[2012] UKPC 27
**Privy Council Appeal No 0061 of 2011**

# JUDGMENT

# La Générale des Carrières et des Mines (Appellant) *v* F.G. Hemisphere Associates LLC (Respondent)

## From the Court of Appeal of Jersey

**before**

**Lord Hope**
**Lord Walker**
**Lord Mance**
**Lord Wilson**
**Lord Carnwath**

## JUDGMENT DELIVERED BY LORD MANCE ON

## 17 JULY 2012

**Heard on 28-29 May 2012**

*Appellant*
Jonathan Hirst QC
Giles Richardson
Justin Harvey-Hills

(Instructed by Clyde & Co LLP)

*Respondent*
Lord Pannick
Andrew Hunter

(Instructed by Ogier)

**LORD MANCE:**

*Introduction*

1. The respondent, FG Hemisphere Associates LLC ("Hemisphere"), is a Delaware corporation. It invests in "distressed" assets, and it has purchased the assignment of two very substantial International Chamber of Commerce arbitration awards against the Democratic Republic of the Congo (the "DRC"). The awards arose from supply and financing contracts entered into by the DRC during the Mobutu era with the then Yugoslavian hydroelectric company, Energoinvest DD. Hemisphere now claims to enforce those awards against assets of La Générale des Carrières et des Mines Sarl ("Gécamines"), a DRC state-owned corporation. The assets consist of, first, Gécamines' shareholding in a Jersey joint venture company called Groupement pour le traitment du Terril de Lumumbashi Ltd ("GTL") and, secondly, the income flow due from GTL to Gécamines under a Slag Sales Contract.

2. By a judgment given in the Royal Court on 27th October 2010, the Commissioner, Howard Page QC, assisted by Jurats Tibbo and Kerley, upheld Hemisphere's claim, on the basis that Gécamines was at all material times an organ of and so to be equated with the DRC. The Royal Court reached this conclusion following an examination of (i) Gécamines' constitutional position, by reference to which it concluded that "the exceptional degree of power accorded to the state over the affairs of Gécamines, at all levels, was such that the company was no more, in truth, than an arm of the state with responsibility for operations in a sector of vital importance to the national economy" (para 69) and (ii) occasions on which the DRC had for its own use taken or used assets belonging to Gécamines without compensation. On appeal, on 14th July 2011 the Court of Appeal, by a majority (James McNeill QC, President, and Sir Hugh Bennett; Nigel Pleming QC dissenting), affirmed this judgment. Gécamines appeals to the Board, with leave of the Court of Appeal.

3. The appeal raises important issues regarding the position of state-owned corporations and the circumstances, if any, in which they and their assets may be equated with the state and its assets. In this case, the issues arise in a claim to hold a state-owned corporation liable for the state's debts. In another case, the claim could be to hold a state liable for its state-owned corporation's debts. On the findings made and approach of the courts below, the DRC and Gécamines would appear to be equated for both such purposes. The creditors of each would have to accept that the (commercial) assets of either were liable to be taken in execution by

the creditors of the other. Whether this would leave the creditors of one or the other better or worse off would depend on the nature and accessibility of each's assets. The majority in the Court of Appeal drew comfort from the thought that in many cases the creditors would have notice of the circumstances leading in law to a conclusion that the DRC and Gécamines should be equated (paras 70 and 108). However that may be, Hemisphere has here located, and obtained interim injunctive relief relating to, substantial assets of Gécamines in Jersey, in respect of a liability of the DRC which has nothing to do with Gécamines' activities.

*The law*

4. In the courts below, the case was argued and decided on the basis that whether Gécamines was an organ of the DRC was to be determined by a common law test derived from the English Court of Appeal's decision in *Trendtex Trading Corp v Central Bank of Nigeria* [1977] 1 QB 529, especially, though not exclusively, from Lord Denning MR's judgment. Addressing the matter on a hypothesis that the court was still bound by the doctrine of absolute immunity, Lord Denning said (p.559C-D and 560C-D):

> "If we are still bound to apply the doctrine of absolute immunity, there is, even so, an important question arising upon it. The doctrine grants immunity to a foreign government or its department of state, or any body which can be regarded as an 'alter ego or organ' of the government. But how are we to discover whether a body is an 'alter ego or organ' of the government?
>
> ….
>
> I confess that I can think of no satisfactory test except that of looking at the functions and control of the organisation. I do not think that it should depend on the foreign law alone. I would look to all the evidence to see whether the organisation was under government control and exercised governmental functions. That is the way in which we looked at it in *Mellenger v New Brunswick Development Corp* [1971] 1 WLR 604, when I said, at p.609:
>
> > 'The corporation …. has never pursued any ordinary trade or commerce. All that it has done is to promote the industrial development of the province in a way that government department does.'"

Earlier in his judgment, Lord Denning had referred to the doctrine of restrictive immunity as giving "immunity to acts of a governmental nature, described in Latin as jure imperii" (p555F). Lord Denning was, presumably, using the phrase "governmental functions" at p. 560 in the same sense.

5. Shaw LJ put the matter in somewhat different terms at p.573E:

> "Whether a particular organisation is to be accorded the status of a department of government or not must depend on its constitution, its powers and duties and its activities These are the basic factors to be considered. The view of the government concerned must be taken into account but is not of itself decisive ….; it does not relieve a court before which the issue of sovereign immunity arises of the responsibility of examining all the relevant circumstances."

In the light of these statements, the Royal Court and Court of Appeal looked at the formal constitutional position, at the control exercised by the state in practice over Gécamines and at Gécamines' functions.

6. *Trendtex* was a decision on state immunity. The issue was whether the Central Bank of Nigeria, a legal entity incorporated by a Nigerian statute, was a department or organ of the State of Nigeria. After a close analysis of its powers, functions and relationship with the State, Donaldson J at first instance held that it was: [1976] 1 WLR 868, 874A-877A. The Court of Appeal found the issue difficult, but held the contrary: [1977] 1 QB 529, 560E-H per Lord Denning MR, 563D-565G per Stephenson LJ and 572H-575G per Shaw LJ. Lord Denning noted that the bank had governmental functions, in that it issued legal tender and safeguarded the international value of the currency, and that its affairs were under a great deal of governmental control in that the Federal Executive Council might overrule its board on monetary and banking as well as internal administrative policy. But it also acted as banker and adviser to the government, to federal states and some private customers. Stephenson and Shaw LJJ emphasised the need for caution against too ready a recognition of a status involving sovereign immunity, particularly in the absence of any clear expression of intent in the domestic incorporating legislation to confer such a status: pp.564F-G and 573C-D. Stephenson LJ was not satisfied that the bank was or had become a department of the State in the light of eleven amending decrees by which it was contended that the Nigerian Government "had dramatically eroded its independence", because "A hobbled horse is still a horse": p.565F. Shaw LJ said that it did not follow from the fact that the issue of legal currency and the safeguarding of its value were functions of government that the delegation of those functions under very tight governmental control to the Central Bank as the Government's agent gave the Central Bank the status of a government department: p.574C-E. Further, it was not

adequate to constitute it an organ or department of government that the Central Bank "was the subserving agent of the government in a variety of activities": p.575F.

7. When *Trendtex* was decided in January 1977, the common law operated in two potential respects on an "all or nothing" basis. First, on a traditional view, immunity was either absolute or non-existent; and, secondly, whether a body had immunity depended upon whether or not it was regarded as part of the state. *Trendtex* re-affirmed the latter aspect, with Shaw LJ saying at p.573A-B that "There can be no intermediate hybrid status occupied by the bank wherein it is to be regarded as a government department for certain purposes and as an ordinary commercial or financial institution for different purposes". But *Trendtex* changed the former aspect. Under international law, there had already been a shift away from absolute immunity towards a more restrictive principle excluding ordinary commercial dealings from the ambit of sovereign immunity; the majority in *Trendtex* held that - international law being, as it exists from time to time, part of the common law - the common law should give effect to this shift by endorsing the restrictive principle, and, further, that whether an act constituted an ordinary commercial dealing depends upon its nature, rather than its purpose: per Lord Denning at pp.554C-559C and Shaw LJ at pp.575G-579H.

8. When, four years later, the cases of *Playa Larga* and *Marble Islands v I Congreso del Partido* [1983] AC 244 came to be decided, the restrictive principle of immunity at common law was accepted on both sides and by the House. Lord Wilberforce at pp.261A-262G justified it as resting on two main foundations:

> "(a) It is necessary in the interest of justice to individuals having such [i.e. commercial or other private law] transactions with states to allow them to bring such transactions before the courts. (b) To require a state to answer a claim based upon such transactions does not involve a challenge to or inquiry into any act of sovereignty or government act of that state."

He also accepted that this is an area in which "English courts are applying, or at least acting so far as possible in accordance with, international law": p.265C.

9. On this basis, the actual issue in *I Congreso del Partido* turned on the categorisation of particular acts of the Cuban state (as to which the House divided). But Lord Wilberforce also referred to the status of two Cuban state-owned corporations involved on the facts, Mambisa and Cubazucar. It was not suggested that either was an emanation, department or agency or had contracted on behalf of the Cuban state, and Lord Wilberforce observed (p.258F-G):

> "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. The distinction between them, and their governing state, may appear artificial: but it is an accepted distinction in the law of England and other states: see *C. Czarnikow Ltd v Centrala Handlu Zagranicznego Rolimpex* [1979] AC 351. Quite different considerations apply to a state-controlled enterprise acting on government directions on the one hand, and a state, exercising sovereign functions, on the other."

10. International law has further developed. The facts in issue in both *Trendtex* and *I Congreso del Partido* occurred in 1975. They pre-dated the United Kingdom's State Immunity Act 1978 and the State Immunity (Jersey) Order, 1985 (Jersey Order in Council 5/1986), extending the provisions of the 1978 Act to Jersey and providing for this purpose that any reference in the 1978 Act to the United Kingdom shall be read as a reference to the Bailiwick of Jersey. The Act was aimed at giving broad effect to (though not following precisely the wording of) the European Convention on State Immunity, which was agreed under the aegis of the Council of Europe at Basle on 16 May 1972 and which entered into force on 11 June 1976.

