

# *Fordham International Law Journal*

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*Volume 6, Issue 2*

1982

*Article 2*

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## The Separate Entity Fiction Exposed: Disregarding Self-Serving Recitals of Juridical Autonomy in Nationalization Cases

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# The Separate Entity Fiction Exposed: Disregarding Self-Serving Recitals of Juridical Autonomy in Nationalization Cases

Aris Haigian

## **Abstract**

This Note presents the factual setting in which the instant claim arose, and discusses the rulings of the lower courts and the conflicting rationales in light of existing law. In conclusion, it proposes a balancing test incorporating the relevant criteria for consideration in this and like cases.

## NOTES

### THE SEPARATE ENTITY FICTION EXPOSED: DISREGARDING SELF-SERVING RECITALS OF JURIDICAL AUTONOMY IN NATIONALIZATION CASES

#### INTRODUCTION

The Cuban revolution of the late 1950's, which was responsible for the forced expropriation of the banking industry in Cuba,<sup>1</sup> effectuated a permanent change in the economic and social order of that country.<sup>2</sup> Of the voluminous litigation which ensued from these expropriations,<sup>3</sup> this Note is primarily concerned with *Banco*

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1. The Act of July 6, 1960, No. 851, 58 Gaceta Oficial [G.O.] 16,367, 16,367-68 (Cuba), reprinted in Joint App. at 57-61, *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, cert. granted, 103 S. Ct. 253 (1982), and the Resolution of Sept. 17, 1960, No. 2, 58 Gaceta Oficial Extraordinaria [G.O.E.] at 1-2, Joint App. at 70-75, *Bancec*, were the means by which the Cuban branches of First National City Bank, First National Bank of Boston, and Chase Manhattan Bank were nationalized. See *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 878 (2d Cir. 1981). Cuba is the only expropriating country in the Americas which has not recognized its liability to pay for property so taken. See A. LOWENFELD, *EXPROPRIATION IN THE AMERICAS* 5 (1971). For a discussion of the Cuban expropriations, see *infra* notes 8-22 and accompanying text.

2. For a general discussion of the Cuban revolution and the installation of the new national government, see E. BAKLANOFF, *EXPROPRIATION OF U.S. INVESTMENTS IN CUBA, MEXICO, AND CHILE* (1975); M. GORDON, *THE CUBAN NATIONALIZATIONS: THE DEMISE OF FOREIGN PRIVATE PROPERTY* (1976); A. LOWENFELD, *supra* note 1. That these changes were drastic is not questioned.

The new regime viewed itself as the lawful successor to its predecessor, the Batista government, and effected substantial changes in Cuba primarily by building on preexisting laws and institutions. A number of statutes were enacted, and decrees announced, in pursuit of two general goals: to concentrate the means of production in the hands of the Cuban government and to restrict greatly the role of foreign enterprises in the Cuban economy.

*Chase*, 658 F.2d at 878.

3. See, e.g., *Chase*, 658 F.2d 875; *Banco Nacional de Cuba v. Chemical Bank N.Y. Trust Co.*, 658 F.2d 903 (2d Cir. 1981); *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, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976); *Banco Nacional de Cuba v. First Nat'l City Bank*, 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); *F. Palicio y Compania v. Brush*, 256 F. Supp. 481 (S.D.N.Y. 1966), *aff'd per curiam*, 375 F.2d 1011 (2d Cir.), cert. denied *sub nom.* *Brush v. Republic of Cuba*, 389 U.S. 830 (1967); *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), *on remand sub nom.* *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957 (withholding determination to dismiss

*Para el Comercio Exterior de Cuba v. First National City Bank*<sup>4</sup> (*Bancec*), which remains to be resolved with finality.

The disposition of this case, which is presently before the Supreme Court, will have potential impact on the future expropriatory conduct of nations.<sup>5</sup> The issue confronting the Court is whether the defendant, First National City Bank (Citibank), may assert against the plaintiff, Banco Para el Comercio Exterior de Cuba (*Bancec*), a counterclaim arising from the expropriation of its property, even though *Bancec* did not actively participate in the expropriation of Citibank's property. The question becomes whether *Bancec* may be regarded as a mere arm, an alter ego, of the Cuban government. If this relationship is established, then existing law<sup>6</sup> would compel a finding that Citibank's counterclaim is properly asserted against *Bancec*. The district and circuit courts reached differing results in this determination.<sup>7</sup>

This Note presents the factual setting in which the instant claim arose, and discusses the rulings of the lower courts and the conflicting rationales in light of existing law. In conclusion, it proposes a balancing test incorporating the relevant criteria for consideration in this and like cases.

### I. ORIGIN OF THE PRESENT CLAIMS

Shortly after the establishment of the new national government, the Republic of Cuba created *Bancec* pursuant to Law No. 793 of April 25, 1960,<sup>8</sup> which described it as "[a]n official autonomous credit institution for foreign trade . . . with full juridical capacity."<sup>9</sup> Under the terms of Law No. 793, *Bancec*'s governing board was comprised of representatives from the various Cuban government ministries,<sup>10</sup> its capital was contributed by the Cuban

complaint), *complaint dismissed*, 272 F. Supp. 836 (S.D.N.Y. 1965), *aff'd*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

4. 505 F. Supp. 412 (S.D.N.Y. 1980), *rev'd*, 658 F.2d 913 (2d Cir. 1981), *cert. granted*, 103 S. Ct. 253 (1982).

5. See *infra* notes 23-36 and accompanying text.

6. See *Banco Nacional de Cuba v. First Nat'l City Bank*, 478 F.2d 191 (2d Cir. 1973).

7. See *Bancec*, 505 F. Supp. 412; 658 F.2d 913.

8. Act of Apr. 25, 1960, No. 793, 58 G.O. at 10,921-26, Joint App. at 36-56, *Bancec*.

9. Art. 1, 58 G.O. at 10,921, Joint App. at 37, *Bancec*.

10. Art. 1, bylaw XI, 58 G.O. at 10,923, Joint App. at 46, *Bancec*.

The Governing Board . . . shall be presided . . . by the President of the "Banco Nacional de Cuba" and shall be composed of a Delegate of the Minister of Commerce, a Delegate of the Minister of Economy, a Delegate of the National Agrarian

government, which also subscribed to all of its stock,<sup>11</sup> and all net profits from operations accrued to the state.<sup>12</sup> The Second Circuit found that Bancec's purposes included "the encouragement of production of goods for export, the increase of exports without affecting essential national sources of supply, and the stimulation and diversification of foreign markets for Cuban products."<sup>13</sup>

On August 12, 1960, Bancec entered into two contracts<sup>14</sup> whereby it agreed to purchase sugar from the National Institute of Agrarian Reform (INRA), the state sugar monopoly, and sell it to the Cuban Canadian Sugar Company.<sup>15</sup> The consideration for the contract between Bancec and Cuban Canadian was an irrevocable letter of credit in favor of Bancec issued by Citibank on August 18, 1960.<sup>16</sup> Bancec assigned this letter of credit to Banco Nacional de Cuba (Banco Nacional)<sup>17</sup> for collection. In due course, Citibank was presented with the letter of credit, and on September 21, 1960 was called upon to pay U.S.\$193,280 to Banco Nacional as Bancec's collecting agent.<sup>18</sup>

On September 16, 1960, however, the revolutionary government of Cuba had nationalized Citibank's eleven Cuban

Reform Institute (INRA) and a Delegate of the Department of Mines and Petroleum of the Ministry of Agriculture.

