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An Investor in a Candy Shop: Nationality Shopping in International Investment Arbitration

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Access to international arbitration as a means of dispute resolution is one of the rights and privileges usually provided to foreign investors under international agreements for the promotion and protection of investments (also referred to as international investment agreemetns, or IIAs). Since IIAs grant special rights and guarantees only to nationals of particular States, the nationality of the claimant in international investment arbitration, whether it is an individual or a legal person, plays a crucial role in determining jurisdiction of international investment tribunals. In light of IIAs' varying dispute resolution mechanisms, foreign investors often attempt to obtain the benefits of dispute resolution clauses which are the most favourable for them by adopting nationalities of convenience, i.e., becoming nationals of a State with which they have extremely tenuous, if any at all, links. Nationality shopping in international investment arbitration has been for many years, and still remains, a popular device for investors and a constant cause of concern for states, which design ways to put an end to this practice.

The frequency and the widespread character of nationality shopping has resulted in an impressive body of jurisprudence on this issue. The relatively vast arbitral practice, however, is not synonymous to elimination of controversies in legal interpretation and the outcome of arbitral proceedings.

This research aims to analyse in one overview the unconsolidated doctrinal findings on this issue and international arbitral practice, including the most recent decisions of international investment tribunals, and to outline the most common nationality planning schemes employed by individuals and legal entities to enjoy the most convenient dispute resolution mechanisms, as well as the methods States resort to in order to curb this practice.

Nationality shopping tends to be a lesser trend for individuals, hindered by the obstacles of many states' harsh naturalization policies requiring excessive efforts on the part of the individual to obtain the desired citizenship. Such rigidity in itself appears to discourage investors from nationality shopping. Mostly for this reason, the existing jurisprudence to the great extent deals with the instances of dual nationality rather than the instances of specifically acquired citizenship, and revolves around the notion of effective nationality and "genuine link" with the state of citizenship as opposed to the artificial connection based on paper only.

Nationality of legal persons is the most frequent legal tool for manipulations by foreign investors due to relative simplicity of corporate restructuring and company migration. It is also efficiently fought against by the states by means of incorporating into international treaties "denial of benefits" clauses, which bar "shell companies" from (ab)using treaty protections and guarantees, including access to dispute resolution mechanisms offered by a particular treaty. The practice of international investment tribunals in this respect illustrates the tight and uncertain balance between the notions of good faith and abuse of jurisdiction, on one hand, and strict interpretation of treaties and technical legality of corporate restructuring and even nationality shopping, on the other.

Источники и литература

1) Dolzer R., Schreuer C. Principles of International Investment Law. 2008. Pp. 46-60.
2) Douglas Z. The International Law of Investment Claims. 2009. Pp. 284-328.
3) Jagush S., Sinclair A., Wickramasooriya M. Restructuring Investments to Achieve Investment Treaty Protection // Kinnear M., Fisher G., et al. (eds) Building the International Investment Law: The First 50 Years of ICSID. 2015. Pp. 175-190.
4) Perkams M. Protection for Legal Persons // Bungenberg M., Griebel J., Hobe S., Reinisch A., Kim Y. (eds) International Investment Law. 2015. Pp. 638-653.
5) Reed L, Davis J. Who Is a Protected Investor? // Bungenberg M., Griebel J., Hobe S., Reinisch A., Kim Y. (eds) International Investment Law. 2015. Pp. 614-637.
6) Tercier P., Tran Tang N. Criteria to Determine Investor Nationality (Juridical Persons) // Kinnear M., Fisher G., et al. (eds) Building the International Investment Law: The First 50 Years of ICSID. 2015. Pp. 141-152.
7) Thorn R., Doucleff J. Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of "Investor" // Waibel M., Kaushal A., et al. (eds) The Backlash Against the Investor Arbitration: Perceptions and Reality. 2010. Pp. 3-29.