

ARTICLES

THE PROSPECT OF ENFORCEMENT OF HAGUE ARBITRATION AWARDS AGAINST STATE-CONTROLLED COMPANIES IN THE UNITED STATES AND THE UNITED KINGDOM

DMITRY GOLOLOBOV,
University of Westminster
(London, UK)

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In 2014 the Permanent Arbitration Court in The Hague made unprecedented awards totalling US\$50 billion against the Russian Federation. The awards crowned more than nine years of arbitration proceedings initiated by the former shareholders of the liquidated oil company Yukos. Although the former shareholders of Yukos represented by the GML Group declared their intention to only enforce the awards against the assets of the Russian state, the lack of assets not covered by state immunity inevitably opens the possibility of enforcement of the awards against the assets owned by the Russian majors controlled by the state. Due to its involvement in the Yukos case, Rosneft, the biggest Russian oil company, will undoubtedly be the first and the main target of such enforcement. This article aims to examine whether the former shareholders of Yukos could succeed in enforcement of foreign arbitration awards in the two main jurisdictions: the United Kingdom and the United States. The article examines the existing legal tests applicable in enforcement proceedings in these jurisdictions to state-controlled companies by considering the corporate structure of Rosneft and its business operations. The findings of the research are widely applicable to the other state-controlled Russian companies.

Keywords: Rosneft; arbitration awards; United States; United Kingdom; enforcement; instrumentality.

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After 10 years of hectic legal disputes, GML Group, which represents the former major shareholders of the defunct Russian oil company *Yukos*, obtained three awards against the Russian Federation from the Permanent Court of Arbitration in The Hague for more than US\$50 billion.¹ This can be considered as the first successful attempt to put political pressure on Russia through financial claims since the famous case of *Berezovsky v. Abramovich*.² The US\$50 billion awards signal a completely new era in conflicts between individuals and the Russian state.³

The GML Group is known for assiduously pursuing the Russian Federation in various international courts since the beginning of the collapse of *Yukos* in 2004. The former shareholders of the biggest Russian oil company have managed to secure several international arbitration awards which, being nominal in the awarded sums and disproportionate in respect of the legal expenses, can be considered as mere 'preparatory' for the main battle in The Hague.⁴

This article aims to discuss a key issue resulting from the former *Yukos* shareholder victory in The Hague – the problem of the enforcement of the awards. It appears that neither the claimants nor the existing system of enforcement of international

¹ *Hulley Enterprises Ltd. (Cyprus) v. Russian Fed'n*, PCA Case No. AA 226, Final Award (Jul. 18, 2014), at <<http://www.italaw.com/sites/default/files/case-documents/italaw3278.pdf>> (accessed Dec. 3, 2015); *Yukos Universal Ltd. (Isle of Man) v. Russian Fed'n*, PCA Case No. AA 227, Final Award (Jul. 18, 2014), at <<http://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf>> (accessed Dec. 3, 2015); *Veteran Petroleum Ltd. (Cyprus) v. Russian Fed'n*, PCA Case No. AA 228, Final Award (Jul. 18, 2014), at <<http://www.italaw.com/sites/default/files/case-documents/italaw3280.pdf>> (accessed Dec. 3, 2015). *Veteran Petroleum Ltd. (Cyprus)*, *Hulley Enterprises Ltd. (Cyprus)* and *Yukos Universal Ltd. (Isle of Man)*, which jointly owned 70.5 percent of the shares in *Yukos*, were respectively awarded US\$8.2 billion, US\$39.9 billion and US\$1.85 billion in damages.

² [2012] EWHC 2463 (Comm.).

³ The previous largest known investment treaty award was the one rendered in the case *Occidental Petroleum Corp. and Occidental Exploration and Production Co. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (Oct. 5, 2012), at <<http://www.italaw.com/sites/default/files/case-documents/italaw1094.pdf>> (accessed Dec. 3, 2015) in which Ecuador was ordered to pay US\$1.7 billion.

⁴ *RosInvest Co. UK Ltd. v. Russian Fed'n*, SCC Case No. V079/2005, Final Award (Sep. 12, 2010), at <<http://www.italaw.com/sites/default/files/case-documents/ita0720.pdf>> (accessed Dec. 3, 2015); *Renta 4 S.V.S.A., Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. Russian Fed'n*, SCC Case No. 24/2007, Award (Jul. 20, 2012), at <<http://www.italaw.com/sites/default/files/case-documents/ita1075.pdf>> (accessed Dec. 3, 2015).

arbitration awards against states were prepared for the need to enforce such mammoth awards.⁵

In order to achieve their main goal of punishing the Russian state for a takeover of *Yukos* with a subsequent sale of its main assets, the former owners of the company should demonstrate at least a realistic prospect of enforcement of the awards.⁶ Russia flatly refused to either pay the awards or to negotiate any settlements. The awards have already been challenged in The Hague District Court.⁷ The game looks hot from the very beginning.

In June 2015 GML Group made the first step on the long road to enforcing the awards. France and Belgium froze the accounts and arrested properties belonging to various entities allegedly associated with the Russian Federation. Several days later, the bulk of the accounts was unfrozen due to extreme pressure from the Russian Ministry of International Affairs which promised to freeze the accounts of Belgian diplomatic establishments in Russia.⁸ Russian officials considered the attempts to freeze the state's assets abroad to be illegal. First Vice-Prime Minister Igor Shuvalov commented: 'We do not recognize such actions as lawful. In states where such procedures are initiated, law firms have been hired. These are highly skilled lawyers.'⁹ Therefore, a long and unpredictable battle over the 'legacy of *Yukos*' is just about to start. Later, the media announced that the claimants had submitted requests for enforcement to the English and American courts but due to the procedural requirements and active opposition of the Russian side, the requests may not be considered until 2016.¹⁰

However, even the officials of GML Group recognize that attempts to arrest and sell assets belonging to the Russian Federation in Europe, the United States and the other countries may fail. Experience of enforcement of arbitration awards against

⁵ See, e.g., Ivan Philippov, *Yukos Award – Beginning of a New Enforcement Saga*, CIS Arbitration Forum (Jun. 10, 2015), <<http://www.cisarbitration.com/2015/06/10/yukos-award-beginning-of-a-new-enforcement-saga/>> (accessed Dec. 3, 2015).

⁶ See on the GML Group strategies Michael Goldhaber, *A Lifetime of Litigation – The Fall of Yukos*, Legalweek.com (Jul. 9, 2010), <<http://www.legalweek.com/legal-week/analysis/1721693/a-lifetime-litigation-fall-yukos>> (accessed Dec. 3, 2015).

⁷ See, e.g., the following articles: Alison Ross, *Yukos Moves to the Dutch Courts*, 10(1) Global Arbitration Review, available at <<http://globalarbitrationreview.com/b/33336/>> (Dec. 3, 2015); eadem, *Fatally Flawed? Why Russia Says the Awards Should Not Stand*, Global Arbitration Review (Jan. 27, 2015), <<http://globalarbitrationreview.com/news/article/33334/fatally-flawed-why-russiasays-awards-not-stand/>> (accessed Dec. 3, 2015); eadem, *Was the Tribunal's Assistant the Fourth Yukos Arbitrator?*, Global Arbitration Review, <<http://globalarbitrationreview.com/news/article/33333/was-tribunals-assistant-fourth-yukos-arbitrator/>> (accessed Dec. 3, 10, 2015).

⁸ *Brussels Says Blocked Russian Accounts Being Unfrozen*, Reuters (Jun. 21, 2015), <<http://uk.reuters.com/article/2015/06/21/uk-russia-yukos-brussels-idUKKBN0P10DW20150621>> (accessed Dec. 3, 2015).

