# Transnational Deposits, Government Succession, Frozen Assets and the Taiwan Relations Act: *National Bank of Pakistan v. The International Commercial Bank of China*

by
Mitchell A. Silk† and Lester Ross*

The 1988 court order in *National Bank of Pakistan v. International Commercial Bank of China*[1] has had dramatic repercussions for banking law,

† Associate, Hughes Hubbard & Reed, New York; J.D. University of Maryland, 1986; Certificate of Advanced Studies in Law, Peking University, 1987. Actively involved in representing Taiwan and other foreign banking and corporate interests in the United States, Mr. Silk is a member of the Board of Editors of the *Chinese Yearbook of International Law and Affairs* and is a consultant to the East Asian Legal Studies Program, University of Maryland School of Law. He is co-author of *Environmental Law and Policy in the People's Republic of China* (1987), editor of *Taiwan and International Trade and Investment: Law and Practice* (Oxford University Press, forthcoming) and author of numerous articles, book chapters and reviews on various aspects of international, U.S. and Chinese law.

* Associate, Jones, Day, Reavis & Pogue, New York; Ph.D. University of Michigan, 1980; J.D. Harvard Law School, 1990. Mr. Ross was Articles Editor of *The Harvard Environmental Law Review* and is the author of *Environmental Policy in China* (1988), co-author of *Environmental Law and Policy in the People's Republic of China* (1987), and author of numerous articles and book chapters on Chinese law, politics and environmental and natural resources management.

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1. National Bank of Pakistan v. International Commercial Bank of China, 199 N.Y.L.J., Apr. 13, 1988 at 11, col. 2 (Sup. Ct. N.Y. City 1988), *aff'd mem.*, 147 A.D.2d 994, 537 N.Y.S.2d 941 (1st Dept.), *appeal denied*, 74 N.Y.2d 606, 543 N.Y.S.2d 399, 541 N.E.2d 428, *cert. denied*, — U.S. —, 110 S. Ct. 282, 107 L.Ed.2d 262 (1989). The case is reprinted in the Appendix to this article, *infra* page 58. The Appellate Division of the New York Supreme Court separately affirmed the lower court's award of costs and disbursements in National Bank of Pakistan v. International Commercial Bank of China, 150 A.D.2d 993, 543 N.Y.S.2d 601 (1st Dept. 1989). The latter aspect of the litigation involves a peripheral matter and will not be discussed here.

international law, the status of Taiwan, and the Taiwan Relations Act.[2] This article provides a systematic analysis of the case, beginning with an overview of the complex set of facts that gave rise to the dispute. After briefly summarizing the trial court's decision, the article analyzes the case from an historical perspective and under the relevant principles of banking and international law, paying particular attention to the Taiwan Relations Act.

## I.
## BACKGROUND[3]

### *A. The Development of China's Modern Banking System*

*National Bank of Pakistan* has a long and complicated history that dates back to the dawn of China's modern banking system. The early history of this banking system is linked to China's efforts at reform and modernization in the late nineteenth century—a time when China came under domination by foreign powers.[4] This domination was facilitated by the signing of the Sino-British Treaty of Nanking in 1842,[5] which marked the beginning of what the Chinese refer to as the century of "Unequal Treaties."[6] The treaties entered into during this period gave the foreign signatories, especially Great Britain, the United States, Germany, France, Japan, and Russia (and the lesser powers of Italy, Austria-Hungary, Belgium, the Netherlands, Spain, Portugal, Norway and Sweden), various extraterritorial rights and unilateral commercial concessions which enabled them to dominate the Chinese economy in many areas including international commerce, shipping, mining, and manufacturing.[7]

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2. 22 U.S.C. §§ 3301-3316 (1988).

3. Chinese names and words are transliterated in *pinyin*, except for pre-1949 and Taiwanese names and words which are transliterated in accordance with the Wade-Giles system.

4. *See generally* S. TENG & J. FAIRBANK, CHINA'S RESPONSE TO THE WEST (1954).

5. Treaty between Great Britain and China, August 29, 1842, *reprinted in* 30 British and Foreign State Papers 389-392 (1858), *reprinted as* Treaty of Peace, Friendship, and Commerce Between Her Majesty The Queen of Great Britain and Ireland and the Emperor of China (1842), *reprinted in* FAR EASTERN INTERNATIONAL RELATIONS (1689-1951) 7-9 (J. Maki Comp. 1951). For the Chinese text, see 1 WANG TIEYA, ZHONGWAI JIU YUEZHANG HUIBIAN [A collection of old treaties between China and foreign states] 30-33 (1957).

6. On unequal treaties, see HUNGDAH CHIU, THE PEOPLE'S REPUBLIC OF CHINA AND THE LAW OF TREATIES 1-7 (1972); CH'IEN T'AI, CHUNG-KUO PU-P'ING-TENG T'IAO-YÜEH CHIH YÜAN-CH'I CHI CH'I FEI-CH'U CHIH CHING-KUO [The Origin and Abolition of China's Unequal Treaties] 22 (1961); Hinckley, *Consular Authority in China by New Treaty*, 21 PROC. AM. SOC. INT'L L. 82 (1927); Putney, *The Termination of Unequal Treaties*, 21 PROC. AM. SOC. INT'L L. 87 (1927); Buell, *The Termination of Unequal Treaties*, 21 PROC. AM. SOC. INT'L L. 90 (1927); W. FISHEL, THE END OF EXTRATERRITORIALITY IN CHINA (1952); WANG SHIH-CHIEH & HU CHING-YÜ, CHUNG-KUO PU-P'ING-TENG T'IAO-YÜEH CHIH FEI-CH'U [The Abolition of China's Unequal Treaties] (1967); TSENG YU-HAO, THE TERMINATION OF UNEQUAL TREATIES IN INTERNATIONAL LAW (1933).

7. *See* Dernberger, *The Role of the Foreigner in China's Economic Development, 1840-1949*, in CHINA'S MODERN ECONOMY IN HISTORICAL PERSPECTIVE 19 (D. Perkins ed. 1975); T. RAWSKI, ECONOMIC GROWTH IN PREWAR CHINA 5 (1989); CHI-MING HOU, FOREIGN INVESTMENT AND ECONOMIC DEVELOPMENT IN CHINA 1840-1937 (Harv. East Asian Series No. 21 1965); W. WILLOUGHBY, FOREIGN RIGHTS AND INTERESTS IN CHINA (1927); T. Tsiang, *The*

The so-called "Unequal Treaty" system also set the groundwork for foreign domination of China's banking industry, most notably in the areas of trade finance and foreign exchange transactions.[8] Beginning in 1848, nearly half a century before the formation of the first Chinese bank, numerous foreign banks established operations throughout China.[9] Their number grew to thirty-three by 1936 and included banks from Great Britain, Portugal, Germany, Japan, France, the United States, Belgium, and Italy.[10]

### *B. Formation of the Bank of China*

The predecessor of the Imperial Bank of China—party to this litigation—was one of the first Chinese-owned banks in China, with roots tracing back to 1904.[11] The Board of Revenue (*Hu Pu*) provisionally formed the bank, initially known simply as the *Hu Pu Yinhang* (or "Board of Revenue Bank"), under an imperial edict of the Ch'ing dynasty.[12] The bank subsequently changed its name to the Imperial Bank of China and was reorganized

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*Extension of Equal Commercial Privileges to Nations Other than the British after the Treaty of Nanking*, 15 CHINESE SOC. & POL. SCI. REV. 422 (1931); Kearny, *The Tsiang Document, Elipoo, Keying, Pottinger, and Kearny, and the Most Favored Nation and Open Door Policy in China in 1842-44, An American View*, 16 CHINESE SOC. & POL. SCI. REV. 75 (1932).

8. *See generally* A. Samansky, *China's Banking System: Its Modern History and Development*, Federal Reserve Bank of New York Research Paper No. 8108 (1981); F. TAMAGNA, BANKING AND FINANCE IN CHINA (1942); T. MIYASHITA, THE CURRENCY AND FINANCIAL SYSTEM OF MAINLAND CHINA (1966); LIU GUANGDI, ZHONGGUO DE YINHANG [Banks in China] 1-28 (1984).

9. *See generally* F. TAMAGNA, *supra* note 8, at 89-120; CHI-MING HOU, *supra* note 7, at 52-58.

10. The following foreign banks were in China at the end of 1936, with their nationality and date of establishment in parentheses: Mercantile Bank of India (British, 1854), Chartered Bank of India, Australia and China (British, 1857), Hongkong and Shanghai Banking Corporation (British, 1864), Banco Nacional Ultramarino (Portuguese, 1864), Deutsch-Asiatische Bank (German, 1889), Yokohama Specie Bank (Japanese, 1892), Banque de l'Indochine (French, 1899), National City Bank of New York (American, 1902), Banque Belge pour l'Etranger, Extréme Orient (Belgian, 1902), Nederlandsche Handel-Maatschappij (Dutch, 1903), Seiryu Bank (Sino-Japanese, 1906), Crédit Foncier pour l'Extréme Orient (Franco-Belgian, 1907), Bank of Taiwan (Japanese, 1911), Banque Franco-Chinoise pour le Commerce et l'Industrie (Sino-French, 1913), Sumitomo Bank (Japanese, 1916), Mitsui Bank (Japanese, 1917), Mitsubishi Bank (Japanese, 1917), Shanghai Bank (Japanese, 1917), Bank of Chosen (Japanese, 1918), American Express Company, Inc. (American, 1919), Banca Italiana per la Cina (Italian, 1919), Hankow Bank (Japanese, 1920), Bank of Tientsin (Japanese, 1920), Bank of Tsinan (Japanese, 1920), Nederlandsche Indische Handelsbank (Dutch, 1920), Chase Bank (American, 1920), P. & O. Banking Corporation (British, 1920), Union Mobiliére Société Française de Banque et de Placement (French, 1921), E.D. Sassoon Banking Co. (British, 1930), Underwriters Savings Bank for the Far East (American, 1930), Finance Banking Corp. (British, 1932), Tientsin Commercial and Credit Corp. (American, 1932), Moscow Narodny Bank (British, 1934). F. TAMAGNA, *supra* note 8, at 96-97.

11. LIU GUANGDI, *supra* note 8, at 16.

12. CHOU PAO-LUAN, CHUNG-KUO YIN-HANG SHIH [History of Chinese Banks] 2-10 (1921). The "Six Boards," which had grown to nine by the time the bank was formed, managed all aspects of Imperial affairs. The administrative ministries included: the Board of Personnel (*Li Pu*), the Board of Revenue (*Hu Pu*), the Board of Rites (*Li Pu*), the Board of Military Affairs (*Ping Pu*), the Board of Justice (*Hsing Pu*), the Board of Public Works (*Kuang Pu*), the Board of Foreign Affairs (*Waiwu Pu*), the Board of Commerce (*Shang Pu*), and the Board of Education

in 1908.[13] Shortly after the founding of the Republic of China, the Imperial Bank of China grew into the Bank of China (BOC) under Nationalist law in 1912. Although BOC was organized as a private banking organization, in practice, BOC was heavily influenced by the government of the Republic of China (ROC), and served as the government's commercial banking arm.[14] BOC was recapitalized by government decree in 1935, after which time the government held one-half of BOC's capital stock.[15] The government injected more capital into BOC in 1942, and thereby increased its stock holding to two-thirds of the outstanding shares.[16] From that point on, thirteen of the twenty-five members of BOC's Board of Directors (a quorum under its Articles of Incorporation) were appointed by the government, and sat on the Board as representatives of the government's shares.[17]

BOC was the preeminent internationally-oriented Chinese-owned bank prior to 1949 and established several overseas branches and agencies during that time. The activities of these branches, located in Karachi and Chittagong in what was then British India, together with those of BOC's New York agency, formed the basis of the instant case.

### C. *Division of the Bank of China*

Civil war broke out in China in 1946 between the Communist Party of China (CPC) and the controlling Kuomintang or Nationalist Party (KMT).[18]

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(*Hsueh Pu*). *See generally* J. FAIRBANK & E. REISCHAUER, CHINA: TRADITION AND TRANSFORMATION 105, 167, 225, 374, 398 (1978); H. MORSE, THE TRADE AND ADMINISTRATION OF THE CHINESE EMPIRE 57 (1907).

13. ZHONGHUA RENMIN GONGHEGUO ZILIAO SHOUCE, 1949-1985 [A Handbook of Information on the People's Republic of China, 1949-1985] 379 (Shou Xiaohe ed. 1986). For the development of Chinese banks on the mainland and Taiwan in general, *see* F. TAMAGNA, *supra* note 8; MIYASHITA, *supra* note 8; WANG YAO-HSING, KUANG-FU YI-LAI WO-KUO CHIN-JUNG CHIH-TU YU CHIN-JUNG CHENG-TSE TI CHIEN-T'AO [A discussion of China's post-war financial system and financial policies], Ministry of Finance, Department of Monetary Affairs Finance Research Studies (015), (n.d.); Yeh Li-chung, *Tai-wan yin-hang yeh chih shih ti yen-chiu* [A study of the history of Taiwan's banking industry], TAI YIN CHI KAN [Bank of Taiwan Quarterly] 1 (1947). The authors thank Mr. Sanrong Lii (Deputy General Manager, First Commercial Bank, New York Agency) for bringing these vital sources to their attention.

