

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-984
FIRST NATIONAL CITY BANK, Petitioner
TITLE v.
BANCO PARA EL COMERCIO EXTERIOR DE CUBA
PLACE Washington, D. C.
DATE March 28, 1983
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FIRST NATIONAL CITY BANK, :

V. : No. 81-984

BANCO PARA EL COMERCIO EXTERIOR :

DE CUBA :

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Washington, D.C.

Monday, March 28, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:59 o'clock a.m.

APPEARANCES:

HENRY HARFIELD, ESQ., New York, New York; on behalf of
the Petitioner.

RICHARD G. WILKINS, ESQ., Office of the Solicitor

General, Department of Justice, Washington, D.C.;

pro hac vice for U.S. as amicus curiae.

MICHAEL KRINSKY, ESQ., New York, New York; on behalf
of the Respondent.

1	C O N T E N T S	
2	<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
3	HENRY HARFIELD, ESQ.,	
4	on behalf of the Petitioner	3
5	RICHARD G. WILKINS, ESQ.,	
6	pro hac vice for U.S. as amicus curiae	15
7	MICHAEL KRINSKY, ESQ.,	
8	on behalf of the Respondent	28
9	HENRY HARFIELD, ESQ.,	
10	on behalf of the Petitioner - rebuttal	41
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
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Mr. Harfield, I think you may proceed whenever you are ready.

ON BEHALF OF THE PETITIONER

In its answer, the defendant, which I am going to call Citibank, again for the sake of convenience, in its answer, Citibank alleged that the action was brought by and for the Republic of Cuba, Bancec being a mere segment or instrumentality, an indistinguishable and integral part of the Cuban government.

Citibank then asserted as a defensive counterclaim to curtail the sum of money that was sought by Bancec in this case its claim for an amount of money equivalent to the value of its properties in Cuba, its

1 eleven branches that had been confiscated, taken without
2 any compensation by the Cuban government in a manner
3 which the Second Circuit from which this case comes has
4 held was in violation of international law.

5 The issue framed, the threshold issue framed
6 by the pleadings was therefore in this claim and
7 counterclaim, are the claimant and the counterclaimant
8 opposing parties? The question here is who is the real
9 claimant, as put in issue by that answer.

10 Now, some three weeks after the commencement
11 of this action by Bancec the Cuban government dissolved
12 Bancec and exercised direct dominion over all of
13 Bancec's assets, including the claim in this case.
14 Thereafter, some several months later, the respondent
15 sought and obtained from the court in which the action
16 was pending leave to substitute the Republic of Cuba as
17 the plaintiff in the action, and that leave was granted,
18 and leave was granted to file a supplemental complaint
19 in which it was alleged that the claim which is the
20 subject of this action was assumed by the Republic of
21 Cuba.

22 Now, that supplemental complaint was never
23 formally filed. It was just approved for filing by the
24 court at the instance of the respondent.

25 QUESTION: Mr. Harfield, what does that

1 connote in the practice of the Southern District,
2 approval for filing by the court?

3 MR. HARFIELD: Well, this was an application
4 by counsel for a party to substitute another party,
5 another person as the party plaintiff, and the Court in
6 this case on stipulation, on the agreement of the
7 defendant, said it is so ordered. You may. This was an
8 application for leave to substitute. So that
9 technically it did not effect a substitution. It was
10 leave to substitute. They asked for it. They asked for
11 permission. They got the permission. Then I suppose
12 they changed their mind.

13 QUESTION: Are you suggesting that certain
14 inferences can be drawn as a result of that?

15 MR. HARFIELD: Yes, I think so, Your Honor.

16 QUESTION: Mr. Harfield, you don't contend
17 that Bancec is somehow unable to proceed in the
18 litigation because it was dissolved, I take it.

19 MR. HARFIELD: Well, I am troubled by that,
20 Justice O'Connor. I should think that it would be very
21 difficult for Bancec as such to proceed in the
22 litigation, and if I --

23 QUESTION: Did you take that position below?

24 MR. HARFIELD: We simply took the position
25 that there was an identity between Bancec or, if you

1 like, between Bancec's ghost and the Republic of Cuba,
2 the Cuban government.

3 QUESTION: But you didn't argue that because
4 Bancec was dissolved, it couldn't proceed?

5 MR. HARFIELD: No, we did not argue that the
6 act of dissolution was what did it. We said that in
7 effect there hadn't been anything there in the first
8 place.

9 QUESTION: Did you argue below that regardless
10 of Bancec's situation, that you could assert the
11 counterclaim in any event because the Cuban government
12 or Banco Nacional had appeared?

13 MR. HARFIELD: We did not put it on the ground
14 of an appearance by the Cuban government or Banco
15 Nacional. We argued that there -- and the District
16 Court after trial found that at least for purposes of
17 this litigation, there was a commonality among the Cuban
18 government, Banco Nacional, Bancec when Bancec was in
19 existence.

20 QUESTION: Well, I guess the courts below
21 didn't really resolve the question about whether the
22 assets had gone to Banco Nacional at one time or had
23 gone to the Cuban government. It seemed to base it on
24 the fact that Bancec was an alter ego of the Cuban
25 government. So they didn't decide the other --

1 MR. HARFIELD: There is -- I think it was
2 decided, Justice O'Connor. The language is somewhat
3 obscure and repetitious, and I think it is a mistake,
4 unfortunate that we talk about alter ego or the like.
5 What we are really talking about here is whether, as
6 used to be the case back in the days of the alien
7 property custodian, whether there is a cloaking
8 operation by a corporation.

