires a willingness on the part of other sovereigns to respect those laws.[2]

This conflict reaches an extreme when a State attempts to expropriate or nationalize property. The expropriation of tangible business or personal property is the easiest form to call to mind. Pictures of armed militia seizing factories or other businesses are familiar. When a sovereign attempts to seize bank accounts, patents, trademarks or other intangible property, the issues become significantly more complex.[3] The difficulty revolves around the determination of where these intangibles are located and who has jurisdiction over them.

Cases litigated in the United States involving foreign nationalizations generally invoke the act of state doctrine, which means that courts "will not examine the validity of a taking of property within its own territory by a sovereign government."[4] The threshold question which courts must address when confronted with these confiscation cases is where the property was located when the foreign sovereign attempted to exercise jurisdiction. This question is relatively mechanical when applied to tangible real or personal property. The difficulty arises when the confiscation involves intangible property which cannot be readily located.[5] If the property is determined

1. "Oppenhiem correctly held that the independence of a State as well as its territorial and personal supremacy (supreme authority in its territory and over its citizens, both at home and abroad) were not rights at all but were recognized and protected qualities or characteristics of states as international persons." G. VON GLAHN, LAW AMONG NATIONS 126 (1970).

2. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 9 (1965).

3. Intangible property is property as has no intrinsic or marketable value but is merely the representative or evidence of value, such as certificates of stock, bonds, promissory notes and franchises. BLACK'S LAW DICTIONARY 726 (rev. 5th ed. 1979).

4. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

5. One author has gone so far as to say, "the question of the situs of true intangibles may not be capable of answer at all, and yet intangibles exist and may have value, including value in

to have been beyond the reach of the expropriating sovereign, courts in the United States do not consider themselves bound to honor the action and are free to apply otherwise applicable law.[6]

The results of a decision as to where intangibles are located were illustrated by two recent cases brought against Chase Manhattan Bank (Chase) by parties seeking to recover on certificates of deposit obtained in Cuba during 1958 and 1959.[7] Chase denied liability in both cases, claiming the accounts had been seized by the government of Fidel Castro in 1959.[8] In 1984 the United States Court of Appeals for the Second Circuit, in *Garcia v. Chase Manhattan Bank*, held that the seizure did not relieve Chase of its obligation to the depositor.[9] The court held that the act of state doctrine did *not* preclude such an examination.[10] However, that same year, the Court of Appeals of New York, in *Perez v. Chase Manhattan Bank*, ruled that the seizure was not subject to question. In *Perez* the court held that the act of state doctrine *did* preclude the court from examining the actions of the Cuban government.[11] These conflicting conclusions on virtually identical facts raise new doubts about the viability of traditional analysis used in cases of expropriation and intangible property.

This Comment will examine the act of state doctrine as it is applied to the expropriation of intangible property and whether it should have been applied in *Garcia* and *Perez*. To make that determination, the method used to establish the location of the certificates

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a law suit." Lowenfeld, *In Search of the Intangible: A Comment on Shaffer v. Heitner*, 53 N.Y.U. L. REV. 102, 108 (1978).

6. "The act of state doctrine . . . is a judicially accepted limitation on the normal adjudicative processes of the courts, springing from the thoroughly sound principle that on occasion individual litigants may have to forgo decision on the merits of their claims. . . ." First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 769 (1972).

7. Garcia v. Chase Manhattan Bank, N.A., 735 F.2d 645 (2d Cir. 1984); and Perez v. Chase Manhattan Bank, N.A., 61 N.Y.2d 460, 463 N.E.2d 5, 474 N.Y.S.2d 689, *cert. denied*, 105 S. Ct. 366 (1984).

8. *Garcia*, 735 F.2d at 649; and *Perez*, 61 N.Y.2d at 465, 463 N.E.2d at 6, 474 N.Y.S.2d at 690.

9. The circuit court affirmed the lower court judgment of Vincent L. Broderick, J., of the Southern District of New York in favor of Garcia and appealed by Chase. *Garcia*, 735 F.2d at 645.

10. "Chase's debt to Dominguez and Garcia was not extinguished merely because it was forced to pay an equivalent sum of money to a third party." *Garcia*, 735 F.2d at 649. The court continues: "Chase cannot use the act of state doctrine as a defense because the doctrine is not implicated here." *Id.* at 651.

11. "Chase's debt to Manas was payable in Cuba, giving Cuba jurisdiction to collect and enforce it, which the Cuban government exercised. By reason of the act of state doctrine the legitimacy of the confiscation is beyond our review." *Perez*, 61 N.Y.2d at 470, 463 N.E.2d at 9, 474 N.Y.S.2d at 693.

will be explained. Initially this Comment will present the factual background of the two cases in order to illustrate the application of the act of state doctrine in expropriation cases. The focus will then narrow to consider intangibles and the methods used to determine their situs. A discussion of several alternatives for the debtor situs rule will follow. This analysis will conclude that the traditional debtor situs rule should be abandoned and propose that a creditor situs rule would best suit the dictates of the act of state doctrine.

I. FACTUAL BACKGROUND

Juanita Gonzalez Garcia and her husband Jose Lorenzo Perez Dominguez, a wealthy businessman and former government official, visited Chase's Vedado branch in Cuba on March 10, 1958, and obtained a non-negotiable certificate of deposit worth 100,000 pesos. Dominguez and Garcia returned in September and converted an additional 400,000 pesos into dollar denominated certificates of deposit. In late 1958 the certificates were sent to Garcia's cousin in Spain for safekeeping.[12]

In the same fashion Rosa Manas y Pineiro (Manas), the wife of a cabinet minister, purchased five non-negotiable certificates of deposit between May and December, 1958. The certificates of deposit were obtained at Chase's Marianao, Cuba branch and had a total value of $227,336.47.[13]

When Fidel Castro assumed control of the Cuban government on January 1, 1959, Señores Dominguez and Manas took refuge in embassies and soon left Cuba.[14] Manas herself remained in Cuba for the first half of 1959 and she returned for four months in 1960.[15] Garcia did not leave Cuba until 1964.[16]

In February 1959 the new Cuban government enacted Law No. 78, which created the Ministry of Recovery of Misappropriated Property (Ministry).[17] The Ministry was empowered to conduct in-

12. *Garcia*, 735 F.2d at 646-47.

