IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-GHANA

CORAM: ATUGUBA, J.S.C (PRESIDING)

DR. DATE-BAH, J.S.C
ANSAH, J.S.C
ADINYIRA (MRS), J.S.C.
OWUSU (MS.), J.S.C
DOTSE, J.S.C
ANIN-YEBOAH, J.S.C.
BAFFOE-BONNIE, J.S.C
GBADEGBE, J.S.C

WRIT No. J1/10/ 2012

19TH JULY, 2013

FELIX KLOMEGA . . . PLAINTIFF

VRS.

1. **THE ATTORNEY-GENERAL . . . DEFENDANTS**
2. **GHANA PORTS AND HARBOURS AUTHORITY**
3. **MERIDIAN PORT HOLDINGS LIMITED**
4. **MERIDIAN PORT SERVICES LIMITED**

JUDGMENT

DR DATE-BAH JSC:

This Court on 16th January 2013 delivered a ruling in which it dismissed the preliminary objection of the defendants (bar one) to the jurisdiction of this Court in this suit. The material facts of this case as stated in that ruling remain apposite and are set out again below.

The plaintiff issued a Writ on 23rd August 2011, invoking the original jurisdiction of this Court and claiming the following reliefs:

1. "A declaration that on a true and proper interpretation of article 181 of the Constitution the expression "government" in article 181 includes a state entity that possesses the characteristics of Second Defendant;

2. A declaration that on a true and proper interpretation of article 181 of the Constitution, the requirements in article 181 equally apply to a state entity such as Second Defendant, that enters into an international economic transaction;

3. A declaration that the Shareholder Agreement dated the 17th day of August 2004 and entered into between Second Defendant, and Third and Fourth Defendants, is an international business or economic transaction, and that the failure and or neglect to submit it to Parliament for approval renders it null, void and unenforceable pursuant to 181 of the 1992 Constitution;

4. A declaration that the Concession Agreement dated the 17th day of August 2004, and entered into between Second Defendant and Third and Fourth Defendants is an international business or economic transaction, and that the failure and or neglect to submit it to Parliament for approval renders it null, void and unenforceable pursuant to 181 of the 1992 Constitution;

5. Any other consequential order (s) as this Honourable Court may deem fit."

The defendants, with the exception of the first defendant, raised a preliminary objection to the jurisdiction of this Court in this matter. This Court therefore had to make the ruling earlier referred to.

The plaintiff is a citizen and taxpayer of Ghana, resident in Ghana, who wishes to ensure compliance with Article 181(5) of the 1992 Constitution. That provision states that: "(5) This article shall, with the necessary modifications by Parliament, apply to an international business or economic transaction to which the Government is a party as it applies to a loan."

Article 181 of the 1992 Constitution states, in full, that:

.

> "(1) Parliament may, by a resolution supported by the votes of a majority of all the members of Parliament, authorise the Government to enter into an agreement for the granting of a loan out of any public fund or public account.
>
> (2) An agreement entered into under clause (1) of this article shall be laid before Parliament and shall not come into operation unless it is approved by a resolution of Parliament.
>
> (3) No loan shall be raised by the Government on behalf of itself or any other public institution or authority otherwise than by or under the authority of an Act of Parliament.
>
> (4) An Act of Parliament enacted in accordance with clause (3) of this article shall provide -

(a) that the terms and conditions of a loan shall be laid before Parliament and shall not come into operation unless they have been approved by a resolution of Parliament; and

(b) that any moneys received in respect of that loan shall be paid into the Consolidated Fund and form part of that Fund or into some other public fund of Ghana either existing or created for the purposes of the loan.

(5) This article shall, with the necessary modifications by Parliament, apply to an international business or economic transaction to which the Government is a party as it applies to a loan.

(6) For the purposes of this article, "loan" includes any moneys lent or given to or by the Government on condition of return or repayment, and any other form of borrowing or lending in respect of which -

(a) moneys from the Consolidated Fund or any other public fund may be used for payment or repayment; or

(b) moneys from any fund by whatever name called, established for the purposes of payment or repayment whether directly or indirectly, may be used for payment or repayment.