⁹ *Russia Hires Lawyers over 'Unlawful' Seizure of Assets Abroad*, Sputnik (Jun. 19, 2015), <<http://sputniknews.com/russia/20150619/1023592220.html#ixzz3fPFwXVqp>> (accessed Dec. 3, 2015).

¹⁰ Linda Kinstler, *Yukos Shareholders Declare War on Russia's Assets*, Politico (Jun. 18, 2015), <<http://www.politico.eu/article/yukos-oil-russia-khodorkovsky-mikhail-putin/>> (accessed Dec. 3, 2015).

Russia over the last two decades is definitely not encouraging. The famous case of the 1990⁵ – *NOGA* – which received widespread publicity after initial successful attempts to arrest Russian paintings, ships and other assets, ended with the complete failure of the claimant.¹¹ *NOGA* unsuccessfully tested the limits of state immunity in many jurisdictions, such as Switzerland, France and the United States.¹²

Anticipating significant legal problems in the course of enforcement, Timothy Osborne, Executive Director of GML Group, in commenting on the expectations of the claimants, said in an interview:

It's going to take a long while to collect \$50 billion but there are assets out there. I can see it taking another ten years. We've stuck at this for ten years. We've got to a point now with this award which nobody ever thought we would get to, and we're not going to stop now.¹³

The long fight in *NOGA*¹⁴ and *Sedelmayer*¹⁵ persuaded the Russian Federation to take proper care of legal protection of its foreign assets. It is difficult to give an accurate assessment of the assets belonging directly to Russia but their overall worth is highly unlikely to exceed several billion dollars. More than 95 percent of these assets are covered by state immunity.¹⁶ Any attempts to arrest the rest, which may be used for commercial purposes as was the case with the property in Sweden arrested by Sedelmayer, may result in prolonged legal battles in different jurisdictions with unpredictable outcomes and high legal costs. The effectiveness of these attempts

¹¹ See for the detailed description: Dan Engström & Cornel Marian, *The Swedish Yukos Saga: RosInvest's Pyrrhic Victory over Russia and the Fortunate Correction of Previous Swedish Case Law under Which Swedish Courts Lacked Jurisdiction over Challenges against Awards in the Absence of Any Connection to Sweden*, 2011 IBA Arbitration Newsletter 80, available at <http://papers.ssrn.com/abstract_id=2072015> (Dec. 3, 2015).

¹² See, e.g., Cour d'Appel, Paris, 10 August 2000, *Embassy of the Russian Federation in France, et al. v. Compagnie NOGA d'Importation et d'Exportation*, 26 Y.B. Comm. Arb. 273 (2001); *The Murmansk State Technical University (MSTU) et al. v. Compagnie NOGA d'importation et d'exportation*, T.G.I. Brest, Jul. 24, 2000, Gaz. Pal., 2001, 3, 801.

¹³ Andrew Cave, *The Man Who Won \$50B from Russian President Vladimir Putin – And Now Has to Collect It*, Forbes (Aug. 8, 2014), <<http://www.forbes.com/sites/andrewcave/2014/08/08/the-man-who-won-50-billion-from-russian-president-vladimir-putin-and-now-has-to-collect-it/>> (accessed Dec. 3, 2015).

¹⁴ *Russian Federation v Compagnie NOGA*, Stockholm Dist. Ct., Case No. T 6-6357-97 (Jun. 17, 1998); *Russian Federation v. Compagnie NOGA*, Svea Ct. App., Case No. T 925-98-80 (Mar. 24, 1999).

¹⁵ *Mr. Franz Sedelmayer v. Russian Fed'n*, SCC Case, Award (Jul. 7, 1998), at <<http://www.italaw.com/sites/default/files/case-documents/ita0757.pdf>> (accessed Dec. 3, 2015). In 1998, the tribunal issued an award, despite six jurisdictional objections from the Russian side, ordering Russia to pay US\$2.35 million plus interest. The case serves as a good example of how difficult may be execution even of comparatively small arbitration awards against Russian Federation.

¹⁶ See, e.g., Vitaly V. Tsvetkov, *Will There Finally Be a Payoff for Yukos Investors?*, Gradient Alpha (Aug. 1, 2014), <<http://www.gradient-alpha.ru/press-center/articles/2014/08/01/will-there-finally-be-a-payoff-for-yukos-investors/>> (accessed Dec. 3, 2015).

may be initially assessed after a five-year period by comparing the overall costs of enforcement with the accumulated interest on the awarded sums and the funds obtained by the claimants. For example, if the claimants manage to obtain in 5 years some EUR10 million, spending 5 million on legal costs and having almost US\$1 billion of accumulated interest, it could hardly be called a success.¹⁷

Given the likelihood of the failure to enforce the awards against the foreign property belonging to the Russian Federation, the GML is almost fated to enforce awards against the assets owned by the entities controlled by the Russian Federation. Moreover, for the claimants it would be the obvious and the only possible choice as the state-owned companies like *Rosneft* and *Gazprom* are not only mentioned in the awards and other *Yukos*-related international judgments, but are also majority-owned by the Russian state and known to hold significant assets in other jurisdictions.¹⁸

In this article, we will assess the hypothetical chances of GML Group to attack *Rosneft* and to arrest its assets in the two most important jurisdictions: the United States and the United Kingdom. As international legal advisers observe, the legislation in force in the United States and the United Kingdom is particularly significant because of the prominent role which these two states and their legal systems still play in international and financial affairs, and because their legislation has exerted a strong influence on state immunity legislation in other common law jurisdictions.¹⁹

There is, of course, an obvious question: why is the biggest Russian company, *Gazprom*, not included in this study? The Russian government owns a 50.002 percent interest in *Gazprom*.²⁰ Just like at *Rosneft*, the head of *Gazprom* is seen as a political appointment.²¹ *Gazprom* is also known for its close involvement in many strategic political projects.²² However, it is recognized by the experts that

[w]hile *Gazprom* enjoys numerous advantages due to its ownership by the Russian government, and its business decisions are at times driven by political policy, it functions much like a non-state company. *Gazprom* has a sophisticated corporate structure, is owned by international shareholders,

¹⁷ See, e.g., Engström & Marian, *supra* n. 11.

¹⁸ E.g., *Yukos affiliates to sue Rosneft: Yukos Capital SARL v. OJSC Rosneft Oil Co.*, [2014] EWHC 2188 (Comm.); *Yukos Capital SARL v. OJSC Rosneft Oil Co.*, [2014] EWHC 1288 (Comm.); *Yukos Capital SARL v. OJSC Rosneft Oil Co.*, [2012] EWCA Civ. 855.

¹⁹ *State Immunity and State-Owned Enterprises: Report Prepared for Special Representative of the UN Secretary-General on Business and Human Rights*, Clifford Chance (Dec. 2008), <<http://business-humanrights.org/sites/default/files/media/bhr/files/Clifford-Chance-State-immunity-state-owned-enterprises-Dec-2008.PDF>> (accessed Dec. 3, 2015).

²⁰ <<http://www.gazprom.com/investors/stock/>> (accessed on June 10, 2015).

²¹ Mike Olsen, *The Future of National Oil Companies in Russia and How They May Improve Their Global Competitiveness*, 35 Hous. J. Int'l L. 617, 627 (2013).

