

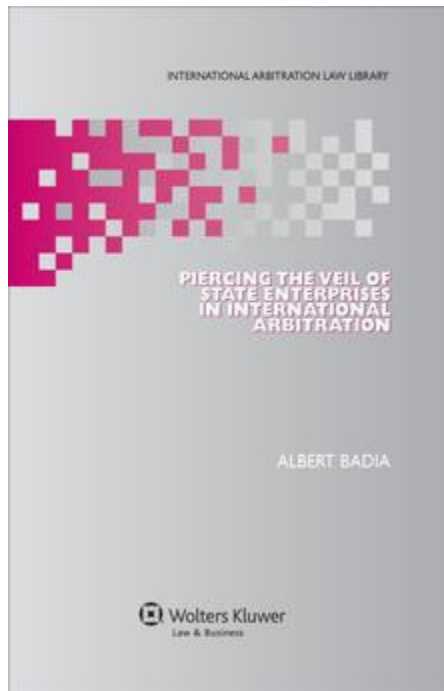
BOOK REVIEW: Piercing the Veil of State Enterprises in International Arbitration

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Reasonable people may strongly disagree about crucial legal issues in international investment law. It is an open question whether the extent and vehemence of this disagreement is greater than in other comparable regimes of international law and dispute settlement. In one area, however, the legal benchmarks already seem quite clear – the body of rules that address the criteria for and consequences of responsibility for internationally wrongful acts, reflected in the International Law Commission’s 2001 Articles on State Responsibility (ILC Articles). The rules on attribution of conduct to states that are set out in articles 4 to 11 of the ILC Articles have been treated as particularly influential in investment treaty arbitration. One might be forgiven for thinking that this is, by and large, a Good Thing. In a workmanlike sense, it provides an accepted frame of reasoning about the involvement of the state in the conduct that breaches international obligations under investment treaty law; in a systemic sense, it firmly places international investment law within the four corners of public

international law, dispelling excessive emphasis on the peculiarity of the discipline.

This view, persuasive as it might seem to some, is not shared by Albert Badia. If the ILC Articles state the modern orthodoxy, then Badia's book is a piece of a sophisticated and delightful heresy, suggesting that their rules on attribution may be inadequate and therefore have to be revisited by reference to the principle of piercing the corporate veil. Badia makes the argument in seven chapters, introducing the general theme of state enterprises and foreign investment in chapter 1. Chapter 2 sets out the broader background for the argument on attribution of conduct by state enterprises in international law. The book then considers the comparative practice on piercing the veil from the perspectives of domestic law (chapter 3) and supranational law (chapter 4) (a pedant might say that, even if certain regional regimes of international law could be described as 'supranational', international human rights law and international trade law are surely 'international'). The book then shifts the perspective to piercing the veil of investors (chapter 5), before turning back to the broader question of state responsibility for breach of investment obligations by the conduct of state enterprises (chapter 6), and concluding with a call for veil-piercing as a special form of attribution (chapter 7). The scope of Badia's argument is ambitious: it includes a discussion of domestic corporate law of several states, law of state responsibility, international investment law, and other regimes of international law. The legal relevance of some issues discussed in chapters 4 and 5 for the general argument may not always be obvious, but the reader will find much of interest in the breadth of coverage, the clear and exhaustive description of judicial and arbitral decisions, and the admirable willingness to push the argument beyond the boundaries of consensus.

Badia's main thesis is that 'states engage responsibility when they control State Enterprises to the extent that they are, or should have been, aware, yet they nonetheless authorize, consent or encourage, the wrongful conduct of those enterprises'. The starting point for thinking about the issue, as per article 2 of the ILC Articles, is that there are two necessary and sufficient criteria for state responsibility to arise: conduct attributable to a state, and a breach of an international obligation of the state. Badia does not challenge

the *sufficiency* of these elements for state responsibility, but he does seem to doubt their *necessity*, at least in their traditional reading, noting that the 'mechanism of attribution ... sets an alternative road to state liability'. The argument that piercing the corporate veil is an alternative to identifying the existence and breach of a primary obligation will leave some people unpersuaded. One response to Badia is that the focus on piercing the veil is not necessarily wrong but can obfuscate the real question: what is the scope and content of the particular primary rule? The primary rule may itself be expressed in terms that require piercing the veil, or it may direct the interpreter to a different legal order that does – or it may not. In all these instances, the piercing of the veil has to stand or fall on traditional techniques of reasoning about the scope and content of obligations, rather than any *a priori* assumptions about how corporations have to be dealt with for all legal purposes.

The second leg of the argument, regarding the relevance of veil-piercing for attribution of conduct (in the technical sense of state responsibility), is more persuasive. The question is whether Badia really goes beyond what the orthodox reading of primary obligations of investment law and secondary rules of state responsibility already permits. James Crawford's *State Responsibility: The General Part* (2013) notes the possibility of attribution of conduct to the state 'where the company itself is an empty shell or is run simply as a vehicle by government officials', where the company 'loses its independence so as to become an extension of the government', or where 'a state actually instructs a corporation to do a certain thing'; rules on attribution of conduct of *de facto* organs, functioning under complete dependency of the state, could perhaps also be of some relevance. Does veil-piercing really provide an alternative to the totality of these propositions, or does it at most suggest a slightly different taxonomy and articulation of principles already accepted? Similarly, it is not at all obvious that cases of privatised or undercapitalised corporations that Badia views as problematic (chapter 6) are quite so vexing. One solution could be to shift the focus away from corporations, and rather evaluate the compliance of the conduct of those state's organs or empowered entities, which make decisions about capitalisation or privatisation, with the state's primary obligations (or identify any special rules of attribution).

Some readers of this book will feel persuaded that the challenges it identifies demand qualitatively new approaches. Others, including this reviewer, will retain the (complacent) view that a diligent application of the accepted vocabulary on sources, interpretation, and responsibility is perfectly adequate for dealing with these issues. Both positions are defensible; the important point is that all the readers will have benefited from clarifying their position on these important issues. As such, the book is recommended to everybody who is interested in this particular aspect of tension between private and public in international investment arbitration: neophytes will consult it for the description of the law, and scholars and practitioners will employ its analysis to both debate the underpinnings of law and nudge its application in a particular direction.

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