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THE EURODOLLAR DEPOSIT MARKET: STRATEGIES FOR REGULATION

George H. Windecker, Jr.*

INTRODUCTION

The legal "independence" of the Eurodollar deposit market¹ might be inconsequential except for its large size² and unregulated character.³ In 1988, the Eurodollar deposit market approached \$4 trillion⁴, exceeding the domestic deposit market of the United States.⁵ Today, the Eurodollar market finances a growing volume of international trade, and fuels the economic growth of both developed and less developed countries.⁶ Eu-

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1. See MARCIA STIGUM, *THE MONEY MARKET* 46-47 (3d ed. 1990) (defining Eurodollars as any United States dollar-denominated deposit in a bank or bank branch located outside the territorial United States); GUNTER DUFFY & IAN H. GIDDY, *THE INTERNATIONAL MONEY MARKET* 7 (1978) (defining Eurodollars as United States dollars intermediated outside the United States). Commercial banks, central banks, large corporations, institutional investors, and wealthy individuals make up the depositors who place money in the Eurodollar market. STIGUM, *supra* at 46. Eurodollar deposits are for large sums, mostly exceeding US\$1 million, therefore, small investors are excluded. R.B. JOHNSTON, *THE ECONOMICS OF THE EURO-MARKET* 3 (1982). With some exceptions, Eurodollar deposits consist of time deposits for fixed terms ranging from one day to five years, although most deposits have terms of six months or less. STIGUM, *supra* at 47.

2. See STIGUM, *supra* note 1, at 218 *quoting* MORGAN BANK, *WORLD FINANCIAL MARKET* (1988) (estimating that the Eurodollar deposit market equalled two-thirds of the world's gross Eurocurrency liabilities of US\$4.8 trillion, or approximately US\$3.8 trillion at the end of 1988).

3. See STIGUM, *supra* note 1, at 222 (stating that Eurodollars remain outside the control of any central bank).

4. See *supra* note 2 (indicating that the size of the Eurodollar market in 1988 reached \$3.8 trillion in US currency).

5. See STIGUM, *supra* note 1, at 31 (indicating that the M2 monetary aggregate of the United States at the end of 1988 amounted to approximately US\$3 trillion). The M2 monetary aggregate equals the sum of all demand, savings, and time deposits in the United States economy. See *id.* at 30 (detailing the various components of the M2 monetary aggregate).

6. See Clive Cook, *Fear of Finance: A Survey of the World Economy*, *ECONOMIST*, Sept. 19, 1992, at 6, 9 (citing statistics that indicate the large size and scope of international capital markets and the importance of international capital flows for

rodollar deposits are essentially unregulated because they are not subject to reserve requirements, legal limits on the rate of interest paid on deposits, or the premiums normally assessed for depositors' insurance.⁷ The Eurodollar market's large size, and particularly its unregulated character, however, produce significant adverse consequences for the global economy.

The Eurodollar market creates greater volatility and instability in world currency markets.⁸ The large upsurge in currency trading, relative to central bank reserves, dramatically underscores the influence gained by private parties in the international money markets compared to that retained by the world's central bankers.⁹ For example, speculation against the pound sterling in September, 1992, created a monetary crisis that forced British authorities to withdraw the pound sterling from the European Exchange Rate Mechanism (ERM).¹⁰

trade and development, including statistics of annual capital-account balances for West Germany, Japan, and the United States).

7. See STIGUM, *supra* note 1, at 220-21 (noting the differences in the banking ground rules in the Eurodollar market as compared with United States banking rules).

8. See ANDREW CROCKETT, INTERNATIONAL MONEY 31-32 (1977) (stating that the Eurodollar market contributes to the volatility and insecurity of foreign currency markets by facilitating efficient transfers of large sums among currencies). See also HEATHER D. GIBSON, THE EUROCURRENCY MARKETS, DOMESTIC FINANCIAL POLICY AND INTERNATIONAL INSTABILITY 44 (1989) (explaining that Eurodollar markets allow speculators, in a floating rate regime, to arbitrage efficiently between money and foreign exchange markets, thereby undermining a central bank's use of monetary policy to pursue a target exchange rate).

9. See Allen R. Myerson, *Currency Markets Resisting Power of Central Banks*, N.Y. TIMES, Sept. 25, 1992, at A1 (noting that the US\$1 trillion traded daily in the international currency markets nearly equalled the world's foreign exchange reserves in June 1992). The capital available in the international money market now rivals that of the major nations' central banks. *Id.*; see also Allen R. Myerson, *Market Place: Agility Counts in Currency Chaos*, N.Y. TIMES, Sept. 17, 1992, at D1 (stating that private currency traders and investors, not central bankers, now control foreign currency markets); Walter Wriston, *The Decline of the Central Bankers*, N.Y. TIMES, Sept. 20, 1992, at 3-11 (explaining that when foreign exchange markets were small, a central bank's buy or sell transaction, which was large relative to the overall size of the market, effectively influenced exchange rates).

10. Tracy Corrigan & Emma Tucker, *The ERM and Britain: Outflow of Funds in Day Put at Pounds 10 Billion*, FIN. TIMES, Sept. 17, 1992, at 6. The European Exchange Rate Mechanism (ERM) is an agreement among ten European countries to stabilize their currencies' exchange rates relative to the German mark. Carl T. Hall, *Foreign Exchange Terms Explained*, S.F. CHRON., Sept. 22, 1992, at B2. Each of the ten ERM nations' central banks buys and sells its national currency to maintain an exchange rate within a predefined trading range against the German mark. *Id.* Specu-

Generally, the Eurodollar market weakens government control over the economy by allowing private parties to circumvent domestic monetary constraints.¹¹ For example, when private parties use the Eurodollar market to avoid these constraints, domestic monetary aggregates understate the volume of domestic credit, thereby reducing their reliability in guiding monetary policy.¹²

The Eurodollar market supports not only legitimate international business, but also illicit international activity, such as drug trafficking, arms smuggling, and influence peddling. The Bank of Credit and Commerce International (BCCI) scandal in 1991 illustrates the potential for harm and abuse within the Eurodollar market system.¹³ BCCI operated a clandestine "bank within a bank" for nearly a decade.¹⁴ This secret bank used the unregulated Eurodollar market to launder money derived from illegal drug trafficking.¹⁵ BCCI's secret bank also used the Euro-

lation against the British pound placed such a strain on the Bank of England's resources, that the bank ceased supporting the pound, allowing it to devalue and fall outside the range determined by the agreement. *Id.* The Bank of England expended between one-third and one-half of its US\$45 billion reserves to unsuccessfully defend the pound's exchange rate. Lisa Vaughan & Gail Counsell, *Inside Story: The Money Trade*, INDEPENDENT, Sept. 27, 1992, at 19. The Bundesbank, Germany's central bank, spent DM35 billion to support the pound during the September, 1992 crisis. Wolfgang Munchau, *Franco-German Move to Prevent Third ERM Realignment*, FIN. TIMES, Sept. 24, 1992, at 1. If the pound recovers from its fall in September, 1992, the Bank of England will have lost an estimated US\$1 billion defending it. *Realignment Merchants*, ECONOMIST, Sept. 26, 1992, at 94.

11. See GIBSON, *supra* note 8, at 47 (noting that controls such as reserve requirements, interest rates ceilings, and credit rationing do not extend to the Eurocurrency market).

12. *Id.* at 45.

13. See *All Things to All Men*, ECONOMIST, Jul. 27, 1991, at 67 (implicating BCCI's abuse of the Eurodollar market, for facilitating criminal activity by drug traffickers and arms smugglers, and for bribing government officials worldwide).

14. See *The Men Who Ran BCCI and Their Biggest Victim*, SUNDAY TIMES, Oct. 25, 1992, at 1 (noting that in 1991 Bank of England governor, Robin Leigh-Pemberton, told a select committee of members of the British Parliament that Swaleh Naqvi, a BCCI official, maintained 6,000 secret files giving the details of the "bank within a bank"). In 1990, BCCI's auditor, Price Waterhouse, first mentioned the secret "bank within a bank" when it disclosed to the Bank of England that BCCI concealed "a bad bank within a better bank." Patrick Weever, *City Focus on BCCI: Conning the Old Lady*, SUNDAY TELEGRAPH, Oct. 25, 1992, at 41.

15. See Michael Isikoff, *Federal Sting Exposes Drug Cartels' Money-Laundering Methods*, WASH. POST, Oct. 24, 1988, at A1 (explaining the apprehension and charging of BCCI officials in connection with a successful undercover sting operation designed to infiltrate the Medellin cocaine cartel's money laundering operations).

dollar markets to finance illegal arms sales.¹⁶ Finally, BCCI bribed various governments' officials worldwide with funds derived from the Euro-dollar markets.¹⁷

This large and important market for financing international trade and development would seem to attract efforts at regulation, because it also adversely affects the world's economic and social order. The Eurodollar market, however, remains largely unregulated. This article explores the unique character of the Eurodollar market and why it continues to avoid

BCCI employees were not only aware of the money derived from illegal drug trafficking, but also assisted undercover agents by suggesting alternative banking procedures utilizing the Eurodollar market to avoid detection by United States customs and law enforcement officials. Richard Donkin, *BCCI Staff Accused of Handling Cocaine*, FIN. TIMES, Oct. 14, 1988, at 28.

