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West v. Multibanco Comermex, S.A.: Application of the Securities Laws to Foreign Certificates of Deposit

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WEST V. MULTIBANCO COMERMEX, S.A.: APPLICATION OF THE SECURITIES LAWS TO FOREIGN CERTIFICATES OF DEPOSIT

The persistent debate concerning which investment instruments constitute "securities" for purposes of the Securities Act of 1933[1] and the Securities Exchange Act of 1934[2] is as old as the Securities Acts themselves. The Supreme Court has addressed the issue eight times without putting the debate to rest.[3] In *Marine Bank v.*

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1. 15 U.S.C. §§ 77a-77bbbb (1982 & Supp. IV 1986) [hereinafter Securities Act of 1933].

2. 15 U.S.C. §§ 78a-78kk (1982 & Supp. IV 1986) [hereinafter Securities Exchange Act of 1934].

3. The United States Supreme Court, in SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943), addressed whether the sale of leasehold interests in gas and oil wells coupled with a commitment by the offeror to drill test wells was the sale of a security. *Id.* at 348. Reasoning that an instrument need not be specifically enumerated as a security within the definitional section of the Securities Exchange Act of 1934 to fall within its purview, the Court held that the leasehold interests were securities, qualifying as " 'investment contracts,' or 'as any interest or instrument commonly known as a "security." ' " *Id.* at 351 (quoting 15 U.S.C. § 77b(1) (current version at 15 U.S.C. § 77b(1) (1982)).

Three years after *Joiner Leasing* the Court held that the sale of parcels of citrus tree groves coupled with a service contract for the management and marketing of the oranges grown on the parcels was also an investment contract and therefore a security within the Securities Act of 1933. SEC v. W.J. Howey Co., 328 U.S. 293 (1946). The *Howey* Court set forth a test for the determination of whether a contract, scheme or transaction constitutes an investment contract under the Act: "The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." *Id.* at 301. The *Howey* test became the established criterion for determining whether an interest fell within the Securities Acts' definitional sections as an investment contract. *See* Tcherepnin v. Knight, 389 U.S. 332, 338 (1967) (test applicable under definitional section of Securities Exchange Act of 1934 and Securities Act of 1933).

Applying the *Howey* test in *Tcherepnin*, the Supreme Court determined that withdrawable capital shares in a state-chartered savings and loan association were securities under the Securities Exchange Act of 1934. *Id.* at 338-40. The Court placed great emphasis on the fact that investment of money in the savings and loan association and profits from the investment were entirely dependent on the success of the savings and loan association's management. *Id.* at 338-39. The Court also stated that the withdrawable capital shares could be considered within other descriptive terms contained in the definitional section of the Securities Exchange Act including "certificate[s] of interest or participation in any profit sharing agreement," "stock," or "transferable share[s]." *Id.* at 339. The Court also emphasized that investors' need for protection necessitated flexible application of the Securities Acts. *See id.* at 338.

In United Housing Foundation, Inc. v. Forman, 421 U.S. 837 (1975), the issue was whether the denomination of an instrument as "stock" renders the instrument a "security" because the statutory definition of a security under both Securities Acts includes "stock." *Id.* at 840. The Court rejected the notion that an investment required regulation under the Securities Acts simply because it bore the label "stock." *Id.* at

Weaver,[4] the Court held that a certificate of deposit[5] (CD) issued by

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848. In an often quoted passage the Court observed, " 'A thing may be within the letter of the statute, and yet not within the statute, because not within its spirit, nor within the intention of its makers.' " *Id.* at 849 (quoting Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892)). The Court emphasized that the focus in determining whether an interest is a security should be whether "economic realities" require such treatment. *Id.* at 848 (quoting Tcherepnin v. Knight, 389 U.S. at 336). International Brotherhood of Teamsters v. Daniel, 439 U.S. 551 (1979), presented the issue of whether an interest in a noncontributory, involuntary pension plan constituted a security. *Id.* at 553. After applying the *Howey* test for the determination of whether the pension plan interest was an investment contract and looking to "the economic realities," the Court held that the primary purpose of the pension plan was not one that required treatment as a security. *Id.* at 558-62.

In Marine Bank v. Weaver, 455 U.S. 551 (1982), the Court rejected the determination of the Court of Appeals for the Third Circuit that certificates of deposit (CDs) were the equivalent of withdrawable capital shares. *Id.* at 557. The Court also rejected the Third Circuit's conclusion that a CD is akin to other long-term debt obligations considered to be securities. *Id.* In contrast to a long-term debt obligation, the Court found that a CD issued by a domestic bank was subject to abundant protections under federal banking laws which "virtually guarantee" the investor's interest. *Id.* at 558-59. The Court concluded that a CD did not require the protection afforded under the Securities Exchange Act of 1934. *Id.* at 559. In a footnote, however, the Court cautioned, "Each transaction must be analyzed and evaluated on the basis of the content of the instruments in question, the purposes intended to be served, and the factual setting as a whole." *Id.* at 560 n.11. For a thorough discussion of *Weaver*, see *infra* notes 40-62 and accompanying text. Most recently, the Supreme Court decided Gould v. Ruefenacht, 471 U.S. 701 (1985), and Landreth Timber Co. v. Landreth, 471 U.S. 681 (1985). In *Ruefenacht*, the Court held that the sale of 50% of the shares of a closely held corporation was the sale of a "security." Gould v. Ruefenacht, 471 U.S. at 704. In *Landreth*, the Court held that the sale of 100% of the shares of a closely held corporation was not exempt from regulation under the Securities Acts. Landreth Timber Co. v. Landreth, 471 U.S. at 688. While the instruments at issue in both *Ruefenacht* and *Landreth* were not called "stock," the instruments in both cases bore all the usual characteristics of stock. *See* Gould v. Ruefenacht, 471 U.S. at 704; Landreth Timber Co. v. Landreth, 471 U.S. at 686-87. As a result the Court concluded that the "stock" was within the plain language of the definitional sections of the Securities Acts. Gould v. Ruefenacht, 471 U.S. at 704; Landreth Timber Co. v. Landreth, 471 U.S. at 687. The Court also observed that the *Howey* test had been developed to determine whether an investment qualified for treatment as an "investment contract" under the Securities Acts, not whether the instrument fell within *any* of the definitions of a "security." *Id.* at 689-92.

4. 455 U.S. 551 (1982). The decision of the *Weaver* Court was somewhat surprising. Prior to *Weaver*, the Securities and Exchange Commission (SEC) had consistently taken the position that CDs were securities within the meaning of the Securities Acts and had informed the administration of national banks of its position. The Acting Comptroller of the Currency stated:

> The Securities and Exchange Commission has expressed the opinion that deposit and share accounts are subject to the antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 and that advertisements by financial institutions that are contrary to such principles may violate the antifraud provisions.