11. Article 24(1) of the European Convention left contracting states free to give effect to the restrictive principle of sovereign immunity, "without prejudice to the immunity from jurisdiction which foreign States enjoy in respect of acts performed in the exercise of sovereign authority *(acta jure imperii)*", while Article 27 provided that:

> "1 For the purposes of the present Convention, the expression "Contracting State" shall not include any legal entity of a Contracting State which is distinct therefrom and is capable of suing or being sued, even if that entity has been entrusted with public functions.
>
> 2 Proceedings may be instituted against any entity referred to in paragraph 1 before the courts of another Contracting State in the same manner as against a private person; however, the courts may not entertain proceedings in respect of acts performed by the entity in the exercise of sovereign authority (acta jure imperii).
>
> 3 Proceedings may in any event be instituted against any such entity before those courts if, in corresponding circumstances, the courts

> would have had jurisdiction if the proceedings had been instituted against a Contracting State."

The European Convention thus expressed an important delimitation of the scope of the State, though one which was implicit in the reasoning of (at least) Lord Denning in *Trendtex* set out in paragraph 4 above. The delimitation excludes from the scope of the State any distinct legal entity capable of suing or being sued, even if entrusted with public functions including activities involving the exercise of sovereign authority. In return, however, the European Convention took an entirely new step, in giving to any such entity a particular immunity in respect of acts in the exercise of sovereign authority, identified with *acta jure imperii*. Previously, such an entity could only have any immunity if regarded as part of the State. From now on, in effect, such an entity could have the hybrid status which Shaw LJ had rejected at common law in *Trendtex*. The second "all-or-nothing" choice existing when *Trendtex* was decided could no longer arise. Full account could be taken of the separateness of an entity, without it thereby foregoing immunity in respect of any sovereign activity which it undertook.

12. The 1978 Act took up but reformulated the approach of the European Convention on this point, providing in section 14:

> "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 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 (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 [which inter alia exclude enforcement against State property other than "property which is for the time being in use or intended for use for commercial purposes"] 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.

….."

13. The 1978 Act also endorsed the restrictive theory, providing in section 3:

"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.

….

(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 subsection (1) above applies to a contract of employment between a State and an individual."

14. In summary, since *Trendtex*, the restrictive principle of immunity has been confirmed, and a clear distinction has in the context of immunity emerged in European and domestic law between, on the one hand, the State and, on the other, "a separate entity" (even one exercising sovereign activity) which is identified by the 1978 Act as "any entity … distinct from the executive organs of the government of the state and capable of suing or being sued". The statutory language was considered by Lord Goff of Chieveley in *Kuwait Airways Corp v Iraqi Airways Co* [1995] 1 WLR 1147, 1158E-1160F. He noted the possible contrast under the 1978 Act between the exemption from immunity of states as respects any commercial transaction entered into by the state and the (potentially more limited) immunity granted to entities distinct from the executive organs of the state as respects acts done in the exercise of sovereign authority; the latter Lord Goff equated unequivocally (and consistently with the European Convention on State Immunity) with acts *jure imperii*.

15. The express distinction between a state and a separate entity has also achieved more general international legal recognition. Chapter II, headed Attribution of Conduct to a State, of The International Law Commission's Articles on State Responsibility (2002) contains these Articles:

"ARTICLE 4

*Conduct of organs of a State*

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative,

executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

ARTICLE 5

*Conduct of persons or entities exercising elements of governmental authority*

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."

16. The distinction between a state organ and a separate or distinct entity is not concluded by determining whether the separate entity has separate legal personality. That was held in *Baccus srl v Servicio Nacional del Trigo* [1957] 1 QB 438 and assumed in Trendtex, where the Central Bank was a separate legal entity, and it continues to be the position. The 1978 Act makes this clear by providing that a separate entity must be "distinct from the executive organs of the government of the state" as well as "capable of suing or being sued". A separate entity *must* therefore have legal personality in this sense in order to have immunity as part of the state. But an organ of the state *may* under certain circumstances have legal personality. This is expressly contemplated both by the Explanatory Report (ETS No. 074) relating to the European Convention, and by the commentary to the International Law Commission's Articles of State Responsibility.

17. The Explanatory Report (ETS No. 074) accordingly explained the distinction contemplated in Article 27 as follows:

"107. In practice, proceedings are frequently brought by an individual, not, strictly speaking, against a State itself, but against a legal entity established under the authority of the State and exercising public functions. …..

108. *For the purpose of defining these entities, the criterion of legal personality alone is not adequate, for even a State authority may have legal personality without constituting an entity distinct from the State. On the other hand, it was considered that a dual test comprising (1) distinct existence separate and apart from the executive organs of the State and (2) capacity to sue or be sued, i.e. the ability to assume the role of either plaintiff or defendant in court proceedings, could provide a satisfactory means of identifying those legal entities in Contracting States which should not be treated as the State.*

109. The entities referred to in Article 27 may be, inter alia, political subdivisions (subject to the federal clause in Article 28) or State agencies, such as national banks or railway administrations.

Paragraph 2 is worded in such a way that where an entity is authorised to exercise public functions in the State of the forum an action may be brought against it provided the proceedings do not relate to acts performed by the entity in the exercise of sovereign authority (acta iure imperii). Paragraph 3 provides that an entity may not enjoy more favourable treatment than a Contracting State.

The overall effect of Article 27 is to deny to entities, when they are not exercising public functions, any right to treatment different from that accorded to a private person." *(emphasis added)*

18. The commentary to Chapter II of the International Law Commission's reads under Article 4:

"(6) …. the reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level. No distinction is made for this purpose between legislative, executive or judicial organs. …."

Under Article 5 the commentary continues:

> "(1) Article 5 deals with the attribution to the State of conduct of bodies which are not State organs in the sense of article 4, but which are nonetheless authorized to exercise governmental authority. The article is intended to take account of the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions."

*The arguments in this case*

19. Before the Board, issue has for the first time in the proceedings been joined as to whether the test suggested in *Trendtex* is or remains appropriate either generally or in relation to the questions of substantive liability and enforcement (as opposed to immunity) raised by Hemisphere's claim to hold Gécamines responsible for the DRC's indebtedness and to attach Gécamines' assets. The Royal Court (para 16) and the Court of Appeal (para 48) wondered in passing whether the reference to functions in the *Trendtex* test ought necessarily to apply to issues of execution as well as immunity. Their underlying thought was that constitutional and/or factual control might alone suffice to make a state corporation liable for state debts. But that thought could open the way to almost any state trading corporation becoming liable for its state's debts. That might be welcomed by some (see e.g. the arguments identified in Gaillard, *Effectiveness of Arbitral Awards, State Immunity from Execution and Autonomy of State Entities*, in *State Entities in International Arbitration*, IAI Series of International Arbitration No. 4 (2008) 179). But it would not be consistent with the common law's approach, as indicated by the reasoning and decision in *Trendtex* and by Lord Wilberforce's statements in *I Congreso del Partido* set out in paragraphs 6 and 8 above, and still less so with the approach developed internationally and by the 1978 Act, which are both at pains to recognise the separateness or distinctness of state-owned corporations, notwithstanding that they may have been entrusted with public functions including activities involving the exercise of sovereign authority.

20. Hemisphere, represented by Lord Pannick QC, has taken its principal stance on the test of a State organ identified in *Trendtex*, on the basis of a concession made by counsel for the appellants, as establishing the correct approach in the present context. The test was described by the majority in the Court of Appeal as involving an "exception" to usual principles of incorporation and a "special rule": paragraphs 33, 41, 70 and 108. Lord Pannick submits that the Royal Court and of the majority in the Court of Appeal were right to conclude upon a careful examination that Gécamines' constitution, control and functions satisfied the test.

21. Gécamines, in submissions presented by Mr Jonathan Hirst QC, joins issue with Hemisphere at several levels. First, if the *Trendtex* test is appropriate, Gécamines questions what was special about the degree of governmental control which the State had over Gécamines as a state-owned corporation, and furthermore what was governmental or sovereign about its functions or activities. Second, and more fundamentally (departing from the concession made below), it questions whether the *Trendtex* test, even in all its aspects involving examination of Gécamines' constitution, the state's control and Gécamines' functions, is appropriate for determination of questions of liability and execution. Mr Hirst submits that a separate juridical entity is just that: a separate juridical entity which the law ought always to recognise, *unless* it can in the particular circumstances be seen to be a sham or unless one of the rare situations exists in which courts will "lift the corporate veil" and look at or to those behind the company.

22. Here, there has been no attempt to suggest that Gécamines or its corporate existence should be regarded as a sham or as having no meaningful existence: see the Royal Court, para 14, and the Court of Appeal, paras 108 and 264-267. That being so, Mr Hirst submits that the court should treat Gécamines and its assets no differently in the present context from any other company or corporation, in accordance with principles, which, he correctly states, have been recognised not only domestically in *Salomon v A. Salomon & Co Ltd* [1897] AC 22 but also internationally in *Case concerning Barcelona Traction, Light and Power Company, Ltd* [1970] ICJ 3. Accordingly, he submits that Gécamines' separate legal identity should be respected, unless the case is one of those rare cases in which the corporate veil can be lifted; and that to lift the veil would require Hemisphere to show that there had been wrongdoing and impropriety, consisting in the (mis)use of the company by the wrongdoers as a device or facade to conceal their wrongdoing.