9 The trial judge certainly used the words
10 "alter ego," but his -- or one of his overall statements
11 as to his findings was that no matter how regarded,
12 whether this was -- the circumstances, the relationship
13 of Bancec during its existence and the Cuban government,
14 taken together with the devolution of the claim, as he
15 put it, upon Bancec's dissolution, made it clear that
16 the claim was now the claim of the Republic of Cuba or
17 of Banco Nacional which had been held to be the alter
18 ego of the Republic of Cuba, that it was in effect --
19 the Republic of Cuba was the party opposed in interest,
20 the protagonist of this case.

21 And that is what really we were looking for
22 down there, was what the court was looking for: who is
23 pushing this case?

24 QUESTION: Well, is the question, who is the
25 real party in interest?

1 MR. HARFIELD: Well, I think that's one way of
2 formulating it. I have used the word "protagonist"
3 because I am trying to avoid these mystique words or
4 phrases of art, such as "real party in interest" and
5 "alter ego." I think the question is, who is the person
6 who is pushing this claim, and the best word I find for
7 that in the dictionary is the protagonist.

8 I'm not sure that answers your question.

9 QUESTION: I am puzzled by why you distinguish
10 that from real party in interest, which is common in all
11 kinds of civil litigation.

12 MR. HARFIELD: Yes, and I am perfectly content
13 to accept that as the real party in interest. Indeed, I
14 think we used that phrase in the pleadings.

15 QUESTION: And your position is that the
16 government of Cuba is the real party in interest.

17 MR. HARFIELD: Is the real party in interest
18 and has been throughout, and in that context, if I may,
19 I would like to point out that -- one other fact here.
20 After the government of Cuba had dissolved Bancec and,
21 shall I say, retrieved the claim in this case, after
22 this stipulation had been entered in the court in 1961,
23 some 14 years later but still before trial, the
24 respondent asked that another Cuban government
25 instrumentality, short name Cubazucar, be substituted as

1 the party plaintiff, because that was, if you like, then
2 the real party in interest. There had been this
3 succession.

4 I think real party in interest is a proper way
5 to examine it. The question as I see it --

6 QUESTION: Mr. Harfield --

7 MR. HARFIELD: -- is that the task of the
8 trial judge, the factfinding task that he had was to
9 find out who is pushing the claim and who is pushing the
10 counterclaim.

11 QUESTION: I was just going to make that
12 inquiry, and I gather that Judge Grant did find pretty
13 much in your favor --

14 MR. HARFIELD: Yes, he did.

15 QUESTION: -- on that point, but the Court of
16 Appeals certainly did not affirm his finding, did it? I
17 had some doubt as to just what the Court of Appeals did
18 with it.

19 MR. HARFIELD: So did I. What the Court of
20 Appeals --

21 QUESTION: Except that you lost.

22 MR. HARFIELD: Yes, I knew that.

23 (General laughter.)

24 MR. HARFIELD: The Court of Appeals said that
25 they agreed with the District Court's description of the

1 functions of Bancec and its status as a wholly owned
2 instrumentality of the government of Cuba, but it
3 disagreed with its conclusions, and there we come to
4 what is, I think, the real mischief in this case, or of
5 the decision of the Court of Appeals, because what they
6 did was in effect to reverse the whole procedure, and
7 they said Bancec is set up, notwithstanding our
8 agreement as to the status of the functions for the
9 District Court and found it was a cloak, but they said
10 Bancec -- the origin of Bancec's claim was a commercial
11 transaction. The origin of the counterclaim was not a
12 commercial transaction.

13 Bancec, when it was in existence, had nothing
14 to do with the subject matter of the counterclaim.
15 Therefore you can't oppose these. You can understand
16 that argument, but what they said was, because you can't
17 oppose these, they are not alter egos, and that leaves
18 me completely confused.

19 QUESTION: If it was not a commercial
20 transaction, how was it characterized by --

21 MR. HARFIELD: The basis for the counterclaim?

22 QUESTION: Yes.

23 MR. HARFIELD: It was characterized as a
24 breach of international law. And we have -- we were
25 here before on the question -- in the Banco Nacional

1 case, on the question of whether that counterclaim could
2 be asserted notwithstanding the active state doctrine,
3 which is something I hope we don't have to reargue
4 today. But the -- at that time the holding -- this
5 Court sent that Banco Nacional case back to the Second
6 Circuit and said, find out whether there are any other
7 grounds for holding in favor of the Cuban
8 instrumentality, in that case Banco Nacional, and the
9 Second Circuit said no. They said Banco Nacional is the
10 alter ego, if you like, of the Cuban government.

11 Number Two, there was a clear violation of
12 international law in taking Citibank's branches, and on
13 that basis they held for the City -- for Citibank in
14 that case. So, there you do have -- there is no
15 question that the transaction on which the counterclaim
16 is based is not the same counterclaim that the claim is
17 based on.

18 But Rule 13(b) says that doesn't make any
19 difference. The issue is not the opposition of the
20 origin of the claims but the opposition of the parties
21 in interest, of the claimant and counterclaimant, and
22 the relief that is sought is precisely the same. We are
23 just talking about money. This isn't a question of
24 trying to recapture property that was taken there.

25 QUESTION: What significance do you think the

1 Court of Appeals attached to the fact that your claim
2 had not arisen out of the same transaction as the bank's
3 had?

