INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON D.C.

IN THE MATTER

CHAMPION TRADING COMPANY
AMERITRADE INTERNATIONAL, INC.
JAMES T. WAHBA
JOHN B. WAHBA
TIMOTHY T. WAHBA

(HEREAFTER "THE CLAIMANTS")

AGAINST

ARAB REPUBLIC OF EGYPT

(HEREAFTER "THE RESPONDENT")

CASE N° ARB/02/9

DECISION ON JURISDICTION

MEMBERS OF THE TRIBUNAL	MR. ROBERT BRINER, CHAIRMAN
	MR. L. YVES FORTIER, Q.C. ARBITRATOR
	PROFESSOR LAURENT AYNÈS, ARBITRATOR
SECRETARY OF THE TRIBUNAL	MRS MARTINA POLASEK

COUNSEL

FOR THE CLAIMANTS	MR. EMMANUEL GAILLARD SHEARMAN & STERLING 114 AVENUE DES CHAMPS-ELYSÉES 78008 PARIS & MR. JOHN SAVAGE SHEARMAN & STERLING 6 BATTERY ROAD, # 19-02 SINGAPORE 049909
FOR THE RESPONDENT	MESSRS ROBERT SAINT-ESTEBEN, TIM PORTWOOD AND MATTHIEU POUCHEPADASS BREDIN PRAT 130 RUE DU FAUBOURG ST-HONORÉ 75008 PARIS

1. INTRODUCTION

The Claimants are shareholders of National Cotton Company ("NCC"), a company formed and incorporated in Egypt according to Egyptian law on August 17, 1994. At that time the shareholders were:

- The National Bank of Egypt — 40,000 Shares (20% of NCC's issued stock)
- The Pension Fund of the Employees — 10,000 Shares (5% of NCC's issued stock)
- Mahmoud A. Wahba — 65,000 Shares (32,5% of NCC's issued stock)
- James T. Wahba — 25,000 Shares (12,5% of NCC's issued stock)
- John B. Wahba — 25,000 Shares (12,5% of NCC's issued stock)
- Timothy T. Wahba — 25,000 Shares (12,5% of NCC's issued stock)
- Mai M. Wahba — 10,000 Shares (5% of NCC's issued stock)

On February 26, 1997, the National Bank of Egypt (the "National Bank") was replaced as a shareholder in NCC by Champion Trading Company, a Delaware (USA) incorporated company which acquired the National Bank's 40,000 shares (representing 20% of NCC issued stock). In addition, the Pension Fund of the Employees of the National Bank (The "Pension Fund") was replaced as a shareholder by Ameritrade International, Inc. another Delaware (USA) incorporated company which acquired the Pension Fund's 10,000 shares (representing 5% of NCC's issued stock). Ameritrade International, Inc. is not affiliated with Ameritrade, Inc., the U.S. online brokerage company.

According to the Claimants, NCC was formed in order to avail itself of the new possibilities created in the Summer 1994 when the Egyptian Parliament passed a number of laws privatising and liberalising the raw cotton trade.

According to the Claimants, the Egyptian Government, following the liberalisation of the cotton industry and NCC's incorporation, took a series of measures, which harmed NCC and, accordingly, the Claimants' investments in Egypt.

According to the Claimants, these measures ultimately resulted in NCC being unable to continue to trade, leading to its insolvency which rendered the Claimants' investments worthless. The Claimants state that these measures constituted violations of the *"Treaty between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments"* of September 29, 1982, which entered into force on June 27, 1992 (the "Treaty").