*Lifting the veil – domestic and international law*

23. In making this last submission, Mr Hurst relies upon domestic law principles recently analysed by Munby J at first instance in *Ben Hashem v Ali Shayif* [2008] EWHC 2380 (Fam). In summary, Munby J held:

> "159 In the first place, ownership and control of a company are not of themselves sufficient to justify piercing the veil. This is, of course, the very essence of the principle in *Salomon v A Salomon & Co Ltd* [1897] AC 22 ...

> 160. Secondly, the court cannot pierce the corporate veil, even where there is no unconnected third party involved, merely because it is thought to be necessary in the interests of justice ...
>
> 161 Thirdly, the corporate veil can be pierced only if there is some impropriety ...
>
> 162 Fourthly, the court cannot, on the other hand, pierce the corporate veil merely because the company is involved in some impropriety. The impropriety must be linked to the use of the company structure to avoid or conceal liability ...
>
> 163 Fifthly, it follows from all this that if the court is to pierce the veil it is necessary to show both control of the company by the wrongdoer(s) and impropriety, that is, (mis)use of the company by them as a device or facade to conceal their wrongdoing ...
>
> 164. Finally, and flowing from all this, a company can be a facade even though it was not originally incorporated with any deceptive intent. The question is whether it is being used as a facade at the time of the relevant transaction(s). And the court will pierce the veil only so far as is necessary to provide a remedy for the particular wrong which those controlling the company have done. In other words, the fact that the court pierces the veil for one purpose does not mean that it will necessarily be pierced for all purposes."

24. Hemisphere accepts Munby J's reasoning and summary as a correct general statement of domestic law as to circumstances in which courts can lift the corporate veil, and the Board is content for present purposes to do so without further consideration. But that does not mean, as Mr Hirst's argument assumes, that the same reasoning and conclusion represent international or domestic law in the present context.

25. First, the Board has already noted in paragraphs 16 to 18 above that a body *may* in the present context fall to be regarded as an organ of the state, rather than a separate or distinct entity, even though it has a separate juridical personality. In *Trendtex* Lord Denning identified as "traditional functions of a sovereign – to maintain law and order – to conduct foreign affairs – and to see to the defence of the country" (p.555A). It is difficult to think that a state could detach itself from, or disown its identity with, its armed or police forces or a ministry like the Treasury or the Ministry of Justice or Defence by decreeing that such forces or

ministry (or the minister in charge as a corporation sole) should have their own legal personality. In such cases at least, function must remain an important aspect of the question whether a juridical entity is in reality part of the state.

26. Another example of the same point may be found in the circumstances of *Mellenger v New Brunswick Development Corporation* [1971] 1 WLR 604, cited by Lord Denning in his remarks in *Trendtex.* The Corporation was set up by statute to promote the industrial development of the province, a governmental policy. It conducted no trade or business. It had pursuant to that policy persuaded a chipboard company to agree with it to construct a new factory in the province, and had agreed to guarantee any bond issue which the company required to finance its project. Mr Mellinger's claim was for commission for introducing the company. The Corporation was held entitled to plead sovereign immunity. It seems likely that it was with cases such as these in mind that Parliament in section 14(1) of the 1978 Act specified that, by separate entity, it had in mind only an entity "which is distinct from the executive organs of the government of the State" as well as capable of suing and being sued.

27. A further difficulty about Mr Hirst's submission is that the concept of an organ of the state in the context of international law will not necessarily be identical to the principles established by a purely domestic authority like *Ben Hashem*. It is true that in the *Barcelona Traction* case, the International Court of Justice referred (para 56) to municipal law practice to lift the corporate veil or disregard the corporate entity,

> "for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations".

But it went on to examine, firstly, whether the Barcelona Traction company had ceased to exist, so that the only persons who could pursue any remedy effectively would be the state of its relevant shareholders' nationality (Belgium) and, secondly, whether its state of incorporation (Canada) had ceased to have capacity to act on its behalf. These were international legal considerations, indicating that there may not always be a precise equation between factors relevant to the lifting of the corporate veil under domestic and international law.

*Separate legal entity - the correct approach*

28. What then is the correct approach to distinguishing between an organ of the State and a separate legal entity? And is this distinction relevant not only to questions of immunity, but also to questions of substantive liability and enforcement? Pleming JA (dissenting) in the Court of Appeal recognised (correctly) at para 235 that the distinction drawn in section 14 of the 1978 Act is not necessarily to precisely the same ~~in~~ effect as that implied by the test in *Trendtex*. But, although *Trendtex* was (like the 1978 Act) dealing with immunity, he applied the simple test in *Trendtex* to the present questions of liability and enforcement. In the Board's opinion, it is now appropriate in both contexts to have regard to the formulation of the more nuanced principles governing immunity in current international and national law. These, as explained in paragraphs 10 to 18 above, express the need for full and appropriate recognition of the existence of separate juridical entities established by states, particularly for trading purposes. They do this, even where such entities exercise certain sovereign authority *jure imperii*, providing them in return (as already noted) with a special functional immunity if and so far as they do exercise such sovereign authority. A similar recognition of their existence and separateness would be expected for purposes of liability and enforcement.

29. Separate juridical status is not however conclusive. An entity's constitution, control and functions remain relevant: paragraph 25 above. But constitutional and factual control and the exercise of sovereign functions do not without more convert a separate entity into an organ of the State. Especially where a separate juridical entity is formed by the State for what are on the face of it commercial or industrial purposes, with its own management and budget, the strong presumption is that its separate corporate status should be respected, and that it and the State forming it should not have to bear each other's liabilities. It will in the Board's view take quite extreme circumstances to displace this presumption. The presumption will be displaced if in fact the entity has, despite its juridical personality, no effective separate existence. But for the two to be assimilated generally, an examination of the relevant constitutional arrangements, as applied in practice, as well as of the State's control exercised over the entity and of the entity's activities and functions would have to justify the conclusion that the affairs of the entity and the State were so closely intertwined and confused that the entity could not properly be regarded for any significant purpose as distinct from the State and vice versa. 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 which against the States' liabilities can be enforced. This was, rightly, recognised by Pleming JA in the Court of Appeal (para 255).

30. There may also be particular circumstances in which the State has so interfered with or behaved towards a state-owned entity that it would be

appropriate to look through or past the entity to the State, lifting the veil of incorporation. But any remedy should in that event be tailored to meet the particular circumstances and need. That is the position under domestic law (as to which see Munby J's final point in his para 164 quoted in paragraph 23 above). It must equally be so in the Board's view under international law. Merely because a State's conduct makes it appropriate to lift the corporate veil to enable a third party or creditor of a state-owned corporation to look to the State does not automatically entitle a creditor of the State to look to the state-owned corporation. Lifting the veil may mean that a corporation is treated as part of the State for some purposes, but not others.

*Other authority*

31. General support for the conclusions suggested in the previous paragraphs can in the Board's view be found in the considerable domestic and overseas case-law to which the parties have referred in their written cases. Domestically, the distinction between a state and a separate organ has been addressed in a series of first instance cases concerning state-owned corporations or bodies: *Kensington International Ltd v Republic of the Congo* [2003] EWHC 2331 (Comm) (Tomlinson J) and [2005] EWHC 2684 (Comm), [2006] 2 Butterworths Company Law Cases 296 (Cooke J), *Walker International Holdings Ltd v Republique Populaire du Congo* [2005] EWHC 2813 (Comm), *Tsavliris Salvage (International) Ltd v Grain Board of Iraq* [2008] EWHC 612 (Comm), and *Wilhelm Finance Inc v Ente Administrador del Astillero Rio Santiago* [2009] EWHC 1074 (Comm). In each of these cases, the court took Lord Denning's test in *Trendtex* of control and functions and applied it to the question whether a separately constituted legal entity was part of the state or a separate entity.

32. In the first three decisions, all relating to the state Congo-Brazzaville, the test was treated as equally applicable whether the claim was for immunity or was against a state corporation for a state debt. On the facts, a wholly owned state corporation, Société Nationale des Pétroles du Congo ("SNPC"), was held to be part of the state of Congo-Brazzaville. Under the law of its incorporation, SNPC was "to hold and manage, on behalf of the Congo, all the assets, rights, ….. whatever their nature, held originally by the Congo … in all activities related to research, exploitation, treatment and transformation of oil and secondary or connected products", and was to undertake on behalf of the State a wide variety of activities in relation thereto, including engaging in all operations of production, treatment, transformation, value adding and transportation and representing the interests of the State in all contractual relations with third parties in connection with exploitation of such oil. It was to carry out the missions entrusted to it under the control of the Ministries for Petroleum Affairs and of the Economy, Finance and the Budget, and was specifically subject to the control of the State. The facts were on any view extreme, and the findings made probably amount to a conclusion

that SNPC had no real separate or distinct existence at all: see further the French courts' approach to the same company in cases considered by the Board in paragraph 41 below. In *Tsavliris* the Grain Board of Iraq was held to be a separate legal entity, distinct from the state of Iraq, and party to a salvage agreement accordingly. Likewise, in *Wilhelm* an Argentinian state-owned shipyard was held to be a separate entity.

33. In State Immunity, Selected Materials and Commentary, by Dickinson, Lindsay and Loonam (OUP), para 4.101, the authors note that the 1978 Act provides no guidance as to the test to be applied to determine whether a party to proceedings is a department of the government of a foreign state for the purposes of s.14(1)(c). The authors add, with a caution which is in the Board's view justified, that "Some assistance, however, can be derived from case law pre-dating the 1978 Act". They then refer not to Lord Denning's but to Shaw LJ's statement in *Trendtex* quoted in para 5 above. They continue:

> "It is suggested that the following principles can be derived from these cases:
>
> (a) The characterization of a party to proceedings as a department of the government of a foreign sovereign State depends not on any single factor, but on a consideration of all relevant circumstances.
>
> (b) The status of the party under the law of its home state is one relevant factor, but is not decisive. Nor is the presence of separate legal personality itself decisive against characterizing a party as a department of government.
>
> (c) A detailed analysis of the constitution, function, powers and activities of the party and of its relationship with the state is likely to be essential. The existence of State control is not, however, a sufficient criterion.
>
> (d) The courts are likely to exercise caution before treating a party having separate legal personality as a department of government.
>
> (e) The range of functions performed by and degree of independence usually granted to (and, indeed, required of) a foreign central bank make it unlikely that a separate legal entity performing such a role will be characterized as a department of government.