4 MR. HARFIELD: I think it is unwholesome to
5 put words in the appellate court's mouth. My guess was
6 that that was the only way they could think of to come
7 out where they wanted. I simply can't -- I can't answer
8 the question because I can't understand it.

9 The net effect of this was that we have a
10 finding by the District Court that there was an identity
11 of interest. We have the Second Circuit saying, we find
12 that because the transactions didn't mesh, it didn't --
13 they are not the same party, and I think that is clearly
14 -- the Court of Appeals was clearly in error.

15 Now, the mischief of this is that what they
16 are doing is to impose a test which in effect forms a
17 blueprint for any foreign government that chooses to do
18 so by arranging its own wardrobe, if you like, in a
19 proper fashion, to come in here as a plaintiff and
20 escape the liabilities that would attach if it came in
21 on its own, the liabilities that would attach by reason
22 of set off counterclaim or other defenses, other
23 defenses.

24 The respondent goes a great deal farther than
25 the Court of Appeals did. I think the Court of Appeals

1 was in error. They are making new law if this decision
2 is allowed to stand. But what the respondent is urging
3 is that the presumption, which everyone admits, the
4 presumption of independence of a corporation, is in
5 effect a conclusive presumption if it is a foreign
6 corporation, a foreign government corporation.

7 He says foreign government corporations are
8 sui generis, and in effect whatever is said about them
9 by their parent government must be taken. This
10 precludes inquiry by a court --

11 QUESTION: But then you are back to the act of
12 state doctrine, are you not?

13 MR. HARFIELD: Well, if you carry that to its
14 extreme, it certainly is dragging the act of state
15 doctrine in the back door and it is like dragging the
16 cat back in the back door after the cat has had kittens,
17 because there is a lot more to it than just the plain
18 act of state doctrine.

19 My peroration of this, I sum up the situation,
20 the position -- the petitioner's position is this, that
21 there can be no serious doubt that the Republic of Cuba
22 is the real protagonist, the real party in interest in
23 this case, and that the parties opposed in interest are
24 the Republic of Cuba and Citibank. Neither under
25 international law nor under federal law -- Under both

1 international and federal law, the consequence of that
2 fact is that Citibank is entitled to curtail the
3 recovery that is sought in this case, and that right of
4 curtailment, the right to assert that defense
5 effectively, should not be defeated in this case because
6 the order to take over Citibank's branches, which is the
7 basis for their counterclaim, because that order was
8 signed by Che Guevera as president of Bancec instead of
9 Che Guevera as president of Banco Nacional.

10 The normal consequences flowing from both
11 federal and international law, which is that the
12 question of the identity of a party is a matter for the
13 forum to determine, that can't be and shouldn't be
14 averted by being bound, handicapping the court,
15 handcuffing the court if a foreign government simply
16 says the immunity that we confer, the characteristics
17 that we confer on a creature of ours in our country are
18 binding on you in your country.

19 There, I think, is the danger of what will
20 come about, and that, of course, is something that I
21 think invokes the interest of the United States, as to
22 which I don't pretend to speak.

23 I would like to reserve my time.

24 CHIEF JUSTICE BURGER: Very well.

25 Mr. Wilkins.

1 ORAL ARGUMENT OF RICHARD G. WILKINS, ES.,

2 PRO HAC VICE FOR U.S. AS AMICUS CURIAE

3 MR. WILKINS: Mr. Chief Justice, and may it
4 please the Court, the United States believes that the
5 issue presented by this case is whether or not an
6 instrumentality of a foreign state could bring suit in
7 United States court should be insulated from a
8 counterclaim properly asserted against the state on the
9 sole basis that that state instrumentality did not play
10 a key role in the wrongful conduct of the state.

11 The Court of Appeals has answered this
12 question in the affirmative, and by so doing, has
13 rendered irrelevant a broad range of legal and equitable
14 factors that United States courts and foreign courts
15 have traditionally analyzed in attributing
16 responsibility between and among nominally separate
17 corporate entities.

18 The United States has a significant interest
19 in addressing or suggesting that this is an erroneous
20 approach, because by limiting the alter ego question to
21 a single narrow factor, that is, whether or not the
22 state entity played a key role in wrongful conduct, the
23 court below has unnecessarily and unduly restricted the
24 ability of American defendants to raise valid
25 counterclaims in suits brought against them by foreign

1 governments.

2 Respondent in this court would go even further
3 than the Court of Appeals. He argues, or it argues that
4 international law requires this Court to apply Cuban
5 law, not only to establish its separate identity, but
6 also its absolute non-liability for the acts of the
7 Cuban state.

8 The Court of Appeals, of course, didn't even
9 go this far when it recognized that Bancec's separate
10 status under Cuban law could and would be disregarded if
11 Bancec did indeed play a key role in the wrongful
12 conduct of the state. International law, moreover,
13 although it is exhaustively examined by respondent, does
14 no more than establish a presumption, which we
15 recognize, that United States and other foreign courts
16 will generally recognize the independent status of
17 Bancec.

18 That presumption, however, is not conclusive.
19 United State courts and foreign courts have never held
20 that foreign law is conclusive on the alter ego
21 question. We cite many cases in our brief where that
22 inquiry is undertaken. Lord Denning of the British
23 Court of Appeals in the Trentex Trading Corporation case
24 stated that whether a state-owned entity should be
25 considered the alter ego of its parent should not depend

1 on foreign law alone. Rather, he stated, he would "look
2 to all the evidence to see whether the organization was
3 under government control and exercising governmental
4 functions."

