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The Interplay of Sovereignty and Consent in the Execution of Arbitral Award Debts Against Non-Party State-Owned Enterprises

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The 21st century has seen the continuance of the internationalization of business and trade, and with it the growth in popularity of international arbitration as a mechanism to resolve cross-border disputes. Yet the enforcement of international arbitral awards continues to be one of the key challenges of the international arbitration system, complicated further where the non-complying award debtor is a state. In circumstances where principles of sovereign immunity fetter the ability of an award creditor to execute against the assets of a state debtor, an alternative route that has gained increasing traction has been the possibility of executing against the assets of a State-Owned Enterprise (SOE) through a legal technique known as 'reverse piercing.'

This paper analyzes the English judiciary's various approaches to answering the question of whether an SOE can be held liable for the award debts of a state via reverse piercing, and undertakes what most other commentary has not. It endeavours to identify the underlying assumptions of the reverse piercing concept. It demonstrates that it is predicated on particular conceptions of the role of the state, sovereignty, personality, and consent, as well as the relationship and interplay between these. It finds that holding SOEs liable for the award debts of a state can only be supported if an absolutist conception of sovereign personality continues to be adopted and the importance of the notion of consent as a foundational basis for arbitration continues to diminish. Accordingly, it challenges such conceptions by proposing that if one adopts non-absolutist and non-monolithic conceptions of sovereignty and legal personality, and that if one acknowledges that consent is the foundational basis for arbitration, then there can be no basis for supporting the proposition that an SOE can be held liable for the award debts of a state and its assets executed against in satisfaction of such debts. Perhaps of greater significance, this articles notes that

Le 21ème siècle a vu la continuation de l'internationalisation des affaires et des échanges, et avec, le gain de popularité de l'arbitrage international en tant que mécanisme pour la résolution de disputes transfrontières. Cependant, l'exécution des sentences arbitrales continue à être un des défis essentiels du système d'arbitrage internationale. Cette exécution est rendue plus compliquée quand le débiteur qui ne se soumet pas à la sentence est un État. Dans les circonstances où les principes de l'immunité souveraine entravent la capacité d'un créancier de s'exécuter contre le capital d'un État débiteur, une route alternative qui devient de plus en plus populaire permet de s'exécuter contre le capital d'une entreprise d'État grâce à une technique juridique qui s'intitule "reverse piercing".

En analysant les opinions des juges anglais concernant la possibilité qu'une entreprise d'État soit tenue responsable pour les dettes de la sentence à travers le reverse piercing, cet article réalisera ce que la plupart des commentaires n'ont pas réalisé. L'article tentera d'identifier les hypothèses qui sont à la base du reverse piercing, démontrant que cette dernière est prédiquée sur des conceptions particulières du rôle de l'État, de la souveraineté, de la personnalité et du consentement, mais aussi des relations et des interactions entre ceux-ci.

L'article démontre que tenir les entreprises d'État responsables pour les dettes de sentences d'un État ne peut être soutenu que si une conception absolutiste de la souveraineté de la personnalité continue d'être adaptée, et que l'importance de la notion de consentement comme la base de fondement de l'arbitrage continue à diminuer. L'article conteste de telles conceptions. L'article propose que si on adopte des conceptions non-absolutistes et non-monolithiques de la souveraineté et de la personnalité

the paradox of an increasingly evanescent notion of consent as the foundational basis for arbitration has been the blurring of the boundaries of legal personality. This has aggravated difficulties with delineating the boundaries of sovereignty. The law respecting the execution of arbitral award debt therefore continues to struggle to reconcile itself with the realities of the role of the modern state in the 21st century.

juridique, et si on admet que le consentement est la base de fondement de l'arbitrage, alors il n'y a pas de raison pour appuyer la proposition qu'une entreprise d'État est capable d'être tenue responsable pour les dettes de la sentence d'un État, et que son capital peut être attaqué afin de satisfaire le paiement de ces dettes. Plus significativement, cet article notera que le paradoxe de la notion de consentement qui devient de plus en plus évanescente, et qui est à la base de fondement de l'arbitrage, estompe les frontières de la personnalité juridique. Cela a aggravé les difficultés de délinéer les frontières de la souveraineté. La loi respectant l'exécution de la reconnaissance de dette d'une sentence arbitrale continue alors à avoir du mal à se réconcilier avec les réalités du rôle de l'État moderne dans le 21ème siècle.

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I. Introduction

One of international arbitration's advantages vis-à-vis transnational litigation is the global enforcement framework set up and facilitated through multilateral international treaty instruments such as the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (*ICSID Convention*) and the *Convention on the Enforcement and Recognition of Foreign Arbitral Awards* 1958 (*New York Convention*) and corresponding domestic legislation.[1] But enforcement continues to be one of the key challenges in international arbitration and is further complicated where the non-complying award debtor is a state.[2] This was recently brought to light in the *Yukos*[3] tripartite arbitration and associated enforcement proceedings which culminated in a USD $50 billion award against the Russian Federation – by no means the only example of the difficult route to enforcing an award against a state.[4]

This difficulty with enforcement is compounded by the ability of state debtors to invoke sovereign immunity to either resist recognition of an award or claim immunity in relation to assets that may be attached, frozen, or seized in satisfaction of the state's debts.[5] This invocation of sovereign immunity to resist submission to the 'imperium of judges' of a sovereign state is usually overcome by the argument that a state's consent to arbitration can be traced to a contractual or treaty provision purporting to refer any disputes to arbitration. However, any such waiver of sovereign immunity from jurisdiction is not generally understood to constitute a waiver of sovereign immunity from execution.[6] Executing an award debt against the assets of a reluctant state debtor thus requires a successful challenge against sovereign immunity. This challenge is compounded by the fact that each enforcement forum recognizes and applies different connotations of sovereign immunity, ranging from absolute immunity precluding all attempts to execute against state assets to a more qualified and restrictive immunity underpinned by a conception of sovereignty that avoids an "all-or-nothing quality."[7] The latter conception permits execution against state assets

1 See e.g. the equivalent national enforcement regime in the UK is the *Arbitration Act 1996* (UK), c 23. Arbitration (International Investment Disputes) Act 1966 (UK), c 41.

2 See e.g. Ernest K Bankas, *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts* (Heidelberg: Springer Berlin, 2005) at 230-31 (noting the unique difficulties associated with enforcing and executing awards vis-à-vis judgments and the interface with sovereign immunity principles).

3 *Hulley Enterprises Limited (Cyprus) v The Russian Federation, Final Award (18 July 2014),* UNCITRAL, PCA Case No AA 226; *Yukos Universal Limited (Isle of Man) v The Russian Federation, Final Award (18 July 2014)*, UNCITRAL, PCA Case No AA 227; & *Veteran Petroleum Limited (Cyprus) v The Russian Federation, Final Award (18 July 2014),* UNCITRAL, PCA Case No AA 228.

4 See Sylvia T Tonova & Baiju S Vasani, "Enforcement of Investment Treaty Awards Against Assets of States, State Entities and State Owned Companies," in Julien Fouret, ed, *Enforcement of Investment Treaty Arbitration Awards* (London: Globe Business Publishing, 2015) 83 at 86.

5 See Graham Coop, Álvaro Nistal & Robert Volterra, "Sovereign Immunities and Investor-State Awards: Specificities of Enforcing Awards based on Investment Treaties" in Julien Fouret, ed, *Enforcement of Investment Treaty Arbitration Awards* (London: Globe Business Publishing, 2015) 67 at 74.

6 See e.g. *ibid* at 81; Eric Teynier, "Can a Party Benefitting from an Award Rendered Against a State Enforce the Award Against an Instrumentality of Such State?: French Law" in Emmanuel Gaillard & Jennifer Younan, eds, *State Entities in International Arbitration* (New York: IAI Series on International Arbitration No 4, JurisNet LLC, 2008) 103 at 128–29; *State Immunity Act 1978 (UK)*, c 33, ss 2, 14, 18–19; *Convention on the Settlement of Investment Disputes between States and Nationals of Other States,* 18 March 1965, 575 UNTS 160 art 55 (entered into force 14 October 1966) [*ICSID Convention*].

7 James Crawford, *Chance, Order, Change: The Course of International Law* (The Hague: Hague Academy of

if these can be characterized as "being in use or intended for use for commercial purposes."[8] Success thus depends on finding not only a jurisdiction where a state debtor holds its assets, but a jurisdiction which maintains a conception of sovereign immunity that is not absolute.