13. *Perez*, 61 N.Y.2d at 465, 463 N.E.2d at 6, 74 N.Y.S.2d at 690.

14. Dominguez took refuge in the Salvadorian embassy. *Garcia*, 735 F.2d at 647. Manas' husband took refuge in the Colombian embassy. *Perez*, 61 N.Y.2d at 466, 463 N.E.2d at 6, 474 N.Y.S.2d at 690.

15. *Perez*, 61 N.Y.2d at 466, 463 N.E.2d at 6, 474 N.Y.S.2d at 690.

16. *Garcia*, 735 F.2d at 647.

17. A series of laws were issued beginning in February, 1959, which authorized the government to confiscate all property of former Batista collaborators. The laws covered most government officials since Batista took power in 1952 as well as members of the Supreme Court, president of the national bank and prominent members of industry, commerce, labor

vestigations, freeze bank accounts, take possession of property, and enact "final decisions" which returned the confiscated property to the "national wealth."[18]

The Ministry ordered Chase to freeze the accounts of Garcia and Dominquez as well as those of Manas. On July 16, 1959, the Ministry ordered the Garcia account closed. Chase complied by remitting a sum equal to their deposits.[19] In September 1959, the Ministry ordered the Manas account closed. Funds in the amount of the certificates of deposit were remitted to the Cuban government.[20] Chase's Cuban branches were nationalized in 1960 and the Banco Nacional de Cuba assumed control of the accounts and facilities.[21]

The decisions of the United States Second Circuit in *Garcia* and the New York Court of Appeals in *Perez* are based on wholly different principles which have been applied to very similar facts. The Second Circuit in *Garcia* held that "if the situs of Chase's debt to Garcia were in Cuba, the Cuban government could validly seize it,"[22] but that Chase's debt was not extinguished simply because it paid the Cuban government. The court concluded that Chase had a contrac-

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and the professions on a 100 person committee created by Batista. *See* M. GORDON, THE CUBAN NATIONALIZATIONS: THE DEMISE OF FOREIGN PROPERTY 72-73 (1976).

18. A translation from Spanish of Cuban Law No. 78 provides in part:

CHAPTER 1

The Ministry and Its Jurisdiction Article 1. The Ministry of Recovery of Misappropriated Property is the proper organization of the Executive Power intended to recover property of any type which has been removed from the National Wealth and obtain the complete restoration of the proceeds of unjust enrichments obtained under cover of the Public Power and so to the detriment of said wealth.

. . . .

Article 5. The Minister shall decree the precautionary measures which may be necessary in order to assure the purpose pursued by this law, and particularly the following:

a) The freezing of bank accounts, the sealing and opening of safe deposit boxes in banks or in other private institutions.

Garcia, 735 F.2d at 647 n.1.

19. *Id.*

20. *Perez*, 61 N.Y.2d at 466, 463 N.E.2d at 7, 474 N.Y.S.2d at 691. Given the precarious position of United States business interests in Cuba following Castro's assumption of power, Chase appears to have had no opportunity to challenge the order. Any denial would, most likely, have been followed by a physical seizure of the assets or some other retaliatory response. This view is reinforced by the fact that the banks were ultimately subjected to the presence of armed militia to ensure compliance and prevent United States managers from leaving. GORDON, *supra* note 17, at 102.

21. When the three American owned banks, First National City Bank of New York, the First National Bank of Boston and the Chase Manhattan Bank, were nationalized, the net assets were over $35,000,000. The implementing resolution linked the nationalization to the "cowardly and criminal economic aggression" committed by the government of the United States. GORDON, *supra* note 17, at 102-03.

22. *Garcia*, 735 F.2d at 650.

tual obligation to pay Garcia because the money had been deposited with the danger of seizure in the minds of both parties.[23]

The New York Court of Appeals in *Perez* ignored any possible contractual obligation and based its decision on the presence of the debtor, Chase, in Cuba which gave the government enforcement power under the reasoning of *Harris v. Balk*.[24] From that point then the confiscation was the act of a foreign sovereign within its territory and thus was beyond review under the act of state doctrine.[25]

II. DEVELOPMENT OF THE ACT OF STATE DOCTRINE

The act of state doctrine requires that courts in the United States not hear cases which would require a questioning of the validity of an act of another government, in its capacity as sovereign, within its own territory.[26] The act of state doctrine originated in seventeenth century England[27] and was recognized in the United States with *Underhill v. Hernandez*[28] in 1897.

The act of state doctrine was first thought to be based on respect for foreign sovereignty.[29] The United States Supreme Court aban-

23. *Id.*

24. 198 U.S. 215 (1905). Simply stated, the rule is that an action can be maintained against a party by an action against the party's debtor. A court's jurisdiction is based on its authority over the debtor and the debtor's location within the territory. For a more detailed discussion of the rule and its implications see *infra* notes 76-102 and accompanying text.

25. *Perez*, 61 N.Y.2d at 473, 463 N.E.2d at 11, 474 N.Y.S.2d at 695. Manas instituted this action in July 1974 by motion for summary judgment in lieu of complaint in the Supreme Court special term of New York County. Chase also moved for summary judgment. The court denied the motions for summary judgment and for dismissal finding that issues of fact were raised by omissions in the certificates of deposit and the Manas' status vis-a-vis the Cuban government when the accounts were expropriated. This was affirmed by the Appellate Division in Manas y Pineiro v. Chase Manhattan Bank, N.A., 383 N.Y.S.2d 357, 52 A.D.2d 794 (1976). When Chase subsequently sought to remove the case to the United States District Court for the Southern District of New York, the court held that litigation of the motion for summary judgment in the state courts deprived the bank of its right to remove the case to federal court and remanded. Manas y Pineiro v. Chase Manhattan Bank, N.A., 443 F. Supp. 418 (1978).