W. Camp, Acting Comptroller of the Currency, Statement of Policy on Advertising For Funds by National Banks, *reprinted in* 31 Fed. Reg. 16,581 (1966). *See also* Bunch, Marine Bank v. Weaver: *What is a Security?* 34 MERCER L. REV. 1017, 1031

a bank regulated under "the federal banking laws" is not a "security" within the meaning of the Securities Exchange Act of 1934.[6]

The Court of Appeals for the Ninth Circuit has twice, since Weaver, addressed the issue of whether CDs are "securities" within the purview of the Securities Act of 1933 in the different context of foreign banks issuing CDs in the United States to United States citizens.[7] Relying on the *Weaver* analysis, the Ninth Circuit held in *Wolf v. Banco Nacional de Mexico, S.A.*, that CDs issued by foreign banks are not securities.[8] In *West v. Multibanco Comermex, S.A.*, the Ninth Circuit again held that the foreign CDs issued to the plaintiff purchasers were not securities.[9] This Note argues that while application of the *Weaver* rationale in *Wolf* was appropriate, the Ninth Circuit erred in relying on the *Weaver* rationale in *West*. The *Weaver* rationale is based upon an examination of the factual surroundings in order to determine the necessity for subjecting issuers of the CDs in question to securities laws when the CDs are abundantly protected under other laws.[10] In *West*, the court determined that a factual inquiry into the actual enforcement of the foreign regulations was barred by the act of state doctrine.[11] This Note argues that the *West* court erred by relying on the *Weaver* rationale when it was prevented from making the necessary factual inquiry. Application of *Weaver* in *West* was unwarranted and jeopardized important protections available under the Securities Act of 1933.

Securities are subject to extensive regulation for several reasons. Unlike other commodities, securities are created rather than pro-

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(1984); Note, *Certificates of Deposit and The Securities Laws: The Limited Precedent of Marine Bank v. Weaver*, 4 ANN. REV. BANKING L. 453, 467 (1985) (SEC interprets Securities Exchange Act to apply to CDs). In *Weaver*, however, the SEC filed a brief as amicus curiae with the Federal Deposit Insurance Corporation and others arguing that the CD at issue was not a security. *See* Marine Bank v. Weaver, 455 U.S. at 557 n.6. The SEC, in an amicus curiae brief filed in the subsequent case of Wolf v. Banco Nacional de Mexico, S.A., 739 F.2d 1458 (9th Cir. 1984), limited its position to CDs issued by domestic banks while opining that CDs "issued to persons in the United States by a foreign non-U.S.-regulated bank are 'securities' within [the Securities Acts]." Wolf v. Banco Nacional de Mexico, S.A.,[1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,232 (June 8, 1983) (litigation release).

5. A certificate of deposit is "[a] written acknowledgement by a bank or banker of a deposit with promise to pay to depositor, to his order, or to some other person or to his order." BLACK'S LAW DICTIONARY 205 (5th ed. 1979).

6. Marine Bank v. Weaver, 455 U.S. at 558-59.

7. West v. Multibanco Comermex, S.A., 807 F.2d 820 (9th Cir.), *cert. denied*, 107 S. Ct. 2483 (1987); Wolf v. Banco Nacional de Mexico, S.A., 739 F.2d 1458 (9th Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985).

8. Wolf v. Banco Nacional de Mexico S.A., 739 F.2d at 1461-62.

9. West v. Multibanco Comermex, S.A., 807 F.2d at 829.

10. Marine Bank v. Weaver, 455 U.S. at 557-59. See *infra* note 58 and accompanying text for a list of the federal regulations protecting CDs.

11. West v. Multibanco Comermex, S.A., 807 F.2d at 827-28. See *infra* notes 97-98 for a discussion of the application of the act of state doctrine in *West*.

duced and thus have no intrinsic value.[12] A security's value reflects the financial condition of its offeror, anticipated profitability, and, most important, what buyers are willing to pay for it.[13] For these reasons, securities regulations are intended to ensure that investors receive accurate and complete information regarding what the created instrument represents.[14] Because securities are traded in organized markets, securities regulations attempt to assure a continuous flow of information to investors and to regulate the behavior of individuals and firms engaged in securities trading.[15]

Federal legislation regulates securities in two distinct ways. The Securities Act of 1933 regulates the public offering of securities.[16] The primary objective of the Securities Act is to achieve "full and fair disclosure" through registration of all newly issued securities with the Securities Exchange Commission (SEC).[17] The Securities Exchange Act of 1934 extends regulation to securities already issued on the securities market.[18] Its dominant purpose is to protect buyers and sellers against fraud.[19] This purpose is accomplished by regulation of securities brokers and dealers.

The question of whether an instrument will be protected under the provisions of the Securities Acts turns largely on whether the instrument is regarded as a security.[20] Both the Securities Act of 1933 and the Securities Exchange Act of 1934 contain definitions of the term.[21] Although not identically worded, the definitions are in-

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12. *See* D. RATNER, SECURITIES REGULATIONS 1 (1986).

13. *See id.*

14. *See id.*

15. *See id.* at 1-2. Securities regulation is designed to prevent sellers from obtaining personal advantages by using their superior skills, experience, and access to non-public information. *See id.* at 2.

16. 15 U.S.C. §§ 77a-77bbbb (1982 & Supp. IV 1986).

17. Cohen, *"Truth in Securities" Revisited*, 79 HARV. L. REV. 1340, 1340 (1966).

18. 15 U.S.C. §§ 78a-78kk (1982 & Supp. IV 1986).

19. *See* Cohen, *supra* note 17, at 1340-41.

20. *See* Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985); United Hous. Found., Inc. v. Forman, 421 U.S. 837, 847-48 (1975).

21. The term "security" is defined by the Securities Act of 1933 as follows:

> When used in this subchapter, unless the context otherwise requires—
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> (1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or

terpreted as having virtually identical meanings.[22] The definitions of "security" set forth in the Securities Acts are preceded by a significant qualification. Introductory language in the definitional sections of both Acts provides that the statutory definition controls "[w]hen used in this [subchapter/chapter], *unless the context otherwise requires.*"[23] The "context" clauses appear to signify that the term "security" may have various meanings in various provisions of the Securities Acts.[24] Prior to its decision in *Marine Bank v. Weaver*,[25] the Supreme Court appeared to embrace the view that the prefatory language referred to the statutory context as opposed to the factual context.[26]

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interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

15 U.S.C. § 77b(1) (1982).

The term security is defined by the Securities Exchange Act of 1934 as follows:

(a) Definitions

When used in this chapter, unless the context otherwise requires—

. . . .

(10) The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

15 U.S.C. § 78c(a)(10) (1982).

22. *See* United Hous. Found., Inc. v. Forman, 421 U.S. at 847 n.12; Tcherepnin v. Knight, 389 U.S. 332, 335-36, 342 (1967); S. REP. No. 792, 73d Cong., 2d Sess. 14 (1934).

23. 15 U.S.C. §§ 77b, 78c(a) (1982) (emphasis added).

24. Hannan & Thomas, *The Importance of Economic Reality and Risk in Defining Federal Securities*, 25 HASTINGS L.J. 219, 278 (1974).

25. 455 U.S. 551 (1982).

