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Act of State: The Fundamental Inquiry of Situs Determination for Expropriated Intangible Property: *Braka v. Bancomer, S.N.C.*

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NOTES

Act of State: The Fundamental Inquiry of Situs Determination for Expropriated Intangible Property: *Braka v. Bancomer, S.N.C.*

In the past ten years, U.S. banks and investors have extended vast amounts of credit to foreign borrowers, particularly Latin American governments, their instrumentalities, and commercial entities subject to control by these governments. Experiencing deteriorating economic conditions, many of these borrowers have chosen to repudiate their debts or have been forced by governmental decrees to scale back their repayments. Although the credit agreements covering these loans and investments have been carefully crafted, they have not anticipated the application of the act of state doctrine, which bars U.S. courts from examining the lawfulness of actions taken by a foreign sovereign within its own territory.¹

Much of the confusion experienced by the courts in applying the doctrine has arisen from their inability to determine properly the situs of these foreign loans and investments. Determining the appropriate situs of intangible property interests is fundamental to the act of state analysis. This issue was recently addressed in *Braka v. Bancomer, S.N.C.*² when the United States Court of Appeals for the Second Circuit affirmed a district court ruling that because the situs of plaintiffs' certificates of deposit was Mexico, the act of state doctrine applied. This decision barred the courts from reviewing the enactment of exchange controls and nationalization of banks by Mexico, generating losses on investments at redemption.³

The plaintiffs in *Braka* were U.S. citizens who purchased peso- and dollar-denominated certificates of deposit (CDs) from Bancomer, S.A., a privately-run Mexican bank.⁴ In September 1982 the Mexican government nationalized Mexican banks, including

¹ RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 428 (Tent. Draft No. 4, 1983).

² 762 F.2d 222 (2d Cir. 1985).

³ *Id.* at 223-24.

⁴ *Id.* The value of the certificates was \$2,100,000. All the certificates matured in February 1983 except one, which reached maturity in September 1982. The annual interest rates ranged from 14.3% to 23.25%. *Id.*

Bancomer, and mandated a system of exchange controls.⁵ When the plaintiffs tendered the CDs on their maturity dates, they received Mexican pesos at the new official exchange rates which did not approximate the maturity value of the certificates,⁶ resulting in a 900,000 dollar loss for the plaintiffs.⁷ Subsequently, plaintiffs brought suit in the United States District Court for the Southern District of New York⁸ claiming damages for breach of contract and for violation of federal securities law. The district court dismissed plaintiffs' complaint holding that the act of state doctrine prevented judicial review of the government's acts because the situs of the property affected was in Mexico and the Mexican imposition of exchange controls was a proper governmental function.⁹

The court of appeals affirmed the dismissal of plaintiffs' complaint on act of state grounds.¹⁰ In reviewing the district court's decision that the act of state doctrine applied, the court noted that its analysis must begin with a determination of the situs of the property taken by the Mexican exchange controls.¹¹ In addressing this issue, the court noted that the CDs named Mexico City as the place of deposit and the place for payment of interest and principal.¹² The plaintiffs had argued that the situs was New York because they purchased the CDs by giving checks to Bancomer's New York agency and received interest payments in New York. The court focused on the contractually mandated situs of the obligation and therefore concluded that the proper situs was Mexico.¹³ Given this determination, the court agreed that the act of state doctrine applied and precluded judicial review. To rule otherwise and intervene would be an impermissible intrusion into the governmental activities of a foreign sovereign.¹⁴

The *Braka* decision represents another chapter in the confusing and uncertain history of the application of the act of state doctrine to sovereign actions. The classic statement of the doctrine¹⁵ was first

⁵ *Id.*

⁶ The plaintiffs received Mexican pesos at the controlled exchange rate of 75 pesos per dollar when the market exchange rate was 150 pesos per dollar. *Id.*

⁷ *Id.*

⁸ *Braka v. Bancomer, S.N.C.*, 589 F. Supp. 1465 (S.D.N.Y. 1983), *aff'd*, 762 F.2d 222 (2d Cir. 1985).

⁹ 762 F.2d at 223.

