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.[1] 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*,[2] *Soufraki v. United Arab Emirates*,[3] *Tokios Tokeles v. Ukraine*[4] and *Loewen v. United States*.[5] 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".

2 *Champion Trading Company, Ameritrade International, Inc., James T. Wahba, John B. Wahba and Timothy T. Wahba v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction, 21 October 2003; available at: ‹www.worldbank.org/icsid/cases/champion-decision.pdf›.

3 *Hussein Nuaman 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.

[8] Treaty between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments of 29 September 1982. (Entry into force: 27 June 1992).

in the United States to parents who were both U.S. citizens. The father, however, also held Egyptian citizenship, a fact that proved fatal to the Wahbas' claim.

In response to a challenge from Egypt, the Tribunal held that the Wahbas did not have standing to claim. It found that, in addition to being U.S. nationals, the Wahbas were all Egyptian nationals and, therefore, precluded from claiming against Egypt by Article 25(2) of the ICSID Convention. As recognized above, Article 25(1) of the ICSID Convention extends the Centre's jurisdiction to disputes between a Contracting State and a "national of another Contracting State". Article 25(2) states that a "national of another Contracting State" does not "include any person who on either date also had the nationality of the Contracting State party to the dispute".

The Tribunal relied on Egyptian law to determine that the Wahbas were Egyptian nationals. Under Egyptian law, the sons of Egyptian nationals retain that nationality for one hundred generations, regardless of where they are born or where they live. While they had never even been to Egypt, the Wahba children were all the sons of an Egyptian national and therefore squarely fell within this bracket.

The Tribunal held that it did have jurisdiction to hear the claims of the U.S. companies, despite the fact that the Wahbas were shareholders in those companies. However, those companies only became shareholders in NCC after much of the alleged damage had already occurred. Egypt is therefore only exposed to some of the damages originally claimed.

The Tribunal's decision to apply Egyptian law to determine Egyptian nationality is consistent with the definition of nationality in most BITs. In a clause common to most BITs, the Egypt–United States BIT in question in *Champion Trading* states in its Article I(1)(e) that "national" means "a natural person who is a national of a party under its applicable law".

The *Champion Trading* Tribunal did recognize limits to the rule that the laws of the State in question are applied to determine an investor's nationality. Applying Article 32(b) of the Vienna Convention on the Law of Treaties,[9] the Tribunal held that:

> "One could envisage a situation where a country continues to apply the *jus sanguinis* [blood line] over many generations. It might for instance be questionable if the third or fourth foreign born generation, which has no ties whatsoever with the country of its forefathers, could still be considered to have, for the purpose of the Convention, the nationality of this state."[10]

Wherever those limits are, the recent *Soufraki v. United Arab Emirates*[11] Decision demonstrates that they will not be easily reached.

[9] That Article states: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

…

(b) leads to a result which is manifestly absurd or unreasonable."

[10] *Champion Trading v. Egypt*, *supra*, footnote 2, at page 17.

[11] *Supra*, footnote 3.

2. *Soufraki v. United Arab Emirates*

The *Soufraki v. United Arab Emirates* dispute arose out of a concession contract that Mr Soufraki had signed, as a Canadian, with the United Arab Emirates for the development of ports in that country. Mr Soufraki also claimed Italian citizenship and, after the relationship broke down, claimed for breaches of the Italy–United Arab Emirates BIT.

The Tribunal rejected the claim because they found that, according to Italian law, Mr Soufraki was not an Italian at the time he made the claim. The striking element of the Decision is that the Tribunal reached this conclusion despite Mr Soufraki producing five certificates of citizenship and a declaration of the Italian Foreign Affairs Minister that he was an Italian citizen and could claim under the Italy–United Arab Emirates BIT. Mr Soufraki made the persuasive argument that Italian officials are in the best position to interpret their laws and these certificates and declaration should therefore satisfy the Tribunal. Sadly for Mr Soufraki, they did not.

The Tribunal questioned whether the authors of the certificates and declaration were fully aware of Mr Soufraki's circumstances and therefore launched its own investigation into his claims of Italian citizenship. It found that by leaving Italy for Canada in 1991 he had abandoned his Italian citizenship under Italian law and was unconvinced by his evidence that he regained that citizenship by subsequently living in Italy. The Tribunal was also unconvinced that the authors of the certificates and declaration of his citizenship were aware that he moved to Canada in 1991 and therefore lost his Italian citizenship under Italian law. The Tribunal recognized that:

> "… it is difficult for Mr. Soufraki, whose business interests span continents and who constantly travels the world, to reconstruct his actual residence during a twelve or thirteen month period more than ten years earlier. It recognizes that Mr. Soufraki, had he been properly advised at the time, easily could have reacquired Italian nationality by a timely application. It further appreciates that, had Mr. Soufraki contracted with the United Arab Emirates through a corporate vehicle incorporated in Italy, rather than contracting in his personal capacity, no problem of jurisdiction would now arise. But the Tribunal can only take the facts as they are and as it has found them to be."[12]

B. *Effective Nationality*

International law has long recognized the importance of an individual's "effective" nationality. The issue was famously considered by the International Court of Justice in the *Nottebohm* case.[13] In that case, the Court considered whether Liechtenstein could espouse the case of Mr Nottebohm, a national of both Liechtenstein and Germany, against Guatemala. Mr Nottebohm had a long-standing and close connection with Guatemala, where he had lived for most of the previous thirty years, but only a minor

[12] Ibid., at para. 83.
[13] The *Nottebohm* case (*Liechtenstein v. Guatemala*), 4 ICJ Rep. [1955].

connection with Liechtenstein. Accordingly, the Court held that Mr Nottebohm's case could not be espoused by Liechtenstein because he did not have a sufficient connection to that country.

