NEW YORK LAW SCHOOL

NYLS Journal of International and Comparative Law

Volume 7
Number 1 *Volume 7, Number 1, Summer 1986*

Article 5

1986

ACT OF STATE DOCTRINE-BANK'S CONTRACTUAL OBLIGATION FOR DEPOSITS AT EXPROPRIATED CUBAN BRANCH (Garcia v. Chase Manhattan Bank, N.A.)

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ACT OF STATE DOCTRINE—BANK'S CONTRACTUAL OBLIGATION FOR DEPOSITS AT EXPROPRIATED CUBAN BRANCH:—*Garcia v. Chase Manhattan Bank, N.A.* — In *Garcia v. Chase Manhattan Bank, N.A.*,[1] the United States Court of Appeals for the Second Circuit held that Chase Manhattan Bank's home office was liable for certificates of deposit (CDs)[2] purchased at its Cuban branch even though the branch was later expropriated by the Cuban Government.[3] The court refused to apply the act of state doctrine[4] to insulate the bank from liability,[5] and found

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1. 735 F.2d 645 (2d Cir. 1984).
2. *See infra* note 8 and accompanying text.

A certificate of deposit is:

> [A] written acknowledgment by a bank of the receipt of a sum of money on deposit which it promises to pay to the depositor, to his order, or to some other person or to his order, whereby the relation of debtor and creditor between the bank and the depositor is created.

5B MICHIE, BANKS AND BANKING § 313, at 235 (1983); *see also* U.C.C. § 3-104(2)(c)(1977): "A writing which complies with the requirements of this section is (c) a 'certificate of deposit' if it is an acknowledgment by a bank of receipt of money with an agreement to repay it." *Id.*

3. 735 F.2d at 650.
4. For a brief explanation of the act of state doctrine, consider the following view, as expressed by the American Law Institute:

> When an agency of another state has taken action affecting legal relationships of persons or things within its territory and has done so in a manner which makes it clear that it is giving effect to the public interests of the state, the act of state doctrine precludes a court in the United States, except as provided by statute, from examining such action. The policy underlying the doctrine is that the courts should abstain from any action that might hinder the Executive Branch in the conduct of foreign relations.

RESTATEMENT (SECOND) FOREIGN RELATIONS LAW § 41 comment c (1965).

It should also be noted that the act of state doctrine is usually viewed as a rule of domestic law of the United States rather than a requirement of international law. *Id.* § 9 comment c, § 41 comment a; *see also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421 (1964).

For a general overview of the act of state doctrine, see generally Kramer, *Modern Status of the Act of State Doctrine*, 12 A.L.R. FED. 707 (1971); Note, *Adjudicating Acts of State in Suits Against Foreign Sovereigns: A Political Question Analysis*, 51 FORDHAM L. REV. 722 (1982); Note, *Judicial Balancing of Foreign Policy Considerations: Comity and Errors Under the Act of State Doctrine*, 35 STANFORD L. REV. 327 (1983); Note, *The Status of the Act of State Doctrine—Application to Litigation Arising from Confiscations of American Owned Property in Iran*, 4 SUFFOLK TRANSNAT'L L.J. 89 (1980).

For a comparative analysis of the English concept of the doctrine, see Singer, *The Act of State Doctrine of the United Kingdom: An Analysis with Comparisons to United States Practice*, 75 AM. J. INT'L L. 283 (1981). For a survey of countries embracing the doctrine, see RESTATEMENT (SECOND) FOREIGN RELATIONS LAW notes following § 4.

> The RESTATEMENT defines an act of state as follows:
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> An "act of state" . . . involves the public interests of state as state, as distinct from its interest in providing the means of adjudicating disputes or claims that arise within its territory. In determining whether an act is an act of state, the branch or agency of the government—Executive, Judicial, or Legislative—that performed the act is not as important as is the nature of the action taken. A judgment of a court may be an act of state. Usually, it is not, because it involved the interests of private litigants or because court adjudication is not the usual way in which the state exercises its jurisdiction to give effect to its public interests.
>
> A typical state action treated as an "act of state" is the taking by a state of property within its own territory.

RESTATEMENT (SECOND) FOREIGN RELATIONS LAW § 41 comment d (1965).

The act of state doctrine in the United States has its roots in The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812). *See* First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972). The Supreme Court first set forth the doctrine in Underhill v. Hernandez, 168 U.S. 250 (1897):

> 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 acts of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed by sovereign powers as between themselves.

Id. at 252.

Clearly, the public policy behind the act of state doctrine is to protect foreign affairs relations between sovereigns. *See* Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschaapij, 210 F.2d 375 (2d Cir. 1954) (per curiam), *modifying*, 173 F.2d 71 (2d Cir. 1949). Thus, in accordance with the separation of powers principles and a desire for the nation to speak with one voice in foreign affairs, *see* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), courts refuse to make decisions that may effect or embarrass the nation in conducting its foreign policy. *See generally* Note, *Adjudicating Act of State in Suits Against Foreign Sovereigns: A Political Question Analysis*, 51 FORDHAM L. REV. 722 (1982); Note, *Judicial Authority and Presidential Competence: Conflicting Powers Affecting Claims Against Foreign States*, 3 N.Y.L. SCH. J. INT'L & COMP. L. 193 (1982).

Case law and legislation, however, have created exceptions and complicated the doctrine. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (doctrine applied even when foreign sovereign's actions violated international law); Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) (creation of the commercial act exception to the act of state doctrine); *Bernstein*, 210 F.2d 375, *supra* (creation of the "Bernstein exception" to the act of state doctrine); 22 U.S.C. § 2370(e)(2) (1976) (the "Sabbatino amendment" to the Foreign Assistance Act of 1964 was passed with the intent to reverse part of the Sabbatino decision. *See* S. REP. No. 1188, Part I, 88th Cong., 2d Sess. 24 (1964)); Banco Nacional de Cuba v. First National City Bank, 431 F.2d 394 (2d Cir. 1970), *rev'd on other grounds*, 406 U.S. 759 (1972) (the "Sabbatino amendment" confined to cases where confiscated property has been brought into the United States).