26. Mathias, *Restructuring the Act of State Doctrine: A Blueprint for Legislative Reform*, 12 LAW & POL'Y INT'L BUS. 369 (1980).

27. Courts in the United States generally refer to Blad v. Bamfield, 3 Swans. 604 (App.), 36 Eng. Rep. 992 (Ch. 1674) as the source of the act of state doctrine. Mathias, *supra* note 26, at 370 n.6.

28. 168 U.S. 250 (1897). The Supreme Court first stated the doctrine as follows: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the act of another government done within its own territory." *Id.* at 252.

29. Mathias, *supra* note 26, at 372-73.

doned this view in 1964, in *Banco Nacional de Cuba v. Sabbatino*.[30] In *Sabbatino*, Justice Harlan wrote that the source of the doctrine was the need to maintain the separation of powers and allow only the Executive Branch to conduct foreign policy.[31] Justice Harlan cited several reasons for the judiciary remaining outside such disputes including the following: first, the greater resources of the Executive to investigate and negotiate;[32] second, the chance that judicial intervention would conflict with and embarrass the Executive; and third, that certain titles might become uncertain in foreign commerce.[33]

However the *Sabbatino* opinion did not completely foreclose judicial involvement in cases involving act of state issues. The Supreme Court qualified its holding slightly by stating:

> [W]e decide only that the 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 treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates international law.[34]

Several factors were outlined in the opinion which might lead courts in the United States to examine the legality of foreign acts despite the act of state doctrine. These factors include: 1) the degree of codification and consensus concerning the area of international law involved; 2) the relative weight or sensitivity of the issues in the international community; and 3) the subsequent dissolution of the foreign government.[35] In the absence of these conditions, a court must defer to the Executive.

Dissatisfaction with the act of state doctrine arose soon after *Sabbatino* and was based on a feeling of helplessness experienced when United States courts refused to hear cases which violated widely accepted standards of international law simply because a for-

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30. 376 U.S. 398 (1964).

31. The act of state doctrine does, however, have "constitutional" underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. . . . The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.

Id. at 423.

32. *Id.* at 431-34.

33. *Id.*

34. *Id.* at 428.

35. *Id.*

eign sovereign was a party to the litigation.[36] In response to dissatisfaction with the results of applying the doctrine, both the courts and Congress created several devices for circumventing the act of state doctrine.[37] The congressional response was contained in what has been referred to as the Sabbatino or Second Hickenlooper Amendment.[38] The amendment prohibits courts from invoking the act of state doctrine where the confiscation violated international law.[39]

The exceptions created by the courts to avoid applying the act of state doctrine have been more varied and fall into three groups which parallel the exceptions to the sovereign immunity doctrine. These include: 1) the doctrine need not be applied where a letter from the Executive indicates that United States foreign policy would not be endangered;[40] 2) the doctrine need not be applied where the foreign government's acts are substantially commercial rather than public in nature;[41] and 3) the doctrine need not be applied to prevent counter-

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36. [T]he act of state doctrine prompts automatic judicial reflexes that relegate all disputes involving foreign governments and international law to an unspecified-or nonexistent-forum outside the courtroom. Judicial circumspection and care as to questions of United States foreign policy and limitations on judicial power in matters touching on foreign affairs seem to have become synonymous with unquestioning judicial abstention in cases alleging international law violations by foreign governments.

Mathias, *supra* note 26, at 371.

37. *See generally* Comment, *The Act of State Doctrine: A History of Judicial Limitations and Exceptions*, 18 HARV. INT'L L.J. 677 (1977).

38. 22 U.S.C. § 2370(e)(2) (1970).

39. The Amendment provides:

Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of the state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided*, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in the particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in the case with the court.

Id.

40. This procedure, known as the *Bernstein* exception, was developed in Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvart-Maatschappij, 210 F.2d 374 (2d Cir. 1954), although its future is uncertain following the Supreme Court decision in First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972). In these situations the Executive Branch will convey to the court its determination that the foreign policy needs or aims of the country would not be disturbed by the court's hearing the case. This method accommodates the judicial concern not to interfere in foreign relations matters which are the constitutional responsibility of the Executive.

41. The commercial exception was discussed in Alfred Dunhill of London, Inc. v. Repub-

claims where the expropriating nation has initially brought the issue before a United States court.[42]

Courts have also developed one other method of avoiding the application of the act of state doctrine by determining that the property or interest expropriated was not located within the State's territory and hence there was no jurisdiction over the property.[43] It is the use of this final escape device which will be examined at length in order to determine the viability of the *Garcia* and *Perez* decisions.

III. DEVELOPMENT OF THE SITUS REQUIREMENT

The Supreme Court in *Sabbatino* made it clear that the act of state doctrine is to be applied only where there is a taking of property by a foreign sovereign "within its own territory."[44] The ability of a sovereign State to prescribe and enforce laws, "within its own territory," without external interference, is embodied in the territorial basis of jurisdiction and is a fundamental tenet of international law.[45] A sovereign is free to regulate the rights to property found within its borders, limited only by general international law, and treaties it may enter into with other sovereigns.[46]

When a sovereign has attempted to regulate rights in property outside its territory through expropriation, United States courts have been willing to enforce them only where it would not offend public

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lic of Cuba, 425 U.S. 682 (1976), where Justice White wrote that embarrassment to the Executive would be even more likely, "if we were to require that the repudiation of a foreign government's debts arising from its operation of a purely commercial business be recognized as an act of state and immunized from questions in our courts." *Id.* at 698.

