IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

IN HIS EXALTED NAME

CASE NO. 296
CHAMBER TWO
AWARD NO. 564-296-2

PARVIZ SADIGH BAVANATI,

Claimant,

and

THE GOVERNMENT OF THE
ISLAMIC REPUBLIC OF IRAN,

Respondent.

CONCURRING OPINION OF KOOROSH H. AMELI

1. Although for many reasons in addition to those of my former colleagues in A18,[1] in my opinion the Tribunal has no jurisdiction over dual Iran-United States nationals, I concur in the Award in the present Case so far as it concerns dismissal of the Claim for lack of dominant and effective United States nationality of the Claimant, because the Award conforms to the practice of the Tribunal. In part One, I set forth my reasons for lack of effectiveness of the U.S. nationality of the Claimant and in part Two, I discuss the earlier decision of the Foreign Claims Settlement Commission of the United States that in contrast to the Award in this Case erroneously concluded on the same facts that the Claimant's U.S. nationality was dominant and effective based.

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[1] See, Dissenting Opinion of the Iranian Arbitrators in The Islamic Republic of Iran and The United States of America, Decision No. 32-A18-FT (6 April 1984), reprinted in 5 Iran-U.S. C.T.R. 275.

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2. While initially finding that the Claimant has been a naturalized national of the United States during the relevant period, the Award finally concludes that his U.S. nationality has not been effective during that period. Award, paras. 13 and 18. Indeed, in my opinion there has been manifest ground contrary to the international effect of the naturalized U.S. nationality of the Claimant as against Iran, the State of his nationality by birth, and thus the Tribunal should not be bound by the conduct of the United States.

3. The Award finds that the Claimant was born in Iran on 15 March 1936 and that there is no dispute between the Parties that, under Iranian law, the Claimant acquired Iranian nationality by virtue of birth to Iranian parents in Iran. Award, paras. 4 & 13. The Award also finds that the Claimant has failed to show that he has renounced his Iranian nationality. Award, para. 13.

4. Under Iranian law, renunciation of Iranian nationality should be obtained with the observance of certain requirements prior to foreign naturalization. Foreign naturalization obtained in disregard of these requirements is considered null and void under Iranian law and the person concerned shall be treated solely as Iranian national, unless for national interests the Ministry of Foreign Affairs or, on its behalf, the respective Iranian ambassador abroad, upon request and observance of other requirements, agrees with the renunciation and decides to recognize such foreign naturalization. Iranian Civil Code Articles 988, 989 and Note added to Article 989, ratified on 4.2.1959, together with Decree Law of 13 December 1967, referred to in the Award, para. 6. n.1.

5. The Award finds that the Claimant left the United States less than a month after his United States naturalization in March 1974 and never returned to settle there. Award, paras. 4 and 15. The Award also finds that "[t]he Claimant neither owned

significant property in the United States nor kept a place of residence there" at any time since that date and that "the only evidence of Claimant's ongoing attachment to the United States while living in Germany" since March 1974, or in fact since his naturalization on 19 February 1974, "was that he voted in the U.S. elections in 1984," three years after entry into force of the Algiers Declarations and two years after institution of the present proceeding. Award, para. 15. It is clear that the Claimant also filed no tax return with the tax authorities of the United States since his naturalization in 1974.[2]

6. Moreover, the Award holds that "the Claimant was a national of both Iran and the United States during the relevant period" (para. 13) and proceeds with the determination of the dominant and effective nationality of the Claimant during that period (para. 14). The Award's holding that the Claimant was a U.S. national is based on the view that "[t]he Tribunal is not convinced by Respondent's argument that the Claimant lost his United States nationality by leaving the United States one month [] after his naturalization", because according to the Award "[t]he provision of the U.S. Immigration and Nationality Act that is invoked by the Respondent provides that the U.S. Government shall - upon affidavit showing good cause therefor- initiate a procedure in order to revoke the acquired United States nationality of one who takes up permanent residence outside the United States within five years of his or her naturalization as a U.S. citizen", citing Section 340(a) of the U.S. Immigration and Nationality Act, 8 U.S.C.§ 1451(a), that "[t]here is no evidence before the Tribunal that the United States Government ever initiated such a procedure against Mr. Bavanati" and that "[m]oreover, there is ample evidence in the file that the United States Government, through its Consulate in Munich, Germany, has

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[2] For the relevant period in this Case, the United States Internal Revenue Code § 6012(a)(1)(A) required every U.S. citizen to file tax return for the taxable year he had a gross income of $750 or more. P.L. 96-589, § 3(b)(1); P.L. 95-30, §104. Moreover, under Code §117(c), a scholarship is taxable when it is dependent on a promise to perform future services.

consistently treated Mr. Bavanati as one of its nationals." Award, para. 13.