> The principles to be applied in determining whether an entity is a 'department of government' for this purpose are closely related to and mirror those for determining whether an entity is a 'separate entity'. Indeed, it is submitted that there should be no scope for a finding that a governmental entity falls between the two categories, into a judicial no-man's land.
>
> 'Separate entity'
>
> An entity is a 'separate entity' if it is 'distinct from the executive organs of the government' and 'capable of suing or being sued'. Although the 1978 Act does not specify the system of law to be applied in determining whether these conditions are satisfied (except insofar as the legislative history supports the view that the law of the foreign State should not be applied exclusively), ordinary rules of English private international law suggest that the ability to sue and be sued should be tested primarily by reference to the law of the place of incorporation of the entity. As for the requirement that the entity be distinct from the executive organs of government, this would appear to require a careful examination of the entity's constitution, functions, powers and activities and its relationship with the State in order to determine whether the required degree of separation exists."

34. This is a helpful enumeration of factors relevant when determining whether an entity is a department or organ of State. The Board sees particular value in the propositions that the existence of State control will not be a sufficient criterion, that the possession of a range of functions coupled with independence in their exercise will militate against a conclusion that an entity is an organ, and, generally, that caution is required before treating a separate legal personality as an organ. The last proposition finds express support both in *Trendtex* (paragraph 6 above) and in the decision of the United States Supreme Court which the Board addresses in the next paragraph. Ultimately, an overall judgment is required as to whether "the required degree of separation" is present, and the Board has in paragraphs 28 to 30 above indicated its own view as to what this involves.

35. The Board has also found generally instructive the judgment of the Supreme Court of the United States in *First National City Bank v Banco para el Comercio Exterior de Cuba* (1983) 462 U.S. 611 (the *Bancec* case), which has been applied in subsequent lower court cases in the United States. Justice O'Connor's notably internationalist reasoning for the majority in *Bancec* includes a footnote reference to both *Trendtex* and *I Congreso del Partido* – though with the caveat that the British courts were "applying principles that we have not embraced

as universally acceptable" (footnote 18). First National City Bank ("FNCB") had issued a letter of credit in Bancec's favour. Very shortly after a demand under the credit, FNCB's Cuban assets were expropriated by order of the Cuban government implemented by the Cuban central bank, Banco Nacional. FNCB claimed to set off its claims arising from the expropriation against Bancec's claim under the credit. Bancec was then dissolved, its banking assets and obligations vested in Banco Nacional and its trading rights and obligations vested in the first instance in the Cuban Ministry of Foreign Trade.

36. The main issue addressed by Justice O'Connor in her judgment for the majority was whether Bancec's separate juridical status could be disregarded, so as to enable FNCB to set off against Bancec FNCB's claims against Cuba and/or Banco Nacional. Justice O'Connor rejected the submission that this issue fell to be determined by Cuban law:

> "To give conclusive effect to the law of the chartering state in determining whether the separate juridical status of its instrumentality should be respected would permit the state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts. We decline to permit such a result". (pp. 621-622)

She held that the issue was to be resolved by principles common to both federal and international law.

37. As a preliminary to examining those principles, Justice O'Connor recalled the dangers attaching in this area of deploying loose epithets like "alter ego", "mere instrumentality" or "to pierce the corporate veil". She then described the practice of states to establish separately constituted legal entities to perform various tasks, in terms paralleling those used by Lord Wilberforce in *I Congreso del Partido*. Such entities were typically created as a separate juridical entity by an enabling statute, with a board selected by the government, run as a distinct economic enterprise, with its own primary responsibility for its own finances and often without the same budgetary and personnel requirements as government agencies. She continued:

> "The instrumentality's assets and liabilities must be treated as distinct from those of its sovereign in order to facilitate credit transactions" (pp.625-626),

and

> "Freely ignoring the separate status of government instrumentalities would result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign, and might thereby cause third parties to hesitate before extending credit to a government instrumentality without the government's guarantee" (p.626).

38. Having recognised, at p.628, a "presumption that a foreign government's determination that its instrumentality is to be accorded separate legal status", Justice O'Connor examined some circumstances in which an incorporated entity might nonetheless not be regarded as legally separate from its owners: pp.629-630. She noted, in footnote 20, that the International Court of Justice had in the *Barcelona Traction* case accepted that, in international as in domestic law, there were circumstances in which the corporate veil could be lifted or the legal entity disregarded. Turning to United States law, she identified, firstly, situations "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created" and, in addition, "a broader equitable principle that the doctrine of corporate entity, recognised generally and for most purposes, will not be regarded when to do so would work fraud or injustice". On the facts, she concluded that similar equitable principles applied, since Bancec had been dissolved and its claim had passed to the State of Cuba and Banco Nacional. They had expropriated FNBC's Cuban assets, and should not be allowed "to reap the benefits of our courts while avoiding the obligations of international law": p.634.

39. The Board has some doubt whether the facts in *Bancec* could under English law have required consideration of any question of lifting the corporate veil. Bancec having been dissolved, it could not on the face of it have continued under English law to pursue any claim at all. Its assets and obligations had passed to the state of Cuba and Banco Nacional. They were, on the face of it, the only entities which could claim and, under English law, they could and should have replaced Bancec in the proceedings for that purpose. They were also the entities against which lay FNCB's (counter)claim for expropriation of its Cuban assets. A set-off (or a stay pending trial of a counterclaim) against Cuba and Banco Nacional should thus have raised no problem and no question of lifting any corporate veil. Be that as it may, both the "principal and agent" approach and the broader equitable approach identified in *Bancec* offer insights into situations in which separate juridical personality may not matter. But a principal and agent analysis, although based by Justice O'Connor on completeness of control, would seem to the Board most obviously relevant in a case where (unlike in *Bancec* or the present) the claim was to hold the State liable for its corporation's activities. The Board would reserve its view as to whether it could have any possible relevance in a case like the present, where the claim is to hold the State corporation liable for its State's activities. As to the broad equitable analysis which the Supreme Court actually applied in *Bancec*, it is clear that this was carefully tailored to the

particular circumstances, in which the effective benefit of the claim as well as the liability for expropriation had both come to rest in the same hands.

40. In the Canadian Federal Court decision in *Roxford Enterprises SA v Cuba* 2003 FCT 763, the principal and agent approach suggested in *Bancec* was regarded as "logical and sound" (para 30), though inapplicable on the facts. The case involved an attempt to enforce against Cubana, the Cuban state-owned airline, a judgment obtained against the State of Cuba. The attempt failed because (para 35) the claimant

> "has not dislodged the presumption that Cubana is a separate juridical entity. The facts do not support the conclusion that Cubana's business, income, undertaking and assets are controlled or even "owned" by Cuba. Such a conclusion would entail an assimilation of the corporation to Cuba. Cubana's articles of incorporation allow the corporation to carry on its own business. It hires its own employees, who are not civil servants, it has its own banking facilities and prepares annual financial statements. Moreover, Cubana appears to possess all of the powers of a company incorporated under Cuban law with the full knowledge and blessing of the Cuban government. Pursuant to its articles of incorporation, the board has all of the usual powers of a board of directors of a corporation. All of the foregoing is inconsistent with Cubana being an agent of Cuba in respect of its business and assets."

The judge went on to acknowledge a number of factors "that are somewhat inconsistent with an independent status" (para 36). But the first, Cuba's ownership of Cubana's assets, had to be seen in the light of a right of usufruct granted to Cubana which appeared equivalent to a bona fide surrender of possessory rights to Cubana for an extended period. The state's 100% ownership of Cubana was insignificant, and Roxford had not cross-examined to suggest that Cuba exercised a controlling influence over Cubana's operations. In these circumstances "[t]o conclude that in its activities, business and use of its assets it is an *alter ego* of Cuba would require both compelling evidence of a *de facto* assimilation of it, or of its business and property, to Cuba and a clear legal basis of a *de jure* assimilation to Cuba", neither of which had been satisfactorily established (para 40). The Board finds helpful these references to the need for both *de facto* assimilation, and *de jure* assimilation, as a precondition to holding the State corporation liable for the State's debts.

41. In contrast, in two recent decisions the French Cour de cassation found no legal error in lower courts' conclusions that SNPC (involved in the *Kensington* and *Walker* cases to which the Board has already referred), and a Cameroon state

corporation, SNH, were each an "emanation" of the relevant state against which such State's debts could accordingly be enforced. In the former case, No de pourvoi: 04-13108 04-16889, SNPC had as object "d'intervenir pour le compte de l'Etat", and generally to fulfil the public service of realising, exploiting and marketing Congolese hydrocarbons. It was under the supervision (*tutelle*) of the ministry responsible for hydrocarbons. Its income was remitted within eight days to the public treasury, depriving SNPC of all real autonomy and any power to self-finance, any net profit being used to meet state obligations to third parties and the lower courts had held accordingly that SNPC had no assets of its own distinct from the State's. In the latter case, No de pourvoi: 04-15388, the lower courts had found not simply that the corporation was wholly owned and under the *tutelle* of the State, but that it had no real autonomy. Inter alia, notices addressed to the State were directed to its offices, its services for the State were unremunerated, it had shown neither the existence nor the issue to the ministry of any budget or programme of action capable of establishing any financial autonomy, and it had no functional independence sufficient to entitle it to enjoy de jure and de facto autonomy and its assets were commingled with the State's. The account of the facts given by the Cour de cassation makes it possible to regard these as cases involving circumstances in which SNPC and SNH, although in law separate juridical entities had, in reality, no existence separate from that of Congo-Brazzaville and Cameroon.

