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## COMMENTS

### Cuban Creditors, American Debtors: Spreading Risk Allocation in a Communist State

Justin Kaplan\*

#### I. INTRODUCTION

In 1959, the political landscape of Cuba and the southeast United States changed forever. Fidel Castro's Soviet-backed communist revolutionaries seized control of the island paradise almost overnight in a relatively short-lived insurrection. Many people lost their lives, and many more lost their property, for in a communist state, private property does not exist.<sup>1</sup> Not only did the new communist government nationalize tangible property, but Castro's regime also seized notes of debt as well.<sup>2</sup> These seizures continue to affect the legal landscape not only of Cuba, but also the United States.

Cornelia Hernandez Perez's story is instructive.<sup>3</sup> In 1958 Cornelia Hernandez Perez's father had on deposit with The First National City Bank of New York (the "Bank") 300,000 Cuban pesos. In or around 1962, while the Bank still owed her father the money, Castro's new communist government nationalized the Bank.<sup>4</sup> In doing so, the Cuban government also repatriated all

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\* Juris Doctor Candidate, May 2006, University of Miami School of Law. I would like to thank Professor Anita Ramasastry for her guidance as well as for putting me in contact with Joseph Sommer, Esq., of the Federal Reserve Bank in New York, NY. His insight was truly inspirational and helped to open doors I would have never known existed.

1. Communist states such as Cuba do not recognize the right to trade in private property therefore barring private ownership except by appropriation. See LOUIS FREDERIC VINDING KRUSE, *THE RIGHT OF PROPERTY* 9 P. T. Federspiel trans., (1939).

2. See *Garcia v. Chase Manhattan Bank, N.A.*, 735 F.2d 645, 647 (2d Cir. 1984) (describing Cuban Law No. 78).

3. See *Hernandez Perez v. Citibank, N.A.*, 328 F. Supp. 2d 1374 (S.D. Fla. 2004); see also Defendant Citibank's Motion to Dismiss for Failure to State a Claim and for Failure to Join Indispensible Parties and Accompanying Memorandum at Law, *Hernandez Perez* (No. 04-20910).

4. See *Garcia*, 735 F.2d at 647 (describing Cuban Law No. 78, which enabled the Cuban Ministry of Recovery of Misappropriated Property to, *inter alia*, freeze foreign bank accounts).

foreign and domestic banks. The Cuban branch of the Bank was therefore closed. Cornelia's father died, leaving all of his assets to her mother. Her mother subsequently died and left her estate to Cornelia, still a Cuban citizen, and Cornelia's brother, an American citizen living in Miami, Florida. Cornelia's father's certificate of deposit is alleged to be included in the estate.<sup>5</sup>

How can Cornelia and her brother retrieve the funds due to them on their father's certificate of deposit? Are they to recover from the Bank or from the *Banco Nacional de Cuba*?<sup>6</sup> Have they simply lost all rights to the funds? The answers to the above questions are far from black and white. Many legal questions come into play,<sup>7</sup> particularly: First, where is the situs of the debt? Second, does the Act of State Doctrine apply?<sup>8</sup>

As it exists today, there is no coherent codification of law that creditors and banks may depend on to determine the correct avenues for handling situations like Cornelia Hernandez-Perez's. If courts compel the banks to honor the debt, they will have to pay the obligation created by the secured transaction twice.<sup>9</sup> If courts find the banks not liable, people in possession of notes of debt will have lost their money in United States banks, potentially creating a damaging precedent to the lauded protections that American banking laws afford U.S. bank customers. Different courts have

5. See *Hernandez Perez*, 328 F. Supp. 2d at 1376; see also Defendant Citibank's Motion to Dismiss for Failure to State a Claim and for Failure to Join Indispensable Parties and Accompanying Memorandum at Law at 1-3, *supra* note 3.

6. American banks that had Cuban branches repatriated ultimately credited the state run bank, *Banco Nacional de Cuba*, a sum equal to that deposited therein. See, e.g., *Garcia*, 735 F.2d at 647.

7. This issue is not unlike many other issues in commercial law: how to allocate loss between two parties. The allocation of risk in determining loss allocation in this instance is two-fold: risk of deposit expropriation and risk of asset expropriation. Debt situs and Act of State Doctrine applicability are instructive as to how the above risks can be allocated.

8. The doctrine is best explained by the Supreme Court in *Underhill v. Hernandez*, 168 U.S. 250, 252 (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 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.") See also Margaret E. Tahyar, *The Act of State Doctrine: Resolving Debt Situs Confusion*, 86 COLUM. L. REV. 594 (1986) ("The act of state doctrine forecloses United States courts from questioning the validity of a foreign sovereign's acts that occur within its own territory.").

9. When Cuba repatriated all foreign bank assets, debts were included. Thus, the banks remitted funds equal to all debts owed by their branches, effectively paying on the notes. If the banks are found liable on notes by American courts, they would have to pay double on the notes already honored in Cuba.

ruled in favor of both alternatives. The reality is that due to Cuba's taking of branch banks' assets, both the banks and the creditors have been victimized.<sup>10</sup> Although the expropriation of Cuban debts occurred almost fifty years ago, it remains a pertinent issue,<sup>11</sup> especially considering the current nature of U.S.-Cuba relations.

This comment will analyze the applicable law as it exists at the time of publication and will attempt to restate what the law should be. In addition, it will propose an equitable solution so persons holding notes of deposit from Cuban branches of American banks will be able to recover their funds, and the American banks that issued said notes will not be required to honor them if they have already done so vis-à-vis remittance to the *Banco Nacional de Cuba*.<sup>12</sup>

## II. RETRACING THE LAW

### A. Cases Involving Cuba

Very few cases that consider the rights and liabilities of litigants arguing over payment of notes of debt that have been expropriated by collateral evincing by the Cuban government have risen to the appellate level.<sup>13</sup> *Garcia v. Chase Manhattan Bank, N.A.*<sup>14</sup> and *Edelmann v. Chase Manhattan Bank, N.A.*<sup>15</sup> are the only two federal cases on point that involve similar scenarios.

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10. The court in *Day-Gormley Leather Co. v. Nat'l City Bank*, 8 F. Supp. 503, 505 (S.D.N.Y. 1934), faced with a similar situation, opined that both the American bank that had its Russian branch and all assets thereof seized, and the depositor that lost its funds as a result, were victims.