14. Except for the Japanese puppet state of Manchukuo (1931-45) in northeast China, the Republic of China was the only internationally recognized government in China from 1911 to 1949. In addition, the Mongolian People's Republic dates its independence from China in 1921. C. BAWDEN, THE MODERN HISTORY OF MONGOLIA 221-37 (1968); A. SANDERS, THE PEOPLE'S REPUBLIC OF MONGOLIA 180 (1968); 1 R. RUPEN, MONGOLS OF THE TWENTIETH CENTURY 141-44 (1964).

15. *See* Bank of China v. Wells Fargo Bank & Union Trust Co., 92 F. Supp. 920 (N.D. Cal. 1950), *appeal dismissed and remanded*, 190 F.2d 1010 (9th Cir. 1951), *on remand*, 104 F. Supp. 59, 62 (N.D. Cal. 1952), *aff'd in part and rev'd in part*, 209 F.2d 467 (9th Cir. 1953).

16. *Wells Fargo*, 104 F. Supp. at 62.

17. *Id.*

18. On the struggle for power between the KMT and CPC, *see generally*, CHINA: SEVENTY YEARS AFTER THE 1911 HSIN-HAI REVOLUTION (Hungdah Chiu & Shao-chuan Leng eds. 1984); F. G. CHAN, CHINA AT THE CROSSROADS: NATIONALISTS AND COMMUNISTS 1927-1949 (1980); A. BARNETT, CHINA ON THE EVE OF THE COMMUNIST TAKEOVER (1963); L. CHASSIN,

By 1949, the Communist Party had succeeded in overthrowing the Nationalists. The Communists founded a new regime, the People's Republic of China (PRC), on October 1, 1949. Meanwhile, the Nationalists fled to the island province of Taiwan where they continued to govern in the name of the ROC.

BOC was subject to the same internal bifurcation that affected China as a whole. During 1949, BOC, through government and corporate procedures, changed its corporate seat and shifted substantially all of its assets to Taiwan.[19] BOC continued its operations in Taiwan ("BOC," but "BOC-Taipei" for the purposes of this article).[20] Some directors of BOC, along with various assets (such as fixtures), remained on the mainland.[21] Shortly after the founding of the PRC, the Central People's Government of the PRC declared that it had succeeded to possession and control of BOC[22] and continued to operate the bank under the same name ("BOC," but "BOC-Beijing" for the purposes of this article). As a result, there were two separate banking entities in existence, each operating under the name BOC and each claiming to be the descendant of the pre-1949 BOC.

The various overseas branches and agencies of BOC also declared their allegiance to one or the other of the competing entities claiming to be BOC.[23] In particular, the New York agency, which at the time constituted BOC's only presence in the United States, maintained its allegiance to BOC-Taipei.[24] Conversely, the Karachi and Chittagong branches, for which the host government as of 1947 had become Pakistan upon a grant of independence from Great Britain, cast their lot with BOC-Beijing.[25]

The record is unclear as to why these three branches pledged their allegiances in different directions. One theory, presented by the plaintiff in *National Bank of Pakistan*, is that the branches made independent decisions on the basis of the loyalties of their respective personnel.[26] However, it seems more likely that the decision regarding which BOC to support was a function of the foreign policy of the host government. Pakistan was one of the first

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THE COMMUNIST CONQUEST OF CHINA (1965); THE KUOMINTANG DEBACLE OF 1949: CONQUEST OR COLLAPSE? (Pichon P.Y. Loh ed. 1965); J. MELBY, THE MANDATE OF HEAVEN: RECORD OF A CIVIL WAR (1971); S. PEPPER, CIVIL WAR IN CHINA: THE POLITICAL STRUGGLE, 1945-1949 (1978); TANG TSOU, AMERICA'S FAILURE IN CHINA, 1941-50 (1963).

19. *Wells Fargo*, 104 F. Supp. at 62.

20. *Id.* at 61.

21. *Id.* at 62.

22. *See Decree of the Government Administration Council on Strengthening the Guidance and Supervision of the Bank, March 22, 1950*, 1 GOVERNMENT ADMINISTRATION COUNCIL, ZHONGHUA RENMIN GONGHEGUO FALING HUIBIAN 1949 [A Selected Compilation of Laws and Decrees of the People's Republic of China 1949] 19 (1952).

23. *Wells Fargo*, 104 F. Supp. at 65.

24. *Id.*

25. *Id.*

26. *See* Affidavit in Support of Plaintiff's Motion for Summary Judgment, *National Bank of Pakistan*, [Index # 20274/83] (on file at the offices of the *International Tax & Business Lawyer*).

countries to recognize the PRC as the lawful government of China,[27] and it has continued to enjoy a mutually beneficial relationship with the PRC since that time.[28] By contrast, the United States in 1950 withheld recognition of the PRC as the lawful government of China. Diplomatic problems arose with the new government as a result numerous disputes involving American personnel and facilities in China.[29] Then, on June 27, 1950, the United States intervened in the conflict between the PRC and the ROC by dispatching naval forces to the Taiwan Strait following the North Korean invasion of South

27. See the following correspondence which are reprinted in CHINA PAKISTAN RELATIONS 1947-1980 3-5 (K. Arif ed. 1984); Note from Qureshi, Ambassador of Pakistan in the Soviet Union, to Premier and Foreign Minister Chou En-lai [Zhou Enlai] (Jan. 5, 1950); Note from Qureshi, Ambassador of Pakistan in the Soviet Union, to Chinese Ambassador in the Soviet Union Wang Chia-chiang [Wang Jiajiang] (Jan. 29, 1950); and Chinese Vice Foreign Minister Le Ke-lung [Li Kelong]'s reply to Pakistani note of Jan. 29, 1950 delivered by Chinese Ambassador in the Soviet Union to Pakistani Ambassador in the Soviet Union (Feb. 4, 1950). *See* 2 J. COHEN & H. CHIU, PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY 1053 (1974); S. COHEN, THE PAKISTAN ARMY 9 (1984). *See also* ZHONGGUO GUOJI FA NIANKAN 1985 [Chinese Yearbook of International Law] 724 (Wang Tieya ed. 1985).

28. Among the more prominent examples of Pakistan-PRC cooperation are the completion of the Karakoram Highway through the Himalayas linking northern Pakistan and the Xinjiang Region of China; defense cooperation, including Chinese deliveries of F-6 interceptors, armor and artillery to Pakistan, as well as some sharing of Chinese nuclear know-how and technology with Pakistan; and sizeable bilateral trade featuring Pakistani exports of cotton to China and Chinese exports of textile and other machinery to Pakistan. A principal motive for bilateral cooperation is mutual fear and antipathy of Pakistan and the PRC toward India, their large and powerful subcontinental neighbor with which they both share long, conflict-laden borders. *See* Vertzberger, *The Political Economy of Sino-Pakistani Relations: Trade and Aid, 1963-82*, 23 ASIAN SUR. 637 (1983). It is notable that Pakistan generally continued to maintain cordial, albeit not very productive, relations with the PRC even while Pakistan was allied with the United States in the Southeast Asia Treaty Organization (SEATO), a now defunct multilateral security organization whose principal hypothetical adversary was the PRC.

29. In October 1949, the United States set three conditions that would have to be satisfied before diplomatic recognition would be extended to a new government. These conditions were: (1) control by the new government over the territory that it claimed to govern, (2) acceptance by the new government of its international obligations, and (3) rule by the new government with the acquiescence of its people. *Hearings on the Nomination of Philip C. Jessup To Be United States Representative to the Sixth General Assembly of the United Nations Before the Senate Comm. on Foreign Relations*, 82d Cong., 1st Sess. (1951), at 616, 790, *construed in* TANG TSOU, *supra* note 18, at 516.

All three conditions presented problems for the PRC. With regard to the first condition, the province of Taiwan and some other offshore islands remain outside the control of the PRC to this day, which qualifies the PRC's control of the territory that it claimed to govern. As for the third condition, any government would find it difficult to prove it enjoyed the acquiescence of its people in the absence of popular elections, which the PRC had no intention of holding.

The most immediate problem was the PRC's unwillingness to meet its international obligations as required by the second condition. Doubts about such willingness were raised by the PRC's renunciation of international agreements that it regarded as unequal. These doubts were aggravated by violation of the U.S. embassy compound in Nanking (Nanjing), physical harassment of consular officials in Shanghai and elsewhere, the arrest on October 24, 1949 of Angus Ward, consul general in Mukden (Shenyang) and other consular employees in flagrant violation of their diplomatic status, and the seizure of consular properties in Peking. *See* TANG TSOU, *supra* note 18, at 515-19.

Korea.[30] Bloody combat between the United Nations forces, led by the United States, and the PRC followed during the Korean War. The resultant state of hostility between the United States and the PRC did not thaw until 1971.[31]

### D. Case History

The political and diplomatic history of this period created the gravamen for the dispute at the center of *National Bank of Pakistan*. The Karachi and Chittagong branches of the Bank maintained funds in their New York sister agency. BOC-Taipei placed restrictions on the withdrawal of these funds in January 1950.[32] Following the onset of the Korean hostilities, the U.S. government officially blocked the funds,[33] acting under the authority of the U.S. Department of the Treasury's Foreign Assets Control (FAC) regulations.[34] These funds, which amounted to $546,120.59 for the Karachi branch and $96,252.18 for the Chittagong branch,[35] remained blocked until January 31, 1980 when the Treasury Department lifted its blocking order,[36] following the normalization of relations between the United States and the PRC.[37]

The instant case involves the status of and title to these funds. It is apparent that no change of status was possible while the blocking order by the Treasury Department remained in effect. On August 5, 1971, however, the PRC assigned control over the Karachi and Chittagong branches (and hence the right to claim the funds in question) to Pakistan, and indirectly to the plaintiff National Bank of Pakistan (NBP).[38] At about the same time, BOC-

30. *Hearings on the Military Situation in the Far East Before the Senate Committees on Armed Services and Foreign Relations*, 82d Cong., 1st Sess. 2580, 3192 (1951), *discussed in* TANG TSOU, *supra* note 18, at 558-59.

31. *See generally* A. WHITING, CHINA CROSSES THE YALU (1968); G. PAIGE, THE KOREAN DECISION (1968); B. CUMINGS, THE ORIGINS OF THE KOREAN WAR: LIBERATION AND THE EMERGENCE OF SEPARATE REGIMES, 1945-1947 (1981); J. HALLIDAY & B. CUMINGS, KOREA: THE UNKNOWN WAR (1988).

32. *National Bank of Pakistan*, 199 N.Y.L.J., Apr. 13, 1988, at 11, col. 2. BOC-Taipei denies, however, that its action constituted an admission of ownership, but instead simply involved an exercise of caution.

33. 15 Fed. Reg. 9040 (1950) (codified as amended, following removal of China from the schedule of designated foreign countries subject to prohibition of various transactions, at 31 C.F.R. § 500.201 (1989)). *See also* Exec. Order No. 9193 (1942), 3 C.F.R. §§ 1174-77 (1938-1943 compilation).

34. 31 C.F.R. Part 500 (1989).

35. *National Bank of Pakistan*, 199 N.Y.L.J., Apr. 13, 1988, at 11, col. 2.

36. Foreign Assets Control Regulations Unblocking of Assets Blocked Because of an Interest Therein of the People's Republic of China or Its Nationals, 45 Fed. Reg. 7224 (1980).

37. Joint Communique on the Establishment of Diplomatic Relations Between the United States of America and the People's Republic of China (January 1, 1979), *reprinted in* 2022 DEPT. ST. BULL. 25 (1979).

38. The transfer was initiated by an exchange of diplomatic notes, and was confirmed in the Agreement between Bank of China, Head Office, Peking and National Bank of Pakistan, Head Office, Karachi, in regard to the transfer of its branch at Karachi and its sub-branch at Chittagong to the National Bank of Pakistan dated August 17, 1971 (copy of document on file at the offices of the *International Tax & Business Lawyer*).

Taipei underwent a corporate reorganization whereby the government distributed large blocks of stock to private individuals and entities aligned with or controlled by the KMT.[39] The bank also concurrently changed its name to International Commercial Bank of China (ICBC), the defendant in the instant case.

NBP apparently presented its claim for the previously blocked funds in 1979 but was rebuffed by ICBC. NBP then filed suit in New York Supreme Court in 1980. After eight years of pre-trial litigation, Justice Wilk found for the plaintiff NBP in all respects on its motion for summary judgment,[40] rejecting in its entirety the defendant ICBC's counter-motion for summary judgment.[41] The Appellate Division affirmed this order without comment,[42] and the Court of Appeals, New York's highest court, denied appeal.[43]

## II.
## THE LOWER COURT'S DECISION

The record is inevitably less than full whenever a decision is rendered before a case goes to trial. When read in conjunction with the briefs of counsel for both parties and the court record, however, the rationale for the lower court's decision is clear—although not free from controversy.

The trial court examined three issues prior to granting the plaintiff's motion for summary judgment: (1) the status of the funds claimed, (2) the validity of the assignment by BOC-Beijing to NBP, and (3) ICBC's defense of collateral estoppel. The plaintiff, NBP, claimed that title to the funds rested with BOC-Beijing after 1949, that such title had lawfully been assigned to NBP in 1971, and that NBP was entitled to the funds once the funds were unblocked in 1980.[44] ICBC responded that title to the funds did not rest with BOC-Beijing after 1949, as the funds did not constitute deposits or credit balances because New York[45] prohibited an agency of a foreign bank from accepting deposits. ICBC further claimed that the transfer to NBP was illegal, both because BOC-Beijing lacked the juridical capacity to make such a transfer and because assignments were prohibited by the U.S. Foreign Assets Control regulations. Finally, ICBC argued that the Taiwan Relations Act and judicial precedent prevented the court from transferring Taiwan bank assets to the PRC.[46] In its decision, the court summarily rejected every legal theory raised by the defense.

