THE TERRITORIALITY INQUIRY UNDER THE ACT OF STATE DOCTRINE: CONTINUING THE SEARCH FOR AN APPROPRIATE APPLICATION OF SITUS OF DEBT RULES IN INTERNATIONAL DEBT DISPUTES

Ariel Oscar Díaz[*]

> "The situs of intangible property is about as intangible a concept as is known to the law."[1]

I. INTRODUCTION

Recent economic downturns in Argentina, Uruguay, and Venezuela, to name a few Latin American states among others in various parts of the world, have once again raised serious concerns regarding the ability of international lenders or creditors to recover on the sovereign and private debt instruments

---

* Ariel Oscar Díaz is an Associate Attorney at Leaf & Associates, LLC. in Miami, Florida. This comment is based on a paper presented to Professor Tomas J. Skola and the International Credit Seminar offered at the University of Miami, School of Law, Spring 2003.

1. Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706, 714 (5th Cir. 1968).

that they hold.[2] With respect to sovereign debt, while the International Monetary Fund, the Paris Club, and the London Club have provided institutional mechanisms by which to conduct organized sovereign debt restructurings, it nonetheless remains for lenders or creditors dissatisfied with the reorganization process to look to the courts to enforce their contractual rights.[3] Significantly, the predictability of debt restructuring regimes have been eroded by the emergence of bondholders and secondary market debt purchasers as principal creditors in place of traditional commercial bank lenders engaged in longstanding relationships with debtor states.[4] Apart from the problems endemic in transnational litigation, this new fixture of non-syndicate or "rogue" creditors in international sovereign lending has engendered a whole set of legal and public policy questions, the heart of which falls beyond the scope of this paper, but which, nonetheless, have already left an indelible imprint on legal commentary and United States decisional law concerning international public or sovereign debt.[5]

In the instance of private debt, which is the realm of creditor-debtor law this paper will focus on, the gamut of international lender or creditor concerns similarly runs wide. However, in the international private debt market the institutional mechanisms for re-negotiation available to sovereign lenders are ordinarily not available to private creditor-obligees. As a result, these creditor-obligees are limited principally to seeking judicial remedies for default or non-

---

2. *See generally* Lex Rieffel, *Notion of Odious Debt is Impractical*, FINANCIAL TIMES, May 26, 2003; Desmond Lachman, *The False Optimists of the Emerging Markets*, FINANCIAL TIMES, May 20, 2003; *World Business Briefing, Americas: Uruguay: Bond Exchange Sought*, N.Y. TIMES, Apr. 11, 2003, at W1; Jonathan Fuerbringer, *Mutual Funds Report; Bonds Eclipse Stocks in Emerging Markets*, N.Y. TIMES, Apr. 6, 2003, at sect. 3, at p. 15; Larry Rohter, *International Business; Amid Financial Despair, Argentines See a 'Little Summer'*, N.Y. TIMES, Dec. 16, 2002, at C13; Larry Rohter, *Argentina Defaults on Big Payment to World Bank*, N.Y. TIMES, Nov. 15, 2002, at W1; Juan Forero, *Venezuela Economy Falters, Despite Abundant Oil*, N.Y. TIMES, Sept. 24, 2002, at W1; *South America's Troubled Economies*, N.Y. TIMES, Aug. 6, 2002, at A14; Larry Rohter, *World Business Briefing, Americas: Argentina: Telecom Default*, N.Y. TIMES, Apr. 3, 2002; Simon Romero, *Defaults Seem Near for Latin Units of BellSouth and Verizon*, N.Y. TIMES, Mar. 29, 2002, at C4; Simon Romero, *AT&T and Others Brace for Trouble From Argentina*, N.Y. TIMES, Jan. 15, 2002, at W1.

3. *See* Charles M. Schmerler, *Litigating Defaults on Sovereign Debt Law: Policy Struggle to Defer to Foreign States While Honoring Lender's Rights*, N.Y.L.J. (Apr. 15, 2002), *available at* http://www.arentfox.com/quickGuide/business Lines/litig2/litigation-related/ra2002-04-25schmerler/ra2002-04-25schmerler.html (last visited Feb. 7, 2004).

4. *See, e.g.*, Elliot Assocs., L.P. v. Banco de la Nación, 194 F.3d 363 (2d Cir. 1999); Pravin Banker Assocs., LTD. v. Banco Popular del Peru, 895 F. Supp. 660 (S.D.N.Y. 1995); CIBC Bank and Trust Co. Ltd. v. Banco Central do Brasil, 886 F. Supp. 1105 (S.D.N.Y. 1995); Nat'l Union Fire Ins. Co. v. People's Republic of Congo, 729 F. Supp. 936 (S.D.N.Y. 1989).

5. *See, e.g.*, Jote Kassa, Note, *A Safety Net for the Eurodollar Market?: Wells Fargo Asia Ltd. v. Citibank*, 65 N.Y.U. L. REV. 126 (1990); William W. Park, *Legal Policy Conflicts in International Banking*, 50 OHIO ST. L.J. 1067 (1989).

payment either, in their own national courts, or the national courts of the debtor-obligor. Further complicating these creditor-debtor disputes is the underlying cause for debtor default or non-payment. Increasingly, it has been noted that the inability of debtors to perform their payment obligations is due, at least in some part, to foreign government regulations to which the debtor is subject. As will be discussed below, these regulations may be imposed in several forms, the prevailing of which are: foreign exchange controls, mandatory currency conversions, debt repayment moratoria, depositary expropriations, and unilateral debt restructurings.

The economic distress that a number of Latin American, as well as other debtor nations must confront, indeed, is likely to increase the resort to creditor-debtor litigation, particularly in the United States. While it is true that international private debt disputes may be litigated in either the home forum of the creditor-obligee or the debtor-obligor, at least where United States debtors or creditors are parties to the contracts in question, United States courts have commonly served as the *de facto* decision-making forum. More importantly, however, the prospect of international debt litigation in the United States arising from these recent economic downturns is likely to revive some difficult and legally complex issues that remained, arguably, unresolved throughout the last period of debt crisis litigation in the 1980's.

One issue likely to evoke an extensive and contentious corpus of legal literature and decisions concerns American notions on international comity and application of the Act of State Doctrine.[6] The Act of State Doctrine has indeed been the focus of much scholarly debate over the last fifty years.[7] While the majority of commentators have been inclined to support the Doctrine, still a

---

6. Other significant issues that arise from the transnational nature of international debt litigation involve, *inter alia*, the doctrine of *forum non-conveniens*, foreign sovereign immunity, jurisdiction to prescribe, and jurisdiction to adjudicate. *See generally* ALAN C. SWAN & JOHN F. MURPHY, CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS 242-97 (2d ed. 1999) (providing a basic framework for understanding the impact of these areas of transnational litigation on international business transactions); ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 257-72, 608-97 (2d ed. 2002) (providing cases and discussion on the development of *forum non conveniens* and the United States Foreign Sovereign Immunities Act of 1976).