*Id.*

11. Art. 1, bylaw IV, 58 G.O. at 10,922, Joint App. at 38, *Bancec*.

12. Art. 1, bylaw V, 58 G.O. at 10,922, Joint App. at 39, *Bancec*. "The profits . . . shall be considered as fiscal revenue and shall be deposited in the General Treasury of the Republic . . ." *Id.*

13. *Bancec*, 658 F.2d at 915. See also Act of Apr. 25, 1960, No. 793, art. 1, bylaw VIII, 58 G.O. at 10,922, Joint App. at 39-41, *Bancec* (enumerating the purposes and powers of Bancec). "[Bancec] is an organization designed to contribute to, and collaborate with . . . the Government and . . . 'Banco Nacional de Cuba.'" *Id.*

14. Contract No. 555, Joint App. at 65, *Bancec*; Contract No. 556, Joint App. at 62, *Bancec*. The price differential between the two contracts is the profit which Bancec was to realize from the transaction. See Contract No. 555 para. 2, Joint App. at 65, *Bancec*; Contract No. 556 para. 2, Joint App. at 62, *Bancec*.

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

16. *Id.*

17. Banco Nacional is the central bank of Cuba, and engages in activities similar to the central banks of most countries.

Banco Nacional, since its formation in 1948, had functioned as the central Bank of Cuba. It engaged in domestic and international banking and was the sole depository of state funds. In addition it had extensive powers both to control and protect the Cuban currency in international trade and to regulate all commercial banks operating in Cuba.

*Id.* at 916.

18. *Id.* at 915.

branches.<sup>19</sup> Upon presentment of the letter of credit, Citibank credited Banco Nacional's account for the stated amount, but rather than remitting it to Banco Nacional, Citibank charged this sum against the value of the assets which it had lost in the expropriation.<sup>20</sup> Bancec then instituted this action against Citibank to recover the amount so charged,<sup>21</sup> and Citibank counterclaimed, arguing that since its lost assets exceeded Bancec's claim, dismissal of the complaint was required.<sup>22</sup>

## II. CONFLICTING RATIONALES OF THE LOWER COURTS

The District Court for the Southern District of New York held that Bancec was an alter ego of the Cuban government<sup>23</sup> and allowed Citibank a full set-off, which resulted in dismissal of the complaint.<sup>24</sup> This determination was made despite language in

19. *Id.* at 916. The expropriations were executed pursuant to the Act of July 6, 1960, No. 851, 58 C.O. at 16,367, Joint App. at 57, *Bancec*, and Resolution of Sept. 17, 1960, No. 2, 58 G.O.E. at 1, Joint App. at 70, *Bancec*. *Id.* See also *Chase*, 658 F.2d at 878. Law No. 851 provided, in part, the grant of

[f]ull authority . . . upon the President and the Prime Minister of the Republic . . . [to] proceed to nationalize, through forced expropriation, the properties or enterprises owned by physical and corporate persons who are nationals of the United States of North America, or of the enterprises in which such physical and corporate persons have an interest, even though they be organized under the Cuban laws.

Art. 1, 58 G.O. at 16,367, Joint App. at 58, *Bancec*. Although this was the general grant of authority for the Cuban expropriations, Resolution No. 2 specifically conferred the authority for the nationalization of Citibank's Cuban branches. Resolution of Sept. 17, 1960, No. 2, 58 G.O.E. at 2, Joint App. at 73, *Bancec*. See also *Chase*, 658 F.2d at 878 & n.3. The Resolution also designated Banco Nacional as the official agency to take over Citibank's assets. Resolution No. 2, 58 G.O.E. at 2, Joint App. at 73, *Bancec*. See also *Bancec*, 658 F.2d at 916; *Chase*, 658 F.2d at 879.

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

21. *Id.* Shortly after the present claim was filed, the Cuban government dissolved Bancec pursuant to Act of Feb. 23, 1961, No. 930, 59 G.O.E. 1, Joint App. 82, *Bancec*, and Act of Feb. 23, 1961, No. 934, 59 G.O.E. 12. Pursuant to Law No. 930, Bancec's assets, rights, and claims "peculiar to the banking business" devolved to Banco Nacional. 59 G.O.E. 1, Joint App. 82, *Bancec*. Law No. 934 provided for the devolution of Bancec's assets and claims not peculiar to the banking business to a newly created Ministry of Foreign Trade. 59 G.O.E. 12. Also pursuant to Law No. 934, Empresa Cubana de Exportaciones was established to engage in commercial activities previously performed by Bancec. *Id.* This organization, too, was dissolved by the government, and succeeded by Empresa Cubana Exportadora de Azucar y sus Derivados (Cubazucar), which remains in existence today. *Bancec*, 658 F.2d at 916 n.4.

22. *Bancec*, 658 F.2d at 916.

23. 505 F. Supp. at 428.

24. *Id.* at 467.

Law No. 793 which stated that Bancec was a separate juridical entity.<sup>25</sup> The district court deemed this description self-serving, and declined to be bound by it.<sup>26</sup> The dispositive factors for this determination included: (1) Bancec's lack of an independent existence; (2) its exclusive control by the government; (3) its total dependence on the government for financing; and (4) accrual of its net profits to the government.<sup>27</sup>

The Second Circuit reversed the district court's ruling and held that Bancec could not be equated with the Cuban government for purposes of this litigation. Consequently, because no alter ego relationship existed, Citibank's counterclaim was not properly assertable against Bancec.<sup>28</sup> The court stated that the factors which

25. Art. 1, 58 G.O. at 10,921, Joint App. at 37, *Bancec*. Bancec's enabling statute describes it as "[a]n official autonomous credit institution for foreign trade . . . with full juridical capacity." *Id.*

26. *Bancec*, 505 F. Supp. at 428.

The law creating Bancec describes it as "an official, autonomous, credit institution for foreign trade with full juridical capacity and capital of its own." *This view of Bancec is not controlling on the Court*. Under all of the relevant circumstances shown in this record, including the Stipulated Facts, it is clear that Bancec lacked an independent existence, and was a mere arm of the Cuban Government, performing a purely governmental function. The control of Bancec was exclusively in the hands of the government, and Bancec was established solely to further Governmental purposes. Moreover, Bancec was totally dependent on the Government for financing and required to remit all of its profits to the Government.

*Id.* at 427 (emphasis added). The court continued, "[d]oing justice in this case should not be obfuscated or side-tracked by self-serving recitals in post-revolutionary statutes of the Cuban Government, undoubtedly drawn with litigation of this sort in mind." *Id.* at 428.