16. See Paul Abrahams & Neil Buckley, *BCCI Used London to Finance US Missiles for Iran*, FIN. TIMES, July 27, 1991, at 1 (explaining that BCCI's London branches financed the export of United States anti-tank missiles to Iran in 1985 during the Iran-Iraq war). Arthur Lisman, former chief counsel for the United States Senate's Iran-Contra committee, verified that BCCI transferred US\$10 million to pay for the secret sale of United States anti-tank missiles to Iran, which were part of the "Irangate" arms-for-hostage scandal. *Id.* BCCI opened a \$175,000 clean credit guaranty for Iran to initiate the transaction, and subsequently transferred the funds to various Midland bank accounts in London to pay for the sale of weapons. *Id.* BCCI was also knowingly involved in the transfer of funds from the Central Intelligence Agency to United States-backed guerrillas in Nicaragua and Afghanistan. *London Banks Tied to Iran Deal: Funds Used in Sale of U.S. Missiles to Tehran, Paper Says*, CHI. TRIB., July 28, 1991, at C6. BCCI also handled multi-million dollar transactions for illegal arms controlled by Palestinian terrorist Abu Nidal. William C. Rempel & Douglas Frintz, *BCCI's Arms Transactions for Arab Terrorists Revealed*, L.A. TIMES, Sept. 30, 1991, at A1. Ghassan Qassem, a 17 year veteran of BCCI, personal banker to Abu Nidal and a spy within BCCI for Western intelligence organizations, disclosed that BCCI officials, knowing that export documents were false, nevertheless secretly financed illegal sales of British weapons to Abu Nidal for resale to Iraq and other parties. *Id.* Forty-two BCCI accounts in British bank branches were associated with various arms merchants and terrorist groups. *Id.* BCCI handled millions of dollars of transactions between Abu Nidal and guerrillas in Peru. *Id.*

17. See Richard Donkin, *The BCCI Indictments: Global Trail of Bribery*, FIN. TIMES, July 30, 1992, at 6 (explaining that BCCI insiders, Agha Hasan Abedi and Swaleh Naqvi, bribed various finance ministers, national leaders, central bankers, and high officials at international and regional organizations, all to increase the flow of deposits to BCCI to continue covering up losses, and to conceal fraudulent transactions). The list of corrupted officials spans the globe, including central bankers from Senegal and Nigeria, the treasurer and other officials at the African Development Bank, import/export officials in the Ivory Coast, and the president and general manager of the central bank of Peru. *The BCCI Indictments: BCCI Web of Corruption*, FIN. TIMES, July 30, 1992, at 6.

regulatory efforts by national governments. The Comment further suggests transnational strategies for regulating the Eurodollar market in the best economic and social interest of world society. Part I of this Comment discusses the history and mechanics of the Eurodollar deposit market. Part II summarizes the leading cases and draws conclusions about the legal underpinnings of the Eurodollar deposit market. Finally, Part III examines how to regulate the Eurodollar deposit market to clarify debtor and creditor expectations, reduce global economic instability, and control abuse of the market to prevent illegal or criminal activity.

I. HISTORY AND MECHANICS OF THE EURODOLLAR DEPOSIT MARKET

Today's Eurodollar deposit market began in response to the hostility that existed between the United States and the communist-bloc nations in the aftermath of World War II.¹⁸ During the Cold War, communist nations placed their United States dollar holdings with banks outside the territorial United States to prevent the United States Government from confiscating or freezing those deposits.¹⁹

18. See STIGUM, *supra* note 1, at 207 (stating that the Eurodollar market resulted from the tensions arising during the Cold War); see also EUGENE SARVER, *THE EUROCURRENCY MARKET HANDBOOK* 28-30 (2d ed. 1990) (recognizing that the Eurodollar market originated out of the conflict and suspicion between Communist governments and the Western capitalist nations). But see, DUFFY & GIDDY, *supra* note 1, at 2 (characterizing some accounts of the origins of the Eurodollar market as a "financial machination" of the Russians, and disparaging it as one for those "who revel in international intrigue").

Following World War II and the Bretton Woods agreement of 1944, investors worldwide preferred United States dollars to British pounds. SARVER, *supra* at 28. When the pound experienced a thirty-percent devaluation in 1949, and subsequent smaller devaluations in the years thereafter, this instability highlighted the rising importance of the United States dollar for international transactions. *Id.* Due to the heightened attractions of the United States dollar in the early part of the 1950s, the Communist nations maintained substantial United States dollar deposits in New York. *Id.* The Soviets, for instance, earned dollars by exporting gold, diamonds, crude oil, and natural gas, and used those same dollars to import machinery and grain. *Id.*

19. See STIGUM, *supra* note 1, at 207 (advancing the view that, as Cold war tensions increased, the Soviets feared that the United States might block Soviet assets); JOHNSTON, *supra* note 1, at 10 (claiming that Eastern European banks were fearful of having their dollar balances in United States banks blocked and held as the result of Cold War extortions); SARVER, *supra* note 18, at 30 (arguing that the incidents such as the Berlin blockade, the *coup d'etat* in Czechoslovakia, and the Chinese civil war all lead the Soviet government to fear the possibility of funds being frozen

Thereafter, the Eurodollar deposit market grew rapidly.²⁰ During the 1960's, the United States Government implemented various capital controls that spurred the growth of the Eurodollar deposit market.²¹ In 1968-1969, when domestic interest rates rose above the level that banks were permitted to pay, both the banks and the depositors resorted to the Eurodollar market where rates remained unregulated.²² During the 1970s, a succession of dramatic increases in crude oil prices greatly increased both the supply of, and the demand for Eurodollars, further propelling the market's growth.²³

in United States banks). The Soviet Union, after consulting their merchant bankers in London, transferred their deposits from New York to Soviet-owned banks in Paris and London. *Id.* Dollars on deposit with Soviet-owned Banque Commercial pour l'Europe du Nord, known by its telex name as EUROBANK, came to be called Eurodollars. *Id.*

20. See SARVER, *supra* note 18, at 10-11 (noting that the Eurodollar markets grew at better than twenty-five percent per annum through the 1970s, and quadrupled in size between 1977 and 1987).

21. See STIGUM, *supra* note 1, at 210 (explaining that capital export controls enacted in the United States promoted the growth and development of the Eurodollar market). In the 1960's, the United States passed three laws which specifically improved its balance of payments and restricted capital flows: 1) the Interest Equalization Tax of 1964, which discouraged foreign borrowers from raising money in the domestic money markets; 2) the Foreign Credit Restraint Program of 1965, which limited American bank loans to foreign borrowers; and 3) the Foreign Investment Program of 1968, which restricted American corporations from using domestic dollars to fund foreign investments. *Id.* All these measures substantially increased the demand for Eurodollars, thereby promoting the growth of the Eurodollar deposit market. *Id.*

22. STIGUM, *supra* note 1, at 209-20; see GIBSON, *supra* note 8, at 13-14 (explaining that Regulation Q, which placed a ceiling on domestic deposit rates, stimulated the growth of the Eurodollar market).

23. GIBSON, *supra* note 8, at 16; see JOHNSTON, *supra* note 1, at 24-25 (citing statistics on international bank lending between 1974 and 1980 illustrating the rapid growth in the Eurodollar market due to the 1973 and 1978 oil crises). In 1973, the Organization for Petroleum Exporting Countries (OPEC) succeeded in quadrupling the price of crude oil. *Id.*

Oil exporting countries suddenly found themselves with large balance of payments surpluses that they were unable to use immediately, and that they subsequently deposited in the Eurodollar market. JOHNSTON, *supra* note 1, at 26. Countries with oil-export surpluses were attracted to the Eurodollar market, both because it offered higher yields than the domestic United States dollar market, and because there were political benefits to depositing funds in Europe rather than in the United States. GIBSON, *supra* note 8, at 16. The banks receiving these Eurodollar deposits efficiently redistributed these oil-export surpluses to oil-importing countries through syndicated Eurodollar loans, thereby spreading country lending risks throughout the international banking system. JOHNSTON, *supra* note 1, at 26.

Eurodollar deposits are transacted either as call deposits,²⁴ interbank placements,²⁵ or Eurodollar certificates of deposit (Euro CDs).²⁶ Banks use the Eurodollar market to profit on interest rate movements,²⁷ arbitrage between foreign exchange and money markets,²⁸ satisfy reserve requirements,²⁹ and fund Eurodollar loans.³⁰ Banks pay funds in the Eurodollar market primarily through the Clearing House Interbank Payments System (CHIPS)³¹ or Fedwire.³² Banks, but to a lesser extent,

24. See STIGUM, *supra* note 1, at 225, 1209 (defining a Eurodollar call deposit as an account which is normally placed by customers of the bank, and not by another bank, for which the depositor must give 24 hours notice of withdrawal). A call account may be for same-day value, seven-day notice, or some other period, usually less than one month. *Id.* Approximately ten percent of all Eurodollar deposits are placed in call deposit accounts. *Id.*

25. See STIGUM, *supra* note 1, at 225-26 (defining an interbank placement as a Eurodollar deposit placed by one bank in another for a fixed time period). The interbank placement market may have accounted for US\$2.4 trillion of the nearly US\$3.8 trillion Eurodollar deposits in 1988. *Id.* at 218, quoting MORGAN BANK, WORLD FINANCIAL MARKET (1988). Most interbank placements are for tenors of six months or less. *Id.* at 47.

26. See STIGUM, *supra* note 1, at 228-29, 1210 (defining a Eurodollar certificate of deposit as a negotiable Eurodollar time deposit usually sold in large denominations by banks to corporations, institutional investors, and other banks). Euro CDs have the advantage over direct Eurodollar placements and call deposits in that the Euro CDs can be sold before maturity to another party, giving the instrument greater liquidity. *Id.* at 228. Nevertheless, the Euro CD market is much smaller than the Eurodollar interbank placement market. *Id.* at 229.

27. See SARVER, *supra* note 18, at 335 (claiming that interbank deposits are created in part to speculate on future interest rate movements).