(7) The Minister responsible for finance shall, at such times as Parliament may determine, present to Parliament any information concerning any discrepancies relating to -

(a) the granting of loans, their repayment and servicing;

(b) the payment into the Consolidated Fund or other public fund of moneys derived from loans raised on institutions outside Ghana.”

The first defendant, the Attorney-General, is responsible for defending suits against the Republic. The plaintiff contends that the first defendant has the duty of protecting the interests of the Republic. The second defendant is a statutory corporation established under the Ghana Ports and Harbours Authority Act, 1986 (PNDCL 160). The third defendant is a company incorporated in England under the Companies Act 1985. The fourth defendant is a company registered under the Companies Act 1963 (Act 179). As at the date of its registration on 3rd December 2002, it had an authorized share capital of 100,000 ordinary shares, 2500 of which had been issued to and held by the Second Defendant, according to the plaintiff. The plaintiff sets out in his Statement of Case several features of the Second Defendant which establish its character, in his view, as a public authority and therefore part of Government, within the meaning of Article 181(5) of the 1992 Constitution.

These include the following: the State may acquire property for the Second Defendant under the State Property and Contracts Act, 1960 (C.A. 6) and the State Lands Act, 1962 (Act 125); the second defendant's Director-General and members of its Board of Directors are appointed by the President of Ghana, in accordance with articles 70 and 195 respectively of the 1992 Constitution and are thus public servants; section 2 of the second defendant's establishment statute requires it to obey directions of a general nature issued by the President of Ghana; by its establishment statute, the second defendant obtains part of the finance for its operations from budget allocations and loans from the Government of Ghana; the second defendant's accounts are audited by the Auditor-General of Ghana and a copy of its annual report on its operations is laid before the Parliament of Ghana under sections 15 and 16 of its establishment statute. Furthermore, the second defendant is prohibited from undertaking certain activities except with the consent or approval of the Minister responsible for Transport and Communication. These include: borrowing money to support its operations, maintaining foreign accounts or disposing of land. The plaintiff also states that the second defendant, as part of its functions and powers under its establishment statute, levies port dues and rates and may, by legislative instrument, make rules for the guidance and conduct of port officers and other persons employed in its service. The plaintiff therefore asserts that the second defendant, on account of its character as a public and regulatory agency of the State, is an

instrument of the State and thus constitutes part of the public services of Ghana under article 190(1)(b) of the 1992 Constitution.

The plaintiff avers that the second and third defendants entered into a shareholders' agreement on 17th August 2004, relating to the fourth defendant, with the fourth defendant. The effect of this agreement was to make the second and third defendants the exclusive shareholders of the fourth defendant. On the same date of 17th August 2004, it is the averment of the plaintiff that the second defendant entered into a Concession Agreement with the fourth defendant by which the second defendant granted a concession to the fourth defendant to design, redesign, engineer and construct, as applicable, and then equip, operate, maintain, manage and repair the Container Terminal at Tema and provide facilities and services within a specified area of the Tema Port. This Concession was to last for 20 years.

The plaintiff contends that neither the Shareholders' Agreement nor the Concession has received Parliamentary approval under article 181(5) of the 1992 Constitution, although in his view they obviously constitute international economic transactions involving an agency of the Government.

The plaintiff considers that the facts of this case raise the following issues for determination by this Court:

1. "Whether and to what extent "Government" under article 181 (3) includes public authorities the cost of whose operations and debt obligations constitute a charge on the public accounts of Ghana;

2. Whether the Agreement entered into between Second and Third Defendants is an international business transaction within the meaning of article 181, and thus null, void and unenforceable for lacking parliamentary approval?; and

3. Whether the Concession entered into between Second and Fourth Defendants is an international business transaction within the meaning of article 181, and is thus null, void and unenforceable for lacking parliamentary authorization? "

The plaintiff sums up his case as follows, in his conclusion to his Statement of Case:

"The outcome of this suit rests on the following arguments:

- By its establishment law, its public functions, levers of governmental control, source of funding and other tell-tale features of a governmental entity, First Defendant *(sic)* is a public/state/government entity which falls within the meaning of government under article 181 of the 1992 Constitution.

