Tepe Insaat Sanayii as v Boru Hatlari Ile Petrol Tasima as (also known as Botas Petroleum Pipeline Corporation)

Jurisdiction:	Jersey
Judge:	Sir Michael Birt, Jurats Nicolle, Kerley, Birt
Judgment Date:	19 January 2016
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Text

[2016] JRC 12A

ROYAL COURT

(Samedi)

Before:

Sir Michael Birt, **Commissioner, and** Jurats Nicolle **and** Kerley

Tepe Insaat Sanayii AS
Representor
and
Boru Hatlari Ile Petrol Tasima AS (also known as Botas Petroleum Pipeline Corporation)
First Respondent
Turkish Petroleum International Company Limited
Second Respondent
Botas International Limited

Third Respondent
Nacap BV
Party cited

Advocate EE. Moran, **for the Representor**.

Advocate P. G. Nicholls **for the Respondents**.

Authorities

Arbitration (Jersey) Law 1998.

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State Immunity Act 1978 of the United Kingdom.

State Immunity (Jersey) Order 1985.

United Arab Emirates v Abdel Ghafar [1995] ICR 65.

Kensington International Limited v Republic of Congo [2003] EWHC 2331.

Compania Naviera Vascongado v SS Cristina [1938] AC 485.

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Rahmatullah v Ministry of Defence [2014] EWHC 3846 (QB).

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FG Hemisphere -v- DR Congo [2011] JLR 486.

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New York Life Insurance Co -v- Public Trustee [1924] 2 Ch. 101.

Kwok Chi Leung Karl -v- Estate Duty Commissioners [1988] 1 WLR 1035.

Mobile Telesystems Finance SA -v- Nomihold Securities Inc. [2011] EWCA Civ 1040.

Goldtron Limited -v- Most Investment Limited [2002] JLR 424.

Fraser v Oystertec Plc [2004] EWHC 1582 (Ch).

Hale -v- Victoria Plumbing Limited [1966] 2 QB 746.

Masri v Consolidated Contractors International (UK) Limited (No. 2) [2009] QB 450.

Companies — representations requiring the Court to consider various matters and certain aspects of the principle of sovereign immunity.

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THE COMMISSIONER:

Introduction

1 The Representor (“Tepe”) has the benefit of certain arbitration awards in its favour against the First Respondent (“Botas”). By two Representations it seeks leave under Article 42(1) of the Arbitration (Jersey) Law 1998 (“the Arbitration Law”) to enforce those awards in Jersey

against certain assets of Botas including the shares held by Botas in the Second Respondent ("TPIC") and the Third Respondent ("BIL"), as well as certain debts owned by TPIC and BIL to Botas. TPIC and BIL are both companies incorporated in Jersey.

2 The Representations require the Court to consider, amongst other matters, certain aspects of the principle of sovereign immunity.

The background to the awards

3 Tepe is a construction company incorporated and carrying on business in Turkey. It is part of the Bilkent Holding Group. The Bilkent group of companies was established for the purpose of raising funds to endow Bilkent University.

4 Botas is also a Turkish company. It was constituted by charter. It is wholly owned by the State of Turkey ("the Republic"). Its principal activity is the transportation of crude oil and natural gas by pipeline in Turkey.

5 The Baku-Tbilisi-Ceyhan ("BTC") pipeline transports crude oil from oilfields in Azerbaijan through Georgia and Turkey to the Ceyhan terminal on the Turkish coast. The pipeline was constructed by a consortium of companies led by BP and known as the Main Export Pipeline ("MEP") participants. The MEP participants in turn contracted with Botas for Botas to be the main contractor for the construction of the Turkish section of the BTC pipeline. Botas in due course sub-contracted certain elements of the work. Two of these sub-contracts are relevant for present purposes.

6 By a contract dated 20 th September, 2002, Botas engaged Tepe to carry out engineering and constructional works for four pumping stations and an intermediate pigging station forming part of the BTC pipeline ("the Stations Contract").

7 On the same date Botas entered into a contract with an unincorporated joint venture ("TPN") between Tepe and a Dutch company Nacap Nederland BV ("Nacap") whereby TPN agreed to carry out engineering and construction works for a section of the BTC pipeline in Turkey (the "Lot A Contract").

8 Both contracts were governed by English law and contained provisions for disputes to be referred to arbitration. The arbitration clauses provided that the rules of English law should be applied to the merits of any dispute, the place of the arbitration should be Paris and the language of the arbitration would be English. The arbitration was to be carried out under the rules of the International Chamber of Commerce ("ICC").

9 Botas terminated the Stations Contract in March 2005 prior to completion of the works. A

dispute arose between the parties as to whether Botas was entitled to terminate the contract (amongst other matters). These disputes were in due course referred to arbitration ("the Stations Arbitration"). The arbitration panel for the Stations Arbitration consisted of Dr Mark Blessing (on the nomination of Tepe), Mr (later Mr Justice) Robert Akenhead (upon the nomination of Botas) and Mr Eric Schwartz (upon the joint nomination of the parties) as chairman. Both Tepe and Botas were represented by leading firms of English solicitors together with leading English counsel.

10 The Stations Arbitration involved three phases (liability, quantum and costs) and resulted in three awards ("the Stations Awards"):-

The overall outcome was that the arbitration panel awarded Tepe sums totalling US$52.5m plus compound interest on such damages, ordered the return of the Stations Securities and payment of commissions accruing until the return of the Stations Securities to Tepe and dismissed all the counterclaims of Botas.

(i) A first partial award on 5 th June, 2009, dealing principally with liability as well as awarding Tepe the return of retention and milestone bonds which it had provided (the "Stations Securities").

(ii) A second partial award on 31 st January, 2011, dealing principally with quantum and interest.

(iii) A third and final award made on 26 th August, 2011, dealing with costs.

11 Botas appealed against the first partial award to the Cour d'Appel in Paris. That court rejected Botas' appeal. Botas further appealed to the Cour de Cassation but that appeal was dismissed on 19 th December, 2012.

12 Botas also appealed against the second partial award to the Cour d'Appel but this was dismissed on 13 th November, 2012. Botas did not appeal this decision further. Finally, Botas also lodged an appeal to the Cour d'Appel against the final award, but later discontinued that appeal.

13 As at the date of the Representation to this Court in December 2014 the total amount due under the Stations Awards was US$64,732,608 together with an order for the return of the Stations Securities, which had an aggregate value of US$5,604,664.

14 In January 2005 Botas also terminated the Lot A Contract prior to completion of the work. Again, a dispute arose between the parties as to whether Botas was entitled to terminate the contract. This dispute was also referred to arbitration ("the Lot A Arbitration"). The panel for the Lot A Arbitration consisted of John Blackburn QC (nominated by TPN), Stephen Furst QC (nominated by Botas) and the chairman Derek Wood QC (jointly nominated by the

parties). Both parties were represented by English solicitors and by leading English counsel.

15 The Lot A Arbitration also had three phases (liability, quantum and costs) resulting in three awards ("the Lot A Awards"):-

(i) A first partial award on 18 th October, 2010, dealing principally with liability.

(ii) A second partial award dated 11 th October, 2012, dealing principally with quantum and interest as well as the return of the performance securities, retention bonds and milestone guarantee letters (the "Lot A Securities").

(iii) A third and final award made on 21 st May, 2013, dealing principally with issues of interest and costs.

16 Botas appealed the first partial award to the Paris Cour d'Appel but did not proceed with it and the appeal was struck out on 28 th April, 2011. Botas did not appeal the second partial award or the final award.

17 At the date of the Representation in December 2014 in respect of the Lot A Arbitration, the total amount due under the Lot A Awards was US$27,818,670. In addition, Botas was obliged to return the Lot A Securities, which had an aggregate value of US$15,930,519.

18 In July 2014 Nacap and TPN assigned to Tepe all their rights under the Lot A Contract and the Lot A Awards. In these proceedings, Botas originally challenged the validity of that assignment but, following the decision of the Court to allow Nacap to be joined as a party cited, that issue has disappeared. Accordingly, for convenience, we shall hereafter simply refer to Tepe and not distinguish between it and TPN (unless the context requires us to do so).

These proceedings

19 Botas has not paid the amounts due under the Stations Awards or the Lot A Awards (together "the Awards") nor has it returned to Tepe the Station Securities or the Lot A Securities. Accordingly, on 17 th November, 2014, Tepe presented two Representations seeking to enforce the Awards in Jersey pursuant to the provisions of the Arbitration Law. It also sought and was granted ex parte an interim *arrêt* in respect of Botas' shares in TPIC (those shares constituting an asset situated in Jersey) and any amounts which TPIC owed to Botas. That interim *arrêt* was subsequently extended on 8 th December, 2014, to cover Botas' shares in and any amounts owed to it by BIL.

20 Botas has filed pleadings disputing Tepe's entitlement to enforce the Awards before this

Court. It seems to us that this is on three broad grounds:-

(A) The Court has no jurisdiction to make any order in respect of the shares in TPIC and BIL ("the Shares") because the Republic has an interest in and/or control of the Shares such as to engage the principle of sovereign immunity.

(B) The Court has no jurisdiction – or if it has, it should not exercise it – in respect of the debts owed by TPIC and BIL to Botas.

(C) The Court has no jurisdiction – or if it has, it should not exercise it – in respect of the Stations Securities and the Lot A Securities ("the Securities").

Botas therefore contends that the Representations should be dismissed and the interim *arrêt* lifted. Tepe, on the other hand, seeks leave to enforce the Awards and confirmation of the interim *arrêt*.

Criticisms of the arbitration

(i) The applicable principles

21 Before we turn to consider these three issues, we should address a submission raised by Advocate Nicholls in his skeleton argument (based in turn on the witness statement of Mr Serkan Genel, chief legal adviser of Botas) as to why, regardless of the above three issues, the Court should not recognise and enforce the Awards. This is based upon alleged defects in the fairness of the procedure followed by each arbitration panel. Advocate Nicholls did not develop this submission orally and simply referred the Court to what was said in his skeleton.

22 Advocate Moran submitted that this argument was not raised in the pleadings and was accordingly not open to Botas. We agree that it was not pleaded. Advocate Nicholls suggested that it was raised because of the terms of paragraph 1 of the amended answer to each Representation which was in identical terms as follows:-

> *"1. The Respondents submit that the Representor should be refused leave to enforce the [Lot A Arbitration Award] [Stations Arbitration Award] as a judgment in Jersey and to execute it against the Shares on the basis that it would be contrary to the New York Convention and that the arrêt entre mains should be discharged for the reasons set out below." (emphasis added)*

23 We do not accept Advocate Nicholls' submission. This introductory paragraph of the amended answers simply refers to the 'reasons set out below' as being grounds for not enforcing the Awards and nowhere in the remainder of either answer is there reference to any alleged unfair procedure followed by the arbitration panels. Accordingly, we agree with Advocate Moran that this point is not open to Botas.

24 Nevertheless, for the sake of completeness and because it was raised in Botas' skeleton argument and addressed by Advocate Moran, we propose to deal with it in order to explain why we consider there is nothing in the arguments raised by Botas on this topic.

25 France is a signatory to the Convention on the Execution of Foreign Arbitral Awards ("the New York Convention"). The Awards are therefore each a "Convention award" for the purposes of the Arbitration Law. Part 4 of the Arbitration Law deals with the enforcement of Convention awards and provides in effect that, with the leave of the Court, these may be enforced in the same manner as a judgment of the Royal Court. Article 44 provides (so far as relevant) as follows:-

> ***"44 Refusal of enforcement***
>
> ***(1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this Article.***
>
> ***(2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves –***
>
> ***…***
>
> ***(b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;***
>
> ***(c) that the person was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present the person's case;***
>
> ***(d) subject to paragraph (4), that the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration;***
>
> ***…***
>
> ***(3) Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.***
>
> **…" [emphasis added]**

26 The general approach to the enforcement of arbitration awards under the New York Convention was authoritively summarised in the recent Privy Council case of *Cukurova Holdings AS v Sonera Holding BV* [2014] UKPC 15, an appeal from the British Virgin Islands where the relevant statute is in similar terms to the 1998 Law. On behalf of the Privy Council, Lord Clarke said as follows:-

"4. It is important to note the narrow grounds upon which the court can refuse to enforce an award made under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, known as the New York Convention. … In particular the court cannot refuse to enforce an award on the ground of error of law or fact.

…

Issues (2) and (3): Was Cukurova able to present its case? Public Policy

30. It is convenient to consider these issues together. Cukurova's case is that enforcement ought to have been refused because the Tribunal violated the rules of natural justice. It says that it was not able to present its case within the meaning of section 36(2)(c) and/or that it would be contrary to public policy to enforce the award under section 36(3) of the Arbitration Ordinance. It takes two points. First, the Tribunal decided the key issue in the dispute (namely, whether the parties had agreed the terms of the SPA) on a basis that had never been put to Cukurova and that Cukurova never had an opportunity to address. Secondly, the Tribunal ignored (and failed to give any reasons for rejecting) Cukurova's evidence and submissions on a key point in relation to the quantification of Sonera's alleged loss. This resulted in a massive increase in the damages awarded against Cukurova.

Section 36(2)(c) and 36(3)

31. Section 36(2)(c) is in the same terms as section 103(2)(c) of the Arbitration Act 1996 in England. They reflect Article V(1)(b) of the New York Convention . *In Minmetals Germany GmbH v Ferco Steel Ltd* [1999] CLC 647, 658 ***Colman J said that the subsection contemplates that the enforcee has been prevented from presenting his case by matters outside his control, which will normally cover the case where the procedure adopted has been operated in a manner contrary to the rules of natural justice***. *In Kanoria v Guinness* [2006] EWCA Civ 222 ***Lord Phillips CJ held in the Court of Appeal that, on the ordinary meaning of section 103(2)(c), a party to an arbitration is unable to present his case if he is never informed of the case he is called upon to meet.*** He referred to the statements in Minmetals referred to above with approval.

32. It is not in dispute that in applying these principles the enforcing court must apply its own concept of natural justice. In this case that is of course the concept of natural justice as understood and applied in the BVI. Section 36(3) reflects Article V(2)(b) of the New York Convention and provides that enforcement may be refused if it would be contrary to public policy, here the public policy of the BVI. It is contrary to public policy in England to enforce a foreign arbitral award where the foreign proceedings violated English principles of natural justice: see eg *Adams v Cape Industries* [1990] Ch 333. ***The same is true of BVI public policy.***

33. The Board accepts Cukurova's submission that, if a particular breach of natural justice does not fall within section 36(2)(c) because it was not one which meant that the party could not present its case, it is in principle open to the court to refuse to enforce the award on the ground of public policy. However, it follows from the above that the question under section 36(2)(c) is whether Cukurova was unable to present its case for reasons which were beyond its control. On the facts here, the Board is of the view that, only if Cukurova succeeds under section 36(2)(c) should the court refuse to enforce the award. As Sir John Donaldson MR observed in *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v R'As al Khaimah National Oil Co* [1990] 1 AC 295, 316 ***considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution.***

34. The general approach to enforcement of an award should be pro-enforcement. See eg *Parsons & Whittemore Overseas Co Inc v Société Générale* 508 F 2d 969 (1974) ***at 973*** :

"The 1958 Convention's basic thrust was to liberalize procedures for enforcing foreign arbitral awards … [it] clearly shifted the burden of proof to the party defending against enforcement and limited his defences to seven set forth in Article V."

In IPCO (Nigeria) v Nigerian National Petroleum [2005] 2 Lloyd's Rep 326, ***Gross J said at para 11, when considering the equivalent provision of the English Arbitration Act 1996:***

"… there can be no realistic doubt that section 103 of the Act embodies a pre-disposition to favour enforcement of New York Convention awards, reflecting the underlying purpose of the New York Convention itself …"

The Board agrees. There must therefore be good reasons for refusing to enforce a New York Convention award. The Board can see no basis upon which it should refuse to enforce the award here if Cukurova fails to show that it was unable to present its case for reasons beyond its control.

…

64. There may be grounds for saying that the Tribunal was wrong to accept the evidence of Professor Lind and to reject that of Mr Osborne with regard to the appropriate figure to take in respect of the illiquidity discount. However those grounds would involve saying that the Tribunal erred on the facts, or perhaps in law. As explained at the outset, the enforcing court is not concerned with such issues. The Board concludes that there is no basis upon which the decision of the judge or the Court of Appeal can or should be reversed, so far as the Tribunal's treatment of the evidence of Mr Osborne is concerned. Cukurova cannot succeed under section 36(2)(c). Nor can it succeed on the basis that enforcement would

be contrary to public policy or on the basis of any infringement of the rules of natural justice. Finally, the Tribunal gave reasons for its decision. Whether those reasons were convincing or not is not a matter for the enforcing court."

27 Thus the Court cannot refuse to enforce an award under the New York Convention merely because it considers that the arbitrators have reached an erroneous decision, whether on the law or on the facts. It may only refuse to enforce such an award in the limited circumstances set out in Article 44(2) or on the ground of public policy as set out in Article 44(3). Furthermore, a refusal on the grounds of public policy should be approached with extreme caution. The Court is likely in most cases simply to be concerned with whether the arbitration panel has breached the rules of natural justice and in particular whether a party has been unable to present its case for reasons which were beyond its control.

28 Advocate Nicholls' first point is that both arbitration agreements underlying the Awards were not valid under Turkish law because they were not written in the Turkish language as required by Law 805 on the Obligation to Use Turkish in Economic Enterprises. Enforcement should therefore be refused under Article 44(2)(b).

29 In our judgment, this point is unarguable. Article 44(2)(b) states that enforcement may be refused if the enforcee proves that the arbitration agreement was "not valid under the law to which the parties subjected it". In both the Stations Contract and the Lot A Contract that was English law, not Turkish law (as set out earlier). The position under Turkish law is therefore irrelevant for these purposes. There is no suggestion that the arbitration agreements were invalid under English law and accordingly the position cannot be brought within Article 44(2)(b).

(ii) The Stations Awards

30 Advocate Nicholls' remaining arguments all relate to the fairness of the procedure followed by the two arbitral panels ("tribunals"). To understand his submissions, it is necessary to explain that, in relation to the Stations Arbitration, the key issue for the tribunal (for present purposes) was the termination of the Stations Contract. The background was that on 22 nd March, 2005, Tepe had written a letter (marked 'without prejudice') to Botas indicating that, because of various alleged actions and failures on the part of Botas, there was a considerable cost overrun and Tepe was not in a position to finance the continuation of its work under the contract without additional funding from Botas. In a letter dated 29 th March, 2005, Botas terminated the Stations Contract with immediate effect. In particular, it did not give Tepe the 'cure period' of 30 days referred to in the contract and intended to allow a period for the cure of any default on the part of Tepe. The tribunal found that the termination by Botas was unlawful because it had not given the cure period notice of 30 days.

31 We would summarise Botas' submissions in support of its contention that the procedure of

the tribunal was unfair as follows:-

(i) The dispute between the parties as to the proper construction of clause 15.2.2 of the Stations Contract (i.e. whether a 30 day cure period was required before the contract could be terminated by Botas) was not contemplated at the date of the Terms of Reference and was therefore outside the tribunal's jurisdiction for the purposes of Article 44(2)(d). This was because Tepe had originally sought to exclude the letter of 22 nd March, 2005, on the ground that it had been written without prejudice. However, following an interim decision of the tribunal that the letter was admissible, Tepe had for the first time raised the issue of the cure period.

(ii) The allegation of Tepe that it could have obtained funds from its holding company so as to enable it to continue with the work and thereby cure the alleged default contained in its letter of 22 nd March was not contained in its Particulars of Claim or its submissions. It was raised for the first time in the witness statement of Professor Atalar. This was contrary to paragraph 3.1 of procedural order number 1 made by the tribunal, which required that the parties' claims would be contained in their submissions and that they should adduce evidence in support of the arguments contained in those submissions. Botas was therefore denied a proper opportunity to respond to the allegation.

(iii) The tribunal concluded that there was insufficient evidence to establish that Tepe would not have been able to secure the required funding to comply with its obligations under the Stations Contract had it been given the cure period. By requiring Botas to show that Tepe could not have obtained funding from its holding company, the tribunal inappropriately reversed the burden of proof. Botas did not have sufficient notice that this approach would be adopted such as to afford it a proper opportunity to respond.

(iv) The tribunal's requirement that Botas discharge the burden of showing that Tepe could not obtain alternative funding was impossible in circumstances where it had refused Botas' request for discovery of documents relating to Tepe's ability to obtain financing from its wider corporate group.

32 In our judgment, none of the points raised by Botas leads us to conclude that the tribunal did not comply with the rules of natural justice or that Botas was prevented from presenting its case for reasons outside its control. We take each of the four points in turn.

33 First, the Terms of Reference specifically stated (at para 38(1)) that one of the issues which the tribunal had to decide was whether the termination of the Stations Contract by Botas was unlawful. It is true that at that stage there was no specific mention of the need for the cure period. However, following the decision of the tribunal to admit the letter of 22 nd March, 2005, Tepe filed Amended Particulars of Claim. These contended first, that the letter of 22 nd March did not amount to a material breach or default such as to entitle Botas to terminate the contract for cause; but secondly that, if Tepe was wrong in this contention,

Botas could only terminate after expiry of the 30 day cure period if Tepe was not diligently pursuing a cure for the default. The issue was therefore fairly and squarely pleaded and was within the tribunal's jurisdiction as set out in the Terms of Reference because it related to the validity of the purported termination by Botas.

34 Secondly, we do not accept that Botas did not have the opportunity of dealing with the suggestion that Tepe could have obtained additional funding from its holding company. This possibility was alluded to in the Amended Particulars of Claim at paragraph 9.59.5 where it is stated:-

> *"Further, as has been set out above, it [Tepe] had committed substantial sums of money to the project from its own resources and had the full, and continuing, support of Bilkent Holdings."*

35 Furthermore, Professor Atalar's witness statement dated 21 st October, 2008, asserted in unambiguous terms that, although the issue never arose because of the way in which Botas had terminated the contract, had the Stations Contract not been terminated, then Tepe would have completed the work with the assistance of the Bilkent Group of companies, Bilkent Holdings and the University. He then went on to explain how they would have provided the necessary funds. Thus, well before the hearing in January/February 2009 Professor Atalar gave evidence on this aspect and leading counsel for Botas had the opportunity of cross-examining him. Botas therefore had ample opportunity to explore and deal with this point.

36 Thirdly, we do not accept that the tribunal reversed the burden of proof. In this context it is important to scrutinise carefully its reasoning. At paragraphs 215 – 221 of its decision, the tribunal considered whether Tepe's letter of 22 nd March, 2005, amounted to a material breach of contract (by indicating that it could not continue the project without immediate funding from Botas) entitling Botas to give notice of termination. The tribunal held that the letter did not amount to a material breach of the contract. Tepe had not been declared bankrupt or insolvent and was continuing to perform the contract. It was in this context that at paragraph 219 the tribunal said that:—

> *"… it nevertheless was not established, to the tribunal's satisfaction, that, if left with no other alternative, Bilkent Holdings would not ultimately have stepped in to support Tepe financially."*

37 This observation was in the context of whether Botas had shown that there was a material breach by Tepe entitling it to give notice of termination. In that respect the burden clearly lay on Botas.

38 As to the cure period, the tribunal found, contrary to Botas' case, that the cure period did not have to be given only in cases where the material breach relied upon by Botas was susceptible to cure within a 30 day period. On the contrary, it held that all material breaches

required a 30 day period to be given (see paras 211 – 213). Thus, even if there were a material breach of contract by Tepe by reason of the letter of 22 nd March, 2005, Botas still had to give the 30 day cure period notice. This it had failed to do and therefore the termination was unlawful. Thus the question of whether Tepe could have secured additional funding if the cure period notice had been given was not essential or relevant to the tribunal's decision.