5 The error of the court below is that it
6 pretermits this sort of inquiry that courts throughout
7 the world have found necessary to resolve this alter ego
8 question.

9 QUESTION: That may be, but what is the source
10 of the law on it?

11 MR. WILKINS: The source of the law. In this
12 case it is --

13 QUESTION: Well, what is the -- you say courts
14 around the world find it necessary to determine it. By
15 what standard do they decide? They look at all the
16 facts, but usually you have to have some rule that you --

17 MR. WILKINS: Well, the rule -- generally
18 courts who have examined the alter ego question in the
19 context of state-owned entities have focused on two
20 particular factors, the extent of government control and
21 whether or not --

22 QUESTION: Well, that may be, but where do
23 they get those rules? Do they make them up, or is it
24 international law --

25 MR. WILKINS: Well, it's --

1 QUESTION: -- or is it federal law, or what?
2 Or is it forum law? Is it the law about forum -- or
3 what?

4 MR. WILKINS: We are suggesting that the
5 United States should apply federal law in the
6 circumstances of this case.

7 QUESTION: The law of the forum.

8 MR. WILKINS: Yes, as in this --

9 QUESTION: Not international law.

10 MR. WILKINS: No. But that -- but that law --
11 but the federal rule that we suggest that this Court
12 should apply is in conformity with the rule that we
13 believe is generally recognized by international law.
14 This case --

15 QUESTION: You don't think international law
16 makes the law of the forum state conclusive?

17 MR. WILKINS: No, it doesn't. In fact, Lord
18 Denning in fact in Trentex Trading said that that --
19 foreign law could not be conclusive. This case -- the
20 procedural context of this case simply cannot be
21 ignored. Cuba has -- or a Cuban entity has entered a
22 United States court to sue an American defendant on an
23 American debt invoking American law. In that context --
24 But in that context they seek to raise their own law to
25 defeat a valid counterclaim.

1 In the Republic of China case, this Court said
2 that a foreign entity simply cannot invoke American law
3 free from the claims of justice.

4 QUESTION: What error -- what error did the
5 Court of Appeals make? In the source of the law, or the
6 standard, or just in application of the facts?

7 MR. WILKINS: Simply overly narrowly confining
8 the inquiry. The question before the Court -- The
9 United States does not dispute that as a matter of
10 general international law or as domestic law, for that
11 matter, Bancec should be accorded the separate status
12 generally granted it under its organic laws, but that is
13 not the question that is before the Court.

14 The petitioners have pled and proven before
15 the Court of -- before the District Court, that is, that
16 notwithstanding the provisions of Cuban law, Bancec
17 lacked a separate identity. It was in reality a mere
18 extension of the Cuban government. That question, the
19 alter ego question is at bottom a factual and not a
20 legal determination.

21 And in making that determination, a broad
22 range of considerations are relevant, not a single
23 inquiry: is it -- did it play a key role in the
24 wrongful conduct of the state? As I stated earlier,
25 courts generally in this circumstance have looked at

1 governmental control, whether it performed a
2 governmental function. That is what the District Court
3 looked at.

4 The Court of Appeals was going to disregard
5 all that on the basis of a single narrow factor. We
6 believe that is erroneous.

7 QUESTION: So the only issue here is sort of a
8 mixed question of law and fact, of whether on all the
9 facts --

10 MR. WILKINS: No, it is a legal question. We
11 believe that the test is a matter of law, I mean,
12 whether or not the legal test is the --

13 QUESTION: Well, I know, but you said it was
14 primarily a factual question.

15 MR. WILKINS: Well, the alter ego
16 determination is a factual question.

17 QUESTION: Well, that's what's involved here,
18 isn't it?

19 MR. WILKINS: Yes, but what the Court of
20 Appeals has said is that the alter ego test, the legal
21 test for alter ego is just one factor: did the state
22 entity play a key role in the wrongful conduct of the
23 state. We say that is an erroneous legal test. We are
24 saying the proper legal test takes note and cognizance
25 of a broad range of legal and equitable factors.

1 QUESTION: And what -- Did the Court of
2 Appeals say what the source of the test would be? I
3 know that you indicate that they chose the wrong test,
4 but where were they reaching for? Did they say --

5 MR. WILKINS: I haven't the foggiest idea.

6 QUESTION: Did they think it was a matter of
7 federal law, or --

8 MR. WILKINS: They didn't state. They said --
9 They said, our prior decision in Banco -- in the Banco
10 Nacional case had a precise basis. We would disregard
11 the separate entity of the state government when they
12 played a key role in the wrongful conduct of the state.
13 Where they derived that test, I am not certain.

14 QUESTION: Mr. Wilkins, may I ask you, looking
15 at this case at the time the litigation started, the
16 very day it started, what was the governmental function
17 in your view that Bancec was performing?

18 MR. WILKINS: You have to look at Bancec --
19 Bancec's overall operation at the time. Respondents, of
20 course, would like you to look at a snapshot of a single
21 commercial enterprise, but when you look at the overall
22 operation of Bancec, it was created to manage all
23 exports and imports on behalf of the Cuban government.
24 It performed a banking function which the Cuban
25 government itself said could only be performed by the

1 state, and one of its primary purposes was to stabilize
2 the national economy, to stabilize their currency.
3 It was, as the court -- the District Court,
4 looking at all these facts, said it was not a mere
5 private corporation, it was performing the sort of a
6 function that even in the United States economy tends to
7 be performed by --

8 QUESTION: Can you give me an example of a
9 government-owned corporation in Cuba that could be
10 performing a non-governmental function under your view
11 of the test?

