Immunities and States' Alter Egos

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Comparing the approach to the alter ego doctrine in the United States with approaches taken in the United Kingdom, Canada, Switzerland and Australia reveals that courts in the United States tend to follow a stringent framework based on a set of factors. By contrast, other jurisdictions undertake a broad 'control and functions' analysis. The *Gécamines* judgment in the UK has strengthened the presumption of separate status to a greater degree than seen elsewhere. Moreover, the UK relies on a matching up of liability and immunity, whereas the US appears to be more concerned with equity in terms of, for example, the foreign State not benefiting unfairly in the US legal system. These variations are significant given the huge assets concentrated in State-owned entities and the question of their availability to satisfy debts owed by the State.

Keywords: State immunity; alter ego; enforcement of arbitral awards; creditor accessibility; State-controlled entities; Crystallex; meaning of a State; fraud and injustice; US law; UK law.

1. Introduction

The State is an abstract entity. Courts often have to ask: "Who is the State?", but they ask this for different reasons. Is the conduct of an entity attributable to the State? Is the debt of an entity attributable to the State? What are the implications for service of process? Does an entity enjoy immunity from jurisdiction? Are its assets State property? Do those assets have immunity from enforcement? The answers to those questions will engage different areas of law – national and international law, customary, treaty, statutory and common law. One of the key issues for the alter ego doctrine is whether an internal logic governs these questions.

State-owned enterprises are, in the words of Lord Wilberforce in 1981, "a well-known feature of the modern commercial scene".[1] This is even more so today: according to the International Monetary Fund (IMF), State-owned enterprises' assets are worth USD$45 trillion, which is half of global GDP. They account for 20 per cent of the world's 2,000 largest firms.[2] The question of whether their assets are available for attachment by a State's creditor is of great practical importance.

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[1] *Playa Larga v. I Congreso del Partido* [1981] A.C. 244, 258.

[2] Vitor Gaspar, Paulo Medas, and John Ralyea, *State-Owned Enterprises in the Time of COVID-19* (last updated, May 7, 2020) available at https://www.imf.org/en/Blogs/Articles/2020/05/07/blog-state-owned-enterprises-in-the-time-of-covid-19.

In this article, I focus on the interpretation of the alter ego doctrine in the United States (US) Court of Appeals for the Third Circuit in *Crystallex v Venezuela,*[3] comparing it with approaches taken in previous US cases, the United Kingdom (UK), Canada, Switzerland and Australia.

2. US approach: exceptions to the presumption of separateness

US courts have upheld a presumption that government instrumentalities that are set up as separate juridical entities are presumed to be independent of the sovereign States that formed them, such that their conduct cannot be imputed to that foreign State in foreign court proceedings.[4] In the infamous 1981 *Bancec* case,[5] however, the Court recognized an exception to allow judgment creditors to attach the assets of a foreign sovereign's instrumentality when that instrumentality is an alter ego of the sovereign State. Under *Bancec,* US courts may disregard the separateness of a sovereign and instrumentality when one of two circumstances applies: (1) extensive control by the State over the corporation so that it is a mere agent of the State;[6] or (2) if not disregarding the separate identities would result in "fraud or injustice".[7] But the presumption is not overcome with ease—courts since *Bancec* have noted that both "*Bancec* and the FSIA legislative history caution against too easily overcoming the presumption of separateness."[8]

In *Bancec* itself, the Cuban Government had established the respondent, Bancec, to serve as an official autonomous credit institution for foreign trade with full juridical capacity of its own. Bancec sought to collect on a letter of credit issued by First National City Bank in its favour in support of a contract for delivery of Cuban sugar to a buyer in the US. Shortly afterwards, all of First National City Bank's assets in Cuba were seized and nationalized by the Cuban Government. When Bancec brought a suit on the letter of credit in the Federal District Court, First National City Bank counterclaimed, but not before Bancec was dissolved and its capital was split between Cuba's central bank and foreign trade enterprises or houses of the Cuban Ministry of Foreign Trade. Bancec argued that its separate juridical status shielded it from liability for the acts of the Cuban

[3] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, 932 F.3d 126 (3d Cir. 2019).

[4] Richard J. Cooper and Boaz S. Morag, *Venezuela's Imminent Restructuring and The Role Alter Ego Claims May Play in this Chavismo Saga* (9 November 2017), available at https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/2017/publications/venezuela-alter-ego--cooper-morag-11-9-2017.pdf. See *First National City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611 (1983).

[5] *First National City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611 (1983).

[6] *First National City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611 (1983), paras. 37, 25.

[7] *First National City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611 (1983), para. 38.

[8] *De Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984).