Given that sovereign immunity, even in the restrictive sense, fetters the ability of an award creditor to execute against the assets of a state,[9] an alternative route that has gained increased traction is executing against the assets of a State-Owned Enterprise (SOE).[10] SOEs are entities through which a state – whether centrally-planned or market-based – can hold assets and engage in business transactions,[11] and whose assets are a particularly attractive target for award creditors because they are often "substantial, readily identifiable and more easily seized than assets of other types of state organs or agencies."[12] Executing involves using a legal technique known as "reverse piercing."[13] Rather than attributing the liabilities of a subsidiary to a parent company, or of an SOE to its state,[14] the reverse occurs such that an SOE can be held liable for the award debts of the state and its assets executed against it in satisfaction of such debts. Outside of the context of arbitral award enforcement, reverse piercing been criticized for creating "an unprincipled hodgepodge of seemingly ad hoc and unpredictable results"[15] with implications encroaching into other areas of law, including property, tax, and competition.[16] Its extension to the context of enforceability of

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International Law, 2014) at 93, 86–113 [Crawford, *Chance, Order, Change*].

8 See e.g. *State Immunity Act*, *supra* note 6, art 13(4); Bankas, *supra* note 2 at viii; Xiaodong Yang, *State Immunity in International Law*, (Cambridge: Cambridge University Press, 2012) at 75-129.

9 See Simon Bushnell & James Davies, *Yukos Arbitration: The Difficulties of Enforcement* (28 August 2014), online: Thompson Reuters Practical Law <us.practicallaw.com/6-578-8425>; Anna O'Connell, "The United Kingdom's Immunity from Seizure Legislation" (2008) London School of Economics and Political Science Working Paper 20/2008 at 2; online: <www.lse.ac.uk/collections/law/wps/WPS2008-20_OConnell.pdf>; *AIG Capital Partners v Republic of Kazakhstan* [2005] EWHC 2239 Comm [*AIG v Kazakhstan*].

10 For further background information, see e.g. Yang, *supra* note 8 at 287–97.

11 See e.g. Anthony Sinclair & David Stranger-Jones, "Execution of Judgments or Awards Against the Assets of State Entities" (2010) 4:1 Disp Resol Int'l 95 (on liberalization and deregulation trend of state business).

12 *Ibid* at 95; see generally Emmanuel Gaillard & Jennifer Younan, eds, *State Entities in International Arbitration*, IAI Series on International Arbitration No 4 (New York: Juris Publishing, 2008) at 97–222.

13 The term is used, for example, in Charles Poncet, "Introductory Remarks" in Gaillard & Younan, *supra* note 6 at 99; Judith Gill, "Can A Party Benefitting from an Award Rendered Against a State Enforce the Award Against an Instrumentality of Such State? English Law" in Gaillard & Younan, *supra* note 6 at 131.

14 See R Doak Bishop, James Crawford & W Michael Reisman, eds, *Foreign Investment Disputes: Cases, Materials and Commentary,* 2nd ed (The Hague: Wolters Kluwer Law & Business, 2014) at 548–65; see also *Wintershall AG et al v Government of Qatar*, Partial Award on Liability (5 February 1988) 28 ILM 795 at 811–12; *Toto Construzioni Generali SPA v Republic of Lebanon, Decision on Jurisdiction (11 September 2009),* ICSID Case No. ARB/07/12; *Draft Articles on Responsibility of States for Internationally Wrongful Acts,* art 5 (Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10)), online: <legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>.

15 See generally Kathryn Hespe, "Preserving Entity Shielding: How Corporations Should Respond to Reverse Piercing of the Corporate Veil" (2014) 14 J Bus & Sec L 69; David Million, "Piercing the Corporate Veil, Financial Responsibility and the Limits of Limited Liability" (2007) 56:5 Emory LJ 1305 at 1311; Nicholas B Allen, "Reverse Piercing of the Corporate Veil: A Straightforward Path to Justice" (2011) 85:3 St John's L Rev 1147.

16 See e.g. *La Générale des Carrières et des Mines Sarl v FG Hemisphere Associates* [2012] UKPC 27 at para 42 [*Gecamines*]; *Shipping Corporation of India Ltd v Evodomon Corporation and the President of India* [1993] ZASCA 167, 1994 1 SA 550 AD (where the judge criticizes reverse piercing technique because it "does not take much imagination to visualize the chaos that could arise from such a blurring of the principles relating

award debt liability is, if anything, audacious,[17] and is the main consideration of this paper.

Specifically, it analyzes the attitude and approach of the English courts to reverse piercing in holding an SOE liable for the award debts of a state, and endeavours to do two things. First, rather than settling for the unsatisfactory conclusion that its use "depends on the facts,"[18] it endeavors to identify reverse piercing's underlying assumptions, demonstrating that the circumstances for using this tool are predicated on particular conceptions of sovereignty and personality, as well as the relationship between them.[19] While it is beyond the scope of this paper to trace the evolution or adoption of a *specific* legal or political theory of sovereignty,[20] it can nevertheless be illustrated that, whereas the doctrine of restrictive sovereign immunity is underpinned by a non-absolutist conception of sovereignty, case law in the context of the enforcement of award debt and liability evidences a struggle to shift away from "all-or-nothing" conceptions of both sovereignty and personality.[21]

Secondly, to determine whether a proper basis in law exists to hold an SOE liable for the award debts of a state, this paper evaluates whether the outcome of reverse piercing – the creation of an illusory relationship of creditor-debtor as between a state and its SOE – affords a just result. It highlights a neglect of the notion of consensual privity in the context of enforcement of arbitral awards. It finds that the proposition of holding an SOE liable for the award debts of a state can only

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to the ownership of property"); see also Anne van Aakan, "Blurring Boundaries Between Sovereign Acts and Commercial Activities: A Functional View on Regulatory Immunity and Immunity from Execution" in Anne Peters et al, eds, *Immunities in the Age of Global Constitutionalism* (Leiden: Koninklijke Brill NV, 2015) at 150–57 (for a discussion on implications in the context of tax and competition law).

17 *Gecamines, supra* note 16 at paras 30–42, 77; see generally Donald Robertson & Leon Chung, "Enforcing Awards Against States and State-Owned Entities" (27 July 2012), online: Freehills Firm Publication <www.lexology.com/library/detail.aspx?g=142f6f26-2de8-4784-a9ce-bc7d61993078>.

18 See e.g. Sigvard Jarvin, "Concluding Remarks" in Gaillard & Younan, *supra* note 6 at 165; Gill, *supra* note 13; Cf. Van Aakan, *supra* note 16 at 131–81(highlighting that "legal literature is still void of a theoretical analysis in what circumstances immunity should be granted, and more importantly why…Only if we dig deeper into the rationales of immunity, can legal harmonization and clarity been [sic] strived for" at 134. She proceeds to outline an economic theory).

19 For further discussion on the relationship between statehood and sovereignty, as well as statehood and legal personality, see Crawford, *Chance, Order, Change*, *supra* note 7 at 192–211; see also Wade Mansell & Karen Openshaw, *International Law: A Critical Introduction*, (Oregon: Hart, 2013) at 40–42, 47–49.

20 See e.g. C E Merriam Jr, *History of the Theory of Sovereignty Since Rousseau* (Kitchener: Batoche Books, 2001); Jens Bartelson, "Sovereignty and the Personality of the State," in Robert Schuett & Peter M R Stirk, eds, *The Concept of the State in International Relations: Philosophy, Sovereignty and Cosmopolitanism* (Edinburgh: Edinburgh University Press, 2015); Bankas, *supra* note 2 at 1–12 (for an exposition of the influence of Roussea, Bodin, Hobbes on theories of sovereignty and sovereign immunity); Roland Portmann, *Legal Personality in International Law* (Cambridge: Cambridge University Press, 2010) at 31–41.