This comment deals only with the act of state doctrine and not the international law doctrine of sovereign immunity. Although the two are closely linked, and their terms often used interchangeably, they are, in fact, distinct. Sovereign immunity is a defense available to a state when a claim is brought against it in the court of another state. It is a defense available to the sovereign when sued directly and it bars the consideration of a

that Chase was liable because the contractual obligations[6] undertaken by the branch ensured the depositor of repayment in the event that Cuba seized the debt.[7]

In 1958, during the last months of the Batista regime in Cuba, Juanita Gonzales Garcia (plaintiff) and her late husband Jose Lorenzo Perez Dominguez purchased several non-negotiable CDs from Chase Manhattan Bank's Vedado branch in Cuba.[8] The incentive for the purchase was concern for "the safety of [their] money [because of] the on-going Cuban revolution."[9] The bank officials agreed that "the deposit was a 'private contract' between the bank and Dominguez and Garcia,"[10] and assured the plaintiff and her husband that they were "doing the right thing 'because it was an insurance, security for the money' . . . that Chase's main office in New York would guarantee the certificate[s], and that they could be repaid by presenting the certificate[s] at any Chase branch world-wide."[11]

In 1959, Fidel Castro assumed control of Cuba and the revolutionary Cuban Government enacted Law No. 78,[12] which enabled the Min-

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claim, including an examination of the act (of the state) which gave rise to the claim. *See* RESTATEMENT (SECOND) FOREIGN RELATIONS LAW § 41 comment e (1965). As to the act of state doctrine:

> When a claim involving an act of state is brought against a person whose rights are based on the act of a foreign state but who is not entitled to that state's defense of immunity or against a thing in its possession, it is the act of state doctrine alone that is invoked.

Id.

5. In Perez v. Chase Manhattan Bank, N.A., 61 N.Y.2d 460, 474 N.Y.S.2d 689 (1984), a case almost identical to *Garcia* on the facts, the Court of Appeals of New York held that Cuba's confiscation of bank deposits relieved the bank of liability to pay the depositor. *Id.; see infra* notes 72-75 and 94-112 and accompanying text.

6. 735 F.2d at 650. The certificates of deposit purchased at Chase's Cuban branch created a debtor-creditor relationship between the bank and the depositor (plaintiff). *Id.* at 649; *see infra* notes 58-65 and accompanying text. *See also supra* note 2.

7. 735 F.2d at 650. The majority and minority, however, disagree on this point. *Compare id.* at 650 n.6 *with id.* at 652 n.1. *See also infra* notes 45-53 and 119-21 and accompanying text.

8. 735 F.2d at 646-47. On March 10, 1958, Dominguez and Garcia bought a CD for 100,000 *pesos* returnable on March 10, 1959 at an interest rate of three and one-half percent. On September 16, 1959, they brought a CD for 400,000 pesos returnable on March 16, 1959 at an interest of three percent. *Id.*

9. *Id.* at 646.

10. *Id.*

11. *Id.*

12. *Id.* at 647. Cuban Law No. 78 provides as follows:

CHAPTER I

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

istry of Recovery of Misappropriated Property[13] to freeze bank accounts.[14] The Ministry froze the plaintiff's "account," ordered it closed, and demanded that "Chase remit its value."[15] Chase complied by sending a sum equal to the debt amount to the Ministry.[16] In 1960, the Cuban Government nationalized Chase's Cuban branch, and the National Bank of Cuba assumed the branch's assets and liabilities.[17]

After attempting unsuccessfully to collect on the CDs from Chase,[18] Garcia commenced an action against Chase in 1976 to secure

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type which has been removed from the National Wealth and obtain the complete restoration of the proceeds of unjust enrichments obtained under the cover of the Public Power and to the detriment of said wealth.

For the purposes of the provisions of the preceding paragraph, the National Wealth is understood to be formed by the Wealth of the State, of the Provinces, of the Municipalities, of the Autonomous and Parastatal Organizations, and of the Savings Banks and Social Insurance.

Article 2. For the purposes of the Present Law, the right of action of the Ministry covers:

a) Public officials and servants and officials and employees of autonomous corporations and bodies, and those set forth in Article 154 of the Organic Law of the Court of Accounts.

b) Private natural or juridical persons who in any way have intervened in the matters forming the object of investigation and whose conduct has resulted in damage to the national wealth and enrichment for the benefit of said persons obtained under the coverage of the Public Power.

c) Natural or juridicial persons who, as a result of the investigations carried out, are shown to appear fraudulently as owners of property and holders of rights which actually belong to the person who is the object of the proceedings and in such case the action for return governed by the present Law can be brought against such persons.

. . . .

Article 5. The Ministry shall decree the precautionary measure 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.

Id. at n.1.

13. The Ministry is defined in article 1 of Cuban Law No. 78. *See supra* note 12.

14. Article 5, § (a) specifically provides that the Ministry has the power to freeze bank accounts. *See supra* note 12.

15. 735 F.2d at 647.

16. *Id.* The court places a great deal of emphasis on the origin and nature of the funds confiscated by the Ministry. *See infra* notes 27-32, 43-44 and accompanying text.

17. 735 F.2d at 647. On July 6, 1960, the Castro government enacted Law No. 851, which provided for the nationalization of United States firms in Cuba. Chase's branches were nationalized pursuant to Resolution No. 2 of September 17, 1960. *See also Perez,* 61 N.Y.2d at 463 (1984).

18. 735 F.2d at 647. In 1964, Dominguez inquired of Chase as to the status of the CDs. Chase advised him of Cuba's actions and told him to address further inquiries to the National Bank of Cuba. In 1968, Garcia made a similar inquiry. The Chase response

payment.[19] After a jury trial, Judge Broderick of the United States District Court for the Southern District of New York entered a judgment awarding $760,383.00 as the amount due on the CDs.[20]

On appeal, Chase attacked Garcia's claim on several grounds. Chase's principal substantive argument[21] was that Cuba's actions amounted to a seizure and cancellation of the bank's debt to the plaintiff.[22] Additionally, Chase argued that the act of state doctrine prevented the court from questioning the validity of Cuba's expropriation.[23]

Judge Meskill, writing the Second Circuit's majority opinion, summarized the bank's argument[24] as follows:

> Chase seeks to avoid liability to Garcia on the basis of the Cuban government's actions. It argues that while the CDs could be repaid at any Chase branch worldwide, Cuba's closing of Garcia's "account" and its appropriation of Chase's funds in a sum equal to the amount of its debt to Dominguez and Garcia prior to their presentment of the CDs canceled the debt. It

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was not introduced into evidence. In 1970, Dominguez made another inquiry, and Chase answered by noting and repeating its 1964 response. *Id.*

19. *Id.* at 647-48.