Government. The Court found that the Cuban government could not sue in US courts without subjecting itself to Citibank's counterclaim, and to give effect to Bancec's separate status would allow Cuba relief it otherwise could not obtain without waiving its sovereign immunity. Relying on equitable principles, the Court reasoned that, since Cuba could not sue in its own name without being subject to the counterclaim, neither should Bancec be allowed to sue free from a counterclaim.[9] These concerns, along with other practical considerations,[10] outweighed the presumption of a separate juridical status of a government entity, which led the court to allow the setoff.

The Supreme Court declined to develop a "mechanical formula for determining" when the exceptions to the presumption would apply, leaving lower courts with the task of assessing the availability of exceptions on a case-by-case basis.[11] Over 20 years later,[12] the Supreme Court reviewed the factors that had been applied by the lower courts in making this determination, and listed them as follows:

> 1. the level of economic control by the government;
> 2. whether the entity's profits go to the government;
> 3. the degree to which government officials manage the entity or otherwise have a hand in its daily affairs;
> 4. whether the government is the real beneficiary of the entity's conduct; and
> 5. whether adherence to separate identities would entitle the foreign State to benefits in United States courts while avoiding its obligations.[13]

The 2019 case of *Crystallex* concerned the issue of whether assets of a separate entity can be attachable so as to satisfy the debt of a State. In 2011, Crystallex, a Canadian gold mining company, secured an ICSID award of USD1.4 billion (plus interest)[14] against Venezuela for expropriation of its investments. Following recognition of the award as a judgment of US courts, Crystallex obtained a writ of attachment against shares owned by Petróleos de Venezuela S.A. (PDVSA), a US subsidiary of

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[9] *First National City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611 (1983), paras. 39–42. See also para. 44: '[our decision] is the product of the application of internationally recognized equitable principles to avoid the injustice that would result from permitting a foreign State to reap the benefits of our courts while avoiding the obligations of international law.'

[10] *First National City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611 (1983), para. 43: '[t]o hold otherwise would permit governments to avoid the requirements of international law simply by creating juridical entities whenever the need arises.'

[11] *First National City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611 (1983), para. 44. See also *Rubin v. Islamic Republic of Iran*, 138 S.Ct. 816, 822 (2018).

[12] *Rubin v. Islamic Republic of Iran*, 138 S.Ct. 816 (2018).

[13] *Rubin v. Islamic Republic of Iran*, 138 S.Ct. 816, 823 (2018).

[14] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2.

Venezuela's State-owned oil company. Crystallex argued that it was the alter ego of the Venezuelan Government.

The Court of Appeals applied the *Bancec* extensive control test and agreed that PDVSA was Venezuela's alter ego. Therefore, its shares in the corporation could be attached under the US Foreign Sovereign Immunities Act's commercial activity exception to Venezuela's jurisdictional immunity.[15] The *Crystallex* court applied the "*Bancec* factors" (as formulated by the US Supreme Court in *Rubin*):

1. On economic control, PDVSA had admitted that it was controlled by the government and was required to fund programmes unrelated to its core business, which caused PDVSA to take on additional debt. Venezuela also dictated to whom PDVSA sold oil and at what price.[16]
2. On whether the Venezuelan government obtained PDVSA's profits, the Court found that the government was entitled to all profits because, *inter alia*, the Constitution provided that hydrocarbon deposits were the property of the State.[17]
3. On the role of government officials, it was found that government officials could hire and fire PDVSA's board and workforce.[18]
4. On whether the Venezuelan government was a beneficiary of PDVSA's conduct, the Court found that Venezuela could extract oil from PDVSA without paying the company, and PDVSA had paid the administrative fees that Venezuela incurred in connection with the arbitration with Crystallex, which amounted to approximately USD249,000.[19]
5. On the potential benefits obtained by Venezuela if the separate status was upheld, the Court noted that the US legal system is the 'backstop that gives substantial assurance to investors who buy PDVSA's debt', and any outcome where Crystallex was not paid would allow Venezuela to avoid its obligations.[20]

In applying the *Bancec/Rubin* factors, *Crystallex* developed the approach in these cases in a number of ways. First, the Court of Appeals clarified that *Bancec*'s "extensive control" aspect does not require a nexus between the injury and the entity against which enforcement is sought.[21] Second, this aspect is not dependent on identifying a formal principal–

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[15] Foreign Sovereign Immunities Act, 28 U.S.C. Ch, 97 (1976) (US), §1605(a)(2).

[16] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, 932 F.3d 126, 146–8 (3d Cir. 2019).

[17] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, 932 F.3d 126, 148 (3d Cir. 2019).