39 Any court considering the enforcement of an arbitration award has to consider for itself whether its rules of natural justice have been complied with. Accordingly we have done so. Nevertheless, it is of note that Botas' argument about the reversal of the burden of proof was also taken on its appeal to the Cour d'Appel in Paris and rejected by that court.

40 Fourthly, it follows that we also reject Botas' argument in respect of discovery. In any event, the extent of discovery to be ordered is a matter for the tribunal to whom the parties have chosen to submit their dispute, not a court which is asked to enforce an award.

41 In our judgment, Botas had ample opportunity to deal with all material points during the course of the Stations Arbitration and we detect no unfairness in the procedure which the tribunal followed.

(iii) The Lot A Awards

42 The Lot A Arbitration also involved (amongst other matters) the question of whether Botas had lawfully terminated the Lot A Contract. The termination provisions of the Lot A Contract were in similar terms to those of the Stations Contract. If Botas wished to terminate for cause, it had to give 30 days' notice of the alleged default so as to give TPN an opportunity of curing the defect. If TPN was *"diligently pursuing the cure of such material breach"* during the 30 day period, it was entitled to a further 60 days to achieve a cure of the breach.

43 On 24 th November, 2004, Botas sent a letter to TPN which the tribunal held was an effective notice of a material breach so as to start the 30 day period running. The material breach relied upon was that TPN had not paid sub-contractors. By letter dated 6 th January, 2005, Botas terminated the Lot A contract with immediate effect on the ground that the defect specified in the letter of 24 th November, 2004, had not been cured. TPN challenged the termination on the ground that it was diligently pursuing a cure during that period and was therefore entitled to a further 60 days to continue its attempts to cure the defect. It contended therefore that the notice of termination on 6 th January was invalid because it was premature.

44 Against that background, Botas raises two aspects in which it contends that the tribunal failed to comply with the rules of natural justice and followed an unfair procedure such that the Lot A Awards should not be enforced:-

(i) Whilst the parties had agreed that the issue for determination by the tribunal was whether, as required by the Lot A Contract, TPN was during the 30-day notice period *"diligently pursuing the cure of such material breach"* the tribunal at paragraph 336 of its first partial award applied a different and lower test when it said *"although, to save the Contract, TPN would have had to have cured the failure completely within 90 days, the best which could have been expected of it, in the circumstances in which it found itself at the time, in our opinion, within the initial 30-day period, was the diligent beginning of progress towards a cure."* [emphasis added]. Botas argues that the diligent beginning of progress towards a cure is a lower test than diligently pursuing a cure as required by the contract. Botas further relies on the wording of paragraphs 345 and 346 of the first partial award where, it contends, there is no or insufficient reference to the need for diligence. It submits that the speculation at paragraph 346 that the remedial measures which were in hand would have *"intensified"* in the following 60 day period indicated that they lacked intensity during the 30 day period and that therefore TPN was not doing all it could have done at that stage and so was not acting diligently.

(ii) Botas complains that the tribunal permitted evidence to be submitted from the founder of Tepe's wider corporate group Dr Ihsan Dugramaci in the form of an unsigned witness statement. Dr Dugramaci died before the hearing. Botas was of the view that his evidence was contentious. In the circumstances where Botas did not have an opportunity to cross-examine Dr Dugramaci on his evidence, the tribunal should not have taken his evidence into account.

45 We shall address each of these points in turn. As to the first, we are satisfied, for the reasons put forward by Advocate Moran, that the tribunal was fully aware of the issues to be determined and applied the correct test. It did not, as Botas submits, base its award on a legal test that was not advanced by either of the parties. We would refer to the following matters in support of that conclusion:-

(i) The Terms of Reference accurately record the claimants' (i.e. TPN) case that "… the Claimants were diligently pursuing a cure of any alleged default such that [Botas] was not entitled to give notice of termination." (at paragraph 44) and at paragraph 50 the contention of Botas that "the First Claimant was not entitled to a period in excess of 30 days to remedy its default because it was not, at the date of the Notice of Termination, diligently pursuing the cure."

(ii) The tribunal set out accurately the question which it had to determine on this topic at paragraphs 84 – 86 of its first partial award as follows:-

> *"84. On the assumption that the letter dated 24 November 2004 was effective in law to start the 30-day period for curing the defect, the Claimants finally argued that they were diligently pursuing a cure during that period so that they were entitled to up to 60 days more, after the expiry of the initial 30-day period, to continue with their attempts to cure the*

defect. It would follow, if they are right, that the notice of termination on 6 January 2005 was invalid for the purposes of Sub-Clause 15.2.2 because it was premature.

85. Botas claims that TPN was not pursuing a cure, diligently or at all. Therefore its time ran out after the expiry of 30 days and the notice of termination was valid.

86. Accordingly under this heading the question for the Tribunal is; on the assumption that TPN's failure to pay sums which had fallen due to Sub-contractors was a material failure susceptible to cure, was TPN as a matter of fact diligently pursuing a cure in the period between 24 November 2004 and 6 January 2005?"

(iii) The tribunal again poses the correct question at paragraph 333 when it states:-

"It follows that, to avoid a termination of the Contract for default, the burden fell on TPN to take urgent steps diligently to pursue a cure of these failures and, ultimately, to cure them."

(iv) The tribunal announces its decision at paragraph 334 in the following terms:-

"The question whether TPN was or was not diligently pursing a cure of its earlier failures is a question of fact. In our opinion, at the date of Botas' letter of 6 January 2005, TPN were diligently pursing a cure of that failure. It follows that the notice of 6 January 2005 was premature and was not effective to terminate the Contract under Sub-Clause 15.2.2(vi)."

In our judgment that could not be clearer. The tribunal asks itself the right question and holds as a finding of fact that, at the material time, TPN was diligently pursing a cure of the defects articulated by Botas in its letter of 24 th November, 2004.

(v) The tribunal then goes on at paragraphs 336 – 346 to explain how it has come to this conclusion and to discuss the various actions which TPN had taken during the 30 day period. Botas criticises in particular the language in paragraph 336 and it is therefore helpful to record the whole paragraph:-

"336. First TPN's failure to pay its Sub-contractors had been the subject of discussion between the parties for most of 2004. It was a deep-seated problem, attributable in large measure to the decline in the value of the US dollar. The size of the debt at 24 November 2004 was, we have found, considerable. It was inherently unlikely that this was a problem which could be cured within the initial 30 days contemplated by Sub-clause 15.2.2. Although, to save the Contract, TPN would have had to have cured the failure completely within 90 days, the best which could have been expected of it, in the circumstances in which it found itself at the time, in our opinion, within the initial 30-day period, was the diligent beginning of progress towards a cure."

In our judgment, when read in context, there is no question of the tribunal applying a different test in this passage. It is simply a different way of saying the same thing. The tribunal was making the point that the defect could not reasonably be expected to be cured within the 30 days and that the best that could be expected was the diligent beginning of progress towards a cure. This is, in our judgment, simply another way of saying that TPN was diligently pursuing a cure.

(vi) Similarly, we do not accept Botas' criticisms of the language in paragraphs 345 and 346 where it is suggested that the tribunal has omitted to require the appropriate degree of diligence on the part of TPN. Thus the opening sentence of paragraph 345 reads:-

> *"In our opinion the principal reason why the notice of termination was served on 6 January 2005 was not because Botas genuinely believed that TPN were not pursing a cure, or not pursing a cure diligently, but because it was impatient to terminate the Contract."*

The tribunal is there again referring to the correct test required by the contract. It is in that context that at the end of paragraph 345 it states:-

> *"although a total cure was still some distance away, some remedial measures were in hand and they should have been given a proper opportunity to mature."*

(vii) Similarly in relation to paragraph 346, the tribunal ends by saying:-

> *"We accordingly conclude that Botas allowed itself to be influenced by extraneous considerations when it served its notice on 6 January 2005.* If it had properly addressed its mind to the only relevant consideration, namely whether TPN was diligently pursing a cure, the notice would not and should not, in our opinion have been served. It was invalid because it was premature."

46 For these reasons, it is in our judgment abundantly clear that the tribunal asked itself the right question and found as a fact that TPN was diligently pursing a cure at the relevant time, such that it was entitled to a further 60 days to achieve a cure. Botas has picked upon occasions when the tribunal used slightly different language and has sought to construct an argument that the tribunal was therefore asking itself the wrong question and applying a lower test. When read fairly, the tribunal's decision is crystal clear and in accordance with the correct issue which it had to determine and which it had repeatedly set out in the rest of its decision.

47 As to the second ground, namely the admission of the unsigned statement by Professor Ihsan Dugramaci, who was the founder of Bilkent University, we are very surprised that this point has been taken. We were referred to a passage in the transcript of the hearing before the tribunal where counsel for Botas (Mr White) specifically agreed that admissibility was not being challenged. The relevant part reads as follows (Mr Blackburn is a member of the

tribunal):-

> *"MR BLACKBURN It follows, doesn't it, from what you have said, that you can't accept the unsigned statement of the founder of the university?*
>
> *MR WHITE Correct*
>
> *MR BLACKBURN What about admissibility in relation to that statement?*
>
> *MR WHITE We are not going to take an admissibility point.* He has now died.
>
> *MR BLACKBURN I know.*
>
> *MR WHITE And I suspect that – we accept this is a French arbitration taking place in London, but if English principles were applied, probably a Civil Evidence Act Notice would have been permissible and it would …*
>
> *THE CHAIRMAN Almost undoubtedly.*
>
> *MR WHITE Yes. And it would be then simply a question of weight.*
>
> *MR BLACKBURN But in any event you don't object to us looking at it?*
>
> *MR WHITE No, not at all.* We say, actually, that it is not inconsistent, on analysis, with the case that we advance, that they had taken the judgment, they had taken the decision that any further money was to come from Botas, not from TPN.
>
> *THE CHAIRMAN That would be a question of fact.*
>
> *MR WHITE And that is a question of fact."*

48 The tribunal accurately recorded the effect of this exchange at paragraph 41 of the first partial award when it said:-

> *"Dr Atalar's statement exhibited an unsigned statement from the Founder.* At the subsequent main hearing on the issues, counsel for Botas stated that, while the facts and matters in the Founder's statement were contentious, the statement was nevertheless admissible."

49 In the circumstances it is now not open to Botas to contend that the tribunal should not have admitted his evidence or taken it into account. There has been no unfairness to Botas or any breach of the rules of natural justice.

(iv) Conclusion

50 For the reasons we have given, we do not accept that any of the grounds in Article 44(2)

and 44(3) for refusing to enforce the Awards are made out. Botas was represented by leading counsel in both arbitrations and was perfectly able to put forward its case and the Awards did not deal with matters beyond the scope of the submission to arbitration. There are no reasons of public policy for not enforcing the Awards.

51 It follows that the position is as follows. Botas agreed in relation to both contracts that any dispute would be referred to arbitration. That was its choice. It could have left the matter to be resolved by the court system. Disputes having arisen, the matters have been referred to arbitration. In each case, after a very full and fair hearing, the tribunal has found in favour of Tepe. This Court and the French courts (so far as the matters came before them) have found that there are no grounds for not enforcing the arbitration awards and that Botas had full opportunity to put forward its case to the respective tribunals. As a result of the Awards, Botas is indebted to Tepe in the total sum of US$94,889,736 as at 19 th July, 2015, and that sum is increasing at the rate of approximately US$10,000 per day.

52 Botas is a substantial company and it appears from its accounts that it could pay such sum if it wished. It is owned by the Republic. Yet, for reasons best known to itself, it has refused to pay the sums found to be due by the tribunals and has not even returned the Securities which it was ordered to return.

53 That is the background to the three arguments (referred to at paragraph 20 above) which are now raised as to why this Court should not enforce the Awards in this jurisdiction against the Shares, or against any amount owed by TPIC or BIL to Botas and should not make any order in respect of the Securities. We accordingly turn to consider those arguments in turn.

(A) Sovereign immunity and enforcement against the Shares

(i) The statutory provisions

54 Botas does not dispute that it is the legal and beneficial owner of the Shares. Furthermore, it accepts that it is a separate entity from the Republic, and is not itself entitled to sovereign immunity. It further accepts that its assets are not therefore generally immune from any process of enforcement in respect of its debts. Thus there is no claim to sovereign immunity in respect of any debts owed to it by BIL or TPIC nor in respect of the Securities. However, it contends that the Shares are assets in or over which the Republic has sufficient interest or control to engage its (the Republic's) sovereign immunity.

55 This is disputed by Tepe. It is therefore necessary to consider the principles of sovereign immunity. The position is now covered by statute but, as we shall see, the principles established under common law remain relevant.

56 The statute in question is the State Immunity Act 1978 of the United Kingdom (“the Act”).

The Act has been extended (with minor modifications) to Jersey by means of the State Immunity (Jersey) Order 1985 ("the 1985 Order"), which provides at paragraph 1(1) of its Schedule that, except in certain sections of the Act (which are not relevant for our purposes) any reference in the Act to the United Kingdom should be construed as a reference to the Bailiwick. It follows that there is no material difference between the law of Jersey and the law of any part of the United Kingdom in this respect. Similarly the principles of common law established under English law are equally applicable under Jersey law.

57 The structure of the Act is that section 1 confers a general immunity on states but this is subject to a series of exceptions set out in sections 2 – 11. Section 13 deals with certain aspects of enforcement. The relevant provisions for present purposes are sections 1, 3, 6, 10 and 13 together with certain definitional provisions in sections 14 and 17. As set out in the 1985 Order those provisions are as follows:-

> ***"Immunity from Jurisdiction***
>
> ***1(1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.***
>
> ***(2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.***
>
> ***Exceptions from Immunity***
>
> ***…***
>
> ***3(1) A State is not immune as respects proceedings relating to:-***
>
> ***(a) a commercial transaction entered into by the State; or***
>
> ***(b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom.***
>
> ***(2) …***
>
> ***(3) In this section 'commercial transaction' means:-***
>
> ***(a) any contract for the supply of goods or services;***
>
> ***(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and***
>
> ***(c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority;***

but neither paragraph of sub-section (1) above applies to a contract of employment between a State and an individual.

…

6(1) A State is not immune as respects proceedings relating to:-

(a) any interest of the State in, or to its possession or use of, immovable property in the United Kingdom; or

(b) any obligation of the State arising out of its interest in, or its possession or use of, any such property.

(2) A State is not immune as respects proceedings relating to any interest of the State in movable or immovable property being an interest arising by way of succession, gift or bona vacantia.

(3) The fact that a State has or claims an interest in any property shall not preclude any court from exercising in respect of it any jurisdiction relating to the estates of deceased persons or persons of unsound mind or to insolvency, the winding up of companies or the administration of trusts.

(4) A court may entertain proceedings against a person other than a State, notwithstanding that the proceedings relate to property:-

(a) which is in the possession or control of a State; or

(b) in which a State claims an interest ,

if the State would not have been immune had the proceedings been brought against it or, in a case within paragraph (b) above, if the claim is neither admitted nor supported by prima facie evidence.

…

10(1) This section applies to:-

(a) Admiralty proceedings; and

(b) proceedings on any claim which could be made the subject of Admiralty proceedings.

(2) A State is not immune as respects:-

(a) an action in rem against a ship belonging to that State; or

(b) an action in personam for enforcing a claim in connexion with such a ship ,

if, at the time when the cause of action arose, the ship was in use or

intended for use for commercial purposes.

(3) Where an action in rem is brought against a ship belonging to a State for enforcing a claim in connexion with another ship belonging to that State, subsection (2)(a) above does not apply as respects the first-mentioned ship unless, at the time when the cause of action relating to the other ship arose, both ships were in use or intended for use for commercial purposes.

(4) A State is not immune as respects:-

(a) an action in rem against a cargo belonging to that State if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes; or

(b) an action in personam for enforcing a claim in connexion with such a cargo if the ship carrying it was then in use or intended for use as aforesaid.

(5) In the foregoing provisions reference to a ship or cargo belonging to a State include references to a ship or cargo in its possession or control or in which it claims an interest; and subject to subsection (4) above, subsection (2) above applies to property other than a ship as it applies to a ship.

…

Procedure

13(1) No penalty by way of committal or fine shall be imposed in respect of any failure or refusal by or on behalf of a State to disclose or produce any document or other information for the purposes of proceedings to which it is party.

(2) Subject to subsections (3) and (4) below:-

(a) relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and

(b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in Rem for its arrest, detention or sale.

…

(4) Subsection 2(b) above does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes; …

(5) The head of a State's diplomatic mission in the United Kingdom or the

person for the time being performing his functions, shall be deemed to have authority to give on behalf of the State any such consent as is mentioned in subsection (3) and, for the purposes of subsection (4) above, his certificate to the effect that any property is not in use or intended for use by or on behalf of the State for commercial purposes shall be accepted as sufficient evidence of that fact unless the contrary is proved.

Supplementary provisions

14(1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to:-

(a) the sovereign or other head of that State in his public capacity;

(b) the government of that State; and

(c) any department of that government ,

but not to any entity (hereinafter referred to as a 'separate entity') which is distinct from the executive organs of the government of the State and capable of suing or being sued.

(2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if:-

(a) the proceedings relate to anything done by it in the exercise of sovereign authority; and

(b) the circumstances are such that a State … would have been so immune.

…

17(1) In this Part of this Act:-

'commercial purposes' means purposes of such transactions or activities as are mentioned in section 3(3) above;

…"

(ii) The Court's duty to give effect to sovereign immunity

58 The Republic has not sought to intervene in the proceedings. It has left the arguments on sovereign immunity to be put forward by the advocate for Botas. It has however placed two documents before the Court to make its position clear.

59 The first is a certificate dated 16 th February, 2015, from the Turkish Ambassador to the United Kingdom which states as follows:-

> *"1. Botas is a state economic enterprise within the scope of the Decree Law numbered 233 under Turkish Law and the shares of Botas are owned by the Treasury of the Republic of Turkey.*
>
> *2. TPIC and BIL were established by Cabinet Decrees pursuant to Article 58/3 of the Decree Law numbered 233. The Shares are owned by Botas and therefore they are indirectly owned by the Treasury of the Republic of Turkey.*
>
> *3. There are restrictions imposed upon the sale, transfer and use of the Shares and the operations of TPIC and BIL under Turkish Law.*
>
> *4. The Shares have never been used, are not in use, and are not intended for use by or on behalf of the State of the Republic of Turkey for commercial purposes."*

60 Secondly, there is a letter dated 20 th February, 2015, from the Turkish Minister for Energy and Natural Resources to Botas. It is sufficient for present purposes to quote simply the first four paragraphs of that letter:-

> *"I understand that enforcement proceedings have been initiated against you [Botas] by [Tepe] in the Royal Court of the Island of Jersey.* Pursuant to those proceedings, I understand that the entire issued share capital in each of [TPIC] and [BIL] held by Botas has been made the subject of an interim order by the Jersey Court.
>
> *I provide this letter as the Minister of Energy and Natural Resources of the Republic of Turkey, to set out the position of the Ministry of Energy and Natural Resources of the Republic of Turkey.* I am aware that this letter may be submitted in evidence before the Jersey Court.
>
> *I confirm that the Government of the Republic of Turkey considers that the shares in TPIC and BIL held by Botas are essential state-owned assets.* The Government of the Republic of Turkey exercises to a specific degree control over the ownership and operations of TPIC and BIL pursuant to Turkish law with the intention of furthering the public interest. I set out below the nature and scope of the Turkish *Government's interest in and control over the shares and operations of TPIC and BIL.*
>
> *Each of Botas, TPIC and BIL are separate legal entities from the Turkish state and aim to make a profit in carrying out their activities.* However, as I explain below, the Turkish Government retains to a specific degree, its interest in and control over the shares and operations of TPIC and BIL because of their sovereign importance."

The letter then goes on to elaborate on what the Minister calls the 'nature and scope of the

Turkish government's interest in and control over the shares and operations of TPIC and BIL'. As these matters are fully developed in the arguments put forward by Advocate Nicholls (and referred to later), we do not think it necessary to quote any further from the Minister's letter but we have of course carefully considered its contents.

61 The fact that the Republic is not participating in these proceedings makes no difference to the Court's duty to consider whether sovereign immunity applies. As set out at paragraph 57 above, section 1(2) of the Act provides that "a court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question". (emphasis added). The strength of the Court's duty in this respect was emphasised by Mummery J in *United Arab Emirates v Abdel Ghafar* [1995] ICR 65 at 73 and by Tomlinson J in *Kensington International Limited v Republic of Congo* [2003] EWHC 2331 (Comm) at para 71 where he said:-

> ***"the overriding duty of the Court, of its own notion, is to satisfy itself that effect has been given to the immunity conferred by the State Immunity Act 1978."***

62 As the Court is itself under a duty to give effect to any immunity, points of pleading are not significant. Tepe pointed out with some justification that in its Amended Answers, Botas had referred only to the immunity from enforcement set out in section 13(2) of the Act whereas in argument it relied on section 6(4). But, if the Court finds that an immunity exists, it must give effect to it regardless of what the pleadings may say.

(iii) Sovereign immunity at common law

63 Sovereign immunity is based upon principles of international law and the courts have over the years had to consider the extent of those principles. It is therefore helpful to refer to decisions at common law as a background to the Act. As Lord Diplock said in *Alcom Limited v Republic of Colombia* [1984] AC 580 at 597, the provisions of the Act fall to be construed against the background of those principles of public international law as are generally recognised by the family of nations.

64 Perhaps the leading statement on sovereign immunity in this context is to be found in *Compania Naviera Vascongado v SS Cristina* [1938] AC 485 ("the Cristina") where the House of Lords considered what nature of interest was sufficient to engage a state's immunity from interference with property. The facts, as taken from the headnote, were that a ship called the Cristina, belonging to Compania Naviera Vascongado ("CNV") and registered at the port of Bilbao, was lying in the port of Cardiff. Shortly before her arrival there, but after she had left Spain, a decree was made by the Spanish government requisitioning all vessels registered at the port of Bilbao, and in view of this, and acting on the instructions of the Spanish government, the Spanish consul at Cardiff went on board the Cristina, stated that she had been requisitioned, dismissed the master and put a new master in charge. Thereupon, CNV issued a writ in rem claiming possession of the Cristina

as its property. The Spanish government entered a conditional appearance and argued that the writ should be set aside on the ground of sovereign immunity. The House of Lords upheld that submission.

65 At 490, Lord Atkin set out two key principles in relation to the law of state immunity as follows:-

> ***"The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted into our domestic law which seem to me to be well established and to be beyond dispute.*** The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.
>
> ***The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control.*** …"

66 The other leading judgment was given by Lord Wright who also affirmed the existence of these two principles, namely:-

> ***"…the independent sovereign may not be directly or indirectly impleaded in the Courts of this country without its consent …" (at 503); and***
>
> ***"… there is a second ground on which the writ should in my judgment be set aside, which is that it claims to interfere with the property of the foreign sovereign.*** …" (at 506)

67 Lord Wright went on to consider what level of interest in property on the part of the state was required to engage immunity. He said this at 507:-

> ***"The appellants, while not contesting the general principle, have denied that it applies to the facts of the present case, for various reasons.*** In the first place they have relied on the fact that the Spanish government had no property (in the sense of ownership) in the Cristina, whereas in the *Parlement Belge* ***the Belgian government was the owner of the mail packet.*** But the rule is not limited to ownership. It applies to cases where what the Government has is a lesser interest, which may be not merely not proprietary but not even possessory. Thus it has been applied to vessels requisitioned by a Government, where in consequence of the requisition, the vessel, whether or not it is in the possession of the foreign State, is subject to its direction and employed under its orders."