21 See e.g. L. J. Brinkhorst, "Sovereign Immunity in the U.S. and Great Britain with Special Reference to State Owned Corporations and Property," (Master of Arts Thesis, Published 1961, Archived and accessed via Rare Book Collection of Lehmann Library, Columbia University, New York City) at 74–92 (for more background information on the shift from absolute to restrictive immunity and the parallel shift in conceptualizing sovereignty); see Justin Harvey-Hills, "State Owned Companies Are Not the State," (2013) February 2013 Jersey & Guernsey L Rev 41 at 44, online: <www.jerseylaw.je/publications/jglr/Pages/JLR1302_Harvey-Hills.aspx>. Harvey-Hills notes that "following the introduction of restrictive immunity, sovereign immunity and enforcement were no longer mirror images of each other." He does not elaborate further, but it is this point which this author endeavours to explore further.

be supported if an absolutist conception of sovereignty continues to be used, and if the notion of consent as the foundation for arbitration continues to diminish. This paper seeks to challenge these underlying thematic and theoretical underpinnings of sovereignty, legal personality, and consent, and concludes that if one adopts non-absolutist and non-monolithic conceptions of sovereignty and legal personality in recognition of the realities of the role of the modern state, and if one acknowledges and reinstates consent as the foundational basis for arbitration, then there is no basis to support the proposition that an SOE can be held liable for the award debts of a state, with its assets executed against in satisfaction of such debts.

II. IN WHAT CIRCUMSTANCES CAN AN SOE BE HELD LIABLE FOR THE AWARD DEBTS OF A STATE?

A. An abbreviated history

In the 2005 case *Kensington International Ltd v Republic of Congo*, the claimant had purchased four judgments rendered against the Congo. The Congo's wholly-owned oil SOE, Société Nationale des Pétroles du Congo (SNPC), had a wholly owned a subsidiary called Cotrade. Africa Oil & Gas Corporation (AOGC) and Sphynx Bermuda were private oil trading vehicles of an individual named D. Gokana, the President and Director General of SNPC and a Special Advisor to the President of Congo.[22] In 2005, three contracts were entered into linking Cotrade and AOGC, AOGC and Sphynx Bermuda, and Sphynx Bermuda with an English company, Glencore. Pursuant to its contract with Sphynx Bermuda, Glencore was due to make a $39 million payment to Sphynx Bermuda. The claimant sought a third-party debt order to intercept Glencore's payment in satisfaction of the state's arbitral award debts. Justice Cooke of the High Court decided in favour of the claimant and granted an order of $39 million to be paid by Glencore to Sphynx Bermuda.[23]

A month later in *Walker International v Republic Populaire du Congo*,[24] a claimant sought to enforce a purchased arbitral award rendered against the Congo. SNPC, the Congo's wholly-owned oil SOE, owned a subsidiary called Financiere et Investissements du Congo SA (Fininco). Fininco had acquired a London business called Jackson 31 Ltd (Jackson), which owned commercial property in London. The claimant successfully obtained an order to enforce the award by executing against the London property as well as Fininco's shareholding interest in Jackson.

Finally, seven years later in *La Générale des Carrières et des Mines Sarl v FG Hemisphere Associates*, a claimant sought to enforce two purchased awards rendered against the Congo. Gecamine, another Congolese SOE, held shares in a Jersey-incorporated joint venture entity known as Groupement pour le traitment du terril de Lumumbashi Ltf (JV). The claimant unsuccessfully sought enforcement via execution against Gecamine's shareholding in the JV, as well as against monies owed by the JV to Gecamines.

22 *Kensington International Ltd v Republic of Congo* [2005] EWHC 2684 at para 8 [*Kensington v Congo*].
23 *Ibid* at para 201-202; Sinclair & Stranger-Jones, *supra* note 11 at 100.
24 *Walker International v Republic Populaire du Congo* [2005] EWHC 2813 (Comm) [*Walker v Congo*].

B. Delineating state from corporation: characterizing the role and functions of an SOE

States and corporations have juridical persona.[25] The former possesses sovereign personality,[26] while the latter possesses corporate personality.[27] In law, both can sue and are capable of being sued subject to certain qualifications.[28]

Reverse piercing proposes that an SOE's corporate personality can be disregarded such that the SOE can be considered part of the state, having sovereign personality instead. It is thus an exercise in delineating the boundaries between corporate personality and sovereign personality. The question to be considered is existential: what constitutes a state? If it is accepted that sovereignty personality is "synonymous with statehood,"[29] then when sovereignty is devolved and an SOE conferred with governmental functions or subject to governmental control is created, what is the impact of such devolution of sovereignty on personality?[30] What type of legal personality does an SOE with governmental functions or control have: sovereign personality or corporate personality?

The important early 1970s case of *Trendtex Trading Corp v Central Bank of Nigeria* did not provide a certain answer to these questions. The question at hand was whether the Central Bank of Nigeria was a separate legal entity distinct from the Nigerian state or an "emanation, alter ego or department" entitled to sovereign immunity from suit.[31] Lord Denning noted a continuing transformation in the functions of a sovereign state,[32] stating that "different countries have different ways of arranging internal affairs," including either "conduct[ing] all their business through their own offices…without setting up separate corporations or legal entities," or by "set[ting] up separate corporations or legal entities which are under the complete control of the department, but which enter into commercial transactions."[33] Despite the state "conduct[ing] some of its activities by means of a separate legal entity," Lord Denning considered that it ought not to lose its immunity.[34]

But did this mean that the state ought not to lose its sovereign personality either? This was unclear. Lord Denning expressly refrained from deciding whether sovereign personality was also

25 See e.g. Crawford, *Chance, Order, Change*, *supra* note 7 at 203; see generally *Case concernin*g *the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, Judgment, [1970] ICJ Rep 3 at 34–35.

26 Sovereign personality refers to legal personality of the State and, in some literature, is used interchangeably with the term "political" or "sovereign" identity. A reference to sovereign personality here is therefore not to be considered equivalent to "international legal personality," which is used to denote legal standing on an international scale and under international, rather than municipal or domestic law: see e.g. James Crawford, *The Creation of States in International Law,* 2nd ed (Oxford: Oxford University Press, 2006) at 28-29 [Crawford, *Creation of States*]; Campbell McLachlan, *Foreign Relations Law,* (Cambridge: Cambridge University Press, 2014) at 381; Bartelson*, supra* note 20 at 89-90, 102; see generally Portmann*, supra* note 20.

27 See e.g. *Salomon v Salomon & Co* [1897] AC 22 (corporate personality is commonly termed "separate legal personality"); David Goddard, "Corporate Personality: Limited Recourse and its Limits" in Charles EF Rickett & Ross B Grantham, eds, *Corporate Personality in the 20th Century* (Oxford: Hart Publishing, 1998) 11 at 11–13, 17–18.

28 See further Crawford, *Chance, Order, Change*, *supra* note 7 at 192–211.

29 Crawford, *Chance, Order, Change, supra* note 7 at 29.

30 For a summary of theories concerning the relationship between sovereignty, devolution thereof, and personality in the international law context, see James E Hickey Jr., "The Source of International Personality in the 21st Century" (1997) 2:1 Hofstra L. & Pol'y Symp 1 at 11–18.

31 *Trendtex Trading Corp v Central Bank of Nigeria* [1977] 1 QB 529 [*Trendtex*].

32 *Ibid* at 366.

33 *Ibid* at 370.

34 *Ibid*.

transmitted to an SOE exercising governmental functions (e.g. issuing legal tender, safeguarding the international value of currency, or acting as a banker and financial adviser to the Nigerian government with "few, if any private customers") and subject to governmental control (e.g. its policy decisions could be overruled by a ministry council).[35] He opined that "on the whole I do not think it should be,"[36] thus finding that the SOE had separate corporate personality notwithstanding elements of governmental function or control. Lord Shaw was more forthright, enunciating that any delegation of a governmental function or power was "hardly an indication of executive power having been vested."[37] Espousing a conception of sovereignty as divisible, he opined that a state could *not* have hybrid status "wherein it is to be regarded as a government department for certain purposes and as an ordinary commercial or financial institution for different purposes."[38] Like Lord Denning, he was unable to find "in the constitution of the bank or in the functions it performs or in the activities it pursues or in all those matters looked at together any compelling or indeed satisfactory basis for the conclusion that [the bank] is so related to the government of Nigeria as to form part of it."[39] Divided on the effect of devolved sovereignty on legal personality, Lord Shaw and Lord Denning's respective articulations in *Trendtex* both reflect a struggle to shift away from an absolutist conception of sovereignty towards the non-absolutist one that underpins the doctrine of restrictive sovereign immunity.

Following *Trendtex,* the subsequent promulgation of the *State Immunity Act 1978* (UK) maintained the dichotomy between sovereign and corporate personality, expressly excluding "any entity which is distinct from the executive organs of the government of the State and capable of suing and being sued" [40] from the definition of a state. It did not address whether the exercise of governmental functions by an SOE meant that it possessed sovereign personality or corporate personality and, therefore, did not contemplate whether a debt owed by the state could be executed against the assets of a state's SOEs.

