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ENFORCEMENT OF ARBITRAL AWARDS OBTAINED AGAINST STATES ON THE ASSETS OF STATE-OWNED ENTITIES: REFORMULATION OF THE ENGLISH TEST

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Abstract

A party who has successfully obtained an arbitral award against a State may find itself in need of enforcing that award against the assets of the owned entities of that State. To that end, English law requires the piercing of the corporate veil of the entity. Section II of this article lays out the case law that has led to the formulation of the current test in England, as well as the prevailing approaches around the world. Section III critically analyses the present English approach and demonstrates that it is based on policy considerations that underlie the doctrine of separate legal personality. There is arguably no need for strict adherence to the doctrine of separate legal personality in this situation. It will be seen that there are countervailing policy considerations that suggest a move away from the present English approach. Section IV contains the core submission of this article, proposing a two-stage inquiry that is largely applied by the courts in the US: first, whether the entity is controlled by the State; and second, whether the entity exercises a sovereign function. Section V concludes.

I INTRODUCTION

A *OVERVIEW*

Most modern States act not only in their sovereign capacity, but also don a commercial hat to pursue commercial activities. This approach concerns not only trade and commerce, but generally encompasses acts within the realm

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of private law.[1] Much of a State's commercial activities are run through its various State-owned entities ('SOEs').[2] In the past decade, the activities of these government entities worldwide have contributed to at least 10% of the world's Gross Domestic Product.[3] For many countries around the world, SOEs are crucial in representing their main source of capital.[4] For example, many countries' national airlines are State-owned,[5] and crucial sectors such as oil in Saudi Arabia and resource extraction in China are run by SOEs.[6] In line with the rapidly growing use of government entities to do business, much of a State's commercial activities are undertaken by their SOEs.[7]

The doctrine of State immunity prescribes the circumstances under which a State may be sued for its activities, commercial or otherwise.[8] There are two kinds of State immunity – absolute immunity[9] and restrictive immunity.[10] Absolute immunity prescribes that a State may not be sued in any court (whether its own or foreign) for any matters.[11] Restrictive immunity draws a distinction between sovereign acts and commercial acts, such that a State does not enjoy immunity for its commercial acts.[12] This distinction also holds true at the enforcement stage, such that enforcement is only allowed against those assets of the State which are put to commercial use.[13] While the extent

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1 Xiaodong Yang, *State Immunity in International Law* (Cambridge University Press, 2012) 75.

2 See Hans Christiansen, 'Balancing Commercial and Non-Commercial Priorities of State-Owned Enterprises' (2013) (Working Paper No 6, Organisation for Economic Co-Operation and Development Corporate Governance Committee, 18 January 2013) 17-41.

3 Garry D Bruton et al, 'State-Owned Enterprises Around the World as Hybrid Organizations' (2015) 29(1) *Academy of Management Perspectives* 92, 92.

4 Michael V Gestrin, 'State-Owned Enterprises Finding Bigger Role in Global Investment' *EastAsiaForum* (Blog Post, 27 November 2014) <https://eastasiaforum.org/2014/11/27/state-owned-enterprises-finding-bigger-role-in-global-investment/>.

5 'List of Government-Owned and Privatized Airlines (unofficial preliminary compilation)' *International Civil Aviation Organisation* (Web Page, 4 July 2008) <https://www.icao.int/sustainability/documents/privatizedairlines.pdf>.

6 Amir Guluzade, 'The Role of China's State-Owned Companies Explained' *World Economic Forum* (Blog Post, 7 May 2019) <https://www.weforum.org/agenda/2019/05/why-chinas-state-owned-companies-still-have-a-key-role-to-play/>.

7 Andrew Dickinson, 'State Immunity and State-Owned Enterprises' (2009) 10(2) *Business Law International* 97, 99.

8 See Yang (n 1) 1-5 where the author argues that the doctrine of State immunity is a principle of customary international law.

9 See *The Schooner Exchange v McFaddon* 11 US 7 Cranch, 116, 3 ed 287 (1812); *The Cristina* [1938] AC 485; *Alcom v Colombia* [1984] 1 AC 580.

10 *State Immunity Act 1978* (UK); *State Immunity Act 1979* (Singapore). See also Ministry of Foreign Affairs of the People's Republic of China (Web Page, 21 October 2023) <https://www.fmprc.gov.cn/eng/xwfw_665399/s2510_665401/2535_665405/202309/t20230905_11138090.html#:~:text=The%20Law%20on%20Foreign%20State%20Immunity%20affirms%20the%20fundamental%20principle,cases%20involving%20disputes%20arising%20out> detailing the amendment to China's laws on sovereign immunity from absolute to restrictive.

11 Yang (n 1) 7.

12 See Empire of Iran Case (1963) 45 ILR 57; *Marble Islands v I Congreso del Partido* [1983] AC 244.

13 James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 9th ed, 2019) 477-478.

of immunity differs, both doctrines give effect to the maxim *par in parem non habet imperium* — an equal exercises no authority over another equal.[14] The restrictive doctrine of State immunity offers a nuance to this rationale by recognising that where a State descends into the commercial arena, it is no longer acting on the basis of its sovereignty.[15]

For a party taking on a State, the preceding discussion is not quite conclusive.[16] Having successfully defused the State's immunity and prevailing on the merits, there is the question of enforcement, and whether the award or judgment may attach to the State's assets.[17]

An area where private investors most frequently take on States in dispute resolution is investment arbitration, typically referred to as Investor-State Dispute Settlement ('ISDS'). ISDS is often championed as a forum for private investors to seek legal recourse in a neutral venue away from the State's local courts.[18] Cementing this are Articles 53(1) and 54(1) of the International Convention on the Settlement of Investment Disputes between States and Nationals of other States ('ICSID Convention'),[19] which provide that disputing parties are to abide by, and comply with, the award and that awards are binding as between parties.[20] Yet, instances of States' non-compliance with awards are not infrequent.[21] It has been observed that as many as 30% of awards in favour of private investors remain unpaid by States.[22] Reports on this topic have also found that certain States continue to be recalcitrant in their non-compliance with arbitral awards.[23]

In these circumstances, it is understandable why private parties might wish to seek enforcement against the assets of SOEs after obtaining an arbitral award against the State. One such attempt was before the Privy Council in the

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14 Arrest Warrant (Democratic Republic of the Congo v Belgium) (2002) ICJ Reports 3, paras 72-73 (Judges Higgins, Kooijmans, and Buergenthal).

15 Crawford (n 13) 470.

16 George K Foster, 'Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments against States and their Instrumentalities, and Some Proposals for its Reform' (2008) 25(3) *Arizona Journal of International and Comparative Law* 665, 666-667.

17 Alexander Orakhelashvili, *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar Publishing, 2015) 372.

18 Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73(4) *Fordham Law Review* 1538.

19 The International Centre for Settlement of Investment Disputes ('ICSID') is an arbitral institution that facilitates the resolution of disputes in arbitration between private investors and States. ICSID was set up under the ICSID Convention.

20 *ICSID Regulations and Rules* ('ICSID Convention') Article 53(1), 54(1).

21 See *Walter Bau Ag (In Liquidation) v The Kingdom of Thailand* (1 July 2009) UNCITRAL Award; *Bernardus Henricus Funnekotter and Others v Republic of Zimbabwe* (22 April 2009) ICSID Case No ARB/05/6; Petrobart Limited v The Kyrgyz Republic (29 March 2005) SCC Case No 126/2003.