2. PROCEDURE

On May 29, 2002, the Claimants seized the International Centre for Settlement of Investment Disputes (ICSID) with a Request for Arbitration directed against the Arab Republic of Egypt. The Claimants sought the following relief:

an award:

(a) declaring that Egypt unlawfully expropriated the Claimants' investments in Egypt without providing prompt, adequate and effective compensation, and discriminated against and unlawfully failed to accord those investments the requisite protection and security;

(b) ordering that Egypt compensate the Claimants in respect of the losses they have suffered through Egypt's unlawful conduct, described above, in an amount to be quantified precisely during this proceeding, but in no event in an amount less than USD 100 million;

(c) ordering that Egypt pay the Claimants' costs occasioned by this arbitration including, without limitation, arbitrators' fees, administrative costs fixed by ICSID, the expenses of the arbitrators, the fees and expenses of any experts, and the legal costs incurred by the parties (including fees of counsel);

(d) ordering that Egypt pay interest on all sums awarded at a rate of 10% compounded quarterly, such interest to run from the date losses were incurred until the date of effective payment of the sums awarded; and

(e) granting the Claimants any other relief the Tribunal deems appropriate.

The ICSID registered the Request on August 8, 2002.

The Claimants designated Mr. L. Yves Fortier as Arbitrator and the Respondent designated Professor Laurent Aynès as Arbitrator. With the agreement of the Parties, the Secretary-General of the Centre appointed Mr. Robert Briner as the President of the Arbitral Tribunal and with letter of January 31, 2003, the Centre noted that, in accordance with Rules 6-1 of the Arbitration Rules of the Centre, the Arbitral Tribunal was deemed to have been constituted and the proceedings have begun on January 30, 2003. Mrs Martina Polasek, Counsel, ICSID, was designated by ICSID as Secretary of the Tribunal.

A first session of the Arbitral Tribunal was held on March 7, 2003, at the World Bank offices in Paris in the presence of representatives of the Parties, President Robert Briner and Arbitrator Professor Laurent Aynès and Mrs Martina Polasek. Arbitrator Mr. Yves Fortier participated through video conferencing.

Among other matters it was agreed that the place of the proceeding is Paris, that the procedural language is English, which is the working language of the Arbitral Tribunal and that pleadings and other documents may be submitted in either English or French or, in case of translation from a third language, into one of these languages.

Before the first session of the Arbitral Tribunal, with letter of March 5, 2003, the Respondent remitted a "Note préliminaire sur la compétence" in which the Respondent stated that the Arbitral Tribunal lacks jurisdiction with respect to the claims by the physical persons as well as those of the corporate Claimants. At the first session, the Arbitral Tribunal informed the Parties that it had decided to first deal with the issue of its jurisdiction and a timetable for the further procedure was agreed upon.

In accordance with this timetable the Respondent submitted on April 18, 2003 its "Mémoire sur la compétence".

The Claimants submitted on May 30, 2003 their reply Memorial on Jurisdiction.

The Respondent on June 19, 2003 submitted "Observations complémentaires sur la compétence".

On June 27, 2003 a session of the Arbitral Tribunal on jurisdiction was held at the World Bank offices in Paris. A sound recording and a transcript were made of these proceedings.

Were present:

The Arbitral Tribunal	Mr. Robert Briner (President) Professor Laurent Aynès Mr. L. Yves Fortier
The Secretary of the Arbitral Tribunal	Mrs Martina Polasek
On behalf of the Claimants	Mr. Emmanuel Gaillard, Shearman & Sterling Ms Yas Banifatemi, Shearman & Sterling Mr. Merwan Lomri, Shearman & Sterling Mr. Dany Khayat, Counsel for Claimants Mr. Arif Ali, Counsel for Claimants Mr. James Wahba, Claimant Mr. John Wahba, Claimant Mr. Timothy Wahba, Claimant Mrs Susanne Wahba, Guardian of Mr. T. Wahba Mr. Mahmoud Wahba Officer of the Corporate Claimants
Witness and Expert	Mrs Eglal El-Waqeel Professor Hisham Sadek

