**Michaelmas Term**
[2018] UKPC 31
**Privy Council Appeal No 0104 of 2016**

# JUDGMENT

# Boru Hatlari Ile Petrol Taşima AŞ and others (also known as Botaş Petroleum Pipeline Corporation) (Appellants) *v* Tepe Insaat Sanayii AS (Respondent) (Jersey)

## From the Court of Appeal of Jersey

**before**

**Lord Mance**
**Lord Sumption**
**Lord Reed**
**Lord Lloyd-Jones**
**Lord Briggs**

## JUDGMENT GIVEN ON

## 22 October 2018

**Heard on 5 and 6 June 2018**

*Appellant*
Professor Zachary Douglas QC
Oliver Jones
(Instructed by Simmons &
Simmons LLP

*Respondent*
Stuart Catchpole QC
Philippa Webb
(Instructed by Pinsent
Masons LLP

**LORD MANCE:**

*Introduction*

1. The first appellant Boru Hatlari Ile Petrol Taşima AŞ (Botaş") and the respondent Tepe İnşaat Sanayii AŞ ("Tepe"), are Turkish companies. A group of Main Export Pipeline ("MEP") participants led by BP engaged Botaş as main contractor under a Turnkey Contract for the construction and operation of the Baku-Tbilisi-Ceyhan ("BTC") pipeline. Botaş in turn engaged Tepe and a joint venture between Tepe and the party cited Nacap BV ("TPN JV") as sub-contractors for parts of the work under a Stations Contract and a Lot A Contract. Nacap BV and TPN JV have assigned their rights under these contracts to Tepe, and need no further mention. Tepe has obtained arbitration awards, which Botaş has failed successfully to challenge in the French courts and failed to pay, under which Botaş is now liable for over USD 100m (including interest).

2. Tepe seeks to enforce the outstanding awards against shares ("the Shares") held by Botaş in two Jersey subsidiary companies, Turkish Petroleum International Limited Company ("TPIC"), the second appellant, and Botaş International Limited ("BIL"), the third appellant. The Jersey courts have granted an *interim arrêt entre mains* in respect of the Shares. Botaş challenges this order on the basis that the Shares were and are immune from any process of enforcement under the State Immunity Act 1978 as extended to Jersey, with minor modifications, by the State Immunity (Jersey) Order, 1985. The challenge failed both in the Royal Court and in the Court of Appeal, albeit by somewhat differing reasoning.

3. The Act includes the following provisions, modified as required by the Order:

> "**Immunity from jurisdiction**
>
> 1(1) A State is immune from the jurisdiction of the courts of the [Bailiwick] 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 [Bailiwick]

…

(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; …

…

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

(a) any interest of the State in, or its possession or use of, immovable property in the [Bailiwick]; 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 connection 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 connection 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 connection with such a cargo if the ship carrying it was then in use or intended for use as aforesaid.

(5) In the foregoing provisions references 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.

(6) Sections 3 to 5 above do not apply to proceedings of the kind described in subsection (1) above if the State in question is a party to the Brussels Convention and the claim relates to the operation of a ship owned or operated by that State, the carriage of cargo or passengers on any such ship or the carriage of cargo owned by that State on any other ship.

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 a 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.

(3) Subsection (2) above does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.

(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; but, in a case not falling within section 10 above, this subsection applies to property of a State party to the European Convention on State Immunity only if -

(a) the process is for enforcing a judgment which is final within the meaning of section 18(1)(b) below and the State has made a declaration under article 24 of the Convention; or

(b) the process is for enforcing an arbitration award.

…

**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 (hereafter 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 [Bailiwick] 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 (or, in the case of proceedings to which section 10 above applies, a State which is not a party to the Brussels Convention) would have been so immune.

(3) If a separate entity (not being a State's central bank or other monetary authority) submits to the jurisdiction in respect of proceedings in the case of which it is entitled to immunity by virtue of subsection (2) above, subsections (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.

(4) Property of a State's central bank or other monetary authority shall not be regarded for the purposes of subsection (4) of section 13 above as in use or intended for use for commercial purposes; and where any such bank or authority is a separate entity subsections (1) to (3) of that section shall apply to it as if references to a State were references to the bank or authority."