27. *Id.* at 427. See *supra* notes 8-13 and accompanying text, describing Bancec's structure and purposes pursuant to its enabling statute, Law No. 793. The district court ruled that it perceived no difference between Bancec and Banco Nacional for purposes of establishing an alter ego relation between them and the Cuban government. 505 F. Supp. at 427. In noting that Banco Nacional was an alter ego of the government, the court deemed as controlling the Second Circuit's prior pronouncement in *Banco Nacional de Cuba v. First Nat'l City Bank*, 478 F.2d 191, 193-94 (2d Cir. 1973). 505 F. Supp. at 429-30. Consequently, since Bancec is to be regarded the same as Banco Nacional, and since Banco Nacional has been held to be Cuba's alter ego, the district court concluded that Bancec too was Cuba's alter ego. *Id.* at 423.

28. *Bancec*, 658 F.2d at 917. On appeal from the district court's ruling, the plaintiff-appellant Bancec advanced three arguments for the lower court's reversal: (1) that Bancec was not an alter ego of Cuba, rather a separate juridical entity; (2) that even if Bancec were a mere arm of the Cuban government, the act of state doctrine precluded adjudication of the counterclaim; and (3) that the losses which Citibank complained of had been compensated by offsets in prior litigation. *Id.* at 917. See also Brief for Appellant at 1, *Bancec*. The circuit court based its reversal on the ground that Bancec was not an alter ego of the Cuban government. 658 F.2d at 917, 920. It made no rulings as to the merits of the latter two points advanced by the appellant. Notwithstanding the court's silence on these issues, it appears

prompted it to hold in *Banco Nacional de Cuba v. First National*

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upon an analysis of the existing law that the act of state doctrine would not bar the present counterclaim. Although the origin of the act of state doctrine may be traced to *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 146 (1812), Chief Justice Fuller's articulation of the doctrine in *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897), is regarded as the "classic American statement" of the doctrine." See *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762-63 (1972) (*Banco I*) (quoting *Sabbatino*, 376 U.S. at 416). Chief Justice Fuller stated:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

168 U.S. at 252. In *Banco I*, Citibank had loaned a predecessor of the respondent a sum of money which was secured by a pledge of United States government bonds. 406 U.S. at 760. Upon Cuba's nationalization of Citibank's branches, Citibank sold the collateral and applied the proceeds to repay the principal and accrued interest. *Id.* Due to the then existing market conditions, Citibank realized some U.S.\$1.8 million in excess of the principal and interest, and Banco Nacional sued to recover this excess. *Id.* at 761. Citibank counterclaimed, arguing that it had a right to offset repayment of this excess with the value of its property which was expropriated. *Id.* The issue before the Supreme Court was whether the act of state doctrine effectively barred Citibank's counterclaim. *Id.* at 762. The Court, in a plurality decision, held that the counterclaim was not barred. *Id.* In reaching this decision, Chief Justice Burger, and Justices Rehnquist and White deemed relevant the State Department's view as to the applicability of the doctrine, thus advancing the so-called *Bernstein* exception to the act of state doctrine as developed in *Bernstein v. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954) (allowing courts to consider the views of the Executive Branch in determining whether the act of state doctrine bars an action). 406 U.S. at 768. The remaining six Justices, however, expressly rejected the *Bernstein* exception, arguing that it violated the separation of powers clause.

Of these six Justices, two believed that despite the inapplicability of the *Bernstein* exception, the counterclaim was not barred by the act of state doctrine. Justice Douglas believed that *National City Bank v. Republic of China*, 348 U.S. 356 (1955), was controlling. 406 U.S. at 770. There, on similar facts, an offsetting counterclaim was allowed up to, but not exceeding, the plaintiff Republic of China's claim. 348 U.S. at 363-66. Justice Powell was of the view that the judiciary should consider whether, in the particular case before it, adjudication by the courts would violate the act of state doctrine. Thus, he rejected both *Republic of China* and *Bernstein* as controlling, but found that in this case, the counterclaim was justiciable. 406 U.S. at 773-76. On remand, the circuit court held that Banco Nacional was an alter ego of the Cuban government because of its active participation in the expropriation. 478 F.2d at 193-94.

*Alfred Dunhill, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976), also considered whether certain actions were sufficient to qualify as acts of state. In *Dunhill*, intervenors were appointed by the Cuban government to manage the expropriated tobacco businesses. These intervenors refused to refund certain payments mistakenly made by Dunhill. When Dunhill sued, the intervenors claimed their refusal to pay was an act of state, thus precluding an affirmative judgment against them. *Id.* at 687. The Supreme Court, in refusing to apply the act of state doctrine, *id.* at 691, held that the intervenors' refusal to pay was not, in and of itself, an act of state. *Id.* at 691-92. Four Justices supported the view that the act of state doctrine should not apply in cases which repudiate purely commercial obligations owed by a foreign sovereign or by one of its commercial instrumentalities. *Id.* at 695. The district court



in *Bancec* recognized that the *Dunhill* rule does not operate to bar Citibank's counterclaim as far as the act of state defense is concerned. 505 F. Supp. at 430. "[T]hat a counterclaim by way of set-off, limited to the amount of a foreign state's principal claim as plaintiff, is not barred by the Act of State doctrine or by sovereign immunity, has been reaffirmed by the majority, concurring and dissenting opinions in [*Dunhill*] . . . ." *Id.*

The Second Circuit recently restated the Supreme Court's rule in *Banco I* in its decision in *Chase*, 658 F.2d at 884.

[W]here (1) the Executive Branch has provided a *Bernstein* letter advising the courts that it believes act of state doctrine need not be applied, (2) there is no showing that an adjudication of the claim will interfere with delicate foreign relations, and (3) the claim against the foreign sovereign is asserted by way of counterclaim and does not exceed the value of the sovereign's claim, adjudication of the counterclaim for expropriation of the defendant's property is not barred by the act of state doctrine.

*Id.* Consequently, *Republic of China, Banco I*, and *Dunhill*, along with the *Chase* restatement of the *Banco I* rule, support the conclusion that the act of state doctrine does not bar Citibank's counterclaim against *Bancec*. Similarly, sovereign immunity does not preclude Citibank's present counterclaim.