[18] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, 932 F.3d 126, 148 (3d Cir. 2019).

[19] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, 932 F.3d 126, 148–9 (3d Cir. 2019).

[20] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, 932 F.3d 126, 149 (3d Cir. 2019).

[21] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, 932 F.3d 126, 141–3 (3d Cir. 2019).

agent relationship.[22] Third, the interests of third parties, such as bondholders, do not have to be taken into account in permitting attachment.[23] The creditors' interest is a reason for, rather than a criterion of, the analysis that presumes separate juridical status. The Court of Appeals also clarified two important procedural points. First, in terms of temporality, the status of the entity is assessed by reference to the record before the lower court and does not deal with later events.[24] Second, the burden of proof in these cases is the preponderance of evidence.[25]

In a continuing trend,[26] in February 2024, the District Court for the District of Columbia issued its ruling in *Amaplat Mauritius Ltd v. Zimbabwe Mining Dev. Corp*,[27] finding that the Zimbabwe Mining Development Corporation (ZMDC) was an alter ego of the Republic of Zimbabwe and that jurisdiction could be exercised under the implied waiver exception to jurisdictional immunity.[28] Amaplat sought recognition of a foreign judgment enforcing an arbitral award against ZMDC as well as additional damages. ZMDC and the Republic filed a motion to dismiss for lack of jurisdiction. In finding that it had jurisdiction, the Court applied the *Bancec/Rubin* factors:

1. On economic control and day-to-day management, the Court found that the Republic exercised 'significant economic control' over ZMDC by virtue of (1) ZMDC's statute; (2) the fact that the government's approval is required for the sale of shares not owned by the Republic; (3) the fact that the Minister of Mines is authorized to give ZMDC directions relating to the exercise of its functions and powers; and (4) that ZDMC must seek approval from the government before the acquisition or disposal of an asset.[29]
2. On profits and beneficiaries, the Republic took ZDMC's profits and was the beneficiary of its conduct during the relevant time. The Republic owned all of ZMDC's shares and therefore received profits

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[22] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, 932 F.3d 126, 143 (3d Cir. 2019).

[23] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, 932 F.3d 126, 143–4 (3d Cir. 2019).

[24] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, 932 F.3d 126, 144 (3d Cir. 2019).

[25] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, 932 F.3d 126, 144–5 (3d Cir. 2019).

[26] With potential to develop. On 4 October 2024, the US Supreme Court held that it would hear the appeal over whether a foreign State being sued under US sovereign immunity legislation must have "minimum contacts" with the US for federal courts to assert jurisdiction. The proceedings are being brought against an Indian state-owned satellite company. See Susannah Moody, *Top US court to hear Indian enforcement battle* (07 October 2024), available at https://globalarbitrationreview.com/article/top-us-court-hear-indian-enforcement-battle.

[27] *Amaplat Mauritius Ltd v. Zimbabwe Mining Development Corporation,* WL 519583 (DC Cir. 2024). At the time of writing, the Zimbabwe Mining Development Corporation has filed an appeal against this decision.

[28] Foreign Sovereign Immunities Act, 28 U.S.C. Ch, 97 (1976) (US), §1605(a)(1).

[29] *Amaplat Mauritius Ltd v. Zimbabwe Mining Development Corporation,* WL 519583, 4 (DC Cir. 2024).

from the dividends, and government officials had illegally diverted ZMDC's revenue to their own coffers.[30]

3. On fraud and injustice, the plaintiffs had not demonstrated that the Republic sought any benefits from the US legal system, but more broadly, recognition of ZMDC as an entity separate from the State would work fraud or injustice—when a government 'shields its instrumentality from creditors', 'this conduct supports an alter-ego finding'.[31]

3. UK approach: upholding the presumption of separate status

English courts are more willing to uphold the presumption of separate status of State-owned entities.

In 1977, the English Court of Appeal gave its judgment in *Trendtex*,[32] which concerned the question of whether the Central Bank of Nigeria was an alter ego of the Nigerian government and therefore immune from suit under the doctrine of sovereign immunity. The Court held that the bank was not an alter ego of the Nigerian State, noting the powers and functions of the Bank, which, though some were governmental, had many of the duties of ordinary banks and was capable of being sued.[33] Lord Justice Shaw noted the constitution and legal status of the Bank, which had been created by the Nigerian government as a separate entity, and found two particular functions to be indicative of the Bank's independent status: first, the Bank, not the government, had the sole right to issue notes; and second, the Bank acted as an advisor to the federal government.[34] Lord Justice Shaw also considered the expectations of the parties who might deal with the bank, ultimately finding that those parties would have no reason to believe that the bank could claim sovereign immunity.[35] Therefore, the Bank could not benefit from Nigeria's immunity.