22 Emmanuel Gaillard and Ilijia Mitrev Penusliski, 'State Compliance with Investment Awards' (2021) 35(3) *ICSID Review - Foreign Investment Law Journal* 540, 587.

23 See Nikos Lavranos, 'Report on Compliance with Investment Treaty Arbitration Awards 2023' *International Law Compliance Index* (Web Page, 26 October 2023) <https://www.internationallawcompliance.com/wp-content/uploads/2023/10/FULL-Report-2023-DEF-25-OCT-.pdf>

UK ('UKPC') in the matter of *La Generale des Carrieres et des Mines v FG Hemisphere Associates LLC* ('*Gecamines*').[24] In that matter, the respondent took assignment of two arbitral awards against the Democratic Republic of the Congo ('DRC') and sought enforcement of those awards against the assets of a DRC-owned company. The UKPC held that where a State forms a separate juridical entity for commercial purposes, there is a strong presumption that its separate corporate status shall not be disturbed.[25] It will 'take quite extreme circumstances to displace the presumption'.[26]

B *EXAMINING THE UKPC'S APPROACH IN GECAMINES*

As opposed to being confined to the enforcement stage, the consequences of the UKPC's approach in *Gecamines* were also felt by SOEs seeking sovereign immunity from suit. In *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Iraq* ('*Taurus Petroleum*'),[27] the English High Court extended this principle of strict adherence to the separate legal personality of SOEs pleading sovereign immunity to the jurisdictional stage. This is despite the existing availability of sovereign immunity to SOEs, at least in theory.[28] The tension that arises in taking this position is that award creditors who have prevailed in their hard-fought battle against the State may be left with nothing but a victory on paper.[29] This is a problem that has received much academic treatment, especially in the context of investment arbitration.[30] As one author observed, 'it is preposterous that a private party, after having put all efforts into arbitration against a State and obtaining judgment or leave to enforce an award, finds himself (or itself) unable to collect money to which that party is entitled'.[31]

The UKPC's insistence on the doctrine of separate legal personality is perhaps unsurprising in light of similar sentiments expressed by the UK Supreme Court ('UKSC') in *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* ('*Dallah*').[32] The

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24 *La Generale des Carrieres et des Mines v FG Hemisphere Associates LLC* [2012] UKPC 27 ('*Gecamines').*

25 Ibid para 29.

26 Ibid.

27 *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Iraq* [2013] 2 CLC 835.

28 Hazel Fox and Philippa Webb, *The Law of State Immunity* (Oxford University Press, 3rd ed, 2013) 178.

29 See Andrea K Bjorklund, 'Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes' (2010) 21(1-4) *American Review of International Arbitration* 211, 213-214.

30 Hazel Fox, 'Sovereign Immunity and Arbitration' in Julian DM Lew (ed), *Contemporary Problems in International Arbitration* (Springer, 1987) 323, 325; Vincent O Nmehielle, 'Enforcing Arbitration Awards Under the International Convention for the Settlement of Investment Disputes (ICSID Convention)' (2001) 7(1) *Annual Survey of International and Comparative Law* 21, 35; Christoph H Schreuer, *State Immunity: Some Recent Developments* (Cambridge University Press, 1988) 125.

31 Nmehielle (n 30) para 35.

32 *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46.

controversy in this matter surrounded whether Dallah's contract with a trust set up by Pakistan, Awami Hajj Trust, extended to bind Pakistan itself.[33] Although Dallah successfully obtained an International Chamber of Commerce arbitral award against Pakistan,[34] the UKSC refused enforcement against Pakistan in England on the basis that Pakistan and the trust were separate legal persons. Given that Pakistan was not a signatory to the arbitration agreement, the award could not be enforced against them.[35] The UKPC's decision in *Gecamines* is consistent with this line of jurisprudence.

As will be discussed, the law on State immunities needs not be further bolstered by the principle of separate legal personality of a State's SOEs. The goals of international commerce arguably merit the separate legal personality of SOEs being set aside for States to assume liability for their corporate wrongs. The concepts of State control and the exercise of sovereign functions are also invoked in the attribution of conduct to the State under international law, and ought to suffice in the present discussion of whether a State's debts may be enforced against its SOEs.

C *PROPOSED REFORMULATION OF THE TEST TO BE APPLIED*

The thesis of this article is as follows. When considering whether an award obtained against a State may be enforced against an SOE's assets, one should not ask whether the corporate veil should be pierced, as this poses an overly high threshold. The US approach is instructive; for example, the US Supreme Court's decision in *First National City Bank v Banco Para el Comercio Exterior de Cuba* ('*Bancec*')[36] held that the US courts are guided by the *Bancec* factors[37] in deciding whether there is a principal-agent relationship[38] between the State and the SOE. The English courts, in being guided by this approach, should inquire whether the State controls the SOE and whether the SOE is exercising sovereign functions.[39]

Further, the US approach provides enough safeguards to ensure that not all of the State's entities' assets will be left vulnerable to enforcement efforts, while still holding the State to its liabilities as a consequence of its pursuit of commerce. In light of the immunities that already exist both at the jurisdictional stage,[40] and at the enforcement stage,[41] this article argues that

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33 Ibid paras 1-2; Jan Kleinheisterkamp, 'Lord Mustill and the Courts of Tennis – *Dallah v Pakistan* in England, France and Utopia' (2012) 75(4) *Modern Law Review* 639, 652.

34 *Dallah* (n 32), para 9.

35 Ibid para 66.

36 *First National City Bank v Banco Para el Comercio Exterior de Cuba*, 462 US 611 (1983) ('*Bancec*').

37 The *Bancec* factors are explored further elsewhere in this article.

38 The issue of whether there is a principal-agent relationship is explored further elsewhere in this article.

39 See *FG Hemisphere Associates LLC v La Generale des Carrieres et des Mines* [2010] JRC 195 para 12 where the Royal Court of Jersey held that this was the correct test to be applied.

40 *State Immunity Act 1978* s14(2); *Foreign Sovereign Immunities Act 1976* s 1603. See Fox and Webb (n 28) 177, 251.

41 Fox and Webb (n 28) 209-215.

the adoption of the US approach is a more balanced allocation of commercial risks between a State and a private party.

II THE PREVAILING POSITIONS AROUND THE WORLD

In this section, the article first sets out the UKPC's approach in *Gecamines*, as well as the resulting extension of this approach in *Taurus Petroleum*. The various approaches in the US, Canada and France are also compared.

A *ENGLAND*

1 *PRESUMPTION OF SEPARATE JURIDICAL PERSONALITY FOR QUESTIONS OF LIABILITY AND ENFORCEMENT*

In England, the current position requires award creditors to pierce the corporate veil of the SOE to attach an award obtained against the State to the assets of the SOE. This is demonstrated by the case of *Gecamines*.[42] In that case, FG Hemisphere attempted to enforce an award obtained against the DRC on the assets of Gecamines, a DRC SOE. These assets included Gecamines' shares held in a Jersey company and monies due from the Jersey company to Gecamines under a sales contract.[43] Ultimately, the UKPC was not persuaded.[44] The chief concern of the UKPC was that the DRC had formed a separate juridical personality 'for what are on the face of it commercial or industrial purposes'.[45] In such circumstances, the DRC (or any other State for that matter) and its SOE should not be responsible for each other's liabilities.[46] The only way that the award creditor who was victorious against the State can attach the award to an SOE's assets is by showing that 'the affairs of the entity and the State were so closely intertwined and confused that the entity could not properly be regarded … as distinct from the State'.[47] Alternatively, the award creditor may also succeed if it can prove that the State has interfered with the SOE such that it would justify piercing the SOE's corporate veil.[48]