On behalf of the Respondent	Counsellor Iskandar Ghattas, Undersecretary of the State for the Ministry of Justice Counsellor Hossam Abel Azeim, President of the State Lawsuits Authority Mr. Osama Mahmoud Vice-President of the State Lawsuits Authority Mr. Mostafa Abdel Gaffar Member of the Directorate General for International and Cultural Cooperation of the Ministry of Justice Mr. Robert Saint-Esteben, Bredin Prat Mr. Louis-Christophe Delanoy, Bredin Prat Mr. Tim Portwood, Bredin Prat Mr. Denis Bensaude, Bredin Prat Mr. Matthieu Pouchepadass, Bredin Prat
Witness and Expert	Major General Hamdy Hafez Professor Hossam El Ehwany

At the end of the examination of the witnesses and experts, counsel for both Parties summed up their respective positions and the Arbitral Tribunal accepted to receive after the Hearing the "Dossier de plaidoirie" which had been used by counsel for Respondent during his pleadings. At the end of the Hearing the Parties and the Arbitrators stated that they had no further issues to raise and the Parties confirmed that they were in agreement with the procedure as conducted by the Arbitral Tribunal up to this time.

3. DISCUSSION

3.1 GENERAL

In accordance with Article VII 3.(c) of the Treaty this arbitration is conducted under the provisions of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("Convention"). The Convention, in Article 25(2)(a), defines as a "National of another Contracting State": "*any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to*

paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute".

3.2 Position of the Respondent

According to the Respondent, the three individual Claimants, James, John and Timothy Wahba are all dual nationals as they have both the American as well as the Egyptian nationality and they can therefore not invoke the Convention.

The Respondent also contests the right for the two corporate Claimants, Champion Trading Company and Ameritrade International, Inc., to be parties to this dispute as it has not been demonstrated that American nationals hold a substantial interest in these companies as required by the Treaty. In order to define the status of an American corporate party one has to employ the same criteria as for the individual claimants and in the determination that American nationals have to hold a substantial interest, one has to disregard interest held by dual nationals.

Furthermore, the Respondent also maintains that the present litigation already constitutes the object of proceedings before the Egypt state authorities and that the Claimants therefore, in accordance with Article VII of the Treaty, are excluded from invoking the arbitration proceedings under the Treaty.

The Respondent therefore asks the Arbitral Tribunal to declare that it lacks jurisdiction to decide on the claims of both the individual and the corporate Claimants and that the Claimants should be ordered to pay all costs of these proceedings.

3.3 Position of the Claimants

The Claimants maintain that the non-corporate Claimants are not Egyptian nationals because they did not acquire Egyptian nationality, that in any case, under international law the nationality has to be established according to the rule of the real and effective

nationality and that the non-corporate Claimants have not effectively acquired Egyptian nationality.

The corporate Claimants are "nationals of another Contracting State" within the meaning of the Convention and the Treaty as they are incorporated in the United States and all the shareholders of the corporate Claimants are nationals of the United States and United States nationals have a "substantial interest" in the corporate Claimants.

The present dispute under the Treaty is different from the dispute before the administrative courts of Egypt insofar as they involve different parties and have different causes of action.

The Claimants therefore request the Arbitral Tribunal to declare that it has jurisdiction to hear the claims raised by the Claimants against the Respondent and that the Respondent should be ordered to pay all costs and expenses incurred by the Claimants in connection with these proceedings.

3.4 FINDINGS OF THE ARBITRAL TRIBUNAL

The Arbitral Tribunal will first examine the situation of the three individual, non-corporate Claimants and then the entitlement of the corporate Claimants and finally the question whether the Egyptian court proceedings exclude the right for the Claimants to bring the present dispute before the ICSID Tribunal.

3.4.1 THE INDIVIDUAL CLAIMANTS

All three individual Claimants were born in the United States of America as sons of Dr. Mahmoud Ahmed Mohamed Wahba, born at Kafr-El-Sheikh, Egypt, on February 12, 1941 and Mrs Susanne Patterson Wahba, born in Minnesota, USA, on June 24, 1944 (not parties to these proceedings).

James Tarrick Wahba was born in Connecticut, USA, on August 3, 1979, John Wahba was born in Connecticut, USA, on February 8, 1980 and Timothy Robert Wahba was born in Connecticut, USA, on April 2, 1985. Being a minor, Timothy Robert is represented in these proceedings by his mother Susanne Patterson Wahba.