¹⁰ *Id.* at 224.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 224-25.

¹⁴ *Id.* at 225.

¹⁵ The roots of the act of state doctrine appear to have taken hold in England in *Blad v. Bamfield*, 3 Swans. 604, 36 Eng. Rep. 992 (1674), and began to emerge in the case law of the United States in the late eighteenth and early nineteenth centuries. In *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), the Court dismissed the claim of a U.S. citizen who brought an action against the French for the wrongful possession of his schooner. The Court concluded that despite the asserted right to ownership of

promulgated by the Supreme Court in *Underhill v. Hernandez*,¹⁶ in which the Court recognized that governmental acts by a sovereign within its own territory are not subject to adjudication by the courts of another sovereign nation. In *Underhill* the Supreme Court dismissed the claim of a U.S. citizen who was detained in Venezuela by a revolutionary general. The Court formulated a two-prong inquiry for evaluating act of state claims. First, is the act in question one of "the acts of the government?"¹⁷ Second, if it is a governmental act, is it "done within its own territory?"¹⁸ The second question obviously relates to a proper determination of situs.

The modern formulation of the act of state doctrine came in *Banco Nacional de Cuba v. Sabbatino*,¹⁹ a case arising from the 1960 Cuban nationalization of property owned by U.S. nationals. After a commodities broker refused to pay Banco Nacional, a Cuban instrumentality, for its tendering of bills of lading on a sugar shipment, Banco Nacional brought suit against the broker for conversion of the bills of lading.²⁰ The Supreme Court applied the act of state doctrine to bar a counterclaim against Cuba and refused to examine the validity of the Cuban expropriation decrees.²¹ The Court made it clear that the import of the doctrine was to negate the likely impact on international relations that would result from judicial consideration of the act of a foreign sovereign. If judicial review would embarrass or hinder the executive in the realm of foreign relations, a court should refrain from inquiring into the act of the foreign state.²²

The *Sabbatino* opinion was met with severe criticism,²³ and within a few months, the Hickenlooper Amendment²⁴ was enacted to

the plaintiff, the ship, at the time of suit, was in the service of a foreign sovereign and was therefore exempt from the jurisdiction of the U.S. courts. *Id.* at 147.

¹⁶ 168 U.S. 250 (1897).

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of 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.

Id. at 252.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 376 U.S. 398 (1964).

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

Id. at 428.

²⁰ 376 U.S. at 401-06.

²¹ *Id.* at 439.

²² *Id.* at 431-33.

²³ Ebenroth, *Winning (or Losing) by Default: The Act of State Doctrine, Sovereign Immunity and Comity in International Business Transactions*, INT'L LAW. (Winter 1985), at 228.

²⁴ Foreign Assistance Act of 1964, Pub. L. No. 88-633, § 301(d)(4), 78 Stat. 1009 (codified at 22 U.S.C. § 2370(e)(2) (1979)).

nullify a portion of the *Sabbatino* opinion by prohibiting a court from refusing to reach the merits in expropriation cases that involve a violation of international law. Additionally, the Supreme Court made two subsequent attempts after *Sabbatino* to clarify the act of state doctrine: by considering the "Bernstein exception" (the doctrine might not apply when the executive branch has affirmatively expressed its position),²⁵ and by focusing on the possible existence of an exception to the act of state doctrine when the sovereign is engaged in commercial activity.²⁶ Unfortunately, these exceptions further muddled the doctrine and led to considerable uncertainty in the courts as to the parameters of the act of state doctrine.²⁷

U.S. courts, however, have uniformly held that extraterritorial seizures are not protected by the act of state doctrine. It is well settled that domestic courts will not give effect to foreign confiscatory decrees over property within the United States.²⁸ Because judicial scrutiny of acts affecting property outside another nation's boundaries involves no affront to territorial sovereignty, U.S. courts are free to judge such acts under domestic legal standards, unfettered by the act of state doctrine.²⁹ Given the extraterritorial exception, situs is of paramount importance because the act of state doctrine will not

²⁵ In *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972), Cuba sued for the excess resulting from the sale of its collateral for a loan made by Citibank. The sale took place after the seizure of all bank branches located in Cuba. The State Department indicated that the act of state doctrine should not be applied to prevent the assertion of Citibank's counterclaim. Four widely divergent opinions were filed, of which no single proposition commanded a majority. The opinion filed by Justice Rehnquist, and joined by Chief Justice Burger and Justice White, asserted that the judiciary may decide a case if there is a communication from the executive branch that the act of state doctrine should not or need not be applied. *Id.* at 767.

