IRAN - UNITED STATES CLAIMS TRIBUNAL 57 دادگاه داوری دعاوی ایران - ایالات متحده

ORIGINAL DOCUMENTS IN SAFE

Case No. 157 Date of filing 29 March 1983

✓ AWARD. Date of Award 29 March 1983

22 pages in English. 21 pages in Farsi.

[redacted]

_____ DECISION. Date of Decision _____

_____ pages in English. _____ pages in Farsi.

_____ ORDER. Date of Order _____

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_____ CONCURRING OPINION of _____

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IRAN - UNITED STATES CLAIMS TRIBUNAL

دادگاه داوری دعاوی ایران - ایالات متحده

[redacted]

CASE NO. 157
CHAMBER TWO
AWARD NO. 31-157-2

NASSER ESPHAHANIAN,
Claimant,

and

BANK TEJARAT,
Respondent.

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری دعاوی ایران - ایالات متحده
FILED - ثبت شد
No. 157 ۱۵۷ شماره
Date 29 MAR 1983
۱۳۶۲/۱/۹ تاریخ

AWARD

Appearances:

For the Claimant: Mr. James Schreiber, Attorney
Schwartz, Klink & Schreiber, P.C.
New York
Mr. Nasser Esphahanian, Claimant

For the Respondent: Mr. Mohammed K. Eshragh, Deputy Agent of the Islamic Republic of Iran
Mr. M. Khavar, Legal Adviser to the Agent of the Islamic Republic of Iran
Mr. M. Kakavand, Assistant to the Agent of the Islamic Republic of Iran

Also Present: Ms. Jamison M. Selby, Deputy Agent of the United States of America

DUPLICATE ORIGINAL
«نسخه برابر اصل»

I. The Proceedings

The Claimant, Nasser Esphahanian, stating that he has been a U.S. national since his naturalization in 1958, filed a Statement of Claim on 16 December 1981 against Bank Tejarat. The relief sought by the Claimant is the payment of U.S. $ 704,691.85, representing the amount of a dishonored check drawn by Iranians Bank, a predecessor of Bank Tejarat, together with interest at a commercially reasonable rate.

The Respondent, Bank Tejarat, filed its Statement of Defence on 20 April 1982 contending that the Tribunal has no jurisdiction over this claim, owing to the Iranian nationality of the Claimant, which was never renounced in accordance with Iranian municipal law. The Claimant filed a Reply on 12 July 1982.

The Respondent then elaborated its contentions in a lengthy Rejoinder filed on 15 September 1982, with supporting evidence filed on 27 September 1982.

The Claimant submitted a Hearing memorial and his documentary evidence, both filed on 11 October 1982. The Hearing was held on 25 October 1982. On 9 November 1982 the Claimant filed a post-Hearing submission concerning his requests for interest and costs. On 17 and 18 January 1983 the parties both submitted further documentation in response to an Order of the Chamber.

II. The Facts

Nasser Esphahanian is a national of Iran and the United States, under the respective domestic laws of each country. He is a national of Iran under Iranian law because he was born in Iran of an Iranian father. He was issued, accordingly, an Iranian identity card, number 1140, in Tehran. He was, moreover, raised in Iran, and received his early education there.

He left Iran at the age of seventeen to study at Brigham Young University in Utah, the United States of America, entering on a student visa. After transfer to the University of Tulsa in Oklahoma, he was graduated from that University in 1950 with a Bachelor of Science degree in petroleum engineering. Moving thereafter to Texas, he obtained work as an engineer for a United States company. In 1952 he was inducted into the United States Army, and, after a brief period of service, was honorably discharged therefrom. In 1953 he married a native Texan, Mary Kolander. They have two children, both born in the United States. From 1953 until 1970 he and his family resided in Texas, where he continued to work as an engineer for United States companies.

On August 26, 1954 he secured permanent resident status in the United States, pursuant to Private Law 795, H.R. 877, 83rd Cong., 2d Sess. (1954). On August 1, 1958, he was naturalized as a United States citizen, pursuant to Petition No. 11,971 before the United States District Court (S.D. Tex.). He is the holder of Naturalization Certificate No. 7902624. That certificate states, in part: "former nationality -- Iran." The certificate further notes the finding of the District Court that "Nasser Esphahanian ... intends to reside permanently in the United States."

