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## Foreign Branches of United States Banks-A Proposal for Partial Suspension During Periods of Unrest

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# Foreign Branches of United States Banks-A Proposal for Partial Suspension During Periods of Unrest

Francis X. Curci

## **Abstract**

This Note discusses the liability of United States banks for the deposits at an expropriated foreign branch. The case of *Vishipco Line v. Chase Manhattan Bank*, which illustrates the problems banks face under the current law, is also discussed. This Note also proposes a Federal Reserve Regulation which, if adopted, would permit a partial suspension of operations of a foreign branch during periods of unrest in the host country.

FOREIGN BRANCHES OF UNITED STATES BANKS—  
A PROPOSAL FOR PARTIAL SUSPENSION  
DURING PERIODS OF UNREST

INTRODUCTION

United States banks have dramatically expanded their operations in foreign countries in the past three decades.<sup>1</sup> As a result, several banks have developed extensive worldwide banking networks<sup>2</sup> with various types of overseas units.<sup>3</sup> One type of unit, the

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1. Trigaux, *1913 Act Unleashed Banks From U.S. Shores*, AM. BANKER, July 28, 1983, at 10, col. 1. United States banks had little involvement in the European financial markets prior to 1913 because, prior to that year, national banks were not empowered to establish overseas offices. DEP'T OF TREAS., REPORT TO CONGRESS ON FOREIGN GOVERNMENT TREATMENT OF UNITED STATES COMMERCIAL BANKING ORGANIZATIONS 6 (1979) [hereinafter cited as TREASURY REPORT]. The Federal Reserve Act of 1913, Pub. L. No. 43, ch. 6, 38 Stat. 251 (codified as amended in scattered sections of 12 U.S.C.) [hereinafter cited as Federal Reserve Act] contained a provision allowing national banks with at least U.S.\$1,000,000 in capital and surplus to establish branches in foreign countries. 12 U.S.C. § 601 (1976). The Federal Reserve Act, however, spurred only modest overseas expansion by United States banks. Trigaux, *supra*, at 10, col. 1. The economic upheavals of the 1920's and 1930's put an end to such ventures. TREASURY REPORT, *supra*, at 6. The dramatic expansion of United States banking operations into foreign countries did not occur until the 1950's. *Id.* at 5-11. One reason for the expansion by United States banks after the 1950's was their desire to meet the needs of United States multinational corporations. R. RODRIGUEZ & E.E. CARTER, INTERNATIONAL FINANCIAL MANAGEMENT 537 (2d ed. 1979). These needs expanded due to the dramatic increase in world trade and foreign investment by United States corporations after World War II. *Id.* Another reason for such expansion was the desire by banks to find new sources of capital in markets outside the United States. Davis, *International Banking*, in BANKER'S DESK REFERENCE 1982 Y.B. 79 (E. Cox ed. 1982).

The expansion of the Eurodollar market provided a further impetus for the opening of foreign offices, first in London and then in the Bahamas and the Cayman Islands. TREASURY REPORT, *supra*, at 6. A Eurodollar is a "dollar in U.S. currency on deposit in a bank abroad, especially in a bank in Europe." BLACK'S LAW DICTIONARY 497 (5th ed. 1979).

2. Hicks, *Citicorp Top U.S. Bank in Foreign Units*, AM. BANKER, July 28, 1983, at 1, col. 1. At the end of 1982, the top one hundred United States bankholding companies operated over 2500 offices in at least 101 foreign countries. *Id.* At that time, Citicorp, BankAmerica, Chase Manhattan, Bank of Boston, and Manufacturers Hanover were the five with the largest worldwide banking networks. *Id.*

3. *Id.* at 70. There are several types of overseas units that a United States bank or bankholding company can operate in a foreign country. One type is the "branch," which is defined as any additional office or place of business located in any State or Territory of the United States where "deposits are received, or checks paid, or money lent." 12 U.S.C. § 36(f) (1976). A "foreign branch" is defined in Regulation K of the Federal Reserve Board Regulations, 12 C.F.R. § 211.2(h) (1983), as "an office of an institution which is located outside the country under the laws of which the institution is organized, at which a banking or financing business is conducted." *Id.*

Another unit, the "subsidiary," is a separately capitalized corporation, organized under the laws of the foreign country where the subsidiary operates, in which a United States

foreign branch, faces the problem of expropriation by the government of a host country.<sup>4</sup> In recent years, foreign branches of United States banks have been expropriated in several countries.<sup>5</sup> Whether the home office of a United States bank is liable for the deposits at an expropriated foreign branch and what action branch officials may take during periods of unrest in a host country<sup>6</sup> are, therefore, issues of growing importance.

When a United States bank decides to expand abroad, it must decide which type of banking unit to establish in a particular foreign country.<sup>7</sup> Historically, the foreign branch<sup>8</sup> is the unit most preferred by banks.<sup>9</sup> The right to establish a foreign branch, how-

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banking organization owns fifty percent or more of the equity. TREASURY REPORT, *supra* note 1, at 5 n.4.

A third type of unit is the "Edge Act Corporation," which is a subsidiary of a United States bank that makes loans, accepts deposits, and provides a wide range of banking services. Hicks, *supra* note 2, at 70. However, all of these services must be directly related to foreign or international transactions. *Id.*

A fourth type of overseas unit, the "representative office," is an office which does not conduct usual banking business but merely funnels clients and business to the parent corporation. *Id.*

4. The term "expropriation" is defined as "the action of the state in taking or modifying the property rights of an individual in the exercise of its sovereignty." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 803 (1976). The term is often used "in the context of a foreign government taking an American industry located in a foreign country." BLACK'S LAW DICTIONARY 522 (5th ed. 1979).

5. Assets of foreign branches were expropriated in Iran in 1979, *see infra* note 13, in Vietnam in 1975, *see infra* note 19, and in Cuba in 1960, *see id.*

6. The term "host country," as used in this Note, refers to the country where a foreign branch of a United States bank is located. It is so used by the Department of the Treasury. *See* TREASURY REPORT, *supra* note 1, at 11.

7. *See supra* note 3. When United States banks select the most appropriate banking unit to open in a foreign country, they must consider the restrictions imposed by the host country. Logan & Kantor, *Deposits at Expropriated Foreign Branches of U.S. Banks*, 1982 U. ILL. L. REV. 333, 334. For example, subsidiaries have historically served as substitutes for foreign branches in those countries that either prohibit or discourage the establishment of branches. TREASURY REPORT, *supra* note 1, at 6.

8. For the definition of a "foreign branch," *see supra* note 3.

9. TREASURY REPORT, *supra* note 1, at 6. Foreign branches are the "most important form of United States banking presence abroad in terms of both numbers and assets." *Id.* For example, United States banks operate roughly 1159 branches in at least 80 countries, but own only 111 subsidiaries in 40 countries. *United States Banking Activities Abroad*, AM. BANKER, July 28, 1983, at 52-63. Between 1973 and 1977 the total assets of foreign branches increased from U.S.\$118,000,000 to U.S.\$227,000,000. TREASURY REPORT, *supra* note 1, at 7. Most United States banks prefer the use of foreign branches because officials of United States banks believe branches provide flexibility in management, are less costly, and allow the parent bank to exercise direct control and supervision over the branch. *Id.* at 6.

