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RETHINKING SOVEREIGN VEIL-PIERCING

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ABSTRACT

This Article undertakes a wholesale reassessment of the sovereign veil-piercing framework created by Bancec*, a landmark U.S. Supreme Court case. The* Bancec *framework limits foreign states' ability to insulate themselves from accountability by acting through corporate entities. Plaintiffs often need to satisfy* Bancec *to secure jurisdiction over sovereigns or enforce rulings against them, but rarely succeed. The Author argues that one reason why is that lower courts are reading the case too narrowly. Specifically, some courts are conflating the* Bancec *framework with the more restrictive alter ego doctrine. In addition, some courts are insisting on certain formal indicia of agency to justify attributing conduct from a controlled*

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entity to a state, which Bancec *itself did not contemplate. Finally, some courts are improperly exempting states' sovereign acts from scrutiny in their analyses, creating a gaping loophole. This Article rethinks all of these approaches, drawing on extensive authority under both U.S. and international law that lower courts and other scholars have largely overlooked. If adopted, its proposals could transform plaintiffs' prospects for recovery in a wide range of cases, from clergy abuse lawsuits to arbitration award enforcement proceedings.*

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INTRODUCTION

To date, not a single survivor of childhood sexual abuse by Catholic clergy has obtained a judgment against the Holy See itself.[1] This is despite multiple lawsuits alleging that the Vatican state directed U.S. church entities[2] to conceal abuse and reassign offending priests.[3] Moreover, even when plaintiffs *do* secure judgments against foreign states, they often struggle to enforce them.[4] Part of the explanation in both contexts is the sovereign immunity that presumptively protects foreign states and their instrumentalities in U.S. courts.[5] Yet sovereign immunity is not absolute,[6] and sometimes there is another factor at work: restrictive readings of a U.S. Supreme Court case called *Bancec*.[7]

Bancec limits the ability of foreign states to insulate themselves from accountability by acting through corporations or other entities they control.[8] It does so by identifying two non-exhaustive scenarios

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1. *See generally* Luca Pasquet & Cedric Ryngaert, *The Immunity of the Holy See*, 8 ITALIAN L.J. 837 (2022) (discussing numerous cases in the United States and Europe that courts have dismissed on sovereign immunity grounds). The Holy See is both the supreme governing body of the Roman Catholic Church and a sovereign nation located in Vatican City. Keenan v. Holy See, 686 F. Supp. 3d 810, 819 (D. Minn. 2023).

2. Roman Catholic archdioceses, dioceses, and bishops in the United States are organized as corporations. *See* Doe v. Holy See, 557 F.3d 1066, 1070-71 (9th Cir. 2009) (describing the corporate status of several of the defendants).

3. O'Bryan v. Holy See, 556 F.3d 361, 370 (6th Cir. 2009) (citing a 1962 Vatican policy that allegedly "impose[d] the highest level of secrecy on the handling of clergy sexual abuse matters"); *Doe*, 557 F.3d at 1069-70 (summarizing the allegation that "policies, practices, and procedures" of the Holy See precluded the removal of a priest even after he admitted to abusing several boys).

4. *See, e.g.*, TIG Ins. Co. v. Republic of Arg., No. 18-mc-00129, 2022 U.S. Dist. LEXIS 71213, at *7-8 (D.D.C. Apr. 18, 2022) (explaining that the plaintiff insurance company had held a U.S. judgment against Argentina for many years that the insurance company was still seeking to enforce); Gujarat State Petrol. Corp. v. Republic of Yemen, No. 19-mc-0547, 2022 U.S. Dist. LEXIS 89707, at *1 (S.D.N.Y. May 18, 2022) (same regarding an oil company with a judgment against Yemen).

5. *See* 28 U.S.C. § 1604 (creating a presumption that foreign states are immune from jurisdiction in U.S. courts); 28 U.S.C. § 1603(a) (defining "foreign state" to include foreign states as well as their agencies and instrumentalities); 28 U.S.C. § 1609 (creating a presumption of immunity from attachment, arrest, or execution).

6. *See* 28 U.S.C. §§ 1605-07, 1610 (establishing exceptions to sovereign immunity).

7. First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba (*Bancec*), 462 U.S. 611, 626-27 (1983), *abrogated on other grounds by* 28 U.S.C. § 1610(g).

8. *Id.* at 621-22 (observing that if courts always had to respect the separate status of

in which a court may attribute conduct from a state-controlled entity to its parent state or even treat the two as one and the same.[9] The first is when the entity "is so extensively controlled by its owner that a relationship of principal and agent is created."[10] The second is when recognizing the entity as separate from its owner "would work fraud or injustice."[11]

The opportunities presented by *Bancec* are often vital to plaintiffs' prospects for recovery. For example, many Catholic organizations have filed for bankruptcy,[12] and abuse survivors have sought to attribute their alleged conduct to the Holy See in the hope of accessing that state's deeper pockets.[13] Further, enforcing a judgment against a foreign state often requires reaching assets of state-owned banks or other commercial enterprises.[14] Satisfying *Bancec* is key to such efforts, but lower courts have interpreted the case so narrowly that plaintiffs rarely succeed.[15]

One reason for some of the stricter readings is a tendency by judges to confuse the *Bancec* principles with the alter ego doctrine. Various versions of the latter exist, but the most common formulation treats an entity as the alter ego of its owner if (1) the owner has completely dominated the entity and (2) some fraud or injustice has

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state instrumentalities, it "would permit the state to violate with impunity the rights of third parties").

9. *Id.* at 629.

10. *Id.*

11. *Id.* (quoting Taylor v. Standard Gas Co., 306 U.S. 307, 322 (1939)).

12. Marie T. Reilly, *Catholic Dioceses in Bankruptcy*, 49 SETON HALL L. REV. 871, 873 (2019).

13. Doe v. Holy See, 557 F.3d 1066, 1076 (9th Cir. 2009) (explaining how attribution would be relevant to securing jurisdiction over the Holy See); Lucian C. Martinez, Jr., *Sovereign Impunity: Does the Foreign Sovereign Immunities Act Bar Lawsuits Against the Holy See in Clerical Sexual Abuse Cases?*, 44 TEX. INT'L L.J. 123, 143-44 (2008) (noting the financial stakes of securing jurisdiction over the Holy See).

14. *See, e.g.*, Funnekotter v. Agric. Dev. Bank of Zim., No. 13 Civ. 1917, 2015 U.S. Dist. LEXIS 73221, at *1-4 (S.D.N.Y. June 3, 2015) (explaining that Zimbabwe's judgment creditors sought to attach assets of state-owned banks because the state had failed to pay the judgment); Crystallex Int'l Corp. v. Bolivarian Republic of Venez., 932 F.3d 126, 132 (3d Cir. 2019) ("Unable to identify Venezuelan-held commercial assets in the United States that it can lawfully seize, Crystallex went after U.S.-based assets of PDVSA," a state-owned oil company).

15. Phillip Riblett, *A Legal Regime for State-Owned Companies in the Modern Era*, 18 J. TRANSNAT'L L. & POL'Y 1, 15 (2008) ("Successfully piercing the corporate veil is a rare feat for those attempting to meet the exceptions established in *Bancec*.").

resulted.[16] At first blush the *Bancec* principles seem quite similar, with their references to "extensive[ ] control[ ]" by the owner and "fraud or injustice."[17] Nevertheless, on closer inspection, key differences emerge.

For one, the *Bancec* framework is disjunctive,[18] whereas the alter ego doctrine is usually phrased as conjunctive.[19] In addition, *Bancec*'s first principle, or "prong," refers to a "relationship of principal and agent,"[20] and agency can exist without complete domination.[21] That is, a parent may turn an entity into its agent in a specific context by exercising extreme control over it *in that matter*; the parent need not dominate the entity altogether.[22] Even so, some lower courts have conflated the *Bancec* framework with the alter ego doctrine in a variety of contradictory ways.

The Courts of Appeals for the Second and Ninth Circuits represent one such approach. These courts maintain that, despite the

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16. *See* Peter B. Oh, *Veil-Piercing*, 89 TEX. L. REV. 81, 84 (2010) (describing the most common version of the doctrine as requiring both "complete control and domination" and use of that control "to perpetuate a fraud, wrong, or injustice"); *see also* Se. Tex. Inns, Inc. v. Prime Hosp. Corp., 462 F.3d 666, 675 (6th Cir. 2006) (asserting that the Tennessee and Delaware law versions require "complete dominion and control and the sanction of fraud or injustice by the corporate form" (footnote omitted)); Ranza v. Nike, Inc., 793 F.3d 1059, 1073 (9th Cir. 2015) (describing the federal alter ego doctrine as having two requirements: (1) "pervasive control over the subsidiary" down to the level of "day-to-day operation," and (2) a "failure to disregard [their separate identities] would result in fraud or injustice" (alteration in original) (quoting Doe v. Unocal Corp., 248 F.3d 915, 926 (9th Cir. 2001))).

17. *See* First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba (*Bancec*), 462 U.S. 611, 629 (1983) (quoting Taylor v. Standard Gas Co., 306 U.S. 307, 322 (1939)), *abrogated on other grounds by* 28 U.S.C. § 1610(g).

18. *See* Rubin v. Islamic Republic of Iran, 583 U.S. 202, 210 (2018) (restating the *Bancec* principles with a disjunctive "or"); *Crystallex*, 932 F.3d at 140 ("[W]e recognize *Bancec* establishes a disjunctive test for when the separate identities of sovereign and instrumentality should be disregarded.").

19. *See* Oh, *supra* note 16; *Ranza*, 793 F.3d at 1073; *Se. Tex. Inns*, 462 F.3d at 675.

20. *Bancec*, 462 U.S. at 629.

21. *See* Phx. Can. Oil Co. v. Texaco, Inc., 842 F.2d 1466, 1477 (3d Cir. 1988) (explaining that agency in parent-subsidiary relationships does not require complete domination, unlike alter ego status); *see also* John J. Kenney & Gerald E. Hawxhurst, *Why Compliance Programs Are Important*, *in* 2 BUSINESS CRIME § 6A.01 (Stanley S. Arkin ed., 2024) ("[U]nlike ... [an] 'alter ego' theory, an agency approach does not require a showing of insufficient attention to corporate formalities or of complete domination or control by the parent.").

22. Kenney & Hawxhurst, *supra* note 21 ("[T]he relevant inquiry [under an agency theory] is whether the parent company exerted control over specific activities directly relating to the underlying claims.").

first prong's reference to a "relationship of principal and agent,"[23] that prong cannot apply unless the state has turned the entity into its "alter ego."[24] For example, in *Doe v. Holy See*, the Ninth Circuit held that it was not enough for the plaintiff to allege that U.S. church entities acted as the Holy See's agents by concealing his abuser's past crimes at the Holy See's direction.[25] In the Ninth Circuit's view, only day-to-day control by the Holy See over these entities' affairs—sufficient to make them its alter egos—would allow the cover-up to be imputed to the Holy See.[26]

Meanwhile, the Court of Appeals for the Fifth Circuit conflates the alter ego doctrine with the *Bancec* framework in a different way: by reading the former into *Bancec*'s *second* prong.[27] In fact, the Fifth Circuit requires plaintiffs to establish both elements of the alter ego doctrine to satisfy *Bancec*'s second prong alone.[28] Moreover, when applying *Bancec*'s first prong, the Fifth Circuit requires the same showing that the Second and Ninth Circuits require for alter ego status: day-to-day control.[29] The Fifth Circuit does so despite insisting that the first prong is about *agency* and purporting to distinguish that prong from an alter ego standard.[30]

By contrast, the Courts of Appeals for the Third and D.C. Circuits reject the notion that complete or day-to-day control is always

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23. *Bancec*, 462 U.S. at 629.

24. *See, e.g.*, Doe v. Holy See, 557 F.3d 1066, 1079 (9th Cir. 2009) (describing the first prong as an "alter ego" standard that requires "'day-to-day' control" by the state over the entity (quoting Flatow v. Islamic Republic of Iran, 308 F.3d 1065, 1073 (9th Cir. 2002))); Esso Expl. & Prod. Nigeria Ltd. v. Nigerian Nat'l Petrol. Corp., 40 F.4th 56, 69 (2d Cir. 2022) (explaining how the district court considered "factors that ... are relevant to the 'touchstone inquiry for "extensive control"' creating alter-ego status" (quoting EM Ltd. v. Banco Cent. de la República Arg., 800 F.3d 78, 91 (2d Cir. 2015))).

25. 557 F.3d at 1080.

26. *Id.*

27. *See* Bridas S.A.P.I.C. v. Gov't of Turkm. (*Bridas I*), 345 F.3d 347, 359 (5th Cir. 2003); Janvey v. Libyan Inv. Auth., 840 F.3d 248, 264 (5th Cir. 2016).

28. *Bridas I*, 345 F.3d at 359; *Janvey*, 840 F.3d at 264. The Fourth Circuit likewise interpreted the second prong as requiring both "day-to-day control" and "fraud or injustice" in one unpublished case, without expressly tying its analysis to the alter ego doctrine. Flatow v. Alavi Found., No. 99-2409, 2000 U.S. App. LEXIS 17753, at *20-21 (4th Cir. July 24, 2000).

29. *See Janvey*, 840 F.3d at 264 (asserting that the first prong is an agency standard that requires "day-to-day control" by the parent (quoting Dale v. Colagiovanni, 443 F.3d 425, 429 (5th Cir. 2006))).

30. *Id.* ("[T]he theories underlying alter egos and agents are 'distinct' and are therefore not to be applied 'as if they were interchangeable.' Again, alter egos are created equitably; agents are created contractually." (footnotes omitted)).

required to satisfy *Bancec*'s first prong. These courts acknowledge that complete domination may be necessary to treat an entity as one and the same with its parent, such that a judgment against one is a judgment against the other.[31] However, these courts also recognize that if the plaintiff seeks merely to attribute discrete acts from an entity to its parent, then the control inquiry should focus on the specific acts at issue.[32]

This Article contends that the Third and D.C. Circuits have it right on this point. However, it also argues these courts interpret *Bancec* too strictly in another sense. In particular, these courts maintain that transaction-specific control is never enough *by itself* to warrant attribution to the state; the plaintiff must also show that the state asked the entity to act on its behalf and that the entity agreed to do so.[33] This Article begs to differ. It argues that if a state directs or compels the relevant conduct in a way that goes beyond the influence typically exerted by a controlling shareholder, then that alone can warrant attribution.[34]

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31. Transamerica Leasing, Inc. v. La Republica de Venez., 200 F.3d 843, 848 (D.C. Cir. 2000) (asserting that if the state has exercised complete domination over a subsidiary then the two are "not meaningfully distinct entities"); Crystallex Int'l Corp. v. Bolivarian Republic of Venez., 932 F.3d 126, 143 (3d Cir. 2019) (endorsing the interpretation from *Transamerica*); *id.* at 139 (noting that if the plaintiff establishes this level of control, then the district court may properly "issue a writ of attachment on that entity's non-immune assets to satisfy the judgment against the country").

32. *Transamerica*, 200 F.3d at 849 ("[A] sovereign need not exercise complete dominion over an instrumentality—to the point of stripping it of any meaningful separate identity—in order to establish a relationship of principal and agent."); *Crystallex*, 932 F.3d at 143 (asserting that *Transamerica* provides the "most persuasive interpretation" of the principal-agent relationship requirements from *Bancec*).

33. *Transamerica*, 200 F.3d at 848-49 (listing the "ordinary agency principles" that plaintiffs must establish if not relying on a "complete domination" or "fraud or injustice" theory under *Bancec* (quoting First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba (*Bancec*), 462 U.S. 611, 629 (1983), *abrogated on other grounds by* 28 U.S.C. § 1610(g))); *Crystallex*, 932 F.3d at 143 (endorsing the *Transamerica* interpretation).

34. *See, e.g.,* Esmark, Inc. v. NLRB, 887 F.2d 739, 757 (7th Cir. 1989) (explaining that a parent may be liable "[w]here the parent specifically directs the actions of its subsidiary, using its ownership interest to command rather than merely cajole"); RESTATEMENT (THIRD) OF AGENCY § 7.04(b) cmt. b (AM. L. INST. 2005) ("Under general tort-law principles, a person who orders or induces an actor's tortious conduct is subject to liability for harm resulting to a third person."); Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, art. 8 (2001) [hereinafter Articles on State Responsibility] (providing for attribution to a state if an entity "is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct").