The Parties are in agreement that a child born of an Egyptian father, either within or outside Egypt, automatically acquires at birth Egyptian nationality if at that time the father holds Egyptian nationality.

Much evidence was presented and discussed in the written submissions and at the Hearing regarding the question whether Dr. Mahmoud Wahba had, as alleged by the Claimants, given up his Egyptian nationality in 1975, after he was authorised to acquire and did in fact acquire US nationality.

According to the Respondent, the Egyptian authorities never ruled that Dr. Mahmoud Wahba had given up or lost his Egyptian nationality. The Respondent submits that after he acquired his US nationality Dr. Wahba remained an Egyptian national and therefore his three sons have automatically, at birth, acquired Egyptian nationality.

The Arbitral Tribunal has been presented with conflicting and contradictory documents by the Parties regarding the nationality status of Dr. Mahmoud Wahba in Egypt and accusations of fraud were raised.

The Arbitral Tribunal need not come to any finding regarding the authenticity or lack thereof of any of the controversial documents which have been presented in the course of these proceedings.

It is uncontested that Dr. Mahmoud Wahba, on March 27, 1997, applied for an Egyptian personal identity card (Exhibit D90) and that he received the identity card. It is also not contested that he carried the Egyptian passport N° 287, issued by the Consulate of the Arab Republic of Egypt in the United States of America in 1992, and that he used this passport extensively for travels to Egypt, at least between the period of 1995 and 1997.

It is also not contested that the Claimants did not produce any authorisation by the Minister of the Interior allowing Dr. Mahmoud Wahba to renounce his Egyptian nationality upon acquiring his American nationality (see Affidavit Professor Sadek of May 28, 2003, page 4, paragraph 5). Although the evidence presented regarding the use of his Egyptian passport and the delivery of the Egyptian identity card occurred in the nineties and not the years 1979 through 1985 when the three individual Claimants were born, no plausible explications were given and no evidence whatsoever was offered to explain how Dr. Mahmoud Wahba could have lost his Egyptian nationality in 1975 but then have used this same nationality to ask for and receive an Egyptian identity card and passport which he used extensively.

The Arbitral Tribunal therefore comes to the conclusion that at the time the three individual Claimants were born, their father still possessed his Egyptian nationality and that therefore under Egyptian law the three individual Claimants upon birth automatically acquired the Egyptian nationality (see Affidavit Professor Sadek of May 28, 2003, page 3, paragraph 3).

The Claimants have, however, argued that under international public law, even if a person might technically be considered to be a dual national, an international tribunal, dealing with the question of the nationality of a party in an investment dispute under the Convention, must look to the real and effective nationality and that this real and effective nationality of all individual Claimants was that of the United States and of the United States only.

The Respondent answers that, even if the rule of the real and effective nationality could be considered to constitute a rule of international law, the Convention has a clear rule in Article 25(2)(a) that "*any person who ... also had the nationality of the Contracting State party to the dispute is excluded from the possibility of bringing his dispute under the arbitration procedure of the Convention*". The Respondent concludes that this clear and specific rule must be applied by the Tribunal which has no discretion to resort to a "so-called" general rule.

Both Parties have drawn the attention of the Arbitral Tribunal to the "travaux préparatoires" for the Convention.

The Respondent drew our attention to the commentary of Professor Schreuer[1] according to which the early drafts of the Convention had provided that a national of the other Contracting State "*may possess concurrently the nationality ... of the State party to the dispute*" (History Vol. I, p. 122, Vol. II, pp. 170-171) but that apparently, after various other formulae had been debated, a proposal was adopted unanimously to exclude dual nationals explicitly if one of their nationalities was that of the host State (Vol. II at pp. 876, 874, 878, 868, 880/881, 937), and that this became the present text of the Convention Article 25 (2)(a).

