4.1 Force majeure

Can a State corporation rely on its separate personality to plead that an act of State constitutes force majeure, freeing the corporation from a contract with a third party? The third party may sometimes have good reason to think that the State may have acted jure imperii in order to escape from a commitment contracted jure gestionis by its alter ego. Böckstiegel\(^258\) recognizes that the other party to the contract may have great difficulty in proving such a connivance. He would therefore place the burden on the corporation to prove that the act of force majeure had been taken for the benefit of the general public good and not only for the benefit of the corporation.

In a much criticized\(^259\) decision\(^260\) the Soviet Foreign Trade Arbitration Commission allowed a Soviet State corporation to rely on force majeure when the Soviet Ministry for Foreign Trade refused to grant the necessary licence for the export of oil to Israel and prohibited the corporation from fulfilling its contract by supplying oil from Romania. As Israel was at that time engaged in the 1956 war with its Arab neighbours, the order could be justified as having been issued in the interest of the foreign policy of the U.S.S.R. rather than for the benefit of the corporation. However the Commission, manned solely by Russians, may not have been impressed by the idea that under the Western concept of separation of powers such an order could have been issued only on the basis of a law authorizing the stoppage of the flow of war materials to belligerents.\(^261\)

There may have been more reason for legitimate suspicion of connivance when the Polish authorities refused to grant an export licence for sugar to Rolimpex, a Polish State corporation. There, too, reasons of public good were alleged. A very bad harvest in Poland had caused a shortage on the Polish domestic market. Under emergency circumstances a State may well prohibit the export of scarce commodities in order to ensure their availability on the home market. There remains, however, the fact that reliance on that act of State as force majeure discharged the Polish State corporation from its duty to obtain the sugar to be furnished under the contract from other sources, at prices which had risen.
considerably since the contract was made. The House of Lords held that, in principle, "there may be cases when it is so clear that a foreign government is taking action purely in order to extricate a State enterprise from contractual liability, that it may be possible to deny to such action the character of government intervention", though it found that the case before it did not amount to such a practice.\textsuperscript{262}

Two recent Arbitral Awards rendered under the rules of the International Chamber of Commerce\textsuperscript{263} indicate a readiness to deny a State-owned enterprise the right to rely on \textit{force majeure} in such circumstances. Both awards approve a decision by the French Supreme Court\textsuperscript{264} which held that Air France could not rely on \textit{force majeure} where its guardian authority, the State, had tried to prevent it from carrying out its obligations. The awards, however, could avoid the issue. In one case the event relied on was held to have been foreseeable. In the other case the State itself was made a party to the arbitration, thus rendering moot the \textit{force majeure} issue.

The problem also arose in economic relations between State corporations belonging to member States of the Council of Mutual Economic Aid. The Foreign Trade Arbitral Tribunal of Poland had admitted reliance on \textit{force majeure} arguments in one such case.\textsuperscript{265} However, the rules on \textit{force majeure} in the Council's General Conditions for Deliveries\textsuperscript{266} are silent on this point. According to two Protocols concluded by the German Democratic Republic with Poland\textsuperscript{267} and with Hungary,\textsuperscript{268} acts by the authorities adopted for the purpose of economic planning or for directing economic activities shall not discharge a State corporation from liability. However the hopes of the Western partners of such corporations that these protocols were a sign of a more general tendency\textsuperscript{269} did not materialize. The Law on International Economic Relations of the

German Democratic Republic\textsuperscript{270} does give a definition of \textit{force majeure}, but does not indicate clearly whether State interventions come under this definition. Sosniak\textsuperscript{271} has recently stated that the rules embodied in these two Protocols were special mutual concessions which have not been granted to the other Council partners, let alone to third States.

Enderlein\textsuperscript{272} explains this attitude by pointing out that in relations between socialist States each enterprise binds itself under international law to furnish and to accept the goods concerned. Non-recognition of a \textit{force majeure} plea constitutes a sanction for a default concerning these duties.