Sovereign immunity may be waived, *Missouri v. Fiske*, 290 U.S. 18, 24 (1933), and a general appearance in litigation in a federal court constitutes such a waiver. *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883). See also *Petty v. Tennessee-Mo. Bridge Comm'n*, 359 U.S. 275, 276 (1959) (citing with approval *Fiske*, 290 U.S. 18 (1933) and *Clark*, 108 U.S. 436 (1883)). Because *Bancec* instituted the present suit, the *Clark* rule applies to bar sovereign immunity as a defense. *Accord* 45 AM. JUR. 2D *Int'l Law* § 59 (1969); 48 C.J.S. *Int'l Law* § 58 (1981); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 70 (1965). See also Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1976) (FSIA). Section 1607 of the FSIA is a codification of the *Republic of China* rule, permitting a counterclaim up to but not exceeding a plaintiff sovereign's claim. See also Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 545-46 (1978) (noting that sovereign immunity is criticized by most commentators, and citing *Republic of China*); Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80, 120 n.207 (1977) (observing that "[t]he Supreme Court has recently suggested that the act of state doctrine may not apply to commercial acts of foreign states"); Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 STAN. L. REV. 385 (1982) (containing a thorough discussion of the FSIA); Lowenfeld, *Act of State and Department of State: First Nat'l City Bank v. Banco Nacional de Cuba*, 66 AM. J. INT'L L. 795 (1972); Lowenfeld, *In Search of the Intangible: A Comment on Shaffer v. Heitner*, 53 N.Y.U. L. REV. 102, 111-15 (1978) (discussing the *Dunhill* result); McManis, *Questionable Corporate Payments Abroad: An Antitrust Approach*, 86 YALE L. J. 215, 234-35 nn.108 & 114 (1976) (discussing the commercial acts exception to sovereign immunity, and noting the difficulty the Supreme Court has had in applying the act of state doctrine in recent years); Timberg, *Sovereign Immunity and Act of State Defenses: Transnational Boycotts and Economic Coercion*, 55 TEX. L. REV. 1, 20 n.132 (1976) (containing an exhaustive treatment of the act of state doctrine and sovereign immunity, and observing that "[a]lthough *Republic of China* was decided on sovereign immunity grounds, the Supreme Court has cited it as precedent in two act of state cases"); Note, *Legal Impediments to Normalization of Trade with Cuba*, 8 LAW & POL'Y INT'L BUS. 1007, 1027-35 (1976) (applying sovereign immunity and the act of state doctrine to the Cuban expropriations).

There is also authority to the effect that *Bancec's* argument denying the present counterclaim because of offsets in prior litigation is without merit. Application of the collateral source rule should permit Citibank's present offset. See *Agwilines, Inc. v. Eagle Oil & Shipping Co.*, 153 F.2d 869 (2d Cir.), *cert. denied*, 328 U.S. 835 (1946). "[T]here is no more

*City Bank*<sup>29</sup> that Banco Nacional was the alter ego of the government did not exist in *Bancec*.<sup>30</sup> The key factor in *Banco Nacional* was the role which Banco Nacional played in expropriating the banks.<sup>31</sup> The circuit court in *Bancec* agreed with the district court's findings but rejected its conclusion, reasoning that Bancec did not actively participate in the expropriation.<sup>32</sup>

Thus, two competing and equally valid rationales emerge from the decisions of the courts below. The district court was concerned with foreign governments avoiding liability for properties they had expropriated. The court equated Bancec with the government,<sup>33</sup> thereby allowing a counterclaim for the value of the expropriated property. However, the district court seemed to suggest that any instrumentality of government which exhibited Bancec's characteristics would be subject to liability for the expropriatory acts of its government, regardless of its role in the expropriations.

solidly established principle than that payments or reparations of *whatever nature* which the injured party receives from a collateral source are, in the words of the courts, *res inter alios acta*, of no concern to the wrongdoer." *Id.* at 873 (Clark, J., dissenting) (emphasis added). Judge Hand's opinion for the majority was in accord with the rule pronounced by the dissent. "[W]hether the [injured party] . . . received any benefit or not, . . . it does not lie in a [wrongdoer's] mouth to say that some third person . . . has indemnified his victim for his loss. . . . [This] doctrine we accept . . ." *Id.* at 871. See also *Helfend v. Southern Cal. Rapid Transit Dist.*, 2 Cal. 3d 1, 465 P.2d 61, 84 Cal. Rptr. 173 (1970), in which the court held the collateral source rule applicable to a governmental entity. "Defendants would have this court create . . . a novel exception to the collateral source rule for [wrongdoers] who are public entities or public employees. We see no justification for such special treatment. . . . [That] would constitute an unwarranted and arbitrary discrimination." *Id.* at 14, 465 P.2d at 69-70, 84 Cal. Rptr. at 181-82.

29. 478 F.2d 191 (2d Cir. 1973).

30. *Bancec*, 658 F.2d at 918-19. In *Banco Nacional*, since the Cuban militia seized Citibank's property on orders from officials of Banco Nacional, and since the expropriatory orders were signed by Che Guevara, Minister of State, in his capacity as President of Banco Nacional, the court concluded that these facts "clearly indicated Banco's active role as a mere arm or division of the Cuban government." 478 F.2d at 194. In distinguishing these two cases, the court avoided the many glaring similarities between Banco Nacional and Bancec. Both were completely owned by the government, thus controlled by the government, their profits inured to the government, and Che Guevara, Minister of State, who signed the expropriation orders, was concurrently President of both Banco Nacional and Bancec. 658 F.2d at 918.

31. *Bancec*, 658 F.2d at 918-19 (quoting *Banco Nacional*, 478 F.2d at 194).

32. 658 F.2d at 918-19. "Citibank has not shown that Bancec played any role . . . in the expropriations of the Citibank branches. Since Bancec had no connection with the subject matter of the Citibank counterclaims, we will not rule, for the purposes of the present litigation, that Bancec was an alter ego of the Cuban government." *Id.* at 919.

33. See *supra* note 27 and accompanying text.

In contrast, the circuit court was concerned with preserving the separate identities of governments and their instrumentalities. Although it recognized that in some cases it would be appropriate to disregard their separate classifications,<sup>34</sup> the court ruled that where an instrumentality does not play any role whatsoever in the expropriatory acts of its government, then it is not proper to treat that instrumentality as the government when adjudicating claims involving the expropriations.

While the district court ruling may be too broad in application, the rather mechanical test espoused by the circuit court<sup>35</sup> potentially precludes the adjudication of counterclaims arising from nationalizations. For example, the confiscating government, by ensuring that the instrumentality which brings the suit did not have a key role in the expropriation, can deny the company whose property has been expropriated the possibility of asserting a meritorious counterclaim.<sup>36</sup> The difficulty in this case lies in attempting to incorporate the strengths while avoiding the deficiencies present in both approaches.

### III. ANALYSIS

#### A. Existing Law

##### 1. The Instrumentality Relation

Although there is an absence of any case law which is directly on point for adjudicating the present litigation, certain cases may nonetheless be relied upon for guidance.<sup>37</sup> In *Unemployment Compensation Commission v. Wachovia Bank & Trust Co.*,<sup>38</sup> the issue

34. See *Bancec*, 658 F.2d at 918.

35. Namely, whether the plaintiff is an instrumentality of the government, and if so, whether it plays a key role in the expropriations. See *id.*

36. In *Federal Rep. of Ger. v. Elicofon*, 358 F. Supp. 747 (E.D.N.Y. 1972), *aff'd*, 478 F.2d 231 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974), the court voiced a related policy consideration. "To allow the Weimar [Museum] to intervene in this case would render our Government's non-recognition of the GDR a meaningless gesture. Such a holding would permit non-recognized governments to use our courts at will by creating 'juridical entities' whenever the need arises." 358 F. Supp. at 757 (emphasis added). This is undeniably applicable to *Bancec* as well.