The principle developed in the *Nottebohm* case has since been applied by various international tribunals. It was famously applied by the Iran–United States Claims Tribunal in *Case No. A/18* to determine that dual U.S.-Iranian nationals could claim against Iran. The Tribunal stated that the *Nottebohm* case:

> "… demonstrated the acceptance and the approval by the International Court of Justice of the search for the real and effective nationality based on facts of a case, instead of an approach relying on more formalistic criteria."[14]

Accordingly, the Tribunal held that:

> "... it has jurisdiction over claims against Iran by dual Iran-United States nationals when the dominant and effective nationality of the claimant during the relevant period from the date the claim arose until 19 January 1981 was that of the United States. In determining the dominant and effective nationality, the Tribunal will consider all relevant factors, including habitual residence, center of interests, family ties, participation in public life and other evidence of attachment."[15]

The recent spate of decisions has helped clarify the role of the effective nationality principle in investor–State arbitration.

1. *Champion Trading v. Egypt*

As discussed above (see Section II.A.1), the *Champion Trading* Decision on Jurisdiction[16] held that the principle of effective nationality has no role in cases interpreting Article 25(2) of the ICSID Convention. The Tribunal stated:

> "The Nottebohm and A/18 decisions, in the opinion of the Tribunal, find no application in the present case. The Convention in Article 25(2)(a) contains a clear and specific rule regarding dual nationals. The Tribunal notes that the above cited A/18 decision contained an important reservation that the real and effective nationality was indeed relevant *'unless an exception is clearly stated.'* The Tribunal is faced here with such a clear exception."[17] (emphasis original).

2. *Olguín v. Paraguay*

In *Olguín v. Paraguay*,[18] Mr Olguín, a national of Peru, claimed that Paraguay breached its obligation under the Peru–Paraguay BIT. Paraguay objected to the claim on the grounds that Mr Olguín was also a national of the United States, in which he was

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[14] Iran and United States, *Case No. A/18*, Decision No. DEC 32-A18-FT, 6 April 1984, reprinted at 5 Iran–U.S.C.T.R. 251, at 263.
[15] Ibid., at 265.
[16] *Supra*, footnote 2.
[17] Ibid., at p. 16.
[18] *Eudoro Armando Olguín v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award, 26 July 2001.

living at the time of the claim. Paraguay argued that, under the Peruvian legal system, in the case of dual nationality, a person's registered address determines "the exercise of specific rights by that person". Paraguay accordingly argued that Mr Olguín should be considered a national of the United States and precluded from claiming under the Peru–Paraguay BIT.[19]

The Tribunal rejected the claim. It held that:

> "What is important in this case in order to determine whether the Claimant has access to the arbitral jurisdiction based on the BIT, is only whether he has Peruvian nationality and if that nationality is effective. There is no doubt on this point."[20]

The Tribunal went on to say that:

> "What one, or the other, or even both of his mother countries' understanding regarding, for example, the person's exercise of political rights, civil rights, the responsibility for his diplomatic protection and the importance of his registered address for determining any such rights has no bearing on the legitimate legal fact that Mr. Olguín effectively has dual nationality. To this Tribunal, the effectiveness of his Peruvian nationality is enough to determine that he cannot be excluded from the provisions for protection under the BIT."[21]

3. *Feldman v. Mexico*

The *Olguín v. Paraguay* Tribunal's comments on Mr Olguín's residence are consistent with the Interim Decision on Jurisdiction in *Feldman v. Mexico*.[22] In that case, Mr Feldman, a U.S. citizen, claimed against Mexico for breaches of the NAFTA. Mexico objected that Mr Feldman had lived in Mexico for the previous twenty-seven years and, therefore, was not really a U.S. national. Mexico relied, in part, on Article 201 of the NAFTA. That Article extends the Treaty's protection to permanent residents of NAFTA Parties even if they are not citizens. Mexico argued that if residency can be used to extend NAFTA's protection, it must also be used to restrict it.

The Tribunal rejected Mexico's objection. It stated that:

> "… in matters of standing in international adjudication or arbitration or other form of diplomatic protection, citizenship rather than residence is considered to deliver, subject to specific rules, the relevant connection."[23]

It is unclear if the Decision in *Feldman v. Mexico* would have been the same if he had been a national of Mexico and therefore had held dual nationality. In distinguishing the facts from those considered in the *Nottebohm* case, the Tribunal stated that:

> "We are, therefore, not confronted, in terms of the state-individual relationship, with a conflict between, on the one hand, permanent residence and, on the other hand, superficial

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[19] Ibid., at para. 60.
[20] Ibid., at para. 61.
[21] Id.
[22] *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, reprinted at 40 I.L.M. 615, 2001.
[23] Ibid., at para. 30.

> or artificial conferral of citizenship, but rather between the former and a citizenship which was conferred under normal circumstances in the first place and was not subsequently tainted by a total breach of relationship. In these circumstances, citizenship must, as a matter of principle, prevail over permanent residence, as far as the issue of standing is concerned."[24]

While the Tribunal found that Mr Feldman had a sufficient connection with the United States as against his residence in Mexico, it is unclear whether this connection would have been sufficient to allow him to claim against Mexico if he were also a citizen of that country. In that circumstance, it is possible that the principle expressed in cases such as *Nottebohm* and *A/18* would have prevented him from claiming.