7. For an enlightening sampling of the theoretical and historical background of the Act of State Doctrine and its relation with other principles of comity consult, *see* Ifeanyi Achebe, *The Act of State Doctrine and Foreign Sovereign Immunities Act of 1976: Can They Coexist?*, 13 MD. J. INT'L L. & TRADE 247 (1989); Daniel C.K. Chow, *Rethinking the Act of State Doctrine: An Analysis in Terms of Jurisdiction to Prescribe*, 62 WASH. L. REV. 397 (1987); Margaret A. Niles, Note, *Judicial Balancing of Foreign Policy Considerations: Comity and Errors Under the Act of State Doctrine*, 35 STAN. L. REV. 327 (1983); Irene Elizabeth Howie, Note, *The Nonviable Act of State Doctrine: A Change in the Perception of the Foreign Act of State*, 38 U. PITT. L. REV. 725 (1977); Louis Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT'L L. 175 (1967).

number of others have called for its abandonment by the courts.[8] In the courts, however, the Doctrine has generally enjoyed substantial normative stability dating back to its earliest articulation in the landmark United States Supreme Court decision *Underhill v. Hernandez*.[9] The Court in *Underhill* considered an action in tort for wrongful detention of a United States citizen against a military government in Venezuela, later recognized as the legitimate governing authority by the United States.[10] The Court held that the sovereign acts of a foreign government done within its territory were unreviewable by United States courts.[11]

More than a century later, the Supreme Court invariably has continued to look to *Underhill* as the classic statement of the Doctrine.[12] In fact, most if not all decisions concerning acts of state have maintained a tradition of quoting verbatim the words of Chief Justice Fuller in *Underhill*:

> 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 the government 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 of by sovereign powers as between themselves.[13]

In subsequent decisions the Supreme Court has adjoined to their classic statement in *Underhill* more precise restatements of the Doctrine and its theoretical predicate.[14] In what has been termed the "second classic statement

---

8. *See, e.g.*, Donald W. Hoagland, *The Act of State Doctrine: Abandon It*, 14 DENV. J. INT'L L. & POL'Y 317 (1986); Michael J. Bazyler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325 (1986).

9. 168 U.S. 250, 252 (1897) (providing a curt distinction between "sovereign risk" and "country risk").

10. *Id.*

11. *Id.*

12. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 763 (1972); Alfred Dunhill of London v. Republic of Cuba, 425 U.S. 682, 691 n.7 (1976); W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., 493 U.S. 400, 405 (1990).

13. *Underhill*, 168 U.S. at 252.

14. *See* Oetjen v. Cent. Leather Co., 246 U.S. 297, 303-04 (1918) ("The principle that the conduct of one independent government cannot be successfully questioned in the courts of another [must] rest . . . upon the highest considerations of international comity and expediency . . ."); Ricaud v. Am. Metal Co., 246 U.S. 304 (1918) ("the details of such [confiscatory] action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision").

of the act of state doctrine,"[15] the Court in *Banco Nacional de Cuba v. Sabbatino*[16] announced:

> [T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.[17]

The Act of State Doctrine, thus, is squarely implicated by some of the potential debt litigation that may ensue given the proclivity of debtor nations to intervene the private banking sector to curb the devaluative effects of financial crises on domestic currency. While this measure appears extreme, even mitigated options such as exchange controls raise the same Act of State problems for international creditors. Nonetheless, the dire economic conditions many debtor nations must confront leave a dearth of alternatives for government policymakers other than adoption of such stringent measures, which effectively, and quite intentionally, disrupt the performance of payment obligations flowing from local debtors to foreign creditors. As such it is of significant value that the Doctrine be examined and its application better understood in anticipation of what may, although hopefully not, turn out to be a reemergence of mass international debt litigation in the United States.

This paper will attempt to address some of the salient issues in the territoriality inquiry that the courts since *Sabbatino* have been concerned with. Additionally, this paper will make an earnest attempt to examine key problems in international debt (i.e., intangible property rights) cases. The following section of this paper will deal directly, and at some length with notions of territoriality as developed by the courts and commentators subsequent to *Sabbatino*. Further, that section will treat the historical and modern functions of the territorial limitations in the Act of State Doctrine. Section three will deal in greater length with the major approaches to situs of debt rules relevant in the Doctrine. That section will treat the underlying rationale for these rules, and argue for an enhanced rule of reason in guiding judicial situation of international debts. Section four will recapture some of these salient points and provide some concluding remarks.

---

15. *See* Michael Gruson, *The Act of State Doctrine in Contract Cases As a Conflict-of Laws Rule*, 1988 U. ILL. L. REV. 519, 530 (1988).

16. 376 U.S. 398 (1964).

17. *Id.* at 428.

II. THE TERRITORIALITY INQUIRY

One important element the Court refined in *Sabbatino* was the proposition that application of the Act of State Doctrine was not dependent upon the inclusion of the acting state in the litigation.[18] In *Sabbatino* the plaintiff, an instrumentality of the Cuban government, brought an action in conversion against a court appointed receiver in New York City to recover payment for a shipment of sugar that had been previously confiscated by the government within Cuban territory.[19] The Court, nonetheless, maintained that the Act of State Doctrine could very well be raised even in the context of non-state party disputes.[20]

Another important element, perhaps the more crucial one to territoriality, in the *Sabbatino* decision was the rehashing of judicial self-restraint principles, particularly over foreign political matters. The newer modification of the Act of State Doctrine in *Sabbatino* indeed appeared to reflect a judicial preoccupation with the increased exercise of expropriatory and confiscatory takings by sovereign states of foreign-owned property. Within a short time period preceding *Sabbatino*, and shortly thereafter, numerous nation-states underwent significant social and political changes, the most notable of which was embodied in the Cuban revolution and the movements for de-colonization in Africa and Asia. Understandably then, the Court in *Sabbatino*, following the dictates of *Underhill*, deemed it necessary to clarify that even takings in contravention of international customary law would be barred from examination by American courts irrespective of whether it was American-owned or locally-owned property that was taken abroad.[21]

The Court, however, made its holding in *Sabbatino* clear that the Doctrine would not apply where the acting sovereign had taken property not located within its territory.[22] While this proposition had been an implied part of the holding in *Underhill*, *Sabbatino* strived to transform the territoriality inquiry

---

18. *Id.* at 417-18, 428; *Underhill*, 168 U.S. at 252 (While it is clear the *Sabbatino* opinion established that the Act of State Doctrine was generally applicable independent of the acting state's participation in litigation, the rudiments of this proposition were first borne out in the *Oetjen* and *Ricaud* cases).

19. *Sabbatino*, 376 U.S. at 402-09. The previous owner of the Cuban sugar attempted to intervene as party to the litigation but was unsuccessful.

20. *Id.* Unlike foreign sovereign immunity, which necessarily involves foreign governments or their instrumentalities in litigation, the Act of State Doctrine operates more akin to an issue preclusion or a strict choice of law rule. *See, e.g.*, Callejo v. Bancomer, S.A., 764 F.2d 1101, 1113 (5th Cir. 1985) (citing to *Sabbatino* for the proposition that the Act of State Doctrine does not require government defendants, or even that the subject matter of the dispute, to be specifically based on a sovereign act).

21. *Sabbatino*, 376 U.S. at 422; *see also* Alfred Dunhill of London v. Republic of Cuba, 425 U.S. 682, 716 (Marshall, J., dissenting) (asserting the point supported by the plurality and concurrence opinions).

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

into one of the only sharp points of distinction in the Doctrine. The Court, thus raised a judicial wall of separation from reviewing acts undertaken by foreign governments within their territory, while dismantling any opportunity to have the Doctrine apply to cases where property rights in the United States were affected by foreign government regulations. A handful of commentators have questioned the development of this doctrinal threshold element as one not entirely rooted in traditional notions of international comity and respect for sovereign authority.[23] Notwithstanding criticism, the *Sabbatino* restatement with its central concern for territoriality has become the guiding rule of law.

Until *Sabbatino*, although arguably thereafter as well, the Court had been certain to indicate that the rule of decision contained in the Act of State Doctrine was predicated upon notions of international comity.[24] Nonetheless, beginning with the *Sabbatino* decision the Court began to elaborate a distinct foundation for the Doctrine.[25] Rather than resting on international comity, the Court in *Sabbatino* and subsequent decisions has made it clear that the Act of State Doctrine has "constitutional underpinnings" and rests upon separation of powers concerns that generally preclude the judiciary from meddling in the foreign affairs powers of the Executive Branch.[26] Under this "judicial institutional" explanation of the Doctrine, *Sabbatino* and its progeny have essentially developed the rationale that where a foreign sovereign undertakes governmental action that affects (expropriates, confiscates, modifies, etc.) property not within its territory then the Act of State Doctrine will not apply since the Executive Branch could not possibly be "embarrassed" from judicial action before the other nations of the world, particularly the acting state. This rationale, of course, presupposes that extraterritorial regulation of property rights by foreign governments fails to raise political questions and that these should not be accorded a high degree of comity and respect.