Before the UKPC in *Gecamines*, the award creditor argued that the test ought simply to be whether the SOE is a State organ.[49] This argument sought to draw support from Lord Denning's judgment in the English Court of Appeal decision of *Trendtex Trading v Bank of Nigeria* ('*Trendtex*').[50] Lord Denning held that to determine whether an organisation is an organ of the State, the functions and control of the organisation are instructive. On the totality of the evidence, the question is 'whether the organisation was under government

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42 *Gecamines* (n 24).
43 Ibid para 1.
44 Ibid para 78.
45 Ibid para 29.
46 Ibid.
47 Ibid.
48 Ibid para 30.
49 Ibid para 20.
50 *Trendtex Trading v Bank of Nigeria* [1977] 1 QB 529.

control and exercised governmental functions'.[51] This argument did not find favour with the UKPC in *Gecamines*, which held that the test in *Trendtex* is not conclusive as to whether the SOE possesses a separate juridical personality.[52] Simply put, an SOE may well be a State organ under the *Trendtex* framework, but for the purposes of enforcement, it is still a separate juridical entity.[53]

To show this, the UKPC considered a proposal which had been made to convert the SOE into a stock company,[54] as well as the SOE's constitution.[55] There had been plans to convert the SOE into a company limited by shares held by private investors since 2009.[56] Notwithstanding the fact that this conversion had not actuated, the UKPC held that this 'was in no way decisive' of whether the SOE is a separate juridical entity.[57] Surveying the constitution of the SOE, the UKPC acknowledged that the SOE was responsible for a vitally important sector of the DRC's economy.[58] The UKPC also did not seem to reject the fact that the running of the SOE's day-to-day activities may be 'reviewed and vetoed by other State authorities'.[59] Despite this, the UKPC reached the finding that the SOE maintained its status as a separate entity, and that responsibility for an important sector of the economy 'may be said of many SOEs in centrally planned or dirigiste economies'.[60]

At the heart of the UKPC's position was its insistence on the SOE's separate legal personality. The consequence of this legal personality, so goes the argument, is that a company can own property in its name.[61] Expectedly, the shareholders of the company have neither a legal nor a beneficial interest in the company's property.[62]

2 *THE APPLICATION OF GECAMINES TO THE QUESTION OF IMMUNITY*

Gecamines has therefore made clear that an SOE is not automatically assimilated with the State for the purposes of liability and enforcement. Where immunity is concerned, *Trendtex* held that, as long as there is governmental control and the corporation exercises governmental functions, the corporation is a State organ.[63] The UKPC in *Gecamines* confined the *Trendtex* test to the question of immunity from suit.[64] It was not immediately

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51 Ibid para 560.
52 *Gecamines* (n 24) paras 16-18, 25.
53 Ibid para 16.
54 Ibid para 56.
55 Ibid para 52.
56 Ibid para 56.
57 Ibid.
58 Ibid para 54.
59 Ibid.
60 Ibid.
61 *Woolfson v Strathclyde Regional Council* [1978] SC (HL) 90, 97.
62 Hans Tjio, Pearlie M C Koh and Pey Woan Lee, *Corporate Law* (Academy Publishing, 2015) 06.009; *Macaura v Northern Assurance Co Ltd* [1925] AC 619, 626-27.
63 *Trendtex* (n 50) para 560.
64 *Gecamines* (n 24) para 28.

clear why a different test is applied when a corporation is seeking immunity from suit, compared with immunity from enforcement.[65]

Indeed, the test in *Gecamines* has now been extended to the question of immunity from suit. The result is that the insistence on an SOE's separate juridical personality now seems to work against the SOE when it pleads sovereign immunity at the jurisdictional stage. In *Taurus Petroleum*,[66] the English High Court was faced with the question of whether the Iraqi State Oil Marketing Company is a separate entity from the Republic of Iraq or whether they are one and the same, such that it should be accorded immunity.[67] The English High Court presumed, as a starting point, that the Iraqi State Oil Marketing Company's separate corporate status should be respected, since the Republic of Iraq formed it for commercial purposes with its own management and budget.[68] The court eventually found that this presumption was not rebutted. Although the Ministry of Oil of the Republic of Iraq exercised 'close overall supervisory function over the operations and affairs',[69] the Iraqi State Oil Marketing Company was not an emanation of the Republic of Iraq. Therefore, sovereign immunity was not extended to the Iraqi State Oil Marketing Company.[70] This was upheld by the English Court of Appeal.[71]

The decision of *Taurus Petroleum* reflects the consequences of the UKPC's decision in *Gecamines*. Insofar as the dispute concerns creditors of the State seeking to enforce against an SOE's assets, *Gecamines* may be hailed as giving full effect to the SOE's separate legal personality. On the other hand, when an SOE seeks refuge in the State's immunity from suit, the same strict position in *Gecamines* works to disapply any such immunity.[72]

B *UNITED STATES*

1 *PRESUMPTION OF SEPARATE JURIDICAL PERSONALITY AND THE EXCEPTIONS OF PRINCIPAL-AGENT, FRAUD AND INJUSTICE*

In the US, the position is similarly that SOEs are to be accorded the presumption of a separate legal status.[73] However, this presumption may be displaced where it can be shown that there is a principal-agent relationship between the State and the SOE, or where recognition of this presumption will

65 Ibid paras 28-29.
66 *Taurus Petroleum* (n 27).
67 Ibid para 855.
68 Ibid para 860.
69 Ibid.
70 Ibid.
71 *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Iraq* [2014] 2 All ER (Comm) 1037, paras 40-45.
72 Cameron Miles, 'State Debts and State-Owned Corporations: Trans-Atlantic Perspectives' (2021) 81 *QIL Zoom-Out* 31, 47.
73 *Bancec* (n 36) paras 626-627.

result in fraud or injustice.[74] In the case of *Bancec*, the US Supreme Court was faced with an issue similar to that in *Gecamines*. Banco Para el Comercio Exterior de Cuba ('Bancec') was a credit institution established by the Cuban government. Bancec sought to call on a letter of credit against the First National City Bank ('Citibank'). Before Bancec brought an action against Citibank for the letter of credit, the Cuban government seized all of Citibank's assets in Cuba. In Bancec's proceedings against Citibank pertaining to the letter of credit, Citibank sought as a counterclaim a setoff for the value of its seized assets. The question before the Supreme Court was whether Bancec, a separate juridical entity, may be held liable for the debts of Cuba.[75]

The US Supreme Court duly recognised the presumption that 'government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such'.[76] However, in circumstances where the corporation 'is so extensively controlled by its owner that a relationship of principal and agent is created',[77] the liabilities of the principal and agent may be interposed between one another.[78] The Supreme Court held that to give effect to Bancec's separate juridical personality would be to allow the Cuban government a remedy in US courts which it could not obtain without waiving its immunities.[79]

Following the decision in *Bancec*, the US Supreme Court has recognised factors that aid in the rebuttal of the presumption of separateness.[80] In *Rubin et al v Islamic Republic of Iran*,[81] the five factors recognised were: (a) the level of economic control by the government; (b) whether the entity's profits go to the government; (c) the degree to which government officials manage the entity or otherwise have a hand in its daily affairs; (d) whether the government is the real beneficiary of the entity's conduct; and (e) whether adherence to separate identities would entitle the foreign State to benefits in US courts while avoiding its obligations.[82]

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[74] Ibid para 628.

[75] Ibid para 613.

[76] Ibid para 626.

[77] Ibid para 628.

[78] Ibid.