26. The Supreme Court has stated:

The meaning of particular phrases must be determined in context, *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-351 (1943). Congress itself has cautioned that the same words may take on a different coloration in different sections of the securities laws: both the 1933 and the 1934 Acts preface their lists of general definitions with the phrase "unless the context otherwise requires."

SEC v. National Sec., Inc., 393 U.S. 453, 466 (1969). *See* Carson, *Application of the*

In addition to the ambiguity present in the context clauses, there are other sources of uncertainty regarding the definition of a security under the Securities Acts. Although the Securities Acts enumerate certain investment instruments commonly recognized as securities, including "stock, treasury stock, bond[s]," and "debenture[s],"[27] the Acts also list broader categories such as "option[s]," "investment contract[s]," and, "in general, any instrument commonly known as a 'security.' "[28] The broader categories are intended by Congress to encompass "the many types of instruments that in our commercial world fall within the ordinary concept of a security."[29] Consequently, the determination of what qualifies as a security remains ambiguous and is not susceptible to precise definition. The Supreme Court observed that the congressional purpose underlying the Securities Acts was to restore investor confidence in the financial market.[30] In keeping with its conception of the congressional purpose, the Court has rejected technical or restrictive construction in favor of flexible interpretations that effectuate the Securities Acts' remedial purposes.[31]

In *Securities and Exchange Commission v. W.J. Howey Co.*, the Supreme Court addressed the problem of classifying investment instruments that did not fall squarely within one of the narrow definitional categories specified in the Securities Acts.[32] The issue in *Howey* was whether a certain investment instrument qualified as an "investment contract" and thus as a security.[33] The Court held that "an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party."[34] In applying the test, the Court focused on the economic substance of the transaction rather

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Federal Securities Acts to the Sale of a Closely Held Corporation by Stock Transfer, 36 MAINE L. REV. 1, 31-32 (1984).

27. 15 U.S.C. §§ 77b(1), 78c(a)(10) (1982).

28. *Id.*

29. H.R. REP. No. 85, 73d Cong., 1st Sess. 11 (1933), *quoted in* United Hous. Found., Inc. v. Forman, 421 U.S. 837, 847-48 (1975). *See* Carson, *supra* note 26, at 5.

30. Marine Bank v. Weaver, 455 U.S. 551, 555 (1982) (citing Fitzgibbor, *What is a Security? A Redefinition Based on Eligibility to Participate in the Financial Markets*, 64 MINN. L. REV. 893, 912-18 (1980)).

31. *See* Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (Securities Exchange Act "should be construed broadly to effectuate its purposes"); SEC v. W.J. Howey Co., 328 U.S. 293, 298-99 (1946) (judicial interpretation of investment contract embodies flexible principle consistent with statutory purposes).

32. SEC v. W.J. Howey Co., 328 U.S. at 297.

33. *Id.* The Court noted that "[t]he legal issue in this case turns upon a determination of whether, under the circumstances, the land sales contract, the warranty deed and the service contract together constitute an 'investment contract' within the meaning of [the definitional section of the Securities Act of 1933]." *Id.*

34. *Id.* at 298-99.

than its form.[35]

Subsequent judicial definition of a "security" developed primarily by application of the principles set forth in *Howey*. The Court consistently applied *Howey* or a variation thereof to determine whether investment instruments not specifically enumerated in the Securities Acts fell within the broad category of "investment contracts."[36] Moreover, the Court apparently viewed *Howey* as the test for determining generally whether an investment instrument was a security and thus within the Securities Acts:

> We perceive no distinction, for present purposes, between an "investment contract" and an "instrument commonly known as a 'security.'" In either case, the basic test for distinguishing the transaction from other commercial dealings is "whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." *This test, in shorthand form, embodies the essential attributes that run through all the Court's decisions defining a security.*[37]

Thus, until the Court's decision in *Marine Bank v. Weaver*,[38] some courts "assumed that the *Howey* test define[d] not only investment contracts but the entire universe of securities."[39]

In *Marine Bank v. Weaver*, the Weavers purchased a $50,000 CD with a six-month maturity date from Marine Bank, a bank governed by federal banking regulations.[40] The Weavers pledged the CD to Marine Bank to guarantee a $65,000 bank loan made to a corporation.[41] In consideration for guaranteeing the loan, the Weavers were to receive from the company a fixed amount per month and a percentage of the company's net profits for as long as they guaranteed the loan.[42] When the debtor company filed for bankruptcy four

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35. *Id.* at 298. *See also* International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 558 (1979).

36. *See* International Bhd. of Teamsters v. Daniel, 439 U.S. at 558-62; United Hous. Found., Inc. v. Forman, 421 U.S. 837, 851-58 (1975); Tcherepnin v. Knight, 389 U.S. 332, 338-39 (1967). See *supra* note 3 for a brief discussion of cases applying the *Howey* test.

37. United Hous. Found., Inc. v. Forman, 421 U.S. at 852 (emphasis added) (citation and footnote omitted) (quoting SEC v. W.J. Howey Co., 328 U.S. at 301).

38. 455 U.S. 551 (1982).

39. Wolf v. Banco Nacional de Mexico, S.A., 549 F. Supp. 841, 846 (N.D. Cal. 1982). *See also* United Am. Bank of Nashville v. Gunter, 620 F.2d 1103, 1116-19 (5th Cir. 1980), *cited in* Wolf v. Banco Nacional de Mexico, 549 F. Supp. at 846; Carney, *Defining a Security: The Addition of a Market-Oriented Contextual Approach to Investment Contract Analysis*, 33 EMORY L.J. 311, 323 (1984).

40. Marine Bank v. Weaver, 455 U.S. at 552.

41. *Id.* at 553.

42. *Id.* The Weaver's agreement with Columbus Packing Co., a wholesale slaughterhouse and retail meat market, stated that "the Weavers were to receive 50% of Columbus' net profits and $100 per month as long as they guaranteed the loan." *Id.* The Weavers also had the use of the company's barn and pasture subject to the owner's discretion and the right to veto further borrowing by the company. *Id.*

months after the Weavers pledged the CD to Marine Bank, the bank threatened to collect on the pledged CD. The Weavers subsequently initiated a lawsuit in federal district court alleging violation of the antifraud provisions of the Securities Act of 1934.[43] The Weavers claimed that the bank actively solicited the loan guarantee in the form of a CD when it knew and failed to disclose the financial plight of the debtor company.[44] Reasoning that there had been no purchase or sale of a "security," the district court granted summary judgment for the defendant.[45] The Court of Appeals for the Third Circuit reversed, holding that a factfinder could reasonably conclude that the CD was a security within the meaning of the Securities Exchange Act of 1934.[46] The Supreme Court reversed the court of appeals.[47]

Writing for the Court, Chief Justice Burger reiterated that the definition of a security is "quite broad" and that Congress intended to include " 'the many types of instruments that in our commercial world fall within the ordinary concept of a security.' "[48] The Court acknowledged that the antifraud provisions of the federal securities laws apply to unconventional and unique investment instruments as well as to typical instruments traded in securities markets.[49] Regarding the determination of whether an instrument is a "security," the Court stated, "We have repeatedly held that the test 'is what character the instrument is given in commerce by the terms of the offer, the place of distribution, and the economic inducements held out to the prospect.' "[50]

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43. *Id.* at 553-54. The Weavers also alleged, in pendant claims, that the bank violated Pennsylvania securities law and committed common law fraud. *Id.* at 554.