42. This exception was endorsed by the Supreme Court in National City Bank v. Republic of China, 348 U.S. 356 (1954). The justification for this exception was the belief that it would be inequitable to allow a foreign plaintiff to bring a suit without permitting the courts to provide just results to all parties.

43. Comment, *supra* note 37, at 683-88.

44. Banco Nacional de Cuba v. Sabbatino, 376 U.S. at 416 (quoting Justice Fuller in Underhill v. Hernandez, 168 U.S. at 252).

45. The supremacy of a nation within its borders was originally founded on the nineteenth century view that, "the community of nations enjoyed the possession of so-called fundamental rights, including . . . territorial supremacy (sovereignty)." VON GLAHN, *supra* note 1, at 122.

46. Independence means that a state is free to manage its affairs without interference (domestic independence), that is, that it can organize its government as it sees fit, adopt a constitution to suit its own needs, lay down rules and regulations for the property rights as well as the personal rights of its citizens and subjects, determine under what specific conditions foreigners will enter its territory, and so on. In other words, an independent state is "absolute master" in its own house, subject only to such limitations as are imposed on it either by the rules of general international law or by such treaty arrangements as it has made with other states. In essence, therefore, domestic independence means freedom from interference on the part of other states.

Id. at 126.

policy.[47] As this Comment will document, such confiscation decrees are rarely upheld because courts have consistently found the situs of the intangible assets to be outside the confiscating country's territory.

Where the property a State seeks to confiscate is tangible, the question of jurisdiction is one of fact and as such can be easily determined. The more difficult question arises when the property is intangible, such as a bank asset or trademark right, and no physical location exists.[48] The location of the intangible assets represented by the certificates of deposit in *Garcia* and *Perez* is central to determining the validity of the Cuban seizure. If it is possible to find that the intangible property was not located in Cuba at the time of the confiscation and Cuba did not then have jurisdiction over the property, United States courts would not be required to invoke the act of state doctrine.[49] Courts have addressed the problems of the act of state doctrine and intangible assests in several forms. An examination of several of these cases will illustrate how and why United States courts have refused to honor certain expropriation decrees in the past by manipulating the situs rule.

The question of intangibles and the application of the act of state doctrine was raised most directly after *Sabbatino* in *Republic of Iraq v. First National City Bank*.[50] In that case the new government of Iraq sought to confiscate assets of the estate of the late King Faisal II that were held by a New York bank.[51] Despite the fact that the King resided in Iraq and died there during the 1958 revolution, the circuit court refused to honor the confiscation decree because the bank had possession of the assets in New York.[52] As a result, Iraq did not have the necessary jurisdiction to confiscate the assets.[53]

The important distinguishing feature between *Republic of Iraq* and the *Garcia* and *Perez* decisions is the fact that the accounts were held by Irving Trust Company in New York.[54] Unlike Chase, Irving Trust did not have a branch operating in the confiscating country at

47. *See supra* note 2.

48. *See supra* note 5.

49. The relevance of this issue was recognized most clearly by Wachtler, J. (dissenting) in *Perez* where the opinion states that "the court must decide, as a matter of law, the threshold question as to whether the intangible had its situs in the confiscating country." 61 N.Y.2d at 475, 463 N.E.2d at 12, 474 N.Y.S.2d at 696.

50. 353 F.2d 47 (2d Cir. 1965).

51. *Id.* at 50.

52. *Id.* at 51.

53. *Id.*

54. *Id.* at 49.

the time of the decree.[55] The majority in both *Garcia* and *Perez* concluded that the presence of Chase offices in Cuba served to locate the assets there and provide Cuba with jurisdiction.[56]

The validity of that conclusion is brought into question by a series of decisions which found the situs of intangible assets outside the confiscating country. The United States Court of Appeals for the Fifth Circuit addressed this problem in *Tabacelera Severiano Jorge S.A. v. Standard Cigar Co.*[57] There the court held that the act of state doctrine did not apply to preclude the pre-revolution managers of Cuban companies from collecting for shipments made before the Cuban revolution.[58] The court reached that result by determining the situs of the company's accounts receivable to be the United States; hence, Cuba could not validly seize them.[59] After noting the shifting nature of intangibles, the court stated that no reason exists for adopting the fiction that, "the situs is irrevocably at the domicile of the creditor."[60] The court then concluded the debt was not property in Cuba.[61] The court put the problem in perspective by observing that "[t]he situs of intangible property is about as intangible a concept as is known to the law."[62]

The issue was addressed in another Cuban nationalization case, *Menendez v. Saks & Company*.[63] Owners of expropriated Cuban cigar companies brought an action against United States importers to recover payments for certain cigar shipments.[64] Cuban government interveners[65] had received some payments due the original owners but claimed the money was owed for post-nationalization shipments. The court found the United States to be the situs of the obligation to

55. *Id.* at 51.

56. *See supra* notes 22-25 and accompanying text.

57. 392 F.2d 706 (5th Cir. 1968).

58. *Id.* at 716.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 714. The distinguishing feature between *Tabacelera Severino* and the *Garcia* and *Perez* decisions appears to be the characterization of the assets. In *Garcia* and *Perez* the normal debt had its situs at the location of the debtor. In *Tabacelera Severino* the asset was characterized as an account receivable which has as its situs the location of the creditor. As the court indicated, no reason exists for adhering to these irrevocable rules. The same should be true for situations similar to those in *Garcia* and *Perez*.

63. 485 F.2d 1355 (2d Cir. 1973), *rev'd on other grounds sub nom.*, Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).

64. *Id.* at 1360.