4. There is some common ground between the parties before the Board. First, Botaş, although owned (with the exception of one representative share held by its general manager) by the Turkish State, is not an organ of the Turkish State, but rather a separate entity within the meaning of section 14 of the Act. Secondly, even assuming section 14(2) to apply in the context of enforcement (a point on which the parties disagree), Botaş could have no claim to immunity from the jurisdiction under section 14(2), not least because (whatever the status of the Shares) the enforcement proceedings do not relate to anything done by it in the exercise of sovereign authority. Thirdly, Botaş's claim to immunity falls to be considered with reference to section 13(2)(b) of the Act, and not under section 6 as the Royal Court of Justice considered. All these points appear to the Board clearly correct.

*Property of a State*

5. Where dispute arises is as to the relevance, interpretation and application of section 13(2)(b). Tepe's primary case is that, once the first two points are accepted, the natural implication is that the Shares are the property of Botaş and that very little, if any, scope exists for treating the Shares as "the property of [Turkey]" within section 13(2)(b). The whole point of a separate entity, and of its recognition in the Act, is, Tepe submits, to own assets and trade on its own account, separately from the State which incorporates it and owns its shares. The separation has advantages for the State and for the separate trading entity.

6. As long ago as 1981 Lord Wilberforce observed in *I Congreso del Partido* [1983] 1 AC 244, 258F-G that:

> "State-controlled enterprises, with legal personality, ability to trade and to enter into contracts of private law, though wholly subject to the control of their state, are a well-known feature of the modern commercial scene."

Yet, as he also noted, it had never been claimed that the relevant enterprise, Mambisa, although subject to direction and control of the Cuban government which provided all the funds necessary for its operation, was an agency of the Cuban State. The Board examined the developing recognition and the legal and practical significance of separate state-controlled entities with legal personality, assets and ability to trade and to enter into contracts of private law, while being subject to very extensive control by the relevant state, in *La Générale des Carrières et des Mines v FG Hemisphere LLC* [2012] UKPC 27, especially paras 4-18.

7. In the present case, as their Memoranda and Articles make clear, both TPIC and BIL were incorporated for commercial purposes. TPIC operates in the areas of

exploration and production of oil, and has about 1000 employees, worldwide. BIL has become the designated operator of the BTC pipeline including terminal operations at Ceyhan under a commercial agreement with the MEP participants. Mr Catchpole QC for Tepe accepts, nevertheless, that a situation might exist in which shares held in the name of a company like Botaş were in fact held for or owned beneficially by the Turkish State. But that is not Botaş's case on this appeal.

8. Botaş's case on this appeal operates at two levels. At the first level - more prominent, it appears, before the Board than below - Botaş submits that it is wrong to focus on the concept of "property of a State" in isolation or as an independent pre-condition to State immunity. The concept of State property is, in its submission, determined functionally, by the answer to the question, whether the asset was "for the time being in use or intended for use for commercial purposes": see section 13(4). If it was, no immunity would exist. If it was not, then it was in use for sovereign purposes, and immune from execution, to whomsoever it might be said to belong. It was therefore unfortunate that the courts below felt that they could determine the position under section 13(2)(b) and leave section 13(4) for consideration at a subsequent hearing only if they decided against Tepe on section 13(2)(b).

9. Botaş's second level case is that, if the words "property of a State" do operate as a pre-condition to the operation of section 13(4), they should be understood in a sense broad enough to embrace not merely assets in which the Turkish State enjoys a proprietary or legal interest, but also assets over the use and disposition of which it exercises significant control. The nature of the control relied on is set out in para 28 below. It consists of various restrictions or obligations placed on Botaş with regard to its conduct or its affairs and the disposition of its assets under Turkish law, falling short of the creation of any direct relationship between the Turkish State and the Shares under Jersey law to which the Shares are subject.

10. The Board cannot agree with the first way in which Botaş puts its case. The words "the property of a State" cannot be disregarded, or their application determined by considering simply whether the property against which enforcement is sought is "for the time being in use or intended for use for" commercial or sovereign purposes. They represent on their face a pre-condition to any application or consideration of that question under section 13(4). Botaş's case on this point would, if accepted, tend to undermine the evident purpose behind the establishment of separate entities by States and their recognition by section 14 of the Act. The separation of a separate entity and its assets from the state is an important aspect of its ability to carry on business. An open-ended enquiry whether assets held by a separate entity could be said to be in use or intended for use for commercial or sovereign purposes, without regard to whether the assets belonged to the separate entity, would effectively eliminate any difference between assets held by the state and by a separate entity.