Indeed, this would be the answer in cases brought under the most recent U.S. Model BIT.[25] That Treaty states that "a natural person who is a dual national shall be deemed to be exclusively a national of the State of his/her dominant and effective nationality." It is important to note, however, that if a claim under a BIT based on the Model were brought under the ICSID Convention, the claimant would still have to satisfy the requirements of Article 25(2)(a) of the Convention.

III. CORPORATE CLAIMANTS

A. *TREATY AND ICSID DEFINITIONS*

The rules for determining nationality become even more complex when they are applied to corporations. Treaties apply a variety of tests to determine if a corporation qualifies as an investor of a party.

Some treaties set a low threshold for a corporation to qualify as an investor of a party. Article 1(2) of the Ukraine–Lithuania BIT, for example, defines a "Lithuanian investor" as "any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations".

Other treaties set a higher threshold. Article 1(1)(b) of the Indonesia–Chile BIT, for example, not only requires that the corporation be "constituted or otherwise duly organized under the law" of the home State, but also requires that its "effective economic activities" be in that State.

Some treaties limit corporations' standing based on who controls the corporation. The NAFTA, for example, states that, following consultations with other NAFTA Parties, a Party may deny the benefits of the Treaty to an investor of another Party "if investors of a non-Party own or control the enterprise and the enterprise has no substantial business activities" in the putative home State.[26] Similarly, the NAFTA allows its Parties

[24] Ibid., at para. 32.

[25] "Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, 2004 Model BIT (Draft)"; available at: ‹ita.law.uvic.ca/investmenttreaties.htm›.

[26] NAFTA, Article 1113(2).

to deny the Treaty's benefits to corporations that are controlled or owned by a State with whom the Party "does not maintain diplomatic relations".[27]

While control is used to limit standing, it is also used to extend investors' standing. Article 25(2)(b) of the ICSID Convention, for example, offers the forum to:

> "… any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."

Similarly, the Indonesia–Australia BIT is representative of several BITs deeming that companies incorporated in States that are not party to the treaty still have standing if nationals from one of the parties control those companies.[28]

Despite such detailed descriptions of which corporations will have standing to bring a claim, gaps remain. Recent decisions help to fill some of those gaps.

B. *Indirect Ownership Does not Bar Claims*

Recent decisions confirm that, even if a treaty does not contain a provision like that contained in the Indonesia–Australia BIT, investments only indirectly owned by requisite nationals still satisfy the nationality requirements. The *Waste Management II* NAFTA Decision is a recent example.[29] In that case, U.S. investors claimed against Mexico for breaches of the NAFTA. The investors owned the investment through a Caymans Island company, and Mexico argued that the claimant was not an "investor" for the purposes of the NAFTA because a company incorporated in a non-Party to the NAFTA suffered the damages. The Tribunal rejected this argument, holding that "[t]here is no hint of any concern that investments are held through companies or enterprises of non-NAFTA States, if the beneficial ownership at relevant times is with a NAFTA investor."[30]

It also appears that a tribunal can look through to a second layer of shareholders to determine if the true controller of a company holds the requisite nationality. In *SOABI*,[31] the ICSID Tribunal considered Senegal's claim that a Panamanian company owned shares in SOABI, the locally incorporated company that contracted with Senegal. Panama was not a signatory to the ICSID Convention and, therefore, according to Senegal, the claimant failed the nationality requirements of that Convention.

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[27] NAFTA, Article 1113(1) states: "A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such Party and to investments of such investor if investors of a non-Party own or control the enterprise and the denying Party: (a) does not maintain diplomatic relations with the non-Party; or (b) adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments."

[28] See Article 1(1)(b) of the Agreement between the Government of Australia and the Government of the Republic of Indonesia concerning the Promotion and Protection of Investments, 17 November 1992.

[29] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Final Award, 30 April 2004.

[30] Ibid., at para. 80. See also *Franz Sedelmayer v. The Russian Federation*, Award, 7 July 1998 (Stockholm, Sweden), unpublished, at page 59. However, note the Dissenting Opinion in that case on this point.

[31] *Société Ouest Africaine des Bétons Industriels v. Senegal*, ICSID Case No. ARB/82/1, Award, 25 February 1988, reprinted at 2 ICSID Rep. [1994], p. 190.

The Tribunal rejected this argument. Belgians owned most of the shares in the Panamanian company and Belgium was a signatory to the Convention. The Tribunal held that this ultimate control was sufficient to establish the Tribunal's jurisdiction, *ratione personae*. In explaining its decision, the Tribunal held that:

> "… it is obvious that, just as a host state may prefer that investments be channelled through a company incorporated under domestic law, investors may be led for reasons of their own to invest their funds through intermediary entities while retaining the same degree of control over the national company as they would have exercised as direct shareholders of the latter."[32]

The *SOABI* Decision therefore settled the confusion arising from the earlier Decision in *Amco v. Indonesia*.[33] That case arose from a contract for the company, Amco, to construct and manage a hotel and plaza in Indonesia. An arbitration clause in the contract referred disputes to the ICSID. After it had been built, the hotel was taken over by the Indonesian military and Amco brought proceedings before an ICSID tribunal. Indonesia challenged the Tribunal's jurisdiction, claiming, *inter alia*, that Amco was not controlled by U.S. investors, as Indonesia originally thought, but was actually controlled by a Dutch national. While it is not clear from the Decision, Indonesia appears to have claimed that it would not have consented to ICSID arbitration if it knew that this was the case.