12 MR. WILKINS: I am not certain. It is, as I
13 say, a factual sort of an inquiry. For that reason,
14 respondent's citation of numerous entities --

15 QUESTION: No, I am just asking your view. I
16 am trying to understand what your position is as to how
17 we distinguish between a governmental function and a
18 non-governmental function in Cuban-owned entities.

19 MR. WILKINS: Well, it -- that --

20 QUESTION: Or are they all governmental?

21 MR. WILKINS: Well, that is a very difficult
22 inquiry, and if you read --

23 QUESTION: But how do we get -- you say that
24 is the key inquiry in this case. How do we --

25 MR. WILKINS: It is a key inquiry. There are

1 precedents, and they are cited in our brief. The House
2 of Lords, for example, in the Rolimpex case recently
3 struggled with that inquiry, and Lord Wilburforce, for
4 example, said, well, it is difficult, there are many
5 factors we have to look at, but just simply because it's
6 a difficult decision to make --

7 QUESTION: You can't give me an example, I
8 take it, of a Cuban government-owned inquiry that would
9 pass your test -- enterprise that would pass your test.

10 MR. WILKINS: I am not familiar. There
11 perhaps are.

12 QUESTION: I don't mean by name, but just by
13 concept. Can you -- What --

14 MR. WILKINS: Well, for example, a very recent
15 case in the E Congresso De Partedel case in the House of
16 Lords again, that -- the House of Lords determined that
17 Mambisa, a Cuban shipping company, was separate enough
18 from the state. It was not subject to everyday control,
19 et cetera. They went through several factors to
20 determine that it was not an organ of the state. So I
21 suppose that Mambisa has been found to be a separate
22 entity, and would be so found in this Court.

23 QUESTION: Now, how does that differ from this
24 export company?

25 MR. WILKINS: Well, the factors that the Court

1 of Appeals -- that the House of Lords examined in the
2 Congresso case and this case are very diverse. In this
3 case, the District Court determined that Bancec in
4 reality, no matter -- we are not looking at what Cuba
5 says Bancec did. The District Court looked at how
6 Bancec operated. And it determined on the basis of all
7 the evidence that was before it that it performed --
8 that it existed solely to manage exports and imports,
9 manage it on the basis -- in some --

10 QUESTION: Well, let me give you a
11 hypothetical. Supposing they had a separate entity that
12 did nothing but supervise the export of sugar. That is
13 all they did. They wanted to make as much money as they
14 could exporting sugar. Could that -- Would that company
15 be a government -- Which category would it fall into?

16 MR. WILKINS: I'm not certain. Again, you are
17 giving me very few facts. It is a broad-ranging sort of
18 a consideration. I don't know -- just because it was
19 exporting all sugar would not necessarily tell me enough
20 to know whether it was a governmental entity or a
21 non-governmental entity. That you have to look at --
22 and in that example exactly is what respondents want you
23 to do. They want you to look at a snapshot. This is
24 merely an export -- a contract for exporting sugar.

25 What we are suggesting is that the District

1 Court properly looked at Bancec in its overall
2 operation, in its overall sphere, its overall mission.

3 QUESTION: Mr. Wilkins, the asset control
4 regulations were developed to try to ensure that all
5 creditors in this country of Cuba were treated fairly, I
6 suppose, in any final settlement that the United States
7 would make with Cuba. Would your view in this case have
8 a tendency to defeat the purposes of the asset control
9 regulation approach?

10 MR. WILKINS: No. No, Justice O'Connor. In
11 fact, we believe that the -- that the interest of the
12 United States, the overall interest of the United States
13 is better served by allowing United States litigants to
14 raise valid expropriation and counterclaims when they
15 can and when they are justly founded in law and fact.

16 The truth of the matter is that we do not
17 have, for example, asset control regulations or a freeze
18 with many countries that expropriate foreign assets. In
19 fact, it is the exception rather than the rule that we
20 do have such a situation, and so the overall interest of
21 the United States is furthered by assuring that United
22 States litigants can raise proper counterclaims in these
23 sorts of suits rather than merely conserving these
24 assets because we have a freeze here.

25 QUESTION: And would it be your position that

1 in all countries in which a corporation is owned and
2 managed by a foreign government, that we should treat it
3 the same way as this case and hold that company liable
4 for any illegal acts of the government?

5 MR. WILKINS: We suggest that on a properly
6 formulated alter ego test, any entity, whether it be a
7 private entity or a state-owned entity could be subject
8 to the same test. We are not suggesting that United
9 States courts should willy-nilly pierce the corporate
10 vails of state trading entities on a simple finding of
11 state control or any other single factor.

12 What we are suggesting is that the presumptive
13 separate status of these entities be subject to a
14 well-recognized exception in international and domestic
15 law. That exception is developed under the general
16 heading of alter ego law, and it holds that that
17 presumptively separate corporate status will be
18 disregarded if it totally fails to reflect reality, and
19 if that disregard is necessary to prevent injustice, and
20 that is all we are arguing, and we would --

21 QUESTION: Is your position here inconsistent
22 with the government's position with respect to the
23 Iranian claims?

24 MR. WILKINS: Certainly not, Justice
25 Blackmun. We --

1 QUESTION: Would you expand on that?

2 MR. WILKINS: I am not certain that I
3 understand exactly what your concern is. We would --

4 QUESTION: Well, as I understand it, if you
5 prevail here, if Citibank does, there is a set off. If
6 you do not prevail here, the money in question will go
7 into the general fund.