Esphahanian's two children have been educated exclusively in American-run schools, both in the United States and Iran. Neither they nor his wife speak Persian; they are not members of the Moslem faith. Esphahanian has participated regularly in cultural, civic, and business activities in the United States. He has voted regularly in United States elections since 1960. He owns real estate in the United States.

Between 1970 and 1978, as Middle East Area General Manager for Houston Contracting Company ("HCC") based in

Houston, Esphahanian resided with his family 9 out of 12 months in Iran, and the rest in Texas. During this period he also made frequent trips to other countries in the Middle East besides Iran. He has not been back to Iran since last leaving in 1978.

In 1972, Esphahanian opened a Rial checking account at Iranians' Bank. In opening the account, he entered his Iranian identity card number on the application form. Into that account he deposited fees earned by him for services rendered in Iran as well as other locations.

In addition to his position as HCC's Middle East Area General Manager, Esphahanian was the Managing Director of Sedco-Khuzestan Construction Co., an HCC subsidiary. In 1978 he was appointed Liquidator of that company when its business was terminated. Esphahanian also held 6 of a total of 10 bearer shares and 26 of a total of 90 registered shares in Iran Marine Industrial Co. ("IMICO"), a company partly owned by SEDCO, Inc., HCC's parent company. At the time he acquired these bearer shares he was also IMICO's Managing Director, and he held these shares as SEDCO'S nominee and at no cost to himself.

From time to time during the 1970's Esphahanian purchased certificates of deposit denominated in Rials. No application form was required for him to purchase those certificates, nor did he need to refer to his identity card to do so.

On December 21, 1978, Esphahanian redeemed the Rial certificates of deposit held by him at Iranians' Bank . He then exchanged those Rials with the Bank for its check No. 020224 of that date, payable in the amount of US$704,691.85, to the order of Nasser Esphahanian. The check was drawn upon Iranians' Bank's account at Citibank, N.A., New York, New York. The check was duly presented to Citibank on December 29, 1978. The check was dishonored for

"insufficient funds." Iranians' Bank was given due notice of the dishonor. By letters dated February 5, 1979, and October 2, 1979, the Bank requested Citibank to debit its account in the full amount of the check, for payment to Mr. Esphahanian. There were, however, still insufficient funds in that account, and the check remained unpaid.

During the course of 1979 Iranian's Bank was nationalized, pursuant to the law for the Nationalization of Banks, dated 7 June 1979. Under the terms of the Bill of Administration of Bank Affairs, dated 2 September, 1979, Iranians' Bank was merged into Bank Tejarat, which explicitly assumed all of Iranians' Bank's assets and liabilities.

Esphahanian sued in a Federal Court in the United States to recover on the check. See Esphahanian v. Iranians' Bank, 79-Civ-6188 (S.D.N.Y. 1979). That proceeding was suspended, however, and the related attachment nullified pursuant to the obligations of the Government of the United States with respect to legal proceedings and attachments by "United States persons" as set forth in General Principle B of the General Declaration. Having been prevented from obtaining relief in United States courts, Esphahanian came to this Tribunal and filed his claim for the face value of the check, plus interest, and costs of arbitration.

III. The Jurisdictional Issue

A. The Applicable Law

Article II(1) of the Claims Settlement Declaration reads, in part, as follows:

> 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....

Article VII (1) of the Declaration provides in pertinent part that a "'national' of Iran or of the United States, as the case may be, means (a) a natural person who is a citizen of Iran or the United States ...."

Both parties agree that the Tribunal's task is to determine whether Esphahanian's claim is within its jurisdiction as a claim of a national of the United States within the meaning of these articles. Since the Claims Settlement Declaration and the General Declaration together constitute a Treaty under international law, we are guided in interpreting them by Articles 31 and 32 of the Vienna Convention on the Law of Treaties of May 23, 1969.

Esphahanian argues that the text is clear and unambiguous and that it applies to all nationals of the United States and of Iran, including dual nationals, without restriction.

The Bank, in response, argues that Iran does not recognize dual nationality and could not be presumed to have accepted it when the Declaration was signed.