44. *Id.* at 554. The Weavers claimed that the bank officers told them that the bank loan would be used by the company as working capital. Almost all of the $65,000 bank loan instead was used to pay the company's overdue obligations to the bank and other creditors and to pay overdue taxes. *Id.* at 553. "The Weavers alleged that bank officers solicited them to guarantee the $65,000 loan to Columbus while knowing, but not disclosing, Columbus's financial plight or the bank's plans to repay itself from the new loan guaranteed by the Weavers' pledged certificate of deposit." *Id.* at 554. The Weavers further alleged that they would not have guaranteed the loan nor pledged the CD if they had known of the company's financial condition and the bank's plans to repay itself and other creditors with the loan money. *Id.*

45. *Id.* at 554.

46. *Id.* at 554. *See* Weaver v. Marine Bank, 637 F.2d 157 (3d Cir. 1980) (as amended). The court of appeals also held that a finder of fact could reasonably find the agreement between the Weavers and the owners of the corporation, *see supra* note 42, to be a security within the Securities Exchange Act of 1934. *See* Weaver v. Marine Bank, 637 F.2d at 162-63.

47. Marine Bank v. Weaver, 455 U.S. at 555.

48. *Id.* at 555-56 (quoting H.R. REP. No. 85, 73d Cong., 1st Sess. 11 (1933), *quoted in* United Hous. Found., Inc. v. Forman, 421 U.S. 837, 847-48 (1975)).

49. *Id.* at 556.

50. *Id.* (quoting SEC v. United Benefit Life Ins. Co., 387 U.S. 202, 211 (1967) (quoting SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 352-53 (1943))).

The Court, however, did not rely on the test set forth in its opinion or on the *Howey* test[51] for its determination that the CD purchased by the Weavers was not a security.[52] Rather the Court fo-

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51. *See* SEC v. W.J. Howey Co., 328 U.S. 293, 301 (1946). The Court of Appeals for the Third Circuit, in Weaver, found that the CD was functionally akin to withdrawable capital shares and thus an investment contract. Weaver v. Marine Bank, 637 F.2d 157, 164 (3d Cir. 1980). In rejecting the appellate court's analogy, the Supreme Court did not expressly rely upon the *Howey* test. Although *Weaver* does not expressly reject *Howey*, "it is perhaps significant that there is no express reliance on *Howey*, despite the fact that the Court was trying to determine if instruments were investment contracts." Carson, *supra* note 26, at 29. One writer has criticized the opinion:

> [T]he Court's analysis is confusing. In particular, it is unclear whether the Supreme Court sought to develop an alternative method of limiting the definition of a security by focusing on the context of the transaction, or whether the Court sought to narrow the *Howey* investment contract analysis once again by adding two new requirements: risk and uniqueness.

Jones, *Footnote 11 of* Marine Bank v. Weaver: *Will Unconventional Certificates of Deposit Be Held Securities?*, 24 HOUS. L. REV. 491, 502 (1987). For a discussion of the *Howey* test, see *supra* note 3 & notes 32-39 and accompanying text. For a discussion of the current status of the *Howey* test, see Carney, *supra* note 39, at 317-30.

52. CDs issued by banks are not expressly enumerated in the categories of investment instruments set forth under the definition of security in the Securities Exchange Act of 1934. Although the Act lists a "certificate of deposit, for a security," 15 U.S.C. § 78c(a)(10) (1982), the Court noted that the term refers to instruments issued by corporations during reorganizations. Marine Bank v. Weaver, 455 U.S. at 557 n.5. The Court also noted that because the maturity date exceeded nine months, the CD was not excluded from the Act's coverage by the language of the Act that excludes " 'any note . . . which has a maturity at the time of issuance of not exceeding nine months.' " *Id.* at 556-57 (quoting 15 U.S.C. § 78c(a)(10) (1982)).

As the Court implicitly recognized, CDs may be characterized as notes under the Act because they are consistent with the general concept of a "note," as that term is used in the commercial world. A note is "[a]n instrument containing an express and absolute promise of signer (i.e. maker) to pay to a specified person or order, or bearer, a definite sum of money at a specified time." BLACK'S LAW DICTIONARY 956 (5th ed. 1979). Indeed, the Supreme Court stated in Landreth Timber Co. v. Landreth, 471 U.S. 681 (1985), that " 'note' may now be viewed as a relatively broad term that encompasses instruments with widely varying characteristics, depending on whether issued in a consumer context, as commercial paper, or in some other investment context." *Id.* at 694.

Although the express language of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(10) (1982), appears to exclude notes with a maturity period of less than nine months, *see also* Securities Act of 1933, 15 U.S.C. § 77c(a)(3) (1982) (excluding "[a]ny note . . . which has a maturity at the time of issuance of not exceeding nine months"), many courts have interpreted the applicability of the exclusion to depend upon the character of the note rather than the time of maturity. *See* Jones, *supra* note 51, at 508. The Court of Appeals for the Fifth Circuit has stated:

> On one hand, the [Securities Exchange] Act covers all *investment* notes, no matter how short their maturity, because they are not encompassed by the "any note" language of the exemption. On the other hand, the [Securities Exchange] Act does not cover any *commercial* notes, no matter how long their maturity, because they fall outside the "any note" definition of a security. Thus, the investment or commercial nature of a note entirely controls the applicability of the [Securities Exchange] Act, depriving of all util-

cused its analysis on the introductory language of the definitional section of the Securities Exchange Act of 1934, which states that the statutory definition applies "unless the context otherwise requires."[53] The Court, in a departure from previous interpretation, interpreted the context clause as a reference to the factual rather than the statutory context.[54] In finding that the CD was not a security, the Court reasoned:

> The definition of "security" in the 1934 Act provides that an instrument which seems to fall within the broad sweep of the Act is not to be considered a security if the context otherwise requires. It is unnecessary to subject issuers of bank certificates of deposits to liability under the antifraud provisions of the federal securities laws since the holders of bank certificates of deposit are abundantly protected under the federal banking laws. We therefore hold that the certificate of deposit purchased by the Weavers is not a security.[55]

The Court rejected the court of appeals's conclusion that CDs are akin to long-term debt obligations typically considered to be securities.[56] The Court found that a purchaser of a CD from a federally

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ity the exemption based on maturity-length.

McClure v. First Nat'l Bank of Lubbock, 497 F.2d 490, 494-95 (5th Cir. 1974), *cert. denied*, 420 U.S. 930 (1975). *See also* SEC v. Continental Commodities Corp., 497 F.2d 516, 524-27 (5th Cir. 1974) (after examining character of notes, court found notes to be securities under both Securities Acts notwithstanding maturity dates of less than nine months).

