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The Liability of Foreign Government Entities: First National City Bank v. Banco Para El Comercio Exterior De Cuba

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I. INTRODUCTION

Governments throughout the world, either in their own names or through agents or instrumentalities, engage in commercial transactions.[1] If disputes relating to these transactions occur, the government's claim of sovereign immunity[2] or the application by a court of the act of state doctrine[3] may prevent plaintiffs from bringing a lawsuit against the government or its agent or instrumentality. By initiating a lawsuit, however, a government waives its sovereign immunity.[4]

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1. In 1976, fifty-nine of the 500 largest industrial corporations headquartered outside the United States were government-owned state enterprises. D. LAMONT, FOREIGN STATE ENTERPRISES 30 (1979). These fifty-nine enterprises accounted for 20.7 percent of the 1976 total sales of the 500 corporations. *Id.* at 250. In 1982, the number of government-owned state enterprises in "The International 500" had increased to sixty-five and comprised 18.5 percent of total sales. *See The International 500*, FORTUNE, August 22, 1983, at 172-81 (data calculated by author).

2. Under a principle of absolute sovereign immunity, a country is exempt from the jurisdiction of any other country and can be sued only with its consent. G. VON GLAHN, LAW AMONG NATIONS 139 (4th ed. 1981). Both the United States and England, however, have adopted a restrictive principle of sovereign immunity, under which immunity is restricted to a foreign government's sovereign, but not commercial, activities. The U.S. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1976) [hereinafter cited as FSIA], codifies this approach. *See, e.g.*, von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33 (1978); Note, *The Foreign Sovereign Immunities Act of 1976: Giving The Plaintiff His Day in Court*, 46 FORDHAM L. REV. 543 (1977). The comparable law in England is The State Immunity Act, 1978, ch. 33, §§ 1-23 (*reprinted in* 48 Halsbury's Statutes of England 85 (3rd ed. 1978)). *See* Delaume, *The State Immunity Act of the United Kingdom*, 73 AM. J. INT'L L. 185 (1979).

One distinction between the two statutes is in the treatment of instrumentalities established by a government as autonomous entities. The FSIA includes those entities in its definition of a foreign state and thereby affords them immunity. 28 U.S.C. § 1603(b) (1976); Carey v. National Oil Corp., 453 F. Supp. 1097, 1100 (S.D.N.Y. 1978) (corporation created and wholly owned by Libya is a "foreign state" for purposes of the FSIA), *aff'd*, 592 F.2d 673 (2d Cir. 1979). *See also infra* note 58. The State Immunity Act, however, expressly excludes these entities from immunity. The State Immunity Act, 1978 at § 14(1). This distinction may be of limited practical significance since governments establish these entities generally to engage in commercial activities and neither statute provides sovereign immunity for such activities. The State Immunity Act does provide immunity to an autonomous entity engaged in a sovereign act for which its government could have claimed immunity. *Id.* at § 14(2). For a comparison of the two statutes, see Delaume, *supra*, and Brower, Bistline, Jr. and Loomis, Jr., *The Foreign Sovereign Immunities Act of 1976 in Practice*, 73 AM. J. INT'L L. 200, 210 (1979).

3. The act of state doctrine dictates that domestic courts will not judge the validity of sovereign acts performed by a foreign government within its own territory. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964); *See infra* note 59 and G. VON GLAHN, *supra* note 2, at 152.

4. First National City Bank v. Banco Para El Comercio Exterior De Cuba, 103 S. Ct. 2591, 2603 (1983); The State Immunity Act § 2(3). *See also infra* note 92 and G. VON GLAHN, *supra* note 2, at 150.

Defendants can therefore bring a claim, by way of a setoff or counterclaim,[5] from which they might otherwise have been barred had the government not brought the initial lawsuit.[6]

An associated issue concerns the relationship between a government instrumentality and the government that established it. Since a government may establish an instrumentality as a separate legal entity,[7] the question arises whether that entity, if it initiates a lawsuit, should be subject to a setoff or counterclaim based not on its actions but on the actions of the establishing government.[8]

In the United States, the recent case of *First National City Bank v. Banco Para El Comercio Exterior De Cuba (Bancec)*[9] raised the issue of whether a foreign government entity should be given a separate juridical status.[10] If afforded such a status, the entity would be legally distinct from its government, and opposing parties could not hold it liable for actions of that government.[11] Additionally, the government entity could not claim sovereign immunity even if the government itself would be entitled to such immunity.[12] The U.S. approach, as indicated by the Supreme Court's decision in *Bancec*, is to deny the claimed separate juridical status of a government entity when the Court believes it would be inequitable to recognize the separate status.[13] In contrast, English courts have consistently recognized this separate status.[14]

This Comment examines the juridical status afforded government entities by courts in the United States and in England. The Comment focuses first on the nature of government entities, the reasons why they generally should be afforded an independent status, and the possible ramifications if they are not. The

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5. A setoff is "a counter demand which a defendant holds against a plaintiff arising out of a transaction extrinsic of plaintiff's cause of action." Howard Johnson, Inc. of Florida v. Tucker, 157 F.2d 959, 961 (5th Cir. 1946). A setoff is raised pursuant to Rule 13 of the Federal Rules of Civil Procedure. The goal of Rule 13(b), which states that any claim may be raised as a counterclaim against an opposing party, is to resolve all controversies between the parties in a single lawsuit. *See* Alaska Barite Co. v. Freighters, Inc., 54 F.R.D. 192, 195 (N.D. Cal. 1972); *see also* C. WRIGHT & A. MILLER, 6 FEDERAL PRACTICE AND PROCEDURE § 1420 (1971). For an early history of the concept of setoff, see Note, *The Development of Set-Off*, 64 U. PA. L. REV. 541 (1916).

6. FSIA, 28 U.S.C. § 1607; The State Immunity Act § 2(6). *See also infra* note 92 and accompanying text.

7. *See infra* § II.

8. *See infra* notes 90 & 91 and accompanying text.

9. Banco Nacional de Cuba v. Chase Manhattan Bank, 505 F. Supp. 412 (S.D.N.Y. 1980), *rev'd sub nom.* First National City Bank v. Banco Para El Comercio Exterior De Cuba, 658 F.2d 913 (2d Cir. 1981), *rev'd*, 103 S. Ct. 2591 (1983) [hereinafter cited as *Bancec*].

10. For the purposes of this Comment, the terms "separate legal personality" and "separate juridical status" are interchangeable.

11. *Bancec*, 103 S. Ct. at 2597; 658 F.2d at 917.

12. 103 S. Ct. at 2599. *See also* Friedmann, *Government Enterprise: A Comparative Analysis*, in GOVERNMENT ENTERPRISE: A COMPARATIVE STUDY 303, 314 (W. Friedmann and J. Garner eds. 1970). *See also infra* notes 32-34 and accompanying text.

13. *Bancec*, 103 S. Ct. at 2603. *See also infra* notes 91-101 and accompanying text.

14. *See infra* § IV.

author then analyzes the *Bancec* decision,[15] in which the Court allowed a setoff, based on actions of the Cuban government, against a Cuban government entity claiming to be independent of that government.[16] Finally, the Comment discusses how English courts have handled this issue. Although English courts have not been faced with the specific question of whether to allow a setoff, they have decided the more general issue of whether to consider a government entity as separate from the government that created it.[17] The author concludes that the English approach of giving effect to the claimed separate status of government entities is preferable because of the potential negative ramifications of not doing so, such as the disruption of commercial transactions.[18] The author further concludes that the Court in *Bancec* should have taken the English approach.

II. THE NATURE OF GOVERNMENT ENTITIES

An autonomous government entity[19] is created by a government, wholly or partially owned by that government, and established to perform a variety of functions, often of an economic nature.[20] These entities have a separate legal personality, which distinguishes them from government departments.[21] To have a separate legal personality, the entity must be able to sue and be sued, enter into contracts, be liable in tort, hold and dispose of property, have its own name, and keep its assets and liabilities distinct from those of the government, even if the entity is a legal part of the government.[22]

As long as these entities perform, in some respect, a governmental responsibility, they will not be financially or bureaucratically independent from the government that created them.[23] Governments finance these entities either by making periodic appropriations or by providing them with capital assets,[24] and

15. 103 S. Ct. 2591 (1983).

16. *Id.* at 2593.

17. *See infra* § IV.

18. *See infra* notes 185-187 and accompanying text.

19. This Comment discusses government instrumentalities that governments establish as separate juridical entities. One type of autonomous government entity is a public or government enterprise, such as a public or government corporation. *See generally* Friedmann, *supra* note 12, at 306-07. These government corporations also are referred to as government proprietary corporations. Thurston, *Government Proprietary Corporations*, 21 VA. L. REV. 351, 351-52 (1935). For purposes of this Comment, the author will use the term 'government entity' to refer to instrumentalities, enterprises, or public corporations that the creating government intends to be legally separate from the government.