- The Agreement and Concession between First, Second and Third Defendants *(sic)*, by their nature, essential characteristics and other background international legal rules such as the Ghana-UK Bilateral Investment Treaty of 1989, constitute transnational or international business or economic transactions.

- When the veil of incorporation of Third Defendant *(sic)* is lifted, Second Defendant *(sic)* emerges as its alter ego, and since Second Defendant *(sic)* is a foreign company contracting with First Defendant *(sic)*, a governmental entity, parliamentary authorization pursuant to article 181 was required for the validity of the transactions.

- The lack of parliamentary approval for the Agreement and Concession pursuant to article 181 makes these agreements void and unenforceable. "

The primary issue in this case is whether the second defendant comes within the intendment of article 181(5). The gravamen of our ruling of 16th January was that article 181(5) was sufficiently unclear as to the scope of the word "Government" to require the deployment of this Court's interpretive jurisdiction under article 130 of the 1992 Constitution. If the 2nd defendant is, in the context of article 181(5), not intended to be within its ambit, then whether

the agreements in issue are international business or economic transactions or not will not affect the outcome of this case.

The first question to be answered therefore is whether the Ghana Ports and Harbours Authority is to be regarded as coming within the meaning of Government as used in article 181(5) of the 1992 Constitution. This issue was variously formulated by the parties to this suit in their individually-filed memoranda of issues. The plaintiff's formulation was: "whether and to what extent the 2nd Defendant as a public authority constitutes part of Government within the meaning of Article 181(5) of the 1992 Constitution?" The 1st defendant did not file any memorandum of issues. Neither did the 2nd defendant. The 3rd defendant framed the issue as follows: "whether or not the 2nd Defendant, being a body corporate established by the Ghana Ports and Harbours Authority Act, 1986 (PNDCL 160) with perpetual succession and a common seal, and which may sue or be sued in its corporate name, is "Government" for the purposes of Article 181(5) of the Constitution?" Finally, the 4th defendant expressed the same issue in the following terms: "whether or not the 2nd Defendant as a public authority or institution constitutes "Government" within the context of Article 181 of the 1992 Constitution?"

The 1st defendant's response, in her Statement of Case, to the plaintiff's case on this issue, as set out earlier *supra*, is as follows: section 2 of the Ghana Ports and Harbours Authority Act, 1986 (PNDCL 160) which establishes the 2nd defendant gives it a complete and separate legal personality from the Government of Ghana. This fact establishes a distinction between this case and *The Attorney-General v Faroe Atlantic Co. Ltd.* [2005-2006] SCGLR 271 and *The Attorney-General v Balkan Energy Ghana Ltd. 2 ors*. unreported, 16th May, 2012, where the party to the impugned agreements was the Government itself. She contends that from the very nature of the 2nd defendant's operations and activities, including engaging in transactions with foreign entities, ship owners etc. it could not have been the intention of the framers of the Constitution that it should come within the ambit of article 181(5). She maintains that the operations of the 2nd defendant are commercial and income-generating and that it would be absurd to cripple its activities by requiring Parliamentary approval of its commercial deals.

The 2nd defendant filed a Statement of Case on 20th November 2012 and a Supplementary Statement of Case on 16th May 2013. In both Statements, it sought to stress the substantial part of its functions that is commercial in nature, though it admitted that it does perform some regulatory functions. It gave a flavour of its commercial operations by setting out what it is required to do under sections 5(1)(e) and 5(1)(f) of the Ghana Ports and Harbours Authority Act, 1986 (PNDCL 160):

> "(e) provide facilities for the transport, storage, warehousing, loading, unloading and sorting of goods passing through any port, and operate road haulage services for hire or reward;
>
> (f) carry on all of the business of stevedoring, master porterage and lighterage services;".