65. *Id.* "Interveners" were the individuals appointed by the government to manage the nationalized businesses.

pay the former owners and, therefore, the Cuban seizure of that portion was ineffective.[66] The court, in *Menendez*, reasoned that, "[f]or purposes of the act of state doctrine a debt is not located within a foreign State unless that State has the power to enforce and collect it."[67] Since the parties owing the debts were the United States importers, the court followed the reasoning of *Republic of Iraq* and ruled that the confiscation was without legal effect.[68]

The court in *Menendez*, had applied the same rule used in *Tabacelera Servino*, regarding accounts receivable. The result in each case was that the situs was outside Cuba and unenforceable in the United States.[69] The court made it clear that, "[i]n the absence of any showing that the importers or their agents were present in Cuba or subject to the jurisdiction of Cuban courts at the time of the intervention," the confiscation was ineffective.[70]

The fact that courts consistently locate intangibles outside the expropriating nation was illustrated with reference to the rights to a trademark in *Maltina Corporation v. Cawy Bottling Company*.[71] In *Maltina*, the Cuban government expropriated a Cuban brewing corporation and dissolved the business.[72] The court determined that these actions neither deprived the former owners of the right to make an effective assignment of their United States registered trademark nor cancelled the trademark.[73] This conclusion was based on the determination that "trademarks registered in this country have a local identity—and situs—apart from the foreign manufacturer."[74]

As the act of state doctrine has developed since *Sabbatino*,

66. *Id.* at 1364.

67. *Id.* at 1365.

68. *Id.* Two cases arising from the nationalization of jute mills by Bangladesh, United Bank Ltd. v. Cosmic International, Inc., 392 F. Supp. 262 (S.D.N.Y. 1975), *aff'd in part, remanded in part on other grounds*, 542 F.2d 868 (2d Cir. 1976); and Rapali Bank v. Provident National Bank, 403 F. Supp. 1285 (E.D. Pa. 1975) reinforced this view. In *United Bank*, the products were received in the United States from East Pakistan in 1971. Before payment was made the new nation of Bangladesh was created and both the banks and the jute mills were nationalized. The district court concluded that the debt was located in New York at the time of nationalization and, as such, was not subject to seizure by the new government. In *Rapali Bank*, the district court held that Bangladesh lacked the necessary jurisdiction over the debt since the established situs of the property was the United States.

69. 485 F.2d at 1365.

70. *Id.* In *Garcia* and *Perez*, Chase was still operating offices in Cuba at the time of the confiscation and both courts indicated that was sufficient. *See supra* notes 14-16 and accompanying text.

71. 462 F.2d 1021 (5th Cir. 1972), *cert. denied*, 409 U.S. 1060 (1972).

72. *Id.* at 1023-24.

73. *Id.* at 1030.

74. *Id.* at 1026.

courts have consistently found the situs of intangible assets to be outside the confiscating sovereign's territory.[75] Since *Garcia* and *Perez* appear to be the first times the application has resulted in giving legal effect to confiscations,[76] the time has come to reexamine its basis and examine alternatives.

IV. THE VIABILITY OF THE *HARRIS V. BALK* RULE

Where the rights to an intangible asset are embodied within a document, the location of that document within the territory of a nation has been held sufficient to establish jurisdiction.[77] The rules for determining jurisdiction in these cases are similar to those used with other tangible personal property.[78] The form of jurisdiction involved with these nebulous assets is known in the United States as either *in rem* or *quasi in rem*.[79] The general rule for determining the existence of jurisdiction involving intangibles is contained in the Supreme Court's decision in *Harris v. Balk*.[80] Justice Peckham stated, "[t]he obligation of the debtor clings to and accompanies him wherever he goes."[81] For numerous reasons serious doubt has recently been cast on the viability of this view and its use as a basis of jurisdiction.

First, the Supreme Court and judicial precedent have not always adhered to the *Harris v. Balk* rule. The Court has, at times, ignored the rule when examining whether rights in intangibles may be altered in a forum having adequate jurisdiction over the debtor. In *New York Life Insurance Company v. Dunlevy*,[82] an action to determine

75. Comment, *supra* note 37, at 683.

76. 61 N.Y.2d at 478, 463 N.E.2d at 13, 474 N.Y.S.2d at 697 (Wachtler, J. dissenting). Some would argue that *Sabbatino* was in fact the first recognition of such a confiscation. However, that case involved the expropriation of tangible property, sugar located in Cuba. 376 U.S. at 403.

77. Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1140 (1966). These intangibles include not only monetary assets but also patents, trademarks and other rights to income.

78. "The location within the jurisdiction of a document that embodies the right to intangible assets, for example, a negotiable instrument, has jurisdictional consequences similar to those assigned to the presence of tangible chattels." *Id.*

79. F. JAMES & G. HAZARD, CIVIL PROCEDURE § 12.15 (2d ed. 1977).

80. 198 U.S. 215 (1905). The case developed over $344 which Balk, a citizen of North Carolina, owed Epstein, a citizen of Maryland. Harris, also a citizen of North Carolina, owed Balk $180. While Harris was in Maryland, Epstein garnished the debt from Harris to Balk. When Balk later sought payment in North Carolina Harris set up the Maryland judgment as a defense. The Supreme Court held that the action in Maryland was valid and Harris was discharged from his debt to Balk.

81. *Id.* at 222.

82. 241 U.S. 518 (1916). Mrs. Dunlevy brought suit against New York Life and her fa-

the validity of claims to an insurance policy, Pennsylvania courts clearly had jurisdiction under the principles of *Harris v. Balk*.[83] Despite the presence of the insurance company/debtor within the state, the Supreme Court ruled that only jurisdiction based on presence or domicile would be allowable against Mrs. Dunlevy.[84] As a result, the Pennsylvania court was without jurisdiction and their judgment was not entitled to full faith and credit in other states' courts.[85]

Second, the *Harris v. Balk* rule does not accurately mirror fiscal reality. The debt is a liability for the debtor, who possesses nothing but a future obligation and, as a result, has little interest in, or control over, to whom it is paid.[86] The debt is a valuable asset, however, to the creditor and it is there that concern for proceedings exist. The creditor is bearing the risk of loss, and therefore has the corresponding desire to protect it. The debtor's concern is limited since the obligation is discharged whether it is paid to the creditor or the sovereign.