The new rationale for the Act of State Doctrine advanced in *Sabbatino*, while argued to be logically flawed in some areas,[27] however, probably does

---

23. *See, e.g.*, Bazyler, *supra* note 8; Henkin, *supra* note 7.

24. *See Oetjen*, 246 U.S. at 303; Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909); but *cf. Sabbatino*, 376 U.S. at 421 (noting that the doctrine is not compelled by the inherent nature of sovereign authority or by some principle of international law; historic notions of sovereign authority do not dictate the doctrine's existence).

25. *Sabbatino*, 376 U.S. at 423, 427-28. *See also* Stephen Zamora, *Recognition of Foreign Exchange Controls in International Creditor's Rights Cases: The State of the Art*, 21 INT'L LAW. 1055, 1070 (1987) (noting three separate theoretical predicates employed by the Court in Act of State Doctrine cases); Kenneth L. Miller, Note, *Debt Situs and the Act of State Doctrine: A Proposal for a More Flexible Standard*, 49 ALB. L. REV. 647, 651 n.16 (1985).

26. *Sabbatino*, 376 U.S. at 423; Louis Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805, 809-13, 820, 828 (1964).

27. *See* Bayzler, *supra* note 8, at 373; Robert S. Rendell, *The Allied Bank Case and Its Aftermath*, 20 INT'L LAW. 819, 826-27 (1986).

appropriately limit the Doctrine's application to territorial state actions. It is indisputable, at least as a matter of law, that when the "parties and the *res* are outside the foreign government's territorial boundaries, the foreign government does not possess the ability to alter the legal status of the parties relative to the *res*."[28] The Court's rationale in *Sabbatino* indeed reflects reasonable notions of territorial sovereignty and comity among independent states. It is not an unsound proposition that "judicial re-examination of a foreign sovereign's act will vex relations with foreign governments or hinder the executive in the conduct of foreign policy only when courts act to frustrate the foreign sovereign's reasonable expectations of dominion."[29] It follows, then, that a reasonable expectation of dominion would be fatally attenuated where a sovereign state acts to regulate property not located within its territory.[30] As a matter of positivist logic, so much is generally conceded. The difficulty, however, comes with the judiciary's determination of when and where territorial state action has transpired. The questions to resolve, thus, seem readily framed: what property exactly is the territorial action being asserted over and when is its location ascertainable? Whereas, these queries have been adequately treated in disputes arising from state actions that "take" tangible property, the judiciary has struggled terribly to arrive at an equally expeditious treatment where intangibles are concerned.[31] Consider the following intangible property dispute scenarios:[32]

> Case 1—A United States bank makes a loan to a foreign borrower (sovereign or private), and brings an action in the United States to

---

28. Miller, *supra* note 25; *see also Alfred Dunhill of London*, 425 U.S. at 686-87, 691 n.7; *First Nat'l City Bank*, 406 U.S. at 768; *id.* at 787 (Brennan, J., dissenting); Banco Nacional de Cuba v. Chem. Bank of New York, 658 F.2d 903, 908 (2d Cir. 1981); United Bank Ltd. v. Cosmic Int'l, Inc., 542 F.2d 868, 874-75 (2d Cir. 1976); Maltina Corp. v. Cawy Bottling Co., 462 F.2d 1021 (5th Cir. 1972) (concluding that a foreign sovereign is *obviously* unable to complete an expropriation of property beyond its borders); F. Palicio y Compañía, S.A. v. Brush, 256 F. Supp. 481, 483-84 (S.D.N.Y. 1966).

29. Margaret E. Tahyar, Note, *The Act of State Doctrine: Resolving Debt Situs Confusion*, 86 COLUM. L. REV. 594, 609 (1986).

30. *See* Callejo v. Bancomer, 764 F.2d 1101, 1123 (5th Cir. 1985) (holding that the theory underlying the territorial limitation to the act of state doctrine is that a foreign state is less concerned about effect of its acts on property outside of its territory than within); *Maltina Corp.*, 462 F.2d at 1021. *See also* 22 U.S.C. § 2370(e)(2) (also termed the "second Hickenlooper amendment" presently bar application of the Act of State Doctrine with respect to property located within the United States where the act of expropriation contravenes international law).

31. *See* F. & H.R. Farman-Farmaian Consulting Eng'rs v. Harza Eng'g Co., 882 F.2d 281, 286 (7th Cir. 1989) (Judge Parsons commenting that "a debt (like a word, a number, an idea) has no space-time location; it is not a physical object, and efforts to treat it as such, like efforts in conflicts of law jurisprudence, now largely abandoned . . . to find the site of a contract, seem bound to fail").

32. The characterizations of these model cases are derived from Tahyar, *supra* note 29, at 614-16. *See also* Zamora, *supra* note 25, at 1056-58.

> enforce the loan following the imposition of exchange controls that, effectively, prevent the borrower from servicing the debt with the contractually stipulated currency (United States dollars).
> Case 2 – A United States bank depositor deposits dollars in a foreign bank (government-owned or private), and the implementation of exchange controls by the foreign government prevents the depositor from withdrawing dollars; the dollar deposit subsequently is converted to local currency at the government-declared rate, hence becoming greatly devalued. The depositor brings an action against the foreign bank in the United States.
> Case 3—A foreign depositor deposits funds in a United States bank; the government of the foreign depositor brings an action against the bank in the United States to collect the deposit following an expropriatory or other regulatory act undertaken by the foreign depositor's government asserting ownership over the account.
> Case 4—A depositor (either from the United States or foreign) deposits funds in a foreign branch office of a United States bank, and brings an action against the bank's home office in the United States to recover the deposit following the depositor government's seizure of the branch's accounts or its prohibition of withdrawals pursuant to exchange controls.
> Case 5 –A foreign government expropriates property owned by one of its subjects, and then sells the property for export to the United States. The former owner of the expropriated property relocates to the United States and brings an attachment action against the United States buyer to recover proceeds or account receivables derived from the sale of the expropriated property.
> Case 6 –A United States seller exports goods to a foreign buyer, and the foreign buyer's government imposes exchange controls thus preventing the foreign buyer from making payment in the contractually stipulated currency. The United States seller brings an action in the United States to collect payment.

Clearly, these scenarios raise issues the nature of which vary substantially, legally and practically, from the more basic tangible property cases which plainly involve the "taking" of movable property or realty located within the territory of the acting state. Still, however, courts continue to fit intangible property into some conception of place and time. To better understand this core convergence a historical perspective on the rules of territoriality might be appropriate.

A. History and Development

The foundation of United States law and policy regarding the conduct of foreign governments acting to regulate rights within and outside their territory

can be traced back to the notions of sovereignty developed within the Westphalian regime of international politics.[33] Under this regime, the state's authority to regulate affairs within the state was an inherent and unquestionable exercise of sovereign power free from review or re-examination by other states.[34] "Thus, an act valid where done [could not] be called into question anywhere" outside the jurisdiction sanctioning its validity.[35] While this basic tenet of vested rights theory developed in the 17th century continues to recede from modern American jurisprudence,[36] its underlying rationale has occasionally maintained a significant degree of adherence among American courts with respect to issues in conflicts of law, and prescriptive and personal jurisdiction.[37] The courts, thus, have selectively opted against vested rights theory in adjudicating some issues implicating more than one body of sovereign law, while favoring the theory in other cases.[38]

The dichotomy engendered by the selective application of vested rights theory has been explained as an implicit acknowledgement by the American courts that giving effect to, or perhaps more accurately, exercising restraint from deciding disputes based on foreign regulations requires a certain degree

---

33. *See* TORBJORN L. KNUTSEN, A HISTORY OF INTERNATIONAL RELATIONS THEORY 84-86 (2d ed. 1997) (articulating the proposition that the power to exercise sole control over rights and duties within a territory was a prerequisite to achieving sovereignty); *see also* SEYOM BROWN, THE CAUSES AND PREVENTION OF WAR 104-05 (2d ed. 1994) (noting that "Westphalian norms give pride of place to national sovereignty and the noninterference by countries in another's domestic affairs").