7. However, the Respondent does not deny the fact of U.S. naturalization of the Claimant. It also acknowledges the fact that he has been treated by the United States as its national since his naturalization, that his U.S. passport has been renewed by the U.S. Consulate in Munich and that his U.S. nationality has not been formally revoked by the United States. But, as the Award states, "[t]he Respondent argues that the Tribunal should" for purposes of the present Case "not consider the Claimant a United States national" and not give such nationality any effect under international law as he left the United States in March 1974, just one month after the date of his naturalization, and thereafter did not maintain sufficient attachment to that country. Award, para. 8. The Award also states that "[i]n support of this, Iran invokes Section 340(d) of the U.S. Immigration and Nationality Act, 8 U.S.C. §1451(d), and also relies on certain international jurisprudence." Id. It is clear, contrary to the Award's statement, that the Respondent does not argue that the Claimant lost his U.S. nationality but that the Tribunal should not recognize and give international effect to that nationality as against Iran. Award, para. 13.

8. The Award rightly finds that the Claimant is covered by Section 340(d) of the U.S. Immigration and Nationality Act, 8 U.S.C. § 1451(d),[3] as evidence of the Claimant's lack of

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[3] Also quoted by the Award, para. 8, n. 2, it provides:

> If a person who shall have been naturalized shall, within five years [amended November 1986 to one year] after such naturalization, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such person to reside permanently in the United States at the time of filing his petition for naturalization and in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to

intention to reside permanently in the United States, due to his taking up residence in Germany. Award, para. 13. This is also confirmed by the finding of the Award that "[t]he Claimant neither owned significant property in the United States nor kept a place of residence there." Award, para. 15. However, the Award does not give the Claimant's U.S. nationality the consequence provided by the U.S. law, basically due to the absence of evidence that the United States initiated the procedure for revocation of U.S. nationality against Bavanati.

9. Under international law, naturalization of nationals of one State by another State in violation of the law of the State of nationality at birth, as in the present Case, is not considered a matter of domestic jurisdiction of the naturalizing State alone. Thus, where the law of the naturalizing State, itself, provides for denaturalization or loss of nationality,[4] the Tribunal should a fortiori readily use the provisions of that law for not recognizing such a naturalized nationality rather than recognizing both nationalities on an equal footing in a quite simplistic manner and proceeding with the determination as to

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> citizenship and the cancellation of the certificate of naturalization as having been obtained by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively. The diplomatic and consular officers of the United States in foreign countries shall from time to time, through the Department of State, furnish the Department of Justice with statements of the names of those persons within their respective jurisdictions who have been so naturalized and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to revoke and set aside the order admitting to citizenship and to cancel the certificate of naturalization.

[4] For loss of U.S. nationality by expatriation see the Immigration and Nationality Act, Section 349, 8 U.S.C. §1481, quoted in n. 17 infra.

which of the two is dominant and effective. Although agreeing that the Award's reasoning conforms to the practice of the Tribunal under A18, I would have joined rather than concurred in the Award, if it had adopted my opinion.

10. The fact that the United States has not actually revoked the Claimant's naturalization in the present Case should not be dispositive of the issue of the effectiveness of his U.S. naturalization against Iran before this Tribunal, as was held in the cases discussed infra.

11. Further, as stated by the joint separate opinion of three justicies of the United States Supreme Court in a case concerning Section 352(a)(1) of the Immigration and Nationality Act of the United States, not at issue in the present Case, "[t]he protection of American citizens abroad has always been a most sensitive matter and continues to be so today. This is especially true in Belgium, Greece, France, Iran, Israel, Switzerland and Turkey, because of their refusal to recognize the expatriation of their nationals who acquire American citizenship. The dissension that springs up in some of these areas adds immeasurably to the difficulty. Nor is the United States alone in making residence abroad cause for expatriation. Although the number of years of foreign residence varies from 2 to 10 years, 29 countries, including the United Kingdom and 7 commonwealth countries, expatriate naturalized citizens residing abroad. Only four -- Czechoslovakia, Poland, Afghanistan, and Yugoslavia -- apply expatriation to both native-born and naturalized citizens. Even the United Nations sanctions different treatment for naturalized and native born citizens; Article 7 of the [1961] United Nations Convention on the Reduction of Statelessness[5] provides that naturalized citizens who reside abroad for seven years may be expatriated unless they declare their intent to

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[5] 989 U.N.T.S. 175.

retain citizenship."[6] These considerations particularly assume importance with regard to a nationality law that despite its ease of conferment of nationality to nationals of other countries provides for numerous instances of loss of nationality so obtained, as a balancing factor. Such considerations are relevant in the present Case, due to the Claimant's departure from the United States almost immediately after his naturalization, to the taking up of residence in Germany for more than twenty years, and to the presence of provisions in the U.S. nationality law, conforming to the Claimant's situation, that would have denaturalized him, had the United States authorities acted accordingly.