20. THURSTON, *supra* note 19, at 351-52. One commentator states that the difference between a government completely owning a company and holding a controlling or strong minority interest is a difference only of degree. Friedmann, *supra* note 12, at 311.

21. Friedmann, *supra* note 12, at 314.

22. *Id.* at 315. *See also* United Nations Dept. of Economic and Social Affairs, Organization, Management and Supervision of Public Enterprises in Developing Countries 64, U.N. Doc. ST/TAO/M/65, U.N. Sales No. E.74.II.H.4 (1974) [hereinafter cited as U.N. Study].

23. Friedmann, *supra* note 12, at 320, 326.

24. *Id.* at 319. *See also* Brief for Respondent at 12, *Bancec*, 103 S. Ct. 2591. *But see* U.N. Study, *supra* note 22, at 64 (except for capital appropriations or to cover losses, a public corporation is generally independently financed).

profits are generally remitted to the state.[25] Moreover, the government usually exercises general direction over the entity.[26] Governments create these entities for many purposes, including state trading.[27] The Soviet Union and other communist and socialist countries are the major state traders,[28] since they conduct most or all of their trade in this manner.[29] State trading is not unique, however, to the communist and socialist countries. In the United States, for example, the Nuclear Regulatory Commission and the Energy Research and Development Administration handle the sale of nuclear fuel.[30] In England, the British National Oil Corporation conducts the exploration, production, and sale of North Sea oil.[31]

Although government entities are intended to be separate from the creating governments, conflicts arise when parties bring suits against these entities. If a court does not consider a government entity as separate, the government entity is immune from suit in the same manner as the creating sovereign.[32] As a separate entity, however, it is liable to suit. The United States and England handle this issue similarly. In England, these entities do not enjoy the privileges and immunities of the government,[33] and in the United States, the ability of the entities to sue and be sued has been construed as constituting a waiver of sovereign immunity.[34] If the entity initiates a lawsuit, it is subject to setoff or counterclaims based on its actions. The *Bancec* case raised the question whether the entity could be subject to a setoff based on actions of the government that created it.

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25. Friedmann, *supra* note 12, at 321; Brief for Respondent at 12, *Bancec*, 103 S. Ct. 2591.

26. Friedmann, *supra* note 12, at 325-26; Brief for Respondent at 12-13, *Bancec*, 103 S. Ct. 2591.

27. A government is engaged in state trading when it conducts and controls foreign trade. This control is exercised in several ways. The state can own a trading enterprise, directly control a private enterprise, or grant exclusive or special privileges to the private enterprise. Ianni, *State Trading: Its Nature and International Treatment*, 5 NW. J. INT'L L. & BUS. 46, 48 (1983).

28. *Id.* at 49. Major state traders include the Soviet Union, Poland, Romania, and East Germany. *Id.* See also Brief for Respondent at a6-a11, *Bancec*, 103 S. Ct. 2591, for a survey of government corporations, primarily in the developing countries.

29. Ianni, *supra* note 27, at 49. *See also* I Congreso del Partido, [1980] 1 LLOYD's L.R. 23, 25 (C.A.) (government entrusts commerce of Cuba to state trading enterprises).

30. 42 U.S.C. §§ 2014, 2073-74 (1976). Congress vested the right to sell "special nuclear material" in the Atomic Energy Commission. *Id.* The Energy Reorganization Act of 1974 abolished the Atomic Energy Commission and transferred its functions to the Administrator of the Energy Research and Development Administration and the Nuclear Regulatory Commission. 42 U.S.C. §§ 5801-5891 (1976). These are not government entities as the term is used in this Comment. *See also* J. JACKSON, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 1046 n.2 (1977).

31. Millard, *The Legal Environment of the British Oil Industry*, 18 TULSA L. J. 394, 432, 446 (1983).

32. But to the extent the entity is engaged in commercial activity, it would not be entitled to sovereign immunity in either the United States or in England. *See supra* note 2.

33. Friedmann, *supra* note 12, at 313; Trendtex Trading Corp. v. Central Bank of Nigeria, [1977] 1 Q.B. 529, 559. *See also* Tamlin v. Hannaford, [1950] 1 K.B. 18, 22-24 (holding that the British Transport Commission, a British statutory commission, was not entitled to the privileges and immunity of the Crown).

34. *Bancec*, 103 S. Ct at 2599; Abel, *The Public Corporation in the United States*, in GOVERNMENT ENTERPRISE: A COMPARATIVE STUDY 181, 198-99 (W. Friedmann and J. Garner eds. 1970).

While the separate status of a government entity, such as a state trading corporation, had never been considered by the U.S. Supreme Court before the *Bancec* case,[35] the legal status of these entities has been the subject of scholarly comment. One commentator, for example, states that these entities should be considered as separate from their governments[36] and that sovereign immunity should not be extended to them.[37] He suggests further that courts, when considering the entities' legal status, reflect on the appropriateness of affording them sovereign immunity.[38] He believes that if courts did so, they would conclude that the entities are legally separate from their governments not only for purposes of sovereign immunity but also in other legal contexts.[39]

The Revised Restatement of the Foreign Relations Law of the United States supports the position that a government instrumentality is a legally distinct entity. Section 452 states that a claim resulting from the activity of a state instrumentality may be brought against that instrumentality or against the state.[40] The Restatement further recognizes, however, that these instrumentalities are usually responsible only for their own activities,[41] and that in order for the liability of the state to be imputed to the instrumentality, the state and instrumentality must have a relationship both to one another and to the claim.[42]

The effects of disregarding the independent status of government entities such as state trading corporations are numerous.[43] Commercial dealings involving countries that use trading corporations could be adversely affected if the independent status of these entities were ignored by U.S. courts.[44] In addition, were the independent status of a government entity ignored, governments could be sued based not on their conduct but rather on the actions of the separate entity.[45]

Courts in the United States and in England have recognized that government entities generally should be afforded a status separate from the government

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35. *Bancec*, 103 S. Ct. at 2598 n.12.

36. W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 352 (1964).

37. Friedmann, *supra* note 12, at 335-36. U.S. courts have generally refused to recognize sovereign immunity as a defense for a state trading entity. Note, *The Liability of Foreign Governments Under United States Antitrust Laws*, 11 GA. J. OF INT'L & COMP. L. 103, 111 (1981); Fensterwald, *United States Policies Toward State Trading*, 24 LAW & CONTEMP. PROB. 369, 369 (1959).

38. FRIEDMANN, *supra* note 36, at 350.

39. *Id.*

40. RESTATEMENT(REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 452 (Tent. Draft No. 2, 1981).

41. *Id.* at § 452, comment d.

42. *Id.* at § 452, reporter's note 2. As an example of this requisite relationship, the RESTATEMENT refers to Banco Nacional de Cuba v. First National City Bank, 478 F.2d 191 (2d Cir. 1973). *See infra* notes 61-65 and accompanying text.

43. *See infra* § V.

44. *See infra* notes 185-87 and accompanying text.

45. Gibbons v. Republic of Ireland, 532 F. Supp. 668, 671-72 (D.D.C. 1982).

which created them.[46] However, while English courts presume the independent status of a government entity,[47] the U.S. Supreme Court has, in a precedent-setting case, held a government entity liable for the acts of its government.[48] Since this holding has far-reaching ramifications, the Court's decision in *Bancec* bears close examination.

III. U.S. TREATMENT OF AUTONOMOUS GOVERNMENT ENTITIES

A. *Expropriation Cases Prior to* Bancec

The Cuban revolution in 1959,[49] and Cuba's subsequent expropriation[50] of U.S. citizens' investments in 1960, produced a significant amount of litigation in U.S. courts.[51] Most of this litigation arose in the following manner. Property owned by U.S. citizens would be nationalized and expropriated, as authorized by

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46. *See infra* notes 90 & 177 and accompanying text.

47. *See infra* § IV.

48. *Bancec*, 103 S. Ct. at 2603.

49. The Cuban revolution began on January 1, 1959. *Bancec*, 505 F. Supp. at 419. After the overthrow of the Batista regime, Castro and Che Guevara established a new national government. *Id.* This new government increased its ownership and control over the means of production and placed restrictions on international trade with Cuba. *Id.*

50. An expropriation is a "transfer of ownership in a property to the State or one of its subordinate organs for reasons of public interest with prompt, effective and full (or adequate) compensation." G. SCHWARZENBERGER & E. BROWN, A MANUAL OF INTERNATIONAL LAW 84 (6th ed. 1976). This expropriation was authorized by the Cuban government on July 6, 1960, in retaliation for the July 6th reduction by Congress of Cuba's sugar quota in the United States. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964).

51. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 193 F. Supp. 375 (S.D.N.Y. 1961), *aff'd*, 307 F.2d 845 (2d Cir. 1962), *rev'd*, 376 U.S. 398 (1964) (act of state doctrine precluded court from hearing case that involved determination of validity of Cuba's acts of expropriation), *on remand sub nom.* Banco Nacional de Cuba v. Farr, 243 F. Supp. 957 and 272 F. Supp. 836 (S.D.N.Y. 1965) (Hickenlooper Amendment to Foreign Assistance Act of 1964 prohibited court from declining to hear case based on act of state doctrine when claim was based on a taking in violation of international law; case dismissed because plaintiff obtained title to sugar in violation of international law), *aff'd*, 383 F.2d 166 (2d Cir. 1967), *cert denied*, 390 U.S. 956, *reh. denied*, 390 U.S. 1037 (1968); Banco Nacional de Cuba v. First National City Bank of N.Y., 270 F. Supp. 1004 (S.D.N.Y. 1967), *rev'd*, 431 F.2d 394 (2d Cir. 1970), *vacated and remanded*, 400 U.S. 1019, *rev'd on remand*, 442 F.2d 530 (2d Cir. 1971), *rev'd and remanded*, 406 U.S. 759 (1972), *aff'd on remand*, 478 F.2d 191 (2d Cir. 1973) [hereinafter cited as *Citibank*] (action by Cuban national bank to recover from Citibank excess amounts received on the sale of a loan; court allowed counterclaim by Citibank for the value of its investment lost due to the expropriation of its assets by the Cuban government); Banco Nacional de Cuba v. Chase Manhattan Bank, 505 F. Supp 412 and 514 F. Supp. 5 (S.D.N.Y. 1980), 658 F.2d 875 (2d Cir. 1981) (setoff by Chase Manhattan Bank allowed against a valid claim of Cuban national bank for losses due to expropriation of Chase's assets by Cuba); Banco Nacional de Cuba v. Chemical Bank New York, 658 F.2d 903 (2d Cir. 1981) (counterclaim by Chemical Bank not allowed for losses due not to the expropriation of its property but rather the property of a corporation that owed it money); Menendez v. Faber, Coe & Gregg, Inc., 345 F. Supp. 527 (S.D.N.Y.1972), *modified sub nom.* Menendez v. Saks & Co., 485 F.2d 1355 (2d Cir. 1973), *rev'd sub nom.* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) (refusal of Cuban government to repay funds mistakenly paid to it by Dunhill for pre-intervention shipments of cigars was not an act of state). *See generally* Casenote, *Act of State Doctrine: Determining its Viability in a Suit Involving an Expropriation by Cuba of Foreign Owned Assets*, 14 LAW. AM. 337 (1982).

the Cuban government and carried out by an instrumentality of that government.[52] In response to this expropriation, the U.S. companies involved, often U.S. banks,[53] would respond with self-help actions directed at Cuban government entities. These actions included withholding the proceeds of a loan due to Banco Nacional de Cuba[54] or failing to pay an undisputed letter of credit to Bancec.[55] These Cuban entities would subsequently bring suit in the United States to recover the withheld or unpaid amounts.[56] The defendant U.S. banks would then claim a setoff for the value of the expropriated property. The setoff claims raised the issue of whether these entities of the Cuban government would be afforded a separate juridical status by U.S. courts, or whether they would be held responsible for the expropriations and thus have their claims subjected to a setoff.[57]

Prior to the *Bancec* case, the U.S. Supreme Court had never addressed the issue of the separate status of foreign government entities.[58] When cases arising

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52. An example of such an instrumentality is Banco Nacional de Cuba, which carried out the expropriation of the Cuban branches of the U.S. banks. *Citibank*, 478 F.2d at 193-94.

53. *See, e.g.*, *Bancec*, 103 S. Ct. 2591; *Chase*, 658 F.2d 875; *Citibank*, 478 F.2d 191; *Chemical Bank New York*, 658 F.2d 903.

54. *Citibank*, 270 F.2d at 1006.

55. *Bancec*, 103 S. Ct. at 2594. A letter of credit is a document issued by a bank which promises to pay to the beneficiary the price of certain goods if the parties comply with the terms contained in the document. R. SPEIDEL, R. SUMMERS & J. WHITE, COMMERCIAL TRANSACTIONS 942 (1969). *See generally* Thayer, *Irrevocable Credits in International Commerce: Their Legal Nature*, 36 COLUM. L. REV. 1031 (1936).

56. Instrumentalities of the Cuban government have the right to sue in U.S. courts. *Sabbatino*, 376 U.S. at 412.

57. *Bancec*, 103 S. Ct. at 2593.

58. *Id.* at 2598 n.12. U.S. courts have considered the nature of these entities under the FSIA. In Verlinden, B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd and remanded on other grounds*, 103 S. Ct. 1962 (1983), the court held that it had jurisdiction over the Central Bank because the bank was an agent or instrumentality of a foreign state. This holding was compelled by the FSIA, which states that a "foreign state" includes an agency or instrumentality of that state and further defines agency or instrumentality as including any entity "which is an organ of a foreign state . . . or whose shares or other ownership interest is owned by a foreign state." 28 U.S.C. § 1603 (1976). The legislative history of the FSIA specifically includes state trading corporations within the definition of an agency or instrumentality. H.R. REP. No. 1487, 94th Cong., 2d Sess. 15-16, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604, 6614 [hereinafter cited as REPORT]. *See also* East Europe Domestic Intern. Sales Corp. v. Terra, 467 F. Supp. 383 (S.D.N.Y. 1979), *aff'd without opinion*, 610 F.2d 806 (2d Cir. 1979) (state trading corporation conceded it was a foreign state for purposes of the FSIA); S & S Machinery Co. v. Masinexportimport, 706 F.2d 411 (2d Cir. 1983), *cert denied*, 104 S. Ct. 161 (1983) (Romanian state-owned export/import company is an agency or instrumentality of a foreign state for purposes of the FSIA).

None of these cases discussed whether the entity could be considered an alter ego of the government so that a claim against the government could be set off against the entity. The FSIA does not resolve this issue, as the House Report states:

> This bill is not intended to affect the substantive law of liability. Nor is it intended to affect . . . the attribution of responsibility between or among entities of a foreign state; for example, whether the proper entity of a foreign state has been sued, or whether an entity sued is liable in whole or in part for the claimed wrong.

out of the Cuban expropriations first came before the Court, it had held that the act of state doctrine[59] barred judicial consideration of these cases.[60] In *First National City Bank v. Banco Nacional de Cuba*,[61] however, the Court reversed its position and held that the act of state doctrine did not prohibit it from considering the acts of expropriation.[62]

On remand, the Second Circuit held that a setoff against Banco Nacional would be allowed because Banco Nacional had expropriated the U.S. property in Cuba for the Cuban government.[63] The Second Circuit subsequently heard several cases involving claims by Cuban government entities and counterclaims for setoff by U.S. banks for the value of their expropriated property.[64] It allowed the setoffs only when the entity had been involved in the expropriation or at least had benefited from it.[65]

REPORT at 12, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6610. The *Bancec* Court also recognized that the FSIA did not control the issue of whether a government entity could be held liable for acts of that government. 103 S. Ct. at 2597.

59. The act of state doctrine dictates that U.S. courts will not judge the validity of sovereign acts performed by a foreign government within its own territory. *Sabbatino*, 376 U.S. at 428. The doctrine is based on constitutional underpinnings arising out of the separation of powers and is rooted in judicial deference to the executive branch's authority over foreign affairs. *Id.* at 423, 427-28.

Chief Justice Fuller articulated the act of state 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." Underhill v. Hernandez, 168 U.S. 250, 252 (1897). *See generally* RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 428-29 (Tent. Draft No. 4, 1983); Comment, *The Act of State Doctrine: A History of Judicial Limitations and Exceptions*, 18 HARV. INT'L L. J. 677 (1977).

A similar statement regarding English law is found in A.M. Luther v. James Sagor & Co., [1921] 3 K.B. 532, 548. *See also* Princess Paley Olga v. Weisz, [1929] 1 K.B. 718, 736. English courts, like those in the United States, have limited the application of the act of state doctrine. If the sovereign act violates international law, the act of state doctrine will not prevent English courts from examining the validity of the act. Anglo-Iranian Oil Co. v. Jaffrate, [1953] 1 W.L.R. 246, 258-59.

60. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

61. 406 U.S. 759 (1972).