The 2nd defendant argues that while statutory corporations like it have public policy objectives, they should be differentiated from other forms of governmental agencies or state entities established to pursue purely non-financial objectives. It points out that statutory corporations like it engage in business or commercial activities for profit; own assets and incur liabilities, including contracting loans; prepare annual reports, including financial statements that do not form part of the Public Accounts; and can sue and be sued in their own name. In sum, such statutory corporations have a legal and operational autonomy and their financial transactions and international business or economic transactions should not be regarded as ones to which government is a party. By design, they are intended to use their financial muscle, financial statements and assets base to operate independently of central government and not to impose obligations on central government.

The 2nd defendant also points to the difference in the professional accounting standards and methods applicable to statutory corporations like the 2nd defendant, which it calls "government business entities" and those applicable to the purely non-commercial and non-profit government agencies. The International Financial Reporting Standards (IFRS), designed as a common global standard for business accounting to enable company accounts to be intelligible

across international boundaries, applies to statutory corporations such as the 2nd defendant, while for the purely governmental agencies, the International Public Sector Accounting Standards (IPSAS) apply. The 2nd defendant maintains that the differentiation between government entities that apply IFRS and those that apply IPSAS is not an idle one, but constitutes a sound basis for determining whether or not an entity, for practical purposes, is a commercial or purely governmental one.

It is the 2nd defendant's contention also that statutory corporations like it routinely engage in international economic or business transactions, subject to the procurement laws, without any reference to Parliament. It does not consider that it was the framers' intention to subject such agreements to Parliamentary approvals.

The last argument of the 2nd defendant that we will note is that which claims that defining "government" to include entities such as it would have the unintended consequence of exposing government to a plethora of lawsuits and international arbitrations in respect of contracts which the statutory corporations enter into routinely. This argument, unlike the plausible ones that we have already set out, is a fallacious one. The fact that the contract of a statutory corporation is subjected to Parliamentary approval would not, necessarily, make the contract become one on which the central government is liable. It would remain a contract of the statutory corporation and any liability on it would remain that of the corporation, unless such were the circumstances that this Court held that the statutory corporation was the *alter ego* of the central government.

The 3rd defendant puts forward the following case in favour of the 2nd defendant not being covered by the term "Government," as used in the Constitution. Its argument begins by noting that "government" is defined in article 295(1) of the Constitution as follows:

> "(1) In this Constitution, unless the context otherwise requires-
>
> …

"government" means any authority by which the executive authority of Ghana is duly exercised;".

It further notes that a similar definition is contained in section 46 of the Interpretation Act, 2009 (Act 792). The provision is in the following terms:

"In an enactment, the expression

…

"Government" means any authority by which the executive authority of the Republic is duly exercised;".

The 3rd defendant draws attention to the fact that the words "unless the context otherwise requires" in the constitutional definition communicate the fact that the definition is contextual in nature. The 3rd defendant emphasises the many cases that have held that a Constitution should be read as a whole. It submits that from its review of the use of the word "government" in the whole Constitution the concept of "government" is best described in article 12(1) which states that:

"(1) The fundamental human rights and freedoms enshrined in this chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all other organs of government and its agencies and, where applicable to them, by all natural and legal persons in Ghana, and shall be enforceable by the Courts as provided for in this Constitution."

The 3rd defendant puts the following interpretation on article 12(1):

"This article confirms that "government" under the Constitution is made up of or composed by the Executive, Legislature and the Judiciary, which accords with the usual definition of "branches" or "arms" of government. In demanding respect for human

rights by all and sundry connected with governance, this article also mentions "other organs" of government. The use of the word "other", which is synonymous with the words "added" or "further" means that the word "organ" is used, first to refer to the "branches" or "arms" of government mentioned, and second, to "other (s)," which are also considered "organs of government". My Lords, the "organs" of a thing are its "limbs" or "appendages" and are to be considered as part of that thing. In other words, government under the Constitution is composed of various organs, the chief of which are the Executive, Legislature and Judiciary, as well as "other organs of government", all of which come together to form the government."