37. Although these cases are concerned with intergovernmental tax immunity, the factors used by the courts in finding the existence of an instrumentality relationship are applicable to the *Bancec* litigation.

38. 215 N.C. 491, 2 S.E.2d 592 (1939).

was whether the defendant, a bank organized under North Carolina law, was a governmental instrumentality and thus protected by intergovernmental tax immunity from the unemployment compensation laws of North Carolina.<sup>39</sup> The court noted that it may not be possible to prescribe a definition of governmental instrumentality applicable to all cases, and that it would indeed be unwise to do so.<sup>40</sup> But the court did articulate factors to consider in determining the existence of an instrumentality relationship. "Generally speaking, . . . it may be said that any commission, bureau, corporation or other organization, public in nature, created and wholly owned by the Government for the convenient prosecution of its governmental functions, existing at the will of its creator, is an instrumentality of government . . . ." <sup>41</sup>

## 2. The Alter Ego Relation

Decisions of the Supreme Court have equated the United States government with its instrumentalities. In *Rainwater v. United States*,<sup>42</sup> the Court held that a wholly owned government instrumentality, the Commodity Credit Corporation,<sup>43</sup> was a part of the United States government because it carried out the federal farm programs with public funds.<sup>44</sup> Under this rule, the performance of a governmental function was the key in equating an instrumentality with its government. In *Emergency Fleet Corp. v. Western Union Telegraph Co.*,<sup>45</sup> the issue presented was whether Fleet<sup>46</sup> could avail itself of the lower "governmental rate" charged by Western Union for transmissions on its systems,<sup>47</sup> that is, whether Fleet

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39. *Id.* at 494, 2 S.E.2d at 594.

40. *Id.* at 496, 2 S.E.2d at 595. The court suggested that "[e]ach case must be determined as it arises." *Id.*

41. *Id.* To the same effect are *Carter v. Coosa Valley Youth Servs.*, 378 So.2d 1145, 1147 (Ala. Civ. App. 1979); *Department of Cal., Veterans of Foreign Wars v. Kunz*, 125 Cal. App. 2d 19, 26, 269 P.2d 882, 887 (1954).

42. 356 U.S. 590 (1958).

43. *Id.* at 591.

44. *Id.* at 592.

45. 275 U.S. 415 (1928).

46. All of Fleet's stock was subscribed for and paid by the government, thus it was wholly owned by the government, and all profits not needed for operations inured to the Treasury. *Id.* at 422, 424. Fleet's activities consisted of "maintaining and liquidating property acquired for the United States during the World War, of settling claims arising therefrom, and of operating, or causing to be operated, vessels not disposed of." *Id.* at 421.

47. *Id.* at 416-17.

could be equated with the government. The Court held that Fleet was entitled to the government rate because it was wholly owned by the government,<sup>48</sup> its profits accrued to the Treasury,<sup>49</sup> and it was engaged in a government function.<sup>50</sup>

In *Federal Republic of Germany v. Elicofon*,<sup>51</sup> the question was whether there was a sufficient nexus between the Kunstsammlungen zu Weimar (Weimar Museum)<sup>52</sup> and the German Democratic Republic such that an alter ego relation existed between them.<sup>53</sup> The issue before the District Court for the Eastern District of New York was who had legal title to certain paintings stolen during World War II from the Land of Thuringia, a province of what is now the German Democratic Republic.<sup>54</sup> Elicofon claimed title to the paintings, having been a good faith purchaser for value.<sup>55</sup> The Federal Republic of Germany filed suit against Elicofon, arguing that it was the only recognized representative of the German people.<sup>56</sup> The Weimar Museum intervened,<sup>57</sup> alleging that it was the rightful owner because the paintings were stolen while in its possession.<sup>58</sup>

The district court held that the Museum was a mere arm of the German Democratic Republic, and since that government was not recognized by the United States, the Museum lacked standing to sue in United States courts.<sup>59</sup> The factors used by the court in determin-

48. *Id.* at 422.

49. *Id.* at 424.

50. *Id.* at 424-25.

51. 358 F. Supp. 747 (E.D.N.Y. 1972), *aff'd*, 478 F.2d 231 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974).

52. The Kunstsammlungen is an art museum located in the Land of Thuringia, a province of what is now the German Democratic Republic (East Germany). *See id.* at 749.

53. *Id.* at 756.

54. *Id.* at 749.

55. *Id.*

56. The Federal Republic of Germany alleged that "[a]t the time of their theft, the . . . [p]aintings were the property of the Weimar Museum which, in turn, belonged to the State of Thuringia, one of the Federal States of the German Reich, of which [the Federal Republic of Germany] is the only lawful and recognized successor." *Id.* at 749 n.1 (quoting paragraph 9 of the plaintiff's complaint).

57. *Id.* at 749. The Grand Duchess of Saxony-Weimar was also an intervenor in the litigation. *Id.*

58. *Id.*

59. *Id.* at 756-57. However, on September 14, 1974, the United States government extended formal recognition to the German Democratic Republic. Consequently, the Museum's intervention was allowed, and the district court's order in 358 F. Supp. 747 was

ing that the Museum was an arm of the government included the performance of a governmental function, complete dominion and control of the Museum by the German Democratic Republic, and conformance to the policies of the Minister of Culture and Education.<sup>60</sup> The court further noted that the grant of a juristic person status to the Museum did not alter the relationship between it and the government.<sup>61</sup> The rule to be extracted from these cases is that where an instrumentality is within the government's control, and is performing a governmental function, it is appropriate to consider that instrumentality as an alter ego of the government.

### B. *Application to Bancec*

The *Wachovia* ruling is applicable to *Bancec*, since *Bancec* was wholly owned by the government,<sup>62</sup> engaged in a governmental function,<sup>63</sup> and existed at the will of its creator.<sup>64</sup> Under this test, *Bancec* is an instrumentality of the Cuban government. This alone, however, will not suffice to validate Citibank's present counterclaim.<sup>65</sup> Additionally, *Bancec* and the Cuban government must be so inextricably intertwined that *Bancec* is deemed to be a mere tool of that government.<sup>66</sup>

*Bancec* was empowered to carry on the foreign trade of Cuba, stimulate production of goods for export, and render foreign mar-

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vacated. See *Federal Rep. of Ger. v. Elicofon*, 536 F. Supp. 813, 814-15 (E.D.N.Y. 1978). In *Kunstsammlungen zu Weimar v. Elicofon*, 536 F. Supp. 829 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982), the Museum was held entitled to the paintings, having passed the standing barrier through formal recognition by the United States of the German Democratic Republic. Throughout the lengthy history of this case, the factors used by the district court in holding the Museum to be an alter ego of the German Democratic Republic were not disturbed. Rather, by formal recognition of the German Democratic Republic, the standing problem no longer remained. Therefore, those factors used by the district court, and approved by the Second Circuit, *Elicofon*, 478 F.2d at 232, which equated the Museum with the government, remain valid authority.