This approach implements the general policy of Parliament, shown through the UK State Immunity Act 1978 (which entered into force one year after *Trendtex*), to respect and give effect to the separate and independent juridical status of the separate entity.[36] It also ensures that one of the (presumed) intentions of a State establishing a separate corporate entity is achieved—the protection of assets. Under the *Trendtex* approach, the assets of the State are protected against liabilities of the separate entity and the assets of the separate entity are protected against

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[30] *Amaplat Mauritius Ltd v. Zimbabwe Mining Development Corporation,* WL 519583, 5 (DC Cir. 2024).
[31] *Amaplat Mauritius Ltd v. Zimbabwe Mining Development Corporation,* WL 519583, 5 (DC Cir. 2024).
[32] *Trendtex v. Central Bank of Nigeria*, 2 W.L.R. 529 (1977).
[33] *Trendtex v. Central Bank of Nigeria*, 2 W.L.R. 529, 535 (1977).
[34] *Trendtex v. Central Bank of Nigeria*, 2 W.L.R. 529, 574–5 (1977).
[35] *Trendtex v. Central Bank of Nigeria*, 2 W.L.R. 529, 574–5 (1977).
[36] See eg., State Immunity Act 1978 (UK), s. 14(1).

the liabilities of the State, unless there are some extreme circumstances that would justify piercing the corporate veil.[37]

Of nine cases[38] on the alter ego doctrine since *Trendtex*, the English courts have found an entity was an alter ego in only one case, which was not an immunity case. In *Kensington v Republic of the Congo*, debts due to two subsidiaries of a Congolese State-owned oil company (Société Nationale des Pétroles du Congo) were held to be owed to the Congolese State, such that they could be the subject of third-party debt orders for the benefit of Congo's creditors.[39] Though this case was concerned with liability and commercial fraud (and whether debts could be attributed to the State) rather than immunity, Cooke J applied the *Trendtex* principles for determining whether a State-owned entity was sufficiently close to the State to benefit from its immunity as an organ or department of the State.[40]

Although English courts sometimes refer to *Bancec*, they instead apply the *Trendtex* criteria, which are broader. This involves an extensive review of past and present operations to determine the extent of State control and if the entity exercises governmental functions.[41]

The Privy Council attempted to clarify the position in *Gécamines* in 2012.[42] That case concerned a Delaware corporation, Hemisphere, attempting to enforce two substantial arbitral awards it had purchased, against Gécamines, a mining company owned by the Democratic Republic of Congo (DRC), domiciled in Jersey. It was argued that Gécamines was a department of the Congolese State, and could therefore be assimilated to it for the purposes of debt collection. The Privy Council held that Gécamines was not the alter ego for the purposes of enforcing arbitral awards against the DRC. This was unsurprising under the *Trendtex* criteria because the company had its own budget, debts, liabilities, tax disputes with the government, and interests in many external joint ventures,[43]

[37] *La Genérale des Carriéres et des Mines v. FG Hemisphere Associates LLC* [2012] UKPC 27, para. 42.

[38] See, in addition to the cases mentioned in this section: *I Congreso del Partido* [1978] 1 QB 500; *Coreck Maritime GmbH v. Sevrybokholodflot* [1994] SLT 893; *Ministry of Trade of the Republic of Iraq v. Tsavliris Salvage (International) (The 'Altair')* [2008] EWHC 612 (Comm); *Wilhelm Finance v. Ente Administrador Del Astiller Rio Santiago* [2009] EWHC 1074 (Comm); *Thai-Lao Lignite v. Government of the Lao People's Democratic Republic* [2013] EWHC 2466, [20]; *Taurus Petroleum Ltd v. State Oil Marketing Co of the Ministry of Oil of Iraq* [2013] EWHC 3494 (Comm); *Estate of Michael Heiser v. Islamic Republic of Iran* [2019] EWHC 2074.

[39] *Kensington International Ltd v. Republic of the Congo* [2005] EWHC 2684 (Comm). See also para. 10: '[t]he Court of Appeal of Paris has twice reached the view that SNPC is an alter ego of the Congo, on 23 January 2003 and 3 July 2003, in the context of enforcing judgments given against the Congo.'

[40] Cameron Miles, *State debts and State-owned corporations: Trans-Atlantic perspectives*, 81 QIL Zoom-out 31 (2021).

[41] *Trendtex v. Central Bank of Nigeria*, 2 W.L.R. 529, 535 (1977).

[42] *La Genérale des Carriéres et des Mines v. FG Hemisphere Associates LLC* [2012] UKPC 2.