11. See *Hernandez Perez v. Citibank, N.A.*, 328 F. Supp. 2d 1374 (S.D. Fla. 2004). Cases that have considered this issue exercised federal question jurisdiction under the Edge Act, 12 U.S.C. § 632 (2005), which provides that: "Notwithstanding any other provision of law, all suits of a civil nature . . . to which any corporation organized under the laws of the United States shall be a party, arising out of transactions involving international or foreign banking . . . shall be deemed to arise under the laws of the United States . . ." Under the Edge Act, the accrual of the plaintiff's right to sue has to be determined under the law of the controlling parent bank—the ultimate obligor. Thus, a cause of action against the obligor of a demand accrues upon demand (in 49 states). The statute of limitations only begins upon refusal to honor a demand. See, e.g., *Edelmann v. Chase Manhattan Bank, N.A.*, 861 F.2d 1291, 1305 (1st Cir. 1988).

12. See *Garcia v. Chase Manhattan Bank, N.A.*, 735 F.2d 645, 647 (2d Cir. 1984) (Cuban Ministry of Misappropriated Property ordered U.S. bank to close account and remit its value and bank complied).

13. The only three cases are *Garcia*, 735 F.2d 645, *Edelmann*, 861 F.2d 1291, and *Perez v. Chase Manhattan Bank, N.A.*, 463 N.E.2d 5 (N.Y. 1984).

14. 735 F.2d 645.

15. 861 F.2d 1291.

*Perez v. Chase Manhattan Bank, N.A.*<sup>16</sup> was decided differently than *Garcia* and *Edelmann* in New York state court, although it had an almost identical fact record as the other two cases.

Although each is unique in its details, the general fact pattern for all three cases can be summarized as follows. Cuban citizens approached Chase Manhattan Bank branches located in Cuba with concerns that their liquid assets would not be safe in the event that Fidel Castro took over the Cuban government.<sup>17</sup> On numerous occasions, Chase officials assured the potential depositors that their repayment could be made in American dollars at any Chase Manhattan Bank branch in the world and that they should deposit their monies with the bank in the interest of safety, as American banking protections would apply.<sup>18</sup> The Cuban citizens deposited their money as a result.<sup>19</sup> At some point after deposit, but before a demand was made on the note, the Cuban government repatriated the Chase Manhattan Bank branches on the island.<sup>20</sup> Cuba then demanded that Chase in turn remit the proceeds of the various deposits in their exact sums, and Chase complied.<sup>21</sup> At a later date, the promissory note holders demanded payment from one of Chase Manhattan's branches abroad, including, but not limited to, the "home office" in New York.<sup>22</sup> Chase subsequently refused to pay on the notes, and claimed *force majeure*<sup>23</sup> as an affirmative defense when brought to suit.<sup>24</sup> Whether the bank remains liable on the debt to the holders of the promissory notes after repatriation rests on where the situs of the debt is held to be located.<sup>25</sup>

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16. 463 N.E.2d 5.

17. See generally *Garcia*, 735 F.2d 645, *Edelmann*, 861 F.2d 1291, and *Perez*, 463 N.E.2d 5.

18. See, e.g., *Garcia*, 735 F.2d at 646-47.

19. See *id.*

20. See *id.* at 647.

21. See e.g., *Perez*, 463 N.E.2d at 6.

22. See *id.* at 7.

23. Defined as "an occurrence that is: (1) abnormal or unusual, (2) strictly natural in origin with no human assistance or influence, and (3) inevitable, so that it could not have been reasonably prevented or provided against by the exercise of ordinary human foresight." 1 AM. JUR. 2D *Act of God* § 1 (2004). The term has "also been said . . . to have [a] broader meaning than an act of God, assuming the form of such human agency as governmental intervention resulting from the necessities of war[.]" which may include Cuban acts of repatriation. *Id.*

24. See, e.g., *Edelmann v. Chase Manhattan Bank, N.A.*, 861 F.2d 1291, 1297 (1st Cir. 1988).

25. If the debt was in Cuba at the time of repatriation, American banks can claim *force majeure* and the Act of State Doctrine as a defense. If the situs of the debt remains in the home office of the American bank into whose branch the original

The first determination that must be made to determine the situs of the debt is whether foreign branches of American banks are separate entities from their parent banks.<sup>26</sup> In contrast to other American companies that have proliferated overseas in the form of locally incorporated subsidiaries, American banks' foreign branches are not separate legal entities.<sup>27</sup> Under traditional rules of corporate law, the home bank remains liable for obligations incurred by its foreign branches.<sup>28</sup> There is, however, strong evidence that the home bank does not remain liable for sovereign or political risks<sup>29</sup> associated with operating under the purview of foreign laws. Rather, the depositors retain the risk of loss.<sup>30</sup>

Home banks gaining favorable treatment from the FDIC for transferring the risk of loss due to sovereign acts of the host country in their foreign branches seems conclusory, but it is actually illusory in terms of whether American banks are liable for debts incurred in Cuba that have been subsequently repatriated. The terms of the deposit agreement will ultimately decide who remains liable on the notes of deposit repatriated from Cuban branches.<sup>31</sup> The fact that the contract ultimately controls explains the disparity between the federal cases<sup>32</sup> and the New York case.<sup>33</sup>

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deposit was made, the banks would naturally continue to be liable on the debt at any of its offices anywhere in the world.

26. Naturally, if a Cuban branch of an American bank is deemed to be a separate entity, the parent bank can incur no liability for secured transactions entered into by a branch.

27. See Mark A. Kantor & Francis D. Logan, *Deposits at Expropriated Foreign Branches of U.S. Banks*, 1982 U. ILL. L. REV. 333, 336.

28. See M. Anne Hannigan, *United States Home Bank Liability for Foreign Branch Deposits*, 1989 U. ILL. L. REV. 735, 741.

29. See *supra* text accompanying note 7.

30. See generally Logan & Connick, *Risk Management and the Status of Foreign Bank Branches Under U.S. Law*, in SOVEREIGN LENDING: MANAGING LEGAL RISK 223 (M. Gruson & R. Reisner eds., 1984). Foreign branch deposits are exempt from domestic reserve requirements and interest rate ceilings imposed upon the parent bank. The Federal Reserve Board recognizes favorable treatment that foreign branches receive as compensation for the added political risks assumed by the depositors. The home bank will lose exempt status if the home bank attempts to assume foreign political risk by guaranteeing payment of foreign deposits in the U.S. See Hannigan, *supra* note 28, at 740-41. Furthermore, foreign branches of American banks generally offer higher interest rates as a result of the greater risks involved with offshore banking, as foreign branch deposits are not restrained by U.S. interest rate ceilings. See 12 C.F.R. § 217.1(c)(ii) (2005).