42. Finally, the Board notes two South African decisions in which the *Trendtex* test was given prominence. Both concerned attempts as in the present case to enforce state indebtedness against a state-owned corporation's assets. In *Banco de Mocambique v Inter-Science Research and Development Services (Pty) Ltd* 1982 (3) SA 330 (T), Goldstone J concluded that the Bank was not an organ of the State, although closely controlled by the government which had the right to veto any of its decisions and although entrusted with a number of governmental functions and duties. Having reached this conclusion he also saw no basis for lifting the corporate veil, or treating its assets as belonging to the State. In *The Shipping Corporation of India Ltd v Evdomon Corporation and the President of India* [1993] ZASCA 167, 1994 1 (SA) 550 (AD), the Supreme Court referred to the *Trendtex* test as determining whether or not an entity enjoyed immunity, but said that the question whether the Shipping Corporation assets should be treated as the property of the State of India was "an entirely different one and different considerations arise". The single question in this latter context was in the Court's view whether "the circumstances justify 'piercing' or 'lifting' the corporate veil". Absent any "element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs", the Court saw no ground for doing so and no other basis for treating the State as owner of the Shipping Corporation's vessel which the claimants had arrested. It added that: "It does not take much imagination to visualise the chaos that could arise from such a blurring of the principles relating to the ownership of property in this, or any other, field". For reasons already given, the Board considers that the current international and

domestic statutory approach to immunity is relevant when considering whether an entity is an organ of the State for the purposes of both immunity and also liability and enforcement. But the Board accepts that, if an initial conclusion is reached that an entity is separate and distinct from the State, that may on particular facts be displaced by circumstances justifying lifting of the corporate veil, and it further considers (as previously explained) that the international element may raise different considerations in this context from those that would arise under purely domestic circumstances.

*The approach of the Royal Court and Court of Appeal*

43. In the Board's opinion, both the courts below treated the *Trendtex* test as introducing too general and too easily established an "exception" to the circumstances in which courts respect the separate juridical personality of state-owned corporations (see para 20 above). The Royal Court (para 12 of its judgment) derived from *Trendtex* a simple test based on the existence of governmental control and the exercise of governmental functions. But governmental control is an ever present aspect of state-controlled enterprises which are *not* part of the State. Lord Wilberforce noted this very clearly in *Il Congreso del Partido*: see para 9 above ("state-controlled enterprises ….. wholly subject to the control of their state").

44. As to the exercise of governmental functions, the Royal Court regarded this as demonstrated because Gécamines was in its view (deploying words used by Cooke J in *Kensington International Ltd v Republic of the Congo* [2005] EWHC 2684 (Comm), at para 53) "constituted in such a way that its purpose is to assist, promote and advance the industrial development, prosperity and economic welfare of the area in which it operates" so that it could "be seen as effectively carrying out government policy in the way that a government department does and therefore to assume the position of a government department" (para 140). But assisting, promoting and advancing development, prosperity and economic welfare, and carrying out government policy in that respect are again of the essence of many state-controlled corporations' functions. The same could no doubt have been said of Mambisa, Cubazucar, Rolimpex or Czarnikow. What the formulation adopted by the Royal Court does not involve or establish is the fulfilment of any functions which could be described as sovereign or acta jure imperii. This is presumably because in submissions before the Royal Court no significance was attached, in relation to the question whether Gecamines was an organ of the State, to the distinction between sovereign functions in the sense of *acta jure imperii* and private or commercial activity (*acta jure gestionis*): see the Court of Appeal judgments, paras 52, 63 and 231. Before the Court of Appeal, however, submissions relying on this distinction were for the first time made and were permitted. The distinction was rightly regarded as very relevant by Pleming JA (paras 236, 239-240 and 266).

45. The Court of Appeal in these circumstances pursued the analysis further than the Royal Court. Both the majority and the minority judgments accepted a dual test of governmental control and the exercise of governmental functions (paras 32-33, 223 and 255). Recognising that control alone could not suffice, the majority also accepted that control together with the exercise of some governmental functions could not suffice. In their view, it was necessary that the "principal functions and activities of the entity are properly to be viewed as governmental" (para 71). But, having set this apparently high hurdle, the majority then substantially diluted it. First, they disclaimed "any need to find any actual sovereign acts, as distinct from the acts which any individual could perform" (para 78) – referring in this connection to Cooke J's statement in para 53 in the *Kensington* case quoted by the Royal Court. They went on, secondly, to espouse "a broad concept of government" (para 81), which could, thirdly, embrace "what, in other circumstances, would merely be viewed as ordinary trading activities", where such "activities, albeit significant in economic or numeric terms, were ancillary to a principal function or functions such as the carrying out of the policies of the Government" – citing in this connection both Cooke J in *Kensington* and *Mellenger v New Brunswick Development Corporation* [1971] 1 WLR 604 (para 82). Finally, they said that it must be established that "the entity performs governmental acts or functions to such a degree that it is properly to be considered as an arm of the government" (para 83).

46. The Board has already noted the treatment in *Trendtex* of the issue whether the Central Bank of Nigeria was an organ or department of the State of Nigeria, by virtue of its nationally important functions in the financial sphere: paragraph 6 above. In *Il Congreso del Partido* Lord Wilberforce also considered in some depth the distinction, which he acknowledged could be difficult, between sovereign and non-sovereign states activities: [1983] AC 244, 262C-267C. He noted that "the existence of a governmental purpose or motive will not convert what would otherwise by an act jure gestionis, or an act of private law, into one done jure imperii" (p.267A-B) and that it was necessary to consider "the whole context" in deciding whether relevant act(s) should be considered fairly as within an area of trading or commercial activity or otherwise of a private character, in which the state has chosen to engage, or done outside that area and within the sphere of governmental or sovereign activity (p.267C). At p.269C, he approved Robert Goff J's pithy summary of the test of a sovereign act at [1978] QB 500, 528: "…. it is not just that the purpose or motive of the act is to serve the purposes of the state, but that the act is of its own character a governmental act, as opposed to an act which any private citizen can perform".

47. The Board considers that the first three of the points made by the majority in the Court of Appeal, as recited in paragraph 45 above, involved both a dilution and a misinterpretation of the approach to sovereign activity indicated by Lord Wilberforce. The true search is for actual activity which can in its whole context

properly be described as sovereign in its nature. The Court of Appeal's use of the word "quality" instead of nature may not itself be significant. But its expansion of the concept of sovereign activity by its second and third points was in the Board's view unjustified. Activity which involves or is ancillary to a principal function or functions such as the carrying out of the policies of the Government is no more than many state-controlled trading corporations undertake. In the *New Brunswick* case, the New Brunswick Corporation was actually responsible for promoting the industrial development of the province, undertook no trading or private activity and had acted solely in that context in giving its bond. In *Arango v Guzman Travel Advisors Corporation* (1980) 621 F.2d 1371, cited by Lord Goff in *Kuwait Airways Corp v Iraqi Airways Co* [1995] 1 WLR 1147, 1160B-E, the national Dominican airline, Dominicana, was impressed into service by Dominican immigration officials acting pursuant to the country's laws, to fulfil a governmental function by re-routing an aircraft. It was held to be performing a sovereign act in a sense which Lord Goff said would in an English law context satisfy s.14(2) of the 1978 Act.

48. In *Kensington*, as the Board has noted (paragraph 32 above), the facts were extreme, and probably amount to a conclusion that SNPC had no real separate existence apart from the State at all. Cooke J's statement at para 53 on which the Royal Court and Court of Appeal both relied should not be taken out of context. 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 activity sovereign activity or make them part of the State. If read as suggesting the contrary, Cooke J's statement goes too far. 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 governmental 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 government 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. In contrast, assigning the ownership of all State owned oil (or similar) reserves to a company so that the company acts on behalf of the State in, for example, granting licences to exploit, may be and probably is different".

*The Board's approach*

50. The Board recalls that it is not its practice to review the concurrent findings of fact of lower courts: *Srimati Bibhabati Devi v Kumar Ramendra Narayan Roy* [1946] AC 508; *Stemson v AMP General Insurance (NZ) Ltd* [2006] UKPC 30. That general rule applies, even where, as here, there was no oral evidence and the findings were based on affidavit and documentary evidence. The present appeal is however primarily concerned with the legal test which the courts below applied to, and with their conclusions on, the question of mixed fact and law whether Gécamines constitutes an organ of the DRC. The correct legal test is a matter for the Board to determine. If the courts below did not adopt it below, then it is for up to the Board to form its own opinion on the significance of the facts by reference to the correct legal test. If the courts below did adopt it, the position regarding the conclusions they reached on an issue of mixed fact and law may be more nuanced than the position in relation to issues of pure fact. The conclusions of any lower court on such an issue will always merit careful attention. In many circumstances, an appellate court will refrain from substituting its own view on an issue on which different minds may differ, though it will on any view intervene if clearly satisfied that the court below was wrong: see *Assicurazioni Generali SpA v Arab Insurance Group* [2003] 1 WLR 577, per Clarke LJ at paras 16-17. This too is however only a general rule. In circumstances potentially involving the immunity or liability of a State (Hemisphere's submission being on its face that the State and Gécamines are to be equated for all purposes), it may be arguable that an appellate court should scrutinise closely for itself whether the test for assimilation has been satisfied.