The Accompanying Report of the Executive Directors of March 18, 1965 stated on page 9 "*this ineligibility is absolute and cannot be cured even if the State party to the dispute has given its consent*".

The Respondent furthermore refers to the comments of Messrs Shihata/Parra[2] :

"*Many BITs, to take another example, purport to extend the benefits of the treaties to investors who are natural persons with the nationality of the host State so long as they also have the nationality of the other State party to the treaty. Article 25(2)(a) of the ICSID Convention, however, categorically excludes from the jurisdiction of the Centre disputes between a State and natural persons with the nationality of that State, irrespective of whatever other nationality the individual may have. In view of this, the Secretariat of the Centre lately had to inform an aggrieved individual with the nationality of both parties to the BIT concerned that he would, despite the terms of the BIT, be unable to resort to arbitration under the ICSID Convention".*

The Claimants refer *inter alia* to Aron Broches, who wrote that during the final debates the working group "*had expressed its unwillingness to deal in the Convention with the problem of involuntary acquisition of nationality, feeling that it would be up*

[1] Ch. Schreuer, T*he ICSID Convention : a commentary*, Cambridge University Press, 2001, n° 440-442
[2] Shihata/Parra, *The experience of the international centre for settlement of investment disputes,* 14 ICSID Review – Foreign Investment Law Journal 299 (1999), p. 308

to the Tribunals concerned to decide whether forced nationality would have to be taken into account or could be disregarded[3]*".*

According to the Claimants "*the issue before this Tribunal is whether a nationality claimed by the Respondent solely for the purpose of challenging jurisdiction should be given effect*" (Reply Memorial, § 51). The Claimants are of the opinion that the Tribunal should determine its jurisdiction on the basis of the applicable rules of international law, and that under those rules "*it is not sufficient for a State claiming an individual as its national to merely refer to the provision of its internal law"* (Reply Memorial, § 53). The Claimants, in this connection, refer to the Convention of The Hague on Nationality of 12 April 1930 (Annex C12), which never became effective but which often is seen as representing the state of international law on the question of nationality of individuals. Article 1 of the Convention states:

"It is for each State to determine under its law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality".

According to the Claimants "*[t]he principles of law generally recognised with regard to nationality include the rule of effective nationality according to which a nationality conferred by a State cannot produce effects unless it is effective and corresponds to a genuine link between the State and the individual"* (Reply Memorial, § 54).

The Claimants specially refer to the landmark decision of the International Court of Justice of April 6, 1955 in Liechtenstein vs. Guatemala, the so-called Nottebohm Case (ICJ Reports 1955; also Annex C32).

The Claimants also refer to the case law of the Iran-United States Claims Tribunal, which decided in Case N° A/18 of 6 April 1984 (5 Iran-U.S.C.T.R.-251), following three cases which had been decided by Chamber Two in 1983, that it did have

[3] Documents Concerning the Origin and the Formulation of the Convention, Volume II, Part II, Doc. 106 (SID/LC/SR – January 5, 1965), Summary Proceedings of the Legal Committee Meeting, December 10, 1964, p. 868, Annex C14

jurisdiction over claims of a dual national, *i.e.* a person holding both the Iranian and the US nationality, against Iran as respondent when the dominant and effective nationality of the Claimant was the US nationality.

In these cases it was held that in a case of conflict of nationalities and rights flowing from the status as a national of a particular country, the rule of the effective or the dominant and effective nationality should be applied.

The Nottebohm case decided in 1955 contained the following key statement:
"According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national."