31. See Hannigan, *supra* note 28, at 754.

32. See, e.g., *Garcia v. Chase Manhattan Bank, N.A.*, 735 F.2d 645 (2d Cir. 1984); See *Edelmann v. Chase Manhattan Bank, N.A.*, 861 F.2d 1291, 1305 (1st Cir. 1988).

33. See *Perez v. Chase Manhattan Bank, N.A.*, 463 N.E.2d 5 (N.Y. 1984).

*Garcia*<sup>34</sup> and *Edelmann*<sup>35</sup> rest on the proposition that all of the assurances that the money was safe in the home bank placed liability at the home bank in the event of *force majeure* at the branch where the deposit was initially made.<sup>36</sup> Thus, regardless of traditional banking laws, the parties received the benefit of their bargain when the home bank remained liable for debts incurred at a foreign branch, notwithstanding an act of *force majeure*. The debt remained in the home office in New York, not at the branch itself.<sup>37</sup> How is it possible, then, that *Perez* was decided differently, as it is factually similar to both *Garcia* and *Edelmann* and was decided under the same laws?

Put simply, the *Perez* Court found the situs of the debt at the time of repatriation was only at the branch in which it was created, so the Act of State doctrine was therefore applicable.<sup>38</sup> According to the *Perez* Court, the Act of State doctrine applies when a foreign sovereign's act amounts to a taking of property within its own borders.<sup>39</sup> A state can only take property that is within its borders.<sup>40</sup> For example, the Cuban government cannot come to the United States and take a Cuban citizen's car that happens to be located in America.<sup>41</sup> However, if a car happened to be

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34. 735 F.2d 645.

35. 861 F.2d 1291.

36. "The purpose of the agreement between Chase and Dominguez and Garcia was to ensure that, no matter what happened in Cuba, including seizure of the debt, Chase would still have a contractual obligation to pay the depositors upon presentation of their CDs . . . Chase was aware of their desire to safeguard their money and assured them that their funds were protected. Chase 'accepted the risk that it would be liable elsewhere for obligations incurred by its branch.'" *Garcia*, 735 F.2d at 650 (citing *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854, 863 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982)). "The intention of the parties is clear. The certificates were to be presented at any branch of Chase in any part of the world except Cuba." *Edelmann*, 861 F.2d at 1294 (emphasis in original). The parties never assumed that the debt would be payable in Cuba, for the precise reason for contracting was to keep the funds outside the jurisdiction of the Cuban government.

37. See *Edelmann*, 861 F.2d at 1294.

38. See *Perez*, 463 N.E.2d at 8 ("For purposes of the Act of State doctrine, a debt is located within a foreign State when that State has the power to enforce or collect it.") (internal citations omitted). Cuban Law No. 78, Art. 1, gave Cuba the right to collect the debt: "The Ministry of Recovery of Misappropriated Property is the proper organization of the Executive Power intended to recover property of any type [including negotiable and non-negotiable instruments] 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." *Garcia*, 735 F.2d at 647 n.1 (translated from Spanish); see also KRUSE, *supra* note 1.

39. See *Perez*, 463 N.E.2d at 8.

40. See *id.*

41. In fact, there are billions of dollars in bank accounts in the United States that

in Cuba, the Cuban government would have full jurisdiction over the car and could appropriate it if it so desired, even if the car was property of an American citizen.

As far as application of the Act of State doctrine to a debt, it is well established that the power to enforce or collect a debt is dependent on the presence of the debtor.<sup>42</sup> The *Perez* court held that "if the debtor is present in the foreign State and the debt is payable there, the foreign sovereign then has power to enforce or collect it, and a confiscation of that debt amounts to a seizure of property within that sovereign's borders."<sup>43</sup>

The *Perez* debt was payable in Cuba.<sup>44</sup> The Cuban government demanded payment on Chase's debt under Cuban law, and Chase complied by honoring its debt.<sup>45</sup> Thus, "Chase paid over the full amount of its debt [on Perez's note] pursuant to the direction of the Cuban government, a direction which under the Act of State doctrine is beyond [the Court's] review . . . ."<sup>46</sup> Although the Cuban government demanded payment without possession of the note, the branch obviously felt the demand was legitimate because it was subject to *Cuban law*. Chase Manhattan bank paid the debt as required by the promissory note, although to Cuba, so the debt was extinguished and Chase was relieved from liability on a later demand.<sup>47</sup>

### B. Vietnamese and Russian Precedent

The fact that the creditors in *Garcia* and *Edelmann*<sup>48</sup> relied to their detriment on assurances that the debt would be payable outside of Cuba, and therefore safe, cannot reconcile the differences of opinion between the courts that so ruled and the *Perez* court. How did the federal judges somehow determine the debt

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belonged to Cuban citizens prior to the Cuban repatriation that remain frozen for the same proposition. The money was deposited in the United States and there it shall remain. Cuba cannot claim the private bank accounts of its citizens located in the United States as its own simply because it so declared in regards to deposits made in Cuba.

42. See *Harris v. Balk*, 198 U.S. 215, 222-223 (1905).

43. *Perez*, 463 N.E.2d at 8.

44. See *id.* at 9 (The court did not find the fact that the debt was payable *outside of Cuba* as well to be an issue. Although the contract for debt contemplated numerous situs for payment, it constituted a single obligation to pay).

45. See *id.*

46. *Id.* (internal citation omitted)

47. See *id.* (Payment at one of the places where the note could be redeemed extinguished the debt at all of the possible situs of debt).

48. Collectively referred to as "the federal cases" or "the federal decisions" for purposes of this subsection.

left its original situs simply because the creditors were told that deposits in Chase Manhattan's Cuban branches were safe? The answer lies in the reliance on misplaced precedent from the Vietnam War and Bolshevik Revolution.