62. *Id.* at 768. A divided court indicated several rationales for this decision. Justice Rehnquist, joined by Chief Justice Burger and Justice White, concluded that the Act of State doctrine did not apply because the executive branch had indicated that application of the doctrine would not advance U.S. foreign policy. *Id.* Justice Douglas, concurring in the judgment, stated that the Court's earlier decision in National Bank v. Republic of China, 348 U.S. 356 (1954) controlled. First National City Bank v. Banco Nacional de Cuba, 406 U.S. at 770. Justice Powell, also concurring, stated that the act of state doctrine did not apply because there was no showing that, by hearing the case, the Court would interfere with U.S. foreign relations. *Id.* at 775-76. Commentators have given this case extensive treatment. *See, e.g.*, Note, *Act of State*, 14 HARV. INT'L L. J. 131 (1973); Note, *New Indications of Justiciability of American Claims Against Cuban Expropriation*, 52 B.U. L. REV. 847 (1972). The issue discussed by these commentators was not whether Banco Nacional should be held responsible for the acts of the Cuban government, but rather whether the act of state doctrine precluded court examination of the acts of expropriation.

63. *Citibank*, 478 F.2d at 193.

64. *Chase*, 658 F.2d 875; *Bancec*, 658 F.2d 913; *Chemical Bank New York*, 658 F.2d 903.

65. RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 428, reporter's note 8 (Tent. Draft No. 4, 1983). *See also infra* notes 85-87 and accompanying text.

B. *The* Bancec *Case*

1. Facts

The Cuban government established Banco Para El Comercio Exterior de Cuba (Bancec) on April 25, 1960 as an autonomous credit institution with its own juridical personality.[66] It was intended to serve as Cuba's exclusive agent in foreign trade[67] and, as such, had the ability to buy goods in Cuba and sell them abroad[68] as well as to finance Cuban organizations engaged in foreign commerce.[69] The Cuban government provided the initial working capital;[70] if Bancec required additional funds, it could raise them by issuing bonds and other securities in its own name.[71] The Cuban government received all of Bancec's profits, after a deduction for capital reserves,[72] and Bancec was managed by a governing board of delegates from Cuban ministries and a general manager appointed by the governing board.[73] In these respects, Bancec was typical of government trading corporations established by other countries.[74]

On August 12, 1960, Bancec agreed to purchase sugar from the National Agrarian Reform Institute[75] and sell it to the Cuban Canadian Sugar Company.[76] To support the contract, Citibank issued an irrevocable letter of credit in favor of Bancec.[77] Bancec assigned this letter of credit to Banco Nacional for collection.[78] On September 15, 1960, Banco Nacional presented Bancec's draft to Citibank for collection.[79] The next day, the Cuban government nationalized the Cuban branches of Citibank, the Chase Manhattan Bank, and the First National Bank of

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66. *Bancec*, 103 S. Ct. at 2593.

67. *Id.*

68. *Bancec*, 658 F.2d at 915. As characterized by the district court, its function was "to manage the export of commodities for the account of the Government." 505 F. Supp. at 425.

69. *Bancec*, 658 F.2d at 915.

70. *Id.* Since the Cuban government supplied all of Bancec's capital, it consequently was its sole shareholder. 103 S. Ct. at 2593.

71. *See* Joint Appendix to Petitioner's and Respondent's Brief at 43-44, *Bancec*, 103 S. Ct. 2591.

72. 658 F.2d at 915. The court of appeals stated that the purpose of the capital reserves was for the "proper operation" of the bank. *Id.* In this respect, the remittance of profits to the Cuban government is similar to a corporate dividend payment, which is a payment to shareholders of profits earned over and above the amount of a corporation's capital. 11 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5318 (Perm. ed. 1971).

73. *Bancec*, 658 F.2d at 915.

74. *See supra* notes 19-27 and accompanying text. *See also* Brief for Respondent at 12-14, *Bancec*, 103 S. Ct. 2591.

75. The National Agrarian Reform Institute was an instrumentality of the Cuban government which owned and operated the nationalized sugar industry. *Bancec*, 103 S. Ct. at 2593.

76. *Bancec*, 658 F.2d at 915.

77. *Bancec*, 103 S. Ct. at 2593-94.

78. *Id.* at 2594.

79. *Id.*

Boston by expropriating them.[80] Shortly thereafter, Citibank credited the amount of the letter of credit to Banco Nacional's account and then applied the balance in that account as a setoff against its losses due to the Cuban expropriation.[81]

2. The Lower Court Decisions

Bancec instituted its action to recover on the letter of credit in the U.S. District Court for the Southern District of New York on February 1, 1961.[82] The district court determined that although Bancec was an autonomous institution under Cuban law, it was really not independent under U.S. law, but rather an alter ego of Cuba.[83] The court held that a setoff, therefore, should be allowed and

80. *Bancec*, 658 F.2d at 916. On July 6, 1960, the Cuban government authorized the nationalization of property located in Cuba belonging to U.S. citizens. *See supra* note 50 and accompanying text. Cuban Law 891, passed on October 13, 1960, authorized Banco Nacional to carry out the nationalization through expropriation. *Bancec*, 103 S. Ct. at 2594. It is beyond the scope of this Comment to discuss the expropriation without compensation of the Cuban branches of U.S. banks as a violation of international law; however, U.S. courts have ruled that it did constitute such a violation. *Citibank*, 270 F. Supp. at 1010; *Sabbatino*, 307 F.2d at 868. *See also* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 185 (1965); REPORT, *supra* note 58, at 19-20, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6618 ("The term 'taken in violation of international law' would include the nationalization or expropriation of property without payment of the prompt, adequate, and effective compensation required by international law. It would also include takings which are arbitrary or discriminatory in nature").

No international consensus exists, however, on this issue. Note, *Creating a Framework for the Reintroduction of International Law to Controversies Over Compensation for Expropriation of Foreign Investments*, 9 SYRACUSE J. INT'L L. & COM. 163, 163-64 (1982). The U.S. position is not followed by a majority of member states of the United Nations General Assembly. Thus, it is debatable whether the U.S. position is consistent with customary international law. J. SWEENEY, C. OLIVER & N. LEECH, THE INTERNATIONAL LAW SYSTEM 1126-27(2d ed. 1981). *See generally*, Garcia-Amador, *The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation*, 12 LAW. AM. 1 (1980); Goldie, *State Responsibility and the Expropriation of Property*, 12 INT'L LAW. 63 (1978).

81. *Bancec*, 103 S. Ct. at 2594. *See also infra* note 84.

82. *Bancec*, 505 F. Supp. at 418. Shortly thereafter, on February 23, 1961, the Cuban government dissolved Bancec. 103 S. Ct. at 2594. It assigned claims and functions relating to Bancec's banking business to Banco Nacional and those relating to its trading function to the Ministry of Foreign Trade. *Id.* On March 1, 1961, the Ministry of Foreign Trade created Empresa Cubana de Exportaciones (Empresa) and authorized it to conduct those commercial export transactions previously handled by Bancec. *Id.* The Ministry assigned a portion of Bancec's capital that it had previously received to Empresa. *Id.*

On December 31, 1961, The Cuban government dissolved Empresa, created Empresa Cubana de Azucar y sus Derivados (Cubazucar) the following day, and assigned Empresa's rights relating to sugar commerce to Cubazucar as a state trading company. *Id.* The fact that the Cuban government retained control over Bancec's assets and assigned them as it desired supports the claim that Bancec was an alter ego of the Cuban government. Brief for Petitioner for Certiorari at 19-20, *Bancec*, 103 S. Ct. 2591. This argument, however, was not discussed by the Court.