This Article also calls into question narrow readings of *Bancec*'s second prong. These include not only the Fifth Circuit's position that the second prong incorporates the alter ego doctrine but also a separate notion that acts taken by a state in its sovereign capacity cannot satisfy *Bancec*'s "fraud or injustice" principle.[35]

In sum, this Article identifies several ways in which lower courts are interpreting *Bancec* too strictly, highlights multiple circuit splits, and recommends how those splits should be resolved. In doing so, it breaks considerable new ground in the literature. To date, most scholars who have addressed this seminal case have focused on discrete issues, such as the proper timing of a control analysis[36] or how to apply *Bancec* to a particular kind of entity.[37] Scholars have also tended to gloss over divisions in the case law,[38] or to assume—as have some courts—that *Bancec* adopted the alter ego doctrine without the label.[39]

The discussion proceeds as follows. Part I summarizes the underlying dispute in *Bancec* and the U.S. Supreme Court's opinion. Part II examines *Bancec*'s first prong. After summarizing the case law in detail, it evaluates the competing interpretations of *Bancec*'s "agency" concept by reference to a wide range of domestic and international authority that lower courts and scholars have largely overlooked. Part III undertakes a similar analysis with regard to the second prong. The Article then concludes.

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35. *See infra* Part III.

36. *See generally* James Hardman, *(Not) Right on Time: Interpretation of "Pertinent Time" for* Bancec *Alter Ego Analysis and Its Effect on Attaching Foreign Sovereign Assets*, 91 U. CIN. L. REV. 1086, 1087-88 (2023).

37. *See generally* Paul L. Lee, *Central Banks and Sovereign Immunity*, 41 COLUM. J. TRANSNAT'L L. 327 (2003).

38. *See, e.g.*, Riblett, *supra* note 15, at 14 ("Under the principal/agent exception, a court will *typically* 'pierce the corporate veil' only where it is established that the parent exercises day-to-day operational control over the subsidiary." (emphasis added)).

39. *See, e.g.*, W. Mark C. Weidemaier, *Piercing the (Sovereign) Veil: The Role of Limited Liability in State-Owned Enterprises*, 46 BYU L. REV. 795, 837 (2021) ("Despite the reference to a principal-agent relationship [in *Bancec*], it is clear that the Court in fact 'applied a veil piercing or "alter ego" analysis.'" (quoting RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 452 reporter's note 7 (AM. L. INST., Tentative Draft No. 3, 2017))).

I. THE *BANCEC* OPINION

Evaluating whether lower courts are applying *Bancec* properly requires a clear grasp of what the Court held in that case and the context in which it did so. This Part I provides that foundation.

A. The Underlying Dispute and the Lower Court Rulings

When Fidel Castro's communist movement took power in Cuba in 1959, Citibank (formerly First National City Bank) had eleven branches in Cuba.[40] Initially, the Castro administration continued to recognize Citibank's property rights, and Citibank sought to build a constructive relationship with the new regime.[41] Toward that end, Citibank issued a letter of credit in favor of a state-owned corporation known as Banco Para el Comercio Exterior de Cuba ("Bancec").[42] The letter of credit obliged Citibank to pay the amount due for a third party's purchase of sugar from Bancec.[43]

Bancec shipped the sugar and requested payment from Citibank.[44] However, almost simultaneously, the Castro regime expropriated all of Citibank's assets in Cuba.[45] In response, Citibank refused to pay Bancec under the letter of credit, arguing that Citibank was entitled to a setoff against the value of its expropriated property.[46]

Bancec disagreed and sued Citibank in the United States.[47] According to Bancec, it was a separate juridical person from the state and therefore was not liable for the state's sovereign acts.[48]

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40. *See* Banco Nacional de Cuba v. First Nat'l City Bank, 270 F. Supp. 1004, 1005 (S.D.N.Y. 1967) (discussing the establishment of the Castro regime in 1959 and events leading up to the subsequent seizure of Citibank's eleven branches).

41. *Id.* (summarizing the early relationship between Citibank and the new regime).

42. First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba (*Bancec*), 462 U.S. 611, 613 (1983), *abrogated on other grounds* by 28 U.S.C. § 1610(g).

43. *Id.* at 614.

44. *Id.*

45. *Id.*

46. *Id.* at 613-15.

47. *Id.* at 615.

48. *Id.* at 617 ("Bancec [contended] that its separate juridical status shielded it from liability for the acts of the Cuban Government.").

Citibank countered that Bancec was simply an "arm" or alter ego of the state.[49] On that basis, Citibank maintained that Bancec's act of initiating the lawsuit in the United States was attributable to Cuba and exposed Cuba to jurisdiction on a counterclaim for the expropriation.[50]

Citibank also presented evidence that the state dissolved Bancec shortly after Bancec filed the lawsuit.[51] Initially, the state assigned Bancec's assets and interest in the lawsuit to the Ministry of Foreign Trade, but the Ministry then transferred them to another newly created state-owned corporation.[52]

After many years of litigation, the district court granted judgment in favor of Citibank.[53] The court accepted Citibank's arguments that Cuba expropriated Citibank's assets in violation of international law[54] and that Bancec was an alter ego of Cuba.[55]

The Second Circuit reversed on appeal,[56] and the case made its way to the U.S. Supreme Court.[57]

B. The Supreme Court's Analysis

Justice O'Connor authored the Supreme Court's opinion in *Bancec*, joined in full by Chief Justice Burger, Justices White, Marshall, Powell, and Rehnquist, and in part by Justices Stevens, Brennan, and Blackmun.[58] A summary of the Court's analysis follows.

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49. *See id.* (citation omitted).

50. *See id.* at 620 (citing 28 U.S.C. § 1607(c)) (setting forth a counterclaim exception).

51. *Id.* at 615.

52. *See id.*

53. *Id.* at 616-17.

54. *Id.* at 633 (discussing the expropriation claim); *see also* Banco Nacional de Cuba v. First Nat'l City Bank, 270 F. Supp. 1004, 1010 (S.D.N.Y. 1967) (discussing an earlier ruling on the expropriation claim).

55. *Bancec*, 462 U.S. at 617-18; *see also* Banco Nacional de Cuba v. Chase Manhattan Bank, 505 F. Supp. 412, 428 (S.D.N.Y. 1980) ("The Court concludes that Bancec is an alter ego of the Cuban Government.").

56. Banco Para el Comercio Exterior de Cuba v. First Nat'l City Bank, 658 F.2d 913, 920 (2d Cir. 1981).

57. *See Bancec*, 462 U.S. at 619.

58. *Id.* at 612.

1. The Applicable Law

As a threshold matter, the Court considered what law should govern "the effect to be given to Bancec's separate juridical status," as well as whether a state instrumentality such as Bancec "may be held liable for actions taken by the sovereign."[59] Bancec contended that the law of the entity's place of incorporation should be determinative on these issues: in this case, Cuban law.[60] The Court rejected that argument, pointing out that such an approach would enable a state to insulate itself from liability simply by declaring its instrumentalities to be separate.[61]

The Court instead opted to apply "principles ... common to both international law and federal common law."[62] The Court may have done so because of the implications of the case for sovereign immunity, which is likewise governed by rules common to federal and international law.[63]

2. Relevant Legal Principles

Before identifying any specific legal principles that it considered pertinent, the Court observed that states may have legitimate reasons for acting through corporations or other separate juridical entities.[64] In particular, corporations may have "a greater degree of flexibility and independence from close political control than is

59. *Id.* at 621.

60. *Id.*

61. *Id.* at 621-22.

62. *Id.* at 623 ("[T]he principles governing this case are common to both international law and federal common law, which in these circumstances is necessarily informed both by international law principles and by articulated congressional policies.").

63. *See* Ungar v. Palestine Liberation Org., 402 F.3d 274, 283 (1st Cir. 2005) ("[T]he FSIA's [Foreign Sovereign Immunity Act's] legislative history is itself replete with congressional references to sovereign immunity's roots in international law." (citing H.R. REP. NO. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605)) (explaining that the bill that became the Foreign Sovereign Immunity Act was intended to codify common law principles recognized by international law); William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2091 n.115 (2015) ("Modern customary international law requires sovereign immunity in some cases, although the exact contours of the customary international law rules are uncertain.").

64. *Bancec*, 462 U.S. at 624-26.

generally enjoyed by government agencies."[65] In addition, just as private corporations use subsidiaries to limit their liability when undertaking risky ventures, states may employ corporations to manage their risk exposure.[66] Further, using a separate entity may make it easier to raise money for an economic venture by giving creditors confidence that the entity's assets will not be used to satisfy the state's obligations.[67]

In the Court's view, these considerations warranted a general presumption that state-owned entities are separate from the state.[68] Yet the Court also noted the risk that if states had too much leeway to act through corporate entities, states could "violate with impunity the rights of third parties."[69] The Court also observed that in the context of "*private* corporations, courts in the United States and abroad, have recognized that an incorporated entity ... is not to be regarded as legally separate from its owners in all circumstances."[70]

The Court then announced two principles that may allow a court to attribute conduct from a state-controlled entity to the state or even treat the two as one and the same:

> Thus, where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, we have held that one may be held liable for the actions of the other....
>
> In addition, our cases have long recognized "the broader equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice."[71]

These principles have since become known as the "*Bancec* test" or the "*Bancec* framework."[72] However, it is noteworthy that, in this

65. *Id.* at 624-25.
66. *See id.* at 625-26.
67. *Id.* at 626.
68. *Id.* at 626-27.
69. *Id.* at 622.
70. *Id.* at 628-29 (footnotes omitted).
71. *Id.* at 629 (citation omitted) (quoting Taylor v. Standard Gas Co., 306 U.S. 307, 322 (1939)).
72. *See, e.g.*, EM Ltd. v. Banco Cent. de la República Arg., 800 F.3d 78, 95 (2d Cir. 2015) (referring to the two "prongs" of the "*Bancec* test"); Amaplat Mauritius Ltd. v. Zim. Mining

portion of the opinion, the Court made no mention of the alter ego doctrine. In fact, the Court's only reference to that doctrine came several pages earlier, when the Court commented that the parties both used the metaphor "alter ego" in their arguments.[73] Yet the Court did not *itself* embrace that term or the doctrine to which it relates. To the contrary, after mentioning the parties' use of that metaphor, the Court quoted from a 1926 decision by then-Judge Cardozo in which he criticized the use of metaphors when dealing with attribution between related entities.[74] According to Judge Cardozo, in such situations courts should simply apply "general rules of agency" *or* the equitable concepts of "honesty and justice."[75] That is, Judge Cardozo endorsed the very principles that the U.S. Supreme Court would subsequently embrace in *Bancec*, and likewise framed them disjunctively.

3. Application to the Facts

Immediately after the Court announced the agency and fraud or injustice principles as potentially applicable in cases involving sovereigns, the Court discussed case law applying the second prong.[76] Specifically, the Court surveyed some of its past decisions in which it had declined to treat an entity as separate or had issued other equitable relief to prevent fraud or injustice.[77]

After discussing those cases, the Court asserted that "similar equitable principles must be applied here."[78] The Court found that

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Dev. Corp., 663 F. Supp. 3d 11, 27 (D.D.C. 2023) (referring to the "*Bancec* framework").

73. *Bancec*, 462 U.S. at 623 ("The parties and *amici* have repeatedly referred to the phrases that have tended to dominate discussion about the independent status of separately constituted juridical entities, debating whether 'to pierce the corporate veil,' and whether Bancec is an 'alter ego' or a 'mere instrumentality' of the Cuban Government.").

74. *Id.* ("The whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of metaphor. Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." (quoting Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (N.Y. 1926))).

75. *Berkey*, 155 N.E. at 61 ("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." (emphasis omitted)).

76. *Bancec*, 462 U.S. at 629-30.

77. *Id.* For a more detailed discussion of these cases, see *infra* Parts III.A.2, III.B.2.

78. *Bancec*, 462 U.S. at 630.

Cuba was seeking to use Bancec to obtain benefits from Citibank in the lawsuit that Cuba could not obtain itself without exposing itself to a counterclaim.[79] In the Court's view, such a maneuver would be unjust and should not be permitted.[80]

This section of the opinion in which the Court applied the "fraud or injustice" principle was the only portion that drew a dissent.[81] Justices Stevens, Blackmun, and Brennan agreed with the legal framework articulated by the majority, but felt the Court should have remanded the case to develop the record more fully before applying it.[82]

The majority did not consider additional information necessary.[83] Accordingly, once the Court determined that Cuba was attempting to use Bancec's separate status to achieve an unjust result, that was enough to treat the two as one and the same.[84] This meant that Bancec's filing of the lawsuit had exposed Cuba to jurisdiction on Citibank's counterclaim, and Citibank was entitled to a setoff for Cuba's expropriation of its assets.[85]

II. *BANCEC*'S FIRST PRONG: FROM TRANSACTION-SPECIFIC TO ALL-PURPOSE "AGENCY"

Since the Court decided *Bancec*, lower courts have struggled to determine what it takes to create a "relationship of principal and agent" within the meaning of that case's first prong.[86] As the Introduction explained, courts are starkly divided on this issue,

79. *Id.* at 632 ("Giving effect to Bancec's separate juridical status in these circumstances ... would permit the real beneficiary of such an action, the Government of the Republic of Cuba, to obtain relief in our courts that it could not obtain in its own right without waiving its sovereign immunity and answering for the seizure of Citibank's assets.").

80. *Id.*

81. *Id.* at 634 (Stevens, J., dissenting) ("I respectfully dissent from Part III-C, in which the Court endeavors to apply the general principles it has enunciated.").

82. *Id.* at 634-35.

83. *Id.* at 630-31 (majority opinion).

84. *See id.* at 631-32.

85. *Id.* at 633.

86. *See, e.g.*, Transamerica Leasing, Inc. v. La Republica de Venez., 200 F.3d 843, 849 (D.C. Cir. 2000) ("Courts have long struggled, often with confusing results, to explain how much control is required before parent and subsidiary may be deemed principal and agent.").

largely because several of them conflate the concepts of "agency" and "alter ego."[87]

This Part II surveys the competing interpretations in depth and evaluates them. Part II.A begins with a summary of the case law. Thereafter, Part II.B explores the authority cited in *Bancec*, post-*Bancec* case law applying agency principles outside the sovereign context, and relevant international authority. Part II.C then draws on these sources to conclude that the Third and D.C. Circuits' approaches are most faithful to *Bancec* and the other authority examined, with one caveat. Namely, these courts overlook the fact that, in some cases, a state's domination of a specific transaction is enough in and of itself to warrant attribution.

A. A Case Law in Disarray: The Courts of Appeals' Contradictory Interpretations of the First Prong

This Part II.A summarizes the chaotic state of play in how the courts of appeals have interpreted the notion of "agency" as used in *Bancec* and their views on the concept's relationship—if any—to the alter ego doctrine.[88]

87. The confusion in the case law is notably captured in the Reporters' Notes to the most recent version of the Restatement of Foreign Relations Law of the United States. Specifically, the reporters cite a Fifth Circuit case for the proposition that "[a]lthough *Bancec* used the phrase 'principal and agent,' in fact the Court applied a veil-piercing or 'alter ego' analysis." RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 452 reporters' note 7 (AM. L. INST. 2018) (citing Bridas S.A.P.I.C. v. Gov't of Turkm., 345 F.3d 347, 359 (5th Cir. 2003)) (*Bridas I*). However, the reporters also acknowledge that "[s]ome courts have interpreted the principal-and-agent language in *Bancec* broadly to include not only corporate principles [such as the alter ego doctrine,] but also common-law rules of agency." *Id.* (citing S & Davis Int'l, Inc. v. Republic of Yemen, 218 F.3d 1292 (11th Cir. 2000)).

88. Conflation between the concepts of "agent" and "alter ego" is not unique to case law interpreting *Bancec*. For example, some courts will not allow a subsidiary of a foreign corporation to be treated as its parent's "agency" for service of process absent proof that the subsidiary is an "alter ego" of the parent. *See* William S. Dodge, *Substituted Service and the Hague Service Convention*, 63 WM. & MARY L. REV. 1485, 1500-01 (2022). Dodge criticizes this approach, arguing that courts should focus instead on whether the relationship between the affiliates is such that service on the subsidiary would provide adequate notice to the parent. *Id.* at 1490-91.