28. See HEINZ REIHL & RITA M. RODRIGUEZ, FOREIGN EXCHANGE & MONEY MARKETS 155-60 (1983) (explaining that profits are earned from arbitrage between foreign exchange and money markets when a disequilibrium exists between the rates in these two markets). This arbitrage, called a covered interest arbitrage, is one of the ways a commercial bank's treasury operation earns a profit trading currencies and deposits. *Id.* at 155.

29. See STIGUM, *supra* note 1, at 200-01 (explaining that when a foreign branch of an American bank receives a Eurodollar deposit, this increases the parent bank's reserves held with the Federal Reserve Bank).

30. SARVER, *supra* note 18, at 335.

31. See STIGUM, *supra* note 1, at 893-95 (stating that the Clearing House Interbank Payments System (CHIPS) in New York processes thousands of Eurodollar transfers daily). CHIPS automated the receiving, clearing, and settling of these interbank transfers, and handles as many as 150,000 transactions for a total value of US\$750 million daily. *Id.* at 894-95.

As foreign banks originally did not have reserve accounts with the Federal Reserve Bank of the United States, they cleared their United States domestic dollar

also transfer funds in-house,³³ draw banker's drafts,³⁴ issue banker's payment orders,³⁵ pay funds through offshore clearing arrangements,³⁶ or issue certificates of deposit.³⁷ Upon payment Eurodollars never actually leave the United States.³⁸ Rather, reserves held by banks with the Federal Reserve Bank of the United States are shifted from the account of one bank to that of another.³⁹

and Eurodollar payments through their correspondent banks in New York. *Id.* at 205. Most foreign banks continued clearing their Eurodollar transactions through their New York correspondents even after they opened reserve accounts at the Federal Reserve Bank. *Id.*

32. See STIGUM, *supra* note 1, at 1216 (defining Fedwire as a computer system linking member banks to the Federal Reserve Bank that is used for making interbank payments of Federal Reserve funds and payments for Treasury and agency securities). Fedwire routinely handles US\$300 to US\$400 billion, daily, in transfers between member banks. *Id.* at 900. Fedwire clears only one to two percent of all Eurodollar transactions, however, because almost all the remaining transactions are cleared through CHIPS. *Id.* at 888.

33. See STIGUM, *supra* note 1, at 898 (defining transfers in-house, or book transfers, as a transfer of funds from one account to another within the same bank by internal bookkeeping entries).

34. See STIGUM, *supra* note 1, at 893-94 (defining a banker's draft as an official check issued by a bank); *Libyan Arab Foreign Bank v. Bankers Trust Co.*, 1989 Q.B. 728, 752 (1987) (defining a banker's draft as a bank's promissory note issued in favor of a certain beneficiary).

35. See *Libyan Arab*, 1989 Q.B. at 753 (defining a banker's payment order as a promissory note issued by one bank directly in favor of another bank).

36. See *id.* at 753-54 (explaining that offshore clearing house arrangements include procedures between banks located outside the territorial United States in which they receive, clear, and settle payments for Eurodollars, or other Eurocurrencies). The London-based United States dollar clearing is limited to relatively small size transactions, maximum US\$50,000, which the clearing house can process on behalf of member banks. *Id.* at 754.

37. See *supra* note 26 (describing the issuance and advantages of Eurodollar certificates of deposit).

38. STIGUM, *supra* note 1, at 200.

39. STIGUM, *supra* note 1, at 202. For example, if Exxon transferred funds from Morgan Bank in New York, and placed those funds on deposit with Citibank's London branch, Exxon has created a Eurodollar deposit. *Id.* at 200. Citibank, as with all United States banks, has only one reserve account with the Federal Reserve Bank, but maintains separate day-to-day accounting records for each foreign branch. *Id.* at 200; [Current] Fed. Banking L. Rep. (CCH) ¶ 98,732 (letter ruling dated May 13, 1981). When Citibank London received the funds it records a Eurodollar deposit liability in favor of Exxon, and a "due from" its New York head office. STIGUM, *supra* note 1, at 201. Citibank New York records a "due to" liability to its London branch, and a corresponding increase in its reserve account with the Federal Reserve Bank. *Id.* at

The Federal Reserve Bank generally exempts Eurodollar deposits from domestic reserve requirements.⁴⁰ Eurodollar deposits also avoid insurance charges assessed by the Federal Deposit Insurance Corporation⁴¹ and interest rate restrictions.⁴² The government adopted these measures, in part, to allow United States banks to compete in the Eurodollar market on an equal basis with the international banks of other nations.⁴³

Telephone conversations and telex confirmations facilitate the daily trading of large sums of Eurodollars in the interbank market.⁴⁴ Typical-

202. When Exxon orders the withdrawal of funds to be transferred to Citibank in London, Morgan Bank records a decrease in its demand deposit liability to Exxon, and consequently, a decrease in its reserve account with the Federal Reserve Bank. *Id.* at 201.

The net result of creating the Eurodollar time deposit has been to shift reserves from the account of Morgan Bank to the account of Citibank at the Federal Reserve Bank. *Id.* at 202. Thus, regardless of who makes the deposit, which bank receives the funds, and where the receiving bank is located, the actual United States dollars never leave the United States. *Id.*

40. See Reserve Requirements of Depository Institutions, 12 C.F.R. § 204.1(c)(5) (1993) (noting that reserve requirements are not assessed on deposits of American banks when the deposit is payable only at a foreign branch of that bank). The exemption applies to deposits of residents in the amount of US\$100,000 or more and the deposits of non-residents for any amount, as long as the deposit is payable only at the foreign branch of an American bank. 12 C.F.R. § 204.2(t) (1993).

The Federal Reserve Bank requires banks to hold a percentage of their total deposits on reserve in accounts at the Federal Reserve Bank; these reserves may not be lent out to customers. STIGUM, *supra* note 1, at 1229. The Federal Reserve Bank uses reserve requirements to expand or contract bank credit in the economy, thereby allowing it as the nation's central bank, to indirectly control macroeconomic performance. DUFFY & GIDDY, *supra* note 1, at 132-135.

41. STIGUM, *supra* note 1, at 221.

42. See STIGUM, *supra* note 1, at 221-22 (stating that as the Eurodollar market exists outside the control of any central bank, there are no limits or restrictions on the interest rate set for Eurodollar deposits).

43. See 12 U.S.C. § 604 (1989) (requiring that every national banking association operating foreign branches maintain independent accounts for their foreign branches and, through this bookkeeping provision, create the inference of equalizing competition).

44. See *supra* note 25 (estimating that the Eurodollar time deposits outstanding between banks at year end 1988 was US\$2.4 trillion); *Libyan Arab Foreign Bank v. Bankers Trust Co.*, 1989 Q.B. 728, 741 (1987) ((citing Memorandum of Law of the Federal Reserve Bank of New York (*amicus curiae*), *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 612 F. Supp. 351 (S.D.N.Y. 1985)) (indicating that in 1985 approximately ninety percent of the US\$400 billion daily clearing volume of CHIPS settled Eurodollar transactions); Peter S. Smedresman & Andreas F. Lowenfeld, *Eurodollars, Multinational Banks, and National Laws*, 64 N.Y.U. L. REV. 773, 740 (1989) (explaining that bank money market traders and money brokers negotiated Eurodollar in-

ly, one bank's money market trader contacts a Eurodollar broker to inquire about the rates for placing or taking Eurodollar deposits.⁴⁵ After the broker quotes the going rate and identifies a potential counter party in general terms, the bank trader orally accepts the bid and the potential counterparty.⁴⁶ Thereafter, the broker reveals the exact identity of the counterparty, and the broker then contacts the parties by telex to conclude the transaction.⁴⁷ Ultimately, the parties themselves confirm the transaction by mailing written statements.⁴⁸

These simple confirmations did not, at least until 1986,⁴⁹ specify either governing law or the place of repayment or collection.⁵⁰ Although in many domestic markets a set of "rules and regulations" govern bank deposits,⁵¹ no such system controls deposits in the interbank Eurodollar market.⁵² Banks contract among themselves for the placing and taking of millions of dollars in deposits with little more documentation than an ordinary sales slip.⁵³

terbank deposits by telephone, evidenced their agreement by an exchange of telexes, and confirmed it by written advice mailed subsequent to the transaction).

45. Charles J. Scanlon, *Definitions and Mechanics of Eurodollar Transactions*, in THE EURODOLLAR 16, 24 (Herbert V. Prochnow ed., 1970) (offering a hypothetical example explaining the mechanics of interbank Eurodollar transactions).

46. *Id.* at 24-25.

47. *Id.* at 25.

48. *Id.*

49. See *infra* note 122 (noting that in 1986 Manufacturers' Hanover adopted wording specifying English law to govern disputes).

50. See Smedresman & Lowenfeld, *supra* note 44, at 740 (stating that negotiations between bank officers for Eurodollar deposits concerned only interest rate and maturity, while country risk, exchange rate risk, and credit risk were controlled by limits set by bank management). But see *Wells Fargo Asia, Ltd. v. Citibank, N.A.*, 612 F. Supp. at 353 (indicating that negotiable deposits, such as Eurodollar certificates of deposit, clearly stated which country's laws governed the deposit, and where the deposit was located in order to give proper notice to a potential transferee).

51. See U.C.C. § 4-103 (1987) (providing for banks to set forth the manner of making deposits, paying interest, processing checks, and other banking mechanics).

52. See Smedresman & Lowenfeld, *supra* note 44, at 737, 740 (observing that few of the UCC rules apply to international transactions, and that the Eurodollar interbank deposit market reflects one of extreme informality with respect to written documentation).