The Tribunal rejected this argument, holding that:

> "To take this argument into consideration, the Tribunal would have to admit first that for the purpose of Article 25(2)(b) of the Convention, one should not take into account the legal nationality of the foreign juridical person which controls the local one, but the nationality of the juridical or natural persons who control the controlling juridical person itself: in other words, to take care of a control at the second, and possibly third, fourth or xth degree.
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> Such a reasoning is, in law, not in accord with the Convention. Indeed, the concept of nationality is there a classical one, based on the law under which the juridical person has been incorporated, the place of incorporation and the place of the social seat."[34]

The Tribunal held that it might, however, in exceptional circumstances, explore the true controller of a company. The Tribunal stated that:

> "… in fact, it could be so where for political or economical reasons, it matters for the Contracting State to know the nationality of the controller or controllers, and where it is proven that would the Contracting State have known this nationality, it would not have agreed to the arbitration clause; such a situation might possibly be met in exceptional instances."[35]

The *Amco* Decision has been interpreted as suggesting that tribunals should only look to the first layer of ownership to determine control. For example, Judge Mbaye dissented

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32 Ibid., at para. 37.

33 *Amco Asia Corporation and Others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, First Award, 20 November 1984, reprinted at 1 ICSID Reports 413.

34 Ibid., at para. 14.

35 Id.

in *SOABI* on the grounds that the *Amco* Decision precluded the search for foreign control beyond immediate control. Delaume, Hirsch and Amerasinghe also believe that the two Decisions are incompatible, but support the Decision of the majority in *SOABI*.[36]

Other commentators have preferred the view that the Decisions are consistent. Nathan, for example, reconciles the Decisions by arguing that they stand for the principle that a tribunal will continue to look up the corporate chain until they find ownership satisfying the nationality requirements.[37] While Nathan is correct that the Decisions are reconcilable, the manner in which he reconciles them is misplaced. As recognized by Schreuer:

> "This idea has a certain degree of attractiveness but leads to further troubling questions. Is it sufficient for nationals of non-Contracting States or even of the host state to set up a company of convenience in a Contracting State to create a semblance of appropriate foreign control?"[38]

The better interpretation of the Decisions comes from recognizing that the Panamanian company in *SOABI* was a mere holding company while the U.S. company in *Amco* was far more substantial. These facts suggest that investor–State tribunals will look through holding companies to determine control but will not look through companies pursuing activities in the jurisdiction in which they are incorporated. This interpretation is then consistent with the *Champion Trading* Decision, in which the Tribunal held that the U.S. companies, which had legitimate activities in the United States, had standing to claim against Egypt even though the shareholders of those companies were Egyptian dual nationals who did not have such standing.[39]

C. *ASSIGNMENT OF CLAIMS*

For corporations with subsidiaries incorporated in various countries, assigning investor–State claims within the corporate structure may appear to be an attractive way to overcome any defects in the nationality of the company immediately suffering damage. The Decision in *Banro*[40] highlights the difficulties of assigning claims in this way.

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[36] Delaume states that the *SOABI* Decision " is consistent with the manner in which many investments are made and especially those involving transnational companies or groups of companies, which, for various reasons, may elect to channel their investments through affiliated companies under their control"; Georges R. Delaume, *How to Draft an ICSID Arbitration Clause*, 7 ICSID Rev.—F.I.L.J. 168, 1992, at 178. Hirsch states: "We are of the opinion that the approach by the tribunal in the case of *SOABI v. Senegal* is preferable, since it is in keeping with the aim underlying the special arrangement set out in Article 25(2)(b) [of the ICSID Convention]"; Moshe Hirsch, *The Arbitration Mechanism of the ICSID*, M. Nijhoff, The Hague, 1993, at 104. Amerasinghe also agrees with this view; see C.F. Amerasinghe, *Interpretation of Article 25(2)(b) of the ICSID Convention*, in R.B. Lillich and C.N. Brower (eds.), *International Arbitration in the 21st Century: Towards Judicialization and Uniformity?* Transnational Publishers, New York, 1994, pp. 223 *et seq.*, at p. 236.

[37] K. Nathan, *The ICSID Convention: The Law of the International Centre for Settlement of Investment Disputes*, Juris Publishing, Huntington, New York, 2000, at 97. Nathan argues that the Decisions stand for the proposition that "where the company is incorporated in a contracting state, an ICSID tribunal will not probe behind the veil of incorporation to see if the ultimate control of the company is in the hands of nationals of a contracting state." Nathan appears to be referring to the company immediately controlling the company suffering damage.

[38] Christoph Schreuer, *The ICSID Convention: A Commentary*, Cambridge University Press, Cambridge, U.K., 2001, at 318.

[39] See *Champion Trading*, *supra*, footnote 2.

[40] *Banro American Resources, Inc. & Société Aurifère du Kivu et du Maniema SARL v. Democratic Republic of Congo*, ICSID Case No. ARB/98/7, Award, 1 September 2000.

1. *Banro Resources v. Congo*

The *Banro* dispute arose out of a contract between Banro Resources, a Canadian mining company, and the Democratic Republic of the Congo, in which they were mining. Article 35 of their contract referred all disputes to the ICSID for settlement.