51. In this connection, the Board notes that in *Trendtex* the Court of Appeal undertook its own re-evaluation of the evidence and circumstances, found the issue difficult, but in the result differed in its conclusion as to the Central Bank of Nigeria's status from the very close analysis of the effect of such evidence and circumstances by the trial judge, Donaldson J: paragraph 6 above. In the event, however, it is not in the Board's view critical to this appeal to decide whether the present situation distinguishes itself from situations falling within the general approach indicated in *Assicuarazioni Generali*. This is because the Board considers that the courts below adopted and applied an incorrect test, particularly as regards the generality of the "exception" or "special rule" which they identified and as regards the breadth of the meaning which they assigned to the concept of governmental functions. That alone means that it is incumbent on the Board to

form its own view of the circumstances applying the appropriate test. But the Board also considers that the courts below, in focusing on aspects of two specific areas (the mining contracts review negotiations and the Sicamines transaction, to which the Board comes in detail below), failed to a significant degree to look at the functions and activities of Gécamines in the round, It further considers that, on a correct understanding of the relevant test, the factors on which the courts below relied do not individually or in conjunction justify a conclusion that Gécamines was an organ of the DRC.

*Gécamines' constitution*

52. The Royal Court examined Gécamines' constitutional position. It recounted that there were steps towards restructuring Gécamines from 2003 onwards. In September 2005 there was an injection of external management, under an eighteen month contract with a French company, SOFRECO SA, which was accompanied by the reconstitution of its Board by a Decree No. 05/185 of 30 December 2005, three of the eleven new directors being recommended by SOFRECO, including the managing director, Mr Paul Fortin, a Canadian, its finance director, M. Antoine, a Frenchman and its assistant technical director, M. Renardet, another Frenchman. The eight other directors included Mr Mukasa who gave affidavit evidence in these proceedings, and five ministerial representatives. After the eighteen month contract with SOFRECO, Mr Fortin remained managing director until September 2009, when Mr Mukasa succeeded him. Meanwhile, in July 2008 two laws No. 08/2007 and Law No. 08/010 both of 7 July 2008 had been passed envisaging the transformation of public enterprises into ordinary stock company. But it was only on 24 April 2009 that Prime Ministerial Decrees applied this process to Gécamines, and repealed its old articles without immediately substituting new ones.

53. The Royal Court took as the relevant date for considering Gécamines' position 19 March 2009, the date when an *arrêt entre mains* was issued against Gécamines' shares in GTL and its income flow from the Slag Sales Contract. No challenge to this has been made before the Board. The Royal Court in fact concluded that it would not have made any difference if the later date of trial had been taken. The Royal Court, in dealing with the constitutional position (in paragraphs 63 to 69), identified the following factors. Gécamines was not only wholly owned by the DRC, but its articles, coupled with the Law No. 78-002 of 1978 governing all public enterprises, conferred on the State a degree of power and potential control over Gécamines that "went beyond anything that could be regarded as merely inherent in the fact of 100% ownership" and was "intrusive and incompatible with the concept of independence in any real sense". In particular, under the 1978 Law its Board of Directors, although expressed to be given the broadest powers with respect to administrative and management duties were appointed and liable to be removed by the President of the DRC, as were the

chair of its management committee and the commissioners of its accounts. Further, it was until 24 April 2009 subject to a régime of tutelle (supervision) by state authority (by, as appears from Article 10 of Law No 007/2002 of 11 July 2002 on the Mining Code, the Ministry of Mines), giving such authority a power of veto over decisions to dispose of property, contract loans, increase or decrease its assets, acquire immovable property, enter into contracts for services or goods in an amount equal to or more than about US$20,000, or purchase or dispose of shares, with all Board or management committee decisions being required to be copied to the supervising authority and taking effect only if after five days there was no objection (and, even after 24 April 2009 it was subject to supervision by a Committee of the General Assembly consisting of six specified ministers). Gécamines's assets originated from the DRC, in the form it appears of extensive mining concessions. The Royal Court acknowledged that Gécamines' financial statements had been the subject of annual audits (some significantly qualified, though the position appears to have been largely regularised by the 2008 accounts), and that Gécamines "appears to have been treated in many respects as a separate entity by the tax authorities". The conclusion drawn by the Royal Court was that (para 69):

> "Overall, however, we find it impossible to avoid the conclusion that, as a matter of constitutional provision prior to recent attempts at reform, the exceptional degree of power accorded to the state over the affairs of Gécamines, at all levels, was such that the company was no more, in truth, than an arm of the state with responsibility for operations in a sector of vital importance to the national economy".

54. This is a strongly worded finding, expressed in terms of a metaphor ("arm of the state"), but based entirely on the constitutional or legal provisions for control of Gécamines. There is no doubt that Gécamines had responsibility for operations in a sector of vital importance to the national economy of the DRC, but that may be said of many state-owned corporations in centrally planned or dirigist economies. It was true in *In Congreso del Partido* of Mambisa and Cubazucar, yet Lord Wilberforce recognised without hesitation the distinction between them and their governing state (to the control of which they were "wholly subject"): paragraph 9 above. There is no doubt that Gécamines' assets originated in the State, but there is nothing surprising or significant about that. Once it acquired them, they became its assets, albeit that dispositions and acquisitions were liable to veto by State authorities. Those in day-to-day charge of Gécamines' affairs were vulnerable to having any important decisions which they took reviewed and vetoed by other State authorities. But that does not mean that Gécamines had no real existence as a separate entity, or that it should be viewed for all purposes as assimilated to the DRC.

*Gécamines' general activities*

55. Further, the Royal Court's conclusion in para 69 was reached without evidence or examination as to when, whether and how any such control was actually exercised; and the bare reference made to Gécamines' actual operations, by reference to its accounting and tax position, did not in the Board's view do either credit. Under Articles 196-197 of the 2002 Law on the Mining Code, mining companies had six months from the grant of any research licence to commence research work and three years from the grant of any mining licence to commence mining operations. Such periods were capable of extension on payment of fees which Gécamines could not itself always afford. The evidence shows that Gécamines was party to some 35 joint venture operations to try to enable it to exploit the mining licences that it held. Its accounts refer to outstanding applications to transform some 37 research licences into mining licences, to which the authorities had not yet responded. Gécamines' accounts occupy over 30 pages, including an auditors' report by PriceWaterhouseCoopers, and show copper, cobalt, zinc and other materials sold to a value of 172 billion Congolese francs (circa US$28 million), about 40% overseas. They record in financial detail a number of transactions involving the State, relating to both services rendered and tax due, with items claimed in each direction, and in several cases they also record negotiations, agreements or set-offs reached or under discussion with the State. They further list extensively outstanding loans (in many millions of dollars) to Gécamines from institutions such as the European Economic Community and Investec Bank, in relation to a number of which Gécamines had negotiated debt relief and revised repayment schedules. None of this suggests that Gécamines can or should be seen as a cypher of the DRC.

*The proposal to convert Gécamines into a stock company*

56. The Royal Court spent some time examining at length (paras 71-84) the progress being made since 19 March 2009 to convert Gécamines into an ordinary company with share capital in which private investors could invest. The need for this was recognised in the accounts, where the relevant law relating to it (No 08/2007 of 7 July 2008) was explained as intended "to breathe new dynamism into State enterprises with a view to improving their potential for production and profitability and help strengthen their competitivity and the whole of the national economy", and it was said that "public sector enterprises which are subject to competition and whose objective is profit will become commercial enterprises (SARL) with the State being sole shareholder and with the possibility of releasing capital from these companies". At a later stage in its judgment (para 142), the Royal Court expressed the view that "Reading between the lines, Gécamines recognises that the pre-2008 *tutelle* regime was fatal to its case; and eliminating this bond has, no doubt, been a prerequisite of further World Bank funding". The last statement may or may not be true. But the suggestion that the pre-2008 tutelle regime was fatal to Gécamines is one which the Board cannot share (and the supposition that Gécamines recognised this appears speculative and irrelevant). At

another point (para 142) the Royal Court said that "unless and until [it] can be seen to have been finally and convincingly reconstituted so as to be genuinely free from governmental control and interference", Gecamines could "hardly complain if it is viewed as no more than an organ of the State." These suggestions all again attach unjustified weight to the possibility of governmental influence and control that the tutelle regime undoubtedly involved. This possibility was in no way decisive of the critical question whether Gécamines should or should not be treated as a organ of the DRC, rather than a separate entity, for the purpose either of a state immunity claim or of being held liable for the DRC's debts and having its assets seized in that connection. Lord Wilberforce's statement establishing the irrelevance of "a state-controlled enterprise acting on government directions" (paragraph 9 above) is again in point.

*The four areas relied upon by Hemisphere*

57. The Royal Court moved then to consider (para 90) whether "irrespective of the constitutional formalities, Gécamines has in practice always been under the dominion of the government of the day, its internal management overridden, bypassed or subject to interference and its property taken or otherwise used for state purposes as and when the government deems appropriate" and identified four particular areas in which it concluded that this had to a greater or lesser degree occurred. They were (a) the use by the DRC of Gécamines' assets to fund military operations by the DRC and its allies during the conflict in the Great Lakes region in the period 1996 to 2003, (b) the 'revisitation' of mining contracts that had occurred since 2007 and the treatment of related 'entry fees', (c) the Sicomines project and its related entry fees and (d) Gécamines' role in the provision of social services to the populace.

58. As to (a), Mr Mukasa, giving affidavit evidence for Gécamines, acknowledged and indeed asserted that the State had during the conflict required Gécamines to put mining assets into joint ventures, the income from which was then directed to supporting the war debt. He put this overall at much less than the figure of one-third of the profits (the Board presumes that this may mean the gross revenue) which the Royal Court found in relation to the years 1999-2000, but nothing turns on that. The point made by Hemisphere is that these sums, whatever they were, were simply taken without compensation. That is so. The Royal Court's comment was that "Taken in isolation, the subject might, perhaps, be regarded as one to which not too much weight should be accorded for present purposes, but as one piece of the larger jigsaw it appears to us to be of substantial significance" (para 92). The Board will return to this area with its own evaluation later in this judgment.