Fast forward thirty years later to 2005 however, two cases – *Kensington v Congo* and *Walker v Congo* – both acknowledged the "liberty" [41] of a state to devolve sovereignty to entities like SOEs (as was envisaged by *Trendtex*) and to use Special Purpose Vehicles (SPVs) to support commercial activity, there being "nothing inherently exceptionable in the use of SPVs as financial vehicles." [42] More significantly, both courts considered that when sovereignty was devolved such that an SOE was conferred governmental functions or was subject to governmental control, sovereign personality followed such devolution. Thus, the SOE would have sovereign personality and not separate corporate personality.

35 *Trendtex, supra* note 31 at 370

36 *Ibid* (Lord Denning expressly stated his preference to "rest my decision on the ground that there is no immunity in respect of commercial transactions, even for a government department" at 560).

37 *Ibid* at 384.

38 *Ibid* at 382; *Gecamines, supra* note 16 at para 14.

39 *Trendtex*, *supra* note 31 at 384.

40 *State Immunity Act*, *supra* note 6 at s 14(1).

41 See e.g. *Walker v Congo*, *supra* note 24 at para 12.

42 *Ibid*; see also Phillip Riblett, "A Legal Regime for State-Owned Companies in the Modern Era" (2008) 18:1 J Transnat'l L & Pol'y 3 at 23-28.

In *Kensington v Congo*, Justice Cooke stated that "[an SOE] whose purpose is to assist, promote and advance the industrial development, prosperity and economic welfare of the area in which it operates can be seen as effectively carrying out government policy in the way that a government department does and therefore to *assume the position of an organ of government*."[43] While SNPC's founding statute and by-laws were set up to "undertake the exploitation of Congo's oil reserve on behalf of the Congo, to hold that State's oil related assets on its behalf and to represent the State on oil related matter," it was the extent of governmental control – of SNPC being "under the financial and economic control of the state with its officers being government appointees,"[44] its President and Director-General Mr. Gokana being a Special Advisor to the President of Congo – that Justice Cooke emphasized as facts that spoke for themselves.[45] The significant control exercised by the state over it led Justice Cooke to find that the SOE did not have separate corporate personality, and therefore "ha[d] no existence separate from the state."[46]

Whereas the court in *Kensington v Congo* found that SNPC had no existence separate from the state on the basis of extensive governmental control,[47] the same SOE was later characterized as a government department on the basis of its governmental functions in *Walker v Congo*.[48] Justice Morison highlighted the following factors as suggesting SNPC did *not* have a separate corporate personality: it was ultimately controlled by its chairman, Mr. Gokana, who was the president's representative; it had unaudited and unverifiable 'compte courants' with the state; it did not declare dividends and its profits did not return to the state in cash, and; it had expenditures normally made by government such election costs, peace initiatives, and donations of humanitarian aid.[49]

If sovereign personality flows together with devolved sovereignty from state to SOE as *Kensington v Congo* and *Walker v Congo* intimate, could it go further? *Kensington v Congo* appeared to suggest as much. Justice Cooke opined therein that "[i]nasmuch as SNPC carries out its functions through subsidiaries and is under the control of, and represents an emanation of the state, *it follows that its subsidiaries under its control* [ie. Cotrade] *must also be under state control and share the same character*."[50] He also found that that two entities downstream from the SOE's wholly-owned subsidiary – Sphynx Bermuda and AOGC – were "devices, facades or masks" that had been structured with an intention to "conceal the reality" of a direct trade between the state and Glencore and to "evade enforcement of the indebtedness" of the state, and could thus be considered part of the state.[51]

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43 *Kensington v Congo*, *supra* note 22 at para 53 [emphasis added].
44 *Ibid* at paras 54–55.
45 *Ibid*.
46 *Ibid* at para 55.
47 *Ibid*.
48 *Walker v Congo*, *supra* note 24 at para 104.
49 *Ibid* at 97–98.
50 *Kensington v Congo, supra* note 22 at para 63 [emphasis added].
51 *Ibid* at para 191. Note that this appears to be an application of a different analytical framework. Instead of considering whether Sphynx Bermuda and AOGC exercised "governmental functions" or were under "governmental control," Justice Cooke examined "each stage of the contractual chain, at each entity involved, at the motivation of the individuals concerned in them and the manner in which the corporations concerned have been utilized": *ibid* at para 192.

One ought to question such a conclusion, however. Sphynx Bermuda and AOGC were private oil trading vehicles of Mr. Gokana, the SOE's President and Director General.[52] Although their operations were carried out by Mr. Gokana without reference to either entity (its Board or its corporate structure),[53] it remains unclear why mere control by Mr. Gokana over Sphynx Bermuda and AOGC – or his related actions – were automatically equated to those of the state. Justice Cooke characterized Mr. Gokana's role in the series of transactions linking SNPC, Cotrade, AOGC, Sphynx Bermuda, and Glencore as possessing an "air of unreality",[54] and noted "virtually no connection between the cash passing through [Sphynx Bermuda and AOGC's] bank accounts and the sums it should have received for the oil it sold."[55] These red flags are arguably more suggestive of the possibility that Mr. Gokana used the corporate structure to siphon monies through his private companies rather than the state attempting to evade enforcement of debts. Although this was seemingly overlooked by Justice Cooke, it is worth noting that subsequent investigations by the anti-corruption non-governmental organization Global Witness indeed found this to be the case.[56]

Following *Kensington v Congo,* Justice Morison appeared to agree in *Walker v Congo* with the notion that sovereign personality flows together with devolved sovereignty. Submitting that government departments do not have subsidiaries, the SOE's wholly-owned subsidiary, Fininco, was ruled to be "as much an organ of the state as SNPC"[57] because it was ultimately a "vehicle for doing the Government's business,"[58] and a "conduit pipe through which government monies were channeled for purposes of which the government approved."[59] Together, *Kensington v Congo* and *Walker v Congo* thus reflect an absolutist conception of sovereignty as indivisible and inalienable such that, when sovereignty is devolved, sovereign personality flows alongside devolution.

By 2012 however, the proverbial coin was on the verge of flipping sides. In *Gecamines*, the Privy Council acknowledged that a state could legitimately use SOEs and SPVs to conduct business, but expressly questioned the appropriateness of *Trendtex*'s 'governmental functions and control' test – applied in *Kensington v Congo* and *Walker v Congo* – to answer the question of 'substantive liability and enforcement' (as opposed to immunity).[60] It criticized these cases for opening the floodgates "to almost any state trading corporation becoming liable for its state's debts,"[61] and took pains to recognize the "separateness or distinctness of state-owned

52 *Kensington v Congo, supra* note 22 at para 8.
53 *Ibid* at paras 79, 92, 169.
54 *Ibid* at para 62.
55 *Ibid* at para 89.
56 See e.g. "Congo Oil Trading Scandal Implicated Top Government Officials" Global Witness (13 December 2005) online: <https://www.globalwitness.org/en/archive/congo-oil-trading-scandal-implicates-top-government-officials/>; Sebastian Mallaby, "A Corrupt French Connection" Washington Post (13 March 2006) online: <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/12/AR2006031201109.html>; Tony Allen-Mills, "Congo Sapped of Riches as Denis Menaces Boulevard Saint-Germain" The Australian (17 June 2008) online: <http://www.theaustralian.com.au/archive/lifestyle/congo-sapped-of-riches/story-e6frga06-1111116650941>.
57 *Walker v Congo*, *supra* note 24 at paras 70–104.
58 *Ibid* at paras 97–100.
59 *Ibid* at para 119.
60 *Gecamines, supra* note 16 at para 19; similarly noted by *Harvey-Hills, supra* note 21 at 43.
61 *Ibid* at para 19.

corporations, notwithstanding that they may have been entrusted with public functions including activities involving the exercise of sovereign authority."[62] The consequent establishment of a strong presumption that an SOE's separate corporate status should be respected[63] could thus be said to reflect a conception of sovereignty as divisible and non-absolute, such that a devolution of sovereignty does *not* necessarily involve a parallel devolution of sovereign personality: the use of SOEs "does *not* make [such] activity sovereign activity or make them [the SOEs or SPVs etc.] part of the state."[64] Thus, Gecamines was found to be a real and functioning corporate entity with its own budget, accounting, borrowings, debts, tax and other liabilities, as well as its own differences with government departments. The Privy Council noted in particular that "at least one such department (the Revenue) went from time to time to the lengths of enforcing tax claims by execution against Gecamines' assets."[65] By contrast to the approaches in *Walker v Congo* and *Kensington v Congo*, the Privy Council emphasized that "it was the day-to-day activities of the SOE under examination, rather than the purpose of a particular transaction" that mattered. [66]

By establishing a presumption as to an SOE's separate corporate personality, *Gecamines* might appear to solidify the dichotomy between corporate and sovereign personality. However, the Privy Council made several observations *in obiter* questioning such strict binary. It opined that governmental functions such as "assisting, promoting and advancing development, prosperity and economic welfare, and carrying out government policy in that respect are…of the essence of many state-controlled corporations' functions,"[67] and that an SOE possessing such governmental functions "does not convert that company into an organ of the state."[68] Not only may an SOE exercising governmental functions have corporate personality (as opposed to sovereign personality),[69] one that exercises governmental functions *and* does not have a distinct existence separate and apart from the state *may* have sovereign personality as well.[70]

This articulation reflects a continuing and incomplete process of delineating the boundaries between state and corporation. It is also significant in suggesting a re-contemplation of a monolithic conceptualization of legal personality in the face of a non-monolithic conceptualization of sovereignty.