Canada is not a signatory to the ICSID Convention and, therefore, Banro Resources could not bring a claim to the ICSID, despite Article 35 of the contract. In an apparent attempt to overcome this problem, Banro Resources transferred the claim to its U.S. subsidiary, Banro America, before claiming before the ICSID. The United States is a signatory to the Convention.

The Tribunal rejected the standing of Banro America for two reasons. First, it held that the claim failed to comply with Article 25 of the ICSID Convention. That Article states that:

> "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, which the parties to the dispute consent in writing to submit to the Centre."

The Tribunal drew from the final sentence of this phrase the requirement that the investor must be a national of a contracting State at the time consent is given. It found that the claimant failed this requirement because, at the time consent was given in the contract, it was given by Banro Resources. Furthermore, the Tribunal found that Banro Resources could not have transferred that consent to its subsidiary, Banro America, because it never held such consent to transfer.

The Tribunal also found that Banro America was precluded from claiming because Canada had diplomatically supported Banro Resources' case. This restriction does not appear in the ICSID Convention. The only mention that it makes of diplomatic protection is in Article 27, which states that "[n]o Contracting State shall give diplomatic protection … in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit … to arbitration under this Convention …" Canada's actions did not breach this Article because Canada is not a Contracting State to the ICSID Convention.

Unable to find this restriction in the actual words of the Convention, the Tribunal drew from the Convention's objectives. It argued that one of those objectives was to provide a means for investors to claim by themselves so as to prevent the diplomatic consequences of States espousing their claims. The Tribunal found that if it allowed Banro America standing, then the company would effectively have the advantage of both diplomatic protection and investor–State claims. The Tribunal found that this defeated the object of the Convention. It drew support for this approach by a brief review of previous ICSID cases:

> "These few examples demonstrate that in general, ICSID tribunals do not accept the view that their competence is limited by formalities, and rather they rule on their competence based on

a review of the circumstances surrounding the case, and, in particular, the actual relationships among the companies involved. This jurisprudence reveals the willingness of ICSID tribunals to refrain from making decisions on their competence based on formal appearances, and to base their decisions on a realistic assessment of the situation before them."[41]

The *Banro* Decision does not, however, mean that defects in the nationality of a company immediately suffering damage from State action can never be cured. The subsequent jurisdictional Decision in the *Autopista* case[42] demonstrates how such defects can be appropriately cured.

2. *Autopista v. Venezuela*

The dispute in the *Autopista* case arose from a contract between Venezuela and the locally incorporated company, Autopista, for the construction and operation of a highway. In drafting the contract, the parties appear to have preferred to include an arbitration clause for ICSID arbitration but were prevented from doing so by the fact that Autopista was owned by ICA Holdings, a Mexican company, and Mexico is not a signatory to the ICSID Convention. Article 63 of the contract referred disputes to *ad hoc* arbitration in Venezuela. Article 64, however, stated that if the majority of the shares were sold to a national of an ICSID Contracting State, then disputes arising from the contract would be settled at the ICSID.

After the contract was signed, the majority of Autopista's shares were sold to Icatech, a U.S. company. The United States is a signatory to the ICSID Convention and, therefore, after a dispute arose, in accordance with Article 64 of the contract, Autopista brought proceedings before an ICSID tribunal.

Venezuela argued that, while Icatech, a U.S. company, owned the majority of shares in Autopista, it was, in turn, a subsidiary of ICA Holdings and true control of Autopista remained with Mexicans. To support their argument, Venezuela highlighted that Mexico had made diplomatic efforts on behalf of Autopista after the dispute had arisen.

Despite the similarities in this case to the facts of *Banro*, the *Autopista* Tribunal arrived at a different conclusion by upholding Autopista's standing. The Tribunal justified its different conclusion by distinguishing the *Banro* Decision on two grounds. They stated that in "*Banro* the transfer of shares was not subject to the approval of the government" and "more importantly, the parties had not contractually defined the test for foreign control".[43]

Indeed, while the clause in *Banro* simply stated that the parties agreed to ICSID arbitration in case of a dispute, the clause in the *Autopista* contract was more

[41] Ibid., at para. 11.
[42] *Autopista Concesionada de Venezuela, CA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award on Jurisdiction, 27 September 2001.
[43] Ibid., at para. 143.

sophisticated. The clause in that contract stated that consent was conditional on the transfer of shares.

In concluding that this consent satisfied the requirements of the ICSID Convention, the *Autopista* Tribunal relied on *Holiday Inns v. Morocco*.[44] In that case, the Tribunal stated that "the Convention allows parties to subordinate the entry into force of an arbitration clause to the subsequent fulfilment of certain conditions, such as the adherence of the States concerned to the Convention".[45]

While the different wording of the clauses consenting to ICSID arbitration distinguishes the two cases, there is one area in which the Decisions squarely conflict. In *Autopista*, Mexico had also exercised diplomatic efforts on behalf of the claimant. Yet, despite the Decision in *Banro*, the *Autopista* Tribunal dismissed the effect of Mexico's diplomatic efforts.

The *Autopista* Tribunal argued that Mexico's diplomatic efforts did not affect the claim because Mexico merely tried to settle the dispute rather than to espouse Banro's claim.[46] However, Canada never tried to espouse Banro's claim, either. The real conflict in the Decisions emerges from the part of the *Autopista* Decision in which the Tribunal stated:

> "… even if Mexico's interventions were to constitute prohibited diplomatic interventions in the meaning of Article 27 of the ICSID Convention, this would have no bearing on the jurisdiction of this Arbitral Tribunal which is properly created under Article 25(2)(b). Indeed a denial of jurisdiction is not a remedy available in the context of Article 27."[47]

Where the *Banro* Tribunal had looked beyond the words of the contract and the ICSID Convention to find the effect of diplomatic protection, the *Autopista* Tribunal stuck strictly to those words.