53. See, e.g., *Wells Fargo Asia, Ltd. v. Citibank, N.A.*, 695 F. Supp. 1450, 1451-52 (S.D.N.Y. 1988) (quoting the written confirmation for an interbank Eurodollar deposit that stated that the parties specified only the manner and place of repayment).

II. THE LEGAL UNDERPINNINGS OF THE EURODOLLAR DEPOSIT MARKET

The Eurodollar deposit market has spawned lawsuits, primarily when war, revolution, or other national crises interrupt international monetary flows.⁵⁴ Depositors have sued their international bankers when Castro seized power in Cuba,⁵⁵ when the North Vietnamese defeated the South Vietnamese,⁵⁶ when the United States froze the assets of Iran⁵⁷ and Libya,⁵⁸ and when Mexico⁵⁹ and the Philippines⁶⁰ imposed exchange

54. John E. Hoffman, Jr. & Rachel E. Deming, *The Role of the U.S. Courts in Transnational Flow of Funds*, 17 J. INT'L L. & POL. 493, 496 (1985).

55. See, e.g., *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (involving a suit brought by the state-owned Cuban bank against an American bank to recover an unpaid letter of credit); *Banco Nacional de Cuba v. Chase Manhattan Bank N.A.*, 658 F.2d 875 (2d Cir. 1981) (reviewing claims based on expropriation of property following the Cuban revolution); *Banco Nacional de Cuba v. Chemical Bank New York Trust Co.*, 658 F.2d 903 (2d Cir. 1981) (holding that the act of state doctrine bars courts from examining the validity of takings claims against a foreign sovereign but does not bar inquiry into the validity of extra-territorial takings).

56. See *Vishipco Line v. Chase Manhattan Bank N.A.*, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982) (involving a suit by Vietnamese corporations against the bank which closed its branch in Vietnam following the communist takeover); *Trinh v. Citibank, N.A.*, 850 F.2d 1164 (6th Cir. 1988).

57. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (holding that the President was authorized, under the International Emergency Economic Powers Act, to nullify attachments of property in which Iran held an interest and to order transfer of Iranian assets); *Chase Manhattan Bank, N.A. v. State of Iran*, 484 F. Supp. 832 (S.D.N.Y. 1980).

58. See *Libyan Arab Foreign Bank v. Bankers Trust Co.*, 1989 Q.B. 728 (1987) (analyzing the claims of the Libyan bank arising from President Reagan's issuance of an order blocking all property and interest in property of the Libyan government, and its agencies, then and thereafter within the United States); *Libyan Arab Foreign Bank v. Manufacturer's Hanover Trust Co.*, [1989] 1 Lloyd's Rep. 608 (Q.B.).

59. See *Grass v. Credito Mexicano, S.A.*, 797 F.2d 220 (5th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987) (involving a depositor who brought a claim against a Mexican bank after the bank paid principal and interest in pesos, at an official rate, rather than in dollars as agreed by the parties following the Mexican government's freezing of all foreign currency accounts and ordering interest to be paid in pesos); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985); *Braka v. Bancomer, S.A.*, 762 F.2d 222 (2d Cir. 1985).

60. *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 660 F. Supp. 946 (S.D.N.Y. 1987), *on remand*, 695 F. Supp. 1450 (S.D.N.Y. 1988), *aff'd*, 852 F.2d 657 (2d Cir. 1988), *remanded* 495 U.S. 660 (1990), *aff'd on remand*, 936 F.2d 723 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 2990 (1992).

controls to stem the outflow of United States dollars from their economies. The key issue underlying all these cases focuses on whether the bank or the depositor bears the sovereign risk⁶¹ associated with a Euro-dollar deposit.⁶² Efforts at rationalizing these decisions and in determining how to allocate risks between debtor and creditor in the Eurodollar deposit market prove difficult.⁶³ Nevertheless, these decisions illuminate the legal structure of the Eurodollar deposit market.

A. *WELLS FARGO ASIA, LTD. v. CITIBANK, N.A.*

Although many lawsuits involve deposits in foreign branches of American banks,⁶⁴ few of these involve Eurodollar deposits among banks or between banks and multinational companies.⁶⁵

One important case involving international banks, *Wells Fargo Asia Ltd. v. Citibank, N.A.*, occurred in 1983 when the Philippines experi-

61. See REIHL & RODRIGUEZ, *supra* note 28, at 389 (defining sovereign risk, also known as cross-border risk or political risk, as the risk that a government might be unable due to a shortage of foreign exchange reserves, or unwilling for political reasons to allow a national to convert local currency into foreign currency for meeting its foreign currency obligation). Depositors in the Eurodollar market concern themselves with the sovereign risk of: 1) the country of origin of the bank in which the depositor places his money, 2) the country issuing the currency in which the deposit is denominated, and 3) the country of location of the bank branch in which the depositor places his money. STIGUM, *supra* note 1, at 226-227.

62. See Hoffman & Deming, *supra* note 54, at 497 (stating that the fundamental issue in these deposit cases is the allocation of risks between the parties); Smedresman & Lowenfeld, *supra* note 44, at 735 (stating that allocating the risks associated with devaluations, freezes of assets, expropriations and debt moratoriums, all aspects of political risk, marks the key issue between bank and depositor).

63. See Smedresman & Lowenfeld, *supra* note 44 (examining numerous court cases and concluding that courts should allocate sovereign risk in the Eurodollar deposit market to depositors and not banks); Hoffman & Deming, *supra* note 54 (concluding that courts allocate sovereign risk between depositors and banks based primarily on the parties' expectations).

64. See *supra* notes 55-60 (citing cases involving disputes concerning deposits in foreign branches of American banks, or in foreign banks).

65. See, e.g., *Chase Manhattan Bank, N.A. v. State of Iran*, 484 F. Supp. 832 (S.D.N.Y. 1980) (involving deposits of a state-owned enterprise); *Libyan Arab Foreign Bank v. Bankers Trust Co.*, 1989 Q.B. 728 (1987) (involving call deposits of a subsidiary of the Central Bank of Libya); *Libyan Arab Foreign Bank v. Manufacturer's Hanover Trust Co.*, [1989] 1 Lloyd's Rep. 608 (Q.B.) (involving call deposits of a subsidiary of the Central Bank of Libya); *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 660 F. Supp. 946 (S.D.N.Y. 1987), *on remand*, 695 F. Supp. 1450 (S.D.N.Y. 1988) (involving an interbank deposit of a private commercial bank).

enced a liquidity crisis and temporarily blocked the repayment of foreign currency debts.⁶⁶ In *Wells Fargo*, an American bank for the first time argued that local law in a foreign country prohibited it from repaying a Eurodollar deposit to an offshore depositor.⁶⁷

In October 1983, the Philippine government devalued the peso by twenty-two percent,⁶⁸ suspended principal repayments on its foreign currency debt for ninety days,⁶⁹ and imposed exchange controls on foreign currency leaving the Philippines.⁷⁰ These foreign exchange controls restricted Philippine banks and branches of foreign banks operating in the Philippines from repaying their foreign currency deposits.⁷¹

Citibank, N.A. (Citibank) had accepted two deposits of one million United States dollars from Wells Fargo Asia, Ltd. (Wells Fargo) that were to mature in December, 1983.⁷² After the Philippine government imposed exchange controls, Citibank informed Wells Fargo that it would repay these deposits when the Central Bank of the Philippines permitted it to do so.⁷³ Although the Central Bank of the Philippines eventually allowed Citibank to repay a part of these offshore obligations,⁷⁴ because Citibank did not fully repay Wells Fargo in a timely manner, Wells

66. 660 F. Supp. 946 (S.D.N.Y. 1987); see *supra* note 60 (detailing subsequent history of the case).

67. Hoffman & Deming, *supra* note 54, at 502.

68. *Manila in Need of Long-Term Loans*, N.Y. TIMES, Oct. 11, 1983, at D1.

69. See Kenneth N. Gilpin, *Philippine Debt Delay Is Granted*, N.Y. TIMES, Oct. 15, 1983, at 35 (reporting that the commercial bank advisory committee had agreed to the Philippine government's request for a ninety day moratorium on principal debt repayments).

70. *Opposition Group Rejects Marcos Proposal on Talks*, WASH. POST, Oct. 18, 1983, at A9 (reporting that the Central Bank of the Philippines had directed Philippine banks to stop payment on their foreign currency obligations for ninety days). The Philippine government imposed foreign exchange controls to check the flight of capital which followed the assassination of opposition leader, Benigno Aquino, as he deplaned in Manila on August 21, 1983. Colin Campbell, *Bankers Say Marcos Must Act Soon*, N.Y. TIMES, Oct. 29, 1983, at 35.

71. Memorandum to Authorized Agent Banks No. 47 (Oct. 15, 1983) [hereinafter "MAAB No. 47"], quoted in *Citibank, N.A. v. Wells Fargo Asia Ltd.*, 495 U.S. 660, 665 (1990). The Philippine government issued order MAAB No. 47 requiring all banks and branches of foreign banks in the Philippines to seek Central Bank approval prior to remitting any foreign currency funds offshore. *Id.*

72. *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 660 F. Supp. 946, 947 (S.D.N.Y. 1987).

73. *Id.*

74. See *id.* (indicating that the Philippine Central Bank eventually gave Citibank approval to repay \$934,000 out of the \$2 million originally owed to Wells Fargo).