C. Reconciling understandings of sovereignty and sovereign personality

Considering the limited circumstances where an SOE has been held liable for the award debts of a state – from *Trendtex* to *Gecamines* – it has been argued that "[a]n English court…will start from the position of recognizing that States and their instrumentalities have independent legal personality," and that "[i]t will be slow to look beyond that principle" unless it can be demonstrated that because of governmental functions or control the SOE should be considered as

62 *Gecamines, supra* note 16 at para 19.
63 *Ibid* at para 29.
64 *Ibid*, at paras 44, 48 [emphasis added]; see similarly Lord Shaw in *Trendtex*, *supra* note 31 at 384.
65 *Gecamines, supra* note 16 at para 70.
66 *Ibid* at paras 54, 71.
67 *Ibid* at paras 44, 48.
68 *Ibid* at paras 19, 48, 49.
69 *Ibid* at paras 11, 71.
70 *Ibid* at paras 16–18.

having sovereign personality and therefore be considered part of the state.[71]

In asking why this is, this paper has endeavoured to demonstrate that the underpinnings of such a position are predicated on particular conceptions of the state, its sovereignty, and its personality. As a preliminary matter, the approach of determining whether an SOE is a 'state' through a governmental function and control test entrenches two fallacies consistently pointed out by international law jurists. First, there is the "persistent tendency…to conflate the recognition of states with the recognition of governments,"[72] even when state and government are distinct and even though "sovereignty is an attribute of states, not a precondition".[73] Secondly, there is a "continued unthinking application of doctrines" (of sovereignty) developed at a time when statehood was conceived "entirely different[ly]."[74] Regarding the latter, it is this author's contention that the English judiciary's continuing struggle to articulate clear tests for distinguishing what constitutes a 'state' is animated by a persisting uncertainty concerning the relationship between sovereignty and personality; specifically whether the devolution of sovereignty to an SOE necessarily involves the continuance, or extinguishment, of sovereign personality. This uncertainty is symptomatic of an underlying inability to shift away from an absolutist conception of sovereignty. Because conceptions of sovereignty define the contours of sovereign personality, the maintenance of an absolutist conception of sovereignty has meant that the parallel evolution of sovereign personality from an absolutist conception to something more nuanced has likewise faltered.

What ought to be the outcome then? If sovereignty is conceived as indivisible and inalienable, then when it is devolved and an SOE is created (conferred with governmental functions and/or subject to governmental control) such devolution necessarily involves a conveyance and continuance of sovereign personality – one that is, moreover, so absolutist in nature that an SOE cannot be said to have separate corporate personality. The legal personality of an SOE both originates from and *is* that of the state. Consequently, as *Kensington v Congo* and *Walker v Congo* demonstrate, this conceptualization of sovereignty supports the proposition that an SOE can be held liable for the award debts of a state because the SOE has sovereign personality and is effectively the state. The irony is that this absolutist conception of sovereignty was disregarded some forty years ago in the establishment of the doctrine of restrictive sovereign immunity, which recognized sovereign functions or *jure imperii* as an expression of sovereignty and therefore entitled to sovereign immunity, but where immunity did not extend to the state's engagement in commercial functions or *jure gestionis*. But if guidance is taken from *Gecamines*, even if it is accepted that an exercise of sovereignty creates an SOE, confers it with governmental functions and/or subjects it to governmental control, such devolution of sovereignty to an SOE does not necessarily imbue the receiving SOE with *absolute* sovereign personality.[75] Rather, *Gecamines* implicitly questioned such a monolithic conceptualization of legal personality.

71 Gill, *supra* note 13 at 146–47.

72 McLachlan, *supra* note 26 at 380; Crawford, *Creation of States, supra* note 26 at 33–34.

73 Crawford, *Creation of States*, *supra* note 26 at 32.

74 McLachlan, *supra* note 26 at 380.

75 See Crawford, *Chance, Order, Change, supra* note 7 at 192–211; Brinkhorst, *supra* note 21; *Gecamines, supra* note 16 at paras 67–69; Yang, *supra* note 8 at 296.

In this vein, this author proposes that, by contrast to the absolutist conceptualization of sovereignty in *Kensington v Congo* and *Walker v Congo,* a non-absolutist conception of sovereignty would mean that sovereign immunity *and* sovereign personality continue to flow with the devolution of sovereignty (albeit only insofar as the SOE engages in sovereign activities).[76] An SOE could accordingly be said to hold dual personalities (the consequence of which is discussed in the next section of this paper).

This re-conceptualization may be criticized as (i) continuing a "binary focus on the *imperii/ gestionis* distinction" that "inhibit[s] development of a unified theory"[77] and (ii) undermining the established principle of an SOE having one legal personality (that of corporate personality).[78] Nonetheless, it allows for a closer alignment with the conception of non-absolutist sovereignty that underpins the restrictive sovereign immunity doctrine. For example, under a restrictive doctrine of sovereign immunity, an SOE can avail itself of sovereign immunity (from jurisdiction) if "the proceedings relate to anything done by it in the exercise of sovereign authority."[79] It also addresses three other major issues related to the present absolutist and monolithic conceptions of sovereignty and legal personality in the context of award debt enforcement: (i) it is reconcilable with the international law principles of state responsibility for the actions of its entities;[80] (ii) it attenuates the drastic implications of disregarding an SOE's corporate personality; [81] and (iii) it avoids the dilemma created by declining to recognize a foreign state's classification of its SOE as a 'state' or 'non-state' – an act of non-recognition that has been acknowledged as having the potential to undermine international comity.[82]

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76 See Hickey, *supra* note 30 at 16–17 (detailing the dynamic state approach of legal personality whereby separate legal personality can be conferred by a state to a state or non-state entity, but "political identity", or as this paper terms, "sovereign personality", does not necessarily follow); Portmann*, supra* note 20 at 35–41; Brinkhorst, *supra* note 21 at 56–56; Paul Shepard, *Sovereignty and State Owned Commercial Entities* (New York: Aberdeen Press, 1951) at 15, 21 (wherein he discusses the effect to sovereignty immunity and personality "once the intention of a state to take itself out of the orbit of sovereignty is manifested").

77 McLachlan*, supra* note 26 at 483; see also Bankas, s*upra* note 2 at 94–96, 364-65; Van Aakan, *supra* note 16 at 150.

78 *Playa Larger (Owners of Cargo Lately Laden on Board) v I Congreso del Partido (Owners)*, [1983] 1 AC 244 at para 258; see also *Salomon v Salomon & Co, supra* note 27.

79 *State Immunity Act*, *supra* note 6, s 14(2); note also Shepard, *supra* note 76; Brinkhorst, *supra* note 21.

80 *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, *supra* note 11, art 8, general commentary note (6).

81 See Van Aakan*, supra* note 16.

82 See e.g. Michael A. Granne, "Defining 'Organ of a Foreign State' Under the Foreign Sovereign Immunities Act of 1976" (2008) 42:1 UC Davis L Rev 1 (questioning whether the "denial of sovereign status has the potential to interfere with diplomatic relations between the United States and the relevant foreign state" at 1); Bartelson*, supra* note 20 at 89–90; *Walker v Congo*, *supra* note 24 at para 12; *AIG v Kazakhstan*, *supra* note 9 at para 58; *Continental Transfer Technique Ltd v Nigeria* [2009] EWHC 2898 (Comm) at 42 [Continental v Nigeria] (specifically Justice Hirst's stipulation that "English rules on conflict of laws recognize the existence of foreign corporations duly created under the law of a foreign country"); see also AV Dicey, *The Conflict of Laws*, 14th ed by Sir Lawrence Collins (London, UKL Sweet & Maxwell, 2006) at para 30R-009 – 30-019; *VTB Capital plc v Nutritek International Corp*, [2013] UKSC 5 at 124 [VTP v Nutritek].