The Federal Reserve Act, Pub. L. No. 43, ch. 6, 38 Stat. 251 (codified as amended in scattered sections of 12 U.S.C.), provides the authority for a national bank, with a capital

ever, is subject to the approval of the host country's government.<sup>10</sup> Once operating, the branch is subject to the laws and regulations of the host country.<sup>11</sup>

Currently, many United States banks are expanding into countries where they have not traditionally had a presence.<sup>12</sup> Although many of these countries are politically unstable,<sup>13</sup> they offer finan-

and surplus of U.S.\$1,000,000, to establish a foreign branch. 12 U.S.C. § 601 (1976). The Federal Reserve Act also grants to the Board of Governors of the Federal Reserve System (Board of Governors) the power to regulate the activities of the foreign branch. *Id.* § 604(a).

A national bank which operates foreign branches is required to "furnish information concerning the condition of such branches to the Comptroller of the Currency upon demand." *Id.* § 602.

The accounts of each foreign branch and the entry of profits and losses must be kept independently of the accounts, profits, and losses of the parent bank and all other branches. *Id.* § 604.

10. See Logan & Kantor, *supra* note 7, at 334. Host countries which permit foreign banks to establish branches within their borders dictate the conditions upon which the foreign banks may do so. *Id.* For example, a United States bank may have to place reserve deposits with the host country's central bank or satisfy certain capital requirements before it may establish a branch. *Id.*

11. *Id.*

12. See Trigaux, *supra* note 1, at 8. United States international banking is currently in transition because the major markets abroad, in the traditional "developed" countries, are saturated. *Id.* The risks present and rewards available in these markets, such as Western Europe, Hong Kong, and Singapore, vary little from those in the United States. *Id.* The larger and more aggressive United States banks are, therefore, expanding their operations in those countries which offer profitable banking. *Id.* These countries, many of which are developing countries in the third world, vary in wealth and natural resources. *Id.* Some of these "are countries which, like Iran, are politically unstable to Western bankers but [are] potentially rich in natural resources." *Id.* Others are among the poorest countries in Africa and the Far East. *Id.*

13. *Id.* Iran is an example of a developing country which attracted United States bankers because of its rich natural resources. *Id.* Iran, however, was not politically stable and in January of 1979, Shah Mohammed Reza Pahlavi of Iran was forced to flee his country after months of rebellion. Note, *Prejudgment Attachment of Frozen Iranian Assets*, 69 CALIF. L. REV. 837, 837 n.1 (1981) (citing N.Y. Times, Jan. 17, 1979, at A1, col.6) [hereinafter cited as Note, *Prejudgment Attachment*]. Ayatolla Khomeini, the "spiritual leader" of the revolution against the Shah, returned to Iran and assumed control of the government. *Id.* at 837 n.2 (citing N.Y. Times, Feb. 1, 1979, at A1, col. 4). In 1979 the Khomeini government nationalized all United States banks in Iran. Note, *The Status of the Act of State Doctrine - Application to Litigation Arising From Confiscation of American Owned Property in Iran*, 4 SUFFOLK TRANSNAT'L L.J. 89, 127 n.227 (1980) (citing N.Y. Times, June 9, 1979, at A1, col. 6) [hereinafter cited as Note, *Status of Act of State Doctrine*]. The Khomeini government threatened to withdraw all Iranian assets held by United States banks, to repudiate Iranian obligations to the United States and its nationals, and to refuse oil payments made in United States dollars. Note, *Prejudgment Attachment, supra*, at 837. President Carter responded by freezing all Iranian assets held in the United States or under the control of persons subject to its jurisdiction. *Id.* For a discussion of the litigation that resulted from the freezing of the Iranian assets, see McLaughlin & Teclaff, *Iranian Hostage Agreements: A Legal Analysis*, 4

cial reward to the adventurous financial institution willing to do business in an unstable environment.<sup>14</sup>

Strong foreign competition has recently challenged the preeminence of United States banks.<sup>15</sup> To retain their competitive banking position, United States banks may have to incur the risks of operating branches in unstable countries.

One risk a United States bank faces when it operates a foreign branch is that of employee safety<sup>16</sup> during periods of unrest<sup>17</sup> in the

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FORDHAM INT'L L.J. 223 (1981); Youngblood, *1980 Survey of International Law in the Second Circuit*, 8 SYRACUSE J. INT'L L. & COM. 159 (1980).

14. Trigaux, *supra* note 1, at 8. The United States banks that have ventured into the developing countries have received handsome financial returns. *Id.* For example, Citibank, in 1974, earned 40% of its total profits from the developing countries while utilizing only 7% of its assets. *Id.* Much of Citibank's success was due to its aggressive policy of not only lending to these poorer countries, but also obtaining approval to conduct banking business within their territory. *Id.*

15. See C.S. GODDIN & S.J. WEISS, U.S. BANKS' LOSS OF GLOBAL STANDING 5 (Staff Papers, Comptroller of the Currency, Administrator of National Banks 1980). Some diminution in the relative importance of United States banks after World War II was inevitable as Japan and the European countries rebuilt their economies. *Id.* The decline in the 1960's and 1970's, however, "closely parallel[s] fundamental changes in the balance of economic powers between the United States and the rest of the world." *Id.* The potential growth of any nation's banking system is heavily dependent upon the economic growth of that nation. *Id.* at 8. A bank's international operations typically serve the financial needs, generated by international trade and investment, of nationals of the bank's home country. *Id.* at 8-9. The industrialized nations experienced significant economic growth between the mid-1950's and the mid-1970's. *Id.* at 9. Although the United States economy expanded during this period, the economic growth experienced in Europe and Japan was far greater. *Id.* "Thus, the opportunity for domestic growth was considerably more constrained for U.S. banks than for their European and Japanese competitors." *Id.* The relative decline in the importance of United States banks and the emergence of European and Japanese banks have reflected these national and international developments. *Id.* at 11.

16. The safety or liberty of foreign branch employees may be jeopardized during periods of unrest in a host country, as illustrated in the case of *Sokoloff v. National City Bank*, 250 N.Y. 69, 164 N.E. 745 (1928). In *Sokoloff*, the employees of the Petrograd branch of National City Bank were arrested by the Russian government in August of 1918 and were forced to flee the country the following month. *Id.* at 80, 164 N.E. at 749.

17. The term "unrest," as used in this Note, is intended to have a broad meaning and includes all types of civil strife. The unrest can simply take the form of violence such as rioting or terrorism. It can also escalate into a political revolution that results in a change of government.

"Civil strife" includes all "overt, collective confrontations between contending groups in a society, including communal and political clashes, economic strikes, antigovernment riots and demonstrations, rebellions, revolutionary movements and terrorist campaigns." T.R. GURR, *GUERRAS, REBELS AND REFORMERS* 14 (1978).

A "riot" can be any public disturbance by three or more persons in which one or more persons commit an act or acts which constitute "a clear and present danger of, or shall result in, damage or injury to the property of any other person or to the person of any other individual." BLACK'S LAW DICTIONARY 1192 (5th ed. 1979).

host country. A second risk is the expropriation of the assets<sup>18</sup> of a branch by a new regime if the host country experiences a change of government.<sup>19</sup> If such expropriation occurs, the home office faces the risk of having to pay twice: first to the expropriating government and thereafter to the foreign branch depositors who demand payment at the home office.<sup>20</sup>

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"Terrorism" is defined as "a strategy whereby violence is used to produce certain effects in a group of people so as to attain some political end or ends." E. EVANS, *CALLING A TRUCE TO TERROR* 1 (1979).