[43] *La Genérale des Carriéres et des Mines v. FG Hemisphere Associates LLC* [2012] UKPC 2, para. 70.

though the Committee was also influenced by *Bancec* (which it described as "generally instructive") and by the Supreme Court's presumption that the State-owned corporation's personality was to be respected, absent evidence of extensive control.[44]

The Privy Council found that where a separate juridical entity is formed by the State for 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.[45] The Committee stated that it would take 'extreme circumstances to displace' the presumption of separate corporate status – the entity must have 'no effective separate existence".[46] It reasoned that the assets protected by immunity (subject to waiver and the commercial purposes exception)[47] should be the same as those against which the State's liabilities can be enforced.[48]

The *Gécamines* approach imposes a parallelism between immunity and responsibility that does not exist in the US approach. Under the FSIA, the existence of immunity is straightforward—any majority State-owned company enjoys immunity.[49]

4. Canadian approach: showing fraud or abuse of rights

In six cases since 1980,[50] Canadian courts have found in four cases that an entity was a State's alter ego.

Canada's approach to the alter ego doctrine is characterized by at least two elements. First, like the English courts, Canadian courts conduct an extensive analysis of the government's control over the State-owned entity's daily affairs and the nature of the functions.[51] Cases like *TMR Energy v. State Property Fund of Ukraine*, which concerned the execution of an arbitral award against an aircraft owned by the State of Ukraine but held by the Antonov Company,[52] have also been concerned with the

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[44] *La Genérale des Carriéres et des Mines v. FG Hemisphere Associates LLC* [2012] UKPC 2, paras. 35–39. Though the Committee did express doubt as to whether the facts of that case would give rise to questions of lifting the corporate veil under the principles of English law, para. 39.

[45] *La Genérale des Carriéres et des Mines v. FG Hemisphere Associates LLC* [2012] UKPC 2, para. 29.

[46] *La Genérale des Carriéres et des Mines v. FG Hemisphere Associates LLC* [2012] UKPC 2, para. 29.

[47] State Immunity Act 1978 (UK), ss. 2, 3.

[48] *La Genérale des Carriéres et des Mines v. FG Hemisphere Associates LLC* [2012] UKPC 2, para. 29.

[49] Foreign Sovereign Immunities Act, 28 U.S.C. Ch, 97 (1976) (US), §1603(b)(2). This provision is subject to the commercial activity exception in §1605(a)(2).

[50] *Farranti-Packard Ltd v. Cushman Rentals td* [1980] CarswellOnt 444.

[51] See e.g., *Ferguson v. Arctic Transportation Ltd* [1995] CarswellOnt 444, paras. 12–13; *Farranti-Packard Ltd v. Cushman Rentals td* [1980] CarswellOnt 444.

[52] Formerly the Aviation Scientific-Technical Complex named after Antonov (Antonov ASTC).

matching up of immunity and liability.[53] Second, Canadian courts have placed strong reliance on Canadian understandings of 'organ', 'agency' and 'separate entity' under the Canadian State Immunity Act.[54] Canadian courts also exercise particular caution before concluding that an entity is an alter ego of a state when discussing questions of the execution of a judgment or order where the entity claims immunity as an alter ego.[55]

There is a strong presumption of separateness in Canadian courts. In *Roxford Enterprises S.A. v. Cuba*, the Federal Court ruled that, as a general principle, instrumentalities of a foreign state are to be accorded a presumption of independent status, and overcoming this presumption 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".[56] Recent decisions have also found that merely showing that an entity is an alter ego is not enough. There must be evidence that the separate personality is being used to perpetuate fraud, engage in an abuse of rights, or contravene public order.[57]

In the recent case of *CC/Devas v. Republic of India*,[58] the Canadian Superior Court held that the Airport Authority of India was entitled to immunity. The Authority is a statutory body owned by the Indian Ministry of Civil Aviation, responsible for creating, upgrading, maintaining and managing civil aviation infrastructure in India. This case was part of a long-running dispute relating to efforts by former investors in an Indian telecoms company (Devas) to enforce an investment treaty award worth US$111 million against India. The Canadian proceedings relate to around $38 million in funds held on the Airport Authority's behalf by the International Air Transport Association (IATA).[59]

Over the past three years, there have been various attempts to execute the award. In September 2022, the attachment of IATA funds held on behalf of Air India, worth around US$17 million, was quashed by the Quebec Court of Appeal, after it found that the corporate veil had not been pierced.[60]

In the Superior Court proceedings, the Authority contested the attachment under the Canadian State Immunity Act 1985, claiming to be a State

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[53] *TMR Energy v. State Property Fund of Ukraine* [2005] FC 566.