Neither of these arguments can be accepted.

On the one hand, the Claimant's interpretation leads to an absurd result in that it would permit dual nationals to make claims before the Tribunal against either Government, or both. If dual nationals can claim on the simplistic ground that there is no provision prohibiting them from doing so, then there is no basis for refusing them the right to claim under either of their nationalities. On the other hand, the simple fact that the Respondent asserts that Iran does not recognize dual nationality is not by itself dispositive, particularly as the 1955 Treaty of Amity between Iran and the United States accepted that concept by providing certain specific exceptions for dual nationals.

In the absence of any specific provision in the Claims Settlement Declaration on this point, the Tribunal must determine the meaning of the text through use of the rules of the Vienna Convention. Paragraph 3(c) of Article 31 directs us to take into account "any relevant rules of international law applicable in the relations between the parties".

There is a considerable body of law, precedents and legal literature, analyzed herein, which leads to the conclusion that the applicable rule of international law is that of dominant and effective nationality.

1. The 1930 Hague Convention

On April 12, 1930 a convention was concluded at The Hague "Concerning Certain Questions relating to the Conflict of Nationality Laws" ("The Hague Convention"). As Article 1 of that 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.

Article 4 of the Convention provides: "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses." But this provision must be interpreted very cautiously. Not only is it more than 50 years old, but great changes have occurred since then in the concept of diplomatic protection, which has been expanded. See Siorat, Jurisclasseur Droit International Fasc. 250 B., No. 20; Kiss, Répertoire de Droit International, Dalloz, Protection Diplomatique No. 14. This concept continues to be in a process of transformation, and it is necessary to distinguish between different types of protection, whether consular or claims-related.

Moreover, the negotiating history of Article 4 of the Hague Convention prevents that provision from being interpreted as extending to a case, such as the present one, where a dual national, by himself, brings before an international tribunal his own claim against one of the States whose nationality he possesses. Such a proposal was made during the Conference, but it was rejected. See Kosters, Revue de Droit International Privé 424 (1930).

In applying international law, the Tribunal finds itself in a position similar to that of a court of a third State faced with the claim of a dual national against one of the States of his nationality. See Batiffol and Lagarde, I Droit International Privé No. 82 (7th ed.). According to Article 5 of the Hague Convention, "within a third State, a person having more than one nationality shall be treated as if he had only one"... and third States "may, in [their] territory, recognize exclusively amongst the nationalities possessed by such individual, either the nationality of the country in which he mainly and principally resides, or the nationality of the State to which, according to the circumstances, he appears to be more attached in fact." Thus, by

construing Articles 4 and 5 of the Hague Convention together the Tribunal is led to adopt the notion of effective or dominant nationality.

2. Precedents

In this field, there is a considerable number of judicial or arbitral decisions, and there is a certain diversity, as arbitral tribunals had to respect, in each case, the limits imposed by the bilateral agreements which established those tribunals. Siorat, supra at No. 20; Kiss supra at No. 25; Reuter, Droit International Public 168 (5th ed.). The International Court of Justice, in its Advisory Opinion of April 11, 1949, referred to the "ordinary practice whereby a State, does not exercise protection on behalf of one of its nationals against a State which regards him as its own national." Moreover, the Institute of International Law, during its meeting of 1965, adopted the same opinion, though the reporter and several other members disagreed. In any event, it seems to the Tribunal that, since the beginning of the century, there has been a very strong tendency to limit the principle of non-responsiblity, expressed in Article 4 of the Hague Convention, by the principle of effective nationality as expressed by Article 5 of the said Convention.

a) The Commissions which arbitrated the disputes between Venezuela and Italy, France, and Great Britain from 1903 to 1905, applied the principle of predominant or effective nationality. (See, e.g., Miliani Case (Italy and Venezuela, 10 R.I.A.A. 584; Massiani Case (France and Venezuela) id. at 159; Stevenson Case (Great Britain and Venezuela) 9 id. at 385; see also Basdevant, "Conflits de nationalités dans les arbitrages Vénézuéliens de 1903-05", Revue de Droit International Privé 41-63 (1909).