1. The Second Circuit

The Second Circuit has characterized the first prong of *Bancec* as an "alter ego" analysis under federal common law.[89] Although it acknowledges that *Bancec* refers to "a relationship of principal and agent," in practice the Second Circuit requires a showing that the entity is the state's "alter ego."[90] Accordingly, to satisfy the first prong, plaintiffs must establish that the state has controlled the entity's day-to-day operations, as evaluated through a five-factor test specific to the Second Circuit.[91]

In fact, the Second Circuit applies the same alter ego standard even if the plaintiff seeks merely to attribute discrete conduct to the state, rather than to treat the entity and the state as one and the same. The Second Circuit did so, for example, in *EM Ltd. v. Banco Central de la República Argentina*.[92] That case arose from Argentina's default on its sovereign debt in the early 2000s.[93] The plaintiffs were bondholders who had obtained judgments against Argentina for the repudiation of their bonds.[94] Seeking to enforce the judgments, the bondholders alleged that the Argentine Central Bank (BCRA) held certain dollar-denominated funds on behalf of Argentina in the United States.[95] They also alleged that BCRA was

89. *See, e.g.*, Bank of New York v. Yugoimport, 745 F.3d 599, 613 (2d Cir. 2014) (describing the two-part *Bancec* test as requiring either an "alter-ego analysis under federal common law" (the first prong) or "equitable veil-piercing" (the second prong) (citing *Bancec*, 462 U.S. at 626-30)).

90. Esso Expl. & Prod. Nigeria Ltd. v. Nigerian Nat'l Petrol. Corp., 40 F.4th 56, 69 (2d Cir. 2022); Kensington Int'l Ltd. v. Republic of Congo, No. 03 Civ. 4578, 2007 U.S. Dist. LEXIS 25282, at *41 (S.D.N.Y. Mar. 30, 2007) (resting its holding on the fact that the plaintiff "has alleged, and has provided materials demonstrating, that SNPC is not just an agent of Congo, but is an alter ego of Congo").

91. *Esso Expl. & Prod. Nigeria Ltd.*, 40 F.4th at 69 (framing the question under the first prong as whether the relevant entity was "an alter ego of Nigeria," and setting forth the factors that the Second Circuit considers to identify "'extensive control' creating alter-ego status" (quoting EM Ltd. v. Banco Cent. de la República Arg., 800 F.3d 78, 91 (2d Cir. 2015))); Gater Assets Ltd. v. AO Moldovagaz, 2 F.4th 42, 55 (2d Cir. 2021) ("In applying *Bancec*'s 'extensive control' prong, 'the touchstone inquiry' is 'whether the sovereign state exercises significant and repeated control over the instrumentality's day-to-day operations.'" (quoting *EM Ltd.*, 800 F.3d at 91 (2015))).

92. 800 F.3d at 91-92.

93. *Id.* at 81-82.

94. *Id.*

95. *See id.*

using those funds to pay other debts of the state preferentially.[96] Further, they asserted that BCRA had acquired these funds and was making these payments because Argentina had *ordered* it to do so, via state decrees.[97]

The bondholders argued that these facts satisfied *Bancec*'s first prong with respect to the relevant payments and funds.[98] That is, they asserted that Argentina had dominated BCRA *in this specific context* and thus had turned BCRA into its agent (or alter ego) to that limited extent.[99] The bondholders sought to attach the funds[100] or at least to be paid pro rata with the state's other creditors.[101]

The district court accepted the bondholders' arguments.[102] Although Judge Griesa found that "[t]he Republic did not manage the day-to-day operations of BCRA,"[103] he concluded that Argentina *did* dominate BCRA in certain key respects.[104] Namely, he determined that Argentina had ordered BCRA to use its funds to buy U.S. dollars and pay debts of the state, and that "[t]he Republic's control in this regard was complete."[105] Accordingly, Judge Griesa ruled that "BCRA was the servant or the agent of the Republic *as to [the relevant] funds*, within the meaning of the *Bancec* case."[106]

The Second Circuit reversed on appeal. In its view, the bondholders could not satisfy the first prong of *Bancec* without demonstrating that Argentina controlled BCRA's *day-to-day operations*.[107] Moreover,

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96. *Id.* at 93-94.

97. EM Ltd. v. Republic of Arg., 720 F. Supp. 2d 273, 286-87 (S.D.N.Y. 2010) (discussing state decrees directed at BCRA).

98. *See id.* at 297-98.

99. *See id.*

100. *Id.* at 276 (discussing the relief sought).

101. *See* NML Cap., Ltd. v. Republic of Arg., 08 Civ. 6978; 09 Civ. 1707; 09 Civ. 1708, 2011 U.S. Dist. LEXIS 158860, at *14 (S.D.N.Y. Dec. 7, 2011) (granting an injunction in a companion case requiring Argentina to "rank its payment obligations pursuant to NML's [the plaintiff's] Bonds at least equally with all the Republic's other present and future unsecured and unsubordinated External Indebtedness").

102. *See EM Ltd.*, 720 F. Supp. 2d at 304.

103. *Id.* at 299.

104. *Id.* at 299-300.

105. *Id.* at 300.

106. *Id.* (emphasis added).

107. EM Ltd. v. Banco Cent. de la República Arg., 800 F.3d 78, 91 (2d Cir. 2015) (explaining that the "touchstone inquiry" in an analysis seeking to identify "extensive control" under *Bancec*'s first prong is "whether the sovereign state exercises significant and repeated control over the instrumentality's day-to-day operations"); *see also id.* at 92 ("[T]hese facts do not support a claim of 'extensive control,' because whatever control Argentina exerted was not tied

instead of focusing on whether Argentina controlled BCRA's activities in connection with the specific funds and payments at issue, the court of appeals examined the state's role (or lack thereof) in BCRA's daily operations *as a whole*.[108] Finding day-to-day control of this nature absent, the court declined to permit any attribution to Argentina.[109]

As part of its analysis, the Second Circuit expressly cast doubt on the district court's holding that an entity can be the state's agent (or alter ego) in a specific context only. Namely, the court of appeals observed in a footnote that it had consistently held in prior cases that "once an instrumentality of a sovereign state has been deemed to be the alter ego of that state under *Bancec*, the instrumentality and the state are to be treated as one and the same for *all purposes*."[110]

It should be noted that the Second Circuit identified a separate reason why, in its view, the bondholders could not reach the relevant funds. The court interpreted a provision in the Foreign Sovereign Immunities Act—28 U.S.C. § 1611(b)(1)—as precluding the seizure of central bank assets even if the bank is not separate from the state, absent a sufficient waiver of immunity.[111] Nevertheless, if the Second Circuit were to interpret *Bancec*'s first prong the same way in another case that did not involve a central bank, that interpretation could be decisive in preventing recovery.

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to BCRA's *day-to-day* operations.").

108. *See id.* at 92-94 (identifying various interventions that Argentina allegedly made vis-à-vis BCRA, and in each case considering whether the intervention related to BCRA's day-to-day affairs); *id.* at 94 (concluding that none of the alleged ways in which Argentina exercised control over BCRA showed that "the Republic so extensively controlled BCRA's day-to-day operations as to transform BCRA into the Republic's alter ego").

109. *See id.* at 94-95.

110. *Id.* at 91 n.56 (emphasis added). The Second Circuit added that it "need not address the District Court's novel conclusion that an instrumentality may become an 'alter ego' for just some, but not all, purposes," because—in its view—the allegations did not support even a *limited* alter ego relationship. *Id.* This latter assertion is curious, however, because under the standard the Second Circuit articulated it seemingly would have been impossible to establish even a limited alter ego relationship unless Argentina had controlled BCRA's day-to-day operations *in general*.

111. NML Cap., Ltd. v. Banco Cent. de la República Arg., 652 F.3d 172, 187-88, 195-96 (2d Cir. 2011); *see also* 28 U.S.C. § 1611(b) ("[T]he property of a foreign state shall be immune from attachment and from execution, if—(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution.").

2. The Third Circuit

The Third Circuit adopted its current interpretation of *Bancec* in *Crystallex International Corp. v. Bolivarian Republic of Venezuela.*[112] The case arose from Venezuela's expropriation of a gold mining investment made by Canadian company Crystallex.[113] In response to the expropriation, Crystallex initiated an arbitration against Venezuela pursuant to an investment treaty and secured an award in its favor.[114] Crystallex then converted the award into a U.S. judgment and attempted to find non-immune U.S. assets of Venezuela, to no avail.[115] Accordingly, Crystallex invoked *Bancec* and sought to seize U.S. commercial assets of a Venezuelan state-owned oil corporation, Petróleos de Venezuela, S.A. (PDVSA).[116]

When the case reached the Third Circuit, the court identified two possible ways to satisfy *Bancec*'s first prong. The first would be to establish that "the sovereign exercises its control in such a way as to make the instrumentality its agent ... under ordinary agency principles."[117] The court indicated that this would require more than the state's control over the conduct at issue; the plaintiff would also have to show consent by the state for the entity to act on the state's behalf and agreement by the entity to do so.[118]

The Third Circuit asserted that a second way to satisfy the first prong would be to demonstrate that the entity is the state's alter ego.[119] By this, the court meant that the state has dominated the entity so completely that the two are effectively one and the same.[120] Because Crystallex was asking the court to treat a judgment against

112. 932 F.3d 126 (3d Cir. 2019).

113. *Id.* at 133.

114. *Id.*; *see also* Crystallex Int'l Corp. v. Bolivarian Republic of Venez., ICSID Case No. ARB(AF)/11/2, Award, 263 (Apr. 4, 2016).

115. *Crystallex*, 932 F.3d at 132.

116. *Id.*

117. *Id.* at 143 (quoting Transamerica Leasing, Inc. v. La Republica de Venez., 200 F.3d 843, 849 (D.C. Cir. 2000)).

118. *See Transamerica*, 200 F.3d at 849, *cited with approval in Crystallex*, 932 F.3d at 143.

119. *Crystallex*, 932 F.3d at 139 ("[S]o long as PDVSA is Venezuela's alter ego under *Bancec*, the District Court had the power to issue a writ of attachment on that entity's non-immune assets to satisfy the judgment against the country.").

120. *Id.* at 143 (adopting *Transamerica*'s "complete domination" concept).

Venezuela as equally an award against PDVSA, Crystallex relied on the "alter ego" theory.[121]

To evaluate whether Venezuela completely dominated PDVSA, the Third Circuit applied five factors mentioned by the U.S. Supreme Court in *Rubin v. Islamic Republic of Iran*, a 2018 opinion.[122] The Third Circuit asserted that, by mentioning these factors, *Rubin* had helped "clarif[y]" how to assess a state's level of control over an entity.[123] The court's comments about *Rubin* are puzzling, however, for several reasons.

First, the U.S. Supreme Court did not endorse or apply the relevant factors in *Rubin*. Rather, it simply noted in dicta that some courts had treated these factors as relevant when applying *Bancec*.[124] The Court did so to explain where Congress had derived language in a statutory provision at issue in *Rubin*, which the Court interpreted as abrogating the need for a *Bancec* analysis in cases involving enforcement of terrorism-related judgments.[125] Second, the fifth factor mentioned in *Rubin* has nothing to do with *Bancec*'s first prong, which the Third Circuit was applying in *Crystallex*. Namely, that factor paraphrases the facts of *Bancec*, which the Court treated as satisfying the *second* prong.[126]

Not surprisingly, other courts of appeals have not joined the Third Circuit in according such significance to the U.S. Supreme Court's dicta in *Rubin*. To the contrary, when other appellate courts

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121. *See id.*

122. *Id.* at 141. The factors are: "(1) the level of economic control by the government; (2) whether the entity's profits go to the government; (3) the degree to which government officials manage the entity or otherwise have a hand in its daily affairs; (4) whether the government is the real beneficiary of the entity's conduct; and (5) whether adherence to separate identities would entitle the foreign state to benefits in United States courts while avoiding its obligations." *Id.* (citing Rubin v. Islamic Republic of Iran, 583 U.S. 202, 210 (2018)).

123. *Id.*

124. *See Rubin*, 583 U.S. at 210.

125. *See id.* at 210-11 (interpreting 28 U.S.C. § 1610(g)).

126. *See supra* note 122 (explaining that the fifth factor is "whether adherence to separate identities would entitle the foreign state to benefits in United States courts while avoiding its obligations"). This captures the rationale offered by the Court in *Bancec* for disregarding Bancec's separate status under the "fraud or injustice" prong. *See supra* Part I.B.3; First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba (*Bancec*), 462 U.S. 611, 632 (1983), *abrogated on other grounds by* 28 U.S.C. § 1610(g).

have even acknowledged *Rubin* they have confined that case's relevance to terrorism-related enforcement proceedings.[127]

In any event, the Third Circuit ultimately found that Venezuela had exercised sufficient control over PDVSA to justify treating it as the state's alter ego.[128] Accordingly, the court affirmed an attachment of PDVSA's shares in the Delaware holding company that owns the U.S. energy company CITGO Petroleum.[129]

3. The Fifth Circuit

The Fifth Circuit differs from the courts discussed so far in asserting that the first prong of *Bancec* is grounded exclusively in agency and does not implicate an "alter ego" concept at all.[130] As explained further in Part III.A below, it is the *second* prong that the Fifth Circuit equates with the alter ego doctrine.

Oddly, however, the legal standard that the Fifth Circuit employs under the first prong is effectively the same as the Second Circuit's "alter ego" standard. Specifically, the Fifth Circuit maintains that "when determining whether one entity is the *agent* of another, it is necessary to consider 'whether the [parent] exercises *day-to-day control* over the [subsidiary].'"[131]

The most recent case in which the Fifth Circuit has applied this standard is *Janvey v. Libyan Investment Authority*.[132] In that case, the plaintiff was a court-appointed receiver for a bankrupt bank, Stanford International Bank (SIB), who sought to recover certain amounts that SIB had transferred to a Libyan state-controlled entity, Libyan Foreign Investment Company (LFICO).[133] The

127. *See, e.g.*, Kirschenbaum v. Assa Corp., 934 F.3d 191, 196 n.5 (2d Cir. 2019) (explaining that *Rubin*'s relevance is limited to terrorism-related enforcement proceedings); *id.* at 197-98 (applying the Second Circuit's own distinct set of factors to evaluate the state's level of control over the entity, which differ from those mentioned in *Rubin*).

128. *See Crystallex*, 932 F.3d at 151-52.

129. *See id.* at 152.

130. Janvey v. Libyan Inv. Auth., 840 F.3d 248, 264 (5th Cir. 2016) (asserting that the first prong is an "agent" exception and that "the theories underlying alter egos and agents are 'distinct' and are therefore not to be applied 'as if they were interchangeable'" (quoting Bridas S.A.P.I.C. v. Gov't of Turkm., 345 F.3d 347, 358 (5th Cir. 2003) (*Bridas I*))).

131. *Id.* (alterations in original) (second emphasis added) (quoting Dale v. Colagiovanni, 443 F.3d 425, 429 (5th Cir. 2006)).

132. 840 F.3d at 264.

133. *Id.* at 254.

receiver alleged that the payments to LFICO were fraudulent transfers and that LFICO had undertaken its transactions with SIB as the agent for LFICO's owner, the Libyan Investment Authority (LIA).[134] On that basis, the receiver sought to recover from LIA as well.[135]

When the case came before the Fifth Circuit, the court of appeals asserted that LFICO could qualify as LIA's agent under *Bancec* only if LIA had exercised "day-to-day control" over LFICO.[136] Moreover, the court framed that inquiry as going to whether LFICO had a separate existence from LIA—not whether LFICO had committed the relevant transactions at LIA's direction or on its behalf.[137] In other words, the court interpreted "agency" as requiring that the entity be controlled so extensively that it is not meaningfully separate from its parent.

Further, although the Fifth Circuit asserted that LIA had not been involved in the specific transactions,[138] it made that finding as part of a broader discussion of whether LIA had exercised day-to-day control sufficient to deprive LFICO of a separate identity.[139] Accordingly, the court seemed to have understood that LFICO could not be an agent of LIA unless it lacked any meaningful independence at all.