20. *Id.* at 646; *see also* Garcia v. Chase Manhattan Bank, 77 Civ. 5340 (S.D.N.Y. June 7, 1983).

21. In addition to its substantive argument on liability for the CDs, Chase argued that Garcia's claim was barred by the New York statute of limitations. Chase claimed that the "events of 1959 and 1960 and its communication of those facts to Garcia and Dominguez by letters in 1964 and 1968 constituted a clear and unequivocal repudiation" which commenced the running of the statutory period. 735 F.2d at 648. Consequently, because an action for breach of contract must be brought within six years of the accrual of the cause of action, N.Y. CIV. PRAC. LAW § 213 (McKinney 1972), the statutory period would have run as of 1984. *See* Hgoc Dung Thi Tran v. Citibank N.A., 586 F. Supp. 203 (S.D.N.Y. 1983). Conversely, Garcia argued that the Puerto Rican statute of limitations should be applied. 735 F.2d at 648 n.2.

The court noted that "since there is no applicable federal statute of limitations, it is appropriate to look to state law." *Id.* As to Garcia's argument that the Puerto Rican statute of limitation should be applied, the court held that "the point is moot . . . due to our conclusion that her action is not barred by the shorter New York statute of limitations." *Id.* Citing N.Y. U.C.C. §§ 3-122(2) and 3-504, the court concluded that the cause of action on a certificate of deposit accrues upon demand and that demand occurs upon presentment and refusal to pay. *Id.* at 648. The court also found that Chase's letters were not clear and unequivocal repudiation. *Id.* Thus, the court held that the statute of limitations did not begin to run until Garcia made a formal demand for payment on the CDs by filing her complaint. *Id.* at 648-49.

22. *Id.* at 649.

23. *Id.*

24. For the court's decision on Chase's statute of limitation argument, see *supra* note 21.

> then asserts that we may not question the validity of the Cuban government's actions under the act of state doctrine.[25]

The court concluded that "Chase's arguments on both of these issues must fail."[26]

In addressing the expropriation of the deposits, the court reasoned that the mere seizure of assets did not affect Chase's contractual obligation for the CDs.[27] The majority found that the expropriated funds came not "from funds specifically earmarked to Dominguez's and Garcia's 'account' " but, rather, from Chase's general funds, because "title to the deposits was vested in Chase, which became debtor of Dominguez and Garcia."[28] The court reasoned, therefore, that the bank's payment of "an equivalent sum of its own money to a third party" affected Chase's assets but not Chase's debt to the plaintff.[29] To illustrate this point, Judge Meskill analogized the expropriation of the CDs to a bank robbery.[30] The Judge wrote: "The Cuban government did nothing more than 'enter' Chase's Vedado branch armed with Law No. 78 and demand depositors' money."[31] In applying this analysis, the court concluded that the debt was not extinguished when "Chase turned over funds without requiring surrender of the CDs, without notice to the holder of the CDs, and without a fight."[32]

In addressing Chase's second argument, the court found that "Chase cannot use the act of state doctrine as a defense because the doctrine is not implicated."[33] Because the court accepted Chase's argument that, if the situs of the debt were in Cuba, the Cuban Government could validly seize it,[34] the majority opinion clearly implied that the situs of the debt was not in Cuba.[35] Judge Meskill went a step

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25. 735 F.2d at 649.

26. *Id.*

27. *Id.*

28. *Id.* The quoted passage refers to the distinction between "general" and "special" deposits. *See infra* notes 54-65 and accompanying text.

29. 735 F.2d at 649.

30. *Id.*

31. *Id.*

32. *Id.; see infra* notes 54-64 and accompanying text. *See also* 5B MICHIE, *supra* note 2, § 326(a) at 317-18 ("A bank acts at its peril in paying a certificate without surrender thereof and endorsement . . . .").

33. 735 F.2d at 651. The dissent, however, noted that "[t]he majority's result may not have such [international repercussions] in this case, but since it has no foundation whatever in the facts found by the jury it creates precedent that may be used in future cases that could involve such repercussions." *Id.* at 653. *See also infra* notes 45-53 and 113-21 and accompanying text.

34. 735 F.2d at 650; *see infra* notes 66-77 and accompanying text.

35. *Id.* at 650 n.5. Citing Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392

further, however, and proclaimed that "even if what occurred was a seizure of the debt and not merely payment of a sum equal to it, the facts in the instant case call for a result favoring Garcia."[36] Thus, the majority dismissed Chase's act of state doctrine defense and applied an analysis based on the "private contract" between the parties.[37]

The court found the purpose of the "private contract" between Chase and Garcia and Dominguez to be determinative. The majority determined that the purpose of the agreement was "to ensure that, no matter what happened in Cuba, including seizure of the debt, Chase would still have a contractual obligation to pay depositors upon presentation of the CDs."[38] The court reasoned that Garcia and Dominguez deposited their money with Chase because of that bank's "international reputation."[39] The court implied that the depositors wanted to be able to collect on the CDs outside of Cuba in case they were prevented from doing so inside Cuba.[40]

The court also implied that the "private contract" between the parties was a method of allocating the risk involved in a possible Cuban expropriation. Judge Meskill stated: "Chase 'accepted the risk that it would be liable elsewhere for obligations incurred by its branch.' "[41] The court concluded that "if the understanding was that the debt could be paid by turning over the amount of the debt to the Cuban government if it should win the race to the bank, it is apparent that the deposits would never have been made."[42]

In contrast to the majority opinion, the dissent focused on the act of state doctrine. Judge Kearse reasoned that, because Cuba was the situs of the debt and the parties did not specify that the debt could be collected only outside of Cuba, Cuba's seizure of Garcia's assets, by

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F.2d 706, 714 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968), the court noted that "[t]he situs of intangible property is about as intangible a concept as is known to the law." *Garcia*, 735 F.2d at 650 n.5. The court concluded: "where a foreign government has both the parties and the *res* before it and alters their relationship thereto, our courts realize that there is little that they can do to change the legal relationship." *Id.* Thus, when the court stated: "Even if what occurred was a seizure of the debt" immediately after discussing the situs requirement, it implied that Cuba's actions did not meet the above quoted definition of situs. *Id.* at 650.