The 3rd defendant considers that the organs of government are to be distinguished from government agencies. The agencies of government should not be considered as part of government. It is the 3rd defendant's view that Parliament has passed laws to create many agencies of government to perform certain functions that might otherwise have been performed by the government itself. Because those agencies are not the government itself, the 3rd defendant contends that it is important that those statutes should expressly vest in them specific functions or businesses that might have been performed by government. Typically, the relevant statutes indicate the legal status conferred on the agency in question, the powers it is to have and the functions to be performed by it. In the case of the 2nd defendant, the relevant establishing statute specifically conferred on it, as already noted, a separate legal personality. From this fact of an independent legal personality, the 3rd defendant draws the inference of Parliamentary approval of the 2nd defendant's right to exist and operate separately and distinctly from the government.

The 3rd defendant rejects the plaintiff's claim that because the members of the 2nd defendant's board are appointed by the President they are public servants. It also argues that the mere fact that the President may give the 2nd defendant directions of a general nature does not make the 2nd defendant part of government.

The 3rd defendant's conclusion is that the term "Government" when used in the various parts of the Constitution refers to the Executive, the Legislature and the Judiciary, as well as their

organs and departments, but cannot be applied to agencies such as the 2nd defendant, established under the circumstances and for the purposes set out in its constitutive Act.

The 4th defendant, in turn, also submits that in the context of Article 181(5) Government means Government acting *qua* Government and not an agency of Government like the 2nd defendant. It stresses the fact that in both *Faroe Atlantic (supra)* and *Balkan Energy (supra)* the party to the transaction in question was the Government of Ghana *simpliciter.* Basing itself on these two cases, the 4th defendant argues that, in spite of this Court's assertion in its ruling of 16th January that it can credibly be argued that executive power can be exercised through statutory corporations, the framers of the 1992 Constitution, in the context of Article 181(5), limited Government to mean the central government, and not an agency of government.

The cumulative points made by the defendants above amount to an irresistible case that in the context of article 181(5) and the facts of this case, the 2nd defendant is not to be regarded as coming within the meaning of "Government". As pointed out by the defendants, to subject statutory corporations with commercial functions to the Parliamentary approval process prescribed in article 181(5) would probably increase the weight of Parliament's responsibilities in this regard to an unsustainable level. Accordingly, it is reasonable to infer that the framers of the 1992 Constitution did not intend such a result. Thus, in our view, "Government" in the context of article 181(5) should mean, ordinarily, the central government and not operationally autonomous agencies of government. Where an agency has a separate legal personality distinct from central government, it usually comes under sectoral ministerial supervision. The Board of the corporation and the appropriate Ministry should then exercise oversight over its international business or economic agreements. That oversight should be exercised within the context of the procurement laws of this country. Parliament would be sucked into unnecessary minutiae if it were to have the function of approving the international business or economic agreements of statutory corporations. That is why "Government", in the context of article 181(5), should be interpreted purposively to exclude corporations such as the 2nd defendant. This interpretation is the only reasonable one, if one reads the Constitution as an organic

whole. As Acquah JSC, as he then was, said in *Mensah v Attorney-General* [1997-98] 1 GLR 227 at 270:

> "I think it is now firmly settled that a better approach to the interpretation of a provision of the Constitution is to interpret that provision in relation to the other provisions of the Constitution so as to render that interpretation consistent with the other provisions and the overall tenor or spirit of the Constitution. An interpretation based solely on a particular provision without reference to the other provisions, is likely to lead to a wrong appreciation of the true meaning and import of that provision. Thus in Bennion, *Constitutional Law of Ghana*(1962) at p 283 it is explained that it is important to construe an enactment as a whole,
>
> > " since it is easy, by taking a particular provision of an Act in isolation, to obtain a wrong impression of its true effect. The dangers of taking passages out of their context are well known in other fields, and apply just as much to legislation. Even where an Act is properly drawn it still must be read as a whole. Indeed a well-drawn Act consists of an interlocking structure each provision of which has its part to play. Warnings will often be there to guide the reader; as for example, that an apparently categorical statement in one is' subject to exceptions laid down elsewhere in the Act, but such warnings cannot always be provided. [pg 271]"