Fargo brought suit in New York.⁷⁵

On a motion for summary judgment, Wells Fargo argued that New York law governed the deposit because Citibank's telex confirmation of the deposit specified repayment in New York.⁷⁶ Wells Fargo also argued at trial that even if Philippine law did govern the debt, Citibank remained unexcused from repaying the deposit on maturity.⁷⁷ After accepting the parties' invitation to apply Philippine law, the district court held that Citibank was obligated to repay deposits placed in its Manila branch from worldwide assets.⁷⁸ The court concluded that Philippine foreign exchange controls in no way prevented Citibank from repaying deposits as long as it used assets of its non-Philippine branches.⁷⁹

Citibank appealed the district court's ruling to the Court of Appeals for the Second Circuit.⁸⁰ On remand, the district court found New York to have the greater interest in the controversy, thus, it ruled, New York law governed.⁸¹ The court reasoned that New York had the dominant

75. *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 612 F. Supp. 351 (S.D.N.Y. 1985).

76. *See Wells Fargo*, 612 F. Supp. at 357 (indicating that the place of performance, and therefore situs of the deposit, was in New York because the confirmation slip required repayment of the Eurodollar deposit there).

77. *Wells Fargo*, 660 F. Supp. at 947.

78. *Id.* at 950.

79. *Id.* at 948-49. The Philippine law expert for Wells Fargo argued as follows: 1) MAAB No. 47 does not apply to the repayment of deposits with non-Philippine assets for branches of non-Philippine banks such as Citibank; 2) Citibank may repay Wells Fargo's deposit from assets located at its non-Philippine branches without prior approval from the Central Bank of the Philippines; 3) branches of banks are not separate legal entities under Philippine law so that obligations incurred by a branch are obligations of the bank as a whole; 4) the obligation of a bank under a deposit contract is a general debt of the bank under Philippine law, and may be repaid out of any of the bank's assets; and therefore 5) Citibank's obligation under Philippine law is not limited to assets of its Manila branch. *Id.*

80. *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 847 F.2d 837 (2d Cir. 1988) (remanding the case back to federal district court).

81. *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 695 F. Supp. 1450, 1453-54 (S.D.N.Y. 1988). The court first determined which conflict of laws rule applied to this case. *Id.* Because the court asserted jurisdiction on both diversity and federal question grounds, the New York conflict of laws doctrine and the federal common law rules concerning choice of law controlled the case. *Id.* at 1454. The court concluded that under either approach, the law of the jurisdiction which had the greatest interest in the litigation should be applied. *Id.*

By finding that New York law controlled, the court avoided applying the act of state doctrine. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964) (holding that United States courts will not inquire into the validity of public acts committed by a recognized foreign sovereign within its own territory). The classic act

interest in the controversy because New York is a major financial center and serves as the chief clearinghouse for United States dollar financial transactions.⁸² It also reasoned that New York law should apply to Eurodollar transactions so depositors and banks can avoid the cost and uncertainty of determining how another country's law affects repayment of Eurodollar deposits.⁸³

Under New York law, the court held that a bank's home office is liable for the obligations of its branch offices.⁸⁴ The court stated, however, that a foreign government's expropriation of a depositor's assets would function as a compulsory assignment of the depositor's rights and thus would serve to discharge the bank's debt to the depositor.⁸⁵ When,

of state doctrine rested on the principle of comity and required sovereign nations to respect the independence of every other sovereign state, and for courts to respect the acts of foreign sovereigns taken within their territories. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). The Supreme Court shifted the act of state doctrine's basis in *Sabbatino* by grounding the doctrine on the constitutional principle of separation of powers. The court required that the judiciary not interfere in the executive's conduct of foreign policy, even if there had been a definite transgression of international law. *Sabbatino*, 376 U.S. at 423-24, 430-33. In applying the act of state doctrine, the court determines where the deposit is located, which law governs the deposit, and whether the decree or event in the foreign country affects the deposit in the dispute. Margaret E. Tahyar, Note, *The Act of State Doctrine: Resolving Debt Situs Confusion*, 86 COLUM. L. REV. 594, 611-13 (1986).

82. *Wells Fargo*, 695 F. Supp. at 1454. The court determined from the confirmation slips that repayment was required in New York. *Id.* at 1452. New York law was deemed to apply under choice of law rules both because repayment was to be performed in New York, and because New York had an overriding interest as a major financial center in protecting the expectations of the parties to the deposit contract. *Id.* at 1454 (citing *J. Zeevi and Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.*, 333 N.E.2d 168, 172-73 (N.Y. 1975)).

83. *Id.* at 1454.

84. *Id.* But see *Chrzanowska v. Corn Exch. Bank*, 159 N.Y.S. 385, 388 (1916), *aff'd*, 122 N.E. 877 (N.Y. 1919) (holding that a bank is not required to honor a draft drawn on another branch of the same bank). For its decision, the court relies on the separate entity doctrine which allows a wholly incorporated branch of a bank to be treated as a separate person for certain legal purposes. *Id.* Courts however often make exceptions to the separate entity doctrine. See *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854, 862-63 (2d Cir. 1981) (finding that the United States home office of the Chase Manhattan Bank was liable for the deposits of its Vietnam branch when the branch closed prior to the fall of Saigon).

85. *Wells Fargo*, 695 F. Supp. at 1454-55. When a foreign sovereign confiscates the assets of a foreign branch of an American bank, the act of state doctrine applies, and requires a United States court to restrain itself from reviewing the act of the foreign sovereign that compelled the assignment of the deposit. *Id.* See *supra* note 81

however, the foreign sovereign did not expropriate, but merely conditioned the repayment of deposits on Central Bank approval, the worldwide assets of the bank remained available to satisfy the depositor's demand for repayment.⁸⁶ Citibank's impossibility defense failed because Citibank had not sought the Philippine Central Bank's approval to repay Wells Fargo's debt from the assets of its non-Philippine branches.⁸⁷

Throughout the litigation, Citibank urged the courts to find that parties who deposit funds at a foreign branch of an American bank assume the risk that the foreign government may later restrict withdrawals.⁸⁸ Citibank presented evidence that Wells Fargo had assumed the risk of Philippine sovereign interference with the deposit repayment in exchange for a higher interest return,⁸⁹ and therefore, the deposit was redeemable only at Citibank's Manila office and was subject to Philippine law.⁹⁰ In support of a federal policy placing sovereign risk on depositors, Citibank cited federal banking rules providing that banking reserves were not required on deposits payable only outside the United States.⁹¹ Citibank

(defining and discussing the implications of the act of state doctrine in cases regarding foreign deposits).

86. *Wells Fargo Asia*, 695 F. Supp. at 1455.

87. *Id.* (asserting that a depositor's demand on a bank to repay a deposit might be frustrated, thereby allowing an impossibility defense for the bank.)

88. *See Wells Fargo Asia Ltd. v. Citibank, N.A.*, 612 F. Supp. 351, 353, 356 (S.D.N.Y. 1985) (relying on the expert testimony of Ian Giddy, a professor of international finance at the New York University Graduate School of Business, to support the notion that the depositor assumes the sovereign risk associated with the country where the deposit is placed).

89. *Wells Fargo Asia, Ltd. v. Citibank, N.A.*, 660 F. Supp. 946, 950 (S.D.N.Y. 1987) (stating that the higher interest paid on Eurodollar deposits located in the Philippines, and the exemption of Eurodollar deposits from reserve requirements under Regulation D, indicates that Wells Fargo willingly assumed the sovereign risk associated with its deposit in the Philippines). *See supra* note 40 (discussing how Regulation D affects Eurodollar deposits); *supra* note 61 (defining sovereign risk, and identifying those sovereign risks associated with any Eurodollar deposit).

90. *Wells Fargo*, 612 F. Supp. at 353, 356. The argument concerning sovereign risk was rejected at oral argument prior to the district court's trial decision. *Wells Fargo*, 660 F. Supp. at 950.

91. *See Wells Fargo*, 660 F. Supp. at 950 (noting that Treasury Regulation D exempts from reserve requirements deposits payable at foreign branches of American banks that are not carrying the specific guaranty of repayment in the United States); *supra* note 40 (explaining that Eurodollars are exempt from reserve requirements under Regulation D); *supra* note 43 and accompanying text (explaining that Eurodollars are exempt from reserve requirements to allow American banks to compete on a equal basis with other foreign banks in the Eurodollar market).

also cited its own "Terms and Conditions" sent to Wells Fargo after accepting its funds, which stated that a customer placing a deposit in one of Citibank's foreign branches assumed the risk that the foreign country may restrict withdrawals.⁹² These arguments failed to persuade the court, which held that depositors do not assume sovereign risk absent clear and express agreement.⁹³

B. *LIBYAN ARAB FOREIGN BANK V. BANKERS TRUST CO.*

Disputes over Eurodollar deposits also arose between certain American banks and the Libyan Arab Foreign Bank, a bank owned by the Libyan government.⁹⁴ *Libyan Arab Foreign Bank v. Bankers Trust Co.* tested whether the British courts would apply United States law to Eurodollar deposits located outside the United States consistent with *Wells Fargo*.⁹⁵

In late 1985, the United States and Libya approached open conflict because of Libya's alleged support of international terrorists.⁹⁶ On Janu-

92. *Wells Fargo*, 612 F. Supp. at 354. The "Terms and Conditions" provided in part: "The bank shall have no responsibility for or liability to the undersigned [depositor] for . . . the unavailability of such funds due to restrictions on convertibility, requisitions, involuntary transfers, distraints of any character . . . or other similar causes beyond the bank's control." *Id.*

93. See *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 695 F. Supp. 1450, 1452-53 (S.D.N.Y. 1988) (finding that the deposit contract failed to specify the place of collection, and that the court could find no custom or usage in the Eurodollar deposit market on which to imply such a term).

94. See *Libyan Arab Foreign Bank v. Bankers Trust Co.*, 1989 Q.B. 728 (1987); *Libyan Arab Foreign Bank v. Manufacturer's Hanover Trust Co.*, 1989 1 Lloyd's Rep. 608 (Q.B.).