34. *See* Chow, *supra* note 7, at 405-06.

35. 3 J. BEALE, A SELECTION OF CASES ON THE CONFLICTS OF LAWS 517 (1902); *see* Chow, *supra* note 7, at 405-06 & n.47 (providing a brief account of the influence of legal positivism and vested rights theory on notions of territoriality in the Act of State Doctrine).

36. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971). *See* Thomas Byron III, *A Conflict of Laws Model for Foreign Branch Deposit Cases*, 58 U. CHI. L. REV. 671, 690 (1991).

37. *See* Chow, supra note 7, at 406-09. *See also* McDonald v. Mabee, 243 U.S. 90, 91 (1971) (noting that the foundation of jurisdiction is power); Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909) (noting that "[a]ll legislation is prima facie territorial"). While the narrow holding in *American Banana* has been overruled in subsequent years, the general thrust of the Court's opinion in that case remains an influential guide through prescriptive jurisdiction cases.

38. *See Am. Banana*, 213 U.S. at 357; Oetjen v. Cent. Leather Co., 246 U.S. 297, 303-04 (1918) ("The principle that the conduct of one independent government cannot be successfully questioned in the courts of another [must] rest . . . upon the highest considerations of international comity and expediency . . ."); Ricaud v. Am. Metal Co., 246 U.S. 304, 309 (1918) ("the details of such [confiscatory] action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision"); These cases represent only a select instance where the courts strongly favored a vested rights approach. *Cf.* Hilton v. Guyot, 159 U.S. 113, 164 (1895) (holding that the principle of comity is essentially a voluntary recognition of foreign acts); Somportex, Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971) (holding that "[c]omity is a recognition that one nation extends to *within its own territory* to the legislative, executive, or judicial acts of another. It is not a rule of law, but one of practice convenience, and expediency") (emphasis added).

of relaxation of the forum's own sovereignty.[39] As such, the fundamental predicate of vested rights theory (sovereign power) appears irreconcilably at odds with the natural consequences of requiring that vested rights be recognized everywhere. The resulting effect of vested rights theory, thus, has served to maximize the acting states territorial sovereignty while minimizing that of the forum state.[40] The reasoning is that where a foreign state acts to regulate property rights squarely within its territory then it has sole territorial sovereignty to do so. Under vested rights theory this means that the act of state must be given strict effect anywhere outside the acting state's territory. This strict effect mandate, of course, would also mean that the forum state would have to relax its territorial sovereignty in order to give such effect to the regulation of the acting state.[41]

While there certainly appears to be an undercurrent of vested rights rationale in the territorial limitation to the Act of State Doctrine, the Doctrine does not entirely depend on that theory.[42] Rather, the Doctrine more soundly rests on the principles that attempt to detach the judiciary from balancing the territorial sovereignty of two states, that is, the acting state and the forum state.[43] These principles are collected under the self-restraint penumbra of non-justiciable political questions.[44] In essence, the Doctrine's territorial inquiry has been designed to serve more as a determinant alerting the courts as to when to avert the consequences of vested rights (minimization of forum sovereignty) on non-justiciable grounds, or when to proceed safely to determine the extent of international comity without the mandate of strict effect.[45] The Doctrine,

---

39. *See* Chow, *supra* note 7, at 410-11.

40. *Id.*; but *cf. Am. Banana*, 213 U.S. at 357 (Justice Holmes suggesting that the mere election of a party subject to foreign sovereign law to litigate in the United States only requires the forum to consider and apply foreign law without, at the same, relaxing notions of the forum's sovereignty).

41. *See* E. SCOLES & P. HAY, CONFLICT OF LAWS 13-15 (1982).

42. *See* Chow, *supra* note 7, at 408-09 (stating the proposition that *Sabbatino* fundamentally recast the rationale for the Act of State Doctrine from one of external (strict effect to territorial sovereignty of acting state) to internal deference (non-justiciablity for reasons of separation of powers and abstention from deciding issues of sovereignty minimization and foreign policy); *Cf.* Charles Mac. Mathias, Jr., *Restructuring the Act of State Doctrine: A Blueprint for Legislative Reform*, 12 LAW & POL'Y INT'L BUS. 369, 392 (1980).

43. *See* Chow, *supra* note 7, at 415-16.

44. *See* Baker v. Carr, 369 U.S. 186, 217 (1962) (providing the seminal statement on doctrinal tests involved in determining non-justiciable political questions as

> the impossibility of deciding without an initial policy determination of a kind for non-judicial discretion, or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decisions already made, or the potentiality of embarrassment from multifarious pronouncements by various departments on one question);

Swan, *Act of State at Bay: A Plea on Behalf of the Elusive Doctrine*, 1976 DUKE L.J. 807, 848-55 & n.145.

45. *See* Chow, *supra* note 7, at 444 (providing an explanation of the courts' doctrinal management

hence, allows a shift of decisional power on the former determination from the judiciary to, presumably, the Executive branch. This shift is predicated on the not unsound assumption that the Executive is better suited to seek appropriate means of remedial redress on behalf of private actors from other sovereign states in the international plane.

B. Modern Function

The historical effect of the territorial inquiry was to raise the question for the judiciary of whether to apply the Act of State Doctrine, thereby eluding a direct confrontation with the issue of forum sovereignty minimization, or to employ notions of international comity to discretionarily enforce the acting state's policies affecting property within the forum. This bifurcation, nonetheless, accorded the party raising the Doctrine as a defense in litigation an exception to the territorial limitation. While the rules of comity, of course, depend on jurisprudential balancing of interests and public policy considerations, the territoriality inquiry could be obviated if enforcing the acting state's policy did not offend the forum's notions of justice and fairness.[46] This interest and policy-balancing component to the territoriality inquiry was firmly established in earlier jurisprudence dating back to the first half of last century.[47]

The modern effect of the inquiry, however, has proven that the judiciary proposes a much sharper bifurcation of results under the Act of State Doctrine. Since the Court's pronouncements in *Oetjen*, *Ricaud*, and *Sabbatino*, the consequence of falling outside the purview of the Doctrine's territorial limitation has meant, with a large measure of certainty, that the acting state's policies will not be enforced or be given effect in the forum state.[48] Hence, the territoriality inquiry has, indeed, become one of burden shifting and risk allocation in transnational property rights litigation.[49] The practical effect of

---

following a determination that the acting state has undertaken to regulate property outside its territorial sovereignty).

46. *See* Chow, *supra* note 7, at 410-11; Elliot E. Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 367-68, 373 (1945).

47. *See* Hilton v. Guyot, 159 U.S. 113, 164 (1895) (holding that the principle of comity is the "recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws"); *See, e.g.*, United States v. Belmont, 301 U.S. 324 (1937); United States v. Pink, 315 U.S. 203 (1942).

48. *See* Chow, *supra* note 7, at 444. *See, e.g.*, Laker Airways v. Sabena, 731 F.2d 909, 937-38 (D.C. Cir. 1984); Tahan v. Hodgson, 662 F.2d 862, 864 (D.C. Cir. 1981); Clarkson Co. v. Shaheen, 544 F.2d 624, 629 (2d Cir. 1976); Somportex, Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971).