In describing the rationale underlying the exemption for short term notes, one court stated:

> This provision originated in a letter to Congress from the Secretary of the Federal Reserve Board. The Secretary described the proposed Securities Act as "intended to apply only to . . . investment securities," and suggested an amendment to exclude "short-time paper issued for the purpose of obtaining funds for current transactions in commerce, industry, or agriculture and purchased by banks and corporations as a means of employing temporarily idle funds."

Wolf v. Banco Nacional de Mexico, S.A., 549 F. Supp. 841, 844 (N.D. Cal. 1982) (quoting *Hearings on H.R. 4314*, 73d Cong., 2d Sess. 180 (1933)), *rev'd on other grounds*, 739 F.2d 1458 (9th Cir. 1984). See *infra* notes 64-82 and accompanying text for a discussion of *Wolf*. For a discussion of the various approaches to determining whether notes are securities within both Securities Acts, see L. LOSS, FUNDAMENTALS OF SECURITIES REGULATION 165-69 (2d ed. 1988).

53. 15 U.S.C. § 78c(a)(10) (1982).

54. Marine Bank v. Weaver, 455 U.S. at 556, 558-59. For a criticism of the *Weaver* interpretation of the context clause, see Note, *Curbing Preemption of Securities Act Coverage in the Absence of Clear Congressional Direction*, 72 VA. L. REV. 195, 205-207 (1986). See *supra* notes 23-51 and accompanying text for a discussion of the context clause and the Court's prior interpretation.

55. Marine Bank v. Weaver, 455 U.S. at 558-59.

56. *Id.* at 557-58. The Court also rejected the court of appeals's conclusion that the CD was functionally equivalent to withdrawable capital shares of a savings and loan association that were held to be securities under the *Howey* test for investment

regulated bank was "virtually guaranteed payment in full, whereas, the holder of an ordinary long-term debt assumes the risk of the borrower's insolvency."[57] Moreover, the Court stated that the issuing bank was "subject to the comprehensive set of regulations governing the banking industry."[58] Thus, the abundant protection provided by the federal banking laws and regulations was found by the Court to support[59] a determination that the CD purchased by the Weavers, "an instrument which seems to fall within the broad sweep

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contracts in Tcherepnin v. Knight, 389 U.S. 332, 338-40 (1967). *See* Marine Bank v. Weaver, 455 U.S. at 557.

57. Marine Bank v. Weaver, 455 U.S. at 558.

58. *Id.* In particular the majority listed: deposit protection in the form of reserve requirements, reporting, and inspection; regulations regarding advertisement on interest paid; and the insurance of deposits by Federal Depositors Insurance Corporation (FDIC). *Id.*

It is important to note that, subsequent to the *Weaver* decision, the failure of the Penn Square National Bank has cast a shadow of doubt over whether the FDIC will fully insure all depositors in the future. *See* Note, *Certificates of Deposit and the Securities Laws: The Limited Precedent of* Marine Bank v. Weaver, 4 ANN. REV. BANKING L. 453, 476 (1985).

59. In support of its determination that there was no need for application of the Securities Exchange Act of 1934 to the CD because of adequate protection by other federal regulation, the Court relied on the earlier case of International Brotherhood of Teamsters v. Daniel, 439 U.S. 551 (1979). Marine Bank v. Weaver, 455 U.S. at 558 & n.7, 559. In *Daniel*, however, the existence of alternative federal regulations was not primarily relied upon by the Court for its determination that an employee pension fund investment was not a security. International Bhd. of Teamsters, 439 U.S. at 569 ("If any further evidence were needed to demonstrate that pension plans of the type involved are not subject to the Securities Acts, [other federal regulation] would put the matter to rest."). The citation in *Weaver* correctly recognizes that the alternative regulatory protection was only one of several elements of the Court's rationale in *Daniel*. Marine Bank v. Weaver, 455 U.S. at 558 n.7. In contrast to *Daniel*, alternative federal regulatory protection is the entire underpinning of the *Weaver* decision. Thus, *Weaver* takes a substantial step beyond *Daniel*. *See* Note, *Securities Regulation Incident to Certificates of Deposit and Privately Negotiated Agreements: Departures From a Functionally Operative Security Definition*, 62 NEB. L. REV. 579, 595 (1983) (*Daniel* Court's reliance on other federal regulation was of secondary importance because discussion occurred after application of *Howey* test).

The *Weaver* Court's reliance on protection provided by alternative federal regulation is problematic for two other reasons. First and foremost, the Securities Acts do not authorize preemption or preclusion of their protections by other federal regulations even if those other regulations afford complementary protection. *See* 15 U.S.C. §§ 77p, 78bb (1982) (the cumulative remedies clause of both Acts states, "The rights and remedies provided by this [subchapter/chapter] shall be in addition to any and all other rights and remedies that may exist at law or in equity."). There is no evidence that Congress intended securities regulations to be rendered inapplicable by the other federal law such as the federal banking regulations. Note, *supra* note 54, at 210. Second, many argue that banking laws do not adequately protect CD purchasers. *See, e.g., id.* at 209-10. In particular, banking regulations may not afford the extensive protections available under the Securities Acts' antifraud provisions because banking regulations generally do not provide a private remedy for fraud. *See* Bunch, *supra* note 4, at 1034-35; Note, *supra* note 58, at 470.

of the Act,"[60] was not a security under the federal securities laws.[61] The *Weaver* Court, however, in a footnote to its opinion, added a significant caveat:

> It does not follow that a certificate of deposit or business agreement between transacting parties invariably falls outside the definition of a "security" as defined by the federal statutes. *Each transaction must be analyzed and evaluated on the basis of the content of the instruments in question, the purposes intended to be served, and the factual setting as a whole.*[62]

Weaver has been relied upon by the Court of Appeals for the Ninth Circuit in two cases[63] that have addressed the question of whether a CD is a security when issued by a private foreign bank to United State citizens in the United States. In *Wolf v. Banco Nacional de Mexico, S.A.*, the plaintiff purchased one six-month and two three-month CDs[64] from a Mexican bank after reading newspaper advertisements and corresponding with the bank through United States mail.[65] Plaintiff purchased the CDs with United States dollars, which were then converted into pesos. Upon maturity, the principal and current earned interest was converted back from pesos to dollars.[66] Prior to maturity, however, the Mexican government suspended its established practice of market intervention to stabilize the value of the peso, and rapid devaluation followed.[67] Consequently, the plaintiff's principal investment, after conversion from pesos to dollars, was substantially less than the amount originally invested.[68] Plaintiff filed suit against the bank in

60. Marine Bank v. Weaver, 455 U.S. at 558.

61. *Id.* at 559. The Court also rejected the court of appeals's determination that a finder of fact could conclude that the agreement between the Weavers and the owners of the company, *see supra* note 42, was a security. Marine Bank v. Weaver, 455 U.S. at 559-60.

62. *Id.* at 560 n.11 (emphasis added).