11. The alternative way in which Botaş puts its case is more closely related to the language of the Act and the preceding common law case law. Botaş relies, in particular, on expanded references to "property" in other sections of the Act, notably

i) section 6(1), which recognises that a State may have interests in, or the possession or use of, property,

ii) section 6(4), which refers to property which is in the possession or control of a State or in which a State claims an interest,

iii) section 10(5), which expressly provides that references 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.

12. Botaş submits that the reference in section 13(2)(b) to "the property of a State" must be understood as a shorthand encapsulation of all aspects associated with property in these earlier sections of the Act. The phrase therefore embraces situations where a state has either possession or control, without claim to any greater proprietary interest. As to the operation of the concepts of possession and control, Botaş refers to the pre-Act case law, which it submits recognised not only possession but also control without possession as a basis of immunity from adjudicative jurisdiction, and was clearly intended to be reflected in the language of the Act referring to possession and control.

13. Botaş in its well-presented submissions made the following further points. First, a confined understanding of the concept of "property of a State" in the context of section 13(2)(b) would conflict with the general recognition that enforcement represents a greater inroad into state sovereignty than adjudication, with the concomitant consequence that exceptions to immunity from enforcement are unlikely to be greater, and will probably be more confined, than exceptions in the case of adjudication. Thus, Tepe's case that "property" in section 13(2)(b) is limited to some proprietary or legal interest in the asset would lead to a conclusion that a third party creditor could levy execution against an asset which was owned by a separate entity but under a State's control, in circumstances where the commencement of proceedings against the separate entity in respect of the asset would be barred.

14. Secondly, Botaş points to the differing domestic understandings of the concept of "property" in different legal systems. In order to achieve coherence, property should be understood widely to embrace not merely any interest which might be described as proprietary, but also possession or control.

15. Thirdly, reference was made to article 19 of the United Nations Convention on Jurisdictional Immunities of States and Their Property dated ~~17~~ 2 December 2004, providing:

> "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 …"

16. Botaş endorses the view expressed by Professor Roger O'Keefe of University College London and Professor Chester Brown of the University of Sydney in O'Keefe and Tams (eds) work *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (2013) (OUP), to the effect that, although the term "property of a State" is ambiguous, recourse to the *travaux préparatoires* "indicates plainly" that the term comprehends possession or control.

17. The Board is unable to accept Botaş's submissions regarding the scope of the concept of "property of a State" in section 13(2)(b). First, there is a clear contrast between, on the one hand, the care taken to address expressly in sections 6 and 10 of the Act property in the possession or control of a State as well as property in which a State claims an interest and, on the other, the more limited reference in section 13(2)(b) to "property of a State". Although the Board here uses the adjective "limited", to point the contrast with sections 6 and 10, that implies no disagreement with Lord Diplock's statement in *Alcom Ltd v Republic of Colombia* [1984] AC 580, 602 that "property" in section 13(2)(b) "is broad enough to include … the debt owed to [a banker's customer] which is represented by the total amount of any balance standing to the customer's credit on current account". In *AIG Capital Partners Inc v Republic of Kazakhstan* [2005] EWHC 2239 (Comm); [2006] 1 WLR 1420, para 45, Aikens J stated that "property" in section 13(2)(b) will include

> "all real and personal property and will embrace any right or interest, legal, equitable, or contractual in assets that might be held by a state or any 'emanation of the state'."

The Board is also happy to proceed on that basis, assuming that, by a contractual right or interest in assets, Aikens J was referring to a contractual interest in an asset such as a bank balance to which Lord Diplock referred. All those are legally ascertainable interests in the relevant asset, and would no doubt have realisable value. Enforcement, in one form or another, can readily be envisaged against them. They can in a broad sense all be regarded as "proprietary" or legal interests. Whether they exist must necessarily be determined by reference to the relevant domestic law, ascertained on conventional private international law principles. The Board does not in this respect accept Botaş's

submission that it should seek to define and apply some autonomous international concept of "property". Enforcement relates necessarily and only to property recognised as such for the purposes of enforcement under domestic law.

18. The formulations of the concept of "property" identified in the previous paragraph do not come near the present case. A contractual interest against a bank in respect of a particular bank account has no present analogue. The Shares were held by and for Botaş in Jersey subject to the Jersey law of their situs, and were capable of disposal and vulnerable to execution accordingly. The existence under Turkish law as between the Turkish State and Botaş of rights or obligations which could affect or restrict Botaş's dealings with the Shares did not give the Turkish State any proprietary, legal or direct interest in or in respect of the Shares.