36. 735 F.2d at 650. By the term "the facts of the instant case," the court seems to have been referring to the purpose of the contract between depositor and the bank. *See infra* notes 76-77 and accompanying text.

37. 735 F.2d at 646. The purchase of the CDs was termed a "private contract" between the bank and depositors. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id. See also infra* notes 78-121 and accompanying text.

42. *Id.*

ordering Chase to deliver those assets to the Cuban Government, was a collection of the debt.[43] Applying the act of state doctrine, Judge Kearse refused "to question the Cuban government's implicit declaration that it need not present [the CDs] in order to seize [the debt] . . . ."[44]

In addressing the majority's conclusion that the purpose of the agreement was to "ensure the safety of Garcia's funds," the dissent argued that the jury's findings did not support that conclusion.[45] Judge Kearse stated:

> The parties *could,* of course, have agreed that even if the Cuban government required Chase to pay it a sum equal to Garcia's account, Chase would still have a contractual obligation to pay Garcia. But the jury found that the parties did *not* contemplate that event in their agreement.[46]

The dissent noted that, in response to interrogatories numbered four and five, the jury found that Chase's branch paid over to the Cuban Government a sum of money equal to the value of the plaintiff's certificates of deposit[47] and that the parties did not contemplate in their agreements that such a payment might be made.[48] The dissent, therefore, concluded that the majority's contractual obligation analysis was inapplicable.[49]

The majority addressed the dissent's criticism by noting that the responses to interrogatories four and five were ambiguous[50] and that,

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43. *Id.* at 651-52.

44. *Id.* at 652. *See also supra* note 4.

45. 735 F.2d at 652-53.

46. *Id.* at 652. (Emphasis in the original).

47. *Id.* at n.1. The jury answered affirmatively with respect to interrogatory 4:

> (4) Has it been established by a preponderance of the evidence that the Verdado (sic) branch of Chase Manhattan in 1959 paid over to the Cuban government a sum of money equal to the value of plaintiff's certificates of deposit?

Id.

48. *Id.* Having answered interrogatory 4 in the affirmative, the jury responded in the negative to interrogatory 5:

> (5) If the answer is yes, did the parties contemplate in their agreements that such a payment might be made?

Id.

49. *Id.* at 652-53.

50. *Id.* at 650 n.6. The majority wrote as follows:

> The dissenting opinion states that the jury decided specifically that the parties did not contemplate that Chase would guarantee the safety of its obligations to Garcia. We disagree. The fact that the jury gave a negative response to interrogatory 5, which asked if the parties "contemplate[d] in their agreements that such a payment might be made," does not indicate to us that the jury deter-

in view of the jury's determination that the defendant was liable to plaintiff with respect to the CDs,[51] it was not improper to resolve all inferences in favor of Garcia.[52] The dissent did not accept this interpretation of the jury's findings and voiced a strong disapproval of what it deemed to be the majority's substitution of its own view for that of the jury.[53]

The dissent was also concerned about the unfairness of requiring the bank to pay the same debt twice. Judge Kearse reasoned that, if Chase paid on its debt to Garcia pursuant to a valid decree of the Cuban Government, it should not be compelled to pay that debt a second time to Garcia.[54]

DISCUSSION

The *Garcia* decision can be divided into three parts: (1) an analysis of the nature and origin of the sum of money confiscated by Cuba; (2) an analysis of the act of state doctrine defense; and (3) an analysis of the "private contract" between Chase's branch and Garcia. Judge Meskill concluded that the mere seizure of assets did not affect Chase's contractual obligation on the CDs,[55] that "Chase cannot use the act of

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mined that the parties did not agree that Chase would ensure against expropriation by the Cuban government . . . . The jury's response to interrogatory 5 could have meant that the parties never contemplated that the Vedado branch would make such a payment in 1959. The jury also could have interpreted interrogatory 5 to inquire whether the parties agreed that such a payment *should* be made.

Id. (emphasis in original).

51. *Id.* The majority pointed to the jury responses to interrogatories 7 and 8 as the factual determination of the defendant's liability. The majority provided the following jury responses:

> Q. "Do you find a preponderance of the evidence that defendant is liable to plaintiff with respect to [the two CDs]?"
>
> A: "Yes."

Id.

52. *Id.* The majority wrote as follows:

> In the absence of a specific and unambiguous finding by the jury on the question of whether Chase agreed to guarantee the safety of the obligation, it was not improper to resolve all inferences in favor of Garcia given the jury's determination as to liability.

Id.

53. *Id.* at 652-53. The dissent wrote: "The majority does not set aside any of the jury findings on any principled basis. It simply ignores them and substitutes its own views." *Id.*

54. *Id.* at 653. Judge Kearse wrote: "I conclude that there is no basis for holding Chase to be an insurer and that the debts owed by Chase to Garcia ceased to exist upon their seizure by the Cuban government." *Id.*

55. *Id.* at 649; *see infra* notes 58-65 and accompanying text.

state doctrine as a defense because the doctrine is not implicated,"[56] and that "the facts in the instant case call for a result favoring Garcia."[57]

1. Nature and Origin of the Sum of Money Confiscated

Bank deposits can be classified as being either "general" or "special" accounts.[58] In a general deposit, money in the bank's possession is the bank's property and the relationship between the bank and the depositor is one of debtor and creditor.[59] In the case of a special deposit, title in the property deposited remains in the depositor, even while the property is in the bank's possession, and the relationship between the bank and the depositor is one of bailee and bailor.[60]

In *Garcia*, the CDs were deemed general deposits.[61] The court applied the distinction noted above, and concluded that the expropriation had no impact on the debtor-creditor relationship between the bank and Garcia.[62] As the dissent pointed out, however, that analysis fails to address Chase's argument that the Cuban Government seized the debt, not just a sum of money equal to the debt.[63]

Chase's argument incorporated the concept of seizure of the debt with an act of state doctrine defense.[64] One commentator has addressed the distinction between seizure of assets and seizure of debts and has concluded that, whereas a nationalization of assets may not affect a bank's liabilities, the nationalization of assets and liabilities accompanied by an application of the act of state doctrine may free a bank of contractual obligations incurred by its branch.[65] Clearly, the court could not limit its inquiry to a mere seizure of assets analysis and was forced to address the alleged seizure of the debt.