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39. *See Wells Fargo*, 104 F. Supp. at 62. *See also* McGregor, *Bank Reform Plan Poses a Major Test for Taiwan Leader*, Asian Wall St. J. Weekly, June 13, 1988, at 1, col. 6.

40. The award amounted to $642,375.38 plus interest, costs and disbursements. *National Bank of Pakistan*, 199 N.Y.L.J., Apr. 13, 1988, at 11, col. 4. There is an unexplained discrepancy of $2.61 between the award and the claim.

41. *National Bank of Pakistan*, 199 N.Y.L.J., Apr. 13, 1988, at 11, col. 4.

42. *National Bank of Pakistan*, 147 A.D.2d 994, 537 N.Y.S.2d 941.

43. *National Bank of Pakistan*, 74 N.Y.2d 606, 543 N.Y.S.2d 399, 541 N.E.2d 428.

44. *National Bank of Pakistan*, 199 N.Y.L.J., Apr. 13, 1988, at 11, cols. 2-3.

45. *See infra* note 48 and accompanying text.

46. *National Bank of Pakistan*, 199 N.Y.L.J., Apr. 13, 1988, at 11, col. 3.

The court began by ruling on the status of the funds claimed by NBP. ICBC denied that the funds in question constituted "deposits" or "accounts" creditable to the branches under either of two theories. First, ICBC maintained that branches are mere instrumentalities of a common enterprise, and hence could not maintain independent claims to the assets of the common enterprise or other elements thereof.[47] Second, ICBC maintained that the funds in question could not constitute deposits or accounts because at the time the funds were placed at the New York agency, foreign bank agencies lacked the power under New York law to accept deposits within the state.[48] Hence the funds in question could only have constituted credit balances from the headquarters or main branch even though nominally credited to the Karachi and Chittagong branches. While accepting the doctrine, the court rejected its application to the instant case. The court held that the Karachi and Chittagong branch funds at their New York sister agency variously qualified as "money on deposit,"[49] "deposits"[50] or "accounts,"[51] to which the branches could lay claim once they ceased to be part of an enterprise in common with their sister branch in New York after 1949.

The court similarly rejected ICBC's argument that BOC-Beijing's assignment to NBP was invalid, dismissing ICBC's arguments that BOC-Beijing lacked juridical capacity to execute such an assignment, and that the FAC blocking order, in effect in 1971, prohibited transfers of such funds. The court reasoned that: (1) BOC-Beijing had juridical capacity even though its government was not recognized by the United States;[52] (2) the United States lacked jurisdiction under the FAC regulations to invalidate transfers of blocked assets if they occurred between sovereign states with regard to assets held abroad;[53] and (3) American courts lacked the capacity under the Act of State doctrine to review sovereign acts by another country within its own territory, even when the government of the second country is not recognized by the United States.[54]

ICBC also argued on procedural grounds that NBP was collaterally estopped from bringing suit in the first place because federal courts during the Korean War had ruled that the ROC, rather than the PRC, was entitled to funds on deposit in the United States.[55] ICBC argued that NBP, as BOC-Beijing's assignee, was estopped from relitigating this issue on which final judgment had been rendered in *Bank of China v. Wells Fargo Bank & Union*

47. *Id.* at 11, col. 3.
48. N.Y. BANKING LAW § 202-a(1)(a) (McKinney 1971 & Supp. 1990).
49. *National Bank of Pakistan*, 199 N.Y.L.J., Apr. 13, 1988, at 11, col. 2.
50. *Id.* at 11, col. 3.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Wells Fargo*, 104 F. Supp. 59, 66. For discussion, see Comment, *Effects in Private Litigation of Failure to Recognize New Foreign Governments*, 19 U. CHI. L. REV. 72 (1951).

*Trust Co.*[56] The court reasoned, however, that the decision in *Wells Fargo*, the case on which the estoppel defense was based, rested principally on the fact that the United States recognized the ROC rather than the PRC at the time.[57] In other words, in the view of the court the decision was in essence a mere artifact of the contemporaneous state of hostility between the United States and the PRC. Based on the court's reasoning, once the United States extended diplomatic recognition to the PRC effective January 1, 1979, *Wells Fargo* ceased to have binding precedential effect on litigation involving the PRC or its assignees.

## III.
## CASE ANALYSIS

### *A. Historical Perspective*

The court drew conclusions on several historical points that were to the detriment of ICBC's position. However, the court's conclusions are rather controversial, if not mistaken, with respect to their characterization of the PRC's assignment to Pakistan of the funds in question, as well as the application of the law of succession, the FAC regulations, the Act of State doctrine, and the Taiwan Relations Act. These conclusions or assumptions appear to have influenced the court's reasoning, and therefore highlight the importance of presenting regional history and the political and diplomatic backdrop of international events to the court in transnational litigation. Judging from the tone and language used by the trial court, the plaintiff was far more effective than the defendant in persuading the court to see the issue from its perspective.

First, the court assumed a conclusory position that the PRC was entitled to diplomatic recognition by the United States. This is evident in the court's use of the terms "liberated"[58] and "liberation"[59] to describe the ouster of the Nationalists by the Communists. "Liberated" is a direct translation of the Chinese word *jiefang* and is widely employed in the PRC to characterize the founding of the PRC and to identify the PRC's armed forces, the Chinese People's Liberation Army.[60] However, "liberation" connotes freedom and is not a neutral term. Consequently, objective observers should refrain from using the term to describe a regime with a long and tragic history of disregard for human rights and individual freedoms.

Second, and of greater significance, the court characterized BOC-Beijing's assignment of the Karachi and Chittagong branches to NBP as "a gift of these two branches to Pakistan in consideration for the friendly relations

56. *National Bank of Pakistan*, 199 N.Y.L.J., Apr. 13, 1988, at 11, col. 4.
57. *Id.*
58. *Id.* at 11, col. 2.
59. *Id.* at 11, col. 4.
60. *See generally* H. NELSEN, THE CHINESE MILITARY SYSTEM (2d ed. 1981).

and cooperation between the two nations."[61] Plaintiff in fact described the assignment not as an exchange but rather as a gift given in response to Pakistan's assistance in facilitating the normalization of relations between the PRC and the United States.[62]

Pakistan did indeed play a notable role in the secret diplomacy that brought Washington and Peking together;[63] nevertheless, another possible explanation for the assignment exists. In 1971, Pakistan was in the midst of a wrenching civil conflict between East and West Pakistan that was sparked by the refusal of the West Pakistani, Urdu-speaking elite to accept electoral victory by the overwhelmingly Bengali-speaking Awami League based in East Pakistan.[64] The conflict led to the creation of the separate state of Bangladesh in what had been East Pakistan.[65] Months of bloody strife occurred before Pakistani forces surrendered on December 16, 1971.[66] During that period, India intervened in a significant manner on behalf of the Bengali insurgents, while the PRC sent only small quantities of military assistance and provided limited verbal support for Pakistan.[67]

This scenario suggests that the PRC's assignment of the branches to Pakistan may not simply have been a gift without consideration reflecting long-standing friendly relations between the governments or even a response to Pakistan's role as a go-between in United States-PRC relations. Rather, the assignment may have been part of the PRC's program of limited assistance to Pakistan. While the gesture proved futile inasmuch as the funds were blocked at the time, the transfer may have served as a symbolic and possibly even material form of assistance by the PRC to Pakistan to the extent that the branches had substantial local assets in Pakistan. The factual basis for this alternative scenario is uncertain, but does indicate the possibility of a less benign image of the assignment at the heart of this litigation. The reasons for

61. *National Bank of Pakistan*, 199 N.Y.L.J., Apr. 13, 1988, at 11, col. 2.

62. *See id.*

63. *See* H. KISSINGER, YEARS OF UPHEAVAL 46, 676 (1982). *See generally* S. SALIK, WITNESS TO SURRENDER (1977).

64. R. SISSON & L. ROSE, WAR AND SECESSION: PAKISTAN, INDIA AND THE CREATION OF BANGLADESH (1990). *See generally* S. SALIK, *supra* note 63.

65. R. SISSON & L. ROSE, *supra* note 64, at ix.

66. *Id.* at 230-34.

67. China limited its support to Pakistan because of China's interest in improving its relations with India, China's lack of direct interest in East Bengal, the worldwide unpopularity of Pakistan's position in East Bengal, the heightened threat posed to China from the Soviet Union after conclusion of the Indo-Soviet Treaty of Peace, Friendship and Cooperation (1971), as well as China's overall military weakness and logistical difficulties. Nevertheless, China did have an interest in maintaining friendly ties with Pakistan, as demonstrated by the increase in China's level of support once India began direct military intervention. J. ARMSTRONG, REVOLUTIONARY DIPLOMACY: CHINESE FOREIGN POLICY AND THE UNITED FRONT DOCTRINE 175-76 (1977); Y. VERTZBERGER, THE ENDURING DETENTE: SINO-PAKISTAN RELATIONS 1960-1980 53-59 (1983); R. SISSON & L. ROSE, *supra* note 64, at 250-53. For texts of Chinese statements in verbal support of Pakistan, see CHINA PAKISTAN RELATIONS 1947-1980, *supra* note 27, at 209-40.

the transfer are important to the extent that the court's decision was influenced by its understanding of the historical background of the case.

Greater attention to the history of Pakistan and Bangladesh also casts doubt on NBP's right to lay claim to the funds held by ICBC for the Chittagong branch. That branch was the nexus for fifteen percent of the total amount at issue in the suit and was located in East Pakistan. As noted above, East Pakistan seceded from Pakistan in 1971 to form the independent state of Bangladesh, which actually dates its independence from March 26, 1971[68]—nearly five months before BOC-Beijing's assignment of the Chittagong branch to Pakistan.[69]

Although Bangladesh did not succeed in effecting its independence until several months after the date of the assignment, the fact that Pakistan was in the process of losing its control over East Pakistan calls into question NBP's right to claim the Chittagong branch funds. Under the declaratory doctrine—a doctrine that has enjoyed increasing adherence with respect to the question of statehood in international law[70]—the declaration of independence by Bangladesh coupled with the exercise of control over its territory would have made Bangladesh rather than Pakistan the state in control of the Chittagong branch. At a minimum, since Bangladesh had declared its independence and a major secession movement was in progress, the court should have required that NBP prove that its parent, the Pakistan government, exercised control over the territory and population in which the Chittagong branch was located at the time of the assignment. Failure of Pakistan to exercise control may have negated NBP's claim to assets originating in the former territory of East Pakistan.[71]

### *B. Characterization of the Funds at Issue Under Banking Law*

The primary banking law issue raised in *National Bank of Pakistan* involves the status of funds held in the name of a bank's overseas branches by another instrumentality of the same bank, e.g., BOC's New York agency. NBP argued that the funds recorded in the name of the Karachi and Chittagong branches constituted deposits or accounts to which the branches could lay claim independent of decisions by the bank's head office.[72] ICBC responded that the funds in question comprised assets of the common enterprise rather than of particular branches and, moreover, that the funds could

68. R. SISSON & L. ROSE, *supra* note 64, at ix.

69. *National Bank of Pakistan*, 199 N.Y.L.J., Apr. 13, 1988, at 11, col. 2.

70. I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 91-93 (3d ed. 1979). Brownlie favors the declaratory doctrine over the constitutive view, but cautions that neither perspective is fully comprehensive. *Id.* at 93.

71. This would not, of course, have precluded the possibility of a claim by Bangladesh, the successor regime in East Pakistan.

72. *National Bank of Pakistan*, 199 N.Y.L.J., Apr. 13, 1988, at 11, cols. 2-3.

not have constituted deposits in any event because the New York agency was not legally authorized to accept deposits.[73]

The law on this question is purely a matter of state law. Indeed, prior to passage of the International Banking Act of 1978,[74] U.S. agencies and branches of foreign banks were regulated exclusively by the states in which they operated.[75] The International Banking Act altered this regulatory regime by allowing foreign bank affiliates the option of federal licenses as an alternative to state licenses, and by bringing the foreign branches and affiliates within the reach of some types of federal banking regulation.[76] Federal legislation on this point is not applicable to the instant case, however, because the funds at issue were deposited and blocked prior to passage of the International Banking Act, and because BOC/ICBC was and remained a New York licensee throughout the period in question.

The court, as noted above, issued an order on this point in favor of the plaintiff's motion for summary judgment. The court, however, only cited sparse authority in its decision. This lack of substantial authority is unfortunate because the answer to the relevant question of law is far from obvious.

The court cited only one statute and one lower court decision for authority on this conclusion. The case cited, *Guaranty Trust Co. of New York v. Lyon*,[77] is not on point and is fairly obscure. *Guaranty Trust* involved the status of funds deposited in a domestic bank by the state-licensed agency of a foreign bank after the foreign agency was liquidated by the government during wartime. Specifically, a Japanese corporation had issued a bond denominated in dollars in the United States. The issuer assured payment of interest on the coupons by periodically depositing sufficient funds in its Japanese bank with instructions to transmit those funds to the domestic bank, Guaranty Trust, which served as its fiscal agent. These funds were seized by the New York government just after the outbreak of World War II before the Japanese bank's New York agency had received a license to pay Guaranty Trust as required by the Treasury Department.