12. In my opinion, the Award should have dismissed the Claim, because in the circumstances of the present Case Iran is under no obligation to recognize U.S. naturalization of the Claimant not only under Iranian law, referred to in para. 4 supra, but also under international and United States law. The Award should not have found the Claimant a United States national, hence a dual Iran-U.S. national, and proceeded to determine whether his U.S. nationality was dominant and effective as compared with his Iranian nationality under the erroneous A18 Decision of the Full Tribunal. The Claims Settlement Declaration, Article VII, paragraph 1, requires the Tribunal to determine whether a United States national has been a citizen of that country for the purposes of the Declaration. The Award also recognizes that under A18, "the Tribunal must first determine [] whether the Claimant was [] a national of the United States or Iran, or of both countries, and, if a national of both countries, his dominant and effective nationality during that [relevant] period." Award, para. 12. As found by the Tribunal in Paul Donin de Rosiere, [w]hile the dispositif in that [A18] case relates only to persons having both United States and Iranian nationality, it appears that the reasoning of Case A-18 may apply

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[6] Separate Opinion of Justice Clark in which Justice Harlan and Justice White joined, Schneider v. Rusk, 377 U.S. 163, at 174, 12L.Ed.2d218, 84S.Ct.1187 (1964).

equally to persons having United States nationality and that of any other State." Order of 17 February 1986, Case No. 498.

13. The rule of dominant and effective nationality as applied by the International Court in Nottebohm and recognized in general international law is limited to determination of nationality of the State invoked in bringing the claim and the nationality of or attachments to any third State other than the respondent State, since under a more predominant rule of international law, nationality of the respondent State is a bar to the claim of dual nationals, as confirmed by the International Court in the Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion (11 April 1949), [1949] I.C.J. 174, 186. This non-responsibility rule has also been recognized by the Washington Convention on the Settlement of Investment Disputes between States and National of Other States[7] of 1965 that has been so widely ratified by industrially developed and developing countries, entered into force within a month of its signature and ratified by 115 States as of October 1994.[8] Various contrary proposals for retention of jurisdiction of the Convention's arbitration and conciliation center, ICSID, over physical persons who also had the nationality of the respondent state were in all circumstances rejected by the regional Consultative Meetings and the Legal Committee in the preparatory work of the Convention because of the recognition of the non-responsibility rule in international settlement of disputes to which a state is a party and thus wisely avoided the opening of

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[7] 575 U.N.T.S. 159. Article 25(2) of the Convention concerning jurisdiction of its center over claims of nationals provides:

"(2) 'Nationals of another Contracting State' means:

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

[8] NEWS FROM ICSID, vol. 12, No. 1, p.6 (Winter 1995).

the pandora's box.[9]

14. The Hague Convention Concerning Certain Questions Relating to the Conflict of Nationality Laws of 1930,[10] even to the extent relied upon in A18 requires in Article 1 that the State conduct as to nationality of individuals first accord with its own law and second be consistent with international law in order to be recognized by other States. The Full Tribunal in A18 confirmed that:

> "As Article 1 of that Convention [The Hague Convention] makes plain, a determination by one State as to who are its nationals will be respected by another State 'in so far as it is consistent' with international law governing nationality. International law, then, does not determine who is a national, but rather sets forth the conditions under which that determination must be recognized by other States." 5 Iran-U.S. C.T.R. 251, 260.

15. With reference to the "international law" provision in Article 1 of the Hague Convention, it has been stated that:

> "This permits of some control of exorbitant attributions by states of their nationality, by depriving them of much of their international effect. Such control is needed since, although the grant of nationality is for each state to decide for itself in accordance with its own laws, the consequences as against other states of this unilateral act occur on the international plane and are to be determined by

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[9] International Bank for Reconstruction and Development, Convention on the Settlement of Investment Disputes between States and Nationals of Other States -- Documents concerning the Origin and the Formulation of the Convention, Vol. II, pp. 709-710, 839-840, 868-869, 876 and 877 (1968); International Bank for Reconstruction and Development, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes, para. 29, id., p. 1069 at 1078, reprinted in 4 I.L.M. 524, 528 (1965); see also A. Broches, The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 136 Recueil des Cours 330, 357-358 (1972-II).

[10] 179 L.N.T.S. 89.

> international law." OPPENHEIM'S INTERNATIONAL LAW, 9th ed. by Sir Robert Jennings and Sir Arthur Watts, vol. 1, p. 853 (Longman Group, Essex 1992).