²² See, e.g., Alexey Miller | *Gazprom*, Euroceo (Aug. 4, 2014), <<http://www.europeanceo.com/profiles/alexey-miller-gazprom/>> (accessed Dec. 3, 2015).

has invested in various countries around the world, and enjoys numerous commercial relationships. Regardless of the source of its power, its activity is essentially commercial.²³

The decision of the former *Yukos* shareholders to attack *Rosneft* is much more obvious than a decision to attack *Gazprom* because of mere personal consideration related to the participation of *Rosneft* in the *Yukos* case and to *Gazprom's* outstanding business-political position in Europe.²⁴ It should not be forgotten that *Gazprom*, regardless of its notoriety as a 'Russian gas weapon' has hardly ever been subject to any gas supply restrictions in recent 'rounds' of EU and United States sanctions.²⁵ Nevertheless, the bulk of the observations that will be made in this article is fully applicable to *Gazprom* and other big Russian corporations whose shares are directly or indirectly owned by the Russian Federation.

1. General Observations

Several years ago, the International Court of Justice made a statement, which highlighted the general problem with awards enforcement: '[I]mmunity from enforcement enjoyed by States in regard to their property situated on foreign territory goes further than the jurisdictional immunity enjoyed by those same States before foreign courts.'²⁶ Therefore, the distinction between state immunity from jurisdiction and enforcement is problematic and can lead to unexpected and undesirable outcomes: litigants who successfully claim a right against a state cannot necessarily claim a remedy.²⁷

As a matter of principle, the awards, which are final and binding, are enforceable in 152 states under the New York Convention.^{28, 29} This combination of the different

²³ Phillip Riblett, *A Legal Regime for State-Owned Companies in the Modern Era*, 18 J. Transnat'l L. & Pol'y 1, 27 (2008–09), available at <http://archive.law.fsu.edu/journals/transnational/vol18_1/riblett.pdf> (accessed Dec. 3, 2015).

²⁴ Jack Farchy, *Igor Sechin: Russia's Second Most Powerful Man*, FT (Apr. 28, 2014), <<http://www.ft.com/cms/s/0/a8f24922-cef4-11e3-9165-00144feabdc0.html#axzz3fPHan3TT>> (accessed Dec. 3, 2015).

²⁵ See, e.g., Kenneth Rapoza, *Are European Companies Ignoring E.U. Sanctions on Russia?*, Forbes (Jun. 21, 2015), <<http://www.forbes.com/sites/kenrapoza/2015/06/21/are-european-companies-ignoring-e-u-sanctions-on-russia/>> (accessed Dec. 3, 2015).

²⁶ Jurisdictional Immunities of the State (*Germany v. Italy: Greece Intervening*), Judgment, 2012 I.C.J. 99, 146.

²⁷ Elizabeth Chan, *The Vulture Swoops and Devours Its Prize: The Unsatisfactory Law of State Immunity in Democratic Republic of Congo v. FG Hemisphere Associates LLC*, 19 Te Mata Koi: Auckland U. L. Rev. 145, 165 (2013).

²⁸ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, at <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf> (accessed Jul. 29, 2015) [hereinafter New York Convention].

²⁹ Julien Fouret & Pierre Daureu, *Enforcement of the Yukos Awards: A Second Noga Saga or a New Sedelmayer Fight?*, 30(2) ICSID Rev. 337 (2015). doi:10.1093/icsidreview/siv015

procedural regimes does give rise to a number of considerations when enforcing an award that falls under the New York Convention.³⁰

As some experts state, when an arbitral award debtor fails to comply with an arbitral award, an arbitral award creditor must begin ‘an international game of cat and mouse in search of assets against which it can enforce the award.’³¹ The New York Convention is silent as to how this game should be played and only compels signatory nations to ‘recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon . . .’³²

It should be noted that, pursuant to Art. VI of the New York Convention, domestic courts hearing a leave of enforcement claim for a foreign arbitral award can stay recognition proceedings and / or enforcement in the case of pending setting-aside proceedings in the country of the seat of the arbitration.³³ The commencement of the trial in The Hague District Court is scheduled for early 2016 and, until the court issues a decision, the whole carefully constructed ‘network of enforcement’ of the GML awards will remain in a ‘transitional’ state.³⁴ Should the awards be set aside, any subsequent attempts at enforcement would be extremely difficult since the vast majority of the states targeted by the GML Group would not recognize them.³⁵

Enforcing arbitration awards against Russian business majors controlled by the state will clearly be a legally and factually complicated task.³⁶ The main problem is in persuading the courts that they should pierce the corporate veil and enforce against the companies’ assets despite their separate legal personality.³⁷

The doctrine of veil piercing has been recognized for a considerable period of time or at least ‘has been generally assumed to exist in all common law jurisdictions.’ ‘Piercing the corporate veil’ rarely occurs; more typically, separate legal status remains intact.³⁸

³⁰ Jarred Pinkston et al., *Jurisdictional Requirements for the Enforcement of Arbitral Awards against Defendants and Their Ownership Interest in Subsidiaries – A Comparative Review*, 15(3) Int’l Arb. L. Rev. 97 (2012).

³¹ Claudia T. Salomon & J.P. Duffy, *Enforcement Begins when the Arbitration Clause is Drafted*, 22(2) Am. Rev. Int’l Arb. 272 (2011) (‘[R]ecent studies demonstrate that only 11% of international arbitrations culminate in enforcement proceedings’).

³² New York Convention, Art. III.

³³ *Id.* Art. IV.

³⁴ See Philippov, *supra* n. 5.

³⁵ Only a few domestic jurisdictions, besides France’s, have indicated that an award may, and sometimes must, be recognized by foreign courts even if set aside at the arbitral seat. See Fourret & Daureu, *supra* n. 29, at 338.

³⁶ See, e.g., NOGA, *supra* n. 12; Sedelmayer, *supra* n. 15.

³⁷ Simon Bushell & James Davies, *Yukos Arbitration: The Difficulties of Enforcement*, Practical Law (Aug. 28, 2015), <<http://uk.practicallaw.com/6-578-8425>> (accessed Dec. 3, 2015).

³⁸ Riblett, *supra* n. 23, at 21.

Courts may, in exceptional cases, be willing to pierce the corporate veil to impose personal liability on the company's controllers. However, there is no single test to determine whether the corporate veil should be pierced in any particular case. There are two general justifications for doing so at common law: first, where the evidence shows that the company is not in fact a separate entity; and second, where the corporate form has been abused to further an improper purpose.³⁹ In *Kensington Int'l Ltd. v. Republic of Congo* it was expressly said that

[t]he words or phrases which appear in the authorities where 'piercing' has taken place and which are used in the context of justifying the court's view, involve an element of impropriety and dishonesty . . . Transactions or business structures which are a 'device' or 'stratagem,' a 'mask' a 'cloak' or a 'sham' can give way to the court's examination and determination of what lies behind them and the real situation which obtains.⁴⁰

Crawford writes that both reason and practice support the suggestion that property or funds of separate state instrumentalities, engaged in non-immune transactions, should be more generally available for execution in respect of transactions of the instrumentality. However, whether the assets of a separate state corporation should be available for execution pursuant to claims against the state itself or other instrumentalities is a different question. In the first instance, it must depend upon the status and organization of the instrumentalities and upon the extent to which the ordinary law of the forum allows recourse to assets in this way.⁴¹ Fox adds that '[a]ctual seizure of State assets without consent . . . [is] a rarity.'⁴²

The United States and the United Kingdom have certain similarities in their application of 'piercing the veil' jurisprudence regarding enforcement of international arbitration awards but there are also differences in the approaches that may be important, taking into consideration the amount of money and political hatred that exists.⁴³ Lawyers who specialize in enforcement in both jurisdictions may obtain invaluable experience from a long-awaited reading of the judgments.

³⁹ *Hashem v. Shayif & Anor.*, [2008] EWHC 2380 (Fam.), paras. 163–64: '[I]t is necessary to show both control of the company by the wrongdoer(s) and impropriety, that is, (mis)use of the company by them as a device or façade to conceal their wrongdoing . . . at the time of the relevant transaction(s).'