b) A few years later, on 13 May 1912, the Permanent Court of Arbitration decided the Canevaro Case (Italy and Peru), Scott, Hague Court Reports 284 (1912). Italy there

espoused the claim of three brothers Canevaro one of whom, Rafael, was a Peruvian national by birth in Peru (jus soli), and an Italian national by birth to an Italian father (jus sanguinis). The arbitral tribunal held that "whatever Rafael Canevaro's status as a national may be in Italy, the Government of Peru has a right to consider him a Peruvian citizen and to deny his status as an Italian claimant." Id. at 287. The arbitral tribunal only reached its conclusion after its factual determination that Canevaro had

> on several occasions acted as a Peruvian citizen, both by running as a candidate for the Senate, where none are admitted except Peruvian citizens and where he succeeded in defending his election, and, particularly, by accepting the office of General Consul for the Netherlands, after having secured the authorization of both the Peruvian Government and the Peruvian Congress.

Id.

Thus, Canevaro does not stand for a firm rule of non-responsibility but is consistent with the view that the principle of non-responsibility is not absolute, but must be tempered by the doctrine of "dominant" or "effective" nationality.

c) After the first World War, different Mixed Arbitral Tribunals took the same position (Hein Case, (Great Britain and Germany), 2 Trib. Arb. Mixtes 71 (1922); Barthez de Montfort Case, (France and Germany), 6 id. at 806 (1926); Born Case, (Serbo-Croato-Slovene Commission), id. at 499 (1926). In the Barthez de Montfort Case, the Tribunal expressly recalled the resolution voted in 1888 by the Institute of International Law: "It is the active nationality which must be considered and not the nationality somehow theoretical which may survive, next to it."

d) After the Second World War the two most important decisions on the subject followed the same approach. First, the International Court of Justice, in the Nottebohm Case,

on 6 April 1955, noted that "the Courts of third States, when they have before them an individual whom two other States hold to be their national, seek to resolve the conflict by having recourse to international criteria and their prevailing tendency is to prefer the real and effective nationality." The Court further observed that international arbitrators in numerous cases of dual nationality, have resolved questions involving the conflict of nationality laws by choosing to apply the law of the place of "real and effective nationality, that which accorded with the facts ... based on stronger factual ties between the person concerned and one of the States whose nationality was involved." Nottebohm Case (Liechtenstein v. Guatemala) [1955] I.C.J. Rpts. 4, 22.

While Nottebohm itself did not involve a claim against one of the States of Nottebohm's nationality, it demonstrated the acceptance and approval of the International Court of Justice of the search for the real and effective nationality based on the facts of a case.

A few months later, on 10 June 1955, the Italian-United States Conciliation Commission set up by application of the Peace Treaty of 1947, decided in the Mergé Case that the principle "based on the sovereign equality of States which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claimant State..." Mergé Case (United States v. Italy) 14 R.I.A.A. 236, 247 (1955). The Commission then applied this same analysis in 51 other similar cases including dual nationals.

3. Legal Literature

Support for the principles applied in these cases is shared by some of the most competent international lawyers. Basdevant, supra, approving the Venezuelan arbitrations,

writes that effective nationality must prevail, because nationality is the juridical translation of a social fact. Maury in Mélanges en l'honneur de G. Scelle expresses his doubts about the alleged rule forbidding a State to act against another State in cases of dual nationality, and concludes that the Nottebohm decision has a general scope. In 1973 Recueil des Cours 162, Charles de Visscher wrote: "La doctrine du lien effectif ou du rattachement dominant a été régulièrement appliquée au cours du XIXe. siècle, mais parce qu'elle le fut généralement pour rejeter les demandes, la doctrine en est venue à enseigner qu'en règle générale les demandes formées au profit des doubles nationaux sont irrecevables...l'idée s'est implantée que toute demande de protection introduite au profit d'un double national devait être déclarée irrecevable. Cette règle... que l'Institut de Droit International a cru devoir réaffirmer en 1965, n'est pas l'expression correcte du droit en vigueur... en prononcant l'arrêt Nottebohm, la Cour Internationale a bel et bien entendu affirmer un principe general." De Visscher concludes that the decision in the Mergé Case "parait résumer assez exactement l'état du droit applicable."