\textbf{4.2 Responsibility for jure imperii State acts}

While in general the corporate veil allows the State corporation to rely on State acts \textit{jure imperii} as being acts of \textit{force majeure}, the existence of this same veil exempts State corporations from any responsibility for such acts. Thus a Soviet Navigation Company was held entitled to claim payment for the services of its tug which had enabled the British ship "King Edgar" to get off a Sandbank. The owners of the "King Edgar" could not offset this claim against their own claim against the Soviet Waterways Administration whose faulty signalling service had caused the stranding of their ship.\textsuperscript{273} Likewise, a Polish State corporation claiming payment in zloty before a Swedish court, was not obliged to accept payment in zloty banknotes smuggled out of the country in contravention of the Polish currency control law.\textsuperscript{274}

Part II CORPORATIONS UNDER INTERNATIONAL LAW

\textbf{CHAPTER 10: COMMON INTER-STATE ENTERPRISES}

10.5 Piercing the corporate veil
In the *Barcelona Traction* case the International Court declared that the corporate veil may be lifted in appropriate cases,\(^{568}\) which the court did not deem to exist in the case concerned.

### 10.5.1 Diplomatic protection

As far as diplomatic protection of common inter-State enterprises is concerned, no problem arises as long as such enterprises are established under the law of one of the partner States. They are thus nationals of that State, which will be entitled to grant them diplomatic protection.

If one were to tie the right to protect a Corporation to a genuine link with the State exercising such protection, this condition would be fulfilled in the present case.\(^ {569}\) The seat State of the enterprise, as partner of that enterprise, will have a considerable interest in it.

Things become more difficult in the case of enterprises established under international law. According to the will of the partner States they should be cut loose from any national ties. These enterprises would be in a position similar to that of stateless persons. None of the partner States could therefore grant them the diplomatic protection it may grant to its nationals.

This undesirable result could be overcome by assuming that this right belongs to those parts of the law of the host State which apply residuarily. However, this solution would be incompatible with the desires of the partner States.

Insofar as such an enterprise is established by a decision of an international organization or by a treaty concluded under the auspices of such an organization, one might consider that the organization could exercise a right of diplomatic protection in favour of its "child". Here too, the intentions of the partner States and of the organization to sever the child from its mother militate against this solution.\(^ {570}\)

However, the partner States would certainly not be willing to leave without any protection enterprises belonging to them and established by them for the promotion of their common good.\(^ {571}\) The only way of obtaining such protection would be to lift the corporate veil. Each partner State would then be able to exercise diplomatic protection on behalf of its share in the enterprise. All the partners could jointly exercise diplomatic protection on behalf of the enterprise.

### 10.5.2 Legal responsibility

The *Barcelona Traction*\(^ {572}\) judgment also refers to piercing the corporate veil in the interest of creditors.

Adam\(^ {573}\) believes that in domestic law the member States remain jointly and severally responsible for the acts of the enterprise at least in a subsidiary way. He deduces this from the fact that organizations are created by treaty, and thus under international law. This treaty, supplemented by the rules of general international law, becomes the national law of the enterprise. The enterprise is not a national of the forum.\(^ {574}\) According to generally accepted principles of the conflict of laws\(^ {575}\) the respective responsibilities of a corporate entity and of its members are determined by the national law of that entity. If the treaty establishing the enterprise does not contain any such rules, the member States will be jointly and severally responsible for its acts, as general international law does not contain any rules comparable to those which, in domestic law, limit the responsibility of the members of a corporation for the latter’s acts.

Moreover, comparative law shows that in the domestic law of several States there exist corporate entities, whose members remain responsible for its acts.\(^ {576}\)

Shihata\(^ {577}\) refuses to deduce the existence of a rule of unlimited liability merely from the absence of a rule of limited liability in international law. “All relevant provisions and circumstances must be studied to ascertain what was intended by the parties in this respect and the extent to which their intention was made known to third parties.” These intentions will be closer to limiting the responsibility of the partners.