59. As to (b), in 2007 the Minister of Mines established a commission to review the many joint venture agreements that public enterprises, including Gécamines, had entered into during and since the conflict, "most often upon the recommendation or instruction of the political and administrative authorities (the Officer of the President of the Republic and the Ministry of Mines)" according to a report which Mr Mukasa did not challenge. The results of the review were in February 2008 notified by the Minister to each of Gécamines' contractual partners, accompanied by lists of the Government's requirements or position. Eventually, the Minister in August 2008 wrote to Gécamines and other mining concerns requesting and recommending them to renegotiate the partnership terms in accordance with the results of the review. The Royal Court accepted that Mr Mukasa "may be right" to say that the ensuring negotiations were conducted by Gécamines "without interference from the Government, and that all but two of its mining contracts were successfully renegotiated", but went on: "But it is plain that the tone of the terms of reference, read as a whole against a background of repeated indications of governmental oversight and the terms of the earlier February 2008 letters, would have left Gécamines with little scope for departure very far from the recommendations of the terms of reference" (para 101). Lord Wilberforce's statement (paragraph 9 above) is once again in point.

60. The Royal Court noted that a further feature of this episode was that the renegotiation involved Gécamines' partners having under the revised terms to commit to pay premiums (variously described as "entry fees", "key money", "signature bonuses" or "*pas de porte*") (para 103), which the Minister of Mines stated in October 2008 should be remitted in their entirety to the State Treasury (para 104). Mr Fortin and another director replied at length to this proposal on 14 November 2008 to the effect that Gécamines owned these premiums and that they were not taxable as such, but continuing in a passage which the Royal Court thought telling (para 105):

> "In the circumstances, it would appear that the payment of Gécamines key money and key money supplements into [the Treasury] accounts arises from a government measure which is no doubt motivated by the superior interests of the State, and Gécamines has no option but to be happy to contribute, once again, to the solution of national problems. Nevertheless, in proper consideration of the logistics of managing a commercial company, and in our capacity as agents of the state in relation to a public enterprise which is prey to difficulties which threaten its survival, we should, on the one hand, ensure that the most pressing operational needs of Gécamines are met and, on the other hand, guarantee that the transfer of its key moneys, which constitute part of its assets, to the State are balanced, 'compensated', if not by means of an income,

> then at the very least by the extinguishment of our company's debts to the transferor [sic]".

The letter went on to address in some detail the immediate needs of Gécamines and the tax and other liabilities against which any key money received by the State should be set.

61. Reading it as a whole, the Board does not regard this letter as being as telling as the Royal Court appears to have thought. On the contrary, it was asserting Gécamines' rights, while acknowledging the State's needs and proposing a solution in terms of a set-off against Gécamines' tax and other liabilities. It does not suggest that those running Gécamines viewed it as a mere cypher for or as identical in its interests with the Government. Further, as the Royal Court recorded (para 106), the Government was not "entirely unresponsive to this appeal". Note 29.1 to the 2008 accounts records that the Prime Minister on 24 January 2009 wrote accepting that key money would be split 50:50 between the Treasury and Gécamines. Mr Mukasa in his evidence explained that the background to the letter of 14 November 2008 lay in Gécamines' heavy indebtedness to the Government and the fear that Gécamines might provoke a claim to further entry fees on the Sicomines project. He said that Gécamines was still also pursuing, and hoping for the help of the workers' union to achieve, its claim to a set-off, that the tax authorities frequently seized Gécamines' bank accounts to recoup unpaid taxes, and that on every occasion Gécamines raised the question of set-off, to be met only by official statements that they were awaiting instructions. The Royal Court would have expected Mr Mukasa to be able to back such statements with documentation, and concluded that any hope he had of achieving a set-off was fanciful (para 108). It also found difficult to reconcile the Government's stance regarding the entry fees with the "supposed reform" of Gécomines, intended under Law No. 08/007 of July 2008. Again, the Board will postpone its conclusions in this area.

62. Coming next to (c), the Royal Court viewed this as "the clearest possible illustration of the Government' view of its relationship with Gécamines and of the role of Gécamines as an instrument for the implementation of policies and projects of national importance" (para 109). In short, a joint venture company, Sicomines, was formed by Gécamines (holding 32%) and a Chinese consortium (holding 68%) to exploit mineral rights to be transferred into it by Gécamines, which Gécamines itself lacked the resources to develop. The consortium was to lend Gécamines US$32 million to finance its contribution to Sicomines' capital. There was to be a vast programme of infrastructure works, funding for which was expected to be around US6 billion to be financed by the Chinese consortium. Funding for the mining operations was expected to be around US$3.25 billion. Revenue from the mining operations was to go first to repay the financing and other costs of the infrastructure works and then to be available to Sicomines' shareholders. Gécamines was to receive a loan of US$50 million to assist it to

modernise its plant. The Chinese were also to pay key money of US$350 million, of which the DRC was to take US$250 million, with Gécamines accepting in its letter of 14 November 2008, to which the Board has already referred, that it would only receive US$100 million.

63. The history of this transaction is that in September 2007 a *Protocole d'Accord* was agreed between the DRC and a consortium of Chinese companies, including China Railway Group and others. The *Protocole* contemplated the financing of the infrastructure development of the DRC through the exploitation of its mineral resources. The mineral resources in question were those of Gécamines, which was also in direct negotiation with certain consortium members, including China Railway. The negotiation took place first in the DRC and then on invitation in Beijing for two months from 2 October 2007. On 22 April 2008 two formal cooperation agreements were concluded. Again, the Royal Court took an unfavourable view of Mr Mukasa's evidence (paras 124-125), saying that he had sought very clearly in paragraphs 145-151 of his first affidavit to give the impression that the project had its origins in Gécamines' own prior discussions in the autumn of 2007, representing that the Government was simply following Gécamines' lead in signing the two agreements of 22 April 2008 and making "no mention" of the *Protocole d'Accord* of September 2007. The Royal Court was incorrect in this last statement. Paragraph 151 of Mr Mukasa's first affidavit describing the negotiations from autumn to December 2007 reads:

> "151 At the same time that Gécamines was negotiating the commercial partnership agreement, the Congolese government was negotiating a Cooperation Agreement with China Railway Group Limited and Sinohydro Corporation following which the latter would advance US$6 billion to the Congolese government to finance large infrastructure projects. The Cooperation Agreement also included the commercial mining partnership and the infrastructure project. The provisions of the draft Cooperation Agreement were made in accordance with the Commercial Partnership Agreement."

64. The real significance of the Sicomines project in the view of the Royal Court was that the project was essentially an inter-state project (para 129), that Gécamines' mining rights and their effective mortgaging as security for repayment for the loan finance were as critical to the infrastructure side as to the mining side of the project (para 130) and that "in the greater scheme of things, Gécamines' own particular interests, though important, were plainly subordinated to those of the Congolese state, and it is wholly improbable in reality that the Board of Gécamines has much option but to fulfil the role allotted to it by the Government" (para 131). In an earlier passage (para 118), the Royal Court recited words of the Minister of Infrastructures to the Congolese National Assembly on 22 May 2008:

> "This is a good time to point out that state-owned companies are instruments of the Government's economic and social policies, and as such the Government is free to use them as it sees fit, in the best interests of the Republic. In this case, Gécamines was intimately involved in these initiatives through its corporate bodies, with the understanding that the issue of the revival of this state-owned company was also taken care of."

65. Finally, as to (d), the Royal Court was not persuaded that it could draw any compelling conclusion of the kind suggested by Hemisphere from such information as it had about public and social services provided by Gécamines, that is apart from the Sicomines project (para 137). In respect of that project, it observed that Gécamines' website was headlined "Gécamines' contribution to major Government works", with a text noting that Sicomines was a partnership that Gécamines had created which "will largely provide the repayment of the financing of major Government works".

66. The Royal Court's conclusions as expressed in paragraph 140 on what it called the "personality issue" were

> "140 …. The circumstances will vary from case to case. It must in the end be a matter of fact and degree. And here, in the present case, we are satisfied that Hemisphere has amply demonstrated that both elements of the *Trendtex* test are satisfied. As regards the first limb, 'governmental control', the evidence speaks for itself. And, as regards the second limb, the performance of 'governmental function', we concur with the words of Cooke, J. in *Kensington* ([2005] EWHC 2684 (Comm), at para. 53):
>
> > 'An entity which is constituted in such a way that its purpose is to assist, promote and advance the industrial development, prosperity and economic welfare of the area in which it operates, can be seen as effectively carrying out government policy in the way that a government department does and therefore to assume the position of an organ of government…'
>
> It is only necessary to add that, in our view, the same necessarily applies, irrespective of its formal constitution, where an entity or its property is in practice made the instrument of the state for such purposes.

141 The picture that emerges strongly in Gécamines' s case is that of an entity which has in many ways been dressed in the garb of an independent body but whose formal constitution counts for little or nothing when the state so chooses: a creature that has sometimes been allowed a considerable autonomy but which, when it matters, can be and is unceremoniously subjected to the controlling will of the state. It might be suggested that the evidence shows no more than a truly independent entity which from time to time has been the victim of unprincipled requisition, expropriation and bullying by successive governments …...

Whatever attraction that argument might have had, were we concerned only with old history, the events of the past eight years or so make the 'much put-upon independent entity' thesis untenable and compel one to a very different conclusion.

142 It is not just what happened in the case of the Mining Review and the Sicomines project that is compelling but when it happened: the fact that the events in question occurred as recently as they did and at a time when Gécamines was supposed to be being transformed, with the encouragement of the World Bank, into an indisputably independent commercial company. …… Reading between the lines, Gécamines recognizes that the pre-2008 tutelle regime was fatal to its case; and eliminating this bond has, no doubt, been a prerequisite of further World Bank funding. How successful the Government will prove to be in relinquishing control is another matter. It is impossible to suppose that resolution of the self-evident tensions and contradictions between the proclaimed intent of this reform process on the one hand and the way in which Gécamines has been treated in relation to the Mining Review and, above all, the Sicomines project on the other have not been the subject of discussion at the highest level in a way that found no expression in Mr. Mukasa's evidence. But it is not unreasonable to suppose that this may well be one of the reasons why the reform process is taking as long as it is. Unless and until Gécamines can be seen to have been finally and convincingly reconstituted so as to be genuinely free from governmental control and interference, it can hardly complain if it is viewed as no more than an organ of state."