49. *See* Jose Ibietatorremendia, *Exchange Control Risk in Eurodollar Deposits: A Law and*

this burden and risk allocation function has meant the "[D]octrine does not apply at all when the foreign sovereign attempts to take property located in the United States."[50] The reason for this sharp-edged rule seems explicable only by the judiciary's reluctance, indeed refusal, to abstain from deciding against issues of property takings by a foreign sovereign.[51]

Due to its modern function, the territoriality inquiry will rarely, if ever, yield a result other than judicial abstention from examining another sovereign's regulation of property rights within its territory, or judicial denunciation of property takings outside the acting states territory. Applying this, seemingly strict, territorial "win or lose" rule has traditionally led to some reasonable outcomes in disputes regarding tangible property.[52] However, as earlier stated, the more difficult question remains: how to determine who wins and who loses in disputes over property the physical nature of which is indefinable, to be sure, intangible. Put simply, the question is: where is the intangible property. As reasonable as may be the outcome in tangible property cases under the territoriality inquiry, the judiciary's treatment of disputes over issues of debt and other chooses in action leave much to be desired in the way of reason and consistency.[53]

III. THE SITUS OF DEBT RULES

Transnational intangible property disputes involving sovereign acts affecting debt obligations have generally relied on three distinct theories for the determination of the situs of debt, in other words, the place where the intangible property is located.[54] The first, and most traditionally rooted, traces the positivist theories on the *in personam* jurisdictional power of sovereigns to subject persons within the sovereign's territory to its regulations. This theory has produced the "jurisdiction over debtor" rule. The second theory focuses on a similar positivist concern. However, rather than looking solely to jurisdiction,

---

Economics Perspective, 141 U. PA. L. REV. 591, 593. *See also* Underhill v. Hernandez, 168 U.S. 250 (1897) (providing a curt distinction between "sovereign risk" and "country risk").

50. Chow, *supra* note 7, at 444.

51. *See* Tahyar, *supra* note 29, at 595-96.

52. *See* Joseph B. Frumkin, *The Act of State Doctrine and Foreign Sovereign Defaults on United States Bank Loans: A New Focus for a Muddled Doctrine*, 133 U. PA. L. REV. 469, 488 (1985).

53. *See* Byron, *supra* note 36, at 680; Peter S. Smedresman & Andreas F. Lowenfeld, *Eurodollars, Multinational Banks, and National Laws*, 64 N.Y.U. L. REV. 733, 735 (1989); Joseph H. Sommer, *Where is a Bank Account?*, 57 MD. L. REV. 1, 86 (1998); Ibietatorremendia, *supra* note 49, at 601; P.J. Rogerson, *The Situs of Debts in the Conflicts of Laws-Illogical, Unnecessary, and Misleading*, 49 CAMBRIDGE L.J. 441, 441-44, 453-60 (1990); L. Goldwaithe, Comment, *Recent Approaches to Situs of Debt in Act of State Decisions*, 1 CONN. J. INT'L L. 151, 182-83 (1986).

54. *See generally* Courtade, Annotation, *Situs of Debt or Property for Purposes of Act of State Doctrine*, 77 A.L.R. FED. 293 (1986).

this second theory, more importantly, looks at the sovereign's power to complete the alteration in property rights within its territory. This theory has produced the "fait accompli" or "complete fruition" rule. While these two theories have been stringently criticized for producing mechanical rules without demonstrating due respect for the underlying rationale of the Act of State Doctrine, most courts have not entirely, or even partly, abandoned them. Yet, a handful of courts and commentators have developed a third rule that seeks to avoid rigid, litmus-like situs tests in favor of a rule of reason and circumstance.[55] This latter attempt has produced the "incident of the debt" rule, the analysis of which "considers whether judicial inquiry will frustrate the foreign sovereign's reasonable expectations of dominion over the debt."[56]

A. Pointing to Jurisdiction Over Debtor

In the seminal case of *Harris v. Balk*,[57] the United States Supreme Court held that "the obligation of the debtor to pay his debt clings to and accompanies him wherever he goes."[58] The Court in *Harris* went on to state the debtor "is as much bound to pay his debt in a foreign state when therein sued upon his obligation by his creditor, as he was in the state where the debt was contracted."[59] Essentially, then, under this reasoning a debt is located within the territory, even if foreign, to whose jurisdiction the debtor is subject.

While the Court in *Harris* employed the term "foreign" to characterize a debt incurred in North Carolina but litigated in Maryland, the holding has been applied beyond interstate debt disputes to those involving cross-border transactions. In *Menendez v. Saks & Co.*,[60] the Second Circuit applied the *Harris* situs test to a factual scenario upon which the above model Case five is based. In *Menendez,* the dispute arose from the Cuban government's confiscatory taking of a Cuban-owned cigar exporting business.[61] The original Cuban owners instituted an action against a cigar importer in the United States alleging that pre-confiscation debts owed to them by the importer were not located in Cuba, hence not subject to the Act of State Doctrine.[62] The circuit court agreed, holding that since the cigar importers were subject to the court's

---

55. *See* Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A., 570 F. Supp. 870, 881-84 (S.D.N.Y. 1983); Callejo v. Bancomer, 764 F.2d 1101, 1123 (5th Cir. 1985); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 comment a (1987).

56. *See* Chow, *supra* note 7, at 439.

57. 198 U.S. 215, 222 (1905).

58. *Id.*

59. *Id.* at 223.

60. 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).

61. *Menendez*, 485 F.2d at 1365-66.

62. *Id.*

in personam jurisdiction, the debts owed to foreign creditors were located in the United States, thus the Doctrine was inapplicable.[63]

In a few intangibles cases preceding *Menendez*, the Second Circuit had already evinced an inclination toward considering the "jurisdiction over debtor" rule.[64] In *Republic of Iraq*, the court held that a bank deposit account carried in New York was a debt owed by a debtor over whom the court had *in personam* jurisdiction.[65] As a result, the Act of State Doctrine was inapplicable and the newly formed Iraqi government, claiming to have confiscated all of the depositor's (King Faisal) assets, was unable to also affect the bank's debt to the accountholder's estate.

In light of these Second Circuit cases, the "jurisdiction over debtor" rule, indeed, became a mainstay in the territoriality inquiry.[66] However, within only a few years following *Menendez* the rule's inherent problems would gradually become apparent. For one, the courts had not articulated an alternative rationale to the obvious problem of shared jurisdiction, where both the acting state and the forum state exercised *in personam* jurisdiction. Secondly, the courts seemed content in continuing to apply this rule ignoring the even greater problem of foreign sovereign intangible takings based on the simple assertion of jurisdiction over a debtor, particularly United States banks operating foreign branches or multinational entities.[67] Theoretically, a strict and mechanical application of the "jurisdiction over debtor" rule would render a creditor powerless to enforce a debt whose obligor (domestic or foreign) was even tenuously subject to the jurisdiction of another sovereign having attempted to "take" that intangible.

B. Pointing to "Fait Accompli" or "Complete Fruition"

Shortly following the decision in *Menendez*, the Second Circuit again had opportunity to treat the "jurisdiction over debtor" rule of *Harris* in *United Bank Ltd. v. Cosmic International, Inc.*[68] The facts in *Cosmic* present a scenario fundamentally similar to *Menendez*, where a pre-confiscation owner and the

---

63. *Id.*

64. *See* Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 293 F. Supp. 892, 910-11 (S.D.N.Y. 1968); Republic of Iraq v. First Nat'l. City Bank, 353 F.2d 47 (2d Cir. 1965).

65. *See Republic of Iraq*, 353 F.2d at 51.

66. Other court opinions adopting the *Harris* approach included: Rupali Bank v. Provident Nat'l. Bank, 403 F. Supp. 1285 (E.D. Pa. 1975); Fed. Republic of Germany v. Elicofon, 536 F. Supp. 813 (E.D.N.Y. 1978); Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854 (2d Cir. 1981).

67. *See* Richard Herring & Friedrich K. Degreesubler, *Allocation of Risk in Cross-border Deposit Transactions*, 89 NW. U. L. REV. 942, 989-90 (arguing that a "government should not be allowed to interfere with a deposit made in another country if its only justification is that it can put its hands on property owned by the depositary bank").