60. 358 F. Supp. at 756.

61. *Id.*

62. See *supra* notes 8-13 and accompanying text.

63. See *supra* note 13 and accompanying text. See also Wells & Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073 (1980).

64. See *supra* note 21, which evidences the Cuban government's capricious formation and dissolution of various successor instrumentalities for the carrying on of *Bancec's* business.

65. The court states, "[a]s a general matter, . . . an instrumentality of a government is not necessarily an alter ego of that government . . ." *Bancec*, 658 F.2d at 918.

66. See *Banco Nacional*, 478 F.2d 191, 191-94.

kets ripe for Cuban products.<sup>67</sup> These are governmental programs<sup>68</sup> not unlike the federal farm programs in *Rainwater*. Furthermore, as was the case in both *Rainwater* and *Fleet*,<sup>69</sup> Bancec was also wholly owned by the government,<sup>70</sup> financed with public funds,<sup>71</sup> and required to remit its net profits to the General Treasury of Cuba.<sup>72</sup> Additionally, as was the Museum in *Elicofon*, Bancec was endowed with full juridical capacity.<sup>73</sup> The district court properly recognized this was self-serving in nature,<sup>74</sup> but the circuit court deemed relevant the recital of Bancec's autonomous status.<sup>75</sup>

In *Bancec*, the Second Circuit disregarded its own determination in *Elicofon*,<sup>76</sup> in which it had upheld the lower court's ruling.<sup>77</sup> The district court in *Elicofon* did not consider itself bound by the Museum's grant of a juristic entity status.<sup>78</sup> Moreover, both the

67. See Act of Apr. 25, 1960, No. 793, art. 1, bylaw VIII, 58 G.O. at 10,922, Joint App. at 39-41, *Bancec*.

68. "[Bancec] is an organization designed to contribute to, and collaborate with . . . the Government and . . . 'Banco Nacional de Cuba.'" *Id.* (emphasis added). See also Wells & Hellerstein, *supra* note 63.

69. *Fleet* also supports the contention that an instrumentality may be engaged in a commercial activity and still be an arm of the government. See 275 U.S. at 424-25. Bancec's involvement in governmental functions and simultaneous engagement in commercial activities bolstered its status as an alter ego of Cuba. There is, however, language in *Fleet* which at first seems to be inconsistent with finding an alter ego relation between Bancec and Cuba. See *id.* at 425-26. Nevertheless, it can be reconciled with *Bancec* inasmuch as that language only concerns corporations which are *not* wholly owned by the government. *Id.* Since Bancec is a wholly owned instrumentality, see Act of Apr. 25, 1960, No. 793, art. 1, bylaw IV, 58 G.O. at 10,922, Joint App. at 38, *Bancec*, it falls within the ambit of *Fleet* and *Rainwater* for finding the existence of the alter ego relation.

70. See Act of Apr. 25, 1960, No. 793, art. 1, bylaw IV, 58 G.O. at 10,922, Joint App. at 38, *Bancec*.

71. Act of Apr. 25, 1960, No. 793, art. 1, 58 G.O. at 10,922, Joint App. at 39, *Bancec*.

72. *Id.*, Joint App. at 38, *Bancec*.

73. *Id.* at 10,921, Joint App. at 37, *Bancec*.

74. See *supra* note 26 and accompanying text.

75. "[W]e decline to hold that a trading corporation wholly owned by a foreign government, but created and operating as a separate juridical entity, is an alter ego of that government . . ." 658 F.2d at 920. *But cf. supra* note 34 and accompanying text.

76. 478 F.2d 231 (2d Cir. 1973).

77. *Id.* at 232.

78. See 358 F. Supp. at 756. Rather, the court looked at the substance over the form. *Accord* *Cherry Cotton Mills, Inc. v. United States*, 327 U.S. 536, 539 (1946) ("[t]hat the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is, an agency selected by Government to accomplish purely governmental purposes"); *Chicago, M. & St. P. Ry. v. Minneapolis Civic & Commerce Ass'n*, 247 U.S. 490, 501 (1918) ("the courts will not permit themselves to be blinded or deceived by mere forms [of] law but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may

Museum and Bancec were under the complete control of their respective governments,<sup>79</sup> and Bancec's existence was at the will of

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require"); *Turner v. TVA*, 613 F.2d 783, 786 (10th Cir. 1980) (citing *Cherry*, 327 U.S. 536 (1946)); *Butz Eng'g Corp. v. United States*, 499 F.2d 619, 622 (Ct. Cl. 1974) (citing *Cherry*, 327 U.S. 536 (1946)); *Carter v. Coosa Valley Youth Servs.*, 378 So.2d 1145, 1147 (Ala. Civ. App. 1979) ("[w]e find the trial court correct in looking through the form . . . to [the] . . . substance . . .").

Indeed, this line of reasoning suggests the application, by analogy, of a related principle from corporate law—that of “piercing the corporate veil,” wherein (1) the actions of a subsidiary are sought to be attributed to the parent or the reverse, or (2) the shareholders are sought to be held liable for the actions or obligations of the corporation. See generally 1 W. FLETCHER, *CYC. CORP.* §§ 41-41.1 (perm. ed. 1974); H. HENN, *CORPORATIONS* § 146 (2d ed. 1970); N. LATTIN, *CORPORATIONS* §§ 14-15 (1971); E. LATTY, *SUBSIDIARIES AND AFFILIATED CORPORATIONS* (1936); I. WORMSER, *DISREGARD OF THE CORPORATE FICTION AND ALLIED CORPORATION PROBLEMS* (1929); Horowitz, *Disregarding the Entity of Private Corporations*, 14 WASH. L. REV. 285 (1939); Latty, *The Corporate Entity as a Solvent of Legal Problems*, 34 MICH. L. REV. 597 (1936). In addition to the cited cases, *supra*, *NLRB v. Deena Artware, Inc.*, 361 U.S. 398 (1960), provides an eloquent articulation of the concept.

“Dominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent. Where control is less than this, we are remitted to the tests of honesty and justice.” That is not a complete catalogue. The several companies may be represented as one. Apart from that is the question whether in fact the economic enterprise is one, the corporate forms being largely paper arrangements that do not reflect the business realities. One company may in fact be operated as a division of another; one may be only a shell, inadequately financed; the affairs of the group may be so intermingled that no distinct corporate lines are maintained.