This court should, however, not lay down an absolute rule. If, on the facts of a particular case, central government were found to have made a particular statutory corporation its *alter ego* under the circumstances of that particular case, the possibility of holding that that statutory corporation comes within article 181(5) should not be ruled out. However, on the facts of this case, and given the nature of the functions of the 2nd defendant, we would hold that it does not come within the ambit of article 181(5).

The notion of an agency serving as an *alter ego* of the government is one that is part of the plaintiff's case. He supports his argument with the United States of America case of *Bridas S.A.P.I.C. v Government of Turkmenistan* (2006) 447 F. 3d 411. In that case, the Federal district court concluded that despite the fact that the Government of Turkmenistan had not signed the joint venture agreement in question in that case, principles of agency and equitable estoppel bound the Government to the agreement. On appeal to the US 5th Circuit Federal Court of Appeal in an earlier appeal reported in (2003) 345 F3d 347, the court held that the Government was not bound through agency since there was insufficient evidence to support the District

Court's finding. The US Circuit Court of Appeal then considered the Government's liability under the *alter ego* doctrine. It explained its approach as follows (*per* Benavides, Circuit Judge, at para 32):

> "Courts occasionally apply the alter ego doctrine and agency principles as if they were interchangeable. See House of Koscot Dev't Corp. v. American Line Cosmetics, Inc., 468 F.2d 64 (5th Cir.1972). The two theories are, however, distinct. Under the alter ego doctrine, a corporation may be bound by an agreement entered into by its subsidiary regardless of the agreement's structure or the subsidiary's attempts to bind itself alone to its terms, "when their conduct demonstrates a virtual abandonment of separateness." Thomson-C.S.F., 64 F.3d at 777. This is due to the doctrine's strong link to equity. See Harrell v. DCS Equip. Leasing Corp., 951 F.2d 1453, 1458 (5th Cir.1992). Accord McCarthy v. Azure, 22 F.3d 351, 362-63 (1st Cir.1994)(holding that the alter ego doctrine can be invoked "only where equity requires the action to assist a third party"). The laws of agency, in contrast, are not equitable in nature, but contractual, and do not necessarily bend in favor of justice. Courts are thus comparatively free from the moorings of the parties' agreements when considering whether an alter ego finding is warranted."

It is this *alter ego* doctrine that the plaintiff prays in aid of his claim that the obligations of the 2nd defendant are ascribable to the Government of Ghana and therefore bring its international business transactions within the ambit of article 181(5) of the Constitution. In the *Bridas* case, the District Court had held that, on the facts of the case, it had not been shown that the agency of the Government of Turkmenistan was its *alter ego.* The Federal Circuit Court of Appeals held that the District Court had not taken into account all the factors that needed to be considered before reaching its conclusion. Accordingly, the case was remitted to it for reconsideration on this issue. The Court explained as follows (*per* Benavides, Circuit Judge at para 37):

> "The district court erred in premising its conclusion solely upon the existence of corporate formalities and an absence of comingling of funds and directors. Alter ego determinations are highly fact-based, and require considering the totality of the

circumstances in which the instrumentality functions. Estate of Lisle v. C.I.R., 341 F.3d 364, 375-76, 2003 WL 21752801, at *8 (5th Cir.2003). No single factor is determinative. This should be apparent from the extensive list of circumstances that courts have developed to guide alter ego determinations. See id; Markow v. Alcock, 356 F.2d 194, 197-98 (5th Cir.1966); American Fuel Corp., 122 F.3d at 134; MAG Portfolio Consultant, GMBH v. Merlin Biomed. Group LLC, 268 F.3d 58, 63 (2d Cir.2001). Because the district court failed to take into account all of the aspects of the relationship between the Government and Turkmenneft, it committed an error of law and must reconsider the issue on remand."