4. The Ninth Circuit

Like the Second Circuit, the Ninth Circuit views the first prong as an alter ego standard that requires day-to-day control over the relevant entity.[140] However, the Ninth Circuit does not simply elide the distinction between "agent" and "alter ego," as the Second Circuit does.[141] Rather, in *Doe v. Holy See*, the Ninth Circuit

134. *Id.* at 255-56.

135. *Id.*

136. *See id.* at 264 (quoting Dale v. Colagiovanni, 443 F.3d 425, 429 (5th Cir. 2006)).

137. *Id.* at 265 ("[I]t is apparent that LIA and LFICO are entitled to the presumption that they are separate entities.... Any control that LIA might have exercised was not nearly enough to justify disregarding the legal distinction between them.").

138. *Id.* at 263.

139. *See id.* at 263-65.

140. *See* Doe v. Holy See, 557 F.3d 1066, 1079-80 (9th Cir. 2009).

141. *Compare id.* at 1080 (noting the common law definition of "agency" and treating it as distinct from alter ego or veil-piercing doctrines), *with* Esso Expl. & Prod. Nigeria Ltd. v. Nigerian Nat'l Petrol. Corp., 40 F.4th 56, 69 (2d Cir. 2022) (using "agent" and "alter ego"

acknowledged that the two concepts are distinct—and yet it applied an "alter ego" standard *anyway*.[142]

a. The Allegations in Doe v. Holy See

The plaintiff in the case, Doe, alleged that when he was a teenager his Roman Catholic priest, Father Andrew Ronan, repeatedly sexually abused him on church premises in Portland, Oregon.[143] Doe alleged further that Ronan had previously abused several boys, in both Ireland and Chicago, and had admitted doing so to church officials.[144] Nevertheless, the Holy See and its church officials allegedly retained and reassigned Ronan repeatedly.[145] Doe also alleged that they kept Ronan's propensity for abuse secret and ultimately placed him in Doe's archdiocese, where he soon began abusing Doe.[146]

Years after the alleged abuse, Doe asserted claims against Ronan, the Holy See, and several U.S. church organizations.[147] The latter included the Archdiocese of Portland, Oregon ("Archdiocese"), the Order of the Friar Servants of Mary ("Order"), and the Catholic Bishop of Chicago ("Bishop").[148] All of these defendants, other than Ronan and the Holy See, were organized as corporations, including the Bishop.[149]

In response to Doe's claims, the Holy See invoked sovereign immunity.[150] Doe countered that his claims against the Holy See fell within the "tortious act" exception to immunity.[151] That exception allows claims against a foreign state for personal injury "occurring in the United States and caused by the tortious act or omission of

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interchangeably).

142. *See Doe*, 557 F.3d at 1079-80.

143. *Id.* at 1070.

144. *Id.* at 1069-70.

145. *See id.* at 1070.

146. *See id.* at 1070-71.

147. *Id.* at 1069.

148. *Id.* at 1069-70.

149. *Id.* at 1071; *see also* Reilly, *supra* note 12, at 880-81 (discussing the "corporation sole" form employed for bishops).

150. *Doe*, 557 F.3d at 1071.

151. *Id.* (citing 28 U.S.C. § 1605(a)(5)).

that foreign state or of any official or employee of that foreign state," subject to certain exclusions.[152]

Doe offered two arguments as to why the Holy See should be deemed to have committed tortious acts and omissions within the meaning of the exception. One was that the Holy See had directly employed Ronan, and therefore his alleged conduct was attributable to the Holy See under respondeat superior.[153] Another was that the U.S. church entities' alleged acts of retaining Ronan and concealing his past abuse should be attributed to the Holy See under *Bancec*.[154] According to Doe, those entities had acted as the Holy See's "agents" because the Holy See had directed or required them to commit the alleged conduct.[155]

In support of those assertions, Doe pointed to a secret decree known as the *Crimen sollicitationis* that the Holy See allegedly issued only three years before it transferred Ronan to Portland.[156] The decree allegedly mandated that church leaders—and hence the entities they ran—maintain the strictest secrecy in response to sexual abuse allegations.[157] Doe alleged further that Holy See policies and practices required the Bishop to retain and reassign Ronan.[158]

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152. 28 U.S.C. § 1605(a)(5).

153. *Doe*, 557 F.3d at 1069.

154. *Id.* at 1076-80.

155. *Id.* at 1070-71 (detailing allegations about the Holy See's directions and policies); *id.* at 1080 ("Doe does directly allege in his complaint that the corporations are 'agents' of the Holy See.").

156. *See* Doe v. Holy See, No. CV-02-430, 2009 U.S. Dist. LEXIS 148259, at *6 (D. Or. Oct. 19, 2009) (discussing the alleged policy decree issued in 1962); *Doe*, 557 F.3d at 1070 (indicating that the Holy See assigned Ronan to the Portland archdiocese in 1965).

157. *See Doe*, 2009 U.S. Dist. LEXIS 148259, at *7. For similar allegations in other cases, see Blecher v. Holy See, 631 F. Supp. 3d 163, 166-67 (S.D.N.Y. 2022) ("Plaintiffs allege that the Holy See had a 'secrecy policy,' set forth in a document titled *Crimen sollicitationis*, that 'mandated that the Bishop follow a specific course of action in response to an allegation of child sexual abuse.'"); Robles v. Holy See, No. 20-CV-2106, 2021 U.S. Dist. LEXIS 242562, at *2-3 (S.D.N.Y. Dec. 20, 2021) (discussing how the *Crimen sollicitationis* allegedly "forbade clergy members from revealing, reporting, or warning of sexual abuse committed by other clergy to anyone outside the Church or to most within the Church"); Keenan v. Holy See, 686 F. Supp. 3d 810, 841-42 (D. Minn. 2023) (alleging that church leaders have "no discretion in the handling" of child sex abuse cases (citation omitted)).

158. *See Doe*, 557 F.3d at 1070.

b. The Ninth Circuit's Analysis

When evaluating these allegations, the Ninth Circuit acknowledged *Bancec*'s holding that acts or liabilities may be attributed from an entity to a foreign state if a "relationship of principal and agent" exists between them.[159] However, the Ninth Circuit asserted that it was "not self-explanatory" how agency was relevant in this context.[160]

The court of appeals suggested that it is one thing to attribute conduct from a *natural person* to someone else—for which agency may be relevant[161]—and another to attribute conduct from one *entity* to another.[162] The latter is the issue addressed by *Bancec*, and the Ninth Circuit asserted that the alter ego doctrine is a better fit for this context.[163] In its words: "The *Bancec* standard is in fact most similar to the 'alter ego' or 'piercing the corporate veil' standards applied in many state courts to determine whether the actions of a corporation are attributable to its owners."[164]

To illustrate what *Bancec* supposedly requires, the Ninth Circuit cited a case applying Oregon's version of the alter ego doctrine.[165] The Oregon Supreme Court held in *Amfac Foods, Inc. v. International Systems & Controls Corp.* that the alter ego doctrine requires both "control and dominat[ion]" by the corporation's owner—a concept it equated with "day-to-day" control—as well as some resulting "fraud or injustice."[166]

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159. *Id.* at 1077 (quoting First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba (*Bancec*), 462 U.S. 611, 629 (1983), *abrogated on other grounds by* 28 U.S.C. § 1610(g)).

160. *Id.* at 1080.

161. *See id.* The Ninth Circuit cited *Rough & Ready Lumber Co. v. Blue Sky Forest Products*, 804 P.2d 498 (Or. Ct. App. 1991), as an example of agency being invoked to attribute conduct from a natural person to a corporation.

162. *Doe*, 557 F.3d at 1080.

163. *See id.* ("[T]he standard for determining that a natural person is the agent of another differs from the standard for attribution of the actions of a corporation to another entity.").

164. *Id.*

165. *Id.* (citing Amfac Foods, Inc. v. Int'l Sys. & Controls Corp., 654 P.2d 1092 (Or. 1982)).

166. 654 P.2d at 1099 ("[C]orporate shareholders who control and dominate a corporation may be held personally liable if the corporation is a mere 'instrumentality' or 'alter ego' and where fraud or injustice has resulted."); *id.* at 1100 (noting that the alter ego theory requires "day-to-day" control but asserting that such control is not sufficient because "some form of moral culpability by the parent" must also be shown).

After drawing this parallel between the alter ego doctrine and the *Bancec* framework, the Ninth Circuit found that Doe had not established the Holy See's day-to-day control over the U.S. church entities.[167] It therefore declined to attribute any of these entities' alleged conduct to the Holy See, excluding that conduct as a possible basis for overcoming the Vatican state's immunity.[168]

The Ninth Circuit did find that the complaint adequately pleaded a different basis for satisfying the tortious act exception: that Ronan was the Holy See's employee.[169] However, the district court later rejected that theory on the merits and dismissed the Holy See from the case.[170]

Flawed or not, the Ninth Circuit's application of *Bancec*'s first prong in *Doe v. Holy See* has proven very influential. Multiple courts around the country have relied on it in dismissing the Holy See from clergy abuse lawsuits.[171] In so doing, these courts have largely relegated abuse survivors to pursuing claims against bankrupt domestic organizations.[172]

5. The D.C. Circuit

The D.C. Circuit adopted its interpretation of *Bancec* in *Transamerica Leasing, Inc. v. La Republica de Venezuela*.[173]

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167. *Doe*, 557 F.3d at 1080; *see also id.* at 1079 ("Doe's complaint does not allege day-to-day, routine involvement of the Holy See in the affairs of the Archdiocese, the Order, and the Bishop.").

168. *Id.* at 1080 ("We therefore conclude that the district court lacked jurisdiction over the Holy See for the tortious acts allegedly committed by the Archdiocese, the Chicago Bishop, and the Order.").

169. *Id.* at 1083.

170. Transcript of Oral Argument at 37, Doe v. Holy See, No. 02-CV-430, 2009 U.S. Dist. LEXIS 148259 (D. Or. Oct. 19, 2009) ("I grant the Holy See's motion to dismiss, ... because I find a lack of an employment relationship between Mr. Ronan and the Holy See sufficient to create an exception to the foreign sovereign immunity enjoyed by the Holy See under U.S. law.").

171. *See, e.g.*, D.M. v. Apuron, 658 F. Supp. 3d 825, 845-46 (D. Guam 2023) (applying an identical day-to-day control standard derived from the Ninth Circuit); Keenan v. Holy See, 686 F. Supp. 3d 810, 834-36 (D. Minn. 2023) (quoting the Ninth Circuit's analysis at length and determining that the Holy See had not exercised "day-to-day control" over the defendant church entities' affairs).

172. *See* Reilly, *supra* note 12, at 873 (explaining that the Archdiocese was the first to file for bankruptcy and that many other Catholic organizations have since done the same).

173. 200 F.3d 843 (D.C. Cir. 2000).

With regard to *Bancec*'s first prong, the D.C. Circuit recognized that different forms of control can be relevant, depending on the relief sought.[174] The court asserted that transaction-specific control is relevant if the plaintiff relies on "ordinary agency principles" to attribute conduct from an entity to the parent.[175] By contrast, the plaintiff would have to establish "complete domination" by the state in order for the court to treat the state and the entity as "not meaningfully distinct entities."[176]

The D.C. Circuit's interpretation of the first prong is consistent with that of the Third Circuit, and in fact the latter court derived much of its own reading from *Transamerica*.[177] However, whereas in *Crystallex* the Third Circuit focused on the "complete domination" theory for satisfying the first prong, in *Transamerica* the D.C. Circuit elaborated on the "ordinary agency principles" theory.[178]

Specifically, the D.C. Circuit indicated that attribution is appropriate under ordinary agency principles when

> the parent has manifested its desire for the subsidiary to act upon the parent's behalf, the subsidiary has consented so to act, the parent has the right to exercise control over the subsidiary with respect to matters entrusted to the subsidiary, and the parent exercises its control in a manner more direct than by voting a majority of the stock in the subsidiary or making appointments to the subsidiary's Board of Directors.[179]

These remarks suggest that transaction-specific control is never enough *on its own* to establish agency within the meaning of *Bancec*. Moreover, that reading of the *Transamerica* opinion is confirmed by the D.C. Circuit's application of the standard in that case.[180]

The plaintiffs in *Transamerica* were shipping companies that had leased equipment to Compañia Anonima Venezolana de Navegación

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174. *See id.* at 848-50 (discussing different forms of control that can satisfy what the court called *Bancec*'s "agency exception").

175. *Id.* at 849.

176. *Id.* at 848.

177. Crystallex Int'l Corp. v. Bolivarian Republic of Venez., 932 F.3d 126, 143 (3d Cir. 2019).

178. *Compare id.*, 932 F.3d at 143 (quoting *Transamerica*, 200 F.3d at 848), *with Transamerica*, 200 F.3d at 849.

179. *Transamerica*, 200 F.3d at 849.

180. *See id.* at 850-53.

(CAVN), a Venezuelan state-owned corporation.[181] The plaintiffs alleged that CAVN failed to pay for the equipment, and they sought to attribute CAVN's breach to the Venezuelan state under *Bancec*.[182] The plaintiffs asserted that CAVN was the state's "agent" because the state had used its control to cause CAVN to default on its obligations.[183] However, the D.C. Circuit rejected this argument, for two reasons.

First, the court held that the plaintiffs needed to show that the state had exercised a level of control over the relevant transactions beyond the control typically exerted by controlling shareholders.[184] The court acknowledged that the state had been active in monitoring CAVN's affairs and had even installed a uniformed naval officer as President of CAVN.[185] Nevertheless, the court pointed out that controlling shareholders often monitor their subsidiaries' affairs and appoint their own officers to manage them.[186] Accordingly, in its view, those facts were not enough.[187]

Second, the court found that "Venezuela did not evince an intent to have CAVN act *as its agent* in dealing with the plaintiffs."[188] This indicates that even if the plaintiffs had been able to show that the state exercised extreme control over the relevant transactions—such as by ordering CAVN to breach the contracts rather than simply using its influence as a controlling shareholder—it still would not have been enough. The plaintiffs also would have had to show mutual consent between the affiliates that CAVN would enter into and breach the contracts *on behalf of the state*.

B. Evaluating the Evidence

As the foregoing survey shows, the courts of appeals could hardly be more divided in their understanding of *Bancec*'s first prong.

Part II.B begins the effort to sort out the confusion. It first examines how the U.S. Supreme Court itself understood *Bancec*'s

181. *Id.* at 846.
182. *See id.*
183. *See id.*
184. *See id.* at 850-51.
185. *Id.* at 851.
186. *See id.*
187. *Id.*
188. *Id.* at 853 (emphasis added).

agency concept. Thereafter, it explores how that concept has developed since then in two contexts: in U.S. case law involving private parent-subsidiary relationships, and in international law. Part II.C concludes that much of this evidence supports the readings of the Third and D.C. Circuits, but also finds that even those readings would benefit from fine-tuning.

1. Authority Cited in Bancec

In the portion of the *Bancec* opinion that articulated the "agency" and "fraud or injustice" principles, the U.S. Supreme Court cited several sources that discuss agency in particular.[189]

One such source is *NLRB v. Deena Artware, Inc.*[190] In that 1960 case, the National Labor Relations Board (NLRB) sought to hold a parent company liable for unpaid wage obligations of its subsidiary.[191] The Court of Appeals for the Sixth Circuit dismissed the case, but the U.S. Supreme Court reversed.[192] To guide the lower courts on remand, the Court offered insights into when a corporation may be held liable for the obligations of an affiliate.[193] The Court began by quoting language from the same 1926 opinion by then-Judge Cardozo discussed above in Part I.B.2. In the quoted language, Judge Cardozo explained that "[d]ominion 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."[194] The Court thereafter identified various scenarios that meet this standard, ranging from complete domination of the subsidiary to more targeted interference in the subsidiary's affairs.[195]

The specific scenarios mentioned in *Deena Artware* include when the parent has operated its own business and that of a subsidiary as a "single enterprise,"[196] when the parent has kept the subsidiary

189. First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba (*Bancec*), 462 U.S. 611, 628-29 (1983) (quoting Taylor v. Standard Gas Co., 306 U.S. 307, 322 (1939)), *abrogated on other grounds by* 28 U.S.C. § 1610(g).

190. 361 U.S. 398 (1960).

191. *Id.* at 400.

192. *Id.* at 402.

193. *See id.*

194. *Id.* at 403 (quoting Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (N.Y. 1926)).

195. *See id.* at 403-04.