68 All the Law Lords agreed that on the particular facts of the case, the Spanish Government had proved it was in possession of the Cristina. It therefore had sufficient interest in the ship

to attract immunity. As Lord Wright said at 513:-

> ***"I may add that in the present case it is in my opinion sufficiently shown by the evidence before the Court that the Spanish Government had actually requisitioned, and taken possession and control of, the Cristina.*** That is all that is needed to justify the claim to immunity on the ground of 'property'."

69 Both Lord Atkin and Lord Wright declined to decide whether a mere claim or assertion by a government would be sufficient or whether it would be necessary for the court to investigate the matter further. It did not arise on the facts of that case because it was clearly established that the Spanish government had possession of the Cristina and had requisitioned it.

70 The next significant case for present purposes is *USA and Republic of France v Dollfus Mieg et Cie SA and the Bank of England* [1952] AC 582. In that case the Bank of England was holding as bailee for the governments of the US, France and the UK, bars of gold which had been wrongly removed by German troops from a French bank and later captured by the Allied armies in Germany during the Second World War. The French company which had deposited the gold with the French bank (*Dollfus Mieg*) brought proceedings against the Bank of England claiming delivery of the gold bars. At first instance and before the Court of Appeal, the Bank of England argued that the proceedings should be stayed on the ground of state immunity. Before the House of Lords, the governments of the US and France intervened to make that submission.

71 The issue for the House of Lords, as stated by Earl Jowitt at 603, was whether the foreign governments, notwithstanding the delivery of the bars to the Bank of England, still retained such an interest in the bars as to entitle them to have the action stayed. While cautioning against treating Lord Atkin's formulation in the *Cristina* as if it were a statute, the House of Lords held that the foreign governments had possession of the gold bars so as to bring the case within the second of the two principles stated by Lord Atkin. The judges stated that the word 'possession' was not to be given a narrow technical meaning as it might have under English law. Given the nature of the legal relationship with the Bank of England, the governments had the right to call at any time for immediate physical possession of the gold bars and could therefore properly be said to be in possession of the gold bars for the purposes of the doctrine of sovereign immunity as stated by Lord Atkin.

72 In both the *Cristina* and *Dollfus Mieg*, reference had been made by some of the judges to whether a bare assertion by a foreign government that it had the relevant interest in property was sufficient or whether it had to go further and establish the interest. This point arose for decision in the next case, *Juan Ysmail & Co v Government of the Republic of Indonesia* [1955] AC 72. Juan Ysmail instituted an action in rem and arrested a ship in Hong Kong claiming possession as owners of the ship. The government of Indonesia asserted that it was the owner of the vessel having bought it from an agent of Juan Ysmail. It sought to have the proceedings stayed on the ground of sovereign immunity. The matter eventually came before the Privy Council and Earl Jowitt, giving the judgment of the Board, outlined the issue as follows at 86:-

"The rule according to a foreign sovereign government immunity against being sued has been considered and applied in many cases. The basis of the rule is that it is beneath the dignity of a foreign sovereign government to submit to the jurisdiction of an alien court, and that no government should be faced with the alternative of either submitting to such indignity or losing its property. The rule was stated by Lord Atkin in the case of the Cristina as involving two propositions. The first, that the courts of a country cannot implead a foreign sovereign; and the second, that they would not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control. Dicey 6th Ed, p131 in a passage in his 'Conflict of Laws' approved by Lord Radcliffe in the case of *Dollfus Mieg*, ***stated the rule in these terms 'The court has … no jurisdiction to entertain an action or proceeding against (1) any foreign sovereign … Any action or proceeding against the property of [a foreign sovereign] is an action or proceeding against such person.'***

In whichever way the rule is stated, it is apparent that difficulty may arise in the application of the second branch of it. Where the foreign sovereign State is directly impleaded the writ will be set aside, but where the foreign sovereign State is not a party to the proceedings, but claims that it is interested in the property to which the action relates and is therefore indirectly impleaded, a difficult question arises as to how far the foreign sovereign government must go in establishing its right to the interest claimed. Plainly if the foreign government is required as a condition of obtaining immunity to prove its title to the property in question, the immunity ceases to be of any practical effect. The difficulty was cogently expressed by Lord Radcliffe in the case of the *Dollfus Mieg* ***where he said: 'A stay of proceedings on the ground of immunity has normally to be granted or refused at a stage in the action when interests are claimed but not established, and indeed to require him [ie the foreign sovereign] to establish his interest before the court (which may involve the court's denial of his claim) is to do the very thing which the general principle requires that our courts should not do.***'"

73 Having considered various authorities the Privy Council summarised the position as follows at 89:-

"In their Lordships' opinion the view of Scrutton LJ that a mere assertion of a claim by a foreign government to property the subject of an action compels the court to stay the action and decline jurisdiction is against the weight of authority, and cannot be supported in principle. In their Lordships' opinion a foreign government claiming that its interest in property will be affected by the judgment in an action to which it is not a party, is not bound as a condition of obtaining immunity to prove its title to the interest claimed, but it must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective. The court must be satisfied that conflicting rights have to be decided in relation to the foreign government's

claim. When the court reaches that point it must decline to decide the rights and must stay the action, but it ought not to stay the action before that point is reached."

The Privy Council went on to consider the facts in that case in some detail and concluded that the government of Indonesia's title was manifestly defective because the individual purporting to act as agent of Juan Ysmail had no authority to sell the ship to the government.

74 The general principles established by these cases are reflected in section 6(4) of the Act which, for convenience, we repeat:-

> ***"(4) A court may entertain proceedings against a person other than a State, notwithstanding that the proceedings relate to property:-***
>
> ***(a) which is in the possession or control of a State; or***
>
> ***(b) in which a State claims an interest*** ,
>
> ***if the State would not have been immune had the proceedings been brought against it or, in a case within paragraph (b) above, if the claim is neither admitted nor supported by prima facie evidence."***

As Leggatt J made clear in *Rahmatullah v Ministry of Defence* [2014] EWHC 3846 (QB) at para 54, it is implicit in this provision that a court may not entertain against a third party proceedings relating to property (a) which is in the possession or control of the state or (b) in which the state claims an interest, if the state would have been immune had the proceedings been brought against it (and, in a case where the state claims an interest in the property, unless the claim is either admitted or not supported by prima facie evidence).

75 As can be seen, there is one significant difference from the pre-existing common law position. Whereas under common law the foreign government had simply to show that its claim was not merely illusory or manifestly defective whether such claim was based on possession, control or an interest, the statute now expressly provides that it is only in relation to proving an interest that a *prima facie* claim will suffice. It must follow that if the claim to immunity is based on possession or control, the foreign government must satisfy the Court that it has such possession or control.

(iv) The distinction between adjudication and enforcement

76 International law has long drawn a distinction between a state's immunity from enforcement and its immunity from adjudication. Thus, even where a party has obtained a judgment in a court against a state, it may not be able to enforce the judgment against assets of the state in the relevant jurisdiction. This distinction is reflected in the Act.

77 Lord Diplock commented on this aspect in *Alcom* at 600 as follows:-

> ***"The [Act] … purports in Part 1 to deal comprehensively with the jurisdiction of courts of law in the United Kingdom both (1) to adjudicate upon claims against foreign states (adjudicative jurisdiction); and (2) to enforce by legal process ("enforcement jurisdiction") judgments pronounced and orders made in the exercise of their adjudicative jurisdiction.*** …
>
> ***In creating these exceptions, for which it has recourse to a somewhat convoluted style of draftsmanship providing for exceptions to exceptions which have the effect of restoring in part an immunity which some other subsection would appear to have removed, the Act nevertheless draws a clear distinction between the adjudicative jurisdiction and the enforcement jurisdiction of courts of law in the United Kingdom.*** Sections 2 to 11 deal with adjudicative jurisdiction. Sections 12 to 14 deal with procedure and of these, sections 13(2) to (6) and 14(3) and (4) deal in particular with enforcement jurisdiction. (Admiralty jurisdiction in rem, … may be regarded for the purposes of this Act as hybrid …)"

78 *Fox and Webb 'The Law of State Immunity'* states as follows at 173–4:-

> ***"The distinction between adjudicative and enforcement jurisdiction***
>
> ***The SIA [the Act] treats separately immunity from adjudication and immunity from execution, but unlike UNCSI's [the UN Convention on State Immunity] separate treatment in Part IV, the SIA makes no clear distinction placing both in its Part 1 under the general title 'Proceedings in the United Kingdom by or against other States' with a general rule of immunity set out in section 1.*** Sections 2 to 11 deal with adjudicative procedure. Sections 12 to 14 deal with procedure; of these, sections 13(2) to (6) and 14(3) and (4) deal in particular with enforcement jurisdiction. This division prevents the automatic enforcement of a judgment in respect of non-immune proceedings and necessitates a further determination of immunity by reference to a separate waiver by the State to the court's enforcement jurisdiction or where there is no such submission, by more restricted different criteria than those applied at the adjudicative stage, … The SIA, section 13(3) expressly provides that a provision merely submitting to the jurisdiction of the courts is not to be regarded as a 'consent' to 'the giving of any relief … or for the enforcement of a judgment or arbitration award'. The division between adjudicative and enforcement stages is, however, by no means easy to make. Lord Diplock himself noted in *Alcom* ***that some proceedings would not fit neatly into this division; he instanced Admiralty jurisdiction in rem as a hybrid.*** Proceedings to recognise a foreign judgment given against a foreign State, to register a ***foreign judgment under the Administration of Justice Act 1920 or to enforce a foreign judgment or arbitral award, relate to the exercise of the court's adjudicative jurisdiction and come within the general rule of immunity in section 1 … A Mareva***

injunction as relief ancillary to execution falls within enforcement jurisdiction."

79 Dicey Morris and Collins, The Conflict of Laws (15th edition) at 10–010 and 10–014 is to like effect.

80 The difference has also recently been authoritively reiterated by the International Court of Justice (ICJ) in its judgment in *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* ICJ Reports 2012, p99.

81 The ICJ was concerned with three separate issues:-

(i) Certain Italian nationals had been awarded damages against the State of Germany by the Italian courts in respect of atrocities carried out by German troops during the Second World War. Germany contended that this infringed its sovereign immunity.

(ii) Certain Greek nationals had also been awarded damages against Germany in the Greek courts for atrocities committed in Greece during the war. That judgment was subsequently declared enforceable in Italy by the Italian courts and, in support of that declaration, the Italian courts had granted a legal charge over property in Italy owned by Germany which was used for governmental purposes. Germany contended that this infringed its sovereign immunity rights in respect of enforcement of any judgment.

(iii) Germany in any event challenged the decision of the Italian courts to declare enforceable a judgment of the Greek courts on the basis that this too was an infringement of its sovereign immunity.

82 We are not concerned with the ICJ's decision on the first issue and merely note that the court found in favour of Germany. It held that, under customary international law, a state was not deprived of immunity by reason of the fact that the acts complained of amounted to serious violations of international human rights law or the international law of armed conflict.

83 When it turned to consider the second issue, namely whether the granting of a legal charge over property by the Italian courts by way of enforcement of the Greek judgment, which had been registered and declared enforceable in Italy, infringed Germany's sovereign immunity, the court emphasised the distinction between the rules of immunity in relation to adjudication and those in relation to enforcement. At paragraph 113, the court said this:-

"113. Before considering whether the claims of the Applicant [Germany] on this point are well-founded, the Court observes that the immunity from enforcement enjoyed by States in regard to their property situated on foreign territory goes further than the jurisdictional immunity enjoyed by those same States before foreign courts. Even if a judgment has been

lawfully rendered against a foreign State, in circumstances such that the latter could not claim immunity from jurisdiction, it does not follow ipso facto that the State against which judgment has been given can be the subject of measures of constraint on the territory of the forum State or on that of a third State, with a view to enforcing the judgment in question. Similarly any waiver by a State of its jurisdictional immunity before a foreign court does not in itself mean that the State has waived its immunity from enforcement as regards property belonging to it situated in foreign territory.

The rules of customary international law governing immunity from enforcement and those governing jurisdictional immunity (understood stricto sensu as the right of a State not to be the subject of judicial proceedings in the courts of another State) are distinct, and must be applied separately."

The Court went on to refer to Article 19 of the United Nations Convention on Jurisdictional Immunities of States and Their Property ("the UN Convention") which provides that no post-judgment measures of constraint, such as attachment, arrest or execution against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that, inter alia, it is established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes. The ICJ held that the property in this case was being used by Germany for governmental purposes which were entirely non-commercial and accordingly the registration of the charge had constituted a violation by Italy of the sovereign immunity owed to Germany.

84 As to the third issue, the Court stated that it was here concerned with adjudicative immunity rather than enforcement immunity. At para 124 it said this:-

"124. It should first be noted that the claim in Germany's third submission is entirely separate and distinct from that set out in the preceding one, which has been discussed in Section IV above (paragraphs 109 -120). The Court is no longer concerned here to determine whether a measure of constraint – such as the legal charge on Villa Vigoni – violated Germany's immunity from enforcement, but to decide whether the Italian judgments declaring enforceable in Italy the pecuniary awards pronounced in Greece did themselves, independently of any subsequent measure of enforcement – constitute a violation of the Applicant's immunity from jurisdiction. While there is a link between these two aspects – since the measure of constraint against Villa Vigoni could only have been imposed on the basis of the judgment of the Florence Court of Appeal according exequatur in respect of the judgment of the Greek Court in Livadia – the two issues nonetheless remain clearly distinct. That discussed in the preceding section related to immunity from enforcement; that which the Court will now consider addresses immunity from jurisdiction. As recalled above, these two forms of immunity are governed by different sets of

rules."

85 In our judgment, given the guidance to be obtained from the ICJ case and the last few lines of the extract from *Fox and Webb* referred to at paragraph 78 above, the application under the Arbitration Law to declare the Awards enforceable in the Island is a matter of the Court's adjudicative jurisdiction. However, the Republic is not raising any point in relation to that aspect; and of course it was not a party to the two arbitrations. It only asserts any interest at the stage where the Court, having declared the Awards enforceable in the Island, seizes the Shares by way of *arrêt* in order to permit enforcement. This raises in acute form the question of which section of the Act applies to the facts of this case.

(v) Is section 6(4) or section 13(2)(b) of the Act applicable?

86 Botas argues that the Court is here concerned with the principles described in the cases summarised at paragraphs 63 – 73 above, which are broadly reflected in section 6(4) i.e. does the Republic have control of or a prima facie claim to an interest in the Shares sufficient to attract immunity? If so, immunity applies and the Court should go no further.

87 Tepe, on the other hand, submits that we are here concerned with the enforcement stage and that is dealt with at section 13(2)(b). Immunity only applies under that section to *'property of a State'*. It is not sufficient for a state merely to have a claim to control or an interest in the property. It must satisfy the Court that the property in question is *'property of a State'*.

88 In support of its argument, Tepe refers to the distinction (referred to at paragraphs 76 —84 above) between the adjudicative and enforcement jurisdictions of the Court. The present case was concerned with enforcement. The imposition of an *arrêt* over the Shares was a means of enforcing a judgment (or in this case an arbitration award declared to be enforceable as a judgment under the Arbitration Law).

89 As to what constituted 'property of a State' in section 13(2)(b) Advocate Moran referred to *AIG Capital Partners Inc v Republic of Kazakhstan* [2005] EWHC 2239 (Comm). The facts of that case were that the claimants had the benefit of an arbitration award against the Republic of Kazakhstan ("the RoK") and had obtained leave to register the award in the High Court as a judgment. They now wished to enforce it by obtaining charging orders against cash and securities held in London which were held to the order of the National Bank of Kazakhstan (NBK) which was the central bank of Kazakhstan. Amongst the issues before the court was whether section 13(2)(b), together with section 14, prevented enforcement against those assets. It was not disputed that legal title to the assets in question was in the NBK but beneficial ownership rested with the National Fund of Kazakhstan (and therefore the RoK).

90 At paragraph 45 of his judgment Aikens J concluded that the word 'property' in sections 13

and 14 included all real and personal property and embraced any right or interest, legal, equitable or contractual in assets held by a state. The judge went on to hold that the assets in question were 'property' of both the RoK and the NBK because NBK had a contractual right to the payment of the assets and the RoK had the beneficial interest in the assets. He further went on to conclude that the assets were immune from enforcement because they fell within both section 13(4) (as property of the RoK not used for commercial purposes) and under section 14 (as being property of a central bank).

91 Advocate Moran argued that on any view the Shares are not the property of the Republic. They are legally and beneficially owned by Botas, which is a separate entity not entitled to any immunity. To use the language of Aikens J, the Republic has no legal, equitable or contractual right or interest in the Shares. Advocate Nicholls referred to section 10 of the Act (which deals with Admiralty proceedings and confers immunity in relation to ships and cargo) and pointed out that immunity was conferred (subject to exceptions) on a ship or cargo *'belonging to a State'*. This expression was defined in section 10(5) as including references to *'…a ship or cargo in its possession or control or in which it claims an interest'*. He submitted that the expression *'property of a State'* in section 13(2) must be interpreted in like manner. However, we agree with Advocate Moran that the fact that there is no equivalent provision in section 13 to section 10(5) is against Advocate Nicholls. It was clearly thought necessary in section 10 to expand the normal meaning of *'belonging to a State'* by including references to possession, control or claiming an interest. There is no similar expanding provision in section 13. It follows, in our judgment, that the expression *'property of a State'* should be given its normal meaning as the legislature did not see fit to expand its normal meaning along the lines of section 10(5).

92 It follows that, in our judgment, if Advocate Moran is correct in saying that the Court is concerned with a situation falling within section 13(2)(b), her argument that the Shares are not the property of the Republic is correct. However, for the reasons set out hereafter, we have on balance concluded that the facts of this case fall within section 6(4) rather than section 13.

93 Whilst we accept the distinction between adjudicative jurisdiction and enforcement jurisdiction referred to earlier, it seems to us that the immunity in relation to enforcement (now reflected in section 13) only arises where there is a judgment against the state in question. In a sense this is self-evident in that assets belonging to A can only be seized and taken to satisfy a judgment against A; they cannot be seized to satisfy a judgment against B. Thus a state only needs to rely upon the immunity from enforcement conferred by section 13 if there is a judgment against it which could otherwise be enforced against its property.

94 It seems to us that no authority is necessary for this proposition but we note the following observations which appear to be consistent with the view we have formed (emphasis added in each case):-

(i) In *SerVass Inc v Rafidain Bank* [2013] 1 AC 595 Lord Clarke (with whom the other members of the Supreme Court agreed) said at paragraph 9:-

> ***"The issues in this appeal are not concerned with a state's immunity from suit, which is governed by section 3 of the Act, but … are solely concerned with the scope of its immunity from execution of a judgment given against it, which is governed by section 13(2)(b) and 13(4)."***

(ii) In the *AIG* case Aikens J said at para 43:—

> ***"The jurisdiction of the UK courts as to enforcement of a judgment against a State is dealt with by Section 13 …"***

(iii) At paragraph 113 of the *Germany v Italy* case in the ICJ (already referred to at paragraph 83 above) is to be found the following passage:-

> ***"Even if a judgment has been lawfully rendered against a foreign State, in circumstances such that the latter could not claim immunity from jurisdiction, it does not follow ipso facto that the State against which judgment has been given can be the subject of measures of constraint on the territory of the forum State … with a view to enforcing the judgment in question."***

95 That is not the situation here. There has been no judgment against the Republic. It has no liability towards Tepe. The Court is concerned with the enforcement of the Awards (having the effect of a judgment) against Botas. There is therefore no question of seeking to enforce a liability of the Republic against assets of the Republic. What is happening in effect is that, in the context of the Court seeking to enforce a liability of Botas against what are apparently assets of Botas, the Republic is seeking to say "Hold it. You cannot enforce the obligation of Botas against these assets because they are assets in or over which we (the Republic) have an interest or control".

96 In our judgment this is not a situation clearly envisaged by the Act and we have not found it easy to fit the facts into the scheme of the Act. Like the Admiralty proceedings referred to by Lord Diplock in *Alcom*, we appear to be in something of a hybrid situation. Nevertheless, it seems to us that it is more properly categorised as an exercise of the Court's adjudicative jurisdiction, because the Court will need to consider whether the Republic has the control or *prima facie* has the interest claimed in assets which appear on the face of it to be those of Botas and, if so, whether the control or interest is sufficient to attract sovereign immunity. It is not a question of enforcement proceedings against the Republic in respect of a liability of the Republic. The Court is being asked to adjudicate on the existence of the control or interest of the Republic rather than ruling on whether a liability of the Republic can be enforced against assets of the Republic (which is the situation envisaged in the enforcement jurisdiction as reflected in section 13).

97 Suppose that, in the *Juan Ysmail* case (referred to at paras 72 – 73 above), rather than it being the owners who arrested the ship, the arrest had been effected at the instance of a creditor of the owners by way of enforcement of a judgment against the owners. Suppose also that the Government of Indonesia still intervened in order to claim that it was in truth the owner of the ship. It seems to us highly unlikely that this would have made any difference to the approach of the Privy Council. It would still have applied the principle outlined by Earl Jowitt at paragraph 73 above (which is broadly reflected in section 6(4)) and would have refused jurisdiction to adjudicate upon the Government of Indonesia's claim unless satisfied that the claim was illusory or founded on a manifestly defective title.

98 It follows, we think, that section 6(4) is the applicable provision. In our judgment that requires us to proceed as follows:-

(i) As to control, we need to ascertain what level of control by the Republic over the Shares is established and whether such level is sufficient to attract immunity. The burden on this aspect rests on the Republic (see paragraph 75 above).

(ii) We need to consider whether, if established, the interest asserted by the Republic would be sufficient to engage immunity. On this aspect, the burden rests on the Republic. If the answer to this first question is yes, we must then consider whether the Republic has made out a *prima facie* case in support of the existence of such interest.

(vi) The evidence concerning the control and/or interest asserted by the Republic

99 As already stated, no sovereign immunity is asserted in respect of any of the assets of Botas other than the Shares. What is said is that, by reason of the operation of various aspects of Turkish law, the Republic has a level of control over/interest in the Shares as to be sufficient to attract immunity. We would summarise that submission under the following headings:-

(a) Law No.4046 concerning arrangements for the implementation of privatisation.

(b) The application of Decree Law 233 on State Economic Enterprises.

(c) The Turkish law principle of parallelism.

(d) Further legal controls over TPIC and BIL.

100 The Court heard expert evidence on Turkish law both in the form of written reports and oral evidence. Botas called Dr Sedat Cal. He is currently an associate professor at the Hacettepe University Law School, Ankara specialising in administrative and investment law, having been at the University since 2012. He is a qualified Turkish lawyer and holds an LLM from Washington College of Law and a PhD from Ankara University in Public and Administrative Law, with a thesis on the evolution of the public service concept in Turkish law in the context of concession agreements.

101 He spent most of his working career in the Turkish Treasury but from 2006 to 2012 he was employed by the Energy Charter Secretariat (ECS) in Brussels as a senior expert on investments. During his time at the Treasury his areas of responsibility included the negotiation of the relevant national and international agreements relating to the BTC pipeline, financing of various infrastructure projects in the energy sector and the restructuring of the energy sector in Turkey with a view to liberalisation in the late 1990s and early 2000s. He therefore has experience in the functioning of public enterprises in the energy sector and in how the Turkish legal system relating to public organisation works in general. He accepted that he had no particular experience in private international law.

102 Professor Cerrahoglu was called on behalf of Tepe. Professor Cerrahoglu graduated from the Faculty of Law University of Istanbul in 1965. He subsequently became Professor of Commercial Law at the Academy of Economics and Commercial Sciences (later Marmara University). He started to practice law in 1966 and founded the Cerrahoglu Law Firm. He remains the managing partner of that firm. He has written various books and articles on Turkish commercial law and Turkish execution and bankruptcy law. He accepted that he was not an expert on administrative law but he was a professor of and experienced in commercial law.