[54] *Ferguson v. Arctic Transportation Ltd* [1995] CarswellOnt 444, para. 20; *TMR Energy Ltd v. State Property Fund of Ukraine* [2005] FC 566, paras. 113–115; *Collavino Incorporated v. Yemen (Tihama Development Authority)* [2007] ABQB 212, para. 177.

[55] *Mallat v. French Financial Markets Authority* [2021] QCCA 1102, para.105.

[56] *Roxford Enterprises S.A. c. Cuba*, [2003] 4 FC 1182, para. 40.

[57] *CC/Devas (Mauritius) v. Air India* [2022] QCCA 1264.

[58] *CC/Devas (Mauritius) v. Republic of India* [2024] QCCS 3225.

[59] Susannah Moody, *Canadian court says Indian airports authority has immunity* (12 September 2024) available at: https://globalarbitrationreview.com/article/canadian-court-says-indian-airports-authority-has-immunity.

[60] *CC/Devas (Mauritius) v. Air India* [2022] QCCA 1264; Susannah Moody, *Canadian court says Indian airports authority has immunity* (12 September 2024) available at: https://globalarbitrationreview.com/article/canadian-court-says-indian-airports-authority-has-immunity.

agency (a separate organ),[61] and therefore immune under Section 2 of the Act. Under Canadian law, in order to be an agency, the entity must: (i) be an organ of the foreign State, and (ii) be a separate juridical entity.[62] In order to meet the first part of the agency definition (being an organ), "an entity needs to be sufficiently controlled by the foreign state to be its alter ego".[63]

The Court held that the AAI was an agency of India and therefore part of the "State". On the first requirement, the Authority was an organ because: "it has a distinct or separate legal existence, it performs functions associated with governmental authority and the effectiveness of the control is exercised over it by the foreign state of India".[64] On the second requirement, it was held that the Authority is a separate juridical entity:[65]

1. The Court held that this depended on an assessment of the "core attributes" of the entity under Indian law followed by an assessment of those attributes by reference to the characteristics Québec and Canadian law associate with a distinct legal entity.[66]
2. The Authority was separate from India, under Indian and Canadian law, and possessed all the core characteristics of a separate legal entity as such entity is understood under both laws.[67]
3. The Court held that even if India *could* control "every element" of the Authority under the AAI Act, this would not be a basis to pierce the corporate veil. The relevant control was control in fact, rather than theoretical, and the Authority enjoyed significant autonomy and functions as a true corporation.[68]
4. The fact that the Plaintiffs sued the Authority in its own name was taken to suggest that the Plaintiffs has originally recognised the Authority's independent legal personality.[69]
5. It was immaterial that the Indian Supreme Court had found that the Authority's predecessor fell within the definition of the "State" under Article 12 of the Indian Constitution. This finding was for the purpose of Indian constitutional law and had no bearing on the Authority's status as an agency under the Canadian SIA.[70] The Court noted that the test under the Constitution was intentionally broad and other rulings of Indian courts had held that, outside of the Constitution, the Authority was a distinct legal entity with its own legal personality.[71]

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[61] As opposed to a state entity (ie. an inseperable organ).
[62] Canadian State Immunity Act 1985, s. 2.
[63] *CC/Devas (Mauritius) v. Republic of India* [2024] QCCS 3225, para. 107.
[64] *CC/Devas (Mauritius) v. Republic of India* [2024] QCCS 3225, para. 79.
[65] *CC/Devas (Mauritius) v. Republic of India* [2024] QCCS 3225, para. 91.
[66] *CC/Devas (Mauritius) v. Republic of India* [2024] QCCS 3225, para. 96.
[67] *CC/Devas (Mauritius) v. Republic of India* [2024] QCCS 3225, para. 100.
[68] *CC/Devas (Mauritius) v. Republic of India* [2024] QCCS 3225, paras. 101-3.
[69] *CC/Devas (Mauritius) v. Republic of India* [2024] QCCS 3225, para. 108.
[70] *CC/Devas (Mauritius) v. Republic of India* [2024] QCCS 3225., paras. 132-3.
[71] *CC/Devas (Mauritius) v. Republic of India* [2024] QCCS 3225, paras. 134-144.

5. Australian approach: upholding the presumption of separate status

In the two key cases on the alter ego doctrine, Australian courts have upheld the presumption of separate status (finding there was no alter ego). Both cases involved the Indonesian airline Garuda and followed a largely *Trendtex* analysis.