196. *Id.* at 402.

inadequately capitalized,[197] and when the parent has failed to respect corporate formalities.[198] The Court also cited with approval[199] a case called *Union Sulphur Co. v. Freeport Texas Co.*, which found a limited agency relationship based on a parent's discrete but heavy-handed intervention in its subsidiary's affairs.[200]

Specifically, in *Union Sulphur Co.,* the U.S. District Court for the District of Delaware held that the parent had caused its subsidiary to infringe the plaintiff's patents.[201] The court reached this conclusion because the parent had not only known about the infringement, but had even transferred the infringing drilling equipment to the subsidiary and had encouraged its use.[202] According to the court, this made the parent liable for the infringement on an agency theory.[203] Significantly, however, the court at no point inquired into whether the affiliates ever agreed that the subsidiary would act on the parent's behalf in the matter. Rather, the parent's efforts to cause infringement, and the fact that the subsidiary complied, were enough to establish agency.[204]

Another source cited in *Bancec* that discusses agency between affiliates is a law review article by Yitzhak Hadari.[205] In the precise language to which the Court cited,[206] Hadari summarized the holding in *Chicago, Milwaukee & St. Paul Railway Co. v. Minneapolis Civic & Commerce Ass'n*.[207] That case involved a railroad company whose two shareholders had made most important decisions on the company's behalf pursuant to an agreement that the shareholders had concluded with the company.[208] In the U.S. Supreme Court's

197. *Id.*

198. *See id.*

199. *Id.* at 403 n.5.

200. 251 F. 634, 661 (D. Del. 1918).

201. *Id.*

202. *See id.*

203. *Id.* ("The doctrine of agency applies to patent infringements, and also the principle that one doing an act which naturally causes another to commit an infringement is responsible for it.").

204. *See id.*

205. Yitzhak Hadari, *The Structure of the Private Multinational Enterprise*, 71 MICH. L. REV. 729, 771-72 (1973).

206. First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba (*Bancec*), 462 U.S. 611, 628 n.20 (1983), *abrogated on other grounds by* 28 U.S.C. § 1610(g).

207. *See* Hadari, *supra* note 205, at 771 n.260 (citing Chi., Milwaukee & St. Paul Ry. v. Minneapolis Civic & Com. Ass'n, 247 U.S. 490 (1918)).

208. *Chi., Milwaukee & St. Paul Ry.*, 247 U.S. at 497.

view, this arrangement had turned the entity into its shareholders' "mere agen[t]" that lacked any meaningful independent existence.[209] Accordingly, this case reflects an extreme form of agency: where the parents control an entity so pervasively that it becomes their agent for all purposes and is not truly separate from them.[210]

By contrast, another case discussed by Hadari involved a more limited form of agency: *Wyoming Construction Co. v. Western Casualty & Surety Co*.[211] In that case, the plaintiff argued that a parent company should be liable for its subsidiary's breach of contract because the subsidiary had acted as the parent's agent when it committed the breach.[212] The U.S. Court of Appeals for the Tenth Circuit agreed.[213] It based its holding on the fact that the parent had instructed its appointees on the subsidiary's board to cease performing the contract even though the subsidiary's president had intended to complete it.[214] The court's analysis of the parent's control notably focused on this specific instance of interference, rather than on any broader or day-to-day domination.[215] Moreover, the court in no way relied on any meeting of the minds between the affiliates that the subsidiary would act for the parent.[216] After all,

209. *See id.* at 501 (describing the corporation as "a completely controlled agency of the two companies which own its capital stock").

210. The *Bancec* Court also cited a treatise that makes clear that *Chi., Milwaukee & St. Paul Ry.* was not alone in recognizing this form of agency. *See Bancec*, 462 U.S. at 628 n.19 (citing I. MAURICE WORMSER, DISREGARD OF THE CORPORATE FICTION AND ALLIED CORPORATION PROBLEMS 42-85 (1927)). Wormser refers to a "constantly increasing number of decisions" that recognize a form of agency pursuant to which the entity's "separate existence as a distinct corporate entity will be ignored, and the two corporations will be regarded in legal contemplation as one unit." WORMSER, *supra*, at 54.

211. 275 F.2d 97 (10th Cir. 1960); *see* Hadari, *supra* note 205, at 772 n.263 (describing this case as an example of one in which "the acts of a controlled corporation are attributed to the controlling corporation for the purpose of imposing liability because the former is found to be the agent of the latter").

212. *Wyo. Constr. Co.*, 275 F.2d at 103 (noting that the plaintiff argued that the subsidiary, Wyoming, was "to be regarded as a department or agent of Monolith [the parent] with the result that Monolith is responsible for the defaults of Wyoming").

213. *Id.* at 104.

214. *Id.* at 103-04 ("Although Wheeler was continued as president of Wyoming until May 1952, his efforts to complete the Forgey contract were frustrated by the Monolith control.... When the meeting was held to determine what should be done about the completion of the Forgey contract, the Monolith employees who were acting as officers of Wyoming phoned their Monolith superiors for directions before stating the Wyoming position to proceed no further on the contract.").

215. *See id.*

216. *See id.*

it would have been odd for the court to inquire into whether the subsidiary had "consented" to act for the parent, given the mandatory nature of the parent's instructions.

In sum, when the U.S. Supreme Court embraced an agency theory in *Bancec*, it likely did not have any single scenario in mind. Rather, the Court understood that a parent's dominant control over an entity could result in different forms of agency, depending on how broadly the domination extended.[217] Moreover, several of the sources discussed in *Bancec* indicate that agency between a parent and subsidiary can exist without formal agreement between the affiliates that the subsidiary will act for the parent.[218] This likely explains why the U.S. Supreme Court made no reference to a mutual consent requirement in *Bancec*, and instead alluded only to the parent's exercise of extensive control over the subsidiary.[219]

The Court had good reason to embrace such a control-based theory that permits anything from targeted attribution to wholesale disregard of the corporate form. Not only was there substantial common law authority articulating such a theory—and labeling it "agency"—but there are strong normative justifications in favor of this approach. In fact, the Court hinted at these in *Bancec* when it described the usual characteristics of state-owned enterprises and the rationale for treating these entities as presumptively separate from the state. According to the Court, the typical state-owned entity is "primarily responsible for its own finances," is "run as a distinct economic enterprise," and enjoys "a greater degree of flexibility and independence from close political control than ... government agencies."[220] The Court added that these features—and the presumption of separateness—enable these entities to attract from creditors "the financial resources needed to make large-scale national investments."[221]

The Court left unsaid that all of these characteristics depend on a key assumption: that the foreign state *itself* respects the entity as separate. If the state fails to do so by dominating the entity

217. *See* First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba (*Bancec*), 462 U.S. 611, 628-30 (1983), *abrogated on other grounds by* 28 U.S.C. § 1610(g).

218. *See supra* Part II.B.1.

219. *Bancec*, 462 U.S. at 629.

220. *Id.* at 624-25.

221. *Id.* at 625.

completely or in particular contexts, then these lauded features vanish. With them goes the rationale for treating the entity as acting on its own account in the relevant matters, or even as separate from the state more broadly. To put it another way, if the state's own actions belie the notion that the entity is separate or acting on its own account, then courts in other countries have no reason to keep up the pretense either. Indeed, courts do a disservice to *all* states if they allow such opportunistic behavior to pass without consequence, because it increases the cost of credit for all sovereign borrowers.[222]

*2. Post-*Bancec *Authority Under U.S. and International Law*

As the preceding discussion shows, the Court did not create *Bancec*'s first prong out of whole cloth. Rather, it simply endorsed preexisting authority applying an agency concept to private entities and their owners. Part II.B.2 considers how this agency concept and control-based attribution more generally have developed since *Bancec*. In particular, it explores post-*Bancec* U.S. case law involving private affiliates, as well as authority on attribution to states under customary international law and under European Union law. The discussion concludes that post-*Bancec* developments in both contexts fully support Part II.B.1's preliminary findings.

a. Most U.S. Courts Recognize that Agency Between Private Affiliates Can Be Transaction-Specific

As explained in more detail below, most U.S. courts since *Bancec* have recognized that agency between private affiliates can exist without "complete" or "day-to-day" control. Some have done so when applying federal common law.[223] Others have done so when applying

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222. *Cf.* David Millon, *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability*, 56 EMORY L.J. 1305, 1307-08 (2007) (explaining that if a controlling shareholder is allowed to engage in illegitimate or opportunistic behavior toward the corporation, then any benefit from treating the corporation as separate "comes at too great a cost to corporate creditors" and causes "the cost of credit [to be] higher for all corporate borrowers").

223. *See, e.g.*, Transamerica Leasing, Inc. v. La Republica de Venez., 200 F.3d 843, 849 (D.C. Cir. 2000); *In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 298-99 (S.D.N.Y. 2009).

state law,[224] which these courts sometimes describe as no different from federal law on the issue of agency.[225] In fact, the consensus is so broad that agency can be transaction-specific that some courts that have insisted on complete control when applying *Bancec* have done otherwise in cases involving private entities.

The Second and Ninth Circuits are two such courts. Namely, both have recognized state-law agency theories that require the parent to control only the specific conduct that the plaintiff seeks to attribute to the parent.[226] District courts within these circuits have done the same in cases applying federal common law.[227] Some of the latter have even contrasted agency with the alter ego doctrine by pointing out that the former does not require complete domination, whereas the latter does.[228]

The Third Circuit made a similar distinction in *Phoenix Canada Oil Co. v. Texaco, Inc.*[229] Specifically, the court asserted that "total

224. *See, e.g.*, Esmark, Inc. v. NLRB, 887 F.2d 739, 756 (7th Cir. 1989).

225. *See, e.g.*, Mia. Prods. & Chem. Co. v. Olin Corp., 449 F. Supp. 3d 136, 180 (W.D.N.Y. 2020) (asserting that there is no difference between agency principles under New York law and federal common law).

226. *See* Williams v. Yamaha Motor Co., 851 F.3d 1015, 1020, 1024-25 (9th Cir. 2017) (assuming that acts of a subsidiary may be imputed to its parent under California law for purposes of personal jurisdiction if the parent has controlled the relevant conduct and other traditional agency elements are met); Charles Schwab Corp. v. Bank of Am. Corp., 883 F.3d 68, 85-86 (2d Cir. 2018) (asserting that attribution from a subsidiary to a parent is possible under New York law at least "where 'the alleged agent acted in New York for the benefit of, with the knowledge and consent of, and under some control by, the nonresident principal'" (quoting Grove Press, Inc. v. Angleton, 649 F.2d 121, 122 (2d Cir. 1981))).

227. *In re* S. African Apartheid Litig., 617 F. Supp. 2d at 298-99 (applying federal common law and adopting the *Transamerica* standard for when agency may exist between a private parent company and its subsidiary); *see also Mia. Prods. & Chem. Co.*, 449 F. Supp. 3d at 180 (interpreting federal common law to provide that "[t]here is jurisdiction over a principal based on the acts of an agent where the alleged agent acted ... for the benefit of, with the knowledge and consent of, and under some control by, the nonresident principal" (quoting *Charles Schwab*, 883 F.3d at 85)); E. & J. Gallo Winery v. EnCana Energy Servs., No. CV F 03-5412 AWI LJO, 2008 U.S. Dist. LEXIS 46927, at *16 (E.D. Cal. May 27, 2008) (applying federal common law and citing the RESTATEMENT (THIRD) OF AGENCY § 1.01 for what agency requires).

228. *In re* S. African Apartheid Litig., 617 F. Supp. 2d at 299 (contrasting agency with theories that apply only "when there is 'actual domination' of a subsidiary in its entirety" (quoting DeJesus v. Sears, Roebuck & Co., 87 F.3d 65, 70 (2d Cir. 1996))); *Mia. Prods. & Chem. Co.*, 449 F. Supp. 3d at 180 ("A parent corporation may be sued in [the venue] when the relationship between the foreign parent and the local subsidiary validly suggests the existence of an agency relationship *or* the parent controls the subsidiary so completely that the subsidiary may be said to be simply a department of the parent." (alteration in original) (emphasis added)).

229. 842 F.2d 1466, 1477 (3d Cir. 1988).

domination or general alter ego criteria need not be proven" to establish agency between a subsidiary and its private parent company.[230] Rather, the plaintiff need only show that the subsidiary acted as its parent's agent "in the course of one or more specific transactions."[231]

The Third Circuit cited section 14M of the Restatement (Second) of Agency for the proposition that "[o]ne corporation whose shares are owned by a second corporation does not, by that fact alone, become the agent of the second company."[232] However, the court added that a subsidiary may "assume the role" of its parent's agent in one or more specific transactions, just as an unrelated company could do so.[233] Moreover, the Reporter's Notes to section 14M acknowledge that even if control over a subsidiary's stock is not enough by itself to establish agency, there may be situations in which "stock control gives the parent a power to convert the relation into one of agency."[234] The Reporter's Notes do not provide any examples of how a parent might use its control to that end, but district courts within the Third Circuit have identified precisely such a scenario: when the parent has *directed or authorized* the subsidiary's conduct at issue.[235]

The Seventh Circuit has similarly observed that a parent corporation may be liable for acts committed by a subsidiary that the parent has mandated. Namely, in *Esmark, Inc. v. NLRB*, the Seventh Circuit held that a parent may be liable for conduct of a

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230. *Id.* (applying Delaware law).

231. *Id.* at 1476-77; *see also* British Telecomms. PLC v. IAC/InteractiveCorp, 356 F. Supp. 3d 405, 409 (D. Del. 2019) ("Under the agency theory, 'total domination or general alter ego criteria need not be proven.'" (quoting *Phx. Can. Oil Co.*, 842 F.2d at 1477)).

232. *Phx. Can. Oil Co.*, 842 F.2d at 1477 (citing RESTATEMENT (SECOND) OF AGENCY § 14 (AM. L. INST. 1958)).

233. *Id.* ("[O]ne corporation—completely independent of a second corporation—may assume the role of the second corporation's agent in the course of one or more specific transactions. This restricted agency relationship may develop whether the two separate corporations are parent and subsidiary or are completely unrelated outside the limited agency setting." (citing RESTATEMENT (SECOND) OF AGENCY § 14M cmt. a (AM. L. INST. 1958))).

234. RESTATEMENT (SECOND) OF AGENCY § 14M reporter's notes (AM. L. INST. 1958).

235. *See, e.g.*, T-Jat Sys. 2006 v. Expedia, Inc., No. 16-581-RGA, 2017 U.S. Dist. LEXIS 31714, at *11-12 (D. Del. Mar. 7, 2017) ("Under agency theory, a parent corporation is held liable for the actions of its subsidiary if the parent directed or authorized those actions.... The fundamental question is whether the parent and subsidiary entered into a limited agency relationship for the transaction giving rise to the claim." (footnote omitted)); *British Telecomms.*, 356 F. Supp. 3d at 409.

subsidiary "[w]here the parent specifically directs the actions of its subsidiary, using its ownership interest to command rather than merely cajole."[236] The court added: "[A] parent corporation should not be permitted to act through its subsidiaries to the detriment of [third parties] and yet escape liability for acts which it has mandated."[237]

As the foregoing summary shows, many U.S. courts since *Bancec* have recognized that agency between private affiliates can be transaction specific. In addition, some courts have recognized that dominant control by a parent over the relevant conduct can justify attribution in and of itself.

b. U.S. Courts Also Continue to Recognize a Form of Agency that Requires Complete Domination

Other decisions since *Bancec* have recognized a form of agency between private affiliates that extends beyond specific transactions. This form of agency *does* require complete domination, but permits the court to disregard the entity's separate status altogether. The Fifth Circuit's decision in *United States v. Jon-T Chemicals, Inc.* reflects this notion of agency, which the court equated with "alter ego" status:

> [W]here, as here, a parent company totally dominates and controls its subsidiary, operating the subsidiary as its business conduit or agent.... the subsidiary is considered the "alter ego," "agent," or "instrumentality" of the parent company, and the district court, acting in its equitable capacity, is entitled to pierce the corporate veil.[238]

It should be noted that a minority of courts in these cases have used language suggesting that agency between affiliates cannot exist without complete domination.[239] However, these courts have

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236. 887 F.2d 739, 756-57 (7th Cir. 1989).

237. *Id.* at 757.

238. 768 F.2d 686, 691 (5th Cir. 1985).