103 We are grateful to both experts who are clearly very knowledgeable and were both seeking to assist this Court in understanding certain aspects of Turkish law. The evidence of both experts covered a wide area and we propose, in the interests of brevity, to restrict ourselves to those aspects specifically relied upon by either side.

104 We shall deal in turn with each of the four headings relied upon by Botas.

(a) Privatisation

105 This was an area of Turkish law where there seemed to be little dispute between the parties. Law No.4046 Concerning Arrangements for the Implementation of Privatisation ("Law 4046") establishes a mandatory procedure for the privatisation of companies which are owned directly by the Republic and of companies which are subsidiaries of companies owned directly by the Republic. Tepe did not therefore dispute that Law 4046 applies to the shares in TPIC and BIL as being subsidiaries of Botas.

106 Law 4046 establishes a Privatisation High Council ("PHC") consisting of the Prime Minister, the Deputy Prime Minister and various other specified ministers. Responsibility for deciding whether to privatise a company rests with the PHC which also determines the method and details of the privatisation.

107 In its skeleton argument, Botas contended that Tepe was in effect seeking the

privatisation of the Shares in circumstances where Turkish law prohibits such privatisation without the PHC's consent. If Tepe were allowed to proceed with enforcement against the Shares, this Court would be wresting control of TPIC and BIL out of the hands of the Republic and placing it in the hands of a private party.

108 However, Dr Cal agreed in evidence that Law 4046 was concerned only with voluntary decisions to transfer assets from public ownership to private ownership. He agreed that the fact that Law 4046 applied to voluntary transfers would not prevent the assets in question being attached as a result of an order by a court in Turkey.

109 We accept that the effect of Law 4046 is that, as a matter of Turkish law, Botas would require the consent of the PHC in order to dispose of the Shares because both TPIC and BIL are its subsidiaries. However, as a matter of Jersey law, Botas is the registered owner of the Shares. If Botas were to sell the Shares to a *bona fide* third party without notice without the consent of PHC, the purchaser would acquire good title.

110 In its closing submission Botas submitted that the interest in the Shares which was created as a result of the effect of Law 4046 was analogous to the interest created by requisition in cases such as *The Cristina*. Law 4046 created an interest under Turkish law sufficient to engage state immunity.

111 Tepe, on the other hand, pointed out that Law 4046 applies to all subsidiaries of all state owned entities. It would follow, if the argument of Botas were correct, that the Republic would be able to claim immunity in relation to all entities covered by Law 4046, which would mean all subsidiaries of any entities owned directly by the Republic. That would be nonsensical and completely contrary to the principle recognised in the Act that separate entities did not have immunity save in certain limited circumstances where they acted in exercise of sovereign authority (see section 14(2)). The mere fact that, as a matter of Turkish law, Botas required the consent of the PHC to dispose of the Shares did not give the Republic a level of interest or control sufficient to attract sovereign immunity.

(b) Does the Decree Law on State Economic Enterprises ("Decree 233") apply to BIL and TPIC?

112 As its name suggests, Decree 233 regulates the establishment and operation of entities owned by the Republic, referred to in the Decree as 'state economic enterprises' ("State Enterprise"). Article 2 of the Decree divides State Enterprises into two categories. The translated version of Decree 233, which was exhibited to the affidavit of Mr Serkan Genel, the chief legal advisor to Botas, describes the first category as a ***'state-owned entity'*** and defines it as follows:-

> ***"A state-owned entity is a state economic enterprise established to operate in accordance with the principles and rules of trade in the***

economic sphere, with its entire capital being owned by the State."

113 The second category is described as a *'public economic organisation'* and is defined in Article 2(3) of Decree 233 as follows:-

> ***"A public economic organisation is a state economic enterprise established to produce and market monopolistic goods and services in pursuance of the public interest, with its entire capital being owned by the State and its goods and services being considered concession (sic) by virtue of the public service it provides."***

114 Various witnesses have used different terminology to describe the two categories of State Enterprise. For convenience we shall refer to a state owned entity (ie the first category) as an 'SOE' and to a public economic organisation (the second category) as a 'Public Organisation'.

115 Dr Cal and Professor Cerrahoglu disagreed as to which category Botas falls into. Professor Cerrahoglu argued that Botas is clearly an SOE for the following reasons:-

(i) Article 60 of Decree 233 provides that the State Enterprises which are subject to the Decree (as well as their institutions and subsidiaries) are shown in the annexed list. Schedule A of that list contains those State Enterprises which are categorised as SOEs and Schedule B lists those categorised as Public Organisations. Botas (under its previous name of Petroleum Pipeline Corporation) is listed in Schedule A under the Ministry of Energy and Natural Resources. Professor Cerrahoglu says that, as this is contained in the legislation, it is determinative of Botas' status as an SOE.

(ii) The main charter of Botas (which is the document which established it) refers in Article 2 to the same two categories of State Enterprise (although it calls the first category a 'State Economic Organisation'). It goes on in Article 3 of its main charter to say as follows:-

> *"1. Botas, incorporated by virtue of this Main Charter, is a State Economic Organisation that bears the nature and character of a legal entity, which is autonomous in its operations, with liabilities limited to its capital."*

It therefore states unambiguously that it is a State Enterprise which falls within the first category, i.e. using our terminology, it is an SOE.

(iii) That accords, says Professor Cerrahoglu, with its objectives which are clearly commercial. Thus at Article 4 of the main charter one finds:-

> *"Botas is founded in order to build oil, oil products and natural gas pipelines, have them built, take over, purchase or hire already built pipelines both in Turkey and abroad, transport oil, oil products and natural gas and purchase and sell the crude oil and natural gas to be transported*

via subject pipelines and carry out all oil related operations such as exploration, drilling, production, transportation, storage and refinery of oil and natural gas abroad, pertaining to the provision of oil and natural gas."

116 Dr Cal, on the other hand, considers that a Turkish court would look to the substance of what Botas does in order to determine whether it is an SOE or a Public Organisation. Although Botas had lost its *'de jure'* monopoly in the transmission of gas, it had retained a *'de facto'* monopoly because it was the sole operator of the Turkish National Gas grid. Its other activities such as participation in a number of international oil and gas projects, including the BTC pipeline, were clearly services of a public benefit. He felt that Botas was put into Schedule A of Decree 233 as an SOE because, when this was done, there was a strong political momentum for privatisation and it might well have been hoped that Botas would be privatised, for which it would be preferable to list it as an SOE running on a commercial basis. He also drew attention to the fact that the state airports authority was listed as a Public Organisation because it held a monopoly in running state airports. If that company was listed as a Public Organisation, why should not Botas be the same?

117 Having had the benefit of listening to both experts give evidence, we conclude that, on this point, we prefer the evidence of Professor Cerrahoglu. Where both the legislation and its constitutive documents state specifically that Botas is an SOE, we cannot see that a Turkish court would be entitled to say that it was not; and Dr Cal provided no evidence to us to suggest that a court might have the power to ignore both the legislation and the constitutive documents of Botas in this way. Indeed, we find that on this point, Botas has not even established a *prima facie* case.

118 Decree 233 provides that, once established, a State Enterprise has legal personality, is subject to the provisions of private law except in relation to the reserved matters set forth in the Decree, and its liability is limited to its capital, which is determined by the Higher Coordination Council of Economic Affairs (Coordination Council) which consists of the Prime Minister and eight other ministers.

119 The Decree defines the relationship between the Republic (acting variously through a Minister, the Coordination Council or the Under Secretariat at the Treasury – and it is not necessary to make any distinction for our purposes) and a State Enterprise and gives a considerable measure of state control over State Enterprises. For example, the directors are appointed by the Republic (Article 6); the relevant Ministry is responsible for supervision of the State Enterprises falling within its area of responsibility and may carry out inspections and investigations and demand financial information etc; State Enterprises may form subsidiaries (when more than 50% of the shares are owned by the State Enterprise) but the establishment of a new subsidiary requires a decision by the Council of Ministers. A number of the provisions of Decree 233 apply to subsidiaries. Article 38 is significant and provides:-

"Decisions concerning liquidation, assignment, sale and granting of operational rights of enterprises, institutions, subsidiaries, businesses,

business units and affiliates within the scope of the present Decree Law shall be taken by the Coordination Council."

120 Thus, on the face of it, a State Enterprise which wishes to liquidate, sell or otherwise dispose of its shares in a subsidiary can only do so with the approval of the Coordination Council; and the Coordination Council could direct any State Enterprise to effect such a liquidation, sale or transfer.

121 Article 58 of Decree 233 is important for present purposes. It is headed ***"Exemption".*** Article 58(1) deals with certain named companies which are to be exempt from the provisions of Decree 233 and Article 58(2) effects the same in relation to companies incorporated outside Turkey by persons who benefit from the provisions concerning incentives for foreign capital. Neither of those two provisions are relevant for the present case. However, Article 58(3) provides:-

"(3) The Council of Ministers shall be authorised to give permission to enterprises to set up companies abroad and participate in established companies abroad without being subject to the provisions of this Decree Law and to determine principles/rules in relation with these matters for each individual organisation."

122 With that general introduction, we turn to consider the position of Botas, TPIC and BIL.

123 Botas was originally established in 1974 as a subsidiary of a State Enterprise called Turkish Petroleum Corporation (TPAO) pursuant to Decree 7/7871 of 7 th March, 1974. In 1995, Botas was restructured as a State Enterprise under its own charter pursuant to Decision 95/6526 of the Council of Ministers, which cancelled Botas' status as a subsidiary of TPAO and reorganised it as a State Enterprise (i.e. held directly by the Republic).

124 TPIC was incorporated in Jersey in 1988 as a wholly owned subsidiary of TPAO. This followed Decision 88/ 13180 of the Council of Ministers dated 28 th July, 1988, whereby it exercised the power under Article 58(3) of Decree 233 and authorised TPAO to incorporate TPIC in Jersey. Article 2 of the Decision said that the share capital of TPIC should be US$3 million. The Decision went on to say at Article 6 that the directors, organisation, operating principles and internal supervision of TPIC as well as its relations with TPAO should be determined by the board of directors of TPAO. A number of the articles in the Decision emphasised that the company would have to comply with the laws and regulations of its place of incorporation. The stated objective of TPIC was to engage in oil exploration, drilling, production, transportation, storage, marketing, delivery services and refining.

125 Following Decision 2012/4152 of the Council of Ministers dated 24 th December, 2012, ownership of TPIC was transferred from TPAO to Botas. The Decision said simply that the shares in TPIC "belonging to [TPAO] shall be transferred to [Botas] free of charge …". The

Decision also amended Article 6 of the original Decision authorising the establishment of TPIC by substituting it with a new Article 6 which read “The management, operating principles and internal supervision of [TPIC] as well as its relations with [Botas] shall be determined by the Ministry of Development, Under Secretariat of Treasury and [Botas] in coordination with the Ministry of Energy and Natural Resources. The company's board of directors shall be organised within the framework of the principles and conditions required by the foreign legislation to which this company shall be subject.”

126 TPIC operates in the areas of exploration and production of oil. It has approximately 1000 employees globally. As at the date of the hearing, it held 20 exploration licences in various regions of Turkey. It is also engages in oil exploration activities in Iraq, Syria, Libya, Sudan, Georgia, Yemen, Russia, Azerbaijan, Turkmenistan, Uzbekistan, Kazakhstan, Colombia, Venezuela, Bolivia and Ecuador.

127 BIL was incorporated in Jersey in 1996 by Botas pursuant to a Decision of the Council of Ministers (96/8293) dated 6 th June, 1996. The authority of the Council was granted pursuant to Article 58(3) of Decree 233. The Decision recorded that the company would be incorporated in Jersey and would comply with the conditions required by the relevant foreign legislation. Article 6 of the Decision provided:-

> *“The directors, organisation, operating principles and internal supervision of the company as well as its relations with [Botas] shall be determined by the board of directors of [Botas].* The board of directors of the company to be established shall be organised within the framework of the principles and conditions required by the foreign legislation to which this company shall be subject. The members of the board of the company shall be elected among the members of [Botas], taking into account the relevant legislation and the company's articles of incorporation.”

128 In our judgment it is clear that both TPIC and BIL were actually incorporated by TPAO or Botas, as the case may be. Those companies were the owners of the two Jersey companies and, under Jersey law, had to be the entities causing those companies to be incorporated. Botas and TPAO needed the authority of the Council of Ministers under Decree 233 to incorporate the Jersey subsidiaries and that is what was granted by the Council. The two Decisions of the Council are consistent with that, in that they speak of TPAO and Botas being authorised to establish the relevant company.

129 Although the language of Decision 2012/4152 is rather different (in that it asserts that the shares in TPIC *‘shall be transferred’*) we think that again this can in reality be no more than an authority for such a transfer. Under Jersey law, the only person who may transfer shares is the registered shareholder. The shareholder in TPIC was TPAO and the share register could not be amended to show Botas as shareholder unless or until TPAO had executed a share transfer in favour of Botas. A decision of the Council of Ministers could not of itself effect any change in the ownership of TPIC; such change could only be achieved by action on the part of TPAO in executing a share transfer form.

130 Against that background, there is a dispute between the parties as to whether Decree 233 applies to TPIC and BIL.

131 Professor Cerrahoglu argues that it does not. We would summarise his reasons as follows:-

(i) Article 58(2) of Decree 233 was not, in his opinion, accurately translated in the version before us. He said that, when correctly translated and understood, Article 58(2) provides that a company is exempt from Decree 233 if either it is an entity benefitting from the provisions to encourage foreign capital investment in Turkey or it was incorporated under the laws of some other jurisdiction. We have to say that, on the evidence before us, we are unable to express any view on the accuracy of the translation. The version before us would appear to require both aspects to be satisfied. In the circumstances we cannot place any weight on this particular argument concerning Article 58(2) and do not consider Article 58(2) to be relevant.

(ii) The correct interpretation of Article 58(3) was that, where the Council of Ministers authorised a State Enterprise to set up a company abroad, that company was not subject to Decree 233. Such company was expressly to be governed by the laws of the jurisdiction of its incorporation, not Turkish law of which Decree 233 formed part.

(iii) That this was the correct position was supported by Article 60 which, as already stated, annexes a list of State Enterprises subject to the Decree and also of their 'institutions and subsidiaries'. TPIC and BIL do not appear on the list of subsidiaries of Botas (or indeed TPAO). That was strong evidence, said Professor Cerrahoglu, that they were not covered by Decree 233.

(iv) That was also the view of the Court of Accounts which, according to Dr Cal is a High Court responsible for inspecting the accounts of State Enterprises in general. In its report on Botas for 2013 it says at page 54 (in translation):-

> *"In accordance with the Council of Ministers decision No. 88/ 13180 published in the official gazette dated 21/08/1988 and numbered 19906, TPIC was established on 07.12.1988 under the legislation of Jersey, with its headquarters located abroad, as a fully owned subsidiary of [TPAO] and was recorded in the Jersey Trade Register with the registration number 42633.*
>
> *The company is not one of the domestic state-capital companies and is not subject to Decree No.233 governing public economic enterprises ("PEEs") and Decree No.399 governing the personnel regime for PEE employees."* [emphasis added]

(v) Professor Cerrahoglu also referred to the answer of the Minister of Energy and Natural Resources to a question in the Turkish Parliament concerning whether TPIC

was regulated by the provisions of Decree 233 in relation to matters of personnel. The written response of the Minister dated 13 th August contained the following:-

> *"Pursuant to sub-paragraph 3 inserted into the Decree No.233 … The Council of Ministers is authorised to give permission to public economic enterprises to establish companies abroad or join companies established without being subject to the provisions of this Decree, and to determine the principles regarding this issue in respect of institutions.*
>
> *Pursuant to the authority granted by Article 58 sub-paragraph 3 of Decree No.233, the Council of Ministers has given permission to [TPAO] to establish a company abroad as per the laws of a foreign state …*
>
> *In this respect, [TPIC] has been established in accordance with the laws of Jersey on 07.12.1988 and registered in the Jersey Trade Registry with the number 42633. TPIC, established in accordance with the laws of Jersey and pursuant to the decision of the Council of Ministers dated 28.08.1988 and numbered 88/13196 … is not among the domestic companies with a public capital; it is not subject to Decree No.233, to which Public Economic Enterprises are subject and to the Decree No.399 regulating the employment regime of their personnel, and hence to the legislation which [TPAO] is subject to."* [emphasis added]

132 Dr Cal, on the other hand, is of the opinion that Decree 233 applies to TPIC and BIL. We would summarise his reasons for so concluding as follows:-

(i) Article 1(1) of the Decree states "This Decree law encompasses the state-owned entities and public economic organisations as well as their institutions, subsidiaries and affiliates." There was no disputing that TPIC and BIL were both subsidiaries of Botas as falling within the definition of ***'subsidiaries'*** contained in Article 2(5) of the Decree. On the face of it therefore, the provisions of Decree 233 applicable to subsidiaries applied to TPIC and BIL.

(ii) He agreed that Article 58(3) enabled the Council of Ministers to say that Decree 233 should not apply to a particular subsidiary set up abroad but the wording of Article 58(3) was permissive and the Council was not obliged to authorise an exemption from the Decree for an overseas subsidiary. The Council had a discretion to determine whether a foreign-incorporated company should be exempt from the Decree or not. If it intended to authorise the establishment of a foreign company which was not subject to Decree 233, Dr Cal considered that this should be stated explicitly in the Council of Ministers' Decision. Neither of the Decisions establishing TPIC and BIL stated specifically that the companies were to be exempt from Decree 233. He considered therefore that they were not exempt.

(iii) In any event, he considered that Article 58(3) could be read so as to confine the qualification "without being subject to the provisions of this Decree law" to the act of establishing companies abroad i.e. exemption did not apply to the operation of the

company thereafter.

(iv) He conceded that TPIC and BIL were not included in the Schedule to Decree 233 as subsidiaries of Botas but pointed out that there was a company which had been privatised but was still erroneously included as a subsidiary of another State Enterprise in the Schedule. There had therefore to be a question mark over the accuracy of the Schedule.

133 In our judgment, the views of Professor Cerrahoglu on this issue are to be preferred. We would summarise our reasons for so concluding as follows:-

(i) We agree that, pursuant to Article 1(1) of Decree 233, subsidiaries of State Enterprises are generally encompassed within the Decree. It is then a question of looking at each Article of Decree 233 to see whether that particular provision extends to subsidiaries. Some of them do, others do not. We accept that TPIC and BIL are subsidiaries of Botas.

(ii) However, it is clear that Article 58(3) contains an exemption provision and indeed it is so headed. We consider that the more natural construction of Article 58(3) is that put forward by Professor Cerrahoglu. In other words, the Council of Ministers may authorise the establishment of a company abroad which is exempt from Decree 223. The two aspects go together. The provision entitles the Council to authorise the establishment of a company abroad in which event it is not subject to Decree 233. That accords with the practicalities. If a company is incorporated abroad, it is governed by the law of the place of incorporation. It would be a recipe for confusion and uncertainty if such a company were also to be subject to the provisions of Turkish law in so far as they were contained in Decree 233.

(iii) We are comforted in our interpretation by the fact that this is clearly the view of the Court of Accounts and also the view of those advising the relevant Minister in 2012 when he gave his parliamentary answer. We accept of course that the opinion of a Minister or his advisers as to the correct interpretation of a piece of legislation is not binding on the Court but, in our judgment, it gives some indication of how Article 58(3) is generally understood in Turkey. Even accepting that there may be errors in the Schedule, it is also of note that the Schedule to Decree 233 does not include TPIC or BIL as subsidiaries of Botas. This would tend to indicate that they are not subject to Decree 233.

(iv) We further note that Decision 2014/6842 (which is a Decision of the Council of Ministers taken pursuant to Article 29 of Decree 233 in relation to the financial strategies etc for State Enterprises and their subsidiaries for 2015) states at Article 1(2) that it applies to State Enterprises and their subsidiaries which are subject to Decree 233, and then goes on in Article 2 to exclude subsidiaries established under Article 58(3) of Decree 233 from the definition of subsidiary for the purposes of the Decision. That again is more consistent with it being generally understood that Decree 233 does not apply to overseas subsidiaries.

(v) Dr Cal was unable to point to any support for his construction of Article 58(3) and simply asserted that the Court of Accounts and the Minister were wrong.

(vi) We do not accept his suggestion that it is possible to construe Article 58(3) so that the exemption applies only to the establishment of an overseas subsidiary, not to its subsequent operation.

134 What is the consequence of this finding? Article 38 of Decree 223 provides as follows:-

> ***"Decisions concerning liquidation, assignment, sale and granting of operational rights of enterprises, institutions, subsidiaries, businesses, business units and affiliates within the scope of the present Decree law shall be taken by the Coordination Council."*** [emphasis added]

Dr Cal accepts that, if TPIC and BIL are not within the scope of Decree 233, Article 38 has no application and, so far as Decree 233 is concerned, Botas is at liberty to sell or otherwise transfer the Shares without the need for the consent of the Republic. It does not of course affect the requirement for such consent under any other legislation.

135 We should add that Article 17(1) of Botas' main charter provides as follows:-

> *"The provisions of the Decree Law and the Founding Articles shall apply for the foundation of affiliates, setting up their executive committees, appointment or elections of executive members, general manager and his or her deputies and the qualifications and conditions of eligibility as well as acquittal of the Executive Committee, while the relevant provisions of Turkish Commercial Code shall apply on any other matters not specifically addressed in any of the forgoing documents."*

136 *'Decree Law'* is defined in the main charter as Decree 233 and *'affiliates'* is defined as including subsidiaries. Botas argued that, even if Decree 233 did not apply directly to TPIC and Botas, Article 17 had the effect of applying it indirectly.

137 We do not agree. It is clear that this provision has in mind domestic subsidiaries to which the provisions of Decree 233 would indeed apply. Support for this is derived from the fact that it is stated that the provisions of the Turkish Commercial Code shall apply. Article 17 cannot have the effect of applying provisions of Decree 233 in circumstances where it would not otherwise apply. If, as we have held, Decree 233 does not apply to TPIC and BIL because they are incorporated outside Turkey and the Council of Ministers granted an exemption under Article 58(3), Article 17 of the main charter cannot override the position as established under the legislation.

(c) Parallelism

138 Based on the opinion of Dr Cal, Botas argues that the Turkish law principle of parallelism means that any transfer of ownership of TPIC and BIL can only be achieved in the same manner as it was created i.e. by Decision of the Council of Ministers. Dr Cal expressed it this way in his first report:-

> *"36. As explained above, Botas, TPIC and BIL were all established by Decree or Decision in accordance with the requirements of Decree Law 233.*
>
> *37. As a consequence, changes to the ownership structure of Botas, TPIC or BIL can only be effected in the same way, unless otherwise stipulated by Turkish law. This is pursuant to the Turkish administrative law principle of 'parallelism in power and procedure'. That is, the same administrative powers and procedures must be used to transfer or dissolve these companies as were used to establish them.*
>
> *38. This means that it would not be possible for a [State Enterprise] to dispose of the shares of its subsidiaries without first being empowered by a Council of Ministers Decree/Decision that would permit that transfer. A clear example of this was the transfer of the shares in TPIC from TPAO … to Botas through a Council of Ministers Decree as I have explained above. It would have been impossible for TPAO to decide to dispose of its shares in TPIC to Botas without this Decree."*

139 In cross-examination, Advocate Moran put to Dr Cal a passage from page 754 of what Dr Cal accepted to be an authoritative text book on Turkish administrative law by Professor Gozler:-

> ***"Principle of parallelism of powers***
>
> ***As can be seen above, an administrative authority can only have a power if that power was granted to it individually and expressly.*** Powers of administrative authorities are exceptional and are therefore interpreted within a narrow scope. This means that the powers of an administrative authority only consist of what were granted to it. However, this rule is softened by the principle of parallelism of powers … This principle means as follows: Unless otherwise specified in the law, the authority authorised to carry out an action (édiction) has also the power to modify (modification), abroage (abrogation) and revoke (retrait) the same action. Laws determine the authority authorised to carry out an action and often remain silent about who will have the power to modify or eliminate that action. In such cases, it is accepted that the authority authorised to carry out an action has the power to modify or revoke that action. For instance, if the law authorises an authority to appoint a civil servant but has remained silent about the discharge of that civil servant, then the power to discharge that civil servant …"

We were not given any more of the translation but neither of the parties disputed that it went on to say that the power to discharge rested with the authority.