*Id.* at 403 (quoting *Berkey v. Third Ave. Ry.*, 244 N.Y. 84, 95, 155 N.E. 58, 61 (1926)) (footnotes omitted). Applying this to *Bancec*, it appears that the terms of the Act of Apr. 25, 1960, No. 793, 58 G.O. 10,921, Joint App. at 36, *Bancec*, which attempt to create *Bancec* as a separate juridical entity are largely paper arrangements that do not reflect the business realities. Indeed, that statute clearly evinces that *Bancec* was to be regarded as a mere conduit for the policies of the government and Banco Nacional. “[*Bancec*] is an organization designed to contribute to, and collaborate with, the international trade policy of the Government and the application of the measures concerning foreign trade adopted by the ‘*Banco Nacional de Cuba*.’” Art. 1, bylaw VIII, 58 G.O. at 10,922, Joint App. at 39, *Bancec* (emphasis added). This result is further warranted by *United States v. Milwaukee Refrigerator Transit Co.*, 142 F. 247, 255 (C.C.E.D. Wis. 1905), wherein the court observed “that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to . . . justify wrong . . . the law will regard the corporation as an association of persons.” This may be applied, admittedly by analogy, to *Bancec*, since the Second Circuit has held that the Cuban expropriation was an illegal activity, in violation of international law. See *Banco Nacional*, 478 F.2d at 194. “[P]ractically all authorities agree that . . . the corporation may be disregarded as an intermediate between the ultimate person or persons or corporation and the adverse party; and should be disregarded in the interest of justice in such cases as . . . contravention of law . . .” 1 W. FLETCHER, *CYC. CORP.* § 41 (perm. ed. 1974).

79. See *Elicofon*, 358 F. Supp. at 756; Act of Apr. 25, 1960, No. 793, art. 1, bylaws IV, V, 58 G.O. at 10,922, Joint App. at 38-39, *Bancec*. Cuban Law No. 793 vested the government with control of *Bancec*. The government owned all of its stock, contributed all of its capital, and enjoyed the benefits of its net profits. *Id.*



the Cuban government,<sup>80</sup> as the Museum's existence depended on the caprice of the German Democratic Republic.<sup>81</sup> The rule of establishing an alter ego relation as developed in *Elicofon* is authority for holding Bancec to be a mere arm, an alter ego, of Cuba.<sup>82</sup>

Bancec's position, however, is not entirely without support. In connection with "piercing the corporate veil,"<sup>83</sup> the courts are reluctant to casually disregard the separate identities of the parties,<sup>84</sup> and face difficulties in applying the doctrine.<sup>85</sup>

### *C. Inadequacy of Existing Standards*

The criteria which the courts have used in determining the existence of an alter ego relation do not encompass all the relevant factors. Quite simply, existing law does not provide a sufficient basis for resolving the *Bancec* litigation. In both *Bancec* and *Elicofon*, the determination essentially revolved around one basic question—did the government have control over its instrumentality.<sup>86</sup> Although this is an extremely relevant consideration, it should not be the end of the inquiry as to the existence of the alter ego relation.<sup>87</sup>

In addition to the control element, the performance of a governmental function was deemed worthy of consideration in both *Rainwater* and *Fleet*. But even this additional factor does not provide a complete catalogue.

80. See *supra* note 21.

81. See 358 F. Supp. at 756.

82. Existence of the alter ego relation in this case is further supported by a court order, obtained at the request of Bancec's counsel, to substitute the Cuban government for Bancec as the proper plaintiff. See *Bancec*, 505 F. Supp. at 424-25. This substitution, however, was not made. *Id.* at 425.

83. See *supra* note 78.

84. See, e.g., *Kirno Hill Corp. v. Holt*, 618 F.2d 982 (2d Cir. 1980); *Gartner v. Snyder*, 607 F.2d 582 (2d Cir. 1979).

85. See, e.g., Douglas & Shanks, *Insulation From Liability Through Subsidiary Corporations*, 39 *YALE L. J.* 193 (1929).

86. These factors included: control by the government, continued existence dependent on the government, dependence on the government for financing and personnel, and accrual of the profits to the government. See *Bancec*, 505 F. Supp. at 427; *Elicofon*, 358 F. Supp. at 755-56. It cannot be questioned that all of these considerations essentially focus on who has control of the instrumentality. Although both decisions also deemed relevant whether a governmental function was being performed, 505 F. Supp. at 427; 358 F. Supp. at 756, discussion of the preceding factors overshadowed this consideration.

87. For a discussion of the other factors which should have been weighed, see *infra* notes 89-109 and accompanying text.

The deficiency of the existing standards is illustrated by the fact that most instrumentalities will exhibit the fatal characteristics. Applying these standards, the instrumentality in question is likely to be liable for the actions or obligations of its government or related entities. This would undoubtedly disrupt commerce with foreign state trading companies.<sup>88</sup>

Finally, it should be noted that all of the preceding cases are distinguishable from *Bancec*. *Rainwater* and *Fleet* were concerned with domestic instrumentalities, and therefore did not present any international ramifications. *Elicofon*, on the other hand, involved a foreign instrumentality, but that case analyzed the alter ego relation in connection with a standing problem. In contrast, *Bancec* seeks to establish the alter ego relationship in connection with a counterclaim which does not present a standing issue. Thus, the precise legal question presented by *Bancec* has not been previously adjudicated. The Supreme Court's decision in *Bancec*, therefore, will have the added distinction of creating law with respect to the issue presented.

#### IV. THE BALANCING TEST: A PROPOSAL

In lieu of the standards adopted by the lower courts for resolving the present issue,<sup>89</sup> a balancing test is the appropriate alternative.<sup>90</sup> The circuit court's decision does not encompass all the relevant criteria. That ruling was concerned primarily with whether *Bancec* had played a key role in the expropriation of Citibank's branches.<sup>91</sup> The district court came closer to utilizing a balancing test, but it too did not incorporate all the relevant criteria.<sup>92</sup>

One factor to consider under this proposed balancing scheme should be whether the instrumentality in issue is performing a governmental function, or one that is commercial or proprietary in

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88. See *Texas Trading & Milling Corp. v. Federal Rep. of Nig.*, 647 F.2d 300, 315-16 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1012 (1982).

89. See *supra* notes 23-36 and accompanying text.

90. It is beyond dispute that where two competing and equally valid claims are presented for review, a balancing test is particularly appropriate. See, e.g., *United States v. Nixon*, 418 U.S. 683 (1974); *Roe v. Wade*, 410 U.S. 113 (1973); *New York Times Co. v. United States*, 403 U.S. 713 (1971).

91. 658 F.2d at 918-19.

92. See *supra* note 86 and accompanying text.

nature.<sup>93</sup> However viewed, it cannot be denied that Bancec's function was governmental. The law which created Bancec specifically provided that it was to collaborate with the government and Banco Nacional in effectuating Cuba's trade policies.<sup>94</sup> Furthermore, the circuit court's ruling that Bancec was engaged in commercial activities<sup>95</sup> is misleading. Any instrumentality engaged in promoting its government's foreign trade will necessarily be involved in commercial activities, but this does not change the governmental nature of its functions. The commercial and governmental functions of an instrumentality can coexist.<sup>96</sup>

Secondly, the element of dominion and control is to be accorded substantial weight in determining whether there are two separate and distinct entities. The district court properly considered this element of control<sup>97</sup> at some length in arriving at its conclusion that Bancec was to be equated with the government.<sup>98</sup> The facts to consider in determining whether the requisite control exists include the following: (1) does the instrumentality's existence depend on the will of the government; (2) is it dependent on the government for personnel and financing; (3) does it conform to the government's policies; and (4) is its governing board composed of members of the government. The district court found that Cuba did in fact have control over Bancec,<sup>99</sup> and the circuit court agreed with this finding.<sup>100</sup> Indeed, it is difficult to envision a contrary finding in view of the legal framework creating Bancec and the Second Circuit's analysis of its function within the Cuban governmental structure.<sup>101</sup>

The length of time the instrumentality has been in existence is also relevant to the weighing process. Although not conclusive, an instrumentality's past performance would be evidence of its auton-

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93. See generally Wells & Hellerstein, *supra* note 63. See also Foreign Sovereign Immunities Act, 28 U.S.C. § 1605 (1976) (discussing the commercial acts exception to sovereign immunity).