Thus, the most recent legal literature seems to admit that the "actually dominant theory" Rousseau, Droit International Public, Précis Dalloz, at 1976 p. 112, is, at least before international tribunals, the effective nationality theory, which must be combined with the rule expressed by Article 4 of The Hague Convention. See Batiffol et Lagarde, supra at No. 82; Siorat, supra at No. 20; [1961] II Y.B. Int'l Law Comm'n 49, U.N. Doc. A/CN.4/34 Add. 1; 1977 Digest of United States Practice in International Law 693-94; Rode, Dual Nationals and the Doctrine of Dominant Nationality, 53 Am. J. Int'l L. 139 (1959).

The non-responsibility doctrine has its most common application today not in cases of espousal of claims, but in instances of diplomatic or consular protection of dual nationals physically present in a State which considers them as its own nationals. It is in the latter cases that formal protection will be denied, despite the closeness of other factual connections with the would-be protector State. See Batiffol and Lagarde, supra at p. 80.

4. The Structure of the Algiers Declarations

Application of the principle of dominant and effective nationality is supported by the general structure of the Algiers Declarations and the circumstances in which they were concluded. It must be recalled that shortly after the 52 U.S. nationals were seized in Tehran, numbers of plaintiffs obtained court attachments of Iranian assets located in the United States. In view of those attachments and the Presidential freeze on Iranian assets generally, the two Governments agreed to substitute the jurisdiction of this Tribunal for the jurisdiction of United States and Iranian Courts over disputes which had previously been the subject of litigation in those national courts.

A critical aspect of this substitution of fora was the parallel replacement of the various United States attachments with the Security Account in the N.V. Settlement Bank. Although funded initially with U.S. $1 billion, the Account's continued replenishment at the U.S. $500 million level has been guaranteed both by the Government of Iran and Bank Markazi Iran. In order to assure further the effectiveness of this unique claims settlement mechanism, the United States in essence forced its nationals to file their claims here by dissolving their attachments and suspending litigation in the United States in favor of this Tribunal, a suspension contingent only on our decisions concerning jurisdiction. In a case where the Tribunal decides that it

lacks jurisdiction, litigation in national courts could be resumed, but the original attachments would not be resurrected. Esphahanian was among those whose attachments were dissolved.

From these facts certain conclusions may be drawn. First, the agreement of the two Governments to create this Tribunal was not a typical exercise of diplomatic protection of nationals in which a State, seeking some form of international redress for its nationals, creates a tribunal to which it, rather than its nationals, is a party. In that typical case, the State espouses the claims of its nationals, and the injuries for which it claims redress are deemed to be injuries to itself; here, the Government of the United States is not a party to the arbitration of claims of United States nationals, not even in the small claims where it acts as counsel for those nationals.

Second, the respondent State is not here simply in its capacity as a sovereign State. Rather, "Iran" and "the United States" are defined to include agencies, instrumentalities, and entities controlled by the State -- a scope of responsibility far broader than usual governmental liability. By guaranteeing the debts of juridical persons not part of the government itself, the two Governments have here assumed responsibility for private as well as public law duties. This potentially broad liability is again far more than is normally comprehended in cases of diplomatic espousal of claims, pursuant to which States as such generally undertake to pay compensation for their own violations of international law.

Third, the Tribunal has been substituted for the national courts of both countries with a flexibility not found in either, consistent with its status as an international tribunal established by treaty. The Tribunal is not therefore unlike the courts of third States, particularly when faced with a conflict of nationality laws.

Since there is, moreover, no lex fori binding on it, the two Governments knew or should have known that, when dealing with dual nationals, the Tribunal would have no choice but to give effect to the "real and effective nationality, that which accord[s] with the facts...based on stronger factual ties between the person concerned and one of the States whose nationality is involved." Nottebohm Case, supra at 22.

Therefore, we conclude that this Tribunal has jurisdiction (a) over claims against Iran by dual Iran-United States nationals when the dominant and effective nationality of the Claimant is that of the United States and (b) over claims against the United States by dual Iran-United States nationals when the dominant and effective nationality of the Claimant is that of Iran.