140 Advocate Moran put it to Dr Cal that, contrary to the implication in paragraph 36 of his report, TPIC and BIL were not established by the Decision of the Council of Ministers; they were established by TPAO or Botas (as the case may be) with the authority of the Decision of the Council of Ministers under Decree 233. He accepted that that was so.

141 She then went on to suggest that, applying the passage from Professor Gozler's book, this meant that the power had been granted to Botas/TPAO to form the relevant Jersey subsidiary and accordingly the principle of parallelism suggested that it was those companies that had the power to revoke that action by liquidation, sale etc. Dr Cal was firm in saying that this was to misread the passage from Professor Gozler's book. The relevant authority was that of the Council of Ministers under Decree 233 and accordingly it was the Council of Ministers which, under the principle, therefore had the power to decide on any change to the ownership of the companies.

142 Advocate Moran maintained her submission as to the correct application of the principle of parallelism in her closing submissions; in other words she said that the principle suggested that it was Botas that had the necessary power to transfer or otherwise deal with the Shares. Her difficulty is that Professor Cerrahoglu said nothing about the principle of parallelism in any of his reports nor was he asked about Dr Cal's evidence on this point when he gave evidence orally. Tepe therefore has nothing with which to contradict the evidence of Dr Cal.

143 We understand the point put to Dr Cal by Advocate Moran in relation to the extract from Professor Gozler's text book but, in the absence of any evidence on the part to Tepe, we do not feel able to reject Dr Cal's evidence. He has made it clear that he agrees with the way it is described in Professor Gozler's book but that in this context it applies to the Council of Minister's decision rather than that of Botas.

144 Accordingly, on the basis of the evidence before us, we find that the principle of parallelism has the result that, where the Council of Ministers consents to the incorporation of a subsidiary of a State Enterprise, the consent of the Council of Ministers is also required to any disposal, liquidation etc of that subsidiary. That applies therefore to the Shares.

(d) Other controls

145 Botas referred to a number of other provisions which, it submitted, supported its contention that the Republic has sufficient control over and/or interest in the Shares as to attract sovereign immunity. For the most part, the existence of these measures was not disputed by Tepe and accordingly we will summarise the position as briefly as possible.

(i) Decision 2014/6842

146 As already stated, the Council of Ministers, in pursuance of the power conferred upon it by Article 29 of Decree 233, issued Decision 2014/6842 on 30 th September, 2014. As stated in Article 1 of the Decision, its objective was to determine the strategies and methods that should enable State Enterprises to carry out their operational activities in 2015 by using the country's resources in an effective and efficient manner and to escalate their values to the maximum level possible. The Decision applied to State Enterprises and their subsidiaries (with the exception of those established under Article 58(3) of Decree 233). Accordingly, all the measures contained in the Decision dealing with matters of employment, procurement, payment of overtime, financial provisions and many other matters do not apply to TPIC and BIL. However, Article 28 of the Decision does apply to overseas subsidiaries of State Enterprises and is in the following terms:-

> *"(1) Upon request, public enterprises shall communicate any information and document concerning the subsidiaries and affiliates founded abroad and operating under the laws of their residence countries and their overseas investments to the Under Secretariat and the Ministry of Development.*
>
> *(2) Any action to be taken regarding the change of capital of subsidiaries and affiliates founded or to be founded pursuant to paragraph (3) of Article 58 of the Decree Law No. 233 shall be subject to the approval of the Under Secretariat and the Ministry of Development."*

Thus, under Article 28(2), any change in the capital of TPIC or BIL (or indeed of any overseas subsidiary of any State Enterprise) requires the approval of the Under Secretariat and the Ministry of Development. Under Article 28(1) the Under Secretariat and the Ministry of Development may request Botas to communicate information and documents about TPIC or BIL.

147 Tepe did not dispute the existence of these two provisions but merely pointed out that both Articles only bound Botas; they did not impose any obligation upon TPIC and BIL themselves.

(ii) Control of the boards of TPIC and BIL

148 Botas asserts that the Decisions dealing with TPIC and BIL emphasised the level of control retained by the Republic. Thus in Decision 2012/4152 (which transferred ownership of TPIC to Botas) Article 6 of the original Decision establishing TPIC was amended to read:-

> *"The management, operating principles and internal supervision of the company as well as its relations with [Botas] shall be determined by the Ministry of Development, Under Secretariat of Treasury and [Botas] in coordination with the Ministry of Energy and Natural Resources. …"*

149 The Decision establishing BIL (96/8293) was amended by Decision 2006/11325 so that

Article 6 now reads:-

> *"The directors excluding the general manager of the company as well as its organisation, operating principles, internal supervision and relations with [Botas] shall be determined by the Board of Directors of [Botas].* The Board of Directors of the company to be established shall be organised within the framework of the principles and conditions required by the foreign legislation to which this company shall be subject. The Board of Directors shall be composed of one chairman and four members. The company's general manager shall at the same time be the chairman *of the Board, and shall be appointed by the relevant Minister.* Two of the members of the Board shall be appointed by the relevant Minister whereas the other two members shall be appointed by the approval of the relevant Minister upon the proposal of the Board of Directors of [Botas], one of which shall be among the company's vice-general managers and the other of which shall be among the members of [Botas]."

Thus the Minister appoints the chairman and two of the directors of BIL. The other two directors are appointed on nomination by Botas but with the approval of the Minister. The articles of association of BIL have been amended to incorporate these provisions.

150 Pursuant to these provisions, the Deputy Under Secretary of the Ministry of Energy and the general manager of the General Directorate of International Foreign Relations and the European Union of the Ministry of Energy sit on the board of TPIC. The general manager of the General Directorate also sits on the board of BIL as does the acting head of the Foreign Capital Coordination Department of the Ministry of Energy.

(iii) Law 4734 on Public Procurement

151 Botas asserts that Law 4734 on Public Procurement applies to both TPIC and BIL. Though we were not referred specifically to this Law during the course of the hearing, the assertion by Botas was not disputed by Tepe and, on inspecting the Law, it states that it applies to State Enterprises and to any corporation more than half of which is owned by a State Enterprise. The assertion of Botas would therefore appear to be correct. According to Mr Genel, the chief legal adviser of Botas, the Law regulates how entities subject to it should procure goods, services and works. The Law sets thresholds for which contracts are caught by it and sets out the procedures by which tenders for such contracts must be conducted. It also includes provisions on the contents of procurement notices, how prequalification notices must be advertised and how tenders should be evaluated. The Law has established a Public Procurement Authority to oversee all public procurements.

(iv) The level of control by the Republic over Botas

152 Advocate Nicholls submitted that, as set out in the affidavit of Mr Genel at paras 28 – 49, the level of control exercised by the Republic over Botas as a State Enterprise went beyond

that of a 100% shareholder. We have carefully considered those paragraphs. We do not lengthen this judgment by repeating them all here but examples of the level of control referred to by Mr Genel can be found in the following:-

(i) Under Decree 233 the relevant Ministry has a power of inspection in pursuance of its responsibility for supervision of Botas (Article 40), the Council of Ministers can (upon the proposal of the Minister) determine the price of goods produced and services provided by and the fields of activity of Botas and its subsidiaries (Article 35(2)), the Higher Planning Council can determine Botas' headquarters (Article 3(4)), approve its strategic plans (Article 29(2)), make decisions regarding its liquidation or sale (Article 38) and control the constitution of its board of directors (Article 6).

(ii) Under Decree 2014/6842, Botas is required to send financial and non-financial information to the Under Secretariat and the Ministry in order to enable them to monitor Botas' progress regarding targets set out in the general investment and finance programme for 2015 (Article 20(2)), the Under Secretariat may carry out audits and inspections of Botas (Articles 22(3) and (4)), and the appointment processes for personnel of State Enterprises is subject to approval of the Under Secretariat (Article 4).

(iii) Law 2477 on the Procedure for Appointment of Public Bodies applies to general managers and deputy general managers of Botas. Permanent employees of Botas are deemed to be civil servants.

153 Advocate Nicholls pointed out that in his evidence Professor Cerrahoglu accepted that the controls imposed by Decree 233 were in addition to those that the Republic possessed as sole owner of Botas.

154 Tepe did not dispute that these various controls over Botas exist but emphasised that they are not specific to Botas; they apply to all State Enterprises. Furthermore, Advocate Moran pointed out that, later in his evidence, Professor Cerrahoglu had, in the context of the Decision to transfer TPIC from TPAO to Botas, stated that the control of the Republic was not based on the sovereign power of the State; any shareholder holding 100% of a company could behave in a similar manner.

(e) Attachment under Turkish law

155 Both experts on Turkish law devoted a significant part of their evidence towards the question of whether assets of Botas such as the Shares (assuming they were situated in Turkey rather than in Jersey) could be subject to attachment to enforce a judgment of a Turkish court. We agree with Advocate Nicholls that, on close analysis, this issue is not relevant to the question which we have to decide, namely whether the Republic has sufficient interest in or control over the Shares as to engage sovereign immunity. Sovereign immunity would not of course be relevant in the Turkish courts as the principle only applies

in relation to foreign states.

156 Nevertheless, in case we are wrong in our view as to relevancy, we will address the issue. However, because of our view on relevancy, we shall do so as briefly as possible.

157 There is much common ground between the experts. The relevant Law is Law No.2004 on Enforcement and Bankruptcy, Article 82 of which provides that ***'state properties'*** and ***'properties designated as non-seizeable in any special law'*** are immune from attachment. There was originally such a special law in relation to State Enterprises because Article 57(2) of Decree 233 provided that both movable and immovable property of State Enterprises was immune from attachment.

158 However, Article 57(2) was repealed by Article 1 of Law 4011 in 1994. Accordingly there is no longer a special law granting immunity in respect of the assets of State Enterprises.

159 One is therefore driven back to the expression 'state property' in Article 82 of the Enforcement Law. This is the point at which the experts divide.

160 Dr Cal considers that shares in a subsidiary of a State Enterprise would be considered as 'state property' by the Turkish courts. We would summarise (very briefly and no doubt very inadequately) his reasons as follows:-

> (i) Taking into account that subsidiaries are established by government decision and that the principle of parallelism and the Privatisation Law mean that shares in a subsidiary cannot be disposed of by a State Enterprise without the consent of the Republic, such shares would be considered as indirectly owned by the state such that they constituted 'state property'.
>
> (ii) A second argument was that, when repealing Article 57(2) of Decree 233, the legislature did not intend to exclude all property of State Enterprises from the scope of the immunity; rather it just intended to remove the blanket immunity of the property of State Enterprises. In the absence of clarity as to whether all State Enterprise property was outside the scope of Article 82, the Turkish courts would determine the matter. In his opinion a Turkish court would be unlikely to permit the attachment of State Enterprise property which was in use for the provision of public services. For example, in case 2010/39 the Court of Cassation held that certain movable properties of municipalities (such as ambulances, firefighting or garbage trucks) were immune from execution because they were in use for public service. Energy sector activities had consistently been viewed as a public service by the courts. BIL operated the Turkish section of the BTC pipeline which would be likely to be considered as a public service. TPIC held exploration licences and had on occasion been used to carry out Turkish foreign policy. Because its activities were in the energy sector, he considered that its activities were likely also to be considered as a public service. His view was supported by the fact that, in his opinion, Botas was a Public Organisation

rather than an SOE (i.e. an entity providing a public service).

161 Professor Cerrahoglu took the opposite view. Subject to the same caveats, we would summarise his reasons as follows:-

As already mentioned, Botas is not in that schedule. We would add that there appears to be a translation ***error in the second line of the passage referred to above.*** We think that it should read either 'excluded from attachment' or ***'immune from attachment'.*** This is because, on any view, 'state property' is immune from attachment.

(i) Article 57(2) of Decree 233 had originally conferred an immunity on all the property of State Enterprises. That provision having been repealed, the natural construction was that there was no longer immunity for the assets of such Enterprises. Article 57(2) in its original form had drawn a distinction between state property and the property of State Enterprises (because they were covered by a special law) and that position remained.

(ii) In support he referred to a decision of the Twelfth Civil Chamber of the Court of Appeals dated 27 th February, 2004, numbered E2003/ 27475, K.2004/4358 which concerned a company known as TEDAS, which is a State Enterprise providing electricity. The Court held that its assets could be attached and in passing said as follows (in the limited extracts with which we have been provided):-

> ***"The concept of state property stipulated in Article 82(1) of the Enforcement and Bankruptcy Law comprises only the properties, which are held by the agencies with general and private budgets that are within the legal entity of the state and whose management and accounting are subject to Law No.1050 on General Accounting.*** Certain public organisations have been given the status of an independent legal entity and turned into entities which are distinct from the state, and going even further, those which have an economic character have been made subject to private law. In order for the property of public organisations which are subject to private law provisions to be considered state property, the above mentioned conditions must be present.
>
> ***In addition, since Article 57(2) of the Decree Law 233 concerning the non-attachability of the movable and immovable properties of enterprises has been abolished by Article 1 of the Law No.4011 …, there is no legal obstacle to the attachment of property owned by such organisations.*** …"

(iii) Law 1050 had been repealed and replaced by Law 5018 on Public Fiscal Administration and Control. In Professor Cerrahoglu's opinion, consistent with the principle described in the case just mentioned, in order to be considered state property, the property must be held by an agency which comes within Law 5018. That Law contained a schedule which set out a list of public administrations which were subject to the Law. Botas was not on that list.

(iv) In support of his opinion, Professor Cerrahoglu referred to a text book *Yuar Talih, Yuar Alper Yuar Cuneyt, Treaties on Enforcement and Bankruptcy Law* at page 1546 where it is stated (in translation):-

> ***"In order for a property to be considered as 'state property' and excluded (sic) from immunity from attachment, such property should belong to a public administration with general or private budget.*** …
>
> ***In the Law No.5018 on Public Fiscal Administration and Control the concept of 'public administrations with general budget' has been preserved, whereas the concept of 'annexed budget administrations' has been abandoned and instead the concept of 'administrations with private budget' is used.*** Under this new form of legislation 'administrations with general budget' whose assets may not be attached is listed in the schedule."

162 We would add that the passage in *Talih* referred to appears to be consistent with the views of Professor Gozler referred to by Dr Cal where, at page 876 of his text book referred to earlier, he discusses the scope of Article 82(1) of the Enforcement Law. We would quote the following passages:-

> ***"The word 'state' in the expression 'state property' in Article 82(1) of the Execution and Bankruptcy Law means only the legal entity of the state, not all public entities.***
>
> ***In practice, the 'state property' that are said to be non-seizeable in Article 82/1 of the Execution and Bankruptcy Law means the property only possessed by general-budget and annexed-budget administrations, the administration of which is subject to the General Accounting Law No.1050.*** The previous decisions of the Court of Appeal are in accordance with this. However, the General Accounting Law No.1050 was abolished on January 1 2006 and was superseded by the Public Finance Management and Control Law No.5018. The Law No.5018 does not contain 'annexed-budget'. In the new system (the Law No.5018), some of the annexed-budget administrations were included in the general-budget administrations, whereas some of them were included in the public administrations with private budget. Therefore, it may be said that the property of public institutions and agencies named as 'private-budget administrations' and included in the sheet No.2 attached to the Law No.5018 is 'state property' for the purposes of Article 82 of the Execution and Bankruptcy Law, and that the property of such institutions may not be attached. Similarly, we can say that the property of regulatory and supervisory Institutions listed in sheet No.3 attached to the Law No.5018 may not be attached. Therefore, we can reach the conclusion that the property of all administrations and institutions that are subject to the 'central administration budget' may not be attached without making any distinction between public property and private property." [original emphasis]

As already mentioned, Botas does not appear to be subject to 'central administration budget'. Furthermore, Gozler goes on to say on the next page:-

> ***"As paragraph 2 of Article 57 of the Decree No. 233 on State Economic Enterprises, stating that 'Any movable and immovable asset of the enterprise may not be attached' was abolished by the Law No.4011 of September 14 1994, it is now possible to attach the property of State Economic Enterprises."***

163 In our judgment, the views of Professor Cerrahoglu are to be preferred on this aspect. One starts with the position that there was originally an immunity from attachment for the property of State Enterprises but that provision was repealed. The normal consequence which would follow from that is that there is therefore no longer any immunity for the property of State Enterprises. There is only therefore immunity for 'state property'. In our judgment, assets belonging to a State Enterprise such as Botas do not constitute 'state property' for the reasons put forward by Professor Cerrahoglu. In the first place, such assets do not belong to the state, they belong to the State Enterprise which is a separate legal entity. Secondly, such immunity appears to be confined to agencies or entities falling within Law 5018. The evidence before us would suggest that Botas does not fall within that Law. Thirdly, his view would appear to be consistent with the only text books to which we have been referred. Fourthly, Dr Cal placed reliance on the fact that, in his opinion, Botas was a Public Organisation rather than an SOE and was therefore an entity producing and marketing *'monopolistic goods and services in pursuance of the public interest'*. For the reasons given at para 117, we do not agree with his opinion. If Botas is an SOE and is therefore established to operate 'in accordance with the principles and rules of trade in the economic sphere', this militates against any of its assets being categorised as 'state property'.

164 Accordingly, we find that assets of Botas (including shares in any subsidiary) would not be immune from attachment by way of enforcement under Turkish law. However, as already stated, we do not consider that this finding is material to the question of whether the Republic is entitled to sovereign immunity in respect of the Shares, which are of course Jersey assets.

(vii) Conclusions on the evidence of control/interest

165 Although the Court received voluminous evidence and material on this topic, we think the position can ultimately be summarised fairly simply.

166 Taking first measures which apply to Botas, we conclude as follows:-

(i) Botas is a State Enterprise. It is accordingly a separate legal entity which can sue and be sued in its own name but it is wholly owned by the Republic. Although it was

created by charter rather than by issue of shares, the effect is the same as if the Republic was a 100% shareholder in Botas.

(ii) The business of any State Enterprise is managed by its board of directors and the same is true of Botas (see Article 6(2) of its Main Charter). However, the Republic has a considerable measure of control over all State Enterprises (and therefore Botas). This derives not only from its ownership but also from legislation which applies to State Enterprises. For example:-

(a) Decree 233, which contains, inter alia, the powers listed at paras 119 and 152(i) above.

(b) Decision 2014/6842, which contains the measures summarised at paragraphs 146 and 152(ii) above.

(c) Law 4734 on Public Procurement which contains the measures summarised at para 151 above.

(d) Law 2477 on the Procedure for Appointment of Public Bodies, as summarised at para 152(iii) above.

167 Turning to matters which have effect in relation to the Shares, we conclude as follows:-

All of these measures apply to the Shares and Botas' interest in TPIC and BIL.

(i) Under Law 4046 on Privatisation, a State Enterprise may not sell a subsidiary out of public ownership into private hands without the consent of the Privatisation High Council (see para 109 above).

(ii) Under the principle of parallelism, where a subsidiary of a State Enterprise comes into existence with the authority of the Council of Ministers, the State Enterprise may not dispose of the subsidiary without the like authority of the Council of Ministers (see para 144 above).

(iii) Any change to the share capital of an overseas subsidiary of a State Enterprise established pursuant to an authority under Article 58(3) of Decree 233 requires the consent of the Minister and the Under Secretariat under Decision 2014/4842 (see para 146 above).

168 As to measures having direct effect on TPIC and BIL we conclude as follows:-

(i) Appointment of the directors of TPIC and BIL is subject to a measure of control by the Republic as stated at paras 148–150 above.

(ii) Law 4734 on Public Procurement applies to TPIC and BIL (see para 151 above).

(iii) For the reasons set out at paras 112–137, Decree 233 does not apply directly to

any overseas subsidiary established pursuant to Article 58(3) of Decree 233 and therefore does not apply directly to TPIC or BIL.

(viii) Is the control/interest asserted by the Republic in the Shares sufficient to attract sovereign immunity?

169 We have come to the clear conclusion that it is not. We set out our reasons in the following paragraphs.

170 One starts from the position that assets of a separate legal entity which is wholly owned by a state are quite separate from the assets of the state itself. For a recent authoritative statement of this principle, we would refer to the decision of the Privy Council in *La Generale des Carrières et des Mines v F G Hemisphere Associates LLC* [2012] 2 CLC 709. In that case, a creditor of the Democratic Republic of Congo (DRC) sought to enforce an arbitration award against the DRC against the assets of a mining company (Gecamines) which was wholly owned by the DRC. The Privy Council, overturning the Royal Court and the Court of Appeal, held that it could not do so as the assets of Gecamines were separate from those of the DRC, notwithstanding the very high level of control exercised by the DRC over Gecamines. The headnote summarises the position in paragraph 2 as follows:-

> ***"… Where a separate juridical entity was formed by the State for commercial or industrial purposes, with its own management and budget, the strong presumption was that its separate corporate status should be respected, and that it and the State should not have to bear each other's liabilities.*** The presumption would be displaced exceptionally if in fact the entity had, despite its juridical personality, no effective separate existence. …"

171 In the present case, there is no dispute that Botas is a separate legal entity with its own management and budget. It is not disputed that its assets (including the Shares) are legally and beneficially owned by it. Applying *Hemisphere* therefore, its assets could not be applied towards payment of liabilities of the Republic.

172 It is of course correct that *Hemisphere* was concerned with whether a wholly owned company's assets could be attached in respect of the liabilities of a state whereas we are here concerned with whether a state can claim immunity in respect of assets of a wholly owned company. Nevertheless, as emerges from *Hemisphere*, they are in many respects different sides of the same coin. Thus Lord Mance at paragraph 29 said:-

> ***"The assets which are (subject to waiver and to the commercial use exception in S.13(4) of the 1978 Act) protected by State immunity should be the same as those against which the State's liabilities can be enforced."***

173 This distinction between assets of a state and of a company wholly owned by a state is reflected in the Act, which makes clear at section 14 that separate entities owned by the

state do not in general have any form of immunity. We have already set out the relevant provisions but for convenience we repeat them here:-

> ***"14(1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom: and references to a State include references to:-***
>
> ***(a) the sovereign or other head of that State in his public capacity;***
>
> ***(b) the government of that State; and***
>
> ***(c) any department of that government*** ,
>
> ***but not to any entity (hereinafter referred to as a 'separate entity') which is distinct from the executive organs of the government of the State and capable of suing or being sued.***
>
> ***(2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if:-***
>
> ***(a) the proceedings relate to anything done by it in the exercise of sovereign authority; and***
>
> ***(b) the circumstances are such that a State … would have been so immune.***
>
> ***(3) If a separate entity … submits to the jurisdiction in respect of proceedings in the case of which it is entitled to immunity by virtue of sub-section (2) above, sub-sections (1) to (4) of Section 13 above shall apply to it in respect of those proceedings as if references to a State were references to that entity."*** [emphasis added]

174 Botas makes no claim to be entitled to immunity under section 14. It would therefore, on the face of it, appear to be somewhat contrary to section 14 if assets legally and beneficially owned by Botas were found to be subject to sovereign immunity on the part of the Republic. Creditors who deal with a company such as Botas are presumably entitled to look at its accounts when considering whether Botas is a good credit risk. They could certainly be misled if assets belonging to Botas and in respect of which it is not entitled to claim sovereign immunity were nevertheless not available to creditors.