[79] Ibid para 631.

[80] Comment, '*Rubin v. Islamic Republic of Iran:* Seventh Circuit Holds that FSIA Does Not Provide Freestanding Basis to Satisfy Judgment Against State Sponsors of Terrorism' 830 F.3d 470 (7th Cir. 2016)' (2016) 130(2) *Harvard Law Review* 761, 763-764.

[81] *Rubin et al v Islamic Republic of Iran* 138 S Ct 816 (2018) ('*Rubin*').

[82] *Rubin* (n 81) paras 822-823. See also *Walter Fuller Aircraft Sales Inc v Republic of Philippines*, 965 F2d 1375, 1380 (1992); *Flatow v Islamic Republic of Iran*, 308 F3d 1065, 1071 (2002); Jennifer Atwood, 'Rubin v Islamic Republic of Iran: The Supreme Court's Textually Veiled Decision to Give State Terror Sponsors Immunity' (2018) 96(4) *Nebraska Law Review* 977, 993.

2 *APPLICATION OF THE BANCEC FACTORS AS AN EXCEPTION TO SEPARATE JURIDICAL PERSONALITY*

One might observe that the decision in *Bancec* was necessitated by the sheer injustice that would have occurred if Citibank were denied recovery. Indeed, the Cuban government had not only nationalised Citibank's assets, but had also dissolved Bancec and transferred its assets to other corporations.[83] Justice O'Connor recognised this in holding that Bancec's separate juridical personality should be disregarded.[84] However, the *Bancec* factors have been subsequently applied in the US courts even in factual matrices that seem less compelling than those in *Bancec* itself.

One such case was that of *Crystallex International Corporation v Bolivarian Republic of Venezuela* ('*Crystallex*').[85] In that matter, the claimant, Crystallex, invoked a bilateral investment treaty ('BIT') between Canada and Venezuela after Venezuela expropriated Crystallex's gold deposits and transferred them to a Venezuelan SOE. Having been victorious in arbitration, Crystallex sought to enforce its award against Venezuela but was unable to locate Venezuelan assets in the US. Thus, it sought to attach its claim against shares held by the aforementioned Venezuelan SOE in a wholly-owned US subsidiary.[86] Applying the *Bancec* factors and on the evidence before it,[87] the US District Court held that Venezuela had extensive economic control over the SOE,[88] the SOE's profits 'ultimately run to the Venezuelan government',[89] the Venezuelan government had 'direct and extensive control'[90] over the appointment of directors and daily affairs, Venezuela 'extracts value from [the SOE] without paying [them]',[91] and the US legal system 'is the backstop that gives substantial assurance to investors who buy [the SOE's] debt'.[92] Therefore, Crystallex was allowed to attach its arbitration award to the Venezuelan SOE's assets.[93]

Beyond its specific outcome, *Crystallex* crystallised the application of the *Bancec* factors.[94] First, there is no need for a link between the claimant's injury and the corporation whose assets are being sought.[95] Second, there is no strict requirement of principal-agent; instead, the claimant can show

83 *Bancec* (n 36) para 611.

84 Ibid para 631.

85 *Crystallex International Corporation v Bolivarian Republic of Venezuela*, 932 F3d 126 (2019).

86 *Crystallex* (n 85) para 132.

87 See Kevin D Benish, 'Introductory Note to Crystallex Int'l Corp v Bolivarian Rep Venez (3d Cir)' (2019) 60(2) *The American Society of International Law* 147, 148.

88 *Crystallex* (n 85) para 145.

89 Ibid para 146.

90 Ibid para 148.

91 Ibid.

92 Ibid para 149.

93 Ibid para 150. See also Mark E Wojcik, 'Recent Developments in International Litigation' (2020) 55(2) *Tort Trial and Insurance Practice Law Journal* 409, 409.

94 Miles (n 72) 47.

95 *Crystallex* (n 85) para 141.

'complete domination of the subsidiary'.[96] Third, there is no need to consider third-party bondholders.[97] Fourth, the court may consider events after the writ is issued in analysing the relationship between the State and the SOE.[98] Fifth, the standard of proof is one of preponderance of evidence,[99] as opposed to the clear and convincing evidence standard.[100]

Interestingly, the UKPC in *Gecamines* considered Justice O'Connor's decision in *Bancec* to be 'generally instructive'.[101] Though the UKPC did not expressly endorse the entirety of *Bancec*'s approach, it is argued that both decisions are substantially similar when it comes to affording SOEs the presumption that they were formed as a separate juridical entity, such that the SOE and the State need not bear each other's liabilities.[102] However, the UKPC also identified two areas of *Bancec* that were not readily transposable to the English context. First, it was pointed out that the facts of *Bancec* would never give rise to the question of piercing the veil before the English courts, since Bancec was already dissolved by the time of the proceedings.[103] Second, the UKPC expressed doubt (though inconclusive) on the principal-agent analysis in *Bancec*. The UKPC found the analysis more befitting of a situation where the State is to be held liable for the SOE's activities, leaving open its applicability in the reverse situation where the SOE is being held liable for the State's activities.[104]

C *CANADA*

In Canada, the *Bancec* factors have been adopted and applied.[105] The principal-agent approach held in *Bancec*, though doubted in *Gecamines*,[106] has been applied in the lower courts of Canada. In the case of *Roxford Enterprises SA v Cuba (TD)* ('*Roxford Enterprises*'),[107] Roxford Enterprises obtained default judgment against the government of Cuba for a breach of contract. They then applied, *ex parte*, to attach that judgment to the assets of Cubana, a Cuban State-owned airline, on the basis that Cubana is an organ of Cuba. The Federal Court of Canada was faced with the novel issue of whether Cubana could be said to be liable for Cuba's debts.[108] The Federal Court

96 Ibid para 142.
97 Ibid para 144.
98 Ibid.
99 This is the standard of assessing evidence on the balance of probabilities. See generally Neil Orloff and Jery Stedinger, 'A Framework for Evaluating the Preponderance-of-the-Evidence Standard' (1983) 131(5) *University of Pennsylvania Law Review* 1159.
100 *Crystallex* (n 85) para 144.
101 *Gecamines* (n 24) para 35.
102 Ibid paras 29 38.
103 Ibid para 39.
104 *Gecamines* (n 24) para 39.
105 See Peter Spiro, 'Piercing the Corporate Veil in Reverse: Comment on *Yaiguaje v. Chevron Corporation*' (2019) 62(2) *Canadian Business Law Journal* 231, 240-1.
106 *Gecamines* (n 24), para 39.
107 *Roxford Enterprises SA v Cuba (TD)* [2003] 4 FC 1182.
108 *Gecamines* (n 24) para 29.

considered the principal-agent exception in *Bancec*, noting that the principle was 'both logical and sound and should be applied to the present case'.[109] On the facts, the Federal Court found that there was no similarly extensive control of Cubana by Cuba, Cubana hired its own employees and maintained its own financial facilities, and the board of directors of Cubana wielded the full suite of powers that were usual to directors.[110] Thus, the Federal Court did not allow the enforcement against Cubana's assets.[111]

The decision of *Roxford Enterprises* preceded the appellate recognition of the *Bancec* factors in the US, as well as decisions such as *Crystallex*. It is notable that the Federal Court used language such as 'alter ego'[112] and 'piercing the corporate veil'.[113] Nevertheless, the Federal Court's inquiry was similar to the consideration of the *Bancec* factors and heeded the caution of Justice O'Connor in *Bancec* that such 'worn epithets' should never substitute rigorous analysis.[114] It is suggested here that the outcome in *Roxford Enterprises* is less indicative of Canadian judicial attitudes in disallowing enforcement against SOEs, and may be more reflective of the evidence led before the court. Roxford Enterprises had not cross-examined Cubana's witnesses on their affidavits asserting that Cubana's internal structures indicated a separate legal personality from Cuba.[115] Instead, Roxford Enterprises maintained their case on evidence adduced from Cubana's website to prove that Cubana was a State organ, along with certain extracts from the Constitution of the Republic of Cuba, and inquiries that had been made to others.[116] In these circumstances, the outcome in *Roxford Enterprises* may be confined to its facts.