²⁶ In *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976), after the nationalization by Cuba in 1960 of the business and assets of five leading cigar manufacturers, the former owners brought actions for the purchase price of cigars that had been shipped to importers from the seized Cuban plants. Justice White, joined by three other Justices, advanced the theory that the act of state doctrine should not be extended to acts in the course of purely commercial operations. *Id.* at 705. This restrictive approach to sovereign immunity was based on the same rationale as that used by Congress in enacting the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1332(a)(2)-(3), 1391(f), 1441(d), 1601-1611 (1982).

²⁷ Note, *An Approach to Act of State: Empresa Cubana Exportadora de Azucar y Sus Derivados v. Lamborn and Co.*, 7 N.C.J. INT'L L. & COM. REG. 409, 409 (1982).

²⁸ *United Bank Ltd. v. Cosmic Int'l, Inc.*, 542 F.2d 868, 872 (2d Cir. 1976) (money with situs in New York not affected by Pakistani act of state); *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021, 1025 (5th Cir. 1972) (expropriation of Cuban Brewing Corporation by Cuba did not affect use of its U.S. trademark registered in the United States); *Tabacalera Severiano Jorge v. Standard Cigar Co.*, 392 F.2d 706, 715 (5th Cir. 1968) (subject of alleged taking by Cuba was creditor domiciled in Florida; confiscation ineffective); *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47, 51 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966) (money with situs in New York not affected by Iraqi act of state); *Tran Qui Than v. Blumenthal*, 469 F. Supp. 1202, 1209 (N.D. Cal. 1979) (bank assets in New York not reachable by Director of Saigon Bank).

²⁹ Note, *Act of State—Foreign Expropriation Decrees—Act of State Doctrine Does Not Enable Foreign Sovereign to Confiscate Debts with Situs in the United States*, 17 VA. J. INT'L L. 567, 573 (1977).

apply if the expropriated property is determined to be situated outside the territorial boundaries of the foreign sovereign.

For expropriated tangible property, situs determination is relatively straightforward. The property is either physically within or without the foreign sovereign's boundaries and control. On the other hand, the situs of expropriated intangible property, such as loans and investments, is much more difficult to establish. The Fifth Circuit Court of Appeals recognized this in *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Company*³⁰ when it stated that "the situs of intangible property is about as intangible a concept as is known to the law."³¹

As a general rule, the situs of a debt depends upon jurisdiction over the debtor.³² For act of state purposes, the courts have generally applied this rule, citing *Harris v. Balk*,³³ in determining the situs of such property to be within the state that has the power to enforce or collect it.³⁴ Yet the courts have recently expanded this test to cover situations in which jurisdiction over the debtor was based on factors other than domicile, such as the contacts the debtor had within the United States.³⁵ The rationale in refusing to use solely the domicile test is that application of that test would almost always place the loan in the foreign nation and would allow the act of state doctrine to be used by foreign nations as a mechanism to avoid payment of debts.³⁶ Finally, in more recent cases, the situs test has been

³⁰ 392 F.2d 706 (5th Cir. 1968). A Cuban corporation and its sole stockholder (a resident of Florida) as assignee brought an action against a Florida corporation to recover a sum owed to the Cuban corporation for tobacco sold to the Florida corporation before the Cuban revolution. In determining that the suit was not barred by the act of state doctrine, the court concluded that the account receivable of the Cuban corporation was not property in Cuba because the Cuban government was not physically in a position to perform a *fait accompli* over the receivable. *Id.* at 715. Thus, the court fashioned a new test whereby the situs of expropriated property depends in large part on whether the purported taking can be said to have "come to complete fruition within the dominion of the foreign government." *Id.*

³¹ *Id.* at 714. Additionally, the court stated:

The situs may be in one place for ad valorem tax purposes, *Farmers Loan and Trust Co. v. State of Minnesota*, 280 U.S. 204; it may be in another place for venue purposes, i.e., garnishment, *Chicago R.I. & R.R. Co. v. Sturm*, 174 U.S. 710; it may be in more than one place for tax purposes in certain circumstances, *Curry v. McCanless*, 307 U.S. 357; 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.