95. See *Libyan Arab*, 1989 Q.B. at 761 (citing G.M. GOODE, PAYMENT OBLIGATIONS IN COMMERCIAL AND FINANCIAL TRANSACTIONS, 120 (1983)) (suggesting that British courts would give extraterritorial effect to a United States executive order freezing a foreign government's Eurodollar deposits because Eurodollar payments are necessarily made through the international clearing system in the United States).

96. See *President's News Conference on Foreign and Domestic Issues*, N.Y. TIMES, Jan. 8, 1986, at A6 (asserting that Libya's publicly proclaimed material support of international terrorist groups who had attacked United States citizens directly involved Libya in acts of armed aggression against the United States). In December 1986, terrorists groups, believed to be receiving assistance from Libya, attacked El Al Israel airline counters in Rome and Vienna, where they killed eighteen and wounded more than one hundred. *U.S. Accuses Libya of Aiding Gunmen in Airport Raids*, N.Y. TIMES, Dec. 31, 1985, at A1. The United States believed that Libya was actively supporting Abu Nidul's international terrorist organization, which was linked to the December 27th attack on the El Al check-in counters at the Rome and Vienna airports. See *Text of the State Department Report in Libya Under Qaddafi*, N.Y. TIMES, Jan.

ary 8, 1986 President Reagan froze all property of the Libyan government and its central bank in the United States or under the control of United States persons; this action included overseas branches of American banks.⁹⁷ A wholly-owned subsidiary of the Central Bank of Libya, the Libyan Arab Foreign Bank (Libyan Bank), owned an account at the London branch of Bankers Trust Company (Bankers Trust).⁹⁸ Because President Reagan's order applied to Bankers Trust's London branch under United States law, Bankers Trust refused to repay Libyan Bank's Eurodollar deposit.⁹⁹ When Libyan Bank sued in the British courts, the British court applied British law and ruled in favor of Libya.¹⁰⁰

Bank deposits create contracts between banks and depositors under British law, as under United States law.¹⁰¹ Libyan Bank's call depos-

9, 1986, at A6 (stating that the President of Libya, Muammar Qaddafi, supported terrorist activities worldwide). This United States government attack on Libyan foreign policy followed a long series of terrorist activity, ranging from hijacking a TWA jet in Athens and exploding a bomb in Germany's Frankfurt airport, to hijacking the Italian cruise ship "Achille Lauro" off Egypt's coast. *Number of Terrorist Attacks in 1985 Up Sharply; Hijackings Alone Leave 62 Dead*, L.A. TIMES, Dec. 28, 1985, at 24.

97. See Exec. Order No. 12,544, 3 C.F.R. § 183 (1987), *reprinted in* 50 U.S.C. § 1701 (1991). The President delegated his authority for blocking a foreign nation's assets to the Treasury Department. *Id.* The Presidential order blocked various categories of assets of the Libyan government and its central bank, including the assets "that are or hereafter come within the possession and control of [United States] persons including overseas branches of [United States] persons." *Id.* This language included foreign branches of American banks not separately incorporated, but excluded foreign subsidiaries of American banks. Smedresman and Lowenfeld, *supra* note 44, at 752, n.74. The Treasury Department subsequently issued detailed regulations to endorse the order. 31 C.F.R. § 500 to 575 (1991).

The International Emergency Economic Powers Act (IEEPA) gives the President the power to declare a national emergency and prescribe other regulations which will restrict granting credit or making payments among banking institutions that deal with foreign countries when the United States faces any exceptional threat to national security, foreign policy, or the economy from abroad. International Emergency Economic Powers Act, 50 U.S.C. § 1701 (1993). The Supreme Court has upheld the constitutionality of IEEPA. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

98. *Libyan Arab*, 1989 Q.B. at 731.

99. *Id.* at 732-33, 742-43.

100. *Id.* at 748, 774.

101. See *id.* at 748 (describing a bank's obligation to its depositor as a species of debt governed by express and implied terms of contract). The court further found that the depositor could not sue on the debt alone. *Id.* at 749. The depositor must first make a proper demand for repayment. *Id.* Notwithstanding, the bank's obligation to

it¹⁰² with Bankers Trust, like most Eurodollar deposits before 1986,¹⁰³ had not been extensively documented.¹⁰⁴ The call deposit documentation failed to indicate an appropriate governing law or place of payment; nor did it clearly allocate sovereign risk between the parties.¹⁰⁵

The court found that performance under the deposit contract would be excused either if it were illegal under the proper law of the contract or if it required an illegal act in a foreign and friendly country.¹⁰⁶ The court held that because the deposit contract failed to specify a choice of governing law, the law of the place where the account was situated should govern the deposit.¹⁰⁷ General banking practice makes clear that banks repay deposits from their general assets; they do not return any specific assets to their customers.¹⁰⁸ When a branch refuses to repay a deposit on a customer's proper demand, however, that customer may sue the bank wherever the customer can obtain jurisdiction.¹⁰⁹

Eurodollar deposits are typically repaid through CHIPS¹¹⁰ or Fedwire,¹¹¹ but they can also be repaid through a banker's draft, pay-

repay could be frustrated. *Id.* This outlook is similar to that found in United States law. *Sokoloff v. National City Bank*, 164 N.E. 745 (N.Y. 1928).

102. *See supra* note 24 (defining Eurodollar call deposits).

103. *Supra* notes 49-50 and accompanying text (noting that most Eurodollar deposit documentation, until 1986, failed to specify governing law or place of repayment).

104. *See infra* note 122 and accompanying text (indicating that only after 1986 did most Eurodollar deposit documentation issued by American banks specify governing law or place of repayment).

105. *Id.*

106. *Id.* at 743.

107. *See id.* at 746 (citing, among others, *X.A.G. v. A Bank*, [1983] 2 All E.R. 464, which held that a New York grand jury could not legally subpoena confidential bank records maintained in London). Similar precedents exist within United States law. *See, e.g., Zimmermann v. Sutherland*, 274 U.S. 253, 256 (1927) (finding that a deposit placed with a Viennese bank remained subject to Austria-Hungarian law); *Trinh v. Citibank, N.A.*, 850 F.2d 1164, 1167 n.2 (6th Cir. 1988), *cert. denied* 496 U.S. 912 (1990) (stating that a deposit placed in a Vietnamese branch of an American bank was subject to Vietnamese law).

108. *See* 5A *MICHIE ON BANKS AND BANKING*, ch. 9, §§ 1, 4b (1983 & Supp. 1993) (explaining that deposits constitute general obligations of a bank).

109. *Libyan Arab Foreign Bank v. Bankers Trust Co.*, 1989 Q.B. 728, 748-49. Similar precedent exists under United States law. *See Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854, 862 (2d Cir. 1981), *cert. denied* 459 U.S. 976 (1982) (holding the home office of an American bank liable for the deposits of its Vietnamese branch when the branch closed prior to the fall of Saigon).

110. *See supra* note 31 (describing CHIPS and its use in settling Eurodollar payments).

111. *See supra* note 32 (describing Fedwire and its use in settling Eurodollar pay-

ment order, or other means.¹¹² The court found that because there was neither an express, nor an implied term in the deposit agreement requiring repayment through CHIPS or Fedwire, there was no potential illegality in the United States under President Reagan's Executive Order.¹¹³ The court rejected other methods of payment for various reasons.¹¹⁴

The court found that Bankers Trust could have repaid Libyan Bank's call deposit in cash notes in either United States dollars or its sterling equivalent, even though this method of repayment was extremely impractical, costly, and time-consuming.¹¹⁵ Consequently, the Libyan Bank was held to be entitled to recover \$131 million United States dollars from Bankers Trust.¹¹⁶

The court's decision affirmed the principle that the law of the place where the Eurodollar deposit is booked governs the deposit. Through a conflict of laws analysis, the court limited the extraterritorial reach of any freeze or blocking order issued by the United States. The court's decision also effectively reinforced the underlying rationale of the Eurodollar market. Depositors place United States dollars on deposit with banks outside the United States, in part, so that the United States government cannot confiscate or freeze them.

Private commercial banks, the United States Government, and the courts are all confused about the proper law governing Eurodollar deposits. That the United States and British courts reached inconsistent decisions in the foregoing cases reflects the confusion that exists in the law governing Eurodollar deposits.¹¹⁷ Bankers echo similar uncertainty

ments).

112. See *supra* note 33-37 (describing other payment mechanisms and their use in settling Eurodollar payments).

113. *Libyan Arab Foreign Bank*, 1989 Q.B. at 762. Although the court concluded that both CHIPS and Fedwire required action in the United States, the court still questioned whether those actions would in fact be unlawful. *Id.*

114. *Id.* at 752-55, 761-66. The court rejected as unacceptable payment through an in-house transfer at Bankers Trust London, a correspondent bank transfer, a banker's draft drawn on a London bank, a banker's payment order drawn on New York, use of the London dollar clearing system, use of other clearing systems outside the United States, and Eurodollar certificates of deposits. *Id.*

115. *Id.* at 755, 764. But see, *Smedresman & Lowenfeld*, *supra* note 44, at 758-59 (suggesting that cash payment in United States dollars may have violated United States Treasury regulations).

116. *Libyan Arab*, 1989 Q.B. at 774.