⁴⁰ [2005] EWHC 2684 (Comm.), para. 178.

⁴¹ James Crawford, *Execution of Judgments and Foreign Sovereign Immunity*, 75 Am. J. Int'l L. 820, 866 (1981).

⁴² Hazel Fox, QC, *The Law of State Immunity* 6 (Oxford University Press 2002).

⁴³ See generally on the *Yukos* case Гололобов Д. Пятилетка Юкоса: Тупиковое дело [Gololobov D. Pyatiletka Yukosa: Tupikovoe delo [Dmitry Gololobov, *The Yukos' Five-Year Plan: A Deadlock Case*]], *Vedomosti* (Jul. 26, 2007), <<https://www.vedomosti.ru/newspaper/articles/2007/07/26/pyatiletka-yukosa-tupikovoe-delo>> (accessed Dec. 3, 2015).

2. *Rosneft*

Before analyzing the test, which may be applied by the English and American courts when deciding on *Rosneft's* liability for arbitration awards brought against the Russian Federation, the contemporary legal and corporate status of *Rosneft* should be explained.

2.1. *Ownership*

The Russian Federation owns a 69.5 percent equity interest in *Rosneft* through *Rosneftegas* OJSC.⁴⁴ *Rosneftegas* OJSC is in 100 percent federal ownership. The Russian government's direct share (through the Federal Agency for State Property Management) in *Rosneft's* equity is 0.00000009 percent. Total amount of shares in nominal holding comprise 2,092,900,097 shares owned by BP Russian Investments Ltd. which constitutes 19.75 percent of *Rosneft's* registered capital.⁴⁵ *Rosneft's* shares are traded on an organized market in Russia: CJSC MICEX Stock Exchange (First Level List). In July 2006 *Rosneft* listed Global Depository Receipts (GDRs) on the London Stock Exchange.⁴⁶ Therefore, *Rosneft* is not a company directly controlled by the state and it has a significant independent shareholding and free-float of shares.

2.2. *Management and Corporate Governance*

Several year ago, Igor Sechin, known as a close friend of Vladimir Putin, stepped down as chairman of the *Rosneft* board to give the board a greater appearance of separation from the Russian state.⁴⁷ Sechin is a CEO of *Rosneft* and is currently the only politician who sits on the board of directors of *Rosneft*. Seven of the other eight members have close relationships with the Russian government but this hardly amounts to direct political control.⁴⁸ *Rosneft* has the appropriate internal corporate governance documentations designed in general compliance with international practice. It conducts international audits and approve transactions in accordance with the requirements of the law and corporate standards.⁴⁹ Although it can hardly be denied that the state exercises significant political influence on *Rosneft's* corporate and business decisions, it never replaces the relevant corporate proceedings with its direct orders. *Rosneftegas* OJSC votes as a major shareholder of *Rosneft* in accordance with the instructions approved by the special procedure.⁵⁰

⁴⁴ <http://www.rosneft.com/Investors/structure/share_capital/> (accessed Dec. 3, 2015).

⁴⁵ *Id.*

⁴⁶ <<http://www.rosneft.com/Investors/structure/>> (accessed Dec. 3, 2015).

⁴⁷ Nina Poussenkova, *The Global Expansion of Russia's Energy Giants*, 63(2) J. Int'l Aff. 108 (2010).

⁴⁸ <<http://www.rosneft.com/about/board/>> (accessed Dec. 3, 2015).

⁴⁹ <<http://www.rosneft.com/docs/report/2014/en/governance/system.htm>> (accessed Dec. 3, 2015).

⁵⁰ Corporate Governance Disclosure in the Russian Federation: A Case Study by the Russian Institute of Directors ¶ 31, <http://unctad.org/Sections/wcmu/docs/ciisar_28th_BelikovPaper_en.pdf> (accessed Dec. 3, 2015) (analyzing Government Resolution No. 738 of December 3, 2004, 'On Managing Shares

2.3. Assistance from the State

Rosneft more than tripled its daily production of barrels of oil between 2004 and 2005, and became the largest oil producer in Russia in 2007 – a position it still holds today.⁵¹ In addition, according to the Russian government, almost 80 percent of the Arctic sections have potential to be developed by *Rosneft* and *Gazprom*.⁵² Of course, none of this would have happened without aggressive support from the state. Since September 2014 *Rosneft* has been at the top of the list of companies facing sanctions from both the United States and the European Union aimed at stopping ‘Russia’s actions destabilising the situation in Ukraine.’⁵³ Attempting to mitigate the consequences of the sanctions, *Rosneft* has applied for RUB1.3 billion (US\$25 billion) from the Stabilization Fund of the Russian Federation although only a fraction of that sum has been approved.⁵⁴ It is also known that *Rosneft* obtains the other significant other assistance from the Russian authorities.⁵⁵

There is no doubt that, without the support of the Russian government, *Rosneft* would never have become the unbeatable leader of the Russian oil industry. However, at the same time *Rosneft* is the country’s biggest corporate taxpayer. The tax revenues from *Rosneft* to the Russian budget in 2013 equaled RUB2.7 trillion.⁵⁶ Therefore, there is a fine balance between assistance from the state and payback from the company.

2.4. State Functions

Rosneft as a national company performs certain additional strategic functions.⁵⁷ In the context of its IPO in July 2006, *Rosneft* acknowledged that ‘[t]he Russian Government . . . controls *Rosneft* and may cause *Rosneft* to engage in business

of Joint-Stock Companies Being in Federal Ownership and on Exercising the Special Right of the Russian State to Participate in Managing Joint-Stock Companies (“Golden Share”).

⁵¹ Olsen, *supra* n. 21, at 627.

⁵² *Russian Arctic Shelf to Be Kept Idle for Gazprom and Rosneft until 2020*, RT (Feb. 20, 2013), <<http://rt.com/business/russia-arctic-reserves-kept-idle-142/>> (accessed Dec. 3, 2015).

⁵³ See Council Regulation (EU) No. 960/2014 of 8 September 2014 Amending Regulation (EU) No. 833/2014 Concerning Restrictive Measures in View of Russia’s Actions Destabilising the Situation in Ukraine, 2014 O.J. (L 271) 3; *Announcement of Treasury Sanctions on Entities within the Financial Services and Energy Sectors of Russia, against Arms or Related Material Entities, and Those Undermining Ukraine’s Sovereignty*, U.S. Department of the Treasury (Jul. 18, 2014), <<http://www.treasury.gov/press-center/press-releases/Pages/jl2572.aspx>> (accessed Dec. 3, 2015).

⁵⁴ *Russian Oil Giant Rosneft Demands Immediate Government Aid – Report*, The Moscow Times (Apr. 21, 2015), <<http://www.themoscowtimes.com/business/article/russian-oil-giant-rosneft-demands-immediate-government-aid--report/519431.html>> (accessed Dec. 3, 2015).

⁵⁵ See Hulley, *supra* n. 1, ¶¶ 33–34. On February 16, 2005, the Supreme Commercial Court of the Russian Federation granted YNG’s cassation complaint and referred for re-examination YNG’s challenge of the 1999 tax reassessment.

⁵⁶ <<http://www.rosneft.com/news/pressrelease/04022014.html>> (accessed Dec. 3, 2015).