The Nottebohm case turned on the question whether Liechtenstein could exercise diplomatic protection on behalf of Nottebohm. Nottebohm was born in 1881 as a German citizen in Germany and went to Guatemala in 1905 where he developed his activities in the field of commerce, banking and plantations. During one of his brief visits to Liechtenstein, where a brother of his had been living since 1931, he applied for Liechtenstein nationality which he obtained on October 20, 1939 and also received a Liechtenstein passport. At the beginning of 1940 he returned to Guatemala to resume his former business activity. He had never become a national of Guatemala. In October 1943 the Guatemala authorities arrested Nottebohm and he was deported to the United States and interned there for two years and three months. In 1944, after he had been deported to the United States, legal proceedings were commenced in Guatemala designed to expropriate, without compensation to him, all his proprieties in Guatemala. After the war, Nottebohm was not allowed back to Guatemala and in 1946 took up residence in Liechtenstein. The issue was therefore not one of a dual

nationality but whether Liechtenstein could exercise diplomatic protection on behalf of Nottebohm. The ICJ came to the conclusion that his ties with Liechtenstein during the relevant period before and during the taking of his proprieties in Guatemala were not of such a nature as to allow Liechtenstein to exercise diplomatic protection before the ICJ.

Forty years after the ICJ, The Iran-United States Claims Tribunal in case N° A/18 had to interpret the "Declaration of the Government of the Democratic Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Algiers Declaration) which states in Article II(1) "*an international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States …"* and Article VII(1)(a), states: "*A "national" of Iran or of the United States, as the case may be, means (a) natural person who is a citizen of Iran or the United States …*".

After having quoted the above cited *dictum* of Nottebohm, the Iran-United States Claims Tribunal stated that "*while Nottebohm itself did not involve a claim against the State of which Nottebohm was a national, it 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. The effects of the Nottebohm decision have radiated throughout the international law of nationality."*

That Tribunal went on to state, before it found that it had jurisdiction over claims against Iran by dual Iran-United States nationals when the dominant and effective nationality of the claimant during the relevant period was that of the United States, that *"[i]n view of the pervasive effect of this rule since the Nottebohm decision, the Tribunal concludes that references to "national" and "nationals" in the Algiers Declarations must be understood as consistent with that rule unless an exception is clearly stated. As stated above, the Tribunal does not find that the text of the Algiers Declarations provides such a clear exception"*.

The findings of the Iran-United States Claims Tribunal therefore concern the interpretation of an international treaty, the Algiers Declarations, and of the words "national" and "nationals" used in that Treaty, which itself does not contain any further definition.

According to the Claimants this Tribunal should, when applying the nationality requirement under Convention, use the definition as it has been developed in international law as shown in the above quoted Nottebohm and A/18 decisions.

The Claimants argue that the Egyptian nationality of the three individual Claimants does not correspond to the prevailing definition of nationality in international law. If they are to be considered Egyptian it is only because of Egyptian law which conferred Egyptian nationality on them at birth. The Claimants submit that, in fact, they neither have today nor ever have had any particular ties or relations with Egypt. Claimants conclude that such an involuntary nationality should not to be taken into account when interpreting the Convention.

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.

According to Article 31 of the Vienna Convention of 23 May 1969, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaties in their context and in the light of their object and purpose.

According to the ordinary meaning of the terms of the Convention (Article 25 (2)(a)) dual nationals are excluded from invoking the protection under the Convention against the host country of the investment of which they are also a national. This Tribunal does not rule out that situations might arise where the exclusion of dual nationals could lead to a result which was manifestly absurd or unreasonable (Vienna

Convention, Article (32)(b)). One could envisage a situation where a country continues to apply the *jus sanguinis* 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.

In the present case this situation does not arise and the question need not be answered.

It is undisputed that the documents regarding the investments in NCC (see e.g. Annexes D5 and D15 through D25) mentioned only the Egyptian nationality of the three individual Claimants. In their Reply Memorial (§§ 88 and 89) the Claimants state that the incorporation on behalf of the then under age Wahba sons *"was carried out by National Bank of Egypt as incorporator of NCC, thus was aimed at accelerating the incorporation and the registration process."*

The Claimants further add that the activity of NCC could have been carried out by Egyptian companies which were not necessarily owned by Egyptians only and that the use of the Egyptian nationality in the corporate documents of NCC was only done to speed up the incorporation process and not in order to allow the company to pursue an activity which it could not have pursued if it would have not be owned by Egyptian nationals.