68. 542 F.2d 868 (2d Cir. 1976).

newly formed government of Bangladesh claimed pre-confiscation accounts receivables owed by a United States creditor. Whereas in *Menendez* and *Republic of Iraq* the court avoided addressing the issue of shared jurisdiction over the debtor,[69] in *Cosmic,* the Second Circuit dealt squarely with the problem.[70] The court there recognized, at least impliedly, that *in personam* jurisdiction alone could not afford the sole basis upon which to determine the situs of intangible property under the Act of State Doctrine.[71] More importantly, the court's reasoning in declining to follow the *Harris* and *Menendez* analysis touched upon the basic problems with the "jurisdiction over debtor" rule mentioned above.

First, the court declined to determine whether the acting state had any jurisdiction over the debtor.[72] To this extent, the court stated: "jurisdictional determinations would inevitably require American courts to engage in complex interpretations of foreign statutory and case law pertaining to jurisdiction, resolving situs questions on such a basis would deprive the act of state doctrine of certainty and predictability."[73] Short of entirely rejecting the "jurisdiction over debtor" rule, the court nonetheless denied having previously adopted the strict jurisdictional approach and determined that following such a rule would give the Act of State Doctrine "needless scope."[74] As a result, the court implicitly recognized that it was required to apply a rule that would obviate the need for a potentially complex shared jurisdiction analysis.

Second, in looking for an alternative to jurisdictional analysis, the court elected to employ and base its decision on the "fait accompli" rule, which had been previously adopted by the Fifth Circuit in a factual pattern virtually indistinguishable from *Menendez* and *Cosmic, Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*[75] While the *Menendez* opinion provided a

---

69. *See* Menendez v. Saks & Co., 485 F.2d 1355, 1365 (2d Cir. 1973) (providing that the result might differ were the importer-debtor "present in Cuba or subject to the jurisdiction of Cuban courts" at the time of the confiscation); *Republic of Iraq*, 353 F.2d at 51 (recognizing that its conclusion might differ if the foreign sovereign could also assert jurisdiction over the debtor).

70. *Cosmic Int'l*, 542 F.2d at 874.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. 392 F.2d 706, 714-15 (5th Cir. 1968). *Tabacalera* was, perhaps, the first true intangibles case arising from the long series of Cuban confiscations revisited in United States courts. In establishing the "complete fruition" test the court in *Tabacalera* held:

> When a foreign government performs an act which is an accomplished fact, that is when it has the parties and the res before it and acts in such a manner as to change the relation-ship of the parties touching the res, it would be an affront to such foreign government for courts of the United States to hold that such an act was a nullity. Furthermore, it is plain that the [previous] decisions [have taken] into consideration

rudimentary statement of the "fait accompli" rule,[76] the more developed rule and rationale in *Tabacalera* was applied in *Cosmic*. This alternative rule appeared to address the secondary "jurisdiction over debtor" flaw of ignoring intangibles "takings" exercised by foreign sovereigns solely and tenuously asserting *in personam* jurisdiction over the debtor, thus leaving a creditor powerless before an Act of State defense. The court in *Cosmic*, thus, determined that the situs of a debt was within the acting state's territory if the state had the power to enforce or collect the debt, leaving the forum court no means by which to rectify the alteration in property rights.[77]

The "fait accompli" debt situs rule established in *Tabacalera* has been hailed as a "common sense" one because it is predicated on the foreign sovereign's ability to extinguish the debt obligation through its collection power over funds carried locally and/or payments to be made by the debtor.[78] Quite obviously, jurisdiction over the debtor is a prerequisite to the power to collect the debt. Thus, in this sense the "fait accompli" rule is a more comprehensive situs determinant. However, this rule too has intrinsic flaws.[79] For one, the rule assumes that forum courts will always be powerless to rectify a foreign sovereign's alteration of intangible property rights. Secondly, the rule, in some ways, replicates the jurisdictional simplicity of the "jurisdiction over debtor" rule in requiring that the debtor and the creditor be subject to the acting state's *in personam* jurisdiction. These flaws have generated mounting criticism against continuing application of this similarly mechanical situs rule.[80] The former assumption has increasingly proven untrue, particularly, in international private debt cases where the debtor's obligation, although leviable by the acting sovereign, is also enforceable and collectable in the forum state through attachment and execution of debtor's assets outside the acting state. The ability of the forum to enforce and collect the debt, thus should serve to negate the genuine motivation for the territoriality inquiry: respect for the acting

---

> the realization that in most cases there was nothing the United States courts could do about it in any event.

Tabacalera, 392 F.2d at 715.

76. *See* Menendez v. Saks & Co., 485 F.2d 1355, 1364 (2d Cir. 1973).

77. *See Cosmic Int'l*, 542 F.2d at 874.

78. *See* Allied Bank Int'l v. Banco Crédito Agrícola de Cartago, 757 F.2d 516, 521 (2d Cir. 1985); Herring & Degreesubler, *supra* note 67, at 990-91 (arguing that in the case of depositary accounts held by banks the situs of the obligation is where the bank "books" the liability, in other words, where the bank carries, maintains, and makes accounting entries regarding the debt); Chow, *supra* note 7, at 441.

79. *See Chow*, *supra* note 7, at 441-42; Tahyar, *supra* note 29, at 597-98; Ibietatorremendia, *supra* note 49, at 604-05.

80. *See generally* Zamora, *supra* note 25, at 1079-80 (citing to Callejo v. Bancomer, S.A., 764 F.2d 1101, 1123 (5th Cir. 1985) for the proposition that the "complete fruition" test, based on power to enforce or collect a debt is not an adequate test of determining situs of debts for act of state purposes because the analysis ignore the quantity and quality of contacts the debt has to the forum state).

sovereign's reasonable expectation of dominion over property sought to be regulated.[81] As is argued, where the debtor has assets in the forum against which the creditor may execute, the acting state attempting to alter the obligation of the debtor cannot expect to have the forum enforce the alteration. The result is the acting state will not have a reasonable expectation of dominion over the debt.

C. On Incidents Of Debt And Reasonable Expectation Of Dominion

Despite the commonsense approach of the "fait accompli" for determining debt situs, the rule's shortcomings have encouraged the development of an alternative rule of reason that looks to the "incidents of the debt." Perhaps the first decision to enunciate this alternative rule was *Libra Bank Ltd. v. Banco Nacional de Costa Rica.*[82] In *Libra*, the court dealt with one of the first debt crisis cases of the 1980's.[83] There a Costa Rican bank was prevented from servicing its debt to foreign creditor banks due to strict exchange control measures imposed by the Costa Rican government, and thus was sued in the United States by its creditor.[84] The Costa Rican bank raised the Act of State defense to excuse its non-performance, however, the court held the Doctrine inapplicable having found the situs of the foreign bank's debt to be in New York, rather than Costa Rica.[85] The rationale for its holding expressly indicated the court's pursuit of a more flexible, multifaceted rule: "although a debtor may in theory be sued at the creditor's choice in either of two jurisdictions, *the legal incidents of the debt may nevertheless place it, for the purposes of the act of state doctrine, in this nation rather than in a foreign nation*" (emphasis added).[86]

---

81. *See* Zamora, *supra* note 25, at 1079-80; *see also Callejo*, 764 F.2d at 1123 (holding the fact that a "debt can be enforced by the creditor in one forum should not be the basis of depriving him of his ability to enforce the debt in a different forum").

82. 570 F. Supp. 870 (S.D.N.Y. 1983).