A "revolution" is "[a] complete overthrow of the established government in any country or state by those who were previously subject to it." BLACK'S LAW DICTIONARY 1188 (5th ed. 1979).

18. Assets are the "entire property of a person, association, corporation, or estate that is applicable or subject to the payment of his or her or its debts." BLACK'S LAW DICTIONARY 108 (5th ed. 1979). The assets of a bank include currency and coins, reserves with the Federal Reserve banks, deposits with other banks, cash items in the process of collection, securities, loans, and the bank premises. T. MAYER, J.S. DUESENBERY & R.Z. ALIBER, *MONEY, BANKING AND THE ECONOMY* 81-93 (1981) [hereinafter cited as T. MAYER].

Liquid assets are "[c]ash, or assets immediately convertible to cash." BLACK'S LAW DICTIONARY 838 (5th ed. 1979). The assets of a bank can be liquid or nonliquid. T. MAYER, *supra*, at 93-94. The liquidity of an asset depends on how easily it can be sold, the transaction cost of selling it, and how stable and predictable its price is. *Id.* at 16. Real estate, for example, is not very liquid because it takes a long time to sell, involves a broker cost, and may have to be sold at less than the anticipated sale price. *Id.*

Logically, the less liquid the assets of a foreign branch, the less likely that those assets can be removed quickly from a host country during periods of unrest because the ordinary means of communication and transportation may be disrupted.

19. See E. COMPTON, *INSIDE COMMERCIAL BANKING* 131 (1980). "There is substantial historical evidence of losses incurred by banks as a direct result of changes of government." *Id.* For example, in *Manas y Pineiro v. Chase Manhattan Bank*, 106 Misc. 2d 660, 434 N.Y.S. 2d 868 (Sup. Ct. 1980), *rev'd sub nom. Perez v. Chase Manhattan Bank*, 93 A.D.2d 402, 463 N.Y.S.2d 764 (App. Div. 1983), certificates of deposit were issued by Chase's Mariano, Cuba branch between May and December of 1958. *Id.* at 661, 434 N.Y.S.2d at 869. On January 1, 1959, Fidel Castro seized control of the Cuban government. *Id.* In September of 1960 the Castro government nationalized the banks and expropriated the assets of all of Chase's Cuban branches. *Id.* at 664, 434 N.Y.S.2d at 870.

*Vishipco Line v. Chase Manhattan Bank*, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 103 S. Ct. 313 (1982), concerned the expropriation of Chase's Saigon branch in 1975 and the liability of the home office to the foreign branch depositors. *Id.* at 856. Chase's operations in Saigon ended on April 24, 1975, after the bank's officials in New York determined that Saigon would soon fall to the Communists. *Id.* at 857. On April 30, 1975 the Saigon government was overthrown by the Communists. *Id.* The following day the new government issued a communiqué which read, in part, that all banks were being confiscated and thereafter would be managed by the new "revolutionary administration." *Id.* See also E. COMPTON, *supra*, at 131 (all loans cancelled and all United States banking offices in Cuba expropriated after Castro seized power in Cuba).

20. See Motion for Leave to File a Brief as Amicus Curiae in Support of the Petition and Brief of the New York Clearing House Association as Amicus Curiae at 3-4, *Vishipco*, 660 F.2d at 854.

This Note discusses the liability of United States banks for the deposits at an expropriated foreign branch.<sup>21</sup> The case of *Vishipco Line v. Chase Manhattan Bank*,<sup>22</sup> which illustrates the problems banks face under the current law, is also discussed. This Note also proposes a Federal Reserve Regulation which, if adopted, would permit a partial suspension of operations of a foreign branch during periods of unrest in the host country.<sup>23</sup>

## I. LEGAL DOCTRINES

The inquiry into the liability of the home office for deposits at an expropriated foreign branch requires an examination of at least two doctrines of law: the act of state doctrine and the separate entity doctrine.<sup>24</sup>

### A. Act of State Doctrine

In *Banco Nacional de Cuba v. Sabbatino*,<sup>25</sup> the Supreme Court defined the act of state doctrine as follows: "[E]very 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."<sup>26</sup> The

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21. See *infra* notes 25-50 and accompanying text.

22. 660 F.2d at 854. *Vishipco* concerned the expropriation of Chase's Saigon branch and the liability of the home office to the foreign branch depositors. *Id.* at 856. The second circuit held that the home office was obligated to pay the plaintiffs the value of their deposits maintained at the foreign branch. *Id.* See *infra* notes 51-71 and accompanying text (discussion of *Vishipco* case).

23. See *infra* notes 72-97 and accompanying text.

24. Other considerations of law that may influence the liability of the home office for deposits at an expropriated foreign branch include choice of law, and the law regarding acts of unrecognized governments. See Heinger, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches*, 11 LAW & POL'Y INT'L BUS. 903, 906-08 (1979).

25. 376 U.S. 398 (1964).

26. *Id.* at 416 (quoting *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897), where the Court first defined the act of state doctrine). The Court in *Sabbatino* stated that: "None of this Court's subsequent cases in which the act of state doctrine was directly or peripherally involved manifest any retreat from *Underhill*. . . . On the contrary . . . , the doctrine as announced in *Underhill* was reaffirmed in unequivocal terms." 376 U.S. at 416-17 (citations omitted). The courts justify the act of state doctrine in that it would be an affront to a foreign government for a United States court to sit in judgment upon acts of that government. *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706, 715 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968). The act of state doctrine "appears to have taken root in England as early as 1674 . . . and began to emerge in the jurisprudence of this country in the late eighteenth and early nineteenth centuries." *Sabbatino*, 376 U.S. at 416 (citation omitted).



federal courts have limited the doctrine by imposing a territorial requirement.<sup>27</sup> The doctrine applies only if the act of the foreign government affects property within that state.<sup>28</sup> The application of the act of state doctrine to a foreign expropriation, therefore, requires the finding that a bank deposit had its situs within the taking state at the time of the expropriation.<sup>29</sup>

Under the current law, the situs of a debt is where the debtor is located.<sup>30</sup> Thus, if the situs of the debt is outside the taking state at

The Supreme Court has also indicated that the doctrine is fundamentally grounded upon a common sense rationale:

- The principle . . . rests at last [sic] upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign State to be re-examined and perhaps condemned by the courts of another would very certainly "imperil the amicable relations between governments and vex the peace of nations."

*Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-04 (1918). The Court stated that the doctrine has constitutional underpinnings which arise out of the "basic relationships between branches of government in a system of separation of powers." *Sabbatino*, 376 U.S. at 423.

27. See *Tabacalera*, 392 F.2d at 713; *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47, 51 (2d Cir. 1965), cert. denied, 382 U.S. 1027 (1966). For a discussion of the territorial requirements of the act of state doctrine, see also Note, *The Territorial Exception to the Act of State Doctrine: Application to French Nationalization*, 6 FORDHAM INT'L L.J. 121 (1982).