19. Secondly, the contexts of adjudicatory jurisdiction and enforcement raise different considerations, and the immunity available in respect of each is not necessarily directly comparable. An important rationale of the limited immunity recognised by sections 6(4) (read in particular with section 3) and 10 is that the State should not be put in a position where, although not a party, it must either forego or appear to defend its interests, expanded expressly to include possession or even control: *Belhaj v Straw* [2017] UKSC 3; [2017] AC 964, para 15. The qualification on immunity recognised in section 3(1)(a) is as respects proceedings relating to commercial transactions entered into by the State. In contrast, the immunity from enforcement provided by section 13(2)(b) assumes that there has been adjudication, it must have been framed with a past adjudication against the State (rather than a separate entity) primarily in mind and it is qualified as respects property (of the State) "for the time being in use or intended for use" in commercial purposes.

20. Thirdly, enforcement, the subject of section 13(2)(b), assumes liability to have been established by judgment or award against a particular defendant. It is, necessarily, directed to property of that defendant. Where liability has been established against the State (the situation on which the drafters would clearly have been focusing), the application of section 13(2)(b) is simple. If the creditor shows that the enforcement is correctly directed to State property, the sole question will be whether that property was for the time being in use or intended for use for commercial purposes. If the creditor fails to show this, the attempt at enforcement will simply fail. Whether the property is State property is an issue which the Act requires to be fought out in court, like the issue (if matters get that far) as to whether it is in use or intended for use for commercial purposes. There is in this context (and in contrast with the position under sections 6 and 10) no place for a mere claim that property is (or is not) State property. Nor is there any place for consideration of questions of possession or control. To the extent that the property is the State's, that suffices for execution, and the State's possession or control will be irrelevant. If all that the State has is mere possession or control without any proprietary interest (such as provided by a lien), enforcement will simply fail for want of any proprietary or legal interest on the part of the State against which to enforce.

21. The present appeal concerns the less common situation of a claim to State immunity in the context of enforcement against a separate entity by execution against property belonging to that entity. Tepe correctly accepts that assets held by a separate entity could be held for or on trust for the State. But Botaş's case is that assets held by a separate entity for itself can represent property of the separate entity and, at the same time though in another sense, also property of the State. If section 13(2)(b) is read as drafted, without introducing concepts of possession or control, that simply does not arise. If and so far as the separate entity is shown to own or have any other proprietary or legal interest in the shares, that interest will be liable to execution. If the separate entity has only a partial interest, then execution will be limited to that interest - and if the State happens to hold the remaining proprietary or legal interest, no question of enforcement against that remaining interest will arise, and so no need for the State to have or invoke immunity in respect of it.

22. Fourthly, what Botaş suggests in this case is that, while it has the entire proprietary or legal interest in the Shares, the Turkish State may at the same time be regarded as having a different form of "property" in the same Shares by way of control or (if it had had it) possession. It is in the Board's view unsurprising that section 13(2)(b) does not contemplate or provide for such an analysis. In the context of enforcement, possession or control are irrelevant, except in so far as they are aspects of some identifiable proprietary or legal interest against which execution could lie. Section 13(2)(b) addresses "the property of a State" in the straightforward sense of a proprietary interest having value against which execution can lie. Section 13(2)(b) was not drafted, and there is no call to read it, to preclude execution in the ordinary course against assets belonging to a separate entity on the ground of non-proprietary involvement by the State in the form of mere possession or control.

23. Fifthly, this conclusion is in the Board's view reinforced by the presence of section 13(2)(a). Assuming the State to have some form of possession or control, that subsection makes clear that no positive relief could be ordered against it in the context of enforcement by way of injunction or specific performance or order for the recovery of the property. The drafters have therefore considered and given the State such protection as was felt appropriate in such cases. Further, if one can, in the result, still conceive of remote situations in which execution might lie against an asset belonging to a separate entity over which a State had control, where section 13(2)(a) would not apply, such situations may well not have engaged the drafters' thought processes and cannot distort the thrust of section 13(2)(b). There is, in the Board's view, nothing intrinsically odd about a separate entity established by the State having to meet its liabilities out of its own assets in which the State has no proprietary or legal interest. The Board adds that, in the present case, section 13(2)(a) cannot present a problem for Tepe. Execution against the shareholdings which Botaş has in Jersey in the two Jersey companies TPIC and BIL requires no relief against the Turkish State in order to be effective.