239. *See, e.g.*, Sonora Diamond Corp. v. Superior Ct., 99 Cal. Rptr. 2d 824, 838-39 (Ct. App. 2000) (asserting that under California law, agency between parent and subsidiary requires the latter to be "nothing more than an incorporated department of the parent," which must have "in effect taken over performance of the subsidiary's *day-to-day* operations"); Butler v.

either failed to distinguish agency meaningfully from the alter ego doctrine, or have simply been focused on one *form* of agency.[240]

Either way, the existence of this comprehensive form of agency that is equivalent to alter ego status likely explains why some courts have conflated *Bancec*'s agency concept with the alter ego doctrine.

*c. Post-*Bancec *International Authority*

Only a few years after the U.S. Supreme Court decided *Bancec*, the International Court of Justice (ICJ) addressed control-based attribution under international law. It did so in *Military and Paramilitary Activities in and Against Nicaragua* ("*Nicaragua*"),[241] a case in which Nicaragua was seeking to hold the United States responsible for violations of international law by the Contras, a rebel group the United States supported.[242] In evaluating whether the Contras' conduct could be attributed to the United States, the ICJ articulated two distinct tests: a "complete dependence" test and an "effective control" test.[243]

The former requires an exceptional degree of control that amounts to complete domination. As the ICJ explained, to satisfy the "complete dependence" test, Nicaragua would have had to show that the Contras were so completely dependent upon the United States that they had no autonomy at all and had become an "organ" of the United States.[244] In that event, anything the Contras did

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BankCorpSouth, Inc., No. 5:04CV00246, 2004 U.S. Dist. LEXIS 33384, at *8-9 (E.D. Ark. Oct. 28, 2004) (asserting that agency requires that "the controlled corporation has no separate mind, or existence of its own and is but a business conduit for its principal"); *In re* Chinese Manufactured Drywall Prods. Liab. Litig., 894 F. Supp. 2d 819, 868 (E.D. La. 2012) (discussing how agency between parent and subsidiary under Florida law requires "day-to-day control of the subsidiary by the parent so complete as to render the subsidiary, in fact, an 'agent' or 'mere department' of the parent" (quoting Brownsberger v. Gexa Energy, LP, No. 10-CV-81021, 2011 WL 197464, at *3 (S.D. Fla. Jan. 20, 2011))).

240. These courts sometimes cite alter ego authority in support of what "agency" supposedly requires. *See, e.g.*, *Sonora Diamond Corp.*, 99 Cal. Rptr. 2d at 837-38 (citing Rollins Burdick Hunter of So. Cal. Inc. v. Alexander & Alexander Servs. Inc., 253 Cal. Rptr. 338 (Ct. App. 1988)) (applying the alter ego doctrine).

241. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (June 27).

242. *Id.* ¶¶ 18-20.

243. *Id.* ¶¶ 109-115.

244. *Id.* ¶ 109.

would have been attributable to the United States because they would not have been truly separate.[245] By contrast, the "effective control" test is more targeted. It applies if the state "directed or enforced" specific wrongful acts, in which case those acts (and those alone) may be attributed to the state.[246]

The effective control test gained further recognition in 2001 when the International Law Commission (ILC) included it in its Draft Articles on Responsibility of States for Internationally Wrongful Acts (the "Articles on State Responsibility" or the "Articles").[247] The Articles identify various circumstances under which conduct may be attributed to a state, one of which is when the state controls the relevant activity.[248] Specifically, Article 8 provides: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[249]

An official comment to Article 8 makes clear that a "person" for purposes of this provision can include a juridical person or entity.[250] Another comment acknowledges that even though a state-owned corporation is presumptively separate from the state, its conduct may be attributed to the state "where there was evidence that the corporation was exercising public powers, *or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result*."[251] Yet another comment

245. *See id.* ¶¶ 109, 114 ("[A]ny offences which [the Contras] have committed would be imputable to the Government of the United States, like those of any other forces placed under the latter's command."); *see also* Elizabeth Nielsen, *State Responsibility for Terrorist Groups*, 17 U.C. DAVIS J. INT'L L. & POL'Y 151, 159 (2010) (describing the "complete dependence" test).

246. *Nicar. v. U.S.*, 1986 I.C.J. ¶ 115 ("For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."); *id.* (indicating that the effective control test would have been satisfied if "the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State").

247. *See* Articles on State Responsibility, *supra* note 34, art. 8.

248. *Id.*

249. *Id.*

250. *Id.* cmt. 1 (explaining that conduct may be "attributable to the State because there exists a specific factual relationship between the person *or entity* engaging in the conduct and the State" (emphasis added)).

251. *Id.* cmt. 6 (emphasis added) (footnote omitted).

clarifies that the control required by Article 8 is "effective control" of the type discussed in *Nicaragua*.[252]

The effective control test is often described as identifying a form of agency between the state and the subservient entity.[253] Nevertheless, neither the ICJ nor the ILC has in any way suggested that the test requires a showing that the state asked the entity to act on its behalf and that the entity agreed to do so.

Not long after the ILC adopted the Articles on State Responsibility, the ICJ recognized Article 8 as expressing customary international law. It did so in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* ("*Bosnian Genocide*"), a case involving atrocities committed by Bosnian Serb forces against the Muslim community in Bosnia, Herzegovina.[254] The ICJ made this point as part of a broader analysis as to whether certain killings should be attributed to the Federal Republic of Yugoslavia (FRY).[255]

The ICJ explained that these acts could be attributed to the FRY under Article 8 if the perpetrators had been acting *under the direction or instructions of* the FRY, or if the FRY had exercised effective control over the military action more broadly.[256] The ICJ ultimately found that there was no evidence of any such control.[257] It was clear, however, that if the killings *had* been carried out under

252. *See id.* cmt. 8.

253. *See, e.g.*, JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 146 (2013) (establishing that the entity at issue in the effective control test is an "agent" of the state in the relevant context, and that this form of control "impl[ies] a core relationship of subordination between the state and its agent"); Nielsen, *supra* note 245, at 160 ("The ICJ established the effective control test in the *Nicaragua* case as essentially a 'subsidiary test' to determine an agency relationship that the Court resorts to only when the non-state actor cannot be proven to be a *de facto* organ of the state under the complete dependence test."); *id.* (referring to Article 8 as establishing "the criteria for agents of the state").

254. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v Serb. & Montenegro), 2007 I.C.J. 188, ¶¶ 245-277 (Feb. 26).

255. *Id.* ¶¶ 406-413.

256. *Id.* ¶ 406 (explaining how attribution is permissible under Article 8 "where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed").

257. *Id.* ¶ 413 ("All indications are to the contrary: that the decision to kill the adult male population of the Muslim community in Srebrenica was taken by some members of the [Bosnian Serb Army] Main Staff, but without instructions from or effective control by the FRY.").

instructions from the FRY, then they would have been attributed to that state.

EU law recognizes a similar theory for attribution between corporate affiliates. This theory holds that "the behaviour of a subsidiary may be imputed to its parent if the subsidiary did not decide independently upon its own conduct on the market *but carried out, in all material respects, the instructions given to it by the parent company*."[258] While the mere ownership of a controlling share is not enough, a parent may be held liable under EU law for conduct committed by a subsidiary pursuant to a specific policy that the parent imposes.[259]

C. The Verdict: Agency Varies in Scope, and Transaction-Specific Domination Is Sufficient in and of Itself for Targeted Attribution

The foregoing analysis calls into question the view of some courts that complete domination is always required to satisfy *Bancec*'s first prong. It also suggests that the reading of the Third and D.C. Circuits stands on firmer footing. At the same time, however, much of the authority surveyed in Part II.B is inconsistent with another aspect of the latter courts' interpretation: that transaction-specific control can never be enough by itself to justify attribution to a state.

One way to reconcile this authority with the Third and D.C. Circuits' position is that the latter courts were focused on express or overt agency, whereas the cases dealing with direction or compulsion have involved *implied* or *constructive* agency. That is, these cases suggest that if a parent compels an entity to engage in conduct, then the parent converts the entity into a de facto agent,

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258. Xavier Ruiz Calzado & Ana Castro, *Proving Cartels: The Commission Practice*, *in* 2 COMPETITION LAW OF THE EUROPEAN COMMUNITY § 7.04(5)(b) (Despoina Mantzari ed., 2023) (emphasis added) (summarizing the European Commission's standard for attribution between affiliates).

259. *See* Peter O'Loughlin, *Collusion Between Undertakings*, *in* 1 COMPETITION LAW OF THE EUROPEAN COMMUNITY § 2.02(f) (Despoina Mantzari ed., 2023) (contrasting two cases: one in which the Court of Justice for the European Union attributed the conduct of a 51 percent subsidiary to its parent because "the subsidiary had followed the policy decided by the parent" and another in which "a subsidiary company disobeyed instructions" and therefore the court fined only the subsidiary).

regardless of whether the two exchanged formal manifestations of consent.

Implied agency is certainly recognized in agency law.[260] As a leading business organizations textbook explains:

> [M]anifestation of consent may be written, oral, or implied from the parties' conduct.... Thus, if *P* asks *A* to complete a task pursuant to *P*'s instructions, and *A* does so, an agency relationship has been created even if *A* did not expressly communicate to *P* his agreement to perform the task.[261]

The same should hold true even if the principal has not expressly indicated that some act to be performed by an agent vis-à-vis a third party is to be performed "on behalf of" the principal, and instead simply instructs the agent to perform it. It is arguably implicit in such a situation that the conduct toward the third party is to be done *for* the principal, whether or not the principal will benefit from the action.[262]

Ultimately, however, it does not matter whether such a scenario qualifies as agency *stricto sensu*. It is a general principle of tort law that one is responsible for tortious acts of another person that one directs or authorizes, *whether or not the actor is one's agent*.[263] This concept is sometimes applied by courts when a parent has compelled

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260. RESTATEMENT (THIRD) OF AGENCY § 1.03 (AM. L. INST. 2006) ("A person manifests assent or intention through written or spoken words *or other conduct*." (emphasis added)); *see, e.g.*, RM Campbell Indus. v. Midwest Renewable Energy, LLC, 886 N.W.2d 240, 251-52 (Neb. 2016) ("An agency relationship may be implied from the words and conduct of the parties and the circumstances of the case evidencing an intention to create the relationship irrespective of the words or terminology used by the parties to characterize or describe their relationship.").

261. JONATHAN R. MACEY & DOUGLAS K. MOLL, THE LAW OF BUSINESS ORGANIZATIONS: CASES, MATERIALS, AND PROBLEMS 10 (14th ed. 2020).

262. An agent that has consented to follow a principal's instructions is acting "on behalf of" the principal regardless of whether the principal actually benefits. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. g (AM. L. INST. 2006) ("[A]ctions 'on behalf of' a principal do not necessarily entail that the principal will benefit as a result.").

263. *Id.* § 7.04 cmt. b ("Under general tort-law principles, a person who orders or induces an actor's tortious conduct is subject to liability for harm resulting to a third person ... [and] it is immaterial whether the relationship between the person and the actor is a relationship of agency as defined in § 1.01."); *see* RESTATEMENT (SECOND) OF TORTS § 877 (AM. L. INST. 1979) ("For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) orders or induces the conduct, if he knows or should know of circumstances that would make the conduct tortious if it were his own.").

a subsidiary to engage in wrongful conduct, without invoking agency as the basis for liability.[264]

It is certainly not necessary for purposes of *Bancec* that the relationship between a state and its controlled entity be labeled as one of agency for the latter's acts to be attributed to the state. Although the only bases for attribution mentioned in *Bancec* were "agency" and "fraud or injustice," the Court identified these as mere *examples* of when attribution may be appropriate.[265] Indeed, the Court confirmed as much when it later rephrased the *Bancec* framework in *Rubin*.[266]

For all of these reasons, if a state has directed or compelled a controlled entity to engage in conduct in a way that goes beyond the normal influence of a controlling shareholder, then the conduct should be attributed to the state. This is a conclusion that courts have repeatedly overlooked in cases like *Transamerica*, *EM Ltd.*, and *Doe*.[267]

The latter case illustrates just how significant this oversight can be to the outcome of a *Bancec* analysis. Had the Ninth Circuit recognized in *Doe* that direction or compulsion alone can justify attribution, then Doe would not have needed to show that the Holy See exercised "day-to-day" control over the U.S. church entities.[268] Nor would he have had to demonstrate that the Holy See asked these entities to act on its behalf in concealing abuse or reassigning

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264. *See, e.g.*, Forsythe v. Clark USA, Inc., 864 N.E.2d 227, 237 (Ill. 2007) ("If a parent company specifically directs an activity, where injury is foreseeable, that parent could be held liable. Similarly, if a parent company mandates an overall course of action and then authorizes the manner in which specific activities contributing to that course of action are undertaken, it can be liable for foreseeable injuries.").

265. *See* First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba (*Bancec*), 462 U.S. 611, 629 (1983) (quoting Taylor v. Standard Gas Co., 306 U.S. 307, 322 (1939)), *abrogated on other grounds* by 28 U.S.C. § 1610(g).

266. Rubin v. Islamic Republic of Iran, 583 U.S. 202, 210 (2018) (explaining that the *Bancec* Court recognized that state-owned entities are presumptively separate from the state, but "that liability would be warranted, *for example*, 'where a corporate entity is so extensively controlled by [the state] that a relationship of principal and agent is created,' or where recognizing the state and its agency or instrumentality as distinct entities 'would work fraud or injustice.'" (alteration in original) (emphasis added) (citation omitted) (quoting *Bancec*, 462 U.S. at 629-30)).

267. *See generally* Transamerica Leasing, Inc. v. La Republica de Venez., 200 F.3d 843 (D.C. Cir. 2000); EM Ltd. v. Banco Cent. de la República Arg., 800 F.3d 78, 91 (2d Cir. 2015); Doe v. Holy See, 557 F.3d 1066 (9th Cir. 2009).

268. *See Doe*, 557 F.3d at 1080.

offenders and that they agreed to do so.[269] He would simply have needed to show that the Holy See *directed or compelled* the alleged conduct and that conduct could have been imputed to the Holy See—full stop.

III. *BANCEC*'S SECOND PRONG: A FLEXIBLE TOOL FOR PREVENTING INJUSTICE

The case law involving *Bancec*'s "fraud or injustice" principle is not as chaotic as that involving its "agency" concept, but the second prong's exact parameters are still far from settled.

One point of uncertainty is whether the second prong implicitly contains its own extensive control requirement, similar to the one expressly mentioned in the first prong. While *Bancec* provides that an entity's separate status may be disregarded whenever recognizing it would "work fraud or injustice,"[270] some courts have held that the fraud or injustice must result from "complete" or "day-to-day control" by the state.[271]

Another controversy is whether courts should exclude from a second-prong analysis conduct committed in the state's capacity as a sovereign.[272] Some courts have read this restriction into *Bancec*'s second prong—a notion that Mark Weidemaier has described as making little sense.[273]

The discussion below engages both controversies. It concludes that—as with the first prong—some lower courts are construing the second prong more narrowly than the U.S. Supreme Court intended.

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269. *See id.* at 1091.

270. *Bancec*, 462 U.S. at 629 (quoting *Taylor*, 306 U.S. at 322).

271. *See infra* Part III.A.1.

272. *See infra* Part III.B.1.

273. Weidemaier, *supra* note 39, at 804 ("Some courts arguably have suggested that acts taken in the exercise of 'sovereign powers' should be disregarded for purposes of the veil piercing inquiry. What matters, these courts suggest, is whether the sovereign abuses its rights *as owner*. But it makes little sense to draw such a distinction.").

A. The Second Prong Does Not Require Any Particular Degree of Control, and Certainly Not "Complete" Control

This Part III.A summarizes the circuit split over whether the second prong requires extreme control, before arguing that it plainly does not.

1. Overview of the Case Law

Most courts have not required any particular degree of state control when applying *Bancec*'s second prong and have focused instead on whether the state "abused" or "manipulated" the entity in some inequitable way.[274] A minority of courts have done otherwise, however.