94. See Act of Apr. 25, 1960, No. 793, art. 1, bylaws VIII, IX, 58 G.O. at 10,922-23, Joint App. at 39-41, *Bancec*.

95. *Bancec*, 658 F.2d at 919.

96. See *Fleet*, 275 U.S. at 424-25. See also *supra* note 69.

97. See *Bancec*, 505 F. Supp. at 427.

98. *Id.*

99. *Id.*

100. *Bancec*, 658 F.2d at 917.

101. See *supra* notes 9-13, 27 and accompanying text.

omy. Bancec's transient existence<sup>102</sup> makes it difficult to conclude that in such a short period of time, Bancec developed its own identity which was distinct from the government.

The question of whether there is a connection between Bancec's claim and Citibank's counterclaim also merits close scrutiny. If the conflicting claims did in fact arise from similar or related events, then Citibank's counterclaim should be assertable against Bancec. It is at this juncture that the circuit court did not assess the complete facts. The court's ruling<sup>103</sup> failed to perceive that all of the expropriations in Cuba were part of a "master plan" of the new Cuban government.<sup>104</sup> Pursuing this, a relationship develops between Citibank's counterclaim, which arose from the expropriation of its Cuban branches, and Bancec's claim, the letter of credit, which had as its underlying obligation expropriated sugar,<sup>105</sup> since both expropriations were part of the master plan.<sup>106</sup>

Finally, policy considerations<sup>107</sup> should be weighed in the balancing process.<sup>108</sup> One such consideration would be the ramifica-

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102. Bancec was created pursuant to the Act of Apr. 25, 1960, No. 793, 58 G.O. 10,921, Joint App. 36, *Bancec*, and dissolved pursuant to the Act of Feb. 23, 1961, No. 930, 59 G.O.E. 1, Joint App. 82, *Bancec*, and Act of Feb. 23, 1961, No. 934, 59 G.O.E. 12. *See Bancec*, 658 F.2d at 916 & n.4. *See also supra* note 21.

103. The court answered this question in the negative, stating that the expropriation of Citibank's property was not related to Bancec's claim. 658 F.2d at 919.

104. *See, e.g.,* Rogers, *Of Missionaries, Fanatics, and Lawyers: Some Thoughts on Investment Disputes in the Americas*, 72 AM. J. INT'L L. 1 (1978). "In 1959 and 1960, the Cuban Government expropriated the sugar plantations, nickel mining facilities, utilities and railroads, investment companies, insurance firms, and private homes of North Americans." *Id.* at 11 (footnote omitted). *See also Chase*, 658 F.2d at 878 (describing the general goals of the new government); Sutton, *American Claims Against Cuba*, 3 INT'L LAW. 741, 746-49 (1969) (describing the laws which effected these expropriations).

105. *See Bancec*, 505 F. Supp. at 419, 423-24.

106. Although establishing a nexus between the two claims is the key in utilizing this factor, the necessary connection should be a matter of proximity and degree.

107. *See* W. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* (1964). A policy oriented judge is one "who is aware of the impact which judicial decisions can have on public policy, realizes the leeway for discretion which his office permits, and is willing to take advantage of this power and leeway to further particular policy aims." *Id.* at 4.

108. An appellate court can change the law based on policy considerations. *See, e.g.,* *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S. Ct. 3164 (1982); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (overruling the separate but equal doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896)). In *Loretto*, Justice Blackmun noted: "The 19th century precedents relied on by the Court lack any vitality outside the agrarian context in which they were decided. But if . . . they have any lingering vitality, then, in my view, those cases stand for a constitutional rule that is uniquely unsuited to the modern urban age." *Id.* at 3182 (Blackmun, J., dissenting) (footnote omitted). Justice Blackmun also articulated a rather

tions which the circuit court's decision would encourage if it were permitted to stand. In selecting which entity will institute suit in the United States, a foreign government will be inclined to choose an instrumentality which did not have an active role in the expropriatory acts. This manipulation will ensure the government that the instrumentality will not be held accountable for a counterclaim based on the expropriations.<sup>109</sup> Policy considerations favoring accountability of foreign governments therefore militate against the circuit court's test, which makes it far too easy for such governments to avoid responsibility for expropriations.

In summary, the factors to be considered in utilizing the proposed balancing test include: (1) whether a governmental function is being performed by the instrumentality; (2) whether it is within the government's control; (3) the length of time it has been in existence; (4) whether there is a connection between the conflicting claims; and (5) the applicable policy considerations.

### CONCLUSION

This Note has suggested a more comprehensive approach for the adjudication of expropriation cases involving instrumentalities of foreign governments. Although use of the prescribed balancing test will not provide all of the answers all of the time, it should make the decisions in these cases more coherent, rational, and understandable.<sup>110</sup> In *Bancec*, the instrumentality was engaged in a governmental function, was controlled by the government, was in

convincing policy argument: "[T]his Court long ago recognized that new social circumstances can justify legislative modification of a property owner's common-law rights, without compensation, if the legislative action serves sufficiently important public interests," *id.* at 3186, and concluded by saying that, "today's decision . . . represents an archaic judicial response to a modern social problem." *Id.*

109. See *supra* note 36 and accompanying text.

110. See, e.g., Douglas & Shanks, *supra* note 85, discussing piercing the corporate veil.

[T]here is no one formula which can be successfully applied to the . . . cases. The formula varies with the facts of each case. But that is unimportant. The significance of this examination is that the concepts which the courts are using can be broken down and translated into the varying factual combinations which are found. That translation will not give the answer to the problem at issue. But it will serve to pose the problem in language which seems more understandable. It will result in reducing the cases to a lower common denominator. It will make more intelligible, and perhaps more intelligent, the answer to the question, was the subsidiary an "agent" of the parent?

*Id.* at 210. This applies with equal vigor to the present situation.

existence for a short duration and then summarily dissolved, and the conflicting claims were related.<sup>111</sup> Applying the proposed test,<sup>112</sup> the necessary factors for review become crystallized, and support a finding that Bancec was an alter ego of the Cuban government. Therefore, reversal of the circuit court is compelled.

*Aris Haigian*

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111. *See supra* notes 89-109 and accompanying text.

112. *See id.*