In *PT Garuda Indonesia*,[72] the Australian Competition and Consumer Commission commenced proceedings against certain airlines, including Garuda, alleging they had entered into anti-competitive arrangements or understandings between themselves. The ACCC sought orders including the pecuniary penalty of up to A$250,000 per airline. All of the airlines, including Garuda, claimed they fell within the definition of a separate entity under the Australian Foreign States Immunities Act,[73] such that they were entitled to immunity. The Australian Federal Court found that Garuda was a separate entity,[74] disagreeing with the primary judge that the test of whether a corporation is an instrumentality should be determined by whether the foreign State had the day-to-day management control of the instrumentality.[75] Ownership and control would be important, but not determinative.[76] Instead, the Court held:

> a. it will be a matter of fact in each case to determine whether a natural person or corporation is an agency or instrumentality of a foreign State and in determining that question regard will have to be had to ownership, control, the functions which the natural person or corporation perform, the foreign State's purposes in supporting the natural person or corporation and the manner in which the natural person or corporation conducts itself or its business.[77]

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[72] *PT Garuda Indonesia Ltd v. Australian Competition and Consumer Commission* [2011] FCAFC 52.

[73] Foreign States Immunities Act 1985 (Australia), s. 3.

[74] The Court found that, although Garuda was a foreign entity for the purpose of the definition at the relevant time and therefore entitled to immunity under s. 9 of the Act, the commercial exception to jurisdictional immunity under s. 11 applied. See *PT Garuda Indonesia Ltd v. Australian Competition and Consumer Commission* [2011] FCAFC 52, para. 54 (per Lander and Greenwood JJ). Note that this judgment was appealed to the Australian High Court on the proper construction of the commercial exception in s. 11. See *PT Garuda Indonesia v. Australian Competition and Consumer Commission* [2012] HCA 33.

[75] *PT Garuda Indonesia Ltd v. Australian Competition and Consumer Commission* [2011] FCAFC 52, para. 46 (per Lander and Greenwood JJ). The Court noted that this conclusion would be inconsistent with s. 3(2) of the Foreign States Immunities Act which contemplates that an entity may be the agency of more than one State.

[76] *PT Garuda Indonesia Ltd v. Australian Competition and Consumer Commission* [2011] FCAFC 52, para. 47 (per Lander and Greenwood JJ).

[77] *PT Garuda Indonesia Ltd v. Australian Competition and Consumer Commission* [2011] FCAFC 52, para. 47 (per Lander and Greenwood JJ); paras. 123–5 (per Reyes J).

In 2023, the New South Wales Court of Appeal gave its judgment in *Greylag Goose Leasing*.[78] This case concerned Greylag Goose Leasing's application to wind up *Garuda* on the basis that Garuda failed to meet creditors' demands for payments of various debts relating to aircraft leases. Garuda resisted the application by alleging that the Court had no jurisdiction under Section 9 of the Australian Foreign States Immunities Act.[79] The Court held that Garuda was a separate entity, and could not find any evidence (in the Immunity Act or the preceding Australian Law Commission Report)[80] that a foreign body corporate is to be treated under the Immunity Act as having State immunity[81] from winding up proceedings in Australia.

6. Swiss approach: rebutting the presumption of separateness

In a 2007 case in Switzerland, the Moscow Centre for Automated Air Traffic Control was found to be the alter ego of Russia, and that its tolls could therefore be collected to satisfy a court order enforcing a settlement agreement.[82] The Court referred to the Moscow Centre's statutes, which provided that the Centre was a 'legal person having the legal form of a State enterprise which is federal property of the Russian Federation' and that its property constitutes 'federal property placed at the disposal of the enterprise', which the Centre has the right to enjoy without restriction within the framework of its economic activity, but can only dispose of within certain legal or conventional limits.[83]

7. Conclusion

The jurisdictions discussed all agree on a presumption of separate status for State-owned entities and that there are various factors to determine if that presumption can be rebutted. However, the approaches, especially in the UK and US, are different.

Although the US courts insist that the five *Bancec/Rubin* factors are not 'a mechanical formula'[84] for extensive control, they do provide a more stringent framework than the broad 'control and functions' analysis in the UK, Canada and Australia. And the *Gécamines* judgment[85] in the UK has

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[78] *Greylag Goose Leasing 1410 Designated Leasing Company v. PT Garuda Indonesia Ltd* [2023] NSWCA 134.

[79] Greylag Goose argued that these proceedings fell within the exception in s. 14(3)(a) of the Foreign States Immunities Act, relating to 'bankruptcy, insolvency or winding up of a body corporate'.

[80] *Foreign State Immunity (ALRC Report 24)* (October 1984), available at http://www8.austlii.edu.au/cgi-bin/viewdoc/au/other/lawreform/ALRC/1984/24.html.