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56. 735 F.2d at 651; *see infra* notes 66-77 and 76-126 and accompanying text.

57. 735 F.2d at 650; *see infra* notes 76-126 and accompanying text.

58. 5B MICHIE, *supra* note 2, § 328.

59. *Id.*; Miller v. Wells Fargo Bank International Corp., 540 F.2d 548 (2d Cir. 1976) (depositor held no assignable title to the Swiss Francs on general deposit in Luxembourg); Kondo v. Katzenback, 356 F.2d 351 (D.C. Cir. 1966), *rev'd on other grounds sub nom.* Honda v. Clark, 386 U.S. 484 (1967) (Yen deposited in American branch of Japanese banks were property of bank and not property of depositors).

60. 5B MICHIE, *supra* note 2, § 328.

61. 735 F.2d at 649. Judge Meskill noted that "the money did not come from funds specifically earmarked to Dominguez's and Garcia's 'account.' " *Id.*

62. *Id.*

63. *Id.* at 652.

64. *Id.* at 649.

65. Heininger, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches*, 11 L. & POL. INT'L. BUS. 903, 1020 (1979); *see infra* note 86 and accompanying text.

2. Act of State Doctrine Defense

The act of state doctrine applies to a seizure of a debt only when the situs of the debt is within the sovereign's territory.[66] The situs requirement has its roots in the definition of the doctrine,[67] which requires that the sovereign act be "within its own territory."[68] Accordingly, as Judge Meskill acknowledged, "if the situs of Chase's debt were in Cuba, the Cuban government could validly seize it."[69]

The situs of a debt depends upon the existence of jurisdiction over the debtor.[70] In *Garcia*, Cuba had jurisdiction over Chase's branch, because the bank was doing business in Cuba subject to that sovereign's laws. Consequently, the dissent's argument, that the act of state doctrine extinguishes Chase's debt on the CDs,[71] seems very persuasive.

In *Perez v. Chase Manhattan Bank, N.A.*,[72] a case almost identical

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66. Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982). *See infra* notes 82-84 and accompanying text. *See also* Republic of Iraq v. First National City Bank, 353 F.2d 47 (2d Cir. 1965) (Assets in New York bank were not within Iraq, even though King Faisal, to whom the assets belonged, resided and was physically present in Iraq at the time of his death).

67. *See supra* note 4.

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

69. 735 F.2d at 650. International law provides protection for those harmed by expropriations of foreign-owned firms in developing countries. Contemporary international law recognizes the right of a sovereign to expropriate alien properties, but subjects such right to rules of non-discrimination, territorial limitation and the principles of public utility and adequate compensation. *See* Burton & Inoue, *Expropriations of Foreign-Owned Firms in Developing Countries, A Cross-National Analysis*, 18 J. WORLD TRADE L. 396 (1984). That study notes:

> A large number of . . . expropriations in recent years have been stimulated by formal recognition of [the sovereign's rights to expropriate alien properties] as exemplified by the General Assembly of the United Nations in the Resolution on Permanent Sovereignty over Natural Resources (Resolution 1803 (XVII)) in 1962, and the Declaration on the Establishment of a New International Economic Order (Resolution 3201 (S-VI)) and the Charter of Economic Rights and Duties of States (Resolution 3281 (XXIX)) in 1974.

Id. at 396. In a case like *Garcia*, the "adequate compensation" would probably be a small percentage of the funds expropriated, but discussions between the United States and Cuba on settlement and compensation terms ceased in 1961, when diplomatic relations between the two nations were severed. Burton & Inoue, *supra* at 413. International law has therefore proven to be totally inadequate in protecting plaintiffs, as here, against expropriation of their property.

70. *Vishipco Line*, 660 F.2d 854; Harris v. Balk, 198 U.S. 215, 222 (1905), *overruled in part*, Shaffer v. Heitner, 430 U.S. 189 (1977) (*Harris* had held that jurisdiction could always be obtained through attachment of a defendant's intangible property in the forum state, but *Shaffer* requires "minimum contacts" as a basis for jurisdiction).

71. 735 F.2d at 651.

72. 61 N.Y.2d 460, 463 N.E.2d 5, 474 N.Y.S.2d 689 (1984).

to *Garcia* on the facts,[73] the Court of Appeals of New York applied an act of state doctrine analysis to the confiscation of the bank's debt for CDs purchased at its Cuban branch.[74] The majority held that, since the situs of the debt was in Cuba, the act of state doctrine precluded an inquiry into the propriety of the confiscation, and the bank's surrender of funds representing the debt for the CDs to Cuba relieved it of further responsibility to pay the depositor.[75]

Perez and Judge Kearse's dissent in *Garcia* are very persuasive in their act of state doctrine analyses. In *Garcia,* however, Judge Meskill maintained that the facts called for a decision favoring Garcia.[76] In so holding, the court found the act of state doctrine inapplicable and implied a contractual obligation analysis. Indeed, one may interpret Judge Meskill's statement that, "even if what occurred was a seizure of the debt and not merely payment of a sum equal to it, the facts in the instant case call for a result favoring Garcia,"[77] as a pronouncement of a contractual obligation exception to the act of state doctrine.