III. SHOULD AN SOE BE HELD LIABLE FOR THE AWARD DEBTS OF THE STATE?

A. The illusory justice of reverse piercing

Arguments advocating for reverse piercing as a means of holding an SOE liable for the debts of a state appear to be largely premised on a belief that enforcement by reverse piercing equates to a just result.[83] Specifically, it ensures the effectiveness and enforcement of an arbitral award.[84] It sends a signal that the state who enjoyed the same freedom as "private persons to organize its commercial activities through corporate entities should be subject to the usual safeguards and protections afforded to those individuals who deal with such corporate entities,"[85] and that states will not be permitted to "make and then break international obligations, leaving harmed investors with a right but no remedy."[86] It also ensures the provision of stability "both for sovereigns and for the companies with whom sovereigns and their subsidiaries do business."[87]

Nevertheless, even if one successfully engages with the legal acrobatics of reverse piercing, whether this can provide the desired just result in enforcement is still questionable. The reverse piercing concept proposes that liability for a state and its award debts applies only when an SOE can be said to possess sovereign personality (i.e. not separate corporate personality). If the re-conceptualization of sovereignty and sovereign personality proposed here is accepted, then an SOE only possesses sovereign personality when it engages in sovereign activity. Executing against an SOE's assets in satisfaction of a state's award debts means the award creditor must identify assets that were (i) acquired in the engagement of such sovereign activity (i.e. when the SOE possessed sovereign personality), and, as required by the governing legislation, (ii) were "in use or intended for use for commercial purposes."[88] Even without this reconceptualization, the outcome is the same: because successful reverse piercing results in the SOE being said to possess the same sovereign personality as the state, it potentially (and quite logically) allows the

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83 In the context of the use of reverse piercing in enforcement proceedings against states and SOEs, see e.g. Brandon Rice, *States Behaving Badly: Sovereign Veil Piercing in the Yukos Affair* (2015) [unpublished, archived at Duke University Law School] online: < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2673335> (see especially pages 42-57); see also n 15 (more generally in the company law context). Other commentators also exalt the reverse piercing doctrine, albeit not for creating a "just result," but rather because of the need for legal theory to mirror corporate reality: Michael J Gaertner, "Reverse Piercing the Corporate Veil: Should Corporation Owners Have It Both Ways?" (1989) 30:3 Wm & Mary L Rev 667.

84 See e.g. Emmanuel Gaillard, "Effectiveness of Arbitral Awards, State Immunity from Execution and Autonomy of State Entities: Three Incompatible Principles" in Isabelle Pingel, ed, *Droit Des Immunites Et Exigences du Procès Équitable* (Paris: Pedone, 2004) 119, reprinted in Gaillard & Younan, *supra* note 6, 179.

85 See Gill, *supra* note 13 at 146–47; in a similar vein, one might note the contention of Lord Denning in *Trendtex*, *supra* note 31 at [369]: "[i]f a government department goes into the market places of the world and buys boots or cement – as a commercial transaction – that government department should be subject to all the rules of the market place".

86 Rice, *supra* note 82 at 54.

87 Riblett, *supra* note 42 at 45.

88 *State Immunity Act*, *supra* note 6, s 13(4); for further discussion on distinguishing commercial assets from sovereign ones, see e.g. David W. Rivkin & Christopher K. Tahbaz, "Attachment and Execution on Commercial Assets" in R. Doak Bishop, ed, *Enforcement of Arbitral Awards Against Sovereigns* (New York: JurisNet LLC, 2009) 139 at 143-44; D. H. Freyer, "Attachment of Debts Owed to Sovereigns" in R. Doak Bishop (*ibid*) (New York: JurisNet LLC, 2009) 159 at 167-72; Van Aakan, *supra* note 16 at 161-68.

SOE to invoke the state's (and therefore its own) immunity from execution.[89] In both scenarios, the award creditor thus runs the risk of being sent back to square one, where overcoming the invocation of sovereign immunity requires refuting the SOE countering that its assets can no longer be characterized as being in use or intended for use for commercial purposes. The irony is that it is this difficulty that likely led the award creditor to contemplate execution against the assets of the SOE in the first place.[90] This double-edged sword reveals that the view that reverse piercing ought to be allowed because it affords a just result warrants significant reconsideration.

B. The injustice of constructing an illusory creditor-debtor relationship

When attempting to enforce arbitral awards, access to the enforcement framework is premised on the existence of an arbitration agreement.[91] Attempts to enforce an award "made against a single party, against…separate and distinct parties" are subject to dismissal.[92] In laying out the grounds which may be invoked to resist enforcement, each reference to "party" in Article V of the *New York Convention* is either a reference to a party to the arbitration agreement, or to a party that was part of the arbitration proceedings. None of the grounds articulated in Article V appear to contemplate a party outside either of these two scenarios,[93] and neither do the corresponding provisions in the *ICSID Convention*.[94] Thus, the enforcement framework has been said to "safeguard fundamental rights *including the right of a party which has not agreed to arbitration*."[95]

By merging the SOE into the state on the basis of its sovereign personality, reverse piercing – as a so-called 'non-signatory' doctrine[96] – overcomes the need to construct a relationship of

89 See Teynier*, supra* note 6 at 105; Sinclair & Stranger-Jones, *supra* note 11 at 95; Yang, *supra* note 8 at 297.

90 Gaillard & Younan, *supra* note 12 at 7-8.

91 See e.g. *Arbitration Act 1996* (UK), *supra* note 1 ss 6, 66; *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 38 arts 1, 2 (entered into force 7 June 1959) [*NY Convention*]; Judith Gill, Stephen Jagusch & Anthony Sinclair, "Experience in the Courts of England and Wales" in R. Doak Bishop, *supra* note 88, 273 at 276-77; Karim Youssef, Consent in Context: *Fulfilling the Promise of International Arbitration: multiparty, multi-contract, and non-contract arbitration* (New York: Thomson Reuters, 2011) at 48.

92 See e.g. *Norsk Hydro v State Property Fund of Ukraine & Others*, [2002] EWHC 2120 (Comm) at para 18; See also Gill*, supra* note 91 at 276.

93 See e.g. *NY Convention*, *supra* note 91, arts 5(1)(a), 5(1)(b), 5(1)(c), 5(1)(d) (Art 5(1)(a) prescribes that a court may refuse to enforce an award on the ground that the parties to the agreement were incapacitated or the arbitration agreement was not valid under the law to which the parties had subjected it; Art 5(1)(b) refers to a party who was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case. Similarly, in permitting non-enforcement on the grounds that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement, Art 5(1)(c) and (1)(d) serve to reinforce the primacy of the arbitration agreement as central to the relationship not only between the parties, but also that of the right of the party seeking to enforce the award in question); see also *Arbitration Act 1996* (UK)*, supra* note 1 at s 103; see Andrea M. Steingruber, *Consent in International Arbitration* (Oxford: Oxford University Press, 2012) at paras 10.72–10.74 (for a brief summary of issues of enforcing and executing awards against non-parties).

94 See e.g. *ICSID Convention*, *supra* note 6, arts 53–55.

95 *AIG v Kazakhstan, supra* note 9 at paras 31, 60, 95 [emphasis added].