The Fifth Circuit is among them, as exhibited by *Janvey v. Libyan Investment Authority*.[275] In that case, the Fifth Circuit described *Bancec* as recognizing two "exceptions" to a state-owned entity's presumptive status as separate: where "the instrumentality is [*i*] the agent or [*ii*] alter ego of the foreign state."[276] As for what the second prong requires, the Fifth Circuit asserted that an entity may be treated as its owner's alter ego if "(1) the owner exercised complete control over the corporation with respect to the transaction at issue and (2) such control was used to commit a fraud or wrong that injured the party seeking to pierce the veil."[277] The Fifth Circuit thus interprets *Bancec*'s second prong as having two elements: "complete control" and "fraud or injustice."

Moreover, while the above-quoted language seems to suggest that the second prong's control analysis should focus on "the transaction at issue," the Fifth Circuit has not so limited itself when applying

274. *See, e.g.*, Transamerica Leasing, Inc. v. La Republica de Venez., 200 F.3d 843, 854 (D.C. Cir. 2000) (indicating that the second prong would be satisfied if the state had kept the entity "thinly capitalized from its inception" or had "use[d] the corporation to defeat any statutory policy," but not mentioning any control requirement); Doe v. Holy See, 557 F.3d 1066, 1080 (9th Cir. 2009) (indicating that the second prong would apply if the Holy See had "inappropriately used the separate status of the corporations to its own benefit" or "created the corporations for the purpose of evading liability for its own wrongs," but, again, mentioning no control requirement).

275. 840 F.3d 248, 264 (5th Cir. 2016).

276. *Id.* (quoting Dale v. Colagiovanni, 443 F.3d 425, 429 (5th Cir. 2006)).

277. Bridas S.A.P.I.C. v. Gov't of Turkm. (*Bridas I*), 345 F.3d 347, 359 (5th Cir. 2003); *see also Janvey*, 840 F.3d at 264 (quoting *Bridas I*, 345 F.3d at 359).

this prong.[278] For example, in *Bridas S.A.P.I.C. v. Government of Turkmenistan* ("*Bridas I*"), the Fifth Circuit called the district court to task for not examining *all* aspects of the state's relationship with its subsidiary when applying the second prong.[279] The Fifth Circuit commented as follows:

> Alter ego determinations are highly fact-based, and require considering the totality of the circumstances in which the instrumentality functions.... Because the district court failed to take into account *all of the aspects of the relationship* between the Government and [the state-owned enterprise] Turkmenneft, it committed an error of law and must reconsider the issue on remand.[280]

Thereafter, the district court endeavored to follow those instructions, ultimately concluding that "the Government did not 'exercise complete domination or extensive control' over Turkmenneft."[281] The Fifth Circuit treated this as error on subsequent appeal, but not because it felt the district court had wrongly focused on whether the state had exercised "complete domination."[282] Rather, the Fifth Circuit faulted the district court for once again failing to undertake a sufficiently expansive control analysis.[283]

Specifically, in *Bridas S.A.P.I.C. v. Government of Turkmenistan* ("*Bridas II*"), the Fifth Circuit asserted that the district court "did not consider 'all of the formalities required by corporation law, including keeping separate books and records and holding regular meetings of shareholders and of the board of directors.'"[284] In the Fifth Circuit's view, those additional factors established that Turkmenneft "lack[ed] an independent identity" from the state.[285] The court noted in particular that Turkmenneft did not maintain separate books and the state had kept it undercapitalized.[286] This

278. *See Bridas I*, 345 F.3d at 359.
279. *See id.* at 359-60.
280. *Id.* (emphasis added).
281. Bridas S.A.P.I.C. v. Gov't of Turkm. (*Bridas II*), 447 F.3d 411, 418 (5th Cir. 2006).
282. *Id.* at 418-20.
283. *Id.*
284. *Id.* at 419 (quoting United States v. Jon-T Chemicals, Inc., 768 F.2d 686, 693 (5th Cir. 1985)).
285. *Id.* at 420.
286. *Id.*

language confirms that the Fifth Circuit interpreted the "complete control" language in the so-called "alter ego" exception as requiring control so complete as to deprive the entity of an independent identity.

The Fourth Circuit likewise read an extreme control element into the second prong in *Flatow v. Alavi Foundation*.[287] The plaintiff in that case, Flatow, had previously obtained a judgment against Iran for its support of Palestine Islamic Jihad, which had carried out a suicide bombing that killed Flatow's daughter.[288] Flatow then brought an enforcement proceeding seeking to execute the judgment against assets of an entity known as the Alavi Foundation (the "Foundation"), which Flatow alleged was "a 'front' for the Iranian Government."[289]

The Fourth Circuit initially applied *Bancec*'s first prong, which the court interpreted as requiring "day-to-day control" by the state over the Foundation.[290] The Fourth Circuit found that Flatow had not demonstrated such pervasive control and moved on to the second prong.[291] The court began this part of its analysis by acknowledging the language in *Bancec* that an entity's presumption of separateness should not be honored if doing so would result in "fraud or injustice."[292] However, the Fourth Circuit asserted that it would be "an equal if not greater injustice" if the plaintiff could disregard the Foundation's separate status without establishing that Iran had day-to-day control over it.[293] Having already found in its application of the first prong that Flatow had not established day-to-day control, the court asserted that this necessarily meant that the second prong was not satisfied *either*.[294]

287. No. 99-2409, 2000 U.S. App. LEXIS 17753, at *20-21 (4th Cir. July 24, 2000).

288. Flatow v. Islamic Republic of Iran, 308 F.3d 1065, 1066-67 (9th Cir. 2002) (discussing Flatow's judgment and summarizing determinations that Palestine Islamic Jihad had committed the bombing and that the Islamic Republic of Iran had provided material support).

289. *Flatow*, 2000 U.S. App. LEXIS 17753, at *1-2.

290. *Id.* at *16-18.

291. *Id.* at *17-19.

292. *Id.* at *20-21.

293. *See id.*

294. *Id.* at *21.

2. A Complete Control Requirement Would Render the Second Prong Superfluous and Is Refuted by Bancec *Itself*

The notion that the second prong incorporates its own extensive control requirement is untenable, for several reasons.

Perhaps the strongest reason is that such a requirement would render the second prong superfluous. After all, if the plaintiff could establish that the state has exercised such a high level of control over the entity, then this would satisfy the *first* prong. The plaintiff would then have no need to make recourse to a second prong—and certainly not one requiring the same showing again *plus* fraud or injustice!

While this is justification enough to reject the readings by the Fourth and Fifth Circuits, there are others as well. Among these is the fact that the U.S. Supreme Court's own application of the second prong in *Bancec* is incompatible with these courts' interpretations.

Specifically, the Court rested its holding in *Bancec* entirely on the second prong, without finding that Cuba had exercised complete or day-to-day control over Bancec.[295] While the Court did note that Cuba had dissolved Bancec and briefly transferred Bancec's assets to the Ministry of Trade, the Court also acknowledged that the Ministry had soon transferred those assets on to a successor corporate entity and had sought to substitute that entity as the plaintiff.[296] What troubled the Court and justified its holding was not the degree of control that Cuba had exercised over its subsidiaries, but the inequitable nature of *what Cuba was seeking to achieve with them*. Namely, the Court objected to Cuba using these entities to pursue claims against Citibank and derive benefits from that company, without having to answer for Cuba's own violations of international law toward Citibank.[297]

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295. *See* First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba (*Bancec*), 462 U.S. 611, 630-33 (1983), *abrogated on other grounds by* 28 U.S.C. § 1610(g).

296. *Id.* at 615-19, 630-36 (summarizing the dissolution and transfers of assets as well as the attempted substitution of the successor corporation as plaintiff); *id.* at 632-33 (treating Cuba's dissolution of Bancec as inequitable because it made the state at least briefly a beneficiary of any potential recovery while allowing the state to avoid its own obligations to Citibank).

297. *See id.* at 633 ("To hold otherwise would permit governments to avoid the requirements of international law simply by creating juridical entities whenever the need arises.").

The Court also cited a number of international and domestic cases in *Bancec* in support of the "fraud or injustice" prong, none of which articulated any requirement of extreme control by the parent.[298]

One such case is *Barcelona Traction, Light & Power Co.*[299] In that case, the ICJ endorsed a veil-piercing theory predicated entirely on equitable considerations:

> The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations.[300]

The ICJ went on to conclude that this veil-piercing principle was equally applicable in international law, and at no point indicated that it required complete or day-to-day control by the parent.[301]

The other cases cited in *Bancec* in support of the second prong are no different. For example, in *Bangor Punta Operations, Inc. v. Bangor & Aroostook Railroad*, a parent sought to use a subsidiary to assert a claim that the parent itself was estopped from pursuing.[302] The Court found that such a maneuver would allow the parent to circumvent public policy, and so it treated the subsidiary as equally estopped from pursuing the claim.[303] The Court acknowledged that the parent *controlled* the subsidiary, but it did not find that the parent had ignored corporate formalities, overridden the subsidiary's decision-making apparatus, or exercised any other extreme form of control.[304] As in *Bancec*, what mattered was the inequitable result that would follow if the entity were treated as distinct from the parent—not the degree of control.[305]

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298. *See id.* at 628-32 (noting cases in support of the "fraud or injustice" prong).

299. (Belg. v. Spain), Judgment, 1970 I.C.J. 3 (Feb. 5).

300. *Id.* ¶ 56.

301. *See id.* ¶ 58.

302. 417 U.S. 703, 713 (1974).

303. *Id.* ("[W]here equity would preclude the shareholders from maintaining an action in their own right, the corporation would also be precluded.").

304. *Id.* at 705-07 (describing the relationship between the shareholder and the corporation).

305. *See id.* at 713.

B. A "Fraud or Injustice" Inquiry Should Take Into Account Any Inequitable Conduct Vis-à-Vis the Entity or Its Creditors—Including Sovereign Acts

As noted previously, although most courts have not required extreme control when applying the second prong, they do routinely assert that the state must have "abused" or "manipulated" the entity in some inequitable way.[306] Some courts phrase the concept more narrowly, asserting that the state must have abused or manipulated *the corporate form itself*.[307] Moreover, some go even further, extrapolating from this notion a significant limitation on the second prong: that the relevant abuse or manipulation must involve the state's relationship with the entity *as its owner*, rather than as a sovereign.[308] The effect of this reading is to take sovereign acts off the table in a "fraud or injustice" analysis, creating a significant loophole in the second prong.[309]

This Part III.B summarizes the case law on this issue before critiquing the relevant courts' reasoning.

1. Overview of the Case Law

The Fifth and Second Circuits have both adopted some version of this approach, as exhibited by three cases discussed below.

a. Bridas II

Bridas II arose from an investment by an Argentine company, Bridas, in a joint venture with a state-owned entity to develop

306. *See supra* note 274 and accompanying text.

307. *See, e.g.*, First Inv. Corp. of Marsh. Is. v. Fujian Mawei Shipbuilding, Ltd., 703 F.3d 742, 755 (5th Cir. 2012) ("First Investment must show how the PRC manipulated FSIGC's corporate form to perpetuate a fraud or injustice."); Gater Assets Ltd. v. AO Moldovagaz, 2 F.4th 42, 56 (2d Cir. 2021) (asserting that the second prong applies when the "sovereign has 'abused the corporate form' vis-à-vis the entity" (quoting EM Ltd. v. Banco Cent. de la República Arg., 800 F.3d 78, 95 (2d Cir. 2015))).

308. *See* Bridas S.A.P.I.C. v. Gov't of Turkm. (*Bridas II*), 447 F.3d 411, 417 (5th Cir. 2006) (holding that a state's imposition of an export ban through its sovereign powers may have constituted a wrong to plaintiff but "was not a wrong based on misuse of the corporate organizational form").

309. *See infra* Part III.B.2.

hydrocarbons in Turkmenistan.[310] Turkmenistan created the state-owned entity and also guaranteed Bridas "an unlimited export license for hydrocarbons" in connection with the project.[311] Even so, once the project was operational, Turkmenistan reversed course and issued an export ban to pressure Bridas into giving the state a larger share of proceeds from the project.[312] The state also substituted the original state-owned entity with an undercapitalized successor called Turkmenneft.[313]

Bridas did not give in to the state's demands.[314] Instead, the company sought and obtained an arbitral award against both Turkmenneft and Turkmenistan, and then it sought to enforce the award in the United States.[315] Bridas argued that even though Turkmenistan was not formally a party to the joint venture agreement, the court should disregard Turkmenneft's separate status under *Bancec* and treat the state itself as a party.[316] The district court agreed, finding that the conduct by Turkmenistan described above amounted to "fraud or injustice."[317]

On appeal, the Fifth Circuit criticized the district court for relying on the export ban as part of its analysis under *Bancec*'s second prong:

> In this case, the act of injustice on which the district court focused was the Government's 1995 export ban, which was accomplished through "the Government's exercise of sovereign control of Turkmenistan's borders, not through governmental control of Turkmenneft." *The Government's exercise of its sovereign powers may have constituted a wrong to Bridas, but it was*

310. 447 F.3d at 414.

311. *Id.* at 414-15 (describing the investment, Turkmenistan's role in establishing the joint venture, and the language in the joint venture agreement guaranteeing unlimited exports).

312. *Id.* at 415 ("The Government insisted, among other things, on raising its share of future proceeds. To force Bridas's submission, the Government ordered Bridas in November 1995 to halt operations in Keimir and cease making imports into and exports from Turkmenistan.").

313. *Id.* at 420 ("[W]hen the Government created Turkmenneft as the Turkmenian Party's successor, Turkmenneft was grossly undercapitalized with the equivalent of $17,000 U.S., a paltry sum to finance oil and gas exploration and production.").

314. *Id.* at 415.

315. *Id.*

316. *See id.* at 414-15.

317. *Id.* at 416-17.

> *not a wrong based on misuse of the corporate organizational form*.[318]

The Fifth Circuit went on to find *Bancec*'s second prong satisfied anyway, but it did so without relying on any sovereign conduct.[319] Namely, the Fifth Circuit determined that the state's acts of dissolving Bridas's original contractual counterparty and replacing it with undercapitalized Turkmenneft constituted a fraud or injustice.[320] The Fifth Circuit seems to have understood that *this* conduct could qualify as an abuse of the corporate form because the state had committed it in its capacity as an owner, rather than as a sovereign.[321]

b. First Investment

The Fifth Circuit subsequently employed similar reasoning in *First Investment Corp. of Marshall Islands v. Fujian Mawei Shipbuilding, Ltd.*[322] That case arose from a contract between the plaintiff, First Investment, and two Chinese state-owned shipbuilders (the "Fujian Entities"), providing for the latter to build various vessels.[323] First Investment alleged that the Fujian Entities breached the contract by failing to provide all the vessels required, and initiated arbitration against them before the London Maritime Arbitration Association (LMAA).[324] After the close of the proceedings, the three-member arbitral tribunal was on the verge of rendering an award against the Fujian Entities.[325] However, their owner—the People's Republic of China (PRC)—arrested and

318. *Id.* at 417 (emphasis added).

319. *Id.*

320. *See id.* at 415 (describing the substitution of Turkmenneft as Bridas's counterparty); *id.* at 417 ("The Government's manipulation of Turkmenneft to prevent Bridas from recovering any substantial damage award satisfies the 'fraud or injustice' prong." (quoting Patin v. Thoroughbred Power Boats, Inc., 294 F.3d 640, 648-49 (5th Cir. 2002))).

321. *See id.*; *see also* Weidemaier, *supra* note 39, at 843 ("*Bridas II* arguably implies ... that the creditor must point to a specific misuse of the government's power *as owner*." (emphasis added)).

322. 703 F.3d 742, 752-55 (5th Cir. 2012).

323. First Inv. Corp. of Marsh. Is. v. Fujian Mawei Shipbuilding, Ltd. of China, 858 F. Supp. 2d 658, 664 (E.D. La. 2012).