63. *See* West v. Multibanco Comermex, S.A., 807 F.2d 820, 826-29 (9th Cir.), *cert. denied*, 107 S.Ct. 2483 (1987); Wolf v. Banco Nacional de Mexico, S.A., 739 F.2d 1458, 1463-64 (9th Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985).

64. Wolf v. Banco Nacional de Mexico, S.A., 739 F.2d at 1459. Notwithstanding the exemption in the Securities Act of 1933, *see* 15 U.S.C. § 77c(a)(3) (1982), and the exclusion in the Securities Exchange Act of 1934, *see id.* § 78c(a)(10), for notes with maturity dates of less than nine months, the Court found the maturity dates insignificant for its determination of whether the CDs were securities. Wolf v. Banco Nacional de Mexico S.A., 549 F. Supp. 841, 844 (N.D. Cal. 1982), *rev'd on other grounds*, 739 F.2d 1458 (9th Cir. 1984). See *supra* note 52 for a discussion of the view held by courts that the length of the CD is not controlling.

65. Wolf v. Banco Nacional de Mexico S.A., 739 F.2d at 1459.

66. *Id.* The guaranteed rates of return on the CDs were 33.9%, 31.4%, and 32.75%, respectively.

67. *Id.* The Mexican government had undertaken such intervention since 1977. Wolf v. Banco Nacional de Mexico S.A., 549 F. Supp. at 842.

68. Plaintiff received only $35,536 of the original $60,000 that he invested. Wolf v. Banco Nacional de Mexico, S.A., 739 F.2d at 1459.

federal district court claiming violation of the Securities Act of 1933 by the sale of unregistered securities [69] and violation of both Securities Acts' antifraud provisions.[70] Plaintiff alleged that the bank violated the antifraud provisions by misleading him with a brochure that omitted material information.[71]

The district court, on motions for summary judgment, held that the sale of the foreign CDs was a sale of securities and that the bank had violated the registration requirements of the Securities Act of 1933.[72] The court reasoned that *Weaver* was not controlling, at least in part, because the Mexican bank was not subject to regulation by a United States bank or regulatory agency.[73] The Court of Appeals for

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69. 15 U.S.C. § 77*l*(1) (1982).

70. Securities Act of 1933, 15 U.S.C. § 77q(a)(2) (1982); Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1982); Rule 10b-5, 17 C.F.R. § 240-10b-5 (1987).

71. Wolf v. Banco Nacional de Mexico, S.A., 549 F. Supp. at 842.

72. *Id.* at 850-53. The district court first acknowledged that the Supreme Court has "consistently admonished that in determining whether an instrument is a security, 'the emphasis should be on economic realities' rather than on the form of the transaction and the letter of the statute." *Id.* at 843-44 (citing United Hous. Found., Inc. v. Forman, 421 U.S. 837, 848 (1974) (quoting Tcherepnin v. Knight, 389 U.S. 332, 336 (1967)). The district court also noted that CDs have been held to be securities, both as "evidences of debt" and as "investment contracts." *Id.* at 843 n.2 (quoting 15 U.S.C. §§ 77(b)1, 78c(a)(10) (1982)).

73. The court stated:

> [The bank] urges that Mexican reserve, reporting and inspection requirements are as thorough as their American counterparts. Even if this is so, *Weaver* does not rest on the independent effect of such requirements on a depositor's risk; and to the extent *Weaver* invokes those requirements, it appears to emphasize their federal character, referring to "deposits in *federally* regulated banks . . . protected by the . . . requirements of the *federal* banking laws." In this connection it is significant that although Congress exempted bank securities from the registration provisions of the 1933 Act, it did not extend that exemption to foreign banks. *Weaver* thus does not compel the conclusion that Mexican banking laws obviate the application of the securities acts in this case.

Wolf v. Banco Nacional de Mexico, S.A., 549 F. Supp. at 845 (footnote omitted) (emphasis added by the court) (quoting Marine Bank v. Weaver, 455 U.S. 551, 558 (1982)). The court also found that two significant risks present in *Wolf*, the substantial risk of a currency devaluation and the risk of bank insolvency, were not present in *Weaver*. *Id.* The court concluded that *Weaver* was inapplicable because the underlying rationale of adequate protection was not met. *Id.* at 853.

After rejecting *Weaver*'s applicability, the district court considered application of the *Howey* test to the CDs in issue. *Id.* at 846-47. The court concluded that *Howey* should be limited to situations in which equity investments rather than debt instruments, such as CDs, were at issue because debt instruments do not usually involve an "expectation of profit" as required by *Howey*. *Id.* at 847. Rather than apply the *Howey* test, the court followed an approach adopted by the Second Circuit and found that the CDs were securities. *Id.* at 850-51. The court adopted an approach similar to the liberalist test set forth in Exchange Nat'l Bank v. Touche Ross & Co., 544 F.2d 1126, 1137 (2d Cir. 1976). The district court explained: "The most direct and reliable approach to deciding cases, such as this one, involving instruments or transactions that unquestionably exhibit the elements most commonly associated with securities is

the Ninth Circuit reversed.[74] Relying on *Weaver*, the court of appeals found that the CDs were not securities because of the protections afforded the purchaser by banking regulations of the Mexican Government.[75] The Ninth Circuit interpreted *Weaver*[76] as resting on the existence of adequate regulation rather than adequate United States regulation: "We think that the Court found it significant that the issuing bank was regulated, and regulated adequately, not that it was the federal government that regulated it."[77] The Ninth Circuit, however, held that the bank had the burden of proving the adequacy of regulation as an affirmative defense because the foreign bank had better access to evidence regarding the foreign government's regulatory structure.[78] After recognition of the plaintiff's concession that the Mexican government's regulation of the bank provided "the same degree of protection against insolvency as does the

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to include them within the meaning of a 'security' unless they fall into certain well defined categories." Wolf v. Banco Nacional de Mexico, S.A., 549 F. Supp. at 850. After determining that the CDs did not fall within any recognized category, *see id.* at 850-51, the court concluded that the CDs were securities.

74. Wolf v. Banco Nacional de Mexico, S.A., 739 F.2d at 1459. The Ninth Circuit rejected the defendant bank's claim of immunity from suit under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1982). The bank's claim was based on the fact that the bank was nationalized in 1982, at the same time as the lower court proceeding was going on, but after both the sale of the CDs and their maturity. The Ninth Circuit agreed with the district court's denial of the defendant's motion to stay proceedings to enforce the judgment because of the commercial activity exception. *See id.* § 1605(a)(2). Wolf v. Banco Nacional de Mexico, S.A., 739 F.2d at 1460.

75. Wolf v. Banco Nacional de Mexico, S.A., 739 F.2d at 1463-64.

76. The court of appeals also addressed post-*Weaver* amendments to the Securities Acts that both the defendant and plaintiff argued in their favor. *Id.* at 1462-63. The court observed that, in 1982, Congress amended part of the definitional sections of the Securities Acts. The House Report accompanying the amendments "described *Weaver* as 'holding that, under the circumstances of the case, a certificate of deposit issued by a bank *subject to regulation by a domestic bank regulatory agency* is not a security' under the 1934 Act." *Id.* at 1462 (quoting H.R. REP. No. 97-626, 97th Cong., 2d Sess. 10 (1982)) (emphasis added). The court concluded that the legislative history did not address the issue at bar, but merely demonstrated that Congress recognized *Weaver*'s narrow holding and that a different context may require a different result. *Id.* at 1463.