3. The "Private Contract" between Chase and Garcia

The contractual obligation exception to the act of state doctrine set forth in *Garcia* seems to have its roots in the general rule of home office liability for branch obligations. Under this rule, when the branch fails to meet its obligations, the home office is liable.[78] In *Sokoloff v. National City Bank,*[79] the bank argued that Russia's seizure of branch assets was a cancellation of the bank's liability to branch depositors. The Court of Appeals of New York stated that, although Russia could prevent the branch from doing business in that country, the end of a branch was not the end of the bank's "duty to make restitution for benefits received without requital."[80] In holding the home office liable for the branch's contractual obligation, the court noted: "this contract the defendant has not yet performed, yet it refuses to return the dollars that were paid to it by the plaintiff upon its promise of performance."[81] Similarly, in *Vishipco Line v. Chase Manhattan Bank,*[82] the

73. *Id.* at 462. In *Perez*, the plaintiff had purchased five certificates of deposit, which were confiscated by the Cuban Government in 1959. *Id.*
74. *Id.* at 466.
75. *Id.*
76. *Garcia*, 735 F.2d at 650.
77. *Id.*
78. United States v. First National City Bank, 321 F.2d 14 (2d Cir. 1963).
79. 239 N.Y. 158, 145 N.E. 917 (1924).
80. *Id.* at 167.
81. *Id.* at 166.
82. 660 F.2d 854 (2d Cir. 1981), *cert. denied,* 459 U.S. 976 (1982).

Second Circuit Court of Appeals held a bank's home office liable for Saigon deposits where the branch had ceased operations in Vietnam prior to a confiscation order.[83] In addition, the court noted that the home office was liable for the Saigon deposits because it operated its business in Vietnam through a branch rather than through a separate corporate entity.[84]

Although *Vishipco* adheres to the general rule of home office liability, the dicta as to a "separate corporate entity"[85] indicates the court's recognition of a possible exception to the general rule. One commentator, Heininger, has suggested the application of a "separate doctrine" for bank branches.[86] According to Heininger:

> Both *Sokoloff* and general corporate principles support the general rule that the home office of a bank may be held liable for deposits that its foreign branches wrongfully refuse to pay. This liability, however, is not without limit. In the field of banking, the general rule is subject to the important qualifications that the bank's liability will generally be measured primarily by the law of the jurisdiction where the foreign branch is located. Choice of law principles of general application might bring about the same result, but the inclination of courts to reach this conclusion is reinforced by concepts unique to banking which have come to be known as the separate entity doc-

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83. *Id.* at 862-63: "Since . . . Chase's branch in Saigon was neither open nor operating at the time of the confiscation and in fact had been abandoned prior to that time, the Vietnamese decree was ineffective as against Chase's debt to the plaintiffs." *Id.* at 863. Heininger notes:

> [T]he situs of a bank's debt on a deposit is considered to be at the branch where the deposit is carried, but if the branch is closed, . . . the depositor has a claim against the home office; thus, the situs of the debt represented by the deposit would spring back and cling to the home office. If the situs of the debt ceased to be within the territorial jurisdiction of [the confiscating state] from the time the branch was closed, then at the time the confiscatory decree was promulgated, [the confiscating state would] no longer [have] sufficient jurisdiction over it to affect it.

Id. at 862 (quoting Heininger, *supra* note 65, at 975).

84. *Id.* at 863:

> By operating in Saigon through a branch rather than through a separate corporate entity, Chase accepted the risk that it would be liable elsewhere for obligations incurred by its branch . . . . U.S. banks, by operating abroad through branches rather than through subsidiaries, reassure foreign depositors that their deposits will be safer with them than they would be in a locally incorporated bank.

Id.

85. *Id.*

86. Heininger, supra note 65, at 930-44.

> trine. According to this doctrine, a branch is treated for some purposes as a distinct business entity rather than simply an extention of the bank's home office. Hence the rules for determining the potential liability of a bank's home office in connection with foreign branch deposits differ from those that would apply to non-banking corporations.[87]

Heininger has suggested that expropriated branches should be treated as liquidations of separate entities.[88] Accordingly, remaining branch assets would be marshalled and valued, and the proceeds would be distributed among the branch's creditors pro rata in relation to their claims. Heininger notes, however, the difficulty in accomplishing such a task.[89] Additionally, it should be noted that this method of satisfying depositors of an expropriated branch may be academic in that the remaining branch assets may be minimal, if any.

In *Garcia*, the court did not even consider the application of a separate entity doctrine.[90] Judge Meskill noted: "Chase 'accepted the risk that it would be liable elsewhere for obligations incurred by its branch.' "[91] Because the branch represented that the New York office would guarantee the CDs,[92] it seems reasonable for the court to have refused to apply the separate entity doctrine. Indeed, the facts here negated the basic premise of separation between the branch and the home office. Consequently, Judge Meskill applied the general rule of home office liability. Because the home office had accepted the risk under the private contract for the CDs, the court held Chase liable "no

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87. *Id.* at 930 (the separate entity doctrine is a development of state law and federal courts have deferred to state law when federal authoriy is not implicated). *Compare* Det Bergenske Dampskibsselskab v. Sabre Shipping Corp., 341 F.2d 50, 53 (2d Cir. 1965) *and* Shinto Shipping Co. v. Fibrex & Shipping Co., 425 F. Supp. 1088 (N.D. Cal. 1976), *aff'd*, 572 F.2d 1328 (9th Cir. 1978) (private garnishment actions) *with* First Nat'l City Bank v. I.R.S., 271 F.2d 616 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960) *and* United States v. First Nat'l City Bank, 379 U.S. 378 (1965) (I.R.S. authority to issue subpoenas and obtain Federal court injunctions). *See also* Note, *Branch Bank as Separate Entity for Attachment Purposes: McCloskey v. Chase Manhattan Bank*, 48 CORNELL L.Q. 333 (1963).

88. Heininger, *supra* note 65, at 1027.

89. *Id.* at 1028.

90. 735 F.2d 645 (2d Cir. 1984). The application of the separate entity doctrine to bank branches has not been successful in the federal courts. *See* Vishipco Line v. Chase Manhattan Bank, 660 F.2d 854 (2d Cir. 1981); First Nat'l Bank of Boston v. Banco Nacional de Cuba, 658 F.2d 895, 901 (1981) (obligations between branches were not obligations between separate entities but merely matters of internal bookkeeping); Banco de Vizcaya v. First Nat'l Bank, 514 F.Supp. 1280, 1283-85 (N.D. Ill. 1981) (*opinion vacated* July 23, 1981); Digitrex, Inc. v. Johnson, 491 F. Supp. 66 (S.D.N.Y. 1980).