16. Even Nottebohm, decided by the International Court of Justice and strongly relied upon by the erroneous decision in A18, identifies the issue as follows:

> "In order to decide upon the admissibility of the Application, the Court must ascertain whether the nationality conferred on Nottebohm by Liechtenstein by means of a naturalization which took place in the circumstances which have been described, can be validly invoked as against Guatemala". Nottebohm Case (Liechtenstein v. Guatemala) (Second Phase, Judgment of 6 April 1955), [1955] I.C.J. 1, 16-17.

The Court added that

> "In this connection, counsel for Liechtenstein said: 'the essential question is whether Mr. Nottebohm, having acquired the nationality of Liechtenstein, that acquisition of nationality is one which must be recognized by other States'. This formulation is accurate, subject to two fold reservation that, in the first place, what is involved is not recognition for all purposes but merely for the purpose of the admissibility of the Application, and secondly, that what is involved is not recognition by all States but only by Guatemala." Id., at 17.

The Court also stated that:

> "International practice provides many examples of acts performed by States in the exercise of their domestic jurisdiction which do not necessarily or automatically have international effect, which are not necessarily and automatically binding on other States or which are binding on them only subject to certain conditions: This is the case, for instance, of a judgment given by the competent court of a State which it is sought to invoke in another State." Id., at 21.

> "[T]he court must ascertain whether the nationality granted to Nottebohm by means of naturalization is of this character or, in other words, whether the factual connection between Nottebohm and Liechtenstein in the period preceding, contemporaneous with and following his naturalization appears to be sufficiently close, so preponderant in relation to any connection which may have existed between him and any other State, that it is possible to regard the nationality conferred upon him as real and effective, as the exact juridical expression of a social fact of a connection which existed previously or came into existence thereafter." Id., at 24, emphasis added.

17. Friedrich Nottebohm was not a national of Guatemala, the respondent State in that Case. He was born at Hamburg, Germany, in 1881 and was German at birth, as also when he applied for Liechtenstein naturalization in 1939. His naturalization certificate was issued in October 1939 and two months later he obtained visa on his Liechtenstein passport from Guatemalan Consul General in Zurich. Upon his arrival in Guatemala in January 1940, Nottebohm informed the Ministry of External Affairs in Guatemala that he had adopted the nationality of Liechtenstein and requested that the entry relating to him in the Register of Aliens should therefore be changed from a German to a Liechtenstein national, which request was granted. Also amended was his identification document in February 1940 as well as a certificate to the same effect by the Civil Registry of Guatemala in July 1940. He resided in Guatemala until 19 October 1943 when he was arrested by the Guatemalan authorities and transferred on the same day to the United States Military Base for the purpose of being deported. His properties in Guatemala were allegedly taken by the Guatemalan authorities about the same time. In response to a Swiss diplomatic note seeking the release of Nottebohm as a citizen of a neutral country, the Minister of External Affairs of Guatemala indicated that the arrest was attributable to the United States, yet he did not refer to the nationality of Nottebohm. However, the International Court gave no effect to the knowledge and conduct of Guatemala concerning

the Liechtenstein nationality of Nottebohm.

18. The Court found that after naturalization of Nottebohm in Liechtenstein,

> "No intention of settling there was [] realized in the ensuing weeks, months or years -- on the contrary, he went to Guatemala very shortly after his naturalization and showed every intention of remaining there. Id., at 25.
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> The Court held that the "facts clearly establish, on the one hand, the absence of any bond of attachment between Nottebohm and Liechtenstein and, on the other hand, the existence of a long-standing and close connection between him and Guatemala [] In both respects it was lacking in the genuineness requisite to an act of such importance, if it is to be entitled to be respected by a State in the position of Guatemala. It was granted without regard to the concept of nationality adopted in international relations." Id., at 26.

Consequently, as to the Liechtenstein nationality of Nottebohm, acquired by naturalization, the Court concluded that

> "Guatemala is under no obligation to recognize a nationality granted in such circumstances." Id., at 26.

19. The competence to proceed beyond the naturalization certificate to examine whether the individual concerned was entitled to it has been elaborated upon in the well-known Case of Flegenheimer (20 September 1958) before the Italian-United States Conciliation Commission. The decision states:

> "It is the duty of this Commission to establish Albert Flegenheimer's true nationality at the relevant dates specified in Article 78, paragraph 9 of the Treaty of Peace, and it has a right to go into all the elements of fact or law which would establish whether the claimant actually was, on the aforementioned dates, vested with the nationality

> of the United States; ... It must therefore freely examine whether an administrative decision such as that taken in favor of Albert Flegenheimer in the United States, was of such a nature as to be convincing.
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> The right of challenge of international court authorizing it to determine whether, behind the nationality certificate or the acts of naturalization produced, the right to citizenship was regularly acquired, is in conformity with the very broad rule of affectivity which dominates the Law of Nations entirely and allows the court to fulfill its legal function and remove the inconveniences specified." Para. 25, 14 R.I.A.A. 327, 338.