83. The factual scenario of *Libra Bank* provided the basis upon which the above model Case 1 is composed. In the ensuing years following *Libra Bank*, the majority of exchange control cases implicating the Act of State Doctrine came under the basic pattern of model Case 1; *see, e.g.*, Allied Bank Int'l v. Banco Credito Agrfcola de Cartago, 757 F.2d 516 (2d Cir. 1985); Citibank, N.A. v. Wells Fargo Asia Ltd., 495 U.S. 660 (1990). During the same time, however, other banking cases raising the Act of State increasingly fit the mold of model Cases 2, 4, and 5. *See, e.g.*, Trinh v. Citibank, N.A., 850 F.2d 1164 (6th Cir. 1988); Riedel v. Bancam, S.A., 792 F.2d 587 (6th Cir. 1986); Callejo v. Bancomer, 764 F.2d 1101 (5th Cir. 1985); Braka v. Bancomer, S.A., 762 F.2d 222 (2d Cir. 1985); Drexel Burnham Lambert Group, Inc. v. Galadari, 610 F. Supp. 114 (S.D.N.Y. 1985); Perez v. Chase Manhattan Bank, N.A., 463 N.E.2d 5 (N.Y. 1984); Garcia v. Chase Manhattan Bank, N.A., 735 F.2d 645 (2d Cir. 1984); Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854 (2d Cir. 1981).

84. *See Libra Bank*, 570 F. Supp. at 874.

85. *Id.* at 881-82.

86. *Id.*

Some of the factors or "legal incidents" the *Libra* court emphasized included the terms of the loan agreement respecting forum selection, choice of law, and place of payment. Additionally, and perhaps, more importantly, the court stressed the significance of the debtor bank's assets in the United States and the attendant ability of the courts to enforce collection of the debt. The court stated: "[s]ince *Banco Nacional* was found here and had considerable assets here, 'the Act of State itself remain[ed] incomplete in the absence of acquiescence by the forum state,' and in such a case as this, 'the obvious inability of a foreign state to complete an expropriation of property beyond its borders reduces the foreign state's expectations of dominion over that property.'[87] Clearly, *Libra* sought to meld the "fait accompli" rule with another, more flexible fact-specific approach. In so doing, it set situs analysis on a course substantially in tune with the territorial underpinnings of the Act of State Doctrine.[88]

Only a few years later the Second and Fifth Circuits, again, made significant strides in the adoption and further development of the "incidents of the debt" rule. In *Callejo v. Bancomer, S.A.*,[89] the Fifth Circuit expressly adopted the "incidents of debt" rule. There the court dealt with a factual scenario upon which model Case two is based: the Mexican government imposed exchange control restrictions that directly prevented the debtor Mexican bank from performing its certificate of deposit obligations to a United States creditor. The creditor sued in the United States and the Mexican bank raised the Act of State defense. The Fifth Circuit accepted the defense holding that the situs of the certificate of deposit right was within the territory of Mexico and thus subject to Mexican regulations.[90] The rationale employed by the court clearly evinced an attempt to ascertain whether Mexico had a reasonable expectation of dominion over the debt. The court, in this respect, focused on where the deposit was carried, the contractual choice of law and forum, and collectability.[91] Since the parties had agreed to have the deposit carried and payable in Mexico, and the creditor could only collect from the debtor in Mexico, the court determined that the debt was properly sitused in

87. *Id.* at 884 (quoting Maltina Corp. v. Cawy Bottling Co., 462 F.2d 1021 (5th Cir. 1972)).

88. *Id.* (holding that where a foreign government contracts to repay a debt in the United States, consents to jurisdiction, waives sovereign immunity, and continues to maintain substantial assets in the United States, "it can hardly be said that this court's judgment shall frustrate the foreign state's reasonable expectations of dominion over the legal rights involved therein so as to vex our amicable relations with that foreign nation."); *see also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) (declining to lay down or reaffirm inflexible and all-encompassing rules).

89. 764 F.2d 1101 (5th Cir. 1985); *see also* Braka v. Bancomer, S.A., 762 F.2d 222 (2d Cir. 1985) (indistinguishable factual pattern and legal outcome).

90. *Callejo*, 764 F.2d at 1124.

91. *Id.* at 1123-24.

Mexico. The court, additionally, raised another seemingly significant factor for situating the debt in Mexico stating: "[g]iven Mexico's interest in these certificates of deposit, which were issued by a Mexican bank and payable in Mexico, disregarding Mexico's exchange regulations would be a serious affront."[92] It appears from this statement that the court also considered the sovereign's interest in the underlying private credit transaction.

1. The Factors

In recent time, the courts have increasingly stressed the importance of the contractual terms of payment and choice of law and forum in determining debt situs.[93] In *Garcia v. Chase Manhattan Bank, N.A.*,[94] the Second Circuit expressly indicated that the intangible property right there, a certificate of deposit allegedly confiscated by the Cuban government, was situated outside Cuba due to a contractual stipulation in the debt instrument ensuring the safety of the deposit against government acts. While this stipulation certainly would have governed the legal rights as among the debtor and creditor, for the purpose of locating the debt the court's reasoning was arguably flawed. First, the deposit in Garcia was issued, carried, and maintained in Cuba, not in the United States.[95] Secondly, the creditor was not contractually deprived from collecting the deposit in Cuba.[96] Thus, the debt situs for the purpose of Cuba's confiscatory act was reasonably expected to be within the territory of Cuba. Notwithstanding this considerable flaw, the courts, over the years, have continued using contractual provisions as a weightier factor than the others.

Reflecting the traditional debt situs analyses, *in personam* jurisdiction over the debtor and enforcement/collection power are, quite obviously, another set of factors in the "incidents of debt" rule. Whereas as every court following an "incidents of debt" analysis has considered these essential factors, the courts following more traditional approaches to locating a debt have too, necessarily, looked to the proper exercise of personal jurisdiction and, both, the ability to enforce and collect debts to determine situs.[97] The one point concerning this set

---

92. *Id.* at 1125.

93. *See* Garcia v. Chase Manhattan Bank, N.A., 735 F.2d 645, 649 (2d Cir. 1984); Drexel Burnham Lambert Group, Inc. v. Galadari, 610 F. Supp. 114, 118 (S.D.N.Y. 1985); Weston Banking Corp. v. Turkiye Garanti Bankasi, A.S., 57 N.Y.2d 315 (1982).

94. 735 F.2d 645 (2d Cir. 1984).

95. *Id.* at 647-50.

96. *Id.* at 647-50, 652 (Kearse, J. dissenting) (stating that in the "present case, when Garcia and her husband (collectively "Garcia") made their deposits and acquired their certificates, they agreed with Chase that the debts could be collected on presentation of the certificates anywhere that Chase has a branch . . . *Cuba was not excluded*") (emphasis added).

97. *See supra* text accompanying notes 56 through 80; *see, e.g.* F. & H.R. Farman-Farmaian Consulting Eng'rs v. Harza Eng'g Co., 882 F.2d 281, 286 (7th Cir. 1989); Trinh v. Citibank, N.A., 850 F.2d 1164

of factors that, to an extent, remains unsettled concerns shared collectability. Similar to the problem confronted by the courts in applying the "jurisdiction over debtor" rule where the forum and the acting state could validly exercise jurisdiction, the incidence with which each state can now also exercise enforcement and collection powers presents an area requiring clarification by the courts.[98] Essentially, where both, the acting and the forum state share enforcement and collection powers over the intangible (derived from the same power exercisable over the debtor), all else being equal, the court must consider yet another factor to determine whether the foreign sovereign has retains a reasonable expectation of dominion over that intangible.[99]

In *Callejo*, the Fifth Circuit, indeed, provided an additional factor on which to potentially find the foreign sovereign's continued reasonable expectation of dominion over a debt.[100] This factor, as mentioned above, would allow the courts to consider the foreign sovereign's interests in the underlying private credit transaction. In this respect, some of the interests the courts have directly or indirectly recognized have been connected to the denomination of the debt obligation in the foreign sovereign's currency.[101]

2. Ordinary or Special Debt Situs Rules

The same year the Fifth Circuit decided *Callejo*, the Second Circuit had chance to treat anew another debt crisis matter in the companion case for *Libra*. In *Allied Bank Int'l v. Banco Crédito Agrícola de Cartago*,[102] the court, once more, considered the case of a Costa Rican bank's non-performance arising from the same exchange control restrictions dealt with in *Libra*. The court in *Allied* held, like *Libra*, that the debt situs was in the United States and not in Costa Rica. Thus, the intangible property right held by the creditor was not and could not be affected by the Costa Rican regulations, and was, as a result,

---

(6th Cir. 1988); Bandes v. Harlow & Jones, Inc., 852 F.2d 661, 667 (2d Cir. 1988); Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854 (2d Cir. 1981); Tchacosh Co. v. Roskwell Int'l Corp., 766 F.2d 1333 (9th Cir. 1985); United Bank Ltd. v. Cosmic Int'l, Inc., 542 F.2d 868, 874-75 (2d Cir. 1976); Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47 (2d Cir. 1965).