[81] Foreign States Immunities Act 1985 (Australia), s. 22.

[82] *Automated Air Traffic Control v. Commission de surveillance des poursuites et des faillites du Canton de Genève*, No. 7B/2/2007.frs (2007).

[83] *Automated Air Traffic Control v. Commission de surveillance des poursuites et des faillites du Canton de Genève*, No. 7B/2/2007.frs (2007), para. 4.3. (unofficial translation).

[84] *First National City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611 (1983), para. 44. See also *Rubin v. Islamic Republic of Iran*, 138 S.Ct. 816, 822 (2018).

strengthened the presumption of separate status to a greater degree than seen elsewhere.

The UK relies on a matching up of liability and immunity,[86] whereas the US appears to be more concerned with equity in terms of, for example, the foreign State not benefiting unfairly in the US legal system.[87]

For a stark example of the different outcomes, we can compare the English case of *Taurus Petroleum*[88] with the US case of *Crystallex*. In *Taurus Petroleum*, the question was whether the State Oil Marketing Company of Iraq's Ministry of Oil (SOMO) was the alter ego of Iraq. Like the PDVSA in *Crystallex*, the Company was a monopoly dealing with assets designated as State property in the State's Constitution; all revenues went to the State, and all management personnel were appointed by the Oil Minister, who also decided on the allocation and sale of oil by SOMO. But the English Court held, applying the 'strong presumption' in *Gécamines*,[89] that it was 'beyond argument' that the State Oil Marketing Company was a separate juridical entity formed for commercial or industrial purposes.[90] This was despite the fact that SOMO did not pay tax and was wholly funded by the Iraqi government.[91]

In comparison, the US court in *Crystallex* found that control over the State-owned company was so extensive as to be beyond normal supervisory control, and 'equity requires that we ignore the formal separateness of the two entities'.[92]

What does this mean for creditors? There are good public policy reasons for ensuring that there are clear and readily identifiable principles which enable the ownership of assets by the State on the one hand and any separate entity on the other to be identified by those who enter into relations with them, particularly where third-party commercial entities are entering into commercial agreements with State-owned separate entities.[93] The *Gécamines* approach in the UK of strongly presuming

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[85] *La Genérale des Carriéres et des Mines v. FG Hemisphere Associates LLC* [2012] UKPC 2.

[86] *La Genérale des Carriéres et des Mines v. FG Hemisphere Associates LLC* [2012] UKPC 2.

[87] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, 932 F.3d 126, 149 (3d Cir. 2019).

[88] *Taurus Petroleum Ltd v. State Oil Marketing Co of the Ministry of Oil in Iraq* [2013] EWHC 3494 (Comm).

[89] *Taurus Petroleum Ltd v. State Oil Marketing Co of the Ministry of Oil in Iraq* [2013] EWHC 3494 (Comm), para. 58.

[90] *Taurus Petroleum Ltd v. State Oil Marketing Co of the Ministry of Oil in Iraq* [2013] EWHC 3494 (Comm), para. 58.

[91] *Taurus Petroleum Ltd v. State Oil Marketing Co of the Ministry of Oil in Iraq* [2013] EWHC 3494 (Comm), para. 54.

[92] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, 932 F.3d 126, 52 (3d Cir. 2019).

[93] *La Genérale des Carriéres et des Mines v. FG Hemisphere Associates LLC* [2012] UKPC 2, para. 42: 'It does not take much imagination to visualise the chaos that could arise

separate status and creating a parallel between immunity and liability favours one group of creditors over the other, as pointed out by Miles: the creditors of State-owned entities benefit because enforcement is not blocked by immunity, but creditors of the State itself are at a disadvantage since their ability to enforce would be greatly expanded if they could more easily characterize an entity as an State's alter ego.[94] This approach also allows third parties to make commercial decisions as to the risk involved in entering into transactions with State-owned separate entities.[95]

The US legal framework benefits both groups of creditors. The flexible *Bancec* factors, expanded by *Crystallex*, help creditors of the State enforce against entities. The clarity of immunity of a separate entity, and the commercial activity exception, benefits creditors of State-owned entities.

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from such a blurring of the principles relating to the ownership of property in this, or any other, field' (per Lord Mance).

[94] Cameron Miles, *State debts and State-owned corporations: Trans-Atlantic perspectives*, 81 QIL Zoom-out 31, 49–50 (2021).

[95] It is much more difficult to make commercial assessments if some of the assets which are apparently legally and beneficially owned by the company are subject to a claim to sovereign immunity which may only be determined by a detailed understanding of the law of the State in question and a considerable degree of imagination.