20. Albert Flegenheimer was a U.S. national at birth, who was naturalized as a German citizen at the age of 4 as indicated in his father's German naturalization certificate of 1894. At least since 24 February 1942 he was again recognized and treated by the United States as its national. Under Article 78, paragraph 9 of the Treaty of Peace, a claimant to be eligible must have been a United Nations national on 3 September 1943, the date of the Armistice and 15 September 1947, the date of the coming into force of the Treaty. Italy, the respondent State considered Flegenheimer a German and not a United States national and therefore not a United Nations national. The Commission however found:

> "that according to a well established international jurisprudence, where international law and the international bodies who must apply that law are concerned 'national laws are simple facts, an indication of the will and the activity of States, just like judicial decisions or administrative measures'. Case concerning certain German Interests in Upper Silesia, (Decision of 25 May 1926) P.C.I.J. Series A, No. 7, p. 19.
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> The result is that in an international dispute, official declarations, testimonials or certificates do not have the same effect as in municipal law. They are statements made by one of the Parties to the dispute

> which, when denied, must be proved like every other allegation." Id., para. 25, at 337-338.

21. The commission found that under both German and United States law Albert Flegenheimer lost his U.S. nationality due to his father's German naturalization in 1894 when he was 4 years old, that his U.S. nationality was neither retained nor suspended, that until 1940 he was only a German national when he lost that nationality again under German law and became stateless without re-acquiring U.S. nationality under German or United States law despite decision of competent authorities of the United States that he had been a national of the United States continuously residing there and having been treated as such at least since 1942, well within the relevant period of 1943-1947 under the Treaty. In so holding, this 1958 decision relied on Salem (1932) and Medina (1862) Cases and to that extent, like Flegenheimer, they may be relied upon as post-World War II and post-Nottebohm cases.

22. In the George J. Salem Case (8 June 1932), the United States - Egyptian Arbitral Tribunal in connection with the United States naturalization of an Egyptian national by filiation born in Egypt affirmed:

> "The Arbitral Tribunal is therefore entitled to examine whether the American citizenship of Salem really exists.
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> The objection of the American Government that such proof can only be furnished to the American courts who, under the law of June 29, 1906, section 23, are competent to deprive any naturalized person of citizenship, if fraud is proved, is not admissible before an international arbitral tribunal. The judgment of a national court may be indispensable to engender the legal effects of such a fraud under national law, but nevertheless in a litigation between States regarding the nationality of a person the right of one State to contest, as acquired by fraud, the nationality claimed by other State cannot depend on the decision of the national courts of this State." 2

R.I.A.A. 1163, 1184 and 1185.

23. In the Medina Case (31 December 1862), the United States-Costa Rica Claims Commission dealt with the U.S. naturalization of Crisanto Medina and his sons, which was disputed by Costa Rica as not being in conformity with United States law. The Medinas, previously subjects of Argentina, had not resided in the United States before or after the grant of the naturalization decree for the period that was required by U.S. law. They had maintained their place of residence in Costa Rica, only staying in the United States for short intervals in one of which the application had been filed with the U.S. court and in another the naturalization decree had been obtained. The claimants argued that their U.S. naturalization decree, granted by the competent U.S. court, had final and conclusive effect on Costa Rica until it was revoked by a competent U.S. court and that naturalization of subjects of another State involved a political question, a matter of sovereign right, to be dealt with diplomatically. Costa Rica argued that although as a general proposition of U.S. municipal law, one may agree that naturalization decrees are final and conducive, they are not conclusive on all the world in all cases, especially because the Commission before which the case was pending was "a tribunal deriving its jurisdiction not alone from the United States, but in equal degree from another sovereign power-- the Republic of Costa Rica. The Convention, which is its charter, obliges it to inquire into, and determine amongst other things, the citizenship of the claimants." See, infra.

24. The umpire, Bertinatti, in dismissing the claim for lack of standing based on the U.S. nationality held:

> An act of naturalization, be it made by a judge ex parte in the exercise of his voluntaria jurisdictio, or be it the result of a decree of a king bearing an administrative character; in either case its value, on the point of evidence, before an international commission, can only be that

> of an element of proof, subject to be examined according to the principle -- locus regit actum, both intrinsically and extrinsically, in order to be admitted or rejected according to the general principles in such a matter. John Bassett Moore, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY, Vol. III, p. 2583, at 2587 (Government Printing Office, Washington, D.C. 1898).