D *FRANCE*

1 *WHETHER THE SOE HAS SUFFICIENT FUNCTIONAL INDEPENDENCE*

In France, the inquiry pursued by the courts is whether the SOE has sufficient functional independence. If answered in the negative, enforcement against the SOE's assets would be allowed. The UKPC in *Gecamines* examined decisions from the French Cour de Cassation where the creditor of a State was allowed to attach the award to the assets of an SOE.[117] One of those decisions was Appeal No. 04-15.388,[118] a dispute concerning the attempt by a creditor

[109] Ibid para 30.
[110] Ibid para 35.
[111] Ibid para 41.
[112] Ibid para 40.
[113] Ibid para 4.
[114] *Bancec* (n 36) [622-623] citing *Berkey v Third Avenue R. Co.*, 244 NY 84, 155 NE 58 (1926).
[115] *Roxford Enterprises* (n 107) para 38.
[116] Ibid para 8.
[117] *Gecamines* (n 24) para 41.
[118] Cour de Cassation [French Court of Cassation] 04-15.388, 14 November 2007 reported in (2007) Bull, I, N° 355.

of Cameroon, Winslow Bank & Trust, to enforce the State's liabilities on the assets of a Cameroonian SOE, Company National Hydrocarbons. On appeal before the Cour de Cassation, the SOE disputed the lower court's finding that the SOE was an emanation of the State. The Cour de Cassation dismissed the appeal, having found that the SOE's capital was entirely owned by Cameroon, its purpose being to promote the development of hydrocarbons in the country. The Court also found that the company was under the supervision of Cameroon — evident from the political representatives on the board of the SOE. The SOE did not have 'sufficient functional independence' to invoke legal autonomy from the State.[119]

The UKPC commented on the outcome in this case, suggesting that it is possible to regard this decision as one where the SOE and the State had no separate existence.[120] It must be recalled that the test suggested by the UKPC involves a very high threshold: the State must have interfered with the SOE in such a way that justifies piercing the corporate veil.[121] Indeed, one should question whether the test adopted by the Cour de Cassation may be more realistic as compared to the stringent test preferred by the UKPC.

2 *THE TEST OF PIERCING THE CORPORATE VEIL IMPOSES A MUCH HIGHER STANDARD THAN THAT ADOPTED IN THE COUR DE CASSATION*

To lift the corporate veil of a company, it must be shown that there has been 'some impropriety' in the control of the company by the wrongdoer.[122] Specifically, the wrongdoer must have controlled the company as a 'device or facade to conceal their wrongdoing'.[123] The corporate veil of the company cannot be pierced merely to achieve the ends of justice.[124] Respectfully, the words 'alter ego'[125] and 'sham or façade'[126] do little to aid in the inquiry of whether the company maintains its juridical independence from its owner,[127] in this case, the State. What we do know of this inquiry is that it is a last-resort remedy that may only be invoked in the most exceptional circumstances.[128]

Applying this to the dispute before the French Cour de Cassation, it is unclear whether the same outcome would have been reached. It was found that Cameroon was the sole owner of the SOE, the SOE was formed to promote the State's interests in an industry, its board of directors consisted of political members of the State and some services rendered to the State were

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119 Ibid para 5.
120 *Gecamines* (n 24) para 41.
121 Ibid paras 29-30.
122 *Ben Hashem v Ali Shayif* [2008] EWHC 2380, para 161.
123 Ibid para 163.
124 *Adams v Cape Industries Plc* [1990] 1 Ch 433, 536 – 7; *Ben Hashem v Ali Shayif* [2009] 1 FLR 115, para 160; Tjio et al (n 62) para 06.028.
125 *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308, para 96.
126 *Woolfson v Strathclyde Regional Council* [1978] SC(HL) 90, 96.
127 *Bancec* (n 36) 622; Tjio et al (n 62) para 06.041.
128 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1, para 35.

not remunerated.[129] The first three features mentioned are arguably analogous to the dispute in *Salomon v Salomon*,[130] where Mr Salomon was the owner of a company created to advance his interests, in which he was also a director.[131] It is argued that there was nothing wrong with Cameroon incorporating and running the company the way it did. It is also posited that even if the SOE had provided unremunerated services to Cameroon, it is far-fetched to argue that the SOE was an alter ego or that it was a sham or a facade of a company. In sum, it is arguable that if the UKPC's reasoning in *Gecamines* were applied to the French case at hand, a different result would have been reached.[132]

III CRITICAL ASSESSMENT OF THE APPROACH IN GECAMINES

It cannot be denied that the approach in *Gecamines* has some merit. There are at least two justifications for this approach, foremost of which is that it preserves a fundamental tenet of company law — a company's separate legal personality. Further, the *Gecamines* approach also prevents a situation where an SOE's assets are made freely available as though they were the State's. Indeed, this article recognises that it is an equally undesirable situation to allow a State's creditors to run helter-skelter over all of the State's assets. However, an approach as strict as that in *Gecamines* may not be justifiable simply to preserve a State's assets. In any event, there may arguably be no need for overprotection of a State's assets if these assets were descended into the commercial arena by the State itself.

A *THE GECAMINES APPROACH PRESERVES THE SEPARATE LEGAL PERSONALITY OF AN SOE*

The preservation of the separate legal personality of an SOE is arguably the strongest argument in favour of the *Gecamines* approach. The UKPC in *Gecamines* was at pains to establish that there is a 'need for full and appropriate recognition of the existence of separate juridical entities established by States, particularly for trading purposes'.[133] As a starting point, it cannot be seriously disputed that a duly incorporated company takes on a separate legal personality. It is also uncontroversial that an SOE is distinct and independent from the State that owns it.[134] To give this practical meaning, the SOE's independence cannot be disregarded too easily, save in instances where the corporate veil of the SOE may be lifted.[135]

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129 Cour de Cassation (n 118) para 5.
130 *A Salomon and Co Ltd v Aron Salomon* [1897] AC 23 ('*Salomon*').
131 Ibid para 23-4.
132 *Gecamines* (n 24) para 41.
133 Ibid para 28.
134 James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002) 112.
135 *Gecamines* (n 24) paras 28-29; Tjio et al (n 62) para 06.018.

1 *JUSTIFICATIONS FOR SEPARATE LEGAL PERSONALITY DO NOT APPLY AS STRONGLY TO STATES*

It is argued, however, that there may be occasions when it is justified to consign an SOE's separate legal personality to the backseat. The law is no stranger to disregarding an SOE's separate legal personality in certain circumstances (apart from instances where the corporate veil is lifted). For example, at the jurisdictional stage, it is accepted that an SOE can plead sovereign immunity.[136] When such an argument is made, the SOE's separate legal personality does not automatically bar its claim of sovereign immunity.