96 See e.g. *Steingruber*, *supra* note 93 at paras 9.61–9.65 (lifting the corporate veil is primarily based on a theory of finding excessive domination and fraud, and thus overlooks the need for consent), 15.27-15.45 (lifting the corporate veil as a non-signatory theory as developed and employed to facilitate deduction of consent to

debtor-creditor between the state and its SOE. [97] But what justice is served by enforcing a liability owed by a party to an arbitration agreement against a non-party – an entity which was neither a signatory to the underlying arbitration agreement (joined to the proceedings where the arbitral award was rendered), and whose assets are not related to the dispute?[98]

By contrast to other jurisdictions, corresponding U.K. legislation does not address whether a connection is required between the party and/or the assets against which an award creditor seeks to execute and the underlying dispute.[99] But the English judiciary has considered the issue on several occasions. In *AIG Capital Partners v Republic of Kazakhstan*[100] for instance, Justice Aitkens opined that the mere fact that a state holds a beneficial interest in the assets of an SOE "does *not* mean that there is a debt due or accruing" to the state.[101] The underlying dispute had arisen from the Kazakh state's expropriation of land originally intended for use in a joint venture. Pursuant to a US-Kazakhstan bilateral investment treaty, the claimant referred the dispute to arbitration and obtained an award in its favour.[102] They then sought to execute the award against cash and securities held in two London banks under a contract stipulating that they formed part of the assets of the National Fund of Kazakhstan. But these were held in the name of the National Bank of Kazakhstan – the National Fund's controlling body.[103] Although the claimant acknowledged that the National Bank was a central bank within the scope of the English sovereign immunity legislation, it contended that the cash and securities against which execution orders were sought were not in fact property of the National Bank. Rather, they were property of the state because the state held a beneficial interest in them.[104] Justice Aikens disagreed, finding that the mere existence of a beneficial interest did not create "contractual rights…or *otherwise*" against an SOE's assets.[105] Moreover, given that the SOE did not play a role in the original dispute referred to arbitration and from which the state's award debt arose, there was no relationship of debtor and creditor between

arbitrate); see also Youssef, *supra* note 91 (veil piercing as 'théorie de l'apparence': 128-130).

97 With respect to a third-party debt order pursuant to the English *Civil Procedural Rules* (Part 72.2), the court may make an order requiring the third party (e.g. a SOE) to pay to the judgment creditor (e.g. the claimant seeking enforcement) the amount of any debt due or accruing due to the judgment debtor (e.g. the state) from the third party; see also Gill, *supra* note 91 at 287-88.

98 See similarly Jarvin, *supra* note 18 (asking why we do not simply apply the well-known concepts we use to decide who is the proper party to an arbitration agreement in order to answer the question whether an award can be enforced against someone who did not sign the arbitration agreement or participate in the arbitration proceedings: 166); *cf* Gill, *supra* note 13 (arguing that there is no reason why the same principles should not apply in this context – whether enforcement is sought of an arbitration award or of a court judgement – but nonetheless acknowledging that there are issues pertaining to enforcement against a non-party: 132, 135).

99 See e.g. USC tit 28 § 1610(a)(2) (2012) (the property is or was used for the commercial activity upon which the claim is based); Cass civ 1re, 1 October 1985, (1985) Bull civ No 84-13.605; Van Aakan, *supra* note 16 at 167-168.

100 [2005] EWHC 2239 (Comm) ('*AIG v Kazakhstan*'). Note *AIG v Kazakhstan, supra* note 9 (the reverse piercing argument – that a SOE should be treated as part of the state – does not appear to have been submitted to Justice Aitkens and he makes no reference to any such argument); see e.g. *Continental v Nigeria, supra* note 82 at para 24– 25.

101 *AIG v Kazakhstan, supra* note 9 at para 31 [emphasis added].

102 *Ibid* at paras 3–4.

103 *Ibid* at paras 8–9.

104 *Ibid* at para 27; *State Immunity Act*, *supra* note 6 s 14(4).

105 *AIG v Kazakhstan, supra* note 9 at paras 31, 60, 95 [emphasis added].

the SOE and the state.[106]

Continental Transfer Technique Ltd v Federal Government of Nigeria & others presented a similar scenario. Nigeria had failed to comply with an arbitral award rendered in the claimant's favour, and the claimant sought interim charging and third party debt orders against the assets of an SOE – the Nigerian National Petroleum Corporation (NNPC). Such assets included the SOE's London property, shares in its wholly-owned U.K.-incorporated subsidiary, and monies to be credited to various London bank accounts held in its name.[107] By contrast to *AIG v Kazakhstan,* the claimant in *Continental v Nigeria* grounded its application on the reverse piercing argument that NNPC was "an organ of the State, such that a judgment against the State could be enforced against the assets of NNPC."[108] On appeal, Justice Hirst upheld charging orders because the question of whether NNPC ought to be considered to have the same legal personality as the state could not be resolved at the hearing.[109] Most significantly, he discharged the third party debt orders against the bank monies because the claimant failed to demonstrate a debtor-creditor relationship between the state and the SOE.[110] He expressed "distinct skepticism" regarding *Walker v Congo*'s and *Kensington v Congo's* proposition of holding an SOE liable for the award debts of a state.[111] Albeit not a "critical" issue,[112] he noted that the original dispute involving the claimant and the Nigerian Ministry of Interior over the provision of identification cards and from which the debt arose "had nothing to do with NNPC."[113]

Returning to *Gecamines*, the original dispute was between Energoinvest (a former Yugoslavian company) and Zaire (later seceded by the Congo) concerning the state's default on a payment related to the construction of a hydro-electric dam.[114] Although not the principle basis for its ultimate decision, the Privy Council nonetheless noted that Gecamines "had and has nothing to do with the transactions on which Hemisphere [the Claimant] now relies to seek to hold Gecamines and its assets responsible for the DRC's debts."[115]

Outside the enforcement context in *VTP v Nutritek*, Lord Mance (who presided in *Gecamines*) took the opportunity to elaborate on his reservations about holding a non-party to a contract liable for a party's debts.[116] Expressly disapproving of *Walker v Congo* and *Kensington v Congo,*[117] he dismissed the claimant's reverse piercing argument, stating the following:

106 *AIG v Kazakhstan, supra* note 9 at para 31.
107 *Continental v Nigeria*, *supra* note 82 at paras 1–9.
108 *Ibid* at para 4.
109 *Ibid* at paras 12, 46–47.
110 *Ibid* at paras 29–33.
111 *Ibid* at para 42.
112 *Ibid* at paras 35–36.
113 *Ibid* at para 2.
114 See Harvey-Hills*, supra* note 21 at 41-42.
115 *Gecamines*, *supra* note 16 at para 76.
116 See n 82: a dispute arose from a loan facility agreement entered into between the Claimant (a London bank which was majority-owned by a Russian state-owned bank) and a Russian company, Russagroprom. Russagroprom used the monies advanced pursuant to the loan facility agreement to purchase a number of companies from Nutritek, which was owned and controlled by a Mr. K. Malofeev. The claimant sought leave to amend its statement of claim to hold Malofeev liable for Russagroprom's debts.
117 *Ibid* at para 127.

> where B and C are the contracting parties and A is not, there is simply no justification for holding A responsible for B's contractual liabilities to C simply because A controls B… That that is the right approach seems to me to follow from one of the most fundamental principles on which contractual liabilities and rights are based, namely what an objective reasonable observer would believe was the effect of what the parties to the contract, or alleged contract, communicated to each other by words and actions, as assessed in their context. [118]

In upholding the importance of contractual privity, Lord Mance opined that "[e]ven accepting that the court can pierce the corporate veil in some circumstances, the notion of such joint and several liability is inconsistent with the reasoning and decision in *Salomon.*"[119] This would be "contrary to high authority, inconsistent with principle, and unnecessary to achieve justice."[120]

These things considered, it is appropriate to review the holding in *Walker v Congo.* The underlying award debt was rendered in relation to a dispute between the state and an individual, Saldemi Cogepi.[121] Neither the SOE entity (SNPC or Fininco) nor their assets (i.e., the Jackson shares or property) were connected to the original dispute. But by disregarding the SOE's separate corporate personality, the court effectively held the SOE liable for the state's award debts such that its assets could be executed against in satisfaction of those debts. Was the court correct in overlooking the requirements for a relationship of creditor-debtor between the state and SOE?[122]

One could also consider other extreme hypothetical scenarios. For instance, if an SOE is not wholly-owned by the state, but only majority-owned, does this mean that private shareholders' assets could be executed against in satisfaction of the majority owner's award debts (i.e. the state)?[123] These situations collectively highlight the paradox of reverse piercing. In its attempt to offer a more certain avenue for enforcing of a state's arbitral award debt, it has delivered another dose of legal uncertainty in the broader enforcement context.

C. Reinstating the Centrality of Consent in the Execution of Arbitral Debt

This section has examined whether a proper basis in law exists to hold an SOE liable for the award debts of a state in two ways. First, it questioned the net justice of reverse piercing. Second, it identified the injustices in the creation of illusory creditor-debtor relationships between a state and its SOE.