⁵⁷ Nina Poussenkova, *Lord of the Rigs: Rosneft as a Mirror of Russian Evolution* (Rice University, Baker Institute for Public Policy Working Paper, March 2007), <http://bakerinstitute.org/media/files/page/9e6513b0/noc_rosneft_nina.pdf> (accessed Dec. 3, 2015).

practices that do not maximize shareholder value.⁵⁸ *Rosneft* is deeply involved in the implementation of the Russian Far East LNG project, including Sakhalin-1 offshore project.⁵⁹ *Rosneft* is also involved in committing to supply petroleum products to the Ministry of Defence of the Russian Federation, in restoration of the oil industry of Chechnya and numerous other projects which are significant for the whole state and the particular regions.⁶⁰ At the same time, participation in all these projects was properly approved by the company's shareholders and the board. This was reflected in the corporate reports and hardly exceeds the level of socially important services that might be reasonably expected from the biggest oil company in Russia.

It is clear that *Rosneft* is a joint stock public company, major but not supermajority stock owned indirectly by the Russian Federation. The company has benefited from different perks, exemptions and benefits provided by the state and follows the general political trends. However, it is also clear that *Rosneft* complies with the requirements of the Russian corporate laws and generally follows international corporate governance standards. Moreover, *Rosneft* was viewed favourably by international investors and financial institutions for many years before the recent conflict between Russia and the West began.⁶¹

3. The United Kingdom

In England, the question of whether a claimant can pursue a state-owned company for the debts of the state has received significant judicial attention. The recent trend has been to take a more restrictive approach, which suggests that any attempt to enforce against Russian state entities in England may well prove fruitless.⁶² It was stated as follows in *I Congreso del Partido*.⁶³

State controlled enterprises, with legal personality, ability to trade and to enter into contracts of private law, though wholly subject to the control of their state are a well known feature of the modern commercial scene. The

⁵⁸ See *Rosneft Risks: Quotes from the Prospectus*, FT (Jun. 27, 2006), <<http://www.ft.com/cms/s/0/ac6837d0-0579-11db-bb76-0000779e2340.html#axzz3f8MeLtoz>> (accessed Dec. 3, 2015).

⁵⁹ *Rosneft Oil Company: Annual Report 2013*, at 73, <http://www.rosneft.com/attach/0/58/80/a_report_2013_eng.pdf> (accessed Dec. 3, 2015).

⁶⁰ See *Rosneft Social Programmes*, <http://www.rosneft.com/attach/0/10/92/social_booklet_eng.pdf> (accessed Dec. 3, 2015); *Rosneft to Invest \$2.5 Billion in Chechnya*, *Vestnik Kavkaza* (May 8, 2013), <<http://vestnikkavkaza.net/news/economy/40084.html>> (accessed Dec. 3, 2015).

⁶¹ See, e.g., Simon Kennedy, *Rosneft Raises \$10.4 Bln in 5th-Biggest IPO*, *MarketWatch* (Jul. 14, 2006), <<http://www.marketwatch.com/story/rosneft-raises-104-billion-in-worlds-fifth-largest-ipo>> (accessed Dec. 3, 2015).

⁶² See Bushell & Davies, *supra* n. 36.

⁶³ *Owners of Cargo Lately Laden on Board The Marble Islands v. Owners of The I Congreso del Partido*, [1983] 1 A.C. 244, 258.

distinction between them, and their governing state, may appear artificial: but it is an accepted distinction in the law of England and other states.⁶⁴

The key issue in the legal reasoning behind the problem of making a separate entity liable for the debts of a state is the determination of its status as an 'alter ego' of the state. In *Adams v. Cape Industries*, the expression 'alter ego' when used to describe the relationship between a company and its shareholders was not considered to be a term of art and, according to the court, could bear a flexible meaning.⁶⁵ For example, such an approach can be found in the famous case *Daimler Co. Ltd. v. Continental Tyre and Rubber Co. (Great Britain) Ltd.* where a majority in the House of Lords held that the claimant company was to be regarded as an enemy alien because the holders of all its shares (save for one) were resident in Germany, as were all the directors.⁶⁶ In *Cape* it was decided that the corporate veil would be lifted where a defendant through the device of a corporate structure, attempted to evade such rights of relief against it as third parties already possessed. However, the court rejected the notion that the corporate veil may be lifted where the corporate structure was created to evade rights of relief which third parties might in the future require.⁶⁷

It should be noted that the *alter ego* concept is significantly more developed in US jurisprudence where a corporation will be regarded as the *alter ego* of a single substantial shareholder if the shareholding is combined with other factors clearly supporting disregard of the corporate fiction on grounds of fundamental equity and fairness.⁶⁸

In *Trendtex*, several decades ago, the Court of Appeal said that the court should look at all the evidence to see whether the organization was under government control and exercised governmental functions:

Whether a particular organisation is to be accorded the status of a department of government or not must depend on its constitution, its powers and duties and its activities . . . The view of the government concerned must be taken into account but is not of itself decisive.⁶⁹

The High Court applied the *Trendtex* criteria in the case of *Kensington Int'l Ltd. v. Republic of Congo*.⁷⁰ The High Court held that the test was the same as that used to determine whether an entity is to be regarded as a department of state or as a separate entity:

⁶⁴ *I Congreso del Partido*, *supra* n. 63, at 258.

⁶⁵ *Adams v. Cape Industries plc*, [1990] Ch. 433, 434.

⁶⁶ [1916] 2 A.C. 307.

⁶⁷ *Cape*, *supra* n. 65, at 434.

⁶⁸ Cheng-Han Tan, *Veil Piercing: A Fresh Start*, 2015(1) J. Bus. L. 26.

⁶⁹ *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] Q.B. 529.

⁷⁰ [2005] EWHC 2684 (Comm.).

[T]he court is entitled to, and must in justice, 'pierce the corporate veil' and recognise that debt as owed to the Congo and that any receipt by Sphynx Bermuda would be the receipt of Cotrade at the top end of the 'sham' chain. The whole purpose was to use Cotrade, AOGC, Sphynx Bermuda and the chain of transactions as a device or façade to conceal the true facts of a sale by Cotrade to Glencore, thereby avoiding or concealing the liability of Cotrade to have its oil or proceeds attached in execution of existing judgments given in respect of the Congo's debts.⁷¹

In *Walker International Holdings Ltd. v. République Populaire du Congo*⁷² the High Court identified the relevant legal test as whether the entity is to be equated with the state, so that it does not exist separately from the state and its assets can be regarded as belonging to the state. In that case, the claimant was successful in obtaining satisfaction of part of an award by showing that a state-owned oil company (SNPC) did not have a legal personality separate from the state and that its assets and those of a subsidiary it created should be considered those of the state available for the satisfaction of Congo's debts, i.e. 'whether SNPC is to be equated with the State so that it does not have an existence separate from the State so that its assets can be regarded as belonging to the State.'⁷³

There were a number of factors suggesting SNPC's independence, such as its formal incorporation; the direction of its board of directors; and its apparently commercial activities in the hydrocarbons sector. However, these were outweighed by the 'contra factors': the existence of unaudited and unverifiable accounts, or running accounts, with the state; the company's failure to pay dividends; and the fact that its profits did not return to the state in cash but instead were disbursed by way of expenditures on behalf of the government, and on matters associated with the states, such as paying for elections, peace initiatives and making donations by way of humanitarian aid.⁷⁴

In another Congo case, *SNPC v. Walker*,⁷⁵ decided in France, the court permitted execution of a judgment against the Congo against the assets of SNPC on the basis that SNPC was

not from statutory standpoint in a position of sufficient operational independence to take independent decisions in its own interest, and to be

⁷¹ [2005] EWHC 2684 (Comm.), para. 201.

⁷² [2005] EWHC 2813 (Comm.).

⁷³ *Id.* para. 92.

⁷⁴ Anthony Sinclair & David Stranger-Jones, *Execution of Judgments or Awards against the Assets of State Entities*, 4 Disp. Resol. Int'l 95, 99 (2010).