175 However, that initial impression must be considered in the light of the Act and the principles of sovereign immunity. There is no suggestion that the Shares are in the possession of the Republic. They clearly are not. However, it is asserted that the Republic has a level of control over, alternatively a *prima facie* interest in, the Shares which is sufficient to attract immunity.

(a) Control

176 Taking first the question of control, that immediately raises the question as to what level and nature of control is required in order to engage sovereign immunity.

177 The reference to control in the context of sovereign immunity appears to derive from the observation of Lord Atkin in the *Cristina* referred to at paragraph 65 above. Lord Atkin did not explain what he meant by control but in our judgment he was applying it in the context of a ship which had been requisitioned by the relevant government, which would therefore have complete control over the vessel in question. Support for this can be found in the observations of Earl Jowitt and Lord Radcliffe in *Dollfus Mieg*. Thus Earl Jowitt said at 604:-

> ***"My Lords, I think it probable that Lord Atkin inserted the words 'or control' in his second proposition so as to make it wide enough to cover those cases which had been cited to him in argument in which the foreign government had requisitioned or directed a ship without depriving the owners of their possession."***

Lord Radcliffe, having referred to the fact that in the Parlement Belge [5 PD 197] the Belgian Government had undoubtedly been the owner of the ship in question, went on to say at 617:-

> ***"But the principle recognised in the Parlement Belge has been carried much further since then.*** It has been applied even when the sovereign had not claimed, let alone proved, that he was the owner of the property that was the subject of the action. It has been regarded as sufficient to stay the proceedings (1) that he had de facto possession of the property (the *Gagara*, the *Jupiter*, the *Cristina*) or such rights of direction and control, without possession, as arise from requisitioning (the *Broadmayne*) and (ii) that the nature of the proceedings is such that, if successful, they would result in an order of the Court affecting that possession or those other rights."

Similarly, in the *Cristina* itself, Lord Wright at 507 said:-

> ***"… but the rule is not limited to ownership.*** It applies to cases where what the Government has is a lesser interest, which may be merely not proprietary but not even possessory. Thus it has been applied to vessels requisitioned by a government, where in consequence of the requisition, the vessel, whether or not it is in the possession of the foreign State, is subject to its direction and employed under its orders."

178 We have not had drawn to our attention any case where sovereign immunity has been conferred on the basis of control other than in the context of the requisitioning of ships.

179 In our judgment, the level of control of the Republic over the Shares is of a very different nature and order from the sort of control envisaged in those cases. Where a government has requisitioned a ship, it has complete control of that ship. It can decide what is to be

done with it, where it should go, what cargo it should carry etc. In substance, if not in legal theory, it has a form of temporary ownership in that it is likely to possess many of the powers of an owner except powers of disposal etc.

180 That is very different from the present case. Here, day to day control of the Shares rests with Botas, which is the legal and beneficial owner of the Shares. In support of the claim to sovereign immunity, reliance is placed first on the level of control (as summarised at para 166 above) which the Republic can exercise over Botas. We are content to accept that, if the Republic (through its relevant organ) directed the board of Botas to dispose of a particular asset (including the Shares), the board would no doubt be obliged to do so. However, that seems to us to be beside the point. First, if that were sufficient, the Republic would have 'control' for these purposes over all the assets of Botas. There could be no distinction between the Shares and all the other assets; yet it is accepted that the Republic has no claim to immunity in respect of any other assets of Botas.

181 Secondly, we do not see that the level of control which the Republic can exert over Botas (whether by means of its ownership or by means of the various legislative measures referred to above such as Decree 233) is of a different order to that commonly exercised by states over their wholly owned subsidiaries; see for example the high level of control exercised by the DRC over Gecamines in the *Hemisphere* case. If the level of state control which exists in this case over Botas were sufficient to attract immunity on the part of the Republic in the assets of Botas, it would drive a coach and horses through the provisions of section 14 and the clear intention of the Act that wholly owned entities should not in general have immunity.

182 One is therefore looking for some specific additional level of control over the Shares which is different from the Republic's general level of control over Botas and takes it into the degree of control envisaged in the *Cristina* and *Dollfus Mieg*.

183 So what are those additional measures of control? In essence they seem to us to be threefold. First, as a result of the law of privatisation and the principle of parallelism, Botas cannot dispose of the Shares without the consent of the Republic, nor as a result of Decision 2014/4842, can it agree any change to the share capital of TPIC or BIL without the consent of the Republic. Secondly, the Republic has a considerable measure of control over who are appointed as directors of TPIC and BIL. Thirdly, the law on Public Procurement applies to TPIC and BIL.

184 In our judgment, these additional factors do not bring the level of control to a level akin to that envisaged in the various cases. As to the law of privatisation, the principle of parallelism and the law on Public Procurement, these would be equally applicable to any other subsidiary of any State Enterprise and Decision 2014/4842 would be equally applicable to any overseas subsidiary of any State Enterprise. Accordingly, if that were sufficient, it would mean that the shares in all subsidiaries of any Turkish State Enterprise would be the subject of sovereign immunity. That seems to us to be wholly inconsistent

with the principles underlying the Act in so far as concerns separate entities. Furthermore powers of this nature are more limited and do not reach the level of control possessed by a government which has requisitioned a ship or some other property.

185 As to the second aspect, we do not think that this assists the Republic either. Even if, contrary to our view, Decree 233 were held to apply directly to TPIC and BIL, all this would mean is that the public would have a measure of control over the activities of TPIC and BIL in the same way as it has control over the activities of State Enterprises and all their other subsidiaries and that the Shares could not be disposed of without the consent of the Republic. As already stated, we cannot think that such control is sufficient of itself to attract sovereign immunity as it would be quite inconsistent with the general approach to separate entities owned by a state and would mean that the shares in all subsidiaries of any State Enterprise would be subject to sovereign immunity. Similarly, the fact that the Republic has a substantial measure of control over who is appointed as directors does not in our judgment take the matter any further. Once appointed, the business is managed by the directors subject to any restrictions imposed by legislation. One comes back to the question of what is the level of control over the Shares, which are legally and beneficially owned by Botas and are therefore under the control of the board of Botas, subject to any specific constraints as already discussed.

186 In summary, we do not consider that the Republic is in control of the Shares in the sense of having absolute control on a day to day basis as in the requisition cases. We do not consider that the nature and level of control which it has is sufficient to attract sovereign immunity.

(b) Interest

187 Turning to the question of whether the interest asserted by the Republic is sufficient to attract immunity, we would start by referring to the case of *Belhaj v Straw* [2015] 2 WLR 1105. The claimant in that case brought an action seeking damages against the defendants (a previous minister and officials of the UK government) for the UK's participation in various actions which it was alleged had led to unlawful abduction, mistreatment and/or torture by agents of foreign governments. The defendants applied to strike out the proceedings on the ground, inter alia, of sovereign immunity on the basis that the action indirectly impleaded those foreign states because it affected 'their interests'.

188 The English Court of Appeal was referred to the UN Convention on Jurisdictional Immunities of States and their Property ("the UN Convention") and in particular to Article 6(2) which provides:-

> ***"A proceeding before a court of a state shall be considered to have been instituted against another state if that other state***
>
> ***(a) is named as a party to that proceeding; or***

(b) is not named as a party to the proceedings but the proceedings in effect seek to affect the property, rights, interests or activities of that other state."

189 Lord Dyson MR referred at paragraph 45 to *Fox and Webb, The Law of State Immunity*, 3rd Edition (2013) p307 where it was stated (in relation to the meaning of Article 6(2)(b):-

"'interests' should therefore be limited to a claim for which there is some legal foundation and not merely to some political or moral concern of the state in the proceedings."

Lord Dyson went on in the same paragraph to conclude:-

"Nevertheless, these passages support the view that it is necessary to confine the reference in Article 6(2)(b) to the 'interests' of states to legal interests as opposed to interests in some more general sense."

The Court of Appeal rejected the argument based on sovereign immunity. It confirmed that the concept of sovereign immunity based on indirect impleader was limited to where the proceedings were brought in relation to property in the ownership, possession or control of a state (paras 35 and 50). It specifically rejected the suggestion (at para 50) that the appropriate test of indirect impleader was whether the rights of the state concerned would be obviously affected.

190 We are not convinced that *Belhaj* is of great assistance because it was concerned with the meaning of 'interests' in Article 6(2) of the UN Convention (which is not yet in force) whereas we are concerned with the meaning of 'interest' in Section 6(4)(b) of the Act. Nevertheless, if 'interests' in the UN Convention refers to legal interests as opposed to interests in some more general sense such as a political or moral concern, *a fortiori*, the same must be true in section 6(4)(b) of the Act because that is referring to an interest in property. We agree therefore that the reference in section 6(4)(b) must be to some interest which has a legal basis such as a legal or beneficial interest or perhaps some contractual interest. The 'interest' of a state in property because it considers that property to be very important politically or economically to the state is not an 'interest' in property for the purposes of section 6(4)(b).

191 In the course of its argument, Botas did not draw a distinction between the grounds which it relied upon to show 'control' and those to show an 'interest'. It relied on all the matters set out at paragraphs 99–154 above.

192 We emphasise that we are considering at present whether the 'interest' asserted on behalf of the Republic is a sufficient 'interest' for the purposes of section 6(4)(b) of the Act so as to attract sovereign immunity. We are assuming for these purposes that the facts giving rise to the interest asserted on behalf of the Republic are established. In fact, as we have seen, the Court has accepted the existence of all the various controls asserted on

behalf of the Republic except for the applicability of Decree 233 directly to TPIC and BIL and the ability to attach property of a State Enterprise in Turkey. For the purposes of the present exercise, we proceed on the basis that these two aspects have also been established in favour of the Republic. The question then is whether such facts give rise to a sufficient interest. In other words, we are engaged on the first of the two exercises referred to in para 98(ii) above.

193 In our judgment, even on this basis, the matters relied upon do not amount to an interest of the Republic in the Shares sufficient to attract immunity. The Republic has no legal, equitable or contractual interest in the Shares. It may be said to have an indirect interest in the Shares in that it is the owner of Botas and Botas owns the Shares. However, that is equally true of every other asset of Botas and indeed every asset of every other Turkish State Enterprise. If that was held to be sufficient interest, the intention behind section 14 of the Act would be set at nought because every state would be able to claim an interest in the assets (including the shares in any subsidiary) of any wholly owned state entity. That is clearly contrary to the intention of section 14. Accordingly, we have no hesitation in concluding that an indirect interest which a state may be said to have in the assets of a state owned entity does not amount to an 'interest' for the purposes of section 6(4)(b).

194 As in relation to control, there has to be something to differentiate the Shares from the other assets of Botas. In that connection, Botas relies upon the matters already referred to at paragraph 183, namely the power of veto over any disposal of the Shares, the Public Procurement Law and the measures of control over the share capital and the constitution of the board of directors of TPIC and BIL. On the assumption referred to at para 192, one can add to this list the application of Decree 233 directly to TPIC and BIL.

195 We do not agree that this is sufficient to give the Republic an interest for the purposes of Section 6(4)(b). Again, if it were sufficient, it would probably usually be the case that a state would be able to claim immunity in respect of the shares in a subsidiary of a state owned entity, contrary to the thrust of section 14.

196 Furthermore, we do not think that any of the previous cases assist Botas. In cases such as the *Cristina*, where there had been a requisitioning of the asset in question (a ship), the level of interest of the state in the ship was of a very different order, in that the state had complete control of the ship which could effectively be used in the interests and for the benefit of the state in such manner as the state directed on a day to day basis. In our judgment, contrary to the argument of Botas, that is very different from the shares in a subsidiary even where, as here, the entity which owns the shares cannot dispose of them without the state's agreement. In *Dollfus Mieg*, the state was held to be in possession of the gold bars (giving that word a wide meaning) but there is no suggestion that the Shares are in the possession of the Republic. In *Rahimtoola v Nizam of Hyderabad* [1958] AC 379, the State of Pakistan had legal title to the account in dispute (through its agent the High Commissioner) and that was sufficient to confer immunity. In the *AIG* case, the Central Bank had legal title and the state (RoK) had the equitable interest. Both those cases were very different from the present case where both legal and equitable ownership of the

Shares rest with Botas.

197 In our judgment, to hold that the Republic has an 'interest' in the Shares for the purposes of state immunity would be to go beyond anything that has been found to be an interest so far and we do not think it would be right or permissible to do so. Regardless of the views of the Republic, it must be for this Court to determine whether the control or interest relied upon is sufficient to fall within the principle of sovereign immunity. We accept that the Minister has emphasised the importance to the Republic of maintaining indirect ownership of TPIC and BIL. Thus in relation to TPIC the Minister says on page 1 of his letter *'It is important for the energy security of the Republic of Turkey that it continues to control TPIC'* and in relation to BIL, which operates the Turkish stretch of the BTC pipeline, the Minister says *'it is critical that the Turkish State continues to retain ownership of BIL'*. He goes on to say *'TPIC and BIL are considered as key state-owned assets by the Government of the Republic of Turkey.'* We accept what the Minister says as to the view of the Republic. However, the desire of the Republic to maintain the current ownership of TPIC and BIL as indirectly owned by the State is an example of the sort of 'more general' interest envisaged in *Belhaj* as opposed to a legal interest.

198 Although given in the different context of the argument in that case, the following comments of the Privy Council in *Hemisphere* are, in our judgment, supportive of the point we are making. Thus Lord Mance said this at paras 48 and 49:-

> ***"48. … Many state-controlled corporations are 'constituted in such a way that [their] purpose is to assist, promote, and advance the industrial development, prosperity and economic welfare of the area in which [they] operate' and in that sense carry out government policy. But that does not make their activities sovereign activity or make them part of the State. … None of the above cases should therefore be taken as supporting a conclusion that a broad concept should be taken of government or that activities which would otherwise be viewed as ordinary trading activities should be treated as governmental merely because ancillary to a principal function of carrying out government policies.***
>
> ***49. The Board therefore considers that Pleming JA was correct in his dissenting judgment in the Court of Appeal to take issue (para 259) with any suggestion that it was 'sufficient … for the entity to be involved in 'the exploitation of the nation's oil [or mineral] reserves' and therefore discharging a governmental function'. As Pleming JA went on to say:-***
>
> ***'… if that were the correct analysis, it is difficult to see how a State owned oil or mining company could fail to be held to be discharging a governmental function and (thereby) entitled at common law to sovereign immunity … A modern democratic State may choose (and is likely only to choose) for nationalisation areas of activity which are important, probably vital, to the economic and social well-being of the nation – energy, food production or transport for goods and people (or any other similar area).***

But, in my view, allowing a State owned company (or companies) to exploit reserves of coal, oil or minerals, does not convert that company into an organ of the State. …'"

(ix) Conclusions on sovereign immunity

199 For the reasons we have given, we hold that the Republic is not entitled to claim sovereign immunity in respect of the Shares. In our judgment, such a conclusion is entirely consistent with the statement by the Privy Council in *Hemisphere* at para 29 which, for convenience, we repeat:-

> ***"The assets which are (subject to waiver and to the commercial use exception in S13(4) of the 1978 Act) protected by state immunity should be the same as those against which the State's liabilities can be enforced."***

200 The Shares, like its other assets, are legally and beneficially owned by Botas. They appear in Botas' accounts and constitute part of its balance sheet. There is no suggestion that the Shares or any other assets of Botas could be enforced against in respect of liabilities of the Republic and any such suggestion would in our judgment be untenable.

201 In those circumstances, it is entirely consistent with the views of the Privy Council that the Republic is not able to claim sovereign immunity in respect of the assets of Botas including the Shares. In our judgment, this accords with justice and reality. The Shares are legally and beneficially owned by Botas. They should therefore be available to satisfy the liabilities of Botas. The mere fact that Botas needs the consent of the Republic to undertake certain transactions in connection with the Shares and that the Republic has a high level of control over how Botas manages its business is not sufficient to conclude that the Republic can claim sovereign immunity in respect of the Shares, particularly where the Shares could not be taken to satisfy any liability of the Republic. Our conclusion is also consistent with the position as described in *Dicey, Morris and Collins* at para 10–010 where it is stated:-

> ***"Even where a State is not immune because one of the exceptions applies, its property (except that used for commercial purposes) is immune from process of execution, but the property (of whatever kind) of a separate entity (other than a central bank) would be subject in such circumstances to execution if the proceedings did not relate to something done by it in the exercise of soverign authority."***

202 We should add that we have of course given careful consideration to the views of the Republic, as expressed by the Minister and the Ambassador as to the importance of TPIC and BIL remaining in indirect public ownership. However, in this connection, we would refer to Article 17 of Decision 2014/6842 of the Council of Ministers which states:-

> ***"Public enterprises shall be obliged to pay all of their debts, whether to the***

> ***public or to the private sector, and to carry out the necessary transactions for the collection of their receivables, including the dividends."*** [emphasis added]

203 Botas agreed to submit the disputes in this case to arbitration and, by reason of the Awards, it now has debts of the amounts contained in the Awards. It is therefore specifically obliged under Turkish law (by Article 17 of Decision 2014/6842) to pay the Awards. It is clear that Botas has sufficient resources to pay the Awards should it so choose. We have been addressed at length concerning the level of control which the Republic is able to exercise over Botas. It must follow that, if it so chooses, the Republic could procure that Botas complies with Turkish law as set out in Article 17 and pays its debts pursuant to the Awards. If the Republic were to procure that Botas complied with its obligations under Turkish law in this respect, any possible risk to the ownership of TPIC and BIL (and therefore to the economic interests of the Republic) would of course disappear.

204 In summary, having held that the Shares do not attract sovereign immunity, we see no reason not to confirm the interim *arrêt* in respect of the Shares.

(x) Commercial Use

205 Tepe argued that, even if we were to find that the Shares were 'property of a state' or that the Republic had sufficient control of or interest in the Shares as otherwise to attract sovereign immunity, sovereign immunity would not in fact apply because of section 13(4) of the Act, which provides that there is no immunity in respect of enforcement against property 'which is for the time being in use or intended for use for commercial purposes'. Tepe argued that, in relation to the holding of shares, one had to have regard to the activities undertaken by the company whose shares were held and that the activities of TPIC and BIL were both clearly commercial.

206 Botas, on the other hand, argued that one has to have regard to the purpose for which the Shares are held. The Shares are not held for commercial purposes, they are held for sovereign purposes because of the importance to the Republic of the activities undertaken by BIL and TPIC respectively. The certificate of the Ambassador as to the purpose for which the Shares are held was sufficient unless the contrary were proved.

207 In view of our conclusion that the Republic is not entitled to sovereign immunity in respect of the Shares in any event, we do not think it necessary to lengthen this already very lengthy judgment by considering this aspect further.

(B) Debts owed to Botas by TPIC and BIL

(i) Introduction

208 Upon presentation of the Representations, the Court by Acts dated 20 th November, 2014, granted an interim *arrêt* in favour of Tepe over all amounts owed by TPIC to Botas. On 8 th December, 2014, following presentation of Amended Representations, the Court extended the interim *arrêt* to cover amounts owed by BIL to Botas.

209 Initially, both the Answers filed and the subsequent witness statement of Mr Genel stated that no monies were owed by BIL or TPIC to Botas. However that was later corrected and it was admitted that monies were owed. We proceed on that basis.

210 No question of sovereign immunity arises in respect of such amounts. Botas accepts that such debts are choses in action which are assets of Botas in the same way as other assets such as bank accounts etc. and that the Republic does not and cannot claim sovereign immunity in respect of such assets.

211 Botas submits however that the Court should not confirm the *arrêt* and should indeed discharge the interim *arrêt*. It so submits on the grounds that the debts owed by TPIC and BIL to Botas are situated in Turkey and that the Court has no jurisdiction to order an *arrêt* over foreign situated assets. Alternatively, it submits that, if there is such jurisdiction, it should not be exercised unless the Court is satisfied that the Turkish court would regard the debts owed by TPIC and BIL to Botas as being automatically discharged by the *arrêt*. It was submitted that Tepe had failed to show that that was the position here.

212 Conversely, Tepe argued that the Court clearly has jurisdiction over TPIC and BIL because they are incorporated in Jersey and therefore amenable to the Court's jurisdiction. The Court could further be satisfied that, bearing in mind in particular that BIL and TPIC are not independent third parties but are subsidiaries of Botas, there is no realistic possibility of TPIC or BIL having to pay these debts twice if the *arrêt* is confirmed, once to Tepe and then to Botas.

213 In order to resolve this dispute, we shall consider first the applicable legal principles and then discuss the reasons for our conclusion.

(ii) Nature of an arrêt

214 In (*Hemisphere* [2011] JLR 486), the Court of Appeal considered whether an *arrêt* merely acted *in personam* or whether it created rights *in rem* in the asset which is the subject of the *arrêt*. After a thorough review of ancient authority, the Court of Appeal concluded (at para 152) that an *arrêt* was an act which affected the debt itself and created more than a mere personal obligation as between the third party debtor and the arresting creditor. The judgment of McNeill and Bennett JJA (agreed with on this point by Pleming JA) went on at para 156 to say that the position in the Island in relation to an *arrêt* was to the same effect as that in England and Wales in relation to a third party debt order (previously a garnishee

order) and that a third party debt order was not an *in personam* order against the third party but had proprietary consequences and took effect as an order *in rem* as against the debt owed by the third party to the judgment debtor.

215 The position is, in our judgment, conveniently summarised in paragraph 175 of the judgment of Page, Commissioner at first instance in (*Hemisphere* [2010] JLR 524) as follows:-

> ***"In English law, the effect of a final third party debt order or garnishee order absolute is not only to direct the third party or garnishee to pay the garnishor instead of his original creditor but, upon such payment, also to discharge, pro tanto, the third party garnishee from liability to his former creditor; the second element is regarded not just as a consequence of the first but as an integral part and necessary concomitant of the first.*** As authority for this it is unnecessary to look further than the decision of the House of Lords in Eram in which the history of this process and its treatment in decided cases were reviewed at length … The reasoning and conclusions expressed there are entirely consistent with those underlying the Jersey process of arrêt entre mains."

(iii) When may an arrêt be granted over a debt situated outside the jurisdiction?

216 The plaintiff in Eram had obtained a judgment from a French court and had registered it in England. The judgment debtors were resident in Hong Kong and had funds in an account there with a bank which was incorporated and carried on business in Hong Kong but also had a registered branch in London. The central issue was whether the plaintiff could properly be granted a third party debt order by the High Court in London in respect of the debt represented by the monies standing to the credit of the judgment debtors in the Hong Kong bank account (the court having jurisdiction over the bank by reason of the presence of its branch in London). The House of Lords, overruling the Court of Appeal and upholding the decision of the trial judge, held that no such order was permissible on the grounds that the debt in question was a foreign debt located in Hong Kong, and there was unchallenged evidence that the courts of Hong Kong would not recognise an English third party debt order as being effective to discharge the bank's liability on the account to its customer, the judgment debtors.

217 The House of Lords held that the fact that all the parties (including the third party debtor) were amenable to the personal jurisdiction of the English courts was not sufficient. Bearing in mind that such an order acted in rem against the debt, it would amount to an attempt to levy execution on an asset in a foreign jurisdiction and this would be contrary to the general principle of international law that one sovereign state should not trespass upon the authority of another by attempting to seize assets situated within the jurisdiction of the foreign state or compelling its citizens to act within its boundaries (see Lord Hoffmann at paras 54 and 67).