324. *Id.*

325. *Id.* at 664-65.

imprisoned one of the arbitrators, Chinese national Wang Shengchang.[326]

Many in the international arbitration community decried Wang's arrest, perceiving it as retaliation against him for having ruled against Chinese state-owned entities in two other arbitration cases.[327] Yet whatever the motivation for the arrest, a practical consequence of it was that the other arbitrators had to issue the award without Wang's signature.[328] The tribunal's chairman explained that Wang had provided his comments on a draft award and had indicated that "he would agree to a final award by email," but had been prevented from doing so by his arrest.[329]

First Investment sought to have the award recognized in China, but the PRC allegedly thwarted that effort in several ways.[330] First, the PRC instructed its diplomatic officials in Athens to refuse to certify certain documents necessary for a recognition proceeding in China.[331] Second, after Greek officials interceded and Chinese embassy officials finally certified the necessary documents, a PRC court refused to recognize the award.[332] The court did so based on its assertion that Wang had not "fully participate[d] in the arbitration" because he had not reviewed the final award.[333] The PRC court seems to have ignored the fact that Wang was sitting in a Chinese jail and seemingly could have reviewed and signed the final

326. *Id.*

327. *See* Wu Ming, *The Strange Case of Wang Shengchang*, 24 J. INT'L ARB. 63, 66-67 (2007) (discussing a widely held belief that PRC authorities arrested Wang because he had ruled against a Chinese state-owned entity in two separate arbitrations); Freshfield Bruckhaus Deringer LLP, *Ex-Secretary-General of CIETAC Released*, Westlaw Practical Law 2-500-6623 (Nov. 5, 2009) ("[T]he arrest of Dr Wang caused significant concern among the international arbitration community.... There was also speculation that Dr Wang's arrest was the result of his role as an arbitrator in two Stockholm arbitrations where he had found in favour of the foreign party."). At the time it was likely not widely known that Wang's arrest also had the convenient result of preventing him from reviewing and signing the final arbitration award against the Fujian Entities. Had that fact been known, media reports might have identified *that* as a possible factor in the arrest as well.

328. *See* First Inv. Corp. of Marsh. Is. v. Fujian Mawei Shipbuilding, Ltd., 703 F.3d 742, 745 (5th Cir. 2012).

329. *Id.*

330. *Id.* at 745-46.

331. *Id.*

332. *Id.* at 746.

333. *Id.*

document if allowed to do so.[334] The court was also unmoved by the fact that only two members of the tribunal needed to approve the award under the LMAA's arbitration rules.[335]

Having been blocked from enforcing the award in the Fujian Entities' home nation, First Investment sought to have the award recognized in the United States.[336] It did so even though it had not been able to identify any assets or activities of the Fujian Entities in this country.[337] Presumably First Investment hoped it would *eventually* identify some assets in the United States. Moreover, it could not wait any longer to initiate the proceedings because it was facing a three-year deadline to apply for recognition of the award.[338]

The absence of known assets or activities meant that First Investment could not establish a basis for personal jurisdiction in the forum over the Fujian Entities.[339] Nevertheless, First Investment would not have been required to do so if it could establish a basis to disregard the Fujian Entities' status as separate from their parent state under *Bancec*.[340] This is because a number of courts have found that states are not "persons" for purposes of the Due Process Clause and thus cannot contest personal jurisdiction.[341]

The Fifth Circuit rejected First Investment's arguments under *Bancec*.[342] According to the court of appeals, there was no evidence that the PRC had completely dominated the Fujian Entities.[343] The court also found no evidence that the PRC had used these entities'

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334. *See id.* at 745.

335. First Inv. Corp. of Marsh. Is. v. Fujian Mawei Shipbuilding, Ltd. of China, 858 F. Supp. 2d 658, 666 (E.D. La. 2012) (quoting the relevant language of the LMAA's rules).

336. *First Inv. Corp. of Marsh. Is.*, 703 F.3d at 745-46.

337. *First Inv. Corp. of Marsh. Is.*, 858 F. Supp. 2d at 672.

338. *See* 9 U.S.C. § 207 (establishing a three-year deadline on petitions for recognition); *First Inv. Corp. of Marsh. Is.*, 858 F. Supp. 2d at 665, 667 (discussing that the award was made on June 19, 2006, and First Investment filed its action in the United States on May 27, 2009).

339. *First Inv. Corp. of Marsh. Is.*, 858 F. Supp. 2d at 672.

340. *First Inv. Corp. of Marsh. Is.*, 703 F.3d at 752 ("[I]f First Investment successfully establishes that either of the Fujian Entities were alter egos of the PRC then it would be improper for the district court to dismiss that party for lack of personal jurisdiction.").

341. *Id.* (first citing Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 96-97 (D.C. Cir. 2002); then citing Frontera Res. Azer. Corp. v. State Oil Co. of Azer. Republic, 582 F.3d 393, 399 (2d Cir. 2009)).

342. *See id.* at 753.

343. *See id.* at 754.

corporate form for an improper purpose, such as to do something the PRC would not otherwise have been able to do.[344]

When applying the fraud or injustice concept, the Fifth Circuit dismissed out of hand First Investment's attempt to rely on conduct committed by the PRC in its capacity as a sovereign: "Although the PRC may have delayed initiation of the confirmation proceeding, First Investment ultimately did bring such an action in China. Moreover, the Chinese court provided a reasoned opinion that denied enforcement on the ground that the panel's third arbitrator did not approve the final draft."[345]

The court ended its analysis there. It thus declined to scrutinize the PRC ruling to verify that it had a good faith basis and was not simply a cynical excuse to protect two state-owned entities from collection.

c. Pemex

The Second Circuit likewise exempted sovereign conduct from its fraud or injustice analysis in another case involving an arbitral award: *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. (COMMISA) v. Pemex-Exploración y Producción* (*Pemex*).[346] The plaintiff in that case, COMMISA, had contracted with a Mexican state-owned oil company, Pemex, to build oil platforms in the Gulf of Mexico.[347] The contract referred any disputes relating to the agreement to International Chamber of Commerce (ICC) arbitration in Mexico City.[348] When a dispute arose between the parties, COMMISA initiated an ICC arbitration and ultimately obtained an award against Pemex.[349]

However, during the pendency of the arbitration, the Mexican Congress enacted legislation known as "Section 98," which purported to retroactively prohibit state-owned entities like Pemex from arbitrating.[350] The arbitral tribunal nevertheless ruled in

344. *Id.* at 755.
345. *Id.*
346. 832 F.3d 92, 104 (2d Cir. 2016).
347. *Id.* at 97.
348. *Id.* at 97-98.
349. *Id.* at 97.
350. *Id.* at 99.

COMMISA's favor, although a Mexican court subsequently relied on Section 98 to issue a judgment annulling the arbitral award.[351]

COMMISA sought to enforce the award in New York despite Section 98 and the Mexican judgment.[352] Pemex disputed the U.S. court's personal jurisdiction, which made *Bancec* relevant.[353] As in *First Investment*, if a basis existed under *Bancec* to disregard Pemex's status as separate from its parent state, then Pemex would be unable to raise any due process objections in the case.[354]

The Second Circuit ruled that there was such a basis, relying on *Bancec*'s second prong.[355] However, the court conspicuously declined to rely on Mexico's enactment of Section 98 as part of the analysis. Instead, the Second Circuit advanced the novel proposition that Pemex had abused its *own* corporate form.[356]

The Second Circuit noted in particular that Pemex had argued in the proceedings that the Mexican legislation treated Pemex differently from private companies because of Pemex's role in protecting state-owned oil resources.[357] The court suggested that this argument implied that Pemex was "functionally the Mexican government,"[358] and that it would be unjust for Pemex to assert simultaneously that it was separate from the government for purposes of personal jurisdiction.[359]

This argument is questionable, because the mere fact that a state-owned entity has responsibility to exploit and protect state-owned resources does not mean that it is one and the same with the state. Nevertheless, the Second Circuit *had* to employ this reasoning if it wished to avoid resting its holding on the more obvious injustice: Mexico's use of its sovereign powers to protect its wholly owned subsidiary from liability.

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351. *Id.*

352. *Id.* at 100.

353. *See id.* at 100-03.

354. *Id.* at 102-04.

355. *See id.* at 103-04.

356. *Id.* at 104 ("[M]anipulation of the corporate form 'to perpetrate a fraud or injustice' warrants overcoming the presumption of separateness." (citing First Inv. Corp. of Marsh. Is. v. Fujian Mawei Shipbuilding, Ltd., 703 F.3d 742, 755 (5th Cir. 2012))); *id.* (holding that it would work such an injustice to "allow [Pemex] to characterize its status vis a vís the Mexican government in whatever way is advantageous to its several arguments").

357. *See id.* at 103 n.7.

358. *Id.* at 103.

359. *Id.* at 104.

To be clear, the Second Circuit did not suggest that there was anything preventing it from impugning Mexico's sovereign conduct as a general matter. To the contrary, elsewhere in the opinion the court declined to recognize the Mexican judgment that nullified the ICC award and characterized it as contrary to "fundamental notions of what is decent and just" because it retroactively canceled vested rights.[360] Accordingly, the Second Circuit's reluctance to rest its *Bancec* analysis on the Mexican legislation must have stemmed from something else: the notion that a sovereign act cannot be an "[abuse] of the corporate form."[361]

2. Excluding Sovereign Acts from the Analysis Contravenes Bancec *and Creates a Gaping Loophole*

The reasoning employed in the above cases warrants rethinking. In fact, even the basic notion that the relevant fraud or injustice must result from an abuse of the corporate form deserves scrutiny. After all, *Bancec* itself does not refer to any such requirement and instead phrases the second prong as applying whenever recognizing the entity's separate status "would work fraud or injustice."[362]

Yet even if it were implicit that the second prong requires some abuse of the corporate form, it does not follow that the abuse must result from acts taken by the state *as owner*. Any such notion is belied by a case discussed in *Bancec* that involved conduct committed by a shareholder in his capacity as a *contractual counterparty*—not as an owner. Specifically, in *Pepper v. Litton*, a shareholder named Litton brought suit against a financially distressed corporation he controlled to enforce an alleged contractual right of Litton to unpaid salary.[363] Litton then used the resulting judgment to execute against the corporation's assets before another creditor, Pepper,

360. *See id.* at 97 (holding that giving effect to the Mexican judgment would run counter to U.S. public policy and would be "repugnant to fundamental notions of what is decent and just"); *id.* at 108 (explaining that the reason for the repugnancy was that Section 98 was "[r]etroactive legislation that cancels existing contract rights").

361. *See* Bridas S.A.P.I.C. v. Gov't of Turkm. (*Bridas II*), 447 F.3d 411, 417 (5th Cir. 2006).

362. First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba (*Bancec*), 462 U.S. 611, 629 (1983) (first quoting Taylor v. Standard Gas Co., 306 U.S. 307, 322 (1939); and then citing Pepper v. Litton, 308 U.S. 295, 310 (1939), *abrogated on other grounds by* 28 U.S.C. § 1610(g)).

363. 308 U.S. at 296-97.

could enforce *his* claims against the company.[364] The U.S. Supreme Court found that Litton's act of enforcing his contractual rights in this manner was fraudulent toward Pepper.[365] It also found that the inequitable nature of the scheme would justify subordinating Litton's claims and recovering the amounts he had previously collected.[366]

Similar facts were presented in a German proceeding known as the *Tivoli Theatre* case, as summarized in a law review article cited in *Bancec*.[367] The shareholder in that case terminated a lease agreement he had entered into with a controlled corporation, taking away the company's only source of revenue and denying recovery to a creditor.[368] As in *Pepper*, the court found that the owner had committed a fraud or injustice against the corporation's creditor by enforcing his contractual rights in an inequitable way.[369] The court therefore treated the shareholder as liable for the corporation's debt to the creditor.[370]

Neither of the above holdings would have been tenable if the court had been limited to considering acts taken by the shareholder *as owner*. Moreover, the courts' reasoning would have been just as apt if the owners had been states and had used their sovereign powers (rather than their contractual rights) to thwart their subsidiaries' creditors.

There is certainly nothing in *Bancec* that places sovereign acts out of bounds in a fraud or injustice analysis. Far from it, in *Bancec* itself, Cuba had used its sovereign powers to transfer assets from Bancec to other entities,[371] and the Court treated those transfers as

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364. *Id.* at 297-98.

365. *Id.* at 311-12.

366. *Id.*

367. *See Bancec*, 462 U.S. at 628 n.20 (citing E.J. Cohn & C. Simitis, *"Lifting the Veil" in the Company Laws of the European Continent*, 12 INT'L & COMP. L.Q. 189 (1963)).

368. *See* Cohn & Simitis, *supra* note 367, at 194-95.

369. *See id.* at 194 (explaining that in the *Tivoli Theatre* case the court found that the shareholder had abused "the liberty to contract and to form corporations").

370. *Id.* at 195 (noting that the court allowed the creditor's judgment against the corporation "to be enforced against the shareholder's personal property").

371. *See Bancec*, 462 U.S. at 635 n.1 (Stevens, J., dissenting) (quoting the law enacted by Cuba which transferred the relevant assets from Bancec to other entities). This makes clear that Cuba did not use its shareholder rights to accomplish the transfer; it enacted a law to do so.

evidence that Cuba was manipulating Bancec to achieve an unjust result.[372]

Taking sovereign acts into account like this makes perfect sense, because a contrary approach creates a gaping loophole in the second prong. If sovereign acts are exempt from scrutiny, then a state that wished to insulate a subsidiary from liability need only cloak its actions in the mantle of sovereignty. For example, instead of thwarting a subsidiary's creditors by exercising contractual rights or declaring dividends until the entity is insolvent, a state could simply seize the entity's assets by fiat.[373] Better yet, the state could pass legislation declaring the entity's obligations void, so as to prevent creditors from enforcing the obligations in the first place.[374] Or, if a creditor did somehow secure a judgment or arbitral award in its favor, the state's courts could refuse to enforce the ruling on a pretext. The state might even have the creditor's representatives thrown into prison if they continued pressing the claims. In short, if sovereign acts were exempt from a fraud or injustice analysis, then the state's options for shielding entities from liability would be limited only by the extent of its control over its own agencies and courts.

CONCLUSION

In *Bancec*, the U.S. Supreme Court placed limits on states' ability to evade liability by acting through corporate entities. To be sure, the Court also established a presumption that state-controlled entities are separate from their parent states, and courts should scrupulously respect that presumption. Yet courts should also take

372. *Id.* at 632-33.

373. *Cf.* Weidemaier, *supra* note 39, at 804-05 ("There is no meaningful difference between, say, a dividend payment that leaves a state-owned corporation insolvent and a confiscatory tax (or mandatory contribution to social programs) that produces the same result.").

374. Although the Second Circuit ruled in favor of a creditor under similar facts in *Pemex*, the court's failure to rest its holding on the state's sovereign acts would make it easy to avoid such an outcome in future cases. The state-owned party could simply refrain from making contradictory claims in the litigation about its relationship with its parent state: the basis for the "fraud or injustice" finding in that case. *See* Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción, 832 F.3d 92, 104 (2d Cir. 2016).

care not to be *overly* protective of sovereigns by reading the *Bancec* principles too narrowly.

This Article has made the case that lower courts are doing just that, in a variety of ways. As a result, these courts are not only placing obstacles in plaintiffs' paths that the Supreme Court never intended, but also undermining a careful balance that the Court struck in *Bancec*. Namely, the Court recognized in that case that states may have legitimate reasons for acting through corporate entities, and weighed those against harms that could result if states were free to manipulate entities at will. The *Bancec* framework was the Court's attempt to balance those considerations.

When lower courts upset this equilibrium by inadvertently placing their thumbs on the sovereign's side of the scale, the plaintiff and the broader society alike may pay a price. For example, if the victim of an egregious tort never has his day in court against a state whose policies allegedly placed him in harm's way, then the plaintiff is not the only one who loses. The state's dismissal from the case also relieves pressure on the state to reform its policies, which may continue to pose similar risks to the broader community.

In other contexts, the societal cost might not be quite so stark, but it is no less real. A sovereign might have been accused of "merely" breaching a contract or violating a treaty, and the plaintiff might be a well-heeled corporation that does not seem particularly sympathetic. Even then, however, something serious is at stake: the ability of creditors or investors to trust that U.S. courts will hold sovereigns to their bargains within the bounds of the law. Without such trust, businesses are less likely to extend credit to sovereigns or to invest abroad, which may inhibit development in states that are perceived as high risk.

The bargains whose enforceability is so critical to greasing the wheels of international commerce include more than whatever deals are reflected in business contracts and treaties. Another is an implied bargain that this Article submits underlies the *Bancec* framework. In essence that bargain is as follows. If a state wishes an entity to be treated as separate, then the state itself must treat the entity as separate and not exercise excessive control over it in specific transactions or more broadly. The state must also not employ the entity for any inequitable purpose, or use unjust means to insulate the entity from liability. If the state does either, then it

forfeits the right to expect other countries' courts to treat the entity as acting on its own account, or even as separate at all.