The federal decisions rest most soundly on *Vishipco Line v. Chase Manhattan Bank, N.A.*<sup>49</sup> In *Vishipco*, the plaintiffs, ten Vietnamese corporations which maintained Vietnamese Piastre demand deposit accounts in Chase Manhattan's Saigon branch in 1975, appealed a judgment of the District Court for the Southern District of New York dismissing their claims against Chase for payment on various deposit accounts and one certificate of deposit.<sup>50</sup> The Second Circuit Court of Appeals reversed.<sup>51</sup>

From 1966 to 1975, Chase Manhattan Bank operated a branch office in Saigon.<sup>52</sup> The ten corporate plaintiffs were depositors at that branch.<sup>53</sup> After Chase officials in New York concluded that Saigon was about to fall to the Communists, they closed the Saigon branch and ceased Vietnamese operations.<sup>54</sup> Saigon fell on April 30, 1975, and the North Vietnamese government seized all of the branch's assets.<sup>55</sup> The plaintiffs fled Vietnam shortly before the takeover, and after arriving in the United States, demanded Chase pay the Piastre deposits made in Saigon. The bank refused to pay, which precipitated the suit.<sup>56</sup>

The court held Chase liable for the debt incurred at its Saigon Branch.<sup>57</sup> In doing so, the court stated that the Act of State doctrine is limited in application to property within the territorial jurisdiction of the acting state.<sup>58</sup> By closing the Saigon branch prior to the fall of Saigon and ceasing operations to protect against any affirmative act of the North Vietnamese expatriating assets the branch may have had, the debt no longer remained in Vietnam.<sup>59</sup> In effect, the situs of the debt "sprung" back to the home

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49. 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982).

50. *See id.* at 856; *see also* *Trinh v. Citibank, N.A.*, 850 F.2d 1164 (6th Cir. 1987) (containing almost the same material facts).

51. *See Vishipco*, 660 F.2d. at 866.

52. *See id.* at 857.

53. *See id.*

54. *See id.*

55. *See id.*

56. *See id.*

57. *See id.* at 866.

58. *See* Patrick Heining, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches*, 11 LAW & POL'Y INT'L BUS. 903, 963 (1979).

59. *See Vishipco*, 660 F.2d at 864 (holding that if unsettled local conditions caused a bank to close a branch, it should inform its depositors of the date when the branch was to close and allow them to withdraw their deposits, or, if the conditions will not

bank.

The *Vishipco* Court cites only one case to support its creation of the "springing" theory of debt situs.<sup>60</sup> The springing situs theory of debt originally comes from a New York case, *Sokoloff v. National City Bank*.<sup>61</sup> The facts in *Sokoloff* are quite different than the Vietnam cases.

In 1917, Boris Sokoloff, a Russian Citizen, deposited \$30,225 and \$883.50 in the National City Bank of New York's ("National") main office in New York, to be held in National's Petrograd, Russia, branch in Rubles.<sup>62</sup> At some point after returning to Russia, the creditor asked that his funds be transferred to another bank in Russia.<sup>63</sup> Due to the archaic Russian bookkeeping system in place at the time,<sup>64</sup> coupled with the unrest of the Bolshevik Revolution, the money was "lost." The American bank would not honor any demand in its Petrograd branch because it did not know if its accounts in Kharkoff had been debited in accordance with the *Giro* style transfer.<sup>65</sup> Before the parties involved could determine if the funds were actually "transferred," the Communist government closed the Petrograd branch and seized whatever assets remained therein.<sup>66</sup>

The court in *Sokoloff* treated the incident as a breach of contract.<sup>67</sup> Sokoloff repeatedly demanded his deposit at the Petrograd

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allow such a result, allow them to obtain payment at an alternative location. In the event that those measures are impossible or only partially successful, the parent bank should then be liable for deposits which it was unable to return abroad).

60. See *Sokoloff v. Nat'l City Bank*, 164 N.E. 745 (N.Y. 1928) (the only precedent for the springing situs theory).

61. *Id.*

62. See *id.* at 746-47.

63. See *id.*

64. Russian banks employed the *Giro* system, which is a manner of bookkeeping that operates, for example, as follows:

Upon the receipt of the order we debit the client's account to the amount which he requested to be transferred. Our record and our account with the State Bank is credited with the same amount. Then the State Bank, upon receipt of our instructions, perform a similar operation; they debit our account and credit the account of the Kharkoff Branch with the same amount. They send a similar instruction to their Kharkoff Branch, where the system of debits and credits is repeated. Our part of the transfer is complete when we sent out our instructions to the State Bank. The rest of this transfer would be performed in the State Bank Petrograd or the State Bank Kharkoff or the Kharkoff Mutual Credit Society.

*Sokoloff*, 164 N.E. at 747.

65. See *id.* at 748.

66. See *id.* at 749.

67. See *id.* (It is important to note that the contract was entered into in New York

branch while the transfer was pending and was refused.<sup>68</sup> The court held that because of the bookkeeping system, no transfer was ever made except on paper.<sup>69</sup> Thus, the bank breached its contract which it entered into in New York.

Although the *Sokoloff* Court made note of the fact that the bank did not breach its contract willfully,<sup>70</sup> which would normally make the Act of State doctrine applicable (thereby stripping the home office of liability), it found the home bank liable on the debt for breach of contract.<sup>71</sup> The United States did not recognize the Soviet Union as legitimate, so its governmental acts such as seizing property were not considered an act of the state. The Act of State doctrine defense, therefore, could be utilized as a defense.<sup>72</sup> Thus, the home bank remained liable for its breach of contract, for at the moment of breach, the debt "sprung" back to the home bank.<sup>73</sup>

### III. RECONCILING THE LAW

Although paramount, the answers to the basic questions, "Where is the situs of the debts incurred in Cuban branches of American banks?" and "Can banks use the Act of State doctrine as an affirmative defense against adjudicating liability?" are not answered easily. Each case propounding the law is distinguishable from the others. All of the existing case law was decided extremely narrowly,<sup>74</sup> pertinent only to the facts included therein.

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specifically with the home bank, not in Petrograd. Because the contract was made between Sokoloff and National's home bank in the U.S., it remains liable for the action of breach by its foreign branch; see also *Perez v. Chase Manhattan Bank, N.A.*, 463 N.E.2d 5 (N.Y. 1984).

68. See *Sokoloff*, 164 N.E. at 749.

69. See *id.*

70. See *id.*

71. See *id.* at 750.

72. See *id.* at 749-50.

73. See *id.* at 750.

74. The previously mentioned, federally decided Cuban cases relied on the fact that the bank branch officers made oral representations that the deposits would be safe as backed by American funds in American banks. See *Garcia v. Chase Manhattan Bank, N.A.*, 735 F.2d 645 (2d Cir. 1984); *Edelmann v. Chase Manhattan Bank, N.A.*, 861 F.2d 1291 (1st Cir. 1988). The previously discussed Vietnamese cases operated as such because the bank branches closed prior to their assets being repatriated. See *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982); *Trinh v. Citibank, N.A.*, 850 F.2d 1164 (6th Cir. 1987). *Sokoloff* turned on a very specific system of bookkeeping used prior to the Communist takeover of Russia that has absolutely no implication today. See *Sokoloff*, 164 N.E. 745.