98. *See supra* text accompanying notes 78 through 80.

99. *See* Frumkin, *supra* note 52, at 491-93 (arguing that an additional factor to consider in shared collectability is whether the forum court can fully or substantially satisfy the debt obligation owed to the creditor by execution of the debtor assets within the forum). This argument is a persuasive one, particularly, as the lack of obtaining adequate collection relief in the forum may reasonably indicate to the acting state that it has dominion over the regulated intangible.

100. *See* Callejo v. Bancomer, S.A., 764 F.2d 1101, 1125 (5th Cir. 1985); Braka v. Bancomer, S.A., 762 F.2d 222 (2d Cir. 1985). *See also* Frumkin, *supra* note 52, at 491-92.

101. *Callejo*, 764 F.2d at 1124; Tahyar, *supra* note 29, at 613.

102. 757 F.2d 516 (2d Cir. 1985).

enforceable in the United States.[103] The court's rationale, more than simply apply the traditional mechanical rules, intimated that flexibility was an important concern under the Doctrine's territoriality inquiry.[104]

The result in *Allied* yielded yet another development in debt situs analysis. Rather, than conform to the generally accepted "fait accompli" rules, the *Allied* court made a distinction between "act of state situs analysis" and "ordinary situs of debt analysis."[105] Judging from the court's opinion the reasonable inference is that the court was no longer satisfied with the "fait accompli" rules and instead was searching for a rule of reason, which it termed "ordinary situs of debt analysis." On closer inspection, however, this "ordinary" analysis considers similar, if not identical, factors as those in *Libra*: jurisdiction, place of payment, and collectability.[106] Interestingly, rather than characterizing the analysis as one looking to the "incidents of debt", the court utilized the more confusing term "ordinary situs analysis" as if to suggest the use of conflict of laws rules to determine debt situs.[107]

In contrast to the *Allied* court's leaning toward an "ordinary" conflict of laws analysis, it has been suggested that the appropriate debt situs analysis under the territoriality inquiry requires a unilateral focus on the expectations of the foreign sovereign and not a balancing approach weighing the interests of the forum against those of the foreign sovereign.[108] This unilateral focus is, arguably, implied in the *Libra* analysis as the court there elected not to directly consider the potential interests of the forum in determining debt situs. The *Libra* opinion consciously considered the factors outlined above (jurisdiction, place of payment, collectability, etc.) as they related to the acting state's reasonable expectation of dominion.

D. Devising a Continuum of Reasonableness

In determining an acting state's expectation of dominion over intangibles the foregoing situs factors may combine to more accurately reflect the

---

103. *Id.* at 521.

104. *Id.* at 521-22.

105. *Id.*

106. *Id.* at 522.

107. Tahyar, *supra* note 29, at 611 n.106 (noting the similarity between the debt analysis and conflict of laws rule).

108. *Id.*; Miller, *supra* note 25, at 673; Chow, *supra* note 7, at 443; *Cf.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971); Michael Gruson, *The Act of State Doctrine in Contract Cases As a Conflict-of Laws Rule*, 1988 U. ILL. L. REV. 519, 520 (1988); Paul N. Filzer, *The Continued Viability of the Act of State Doctrine in Foreign Branch Bank Expropriation Cases*, 3 AM. U. J. INT'L L. & POL'Y 99, 124-25 (1988); Edmund W. Sim, *Throwing A Monkey Wrench Into the Wheels of International Finance: Wells Fargo Asia Ltd. v. Citibank, N.A.*, 11 MICH. J. INT'L L. 1039, 1058-59 (1990); Miller, *supra* note 25, at 683.

reasonableness of that expectation.[109] The ability to enforce and collect is essential elements in determining reasonableness. So too is the power to assert *in personam* jurisdiction over the debtor. Consideration of contractual stipulations (place of payment, choice of law and forum, country risk insurance, etc.) between the underlying private parties is an important element, but is likely not one of fundamental value for a state's reasonable expectation of dominion.

1. Strongest Expectation of Dominion

An acting state's regulations, when viewed through the unilateral situs analysis, are seized with the strongest possible expectation of dominion where the state has jurisdiction over the debtor, power to enforce and collect, and is, either, by default or design of the underlying private parties the place of payment. The exemplary cases on this point are *Callejo* and *Braka*. These cases provide the factual scenario upon which model Case two is based.

2. Strong Expectation of Dominion

Following the strongest case for the acting sovereign is the fact pattern where the state, again, has the sole power to enforce and collect the intangible and jurisdiction over the debtor. Unlike the case above, reasonableness here may require that the acting state have exclusive power to levy against the debtor's assets within its sovereign territory. There have been a number of decisions indicating that this would likely be the accepted result on this point: *Bandes v. Harlow & Jones*,[110] *Republic of Iraq v. First National City Bank*,[111] *Tchacosh Co. v. Roskwell Int'l Corp.*,[112] and *F. & H.R. Farman-Farmaian Consulting Eng'rs v. Harza Eng'g Co.*[113] These cases provide the factual scenarios upon which model Cases three and five.

3. Substantial Expectation of Dominion

On the fringes of reasonableness, a state may still retain sufficient dominion over a debt so as to come expect judicial abstention from the forum

---

109. *See* Miller, *supra* note 25, at 675-79.

110. 852 F.2d 661, 667 (2d Cir. 1988).

111. 353 F.2d 47 (2d Cir. 1965).

112. 766 F.2d 1333 (9th Cir. 1985). The facts in *Tchacosh* clearly also evokes the strongest expectation of dominion for the acting sovereign. The Ninth Circuit held there that the acting state was the place where the service contract between the parties was to be performed and where payment was impliedly to be made.

113. 882 F.2d 281, 286 (7th Cir. 1989). Similar to *Tchacosh*, the Seventh Circuit in *Farmaian*, also determined that shared enforcement and collection power did not lower the acting state's expectation of dominion where the contractual and implied obligations were performable within the acting state.

state where jurisdiction over the debtor can be asserted, but the power to enforce and collect is shared with the forum state, and no other contractual factor serves to further connect the acting sovereign with the intangible. In this case, the acting sovereign may validly be held to retain dominion if it has a legitimate interest in the underlying private credit transaction between the parties. Under the additional "tie-breaking" factor in *Callejo* and *Braka*, this interest is implicated by the acting sovereign's inherent right to regulate its national currency and payment obligations denominated in such currency.[114]

IV. CONCLUSION

The financial obligations of developing and debtor nations, as well as the obligations of private debtors within these debtor nations is, once more, becoming a mounting concern for private international creditors. The fact that these nations have in the past resorted, and may again look to drastic policy measures to contain economic downturns should alert international and domestic creditors to the attendant legal implications of such purely sovereign maneuvers. The Act of State Doctrine is just one of the several jurisprudential concerns in international credit disputes; however, to a greater degree than the other concerns, it evokes profound considerations of sovereignty and international comity. Moreover, the Doctrine's territoriality inquiry, particularly with respect to disputes over intangibles, has for many years mired the judiciary in a morass of, on one-hand rigid standards, and on the other, unconvincing rationale on the situs of indefinable cross-border property rights. If any one notion on debt situs persists, it should fundamentally necessitate legal and analytical flexibility, and must consider the reasonable expectation of a sovereign to regulate property rights within its territory.

114. *See supra* text accompanying notes 97 through 100.