Even if Shihata's approach were followed,\(^ {578}\) the member States would remain liable under circumstances which would...
have required a lifting of the corporate veil in domestic law.\textsuperscript{579}

Such an action will be admitted only in exceptional circumstances. Pressure of public opinion may sometimes be so strong that a principal shareholder does not dare hide any longer behind the corporate veil and will settle debts incurred by the corporation. Thus in the Federal Republic of Germany, Gerling Insurance Co. settled the debts of Herstatt Bank\textsuperscript{580} and due to pressure exercised by O.E.C.D., Raytheon, the U.S. mother company settled the debts of its Belgian Subsidiary, Badger Co.\textsuperscript{581}

As far as common inter-State enterprises are concerned, the partner States here too come to their rescue. The partners assumed the financial consequences of their bad judgment when establishing the International Institute for the Management of Technology in Milan.\textsuperscript{582} It should have been evident to them that there was no market for a school of this type, in addition to the well-established schools already in existence in this field.

The responsibility of the partner States was even more directly engaged in the case of Eurochemic. They had ordered Eurochemic to continue its activities for political reasons when the management of Eurochemic saw no other possibility than winding up.\textsuperscript{583} After protracted negotiations the partners furnished funds to Eurochemic in excess of their share in Eurochemic's capital in order to avoid its bankruptcy.

However, may the member States hide behind this veil at all in order to escape liability for debts incurred by their common inter-State enterprise? The above precedents are not devoid of legal significance. The States appear to have acted on the assumption that they had more than a moral responsibility. Such responsibility as there is would be borne by the partner States jointly and severally.

Just as a State cannot escape its responsibility under international law by entrusting to another legal person the fulfilment of its international obligations,\textsuperscript{584} the partner States of a common inter-State enterprise are jointly and severally responsible in international law for the acts of the enterprise.

**10.5.3 States as masters of the enterprise**

Agreements establishing a common inter-State enterprise often include as an annex a statute containing rules for its own amendment. However, as long as the partner States act in common, they may disregard these rules. This will be so even if the enterprise has been established under the law of one of its member States,\textsuperscript{585} unless the rules in the statute form part of the imperative law of that State.

In general, however, and especially where the enterprise has been established under international law, the partner States may rely on the rights granted to States as masters of the treaty.\textsuperscript{586}

At least such would be the result if one were to examine the problem exclusively from the international law angle. The rules of domestic constitutional law on the transformation or incorporation of international law into domestic law may be more formalistic. Even in international law, though, there may be limits to the "masters of the treaty" doctrine. Article 84 and Annex 29 of the Treaty between France and the Federal Republic of Germany on the Saarland of 27 October 1956\textsuperscript{587} established Saarlor S.A. for a period of 25 years. This period expired in 1981. The State partners of Saarlor S.A. continued this common inter-State enterprise beyond this term. Rolshoven and Jehne\textsuperscript{588} believe that the statute of Saarlor S. A. enables the organs of Saarlor to take this decision, provided it is approved by the two governments. Nevertheless, in view of the specific terms of the Treaty this decision may have been \textit{ultra vires}. It would have been preferable to modify the relevant provisions of the Treaty.

[...]

[...]


272 Enderlein, loc. cit., p. 403.


275 See supra text at note 33.


277 But see Goldman's proposal for granting such a right of diplomatic protection to the U.N. in respect of multinational enterprises, supra text at note 103.

278 See supra text after note 530.

279 See supra text at note 568.


281 Cf. supra text at notes 472-3.

282 Cf. supra text at note 492.

283 R. David and Drobnig in S. Bastid, R. David, op.cit., pp. 12-13 and 46-8 respectively.


285 But see text at note 576.

286 Cf. supra text at notes 412-20.


289 See supra text at note 559.

290 Von Busekist, loc.cit., p.264.


292 According to the German Federal Court, the partners of a contract could modify this contract merely by their unanimous behaviour over a certain period of time although according to the text of the contract all amendments thereto should have had to be made in writing. German Federal Court, 17 January 1966, Lindenmaier-Möhring, Nachschlagewerk des Bundesgerichtshofes, No.22 to H.G.B., Art.105.
Cf. supra text at notes 351 and following.

French J.O., 10 January 1957, p.460.


Referring Principles:

VI.3 - Force majeure

X.2 - Piercing the corporate veil