28. See *Tabacalera*, 392 F.2d at 713; *Republic of Iraq*, 353 F.2d at 51. As stated by the Supreme Court in *Underhill*, the justification for the territorial requirement is that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." 168 U.S. at 252 (emphasis added). See Note, *supra* note 27, at 134-40 (discussion of the territorial requirements of the act of state doctrine).

29. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 41(d) (1965) (taking by state of property within its own territory is typical "act of state"). Determination of situs of the property is essential when applying the act of state doctrine. See Logan & Kantor, *supra* note 7, at 348. For a discussion of the problem of determining the situs of intangible property such as a debt, see Lowenfeld, *In Search of the Intangible: A Comment on Shaffer v. Heitner*, 53 N.Y.U. L. Rev. 102 (1978). The court in *Tabacalera* stated that:

The situs may be in one place for ad valorem tax purposes; it may be in another place for venue purposes, i.e., garnishment; . . . it may be in still a different place when the need for establishing its true situs is to determine whether an overriding national concern, like the application of the Act of State Doctrine is involved.

392 F.2d at 714-15 (citations omitted).

30. See *Heininger*, *supra* note 24, at 966 n.303. *Heininger* states:

*Harris v. Balk* stood for the proposition that the situs of a debt is where the debtor is located at any given time (rather than the original situs of the debt), that a debtor may be served and sued wherever he can be found, and that in this way the property of the debtor's creditor may be reached by third parties to satisfy claims owed them by the creditor. . . . *Shaffer v. Heitner*, 433 U.S. 186 (1977) [partially] overruled *Harris v. Balk*. . . . *Shaffer*, however, did not overrule *Harris* insofar as the situs of a debt is concerned . . . .

*Id.* (citations omitted). See also, *Alfred Dunhill, Inc. v. Cuba*, 425 U.S. 682, 687 (1976) (debt located where debtor is located); *Vishipco*, 660 F.2d at 862 ("The rule announced in *Harris v.*

the time of the expropriation decree,<sup>31</sup> the act of state doctrine does not apply.<sup>32</sup> In that case, United States courts will give effect to the decree only if it is consistent with the policy and laws of the United States.<sup>33</sup>

On the other hand, if the situs of the debt is within the taking state, the act of state doctrine will apply,<sup>34</sup> entitling the decree to recognition by United States courts.<sup>35</sup> This extinguishes the debt of a foreign branch and bars subsequent claims by its depositors against the home office.<sup>36</sup>

### B. *Separate Entity Doctrine*

Under the separate entity doctrine, a foreign branch is considered a separate business entity from the home office and all other branches in various business transactions.<sup>37</sup> The doctrine is applied

Balk . . . continues to be valid on this point: the power to enforce payment of a debt depends on jurisdiction over the debtor."); Logan & Kantor, *supra* note 6, at 348 (situs of debt is in the place where the debtor, not the creditor, is located).

31. For a discussion of the determination of the situs of a debt, see *supra* note 30 and accompanying text.

32. See *Vishipco*, 660 F.2d. at 862; Heininger, *supra* note 24, at 963. Heininger states: [I]f the debtor is situated outside the jurisdiction of the acting state, the laws of the acting state do not apply. . . . If the situs of the debt ceased to be within the territorial jurisdiction of [the confiscating state] . . . at the time the confiscatory decree was promulgated, [the confiscating state would] no longer [have] sufficient jurisdiction over [the debt] to affect it . . . since, under the act of state doctrine, the courts of the United States are not bound to give effect to foreign acts of state as to property outside the acting state's territorial jurisdiction.

*Id.* at 963, 975. In *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966), the issue was whether a United States court could enforce an Iraqi law which confiscated all property of King Faisal II, against the King's New York bank account. *Id.* at 49-50. The court found situs in the United States because the debtor bank had no office in Iraq nor was the bank answerable to Iraqi courts. *Id.* at 51. The court stated that only a United States court could compel the bank to pay the balance in the account or deliver the certificates of deposit. *Id.*

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

34. See *supra* note 28 and accompanying text.

35. See *supra* notes 25-26 and accompanying text. "Under the traditional application of the act of state doctrine, the principle of judicial refusal of examination applies only to a taking by a foreign sovereign of property within its own territory." *Republic of Iraq*, 353 F.2d at 51 (citations omitted). The Supreme Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964), stated that the "Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government . . . even if the complaint alleges that the taking violates customary international law." *Id.*

36. See Heininger, *supra* note 24, at 963; Logan & Kantor, *supra* note 7, at 347.

37. See *Pan-American Bank & Trust Co. v. National City Bank*, 6 F.2d 762, 767 (2d Cir.), *cert. denied*, 269 U.S. 554 (1925). For example, a branch which negotiates a draft,

to determine whether the home office is liable for repayment of deposits made at a foreign branch.<sup>38</sup> As a general rule, branches are regarded as distinct entities with deposits made in one branch payable only at that particular branch.<sup>39</sup> The rationale offered to support this rule is that a branch is separately indebted to its depositors<sup>40</sup> and an obligation exists only between the branch and its depositors.<sup>41</sup> The home office, as a general rule, is not liable for the deposits at a foreign branch.<sup>42</sup>

This general rule, however, has an important exception: the home office will be liable on the deposits of a foreign branch if the

drawn against a letter of credit issued by the parent bank, becomes the legal holder of that draft and the rights between the branch and parent bank are governed by rules which apply to unrelated banks. *Id.*

The separate entity doctrine has been applied to attachment proceedings between a home office and its branches. *See* *McCloskey v. Chase Manhattan Bank*, 11 N.Y.2d 936, 937, 183 N.E.2d 227, 227, 228 N.Y.S.2d 825, 825 (1962) (money payable at German branch of New York bank held not subject to New York attachment). *See also* Note, *Civil Procedure: Attachment: Branch Bank as Separate Entity for Attachment Purposes: McCloskey v. Chase Manhattan Bank*, 48 CORNELL L. REV. 333 (1963) (discussion of branch as a separate entity from home office for attachment purposes).

Other courts have held a branch to be a separate entity for purposes of obtaining information to attach funds. *See* *Clinton Trust Co. v. Compania Azucarera Cent. Mabay, S.A.*, 172 Misc. 148, 151, 14 N.Y.S.2d 743, 746 (Sup. Ct. 1939) (court denied application to direct Chase Manhattan Bank and Royal Bank of Canada to answer questions concerning status of defendant's deposit account in the Havana, Cuba branch of both banks), *aff'd mem.*, 258 A.D. 780, 15 N.Y.S.2d 721 (1939). *See also* *Heininger, supra* note 24, at 930-44, for a discussion of the separate entity doctrine and its limitations.

38. *See* *Chrzanowska v. Corn Exch. Bank*, 173 A.D. 285, 290-91, 159 N.Y.S. 385, 388 (1916) (branch regarded as entity distinct from home office when deposits made at branch), *aff'd per curiam*, 225 N.Y. 728, 122 N.E. 877 (1919).

39. *Id.* at 291, 159 N.Y.S. at 388.

40. *Id.* In *Sokoloff v. National City Bank*, 130 Misc. 66, 224 N.Y.S. 102 (Sup. Ct. 1927), *aff'd*, 223 A.D. 754, 227 N.Y.S. 907, *aff'd*, 250 N.Y. 69, 164 N.E. 745 (1928), the court stated:

Where a bank maintains branches, each branch becomes a separate business entity, with separate books of account. A depositor in one branch cannot issue checks or drafts upon another branch or demand payment from such other branch, and in many other respects the branches are considered separate corporate entities and as distinct from one another as any other bank.