Even before World War II had ended, Guaranty Trust unsuccessfully applied for release of the funds. Several years after the end of the war, when the New York Superintendent of Banks was in the process of liquidating the Japanese bank's New York agency, Guaranty Trust filed suit against the New York Superintendent of Banks demanding release of the funds. The Superintendent answered the complaint by insisting that the funds in question were properly forfeited because they were the property of the Japanese government

73. *Id.* at 11, col. 3.

74. International Banking Act of 1978, Pub. L. No. 95-369, 92 Stat. 607 (1978) (codified as amended in scattered sections of 12 U.S.C.).

75. Skigen & Fitzsimmons, *The Impact of the International Banking Act of 1978 on Foreign Banks and Their Domestic and Foreign Affiliates*, 35 BUS. LAW. 55, 56 (1979).

76. *Id.* at 57, 58.

77. Guaranty Trust Co. of New York v. Lyon, 124 N.Y.S.2d 680 (Sup. Ct. N.Y. City 1953).

rather than the issuer or the Japanese bank. The court had little difficulty finding for the plaintiff, Guaranty Trust, which was held to be a creditor of the Japanese bank and hence entitled to a prior claim on the Japanese bank agency's assets.[78]

Although *Guaranty Trust* involved the title to funds transferred from a foreign bank to its New York agency, the claimant in *Guaranty Trust* was not a branch of the bank.[79] Rather, the claimant in *Guaranty Trust* was a creditor of the foreign bank whose right to the funds (for the purpose of paying interest coupons due on an indenture issued to American customers by a foreign corporation) was never in question.[80] The dispute in *Guaranty Trust* arose when the New York agency of the Japanese bank was prevented from disbursing the funds in question when New York seized the assets of the bank after the outbreak of World War II.[81] The foreign bank itself never resisted the claim in *Guaranty Trust*. Indeed, the defendant in *Guaranty Trust* was not the foreign bank but rather the New York Superintendent of Banks, who had seized the foreign bank's New York agency one day after the bombing of Pearl Harbor[82] and then denied the plaintiff American bank's claim.

Thus, *Guaranty Trust* bears only a superficial similarity to *National Bank of Pakistan*. Whereas *Guaranty Trust* involved a claim by a creditor for funds seized from a foreign bank's sister agency by a regulatory institution (a claim not contested by the foreign bank), *National Bank of Pakistan* involved a claim by branches of the foreign bank itself regarding funds held by a sister agency. *Guaranty Trust* hinged on a finding that the plaintiff was a creditor of the foreign bank.[83] By contrast, *National Bank of Pakistan* involves the more basic issue of whether a branch can be a creditor of its own bank.

Banking law in fact is clear on this issue of whether a branch of a bank can constitute a creditor of the bank itself. The law indicates that a branch bank lacks the legal status necessary to sue the parent bank. Specifically, the branch lacks legal personhood distinct from that of the bank itself.[84] As a general matter, a branch or agency is separate and distinct from its parent for business purposes, but is not a separate legal entity. The parent supervises and owns the property of such separate business entities.[85] Moreover, the assets and liabilities of a branch bank are pooled with those of its parent bank.[86] According to Matthew Bender's Banking Law:

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78. *Id.* at 684.

79. *Id.* at 683-84.

80. *Id.* at 686-87.

81. *Id.* at 683.

82. *Id.* (applying N.Y. BANKING LAW § 606(4)(a) (McKinney 1971 & Supp. 1990)).

83. *Guaranty Trust*, 124 N.Y.S.2d at 684. *See also* Banque Mellie Iran v. Yokohama Specie Bank, 299 N.Y. 139, 85 N.E.2d 906 (1949), *aff'd*, 339 U.S. 841 (1950); Singer v. Yokohama Specie Bank, 299 N.Y. 113, 85 N.E.2d 894 (1949), *aff'd*, 339 U.S. 841 (1950).

84. *See* 10 AM. JUR. 2D *Banks* §§ 326-327 (1963).

85. *See* 1 BANKING LAW § 5.02 (MB)(1989); Comment, *Creditor's Rights—Garnishment—Garnishment of Branch Banks*, 56 MICH. L. REV. 90 (1957).

86. *See* 10 AM.JUR. 2D *Banks* § 327 (1963).

> A branch bank is considered an agent of its parent bank. Liability may be imposed upon the parent bank for acts committed by the officers or agents of the branch within the scope of their actual or apparent authority, or for their failure to act when under a duty to do so. Liability for contracts of the branch and for deposits held by the branch may be imposed upon the parent bank. A parent bank is generally not liable for deposits placed in its foreign branch [, however,] unless that branch closes or wrongfully refuses to return a deposit.
>
> All the assets of a branch bank are owned by the parent bank. The parent bank is also responsible for the debts of the branch. A branch bank is prohibited from making a separate assignment to its creditors. Upon insolvency of the parent bank, the assets of it and the branch are pooled and distributed pro rata to the creditors of each.[87]

The court in fact accepted the defense argument that "foreign branches of a bank are not considered by the courts to be independent agencies. They are considered to be instrumentalities through which the parent bank carries on business . . . ."[88] The court nevertheless reasoned that the Karachi and Chittagong branches had ceased to be part of a common enterprise with their parent bank when BOC-Taipei/ICBC split off from BOC-Beijing, thus creating two separate enterprises.[89] However, as will be discussed more fully below,[90] this rationale is insufficient to provide BOC-Beijing or the two Pakistani branches a greater right to the property in question than they had enjoyed prior to the split. That is, accepting the basic principle of derivation that one may not give away more than one owns, if BOC-Beijing did not succeed to ownership to these funds, then it would have had no right to assign them.

The court apparently found for the plaintiff on statutory grounds as well. The statute, New York Banking Law section 202-a(1)(a), allowed (and still allows) state-licensed agencies of foreign banks otherwise prohibited from accepting deposits within the state to maintain "credit balances incidental to, or arising out of the exercise of [ICBC's] lawful powers."[91] The statute provides that agencies of a foreign bank may maintain credit balances for "others."[92]

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87. 1 BANKING LAW § 5.02 (MB)(1990) (citations omitted). The question of the liability of the parent bank for its branch is at issue in Citibank v. Wells Fargo Asia Ltd., 852 F.2d 657 (2nd Cir. 1988), *rev'd and remanded*, 1990 W.L. 68520 (1990). *See also* Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 863-64 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982) (citing Sokoloff v. National City Bank of N.Y., 130 Misc. 66, 224 N.Y.S. 102 (Sup. Ct. 1927), *aff'd mem.*, 223 A.D. 754, 227 N.Y.S. 907, *aff'd*, 250 N.Y. 69, 164 N.E. 745 (1928)); Trinh v. Citibank, N.A., 623 F. Supp. 1526 (E.D. Mich. 1985), *aff'd*, 850 F.2d 1164 (6th Cir. 1986), *cert. granted*, — U.S. —, 109 S. Ct. 1740, 104 L.Ed.2d 177 (1989). For discussion of *Sokoloff* and the separate entity doctrine, see Heininger, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches*, 11 LAW & POL. INT'L BUS. 903, 926-44 (1979).

88. *National Bank of Pakistan*, 199 N.Y.L.J., Apr. 13, 1988, at 11, col. 3, citing Perez v. Chase Manhattan Bank, 61 N.Y.2d 460, 474 N.Y.S.2d 689, 463 N.E.2d 5 (1984), *reh'g. denied*, 62 N.Y.2d 943, *cert. denied*, 469 U.S. 966 (1984). *See also Sokoloff*, 130 Misc. at 73, 224 N.Y.S. at 114.

89. *National Bank of Pakistan*, 199 N.Y.L.J., Apr. 13, 1988, at 11, col. 3.

90. *See infra* page 29.

91. *National Bank of Pakistan*, 199 N.Y.L.J., Apr. 13, 1988, at 11, col. 3 (citing N.Y. BANKING LAW § 202-a(1)(a)).

92. N.Y. BANKING LAW § 202-a(1)(a) (McKinney 1971 & Supp. 1990).

Reasoning that the divorce of BOC-Beijing and BOC-Taipei from the pre-1949 BOC had created distinct institutions, the court determined that BOC-Taipei's New York agency held a credit balance for a separate institution.[93]

This rationale, however, raises certain issues. While the court is correct in its finding that the branches as of 1950 no longer formed part of the same enterprise as BOC-Taipei, it does not necessarily follow that the funds held by the New York agency were property of the branches. To the contrary, the funds in question had belonged to the common enterprise prior to the bifurcation, and hence were presumptively the property of the parent bank.[94] As will be discussed below,[95] accepted principles of international law as applied in the United States support the conclusion that BOC-Beijing did not succeed to all of the assets of BOC after 1949.[96] NBP never established that it stood in a creditor relationship vis-á-vis the defendant. The court did not even require the plaintiff to show that the funds in question had been contributed by the branches as opposed to the head office itself, or that the funds consisted of third party deposits in the branches rather than capital contributed by the common enterprise.[97] The funds claimed by NBP may have consisted merely of funds provided by the parent bank prior to the bifurcation, or of obligations to third persons that would have to be performed by the parent BOC-Taipei. At a minimum, the court should have required the plaintiff to present evidence on the origin of the funds in question.

### *C. The International Law of Succession*

NBP's claim to the accounts in question hinges in part on the 1971 assignment from BOC-Beijing, which purported to assign all of BOC-Beijing's rights in the accounts of the Chittagong and Karachi branches in New York to NBP. Yet a careful analysis of the international law of succession raises serious questions as to BOC-Beijing's color of entitlement to the funds in the first place.

In the realm of international law, the initial inquiry is whether the government of the PRC ever succeeded in interest to the assets under dispute. It is generally recognized under international law that "[t]he rights, capacities and obligations of a state appertain to the state as such and are not affected by

93. *National Bank of Pakistan*, 199 N.Y.L.J., Apr. 13, 1988, at 11, col. 3.

94. Relying on *Guaranty Trust*, the court found it unnecessary to decide this issue. *National Bank of Pakistan*, 199 N.Y.L.J., Apr. 13, 1988, at 11, col. 3. As argued above, however, the court's reliance on *Guaranty Trust* is misplaced.

95. *See infra* text accompanying notes 98-123.

96. The authors focus here on principles of international law as applied in the United States, which U.S courts are most likely to apply. Given the consensual nature of international law, other countries may differ on the applicable principles of law to be applied. PRC interpretations would, for example, differ with respect to partial succession and its application here. *See, e.g.*, WANG TIEYA, GUOJI FA [International Law] 108-22 (1986). As a matter of practice, however, it is unlikely that a court in New York, for example, would apply such rules.

97. *National Bank of Pakistan*, 199 N.Y.L.J., Apr. 13, 1988, at 11, col. 2.

changes in its government."[98] Such capacities, rights and duties terminate only when the given state ceases to exist.[99]Further, state property located within territory where a succession has occurred passes to the successor state.[100] However, "[e]xcept where the predecessor state wholly ceases to exist, property located outside the territory subject to the transfer of sovereignty (*including intangibles, such as bank accounts*) generally remains with the predecessor state."[101]

The actual circumstances surrounding the bifurcation of China do not, however, fit neatly within the set of rules enumerated above. Two separate regimes have existed and have occupied territories which both agree are parts of China,[102] yet neither has maintained effective control over the whole of China. Nevertheless, the government of the ROC has existed continuously since 1912, maintained control of BOC until 1949, and since then has maintained control of BOC-Taipei (now ICBC).[103] More specifically, the Government of the ROC increased its holding from one-half to two-thirds of the capital stock of BOC in 1942.[104] From that date until after the assignment of the bank accounts in question took place in 1971, the Government of the ROC appointed thirteen of the twenty-five representative directors of BOC.[105] In 1949, by government order and corporate procedures, BOC moved its Head Office and substantially all of its assets and liabilities from mainland China to Taipei, Taiwan.[106]

These facts, when analyzed under New York banking law, applicable Chinese corporate and banking law, and general rules of the international law of succession, support the continuous chain of title that BOC-Taipei maintained with respect to the assets in question, despite the PRC's objections. As a primary matter, the Government of the ROC had distinct rights in BOC as a majority shareholder, and thus had a majority voice with respect to the disposition of BOC's assets. With the exception of certain fixed assets on the

98. L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 266-67 (1987) [hereinafter HENKIN & PUGH] (citing RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 208 (1987)). *See also* I. BROWNLIE, *supra* note 70.

99. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 208 comment a (1987).

100. *Id.* § 209(1)(a). *See also* I. BROWNLIE, *supra* note 70, at 635.

101. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, at § 209 reporters' note 1 (emphasis added). *See also id.* at reporters' note 3. O'Connell has noted that in the context of partial succession, which is analogous to the China case, "property of the predecessor State not actually located in the territory does not change its ownership." 1 D. O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW 207 (1967).

102. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, at § 201 comment f and reporters' note 8.

103. *See* McGregor, *supra* note 39, at 24, col. 2.

104. *Wells Fargo*, 104 F. Supp. at 62.

105. *Id.*

106. *Id.* BOC first moved its corporate seat from Shanghai to Chongqing before relocating to Taiwan. Of course, the PRC denied that BOC had relocated to Taiwan. *National Bank of Pakistan*, 199 N.Y.L.J., Apr. 13, 1988, at 11, col. 3.