What the plaintiff cites in his Statement of Case is a second appeal to the US Court of Appeal of the 5th Circuit from the District Court, in this case. There the court outlined some of the factors to be taken into account in making a determination as to *alter ego*, in the following terms (*per* Chief Judge Edith Jones, at paras 17-21 of 447 F 3d 411):

"17

Bridas I first identified twelve "private law" factors commonly utilized by this circuit in making a corporate alter ego determination:

18

(1) the parent and subsidiary have common stock ownership; (2) the parent and subsidiary have common directors or officers; (3) the parent and subsidiary have common business departments; (4) the parent and subsidiary file consolidated financial statements; (5) the parent finances the subsidiary; (6) the parent caused the incorporation of the subsidiary; (7) the subsidiary operated with grossly inadequate capital; (8) the parent pays salaries and other expenses of subsidiary; (9) the subsidiary receives no business except that given by the parent; (10) the parent uses the subsidiary's property as its own; (11) the daily operations of the two corporations are not kept separate; (12) the subsidiary does not observe corporate formalities.

19

Id. The court then referenced three more private law factors: "(1) whether the directors of the `subsidiary' act in the primary and independent interest of the `parent'; (2) whether others pay or guarantee debts of the dominated corporation; and (3) whether the alleged dominator deals with the dominated corporation at arm's length." *Id.* Finally, the panel instructed the district court to take into account six "public law" factors held relevant in this

court's cases, to determine whether a state agency shares the state's Eleventh Amendment sovereign immunity:

20

(1) whether state statutes and case law view the entity as an arm of the state; (2) the source of the entity's funding; (3) the entity's degree of local autonomy; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has the authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property.

21

Id. In all, the district court was given the task of evaluating how up to twenty-one factors bear on the facts of this case."

Whilst we do not consider that the facts of the case before us can reasonably be interpreted as falling within the notion of an agency of government constituting an *alter ego* for the Government, we nevertheless consider that the idea that a statutory corporation, though legally distinct from the Government, can in appropriate circumstances be held to be an *alter ego* of the Government is one that should serve the useful purpose of an exception to the general rule on the basis of which this case has been determined. In appropriate future cases, the doctrine of *alter ego* could be adopted and adapted to serve the purposes of Ghanaian law, after due and rigorous review. The Ghanaian doctrine need not have an umbilical cord to the case cited above. That case merely provides an illustration of how to construct an exception to the primary interpretation of article 181(5) set out above. The mischief that the doctrine would be helpful in suppressing is the possibility of the central Government seeking to evade Parliamentary scrutiny and approval of its qualifying agreements by getting a statutory corporation to enter into international business or economic transactions that would otherwise fall within the ambit of article 181(5). The *alter ego* doctrine has the potential for development to respond to this loophole. In short, article 181(5) is to be interpreted as follows: generally, the contracts of statutory corporations are not within the ambit of the provision. However, in exceptional circumstances, through the application of a customized Ghanaian version of the doctrine of *alter ego,* the contracts of a Ghanaian statutory corporation could be brought within the intendment of article 181(5).

Given our main conclusion that the 2nd defendant does not come within the ambit of article 181(5), it is not necessary to consider the other issues identified by the parties as requiring determination by this Court. The determination of the primary issue dealt with above disposes of this case.

Among these other issues that it is not necessary to decide are the following which were included in the Memorandum of Issues filed by the Plaintiff: whether the Shareholders Agreement executed between the 2nd,3rd and 4th defendants is an international business transaction within the meaning of Article 181(5) and thus null, void and unenforceable for want of Parliamentary authorization; and whether the Concession Agreement entered into between the 2nd defendant and the 4th defendant is an international business transaction within the meaning of Article 181(5) and thus null, void and unenforceable for want of parliamentary authorization.