Id. at 714-15.

³² *Harris v. Balk*, 198 U.S. 215, 222-23 (1905). Although another aspect of *Harris* has been overruled, see *Shaffer v. Heitner*, 433 U.S. 186 (1977), the debt-situs holding remains unimpaired.

³³ 198 U.S. 215 (1905).

³⁴ See, e.g., *United Bank Ltd. v. Cosmic Int'l, Inc.*, 542 F.2d 868, 873 (2d Cir. 1976); *Menendez v. Saks & Co.*, 485 F.2d 1355, 1365 (2d Cir. 1973).

³⁵ See *Zaitzeff & Kunz, The Act of State Doctrine and the Allied Bank Case*, 40 Bus. Law. 449, 457-58 (1985).

³⁶ *Id.*

further broadened beyond jurisdictional considerations by the court's willingness to implement policy considerations, specifically the protection of foreign property located in the United States and the protection of U.S. property interests located abroad.³⁷

These issues are well illustrated in two recent actions brought by the lead banks of syndications that extended large loans to Costa Rica. In *Libra Bank Ltd. v. Banco Nacional de Costa Rica*³⁸ the syndication lent forty million dollars to a banking concern wholly owned by the Costa Rican government. Pursuant to a governmental decree that suspended payment on Costa Rica's external debt, Banco Nacional ceased payments on its debt. In the action brought by Libra Bank, the district court held that the situs of the debt was New York and hence the act of state doctrine did not preclude the court from inquiring into the validity of the Costa Rican decree. Summary judgment was granted to Libra Bank.³⁹ No appeal was requested as the parties eventually joined in a rescheduling of the loan package.

In determining that the situs of the debt was in New York, the court was influenced by the fact that under the loan agreement, Banco Nacional consented to the jurisdiction of the district court; that Banco Nacional was to make all payments to The Chase Manhattan Bank in New York City; and that Banco Nacional had two and a half million dollars in various New York City bank accounts.⁴⁰ Additionally, the court stated that even if a creditor can sue a debtor in his foreign domicile, a U.S. court may still find that the situs of the debt was in this country at the time of attempted confiscation.⁴¹

In *Allied Bank International v. Banco Credito Agricola de Cartago*⁴² a banking syndication lent ten million dollars to an instrumentality of the Costa Rican Central Bank. Pursuant to the decree discussed above, Banco Credito ceased payments on the loan. Allied accelerated the debt and then sued for the unpaid principal and interest. In its initial decision the Second Circuit affirmed the district court's application of the act of state doctrine to bar review of the Costa Rican decree. Upon rehearing, the Second Circuit reversed its prior decision, holding that the act of state doctrine did not apply to the loan defaults because the situs of the bank's obligation was in New York.⁴³ Summary judgment was granted to Allied.⁴⁴

³⁷ See Note, *supra* note 29, at 581.

³⁸ 570 F. Supp. 870 (S.D.N.Y. 1983).

³⁹ *Id.* at 871.

⁴⁰ *Id.* at 881-82.

⁴¹ *Id.* at 881. Further, the court noted that this analysis is consistent with the historical formula set forth in *Harris*, 198 U.S. at 222. ("The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes.")

⁴² 733 F.2d 23 (2d Cir. 1984), *rev'd and remanded on rehearing*, 757 F.2d 516 (2d Cir. 1985).

⁴³ 757 F.2d at 523.

⁴⁴ *Id.* at 518.