8 MR. WILKINS: Yes. Well, as I explained, or
9 as I tried to -- attempted to explain to Justice
10 O'Connor, the United States has no general interest in
11 preserving per se this general fund. Our overall
12 interest is preserving the ability of litigants to raise
13 valid counterclaims. Now, in particular contexts, for
14 example, in the Iranian context, there is a general
15 freeze. There is perhaps a broader freeze, and in that
16 context perhaps the United States would have an interest
17 in not -- we don't even allow people to bring claims.
18 They are being brought before a foreign arbitral
19 tribunal. But that is a question that is unique on its
20 facts, and I don't know that our position here would
21 have any negative impact on what we wanted to do or what
22 we -- in Iran.

23 QUESTION: Your position is that this is
24 really the Cuban government.

25 MR. WILKINS: Exactly.

1 QUESTION: And if it were clear and admitted,
2 there would be no question what the outcome of this case
3 should be.

4 MR. WILKINS: Exactly.

5 QUESTION: Wholly aside from there being a
6 fund.

7 MR. WILKINS: True.

8 QUESTION: Except that there you run into the
9 act of state doctrine.

10 MR. WILKINS: Yes, but it is very clear -- it
11 may not be terribly clear what the rationale is, but it
12 is very clear what the result is here, but in the
13 context of this case there is no act of state problem.

14 CHIEF JUSTICE BURGER: Mr. Krinsky.

15 ORAL ARGUMENT OF MICHAEL KRINSKY, ESQ.,

16 ON BEHALF OF THE RESPONDENT

17 MR. KRINSKY: Mr. Chief Justice, and may it
18 please the Court, I would like to begin by addressing
19 Mr. Justice White's question about the source of law.
20 In the first instance, we believe it is international
21 law, and there is a substantial body of law, of
22 international law precisely upon the question before the
23 Court.

24 All countries, or almost all countries conduct
25 much of their trade through government corporations.

1 The third world countries, 100 or so of them, have
2 staked much of their aspirations and economies on these
3 corporations, and the socialist countries conduct all of
4 their trade through these enterprises.

5 The distinction to be drawn between this
6 respondent and all these other enterprises does not
7 withstand analysis. That is an analysis indeed that is
8 not even undertaken by the petitioner and the government
9 in their briefs. When one looks at those institutions,
10 one sees exactly the same things as said here about the
11 respondent.

12 There is the fact that all of their capital is
13 provided by the government. There is the fact that all
14 of their profits go to the state's treasury. There is
15 the fact that their boards are dominated by ministers or
16 the representatives of ministers.

17 QUESTION: Are you speaking now of this
18 corporation, or are you generalizing?

19 MR. KRINSKY: This is the points in common
20 between this corporation and most of the government
21 corporations of the world, particularly the third
22 world.

23 They perform governmental -- they pursue
24 governmental purposes. They implement governmental
25 policies, just as the respondent did here, but through

1 their commercial acts, just as the respondent did here.
2 And it is this last factor which is stressed perhaps
3 most strongly by the government and petitioner in their
4 brief. But the focus of the inquiry is misplaced.

5 Congress in the Foreign Sovereign Immunities
6 Act came to the conclusion, as every other country has,
7 that all these government corporations pursue
8 governmental purposes, and for that reason it held that
9 the proper inquiry between commercial and governmental
10 is the nature of the act involved, not its purpose.

11 And this indeed is a rule of international
12 law. The Federal Constitutional Court of Germany in the
13 Empire of Iran case, the English courts in the Primaro
14 Congresso case, and this court in Dunhill have said
15 precisely that about the entire law of state training.
16 One must look to the nature of the act rather than its
17 purpose.

18 There is no reason to identify respondent on
19 that basis more closely with its government than there
20 is to identify any of these hundreds of other
21 corporations of the world with their government.

22 The English cases have indeed decided issues
23 quite close to that presented here, and they have held
24 that government corporations, including Cuban government
25 corporations, including the successor to this

1 respondent, is not to be identified with the state. It
2 is not responsible for the acts of the state, nor is the
3 state for its acts. And the basis upon which it reached
4 that conclusion was one of international law.

5 In Trendex, Lord Denning and other members of
6 the court, and in all of the cases, said, the question
7 of whether or not an enterprise is to be identified with
8 the state for purposes of sovereign immunity, and then
9 later in the Primero Congresso case, for purposes of
10 separate liability, is itself a question of
11 international law, and the definition and the line given
12 by the House of Lords in Primero Congresso, the Cuban
13 case, was whether this is a familiar institution in the
14 international scene. Is this a familiar corporation,
15 established by governments throughout the world?

16 And the answer in that case was yes, and the
17 answer in this case, upon analysis and comparison, must
18 also be yes.

19 I think, to answer Justice O'Connor's
20 question, the impact of a ruling disregarding the
21 separate status of this enterprise indeed would be
22 broad. It could not be broader, because it is not
23 different. It is not different in its functions, and it
24 is not different in its relationship to its government.

25 QUESTION: Mr. Krinsky, I take it that the

1 argument you are just making is not in your view -- you
2 can accept all of Judge Brant's findings and still say
3 that they don't bear on it because you would apply a
4 different legal test than he did.