*Id.* at 73, 224 N.Y.S. at 114 (citations omitted). In *Clinton Trust Co.*, 172 Misc. at 148, 14 N.Y.S.2d at 743 (Sup. Ct. 1939), *aff'd mem.*, 258 A.D. 780, 15 N.Y.S.2d 721 (1939), the court stated that "branches . . . [are] as separate and distinct from one another as from any other bank, and a depositor in one branch cannot demand payment from another." *Id.* at 151, 14 N.Y.S.2d at 745.

41. *See* *Bluebird Undergarment Corp. v. Gomez*, 139 Misc. 742, 744, 249 N.Y.S. 319, 321-22 (City Ct. 1931).

42. *See supra* notes 39-41 and accompanying text. *See also* *Heininger, supra* note 24, at 943; *Logan & Kantor, supra* note 7, at 340-41.

branch closes without discharging its obligations to the depositors, or wrongfully refuses a depositor's demand for payment.<sup>43</sup> The rationale for this exception apparently stems from the fact that branches are not independent agencies but are a part of the parent bank corporation.<sup>44</sup> The home office, therefore, should not be able to shield itself from liability if the foreign branch wrongfully refuses to pay a depositor or if the branch is closed.<sup>45</sup>

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43. See Heinger, *supra* note 24, at 975; Logan & Kantor, *supra* note 7, at 341. Courts often quote *Sokoloff*, 130 Misc. at 66, 224 N.Y.S. at 102, for its holding that the "[u]ltimate liability for a debt of a branch would rest upon the parent bank." *Id.* at 73, 224 N.Y.S. at 114. This statement, however, has often been cited out of context. For example, in *Sokoloff v. National City Bank*, 250 N.Y. 69, 164 N.E. 745 (1928) (holding arose from a separate opinion of the *Sokoloff* case), Sokoloff, a Russian subject, paid a sum of money to the New York office of National City Bank of New York (National City). *Id.* at 73-74, 164 N.E. at 746-47. The money was to be transferred to his account at National City's branch in Petrograd, Russia. National City transferred the funds and Sokoloff drew upon them from time to time. *Id.* at 74, 164 N.E. at 747. In October or November of 1917, Sokoloff directed the Petrograd branch to transfer funds to a different bank in Kharkoff, Russia. Several days later Sokoloff learned that the transfer had not been made. He directed the Petrograd branch to cancel the original order and hold the funds at the disposal of his sister in Petrograd. *Id.* The Petrograd branch, however, refused the sister's repeated demands for payment on the grounds that Sokoloff had originally directed the transfer to be made to Kharkoff. *Id.* at 79, 164 N.E. at 749. The Petrograd branch was seized by the order of the new Bolshevik regime and ceased operations on September 1, 1918. The deposit was never repaid to Sokoloff. *Id.*

The court cited several reasons for holding the home office of National City liable for the deposits of the Petrograd branch. First, the court noted that a bank must keep a deposit until demanded by a depositor. A bank would be in default for wrongfully refusing to honor a depositor's demand for payment. *Id.* at 80, 164 N.E. at 749. Demand for payment was made several times by Sokoloff's sister but the Petrograd branch wrongfully refused to make the payments. *Sokoloff v. National City Bank*, 130 Misc. 66, 80-81, 224 N.Y.S. 102, 121-23 (Sup. Ct. 1927), *aff'd*, 223 A.D. 754, 227 N.Y.S. 907 (1928). The court concluded that the depositor had a cause of action against the home office because the branch wrongfully refused the demands for payment prior to the expropriation. *Id.*

Second, the court held that the deposit contract between the branch and depositor was broken on the date the Petrograd branch ceased to exist, even if the depositor had not made a payment demand. *Sokoloff*, 250 N.Y. at 80-81, 164 N.E. at 749-50. Thus, if the branch is closed, the home office becomes liable for all deposits at the branch. *Id.* at 81, 164 N.E. at 750.

44. A subsidiary is a separate corporate entity and is solely liable for its own obligations. TREASURY REPORT, *supra* note 1, at 5 n.4. On the other hand, a foreign branch is not an independent corporation. See 3 FED. RES. BULL. 198 (1917). Instead, the home office, together with all of its branches, constitutes one corporation. *Id.* The home office is merely engaging "in certain foreign transactions through its foreign branch. This view is substantiated by the fact that the profit and loss accruing to each [branch] bank is to be entered on the general ledger of the parent bank at the end of each fiscal year." *Id.* at 199. For a discussion of the differences between branches and subsidiaries, see *supra* note 3.

45. See Logan & Kantor, *supra* note 7, at 341.

Although the home office may ultimately be liable for the deposit obligations of its branches,<sup>46</sup> such liability does not alter the situs of the debt.<sup>47</sup> If the situs of the deposit is within the taking state<sup>48</sup> at the time of expropriation, the act of state doctrine will apply to relieve the branch of liability.<sup>49</sup> Once the branch is relieved of its obligation, the home office's liability also terminates.<sup>50</sup>

### C. *Vishipco Line v. Chase Manhattan Bank*

In the recent case of *Vishipco Line v. Chase Manhattan Bank*,<sup>51</sup> the court reviewed both the act of state<sup>52</sup> and separate entity<sup>53</sup> doctrines. In *Vishipco*, Chase Manhattan Bank (Chase) operated a branch office in Saigon from 1966 until April 24, 1975.<sup>54</sup> Chase's operations in Saigon "came to an end"<sup>55</sup> on April 24, 1975 when the bank's officials in New York feared the imminent overthrow of the Saigon government.<sup>56</sup> The branch officials balanced the day's books, shut the vaults, locked the building, and delivered the keys and financial records needed to operate the branch to the personnel at the French Embassy.<sup>57</sup>

The Saigon government was overthrown on April 30, 1975.<sup>58</sup> The following day the new Communist government issued a communiqué announcing that all United States banks in South Vietnam would be confiscated and thereafter managed by the new regime.<sup>59</sup>

46. See *supra* note 43 and accompanying text.

47. *Manas y Pineiro v. Chase Manhattan Bank*, 106 Misc. 2d 660, 666-67, 434 N.Y.S.2d 868, 872 (Sup. Ct. 1980), *rev'd sub nom. Perez v. Chase Manhattan Bank*, 93 A.D.2d 402, 463 N.Y.S.2d 764 (1983).

48. See *supra* note 30 and accompanying text.

49. See *supra* notes 34-36 and accompanying text.

50. See *supra* note 36 and accompanying text.

51. 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 103 S. Ct. 313 (1982).

52. *Id.* at 862-63.

53. *Id.* at 863.

54. *Id.* at 857. South Vietnamese law permitted banks of other countries to operate only by way of branches. *Id.* at 863. See *supra* notes 7-8 and accompanying text.

55. *Vishipco*, 660 F.2d at 857.