In *Allied Bank* the court made reference to the *Tabacalera* test⁴⁵ whereby the situs of expropriated property depends in large part on whether the purported taking can be said to have "come to complete fruition within the dominion of the foreign government."⁴⁶ Without elaboration, the court concluded that Costa Rica could not wholly extinguish the Costa Rican banks' obligation to pay U.S. dollars to Allied in New York and the situs was therefore not Costa Rica.⁴⁷ The court also supported its situs determination by noting that the Costa Rican banks conceded jurisdiction in New York, they agreed to pay the debt in New York City, and some of the negotiations between the parties took place in the United States.⁴⁸ Various policy reasons were also cited for locating the debt situs in New York—principally, the protection of U.S. creditors.⁴⁹

Although *Braka* yielded a result contrary to that in *Libra Bank* and *Allied Bank*, the *Braka* court, in fixing the situs of the expropriated CDs, used reasoning similar to that of the *Libra Bank* and *Allied Bank* opinions. The underlying analysis for these three decisions focused on the terms of the credit agreements, whether the foreign debtor had conceded to U.S. jurisdiction, the designated place for payment of principal and interest, and the extent to which the foreign debtor had assets in the United States. The *Braka* analysis, however, differed from *Libra Bank* and *Allied Bank* in that it placed greater emphasis on the contractually mandated situs of the CDs, naming Mexico City as the place of deposit and of payment of interest and principal.⁵⁰ The court was not influenced by the plaintiffs' argument that the CDs had been purchased in New York, and instead, relied exclusively on its contractually mandated situs determination.⁵¹

Further, absent from the *Braka* opinion are the policy considerations found in *Libra Bank* and *Allied Bank* in which the courts cited protection of the U.S. creditor to support their conclusion that the United States was the situs of the debts. As noted previously, the use of such policy considerations and factors extrinsic to the parties' agreement in resolving the situs issue results in a more expansive test enabling the courts to fix more readily the situs of the expropriated intangible property in this country. On the other hand, the

⁴⁵ See *supra* note 30 for a discussion of *Tabacalera*.

⁴⁶ 757 F.2d at 521.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 521-22. The court stated:

The United States has an interest in assuring that creditors entitled to payment in the United States in United States dollars under contracts subject to the jurisdiction of United States courts may assume that, except under the most extraordinary circumstances, their rights will be determined in accordance with recognized principles of contract law.

Id.

⁵⁰ *Braka*, 762 F.2d at 224-25.

⁵¹ *Id.*

Braka approach focuses mainly on the credit instrument itself and ascertains the situs from the terms of the contract between the parties.

In this regard, *Braka* can possibly be reconciled with the earlier decisions by the fact that the materiality of the investment in *Braka* did not approach the magnitude of the large loans found in *Allied Bank* and *Libra Bank*. The *Braka* court referred to the *Sabbatino* opinion in which "the Supreme Court directed that each case be analyzed individually to determine the need for a separation of powers."⁵² Additionally, there is language in the *Braka* opinion to support the contention that the court opted not to intervene because the facts did not warrant judicial review.⁵³ Although the *Braka* court confines its analysis of the situs issue to the terms of the credit instrument, it appears that it will continue to adhere to the flexible approach formulated in *Sabbatino*. The court seems to reserve application of a situs test that considers policy considerations and factors extrinsic to the credit instrument for facts that might motivate the court to look beyond the parties' contract. If *Braka* and the other plaintiffs had been large commercial entities with excessive foreign loan exposure rather than private individual investors, the outcome might have been different.

Despite the above differences, *Braka* is consistent with several recent Mexican currency control cases⁵⁴ that had factual situations similar to *Braka* and had dismissed plaintiffs' claims on act of state grounds. These decisions, along with *Braka*, found that while the defendant banks' activities were commercial, the cause of actions arose from the bank's conduct as required by the Mexican government's imposition of currency controls and bank nationalization. The *Braka* court noted that to intervene and contradict the result of the exchange controls would be an impermissible intrusion into the governmental activities of a foreign sovereign.⁵⁵ Thus, in addition to *Braka's* analysis of the situs issue in a more formal and technical manner than that found in earlier cases, the *Braka* court appears to adhere to the spirit of the act of state doctrine by not placing the U.S. judicial branch at odds with policies established by a foreign government which are public and regulatory in nature.