83. *Bancec*, 505 F. Supp. at 428. The court did not define alter ego. In corporate law, an alter ego relationship exists "when there is such a unity of interest and ownership that the separate personalities of the corporation and the owners cease to exist." Ize Nantan Bagowa, Ltd. v. Scalia, 577 P.2d 725, 728 (Ariz. App. 1978). One-hundred percent ownership of the stock of a corporation does not, in and of itself, result in an alter ego relationship between the sole shareholder and the corporation. Farmers Feed and Supply Co. v. United States, 267 F. Supp. 72, 76 (N.D. Iowa 1967).

dismissed the complaint because the value of the confiscated branches exceeded the amount of Bancec's claim.[84]

The Second Circuit reversed the district court decision, holding that because Bancec had no role in the expropriation, it was not an alter ego of the Cuban government for purposes of Citibank's counterclaim.[85] It distinguished the instant case from those involving Banco Nacional as plaintiff[86] because Banco Nacional had taken part in the expropriation that was the basis of the counterclaim.[87] The court dismissed the counterclaim, found in favor of Bancec, and directed that Citibank pay the judgment in accordance with the Cuban Asset Control Regulations.[88]

3. The Supreme Court Decision

The Supreme Court, in reviewing the court of appeals dismissal of the counterclaim,[89] recognized conflicting considerations. The Court realized that the separate status of government instrumentalities generally should be respected and, based on this consideration alone, the setoff disallowed.[90] The Court also noted, however, it would be unfair to allow Bancec to recover on the letter of credit because the government of Cuba would be the ultimate beneficiary of such a recovery.[91]

The Court stated that the Cuban government could not sue in U.S. courts without subjecting itself to Citibank's counterclaim.[92] The Court indicated that to

84. *Bancec*, 505 F. Supp. at 467. Citibank claimed the value of its losses was in excess of $5 million or $9 million, depending upon the valuation technique. *Id.* at 465. In contrast, the amount demanded on the letter of credit was $193,280. *Id.* at 424. The appellate court did not determine the exact amount of Citibank's losses, but held that those losses exceeded amounts already recovered and therefore allowed the setoff. *Id.* at 467. For a further discussion of the valuation of expropriation claims, see A. LOWENFELD, EXPROPRIATION IN THE AMERICAS 7 (1971); *Chase*, 658 F.2d at 887.

85. *Bancec*, 658 F.2d at 919-20.

86. *See supra* note 51.

87. *Bancec*, 658 F.2d at 918. *See also supra* notes 63-65 and accompanying text.

88. *Bancec*, 658 F.2d at 920. The Cuban Asset Control Regulations, 31 C.F.R. §§ 515.101-515.809 (1983), were enacted pursuant to subchapter V, Claims Against Cuba and China, of Chapter 21 — Settlement of International Claims, 22 U.S.C. §§ 1643-1643(k)(1976). Subchapter V gives the Foreign Settlement Claims Commission, established pursuant to 22 U.S.C. § 1622 (1976), authority to "determine the amount and validity of claims against the Government of Cuba." *Id.* at § 1643. The regulations provide that property, including "claims, obligations or other evidence of indebtedness," cannot be transferred to Cuba, but setoffs against such property are permitted. 31 C.F.R. § 515.205.

89. 103 S. Ct. 2591 (1983). Justice O'Connor delivered the opinion of the Court, in which Chief Justice Burger and Justices White, Marshall, Powell, and Rehnquist joined. Justice Stevens, joined by Justices Brennan and Blackmun, concurred in part and dissented in part.

90. *Bancec*, 103 S. Ct. at 2593, 2600. *See infra* notes 185-193 and accompanying text.

91. *Bancec*, 103 S. Ct. at 2603.

92. *Id. See* National Bank v. Republic of China, 348 U.S. 356 (1955). This decision was codified in the FSIA, which reads in relevant part:

> In any action brought by a foreign state . . . in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim . . . (c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

give effect to Bancec's separate status would allow Cuba relief it otherwise could not obtain without waiving its sovereign immunity.[93] This equitable concern had been expressed by the Court in an earlier case: "We have a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery. It wants our law, like any other litigant, but it wants our law free from the claims of justice."[94]

Since no equitable principles were precisely on point, the Court relied on a general equitable principle, found in both international law and federal common law,[95] pertaining to private corporations.[96] The principle states that a corporation is not always considered legally separate from its owners and that the corporate form can be disregarded if fraud or injustice is involved.[97] For example, if a shareholder cannot bring a particular cause of action because of equitable principles, the corporation cannot bring it either.[98] In this case, Bancec is the corporation and the government of Cuba is the shareholder.[99] The Court reasoned that, since Cuba could not sue in its own name without being subject to the counterclaim,[100] neither should Bancec be allowed to sue free from a counterclaim.[101]

While the setoff in *Bancec* could be based on equitable principles found in the law of corporations, the Court was also moved by practical considerations. It expressed concern that if it did not allow the setoff, governments could create juridical entities in order to avoid the requirements of international law.[102] The equitable concerns and practical considerations expressed by the Court outweighed the presumption of a separate juridical status of a government entity and led the Court to allow the setoff.[103] It therefore reversed and remanded the

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28 U.S.C. § 1607 (1976). *See also supra* note 2 (discussion of sovereign immunity) and Note, *The Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine*, 75 HARV. L. REV. 1607, 1613 (1962).

93. *Bancec*, 103 S. Ct. at 2603.

94. National Bank v. Republic of China, 348 U.S. at 361-62.

95. Federal common law has been defined as a "body of decisional law untrammeled by state court decisions." Lyons v. Howard, 250 F.2d 912, 915 (1st Cir. 1958), *rev'd*, 360 U.S. 593, *reh'g denied*, 361 U.S. 854 (1959).

96. *Bancec*, 103 S. Ct. at 2601.

97. *Id. See* 1 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 43 (rev. perm. ed. 1983), for a description of a growing body of law that disregards the corporate entity when the level of control exercised over it by another corporation makes it, in effect, "an instrumentality, agency, conduit or adjunct" of that other corporation. *See also* E. LATTY AND G. FRAMPTON, BASIC BUSINESS ASSOCIATION 699 (1963).

98. Bangor Punta Operations, Inc. v. Bangor & Aroostock Railroad Co., 417 U.S. 703, 713 (1974).

99. *See supra* note 70.

100. *See supra* notes 92-94 and accompanying text.

101. *Bancec*, 103 S. Ct. at 2594. *But see* Minpeco, S.A. v. Conticommodity Services, Inc., 549 F. Supp. 857, 859 (S.D.N.Y. 1982) (the prohibition against piercing the corporate veil is especially important in cases involving foreign government-owned corporations).

102. *Bancec*, 103 S. Ct. at 2603-04. *See infra* notes 204-211 and accompanying text. *See also supra* note 80 on whether Cuba violated international law.

103. *Bancec*, 103 S. Ct. at 2593.

case to the court of appeals to determine whether the value of Citibank's Cuban assets exceeded Bancec's claim.[104]

In so holding, the Court put considerable weight on the finding of the district court that Bancec had been dissolved into the Ministry of Trade and Banco Nacional,[105] either one of which could be liable, arguably, for acts of the Cuban government.[106] The Ministry of Foreign Trade, however, apparently had acted only as a trustee in the transfer of Bancec's assets, including this claim,[107] to Empresa, another juridically autonomous government entity.[108] If the Ministry did indeed act only as a trustee and did not hold the assets in its own right, then Bancec had been dissolved, in effect, into Banco Nacional and Empresa. This weakens the Court's argument that Bancec was dissolved into two entities which were alter egos of Cuba for purposes of the expropriation.[109] It is difficult to imagine an entity more removed from its government's act of expropriation than Empresa, since it did not even exist at the time of the expropriation[110] and was the successor in interest to only those of Bancec's claims which involved commercial transactions.[111]

As a general rule, the United States claims to give effect to the separate juridical status of foreign government entities.[112] The *Bancec* Court recognized that foreign governments establish these entities for a variety of reasons and that, for economic reasons as well as due to principles of comity, courts should generally treat these entities as separate from their respective governments.[113] But when confronted with the issue, the Supreme Court held that the presumption of Bancec's separate legal status was overcome by the circumstances of the

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104. *Id.* at 2604.

105. *See supra* note 82.

106. *Bancec*, 103 S. Ct. at 2595 n.5. The court of appeals referred to this dissolution only in passing. 658 F.2d at 916 n.4. The fact that there was an attempt to substitute Cuba as plaintiff in 1961, 103 S. Ct. at 2594, implies that Cuba was the real party in interest.

107. The district court stated that this claim probably should be considered among those assets of Bancec that vested to Banco Nacional, but it never had to reach a definite conclusion since both Banco Nacional and the Ministry of Foreign Trade could be considered alter egos of Cuba. 505 F. Supp. at 424-25.

108. *Bancec*, 103 S. Ct. at 2605.

109. The court in De Letelier v. Republic of Chile stated that Bancec's only connection with the Cuban government "was a period of less than a week during which Bancec's assets passed through the Cuban Ministry of Foreign Trade." 567 F. Supp. 1490, 1496 n.2 (S.D.N.Y. 1983).

110. *See supra* notes 50 & 82.

111. *See supra* note 82. If Empresa were to be subject to a counterclaim based on the expropriation, then the precedential value of this case could be that whenever an expropriation occurs, entities of the expropriating government will be subject to a counterclaim for the unreimbursed losses, regardless of the autonomous status of that entity. This very broad rule appears to be favored by the U.S. government, which took the position that the opinion of the Second Circuit would severely limit the ability of the United States to raise expropriation claims. *See* Brief for the United States as Amicus Curiae on Petition for Certiorari at 6, *Bancec*, 103 S. Ct. 2591.