Although the judiciary has expressed concern about holding a non-party liable for the award debts of a party to a contract or arbitration agreement, such concern has not manifested with any particular strength in cases that have considered the issue of reverse piercing and whether an SOE as a non-party ought to be held liable for the award debts of the state.

While it is beyond the scope of this article to do a complete exegesis of the evolution

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118 *Gecamines*, *supra* note 16 at para 138–139 [emphasis added]; see also *ibid* at para 132.

119 *Ibid* at para 138.

120 Case is noted in Dmitry Gololobov, "The Prospect of Enforcement of Hague Arbitration Awards Against State-Controlled Companies in the United States and the United Kingdom" (2015) 3:4 Russian LJ 7.

121 *Walker v Congo*, *supra* note 24 at para 3.

122 A similar question was posed in *Continental v Nigeria*, *supra* note 82 at 27–29.

123 Van Aakan, *supra* note 16 at 172.

of consent in arbitration,[124] the author nevertheless contends that the trend above reflects the entrenchment of an increasingly vocal thread of jurisprudential thinking that regards contractual privity/consent as declining in worth[125] or as having no future[126] as the foundational bedrock for arbitration.[127] The judiciary should seriously question the evanescence of the role of consent in arbitration,[128] as well as its underlying conception of arbitration as a "social contract" or "jurisdictional order"[129] rather than as a *specific* contractual (or treaty) framework within which the parties consented to resolve their disputes and from which the award debt arose. Reinstating the centrality of consent within these arrangements would restrain an award creditor from executing against the assets of an SOE in satisfaction of a state's award debts unless the SOE was a party to the arbitration agreement or to the proceedings, or at the very least its assets were connected to the original dispute from whence the award debt arose.[130]

IV. Conclusion

Whether the award debt of a non-complying state can be satisfied against the assets of its SOE is a pertinent question because a lack of effective enforceability of an arbitral award rendered against a state ultimately exposes such an award – and the system of arbitration itself – to the "harsh verdict of irrelevance."[131] This paper concedes that an award creditor may be in a precarious position if they failed to extract a waiver from execution from the state[132] to seek anticipatory orders (e.g. a freezing order or a security for award)[133] or to undertake risk mitigation (e.g. political risk insurance with respect to possible award default).[134] This may also be the case if they lack the leverage to lobby their home state to exert diplomatic pressure[135] or to initiate a state-state claim,[136] or are otherwise unable to negotiate a settlement subsequent to any award rendered.[137] Nonetheless, the emphasis on ensuring the enforceability is arguably misplaced. Aside from the fact that non-compliance of arbitral awards is more of an exception

124 See Steingruber, *supra* note 93; Youssef, *supra* note 91.
125 See Youssef, *supra*, note 91 at 331–64.
126 See Jan Paulsson, "Arbitration Without Privity" (1995) 10:2 ICSID Rev 232.
127 See Steingruber, *supra* note 93 at 11–30, 21–23, 329–30.
128 See similarly Bernard Hanotiau, "Consent to Arbitration: Do we Share a Common Vision?" (2001) 27:4 Arb Intl 539.
129 *Cf* Youssef, *supra* note 91 at 344.
130 See e.g. *United Nations Convention on Jurisdictional Immunities of States and Their Property*, 2 December 2004, (not yet in force as of 12 July 2017). (Article 19 provides among other things that the SOE's property has a "connection with the entity [ie. the state] against which the proceeding [ie. the underlying proceedings from which the debt arose] was directed); Van Aakan, *supra* note 16 at 172.
131 Peer Zumbansen, "Piercing the Legal Veil: Commercial Arbitration and Transnational Law" (2002) European University Institute Working Paper No 2002/11 at 38.
132 See further Coop, Nistal & Volterra, *supra* note 5 at 81–82; Bishop, Crawford & Reisman, *supra* note 14 at 278–279 (for examples of waivers of immunity from execution).
133 See e.g. Gill, supra note 91 at 279–88; Coop, Nistal & Volterra, *supra* note 5 at 82.
134 Tonova and Vasani, *supra* note 3 at 97.
135 *Ibid* at 90-93.
136 *ICSID Convention*, *supra* note 6 at art 27 (which does not expressly preclude this in the situation of a contracting state failing to comply with an award rendered in an ICSID arbitration proceeding; see Coop, Nistal & Volterra, *supra* note 5 at 82.
137 See e.g. Coop, Nistal & Volterra, *supra* note 5 at 82.

than a norm,[138] equating the effectiveness of arbitration singularly to enforceability overlooks the fact that enforceability is not absolute but rather qualified.[139]

In analyzing the English judiciary's various attempts to situate the legal basis for holding an SOE liable for award debts of a state in the doctrine of reverse piercing, this article has undertaken what most other commentaries have not yet done.[140] It has interwoven an examination of the contrasting and evolving assumptions and conceptions of the state's role, and of sovereignty, personality and consent. It has found that the proposition of holding an SOE liable for award debts of a state can only be supported if an absolutist conception of sovereign personality continues to be adopted, and the notion of consent as the foundational basis for arbitration continues to diminish. The question remains as to whether this should be the case; should we "beat on, boats against the current, borne back ceaselessly into the past?"[141]

In outlining thematic and theoretical underpinnings of reverse piercing, this paper sought to challenge them in two respects. First, it challenged the continued adoption of an absolutist conception of sovereignty in the context of award debt enforcement. It argued that this cannot be reconciled with the doctrine of sovereign immunity's own conception of sovereignty. When this shifted forty years ago from absolute to restrictive immunity in the U.K., it was because the "very conceptualization of the state itself had undergone so phenomenal a change that the law inevitably and inexorably became out of step with the reality and thus had to be discarded as a thing of the past."[142] It has become anachronistic to maintain an absolutist conception of sovereign personality in light of the multifaceted roles and functions of the 21st century state:[143] its increasingly common engagement in commercial activities through central banks, stabilization funds, sovereign wealth funds,[144] and SOEs, as well as the reality of an international business world where SOEs (such as Gazprom, Aramco, Petrobas, Sinopec) have become as influential and independent a market player as traditional companies.[145] Law must reflect "changing times, changing power structures,"[146] and this paper calls for a reconsideration of the monolithic view of legal personality.

Secondly, this paper challenged the significant neglect that the judiciary has afforded to situations where a non-party is held liable for the award debts of a party to an arbitration agreement. It questions the evanescence of the role of consent in international arbitration. Although it is evolving as a concept, consent, and not the lack thereof, is still the "prerequisite of confidence in the legal process" of arbitration, and it is essential to the "legal security of international economic life" 147 that refers disputes to such a process. It ought not to be relegated to the bins of cessante

138 Teynier*, supra* note 6 at 116.

139 See e.g. *ICSID Convention*, *supra* note 6 at art 55; *NY Convention*, *supra* note 91 at art 5; see also *AIG v Kazakhstan, supra* note 9 at para 83.

140 But see Van Aakan, *supra* note 16; Harvey-Hills*, supra* note 21.

141 F. Scott Fitzgerald, *The Great Gatsby.*

142 Yang, *supra* note 8 at 31–32.

143 Sinclair & Stranger-Jones, *supra* note 11 at 107; see also Bankas, *supra* note 2 at 324–38.

144 Van Aakan, *supra* note 16 at 135–139 (for a consideration of the spectrum of commercial activities which a state commonly engages in).

145 Gaertner, *supra* note 82 at 675; Riblett, *supra* note 42 at 23.

146 Mansell & Openshaw, *supra* note 19 at 48.

147 *Cf* Paulsson, *supra* note 126 at 256–57.

ratione legis cessat ipsa lex just yet.[148]

In conclusion, the continuing evolutionary shift in the boundaries of sovereignty, legal personality, consent – and their cyclical interplay – leads to a paradox. Evanescent consent has created a "dilution of the boundaries of the legal persona"[149] which has aggravated the conundrum of delineating the boundaries of sovereignty. From this erupts more challenges than solutions to the enforcement of arbitral awards involving state debts. Distinguishable for their continuity into the temporal beyond, such debts will increasingly test the stability of the emerging de-bordered legal, economic, political, domestic and international order. [150]

148 Yang, *supra* note 8 at 64 (albeit in relation to the concept of legal personality rather than consent).

149 Youssef, *supra* note 91 at 187; see also 114–30.

150 Zumbansen, *supra* note 131 at 31–32; see also Anne Peters, "Immune Against Constitutionalisation?" in Anne Peters et al, eds, *Immunities in the Age of Global Constitutionalism* (Leiden: Koninklijke Brill NV, 2015) 1.