Nationality Requirements in Investor–State Arbitration

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I. INTRODUCTION

Investor–State arbitration allows foreign investors to directly claim against the State in which they invested. A fundamental requirement of all such arbitration is that the investor, whether an individual or a corporation, be a national of a specific foreign country. Yet the issue of investors’ nationality can be surprisingly complex. In a globalized world economy, most international investment is channelled through complex structures consisting of companies incorporated in different jurisdictions and owned by nationals of different countries. In such cases, it can be difficult to identify the rung of the corporate ladder that determines the nationality of the investor. Even the nationality of individual persons can be difficult to determine when many international business people carry two or more passports.

A recent spate of investor–State arbitral awards has grappled with different aspects of this nationality problem. These decisions include Champion Trading v. Egypt, Soufraki v. United Arab Emirates, Tokios Tokeles v. Ukraine and Loewen v. United States. The sometimes surprising and contradicting conclusions reached in these decisions are discussed in detail below.

All of these cases arise out of investment treaties. These treaties are negotiated by home States seeking to protect their own nationals with investments in a host State and by host States seeking to attract foreign investment. Accordingly, all such treaties restrict their benefits to investors who can satisfy certain basic nationality requirements.

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1 The State hosting foreign investment is generally regarded as the “host State”, and the State of which the investor is a national is regarded as the “home State”.


3 Hussein Naiaman Soufraki v. The United Arab Emirates, ICSID Case No. ARB/02/7, Award, 7 July 2004.

4 Tokios Tokeles v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004.

5 Loewen Group, Inc. & Ray Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3, Award, 25 June 2003.
For example, Article 1101 of the North American Free Trade Agreement (NAFTA) states that Chapter Eleven of the Agreement applies to "measures adopted or maintained by a Party relating to ... investments of investors of another Party in the territory of the Party". 6

Similarly, the International Centre for Settlement of Investment Disputes (ICSID), where most modern investor-State claims are brought, is limited to investors from States Parties to the Centre's Convention. Article 25(1) of that Convention reflects these limits on the nationality of the investor:

"The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State ... and a national of another Contracting State ..." (emphasis added).

Where an investor does not clearly satisfy these nationality requirements, States are quick to challenge their standing. The acceleration of investor-State arbitration in recent years has clarified the circumstances in which an investor satisfies the nationality requirements. This article will discuss these requirements as they apply to both natural and corporate claimants.

II. NATURAL CLAIMANTS

A. NATIONALITY IS DETERMINED BY THE RELEVANT NATIONAL LAWS

Two recent decisions demonstrate that, although investment treaties are governed by international law, international law will refer back to municipal law for the purpose of determining nationality. States determine nationality in many different ways, sometimes by rules that can appear harsh and unusual to observers from different legal systems.

1. Champion Trading v. Egypt

The dispute in Champion Trading v. Egypt 7 arose following the passage of Egyptian laws in the mid-1990s privatizing and liberalizing the cotton trade. U.S. investors took advantage of the new laws by investing in cotton trading in Egypt through a locally incorporated company, National Cotton Company (NCC). The venture failed and shareholders in NCC claimed against Egypt at the ICSID for breaches of the Egypt–United States bilateral investment treaty (BIT). 8 The claiming shareholders were two U.S. companies, Champion Trading Company and Ameritrade, and three U.S. citizens who were all members of the Wahba family. These three individuals were born

6. Bilateral investment treaties (BITs) also contain such limitations. Article 8(1) of the Ukraine–Lithuania BIT, for example, provides for investor-State arbitration for "[a]ny dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment on the territory of that other Contracting Party".
7. Supra, footnote 2.