117. Compare *Perez v. Chase Manhattan Bank, N.A.*, 463 N.E.2d 5 (N.Y. 1984) (holding that Chase Manhattan was not obligated to repay the plaintiff's Eurodollar deposit that was located in its Cuban branch after the Cuban government had confis-

about the proper law governing Eurodollar deposits.¹¹⁸ The United States Government has also taken conflicting positions. The Federal Reserve Bank argued for applying Philippine law in *Wells Fargo*,¹¹⁹ but the United States Treasury Department joined Bankers Trust in arguing for the application of New York law in *Libyan Arab*.¹²⁰

At a more fundamental level, the courts of several nations have disagreed on a single governing law,¹²¹ and courts in the United Kingdom and the United States have refused to hold, as a matter of law, that depositors assume the sovereign risk associated with their Eurodollar deposits.¹²² The Federal Reserve Bank now requires United States banks to write into their confirmation slips for Eurodollar deposits an appropriate choice of foreign governing law, and to restrict payment to

cated Chase Manhattan's Cuban branch's assets) *with Garcia v. Chase Manhattan Bank, N.A.*, 735 F.2d 645 (2d Cir. 1984) (holding that Chase Manhattan was obligated to repay the plaintiff's Eurodollar deposit located in its Cuban branch after the Cuban government confiscated Chase Manhattan's Cuban branch's assets). These two courts reached exactly opposite conclusions on essentially similar facts within two days of one another. *Compare Perez*, 463 N.E.2d at 5 (decided on March 30, 1984); *with Garcia*, 735 F.2d at 645 (decided on March 28, 1984).

118. See *Libyan Arab Foreign Bank v. Manufacturer's Hanover Bank Trust Co.*, [1989] 1 Lloyd's Rep. 608, 614 (Q.B.) (revealing that although Manufacturer's Hanover pressed the British courts to apply United States law in its dispute with Libyan Bank, it had already modified its Eurodollar deposit contracts by selecting British law to govern Eurodollar deposits at its London branch). In the words of the court:

"Thus, we are confronted with the extraordinary anomaly that [Manufacturer's Hanover] rel[ies] on a stamped deposit [restricting payment to its London branch and choosing English law to govern the deposit] to avoid potentially dire financial consequences to them of freezes outside the United States, but resist [Libyan Bank's] reliance on the self-same stamp to avoid similar consequences to [Libyan Bank] from the imposition of the [United States] freeze."

Id. at 621.

119. Memorandum of Law of the Federal Reserve Bank of New York (*amicus curiae*), *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 612 F. Supp. 351 (S.D.N.Y. 1985) (No. 84 Civ. 0996 (WK)), *quoted in Libyan Arab*, 1989 Q.B. at 741.

120. Smedresman and Lowenfeld, *supra* note 44, at 754.

121. See *supra* notes 113-120 (showing cases in which countries, including the United States, the United Kingdom, Cuba, Libya, and the Philippines chose differing positions on which locality's law ought to govern in the event that a sovereign confiscates the funds of a bank's foreign branch).

122. See *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 660 F. Supp. 946 (S.D.N.Y. 1987) (holding that a depositor does not assume the risk of arbitrary state confiscation); *Libyan Arab Foreign Bank v. Bankers Trust Co.*, 1989 Q.B. 728 (1987) (same).

their foreign branches.¹²³ The Eurodollar market, therefore, is not uniformly subject to the regulatory power of the United States. In the absence of a governing law clause in a deposit contract, the law of the country where the bank that has accepted the Eurodollar deposit is located applies.

Individual countries have no incentive to regulate the Eurodollar market. Any nation that regulates the Eurodollar deposits located at banks and bank branches within its territory merely raises the cost to banks of holding these deposits. Banks in turn will necessarily lower the yields offered to depositors. Lower yields, however, create an incentive for depositors to seek banks in other jurisdictions, where the market remains unregulated and the deposit yields are correspondingly higher.¹²⁴ Consequently, the Eurodollar market remains an unregulated market worldwide.

III. TRANSNATIONAL SOLUTIONS

United States dollars located outside the territory of the United States have become a species of truly transnational, or state-less currency because they are not uniformly subject to United States law. Although the problems posed by Eurodollar deposits could be resolved by eliminating this market, the time for this has long passed.¹²⁵ The United States government cannot forcibly repatriate its offshore dollars, if only because governments, corporations, and international organizations use the Eurodollar market extensively for financing international trade and economic development.¹²⁶ At this time, therefore, only transnational efforts by private parties and governments can order and regulate the Eurodollar

123. *Libyan Arab Foreign Bank v. Manufacturer's Hanover Trust Co.*, [1989] 1 Lloyd's Rep. 608, 628 (Q.B.) (stating that after 1986, and under pressure from the Federal Reserve Bank of the United States, Manufacturer's Hanover placed specific wording in its confirmation slips stating that banks placing Eurodollar deposits with its London branch chose English law and agreed to be repaid only at its London branch). The Federal Reserve Bank of the United States apparently pressured all American banks to do likewise. *Id.*

124. See Rupert Pennent-Rea, *A Survey of Central Banking: The Skippers*, *ECONOMIST*, Sept. 22, 1984, at 23 (stating that dozens of smaller countries would race to allow unregulated offshore banking if existing financial centers discouraged it).

125. See *id.* at 23 (stating that once the global finance market was opened, it could not be closed).

126. See Cook, *supra* note 6, at 6-9 (citing statistics which indicate that the size and scope of the international capital markets and international capital flows promote international trade and economic development).

deposit market.

A. UNIFORM CUSTOM AND PRACTICE FOR EURODOLLAR DEPOSITS

As early as the 1920s, the world banking community recognized that banks and their customers needed uniform procedures to govern their use of commercial letters of credit to finance international trade.¹²⁷ In response to the problems associated with using commercial letters of credit, the International Chamber of Commerce (ICC) drafted the Uniform Customs and Practice for Documentary Credits (UCP).¹²⁸ The ICC successfully persuaded international banks to adopt the UCP for governing transactions with respect to documentary letters of credit.¹²⁹ Although not required by law, when the parties have agreed to adopt the UCP, the courts have generally followed the conventions of the UCP in resolving documentary letter of credit disputes.¹³⁰ The UCP has been so successful that various states in the United States have enacted the UCP into positive law.¹³¹ Eventually, it may become accepted as customary

127. David J. Kalson, Note, *The International Monetary Fund Agreement and Letters of Credit: A Balancing of Purposes*, 44 U. PITT. L. REV. 1061, 1066 (1983)

128. INTERNATIONAL CHAMBER OF COMMERCE, UNIFORM CUSTOMS AND PRACTICES FOR DOCUMENTARY CREDITS (1983) (ICC Publication No. 400). In 1926, the International Chamber of Commerce, located in Paris, France, began studying documentary credits and eventually drafted procedures for their handling. Kalson, *supra* note 127, at 1066. The original ICC committee report was published in 1930 as the "Uniform Regulations for Commercial Documentary Credits." *Id.* In 1933, the ICC reviewed and finalized its recommendations as the "Uniform Customs and Practice for Commercial Documentary Credits." *Id.* The most recent edition was revised and accepted in 1983. INTERNATIONAL CHAMBER OF COMMERCE, *supra*.

129. See Smedresman & Lowenfeld, *supra* note 44, at 796-97 (indicating that many international banks have accepted the code and generally cite it in letter of credit documentation as governing the issuance of documentary credits); Egon Guttman, *U.C.C. Article 5 Symposium: Bank Guarantees and Standby Letters of Credit: Moving Toward a Uniform Approach*, 56 BROOKLYN L. REV. 167, 172 (1990) (noting that the ICC succeeded in developing rules to govern documentary letters of credit).

130. See Christopher Leon, *Letters of Credit: A Primer*, 45 MD. L. REV. 432, 439 (1986) (indicating that New York, Missouri, Alabama, and Arizona have all enacted into their commercial statutes a provision stating that article five of the UCC will not apply when a letter of credit transaction is subject to the Uniform Commercial Procedures for Documentary Credits).

131. See, e.g., N.Y. U.C.C. § 5-102(f) (McKinney 1964) (exempting a documentary credit from the normal provisions of Article 5 of the UCC if the letter of credit is governed by the UCP).

international law.¹³²

Just as the ICC drafted the UCP to promote international trade,¹³³ privately codifying procedures for Eurodollar deposits¹³⁴ will create predictability and thereby further promote the growth and development of the Eurodollar deposit market. The ICC could take account of the expectations of bank and depositor, select what expectations are reasonable, and convert these expectations into clear operating rules.

In addition, just as banks may cite the UCP for proving "custom and practice" with respect to documentary letter of credit transactions,¹³⁵ they may eventually be able to cite a UCP-type convention for proving trade usage or custom with respect to Eurodollar deposits.¹³⁶ In *Wells Fargo*, Citibank failed to persuade the court that by custom and practice in the Eurodollar deposit market depositors assume sovereign risk.¹³⁷ Had an UCP-type convention existed for Eurodollar deposits to which Citibank could have referred to prove usage or custom with respect to sovereign risk, Citibank would more likely have persuaded the court of its position, or avoided a lawsuit with Wells Fargo altogether.

B. CENTRAL BANK COOPERATION

If a UCP-type convention represents a private solution for creating operating procedures for the Eurodollar deposit market, the Basel Supervisors' Committee (BSC)¹³⁸ represents the governments' best ap-

132. Leon, *supra* note 130, at 439.

133. Christopher Leon, *Letter of Credit: A Primer*, 45 MD. L. REV. 432, 439 (1986).

134. Leon, *supra* note 130, at 440.

135. Leon, *supra* note 133, at 440.

136. See Smedresman and Lowenfeld, *supra* note 44, at 796 (implying that courts would be persuaded by custom and practice with respect to Eurodollar deposits if deposit procedures were codified in writing and adopted by a majority of banks).