### A. *Situs of the Debt*

The situs of the debt decides whether the Act of State doctrine applies, thus determining how the risk of loss on expropriated debts is allocated. Debt situs turns on choice of law determinations. As of the time of publication, no authority exists that truly answers where the situs of the debt deposited in Cuban branches of American banks prior to repatriation is located. Some of the authority on point holds that the debt "sprang" to the home bank at the instance that demand became impossible at the branch office in Cuba.<sup>75</sup> These cases rest solely on the fact that deposits were expressly made for payment outside of Cuba to protect assets in the face of the pending revolution. On the other hand, *Perez*<sup>76</sup> did not contemplate the fact the banks affirmatively told creditors their deposits would be safely payable outside of Cuba. Thus, the court held the situs of the debt remained in Cuba at the time of repatriation.<sup>77</sup> As a result, one issue remains unresolved. The *Perez* court held that no springing occurred because it was payable outside of Cuba, *as well as within Cuba*.<sup>78</sup> The very fact that the debt was payable inside of Cuba brought the debt under Cuba's jurisdiction. In contrast, *Garcia*<sup>79</sup> and *Edelmann*<sup>80</sup> held the debt sprung back to the home office as a result of repatriation because it was payable outside of Cuba.

Choice of law issues and the situs of a debt are easily cleared up by using an *incidents of the debt analysis*.<sup>81</sup> An incidents of the debt analysis takes various factors into account when determining debt situs: jurisdiction over the debtor, place of payment, intent as to governing law, and currency denomination.<sup>82</sup>

Understanding the purposes underlying the Act of State doctrine is helpful in recognizing why an incidents of the debt analy-

75. See *Garcia*, 735 F.2d at 741; *Edelmann* 861 F.2d 1291.

76. 463 N.E.2d 5 (N.Y. 1984).

77. See *id.*

78. See *id.* at 13 (The court reasoned that only if a debt is not payable at all in the confiscating state would the act of state doctrine be inapplicable to confiscation because in such situations the foreign sovereign has no power to enforce or collect the debt).

79. 735 F.2d 645.

80. 861 F.2d 1291.

81. "The proper test for determining situs is where the incidents of debt, as a whole, place it." *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1123 (5th Cir. 1985); see also *Libra Bank Ltd. V. Banco Nacional de Costa Rica, S.A.*, 570 F. Supp. 870, 881-84 (S.D.N.Y. 1983); Tahyar, *supra* note 8, at 612-13 (explaining four factors to be considered in the Incidents of Debt Analysis).

82. See Tahyar, *supra* note 8, at 612-13.

sis clears up the current confusion about Cuba's debt fiasco.<sup>83</sup> The Act of State doctrine was originally an idea to respect the sovereign authority of other nations.<sup>84</sup> In 1964, however, the Supreme Court shifted the basis for the doctrine away from respect for sovereign authority to constitutional principals of separation of powers.<sup>85</sup> However, the original principles of comity among independent nations still play a role in the propagation of the Act of State doctrine.<sup>86</sup> Thus, when determining whether the Act of State doctrine applies, courts must continue, at least as part of the analysis, to look to the foreign sovereign's position in the matter. The situs of a debt is about as "intangible a concept known to exist in the law[.]"<sup>87</sup> so the incidents of the debt analysis necessarily requires sovereign authority to play a role in determining Act of State doctrine applicability. Therefore, applying the Act of State Doctrine makes an incidents of the debt analysis a workable framework for determining the situs of debt in cases of Cuban expropriation of debts in United States bank branches located in Cuba at the time of seizure.

When utilizing an incidents of the debt analysis, the situs of the debt is determined by the "foreign state's reasonable expectations" of dominion over the debt.<sup>88</sup> This analysis takes into

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83. The applicability of the Act of State doctrine as an affirmative defense in Cuban debt expropriation suits will be addressed in the subsequent section.

84. See Tahyar, *supra* note 8, at 606.

85. For example, in the United States Supreme Court case, *Banco Nacional de Cuba v. Sabbatino*, the Cuban government confiscated sugar from a boat docked in a Cuban port. In order that Cuba would permit the ship to leave port, the American broker executed new contracts with interveners appointed by the Cuban government. After its expropriation, the sugar was exported from Cuba. The pre-revolutionary owners of the sugar attached the proceeds of the sale of the sugar. The court adhered to the Act of State doctrine not on grounds that Cuban sovereignty was to be respected, rather that it was not the Judiciary's place to determine issues of foreign policy as it would constitute an encroachment on the Executive power. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

86. See *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976) (holding that the doctrine of sovereign immunity did not extend to the purely commercial activities of nations); see also *First Nat'l City v. Banco Nacional de Cuba*, 406 U.S. 759 (1972) (holding that when the application of the act of state doctrine would not advance the interest of American foreign policy, the doctrine will not be applied by the Court). See also Tahyar, *supra* note 8, at 606 ("In the two act of state cases subsequent to *Sabbatino*, the Court has failed to reach a majority consensus concerning the doctrine's purpose.").

87. *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706, 714 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968).

88. See *Libra Bank Ltd. v. Banco Nacional De Costa Rica, S.A.*, 570 F. Supp. 870, 884 (S.D.N.Y. 1983) (The court reasoned that the foreign sovereign's reasonable expectations are the "root notion" underlying the Act of State doctrine).

account the four criterion utilized by an incidents of the debt analysis.<sup>89</sup> Since the situs of the debt is based on whether the foreign sovereign had reasonable expectations of dominion over the debt, the choice of law to employ naturally follows the same reasoning. If the foreign sovereign expects to have dominion over the debt, its laws should control.