This question need not be addressed by this Tribunal. What is relevant for this Tribunal is that the three individual Claimants, in the documents setting up the vehicle of their investment, used their Egyptian nationality without any mention of their US nationality. According to the documents, Dr. Mahmoud Wahba acted in this connection as the legal guardian of his then still minor three children. The mere fact that this investment in Egypt by the three individual Claimants was done by using, for whatever reason and purpose, exclusively their Egyptian nationality clearly qualifies them as dual nationals within the meaning of the Convention and thereby based on Article 25 (2)(a) excludes them from invoking the Convention.

The Tribunal therefore holds that it does not have jurisdiction over the claims of the three individual Claimants.

3.4.2 THE CORPORATE CLAIMANTS

According to Article I (b) of the Treaty " *"Company of a Party" means a company duly incorporated, constituted, or otherwise duly organised under the applicable laws and regulations of a Party or its subdivision in which*
(i) natural persons who are nationals of such Party....
have a substantial interest."

Article 25 (2)(b) of the Convention states: the term *"National of another Contracting State"* is defined as *"a judicial person which had the nationality of a Contracting State other then the State party to the dispute…."*

It is not disputed that Champion Trading Company was incorporated in the State of Delaware on 24 July 1995 and Ameritrade International Inc. was likewise incorporated in the State of Delaware on 20 May 1992.

According to the uncontested statement of the Claimants, the shareholders of both companies are the natural persons Mahmoud Wahba, Susanne Patterson Wahba, James T. Wahba, John B. Wahba and Timothy T. Wahba and each of these five individuals holds 20% of the capital of each company (C29).

Neither the Treaty nor the Convention contain any exclusion of dual nationals as shareholders of companies of the other Contracting State, contrary to the specific exclusion of Article 25 (2)(a) of the Convention regarding natural persons.

The Respondents did not adduce any precedents or learned writings according to which dual nationals could not be shareholders in companies bringing an ICSID action under the Treaty.

The Tribunal therefore holds that it does have jurisdiction over the claims of the two corporate Claimants.

3.4.3. PROCEEDINGS BEFORE THE STATE COUNCIL

It is not disputed that the Egyptian company NCC in the Fall of 1996 seized the Egyptian Conseil d'Etat with its claims against the Arab Republic of Egypt for alleged losses arising from various acts allegedly committed by the Egyptian authorities.

According to the Respondents, the subject matter of the claim of NCC before the Egyptian Conseil d'Etat and the claim before this Tribunal concern the same dispute and the real claimant behind both claims is Dr. Mahmoud Wahba.

The Convention does not contain any rules regarding possible parallel proceedings.

According to Article VII 3.(a) of the Treaty recourse to ICSID arbitration is only possible if "(iii) *the national or company concerned has not brought the dispute before the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Party that is a Party to the dispute."* The terms "national" or "company" are defined for the purpose of this Treaty in Article I (e) and (a). The nationals and company concerned in the present dispute are the three individuals Claimants and the two corporate Claimants, however not NCC. The Respondents have not shown any convincing reason why the Treaty should not be interpreted in good faith in accordance with the ordinary meaning expressed therein which excludes from ICSID arbitration only those disputes where the ICSID claimant is also the claimant in the national proceedings.

The Arbitral Tribunal therefore rejects the defence of the Respondent that it does not have jurisdiction because of the claim brought by NCC before the Egyptian Conseil d'Etat.

The Tribunal reserves the questions of costs and arbitration fees.

FOR THE ABOVE REASONS THE TRIBUNAL DECLARES

- that it does not have jurisdiction over the individual Claimants John T. Wahba, James B. Wahba and Timothy T. Wahba

- that it does have jurisdiction over the claims of the corporate Claimants Champion Trading Company and Ameritrade International Inc.

signed

Mr. Robert Briner

signed

Mr. L. Yves Fortier, Q.C.

signed

Professor Laurent Aynès

October 21, 2003