77. Wolf v. Banco Nacional de Mexico, S.A., 739 F.2d at 1462.

The SEC filed an amicus curiae brief arguing that *Weaver* should not be extended to CDs issued by foreign banks. *See supra* note 4. Although this Note does not focus on the argument advanced by the SEC, support for the argument can be found in the *Weaver* Court's reliance on International Brotherhood of Teamsters v. Daniel, 439 U.S. 551 (1979). *See* Marine Bank v. Weaver, 455 U.S. at 558 n.7. See *supra* note 59 for a discussion of *Daniel*. *Daniel* focused on whether the Employment Retirement Security Act adequately regulated employer pension investment plans. International Bhd. of Teamsters v. Daniel, 439 U.S. at 557. *Daniel* did not inquire into protection afforded under regulations, but merely into the protections afforded under United States statutes.

78. Wolf v. Banco Nacional de Mexico, S.A., 739 F.2d at 1463.

federal system,"[79] and a brief overview of Mexican regulations,[80] the court held: "Thus, because the government regulations imposed on [the bank] provide its certificate holders with protection equivalent to that afforded depositors in the federally regulated [bank in *Weaver*], [the bank's] certificates of deposit are not securities within the meaning of the federal securities acts."[81]

In *Wolf*, the Ninth Circuit heeded the *Weaver* Court's caveat that *Weaver* be carefully applied depending upon the facts of each case. The court placed on the bank the burden of establishing adequate protection of regulation as an affirmative defense and examined, although cursorily. Mexican regulation of the bank that plaintiff had conceded was adequate. In the later decision of *West v. Multibanco Comermex, S.A.*,[82] however, the Ninth Circuit failed to heed the *Weaver* caveat and, by so doing, jeopardized important protections provided by the securities laws.

In *West*, the Ninth Circuit addressed the question of whether *Weaver* should govern facts that were nearly identical to those in *Wolf*.[83] *West* was a consolidation of several suits also arising out of the Mexican peso devaluation of 1982.[84] The plaintiffs purchased from the defendant banks several CDs in United States dollars. The

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79. *Id.*

80. In reviewing the Mexican regulations, the court determined that the following protections existed: 1) supervision of the banks by Banco de Mexico, the National Banking Commission, and the Ministry of Finance and Public Credit; 2) paid-in capital and reserve requirements; 3) authority of the National Banking Commission over advertising; 4) requirements of annual audits and for submission of monthly financial statements to the National Banking Commission; and 5) "preferential" legal status for claims against insolvent banks. *Id.*

For a discussion of *Wolf*'s failure to evaluate Mexican government regulations specifically and the need for disclosures of the risk of peso devaluation, see Note, *International Banking and Securities Law*: Wolf v. Banco Nacional de Mexico, S.A., 26 HARV. INT'L L.J. 616, 620-21 (1985); Note, *Foreign Time Deposits Become "Securities"*: Wolf v. Banco Nacional de Mexico, 9 N.C. J. INT'L L. 159, 169-70 (1983).

81. *Id.* at 1463-64. Not long after the Ninth Circuit handed down its decision in *Wolf*, a similar case, Callejo v. Bancomer, S.A., 764 F.2d 1101 (5th Cir. 1985), came before the Fifth Circuit. In *Callejo*, the plaintiff had purchased CDs in the amount of $300,000 from a Mexican bank. *Id.* at 1106. The transaction was virtually identical to the one in *Wolf*. Due to devaluation of the peso and the substantial loss of invested principal, the plaintiff in *Callejo* brought, inter alia, an action for violation of the Securities Exchange Act of 1933, 15 U.S.C. § 77*l*(1) (1982), by the sale of unregistered securities. Callejo v. Bancomer, S.A., 764 F.2d at 1125 n.33. The district court dismissed the plaintiff's claim for want of jurisdiction. *Id.* at 1105. The court of appeals determined that the court had jurisdiction, but held that a CD was not a "security." *Id.* at 1125 n.33. The Fifth Circuit substituted a citation to *Wolf* for a substantive analysis of whether *Weaver* should control on the particular facts before the court. *Id.*

82. 807 F.2d 820 (9th Cir.), *cert. denied*, 107 S. Ct. 2483 (1987).

83. *Id.* at 825.

84. *Id.* at 822-23.

CDs were to be paid back in either pesos or dollars upon maturity.[85] Due to a Mexican government decree, all CD purchasers, including the plaintiffs, were paid in pesos at a rate of exchange determined by the Mexican government's central bank.[86] According to one plaintiff, his principal in one CD was reduced by one-third.[87] Plaintiffs filed claims in federal district court alleging that the banks had violated the Securities Act of 1933 by selling unregistered securities through interstate commerce.[88] The district court, in reliance on *Wolf*, granted the defendants' motions for summary judgment.[89]

On appeal to the Ninth Circuit,[90] the plaintiffs argued that *Wolf* was inapplicable because the plaintiffs, in contrast to *Wolf*,[91] did not concede that the protection provided against insolvency by the Mexican government was equivalent to that of the United States.[92] The *West* plaintiffs, in contravention of the *Wolf* rationale, argued that the Mexican regulatory system affords no insolvency protection because Mexican officials are not complying with or enforcing their laws.[93] "According to the plaintiffs, if the scheme of regulation *as applied* does not satisfy the insolvency protection test, the certificates of deposit should be considered to be 'securities.' "[94]

The Ninth Circuit affirmed the judgment of the district court al-

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85. *Id.* at 822. Defendant bank had solicited the plaintiffs' business through the United States mail. From the late 1970s, the bank had "mailed a brochure entitled *'Mexico's Other Great Climate . . . Investment'* to numerous persons in the United States, encouraging investment in [peso- and dollar-denominated CDs]." *Id.*

86. *Id.* at 822-23. In 1982, the government of Mexico implemented a program of exchange control regulations to stabilize the exchange value of the peso. *Id.* at 822. The Mexican government also nationalized the entire private banking system. *Id.* at 823.

87. *Id.* at 823. Both the dollar-denominated and peso-denominated CDs sustained substantial losses due to the peso devaluation. *Id.*

88. *Id.* Plaintiffs also claimed that "the institution of exchange controls by Mexico constituted a taking of property in violation of international law." *Id.* at 831. The Ninth Circuit affirmed the district court's grant of defendant bank's motion for summary judgment on the takings claim. *Id.* at 833. *See id.* at 831-33 (discussion of the takings claim).

89. *Id.* at 823.