56. *Id.* The Saigon government was overthrown by Communist revolutionaries. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* The communiqué stated that "[a]ll . . . banks . . . together with documents, files, property and technical means of U.S. imperialism and the Saigon administration - will be confiscated and, from now on, managed by the revolutionary administration." *Id.* Shortly after this communiqué was issued, the French Embassy officials delivered the records of Chase's Saigon branch to the new Communist government. *Id.*

The plaintiffs<sup>60</sup> brought an action against Chase's home office in New York seeking recovery of their deposits held by the Saigon branch.<sup>61</sup>

The *Vishipco* case raised the issue of whether the home office of Chase was liable for the deposits held by the expropriated Saigon branch.<sup>62</sup>

The second circuit concluded that the branch had ceased operations when the branch officials balanced the books, shut the vaults, locked the building, and delivered the keys and records to the French Embassy personnel.<sup>63</sup> The court, therefore, held the home office liable to the plaintiffs for the value of their deposits at the Saigon branch.<sup>64</sup>

The court found that the Saigon branch was neither open nor operating at the time of the expropriation decree.<sup>65</sup> The court, therefore, concluded that Chase's home office was liable<sup>66</sup> because a home office is obligated on branch deposits if the branch is closed.<sup>67</sup>

The court further held that the act of state doctrine did not apply in this case.<sup>68</sup> United States courts, therefore, could entertain a challenge to the validity of the expropriation decree.<sup>69</sup> The court

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60. The plaintiffs, Vietnamese corporations and a Vietnamese national, were depositors at Chase's Saigon branch. *Id.* The individual plaintiff held a 200,000,000 Vietnamese piastre certificate of deposit issued by the Saigon branch. *Id.* The ten corporate plaintiffs were engaged in the business of providing shipping services to the United States government. *Id.*

61. *Id.* The recovery sought was the dollar value of the Vietnamese piastre deposits. *Id.* The plaintiffs claimed that Chase had breached its deposit contract with them by closing the branch and refusing to make payment to the plaintiffs in New York. *Id.* at 856.

62. *Id.* at 856.

63. *Id.* at 857.

64. *Id.* at 856. The second circuit held that the plaintiffs were entitled to recover an amount in United States dollars equal to the value of the South Vietnamese piastres, based on the exchange rate at the time of the breach. *Id.* at 865.

65. *Id.* at 863. The court essentially concluded that the Saigon branch was closed.

66. *See id.* at 863-64. The second circuit stated that Chase's liability to the foreign branch depositors was not affected by the expropriation because the new Communist regime confiscated the assets abandoned by the foreign branch officials. *Id.* at 864. In other words, the Saigon branch was already closed at the time of the expropriation. *See also supra* note 43 and accompanying text (home office liable for deposits at foreign branch which is closed).

67. *See supra* note 43 and accompanying text.

68. *Vishipco*, 660 F.2d at 862-63. The act of state doctrine applies only where the debt has its situs in the taking state at the time of the expropriation. *See supra* notes 25-36 and accompanying text. The second circuit, in *Vishipco*, found that when a branch is closed the situs of the debt "springs back" and "clings" to the home office. 660 F.2d at 862. This holding is consistent with the exception to the separate entity doctrine which states that a home office is liable for the deposits at a foreign branch when the branch is closed. *See supra* note 43 and accompanying text.

69. *Vishipco*, 660 F.2d at 862-63. *See also supra* notes 30-33 and accompanying text.

concluded that, because Chase had abandoned its Saigon branch before the expropriation decree, the deposits no longer had their situs in South Vietnam.<sup>70</sup> The decree, therefore, did not cut off Chase's obligation to repay the debt of its foreign branch.<sup>71</sup>

## II. PROPOSAL: FEDERAL RESERVE REGULATION PERMITTING PARTIAL SUSPENSION OF OPERATIONS OF A FOREIGN BRANCH DURING PERIODS OF UNREST

During periods of unrest in the host country where a foreign branch is operating, United States banks which seek to protect their branch employees and assets are presented with a limited number of viable options. The parent bank may close a branch to ensure the safety of the employees and its assets.<sup>72</sup> Such action, however, may be premature.<sup>73</sup> On the other hand, the bank may continue *full* operation<sup>74</sup> of the branch, but this may jeopardize the safety of branch employees<sup>75</sup> and assets.<sup>76</sup>

United States banks should be given more than two options when dealing with unrest in a host country because United States

70. *Vishipco*, 660 F.2d at 862-63.

71. *Id.* at 863.

72. In order for a Federal Reserve System member bank to close a foreign branch, the bank must inform the Board of Governors of the closing and provide the address of any new or relocated foreign branch within thirty days of the closing. 12 C.F.R. § 211.3(a) (1983). For a discussion of the threat to the safety of foreign branch employees during periods of unrest in a host country, see *supra* note 16. For a discussion of the threat to branch assets during these periods, see *supra* note 18.

73. There may be no need to close a branch if there is a possibility of the unrest subsiding and the banking business eventually resuming. If the branch is closed, however, the home office will automatically become liable for all the deposits at the foreign branch. See *supra* note 43 and accompanying text. Once the unrest subsides, the home office must seek the approval of the appropriate United States regulatory agencies and agencies in the host country before it can open a new foreign branch. See *supra* notes 9-11 and accompanying text. Business at the old branch cannot simply resume because the branch had been closed.

74. Foreign branches provide a wide range of services to the general public including taking deposits, making loans, clearing checks, issuing commercial letters of credit and purchasing and re-selling foreign currency. 9 L. WEERAMANTRY, W. SCHLICHTING, J. COOPER & J. SEXTON, *BANKING LAW* 212-13 (1983) [hereinafter cited as L. WEERAMANTRY]. Some foreign branches also provide collection services. See *How Foreign Banks Still Get Rich in Brazil*, *Bus. Wk.*, Aug. 22, 1983, at 102. For example, Citibank's Brazilian branches collect taxes, rent, and utility bills for their domestic customers. *Id.* See also Regulation K, 12 C.F.R. § 211.3(b) (1983) (permissible activities of foreign branches of Federal Reserve member banks).

75. See *supra* note 16 and accompanying text.

76. See *supra* notes 18-19 and accompanying text.

banks are currently expanding into politically unstable countries.<sup>77</sup> For several years, the Federal Reserve Board Regulations (Regulations) permitted the suspension of operations of a foreign branch during periods of disturbance in a host country.<sup>78</sup> This provision was not renewed when the Board of Governors of the Federal Reserve System (Board of Governors) revised its international banking regulations in 1979.<sup>79</sup>

### A. Proposed Regulation

To better equip United States banks to deal with unrest in a host country, the Board of Governors should establish a new provision in its Regulations permitting United States banks to partially suspend the operations of a foreign branch<sup>80</sup> during periods of unrest in the host country. This proposal gives United States banks a

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77. See *supra* notes 12-14 and accompanying text. If United States banks risk expanding into politically unstable countries, United States laws or regulations should equip the banks to deal with threats to employee safety and the possibility of expropriation in the host country. The risks United States banks take are important to the economic health of the United States because the United States banking industry controls "a trillion dollars of deposited funds" and its operations "vitally affect the entire economy." E. COMPTON, *supra* note 19, at 165. Therefore, what United States banks do, "and the manner in which they do it, must be viewed as legitimate areas for concern and supervision" by the United States government. *Id.*

78. 12 C.F.R. § 213.3(d) (1978). Prior to June 14, 1979, § 213.3(d) of Regulation M provided that:

[T]he officer in charge of a foreign branch may suspend its operations during disturbed conditions which, in his judgment, make conduct of such operations impracticable; but every effort shall be made before and during such suspension to serve its depositors and customers. Full information concerning any such suspension shall be promptly reported to the branch's home office, which shall immediately send a copy thereof to the Board through the Federal Reserve Bank of its district.