Chinese mainland, those rights were unaffected by the ROC Government's removal of its seat to Taiwan or by the formation of the PRC. This is especially true of the assets in question, which were located in New York—outside the territorial locus of the sovereignty dispute involving the governments of the ROC and the PRC. Thus, with respect to the funds in New York under dispute, in assigning all the assets and liabilities of the Karachi and Chittagong branches, BOC-Beijing at most assigned a chose in action to NBP rather than actual title.[107]

Doubts about BOC-Beijing's succession to the funds in question are also raised by a significant case decided in Japan bearing strong resemblance to the facts presented in *National Bank of Pakistan. Republic of China v. Yu Ping-huan*[108] involved rights to a student dormitory in Kyoto purchased by the ROC government in 1952. Shortly after Japan's recognition of the government of the PRC in 1972, the PRC students occupying the building claimed the PRC's rights in the property as a result of Japan's shift of recognition from the ROC to the PRC. The ROC then sought to quiet title in the property. The District Court ruled that government succession operated to transfer title to the PRC since the land and building had been financed with government funds.[109] On appeal, the Osaka High Court reversed and found in favor of the ROC on a "partial" or "incomplete" government succession theory.[110] The Osaka High Court stated in pertinent part:

> The fact that the plaintiff still actually rules and dominates Taiwan and the surrounding islands as a *de facto* government makes the succession of government from the plaintiff to the People's Republic of China as a result of Japan-China normalization of relations an *incomplete succession*. The retroactive legal effect of Japan's switch of recognition to the People's Republic of China as the sole legal government of China does not affect ownership of the property in question which, having no direct state functions, was acquired by the plaintiff in 1952 when it was still the government recognized by Japan. The People's

107. Claims to credit balances involve personal rights and hence constitute choses in action. A chose in action is a personal right to recover a debt or sum of money, see BLACK'S LAW DICTIONARY 219 (5th ed. 1979), and thus is of a lesser order than title to the personal chattel or sum of money.

108. Republic of China v. Yu Ping-huan, Decision of September 16, 1977, Kyoto District Court, 22 JAPANESE ANN. INT'L L. 151 (1978), *discussed in* Ying-jeou Ma, *Two Major Legal Issues Relating to the International Status of the Republic of China*, 6 CHINESE Y.B. INT'L L. & AFF. 171, 179-80 (1986-87). This case is more commonly referred to as the *Kokaryo* (in Japanese) or the *Kuang Hua Liao* (in Chinese) case, after the name of the building in issue. *See also* Wen Gong, *Preliminary Analysis in the Legal Problem on 'Ko Ka' Dormitory Case*, 2 ZHONGGUO FAXUE [Law of China] 101 (1988); Lin Wenzong, *On the Nonlegality of the Accepting of Ko-Ka Dormitory Case of Japan's Court from International Law Viewpoint*, 3 ZHONGGUO FAXUE [Law of China] 112 (1988); Renmin Ribao [People's Daily], Apr. 30, 1988, at 1; *Experts Go to Japan Over Case*, China Daily, Feb. 10, 1987, at 3; Zhao Lihai, *Riben fayuan dui Kuang Hua Liao an di shenpan yanzhong weifan guoji fa* [Japanese Court Decision in the Kuang Hua Liao Case Severely Violates International Law], Renmin Ribao [People's Daily], Mar. 6, 1987, at 4; Kaino Shoichi, *Points and Opinions on the Kuang Hua Liao Issue*, Renmin Ribao [People's Daily], Mar. 28, 1988, at 3.

109. JAPANESE ANN. INT'L L., *supra* note 108, at 155.

110. Ma, *supra* note 108, at 180 n.44 (citing Decision of Apr. 14, 1982, Osaka High Cour at 10).

> Republic of China therefore cannot claim ownership of the property in question on the ground of governmental succession (which it has not done). Consequently, the plaintiff has not, as a matter of course, lost the ownership of the property in question after the Japan-China normalization of relations.[111]

The District Court redecided the case in favor of the ROC on remand,[112] which decision was affirmed by the Osaka High Court.[113]

Based on this analysis, one may take issue with the New York Court's statement in *National Bank of Pakistan* that "[t]he PRC undeniably had an interest in BOC-Karachi and BOC-Chittagong funds on deposit with ICBC in 1949."[114] If the above analysis on succession is correct, the position of the court, simply put, judicially sanctions an assignment of property by an assignee (BOC-Beijing) who had no rights in the assigned property.

An accepted rule of international law relating to succession and corporate existence buttresses the analysis and conclusion above. This rule supports the proposition that BOC as originally organized in 1912 ceased to exist on the mainland in 1950 when the laws providing the basis for its existence were abolished.[115] In the area of succession, international law distinguishes between public law (affecting government administration) and private law (regulating activities between individual citizens and legal persons).[116] The accepted rule has been summarized as follows: "If the laws of the new state and the predecessor state are consistent, succession takes place, but that if the laws are inconsistent, no succession occurs. In this view, succession is, in effect, a presumption, which can be rebutted by positive legislation of the new state."[117]

Neither side to this litigation disputes the fact that BOC was originally formed under ROC law in 1912. ROC laws, including those governing civil relations and banking and corporate matters, formed the basis for the legal existence on the mainland of BOC formed in 1912. Yet the PRC abolished all laws supporting the existence of the bank to which it contends it succeeded

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111. *Id.* (emphasis added). Note two factual distinctions compared to *National Bank of Pakistan*. First, the dormitory was acquired by the ROC after the founding of the PRC. Second, the Japanese court found that the dormitory had no direct state functions. Neither distinction is, however, dispositive. As noted earlier, the court in *National Bank of Pakistan* never required the submission of evidence regarding the nature of the funds in question, which may have involved commercial or proprietary rather than state functions, and which may have involved funds contributed by the parent BOC or third persons rather than the Karachi and Chittagong branches. Most significantly, however, the Japanese court recognized the doctrine of incomplete succession, a striking rejection of the PRC's position that succession can only be complete in the eyes of the law.

112. Ma, *supra* note 108, at 180 (citing Decision of Feb. 4, 1986, Kyoto District Court, at 2).

113. *Court Rules Taiwan Owns Kyoto Dormitory*, Japan Times, Feb. 27, 1987, at 1, col. 3, *construed in* Ma, *supra* note 108, at 180.

114. *National Bank of Pakistan*, 199 N.Y.L.J., Apr. 13, 1988, at 11, col. 3.

115. *See infra* notes 118-21.

116. D. O'CONNELL, *supra* note 101, at 101-04.

117. HENKIN & PUGH, *supra* note 98, at 267-68 (citing D. O'CONNELL *supra* note 101, at 107).

in interest. Specifically, in February 1949, the Central Committee of the Chinese Communist Party issued the "Directive Regarding the Abolition of the Kuomintang's [Nationalist Party] Complete Book of Six Codes and the Affirmation of the Legal Principles in the Liberated Areas."[118] One learned commentator noted that "the term 'Complete Book of Six Codes' . . . refer[red] to the whole body of laws, including the Constitution, Criminal Code, Civil Code, Commercial laws, Code of Civil Procedure, and Code of Criminal Procedure."[119] This act abolishing all KMT laws on the mainland was subsequently confirmed in the PRC's first constitutional document, the Common Program of the Chinese People's Political Consultative Conference (promulgated on September 27, 1949).[120] Article 17 of the Common Program provides: "All laws, decrees, and judicial systems of the Kuomintang reactionary government which oppress the people shall be abolished. Laws and decrees protecting the people shall be enacted and the people's judicial system shall be set up."[121]Chinese law is far from vague on this point.

Thus, according to authoritative sources on international law and in accordance with what can be regarded as the black letter of mainland Chinese law, the PRC did not succeed to any ROC laws. Wholly separate from any political issue, PRC law does not provide a legal basis for the continued corporate existence on the mainland of BOC formed in 1912. Given this legal conclusion, the PRC Government Administration Council's[122] declaration in 1950 that the government of the PRC succeeded in interest to the two-thirds government stock holding in BOC[123] was tautological since there was no longer any legal basis for the existence of such stock on the mainland. At most, as mentioned above, this declaration manifested the PRC government's intent to maintain control over any BOC fixed *assets* existing on the mainland, but cannot be construed as vesting ownership rights in government-owned *stock* of BOC formed in 1912. Any rights in such stock would have had to have been in a new enterprise formed under PRC law, and such an enterprise—with a completely separate corporate identity—could not be deemed to possess any interest in the funds in question.

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118. *See* Hsia & Zeldin, *Recent Legal Developments in the People's Republic of China*, 28 HARV. INT'L L.J. 249 (1987). *See, e.g.*, Zheng Pu, *Destroying Thoroughly the Old Legal System and Liquidating Bourgeois Legal Thinking—Rereading of the Central Committee of the Chinese Communist Party's "Directive Regarding the Abolition of the Kuomintang's Complete Book of Six Codes and the Affirmation of the Legal Principles in the Liberated Areas*, 2 ZHENGFA YANJIU [Studies in politics and law] 15 (1964), *cited in* TAO-TAI HSIA, GUIDE TO SELECTED LEGAL SOURCES OF MAINLAND CHINA 2 n.7 (1967).

119. HSIA & ZELDIN, *supra* note 118, at 251.

120. 1 GOVERNMENT ADMINISTRATION COUNCIL, ZHONGHUA RENMIN GONGHEGUO FALING HUIBIAN 1949 [A selected compilation of laws and decrees of the People's Republic of China 1949] 19 (1952).

121. *Id.*

122. The people's government was led by the Government Administration Council prior to 1954, when the PRC's first constitution came into force and the State Council replaced the Government Administration Council.

123. *See supra* note 22.

### D. The FAC Regulations

ICBC also argued that the assignment of BOC-Beijing to NBP of the Pakistani branches' assets was void by virtue of the U.S. government's asset-freezing regulations.[124] The court found, however, that the U.S. regulations provided no legal authority to declare the 1971 assignment void, especially since the assignment occurred overseas between two sovereign states.[125] The regulations, in the court's view, only blocked transfers within the United States. The court held that it lacked the power to render the entire assignment invalid because only a small portion of the 1971 assignment concerned the accounts in New York. In addition, the court relied on the Act of State doctrine to find that it could not render invalid the acts of assignment by the PRC within its own territory.[126]

#### 1. Partial Invalidation of the Assignment

The asset-freeze regulations by their own terms ordered the court to declare the transfer partially invalid to the extent that the 1971 assignment was subject to the FAC regulations. The FAC regulations provide:

> All of the following transactions are prohibited . . . if . . . such transactions are by, or on behalf of, or pursuant to the direction of any designated foreign country, or any national thereof, or such transactions involve property in which any designated foreign country, or any national thereof, has . . . since the effective date of this section had any interest of any nature whatsoever, direct or indirect: (1) All transfers of credit . . . by, through, or to any banking institution . . . wheresoever located, *with respect to any property subject to the jurisdiction of the U.S.*[127]

Within the parlance of the FAC regulations, "transfer" included ". . . the making, execution, or delivery of any assignment."[128] Thus, the purported 1971 assignment would fall within the FAC regulations as a transactional matter.

Wholly aside from the issue of entitlement to the funds, the mere attempt by a "designated foreign country" to assign property within U.S. jurisdiction would be "null and void" under the express and unambiguous terms of the FAC regulations:

> Any transfer . . . which is in violation of any provision of this chapter or of any regulation . . . thereunder and involves any property in which a designated national has, or has had an interest . . . is *null and void* and shall not be the basis for the assertion or recognition of any interest in or right . . . with respect to such property.[129]

The PRC, a "designated foreign national," assigned various property rights to NBP in 1971. Plaintiff asserted that the assignment included funds in the

124. *National Bank of Pakistan*, 199 N.Y.L.J., Apr. 13, 1988, at 11, col. 3.
125. *Id.*
126. *Id.*
127. 31 C.F.R. § 500.201(a)(1) (1989) (emphasis added).
128. 31 C.F.R. § 500.310 (1989).
129. 31 C.F.R. § 500.203(a) (1989) (emphasis added).

New York agency.[130] Therefore, the black letter of the FAC regulations requires a partial invalidation of the assignment.

Given the FAC regulations, the question of how to characterize the funds in New York, and whether the PRC succeeded in interest to such funds, is of little practical significance. Regardless of which analysis was applied by the court, the 1971 assignment could not have vested in NBP any rights to the funds in New York. If the banking law common entity and international law succession analyses presented above are correct, then the PRC, as stated above, would have no rights in the funds in New York and hence would lack the power to assign the funds.[131] If, on the other hand, the banking and international law analyses above are incorrect, thereby vesting interest in the disputed funds in the PRC, then the assignment would be struck down by virtue of the FAC regulations. In the latter scenario, the simple remedy for the PRC would have been to reassign the funds in New York after the FAC regulations were repealed. As a matter of great practical importance, if legal analysis supports partial invalidity of the transfer and the PRC failed to assign the money within the United States *after the lifting of the freeze regulations*, then the claim was subject to dismissal for failure to state a claim.

### 2. *The Act of State Doctrine*

As stated above, the second aspect of the court's decision with respect to the assignment was that the Act of State doctrine barred the court from passing judgment on an act of the PRC government. The Act of State doctrine as applied in the United States traces its roots back to the seminal case of *Underhill v. Hernandez*.[132] The Supreme Court in *Underhill* stated: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[133] The doctrine was based on deference to state sovereignty, the separation of powers doctrine

130. For purposes of the FAC regulations, an exact characterization of the funds is not necessary, given the broad definition of "property" therein, which included "bank deposits, . . . any debts, . . . book accounts, . . . and any other property, . . . or interests . . . therein, present, future, or contingent." 31 C.F.R. § 500.311 (1989).