25. As to the Medinas argument that even if their acts of naturalization were intrinsically void, the Commission had no power to reject them as proof until they had first been set aside as fraudulent by a competent U.S. court, the Commission observed:

> "To admit this would give those certificates in a foreign land or before an international tribunal an absolute value which they have not in the United States, where they may eventually be set aside, while Costa Rica, not recognizing the jurisdiction of any tribunal in the United States, would be left with no remedy. Moreover, this commission would be placed in an inferior position, and denied a faculty which is said to belong to a tribunal in the United States.
> If we examine this question with a view to the law of the United States, and if in the matter under consideration we establish a contrast between the power of a tribunal of one of the States and [] with the powers of this joint commission, which precisely is the result of the exercise of that faculty [of making international agreements], there can be no doubt as to which of the two shall be the supreme law of the land.
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> The claimants having chosen to place themselves under the jurisdiction of this commission, must bring before it proofs which are really true and not merely considered so by a fiction introduced by the municipal law of the United States. Id., at 2588.

26. The umpire found that the claimants

> "had not been [] resident of the United States for the term of five years, which the

> law requires as a period of probation and proof of a determined and constant intention to become a bona fide citizen of the United States.
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> Three years after that declaration [of intent in the naturalization petition] the said claimant made another visit to New York, took out his naturalization papers and went back to reside in Costa Rica. [] Had this been represented to Hon. Judge Daly, he could not have granted the certificate of naturalization; and should the case be legally brought now before that learned judge he could not hesitate a moment to set aside that certificate." Id., at 2588-2589.

Consequently, the umpire concluded that the claimants had no standing before the Commission.

27. Under United States law, Section 340(d) of the Immigration and Nationality Act provides that if within five years from the date of his naturalization, a U.S. naturalized person takes permanent residence in a third country it should be considered prima facie evidence of a lack of intention on the part of such person to reside permanently in the United States at the time of filing his petition for naturalization and in the absence of countervailing evidence it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the naturalization order and that the revocation shall be effective as of the original date of the naturalization order.

28. Under United States law, departure from the United States within a month of the naturalization together with maintenance of no place of residence in the United States for any period after departure therefrom is a strong presumption, if not conclusive evidence, of lack of intent to reside permanently in the United States when the Claimant in the present Case was naturalized.[11] The Claimant's argument that his departure was

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[11] Luria v. United States, 231 U.S. 9, 58 L. Ed. 101, 34 S. Ct. 10 (1913) (when the intervening period between the naturalization and the departure is short, the statutory

for educational purposes is not persuasive, as he remained in Germany on the basis of a German residence permit, rather than a student stay permit, and continued his residence there even after completion of his studies, marrying a German national in the meantime. Award, paras. 4 and 16. Moreover, such a person, having no place of residence in the United States, Iran or any country but Germany since 1974, should be readily considered as having his permanent residence or domicile in Germany.

29. Section 340(d) also requires that the diplomatic and consular officers of the United States in foreign countries shall through the Department of State furnish the Department of Justice with statements of the names of the naturalized persons who take up permanent residence in their respective jurisdictions. Section 340(a) of the Act[12] further provides that it shall be

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presumption here could not be regarded as yielding to anything short of substantial and convincing explanation); United States v. Banafshe, 616 F. 2d 1143 (9th Cir. 1980), (naturalized citizen does not present sufficient countervailing evidence to overcome such presumption where his explanation, that he returned to Iran because of his father's illness, is insufficient to explain his continued residence there and his engaging in activities there, such as starting family, which are entirely consistent with the intent to remain there permanently).

[12] Section 340(a), 8 U.S.C. §1451(a) provides:
"(a) Concealment of material evidence; refusal to testify. It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title [8 USC 1421(a)] in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively" Provided, That refusal on the part of a naturalized citizen within a period of ten years following his naturalization to testify as a witness in any

the duty of the United States government attorneys upon affidavit showing good cause to institute court proceedings against such persons for revocation and setting aside of their naturalization orders.

30. It is clear that the failure of the United States Consulate in Munich or the Department of State to perform their obligation under the same provision in reporting the Claimant's status to the U.S. Department of Justice or the failure of the United States government attorneys in their "duty" to institute proceedings against the Claimant for the purpose of revoking or setting aside his naturalization order should not bar the Respondent from rightly challenging the effectiveness of Claimant's U.S. nationality, particularly before this Tribunal. Likewise, it is clear that such a failure does not prevent the Tribunal from questioning the matter.

31. The diplomatic and consular officers of the United States abroad or its Departments of State and Justice have not been given any discretion in the matter under Sections 340(a) and (d) of the Act, 8 U.S.§§ 1451(a) and (d), so that this law could be used selectively, only against certain such dual nationals abroad. The loss of naturalization of such individuals is a long standing provision of the United States law and the purpose of institution of the proceedings is only to avoid its automatic operation by affording the individual concerned a due process rather than to exclude the jurisdiction of this Tribunal or to

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proceeding before a congressional committee concerning his subversive activities, in a case where such person has been convicted of contempt for such refusal, shall be held to constitute a ground for revocation of such person's naturalization under this subsection as having been procured by concealment of a material fact or by willful misrepresentation. If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing such suit, the proceedings may be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence."

prevent it from dealing with and deciding the issue.