137. *Wells Fargo Asia, Ltd. v. Citibank, N.A.*, 612 F. Supp. 351, 355-56 (S.D.N.Y. 1985); see *supra* note 88-93 and accompanying text (discussing Citibank's failed attempt to prove that Wells Fargo assumed the sovereign risk associated with the bank's Eurodollar deposit in Manila).

138. See generally J.J. Norton, *The Work of the Basle Supervisors Committee on Bank Capital Adequacy and the July 1988 Report on "International Convergence of Capital Measurement and Capital Standards"*, 23 INT'L L. 245, 247-49 (1989) (explaining that after the 1974 collapse of Bankhaus Herstatt in West Germany, the governors of the central banks expanded their cooperation by forming the Basle Committee on Banking Regulations and Supervisory Practices (BSC)). These banks were comprised of the "Group of Ten", or "G-10 Group", of the Organization for Economic Cooperation and Development (OECD) and Switzerland. *Id.* The OECD is a con-

proach to regulating this market. The BSC encourages member central banks to equalize their regulations and supervisory practices, recommends actions on specific issues to central bank supervisors, and allows central bankers to exchange information on policy and supervisory practices.¹³⁹ Since the 1970s, the central banks of the economically developed countries, through the BSC, have increasingly cooperated with one another in pursuing international monetary policies.¹⁴⁰ In the 1970s, when it recognized the growing importance of international banking, the BSC recommended coordinating supervisory oversight of international banks.¹⁴¹

sultative body that informs its twenty-four Western industrialized nation members on issues of economic importance. *Id.* at 248 n.16. Ten of the OECD countries formed the Group of Ten to coordinate lending under the General Agreement to Borrow (GAB) as implemented by decision of the International Monetary Fund (IMF). *Id.* From these beginnings, the G-10 Group has expanded the scope of its consultations to embrace broader issues of economic policy, and has arranged for its finance ministers and central bankers to meet regularly with the IMF, OECD, and the Bank for International Settlements. *Id.*

139. Norton, *supra* note 138, at 249.

140. See Pennent-Rea, *supra* note 124, at 24-29, (indicating that as the global economy became more integrated in the 1970s, the world's central bankers were forced to coordinate their policies). *But see* Cook, *supra* note 6, at 24-30 (describing how central banks have experienced greater difficulty coordinating monetary and exchange rate policies since the 1980s).

Such cooperation is generally secret and unseen; only on rare occasions is the public given any indication that it even exists. See Norton, *supra* note 138, at 249-50 (stating that the G-10 Group central bankers cooperated in secret when they formed the BSC, and distributed the BSC's first report on foreign bank supervision only to central bank members).

In September 1992, public disagreement between the Bank of London and the Bundesbank followed London's withdrawal from the European Exchange Rate Mechanism (ERM). See Corrigan and Tucker, *supra* note 10, at 6 (describing how the Bank of England was forced to withdraw the pound from the European ERM after unsuccessfully defending its exchange rate in the international currency markets); see also *supra* note 10 and accompanying text (explaining the European Exchange Rate Mechanism (ERM)). The Bundesbank's public remarks concerning its minimal support for the English pound may have spurred speculative selling against it, thus causing the pound to fall out of the ERM band. See *Bank of England Criticizes Bundesbank*, FIN. TIMES, Oct. 6, 1992, at 1 (reporting that the Bank of England had openly criticized the Bundesbank, thus violating the usual central bank secrecy).

141. Pennant-Rea, *supra* note 124, at 55. The Basle Concordat of 1974, which set forth the basic guidelines for such coordination, was later revised after the failure of the Italian Bank Ambrosiano in 1983. See *id.* (stating that after the collapse of Banco Ambrosiano Holdings, the BSC revised its original bank supervisory recommendations and placed greater emphasis on the overlapping responsibilities of central banks in

The BSC's initial success led it to recommend other actions for central bankers and bank supervisors.¹⁴² Most important among these was the BSC's achievement in equalizing bank capital adequacy standards.¹⁴³ Beginning in 1982, the Committee devoted nearly six years to developing its recommendations.¹⁴⁴ Concerned not only with the stability of the financial system, the BSC and its member countries' governments also increasingly sought to create a level playing field for banks competing in the international arena.¹⁴⁵ Uniform capital adequacy standards became a greater priority in the late 1980s, when both banks and regulators worried that major banks might default on their obligations because of the international debt crisis and the various domestic lending emergencies.¹⁴⁶ By 1990, the United States, based on the recommendations of the BSC, had adopted new capital adequacy standards for banks into its regulatory scheme.¹⁴⁷

supervising international banks). The collapse of Banco Ambrosiano resulted in losses of \$450 million for some two hundred and fifty banks which held assets in the failed bank. *Id.* The guidelines for cooperation were revised again following BCCI's failure in 1991. *Bank Supervision: Over the Hills and Far Away*, *ECONOMIST*, July 11, 1992, at 72. The closure of BCCI led to the loss of \$10 billion for many banks and depositors worldwide. *Id.*

142. See Norton, *supra* note 138, at 254-55 (stating that the BSC issued reports on foreign exchange, bank secrecy, political risk analysis, and risk analysis for off-balance sheet products).

143. See Norton, *supra* note 138, at 262 (stating that the BSC's work on capital adequacy standards was eventually accepted by the central banks of the G-10 Group). Of the Committee's reports, the report on bank capital adequacy standards had the most significant impact on international regulatory laws. *Id.* at 252.

144. See Norton, *supra* note 138, at 253-59 (describing how the July 1988 Report resulted after six years of research, study, and negotiation among the BSC's members). During the first two years, the BSC studied bank capital adequacy standards and discovered that a great diversity existed among the various national systems for measuring bank capital and setting capital adequacy standards. *Id.* at 253. The Committee began work in June 1982, but did not issue its final report until July 1988, despite the importance and urgency, of equalizing capital adequacy standards worldwide. *Id.* at 253-59. The Federal Reserve felt the United States Congress had firmly mandated that the Federal Reserve equalize capital adequacy standards for banks. *Id.* at 255. Consequently, the Federal Reserve signed a bilateral accord with the United Kingdom on January 8, 1987 in order to pressure the BSC into finalizing its recommendations on bank capital adequacy standards. *Id.* at 256.

145. Norton, *supra* note 138, at 253.

146. 12 C.F.R. sec. 225 app. A (1992); see 54 Fed. Reg. 4, 186 (1989) (stating that the proposed revised capital adequacy standards for banks were based on the recommendations of the Basel Supervisors' Committee).

147. 12 C.F.R. § 208.13, app. A to § 208 app. A, to § 225 (1992); see 54 Fed.

The legal significance of the BSC's work is not that its recommendations are officially binding on member central banks.¹⁴³ Rather, its recommendations generate significant legal activity within member countries' regulatory agencies by providing a focal point around which their actions may converge.¹⁴⁹ The BSC's success with bank capital adequacy standards, a cornerstone of prudential regulation of world capital markets, should be followed by other measures creating consistent regulation of the Eurodollar deposit market between major Eurodollar financial centers.¹⁵⁰

CONCLUSION

This paper has argued that the net result of major court decisions in the 1980s concerning the Eurodollar market have effectively created a new species of transnational currency. This transnational currency is not only unregulated by any international authority, but also beyond the regulatory reach of any single country. The Eurodollar market has weakened control over national economic and monetary policy, thus creating greater instability and volatility in exchange rates. Exchange rate instability has created new uncertainties for those trading and investing internationally. The existence of an unregulated Eurodollar deposit market has also hindered governments in their fight against the illegal trade in arms and drugs.

As the ills associated with this unregulated market are regularly visit-

Reg. 4,186 (1989) (stating that the proposed revised capital adequacy standards for banks were based upon the BSC's recommendations).

148. See Norton, *supra* note 138, at 249 (quoting the second Chairman of the Committee, Governor of the Bank of England Peter Cooke, as stating that the Committee lacked formal supranational supervisory authority, and its recommendations, therefore, have no legal force).

149. Norton, *supra* note 138, at 252. The BSC recommends supervisory guidelines that incorporate the best practices, hoping that its member central banks will implement domestic regulations consistent with the Committee's recommendations. *Id.* at 249 n.20. Through these means, the Committee encourages every country's regulations to converge on a common set of standards, thus alleviating the necessity of forcing each central bank to adopt specific supervisory practices. *Id.*

150. See SUBCOMMITTEE ON NARCOTICS, TERRORISM AND INTERNATIONAL OPERATIONS OF THE SENATE COMMITTEE ON FOREIGN RELATIONS, DRUG MONEY LAUNDERING, BANKS, AND FOREIGN POLICY, S. REP. No. 101-104, 101st Cong., 2d Sess. 27 (1990) (reporting that the G-10 Group of central bank governors had all endorsed the BSC's recommendations to prevent drug traffickers from abusing the banking system by encouraging banks to identify customers, cooperate with law enforcement agencies, and comply fully with money laundering laws).

ed upon national economies, governments should reach a consensus on regulating the Eurodollar deposit market in the best interests of the global economy. The ICC should establish uniform procedures for Eurodollar deposits that could be adopted by private commercial banks worldwide. The BSC should build on the success of its recommendations for setting bank capital adequacy standards by creating recommendations for harmonizing banking regulations with respect to the Eurodollar deposit market.

Although the Cold War finally ended in 1991, its impact for good and evil lives on in various guises. The birth and growth of the Eurodollar deposit market has brought with it not only expanding international trade and economic development, but also an unregulated form of transnational currency beyond national-level regulation. Courts have failed to agree on a single legal system within which to order and regulate the Eurodollar deposit market. They have not recognized the extra-territorial jurisdiction of United States law with respect to United States dollars on deposit in banks outside the territory of the United States. Nevertheless, other international measures are possible, and should be used, to control and regulate the Eurodollar deposit market.