131. Even if the PRC had no rights in the funds, BOC-Taipei (ICBC) would still have been subject to the filing requirement in the FAC Regulations set forth in 31 C.F.R. § 500.603 (Supp. 1951). This requirement exists because the original regulatory definition of "China" included Taiwan. Thus, in this context there would be no practical distinction between BOC-Taipei ownership and BOC-Beijing ownership of the funds.

132. Underhill v. Hernandez, 168 U.S. 250 (1897). *See also* Millen Industries, Inc. v. Coordination Council for North American Affairs, 855 F.2d 879, 882 (D.C. Cir. 1988) ("The doctrine applies with reference to Taiwan even though the United States does not recognize that government."). For discussion of this doctrine, see L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972); Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT'L L. 175 (1967).

133. *Underhill*, 168 U.S. at 252 (cited with approval in First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 763 (1972) (plurality opinion)).

which accords responsibility for the conduct of the foreign relations of the United States to the other branches of the government, especially the executive branch, and the basic principle of comity between states.[134] With respect to the taking of property rights, the Supreme Court issued its definitive statement in *Banco Nacional de Cuba v. Sabbatino*,[135] stating that "the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government."[136] The court in *National Bank of Pakistan* thus reasoned that it could not sit in judgment of an act by the government of the PRC and hence, could not even partially invalidate an assignment the PRC had made.[137]

The court's opinion here is at odds, however, with the accepted rule that U.S. courts will protect the acts of a foreign state by applying the Act of State doctrine only to acts taken by a foreign government within its own territory.[138] The doctrine does not, however, apply to acts of a foreign government taking property outside of its territory based on the rationale that to do so would contravene the public policy of the forum state.[139] As a result, this

134. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, at Sec. 443, comment a.

135. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

136. *Id.* at 428.

137. *National Bank of Pakistan*, 199 N.Y.L.J., Apr. 13, 1988, at 11, col. 3. The *National Bank of Pakistan* court was by no means alone in its questionable application of the Act of State doctrine. Leigh, *Sabbatino's Silver Anniversary and the Restatement: No Cause for Celebration*, 24 INT'L LAW. 1, 2 (1990); Bazyler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 328 (1986). Indeed, Leigh and Bazyler both criticize the Restatement itself for overextending the reach of the doctrine, thereby frustrating the development of international law and the effective application of domestic United States law by United States courts. Leigh, *supra* at 3; Bazyler, *supra* at 372-73.

138. This territorial exception has received judicial sanction in Supreme Court dicta as well as in numerous federal courts. *See, e.g.*, Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 691-94, 697 n. 11, 716-18, 721-22, 729 (1976); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 763 (1972); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 400-01, 413-15, 454-55 (1964); United States v. Pink, 315 U.S. 203, 217 (1942); United States v. Belmont, 301 U.S. 324, 327-30 (1937); Shapleigh v. Mier, 299 U.S. 468, 469-72 (1937); Ricaud v. American Metal Co., 246 U.S. 304, 309 (1918); Gross v. Credito Mexicano, S.A., 797 F.2d 220 (5th Cir. 1986) *cert. denied* 480 U.S. 934 (1987); Reidel v. Bancam, 792 F.2d 587, 592 (6th Cir. 1986); Randall v. ARAMCO, 778 F.2d 1146, 1153 (5th Cir. 1985); BANCEC v. First Nat'l City Bank, 744 F.2d 237, 241-42 (2d Cir. 1984); Banco National de Cuba v. Chemical Bank, 658 F.2d 903, 908-09 (2d Cir. 1981); First Nat'l Bank of Boston v. Banco Nacional de Cuba, 658 F.2d 895, 901 (2d Cir. 1981), *cert. denied* 459 U.S. 1091 (1982); Rosado v. Civiletti, 621 F.2d 1179, 1190 (2d Cir. 1980), *cert. denied*, 449 U.S. 856 (1980).

139. Although the Supreme Court has yet to pass on the doctrine's application to acts of a foreign government with regard to property outside that state's territory, lower courts have unanimously held that the doctrine does not apply to takings of property outside of the state's territory at the time of the taking. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, at Sec. 443, comment b and reporters' note 4. Republic of Iraq v. First National City Bank, 241 F. Supp. 567, 574-75 (S.D. N.Y. 1965), *aff'd*, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966). *See also* Heininger, *supra* note 87, at 975-76 (*cited with approval in Vishipco*, 660 F.2d at 862-63 and in *Trinh*, 623 F. Supp. at 1536). It should be noted that although the Supreme Court has yet to address the territoriality exception to the Act of State doctrine, the Court denied certiorari in both *Republic of Iraq* and *Vishipco*. For commentary, *see* Note, *The Territorial Exception to the Act of State Doctrine: Application of French Nationalization*, 6 FORDHAM INT'L L.J. 121 (1982-83). *Cf.* Note, *The Resolution of Act of State*

territorial limitation will pierce the shield of the Act of State doctrine and permit U.S. courts to adjudge the act of a foreign government outside the United States that affects property, or has an otherwise direct effect, in the United States.[140] Analysis of the situs of the property also supports this conclusion. This exception permits U.S. courts to adjudicate disputes involving property located outside the territory of the state, particularly when the property is located in the United States. Admittedly, there is some ambiguity regarding the situs of intangible property such as bank funds, as opposed to physical property. Nevertheless, the fact that the funds were placed in the United States strongly indicates that the United States was the situs of the property. Moreover, this fact suggests that no Chinese government could have reasonably expected U.S. courts to defer to the state's attempt to change the nature of the obligation.[141]

As discussed above, the PRC assigned all of its rights in BOC's Karachi and Chittagong branches to Pakistan. This assignment passed title to NBP in many different types of assets—including, *inter alia*, fixed assets and intangibles in Pakistan as well as claims on funds in New York. Contrary to the trial court's position, the accepted rules and exceptions to the Act of State doctrine would allow a U.S. court to review the assignment to the extent that the act affected assets in the United States. The disposition of the assets at issue in *National Bank of Pakistan* indeed had a direct effect on assets in the United States. Thus, the Act of State doctrine should not have barred the court from partially invalidating the assignment in accordance with the FAC Regulations.

### *E. The Taiwan Relations Act*

ICBC finally argued that *Wells Fargo*[142] should be applied to collaterally estop BOC-Beijing from succeeding to rights to the funds in question. *Wells*

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*Disputes Involving Indefinitely Situated Property*, 25 VA. J. INT'L L. 901, 906-07, 919-20, 930-34 (1985).

140. *See, e.g.*, Grass v. Credito Mexicana, S.A. 797 F.2d 220 (5th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987); Tchacosh Co., Ltd. v. Rockwell Int'l Corp., 766 F.2d 1333, 1336-39 (9th Cir. 1985); Allied Bank Int'l v. Credito Agricola, 757 F.2d 516, 521 (2d Cir. 1985), *cert. denied*, 473 U.S. 934 (1985); First Nat'l Bank of Boston v. Banco Nacional de Cuba, 658 F.2d 895 (2d Cir. 1981), *cert. denied*, 459 U.S. 1091 (1982); Maltina Corp. v. Cawy Bottling Co., 462 F.2d 1021, 1024-27 (5th Cir. 1972), *cert. denied*, 409 U.S. 1060 (1972); Brush & Black v. Cuba, 389 U.S. 830 (1967); F. Palicio y Compania, S.A. v. Brush, 256 F. Supp. 481, 487-90 (S.D. N.Y. 1966), *aff'd mem.*, 375 F.2d 1011 (2nd Cir.), *cert. denied sub nom.*; 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 background, see also J. DELLAPENNA, SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS 294-98 (1988); Comment, *Act of State Doctrine Held Inapplicable to Foreign Seizures When the Property at the Time of the Expropriation is Located within the United States—United Bank Ltd. v. Cosmic Int'l, Inc.*, 9 N.Y.U. J. INT'L L. & POL. 515 (1977); Note, *Rehabilitation and Exoneration of the Act of State Doctrine*, 12 N.Y.U. J. INT'L L. & POL. 599 (1980); Crockett, *Extraterritorial Expropriations*, 13 IND. L. REV. 655 (1980).

141. *See* Note, *The Act of State Doctrine: Resolving Debt Situs Confusion*, 86 COLUM. L. REV. 594, 608-10 (1986).

142. *Wells Fargo*, 104 F. Supp. 59, *aff'd in part and rev'd in part*, 209 F.2d 467.

*Fargo* held that BOC-Taipei was entitled to BOC funds on deposit with an American bank after the 1949 revolution. The court rejected this argument, however, citing both the normalization process between the United States and the PRC and the Taiwan Relations Act [hereinafter the Act].[143] According to the court, the normalization of relations between the United States and the PRC undercut the rationale behind the *Wells Fargo* decision. Although ICBC argued that the Act was a justification for continuing the pre-normalization freeze of assets, the court found that the Act contained no basis on which "to continue the pre-1978 status between the ROC and the United States."[144]

The court's stance here raises several issues under international law and the Act. As the court notes, the judiciary generally is obliged to follow the executive branch's acts of recognition as binding on the judiciary.[145] The Act ensured that this rule did not affect the status of Taiwan under American law. Specifically, the terms of the Act accorded the Taiwan government a status in most respects equivalent to that of a state. As will be shown, the court's construction of the Act defies the express terms of the Act, its legislative history, and previous judicial interpretation of the Act.

143. 22 U.S.C. §§ 3301-3316 (1988). The Act sought to define and maintain ties between the United States and the Taiwan government after the U.S. derecognition of the Republic of China and recognition of the PRC. The seminal source for the Act's background and legislative history is L. WOLFF & D. SIMON, LEGISLATIVE HISTORY OF THE TAIWAN RELATIONS ACT: AN ANALYTICAL COMPILATION WITH DOCUMENTS ON SUBSEQUENT DEVELOPMENTS (1982). For discussion of the act, see W. BADER & J. BERGER, THE TAIWAN RELATIONS ACT: A DECADE OF IMPLEMENTATION (1989); AMERICA AND ISLAND CHINA: A DOCUMENTARY HISTORY (S. Gibert & W. Carpenter eds. 1989); A UNIQUE RELATIONSHIP: THE UNITED STATES AND THE REPUBLIC OF CHINA UNDER THE TAIWAN RELATIONS ACT (R. Myers ed. 1989); Gable, *Taiwan Relations Act: Legislative Re-recognition*, 12 VAND. J. TRANSNAT'L L. 511 (1979); Randolph, *The Status of Agreements between the American Institute in Taiwan and the Coordination Council for North American Affairs*, 15 INT'L LAW. 249 (1981). For a PRC view of the act, see Zhang Hongzeng, *U.S. "Taiwan Relations Act" Viewed From An International Law Perspective*, in SELECTED ARTICLES FROM CHINESE YEARBOOK OF INTERNATIONAL LAW 189 (1983).

144. *National Bank of Pakistan*, 199 N.Y.L.J., Apr. 13, 1988, at 11, col. 4.

145. *See, e.g.*, National City Bank of N.Y. v. Republic of China, 348 U.S. 356, 358 (1955) ("The status of the Republic of China in our courts is a matter for determination by the Executive and is outside the competence of this Court."); Russian Socialist Federated Soviet Republic v. Cibrario, 235 N.Y. 255, 262, 139 N.E. 259, 262 (1923); Guaranty Trust Co. of N.Y. v. United States, 304 U.S. 126 (1938); Republic of Vietnam v. Pfizer, Inc., 556 F.2d 892, 894 (8th Cir. 1977); The Maret, 145 F.2d 431 (3d Cir. 1944). Note, however, that a court may extend cognizance to a *de facto* government that has not been recognized by the United States. Upright v. Mercury Business Machines Co., Inc., 13 A.D. 36, 213 N.Y.S.2d 417 (1961). *See also* T. FRANCK & M. GELMAN, FOREIGN RELATIONS AND NATIONAL SECURITY LAW: CASE MATERIALS AND SIMULATIONS 430-524 (1987); Franck, *The Courts, the State Department and National Policy: A Criterion for Judicial Abdication*, 44 MINN. L. REV. 1101 (1960) (judicial autonomy should be exercised unless the national interest is substantially affected); Lubman, *The Unrecognized Government in American Courts: Upright v. Mercury Business Machines*, 62 COLUM. L. REV. 275, 304-10 (1962) (endorsing the *de facto* government doctrine); Alder, *The Unrecognized Government in the Courts of the United States*, 5 VA. J. INT'L L. 36 (1964) (suggesting limits to application of the *de facto* government doctrine).

In contrast with the court's holding that diplomatic recognition of the PRC rendered *Wells Fargo* inapplicable,[146] the Act makes it very clear that: (1) the derecognition of the ROC shall have no effect on Taiwan's standing in American courts, or on the application of American law to Taiwan; and (2) the *Wells Fargo* case continues to carry precedential value even after derecognition. Section 4(a) of the Act provides:

> The absence of diplomatic relations or recognition shall not affect the application of the laws of the United States with respect to Taiwan, and the laws of the United States shall apply with respect to Taiwan in the manner that the laws of the United States applied with respect to Taiwan prior to January 1, 1979.[147]

The House of Representatives report reveals that the "[l]egal rights assured by this section include . . . *rights involving bank assets and other intangible assets.*"[148]

Finally, the holding in this case contravenes a very important provision of the Act, namely that derecognition of the Republic of China "shall not abrogate, infringe, modify, deny, or otherwise affect in any way any rights or obligations (including but not limited to those involving contracts, debts, or property interests of any kind) under the laws of the United States heretofore or hereafter acquired by or with respect to Taiwan."[149] As such, *National Bank of Pakistan*, by judicially sanctioning the assignment by the PRC to NBP of what appears under legal analysis to have been the assets of the ROC, violates the letter and spirit of the Act—a law that defines the metes and bounds of United States-Taiwan relations.