The reasons supporting the existence of the principle of separate legal personality do not apply as strongly to States as they do to natural persons and private corporations.[137] The principle of separate legal personality was formulated for the facilitation of commerce without fear of personal bankruptcy.[138] These traditional concerns do not apply with full force to States and SOEs. In the case of *Salomon v Salomon*, Lord Macnaghten observed that one of the 'principal reasons which induce persons to form private companies…[is] the desire to avoid the risk of bankruptcy'.[139] The principle of separate legal personality ensures this through the formation of a private company with limited liability that will not expose its owner to 'the harsh provisions of the bankruptcy law'.[140] As a sovereign, a State is not subject to traditional bankruptcy proceedings, be it locally or internationally.[141]

A State also has the power to incorporate SOEs under special legislative directions, unlike ordinary companies.[142] That is not to say that the principle of separate legal personality is foreign to SOEs. Indeed, it might even be integral to the formation and the running of SOEs, given the key roles that some SOEs undertake in the economy.[143] The suggestion here is narrower: SOEs, as a matter of policy,[144] should retain their separate legal personality, save in circumstances justifying otherwise — circumstances in addition to those that justify lifting the corporate veil.

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136 *State Immunity Act 1978* (UK) s 14(2); *Foreign Sovereign Immunities Act 1976* (UK) s 1603; see Fox and Webb (n 28) paras 177, 251.

137 The term 'private' is used to refer to a non-government corporation.

138 *Salomon* (n 130) para 52.

139 Ibid para 52.

140 Ibid.

141 International Law Association, Sovereign Bankruptcy Study Group, Johannesburg (7 – 11 August 2016) chaired by Philip Wood 2.

142 Organisation for Economic Co-Operation and Development, *Ownership and Governance of State-Owned Enterprises: A Compendium of National Practices* (26 April 2018) 18 – 9.

143 International Monetary Fund, *Fiscal Monitor* (April 2020) 47, 47 – 8.

144 See Jonathan Macey and Joshua Mitts, 'Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil' (2014) 100(1) *Cornell Law Review* 99, 101 where the authors opine that piercing the corporate veil should be done for achieving policy objectives.

2 *THE SEPARATE LEGAL PERSONALITY OF SOES IS EFFECTIVELY DISREGARDED WHEN THEY PLEAD SOVEREIGN IMMUNITY*

As alluded to above, it is not uncommon for an SOE to argue that it should be treated as the State in order to invoke the doctrine of sovereign immunity against suit. It is acknowledged that such an argument is based on the doctrine of attribution. The SOE in this situation will make the argument that the allegedly wrongful conduct pleaded by the opposing party is *jure imperii* as opposed to *jure gestionis*.[145] While this situation does not involve the lifting of the SOE's corporate veil as much as it involves attribution, the effect is the same. The UKPC in *Gecamines* explained this by pointing to the nature of the doctrine of restrictive immunity, stating that the rise of restrictive immunity permitted an SOE to retain its separateness 'without it thereby foregoing immunity in respect of any sovereign activity which it undertook'.[146]

The rationale and need for this are not disputed.[147] At the same time, asserting that an SOE retains its separate juridical personality whilst allowing it to invoke sovereign immunity is a legal fiction. When an SOE invokes sovereign immunity, it is in fact taking refuge as a State organ in order to dispense with the suit at the jurisdictional stage.[148] Effectively, the SOE's separate juridical personality takes a backseat in favour of policy reasons necessitating otherwise. The key observation from this is that the law is willing to look past an entity's separate juridical personality when policy justifies it. On this basis, it is not entirely defensible to insist on an SOE's separate juridical personality when an award creditor seeks to enforce an award against the SOE's assets.

B *THE GECAMINES APPROACH ENSURES THAT THE ASSETS OF THE SOE ARE NOT OVERLY EXPOSED*

In its judgment in *Gecamines*, the UKPC framed the issue at hand as whether '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'.[149] The UKPC was concerned that any other approach would render SOEs exposed to 'an entirely unpredictable extent'.[150] The concerns at play here are live and valid. To the extent that SOEs are run as pure commercial entities which exercise no sovereign function, the UKPC's reasoning applies with full force. It is unrealistic and uncommercial to impose State debts on such SOEs

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145 Fox and Webb (n 28) 23 *Jure imperii* refers to those acts of a State which it carries out in its sovereign capacity, while *jure gestionis* refers to those acts of a State which it carries out in its commercial capacity.

146 *Gecamines* (n 24) para 11.

147 See generally Erwin Chemerinsky, 'Against Sovereign Immunity' (2001) 53(5) *Stanford Law Review* 1201 for a contrasting account on the rationale underlying sovereign immunity.

148 *Trendtex* (n 50) paras 559-560.

149 *Gecamines* (n 24) para 3; Justin Harvey-Hills, 'State-Owned Companies are not the State' (2013) 17(1) *The Jersey & Guernsey Law Review* 41, 49.

150 *Gecamines* (n 24) para 75.

just because they are State-owned. Further, it is arguable that if the assets of SOEs are left overly exposed to the creditors of States, it will stifle the participation of States in international commerce. The approach in *Gecamines* ensures that the States' creditors may only have recourse to the SOE's assets in the most rare and exceptional circumstances.

Notwithstanding the policy arguments in favour of the *Gecamines* approach, there are competing arguments. It is argued that a shift away from the *Gecamines* approach can in fact facilitate commerce and commercial certainty by allowing States and SOEs to ringfence certain assets and avoid a situation where all of the SOE's assets are left open for the taking.

It is useful to recall the factual scenario in issue: A is victorious in arbitration against State X. A seeks to enforce the arbitral award in a jurisdiction where State X has enforceable assets. Prior to the dispute, State X has (lawfully) dispersed its assets among its various SOEs. A is left with a victory on paper.

Following this scenario, if State X chooses to disperse its assets among SOEs engaged purely in commercial activities and exercising no sovereign functions, then those assets should not be subject to enforcement. On the other hand, if State X's assets are left with SOEs controlled by it and exercising sovereign functions, there is arguably less objection in treating those assets as though they were the State's for the purposes of enforcement. In the former hypothetical, it is presumed that the SOE runs on its own budget, with its own agents and its profits are not entirely refunnelled into the State but are used for business activities as well. Whereas in the latter hypothetical, the SOE is fed with a State budget, equipped with board members or other company agents from the State itself and any profit is stripped and redirected to the State.[151] When this is the case, it is argued that policy considerations weigh in favour of allowing the award creditor to enforce against the SOE's assets.

When a State conducts commercial activities, the law affords it a number of ways to protect itself and its assets — including by invoking sovereign immunity from jurisdiction and execution.[152] Conversely, non-State parties (i.e. natural persons and purely private entities) are not afforded such immunities. Therefore, the risk assumed by non-State parties when contracting with States is much higher. For good reasons, a non-State party cannot easily identify the available assets of a State prior to contracting.[153] There are limited measures that a non-State party can take against a State

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[151] See Mark C Weidemaier, 'Piercing the (Sovereign) Veil' (2021) 46(3) *Brigham Young University Law Review* 795, 823 – 825 for a discussion on States' control over SOEs.

[152] See Fox and Webb (n 28) 209 – 215; see also *Kingdom of Spain v Infrastructure Services Luxembourg SÀRL and Anor* [2023] HCA 11 at paras 46-47 for an explanation of the difference between recognition, enforcement, and execution.

[153] Fox and Webb (n 28) para 214; Ernest K Bankas, *The State Immunity Controversy in International Law* (Springer, 2nd ed, 2022) 457.

prior to the resolution of the dispute to ensure that there are sufficient assets to enforce against.