⁷⁵ *Société nationale des pétroles du Congo v. Walker International Holdings Ltd. and République du Congo*, CA Paris, 8^e ch., Jul. 3, 2003, *State Entities in International Arbitration* (= 4 IAI Series on International Arbitration) 475 (Emmanuel Gaillard & Jennifer Younan, eds.) (Juris Pub. 2008).

considered as benefiting from a legal and *de facto* independence with regard to the Congolese state.⁷⁶

The approach taken in *Walker* and *Kensington* has been subject to recent judicial criticism on the ground that it ignores the separate legal personality of corporations conferred by company law. In *Continental Transfert Technique Ltd. v. Federal Government of Nigeria & Ors.*,⁷⁷ the High Court stressed that

English rules on conflict of laws recognise the existence of foreign corporations duly created under the law of a foreign country . . . In the absence of a sham or fraud . . . it is not obvious why the separate status of a foreign corporation should be ignored just because it is an organ of a State . . .⁷⁸

Significant skepticism about the *Kensington* approach was expressed in the Supreme Court case of *VTB Capital plc v. Nutritek Int'l Corp. & Ors.* where the court said that piercing the corporate veil in a particular case was 'contrary to high authority, inconsistent with principle, and unnecessary to achieve justice.'⁷⁹

A comparatively recent case, *Kazakhstan v. Istil Group Inc.*,⁸⁰ was concerned with whether a tribunal had been right to find the Republic of Kazakhstan liable for the contractual breaches of companies it allegedly controlled. The High Court confirmed that the Kazakh government's ability to appoint the board of directors and the requirement that the company obtain approval before the conclusion of any contracts 'does not justify piercing the corporate veil.'⁸¹

In addition to the judgments cited above, the Privy Council in *La Générale des Carrières et des Mines v. F.G. Hemisphere Associates LLC*⁸² has recently taken a restrictive approach, referring to a strong presumption that a state-owned entity's separate corporate status should be respected and that the entity and the state should not have to bear each other's liabilities.⁸³ In its decision, the board commented that

[a]ssuming for the sake of argument that the 'unceremonious' subjecting of *Gécamines* to the controlling will of the state involved a breach by the State

⁷⁶ *Société nationale des pétroles du Congo*, *supra* n. 75, ¶¶ 6–7.

⁷⁷ [2009] EWHC 2898 (Comm.).

⁷⁸ *Id.* para. 42.

⁷⁹ [2013] UKSC 5, para 126.

⁸⁰ [2007] EWHC 2729 (Comm.).

⁸¹ *Republic of Kazakhstan v. Istil Group Inc.*, [2006] EWHC 448 (Comm.), para. 66.

⁸² [2012] UKPC 27.

⁸³ *Bushell & Davies*, *supra* n. 37.

of its duty to respect *Gécamines* as a separate entity, that might conceivably justify an affected third party, possibly even an aggrieved general creditor of *Gécamines*, in suggesting that the corporate veil should be lifted to make the State, which had deprived *Gécamines* of assets, liable for *Gécamines*' debts. The Board need express no further view on that possibility. It represents the inverse of the present situation.⁸⁴

As far as English law is concerned, from the foregoing it appears that it is generally accepted that in seeking to identify whether an entity is to be identified as or with 'the state' the following factors should be considered:

- no single factor is decisive;
- the proper characterization of a state entity will depend on consideration of all relevant circumstances;
- the status of the entity in its home jurisdiction is relevant but not decisive;
- the existence of separate legal personality is not conclusive;
- state control is also relevant but not a sufficient criterion; and
- what is essential is a detailed analysis of the constitution, function, powers and activities of the state entity and its relationship with the state.⁸⁵

In summary, the analysis of UK case law shows that piercing the corporate veil may occur in the truly exceptional circumstances where the state-controlled entity is not only considered 'a department of the state' lacking actual legal personality but also used to commit some sort of serious wrongdoing aimed at evasion of a liability.

4. The United States

In the United States, rules regarding state immunity have been codified in the Foreign Sovereign Immunities Act of 1976 [hereinafter FSIA], which establishes two different aspects of sovereign immunity: 1) jurisdictional immunity, a foreign state's immunity from suit; and 2) immunity from execution and attachment, a foreign state's immunity from having its property attached in satisfaction of judgments.⁸⁶

According to the FSIA, an arbitration award holder must first obtain a judgment confirming the award and then the court must enter an order levying execution against the opponent's property. When the opposing party is a foreign state or state agency, the award holder must show that the state entity is not immune from jurisdiction.⁸⁷

⁸⁴ [2012] UKPC 27, para. 77.

⁸⁵ Sinclair & Stranger-Jones, *supra* n. 74, at 101.

⁸⁶ 28 U.S.C. §§ 1605, 1610.

⁸⁷ Molly Steele & Michael Heinlen, *Challenges to Enforcing Arbitral Awards against Foreign States in the United States*, 42 Int'l Law. 87, 88 (2008), available at <<http://www.tklaw.com/files/Publication/b28d3bccd-44e4-479b-9382-13c314278fd1/Presentation/PublicationAttachment/09e876d4-20a1-4fdb-8ed0-37469d463e98/TIL%20ch%203.pdf>> (accessed Dec. 3, 2015).

There are two ways that an entity can qualify as 'agency or instrumentality of a foreign state' under § 1603(b)(2) of the U.S.C.: either it 'is an organ of a foreign state or political subdivision thereof, or a majority of [its] shares or other ownership interest is owned by a foreign state or political subdivision thereof.' The first criterion, also established by the FSIA, requires that the entity should be 'a separate legal person, corporate or otherwise.'⁸⁸ According to the legislative history, this 'is intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name.'⁸⁹

The US legislative report on the US FSIA gave the following examples of entities which may constitute agencies or instrumentalities: '[A] state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.'⁹⁰ It is usually not difficult to determine whether an entity is a separate legal person for the purposes of this definition.

If the arbitration award is against the state but enforcement is sought against the assets of a state entity then the award or judgment creditor must be able to, in the eyes of the court where enforcement is sought, identify the state entity. Where the state entity has separate legal existence, piercing or pulling aside that corporate veil is a significant obstacle that is likely only to be overcome in exceptional circumstances.⁹¹ The US Supreme Court decision in *First National City Bank v. Banco Para el Comercio Exterior de Cuba*⁹² [hereinafter *Bancec*] established the strong presumption of separateness between a foreign sovereign and its agencies and instrumentalities, stating that 'government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such.'⁹³

Claimants who want to enforce arbitration awards in the United States quite commonly face problems dealing with two widely applied exceptions. First, a straightforward exception was established in the leading case that is cited in most academic writing on the problem of enforceability of arbitration awards against states – *Dole Food Co. v. Patrickson*.⁹⁴ In this case, the Supreme Court, in defining

⁸⁸ 28 U.S.C. § 1603(b) (2000).

⁸⁹ H.R. Rep. No. 94-1487, 6, at 16 (1976).

⁹⁰ *Id.*

⁹¹ Sinclair & Stranger-Jones, *supra* n. 73, at 96.

⁹² 462 U.S. 611 (1983).

⁹³ *Id.* pt. III-A.

⁹⁴ 538 U.S. 468 (2003).