Third, the *Harris v. Balk* rule creates a complicated and inequitable situation because the debt is payable and enforceable at any bank branch throughout the world.[87] The possibility of multiple situses has been acknowledged, but never strongly considered by the courts.[88] As a multinational corporation, Chase is located in

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ther to recover $2,479.70 on a policy on his life. The case was brought in California state court, removed to federal court, and judgment was for Mrs. Dunlevy. The judgment was affirmed by the court of appeals. The insurance company had set up the defense of an earlier Pennsylvania judgment. The Supreme Court held that California was not bound by the full faith and credit clause to honor the Pennsylvania decision despite the presence of the debtor in Pennsylvania.

83. "Beyond doubt, . . . the Court of Common Pleas at Pittsburgh had ample power through garnishment proceedings to inquire whether she had a valid claim against the insurance company and if found . . . to condemn and appropriate it. . . . Although herself outside the limits of the state such dispositions of the property would be binding on her." *Id.* at 520.

84. *Id.*

85. Liberal interpleader laws particularly where insurance policies are involved may make this specific result unlikely today; however, the principle remains. The inadequacy of the *Harris v. Balk* view is still a concern.

86. Referring to tax problems, the Supreme Court stated: "[D]ebts owing by corporations, like debts owing by individuals are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors." Farmers Loan Co. v. Minnesota, 280 U.S. 204, 213 (1929) (quoting Railroad Company v. Pennsylvania, 82 U.S. (15 Wall.) 300, 320 (1872)).

87. E. SCOLES & P. HAY, CONFLICT OF LAWS 235 (1982). "Under *Harris v. Balk*, a garnishment process could be had wherever a garnishee could be found, if the local statute permitted it." *Id.*

88. Although the Supreme Court accepted the idea of multiple situses in *Curry v. McCanless*, 307 U.S. 357 (1938), that case involved specific activities in both states and did not involve the literally hundreds of locations around the world created in the present situation. It seems inappropriate to use it as justification for establishing this inequitable result.

thousands of places where it does business and is subject to actions everywhere.[89] This creates an unreasonable handicap on all depositors by making them subject to suit from Australia to Zaire and all branches in between. The problem is avoided in the United States by the full faith and credit provisions of the Constitution, because one state is required to recognize the disposition of a debt undertaken in another state.[90] That protection is not guaranteed by any enduring legal limitation in international actions; the courts themselves are the only source of protection.[91] The decisions in *Garcia* and *Perez* placed no limits on the ability of a nation to affect deposits at other branches throughout the world. At an even greater extreme, no reason appears to preclude such actions even where the deposits were made with a bank in the United States.

Fourth, it is important to keep in mind that *Harris v. Balk* dealt only with a portion of the entire question of the ability to obtain jurisdiction through attachment.[92] The Court was not addressing the ability to confiscate property without a hearing or other objective judicial involvement.[93] In fact, there is little reason to believe courts then or now would reach a conclusion with those results despite the absolute language of the opinion.[94] In applying the act of state doctrine, the *Bernstein* exception[95] and the provisions of the Second Hickenlooper Amendment[96] allow an analysis of the propriety of the

89. It was the presence of an operating Chase branch in Cuba at the time of the confiscation as well as the debts being payable there which provided the basis for Cuban jurisdiction. The fact that this view would have allowed an action at any Chase office in any country is never directly addressed by the opinions, except in Judge Watchler's dissent in Perez v. Chase Manhattan Bank, 61 N.Y.2d at 478, 463 N.E.2d at 13, 474 N.Y.S.2d at 697.

90. SCOLES & HAY, *supra* note 87, at 235. "As long as full faith and credit is required to the garnishment judgment, the garnishee is not in danger of having to pay twice." *Id.*

91. In the absence of this sort of constitutional proscription debtors could be subject to liability more than once for the same debt.

92. Implicit in the Court's decision in *Harris v. Balk* were notions of "fair play and substantial justice" as the standard stated. This included, "the duty of the garnishee to give notice to his creditor, if he would protect himself, so that the creditor may have the opportunity to defend himself against the claim of the person suing out the attachment." 198 U.S. at 227.

93. *Id.*

94. "The question remains whether all relationships that would ground jurisdiction in an action brought by the true defendant against his debtor are acceptable in a garnishment proceeding. The language of the decisions is often expansive . . . but the point has little discussion and apparently arises only rarely in litigation." Von Mehren & Trautman, *supra* note 77, at 1140.

95. The *Bernstein* exception, discussed *supra* note 40, provides a mechanism for the Executive to determine whether the United States foreign policy interests would be endangered by a judicial examination of the propriety of the nationalization. Where the taking is found to have been improper the courts may provide relief.

96. The Second Hickenlooper Amendment, discussed *supra* note 39, prohibits courts from

nationalization. It would appear incongruous, then, to adopt an arbitrary rule of jurisdiction which strips those powers from the courts.

Fifth, the reliance on the *Harris v. Balk* rule for determining the situs of intangible assets appears less certain following the Supreme Court's decision in *Shaffer v. Heitner*.[97] There, the Court held that the presence of the intangible alone could not establish jurisdiction and required the minimum contacts set out in *International Shoe v. Washington*.[98] The result of these decisions has been an extreme limitation on the use of *quasi in rem* jurisdiction in the absence of some form of personal jurisdiction over the parties involved.[99] This retreat from the traditional *Harris v. Balk* holding signals the same concerns expressed previously, that a person be given an opportunity to defend an action and not be subject to suit simply because the debtor is present in a particular jurisdiction. Given the virtual abandonment of the *Harris v. Balk* case after *Shaffer*, it seems inappropriate to allow the simple presence of a Chase branch to establish the jurisdiction of a foreign State and through it subject any depositor to action without requiring contacts sufficient under the *International Shoe* rule.[100]

The *Harris v. Balk* rule is neither completely accepted nor uniformly applied.[101] Further, the decision has been eroded over the last eighty years to a point where its application has become simply a matter of personal choice.[102] The dissent in *Garcia* and the majority in *Perez* both placed an unwarranted degree of weight on the *Harris*

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invoking the act of state doctrine where the expropriation violated international law and the President has not directed application of the doctrine.