The 3rd defendant also filed the following other issues in its Memorandum of Issues:

- Whether the 2nd defendant acquired shares in the 4th defendant under the Shareholders Agreement dated 26th October 2004?
- Whether the 2nd defendant's acquisition of the shares in the 4th defendant (a company incorporated in Ghana with three Ghanaian companies as its subscribers) was an "international business or economic transaction" for the purposes of Article 181(5) of the Constitution?
- Whether the Shareholders Agreement is an "international business or economic transaction" or a major "international business or economic transaction" for the purposes of Article 181(5) of the Constitution?
- Whether or not the Concession Agreement dated 17th August 2004 between the 2nd defendant and the 4th defendant (a company incorporated in Ghana that had solely Ghanaian shareholders at the material time) is an "international business or economic transaction" or a major "international business or economic transaction" for the purposes of Article 181(5) of the Constitution?

The 4th defendant's other issues filed in its Memorandum of Issues can be regarded as subsumed in the issues set out above.

Although these other issues raised by the parties are tantalizingly interesting, we will refrain from commenting on them or deciding them, since that is not necessary for the determination of this case. Before concluding, however, it should be pointed out that the 3rd and 4th defendants challenged the plaintiff's version of the facts relating to the incorporation of the 4th defendant. They pointed out that the 2nd defendant was not a shareholder of the 4th defendant at its incorporation.

In conclusion, the result of this case is that the plaintiff's action is dismissed. This is the fifth case in which the Supreme Court has had to interpret Article 181(5) of the 1992 Constitution. It is hoped that this Court's elucidation of the provision through its case law (*The Attorney-General v Faroe Atlantic Co. Ltd.* [2005-2006] SCGLR 271; *The Attorney-General v Balkan Energy Ghana Ltd. 2 ors*. unreported, 16th May, 2012; *Amidu v Attorney-General, Waterville and Woyome,* unreported, 14th June 2013 and *Amidu v Attorney-General, Isofoton & Forson*, unreported, 21st June 2013) has laid the foundation for determining the provision's meaning predictably. With the determination of this case, it is now our expectation that Article 181(5) will lend itself to *application* by the High Court, rather than to further *interpretation* by this Court. Legal advisers to foreign entities that contract with the Government of Ghana need to be aware of this important case law in order to guide them appropriately on the Ghanaian law on this issue. It is also hoped that Parliament will act soon to make the modification to article 181 which is necessary when it is applied to the subject-matter of article 181(5). This is a modification contemplated by the express language of that clause, in order to clarify further this area of law.

(SGD) DR. S. K. DATE-BAH

JUSTICE OF THE SUPREME COURT

(SGD) **W. A. ATUGUBA**

JUSTICE OF THE SUPREME COURT

(SGD) **J. ANSAH**

JUSTICE OF THE SUPREME COURT

(SGD) **S. O. A. ADINYIRA (MRS.)**

JUSTICE OF THE SUPREME COURT

(SGD) **R. C. OWUSU (MS.)**

JUSTICE OF THE SUPREME COURT

(SGD) **J. V. M. DOTSE**

JUSTICE OF THE SUPREME COURT

(SGD) **ANIN -YEBOAH**

JUSTICE OF THE SUPREME COURT

(SGD) **P. BAFFOE- BONNIE**

JUSTICE OF THE SUPREME COURT

(SGD) **N. S. GBADEGBE**

JUSTICE OF THE SUPREME COURT

COUNSEL

DR. AZIZ ABDUL BAASIT BAMBA FOR THE PLAINTIFF.

GRACE OPPONG (S S A) WITH HER AKUA GYAMFUA BOAKYE-ACHEAMPONG (ASA) FOR THE 1ST DEFENDANT.

TONY LITHUR WITH HIM CEPHAS MORTEY FOR THE 2ND DEFENDANT.

ACE ANKOMAH WITH HIM KWESI FYNN FOR THE 3RD DEFENDANT.

YONI KULENDI WITH HIM DENIS AGYEI DWOMOH ,MODESTA ASANTEWAA FOSU AND JOSEPH BERNARD ASHALLEY FOR THE 4TH DEFENDANT.