*The Board's conclusions*

67. The Royal Court relied for its conclusions regarding Gécamines' status on two principal matters: the history of the mining review, where Gécamines may not

have succeeded in enforcing its right to have or to set-off half the premiums or key moneys paid on contractual renegotiations, and the Sicomines transaction, where Gécamines has achieved the exploitation of mining rights which otherwise it could not have afforded (and might have had to surrender if they remained unexploited), but has only done so at the cost of putting them into a joint venture company which will fund not Gécamines' activities, but the giant infrastructure project of the DRC Government. The taking out of Gécamines of profits or revenue under emergency or war conditions would not, as the Royal Court acknowledged, merit much weight by itself. Further, assuming that a distribution of this nature, even though to the State as Gécamines' owner, was contrary to Gécamines' constitution, it was of a different nature occurring under quite different, historical conditions compared with the two principal matters on which the Royal Court relied. In these circumstances, the Board agrees with Pleming JA's view (para 279) that this matter should effectively be disregarded.

68. As to the two principal matters, the Board cannot itself attach real significance to the fact that the mining contract review was instigated by the Government, or that Gécamines probably had little option but to adhere fairly closely to its outcome in its renegotiation of mining contracts. Neither fact is any surprise in relation to a state-owned and controlled enterprise. The Board is equally unpersuaded that any real significance should be attached to Gécamines' failure to achieve payment of more than half the premiums on the mining review renegotiations. Gécamines maintained its right to the whole, and succeeded in getting half, and it sought to achieve a set-off of the balance, even though unsuccessfully.

69. The Sicomines transaction is different, in that Gécamines made available assets which it might never itself have been able to exploit at all, but thereby also provided the DRC with the funding for its enormous infrastructure project. Further, Gécamines accepted a position where the larger part of the premiums payable went to the Treasury rather than itself. However, the State itself made a contribution to the project, which was both integral and on the Royal Court's findings essential: the Royal Court found (paragraph 129) that "at the strategic level the project was essentially an inter-state one between the DRC and the People's Republic of China and could not have come about, on the Congolese side, without the overall direction and control of the Government." The project also had real benefits for Gécamines in the form of the US$50 million loan, the US$100 million premium, the US$32 million contribution made to it to enable it to subscribe to the capital in Sicomines and, long-term, the 32% interest in Sicomines. Hemisphere relies on the characterisation of the transaction in the ministerial statement quoted in paragraph 64 above. A ministerial statement in a national assembly may not be the surest guidance to correct legal characterisation, but, even in its own terms, its description of state-owned companies as instruments of governmental economic and social policies is unremarkable, and, although it

described the Government as "free to use them as it sees fit, in the best interests of the Republic", it recognised Gécamines as "intimately involved" in an initiative by which its own revival as a state-owned company would also be "taken care of". The Board finds it less easy than the Royal Court evidently did to categorise this transaction as one where Gécamines was "unceremoniously subjected to the controlling will of the state".

70. Even taking that however as an accurate description, the question arises whether the Royal Court and the majority of the Court of Appeal were right to conclude that Gécamines could not and should not be regarded as a separate entity from the State, for the purposes of enabling a third party to hold it responsible for the DRC's debts and to enforce these against its assets. In the Board's view this conclusion was not justified. A starting point is that it is common ground that Gécamines was not a sham entity. It was therefore, and as is apparent from its accounts and from what has been set out in paragraphs 52-53 and 55 above, a real and functioning corporate entity, having substantial assets and a substantial business including interests in over thirty joint ventures with outside concerns. It had its own budget and accounting, its own borrowings, its own debts and tax and other liabilities and its own differences with government departments. At least one such department (the Revenue) went from time to time to the lengths of enforcing tax claims by execution against Gécamines' assets.

71. Further, Gécamines was not in any sense by reason of its functions or activities a core department of, or on that score inseparable from, the State in the sense discussed in paragraph 25 above. It was an entity clearly distinct from the executive organs of the government of the State. In the Board's view the courts below allowed an intense focus on two aspects of Gécamines' activities to dominate their analysis of Gécamines' status. Even if (contrary to the Board's view) the history of the mining contracts review and the Sicomines transaction were treated as significant pointers towards a conclusion that Gécamines was, or perhaps became at some unspecified time, a State organ, they fell to be viewed against the background that Gécamines was in other respects clearly established and acting as an ordinary mining company. On this basis it may have been a company which had or acquired governmental functions, but that does not mean that it was or was no longer a legal entity separate from the State.

72. The Royal Court and the majority in the Court of Appeal concluded, when applying the *Trendtex* test, that Gécamines fulfilled governmental functions. Indeed the majority in the Court of Appeal concluded that its "principal" functions and activities were "governmental" (paragraph 71). The Board considers, for reasons already indicated, that these conclusions were based on a misreading of the concept of "governmental" functions. Whatever part of its assets or rights Gécamines used for the State's benefit during the mining contracts renegotiation and in the Sicomines transaction, neither Gécamines' entry into nor its

performance of the renegotiation and the transaction can sensibly be described in nature as involving the exercise of sovereign authority or as acta jure imperii. Indeed, the Royal Court's descriptions in its paragraphs 141 to 142 (paragraph 66 above) of Gécamines as being in this respect "unceremoniously subjected to the controlling will of the state" and as not "genuinely free from governmental control and interference" suggests that its role was the exact opposite of exercising sovereign activity.

73. In *Trendtex*, the Central Bank did not become an organ of the State merely because a dramatic erosion of its independence made it a "hobbled horse" or because it was the "subserving agent of the government in a variety of activities": paragraph 6 above. No more here Gécamines. The Board views with scepticism the idea that Gécamines could have claimed sovereign immunity in relation to any, let alone every, aspect of the renegotiation or joint venture arrangement that it made with the Chinese consortium. But, even if the concept of sovereign activity were stretched to cover all or any aspect of the renegotiation or of the joint venture by which Gécamines assisted or was used to assist the DRC's grand infrastructure project, that does not mean that Gécamines became for all purposes an organ of the DRC, rather than a separate entity exercising sovereign authority in that regard. As the Board has already indicated, Gécamines was clearly active as a separate entity for many other purposes.

74. On the Board's analysis of the legal position, the primary question in relation to Gécamines is whether the circumstances proved show that its juridical personality and its apparently separate commercial assets and business were so far lacking in substance and reality as to justify assimilating Gécamines and the State for all purposes. There may be an element of circularity about any such question, which is probably unavoidable. Even assuming that the concession that Gécamines was not a sham and that it had a meaningful existence does not, in circumstances such as the present, answer this question without more, there is in the Board's view no justification for deriving from the instances of cases where Gécamines' assets were used for the State's benefit a conclusion that the two should for all purposes be assimilated.

75. Hemisphere suggests that the differences between a state-owned corporation and an ordinary stock company, regulated by companies' legislation protecting the interests of creditors, justify a different approach to their treatment as separate entities. But there is no suggestion that Gécamines is at risk of becoming or being allowed to become insolvent, or that creditors have actually been prejudiced by anything that has happened. Even if there were any such risk, the absence, if it be the case, of any effective remedy for any creditors of Gécamines aggrieved by State use of Gécamines' assets appears to the Board to have no relevance to the present issue. The present issue is, in effect, whether Gécamines should be entirely assimilated with the State for the purpose of

allowing all its assets to be available to meet State debts – transforming and potentially worsening its and its creditors' exposure to an entirely unpredictable extent.

76. Hemisphere also suggests that the absence in the case of a state-owned corporation like Gécamines (or no doubt Mambisa, Cubazucar or Rolimpex) of any shares held by the State against which a State creditor could execute should bear on the law's willingness to allow recourse to a State corporation's assets in respect of State indebtedness. But, assuming the State's interest in Gécamines to be effectively immune from execution, that was a feature that always existed, and about which Hemisphere and those from whom it acquired its present claims can make no legitimate complaint. It had and has nothing to do with the transactions on which Hemisphere now relies to seek to hold Gécamines and its assets responsible for the DRC's debts.

77. The alternative way in which Hemisphere puts its case is to submit that, if Gécamines is otherwise accepted as a separate juridical entity, the facts found justify the lifting of the corporate veil to enable Hemisphere to pursue Gécamines as well as the State. In the Board's view, this involves a misapplication of any principles upon which the corporate veil may be lifted under domestic and international law. Assuming for the sake of argument that the "unceremonious" subjecting of Gécamines to the controlling will of the state involved a breach by the State of its duty to respect Gécamines as a separate entity, that might conceivably justify an affected third party, possibly even an aggrieved general creditor of Gécamines, in suggesting that the corporate veil should be lifted to make the State, which had deprived Gécamines of assets, liable for Gécamines' debts. The Board need express no further view on that possibility. It represents the inverse of the present situation. There is no basis for treating the State's taking or Gécamines' use of Gécamines' assets for State purposes, at which Hemisphere directs vigorous criticism, as a justification for imposing on Gécamines yet further and far larger burdens in the form of responsibility for the whole of the debts of the DRC. In international law as in domestic law, lifting the corporate veil must be a tailored remedy, fitted to the circumstances giving rise it.

*Disposition*

78. For these reasons, the Royal Court and the majority of the Court of Appeal erred in the Board's opinion in concluding that Gécamines was an organ of the DRC and so liable, and its assets answerable, for the DRC's debts consisting in this case of the two arbitration awards, the benefit of which Hemisphere has acquired from Energoinvest DD. The Board will therefore humbly advise Her Majesty that the appeal should be allowed and the orders made below set aside.

The Board invites submissions in writing on the form of the appropriate order and on costs.