## IV.
## CONCLUSION

*National Bank of Pakistan* presents a disturbing mixture of judicial activism and judicial deference. On the one hand, the court reveals a casual disregard for the positions of the executive and legislative branches of government, which demonstrated continuing regard for the status of Taiwan through the Taiwan Relations Act, even after the transfer of diplomatic recognition by the United States from the ROC to the PRC. On the other hand, the court exhibits great deference to the acts of other states, even when those acts occur outside the territory of the respective states and pertain to assets held in the United States. This combination of activism and deference helped lead the court to rule against ICBC despite complex factual, banking, foreign relations and international law issues that may dictate a contrary result.

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146. *National Bank of Pakistan*, 199 N.Y.L.J., Apr. 13, 1988, at 11, col. 4.

147. 22 U.S.C. § 3303(a) (1988). *See also Millen Industries*, 855 F.2d, at 883; Chang v. Northwestern Memorial Hosp., 506 F. Supp. 975 (N.D. Ill. 1980), *dismissed on other grounds*, 549 F. Supp. 90 (N.D. Ill. 1982).

148. H.R. REP. No. 96-26, 96th Cong., 1st Sess. 9 (1985), *reprinted in* WOLFF & SIMON, *supra* note 143, at 153 (emphasis added). Although the Report does not refer to the facts at issue in the instant case, the language covers assets like those at issue in *National Bank of Pakistan.*

149. 22 U.S.C. § 3303(b)(3)(A) (1988).

Indeed, the discussion and analysis above reveal numerous shortcomings in the trial court's assumptions of fact and determinations of law. At the historical and diplomatic levels, Chinese political motivations and diplomatic interests at the time of the assignment offer strong foundations for arguments that run counter to the factual assumptions on which the court based its opinion. That is, at least with respect to the funds in New York, the normalization of relations with the PRC and the plaintiff's characterization of the transfer as a gift do not suffice to warrant validation of the assignment by deviation from accepted principles of U.S. law. Nor did normalization of relations with the PRC require a ruling for NBP *qua* the PRC or against ICBC *qua* the ROC. The court's decision is even more troublesome if the PRC's transfer was a disguised form of foreign aid to Pakistan, since the court would be effectively assisting a foreign state in the conduct of its foreign affairs, even if the state's conduct may not have been consonant with U.S. foreign policy. In addition, the timing of Bangladesh's independence movement weakens NBP's claim to the funds of the Chittagong branch.

In terms of banking law, the ruling appears to expand the power of agencies and branches to act as legal persons to the extent that agencies and branches, or at least the new corporate headquarters of such subordinate components following a corporate division, may sue the parent bank itself.

This aspect of the ruling touches upon the current controversy regarding a parent multinational bank's obligations to customers for deposits in an overseas branch that are blocked or expropriated by the foreign state where the branch is located. Although overseas branches have been treated as separate entities vis the parent bank for various purposes, particularly liability for deposits made at the overseas branches,[150] several but by no means all recent court decisions on this issue have held that the parent bank is liable for blocked or expropriated funds based on the particulars of the contractual relationship between the bank and the depositor or the nature of the payment mechanism involving wire transfers through the parent bank.[151] Although the banks' defenses have included the Act of State doctrine, several courts have held that the parent bank assumed liability as a matter of contract law, or that the contract or form of the transaction shifted the situs of the intangible obligation out of the territory of the foreign state, thereby vitiating the Act of State doctrine.[152]

150. Smedresman & Lowenfeld, *Eurodollars, Multinational Banks, and National Laws*, 64 N.Y.U. L. REV. 733, 741-43 (1989); Logan & Kantor, *Deposits of Expropriated Foreign Branches of U.S. Banks*, 1982 U. ILL. L. REV. 333, 340.

151. *Wells Fargo Asia Ltd.*, 852 F.2d 657; Libyan Arab Foreign Bank v. Bankers Trust Co., (1988) 1 Lloyd's Rep. 259 (Q.B.); 26 I.L.M. 1600 (Nov. 1987); *Trinh*, 850 F.2d 1164; *Vishipco*, 660 F.2d 854. *But see Sokoloff*, 250 N.Y. 69. *See generally* Smedresman & Lowenfeld, *supra* note 150.

152. *Libyan Arab*, 1 Lloyd's Rep. at 276 (payment in sterling outside the situs of the obligation was possible); *Wells Fargo Asia Ltd.*, 852 F.2d at 660 (parties agreed that payment could occur at the location of the parent bank).

In its first opinion on the subject, the Supreme Court distinguished between the situs for discharging the repayment obligation and the situs for collecting the deposit. The Court found that confirmation slips and telegraphic messages employed in a wire transfer did not themselves constitute an agreement requiring the parent bank of the deposit-taking overseas branch to make its worldwide assets available for collection of the deposit in a Eurodollar transaction when the government where the branch was located prohibited release of the branch's funds.[153] Moreover, the Court, while limiting its ruling to the facts of the case, held that there was no custom or practice in the international banking industry imposing the burden of sovereign risk on the deposit-taking bank in the absence of an agreement between the parties themselves.[154] In this respect, the Court indicated sympathy for the risk-apportionment rule under which the overseas branch alone, and indirectly the depositor in the event of an act by the foreign state, would bear the sovereign risk of blockage or expropriation based on the law of the situs of the deposit, while the parent of the deposit-taking branch would continue to assume the commercial or credit risk. The only exception would consist of a showing by the depositor that the parties had contracted for payment elsewhere, presumably in exchange for a lower interest premium or higher service charge on the deposit. Such a rule appears to better comport with the principles of comity among nations and the reasonable expectations of the parties.[155]

The cases discussed above concern the relationship between the overseas branch and the parent bank in the role of obligor. *National Bank of Pakistan*, by contrast, concerns an analogous conflict between an overseas branch and a parent bank, except that this time the conflict concerns the branch's role as creditor after division of the corporate entity. As argued previously, the court's holding is particularly troubling because improper application of the Act of State doctrine removed the controversy from the court's jurisdiction, while the court's casual treatment of the funds variously as accounts, credit balances and deposits elided argument on the nature of the relationship between the overseas branch and the parent bank. The court thus dismissed two of the three issues, i.e., the situs of the obligation and the contractual relationship between obligee and obligor,[156] that are at the heart of the current controversy in banking law discussed above. Although it is unclear whether there are any other conflicts between rival claimants for state sovereignty comparable to that between the PRC and Taiwan, the court appears to have sacrificed an opportunity to more fully analyze the issues that result when a schism occurs in the corporate entity.

153. Citibank, N.A. v. Wells Fargo Asia Ltd., 1990 W.L. 68520 at 13-17.

154. *Id.* at 17-18.

155. Smedresman & Lowenfeld, *supra* note 150, at 796-803.

156. The other factor is the means for the transfer of funds, i.e., wire transfer through the parent bank or its domicile versus payment exclusively at the situs of the obligation without the mediation of a central transfer mechanism.

The court's most problematic analysis arises with respect to various issues of international law, Chinese law, and U.S. foreign relations law. First, the international law of succession as applied by U.S. courts firmly supports the proposition that BOC-Beijing succeeded only partially, not in whole, to the rights and assets of BOC. The unequivocal terms of Chinese law further buttress this point. Second, the FAC regulations mandated a partial invalidation of the assignment. Third, in contravention of the basic policy rationales underlying the Act of State doctrine, the court misapplied the basic doctrine and overlooked one of the central exceptions to application of the doctrine. Specifically, the location of the funds in New York (outside the PRC) involves the territorial exception to the Act of State doctrine that would not prevent the court from reviewing the transaction. Finally, the court overlooks the express terms of the legal cornerstone of U.S.-Taiwan relations—the Taiwan Relations Act— and as such erodes the foundation for U.S.-Taiwan relations. When viewed together, these principles of law favor conclusions and an outcome contrary to the position of the trial court.

In light of the case's disposition with respect to the Taiwan Relations Act, one practical significance of this holding is its potential as an irritant to U.S.-Taiwan relations. But beyond this point of conjecture, while the status of Taiwan is somewhat *sui generis*, the court's ruling also creates a questionable precedent for future litigation involving entities from divided states. It is unclear how many cases involving divided governments with attendant divisions of corporate authority will arise. Yet, at the very least, this case paints a picture that New York—the world's financial center—is perhaps an uncertain forum for Taiwan. To be sure, the New York State and federal bank regulatory authorities welcome Taiwan banks. Four of Taiwan's largest commercial banks, First Commercial Bank, Chang Hwa Commercial Bank, Bank of Taiwan and Hua Nan Commercial Bank and one of its trust companies, China Trust, have opened offices in New York over the last year. Other institutions, such as City Bank of Taipei (Taipei Bank), for example, are in the process of applying for banking licenses. Taiwan's Bank of Communications, like BOC-Taipei/ICBC, was formed on the mainland, and shifted its seat to Taiwan in the late 1940's. It established its first U.S. branch in San Jose, California in 1989 and has expressed initial concern over expanding into the New York market because of the presence of the PRC's Bank of Communications' representative office in New York. Thus, on a broader level, this case may also be seen as hindering the growth of New York's financial market and international financial linkages between Taiwan and New York.

Finally, given its intricacy, *National Bank of Pakistan* appears to have been particularly unsuited for decision on motion for summary judgment. The court of original jurisdiction deprived itself and the appellate courts of the opportunity for fuller presentation of evidence and oral argument that the judiciary requires before it can rule on such novel and complicated questions of fact. It is unclear whether the outcome would have been different had the

case gone to trial, or had the case been decided in federal court, but this analysis has shown that the complexity of the issues, including the origin and nature of the funds at issue and BOC-Beijing's legal status, exceeded the bounds of a motion for summary judgment.

## APPENDIX

NATIONAL BANK OF PAKISTAN v. THE INTERNATIONAL COMMERCIAL BANK OF CHINA
NEW YORK LAW JOURNAL—
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[COL. 2]

Wilk, J.—Plaintiff moves for summary judgment pursuant to CPLR 3212. Defendant cross-moves for the same relief.

This action concerns the right to the sum of $642,375.38 on deposit with defendant International Commercial Bank of China ("ICBC"). In 1972, the Bank of China ("BOC") was chartered. Pursuant to the Articles of Association by which it was created, the majority of the Board of Directors of the bank were to be appointed by the government, thus enabling it to function as an arm of the government.

Prior to 1949 BOC maintained numerous branches throughout China and the world. One branch was established in Chittagong, Pakistan ("BOC-Chittagong") and another in Karachi, Pakistan (now Bangladesh) ("BOC-Karachi"). A banking agency was also established in New York City ("BOC-NY"). In 1971, BOC-NY changed its name to ICBC.

In 1949, the People's Liberation Army liberated mainland China. The People's Republic of China ("PRC") continued to operate BOC-Beijing as the banking arm of its government. The defeated forces fled to Taiwan, where they established the government of the Republic of China ("ROC") and set up a branch of the BOC in Taipei ("BOC-Taipei"), which was operated as the official bank of the ROC.

The de facto division of the BOC into two distinct banking entities forced each branch and agency of the bank to declare its loyalty either to BOC-Beijing or to BOC-Taipei. BOC-NY allied itself with BOC-Taipei. BOC-Karachi and BOC-Chittagong affiliated with BOC-Beijing. Upon learning of the position taken by the Karachi and Chittagong branches, BOC-Taipei "froze" or "blocked" all money on deposit with it from branches which associated themselves with the PRC. This "freeze" is evidence by an internal memo dated Jan. 16, 1950. On Dec. 17, 1950, the United States Government promulgated regulations which had the result of freezing all assets in this country in which PRC or its nationals claimed an interest. Trading With the Enemy Act (50 U.S.C. App. § 5(b)); Executive Order 9193; Foreign Assets Control Regulations (31 C.F.R. Part 500), hereinafter referred to as the "FAC Regulations."

Notwithstanding the establishment of the PRC, the United States recognized the ROC as the true government of China. The recognition of the ROC to the exclusion of the PRC was judicially sanctioned in 1952 (Bank of China v. Wells Fargo Bank & Trust Co., 104 F. Supp. 59 (N.D. Ca. 1952), *aff'd* 209 F.2d 467 (9th Cir. 1953) hereinafter referred to as "Wells Fargo").

Richard Nixon's Feb. 21, 1972, trip to Beijing culminated in the signing of the Shanghai Communique, which committed the United States and the PRC to "normalize" relationships. The normalization process was completed on Dec. 15, 1978 when Jimmy Carter announced that the United States would formally recognize the PRC as the sole legal government of China.

On Jan. 31, 1980, the regulations blocking the assets of the PRC in this country were repealed. The National Bank of Pakistan ("NBP"), as assignee of BOC-Beijing, demanded that ICBC (formerly BOC-NY) release to it the BOC-Karachi and the BOC-Chittagong deposits. When ICBC refused, this action was commenced. Both NBP and ICBC now move for summary judgment, claiming legal entitlement to the disputed funds.

Copies of BOC-NY's internal account statements prepared in 1949 and 1950 suggest that at that time, BOC-Chittagong had an account balance of $96,252.18 with BOC-NY, and the Karachi branch had a balance of $546,120.59 (*see generally*, Guaranty Trust Co. of New York v. Lyon, 124 N.Y.S.2d 680 (Sup. Ct., N.Y. Co., 1955)). The deposition of ICBC's vice president (pages 289, 313, 318, 326) also supports plaintiff's contention that there was money on deposit with ICBC in 1950.