112. *Bancec*, 103 S. Ct. at 2600.

113. *Id.*

case, as the Court believed that the Cuban government would be the ultimate beneficiary of any decision which respected Bancec's separate status.[114] In the future, therefore, parties dealing with these government entities will be unable to predict whether U.S. courts will consider these entities separate or a part of the government which created them. This uncertainty does not exist in England.

IV. ENGLISH TREATMENT OF AUTONOMOUS GOVERNMENT ENTITIES

English courts follow a rule similar to the general rule in U.S. courts; English courts recognize the separate juridical status of foreign government entities.[115] The English courts, however, have not deviated from this general rule, as indicated by the three English cases cited by the U.S. Supreme Court in *Bancec*.[116] Although these cases do not involve a setoff, they do involve government entities with many of the same characteristics as the Cuban state trading corporation Bancec.[117] For this reason, the cases are indicative of how English courts might handle the issue presented in *Bancec* if and when they are confronted with it.

A. Trendtex

In *Trendtex Trading Corporation v. Central Bank of Nigeria*,[118] the court considered the relationship between the Central Bank of Nigeria, a government entity, and the Nigerian government.[119] The Nigerian government had instituted import controls on cement to alleviate shipping congestion in Nigerian ports.[120] Pursuant to these import controls, the Central Bank of Nigeria refused to honor its obligations under various irrevocable letters of credit to Trendtex,[121] a Swiss corporation that was to supply the cement to an English trading company.[122] One issue in the case was whether the Central Bank of Nigeria was an alter ego of the Nigerian government and therefore immune from suit under the doctrine of sovereign immunity.[123] The court found that the functions of the bank were: to

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114. *Id.* at 2603. *See supra* note 91 and accompanying text.

115. *See infra* note 177 and accompanying text.

116. *Bancec*, 103 S. Ct. at 2600 n.18. The Court cited Trendtex Trading Corp. v. Central Bank of Nigeria, [1976] 1 W.L.R. 868, [1977] 1 Q.B. 529 (C.A.); C. Czarnikow Ltd. v. Centralia Handlu Zagranicznego Rolimpex, [1978] 1 Q.B. 176 (C.A.), 1979 A.C. 351; and I Congreso del Partido, [1978] 1 Q.B. 500, [1980] 1 LLOYD'S L.R. 23 (C.A.), 1983 A.C. 244.

117. *See infra* notes 179-184 and accompanying text.

118. [1976] 1 W.L.R. 868, [1977] 1 Q.B. 529 (C.A.)

119. *Trendtex*, [1977] 1 Q.B. at 560. This case is important to English law for several reasons. The court clarified the application of international law in English courts and also discussed which entities may claim sovereign immunity and what activities entitle a state to claim immunity. Note, *State Immunity and International Law in English Courts*, 26 INT'L & COMP. L. Q. 674, 677, 680 (1977).

120. *Trendtex*, [1976] 1 W.L.R. at 871.

121. *Id.*

122. *Trendtex*, [1977] 1 Q.B. at 550.

123. *Trendtex*, [1976] 1 W.L.R. at 873.

control the national currency; to handle exchange controls; to act as the state treasury; to supervise and regulate the banking industry; to act as banker for the provincial (state) governments; to generally advise the government; and to issue letters of credit in commercial transactions.[124] The court found that these were essentially functions of the state of Nigeria[125] and, for that reason, held that the bank was a department of the state and thus immune from suit in England.[126]

The Court of Appeal, however, reversed this decision.[127] Lord Justice Stephenson found that the Central Bank of Nigeria Act[128] established the bank as a separate entity, not as a government department.[129] Since the bank had many of the duties of a bank and was capable of suing and being sued,[130] Lord Justice Stephenson ruled that the bank was not a department of the Nigerian government and thus could not claim sovereign immunity.[131]

Lord Justice Shaw concurred in this decision.[132] He stated that the basic factors to consider in determining whether the bank should have an independent legal status were its constitution, its powers and duties, and its activities.[133] Noting that the Nigerian government had created the bank as a separate entity, not as a government department,[134] Lord Justice Shaw found two particular functions of the bank to be indicative of the bank's independent status. First, the bank, not the government, had the sole right to issue notes.[135] Second, the bank acted as an advisor to the federal government.[136] Lord Justice Shaw stated that to advise the government, the bank had to be separate from that government.[137] Finally, Lord Justice Shaw considered the expectations of the parties who might deal with the bank.[138] He felt that those parties would have no reason to believe the bank could claim sovereign immunity.[139]

Based on these considerations, that the Nigerian government had established

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124. *Id.* at 876. These functions generally correspond to those discussed by U.S. courts in cases involving the Central Bank of Nigeria. *See* Texas Trading v. Federal Republic of Nigeria, 647 F.2d 300, 304 n.12 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

125. The only purely banking function performed by the bank was the issuance of letters of credit in commercial transactions. *Trendtex*, [1976] 1 W.L.R. at 876.

126. *Id.* at 877.

127. *Trendtex*, [1977] 1 Q.B. at 580.

128. *See Trendtex*, [1977] 1 Q.B. at 573-74, for a discussion of this legislation.

129. *Id.* at 563.

130. *Id.*

131. *Id.* at 563, 565. *See also* Hispano v. Central Bank, [1979] 2 LLOYD'S L.R. 277, 278-79 (C.A.) (following *Trendtex* in holding that the Central Bank of Nigeria was separate from the state and therefore could not claim sovereign immunity).

132. *Trendtex*, [1977] 1 Q.B. at 580.

133. *Id.* at 573.

134. *Id.*

135. *Id.* at 574.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

the bank as a separate entity, that the bank's functions were indicative of this separate status, and that those dealing with the bank would presume it was independent, Lord Justice Shaw concluded that the bank was a separate entity from the government.[140] The Central Bank of Nigeria, therefore, could not claim sovereign immunity and was amenable to the jurisdiction of the English courts.[141]

B. C. Czarnikow

The English Court of Appeal reconsidered the relationship between a government entity and the government which created it in *C. Czarnikow Ltd. v. Centralia Handlu Zagranicznego Rolimpex*.[142] In this 1978 case, the Polish state enterprise[143] Rolimpex contracted to sell sugar to C. Czarnikow Ltd., an English sugar merchant.[144] When the Polish Minister of Foreign Trade and Shipping banned the export of sugar, Rolimpex was unable to meet its contractual obligations.[145] Rolimpex then claimed that a force majeure clause,[146] which excused performance if prevented by government intervention, released it from liability for nonperformance of the contract.[147] The plaintiff[148] contended that because Rolimpex was a Polish state enterprise, the actions of the Polish government could not be separated from those of Rolimpex; therefore, the government intervention was not beyond the seller's control, as required for the force majeure clause to be effective.[149] The court ruled, however, that Rolimpex and the Polish government were not the same entity[150] and that Rolimpex could therefore rely on the force majeure clause.[151]

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140. Lord Denning, the third justice, also felt that the bank was not a department of Nigeria, but found the question difficult, since the bank did perform some government functions and was subject to government control. For this reason, he based his decision on the commercial exception to sovereign immunity. *Id.* at 560.

141. *Id.* at 580.

142. [1978] 1 Q.B. 176 (C.A.), 1979 A.C. 351.

143. A state enterprise is "a unit or organisation of the socialist economy which is created with the aim of providing for social needs within a specific sphere of activity defined in the decree or order which establishes it." *Rolimpex*, [1978] 1 Q.B. at 179.

144. *Id.* at 190.

145. *Rolimpex*, 1979 A.C. at 362.

146. A force majeure clause protects a party from liability when nonperformance is due to circumstances beyond its control. Hong Guan & Co. Ltd. v. R. Jumabhoy & Sons Ltd., 1960 A.C. 684, 700.

147. *Rolimpex*, [1978] 1 Q.B. at 193.

148. *Rolimpex* differed from *Trendtex* in that the English plaintiff was arguing that the government entity should be considered a part of the government. In *Trendtex*, the plaintiff successfully argued that the Central Bank of Nigeria was a separate entity that could not claim sovereign immunity. *See supra* notes 131 & 140 and accompanying text.

149. *Rolimpex*, [1978] 1 Q.B. at 194. *Cf. I Congreso*, [1978] 1 Q.B. at 529 (a sovereign normally cannot plead force majeure when it is the sovereign who has intervened).

150. *Rolimpex*, [1978] 1 Q.B. at 200.

151. *Id.* In so doing, the court upheld the decision of an arbitration panel, which had been affirmed by the trial court. *Id.* at 181. The unpublished trial court opinion of December 13, 1976 was referred to in *I Congreso*, [1978] 1 Q.B. at 532.