'agencies and instrumentalities of a foreign state,' held that 'only direct ownership of a majority of shares by the foreign state satisfies the statutory requirement' involving an entity the 'majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof.'⁹⁵ The Court stressed in its judgment that the Dead Sea Companies, as indirect subsidiaries of the State of Israel which were separated by one or more intermediate corporate tiers, were not instrumentalities of a foreign state because § 1603(b) of the U.S.C. makes clear that instrumentality status is provided only for those entities majority owned by a foreign state.⁹⁶ In *Dole* the Court also indicated that '[t]he veil separating corporations and their shareholders may be pierced in some circumstances' but these instances are the 'rare exception, applied in the case of fraud or certain other exceptional circumstances.'⁹⁷ Ultimately, *Dole* suggests that only companies that are directly majority-owned by the state could qualify as agencies or instrumentalities.⁹⁸

The second principle approach to enforcement of international arbitration awards in the United States (often cited as the '*Bancec* exemption') may create even more problems for the claimant when the principles established in *Dole* are followed. In such cases, courts apply a fact specific analysis to determine whether recognition of separate legal status would be unfair. Typically, such cases involve the foreign state's manipulation of the corporate form for its own benefit, to the detriment of the plaintiff.⁹⁹

In *Bancec*, the main issue before the court was whether an instrumentality of the Cuban government could escape the sovereign's liabilities.¹⁰⁰ In this case, the Supreme Court applied federal common law to determine whether a juridically separate, wholly-owned government corporation could escape the liabilities of its government ('downward attribution').¹⁰¹ Focusing on the 'fairness' and 'formalities' elements, the Court overcame the presumption of separate legal status accruing to a foreign state corporation.¹⁰² The Court held that *Bancec* was a governmental instrumentality because of the following reasons:

⁹⁵ 538 U.S. 468, 474 (2003) (quoting § 1603(b)(2) of the U.S.C.).

⁹⁶ *Id.* at 473, 474 (quoting § 1603(b)(2) of the U.S.C.).

⁹⁷ *Id.* at 475.

⁹⁸ The approach is not consistent (see, e.g., *Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir. 2004); *USX Corporation v. Adriatic Insurance Co.*, 345 F.3d 190, 209 (3d Cir. 2003)).

⁹⁹ Riblett, *supra* n. 23, at 14.

¹⁰⁰ 462 U.S. 611, 613–14 (1983).

¹⁰¹ Sandra Engle, *Choosing Law for Attributing Liability under the Foreign Sovereign Immunities Act: A Proposal for Uniformity*, 15 Fordham Int'l L.J. 1060, 1082 (1991–92), available at <<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1326&context=ilj>> (accessed Dec. 3, 2015).

¹⁰² Mark M. Christopher, *Piercing the Corporate Veil between Foreign Governments and State Enterprises: A Comparison of Judicial Resolutions in Great Britain and the United States*, 25 Va. J. Int'l L. 451, 461 (1984–85).

Bancec was empowered to act as the Cuban Government's exclusive agent in foreign trade. The Government supplied all of its capital and owned all of its stock. The General Treasury of the Republic received all of *Bancec's* profits, after deduction of amounts for capital reserves. A Governing Board consisting of delegates from Cuban governmental ministries governed and managed *Bancec*. Its president was . . . [the] Minister of State and president of *Banco Nacional*. A General Manager appointed by the Governing Board was charged with directing *Bancec's* day-to-day operations in a manner consistent with its enabling statute.¹⁰³

Therefore, under the *Bancec* standard the control exercised by the state must be significant, amounting to day-to-day operational control.¹⁰⁴ The level of control that any sole shareholder would normally exercise over its subsidiary is insufficient to justify piercing the veil.¹⁰⁵ A court may 'pierce the corporate veil' only where it is established that the parent exercises day-to-day operational control over the subsidiary.¹⁰⁶ In *Bancec* the court characterized state instrumentalities as possessing a number of common features: creation by an enabling statute, management by a board selected by the government, and operation as a distinct economic enterprise.¹⁰⁷ The court established a presumption that 'instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such' unless equitable principles weigh in favour of treatment otherwise.¹⁰⁸

In *Cubaexport*¹⁰⁹ the court followed the presumption set out in *Bancec* that instrumentalities 'established as juridical entities distinct and independent from their sovereign should normally be treated as such.'¹¹⁰ This specifically noted that the entity at issue had been engaged in 'commercial operations' rather than 'government functions' as it entered into contracts of its own accord, paid taxes to Cuba and applied for the registration of the trademark in dispute in its own name.¹¹¹ The court also distinguished *Cubaexport* from another case, *TMR Energy Ltd. v. State Prop. Fund of Ukr.*,¹¹² pointing out

¹⁰³ 462 U.S. 611, 613–14 (1983).

¹⁰⁴ *Id.* at 614.

¹⁰⁵ Riblett, *supra* n. 23, at 14.

¹⁰⁶ *Id.*

¹⁰⁷ Frederick W. Vaughan, *Foreign States Are Foreign States: Why Foreign State-Owned Corporations Are Not Persons under the Due Process Clause*, 45 Ga. L. Rev. 913, 935 (2010–11).

¹⁰⁸ 462 U.S. 611, 626–27, 629 (1983).

¹⁰⁹ *Empresa Cubana Exportadora de Alimentos y Productos Varios, Doing Business as Cubaexport v. Dep't of Treasury*, 606 F. Supp. 2d 59 (D.D.C. 2009), *aff'd*, No. 09-5196, 2011 WL 1120271 (D.C. Cir. Mar. 29, 2011).

¹¹⁰ *Id.* at 77.

¹¹¹ *Id.* at 76.

¹¹² 411 F.3d 296 (D.C. Cir. 2005).

that ‘the government of Ukraine exercised significantly more control over the State Property Fund than the Cuban government exercises over Cubaexport.’

Courts have followed the *Bancec* approach when evaluating the separate juridical status of foreign state instrumentalities, such as telecommunication companies,¹¹³ an airline,¹¹⁴ a not-for-profit foundation¹¹⁵ and a shipping line.¹¹⁶

The requirements for establishing ‘day-to day operational control’ have been analyzed in several cases. For example, in *Walter Fuller Aircraft*¹¹⁷ the court highlighted the following factors:

- level of economic control exerted by the government and the degree of management carried out by government officials;
- whether the government receives the entity’s profits or is otherwise the beneficiary of the entity’s operations;
- whether acceptance of separate juridical status would allow the foreign state to obtain the benefits of the US judicial system while evading its obligations.¹¹⁸

The more detailed approach was taken in *Filler v. Hanvit Bank*,¹¹⁹ where the court emphasized the importance of careful consideration of five factors:

- 1) whether the foreign state created the entity for a national purpose;
- 2) whether the foreign state actively supervises the entity;
- 3) whether the foreign state requires the hiring of public employees and pays their salaries;
- 4) whether the entity holds exclusive rights to some right in the foreign country; and
- 5) how the entity is treated under foreign state law.¹²⁰

In *Silvia Seijas et al. v. Republic of Argentina*¹²¹ the court, in considering the application of a group of bondholders seeking to enforce an award of over US\$172 million stemming from Argentina’s 2002 default on its debt, noted that the almost 100 percent state ownership, the state capitalization and the partial control of

¹¹³ *Pravin Banker Assocs. v. Banco Popular del Peru*, 9 F. Supp. 2d 300, 304–05, 307 (S.D.N.Y. 1998) (treating a Peruvian telephone company as a separate juridical entity).

¹¹⁴ *Letelier v. Republic of Chile*, 748 F.2d 790, 793–95, 799 (2d Cir. 1984) (treating Chile’s national airline as a separate juridical entity).

¹¹⁵ *Gabay v. Mostazafan Found. of Iran*, 968 F. Supp. 895, 898–900 (S.D.N.Y. 1997) (treating a not-for-profit foundation as a separate juridical entity).

¹¹⁶ *Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 846, 848–53 (D.C. Cir. 2000) (holding that Venezuela was not amenable to suit based upon the actions of a shipping line).

¹¹⁷ *Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines*, 965 F.2d. 1375.

¹¹⁸ *Id.* at 1380 (fn. 7).

¹¹⁹ 378 F.3d 213 (2d Cir. 2004).