97. 433 U.S. 186 (1977). This case involved a Delaware court's exercise of *quasi in rem* jurisdiction based on a state law establishing the situs of shares of stock in the state where the corporation is chartered. The Supreme Court held that the fictional situs of the stock in Delaware alone was not sufficient to allow state jurisdiction in the absence of more personal contacts.

98. 326 U.S. 310 (1945).

99. SCOLES & HAY, *supra* note 87, at 237. Although the basic *Shaffer* decision was a conclusion that shares of stock were unrelated to the cause of action and that it would then be unjust to force a defendant to defend herself in a distant forum under threat of default, the result has been an abandonment of the *Harris v. Balk* view that the situs of the intangible alone creates jurisdiction.

100. Whether this would change the result in either *Garcia* or *Perez* is immaterial. Given the absence of an attempt to assert personal jurisdiction the Cuban action should not be given effect.

101. The continuing uncertainty regarding this form of jurisdiction was included in the Restatement (Second) of Conflicts where the authors state, "[i]t is uncertain, . . . whether all of the other bases stated in section 27 for the exercise of personal jurisdiction will suffice for this purpose." RESTATEMENT (SECOND) CONFLICTS OF LAW § 68 comment c (1971).

102. Particularly in cases involving the act of state doctrine where policy considerations play an important role in all decisions, it is unreasonable to conclude that the holdings have created a consistent rule.

v. Balk rule and have based critical policy decisions on infirm ground.

V. ALTERNATIVES

To apply the act of state doctrine in expropriation cases, the property must be located within the territory of the confiscating sovereign.[103] In order to determine whether intangible property is within certain territory it is necessary to resort to some legal fiction.[104] The fiction the courts in *Garcia* and *Perez* use is represented by *Harris v. Balk*.[105] The result is recognition of Cuban jurisdiction and the confiscation of the assets.[106] Given the basic policy nature of the act of state doctrine, centering around the protection of United States interests from arbitrary and discriminatory enforcement abroad,[107] the time has come to examine whether a more appropriate rule/legal fiction exists for these situations. Toward that end this section will examine a standard presented in another Supreme Court situs case and apply it to *Harris v. Balk*. Then this section will outline three alternatives to the rule and the advantages of each.

In *Curry v. McCanless* the United States Supreme Court provided a barometer for use in determining when jurisdiction over intangibles should be recognized if alternative forums exist.[108] While the Supreme Court recognized that complex issues may require abandonment of the old single situs view, "[rights relating to intangibles] can be made effective only through control over and protection afforded to those persons whose relationships are the origin of the rights."[109] Concern for protection of these rights should be central to the policy balance in determining whether the act of state doctrine should be applied.

The *Harris v. Balk* rule, as used by the court in *Perez*, abandons this concern for protection by deciding that the situs of certificates of

103. *See supra* notes 43-45 and accompanying text.

104. *See supra* notes 76-81 and accompanying text.

105. *See supra* notes 22-25 and accompanying text.

106. *Id.*

107. Courts are limited by their own need to maintain credibility. One author discussed the problem in the context of First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972). "Failure to provide meaningful compensation for the taking of Citibank's branches may itself violate an international law duty; the point, however, is that the U.S. court's finding a violation becomes less credible internationally as the facts slip away from the combination of retaliation, discrimination and noncompensation." Kirgis, *Act of State Exceptions and Choice of Law*, 44 COLO. L. REV. 173, 187 (1972).

108. 307 U.S. 357 (1938).

109. *Id.* at 366.

deposit is any branch at which they can be redeemed.[110] This same result would have occurred in *Garcia* in the absence of the express promises on which the Second Circuit relied.[111]

As outlined previously, courts in earlier act of state doctrine cases have always located intangibles in a single country.[112] Nonetheless, the *Perez* and *Garcia* decisions leave the door open for a depositor to be subject to an action anywhere the bank operates. Application of the *Harris v. Balk* rule therefore fails to meet the standard established in *Curry*.

A. Alternative I: Minimum Contacts

The first alternative is to use the minimum contacts test of *International Shoe*.[113] The traditional statement of the rule is that a party must, "have certain minimum contacts with it (the forum) such that the maintenance of suit does not offend 'traditional notions of fair play and substantial justice.' "[114] This test is more useful to the extent that it requires a reasonable connection between the parties suffering the loss and the forum exercising jurisdiction.[115] By using minimum contacts a person is unlikely to be subject to confiscation in an unforseeable forum without warning. The test would also require some connection between the forum and the claim in order to have recognizable jurisdiction. The disadvantage of a minimum contacts analysis would be that judges would be required to analyze a much broader range of activities occurring outside the United States.[116]

It appears unlikely that the minimum contacts analysis would have altered the result in *Garcia* or *Perez*. The presence of Chase, Manas, and Garcia in Cuba, and the fact that the transactions were

110. The situs of the debtor creates jurisdiction wherever that party is found, despite the interested party's lack of reasonable relation to the confiscating State.

111. The purpose of the agreement between Chase and Dominguez and Garcia was to ensure that no matter what happened in Cuba, including seizure of the debt, Chase would still have a contractual obligation to pay the depositors upon presentation of their CDs. . . . Chase was aware of their desire to safeguard their money and assured them that their funds would be protected.

Garcia, 735 F.2d at 650.

112. *See supra* notes 75-76 and accompanying text.

113. 326 U.S. 310 (1945).

114. *Id.* at 316.