To this conclusion we add an important caveat. There is precedent for denying jurisdiction on equitable grounds in cases of fraudulent use of nationality. Such a case might occur where an individual disguises his dominant or effective nationality in order to obtain benefits with his secondary nationality not otherwise available to him. See Flegenheimer Case (United States v. Italy), 14 R.I.A.A. 327, 378 (1958) (dicta).

B. Application of the Law to the Facts in this Case

We may now frame the jurisdictional issue before us: Were Esphahanian's factual connections with the United States "in the period preceding, contemporaneous with and following" his naturalization as a United States citizen more effective than his factual connections with Iran during the same period? See Nottebohm, [1955] I.C.J. Rpts. at 24.

Esphahanian's contacts with the United States were long and consistent. He has resided in the United States since 1946. He served in the U.S. armed forces. He became an

American citizen in 1958. He is married to an American woman, and they have two children who are American, speak no Farsi and have been educated solely in American schools. Except for a limited time during the period 1970-78 (which is discussed below), his investments have all been in the United States. He bought four residences in the United States between 1957 and 1979. Since becoming a citizen of the United States, Esphahanian has paid U.S. taxes and has voted in U.S. elections, even during the years 1970-78 when he was outside the United States most of the year.

Esphahanian's contacts with Iran since he went to the United States to study have been significant, but much more limited. Aside from contact with relatives still living in Iran, he has made many visits to Iran, has retained his Iranian passport, and most important, had his principal residence there for approximately nine months of each of the years 1970-77 where his family lived while the children attended the American school in Tehran. The evidence presented shows that his American employer required him to divide his time among a number of countries in the Middle East and paid all of his and his family's living expenses. In effect, he operated out of Iran and spent only about one-third of his time there. The evidence also shows that the family returned to the United States each year for the summer months and, thus, maintained a secondary residence there. Esphahanian paid (or his employer paid for him) taxes to Iran on that part of his salary attributable to his work in Iran, whereas his U.S. taxes were based on his total salary. All of Esphahanian's salary and reimbursements from his employer were paid to him in Iran in rials, and he states that the total for the years 1970-78 amounted to approximately $610,000 (of which he has documented $478,345), most of which he invested in certificates of deposit, which were the source of funds for the dishonored check that is the basis of this claim. His other income during those

years stemmed from interest ($174,000), reimbursement of expenses by his employer (some portion of $165,000), consulting work ($25,000), and money received from business transactions with his brother ($50,000). There is, thus, sufficient evidence to believe that virtually all of the funds used to purchase the check in question were acquired legitimately from activities unrelated to Esphahanian's Iranian nationality.

In this connection, the Tribunal is troubled by the evidence that Esphahanian was the nominal owner of a number of shares of stock in the Iran Marine Industrial Co. The beneficial owner was Sedco, and it is possible, if not certain, that Esphahanian was made Sedco's nominee because he had Iranian nationality and could be used to disguise the true extent of Sedco's ownership. This is the kind of use of a second nationality that may cause the Tribunal to deny a claim, but in this case there is no evidence that his allowing his employer to use him as its nominee shareholder was a substantial part of his job. Thus, it does not seem that the Claimant used that subterfuge in a significant way to obtain benefits available only to Iranian nationals for which he is now claiming. This question is more relevant to Sedco's claim (Case No. 128) and will be considered in that context.

It should be noted that Iranian law permits renunciation of Iranian nationality only with the approval of the Council of Ministers. Any person who receives such approval is thereafter allowed to travel to Iran only once, in order to sell or transfer his properties. With respect to Esphahanian's use of an Iranian passport to enter and leave Iran, the Tribunal notes that the laws of Iran in effect forced such use. Once Esphahanian had emigrated to the United States and had become an American citizen, the only way he could return lawfully to Iran was as an Iranian

national, using an Iranian passport. If he insisted on using his U.S. passport to enter Iran, he would be turned away or, at least, his U.S. passport would be confiscated and he would be admitted only as an Iranian. In effect, Iran told its citizens that, if they took foreign nationality, they must also retain their Iranian nationality - which in Iran would be considered their sole nationality - or they would be forever barred from returning to Iran. Esphahanian asserts that he used his Iranian passport solely to enter and leave Iran, and a review of copies of his various passports largely supports those assertions. With the exception of one Lebanese and one Saudi Arabian visa, the visas and immigration stamps of countries other than Iran are all in his American passports.