When parties conclude a contract, it is reasonable to expect each party to assume the risks that come with their commercial pursuits. These include the risks of their commercial venture failing, the risk of a dispute arising, as well as the risk of the enforcement of any subsequent judgment or award obtained in their favour. One may reasonably argue that the law on separate legal personality should not be relaxed just because one party did not protect itself against such risks. The same cannot be said with full force in contracts between States and non-State parties. Not all courts can hear disputes arising out of contracts between a State and a non-State party.[154] Even where a judgment or award has been rendered, the process of enforcement against the State's assets is a long and drawn-out one where success is far from guaranteed.[155] The award creditor faces issues such as locating the State's assets[156] and proving that they are commercial assets (and as such non-sovereign).[157] Coupled with the rule that, generally, there is a presumption over State assets being sovereign assets,[158] the risks a non-State party faces are arguably higher.

From a policy perspective of levelling the commercial playing field, there is arguably less objection in allowing a State's award creditor to enforce the award against assets of an SOE that is controlled by the State and exercises a sovereign function, as long as the assets in question are not used for a sovereign function.

IV REFORMULATING THE ENGLISH APPROACH: IS THE SOE CONTROLLED BY THE STATE AND DOES IT EXERCISE A SOVEREIGN FUNCTION?

Under English law, a strict application of the doctrine of separate legal personality inevitably leads to the outcome that a State's award creditor may only enforce the award against an SOE if the corporate veil of the SOE may be lifted. Even if one accepts that the doctrine of separate legal personality should be extended to SOEs for the ease and certainty of commerce, SOEs enjoy the effective lifting of their corporate veil when it benefits them, namely, when they seek immunity from suit. By the same token, the same test ought

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154 Fox and Webb (n 28) 73; Bankas (n 153) paras 120-122.

155 Jacob Kuipers, 'Too Big to Nail: How Investor-State Arbitration Lacks an Appropriate Execution Mechanism for the Largest Awards' (2016) 39(2) *Boston College International and Comparative Law Review* 417, 426-428.

156 Andrea K Bjorklund, 'Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes' (2010) 21(1-4) *American Review of International Arbitration* 211, 225-226.

157 Fox and Webb (n 28) 209; Zixin Meng, *State Immunity and International Investment Law* (Springer, 2022) 45-8.

158 August Reinisch, 'European Court Practice Concerning State Immunity from Enforcement Measures' (2006) 17(4) *European Journal of International Law* 803, 829.

to be applied when one is asking whether the assets of that SOE are vulnerable to enforcement efforts against the State.

Rather than framing the issue as one which requires lifting of the SOE's corporate veil, it is argued here that the inquiry should instead be centred on whether the SOE is controlled by the State and whether the SOE exercises a sovereign function.[159] This approach likely imposes a lower threshold to be met with respect to the enforcement of State liabilities against SOEs. While this may appear concerning to the proponents of the *Gecamines* approach, there is some comfort that the stage of enforcement is not concerned with wrongdoing. A State's creditor's ability to enforce against the assets of the SOE does not shift any element of fault or wrongdoing to the SOE — all it does is recognise that the assets of the SOE are those of the State's for the purposes of enforcement.

The tests of State control and the exercise of a sovereign function lend much aid to the question of whether an SOE's assets are effectively the State's. These twin requirements are not foreign to the relationship between a corporation and a State. These requirements have featured in US jurisprudence in what is now known as the *Bancec* factors.[160] They also commonly feature in international law, such as in the attribution of a corporation's conduct to a State. For example, the corporation must be 'empowered by the law of the State to exercise elements of government authority',[161] or must 'in fact (be) acting on the instructions' of the State or 'under the direction or control of the State'.[162] The idea of State control in this context has also featured in international tribunals' reasoning. For instance, in the 2017 ICSID Award of *UAB v Latvia*,[163] one of the issues before the tribunal was whether an SOE's actions may be attributed to Latvia. The tribunal observed that it was not enough that the SOE was wholly owned by Latvia — it had to show further that the SOE was acting under the instructions of, or was otherwise being controlled by, Latvia.[164]

A *THE REQUIREMENT OF STATE CONTROL*

The first requirement concerns State control over the SOE. As a starting point, the fact that we are dealing with an SOE presupposes the notion of State ownership. Therefore, this limb goes further than mere ownership of the SOE. It must be established that not only is the SOE owned by the State, but it is also controlled by the State. The key question is, to what extent must the SOE be State-controlled? Elements of State control also featured in the *Gecamines* approach. After all, the inquiry of lifting the corporate veil does entertain the

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159 Rajesh Sharma, 'Enforcement of Arbitral Awards Against a State-Owned Entity: A Tale, Two Jurisdictions' (2017) 2(2) *University of Bologna Law Review* 346, 361.

160 *Rubin* (n 81) paras 822-823.

161 *Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) A/56/10*, Article 5.

162 Ibid Article 8.

163 *UAB v Latvia* (22 December 2017) ICSID Case No ARB/12/33 ('*UAB v Latvia*').

164 *Rubin* (n 81) para 825.

idea of an alter ego. There, the control required is to the extent that the corporation no longer functions as its own entity. That is one extreme on the spectrum of control. The other extreme is, of course, an entity where there is no State control at all and the entity functions entirely independently. It is proposed that the extent of State control that should be required is something that is near the extreme of alter ego but falls short in material respects.

Recalling the *Bancec* factors identified above, the first factor of the level of economic control by the State and the third factor of the degree to which government officials manage the SOE (or otherwise have a hand in its daily affairs) are most relevant to the question of State control. Illustrations of how this test operates can be found in cases adopting the *Bancec* factors.[165]

In *Bancec* itself, for instance, the US Supreme Court observed that government instrumentalities are meant to be operated on an enterprise level, although they are often created by an enabling statute prescribing their powers and duties.[166] Therefore, their establishment as a separate juridical personality entails that they are run as a distinct economic enterprise, not subject to the same budgetary and personnel requirements with which government agencies must comply.[167] The lack of these features was also what prompted the US Supreme Court to find in favour of the award creditor in *Crystallex*.[168] In *Crystallex*, it was found that the Venezuelan government had a high level of control over the SOE's economic policies and day-to-day running.[169] The board of directors in the SOE was comprised largely of personnel from the ruling government's cabinet.[170] Thus, in these cases, the court reached the finding that the SOE was controlled by the State.

Once again, it is helpful to bear in mind the differences between this approach and the *Gecamines* approach of lifting the corporate veil. In the *Gecamines* inquiry, one would still fall short of lifting the corporate veil even if the SOE is run by ministers of the ruling government or other such personnel of the State. It may not even help the case that the State has a large influence on the SOE's corporate policies. This is for the chief reason that the inquiry of lifting the corporate veil requires a level of wrongdoing that displays an abuse of the corporate form — the above factors may well exist without any abuse of the corporate form. It must be recalled that the present inquiry is not concerned with wrongdoing. Accordingly, in order to impose a State's liabilities on an SOE that it controls, there should be no need for such a high bar of lifting the corporate veil with its attendant finding of wrongdoing.

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165 See *Kirschenbaum v 650 Fifth Ave & Related Props* 830 F.3d 107, 130 (2nd Circuit 2016); see also *EM Ltd. v Banco Central de la República Argentina* 800 F.3d 78, 91 (2nd Circuit 2015).

166 *Bancec* (n 36) para 24. See also George Kahale, 'The Legal Personality of State Companies in US Courts' (1987) 6(11) *International Financial Law Review* 20, 20 – 1.

167 *Bancec* (n 36) para 24.

168 *Crystallex* (n 85) paras 36-40.

