

RESOLVING NATIONALITY PLANNING ISSUE THROUGH THE APPLICATION OF THE DOCTRINE OF PIERCING THE CORPORATE VEIL IN INTERNATIONAL INVESTMENT ARBITRATION

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ABSTRACT

Nationality planning by transnational enterprises in the international investment arena to date still is an unsettled controversy. Respondent States often raise objections against such activities in the jurisdictional phase. Among other arguments, they have relied on the common law doctrine of piercing the corporate veil against nationality planning. There has been neither a conclusion on whether such nationality planning should be allowed, nor an identification of the best solution to address this problem. Acknowledging a few tribunals' resort to the principle of abuse of rights, the author of this article attempts to analyze the possibility of supplementing the examination of abuse of rights with the values and elements of the doctrine of piercing the corporate veil. Through this approach, the author hopes to enhance the justification, reasoning, or predictability of such application.

This article firstly introduces the application and examination pattern of the doctrine of piercing the corporate veil in the municipal law context. More specifically, it focuses on its evolving function in United State courts to better implement or to prevent the frustration

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of the underlying objectives and purposes of the law at dispute, particularly with regards to laws concerning public policy.

The article then proceeds to the core issue of nationality planning, by briefly presenting its causes and its several patterns, and setting out that it is accompanied by an “abuse of corporate personality”. Followed by the claims argued by Respondent States and tribunals’ corresponding opinions and reasoning, Section III explains the respective limits of the interpretation of international investment agreements and the application of abuse of rights under current international arbitration practice.

While approving a few tribunals’ resort to the principle of abuse of rights, its application in current practices is vague and divergent. To develop a more specific examining standard, this article aims to demonstrate that the doctrine of piercing the corporate veil is derived from and based on the principle of abuse of rights. Therefore, in terms of abuse of corporate form in nationality planning issues, this article suggests that arbitral tribunals can refer to the elements and standards of the doctrine of piercing the corporate veil. Finally, this article will demonstrate that under certain circumstances, claimant’s nationality acquired by nationality planning activities, can be pierced through via the three-pronged test of the doctrine of piercing the corporate veil. The claim will then be dismissed.

KEYWORDS: *doctrine of piercing the corporate veil, separate corporate personality, enterprise entity theory, international investment agreement, Investor-State Dispute Settlement, separate corporate personality, nationality planning, abuse of right, denial of benefits, international investment arbitration*