218 We would refer to the following passages as summarising the decision for present purposes:-

Lord Bingham at para 26:-

> ***"26. It is not in my opinion open to the court to make an order in a case, such as the present, [i.e. where the debt is situated in and governed by the law of the foreign jurisdiction], where it is clear or appears that the making of the order will not discharge the debt of the third party or garnishee to the judgment debtor according to the law which governs that debt.... I find myself in close agreement with the opinion of Hill J in*** *Richardson -v- Richardson* [1927] P 228, ***subject only to the qualification (of little or no practical importance) that an order may be made relating to a chose in action sited abroad if it appears that by the law applicable in that situs the English order would be recognised as discharging pro tanto the liability of the third party to the judgment debtor. ..."*** [emphasis added]

Lord Millett said as follows:—

> ***"107. ... The judgments were directed to the territorial reach of the court's jurisdiction, and were founded on the rule of international law that a debt can be discharged only by the law of the place where it is recoverable. There was no attempt to evaluate the risk that the third party might be compelled to pay twice. It was enough that the English court could not itself protect the third party and discharge the debt by the force of its own order. In*** *Martin -v- Nadel* ***Vaughan Williams LJ placed reliance on the statement of Channell B giving the judgment of the Exchequer Chamber in*** *Wood -v- Dunn* (1886) LR 2 QB 73, 80 ***that "the law will never compel a person to pay a sum of money a second time which he had paid once under the sanction of a court having competent jurisdiction." (original emphasis).***
>
> ***108. This is an important qualification. Just as the English court would not regard a foreign court as being a court of competent jurisdiction to discharge a debt recoverable here, so a foreign court would not regard our court as competent to discharge a debt recoverable there; and that was sufficient in itself to preclude the making of the order in respect of a foreign debt. Although in places this was described as a matter of discretion and in other places as a matter of principle, I think that the rationale was based on principle.***
>
> ***109. However that may be, I have no doubt that the issue should be regarded as one of principle. Our courts ought not to exercise an exorbitant jurisdiction contrary to generally accepted norms of international law and expect a foreign court to sort out the consequences. I do not share the Court of Appeal's confidence that the bank would have a restitutionary remedy under the law of Hong Kong. The cases indicate***

that it would not have such a remedy under English law in the converse case; compulsion of law connotes compliance with the order of a court of competent jurisdiction. It cannot safely be assumed that a foreign court would regard compliance with an order of a court whose jurisdiction it did not recognise as a sufficient basis for a restitutionary claim. Nor do I understand how a bank can properly debit a customer's account if it is not authorised to do so by the law which governs the account.

110. But it goes further than this. A restitutionary claim normally yields a personal remedy and not a proprietary one. If the third party debt order does not have extraterritorial effect in the place where the account is kept, then the account itself is not affected by the order. Such an order cannot give priority in the judgment debtor's bankruptcy or over other execution creditors in the foreign jurisdiction. Indeed, having regard to the terms of section 103 of the Insolvency Act 1986, I do not see how it would prevail even against an English bankruptcy. The order must, as the Court of Appeal appreciated, operate in personam and compel the third party to make payment out of its own money with only such rights of recourse against the judgment debtor as the foreign court or the English law of bankruptcy may allow.

111. But this would not be to execute the judgment against the assets of the judgment debtor. It would not be a process of execution at all. As I have explained, the discharge of the debt owed by the third party to the judgment debtor is not merely a normal consequence of the order but the critical feature which makes the process one of execution. If the court cannot discharge the debt by force of its own order, it cannot make the order. If the debt is situated abroad, the court should not seek to evaluate the risk of the third party being compelled to pay twice. The only relevant question is whether the foreign court would regard the debt as automatically discharged by the order of the English court. Since this would be most unusual, it would be for the judgment creditor to establish." [emphasis added]

219 Interestingly, *Dicey, Morris and Collins*, Vol. 2 (15th Edition) appears to consider that Eram has laid down an absolute rule that a third party debt order may not be made in respect of a debt situated abroad. Thus para 24–084 states:—

> ***"Until recently it was accepted that the presence of the debtor within the jurisdiction was the crucial factor which gave the court jurisdiction to make the order, and that neither the location of the debt, nor the lex contractus under which the debt had arisen, was required to be English.*** The House of Lords has now explained that this understanding was based on an erroneous interpretation of the authorities under legislation, and that the court will only make such an order if the debt is situated in England."

Dicey does not refer to the possible exception mentioned by Lord Bingham and Lord Millett

in the emphasised passages in the preceding paragraph (i.e. that such an order may be made if the court is satisfied that the order will be recognised as discharging the liability of the third party debtor). Although Lord Hoffmann did not advert to any such exception, both Lord Nicholls and Lord Hobhouse specifically agreed with the speech of Lord Bingham (although they also agreed with that of Lord Hoffmann). In the circumstances we think that the majority of the House of Lords are to be taken as having agreed with the existence of the exception. However, both Lord Bingham (where at para 26 of his speech he refers to the exception being of 'little or no practical importance') and Lord Millett (who at paragraph 111 speaks of the circumstances in which the exception would exist as being 'most unusual') clearly envisaged that it would be very rare for the requirements of the exception to be met. Lord Hoffmann also thought that this would be very unlikely because he said at para 66:—

> ***"… The bank owes the judgment creditor nothing.*** The third party debt jurisdiction is, as I have said, execution in rem against the chose of action. If the English court has no jurisdiction over the debt, I do not understand why a ***foreign court should recognise the third party's obligation to pay as having been under compulsion of law.*** Under generally accepted conflict of law rules, it is simply an unlawful seizure. The notion that one can justify the attachment of a foreign debt by imputing to the foreign law recognition of an exorbitant order for the purpose of founding a claim of payment under compulsion of law is in my opinion quite unreal."

220 In *Hemisphere*, the debt was found to be situated in Jersey and therefore the particular issue which we have to decide did not arise. Nevertheless, we consider that Page, Commissioner summarised the position accurately at paragraph 181:-

> ***"… Where a debt is situated (has its situs) abroad, an English court will not make a final third party debt order unless it is clearly shown that the foreign court would regard the debt as automatically discharged by the order of the English court; it is for the judgment creditor to establish this; this is the only relevant question; the court is not called upon, in such circumstances, to try to evaluate the risk of the third party being compelled to pay twice (see, in particular, Lord Millett at Eram … at para 111).*** But where the debt is situated in the country where the third party debt order is sought, the court has, nonetheless, a discretion to refuse to make a final order where it is satisfied by evidence that there is a real risk that a third party could be compelled to pay the debt again by its original creditor, even if this is the result of the foreign court purporting to exercise an extravagant extraterritorial jurisdiction."

As the Court of Appeal made clear in Hemisphere, the position concerning a third party debt order under English law is to be regarded as being equally applicable to the imposition of an arrêt under Jersey law.

(iv) The test for ascertaining where a debt is situated

221 This topic was the subject of detailed consideration by both the Royal Court (at paras 152–174) and the Court of Appeal (paras 178–194) in *Hemisphere*. Both Courts in turn referred, amongst other cases, to the leading authorities of *New York Life Insurance Co -v- Public Trustee* [1924] 2 Ch. 101 and *Kwok Chi Leung Karl -v- Estate Duty Commissioners* [1988] 1 WLR 1035. We would summarise the position as established in *Hemisphere* as follows (with the reference in brackets being to the paragraph in the judgment of the Court of Appeal (CA) or Royal Court (RC)) which establishes this proposition:-

(i) The situs of a debt owed by a company is the place where the company resides (CA 184).

(ii) A company is resident in the place where it is incorporated and has its registered office (CA 190).

(iii) A company is also resident where it carries on business. In order to be carrying on business in a place, a company must have a physical presence within the jurisdiction in question in the form of an identifiable place with a degree of permanence about it from which it carries on business; a branch or office (RC 171; CA 192).

(iv) A company may carry on business in a number of jurisdictions in which event it is resident in each of those jurisdictions (CA 184).

(v) Where a company is resident in more than one jurisdiction and it is expressly provided that payment of the debt is to be made in one of those jurisdictions, then that will be regarded as the situs of the debt (RC 153; CA 187).

(vi) Similarly, if one of the places where the company is resident is impliedly selected as the place where the debt is payable, that will be regarded as its situs (RC 153; *Dicey, Morris and Collins*, para 22–029).

(vii) Where the debtor company has more than one place of residence but there is no express or implied promise to pay at any one of them, then the debt is situated at that place of residence where it would be paid in the ordinary course of business; *Dicey, Morris and Collins* para 22–029.

(v) The location of the debts owed by TPIC and BIL

222 It is not disputed that TPIC and BIL are resident in Jersey because that is where they are incorporated and have their registered office.

223 However, it is clear from the evidence – and Tepe does not really dispute this —that both companies also carry on business in Turkey and are therefore resident there.

224 So far as TPIC is concerned, it is to be recalled that it is an oil exploration and production company with approximately 1,000 employees worldwide. It operates in a number of

countries (see para 126 above) and has a substantial operation in Turkey. Thus it holds 20 exploration licences in various regions in Turkey. According to the annual report exhibited to the affidavit of Mr Mark Roe, it was in 2012 the fourth largest oil producer in Turkey. Its 2013 financial accounts state on page 6 that it has offices in Turkey, Azerbaijan, Kazakhstan, Iraq, Georgia and Columbia and that its operations in Turkey are executed via the use of its Ankara office. The witness statement of Mrs Urun, the in-house legal adviser to TPIC, states that TPIC has a Turkish branch which is separately registered with Turkish tax authorities. All its directors are Turkish.

225 As to BIL, its sole activity is as the designated operator of the Turkish section of the BTC pipeline. According to the witness statement of Mr Yaylaci, the finance and accounting manager of BIL, the company has a branch office in Ankara registered with the Turkish tax authorities through which all the company's financial activities are transacted. Again, all its directors are Turkish.

226 It follows that BIL and TPIC are resident in both Jersey and Turkey. It is therefore necessary to establish the place of performance of the various payment obligations of TPIC and BIL to Botas.

227 Ultimately, Advocate Moran accepted during the course of the hearing that the debts in question are situated in Turkey because they are payable there. We think she was right to concede this point. We would summarise briefly our reasons for so concluding as follows.

228 In relation to TPIC, the evidence of Mrs Urun shows that the liabilities of TPIC to Botas arise exclusively out of services rendered by Botas to TPIC for the transport of oil. TPIC produces some 700 barrels of oil per day from wells located in the Adhyayan region of Turkey. Crude oil produced in this region is transported via a pipeline owned and operated by Botas to the relevant oil refinery. Botas issues invoices calculated by multiplying the number of transported TPIC barrels of oil by a unit price which is set by the Turkish Energy Market Regulatory Board under Turkish law. All the services to which payments are made are provided in Turkey in relation to oil fields and pipelines situated in Turkey. All the documentation relating to these arrangements is in Turkish. All payments are made by TPIC's Ankara branch from its bank accounts in Turkey to bank accounts of Botas in Turkey. All TPIC's employees dealing with these arrangements are located in Turkey. TPIC does not have a bank account in Jersey.

229 In the circumstances, we are satisfied that the place of performance of the obligation of TPIC to pay Botas is by necessary implication Turkey, alternatively that Turkey is the place where it will be paid in the ordinary course of business. In either case, the consequence is that the liability is deemed to be situated in Turkey. Although there is apparently not a written contract governing these arrangements, it seems clear that the proper law governing the arrangement between TPIC and Botas for the transport of oil via the pipeline is Turkish law.

230 Turning to BIL, as already stated, it is responsible for operating the Turkish section of the BTC pipeline. On that section there are four pumping stations which are powered by generators burning natural gas. The natural gas is supplied by Botas. The terms upon which the gas is supplied by Botas to BIL is governed by a natural gas purchase and sale protocol dated 25 th September, 2013, (the "Protocol"). The Protocol was negotiated in Turkey between Turkish officers and employees of Botas and BIL's Ankara branch. It is drafted in Turkish and is expressed to be governed by Turkish law. It also contains an exclusive jurisdiction clause in favour of the Ankara courts in Turkey. Invoices pursuant to the Protocol are issued in Turkish by Botas to BIL's Ankara branch and payments are then made by that branch from BIL's bank account in Turkey to Botas' bank account in Turkey.

231 At the date of the Representations, BIL also had certain other obligations to Botas as described in Mr Yaylaci's witness statement. These consisted of amounts due under three loan agreements, accumulated debts relating to the supply and purchase of natural gas under the Protocol and debts relating to items purchased by Botas on BIL's behalf for use in the regular operations of BIL's Ankara branch. All of these obligations were entered into by BIL's Ankara branch and related to BIL's activities in Turkey. We therefore find that these obligations were also payable in Turkey and are therefore situated in Turkey.

232 In summary, the debts owed by TPIC and BIL to Botas are situated in Turkey rather than in Jersey. It follows that the Court is in the situation discussed in Eram. It is being asked to grant an *arrêt* over debts situated in a foreign jurisdiction.

(vi) Is it open to the Court to confirm the arrêt over the debts owed by TPIC and BIL?

233 Advocate Moran argued that Eram could be distinguished. In that case, the bank was only amenable to the English court's jurisdiction because it had a branch in England. It was a company which was incorporated in Hong Kong and the accounts in question were held in Hong Kong. Here, submitted Advocate Moran, the position is different. TPIC and BIL are incorporated in Jersey. They are therefore in the same position as a British national and resident. They are fully amenable to the Court's jurisdiction because it is where they are incorporated and any *arrêt* could easily be enforced against them.

234 We do not accept that the fact that TPIC and BIL are incorporated in the Island distinguishes this case from Eram. The key point in Eram was that the court was being asked to arrest an asset situated abroad which on its face was an exorbitant jurisdiction. The court should only therefore make such an order, if at all, where it was clear that the debt owed to the judgment debtor would be extinguished so that there was no risk of the third party having to pay twice. It seems to us that that principle is equally applicable whether the third party is incorporated in the Island or is incorporated elsewhere but with a branch in the Island. Let us suppose that a bank incorporated in the Island has a branch in a foreign jurisdiction. It seems to us that the fact that the bank is incorporated in Jersey would make no difference to the issues discussed in Eram. If the court were to grant an

arrêt (or a third party debt order) in respect of monies held in the name of the judgment debtor at an overseas branch of the bank, the risk of the bank having to pay twice would be the same as where it was incorporated in the foreign jurisdiction (or perhaps in some other foreign jurisdiction) but with a branch here.

235 Accordingly we consider that the principles established in Eram (as summarised at paras 216–220 above) are equally applicable to the facts of the present case. The Court should therefore not confirm the *arrêt* unless Tepe establishes that the *arrêt* would be recognised by a Turkish court as discharging *pro tanto* the liability of TPIC/BIL to Botas.

236 So what is the evidence as to Turkish law on this point?

237 In his supplemental report, Professor Cerrahoglu said this at paragraphs 29–30:-

> *"29. In other words under Turkish law, if there exists a valid legal basis that necessitates BIL and/or TPIC to pay TEPE instead of BOTAS, they would be released from their debts pro tanto. In this case such valid reason would be the Third Party Debt Order to be given by the Jersey Court in respect of companies established in and subject to the Jersey jurisdiction. Consequently if the suggested Third Party Debt Order is amenable to recognition in Turkey, it is possible to conclude that the Order would constitute "a good discharge of debt" under Turkish law.*
>
> *30. Now turning to the admissibility in a Turkish court of a BOTAS action against BIL and TPIC, I would like to explain as follows. If and when BIL and TPIC comply with a Third Party Debt Order, BOTAS would be relieved of its judgment debt vis-à-vis TEPE immediately and at the same amount paid. Therefore, any such third party payment creates a positive impact on BOTAS's balance sheet by decreasing its debts burden. In other words, BIL or TPIC payments to Tepe profits BOTAS. That being the case (as well as due, in any case, to the fact that BIL and TPIC would simply be complying with a foreign court with proper jurisdiction on them), BOTAS cannot pretend to have suffered any losses due to BIL or TPIC payments to Tepe. A Turkish court would not allow such a bad faith, almost disingenuous, application by BOTAS."*

238 Professor Cerrahoglu went on to accept that the International Private and Procedural Law (No 5718) was the applicable statute in connection with enforcement and recognition of foreign judgments and that Article 54 laid down certain conditions before a Turkish court could enforce a foreign judgment. These included that the foreign judgment must have been given on matters not falling within the exclusive jurisdiction of the Turkish courts and must not be contrary to 'public order'. He referred to a decision of the General Assembly for Unification of Conflicting Judgments of the Court of Appeals dated 10 th February, 2012, E2010/1, K2012/1 for an explanation of the sort of matter which falls within the concept of Turkish public order.

239 In evidence, and consistently with paragraph 30 of his report, Professor Cerrahoglu said that it was payment by the third party debtor (i.e. BIL or TPIC) which would discharge the debt owed to Botas rather than the order of the Jersey court itself. Thus in cross-examination by Advocate Nicholls he said as follows on page 12 of the transcript of day 4: —

> *"Q. So is it the order or is it the payment? I'm slightly confused. Is it the order or is it the actual payment which discharges the debt?*
>
> *Payment."*

The point is then explored further and the Professor says that he does not consider that the Jersey order has the effect under Turkish law of discharging the debt obligation of TPIC and BIL. He subsequently goes on to say that, if Botas were to sue TPIC or BIL for the debts after they had paid Tepe, there would be a defence of an unjust enrichment. This was because Botas would have suffered no loss because its debt to Tepe would have been reduced by the same amount as the amount paid by TPIC/BIL to Tepe pursuant to the *arrêt*.

240 Dr Cal did not express an opinion on this particular point. He stated that, for an order of the Jersey court to have effect in Turkey, it would need to be recognised and approved for enforcement in Turkey by the Turkish court pursuant to Law No. 5718. Before enforcing a foreign judgment, the Turkish court would need to be satisfied that the foreign judgment did not conflict with Turkish public order. He raised the possibility that the court might find the order of a foreign court in respect of sums owed by TPIC and BIL to Botas to be contrary to public order if to enforce it would be detrimental to the services run by Botas, TPIC or BIL.

241 We have to say that, on the facts of this case, we do not see that enforcement of the order could be detrimental to the services run by any of the companies. Payment by TPIC and BIL would put them in no worse position than if they had paid to Botas and Botas's position would also be neutral because, to the extent that it did not receive payment of the debts from TPIC or BIL, it would be relieved of its liability to Tepe.

242 In cross-examination, Dr Cal was asked whether he agreed with the analysis of Professor Cerrahoglu contained in paragraph 29 of his report (as set out at para 237 above), but said that he would rather not comment as it was a matter relating to private law, the law of debts etc. He similarly did not wish to comment on paragraph 30.

243 As stated very clearly by the House of Lords in Eram, whilst evaluation of the risk of the third party debtor being compelled to pay twice is the correct issue to be considered when the debt is situated in England (or Jersey in our context), it is not the issue where the debt is situated abroad. There, the question is whether the order would be recognised by the foreign court as extinguishing the liability of the third party debtor. Thus in our context, the issue is whether the *arrêt* would be recognised by the Turkish court as extinguishing *pro tanto* the liability of TPIC and BIL to Botas. The importance of the order being recognised as extinguishing the liability of the third party debtor to the judgment debtor is recognised in

the passages from the speeches of Lord Bingham and Lord Millett quoted at para 218 above. Lord Hoffmann was to like effect at paras 62–64 as follows:-

> ***"62… The essence of [a third party debt order] is that it is execution in rem against the property of the judgment debtor, against a res or chose in action which belongs to him and which is within the jurisdiction of the court making the order.*** As the Royal Commissioners said in 1853, it is an attachment of "monies of [the] debtor in the hands of third persons". It is true that once the judgment debtor's chose in action has been captured or attached, the court will realise it or turn it to account by ordering the third party to pay the debt to the judgment creditor. But that is a process of realisation in the same way as the sale of a chattel belonging to the debtor which has been taken in execution. It is not a personal claim against the third party. The third party pays with his own money only in the same sense as a bank upon which a cheque has been drawn by a customer in credit pays with its own money. But the substance of the matter is that the judgment creditor is paid with the debtor's money, as the drawee of the cheque is paid with the customer's money.
>
> ***63. The discharge of the third party's indebtedness effected by Rule 72.9(2) (formerly RSC Ord. 49, r8) is therefore an essential part of the execution. As Lord Blackburn said in*** *London Corpn.* -v- London Joint Stock Bank (1881) C App Cas 393, 416 ***the garnishee, "If he is to be obliged to pay the money, must be discharged from paying it to his creditor." It is this which ensures that the creditor is paid with the debtor's money and not the third party's.***
>
> ***64. It is not in my opinion an adequate substitute for this protection to argue that if the third party has to pay out of his own money, he will acquire a restitutionary claim in personam which he can set off against the debt."***

244 It is clear from the speeches in Eram that the underlying principle is that it is not in general open to a court to make an order permitting enforcement against assets situated overseas. As Lord Hoffman said at para 54:-

> ***"54. My Lords, so far I have been considering the matter, as almost all the authorities have done, as one of fairness and equity between the parties. But there is another dimension. The execution of a judgment is an exercise of sovereign authority. It is a seizure by the state of an asset of the judgment debtor to satisfy the creditor's claim. And it is a general principle of international law that one sovereign state should not trespass upon the authority of another, by attempting to seize assets situated within the jurisdiction of the foreign state or compelling its citizens to do acts within its boundaries."***

245 That is no doubt why their Lordships held that, where the debt is situated abroad, it is not

a question of evaluating the risk of double payment, it is a question of whether the order itself would be recognised as having discharged the liability of the third party to the judgment debtor. Furthermore the burden of establishing this clearly rests upon the judgment creditor.

246 In our judgment, Tepe has failed to discharge that burden in this case. The evidence from Professor Cerrahoglu is that it would be payment by TPIC or BIL which would be recognised by the Turkish court as discharging their obligation to pay Botas. Furthermore, one of the reasons which he gave for thinking that a Turkish court would not allow Botas successfully to sue TPIC and BIL was that, if successful, it would thereby be unjustly enriched. That seems to us very similar to the point so resoundingly rejected by their lordships in Eram. We conclude that we cannot bring the facts of this case within the narrow compass of the exception in Eram, which decision was held to be equally applicable to *arrêts* by the Royal Court and the Court of Appeal in *Hemisphere*.

247 In the circumstances, we do not consider it open to us to confirm the interim *arrêt* in respect of the debts owed by TPIC and BIL to Botas.

(vii) Subsidiary points in relation to the debts

(a) Background

248 In view of our decision that the Court will not confirm the *arrêt* in respect of the debts owed by TPIC and BIL to Botas, it is not strictly necessary to deal with any of the other points raised in this connection. However, in case a higher court should take a different view and in the hope of providing some assistance for any future occasion where an interim *arrêt* is ordered, we propose to deal briefly with certain aspects.

249 As stated at para 209, the Answers filed on behalf of Botas and the supporting witness statements initially denied that any debts were owed by TPIC or BIL to Botas. That subsequently turned out to be incorrect.

250 In relation to TPIC, the interim *arrêt* was served on 21 st November, 2014. Subsequent to that date four sums (paid in Turkish lira but converted for present purposes to sterling) varying between £12,425 and £15,400 were paid by TPIC to Botas on 27 th November, 2014, 24 th December, 2015, 30 th January, 2015, and 11 th March, 2015. These payments were all made to settle the monthly invoices submitted by Botas to TPIC for the transport of oil via Botas' pipeline from TPIC's exploration area in Turkey to the oil refinery.