On the basis of these facts, the Tribunal concludes that Esphahanian's dominant and effective nationality at all relevant times has been that of the United States, and the funds at issue in the present claim are related primarily to his American nationality, not his Iranian nationality. With the exceptions of his use of an Iranian passport to enter and leave Iran and his nominal ownership of stock on behalf of his employer, all of his actions relevant to this claim could have been done by a non-Iranian. The Tribunal holds that the Claimant, Nasser Esphahanian, is a national of the United States within the meaning of the Claims Settlement Declaration and that the Tribunal has jurisdiction to decide his claim against Bank Tejarat.

IV. Reasons for the Award

1. The Amount of the Check

Bank Tejarat admits that it owes Esphahanian the money he spent to buy the check that was dishonored. It argues, however, that the dishonor was not the fault of the former Iranians' Bank, which did all that it could do to induce

Citibank to pay the check. The evidence presented to the Tribunal did not establish why the credit facilities of Iranians' Bank were ended or deemed insufficient by Citibank, but in any event, a bank that draws a check is responsible to ensure that sufficient funds are available in the bank on which the check is written to cover the check. That is textbook law in New York, the place where payment was due. See Uniform Commercial Code §3-413. It is also customary international practice. See Geneva Convention on Bills of Exchange of 1932, Uniform Law on Checques, Art. 12.

From the time payment on the check was refused (apparently January 10, 1979), Esphahanian had an immediate right of recourse against Iranians' Bank, the drawer of the check. Uniform Commerical Code §3-507. The drawer was promptly informed of the refusal of payment, and the evidence indicates it made many unsuccessful efforts to bring about payment, so there can be no question about notice and knowledge. The Tribunal holds that the claimant, Nasser Esphahanian, is entitled to an award in the amount of the check, $704,691.85 against Bank Tejarat.

2. Interest

The award of interest is certainly permissible in the discretion of the Tribunal. In this case there is no evidence that Iranians' Bank deliberately deprived the claimant of his money; on the contrary, the evidence indicates that the bank tried over many months to find ways to pay the check. On the other hand, drawing a check on a bank where the drawer has insufficient funds engages the responsibility of the drawer for the damages that result. Esphahanian paid a substantial fee to the bank to purchase the check in question. Purchase of a bank check usually removes any risk that the check will not be honored. At a minimum, Esphahanian had a right to expect that he would be

indemnified if, for any reason, payment was refused. In view of these circumstances the Tribunal concludes that interest at the rate of 8 percent should be awarded in this case from January 10, 1979 until the date the Escrow Agent instructs the Depositary Bank to pay the award.

3. Costs

Each party shall be left to bear its own costs of arbitration.

AWARD

The Tribunal Awards As Follows:

The Respondent, Bank Tejarat, is obligated to pay the claimant, Nasser Esphahanian, U.S. $704,691.85, plus interest at the rate of 8 percent from January 10, 1979 to the date on which the Escrow Agent instructs the Depositary Bank to pay the Award, which obligation shall be satisfied by payment out of the Security Account established by Article 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria of 19 January 1981.

Each of the parties shall bear its own costs of arbitrating this claim.

This award is hereby submitted to the President of the Tribunal for the purpose of notification to the Escrow Agent.

Dated: The Hague
29 March 1983

Pierre Bellet
Chairman
Chamber Two

George H. Aldrich

Shafie Shafeiei

I REFUSE TO TAKE PART IN THE MAKING OF A DECISION WHICH CANNOT BE LEGALLY JUSTIFIED, BUT TAINTED WITH IMPROPER MOTIVES; WHICH MOTIVES SHALL BE DISCLOSED IN MY SEPARATE OPINION.

Shafie Shafeiei

Mr. Shafeiei took part in the hearing and deliberation of this case. He signed the English text of the Award. Having been invited by letter dated 25 March 1983 to sign the Farsi text on 28 March 1983, he attended the meeting, but refused to sign.

Pierre Bellet
Chairman
Chamber Two

George Aldrich

29 March 1983