32. Further, the phrase "upon affidavit showing good cause" in Section 340(a) of the Act referred to in the Award, para. 13, does not imply that the United States government attorneys have been given certain discretion in instituting the proceedings against the naturalized citizens involved. The affidavit for good cause in this provision is only a procedural requirement. As a matter of routine, it is complied with by the Immigration and Naturalization Service ("INS") attorneys. This affidavit is needless of any personal knowledge of the affiant INS officer. It is sufficient when the affidavit indicates that the allegation is based upon facts disclosed by official records of the Immigration and Naturalization Service to which the affiant had access.[13] Dismissal for failure to file affidavit of good cause does not bar the filing of a new suit with the affidavit, as it is not an adjudication on the merits.[14] Further, since the affidavit requirement is merely procedural, a final judgment rendered without timely filing of the affidavit is not void and cannot be subsequently challenged on that basis.[15] In fact, the requirement of good cause affidavit is only to avoid abuse or selective approach on the part of the United States attorneys in filing of the denaturalization complaint.[16]

33. Moreover, the procedure of institution of court proceedings

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[13] Maisenberg v. United States, 356 U.S. 670, 2 L. Ed. 2d 1056, 78 S. Ct. 960 (1958); United States v. De Lucia 256 F. 2d 487 (7th Cir. 1958), cert. den. 358 U.S. 836, 3 L. Ed. 2d 72, 79 S. Ct. 59, reh. den. 358 U.S. 896, 3 L. Ed. 2d 123, 79 S. Ct. 152.

[14] Costello v. United States 365 U.S. 265, 5 L. Ed. 2d 551, 81 S. Ct. 534, 4 FR Serv. 2d 758 (1961).

[15] Title v. United States, 263 F. 2d 28 (9th Cir.), cert. den., 359 U.S. 989 (1959); United States v. Failla, 164 F. Supp. 307 (D.N.J. 1958).

[16] Nowak v. United States, 356 U.S. 660, 78 S. Ct. 995, 2 L. Ed. 2d 1048 (1958); United States v. Minerich, 250 F. 2d 721 (7th Cir. 1957).

for revocation of naturalization order does not apply in cases of loss of nationality by expatriation under the 1952 U.S. Immigration and Nationality Act Section 349, 8 U.S.C. 1481, which is not at issue in the present Case.[17]

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[17] However, I find it informative for the Claimant and other dual nationals to quote this Section. It provides:

> "(a) From and after the effective date of this Act a person who is national of the Untied States whether by birth or naturalization, shall lose his nationality by--
>
> (1) obtaining naturalization in a foreign state upon his own application, upon an application filed in his behalf by a parent, guardian, or duly authorized agent, or through the naturalization of a parent having legal custody of such person: *Provided*, That nationality shall not be lost by any person under this section as the result of the naturalization of a parent or parents while such person is under the age of twenty-one years, or as the result of a naturalization obtained on behalf of a person under twenty-one years of age by a parent, guardian, or duly authorized agent, unless such person shall fail to enter the United States to establish a permanent residence prior to his twenty-fifth birthday: *And provided further*, That a person who shall have lost nationality prior to January 1, 1948, through the naturalization in a foreign state of a parent or parents, may, within one year from the effective date of this Act, apply for a visa and for admission to the United States as a nonquota immigrant under the provisions of section 101 (a) (27) (E); or
> ["special" substituted "nonquota" by the Act of 29 Dec. 1981.]
>
> (2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof; or
>
> (3) entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense: *Provided*, That the entry into such service by a person prior to the attainment of his eighteenth birthday shall serve to expatriate such person only if there exists an option to secure a release from such service and such person fails to exercise such option at the attainment of his eighteenth birthday; or
>
> (4) (A) accepting, serving in, or performing the

duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, if he has or acquires the nationality of such foreign state; or (B) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, for which office, post, or employment an oath, affirmation, or declaration of allegiance is required; or

(5) voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; or [this para. was repealed by the Act of 10 Oct. 1978.]

(6) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

(7) making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense; or

(8) deserting the military, air, or naval forces of the united States in time of war, if and when he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military, air, or naval forces: *Provided*, That notwithstanding loss of nationality or citizenship under the terms of this or previous laws by reason of desertion committed in time of war, restoration to active duty with such military, air, or naval forces in time of war or the reenlistment or induction of such a person in time of war with permission of competent military, air, or naval authority shall be deemed to have the immediate effect of restoring such nationality or citizenship heretofore or hereafter so lost; or [this para. was repealed by the Act of 10 Oct. 1978 and paras. 6,7 and 9 were renumbered as 5,6 and 7.]