24. Sixthly, in relation to Botaş's reliance on the United Nations Convention and the commentary by O'Keefe and Tams, the Board invited and after the hearing received detailed submissions on the *travaux préparatoires*. These do not lead it to quite so confident a conclusion about the understanding of the drafters of the UN Convention in the late 1980s and early 1990s as the commentary. It is true that, during the drafting negotiations, the focus of attention was on the bracketed phrase "or property to which it has a legally protected interest", which was in the end deleted in May 1990. In the same month, a reformulated article, combining previous articles referring to constraints on property in a State's possession or control, now referred simply to "measures of constraint against the property of a Foreign State". This change was not formally discussed, but it is not clear to the Board that it can simply be ignored, as intending to reproduce the previous more expanded language by way of shorthand.

25. Be that as it may be, much more important considerations are, in the Board's view, that (i) these drafting discussions on the United Nations Convention post-date the United Kingdom Act by at least ten years; so the Act cannot be construed by reference to them; (ii) the United Nations Convention is not yet in force, lacking a sufficient number of signatories; (iii) although the absence in it of any torture or jus cogens exception was in *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26; [2007] 1 AC 270, para 26 treated as an authoritative statement on the then current international understanding of the limits of immunity in respect of torture, the Convention does not have equivalent status on a detailed question such as the present: see *Belhaj v Straw*, para 25 and see further *Benkharbouche v Secretary of State for the Foreign and Commonwealth Affairs* [2017] UKPC 62; [2017] 3 WLR 957, paras 32 (in particular, the words: "it is not to be assumed that every part of the Convention restates customary international law") and 39, and *Jurisdictional Immunities of the State (Germany v Italy, Greece intervening* ICJ Reports 2012, p 99, paras 117 and 118, where the International Court of Justice referred, in the context of measures of constraint, only to "property belonging to a foreign State" and to a "State which owns the property"; (iv) the international instrument to which the Act does, however, owe some allegiance is the European Convention on State Immunity, dated Basle, 16 May 1972, at which it was aimed at giving broad effect, while not following precisely the wording: see *Gécamines*, above, para 10.

26. The European Convention contains these provisions:

"**Article 9**

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to:

> (a) its rights or interests in, or its use or possession of, immovable property; or
>
> (b) its obligations arising out of its rights or interests in, or use or possession of, immovable property
>
> and the property is situated in the territory of the State of the forum.
>
> …
>
> **Article 23**
>
> No measures of execution or preventive measures against the property of a Contracting State may be taken in the territory of another Contracting State except where and to the extent that the State has expressly consented thereto in writing in any particular case."

Again, there is a clear distinction evident between the full wording used in the context of article 9, referring to use and control of as well as interests in property, and the limited wording of article 23, referring on to measures against "the property of a Contracting State".

27. For all these reasons, the Board considers that the application of section 13(2)(b) turns on the straightforward question whether the property against which enforcement is sought is property of a State, property being used here in the sense indicated in para 17 above. In the present case, all that is relied on is mere control, which is not property in that sense. The appeal therefore fails on that simple basis.

*Control of the Shares*

28. In these circumstances, it is strictly unnecessary for the Board to engage further with the issue which predominated below, whether the Turkish State had sufficient control over the Shares to render them immune from execution. The Board will nevertheless address some remarks to this aspect, on the assumption that (contrary to its conclusion) a concept of control reflecting that which would be relevant under sections 6 and 10 and/or is referred to in the pre-Act case law on adjudicative immunity is also relevant under section 13(2)(b). Botaş relies, cumulatively, on the following main aspects of the "special legal régime" which it identifies as existing in respect of it and its shareholdings:

i) Botaş is under its charter a State Economic Organisation ("SOE"), formed to build inter alia pipelines for oil, oil products and natural gas in Turkey and abroad and carry out related operations including transportation. It is subject to Decree 233, article 38 of which provides that decisions concerning inter alia assignment, sale and granting of operations rights of enterprises, institutions, subsidiaries, businesses, business units and affiliates within the scope of the Decree shall be taken by the Coordination Council. However, article 58(3) authorises the Council of Ministers to give permission to set up companies abroad "without being subject to this Decree Law and to determine principles/rules in relation to these matters for each individual organisation". The consequence of disapplying article 38 was however that, so far as Decree 233 was concerned, the company set up abroad would be free to sell or otherwise transfer the Shares without the need for consent by the Turkish State. Both TPIC and BIL were incorporated following decisions giving permission under article 58(3). TPIC was incorporated by Turkish Petroleum Corporation ("TPC"), which later transferred ownership to Botaş pursuant to a decision 2012/4152 of the Council of Ministers dated 24 December 2012. BIL was incorporated by Botaş. Decision 2012/4152 further provided that the management, operating principles and internal supervision of TPIC as well as its relations with Botaş should be determined by the Ministry of Development, Undersecretariat of Treasury and Botaş in coordination with the Ministry of Energy. The decision granting permission to incorporate BIL provided that the directors, organisation, operating principles and internal supervision of the company as well as its relations with Botaş should be established by the board of directors of Botaş, but specified that the relevant minister should appoint the general manager/chair of the board and two other directors of BIL, while the other two directors should be nominated by Botaş but approved by the minister.

ii) The Shares are subject to Law No 4046 Concerning Arrangements for the Implementation of Privatisation, according to which their privatisation would require the consent of the Privatisation High Council "PHC"). Law 4046 is however only concerned with voluntary privatisation, and, that apart, cannot as a Turkish law have direct relevance to a disposition of Jersey shares. A voluntary sale to an innocent purchaser outside Jersey would, for example, be unaffected. Tepe submits that Law 4046 impacts not merely privatisation of shares, but any voluntary disposition of assets. That far-reaching submission is not endorsed in the judgments below, and it is unnecessary to consider it further.

iii) The Royal Court also found that, by virtue of the principle of "parallelism", since the permission of the Council of Ministers was required, and was received, to incorporate TPIC and BIL, permission of the Council was also required for any (voluntary) disposition or liquidation of TPIC and BIL.

iv) By decision 2014/6842, the Council of Ministers in fact stated that approval of the Under ecretariat and Ministry of Development was required for "any action to be taken regarding the change of capital of subsidiaries and affiliates founded or to be founded pursuant to article 58(3) of the Decree Law 233".

v) In common with any other company more than half of whose shares are owned by a SOE, TPIC and BIL are subject to Law 4734 on Public Procurement, which regulates the procurement by such entities of goods, services and works, and establishes a Public Procurement Authority to oversee procurement.

vi) Various other elements relied on in support of Botaş's case on control were identified by the Royal Court as follows:

vii) Under Decree 233 the relevant Ministry has a power of inspection in pursuance of its responsibility for supervision of Botaş (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 Botaş and its subsidiaries (article 35(2)) and the Higher Planning Council can determine Botaş' 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).

viii) Under Decree 2014/6842, Botaş is required to send financial and non-financial information to the Under Secretariat and the Ministry in order to enable them to monitor Botaş's 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 Botaş (articles 22(3) and (4)) and the appointment processes for personnel of State Enterprises is subject to approval of the Under Secretariat (article 4).

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

29. Notwithstanding these suggested indicia, the Royal Court rejected Botaş's case on control. It took as its starting point Botaş's status as a separate legal entity owning and in possession of its own assets. It saw nothing in the matters relied on to indicate that the level of control the Turkish State could exert over Botaş was of a different order to that commonly exercised by states over their wholly owned subsidiaries, citing in this connection the high level of control exercised by the Democratic Republic of the Congo over Gécamines in *La Générale des Carrières et des Mines v FG Hemisphere*

*Associates LLC* [2012] UKPC 27. The level of control derived from in particular factors (i) to (v) above did not reach a level akin to that which the pre-Act case law suggested might suffice to entitle the State to adjudicative immunity.

30. The Royal Court also held that, under Turkish law, state property is immune from seizure (article 82(1) of the Execution and Bankruptcy Act). But this immunity was abolished by Law No 4011 of 14 September 1994 as regards the property of any SOE. So the Shares, if they had been in Turkish companies, would have been available for attachment and not immune from execution. The Royal Court did not think this relevant to the issue before it of state immunity under Jersey law, and it is correct that the principles governing immunity domestically and in a foreign jurisdiction do not necessarily coincide, particularly when the domestic position is expressly regulated by statute.