*Id.*

79. See 44 Fed. Reg. 36,012 (1979) (codified at 12 C.F.R. pt. 211). These revisions became effective June 14, 1979. *Id.* Regulation M, 12 C.F.R. pt. 213 (1978), and other regulations governing international banking operations were revised and combined into the current Regulation K, International Banking Operations, 12 C.F.R. pt. 211 (1983). See 44 Fed. Reg. 36,012 (1979). Regulation M was rescinded *in toto*. *Id.* The suspension provision contained in the old Regulation M was not included in the new Regulation K.

80. See *infra* notes 81-84 and accompanying text for the proposed regulation. In the event of a total suspension of operations of a foreign branch, the home office would be liable for all the deposits at the *de facto* closed branch. For the proposed regulation, see *infra* notes 81-84 and accompanying text. For a discussion of *Sokoloff v. National City Bank*, 250 N.Y. 69, 80-81, 164 N.E. 749-50 (1928), in which the home office was held liable for the deposits at a closed foreign branch, see *supra* note 43. A regulation that would not require a foreign branch to remain fully operative, but would permit the branch to terminate certain services, would provide a viable third option to banks wanting to protect their employees and assets without closing the branch. Such a third option is proposed in this Note. See *infra* notes 81-84.



third option whereby a foreign branch can continue to exist, but at less than full capacity.

Branch officials, however, cannot suspend all operations of the foreign branch because full suspension would be tantamount to a closing of the branch.<sup>81</sup> The new regulation, therefore, should only permit a partial suspension. A partial suspension would require the branch officials to provide the depositors with the opportunity to withdraw or transfer their funds, but would allow the suspension of other services which foreign branches provide to the general public.<sup>82</sup>

The regulation should outline the procedure that foreign branch officials must follow to implement the partial suspension.<sup>83</sup>

81. See generally *Sokoloff*, 250 N.Y. at 69, 164 N.E. at 749 (deposit contract broken when bank ceased doing business, precluding depositor from making withdrawal or otherwise drawing upon his account). A foreign branch is *de facto* closed, therefore, if its depositors are provided with no opportunity to withdraw or transfer their funds. In *Vishipco Line v. Chase Manhattan Bank*, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 103 S. Ct. 313 (1982), the second circuit noted that the officials at Chase's Saigon branch closed the branch doors without prior notice to the depositors, balanced the day's books, shut the vaults, locked the building, delivered the keys and financial records needed to operate the branch to the officials at the French Embassy, and failed to return to the branch. *Id.* at 857. The court, citing this conduct, held that Chase's Saigon branch was abandoned. *Id.* at 863.

82. See *supra* notes 80-81 and accompanying text. The minimum duty of a foreign branch, in order to be "partially operative" and not "closed," should be to provide the depositors with a reasonable opportunity to transfer their funds or demand withdrawal of their funds from the branch. *Id.* Many of the services which foreign branches provide to their customers, however, should not be required. Such services include taking deposits, making loans, clearing checks, issuing commercial letters of credit, and purchasing and selling foreign currency. See WEERAMANTRY, *supra* note 74, at 212-13. For a discussion of the other services a foreign branch may provide to the general public, see *supra* note 74. Such services could be terminated when a foreign branch partially suspends its operations, provided that the reduction in service does not prevent depositors from withdrawing or transferring their funds. For discussion of a branch's *de facto* closing if its depositors are provided with no opportunity to withdraw or transfer their funds, see *supra* notes 80-81.

Although the depositors must have such access to their funds, the proposed regulation should not require, for example, that the foreign branch officials maintain a full staff for the depositors. A foreign branch could be partially operative if it merely provides the depositors with a telephone line or automatic teller machine from which withdrawals or transfers can be ordered, even though the branch doors are not opened or there are no tellers at the branch to take deposits. Because the depositors would have the ability to withdraw or transfer their funds from the foreign branch, the branch would not be closed. See *supra* note 80. The home office, therefore, would not be liable for the deposits at the foreign branch. For discussion of the general rule that the home office is not liable for deposits at a foreign branch, see *supra* notes 39-42 and accompanying text. For discussion of the exception which states that the home office is liable for deposits at closed foreign branches, see *supra* note 43 and accompanying text.

83. Federal Reserve Act, Pub. L. No. 43, ch. 6, 38 Stat. 251 (codified as amended in scattered sections of 12 U.S.C.) grants to the Board of Governors the power to regulate the

A time limit should also be set, indicating the period for which a branch may remain partially suspended.<sup>84</sup>

The advantage of the proposed regulation is that it balances the depositor's need to have access to his funds with the bank's desire to provide for the safety of its branch employees and assets.<sup>85</sup>

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activities of a foreign branch of a Federal Reserve System member bank. 12 U.S.C. § 604(a) (1976). A bank, therefore, may establish and operate a foreign branch only with the approval of the Board of Governors. 12 C.F.R. § 211.3(a) (1983). The Board of Governors must also be notified if any foreign branch is closed. *Id.*

The regulation proposed in this Note, therefore, should contain a requirement that the Board of Governors must be notified that a foreign branch is partially suspending its operations. To require that the Board of Governors approve a partial suspension before a foreign branch can implement the proposed regulation would, however, defeat the purpose of a partial suspension because unrest in the host country usually requires quick action by the branch officials to protect branch employees and assets. *See supra* notes 16-17 and accompanying text. To prevent the banks from abusing the above regulation, however, the Board of Governors should be notified of its implementation. Under the proposed regulation, therefore, full information concerning the partial suspension, and a justification for its implementation, would be reported promptly to the foreign branch's home office. The home office would then be required to send the Board of Governors a copy of this information and justification, through the Federal Reserve Bank in the home office's district. Once notified, the Board of Governors would inquire into the circumstances preceding the partial suspension to determine whether such action was justified. The Board of Governors could consider such factors as the political and social developments in the host country, the location of the particular foreign branch, the existence and location of insurgents, and the existence and level of violence or rioting. These factors are important because, among other reasons, while rioting may be occurring in the streets near the branch, it may not be serious enough to warrant partial suspension. Moreover, while unrest may exist in one region of the host country, all branches in the country may not be similarly threatened. Officials in a particular branch, for example, may lack sufficient reason to partially suspend operations if the unrest is hundreds of miles from the branch.

If the Board of Governors determines that partial suspension was not justified, the Board of Governors should notify the home office that its foreign branch must either resume full operations or close.

84. The new regulation should authorize the Board of Governors to set a time limit within which a particular branch must either be closed or returned to full operation. When setting this time limit, the Board of Governors could consider the same factors suggested for determining whether the foreign branch officials were justified in implementing the partial suspension provision. *See supra* note 83. The Board of Governors, for example, could allow the suspension period to be measured by how long it would take to evacuate most of the foreign branch employees from the host country. While the period could be longer, the Board of Governors should set a definite date by which time the bank officials must either decide to close the branch or return it to full operating capacity.

85. If a foreign branch remains fully operative, the safety of all branch employees will be jeopardized because all the employees will be working. On the other hand, if a branch partially suspends operations, only a few employees will be needed to work. Therefore, while a depositor will still have access to his funds, the safety of fewer employees will be threatened.