In so doing, the *Braka* court seems to recognize that involved in a judicial determination of the location of expropriated intangible

⁵² *Id.* at 224.

⁵³ *Id.* "Our examination of the facts in the instant case convinces us that the district court was correct in ruling that the relevant considerations mitigate against judicial intervention." *Id.*

⁵⁴ *E.g.*, *Braka v. Multibanco Comermer, S.A.*, 589 F. Supp. 802 (S.D.N.Y. 1984); *Caljejo v. Bancomer, CA-3-82-1604-D* (N.D. Tex. 1984); *Frankel v. Banco Nacional de Mexico, S.A.*, No. 82-6457 (S.D.N.Y. 1983).

⁵⁵ *Braka*, 762 F.2d at 225.

property are two pragmatic and related considerations: the futility and perhaps detrimental effect of ruling on a *fait accompli* by a foreign government and the realization that the court is powerless to do anything about it.⁵⁶ If the foreign government's act has been made substantially effective within its borders, U.S. courts will be unable to grant meaningful relief.⁵⁷ In such a situation the party injured by the act of state can only attain meaningful recovery with the help of the political branches.⁵⁸

In terms of future international finance disputes addressing an act of state by a foreign country, *Braka's* reliance on the contractually mandated situs of the CDs to fix the place of expropriation should have desirable consequences. It provides a standard whereby investors and foreign governments alike can predict with reasonable certainty the judicial outcome. When it appears the contractual situs of an investment or loan, as determined from the credit instrument itself, is located in a foreign country, an investor should probably seek help from the executive branch instead of the judiciary. Similarly, such a standard will provide uniform assurances to a foreign government that actions taken to put its economic house in order will not be subject to extensive litigation in the United States. Unfortunately, U.S. creditors must continue to be wary of foreign governmental actions that may impair their right to repayment.⁵⁹

A proposed solution to the situs question suggests that an act be considered "done" within the territory of a foreign sovereign when that sovereign has the power to make the action substantially effective.⁶⁰ When the expropriated property is tangible, this analysis arrives at the same result as standard theories for determining the applicability of the act—the situs of the property at the time of the expropriation is dispositive.⁶¹ When intangible property is involved, this approach in effect places the property in the country that can most significantly affect the legal interests in that property.⁶² This proposed solution, however, appears to be a restatement of the *Tabacalera* test whereby the situs of expropriated property depends in large part on whether the purported taking can be said to have "come to complete fruition within the dominion of the foreign government."⁶³

⁵⁶ See Note, *The Act of State Doctrine—Ethiopian Spice Extraction Share Company v. Kalamazoo Spice Extraction Company*, 10 BROOKLYN J. INT'L L. 243, 250 (1984).

⁵⁷ Comment, *The Act of State Doctrine and Foreign Sovereign Defaults on United States Bank Loans: A New Focus for a Muddled Doctrine*, 133 U. PA. L. REV. 469, 495 (1985).

⁵⁸ *Id.*

⁵⁹ Note, *Act of State: Treatment of Foreign Defaults in Domestic Courts*, 25 HARV. INT'L L.J. 195, 200 (1984).

⁶⁰ Comment, *supra* note 57, at 493.

⁶¹ *Id.*

⁶² *Id.*

⁶³ See *supra* note 30 for a discussion of *Tabacalera*.

The *Braka* decision is certainly helpful in that the decision formally and technically addressed the important issue of situs determination for expropriated intangible property. Prior cases placed less emphasis on this threshold question which is fundamental to whether the act of state doctrine will apply. Further, the approach of the *Braka* court in focusing on the contractually mandated situs of the credit instrument yields a standard not so heavily influenced by policy considerations and factors extrinsic to the parties' agreement. Such a standard could provide uniform results and more predictability for investors and foreign governments alike. Unfortunately, the question remains whether the court might opt to look beyond the parties' contract when faced with facts having a greater financial impact than those in *Braka*.

—JAMES A. JOHNSON