90. The Ninth Circuit addressed the issue of whether the three defendants could assert sovereign immunity under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1982), because the banks were nationalized in 1982. West v. Multibanco Comermex, S.A., 807 F.2d at 823-26. The court, agreed with the analysis of the Fifth Circuit in Callejo v. Bancomer, S.A., 764 F.2d 1101 (5th Cir. 1985), and determined that it had jurisdiction consistent with the Act for the securities claim. West v. Multibanco Comermex, S.A., 807 F.2d at 826. See *supra* note 81 for a discussion of *Callejo*. The Ninth Circuit also held that it had jurisdiction for the takings claim. West v. Multibanco Comermex, S.A., 807 F.2d at 826.

91. *See supra* notes 77-79 and accompanying text.

92. West v. Multibanco Comermex, S.A., 807 F.2d at 827.

93. *Id.*

94. *Id.*

though on a notably different rationale.[95] After reviewing the requirement and underlying rationale of *Wolf* regarding adequate protection that virtually guarantees repayment to CD purchasers, the court held that it was barred from examining whether the Mexican officials enforced their regulatory scheme.[96] The *West* court reasoned that the act of state doctrine, "a combination justiciability and abstention rule,"[97] prohibited review "in order to avoid embarrassment of foreign governments in politically sensitive matters and interference with the conduct of our own foreign policy."[98] For reasons of comity, the court presumed that the officials acted in accordance with the Mexican regulatory scheme.[99] The court concluded:

> Here, the only question as to the adequacy of the Mexican regulatory structure is the compliance of Mexican officials with the requirements of the Mexican law. Because our inquiry into the foreign officials' actions is barred by the act of state doctrine, our holding in *Wolf* that the certificates of deposit issued by Mexican banks are not "securities" is applicable. Since the certificates were not subject to the requirements of U.S. securities law, the plaintiffs cannot prevail on their securities law claim.[100]

The *West* court held that the act of state doctrine barred a factual inquiry into whether Mexican regulation of the banks and CDs at issue were enforced. The doctrinal bar thereby prevented the analysis, required by *Weaver*, of whether the CDs were in fact abundantly protected by law and whether the purchasers of the Mexican CDs

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95. *Id.* at 823.

96. *Id.* at 827.

97. *Id.* The *West* Court noted that the doctrine was developed in pre-*Erie* days and reaffirmed by the Supreme Court in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). West v. Multibanco Comermex, S.A., 807 F.2d at 827. The Ninth Circuit quoted an early decision by the Court for a classic statement of the doctrine: " '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.' " *Id.* at 828 (quoting Underhill v. Hernandez, 168 U.S. 250, 252 (1897)).

98. West v. Multibanco Comermex, S.A., 807 F.2d at 828. The court relied upon the *Restatement (Second) of Foreign Relations of the United States* for the proposition that, " '[w]hen the causal chain between defendant's conduct and plaintiff's injury could not be determined without an inquiry into the motives of the foreign government, the [act of state doctrine] defense has been successful . . . .' " West v. Multibanco Comermex, S.A., 807 F.2d at 828 (quoting RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 469 comment 7 (Tent. Draft No. 7, 1986)). For a general discussion of the act of state doctrine, see Kleinman, *The Act of State Doctine—From Abstention to Activism*, 6 J. COMP. BUS. & CAP. MARKET L. 115 (1984).

99. West v. Multibanco Comermex, S.A., 807 F.2d at 828.

100. *Id.* at 829. The court noted that the doctrine would not bar examination in situations where "the [regulatory system] may not address the depositor's problems or that even with the regulatory system, banks nonetheless fail with regularity." *Id.* at n.7.

were "virtually guaranteed payment in full."[101] In direct response to the doctrinal bar, the *West* court presumed that Mexican officials were enforcing their regulations.[102] By so presuming, the Ninth Circuit presumed that the *Weaver* requirements were met. The court's reliance on a presumption for the determination of whether the CDs in question were securities is in direct contravention to the caveat of *Weaver* that admonishes, "Each transaction must be analyzed and evaluated on the basis of the content of the instruments in question, the purposes intended to be served, and the *factual setting* as a whole."[103]

Despite other accepted interpretations and applications of the act of state doctrine, this Note does not argue against the *West* court's use of the act of state doctrine,[104] but with the outcome resulting from the doctrine's use. After determining that the doctrine barred a factual inquiry, the Ninth Circuit erred by relying on a presumption for its determination that the CDs were not securities. The Court in *Weaver* stated, "The definition of 'security' in the 1934 Act provides that an instrument which seems to fall within the broad sweep of the Act is not to be considered a security if the context otherwise provides."[105] The Court then cautioned that each situation should be analyzed and evaluated for a determination of whether the securities laws are necessary for the protection of investors. Accordingly, an evaluation of the factual context was necessary to determine whether, because of the actual protections provided under other laws, it was necessary to subject the defendant banks' CDs to the federal securities laws.

Rather than presume that the requirements of *Weaver* were satisfied, the *West* court should have held that because the doctrinal bar prevented the necessary factual inquiry, *Weaver* was inapplicable.[106]

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101. Marine Bank v. Weaver, 455 U.S. at 558.

102. West v. Multibanco Comermex, S.A., 807 F.2d at 828.

103. Marine Bank v. Weaver, 455 U.S. at 560 n.11 (emphasis added).

104. The act of state doctrine varies in interpretation and application. *See* Kleinman, *supra* note 98, at 115-16. Although the Ninth Circuit found that the doctrine barred the inquiry in *West*, other courts may have found that the doctrine did not bar the inquiry. For example, the "prudential balancing" approach requires adjudication of the facts as long as the court has jurisdiction and no compelling reason to abstain. The balancing approach embodies the position "that a court can resolve most disputes placed before it, even those involving the acts of a foreign state." *Id.* at 126. A court adopting such an approach may have continued with the factual inquiry and followed the mandate of *Weaver*.

105. Marine Bank v. Weaver, 455 U.S. at 558-59.

106. Before holding that the act of state doctrine prevents a further inquiry required by *Weaver*, courts should closely examine the facts to determine if the facts can be characterized in such a manner that the act of state doctrine is not implicated. This close evaluation will prevent parties from manipulating the facts in their favor, i.e., a plaintiff may desire to characterize the facts in a manner that implicates the act of state doctrine to avoid the *Weaver* inquiry.

Consequently, the Ninth Circuit should have either concluded that the CDs issued by the defendant banks were securities or applied another appropriate test. By holding that *Weaver* is inapplicable, the court would have upheld the rationale of *Weaver* and the policies underlying the Securities Acts.[107] The failure to be consistent in applying the provisions and policing all transactions within the terms of the Securities Acts may reduce confidence in the securities market. Increasing and maintaining investor confidence was the precise catalyst for the promulgation of the Acts. In light of the importance of the securities market to our domestic and the world economy and the extreme sensitivity of investors to the perceived integrity and stability of the market, the broad protective provisions of the Acts must be applied consistently, and applied as the Supreme Court has directed in *Weaver*. Reliance on legal presumptions to determine whether a CD is a security fails to ensure the integrity of the market and the Securities Acts' protections on which investors rely.

*Peter J. Stocks**

107. *See supra* notes 40-62 and accompanying text.

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