The reasoning is circular, but important. Act of State doctrine applicability is predicated on the situs of the debt, which turns on the choice of law. The situs of the debt determines the choice of law to be employed. Thus, you cannot have one without the other. The issue becomes less confusing by effectually dissipating any need for a choice of law analysis, for such a determination rests on the situs of the debt.<sup>90</sup>

Persons or entities depositing funds in foreign branches of American banks should not expect to be protected by American banking laws because of the added risk. Thus, the law of the foreign entity where the branch is located should apply because that foreign jurisdiction has a reasonable expectation of dominion over the debt. *Garcia*<sup>91</sup> and *Edelmann*<sup>92</sup> are specific cases where the sole purpose of depositing the funds was to take advantage of the stability American banking provides.<sup>93</sup> There will likely be future suits where creditors sue American banks for payment on notes of deposit made in their Cuban branches without the oral safety guarantees the courts found in *Garcia*<sup>94</sup> and *Edelmann*.<sup>95</sup>

Therefore, *Edelmann* and *Garcia* cannot be controlling due to the extremely narrow basis of their holdings. Future litigants also cannot rely on the seemingly similar cases *Vishipco*<sup>96</sup> and *Trihn*,<sup>97</sup> which arose out of the fall of Saigon. Since the Vietnamese

89. See Tahyar, *supra* note 8, at 612-13.

90. Imagine, for example, a situation where Cuban law holds that the debt remained in Cuba and United States law concurrently held that the debt remained in the home bank. What would the implication be if Cuba reasonably expected dominion over the debt, yet a United States court held that U.S. law applied? How could a court determine if the Act of State doctrine applied without affronting the original notion of respect for acts of individual sovereign action? It would create a situation where U.S. law required that the situs of the debt be in the United States, even though every indication pointed to the fact that the debt remained in Cuba. The only way to reach such a conclusion is to undermine the very foundation of the Act of State doctrine.

91. 735 F.2d 645 (2d Cir. 1984).

92. 861 F.2d 1291 (1st Cir. 1988).

93. See generally *Garcia*, 735 F.2d 645; *Edelmann*, 861 F.2d 1291.

94. 735 F.2d 645.

95. 861 F.2d 1291.

96. 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982).

97. 850 F.2d 1164 (6th Cir. 1987).

branches closed prior to repatriation of their assets, *Vishipco* and *Trihn*<sup>98</sup> are easily distinguishable because the Cuban branches of American banks remained open at the time of seizure.<sup>99</sup> Therefore, not only is the reliance of the *Edelmann* and *Garcia* courts on *Vishipco*<sup>100</sup> and *Trihn* misplaced,<sup>101</sup> those two cases are inapplicable to the Cuban fact pattern as may arise.

*Sokoloff*<sup>102</sup> similarly does not apply. Although both the bank and the depositor were victims of the Bolshevik Revolution, the court attributed the risk of loss to the home bank.<sup>103</sup> However, one major distinction exists. The debtor in *Sokoloff* repeatedly demanded payment *prior* to Russian expropriation.<sup>104</sup> For that reason, the breach of contract the *Sokoloff* court contemplated<sup>105</sup> occurred prior to any act of state that would extinguish liability on the debt. Just as the debt "sprung" to the home office when the Vietnamese branches were voluntarily closed, so too did the debt "spring" back to the home bank when one of its branches voluntarily breached its contract with the creditor.<sup>106</sup>

The only case truly on point, then, is *Perez*.<sup>107</sup> Although it is a New York case decided under New York law, *Perez* is entirely correct that at the instant the Cuban government repatriated the creditor's funds by making a demand on the notes of deposit, the debt had to reside in Cuba,<sup>108</sup> and was extinguished upon payment to the Cuban government.<sup>109</sup> The very fact the Cuban government was able to seize the debt in Cuban pesos *in Cuba* demonstrates a fulfillment of the four-pronged incidents of the debt analysis.<sup>110</sup> Therefore, absent any contemplation between the contracting par-

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98. See *Vishipco*, 660 F.2d 854; *Trinh*, 850 F.2d 1164.

99. See *Edelmann*, 861 F.2d 1291; *Garcia*, 735 F.2d 645; *Perez v. Chase Manhattan Bank, N.A.*, 463 N.E.2d 5 (N.Y. 1984).

100. 660 F.2d 854.

101. The fact that the Vietnamese branches ceased operations prior to the fall of Saigon meant that there was no possible way the debt resided in Vietnam at the time of repatriation. Such a difference in circumstance distinguishes *Vishipco* completely from the cases arising in Cuba and cannot logically apply because the Cuban banks were open at the time their assets were taken.

102. 164 N.E. 745 (N.Y. 1928).

103. See *id.* at 746.

104. See *id.*

105. See *id.*

106. See *id.*

107. 463 N.E.2d 5 (N.Y. 1984).

108. As mentioned above, *Garcia* and *Edelmann* were special cases with specific fact patterns that are not necessarily representative of all situations of repatriated debt in Cuban branches of American banks.

109. See *Perez*, 463 N.E.2d 5.

110. See Tahyar, *supra*, note 8.

ties that the situs of the debt would be otherwise, persons or entities demanding payment on notes repatriated by the Cuban government must do so with the understanding that the debt was properly located in Cuba when the Cuban government demanded payment.<sup>111</sup>

### *B. Applicability of the Act of State Doctrine*

Once it is determined the debt remained in Cuba at the time of repatriation, the question remains whether the Cuban seizures were valid. If they were valid, the Act of State doctrine would presumably apply, extinguishing the banks' liability. If the seizures were invalid, the banks retained liability for the debts to the debtor and should pay on demand.<sup>112</sup> If the latter scenario prevails, the banks decision to remit funds equal to the debts held to Cuba is a non-issue. This section will explore the applicability of the Act of State doctrine both under the restrictions of the Helms-Burton Act<sup>113</sup> and not, as statutory restrictions against the implementation of the doctrine may come into play in the future.

#### *i. Act of State Doctrine Notwithstanding Helms-Burton*

Where the situs of the debt remains, and thus, choice of law depends on the sovereign's jurisdiction over the debtor.<sup>114</sup> In *Cornelia Hernandez's* case, for example, if Cuba had no jurisdiction over the bank at the time, First National City Bank of New York cannot now claim the Act of State doctrine as a defense. Rather, the bank is stuck with foolishly making the act of remitting its own funds to Cuba in an amount equal to that of Hernandez's father's deposit. In a U.S. court, for purposes of the Act of State doctrine, it would be seen almost as if National voluntarily handed funds to Cuba, which in no way extinguishes a debt owed to someone else. In fact, the very reason that Citibank closed its doors prior to North Vietnamese takeover and expatriation of bank assets precluded Citibank from asserting an Act of State

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111. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003) ("In a real sense, there are three partners to every civil marriage: two willing spouses and an approving state.").

112. If the debtor transferred the promissory note, the banks would thereby be liable on the debt on the note to the holder thereof.

