TREATY SHOPPING IN INTERNATIONAL INVESTMENT LAW

ABSTRACT

Treaty shopping is a term used to describe a change of the corporate structure of an investor with the aim of falling within the scope of a chosen investment treaty that would otherwise not be accessible to the investor in order to take advantage of its benefits. This thesis offers a comprehensive overview and analysis of treaty shopping in international investment law with the aim of clarifying what the limits of treaty shopping are and whether they are currently taken into account by investment tribunals.

The thesis first examines several related theoretical issues. After introducing the notion of treaty shopping and outlining the negative impacts it may have (Chapter 1), the attention is turned to the question of how to approach the nationality of legal persons in international law and under investment treaties, since nationality is the key concept that enables treaty shopping (Chapter 2). Different corporate nationality criteria – incorporation, seat, control and effective activities – are introduced and described. The chapter also strives to illuminate how nationality is understood under the ICSID Convention.

The subsequent analysis focuses on the denial of benefits clauses (Chapter 3) that are inserted into some treaties to prevent treaty shopping. The chapter presents numerous application problems that have emerged in relation to these clauses. Based on the identification of the problematic issues, denial of benefits clauses included in the recent investment treaties are evaluated. At the end of the chapter, a model denial of benefits clause is presented.

The last theoretical chapter investigates the role of general principles of law in investment law (Chapter 4). The principles of good faith and the prohibition of abuse of rights are crucial for preventing treaty shopping; therefore, the chapter examines their origins, their applicability in investment law and their role in cases of treaty shopping, including their impact on treaty interpretation.

The second part of the thesis examines investment arbitration tribunals' decisions concerned with treaty shopping and analyses their approach to the issues of corporate nationality, the interpretation of article 25(2)(b) of the ICSID Convention, the doctrine of piercing the corporate veil and the application of the abuse of rights principle (Chapter 5). The outcomes of the decisions in relation to relevant issues are summarised; in this way, the tendencies in the current practice are identified.

In the end, the attention is brought to possible future challenges relating to treaty shopping, namely to changes in the drafting practice, current investment protection trends in the EU and possible inspiration by developments in international tax law that faced a similar treaty shopping problem (Chapter 6).

The thesis arrives at the conclusion that the limits imposed on treaty shopping are twofold. First, they are set by the text of investment treaties that might facilitate treaty shopping or considerably limit it and, secondly, by the application of the abuse of rights doctrine. Based on the analysed investment arbitration decisions, the dissertation thesis advocates the view that the limits are currently not set satisfyingly, especially due to the insufficient understanding of the abuse of rights doctrine by investment tribunals. However, it also appears that in the future, the challenges posed by treaty shopping might be overcome by more accurate treaty drafting.

KEYWORDS

abuse of rights; article 25(2)(b) of the ICSID Convention; corporate nationality; denial of benefits clause; international investment agreements; treaty shopping