¹²⁰ *Id.* at 217 (quoting *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846–47 (5th Cir. 2000)).

¹²¹ 04 Civ. 400 (TPG) (S.D.N.Y. Aug. 19, 2009).

the airline by the government of Argentina was insufficient evidence of an *alter ego* or principal-agent relationship to allow the assets of the airline to be made available for execution of a state debt. Moreover, the US Court of Appeals for the Ninth Circuit found that proposing candidates for the board of directors, assisting 'in the preparation of regulations, budgets, and reports on banking operations in Iran' but no involvement in day-to-day operations was insufficient to establish a principal-agent relationship.¹²² In another case, financial infusion and the approval by the government of certain sales did not suffice to establish control of day-to-day operations.¹²³

Analysis of the main judgments of the United States courts concerning enforcement of foreign arbitration awards against corporations owned and controlled by states shows that these are more reluctant to pierce the corporate veil than English courts. The *Dole* principle makes corporations not directly owned by states actually immune to the test to enforce foreign arbitration awards against them. The *Bancec* exemption also makes the lives of those who have managed to go through the *Dole* barrier not easy: the piercing of the corporate veil standard is high and any company which complies with the basics of international corporate governance standards and local laws is almost sure to avoid liability.

The perfect example of how the United States approach may work for *Rosneft* was, surprisingly, given in the almost forgotten case concerning *Rosneft* and its parent company *Rosneftegas*. In 2007, *Yukos* shareholders brought a civil suit in Washington against Russia, *Rosneft* and a number of Russian officials. They alleged violations of federal, state and Russian law for what they characterized as effectively the theft of the company's assets.¹²⁴

In *Allen et al. v. Russian Fed'n et al.*,¹²⁵ decided by the US District Court of the District of Columbia in November 2007, the plaintiffs argued that 'the state may be found to exercise such extensive control over the entity [*Rosneft*] that a relationship of principal and agent is created.'¹²⁶ Plaintiffs also alleged that *Rosneftegaz* was a sham entity and invited the court to pierce the corporate veil separating the Russian Federation and *Rosneftegaz* and treat *Rosneft* as an agency or instrumentality of the Russian Federation.¹²⁷ However, the court found that the first plaintiffs' argument that *Rosneft* was an agency or instrumentality of the Russian Federation

¹²² *Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1073 (9th Cir. 2002).

¹²³ *Transamerica Leasing*, *supra* n. 116, at 851–52.

¹²⁴ 522 F. Supp. 2d 167, 171 (D.D.C. 2007).

¹²⁵ *Id.* at 184–85.

¹²⁶ *Allen*, Pl.'s Opp'n at 4–5 (citing *First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611, 629, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983)).

¹²⁷ 522 F. Supp. 2d 167, 184–85 (D.D.C. 2007).

is nothing more than a frontal assault on the Supreme Court's decision in *Dole*. Plaintiffs highlight the various ways in which the Russian Federation asserts control over *Rosneft*, including Russia's indirect ownership, its domination of its Board of Directors, business strategies, and other decisions. This analysis does not advance Plaintiffs' argument because the Supreme Court specifically stated in *Dole* that '[m]ajority ownership by a foreign state, not control, is the benchmark of instrumentality status.'¹²⁸

Regarding the second plaintiffs' argument, the court noted that the plaintiffs did not allege that *Rosneftegaz* failed to follow corporate formalities, was intentionally undercapitalized or commingled funds but instead that *Rosneftegaz* 'is a sham organization, with no purpose other than to act as a vehicle for the Russian Federation's shareholding in state-owned oil and gas companies.' This argument, according to the court's opinion, was simply an attempt to circumvent the *Dole* holding. The court stressed that the Supreme Court explained in *Dole* that '[e]ven if Israel exerted the control the Dead Sea Companies describe, that would not give Israel a "majority of [the companies'] shares or other ownership interest."¹²⁹ The statutory language will not support a control test that mandates inquiry in every case into the past details of a foreign nation's relation to a corporate entity in which it does not own a majority of the shares.¹³⁰ The court confirmed that given this holding, plaintiffs must show something more than control exerted by the Russian Federation. Otherwise, the Supreme Court's holding that control is legally irrelevant would be rendered meaningless and its reference to the rarity of veil piercing would constitute mere surplusage. Since *Allen*, there has been no other known attempt to make *Rosneft* responsible for Russian sovereign debts in the United States.

5. Discussion and Conclusion

Rosneft is close to the Russian state and its rise to becoming a powerful oil corporation has been facilitated by this. In return, it has paid a significant amount of tax and participated effectively in strategic state projects. On the one hand, *Rosneft* is a 'national company' with a 'national mentality' but on the other hand, it has done its best to comply as far as this is possible for such a company with advanced corporate governance standards. In so doing, it has demonstrated its effectiveness to its shareholders and the international business community. To a significant extent, this has been driven by the second biggest shareholder of *Rosneft* – BP, and its IPO on the London Stock Exchange.

¹²⁸ 522 F. Supp. 2d 167, 184–85 (D.D.C. 2007).

¹²⁹ *Id.*

¹³⁰ *Id.*

The successful development of *Rosneft* affair have caused the past and potential future attempts to hold it accountable for some actions taken by the state and declare it an 'instrumentality' of the Russian Federation. In *Allen* the plaintiffs argued that *Rosneftegaz* OJSC was a sham entity and invited the court to pierce the corporate veil separating the Russian Federation and *Rosneftegaz*, treating *Rosneft* as an agency or instrumentality of the Russian Federation. The defendant stated that the plaintiffs' argument should be rejected because the Supreme Court specifically stated in *Dole* that '[m]ajority ownership by a foreign state, not control, is the benchmark of instrumentality status.'¹³¹ The court supported the arguments of the defendant.

Almost 10 years have passed since that forgotten attempt and now the question of whether *Rosneft* is an instrumentality of the Russian state may be on the agenda once again in the course of the pending enforcement of the awards in the United Kingdom and United States. The legal tests analyzed in this article, compared with the brief research on *Rosneft* corporate governance issues and its involvement in the strategic state projects, demonstrate that both the United Kingdom and United States, in any attempt to enforce the awards against *Rosneft's* assets if any are found in the jurisdictions, would definitely fail on quite similar grounds. Firstly, the Russian Federation does not own *Rosneft* stock directly and the necessity to own controlling stake in a targeted company directly in order to have a corporate veil pierced was expressly articulated in *Dole* in the United States. Secondly, regardless of its participation in a significant number of social and strategic state projects and permanent influence from the government exercised through the managers and members of the supervisory board, *Rosneft* conducts its corporate and business activities in compliance with Russian laws and internationally recognized corporate governance standards. It is definitely within a 'margin' of cooperation and contraction with the state, permissible for a company of that size, especially in a country in which the economy is still in a state of some murky transition. *Rosneft* has not reached the level of cooperation with the Russian Federation where it could be considered a 'department of the state' that performs direct orders issued by the government, ignoring the interests of its minority shareholders. Absence of any claims or negative comments from its second biggest shareholder, BP, even in an era of tough political sanctions, serves as the best confirmation that *Rosneft* has managed to find a proper, albeit fine, balance between the interests of the state where it performs the bulk of its business operations and the interests of its shareholders. Based on this, it is doubtful that the desire for revenge felt by GML shareholders will be satisfied.

¹³¹ 538 U.S. 468, 477 (2003).

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Information about the author

Dmitry Gololobov (London, UK) – Visiting Professor, University of Westminster, Visiting Lecture, BPP University, Russian Advocate and Solicitor of England and Wales, Principal of the Private Practice *Gololobov and Co.* (27 Cosway Mansions, London, NW1 6UE, UK; e-mail: dmitry@gololobovandco.co.uk).