5 MR. KRINSKY: Exactly, Your Honor. That is
6 exactly right.

7 The international practice goes beyond the
8 fact that all of the countries have such corporations
9 and assert a claim for the recognition of their
10 international -- their independent status. This
11 question, it has been thought, was settled a long time
12 ago in international law by that extensive network of
13 bilateral treaties between the socialist countries and
14 the capitalist world dating back to the 1920's, by which
15 it was -- by which two things were recognized: one,
16 that sovereign immunity is inappropriate for commercial
17 activity; and two, part and parcel of that accommodation
18 that the limited liability of government corporations
19 would be recognized, and that is the basis of
20 international law of state trading, both in respect to
21 sovereign immunity and in respect to limited liability.

22 QUESTION: Mr. Krinsky, what corporations of
23 the United States, analogous government corporations,
24 would benefit in other nations from the application of
25 the rule of international law that you describe?

1 MR. KRINSKY: Your Honor, the District Court
2 stated that this corporation was closest to, in his
3 view, the Reconstruction Finance Corporation.

4 QUESTION: Is that still extant?

5 MR. KRINSKY: No, Your Honor, it is not, but
6 it was for a long time, and of course --

7 QUESTION: Well, I --

8 MR. KRINSKY: -- and of course one of its
9 successors is the Export-Import Bank of the United
10 States. But the major impact of departing from this
11 rule of international law and this international
12 practice is not on United States government
13 corporations, but will be in the judgment of Congress
14 upon United States private corporations, because the
15 multinational enterprise, the system of a United States
16 private parent corporation owning subsidiaries
17 incorporated abroad would be undermined, because these
18 institutions are under attack in the international arena.

19 The relationship between the parent and the
20 subsidiary has been described in precisely the same
21 terms used to describe the respondent here. And the
22 judicial distinction between parent and subsidiary has
23 been denounced -- denounced fervently as a fiction which
24 should be disregarded according to the notions of equity
25 and international justice and national interests of the

1 forum.

2 And Congress, in its consideration of the
3 Foreign Sovereign Immunities Act, said that this is a
4 dangerous trend, and we do not want to encourage it. We
5 do not want to give excuse for this essentially
6 politically motivated chain of events.

7 QUESTION: Mr. Krinsky --

8 MR. KRINSKY: And there is -- and the way to
9 do that is to -- and if we treated --

10 QUESTION: Mr. Krinsky --

11 MR. KRINSKY: -- if I might just finish --

12 QUESTION: Go ahead.

13 MR. KRINSKY: -- government corporations
14 differently, we would provide that excuse. Excuse me.

15 QUESTION: Go ahead.

16 MR. KRINSKY: No, I have finished, sir.

17 QUESTION: Go right ahead.

18 MR. KRINSKY: Now, we believe Congress has
19 codified the separate entity principle into the Foreign
20 Sovereign Immunities Act. But even if the statute is
21 not clear enough, and even if the international practice
22 is not clear enough by their own force to provide a rule
23 of law, we believe nonetheless they represent clear and
24 consistent expressions of policy by Congress and by the
25 international community.

1 And we think, given their source, they should
2 prevail in the formation of any rule of common -- rule
3 of federal common law here. If there is disagreement
4 about those policies, if they are not clear, then we
5 think petitioner and the executive should go to
6 Congress, because Congress is the branch of government
7 which resolves such policy matters.

8 And that is -- we think that's the teaching of
9 the Court's decisions on federal common law generally,
10 and we think as well that that teaching is underlined
11 strongly by the prior Cuban cases in this Court.

12 Whatever controversy there might have been
13 over the role of the courts there, there was, I suggest,
14 broad agreement that the role in this area is more
15 modest and more limited than normal, and that the Court
16 acting as a national court, as it must, is on firmer
17 ground when it seeks to apply international law than
18 when it is asked to frame a rule of law on its own.

19 And that is precisely what respondent -- or
20 what petitioner and the United States have asked.

21 It is, moreover, we suggest, difficult to
22 understand the basis upon which the Court itself could
23 come to a conclusion of what proper policy is here.
24 There is not the facile distinction that this respondent
25 somehow is different than the hundreds and hundreds of

1 other government corporations in the world. We have
2 shown that it is not.

3 But more critically, there will be -- there is
4 the question of whether the Court can make a decision as
5 to whether or not to run the risks of fueling this chain
6 of events that Congress -- of undermining the stability
7 of trade based upon the limited liability of these
8 government corporations.

9 QUESTION: Mr. Krinsky, may I just throw out --

10 MR. KRINSKY: For the sake of --

11 QUESTION: May I ask you just one question
12 please?

13 MR. KRINSKY: For the sake of what the
14 petitioner seeks.

15 QUESTION: Mr. Krinsky, do we look at the case
16 as of the time the complaint was filed, or as of today?
17 There has been about a 20-year lapse of time, and there
18 is material in the record that suggests very strongly
19 that the ownership of the claim now is in the government
20 itself, or much more closely so than in Bancec.

21 MR. KRINSKY: Your Honor, let me address the
22 question of where the ownership is now. Our position is
23 that the ownership is in a state trading corporation by
24 the name of Cubazucar. It is the same corporation which
25 was involved in the Primero Congresso case in the House

1 of Lords, and which was held to be a separate entity,
2 not responsible for the acts of the Cuban government in
3 that case.

4 We assert, and our position has always been in
5 the District Court, that the claim went from Bancec to
6 the state entesis. We made a motion to substitute this
7 state impressor as the successor. It was denied by the
8 District Court because it did not want to introduce into
9 the case, which it considered a complicated case, new
10 issues, and the new issue that was excluded was
11 precisely what happened upon the dissolution of Bancec.