251 According to witness statements filed on behalf of TPIC, it was not initially realised that the interim *arrêt* prevented payment of debts in the ordinary course of business in Turkey. When this was appreciated, a summons was issued on 7 th April, 2015, on behalf of Botas,

TPIC and BIL seeking (i) a declaration that the interim *arrêt* did not prevent them from making payments and/or discharging obligations incurred in the ordinary course of business, or (ii) in the alternative a variation of the *arrêt* to allow for such payments. Since then, although further monthly invoices have been raised by Botas for the transport of oil, no such invoices have been paid by TPIC.

252 In relation to BIL, the *arrêt* was served on 11 th December, 2014. As explained at paras 230–231 above, BIL is obliged to pay monies to Botas in three contexts:-

(i) payments in accordance with the Protocol for gas supplied by Botas to pumping stations operated by BIL along the Turkish section of the BTC pipeline;

(ii) repayments under loan agreements with Botas and other debt repayments;

(iii) payment of day to day expenses incurred in relation to the use of Botas facilities.

253 In relation to the payments for gas, Botas renders a monthly invoice pursuant to the Protocol and this is paid by BIL. Despite the *arrêt*, monthly payments were made in December 2014 and January, February, March, April and May 2015. The monthly sum was usually in the region of Turkish lira 1 million.

254 As to the loan agreements and other debt repayments, Mr Yaylaci explained that these consisted of three loan protocols in a total amount of US$15 million entered into in 2004 and 2005, accumulated debts in relation to the supply of natural gas under the Protocol (i.e. sums which have not been paid historically but were accumulated) and debts relating to items purchased by Botas' Project Directorate on BIL's behalf for use in the regular operations of BIL's Ankara branch.

255 Mr Yaylaci said that since November 2013, BIL has been repaying its debts to Botas in regular quarterly payments, beginning with the accumulated historic debts for the supply of natural gas, because these carried the highest rate of interest. The last payment in respect of natural gas was on 17 th November, 2014. Having repaid these amounts, BIL started repaying the debt under the three loan agreements. It was agreed between Botas and BIL that, with interest, the total debt was US$20,822,264 and that this would be paid by way of three payments, US$7,511,400 in November 2014, US$12.5 million in February 2015 and US$810,864 in May 2015. The first of these payments was made before the interim arrêt but the second and third were paid on 20 th February, 2015, and 12 th May, 2015, respectively. At the same time as it paid the third instalment under the loan agreement, BIL also paid the Project Directorate debts in the sum of €224,183.40.

256 As to the operating expenses, these invoices are rendered monthly. They tend to be for comparatively small sums and the total debt as at the end of April 2015 was the Turkish lira equivalent of US$44,500.

257 It is asserted on behalf of BIL that, like TPIC and Botas, it did not appreciate that the payments which it made were caught by the interim *arrêt*. Nevertheless, in the case of BIL, certain payments were made after the summons seeking a variation of the *arrêt* to allow for payments in the ordinary course of business was issued. According to Mr Yaylaci, the sums paid to Botas after the summons to vary the *arrêt* was filed have since been paid into a segregated account and all future payments which ought to be paid to Botas are also being paid into that account. This procedure was intended to preserve the position pending the decision of this Court.

(b) Payment of debts in the ordinary course of business

258 The summons issued by the Respondents seeks first a declaration that the interim *arrêt* does not prevent the making of payments or discharging of obligations to Botas in the ordinary course of business. We can deal with this point very briefly. The *arrêt* is expressed in the Act of 20 th November, 2014, in relation to TPIC to cover "all that [TPIC] owes or may owe [Botas], including all and any rights or obligations arising under or in respect of the shareholding arrested pursuant to paragraph 4.1 above and any other sum, royalty, commission, repayment, entitlement or obligation arising howsoever." The *arrêt* for BIL is in similar terms. As can be seen, there is no exception for obligations incurred or payments made in the ordinary course of business. If there were to be such an exception, it would be necessary for it to be stated specifically. It follows that all the payments after the *arrêt* were made in breach of the order.

259 The real issue raised by the summons is therefore whether there should be an exception to payments made in the ordinary course of business.

260 Both counsel agreed that there was no Jersey authority on the point. Advocate Nicholls submitted that, although not identical, an interim *arrêt* had many similarities with a freezing injunction in England (previously a Mareva injunction) and accordingly helpful guidance could be obtained from the decision of the English Court of Appeal in *Mobile Telesystems Finance SA -v- Nomihold Securities Inc.* [2011] EWCA Civ 1040, where it was held that a freezing order granted in aid of enforcement of an arbitration award ought ordinarily to contain an ordinary course of business exception. Advocate Nicholls submitted that this was clearly sensible. It would be unfair to a defendant to subject its assets to a process of enforcement before there is a final judgment to be enforced. It is entitled to get on with its business provided it is not doing anything unusual.

261 Advocate Moran, on the other hand, referred to *Goldtron Limited -v- Most Investment Limited* [2002] JLR 424 where the Royal Court held that, where a plaintiff was seeking an injunction in aid of the enforcement of an arbitration award, the applicable principles were those for post-judgment injunctions rather than pre-trial relief. This would point to there not being an exception for payments in the ordinary course of business, although she accepted that the point did not arise specifically in *Goldtron*. She further pointed out that, unlike a

third party debt order, an arrêt is intended to give the judgment creditor priority over other claimants in relation to the asset arrested. It therefore differed from a freezing injunction which was not intended to confer any priority over the assets frozen. Furthermore, an injunction had the effect of freezing all activities of a party and was therefore a greater imposition than an arrêt, which only affected the assets subject to the *arrêt*. Thus, in the present case, TPIC and BIL were perfectly free to carry on their business as normal and make all payments except those due to Botas. A payment in ordinary course exception was therefore less necessary in the case of an interim *arrêt*.

262 In the *Nomihold* case Nomihold had the benefit of an arbitration award against Mobile Telesystems Finance SA ("MTSF"). It had been given leave at an ex parte hearing to enter the arbitration award as a judgment of the High Court but MTSF was entitled within a specified period to apply to set aside that order and had made such an application. When entering the provisional judgment, the court had granted a worldwide freezing injunction and, after certain variations, had removed the ordinary course of business exception originally included in the injunction. MTSF appealed that decision.

263 The Court of Appeal held at para 33 that it would sometimes and perhaps usually be inappropriate to include an ordinary course of business exception in a post-judgment asset freezing order, although clearly there would be a discretion to do so. However the court did not consider that that was the position where a provisional judgment had been entered into to allow enforcement of an arbitration award. That was because such a judgment was not presently enforceable and could be set aside on the application of the defendant. One was therefore not in a post-judgment situation. Tomlinson LJ concluded at para 37:—

> ***"Thus both as a matter of principle and on authority it seems to me that a freezing order granted in aid of enforcement of an arbitration award ought ordinarily to contain an ordinary course of business exception.*** There is no basis upon which one contractual claimant should be able to prevent the satisfaction of the claims of others in a similar position…."

264 In *Goldtron*, this Court took a slightly different view as to the position of a plaintiff who has the benefit of an arbitration award which he seeks to enforce as a judgment in Jersey pursuant to the Arbitration Law. At paragraph 30 the Court said this:—

> ***"In this case the parties have chosen to arbitrate their differences.*** There is an award of the arbitration panel. The plaintiff seeks to enforce the arbitration award. Subject only to any appeal to the Moscow courts, this court is obliged to enforce the award unless the defendant satisfies the court that one of the exceptions in art. 45 of the 1998 Law applies. We consider that Mr Thompson was correct in submitting that the injunctions in this case are in aid of the enforcement of an arbitration award and that the applicable principles are those for post-judgment injunctions rather than pre-trial relief. The ***threshold is therefore considerably lower, as was made clear by Donaldson, MR in*** *Deutsche Schachtbau*."

Later at paragraph 32(a) the Court said:—

> ***"The general policy of the court is to assist in the enforcement of arbitration awards by seeking to ensure that funds are available to meet such awards.*** As mentioned earlier, the threshold for obtaining injunctive relief post-award is considerably lower than when seeking pre-trial relief."

265 However *Goldtron* did not address the question of whether there should be an ordinary course of business exception where an injunction is sought in support of an application to enforce an arbitration award in Jersey.

266 We do not think that, when granting an interim arrêt in support of an application for enforcement of an arbitration award, the Court should apply the observation of the English Court of Appeal in *Nomihold* that an ordinary course of business exception should 'ordinarily' be included. We say that for the following reasons:-

(i) A freezing injunction generally imposes a greater restriction on the person injuncted than does an *arrêt*. The freezing injunction normally prohibits any dealing with the defendant's assets. All such assets are in truth 'frozen' by the order. The restriction on the person injuncted is therefore very great and a business could be brought to its knees if there were no ordinary course of business exception. By contrast, an interim arrêt is normally limited to specific assets. The person remains free to deal with all his assets other than those which are the subject of the *arrêt*. The need for an ordinary course of business exception is therefore correspondingly less. We accept of course that the more extensive the *arrêt*, the less weight this point may have.

(ii) A freezing injunction does not give a plaintiff security or preference in respect of a particular asset of a defendant. It is merely intended to ensure the continued availability of assets to meet the claim and any other claims which may exist. By contrast, as discussed earlier, an *arrêt*, once confirmed, confers an interest *in rem* in the asset arrested. The Court must of course bear in mind that an interim *arrêt* may not ultimately be confirmed and that it may therefore be discharged if it is not confirmed; but nevertheless there is a fundamental distinction in this respect between an arrêt and a freezing injunction.

267 For these reasons, we do not think that the general rule set out in *Nomihold* should be applicable in respect of an interim *arrêt*. However, that is not to say that the Court should not consider in every case whether to include an ordinary course of business exception. On the contrary, we think that it is incumbent upon counsel to raise this aspect specifically when seeking an interim *arrêt* and the Court should always consider whether to include it. In many cases, it will be appropriate to do so despite the differences which we have articulated between an *arrêt* and a freezing injunction. The Court must always bear in mind that it is an interim arrêt and it may not ultimately be confirmed. A failure to include an ordinary course of business exception may in some circumstances lead to real and

unjustified damage for the person who is subject to the *arrêt*.

268 At the time when the interim *arrêt* was granted in this case, neither counsel for Tepe nor the Court raised the matter. Having now had the benefit of argument, we consider that this was an omission both by counsel and by the Court.

269 It is not possible to know now exactly what order the Court would have made had the matter been raised in November 2014 or shortly thereafter. We can only address the position as we now find it in the light of all the evidence which has been produced to us.

270 Advocate Moran submits that, when exercising our discretion, we should take into account that Botas is the parent of TPIC and BIL. The *arrêt* only has the effect that these two companies are being prevented from making certain payments to their parent. It is a very different situation from where there is a genuine third party. There is in this case, she submits, no real risk of TPIC or BIL suffering financially as a result of not paying their debts to Botas as they arise.

271 We agree that the fact that TPIC and BIL are subsidiaries of Botas is a relevant factor. Nevertheless, in relation to TPIC, we think that it should have been permitted to pay for the transport of oil as such liability arose. This is a classic example of a payment made in the ordinary course of business which is an integral part of the company being able to earn its profits. Accordingly, had the matter arisen, we would have varied the interim arrêt so as to allow for such payments.

272 As to BIL, the position is slightly different. In the first place, we do not consider that the loan repayments were payments made in the ordinary course of business. They were payment of long outstanding debts to BIL's shareholder which had not been paid over many years. The payments are substantial. Furthermore, as mentioned below at para 274, they are payments made at a time when Botas owes greater sums to BIL. However, we do consider that the payment for gas is a payment in the ordinary course of business and, were it not for the amount owed by Botas to BIL, we would have varied the arrêt so as to introduce an ordinary course of business exception and allow BIL to pay for its gas as it arises. However, on the particular facts of this case, we do not think that is necessary. If BIL does not pay the invoices rendered by Botas, Botas will be able to reduce the amount which it owes to BIL. In the circumstances, we think there is no risk to the security of BIL's supply of gas and therefore its ability to earn a profit. Accordingly, had the matter arisen, we would not have varied the interim *arrêt* in respect of BIL so as to introduce an ordinary course of business exception.

273 Any variation of the *arrêt* would of course only be applicable in relation to the interim *arrêt*, so as to permit the various payments in the ordinary course of business to be made. We would not in any event have introduced an ordinary course of business exception after confirmation of the *arrêt* because at that stage the liability of Botas to Tepe would have

been enforceable as a judgment against the debts owed to Botas.

(c) Set off

274 Botas owes BIL a considerable sum under a Marine Services Agreement relating to the operation of the Ceyhan Marine Terminal. It appears from Mr Yaylaci's witness statement that a monthly sum is payable by Botas to BIL under that agreement. For reasons which are not explained, Botas has apparently not made any payment under the agreement since September 2011. As a result, as at the end of April 2015, Botas owed BIL the sum US$62m pursuant to the agreement.

275 This greatly exceeds the amounts owed by BIL to Botas even if one assumes that all payments which have become due or been made since the imposition of the interim *arrêt* are still regarded as being due. Furthermore the sum due by Botas would appear to be payable immediately given that it consists entirely of arrears due under the agreement. There is therefore on the face of it a right of BIL to set off the sum of US$62m against any amount which it owes to Botas, with the consequence that it would in fact have a defence to the entire sum which could be claimed by Botas.

276 Tepe submitted that there was no evidence as to the existence of a right of set-off as a matter of Turkish law. However, in the absence of such evidence, the Court is entitled to assume that Turkish law is the same as Jersey law. Furthermore, set off is such a well-known concept that it seems to us the burden must be on Tepe to produce evidence that it does not exist under Turkish law rather than the other way round.

277 It seems clear that under English law, where the court is considering making a final third party debt order, the fact that there is a right of set-off is a good reason for the court to exercise its discretion not to make such an order, because to do so would put the judgment creditor in a better position *vis-à-vis* the third party than the judgment debtor; see *Fraser v Oystertec Plc* [2004] EWHC 1582 (Ch) at paras 20 and 22; *Hale -v- Victoria Plumbing Limited* [1966] 2 QB 746.

278 In our judgment, this makes good sense and is equally applicable when considering an *arrêt*. In the present case, if a dispute arose, BIL would be able to resist payment of its obligations to Botas on the ground that Botas owes more to it than it owes to Botas. This is so even though no set-off had actually been claimed prior to the imposition of the interim *arrêt*. If the Court were to confirm the interim *arrêt*, Tepe would be placed in a better position than Botas itself. BIL would effectively be forced to discharge its debts to Botas (via payment to Tepe) in circumstances where it could have resisted payment to Botas. An *arrêt* (or third party debt order) is not intended to prejudice a third party. To grant an *arrêt* in such circumstances would constitute such prejudice.

279 We have not ignored the fact that BIL is a subsidiary of Botas and we are not therefore

considering the normal situation of a wholly independent third party. Nevertheless, BIL is a separate legal entity and we do not think as a matter of principle that it is right to confirm an interim *arrêt* over a debt where the effect of such confirmation would be to put the third party debtor in a worse position than it would have been were no such order to be made.

280 It follows that, had we been otherwise minded to confirm the interim *arrêt*, we would not have done so in respect of BIL because of the greater amount owed by Botas to BIL. However this would not have affected any decision in relation to TPIC.

(d) Future liabilities

281 It is not disputed that the Court may confirm an *arrêt* in respect of future obligations of the third party debtor to the judgment debtor provided that the obligation which is the subject of the *arrêt* can be identified with precision; see the judgment of the Court of Appeal in *Hemisphere* at para 176. If the Court were minded to confirm the *arrêt* in respect of the future obligations of TPIC in respect of the transport of its oil by Botas' pipeline and BIL in respect of its purchase of gas from Botas, it seems to us that there would be little difficulty in identifying the relevant obligations with sufficient precision.

282 However, we accept that the decision whether to confirm an *arrêt* is a discretionary decision and that the Court may properly take into account any prejudice which might be caused to the third party debtor as a result of the *arrêt*.

283 Botas argues that the future obligations owed by TPIC and BIL to Botas will only arise if Botas continues to provide services to TPIC and BIL for which those companies are obliged to pay. It suggests that, if the Court were to confirm the interim *arrêt* so that all future payments due from TPIC and BIL would be paid to Tepe, there would be little incentive for Botas to continue to provide services to TPIC and BIL.

284 It further suggests that, if this were to occur, it would cause severe prejudice to TPIC and BIL because Botas has a *de facto* monopoly in relation to the services which it provides to them. Thus in relation to TPIC, no other pipelines are available to transport the oil TPIC extracts from the oil field in question. If Botas were to refuse to permit transport through its pipeline TPIC would not be able to transport its oil. Similarly, in relation to BIL, if Botas were to refuse to provide gas to BIL, BIL would not be able to operate the pumping stations along the Turkish section of the BTC pipeline.

285 As explained earlier, the Republic as owner of Botas, has emphasised the importance of the activities of TPIC and BIL to the Turkish economy. Botas has also emphasised the level of control which the Republic can exercise over Botas. The idea that in those circumstances Botas would refuse to supply gas to BIL (thereby imperilling the operation of the BTC pipeline) or would refuse to transport oil extracted by TPIC (thereby damaging the Turkish economy) seems to us to be a fanciful suggestion. Furthermore, such an activity if it

occurred, would take place in circumstances where Botas would know that TPIC and BIL were only making the payments to Tepe because they had been ordered to do so by a court to the jurisdiction of which both they and Botas had submitted and in circumstances where a payment by TPIC or BIL to Tepe would effect a corresponding reduction in the amount owed by Botas to Tepe.

286 Accordingly, if we had otherwise been minded to confirm the *arrêt* in respect of the debts, we would have ordered that the *arrêt* include the future defined obligations of TPIC and BIL to Botas.

(C) Return of the Securities

287 As outlined at paragraphs 10(1) and 15(2) above, the tribunals have awarded the return of the Stations Securities and the Lot A Securities which were provided by Tepe (or TPN) as security in accordance with the relevant contract. Tepe is incurring continuing charges in respect of the Securities (at the rate, according to Mr Gungenci, of over US$250,000 per year) and has also been awarded the amounts thereby incurred together with interest. Botas has failed to comply with the Awards and retains the Securities. Tepe submits that, if the Awards are declared to be enforceable in Jersey pursuant to the Arbitration Law, this Court should make an order directing the return of the Securities to Tepe. Botas, on the other hand, submits that this Court should make no such order as it would be an exorbitant exercise of jurisdiction given that the Securities are situated in Turkey.

288 In support of its submission, Botas referred to Eram and in particular the observation of Lord Hoffmann at para 54 (already cited above at para 244 but repeated here for convenience):-

> ***"The execution of a judgment is an exercise of sovereign authority.*** It is a seizure by the state of an asset of the judgment debtor to satisfy the creditor's claim. And it is a general principle of international law that one sovereign state should not trespass upon the authority of another, by attempting to seize assets situated within the jurisdiction of the foreign state or compelling its citizens to do acts within its boundaries."

289 However, Eram was concerned with enforcement against assets. The House of Lords made clear that a third party debt order is a proprietary remedy which operates by way of attachment against the property of the judgment debtor, and creates a proprietary interest by way of security in the debt or fund and gives priority to the claim of the judgment creditor to have his debt paid out of the fund before all other claims against it, including that of the judgment debtor himself (Lord Bingham at para 24).

290 What is sought here by Tepe in respect of the Securities is an in personam order against Botas directing it to return the Securities. There is ample authority that a court may make an

in *personam* order against a party who has submitted to its jurisdiction even where that involves taking action in respect of matters situated outside the court's jurisdiction.

291 As an example, we were referred to *Masri v Consolidated Contractors International (UK) Limited (No. 2)* [2009] QB 450. The facts of that case were that the claimant obtained judgment in English proceedings for a sum of money against two defendants who had submitted to the jurisdiction of the English court by defending the proceedings but were incorporated in Lebanon. The judgment was for a sum of money which represented a share of the interest held in an oil concession in the Yemen. The defendants did not pay the judgment debt and the claimant applied to appoint a receiver by way of equitable execution to receive the oil revenue due to the defendants under the concession. The trial judge appointed the receiver and also granted a freezing injunction restraining the defendants from dealing with their rights under the concession otherwise than in the ordinary course of business.

292 The defendants appealed on the grounds, inter alia, that the court had no jurisdiction to appoint a receiver in relation to foreign debts. The Court of Appeal held that the appointment of receiver had no proprietary effect and merely acted in *personam* against the judgment debtor. It had effect as an injunction restraining the judgment debtor from receiving any part of the property which the receivership covered if that property was not already in the judgment debtor's possession but it did not vest the property in the receiver (see para 53 of the judgment of Lawrence Collins LJ). The court distinguished Eram and held that the court had jurisdiction to make an in *personam* order against a party which had submitted to its jurisdiction and that it would not be an exorbitant exercise of that jurisdiction to make the receivership order.

293 The order sought by Tepe in this case is an in personam order. It does not affect title to the Securities; it would merely order Botas to return them to Tepe. We do not consider that it would be an exorbitant exercise of discretion. Botas has submitted to the jurisdiction knowing that Tepe has been seeking to enforce the Awards. Botas submitted to the two arbitrations and the Awards have directed that Botas should return the Securities. This Court has decided that there are no grounds under Article 44 of the Arbitration Law not to recognise and enforce the Awards and accordingly we see nothing exorbitant in supporting the arbitration process by making an in *personam* order to give effect to the Awards.

294 We agree therefore that we have jurisdiction to make an order directing Botas to return the Securities to Tepe in accordance with the Awards and that, in our discretion, it is appropriate to do so.

Summary of conclusions

295 For the reasons given in this judgment, we would summarise our conclusions as follows: —

(i) There are no grounds under Article 44 of the Arbitration Law not to enforce the Awards (paras 21–53). The Awards may therefore be enforced in the same way as a judgment of this Court.

(ii) The Republic is not entitled to sovereign immunity in respect of the Shares. This is on the basis that:—

(a) If section 13(2)(b) of the Act is the applicable provision, the Shares are not 'property of a State' (paras 91–92).

(b) If, as this Court finds, section 6(4) of the Act is the applicable provision, the Shares are not in the possession or control of the Republic and the interest claimed by the Republic, even if proved, is not an 'interest' for the purposes of section 6(4)(b) such as to attract sovereign immunity (paras 54–203).

(iii) Accordingly, the Court is willing to confirm the interim *arrêt* in respect of the Shares (para 204).

(iv) The Court is not willing to confirm the interim *arrêt* in respect of the debts owed by TPIC and BIL to Botas (paras 208–286).

(v) If, contrary to (iv), the Court were otherwise willing to confirm the *arrêt* in respect of the debts, it would do so in respect of TPIC but not in respect of BIL because of the greater amount owed by Botas to BIL (paras 274–280). Any *arrêt* could properly cover future defined obligations (paras 281–286).

(vi) The Court agrees to order Botas to return the Securities to Tepe (paras 287–294).

296 This judgment will be circulated in draft in the usual way and we would ask counsel to prepare (and if possible agree) a draft order to give effect to the decisions which we have reached. We are willing to hear counsel on the exact form of any order following the formal handing down of the judgment.

Postscript

297 We cannot leave this case without expressing our gratitude to Advocate Moran and Advocate Nicholls together with those who have assisted them. We were greatly helped by the thorough and impressive skeleton arguments and written closing submissions together of course with the oral presentations.

298 Furthermore, given the fact that the Court was faced with over 20 large files of evidence and authorities, we were particularly grateful for the measures which counsel took to make it easier for us to find the relevant material. Thus the pre-reading bundle contained in one bundle both skeleton arguments and the key material which counsel felt we should read before the hearing. It was also most helpful for us to be given separate files which

contained the key documents to which reference was going to be made repeatedly, so that the Court was not having to spend its time looking at individual files. We were also assisted in preparing this judgment by having the transcript of the hearing which was prepared at counsel's initiative.