113. See Cuban Liberty and Democratic Solidarity Act ("LIBERTAD"), 22 U.S.C. §§ 6021, 6091 (2000).

114. See Colleen R. Courtade, J.D., Annotation, *Situs of Debt or Property for Purposes of Act of State Doctrine*, 77 A.L.R. FED. 293 § 5[a] (1986) (noting the utilization of an incidents of the debt analysis). See *supra* text accompanying note 83.

doctrine defense in *Vishipco*.<sup>115</sup> However, Cuban banks were not closed when Cuba repatriated their branch assets.<sup>116</sup>

Notwithstanding the inapplicability of *Vishipco*<sup>117</sup> and the narrow federal cases dealing with demands made on repatriated Cuban notes of deposit, there is existing law that can clear up the confusion left in the wake of the strikingly easily distinguishable cases heretofore relied upon when adjudicating similar litigation. Where the debtor was a German state, the court in *Federal Republic of Germany v. Elicofon*<sup>118</sup> held that, for purposes of the Act of State doctrine, the situs of an annuity obligation was Germany. The heirs of a former Grand Duke of an area that was once one of the East German states claimed the German government owed an annuity obligation to them for the loan of art works made by the Grand Duke. An act of the German state, which allegedly owed the annuity obligation, terminated all contract rights of former sovereigns and their families.<sup>119</sup> The German government claimed the Act of State doctrine precluded the court from reviewing its act, and therefore prevented adjudication of the Grand Duke's heirs' claims. It is well settled, the court said, that where the confiscated property consists of debt, the situs of the debt is the debtor's domicile.<sup>120</sup> The debtor, the East German state, was located in Germany *at the time of the confiscation*, so the court held the situs of the annuity obligation was Germany.<sup>121</sup> Thus, the Act of State doctrine barred adjudication in U.S. courts.

It is factually settled that the Cuban branches of American banks remained open for business at the time the debts were confiscated by the Cuban Government.<sup>122</sup> The debtor, the Cuban branches wherein the debts were made, was located in Cuba at the time of the confiscation and under Cuban jurisdiction. Cuba

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115. 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982); *see also* *Trinh v. Citibank, N.A.*, 850 F.2d 1164 (6th Cir. 1987).

116. *See generally* *Edelmann v. Chase Manhattan Bank, N.A.*, 861 F.2d 1291 (1st Cir. 1988); *Garcia v. Chase Manhattan Bank, N.A.*, 735 F.2d 645 (2d Cir. 1984); *Perez v. Chase Manhattan Bank, N.A.*, 463 N.E.2d 5 (N.Y. 1984).

117. 660 F.2d 854.

118. 536 F. Supp. 813 (E.D.N.Y. 1978), *aff'd sub nom. Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982).

119. *See Elicofon*, 536 F. Supp at 815.

120. *See id.* (The jurisdiction of a debtor's domicile naturally would fulfill the four-pronged incidents of the debt analysis, absent any contractual provision to the contrary).

121. *See id.*

122. *See generally* *Edelmann v. Chase Manhattan Bank, N.A.*, 861 F.2d 1291 (1st Cir. 1988); *Garcia v. Chase Manhattan Bank, N.A.*, 735 F.2d 645 (2d Cir. 1984); *Perez v. Chase Manhattan Bank, N.A.*, 463 N.E.2d 5 (N.Y. 1984).

had jurisdiction over the debtor, demanded payment in Cuban currency in Cuba, and no contractual provisions contemplated any specific governing law. As a result, the contract defaults to Cuban law, placing the situs of the debt in Cuba. Thus, the Act of State doctrine bars adjudication in the United States and the banks should not be liable twice on the notes of debt in the absence of any legislation preventing the use of the doctrine.<sup>123</sup>

## ii. Act of State Doctrine Under Helms-Burton

President Clinton signed the Helms-Burton bill into law on March 12, 1996.<sup>124</sup> Titles I, II, and IV of Helms-Burton<sup>125</sup> were effectuated, yet Title III is not yet implemented.<sup>126</sup> Irving explains why Title III is not yet law:

Language in the Helms-Burton Act allows the president 'suspension authority,' defined as the ability to suspend the effective date of Title III's implementation for a six-month period. This authority, which can be renewed periodically, was utilized by President Clinton for the remainder of his presidency. During George W. Bush's 2000 presidential campaign, his platform included a promise to rescind the suspensions that Clinton had repeatedly requested and been granted. One could argue that the pledge to finally implement Title III of the Helms-Burton Act helped Bush win the key state of Florida, and thus the presidency. Since being elected, however, he has reneged on his promise by consistently requesting six-month suspensions of Title III. It remains, at the moment, a mere threat, but one that is resoundingly spurned by the international community.<sup>127</sup>

In the event that Title III is ever implemented, it will have colossal implications to issues of debt liability on expatriated Cuban notes of deposit.

Section 6082(a)(6) of the Helms-Burton Act, Inapplicability of Act of State Doctrine, states: "No court of the United States shall

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123. This assertion does not apply to the specific facts and narrow holdings as they appeared in *Garcia* and *Edelmann*. Those cases would be controlling in the event of litigation where the exact same factors came into play. The law as posited is meant only to apply the general factual pattern involving repatriated debts from Cuban branches of American banks.

124. See David O. Irving, Note, *¿Viva Helms-Burton?: An Alternative to Continued U.S. Sanctions of Cuba and Threats to Third-Party Nationals*, 19 CONN. J. INT'L L. 631 (2004).

125. 22 U.S.C. §§ 6021, 6091 (2000).

126. See Irving, *supra* note 124.

127. *Id.* at 633-634.

decline, based upon the act of state doctrine, to make a determination on the merits . . . ."<sup>128</sup> Thus, Helms-Burton effectually destroys the Act of State doctrine as it may be applicable to determining if an American bank remains liable on a debt incurred in a Cuban branch that was subsequently repatriated.<sup>129</sup> American banks, notwithstanding the fact that they already paid their debts on the note to Cuba, would unequivocally be liable to creditors demanding remittance in the United States under Title III of the Helms-Burton Act.

The potential of Title III of Helms-Burton becoming law further blurs any coherent attempt at determining how the law truly applies to Cuban debts. Without passage, the law supports the application of the Act of State doctrine, so the banks should therefore not be held liable on repatriated debts.<sup>130</sup> If ever implemented, the Act of State doctrine could not be employed and the banks will be forced to honor notes of debt twice. Regardless, the outcome is the same: One innocent party wins, and one innocent party loses. The only certainty is that Castro will prevail, potentially gaining possession of millions of dollars of other people's intangible property, for just as the *Day-Gormley Leather Co.* court noted in 1934, "both the depositor and the bank [are] victims."<sup>131</sup>

#### IV. A PROPOSED SOLUTION

Cuban-American relations remain a hot topic in American politics. Any court facing the task of adjudicating Cuban debt liability must be required to take policy considerations into account. This is a difficult task. If a court holds the Act of State doctrine applicable, as argued herein, many individuals will suffer harm at the hands of Fidel Castro by the pen of an American judge. If Title III of Helms-Burton is ever implemented, American courts will force American banks to pay debts twice. This conundrum probably explains the *Garcia* and *Edelmann* holdings; if protection of one party where both are victims is the only option, courts will naturally be more sympathetic to individuals than giant banks.

