CHAPTER 6
THE DECISION ON JURISDICTION IN
TOKIOS TOKELES V. UKRAINE

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I. INTRODUCTION

Nationality, usually defined as the quality of being a subject of a certain state, has been one of the legal concepts that plays a prominent role in both the domestic and international arenas. It not only provides a basis for state jurisdiction, but also creates a link between nationals, including individuals and corporations, and international law. For example, pursuant to traditional international law, if a state’s nationals were mistreated abroad, their home state exclusively would have the right to ask for remedy through diplomatic protection. Nationals themselves had no such a right. The Nottebohm and Barcelona Traction cases serve as examples of this principle. Similarly, in the context of international trade law, no nationals of one state can bring a claim directly against other states, even if their private and economic interests are hurt. As two commentators have noted, “[v]iolations of trade law, even though they strike at the economic interests of private parties, are matters resolved directly and solely by states.”

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2 Id. at 849.


In 1965, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States\textsuperscript{6} created the first forum for bringing and adjudicating foreign investment disputes between nationals of one state and another sovereign state,\textsuperscript{7} the International Center for Settlement of Investment Disputes (ICSID). Again, the nationality of claimants is one of the decisive elements for determining whether a claim can be arbitrated under an international regime. Only nationals of the contracting states can benefit from the ICSID’s mechanism. It seems that the role of nationality in the Convention is more important than it is in public international law and international trade law. As \textit{lex specialis} allowing nationals to bring a claim directly against a sovereign state without their national state’s filter, it should be applied carefully and only with the sufficient line of reasoning.

Nationality as a part of jurisdiction \textit{ratione personae} of ICSID’s tribunals has often been challenged by host states, arguing that a claimant is not an investor of another contracting state, and asking a tribunal to deny jurisdiction over the case. The dispute in \textit{Tokios Tokeles v. Ukraine}\textsuperscript{8} is among the cases in which the tribunal had confirmed its jurisdiction, despite such objection. The \textit{Tokeles} tribunal issued two procedural orders and ultimately rendered an award of July 26, 2007, in favor of Ukraine.

The critical part of the decision on jurisdiction and the dissenting opinion both focused on the nationality of the investor. While the majority seemed to adopt a passive approach when dealing with the issue, the dissident took an overly active role. This case is problematic, not only because after the decision on jurisdiction was issued, the dissenting chair of the tribunal resigned, but also because of the quality of its reasoning. The analytical purpose here is to consider the instances of inadequacy or manifest absence of reasoning in the case.

The first part of the article will present the relevant facts, the pertinent legal provisions, the problematic issues, and the controlling and dissenting opinions. The second part will focus exclusively on the patterns of reasoning employed by the tribunal.

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\textsuperscript{6} Convention on the Settlement of Investment Disputes between States and Nationals of Other States, ICSID (World Bank), art. 1, \textit{opened for signature} Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention or Convention].

\textsuperscript{7} R. Doak Bishop \textit{et al.}, \textit{Foreign Investment Disputes: Cases, Material and Commentary} 5 (2005).

\textsuperscript{8} Tokios Tokeles v. Ukraine, Decision on Jurisdiction, ICSID Case No. ARB/02/18 (Apr. 29, 2004), available at http://www.worldbank.org/icsid/cases/awards.htm [hereinafter Tokeles].