Ownership, Control, and Nationality in Investor-State Dispute Settlement: Analysis of 2021 Cases (UNCTAD Review)

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Navigating the labyrinthine complexities of Investor-State Dispute Settlement (ISDS) often requires a discerning eye for detail, especially when it comes to pivotal issues such as ownership, control, investor nationality, and corporate structuring. The 2021 review by the United Nations Conference on Trade and Development (UNCTAD) published in July/August 2023 serves as a recent cartography of this intricate landscape, shedding light on how arbitral tribunals have approached these multifaceted questions. This article highlights these dimensions, guided by the interpretive subtleties and judicial temperaments exhibited in recent tribunal decisions.

Çap and Sehil v. Turkmenistan: Ownership and Third-Party Funding

The tribunal in this case was confronted with the question of whether it had jurisdiction over the claimants, considering the allegation that the claims had been assigned to a third-party funder with non-Turkish nationality. The tribunal found that no evidence had been presented to suggest that the claimants were no longer the proper owners of the claims. This decision underscores the need for concrete evidence when challenging the ownership of claims, particularly in the context of third-party funding.

Carrizosa Gelzis v. Colombia: Dual Nationality and Dominant Nationality

The tribunal had to determine its jurisdiction over the claimants, who were dual nationals of the United States and Colombia. The tribunal found that Colombia was the center of the claimants' professional, private, and public lives at the critical dates. Consequently, it concluded that the dominant and effective nationality of the claimants was Colombian, not American. This decision highlights the importance of the "dominant and effective nationality" test in ISDS cases involving dual nationals.

Eco Oro v. Colombia: Nationality Requirement and Beneficial Ownership

The tribunal had to ascertain whether Eco Oro met the nationality requirement under the Canada-Colombia Free Trade Agreement (FTA) and whether it was owned or controlled by Canadian investors. The tribunal found in favor of Eco Oro on both counts, emphasizing that the respondent did not present any evidence of actual control by non-Party investors. This decision elucidates the need for a meticulous examination of beneficial ownership and control structures in ISDS cases.

Fynerdale v. Czechia: Corporate Structuring and Jurisdiction

The tribunal had to decide whether the alleged investments made by a Dutch entity through a Maltese company were protected under the Czechia-Netherlands BIT. The tribunal declined jurisdiction on another basis, rendering it unnecessary to entertain this argument. Nevertheless, the case raises pertinent questions about the role of corporate structuring in determining the jurisdiction of arbitral tribunals.

Hope Services v. Cameroon: Denial of Benefits and Ownership

The tribunal had to determine its jurisdiction over the claims

despite the respondent's invocation of the denial of benefits clause. The tribunal found that the respondent's invocation was not valid, as it failed to "promptly consult" with the United States, the other contracting party to the BIT. Moreover, the tribunal found that the claimant did not own or control investments in the online platform and related government contracts. This decision accentuates the procedural and substantive aspects of invoking the denial of benefits clause in ISDS cases.

Infracapital v. Spain: Abuse of Process and Good Faith

The tribunal had to decide whether it had jurisdiction over the claims, considering the respondent's objection that there was an abuse of process or lack of good faith on the part of the claimants. The tribunal found no elements to sustain such allegations, emphasizing that the investment was not restructured solely for gaining access to investment arbitration. This decision serves as a cautionary tale against hastily alleging abuse of process or lack of good faith without substantial evidence.

Littop and Others v. Ukraine: Minority Shareholding and Business Activities

The tribunal had to ascertain whether the claimants had an investment under the Energy Charter Treaty at the time the arbitration was commenced. The tribunal found that they did not, as they failed to prove ownership of any Ukrnafta shares at that time. Moreover, the tribunal found that the claimants did not have substantial business activities in Cyprus, the alleged home state. This decision underscores the importance of proving ownership and substantial business activities in the alleged home state for establishing jurisdiction.

MAKAE v. Saudi Arabia: Control and Physical Presence

The tribunal had to decide whether it had jurisdiction over the claims, considering the respondent's allegation that the

claimant did not control the investment in the host State. The tribunal found that the claimant had no ownership interest in the alleged investment and did not exercise de facto control over it at any relevant time. This decision highlights the need for concrete evidence of control and ownership for establishing jurisdiction in ISDS cases.

Pawlowski and Projekt Sever v. Czechia: Incorporation and Control

The tribunal had to decide whether the claimants qualified as protected investors under the Czechia-Switzerland BIT, considering the respondent's objection that Pawlowski AG had neither real economic activities nor its seat in the alleged home state Switzerland. The tribunal found that Pawlowski AG was incorporated under the laws of Switzerland and fully owned and controlled by a Swiss national, thereby qualifying as a protected investor. This decision emphasizes the significance of the place of incorporation and control in determining the status of a protected investor.

Concluding Remarks: The Temperament of ISDS Tribunals in the Current Landscape

In synthesizing the jurisprudential landscape delineated by the UNCTAD's 2021 review, one cannot overlook the discernible temperament of ISDS tribunals as they navigate the intricate corridors of ownership, control, nationality, and other pivotal issues. The tribunals have exhibited a proclivity for rigorous evidentiary scrutiny, eschewing superficial analyses in favor of a more nuanced, fact-intensive inquiry. This is not merely a matter of jurisprudential preference but a reflection of the tribunals' cognizance of the gravity of their mandates.

The tribunals have demonstrated an acute awareness of the dual imperatives that underpin ISDS proceedings: the need to safeguard the legitimate expectations and rights of foreign

investors, and the equally compelling need to respect the sovereignty and regulatory prerogatives of host states. This delicate equipoise is manifest in the tribunals' approach to questions of ownership and control, where the emphasis has consistently been on substantive economic reality over formalistic legal structures.

Moreover, the tribunals have shown a marked attentiveness to the specificities of treaty language, particularly in the context of denial of benefits clauses and nationality requirements. This textual fidelity serves a dual function: it not only ensures fidelity to the parties' bargain as encapsulated in the treaty but also fortifies the legitimacy of the ISDS mechanism itself by mitigating accusations of judicial overreach.

The trend toward a more discerning, evidence-based analysis is especially salient in cases involving complex corporate structures and third-party funding. Tribunals are increasingly wary of claimants who seek to manipulate corporate form to gain access to ISDS or to circumvent treaty limitations, and they are correspondingly rigorous in their scrutiny of the factual matrix that underpins such structures.

In the realm of nationality and dual nationality, the tribunals have evinced a nuanced understanding of the complexities that arise in an increasingly globalized world. The "dominant and effective nationality" test, although not without its critics, has emerged as a pragmatic tool for resolving the dilemmas posed by multiple allegiances, thereby ensuring that the protective ambit of investment treaties is neither over- nor under-inclusive.

In sum, the prevailing temperament of ISDS tribunals, as gleaned from the 2021 UNCTAD review, is one of cautious deliberation, evidentiary rigor, and a nuanced appreciation of the complex interplay between investor rights and state sovereignty. This judicial temperament does not operate in a

vacuum; it is both a response to and a shaping force in the evolving norms and expectations that govern the international investment regime. As such, it warrants close attention from practitioners and scholars alike, serving as both a barometer and a guidepost for future developments in this ever-evolving field.

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