The House of Lords affirmed the decision.[152] It considered that while Rolimpex was subject to the direction of a government minister, it did have a separate personality, making its own decisions on commercial activity, such as choosing with whom and on what terms to do business.[153] The Polish government expected Rolimpex to make a profit and managed it on the basis of economic accountability.[154] The state treasury was not responsible for the financial obligations of Rolimpex, and Rolimpex was not responsible for those of the state.[155] In addition, because Rolimpex had a legal personality, it could not claim sovereign immunity under Polish law.[156]

Under these circumstances, the court ruled that Rolimpex and the Polish government were not so closely connected as to preclude Rolimpex from relying on the sugar export ban as government intervention beyond its control.[157] Rolimpex was thus released from liability because of the force majeure clause.[158] This decision is consistent with *Trendtex* and demonstrates the desire of the English courts to respect the independent status of government entities, even when the result denies a substantial recovery to an English plaintiff.[159]

C. I Congreso del Partido

The most recent and perhaps clearest case indicating the policy of English courts to respect the independent status of foreign government entities is *I Congreso del Partido*.[160] This case concerned a contract for the sale of sugar between Cubazucar,[161] a Cuban trading enterprise, and Iansa, a Chilean company.[162] Mambisa, another Cuban state trading enterprise, operated the ships which were to deliver the sugar.[163] The Cuban government exercised overall direction and control over Cubazucar and Mambisa and provided the funds necessary for their operation.[164] The trading companies, however, made their own decisions regarding day-to-day commercial matters.[165] The court recognized that these companies were very similar to the Polish organization Rolim-

152. *Rolimpex*, 1979 A.C. at 373.
153. *Id.* at 367.
154. *Id.*
155. *Id.* at 369.
156. *Id.*
157. *Id.* at 367.
158. *Id.* at 373.
159. *Rolimpex*, 1979 A.C. at 361. *See also* Lesser, *Rolimpex: A Sweet Solution to Legal Success*, 128 NEW L. J. 591, 592 (June 15, 1978).
160. [1978] 1 Q.B. 500, [1980] 1 LLOYD'S L.R. 23 (C.A.), 1983 A.C. 244.
161. Cubazucar was a legal successor to Bancec. *See supra* note 82.
162. *I Congreso*, 1983 A.C. at 258.
163. *Id.* The plaintiff claimed that the English courts had jurisdiction over this controversy because another ship under the control of Mambisa, the I Congreso del Partido, was located in England. *I Congreso*, [1980] 1 LLOYD'S L.R. at 27.
164. *I Congreso*, 1983 A.C. at 258.
165. *I Congreso*, [1980] 1 LLOYD'S L.R. at 25.

pex.[166] When the Cuban government ordered that the contract not be performed because of its intense dislike of the new Chilean government,[167] Iansa sued Mambisa and the Republic of Cuba.[168]

The Admiralty Court held that it had no jurisdiction over Mambisa or the Republic of Cuba and therefore dismissed the actions.[169] In so doing, it held that Cuba could plead sovereign immunity with respect to its actions.[170] Referring to Cubazucar and Mambisa, the court stated that they were examples of independent state enterprises found in both western and socialist countries.[171] The court expressed concern that the actions of Cubazucar were being confused with actions of the Republic of Cuba.[172] If Cubazucar and the Cuban government were considered one and the same, there would be no need to differentiate between their actions.

The Court of Appeal affirmed the lower court's decision[173] and agreed that Cubazucar and Mambisa were not departments of the Cuban government, but rather were independent entities.[174] In so doing, the court recognized that commerce in Cuba was conducted by state trading enterprises rather than by private enterprises.[175]

The House of Lords reversed the decision of the Court of Appeal and held that Cuba could not plead sovereign immunity.[176] It agreed, however, with the lower courts' treatment of the Cuban state enterprises, as Lord Wilberforce stated:

> State-controlled enterprises, with legal personality, ability to trade and to enter into contracts of private law, though wholly subject to the control of their state, are a well-known feature of the modern commercial scene. The distinction between them, and their governing state, may appear artificial; but it is an accepted distinction in the law of England and other states.[177]

Lord Wilberforce asserted that English law would not hold the sovereign state answerable for the actions of the independent entity,[178] presumably because the

166. *Id. See supra* notes 153-156 and accompanying text.

167. *I Congreso*, [1978] 1 Q.B. at 512.

168. *I Congreso*, 1983 A.C. at 257.

169. *I Congreso*, [1978] 1 Q.B. at 533, 543.

170. *Id.* at 533. The court had no jurisdiction over Mambisa because Mambisa did not own the I Congreso. *Id.* at 543. *See supra* note 163.

171. *I Congreso*, [1978] 1 Q.B. at 532.

172. *Id.*

173. *I Congreso*, [1980] 1 LLOYD'S L.R. at 36.

174. *Id.* at 25.

175. *Id.*

176. *I Congreso*, 1983 A.C. at 279. *See* Fox, *State Immunity: The House of Lords' Decision in I Congreso del Partido*, 98 L.Q. REV. 94 (1982) for a discussion of this decision.

177. *I Congreso*, 1983 A.C. at 258.

178. *Id.* at 271. This position is distinguishable from the position of the United States, as suggested by the RESTATEMENT OF THE FOREIGN RELATIONS LAW. *See supra* note 40 and accompanying text. The U.S.

sovereign state intends the entity to be separate from the state. Thus, while the various English courts disagreed on whether Cuba could plead sovereign immunity for actions having both political and commercial aspects, the courts did agree that these state trading entities should be considered independent from their governments.

English courts, when faced with questions on the status of foreign government entities, have demonstrated a policy of allowing such entities to maintain their autonomous status. These courts have recognized that countries use government entities for a variety of purposes and, in so doing, intend them to be separate from the government. Unlike the U.S. Supreme Court in *Bancec*, the English courts have not yet allowed the circumstances of a particular case to override this policy, even in *Rolimpex*, when respect of the entity's separate status resulted in the denial of a recovery to the English plaintiff.

V. ANALYSIS

Although the precise issues in the U.S. and English cases were different, the government entities were similar. The governments creating the entities had established them with a separate legal personality,[179] which gave the entities the capacity to sue and be sued[180] and to enter into contracts.[181] The entities were established to engage in some economic undertaking that, in every case but *Trendtex*, involved state trading.[182] A financial relationship existed between each entity and its respective government,[183] and the governments all maintained some level of managerial control over the entity.[184]

When a court disregards the independent status of a foreign government entity, several negative ramifications may result. The use of these entities is an accepted manner of engaging in commerce in many countries. Commercial dealings involving such countries could be adversely affected if other countries ignored the independent status of these entities.[185] For example, third parties

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Supreme Court, in discussing *I Congreso*, stated that English courts are reluctant to attribute the actions of a state to an entity of the state. *Bancec*, 103 S. Ct. at 2600 n.18.

179. *See supra* notes 22, 66, 129, 153, & 174 and accompanying text.

180. *See, e.g., supra* notes 22 & 130 and *infra* note 210 and accompanying text.

181. *See, e.g., supra* notes 22, 144 & 177, and *infra* note 210 and accompanying text.

182. *See, e.g., supra* notes 67, 144 & 161 and accompanying text.

183. For example, the Cuban government provided the funds necessary for the operation of Bancec, Mambisa, and Cubazucar. *See supra* notes 70 & 164 and accompanying text. The profits of Bancec and the Central Bank of Nigeria were remitted to their respective governments. *See supra* note 72 and accompanying text; *Trendtex*, [1976] 1 W.L.R. at 875. Neither the Cuban government in *Bancec* nor the Polish government in *Rolimpex* was responsible for the debts of the respective government entity. *See supra* note 155 and *infra* note 211 and accompanying text.

184. *See supra* notes 26, 73, 153 & 164 and accompanying text.