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

92. *Id.* at 646.

matter what happened in Cuba."[93]

The contractual obligation analysis utilized in *Garcia* has not been applied in all jurisdictions. In *Perez*,[94] the New York Court of Appeals did not apply the home office liability doctrine enunciated in *Sokoloff* and *Vishipco*. The court noted that, in those cases, the banks were not entitled to rely upon a foreign sovereign's order confiscating a depositor's property because the bank's branches in the foreign state had ceased operations prior to the confiscation order.[95] Because the situs of the deposit was no longer in the foreign state, the foreign sovereign's confiscation order did not affect the bank's liability on the deposit.[96] The *Perez* court distinguished its case by noting that the plaintiff had the opportunity, prior to the seizure, to redeem the certificates in any Chase branch, including the Cuban branch.[97] The court concluded that, because Chase's debt to the plaintiff was extinguished by the seizure of plaintiff's account before the branch was nationalized, "there is no occasion to apply the rationale of *Sokoloff* and *Vishipco*."[98]

The Second Circuit itself has not always applied a contractual obligation analysis. In *First Nat'l Bank of Boston (Int'l) v. Banco Nacional de Cuba*,[99] the Second Circuit held that the act of state doctrine barred a suit against a state-owned Cuban bank to recover unreimbursed payments by the plaintiff's assignor on letters of credit issued by its Cuban branches prior to expropriation by the Cuban Government. In that decision, the court quoted *Menendex v. Saks & Co.*,[100] another Second Circuit decision, in which the court stated that it would not recognize a quasi-contractual claim based on unjust enrichment as an exception to the act of state doctrine.[101] *Mendenex* had held that the refusal by Cuban agents to reimburse importers for amounts paid to Cuba by mistake for pre-intervention shipments was an act of state.[102]

The focus in these cases seems to be on the act of state doctrine rather than on contractual interpretation, and, therefore, the contracts are not determinative. Upon a finding that the expropriated debt's situs was within the foreign sovereign's territory, the courts have applied

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93. *Id.* at 650.
94. 61 N.Y.2d 460, 474 N.Y.S.2d 689 (1984).
95. *Id.* at 473.
96. *Id.*
97. *Id.* at 474.
98. *Id.*
99. 658 F.2d 895, 901 (2d Cir. 1981).
100. 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).
101. *Id.* at 1370.
102. *Id.*

the act of state doctrine to relieve the debtor of his obligation to the creditor. The policy behind these decisions is a recognition of a sovereign's power to govern itself and the determination that United States courts should not pass judgment upon the actions of foreign sovereigns in their own territories.[103] Accordingly, the courts have recognized the foreign sovereign's power to extinguish a debt within the foreign state.

As in *Garcia*, however, a number of courts have bound parties to their contracts even in expropriation cases. Although *Perez* seems to suggest that New York does not recognize a contractual obligation exception to the act of state doctrine, there is case law that indicates otherwise. In *Gonzalez v. Indus. Bank of Cuba*, the New York Court of Appeals held that, where the plaintiff had purchased a United States currency draft from a Cuban bank payable to her order on a bank located in New York, Cuba's actions could not diminish the plaintiff's right on the draft.[104] Thus, the plaintiff was able to collect on the draft in New York notwithstanding the expropriation of the bank by the Cuban Government.[105]

Other jurisdictions have also refused to apply the act of state doctrine to relieve parties of contractual obligations. In *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, the Court of Appeals for the Fifth Circuit held that a suit by a Cuban corporation against a Florida corporation to recover sums owed from the sale of tobacco concluded prior to the Cuban revolution was not barred by the act of state doctrine.[106] The court concluded that the Cuban Government's actions had not interfered with the plaintiff's right to collect its accounts and that "this would be true even if the credit here be deemed to have a 'situs' in Cuba, or even if it be deemed to be in all material aspects the same as tangible property."[107]

Similarly, in *Pan-American Life Ins. Co. v. Blanco*, the Fifth Circuit did not apply the act of state doctrine to relieve an insurance company of its obligation under a life insurance policy.[108] Despite the fact that the Cuban assets of the company were expropriated and nationalized, the court held that the policy holder was entitled to receive the dollar equivalent to pesos at the prevailing rate of exchange when the life policy issued by a Texas insurance company was made payable in pesos at Galveston, Texas.[109] Likewise, in *Pan-American Life Ins. Co.*

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103. *See supra* note 4.
104. 12 N.Y.2d 33, 234 N.Y.S. 2d 210 (1962).
105. *Id.*
106. 392 F.2d 706 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968).
107. *Id.* at 714.
108. 362 F.2d 167, 170 (5th Cir. 1966).
109. *Id.* at 171.

v. Recio, a Florida court held that a fair reading of the policy made it apparent that an important provision was that the policyholder might travel to the United States and that the policy could be paid there.[110] Therefore, even though the Cuban Government had seized the company's assets in Cuba, the insurance company was not excused from performance under the contract.[111]

Garcia is based on this second line of cases and the general rule of home office liability. The facts in *Garcia*, however, take the case a step beyond the cases noted above. None of these decisions dealt with a contract similar to the one in *Garcia*. The parties to those contracts for accounts receivable, letters of credit and certificates of deposit did not specifically agree on an allocation of the loss in case of an expropriation of the debt, but the parties in *Garcia* did so agree, according to the majority opinion. This aspect makes *Garcia* different from prior case law, because *Garcia* recognizes the parties' ability to form such a contract and gives it effect.[112] Thus, the decision stands for the principle that where parties contemplate possible future actions by a sovereign, they may contract to protect against any such actions' interference with their contractual relations.