D. *When Can a Tribunal Examine Beneficial Ownership?* Loewen *and* Tokios

The conflict between the *Banro* and *Autopista* Decisions demonstrates that, despite recent tribunals' contributions to filling the gaps left by definitions in investment treaties and the ICSID Convention, several gaps remain. The issue touched on in the *SOABI* and *Amco* Decisions was revealed in the recent *Loewen*[48] and *Tokios*[49] disputes as being perhaps the biggest gap: when can a tribunal look beyond a corporation's satisfaction of formal treaty requirements to examine beneficial ownership?

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[44] *Holiday Inns S.A. and others v. Morocco*, ICSID Case No. ARB/72/1.
[45] Pierre Lalive, *The First "World Bank" Arbitration (Holiday Inns v. Morocco)—Some Legal Problems*, 1 ICSID Rep. [1993], p. 645, at p. 668, cited in *Autopista*, *supra*, footnote 42, at para. 90.
[46] *Autopista*, ibid., at para. 138.
[47] Ibid., at para. 140.
[48] *Supra*, footnote 5.
[49] *Supra*, footnote 4.

1. *Loewen v. United States*

The facts surrounding the *Loewen* case are now well known. Ray Loewen is a Canadian citizen whose Canadian incorporated company, The Loewen Group, Inc., bought several funeral homes across the United States in the 1980s and 1990s. When Loewen attempted to purchase homes in Mississippi, a dispute emerged with a local funeral home operator, O'Keefe, over a transaction worth at most US$ 10 million. O'Keefe sued Loewen in the local Mississippi courts.

During the trial, O'Keefe's lawyers made repeated references to Loewen's Canadian nationality, his race and class. It is fair to say that the Mississippi jury was swayed by O'Keefe's appeal to their prejudices. The jury awarded him US$ 500 million damages, including US$ 75 million for emotional distress and US$ 400 million in punitive damages.

Not surprisingly, Loewen hoped to appeal the Decision. Unfortunately for him, Mississippi law requires the losing party to post a bond equal to 125 percent of the damages award within seven days as a condition to stay the execution of the judgment. The Loewen Group could not produce US$ 625 million in that time and settled the case for US$ 175 million.

Loewen then brought a claim under the NAFTA, alleging, among other things, a denial of justice in breach of NAFTA Chapter Eleven. During the proceedings, The Loewen Group's pending bankruptcy forced it to restructure so that a U.S. company owned all of its assets except for one. The remaining asset was the NAFTA claim, the rights in which were assigned to a specially created Canadian company, Nafcanco.

The *Loewen* Tribunal found serious shortcomings in the Mississippi trial process. It found that the trial judge's decision to permit O'Keefe's lawyers to make prejudicial references to Loewen's foreign nationality, race and class was a denial of justice that would have violated NAFTA had all appeals been effectively exhausted. However, the Tribunal rejected the claim because of the effects of the restructuring. According to the Tribunal, the restructuring effectively ensured that U.S. citizens would benefit from any award in Loewen's favor.[50]

The Tribunal then decided that the NAFTA text did not address the situation of a claimant changing nationality before the award and that Article 1131 therefore directed the Tribunal to fill the gap by applying "applicable rules of international law".[51] After a

[50] In addition, the Tribunal also found that The Loewen Group had not exhausted all appeals when it settled the case without pursuing leave to appeal to the U.S. Supreme Court.

[51] *Loewen*, *supra*, footnote 4, at para. 228. It is important to note that, because Canada is not a signatory to the ICSID Convention, this case was decided under the ICSID Additional Facility Rules and not the Convention. The Decision would likely be different if the case were decided under the Convention. Article 25(2)(a) of the Convention states that a corporation need only have the appropriate nationality "on the date on which the parties consented to submit such dispute to conciliation or arbitration". On the other hand, see Schreuer, *supra*, footnote 38, at 322, for the view that a tribunal may require some form of continuous nationality even when deciding under the Convention.

brief review, the Tribunal held that such rules required a claimant to have continuous nationality from the moment of the damage to the date of the award.[52] It dismissed the authority cited by the claimant that such a rule is only discretionary and, in the alternative, only requires continuous nationality up until the date of submission of the claim.[53] Loewen walked away with nothing.[54]

It is difficult to be sympathetic to much of the *Loewen* Tribunal's reasoning. The Tribunal overlooked the fact that the NAFTA contains specific provisions governing when a tribunal can pierce the corporate veil. Article 1113(1) enables a tribunal to pierce that veil to ensure that the benefits of the NAFTA do not go to investors from inappropriate countries.[55] Similarly, Article 1113(2) enables a tribunal to pierce the corporate veil and deny the benefits of the treaty if a non-NAFTA Party controls the investor and the investor does not have any substantial business activities in the country in which it is incorporated. This Article would have enabled the *Loewen* Tribunal to deny Nafcanco standing if it was controlled by Europeans, for example.[56]

The recent *Waste Management II* Decision recognized the NAFTA's carefully drafted provisions on investor nationality.[57] The Tribunal concluded that:

> "Where a treaty spells out in detail and with precision the requirements for maintaining a claim, there is no room for implying into the treaty additional requirements, whether based on alleged requirements of general international law in the field of diplomatic protection or otherwise."[58]

Given the NAFTA's carefully worded circumstances in which a tribunal can pierce a company's corporate veil, a decision to pierce the veil in other circumstances would require some justification. The *Loewen* Tribunal provides none, simply assuming that it can do so.[59]

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52 *Loewen*, ibid., at para. 229. The Tribunal stated that "[t]here is only limited dispute as to the history of the requirement of continuous nationality to the end of any international proceeding." See Jan Paulsson, *Continuous Nationality in Loewen*, Arbitration International, Vol. 20, No. 2, 2004, p. 213, for a criticism of this aspect of the Tribunal's Decision.