31. The critical question is what is meant by and suffices to constitute control for the purposes of immunity. The case law in which adjudicative immunity has been upheld examines the significance of actual possession (*Compania Naviera Vascongado v Steamship "Cristina"* [1938] AC 485) (*The "Cristina"*), of a bailor's right to immediate possession (*USA and Republic of France v Dollfus Mieg et Cie SA* [1952] AC 582) as well as of an undisclosed principal's contractual right to moneys in a bank account (*Rahimtoola v Nizam of Hyderabad* [1958] AC 379). The authorities on control are more slender, consisting of cases of requisition of vessels without any taking of possession by the State but in circumstances where the master and crew accepted the requisition and obeyed the State's orders: see eg *The Broadmayne* [1916] P 64, where Pickford LJ at p 73 rationalised the resulting relationship as one of forced hiring. It was on this basis that Lord Wright in *The Cristina* said (p 507):

> "The rule [of immunity] 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."

He went on to refer to inter alia *The Broadmayne*. Lord Atkin covered the same point succinctly at p 490 with a reference to property which is the sovereign's "or of which he is in possession or control".

32. In *Dollfus Mieg*, gold bars claimed to be the property of the French company Dollfus Mieg were wrongfully seized by German authorities during the war, after the end of which they were lodged with the Bank of England as bailee for the Governments

of the United States, France and the United Kingdom. Dollfus Mieg's claim to recover the 51 bars still held by the Bank failed, because it indirectly impleaded the three bailor states by affecting their immediate possessor rights against the Bank. In his speech, Earl Jowitt, at p 604, noted the statements in *The Cristina* and said that Lord Atkin's words "or control" were probably inserted to cover those cases cited to him in argument in which the foreign government had requisitioned or directed a ship without depriving the owners of their possession. But he added that "there is, I think, no special doctrine applying to ships which does not equally apply to gold bars", gold bars being simply the asset in issue in *Dollfus Mieg*. That said, however, he very shortly afterwards said this:

> "The word 'control' in the second limb of Lord Atkin's proposition is a word of vague import, and I think it fallacious to treat Lord Atkin's words as though they were the words of a statute. I do not think that the word 'control' is apt in the present context. The bars of gold did not require any treatment or anything in the nature of management. All that was required was that they should be left intact and undisturbed in the vaults of the bank." (pp 604-605)

33. The Board considers that the courts below were correct to regard the Shares as being in a different position to that of a ship operating without transfer of possession as a "hired" ship in the service of a requisitioning state. The trading operation, earnings and costs of such a ship are for the account of the requisitioning state, although it has no actual possession. The Shares in contrast were held by Botaş for its own account, and such dividends or other earnings as they yielded likewise. In reality, as in *Dollfus Mieg*, the concept of "control" has limited if any relevance to the Shares, which did not require or receive management any more than did the gold bars. But, in so far as the concept can sensibly be deployed, the Board does not consider that the factors on which Botaş relies establish any degree of control over the Shares, or even over Botaş itself, significantly different from that which could be expected with any separate state-owned entity.

34. At times Botaş's submissions seemed to suggest that the issue by the recognised Government of Spain in *The Cristina* of a decree of requisition, while the vessel was (it appears) on the high seas, sufficed itself to give the Spanish Government control entitling it to state immunity in respect of the owners' subsequent claim to recover their vessel. By parity of reasoning, reliance was placed on the restrictions imposed on Botaş as regards the Turkish State under Turkish law, prohibiting (for example) voluntary dispositions of the Shares and giving the State power to regulate Botaş and its activities in other respects. But *The Cristina* was not decided on any such basis. Rather the requisition which was decisive was the Spanish Government's seizure (illegal though it was) of the vessel in Cardiff Docks involving placing in charge a new master who answered to the Government. But, whatever the position might be with regard to a vessel on the high seas, *The Cristina* is not authority for a proposition that control exists

over an asset like the Shares, even in a context of adjudication, simply because the State claims it by virtue of a law which is not the law of the situs.

*Conclusion*

35. For these reasons, had the Board approached the matter as the courts below did, it would have come to the same conclusion. As it is, however, it does not consider that considerations of control enter into the issue under section 13(2)(b) at all.

36. The Board will in the circumstances humbly advise Her Majesty that this appeal should be dismissed. The parties have 21 days in which to make submissions on costs, failing which the Board will order that they should be borne by Botaş, as the unsuccessful appellant.