Garcia has wide ranging implications in terms of the status of the act of state doctrine in international law. If the contractual obligation exception to the act of state doctrine is taken to its logical conclusion, careful draftsmanship could render international commerce less vulnerable to acts of state. Risks could be allocated contractually rather than by the act of a foreign sovereign. International commerce would be governed by freedom of contract principles. The parties would be free to negotiate returns in relation to the risk undertaken and each party would be assured the benefit of its bargain. For example, a bank that had agreed to absorb the risk of a nationalized branch could offer less interest on deposits with such a branch, and, conversely, a depositor who had agreed to absorb the risk of nationalized branch and seizure of the depositor's account could bargain for higher interest.

The *Garcia* majority's contention that its decision is consistent with the policy considerations behind the act of state doctrine[113] is a valid one. The decision does not judge Cuba's sovereign actions, nor does it interfere with the foreign affairs powers of the executive.[114] It does not affect the relations between the United States and Cuba; rather, it affects the relations between a bank's foreign branch, the

110. 154 So.2d 197, 199 (Fla. Dist. Ct. App. 1963), *cert. denied*, 377 U.S. 990 (1964).
111. *Id.*
112. 735 F.2d 645 (2d Cir. 1984).
113. *Id.* at 651.
114. *See supra* note 4 and accompanying text.

home office and the branch depositors. Had the litigation in this case involved a party to the contract suing Cuba, the act of state doctrine and hence, sovereign immunity would have been implicated.[115] When the issue is solely a matter of contractual interpretation as to the agreed upon allocation of risk of possible loss from expropriation, however, the act of state concerns are minimal, because Cuba will not be affected by the allocation of the loss. *Garcia* does not hold that Cuba's expropriation was invalid or that there was no expropriation or that Cuba must give back the funds. Indeed, the decision is so vague that one is not clear how the court categorizes Cuba's action. The court held that "even if what occurred was a seizure of the debt and not merely payment of a sum equal to it, the facts in the instant case call for a result favoring Garcia."[116] The court avoided an analysis of Cuba's action and concentrated on the contractual relationship between Chase and Garcia. It seems proper that the cause of action in *Garcia* was not barred by the act of state doctrine. In a case in which the validity or categorization of a foreign sovereign's actions is not at issue, parties should be allowed to bring their cases before a United States court to adjudicate their legal rights.

Garcia also limits the ability of defendants to hide behind the act of state doctrine. Consequently, because Chase's Cuban branch represented that "Chase's main office would guarantee the certificate(s) and that (depositors) could be repaid by presenting the certificate(s) at any Chase branch world-wide,"[117] Chase's New York office had to live up to those representations.[118] To rule otherwise would permit a fraud to be perpetrated on the branch depositors through an application of the act of state doctrine.

Judge Kearse's dissent, however, attacked the basic premise of the majority's "contractual exception to the act of state doctrine."[119] The dissent's argument, that the jury concluded that the parties did not contract to ensure payment on the CDs even if the debt was seized by Cuba,[120] seems persuasive. The jury's responses to interrogatories

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115. 735 F.2d 645. As the court in *Garcia* stated:

> We are not challenging the validity of the Cuban government's actions here and Cuba has shown no interest in the outcome of this case. We are simply resolving a private dispute between an American bank and one of its depositors. The result we reach will have no international repercussions. Chase cannot use the act of state doctrine as a defense because the doctrine is not implicated.

Id. at 651.

116. *Id.* at 650.

117. *Id.* at 646.

118. *Id.* at 650.

119. *Id.* at 652 n.*; *see supra* notes 45-53 and accompanying text.

120. 735 F.2d at 650 n.6; *see supra* note 47 and accompanying text.

four[121] and five[122] seem to indicate that the jury concluded that the parties did not contract for payment on the CDs, regardless of what happened in Cuba. Still, the majority's interpretation of the jury's findings, in view of the jury's determination that Chase was liable to Garcia,[123] was valid. Because the jury concluded that Chase was liable to Garcia, it seems logical to infer that they also concluded that the Cuban Government's seizure of a sum equal to the CD did not effect the bank's contractual obligation to pay Garcia. In view of the fact that the court's decision is based on the determination that the parties contracted to ensure payment on the CDs even if the debt was seized by Cuba,[124] it may have been more appropriate for the court to have ordered reconsideration of the jury interrogatories, as the dissent suggested.[125]

The importance of *Garcia* lies not in its interpretation of the jury's findings but in its establishment of a contractual obligation exception to the act of state doctrine. The dissent's criticism is not directed at the validity of the exception, but at its application in this case. Indeed, the dissent acknowledged that "the parties *could*, of course, have agreed that even if the Cuban government required Chase to pay it a sum equal to Garcia's account, Chase would still have a contractual obligation to pay Garcia."[126] Clearly, it seems that the entire *Garcia* court at least implicitly recognized a contractual obligation exception to the act of state doctrine.

CONCLUSION

Garcia illustrates that courts are willing to look beyond the mere mechanical application of established doctrines in adjudicating the liability of a bank for deposits in expropriated branches. The decision may be viewed as the creation of a contractual obligation exception to the act of state doctrine, but it should also be viewed as indicative of the balancing involved in choosing whether to apply the act of state doctrine or the general rule of home office liability in confiscation cases. It seems appropriate that, when the circumstances do not demand the application of the act state doctrine, the court should consider as determinative the bank's contractual obligations and the possibility of a fraud being perpetrated on the branch depositors. It should

121. 735 F.2d at 650 n.6; *see supra* note 48 and accompanying text.
122. 735 F.2d at 650 n.6; *see supra* notes 50-52 and accompanying text.
123. 735 F.2d at 650 n.6; *see supra* note 51 and accompanying text.
124. 735 F.2d at 650.
125. *Id.* at 652 n.1.
126. *Id.* at 652 (emphasis in original).

be noted, however, that *Garcia* involved an unusual contract. In future cases when a branch does not make specific representations that the home office guarantees the deposits, a court may find the *Garcia* contractual obligation analysis inapplicable.

Most significant is the court's decision to apply a contractual obligation, rather than act of state analysis. This approach affords parties the opportunity to a contract a greater degree of certainty in their contractual relations. Rather than being subjected to the whims of a foreign sovereign, parties may contract to allocate the loss from possible expropriations. With this greater degree of certainty in international contracts, international commerce will be less risky for all, whether a modest depositor or a world-wide bank.

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