53 At ibid., para. 236, the Tribunal notes that the claimants cited the ICSID Convention, which appears not to require such continuous nationality, and a recent International Law Commission Report, which proposed eliminating the rule.

54 The wording of the Decision indicated that it only applied to The Loewen Group's claim, and Ray Loewen subsequently sought clarification that the Decision also applied to his personal claim. In the Tribunal's Decision on Respondent's Request for a Supplementary Decision, 6 September 2004, it clarified that Loewen's individual claim was also rejected. The Tribunal reaffirmed comments in the earlier Award, in which it stated that a judicial system cannot commit a denial of justice until the claimant has exhausted all avenues of appeal. The Tribunal held that by failing to appeal the Mississippi Decision to the U.S. Supreme Court, Loewen had not exhausted all avenues (at para. 22).

55 See *supra*, footnote 27.

56 NAFTA Article 1113(2) states: "Subject to prior notification and consultation in accordance with Articles 1803 and 2006, a Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such Party and to investments of such investors if investors of a non-Party own or control the enterprise and the enterprise has no substantial business activities in the territory of the Party under whose law it is constituted or organized."

57 *Waste Management*, *supra*, footnote 29, at paras. 80–81.

58 Ibid., at para. 85. On this point, see also Amerasinghe, *supra*, footnote 36, at pp. 259 and 262; and Nathan, *supra*, footnote 37, at 92 and 95, who argue against implying additional requirements into investment treaties. However, see Schreuer, *supra*, footnote 37, at 278–279 and 332; and Aron Broches, *Denying ICSID's Jurisdiction: The ICSID Award in Vacuum Salt Products Limited*, 13 J. Int'l Arb. 21, 1996, at 27 and 29, for the opposite view.

59 See Paulsson, *supra*, footnote 52, at footnote 5, for further criticism of this aspect of the Tribunal's Decision.

2. *Tokios Tokeles v. Ukraine*

The *Loewen* Award would have pleased the Ukraine. At the time the Award was given, the Ukraine was facing an investor–State claim under the Ukraine–Lithuania BIT.[60] The claimant, Tokios Tokeles, had created a subsidiary in the Ukraine, Tokios Spravy, to operate a printing business. Tokios Tokeles claimed that the Ukraine mistreated Tokios Spravy, in breach of its obligations under the treaty, in response to their publication of a book favourably portraying a leading Ukrainian opposition politician.

The Ukraine challenged the standing of Tokios Tokeles, alleging that, although it was incorporated in Lithuania, it was clearly controlled by Ukrainians and should therefore be considered Ukrainian. Ukrainian nationals owned 99 percent of Tokios Tokeles' shares and held two-thirds of the positions on its Board of Directors.

The Tribunal rejected the Ukraine's argument. Beginning first with the ICSID Convention, the Tribunal found that:

> "The jurisdiction of the Centre depends first and foremost on the consent of the Contracting Parties, who enjoy broad discretion to choose the disputes that they will submit to ICSID. Tribunals shall exercise jurisdiction over all disputes that fall within the scope of the Contracting Parties' consent as long as the dispute satisfies the objective requirements set forth in Article 25 of the Convention."[61]

The Tribunal concluded that the Ukraine and Lithuania's discretion to choose the disputes they submit to ICSID is exercised through the BIT. The BIT included detailed definitions of "investor". Article 1(2) of the Ukraine–Lithuania BIT defined "investor" as:

> "… (b) in respect of Lithuania:
> …
> – any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations …"

The Tribunal stated that, regardless of who ultimately controlled Tokios Tokeles, it clearly satisfied the definition of "investor" contained in the BIT and was also consistent with the objective requirements of the ICSID Convention. The Tribunal argued that its formalistic approach "fulfils the parties' expectations, increases the predictability of dispute settlement procedures, and enables investors to structure their investments to enjoy the legal protections offered under the treaty."[62]

Extraordinarily, this majority opinion came from the two arbitrators appointed by the parties. The President of the Tribunal, Professor Prosper Weil, dissented and subsequently resigned from the Tribunal. He disagreed with the majority's conclusion that the BIT's definition of "investor" was consistent with the objective requirements of the Convention. He stated that, according to Article 31(1) of the Vienna Convention

[60] *Tokios Tokeles v. Ukraine*, *supra*, footnote 4.
[61] Ibid., at para. 19.
[62] Ibid., at para. 40.

on the Law of Treaties,[63] the ICSID Convention must be interpreted "in the light of its object and purpose". According to Weil, both the Preamble to the Convention and the reports leading up to its adoption demonstrate that its object and purpose is not the settlement of disputes between a State and its own nationals. He concluded that:

> "It is this very same rationale of giving effect to the economic reality over and above the legal structure that should have led the Tribunal to decide that an investment made in Ukraine by Ukrainian citizens with Ukrainian capital—albeit through the channel of a Lithuanian corporation—cannot benefit from the protection of the ICSID mechanism and, as a consequence, to deny Tokios … for the purposes of the Convention, the character of a 'foreign investor' in Ukraine."[64]

Weil was also concerned about the effect that giving the ICSID jurisdiction over foreign investments using local capital has on domestic judicial proceedings. He stated that:

> "It appears, therefore, that because of its specific object and purpose—namely, the protection of international investments—the ICSID Convention imposes strict obligations and limitations on both the Contracting States and the investors who are nationals of other Contracting States. It prohibits the use of diplomatic protection and excludes the jurisdiction of domestic courts, for which it substitutes the recourse to its own, specific international arbitration mechanism. It follows that ICSID arbitral tribunals have to be particularly cautious when they determine their jurisdiction. An unwarranted extension of the ICSID arbitral jurisdiction would entail an unwarranted encroachment on both the availability of diplomatic protection and the jurisdiction of domestic courts."[65]

It is apparently for this reason, especially, that Weil believed that his dissent was vital to preserve the "integrity" of the ICSID Convention[66] and that the majority Decision "might jeopardize the future of the institution"[67] and put its success "at risk"[68] by "dissuad[ing] Governments either from adhering to the Convention or, if they have already adhered, from providing for ICSID arbitration in their future BITs or investment contracts".[69]

It is unclear how finding ICSID jurisdiction in the case could be an "unwarranted encroachment". It is certainly not an unwarranted encroachment on the Ukraine and Lithuania, because they accepted this application of ICSID jurisdiction by not including a "control" test in their BIT. Similarly, it is not an unwarranted encroachment on any State that includes an ICSID clause in its contract with a foreign investor who is using local capital. They, too, accepted ICSID jurisdiction.

Finding ICSID jurisdiction in this situation also cannot be an unwarranted encroachment on the other signatories to the ICSID Convention. If they do not want to

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63 Article 31(1) of the Vienna Convention on the Law of Treaties reads: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."
64 See *Tokios v. Ukraine*, *supra*, footnote 4, Dissenting Opinion of Prosper Weil, 29 April 2004, at para. 23.
65 Ibid., at para. 8.
66 Ibid., at para. 25.
67 Ibid., at para. 1.
68 Ibid., at para. 30.
69 Id.

settle through arbitration, rather than through domestic courts, their disputes with foreign investors who apply local capital, then they simply will choose not to include an ICSID clause in their contracts or to include a "control" clause in their BITs.

Yet, perhaps the fundamental flaw in Weil's Opinion is his focus on the "national" origin of capital. The free-trade and capital-mobility principles, upon which the ICSID was founded, support the free movement of capital. Furthermore, since 1965, when the ICSID Convention came into force, capital has become significantly more mobile, to the point where it is artificial to talk of capital belonging to any particular nation. The Ukrainian bank from which Tokios Tokeles drew its funds, for example, could well have obtained those funds from a loan from a U.S. bank or from a deposit from a Chinese engineer. Would Weil be satisfied if Tokios Tokeles could have shown that a U.S. bank lent money to the Ukrainian bank before the Ukrainian bank lent to Tokios?

Indeed, this is where the irony of Weil's dissent emerges. The ICSID Convention creates a flexible system that can accommodate changing circumstances, such as the increased mobility of capital. Weil seeks to stymie this flexibility by preserving the Convention in a bygone age. It is such inflexibility that would truly threaten the future of the Centre, not the pragmatic approach of the majority.

IV. CONCLUSION

It is difficult to overstate the importance of understanding the nationality requirements that an investor must satisfy before it can bring a claim against a State. Investors who have already suffered damage need to know if they have standing to claim. Just as importantly, corporate investors need to know if they can structure their corporations to take advantage of BITs and contractual arbitration clauses.

Decisions like those in the *Tokios* and *Amco* cases suggest that tribunals in investor–State arbitrations will merely look to a corporate investor's satisfaction of the formal nationality requirements and emphasize the value of structuring corporations to take advantage of investor–State arbitration mechanisms. Indeed, there is already evidence that corporations have begun to do this. The U.S. giants, GE and Bechtel, for example, have attempted to overcome the lack of a BIT between the United States and India by claiming for breaches of the India–Mauritius BIT through Mauritian subsidiaries.[70]

It is, however, far from clear whether investors will continue to be able to take advantage of special corporate structuring in this way. The Tribunals in *SOABI* and, especially, in *Loewen* looked beyond formal satisfaction of a treaty's criteria to assess the true beneficiary of a claim.

[70] See also J. Lew, *ICSID Arbitration: Special Features and Recent Developments*, in Norbert Horn (ed.), *Arbitrating Foreign Investment Disputes*, Kluwer Law International, The Hague, 2004, at 281: "In particular, the question of control of a foreign investor company by its parent or a subsidiary company along the chain of control remains to be fully clarified. This will be especially important to international firms who are beginning to structure their foreign investments to ensure they fall within the terms of at least one BIT."

Cases such as *Soufraki* and *Tokios* also highlight the tension generated by old rules attempting to govern investor–State arbitration in a changing world. At the time the ICSID Convention was drafted forty years ago, for example, we could sensibly talk about the nationality of a corporation and the national origins of capital. In the modern world of multinational corporations and instantaneous movement of capital, such labels are decreasingly relevant. One of the next major challenges for the investor–State arbitration system is whether the existing instruments can accommodate the change or if we need a new set of instruments to better reflect the changed world.