185. Brief for Respondent at 4, *Bancec*, 103 S. Ct. 2591; Note, *The Separate Entity Fiction Exposed: Disregarding Self-Serving Recitals of Juridical Autonomy in Nationalization Cases*, 6 FORDHAM INT'L L. J. 288, 303 (1983). *Cf.* Texas Trading v. Federal Republic of Nigeria, 647 F.2d at 315-16.

might be unwilling to extend credit to a government entity if the assets of that entity could be used to satisfy a claim against the sovereign.[186] Failure to recognize an entity's independent status could also affect the ability of developing countries to make large scale national investments, since these countries often use public development corporations to obtain the financing necessary for such projects.[187]

The United States would not want foreign countries to disregard the separate status of U.S. corporations and their independent subsidiaries. If this separate status were ignored, assets of the U.S. parent corporation could be used to satisfy claims against an independent subsidiary, an approach contrary to the nature of the corporate form.[188] Congress was concerned with this problem when it enacted the Foreign Sovereign Immunities Act, as it indicated that the failure by the United States to recognize an entity's separate juridical status could lead to such a result.[189]

In addition, the United States uses independent government entities,[190] some of which engage periodically in international commercial transactions.[191] Plaintiffs bringing suit based on the actions of an entity should sue the entity itself, and not the U.S. government.[192] Similarly, if the entity brings suit, it seems undesirable for the entity to be subject to a setoff based on claims held by the defendant against the United States. Yet if U.S. courts fail to draw this distinction between a foreign government and its independent entities, the United States is not in a strong position to complain when foreign courts fail to do so.[193]

English courts acknowledge these considerations and thus have recognized entities as separate from their governments.[194] They have not moved in the direction of the *Bancec* Court, regardless of the facts of a specific case.[195] Indeed, the Court's rationale in *Bancec* is not very convincing. For example, the Court, in expressing equitable concerns, indicated that it would be an injustice to give effect to Bancec's separate juridical status and disallow the setoff.[196] Such a conclusion, however, does not necessarily follow.[197] The Court recognized that a

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186. *Bancec*, 103 S. Ct. at 2600.

187. *Id.* at 2599. *See also* U.N. Study, *supra* note 22, at 18-20.

188. *See generally* Note, *Liability of a Corporation for Acts of a Subsidiary or Affiliate*, 71 HARV. L. REV. 1122, 1122-23 (1958); Hamilton, *The Corporate Entity*, 49 TEX. L. REV. 979, 979 (1971); H. HENN & J. ALEXANDER, LAW OF CORPORATIONS 355 (1983).

189. REPORT, *supra* note 58, at 29-30, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6628-29.

190. See A. WALSH, THE PUBLIC'S BUSINESS 34-36 (1978), for a 1976 survey of U.S. government corporations.

191. Gibbons v. Republic of Ireland, 532 F. Supp. 668, 671-72 (D.D.C. 1982).

192. *Id.*

193. *Id.* at 672. *See also supra* note 189 and accompanying text.

194. *See, e.g., supra* note 177 and accompanying text.

195. *See, e.g., supra* note 159 and accompanying text.

196. *Bancec*, 103 S. Ct. at 2603.

197. *Id.* at 2605 n.2 (Stevens, J., dissenting).

judgment for Bancec would not result in a payment to Bancec or the Republic of Cuba, since these amounts would be frozen pursuant to the Cuban Asset Control Regulations.[198] By allowing the setoff, the Court enabled Citibank to recover one hundred percent of its losses, to the extent of Bancec's claim.[199] If the Court had not allowed the setoff, the judgment eventually might have been used as partial conpensation, on a proportional basis, to any party who suffered losses as a result of the Cuban expropriation and who had subsequently filed claims with the Foreign Claims Settlement Commission.[200] Had this occurred, Citibank would have received the same proportional settlement as other claimants and would not have received a preference because it was liable to Bancec on an independent matter.[201]

Given the extensive control the Cuban government exercised over Bancec, their relationship arguably was that of parent and subsidiary corporation. If so argued, a finding of liability against Bancec for the acts of Cuba is not compelled. Judge Learned Hand stated that if it were at all possible to hold a subsidiary liable for the acts of its parent, such instances would be extremely rare.[202] Furthermore, if the level of control by Cuba over Bancec was such that an agency relationship existed, with Cuba the principal and Bancec its agent, allowance of the setoff does not necessarily result. By allowing the setoff, the Court has held Bancec liable for the actions of the Cuban government. Yet it is axiomatic, in the law of agency, that an agent is not responsible for the acts of its principal.[203]

The Court expressed concern that giving effect to the claimed separate status of an entity such as Bancec would allow foreign governments to create separate juridical entities to avoid the requirements of international law.[204] While concerns about the use of these entities for this reason are not without merit, neither are they particularly convincing. The first way a government might accomplish this goal is by excluding an entity from participation in the expropriation if that entity were subject to suit in the United States.[205] This assumes, however, that a foreign state will have the devious foresight, when expropriating property or committing some other alleged violation of international law, to consider which

198. *Id.* at 2602 n.24 and 2604 n.2.

199. This argument was set out in detail in *Citibank*, 431 F.2d at 404 n.18. *See also* Justice Brennan's dissent in the appeal of that case. 406 U.S. at 794.

200. *Citibank*, 431 F.2d at 404.

201. *Id.* An analogy to a bankruptcy is revealing. In such a case, the setoff would be allowed, assuming mutuality of interest was present, notwithstanding the alleged unfairness of allowing such a setoff. 4 COLLIER ON BANKRUPTCY, ¶¶ 553.02, 553.03 (15th ed. 1983).

202. Kingston Dry Dock Co. v. Lake Champlain Transp. Co., 31 F.2d 265, 267 (2d Cir. 1929), *quoted with approval in* FMC Finance Corp. v. Murphree, 632 F.2d 413, 422 (5th Cir. 1980). *See also* FLETCHER, *supra* note 97, at § 43.60.

203. *See, e.g.*, King v. City of Beaumont, 296 F. 531, 534 (E.D. Texas 1924) (agent not liable for tort committed by its principal).

204. *See supra* note 102 and accompanying text.

205. Comment, *Foreign Expropriation Cases in the United States: Conflicting Legislation and Judicial Policies*, 17 U.S.F. L. REV. 117, 139 (1982).

of its entities are subject to suit in the United States and to avoid their involvement in the prohibited conduct. In the *Bancec* case, for example, no evidence indicated that the Cuban government had established Bancec to avoid potential liability in U.S. courts.[206] In fact, Bancec had been established before the expropriation of Citibank's property.[207]

Second, a foreign government could avoid counterclaims by carefully selecting the entity through which to bring suit in the United States.[208] For example, it would not bring suit in the United States through an entity that had participated in an act violating international law.[209] This method assumes that a foreign government will have a choice as to which entity brings suit, so that by carefully selecting that entity, the foreign government will avoid counterclaims based on the conduct either of the government itself or of another entity. Since the party bringing suit must have a cause of action in its own right, and only one entity might be in the position of having a particular cause of action, this is an unreasonable and farfetched assumption. In *Bancec*, Bancec was suing on its own cause of action. Bancec, not the Republic of Cuba, was the party to the letter of credit.[210] The Cuban government was not responsible for Bancec's debts, nor Bancec for those of the government.[211] There was no choice, therefore, as to which entity could bring suit.

Since allowing Bancec to recover would arguably have been fair, and since there was no indication that Cuba had established Bancec to avoid the requirements of international law, the Supreme Court could have respected the separate juridical status of Bancec and dismissed the counterclaim. Given the decisions in *Trendtex*, *C. Czarnikow*, and *I Congreso*, an English court would have dismissed the counterclaim, had it been deciding the *Bancec* case.

VI. CONCLUSION

Members of the business community desire certainty in business dealings.[212] The Court in *Bancec* has introduced an element of vagueness into any determination of whether a government entity will be considered independent from its government. This decision will result in increased uncertainty regarding the status of these government entities and has the potential to seriously disrupt commercial dealings involving them.

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206. *See also* Brief for Respondent at 14, *Bancec*, 103 S. Ct. 2591. *Cf.* Minpeco S.A. v. Conticommodity Services, Inc., 549 F. Supp. 857 (S.D.N.Y. 1982) (court gave effect to the separate status of a state-owned corporation since there was no evidence the corporate form had been manipulated or abused).

207. *See supra* notes 50 & 66 and accompanying text.

208. Comment, *supra* note 205, at 139.

209. Note, *supra* note 185, at 296.

210. *See supra* note 77 and accompanying text.

211. *See* Joint Appendix to Petitioner's and Respondent's Brief at 190, *Bancec*, 103 S. Ct. 2591.

212. Fox, *supra* note 176, at 95; James v. Bell Helicopter Co., 715 F.2d 166, 173 (5th Cir. 1983).

Although courts in the United States and in England have reached the same conclusion — that the independent status of foreign government entities generally should be respected — they have differed when deciding the merits of a particular case. While the U.S. Supreme Court failed to give effect to the separate juridical status of a government entity, English courts have consistently given effect to their independent status. Had an English court decided *Bancec*, it probably would have reached the opposite result and respected Bancec's separate status.

The specific equitable and practical concerns expressed by the *Bancec* Court, however, did not compel a decision to disregard the independence of the government entity in that case. Furthermore, the ramifications of the *Bancec* precedent are potentially far more significant than the perceived inequity of that one case. Although the Court has spoken, more litigation involving this issue is likely. Should such litigation occur, the Court should reconsider its holding in *Bancec* and follow the English lead, thereby giving respect to the independent status of a government entity.

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