Plaintiff also relies upon ICBC's account statements and inter-branch memos which indicate that the accounts of the BOC-Karachi and BOC-Chittagong were blocked. Stamps on the BOC-Karachi and BOC-Chittagong accounts that began to appear on the statements in 1950 state that "account blocked in accordance with Executive Order No. 9193" and "reported on TFR-603." Several letters from the United States Treasury Department confirm that the accounts were blocked (*see* Chase Manhattan Bank v. United China Syndicate, Ltd., 180 F. Supp. 848 (S.D.N.Y. 1960)). Plaintiff also argues that this claim would be further supported by the TFR-603 forms themselves, which ICBC has repeatedly refused to supply. Plaintiff concludes that this evidentiary showing is adequate to support a finding that the accounts exist and that each contains the amount of money demanded in this action (*see* Banque Mellie Iran v. Yokohama Specie Bank, Ltd., 299 N.Y. 139 (1949), *aff'd* 339 U.S. 903 (1950); Singer v. Yokohama Specie Bank, Ltd., 299 N.Y. 542 (1944); cf. Buxhoeveden v. Estonian State Bank, 106 N.Y.S.2d 287 (Sup. Ct., Queens Co., 1951)).

NBP then asserts that it acquired BOC-Beijing's interest in the accounts of the Chittagong and Karachi branches in New York by virtue of a 1971 assignment. This contention is supported by copies of the correspondence between the two governments wherein the PRC indicated its intention to make a gift of these two branches to Pakistan in consideration for the friendly relations and cooperation between the two nations. Plaintiff also relies upon the Aug. 31, 1971 agreement pursuant to which BOC-Beijing assigned to NBP all of its liabilities, assets and undertaking in the two branches. Plaintiff

offers a number of other documents and certificates executed between the parties to carry out

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the transfer. NBP concludes, therefore, that having made an evidentiary showing sufficient to support a possessory claim to the BOC-Karachi and BOC-Chittagong funds on deposit in New York, it was entitled to the funds as of Jan. 31, 1980, the date on which the FAC regulations were amended to permit the free transfer of all Chinese assets previously blocked by Section 500.201.

ICBC contends that BOC-Chittagong and BOC-Karachi had no funds "on deposit." ICBC claims that all of the assets held by any of BOC's branches were part of the same common enterprise operated by a single banking corporation then called BOC and controlled by ICBC's head office in Taipei.

ICBC correctly observes that foreign branches of a bank are not considered by the courts to be independent agencies. They are considered to be instrumentalities through which the parent bank carries on business (*see* Perez v. Chase Manhattan Bank, 61 N.Y.2d 460, *rearg. den.* 62 N.Y.2d 943, *cert. den.* 469 U.S. 966 (1984); Sokoloff v. The National City Bank of New York, 130 Misc. 66 (Sup. Ct., N.Y. Co., 1927), aff'd 223 A.D. 754 (1st Dept.), *aff'd* 250 N.Y. 69 (1928)). After the 1949 revolution, however, BOC-Beijing and BOC-Taipei functioned as two independent rival banks. Thus, ICBC's contention that the BOC offices in Chittagong and Karachi should be treated as branches of BOC-Taipei is unsupportable.

ICBC then attempts to establish that it cannot legally have any money "on deposit" on behalf of BOC-Karachi BOC-Chittagong because Banking Law [Section] 202-a prohibits the agency of a foreign banking corporation from accepting deposits within this state. Plaintiff claims that the account balances maintained by BOC-NY for BOC-Karachi and Chittagong may be characterized as "credit balances incidental to, or arising out of, the exercise of [ICBC's] lawful powers" as permitted by Section 202-a(1)(a). ICBC apparently takes the position that because it was not authorized to accept credit balances on behalf of its other branches, these balances evidence money held by ICBC's main branch in Taipei rather than money on deposit in New York. Even if accepted as true, this contention is legally insufficient to deprive plaintiff of its right to possession of the funds.

In the first instance, ICBC offers no support for its claim that an agency cannot maintain a credit balance for one of its branches (*see* Guaranty Trust Company of New York v. Lyon, *supra*). Moreover, even if the balances are construed as being owned by BOC-Taipei, the money would still be on deposit in Taipei on behalf of BOC-Karachi and BOC-Chittagong. As stated by ICBC in support of its previous argument, the main office of a bank and its branches are treated as single legal entity by our courts. Thus, for purposes

of this action, whether the money is actually "on deposit" in Taipei is a distinction having no practical effect.

Alternatively, ICBC seeks to establish that the 1971 assignment between BOC-Beijing and NBP is null and void. In support of this position, ICBC first contends that BOC-Beijing lacked that juridical corporate capacity to make a gift of any of its branches in 1971. This argument, being but another attempt to establish that BOC-Taipei was the true legal embodiment of the BOC chartered in 1912, is without merit.

ICBC then argues that the assignment is void by virtue of the FAC regulations.

The FAC regulations were promulgated on Dec. 17, 1950 by the United States Department of Treasury pursuant to the Trading with the Enemy Act (50 U.S.C. App. § 5(b)(1)) and Executive Order 9193, which transferred the president's authority to enact rules and regulations to the Secretary of the Treasury. The regulations were enacted for the purpose of curtailing all commercial transactions and property transfers between the United States and persons over whom it has jurisdiction and certain "designated foreign countries" and their nationals unless a license was first obtained from the secretary (31 C.F.R. § 500.201). The PRC was included as a designated foreign country (*Id.*). The terms "foreign country" and "national" were broadly defined to include all governmental entities, all citizens or residents thereof, and all businesses located in the country or substantially owned or controlled by a national of that country (31 C.F.R. §§ 500.301, 500.302). In prohibiting the transfer of any property subject to the jurisdiction of the United States, the regulations specifically included "[a]ll transfers of credit and all payments between, by, through, or to any banking institution . . ." (31 C.F.R. § 500.201(a)(1)), including, without limitation, "the taking, execution, or delivery of any assignment" (31 C.F.R. § 500.310).

The PRC undeniably had an interest in the BOC-Karachi and BOC-Chittagong funds on deposit with ICBC in 1949. It is equally clear that the deposits have their situs in New York. Indeed, ICBC concedes that if the deposits exist at all, they exist here. Thus, the transfer of the disputed funds in 1971 is within the scope of transactions prohibited by the FAC regulations (31 C.F.R. § 500.203).

Contrary to the argument advanced by ICBC, however, the FAC regulations do not provide this court with legal authority to declare the 1971 assignment null and void in its entirety. Although the United States had jurisdiction over the deposits of BOC-Chittagong and BOC-Karachi located in New York, these deposits are but a small portion of the assets, liabilities and undertakings assigned by BOC-Beijing to NBP under the 1971 agreement. The United States has no jurisdiction over the remainder of the transferred assets of BOC-Beijing located abroad and has no jurisdiction over Pakistan, China, or their respective banks (31 C.F.R. §§ 500.313, 500.325, 500.330). Thus, although the FAC regulations give the United States the

authority to declare the transfer of the assets located within our boundaries or transferred by persons over whom the United States may assert jurisdiction to be null and void, the regulations do not confer upon the courts the authority to declare void an assignment agreement made overseas between two sovereign countries with regard to assets held abroad. The cases relied upon by ICBC in support of its argument are not to the contrary (*see, e.g.*, Cheng Yih-Chun v. Federal Reserve Bank of N.Y., 442 F.2d 460 (2d Cir., 1971); Ferrera v. United States, 424 F. Supp. 888 (S.D. Fla., 1976)).

Furthermore, pursuant to the "act of state" doctrine, the courts of one sovereign state are precluded from reviewing the acts of another sovereign state done within its own territory (First National City Bank v. Banco National of Cuba, 406 U.S. 759, *rehearing den.* 409 U.S. 897 (1972)). Thus, acts of a sovereign are presumed to be valid by the courts of this country (*see generally*, Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir., 1975), *cert. den.* Barrett v. Zweibon, 425 U.S. 944 (1976)). This is true even though the PRC was not recognized by our government at the time of the transaction (*see generally*, Karl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena, 293 F. Supp. 892 (S.D.N.Y. 1968)). Thus, the "act of state" doctrine also compels the conclusion that the courts of this country are without jurisdiction to declare the 1971 assignment to be null and void.

Because the FAC regulations only block the transfer of funds within the United States as intended by the 1971 assignment, but do not effect the presumptive validity of the assignment itself, it follows that once the FAC regulations were amended on Jan. 31, 1980, to make freely alienable

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all property in which the PRC or one of its nationals had an interest, subject to certain limited exceptions not relevant here (31 C.F.R. § 505.10), the 1971 assignment could be fully effectuated by permitting the transfer of the funds previously blocked pursuant to Section 500.201. Furthermore, having determined that the 1971 assignment was never void in the first instance, Section 500.402 of the regulations, which prohibits the revival of previously void acts, is no bar to the transfer of previously blocked funds once the accounts were unblocked.

ICBC then seeks to overcome plaintiff's prima facie showing of entitlement to summary judgment by arguing that plaintiff, as the assignee of BOC-Beijing, is collaterally estopped by the Wells Fargo decision from relitigating the issue of BOC-Beijing's entitlement to funds on deposit in the United States. This argument is also unpersuasive.

In order to invoke the doctrine of collateral estoppel, there must first be "an identity of issue which has necessarily been decided in the prior action and is decisive of the present action . . . [T]here [also] must have been a full and fair opportunity to contest the decision now said to be controlling" (Schwartz v. Public Administrator of the County of Bronx, 24 N.Y.2d 65, 71 (1969)). In the Wells Fargo case, the issue to be determined was whether

BOC-Beijing or BOC-Taipei was entitled to the funds of the BOC on deposit with an American bank after the liberation of mainland China, at a time when the executive branch of our government chose to recognize the ROC as the "legal" China. In this action, the issue to be determined is whether ICBC is entitled to retain funds blocked as assets of China which were originally received as a credit for the account of what subsequently became a branch of the BOC choosing to ally itself with BOC-Beijing, after relations between the United States and the PRC were normalized. Although these issues may be related, they cannot be characterized as identical.

Moreover, it is well settled that collateral estoppel is a flexible doctrine which defies rigid or mechanical application (*Id.*). Applicability of the doctrine should be determined on a case-by-case basis, with the overall fairness of applying the doctrine being the crowning consideration (Sucher v. Kutscher's Country Club, 113 A.D.2d 928, 931 (2d Dept., 1985)). Changes in the law and changes in circumstances are among the factors to be considered in making such a determination (Gilberg v. Barbieri, 53 N.Y.2d 285, 292 (1981)); *see, e.g.*, Sucher, *supra*; R.G. Barry Corporation v. Mushroom Makers, Inc., 85 A.D.2d 544 (1st Dept., 1981); *accord* Costello v. Pan American World Airways, Inc., 295 F. Supp. 1384 (S.D.N.Y., 1969)).

The key factor relied upon in Wells Fargo was our nation's diplomatic recognition of the ROC to the exclusion of the PRC. Since the decision was rendered, however, our government has recognized the PRC and has repealed the regulation pursuant to which the PRC was declared to be an enemy country. Thus, in view of this basic change in both the law and the facts under which Wells Fargo was decided, the application of the doctrine of collateral estoppel to preclude NBP from litigating the issue now before the court would be inappropriate.

The Taiwan Relations Act (22 U.S.C. §§ 3301 et seq.) does not mandate a different conclusion. In seeking to accomplish its goal of continuing commercial, cultural and other relations between the United States and Taiwan (22 U.S.C. § 3301), that act did provide that the laws of United States would continue to be applied to Taiwan in the same manner as on Jan. 1, 1979. 22 U.S.C. § 3303(a). The term "laws of the United States" was defined to include "any statute, rule, regulation, ordinance, order or judicial rule of decision of the United States or any political subdivision thereof." 22 U.S.C. § 3314(1).

ICBC argues that these provisions require this court to give the Wells Fargo decision conclusive effect in this case. Because the Taiwan Relation Act was promulgated after the United States declared it would recognize the PRC as the sole legal government of China, there is no basis to support ICBC's contention that the act was intended to continue the pre-1978 status between the ROC and the United States.

NBP is entitled to summary judgment and is awarded possession of the BOC-Karachi and BOC-Chittagong funds on deposit with ICBC.

In asserting its claim for interest, NBP alleges that it may be entitled to interest since Aug. 31, 1971, when it became the legal owner of the funds, or from Dec. 17, 1950, when the funds first became blocked. There is, however, no statutory or contractual provisions entitling NBP to such relief. CPLR 5001(a) provides that interest is recoverable if a judgment is obtained because of a breach of performance of a contract, or because of an act or omission depriving a party of its property. There is no breach of contract claim asserted here. Because ICBC's actions in blocking the funds was mandated by federal law, an award of interest by virtue of such blocking would be inequitable.

As of March 2, 1979, however, the regulations pursuant to which the subject funds were blocked were amended to provide that all property being so held must be held in an interest bearing account (31 C.F.R. § 500.205). NBP is, therefore, entitled to recover interest since that date.

Accordingly, plaintiff's motion for summary judgment is granted; defendant's cross motion for the same relief is denied. The clerk is directed to enter judgment in favor of the plaintiff in the amount of $642,375.38, plus interest since March 2, 1979, costs and disbursements.

The foregoing shall constitute the order and decision of this Court.