(9) committing any act of treason against, or attempting by force to overthrow, or bearing arms against, the Untied States, violating or conspiring to violate any of the provisions of section 2383 of title 18, United States Code [18 USC § 2383], or willfully performing any act in violation of section 2385 of title 18, United States Code [18 USC § 2385], or violating section 2384 of said title [18 USC § 2384]

34. I am also mindful of Sections 352(a)(2)[18] and 353(6)[19] of

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by engaging in a conspiracy to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, if and when he is convicted thereof by a court martial or by a court of competent jurisdiction; or [as expanded by the Act of 3 Sept. 1954.]

(10) departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States. For the purposes of this paragraph failure to comply with any provision of any compulsory service laws of the United States shall raise the presumption that the departure from or absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States. [This para. was repealed by the Act of 14 Sept. 1976.]

(b) Any person who commits or performs any act specified in subsection (a) shall be conclusively presumed to have done so voluntarily and without having been subjected to duress of any kind, if such person at the time of the act was a national of the state in which the act was performed and had been physically present in such state for a period or periods totalling ten years or more immediately prior to such act.

(c) Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after the enactment of this subsection [enacted 26 Sept. 1961] under, or by virtue of, the provisions of this or any other Act, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence. Except as otherwise provided in subsection (b), any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily."

I have not included the 14 Nov. 1986 and later amendments to this Section, as they do not pertain to the status of the law before 19 January 1981, our jurisdictional cut-off date.

[18] It provides:
"(a) A person who has become a national by naturalization shall lose his nationality by --
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(2) having a continuous residence for five years in

the U.S. Immigration and Nationality Act, 8 U.S.C. §§1484(a)(2) and 1485(6) that have not been pleaded by either party. This provision provided for automatic loss of nationality of a U.S. naturalized national who has a continuous residence for five years in a foreign state other than his country of birth or former nationality except for a full course of study that does not exceed five years. Although the Claimant's study in Germany exceeded five years, that provision was repealed in 1978 in accordance with Section 2 of the Act of 10 October 1978, P.L.95-432, 92 Stat.1046, by which time the Claimant's residence in Germany had not reached five years. That provision, therefore, does not appear to be applicable to the Claimant in this Case.

II

35. It is surprising how the U.S. Foreign Claims Settlement Commission in its Proposed Decision No. IR-2142, dated 27 July 1994, that was confirmed after hearing the Claimant by its Final Decision No. IR-2142, dated 27 October 1994, has erred in the application of the provisions of the Claims Settlement Declaration and jurisprudence of the Tribunal to the same facts on the issue of the dominant and effective nationality of the same Claimant concerning the same Respondent, although in a bank claim for less than $250,000. The Settlement Agreement between Iran and the United States in Claims of Less Than $250,000 that has been recorded as an Award on Agreed Terms by this Tribunal, Award No. 483 (22 June 1990) reprinted in 25 Iran-U.S. C.T.R.

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any other foreign state or states, except as provided in sections 353 and 354 of this title, whether such residence commenced before or after the effective date of this Act."

[19] It provides:
"(a) Section 352(a) shall have no application to a national who--

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(b) has residence abroad for the purpose of pursuing a full course of study of a specialized character or attending full-time an institution of learning of a grade above that of a preparatory school: Provided, that such residence does not exceed five years".

327, 334, provides:

> "In adjudicating such claims [of less than 250,000], the Foreign Claims Settlement Commission shall apply Tribunal precedent concerning both jurisdiction and merits, and shall take into account all issues including counterclaims and liens." Article III (v).

36. The earlier relevant precedents of the Tribunal may be found in Benedix and The Islamic Republic of Iran, Award No. 412-256-2 (22 February 1989), reprinted in 21 Iran-U.S. C.T.R. 20, that we have cited in paragraph 17 of the Award in the present Case as well as Ardavan Peter Samrad, et al. and The Government of the Islamic Republic of Iran, Award No. 505-461/462/463/464 & 465-2 (4 February 1991) para. 29 reprinted in 26 Iran-U.S. C.T.R. 44, 53.

37. The Claimant could have avoided any inconsistency between the Award of this Tribunal and the Decision of the U.S. Foreign Claims Settlement Commission by avoiding frequent requests for postponement of the hearing before the Tribunal, whose award would have been binding on the Commission in accordance with the Agreement between the two governments, cited above. Likewise, the Commission, having been notified of the pendency of the present Case, could have deferred deciding the Claimant's nationality until the Tribunal had decided the issue. Apparently, neither the Claimant nor the Commission was concerned, while the Respondent is blameless for not being a party to the proceedings before the Commission.

Dated, 24 November 1995/3 Azar 1374
The Hague

Koorosh H. Ameli