### B. Effect of the Proposed Regulation

The outcome of the *Vishipco*<sup>86</sup> case might have been different had the proposed regulation been in effect at the time.<sup>87</sup> Such a regulation would have provided Chase's branch officials with a third option: with assets threatened by expropriation and employees endangered by the political unrest, Chase could have partially suspended its operations. In the future, if the proposed regulation is adopted by the Board of Governors,<sup>88</sup> United States banks will have a third option whenever confronted with unrest in a host country.

The proposed regulation would benefit both the foreign branch depositors and the home office. First, no foreign branch depositor would be denied payment because the depositors would have access to their funds, thus enabling them to withdraw or transfer their money.<sup>89</sup>

On the other hand, because the partial suspension would not constitute a closing,<sup>90</sup> the home office would also benefit because it would not be liable to the depositors of the foreign branch.<sup>91</sup> Then, should the unrest subside or the authorities make it possible for the

86. *Vishipco Line v. Chase Manhattan Bank*, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 103 S. Ct. 313 (1982).

87. The suspension provision contained in Regulation M, 12 C.F.R. § 213.3(d) (1978), was in effect in 1975 when Chase's Saigon branch was expropriated by the new Communist regime. The provision, however, was only raised as a defense by the Federal Reserve Bank of New York in an amicus curiae brief to the Supreme Court. See Motion of the Federal Reserve Bank of New York for Leave to File a Brief as Amicus Curiae in Support of the Petition and Brief of the Federal Reserve Bank of New York as Amicus Curiae at 4-5, *Vishipco*, 660 F.2d at 854. The Supreme Court denied *certiorari*, never addressing the suspension issue. *Vishipco Line v. Chase Manhattan Bank*, 103 S. Ct. 313 (1982).

88. The Board of Governors has the authority to "issue such regulations as may be necessary [for] the strict enforcement" of the Federal Reserve Act. 12 U.S.C. § 339(e) (1976). The Board of Governors is also authorized to regulate the powers which a foreign branch may exercise under the law and to authorize foreign branches to exercise further powers that are common in the transaction of a banking business. 12 U.S.C. § 604(a) (1976). The regulation proposed in this Note, therefore, could be adopted by the Board of Governors by amending Regulation K, 12 C.F.R. pt. 211 (1983) (International Banking Operations).

89. See *supra* note 82 and accompanying text.

90. See *supra* notes 81-82 and accompanying text. In *Vishipco*, the court concluded that the Saigon branch had been abandoned by Chase. 660 F.2d at 862-63. A partial suspension of operations would not constitute an abandonment of a foreign branch because the branch's existence in the host country would not be terminated. See *supra* notes 80-81 and accompanying text.

91. See *supra* note 43 and accompanying text. If the branch had ceased to exist and, therefore, was deemed closed, the separate entity doctrine would no longer shield the home office from liability. *Id.*

branch employees to return to work in safety, the foreign branch could merely resume full operations.<sup>92</sup> On the other hand, if political unrest were to escalate and result in expropriation of the branch assets, the act of state doctrine would apply,<sup>93</sup> cutting off the home office's liability<sup>94</sup> and precluding United States courts from adjudicating the validity of the expropriating decree.<sup>95</sup>

The interests of the foreign branch depositors, however, cannot be ignored in the event the act of state doctrine does relieve the home office of liability. The home office, for example, could get a windfall if it is relieved of liability yet permitted to retain assets that branch officials somehow removed from the host country during the period of unrest.<sup>96</sup> Also, the parent bank may receive insurance payments if the foreign branch was insured against expropriation.<sup>97</sup> In either event, it is only equitable that a court require the home office to pass on to the foreign branch depositors the value of any branch assets that the home office recovers or any insurance payments received.

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92. Establishment of a new branch would not be required in this event because the partially suspended branch was not closed to begin with. For a discussion of the establishment of a new branch, see *supra* notes 9-11 and accompanying text.

93. See *supra* notes 28-35 and accompanying text. Because the foreign branch operations were not terminated, the debtor branch would remain within the territorial jurisdiction of the host country. The situs of the debt deposit would also be within the host country and subject to its jurisdiction. *Id.* The debt, therefore, would be subject to any expropriation decree issued by the host country's government. *Id.*

94. See Heininger, *supra* note 24, at 963; Logan & Kantor, *supra* note 7, at 347.

95. See *supra* notes 25-36 and accompanying text.

96. *But see supra* note 18 and accompanying text (difficulty involved in removing foreign branch assets from host country during periods of unrest).

97. See R. JORDAN, OVERSEAS PRIVATE INVESTMENT CORPORATION I (1983) (copy on file with the *Fordham International Law Journal*). In 1969, Congress created the Overseas Private Investment Corporation (OPIC) to stimulate United States private investment in developing countries. *Id.* OPIC provides United States investors with insurance coverage against political risks such as expropriation, abrogation of contractual rights, inconvertibility of local currency, war, revolution, insurrection, and political strife. *Id.* OPIC also provides financial services to United States investors in the form of loan guarantees, direct loans, and pre-investment assistance in developing countries. *Id.*

OPIC was the subject of criticism in Congress in the early 1970's when it was believed that OPIC foreign investments were only embroiling the United States in the internal politics of host countries. See Note, *International Trade Reauthorization for the Overseas Private Investment Corporation*, 12 GA. J. INT'L & COMP. L. 251, 252 (1982) [hereinafter cited as Note, *International Trade*]. The OPIC coverage against expropriation, war, revolution, insurrection, and civil strife, however, provides no solution to the problem of protecting branch employees during periods of unrest in the host country. For a discussion of the purposes and limitations of OPIC, see Note, *Encouraging Investment in LDC's: The United States Investment Guaranty Program*, 8 BROOKLYN J. INT'L L. 365 (1982); Note, *International Trade, supra*, at 252-53.

### CONCLUSION

Whether the home office of a United States bank is liable for deposits at an expropriated foreign branch, and what action can be taken during periods of unrest in a host country, are significant issues for United States banks operating abroad. The possibility of costly double liability should the home office be found liable,<sup>98</sup> may discourage United States banks from expanding their international banking operations.<sup>99</sup> Limiting the options of banks during periods of unrest to two alternatives – either closing the foreign branch or keeping it fully operative – may further discourage this expansion. If United States banks do not expand their international operations, their global position could further erode,<sup>100</sup> adversely affecting United States foreign trade.<sup>101</sup>

The new Federal Reserve regulation,<sup>102</sup> if adopted, would offer a third option for United States banks, a format with which to better equip them to deal with unrest in foreign nations. The proposal balances the foreign branch depositor's need or desire to have access to his money with the bank's desire to provide for the safety of the branch employees.<sup>103</sup> Adoption of the proposal may encourage United States banks to continue their growth into countries where they have not previously expanded,<sup>104</sup> thereby maintaining their competitive position in the international banking industry.

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98. See *supra* note 20 and accompanying text.

99. See *supra* notes 12-15 and accompanying text (United States banks should expand banking operations to retain worldwide importance).

100. See *supra* note 15 and accompanying text.

101. See E. COMPTON, *supra* note 19, at 165.

102. See *supra* notes 80-85 and accompanying text.

103. See *supra* note 85 and accompanying text.

104. See *supra* notes 12-13 and accompanying text.