12 And that is how the case was tried. It was
13 tried by the plaintiff that way and it was tried by the
14 defendant that way, and indeed, when one looks at the
15 post-trial requests for findings of fact and conclusions
16 of law by the respondent -- I'm sorry, by the
17 petitioner, there is no request for a finding as to the
18 identity of who held the claim after Bancec.

19 And it is for that reason that we did not
20 introduce expert testimony on what is a question of
21 foreign law. And indeed, if that issue is still in the
22 case, despite it having been excluded in this way, we
23 believe that we should be entitled to an opportunity of
24 introducing that expert testimony on foreign law.

25 Now, on the merits of the claim, we have

1 always taken the position that upon Bancec's
2 dissolution, the claim went to the succeeding state
3 enterprise, and if one reads Law Number 934, which is
4 the critical law here, it says Bancec is dissolved and
5 its assets are transferred to the new state
6 enterprises. It is in the present tense.

7 We think there was no foundation, no
8 foundation in the record for this position, and indeed,
9 it is not procedurally proper, properly in the case any
10 longer.

11 There is another aspect of the situation,
12 however, in which the case properly should be looked at,
13 I think, from the vantage point of the present day, and
14 that is the impact of the freeze regulations and what
15 Congress has done on the question of separate entity,
16 the question of nationalizations in general and Cuba,
17 Cuban nationalizations in particular.

18 It is difficult to conceive of what issue of
19 policy or equity relevant to this case has not been
20 addressed by Congress and answered by Congress.
21 Congress had ratified the freeze of all property in the
22 United States of Cuba, of Cuban government corporations,
23 and of Cuban nationals. Any recovery by this respondent
24 will become frozen, and that can hardly give foreign
25 countries any encouragement in the belief that they can

1 nationalize the United States' own property without
2 consequence for the property of their government
3 corporations in the United States.

4 QUESTION: Mr. Krinsky, what then is the
5 motive of your client to continue to litigate this issue
6 if you are not going to get anything out of it anyway?

7 MR. KRINSKY: Your Honor, we have been
8 instructed by our client to litigate the issue, and we
9 have not been told the reason why.

10 The Congress has said something else here of
11 great importance, and that is on the question of
12 equity. It established a program of certifying
13 nationalization claims, not just Citibank's claims, all
14 nationalization claims, and the Foreign Claims
15 Settlement Commission has met for many years and has
16 certified claims of individuals, of corporations.

17 And the reason why Congress did that was to
18 provide an equitable basis for the distribution of all
19 frozen funds in the United States in the event of a
20 settlement. The result here of a judgment in favor of
21 petitioner would be contrary to that policy. Equity in
22 this case, according to the Congress, is that the funds
23 be available for distribution to all the claimants, not
24 that Citibank obtains a preference.

25 And it is, again, we suggest, the interest of

1 the United States and the equitable notions of the
2 United States as established by Congress which should
3 govern this controversy.

4 There is, Your Honor, a notion in these cases
5 of looking to the overall interests of the United
6 States. There is, however, counterposed to this who is
7 to define those interests and what are the sources of
8 law to govern. We have argued, we believe, that
9 international law provides that basis. There is no
10 distinction between this respondent and other government
11 corporations. The rule of law which allows each case,
12 each government corporation to be evaluated according to
13 the local law of the forum will leave nothing, nothing
14 of the international law of state trading and government
15 corporations.

16 All that would be left is all government
17 corporations in doubt, and every country invited to
18 apply its own notions of what is a proper government
19 corporation, and indeed precisely as Congress feared,
20 each country will be invited to apply its local notions
21 of what is a proper private corporation and what is the
22 proper relationship between a parent corporation, a
23 United States parent corporation and its subsidiary.

24 We think that is a result which has no basis
25 in law, and to the extent that policy concerning it is

1 to be changed, it should be done by Congress or by the
2 executive in the international area advocating a
3 different position.

4 I believe, Your Honor, that is all I have to
5 say.

6 CHIEF JUSTICE BURGER: Very well.

7 Do you have anything further, Mr. Harfield?

8 ORAL ARGUMENT OF HENRY HARFIELD, ESQ.,

9 ON BEHALF OF THE PETITIONER - REBUTTAL

10 MR. HARFIELD: Just this, that I think that
11 what has been indicated by the respondent's argument is
12 that the case must be either looked at on the facts of
13 the case where we have findings or it must be looked at
14 in terms of the generalities. As far as the
15 generalities are concerned, which Mr. Krinsky has
16 discussed, I think he is wrong on them, but I think
17 where he is mainly wrong is in his election to speak for
18 what the policy of the United States and what the
19 interest of the United States ought to be.

20 I have really nothing to add unless the Court
21 has further questions.

22 CHIEF JUSTICE BURGER: Thank you, gentlemen.
23 The case is submitted.

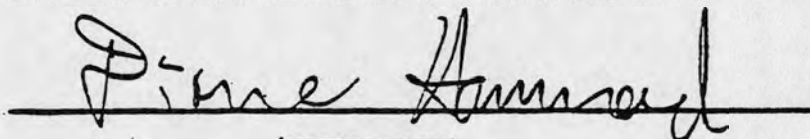
24 (Whereupon, at 11:51 o'clock a.m., the case in
25 the above-entitled matter was submitted.)

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First National City Bank, Petitioner
v. Banco Para El Comercio Exterior De Cuba No. 81-984

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BY

A handwritten signature in cursive script, appearing to read "Pina Amador", is written over a horizontal line.

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