115. The rationale being that due process required that a court not exercise jurisdiction where no relation existed between the court and the party whose rights were being affected. *Id.*

116. When this may involve an inquiry into factors which the court would find hard to ascertain with certainty they would be forced to resort to simple speculation or decline jurisdiction to be on the safe side. It was the Executive's superior fact finding ability which led to the act of state doctrine in the first place. *See supra* note 32 and accompanying text.

originally conducted in Cuba indicates that sufficient contacts existed. What the use of this test would have gained, however, was a firmer basis for recognizing Cuban jurisdiction and more complete protection for those whose interests were threatened.[117]

B. Alternative II: Limiting to Seizures of Tangibles Only

The second alternative is outlined by Judge Wachtler in his dissent in *Perez*.[118] Judge Wachtler suggested that the act of state doctrine be applied only to the assets physically seized by the foreign sovereign.[119] This determination would be made in the same manner such issues are resolved in domestic disputes in which possession of a document is all that is required. The advantage of this would be that the legal fictions involved in determining the situs of intangibles could be ignored. Instead, courts could focus their attention on the assets actually seized and for which there is almost unanimous accord that the act of state doctrine should be applied.[120] The disadvantage of this alternative would be the fact that it may ignore the complex nature of modern financial transactions and severely limit another nation's ability to police the activities of multinational corporations. The alternative is also likely to create situations where banks would be subject to multiple liability.[121] Utilizing this theory, both Garcia and Perez would have recovered the amount of their certificates of deposit from Chase.

C. Alternative III: Creditor's Presence

The final alternative is to base jurisdiction on the presence of the creditor rather than the debtor. This view was adopted by the Supreme Court for certain tax purposes in *Farmers Loan Company v. Minnesota*.[122] The rule would operate in the same manner as the traditional debtor rule, but the situs of intangibles would be based on

117. The goal is not to deny Cuban jurisdiction but to ensure that it will not be given effect in the absence of just cause. The minimum contacts analysis guarantees that strong reasons exist for respecting that exercise of jurisdiction.

118. *Perez*, 61 N.Y.2d at 479, 463 N.E.2d at 14, 474 N.Y.S.2d at 698 (Wachtler, J., dissenting).

119. *Id.*

120. *Id.*

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

122. 280 U.S. 204 (1930). The state of Minnesota sought to tax the transfer of certain negotiable bonds and certificates of indebtedness it and its municipalities had issued. The bonds and obligations had been held in New York by a domiciliary and passed under his will which was probated there. The Court held the bonds and certificates had acquired permanent situs for taxation in New York and the transfer was taxable there but not in Minnesota.

where the creditor was found.[123] This would be advantageous because, as discussed above, it is the creditor who has the strongest interest in defending the suit or other action.[124] The result would be a more complete airing of the issues and a correspondingly more informed decision. The disadvantage of this alternative is that a multinational corporation that is a creditor may be subject to suit in forums unconnected with the transaction in issue. This is not as bad as *Harris v. Balk*, because the creditor continues to have an interest in the outcome far greater than the debtor, no matter where it is located.[125]

It is quite likely that this rule would not affect the outcomes in *Garcia* and *Perez* either. This is because both Garcia and Manas were in Cuba at the time of the confiscation or returned sometime thereafter.[126] The use of the creditor's location would still have produced a more acceptable decision because an action involving the persons losing property in the transaction would have been required. In that case the confiscation would seem more palatable to United States courts.

Of the alternatives outlined, the best would be to base jurisdiction on the presence of the creditor. It would provide consistency in application, represent a realistic view of the complexity of modern financial dealings, and ensure the party at risk the greatest chance of access to any process which might be available. This view would also serve to keep practice more in step with international law by requiring a territorial basis of jurisdiction over the party losing property. Finally, this alternative would best meet the standards of *Curry* by maximizing the protection available against suits in distant, unrelated forums.

CONCLUSION

The decision to apply the act of state doctrine in its present form is based on policy considerations of what is best for the United

123. The mechanical aspect of determining where the creditor is located would be performed in the same manner as presently done for debtors, i.e., domicile, principle place of business, etc.

124. *See supra* note 86 and accompanying text.

125. Where presence of the debtor is the sole basis of jurisdiction, the probability of an enlightened decision remains limited by the likelihood that the creditor will, coincidentally, also be in the area. This is because, without the creditor's involvement, the property is being taken without an opportunity to defend against the action.

126. *See supra* notes 15-16 and accompanying text.

States.[127] The sweep of the doctrine has been consistently narrowed since its highwater mark in *Sabbatino* by a series of decisions seeking more uniform and objective application.[128] Today, where judicial consideration would not endanger the foreign policy interests of the Executive, courts have used their own discretion in deciding such cases.[129]

The application of the traditional *Harris v. Balk* rule regarding the situs of intangible assets produces inequitable results.[130] Given the narrowing application of the act of state doctrine and the policy goals which are the basis of the doctrine, it appears time to reexamine the old intangible assets concepts.[131] Thus, the traditional view that an intangible debt has its situs wherever the debtor may be, when used to determine application of the act of state doctrine, should be abandoned.[132]

Three alternatives exist which could be used to determine whether an expropriation of intangibles occurred within a sovereign's borders.[133] The first is to use the minimum contacts analysis of *International Shoe*. The second is to limit it to physical seizures only. The third is to base the question on the ability to obtain some form of jurisdiction over the creditor.[134] Adopting the jurisdiction based on the presence of the creditor would best serve the policy concerns of the act of state doctrine by helping to protect United States interests abroad while bringing the doctrine more in step with the current state of jurisdictional law.

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127. *See supra* notes 29-32 and accompanying text.
128. *See supra* notes 36-39 and accompanying text.
129. *See supra* notes 40-43 and accompanying text.
130. *See supra* notes 86-96 and accompanying text.
131. *See supra* notes 101-02 and accompanying text.
132. *See supra* notes 104-12 and accompanying text.
133. *See supra* notes 113-26 and accompanying text.
134. *Id.*