169 Ibid para 36.

170 Ibid para 40.

B *THE REQUIREMENT OF SOVEREIGN FUNCTION*

It is proposed here that, in addition to being controlled by the State, the SOE must also exercise a sovereign function. The idea of a sovereign function ensures that State liabilities are only imposed on SOEs that carry out the important public objectives of the State.[171] It is also increasingly seen today that many functions typically associated with the sovereign, such as healthcare and education, are being privatised by States.[172] It is argued that this requirement establishes the necessary link between the SOE and the State for the purposes of imposing State liabilities on the SOE. This also rules out SOEs that are set up for purely commercial purposes and cannot be mapped to any sovereign interests. Admittedly, a discussion of this requirement in the abstract may yield little practical guidance. After all, sovereign functions in each State differ according to the intricacies of their domestic context. What is required of this limb must then depend on the State that is concerned. In any case, the second and fourth factors in the *Bancec* factors are highly instructive in the inquiry of whether an SOE exercises a sovereign function: whether the SOE's profits go to the government, and whether the government is the real beneficiary of the SOE's conduct.

In *Crystallex*, the US Supreme Court held that as Venezuela was the sole shareholder of the SOE, all of the SOE's profits ultimately flowed to the Venezuelan State.[173] This might be true as a matter of design. However, it is proposed that the inquiry should go further in asking whether the profits arising out of the SOE are channelled back into the SOE for its running. Certainly, it need not be that all of the profits are put back into the SOE. As long as it can be shown that the SOE does not exist for the sole purpose of benefitting the State, but rather it is given the latitude to use its own resources to run itself, it should be open for the SOE to show that it does not exercise a sovereign function. The US Supreme Court made a further finding in *Crystallex*, that the SOE had to pay Venezuela taxes and royalties on the oil it produced. It was also found that such taxes were extraordinary, set at a rate designed for Venezuela to benefit from its SOE's revenues.[174] Venezuela also benefitted in another substantial way. The oil produced by its SOE was sold to Venezuela's allies, thereby achieving its foreign policy goals.[175] The US Supreme Court saw this as a way for Venezuela to extract value from the SOE without having to

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171 See Frederic Megret, 'Are there Inherently Sovereign Functions in International Law?' (2021) 115(3) *American Journal of International Law* 452, 452 – 453 where the author discusses the privatisation of functions that are typically sovereign such as police, military, and spying.

172 See Manfred Nowak, *Human Rights or Global Capitalism: The Limits of Privatization* (University of Pennsylvania Press, 2016) 58-67.

173 *Crystallex* (n 85) para 36.

174 *Crystallex* (n 85) para 36.

175 See Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press, 2011) 31 – 6 where the author discusses the commercialisation of sovereignty in the context of migration control. Some parallels are seen with Venezuela's strategies in oil production.

pay them.[176] In such circumstances, it is difficult to resist the finding that the SOE was exercising a sovereign function.[177]

Similar instances of exercising sovereign functions were seen in the case of *Bancec*. There, the US Supreme Court found that the Cuban State received all of Bancec's profits. It was also found that Bancec was set up to be the Cuban State's exclusive agent in foreign trade.[178] To play such a role in the economy of Cuba is highly suggestive of a sovereign function being exercised by Bancec. It is proposed, however, that courts should be careful before finding that SOEs exercise a sovereign function for the purposes of this test. For instance, it is conceivable that any SOE could be said to be carrying out some form of activity that benefits the State. For that reason alone, one should not automatically conclude that the SOE is carrying out a sovereign function. In the entire social and economic context of a State, the inquiry should consider whether the activities undertaken by the SOE impact an area of importance to that State. Further, the type of impact should also be surveyed. For instance, one may consider whether the SOE's impact on that area of public importance is a cursory one or a substantial one. It is proposed that only substantial impact should be considered to satisfy this limb of the test.

Applying this proposed test to *Gecamines*, it is likely that FG Hemisphere would have been successful in enforcing its award against Gecamines. As explained above, Gecamines was owned by the DRC and its constitution allowed for DRC State officials to have a significant influence on day-to-day decisions. It was also established that Gecamines played an important role in the economy of the DRC. Not only would Gecamines likely be found to have been under the control of the State, it could also be argued to have been exercising a sovereign function with its role in the DRC's economy.

C *STATES CAN ADOPT MEASURES TO AVOID OVEREXPOSURE OF ASSETS*

The suggested approach does not spell doom for the assets of SOEs that are not protected by sovereign immunity from execution. Indeed, it would be an undesirable outcome if States were not allowed to ringfence certain assets. These assets, while not falling under the category of sovereign assets, may still constitute assets which are critical to States. If such assets can no longer be protected by the corporate veil, it may lead to the stifling of State participation in commerce.

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176 *Crystallex* (n 85) para 40.

177 See generally Jennifer Zerk, 'Corporate Liability for Gross Human Rights Abuses' (Office of the UN High Commissioner for Human Rights, 2014) (Web Page) <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf> 51 where the author discusses the liability of corporations for human rights violations of the State. The author's discussion covers sovereign immunity, which is a frequent bar to such claims. The requirement of a 'sovereign function' proposed in this article may be equally applicable.

178 *Bancec* (n 36) para 5.

Accordingly, States can avoid enforcement against such assets if they belong to SOEs that do not exercise a sovereign function. Of course, if certain assets are left with SOEs but the State's award creditor can show that those assets have been freely transferred between the SOE and the State without consideration, that may constitute evidence of the exercise of a sovereign function.[179]

At the same time, the suggested approach only allows ringfencing to a certain extent. Certainly, one should not allow a State to ringfence all its assets. For example, it should not be permissible for a State pursuing commercial ends to reap its fruits yet evade its thorns when it commits wrongs.

V CONCLUSION

The outcome in *Gecamines* has left award creditors in a difficult position. As much as that outcome is justified by securing the position of the creditors of SOEs, the UKPC's approach in *Gecamines* has already begun to work against that goal. This is seen in *Taurus Petroleum* where SOEs seeking immunity from suit face a high threshold. *Gecamines* reflects the English courts' strict insistence on the separate legal personality of an incorporated entity. Insofar as this approach serves to preserve consistency and certainty in commerce, it remains to be questioned whether these are policy objectives that sufficiently outweigh the countervailing objectives of protecting a private party facing a State in a dispute. Concerns of stifling commerce by exposing State assets to enforcement are curtailed by the existing doctrines of immunities offered to States both at the jurisdictional and enforcement stages. In any event, commerce is no less stifled when the expectations of private parties are frustrated, as they are left with mere paper victories in arbitrations against States.

This article has argued that, insofar as the approach in *Gecamines* is based on a strict application of the doctrine of separate legal personality, such strict adherence may not be justifiable. That the doctrine of separate legal personality finds its origins in the need to promote commerce without the fear of personal bankruptcy supports two suggestions. First, this rationale does not apply with equal force to SOEs, and second, the doctrine of separate legal personality is propelled by policy objectives and thus may take a backseat should there be countervailing policy objectives. Indeed, the separate legal personality of SOEs is effectively relaxed when they seek sovereign immunity at the jurisdictional stage. This article therefore proposes reformulating a new test under English law: rather than ask whether the corporate veil should be lifted, an inquiry should be made into whether the SOE is controlled by the State and whether the SOE exercises a sovereign function. If that is so, an award creditor seeking enforcement against a State should be able to enforce against non-sovereign assets of the SOE.

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179 See *Crystallex* (n 85) para 40 where the US Supreme Court observed a 'seamless transfer of value between (the SOE) and Venezuela' without consideration.