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128. 22 U.S.C. § 6082(a)(6) (2000); See *supra* note 10 and accompanying text.

129. See Irving, *supra* note 124, at 647 ("Under the act of state doctrine, then, it seems that the U.S. would have no right to enact laws having the effect of intervening with Cuba's confiscation of property located within Cuba itself. The doctrine clearly conflicts with Helms-Burton.")

130. See *id.*

131. *Day-Gormley Leather Co. v. Nat'l City Bank*, 8 F. Supp. 503, 505 (S.D.N.Y. 1934).

As a solution, this Comment proposes two different avenues for a remedy in an effort to quash policy concerns that place American courts in a no-win situation. Under the proposed solutions, regardless of whether the banks are held liable, the depositors will receive their credit due and the banks will only have to pay the debt once.

If a court finds the American parent-bank liable on a repatriated note from Cuba, the bank will suffer the inequity of having to pay the debt twice — once to Cuba after the Communist Revolution, and once again to the possessor of the original certificate of deposit. A more equitable solution would be to allow the banks to recover damages directly from the *Banco Nacional de Cuba*, to whom the banks originally paid the debts. To do this, the banks could cross-claim and obtain a writ of garnishment against seized Cuban interests in America.

There is a total freeze on Cuban assets in the United States, both governmental and private, including bank accounts held in U.S. banks.<sup>132</sup> Blocked deposits of funds are held in interest-bearing accounts.<sup>133</sup> There are four seized bank accounts belonging to the *Banco Nacional de Cuba* alone.<sup>134</sup> There is absolutely no reason why banks should not be allowed to garnish funds being paid into those frozen accounts. If the banks are held liable, it must be because the Act of State Doctrine did not apply. Therefore, American courts would not be barred from deciding on the merits of the Cuban repatriation of American assets.

A writ of garnishment has been used against Cuba before. In *Alejandro v. Telephonica Larga Distancia de Puerto Rico, Inc.*,<sup>135</sup> the Eleventh Circuit Court of Appeals executed a writ of garnishment against, among others, Citibank, AT&T, Sprint, Worldcom, and MCI to satisfy a \$178 million judgment against Cuba and the Cuban Air Force for shooting down the plane of three American citizens. Apparently, prior to 1994, the Cuban telephone system was operated by a wholly-owned company of the Cuban Ministry of Communications.<sup>136</sup> Many U.S. telephone companies signed Operating Agreements with the Cuban telephone company<sup>137</sup> to

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132. See Cuban Assets Control Regulations, 31 C.F.R. § 515 (2005).

133. See 31 C.F.R. § 515.205 (2005).

134. See Office of Foreign Assets Control, Department of the Treasury, *Specially Designated Nationals and Blocked Persons* 49 (Feb. 15, 2005), available at <http://www.treas.gov/offices/enforcement/ofac/sdn/t11sdn.pdf>.

135. 183 F.3d 1277 (11th Cir. 1999).

136. See *id.* at 1280.

137. The company was "Empresa de Telecomunicaciones de Cuba." See *id.*

provide international telephone service between Cuba and the United States.<sup>138</sup> Subsequently, the Department of the Treasury's Office of Foreign Assets Control granted the U.S. telecom companies licenses under 22 U.S.C. § 6004(e)(3)(A) and 31 C.F.R. §§ 515.418(a), 515.542(c), permitting them to make payments under the law as required by the Operating Agreements.<sup>139</sup>

Normally, property of a foreign state in the United States is immune from garnishment.<sup>140</sup> However, if that foreign property in the United States is used for commercial activity, it is subject to garnishment.<sup>141</sup> Because the debts the U.S. telephone companies owed to Cuba were the result of commercial activity, the judgment was satisfied out of those funds.<sup>142</sup> The same can easily be extended to writs of garnishment banks would utilize after being held liable on the repatriated notes.

This logically extends to the bank accounts holding monies owed to the Cuban Government both before and after seizure. If there are funds in the seized accounts that were either the fruit of a commercial activity or have been deposited therein due to commercial activity after the account was blocked, those funds should be available for garnishment to satisfy judgments against Cuba for wrongfully demanding payment on a certificate of deposit and effectually taking funds from American banks.

If a court does not find the bank liable on the debt, the creditor must have some recourse. The answer is very simple. When suing on the note, creditors can simply name the *Banco Nacional de Cuba* as a defendant. If the American bank is not liable on the note, the *Banco Nacional de Cuba* must be, as it assumed all rights and liabilities incorporated with the foreign branch when it repatriated its assets.<sup>143</sup> The *Banco de Nacional de Cuba* simply stepped into the shoes of the bank it repatriated the debt from and should be accountable for payment. The method for attaching funds can be employed in the same way as the above.

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138. See *id.* at 1281.

139. See *id.*

140. See 28 U.S.C. § 1609 (1999).

141. See 28 U.S.C. § 1610(a)(7) (1999).

142. See *Alejandro v. Telephonica Larga Distancia de Puerto Rico, Inc.*, 183 F.3d 1277, 1283 (11th Cir. 1999).

143. See *Wollman v. Gross*, 646 F.2d 1306, 1308 (8th Cir. 1981) ("If the Government voluntarily chooses to stand in the shoes of another, it should assume all rights and liabilities existing.").

## V. CONCLUSION

Simply put, as the law stands now, Fidel Castro has been able to deny the very property rights America holds so dearly. The victims of a tyrannical seizure of property have been left to quibble among themselves to try to protect their own interests. Banks lose when they are found liable and individual people lose when they are not. One thing remains unmistakably clear: Fidel Castro has won. This, however, need not be the case.

Whatever the outcome courts may reach, be it home bank liability or not, there is still an avenue for hope. The banks need not pay twice, and the individual creditors need not be left out in the cold, holding worthless pieces of paper evincing a debt owed to them, but paid to the Cuban government. American courts need only follow their own precedent and garnish the multitude of funds belonging to Cuba either sitting in seized accounts or payable to Cuba itself. It has been done before, and can be done again. In this fashion, Cuba will be compelled to compensate those parties it took property from. Forcing Cuba to compensate both the banks *and* the creditors is nothing less than an equitable solution to an inequitable problem.