IRAN-UNITED STATES CLAIMS TRIBUNAL

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DISSENTING OPINION OF DR. SHAFIE SHAFEIEI

ON THE ISSUE OF DUAL NATIONALITY

Raised in Cases Nos. 157 and 211

AWARDS NOS.31-157-2 AND 32-211-2

DISSENTING OPINION

Only a short time has passed since the signing of the Algiers Declarations. The events leading to the signing of these Declarations are still within memory. Indeed, a crisis of extreme complexity was created by the abrupt and radical rupture of all political and economic relations between Iran and the United States, two Governments which had been closely linked, particularly during the twenty years preceding the Iranian Revolution. After the repeated failure of efforts made by various international organizations, a solution to the crisis was found, thanks to the intervention of the Government of the Democratic and Popular Republic of Algeria. Following a period of indirect negotiations, the Declarations were concluded on January 19, 1981.

In the preamble to the Declarations, the Algerian Government declares itself as having served, at the two Governments' request, as the intermediary to seek a "mutually acceptable" solution to the crisis. There also lies revealed the object of the Declarations: an amicable resolution of the crisis between the United States and Iran. Together the Declarations are made up of three separate instruments, the second of which is entitled the "Claims Settlement Declaration".

This Declaration establishes an arbitral tribunal whose mission is to give effect to the mutual desire of the two Governments, to settle the claims between the Government of each party and the nationals of the other party through binding arbitration. In execution of that Declaration the Tribunal was duly established, and claims were filed there over a period of three months, beginning 19 October 1981 and ending 19 January 1982, in accordance with Article III, paragraph 4 of the Claims Settlement Declaration.

It has now become apparent that some of the claims against the Islamic Republic of Iran were filed by Iranians holding both Iranian and U.S. nationalities. In order to establish the jurisdiction of the Tribunal, these claimants are relying on their U.S. nationality as prevailing, contending that it is their effective and dominant nationality. The Government of Iran has objected to the jurisdiction of the Tribunal and has invoked the principle of non-responsibility of States for claims by dual nationals, according to which a dual national may not bring an international action against either State of which he is a national.

Two claims involving dual nationals have recently been adjudicated by Chamber Two of the Tribunal, of which I am a member. The claimant in each case held both the nationality of Iran (the Respondent State) and the nationality of the United States. The Tribunal was called on to determine whether this particular arbitral Tribunal, established under the Algiers Declarations of 19 January 1981 to settle the disputes between the Government of each contracting party

and the nationals of the other party, has jurisdiction over a claim brought by an individual relying upon U.S. nationality in order to make a claim against Iran, a State of which he is also a national. Following an examination of international jurisprudence and legal doctrine, Chamber Two held that the Tribunal has jurisdiction to adjudicate the claims of dual Iranian - U.S. nationals against Iran, on condition that the effective and dominant nationality of the claimant is that of the United States.

The solution arrived at by the majority is not an adequate expression of substantive international law. The majority's analysis of established judicial precedents and treaty law is flawed. Certain references are even inappropriate. The majority has adopted a position on certain points concerning the Algiers Declarations which were neither invoked nor maintained by the two Governments party to those Declarations.On the other hand, the majority has neglected to examine a line of argument raised by the Respondent which would have been decisive. The application of the theory of effective nationality to the two cases in question is regrettable; the majority conclusion is contrary to legal precedent.

It must be made clear at the onset that the Claims Settlement Declaration does not expressly address the issue raised by dual nationality. There are two principles which dictate the solution to the dilemma: (a) restrictive interpretation of the very particular powers granted to this Tribunal and (b) recourse, if necessary, to customary international law to supply any possible omissions that

might appear in the Declarations. This is the order in which I should have preferred to address the issues. But I find it appropriate here to consider the issues in the same order as that adopted by the majority in drafting its award. One must first examine: (I) what remedies are generally prescribed by public international law; and (II) whether these remedies are in harmony with the principles of interpretation of international agreements, and in particular with the terms used in the Algiers Declarations themselves. Finally, (III) it would appear necessary to review the majority's application of the theory of effective nationality to the two present cases; this is dealt with in Chapter III.

I

The purpose of the Iran-United States Claims Tribunal, established pursuant to the Algiers Declarations concluded 19 January 1981 between the Government of Iran and the Government of the United States, is to bring about the resolution of claims by the nationals of each contracting party against the Government of the other party. Taking into account the legal and inter-State nature of the Tribunal, the question is raised whether a U.S. or Iranian claimant can present a claim when the individual concerned simultaneously holds more than one nationality.

In this connection, careful distinction must be drawn between two possible hypothetical situations. The first is when the dual nationality involves the nationality of the claimant State and another nationality. This would be the case where the claimant holds U.S. nationality and another nationality, be that French, Swiss, or whatever. The second hypothetical situation is where the dual nationality involves the nationality of the claimant State and that of the respondent State. This would be the case where the claimant simultaneously holds both the nationality of the United States and the nationality of Iran, against which the claim has been filed.

In the first hypothetical situation, where the injured individual is a national of States other than the defendant State, the question is to determine which State may intervene on his behalf. Joint protection would appear impracticable. One could accord to any of the States of which the injured party is a national the right to intervene on his behalf, regardless of the extent to which the individual is linked to that State. That is the solution offered by the Salem case (II R.I.A.A. 1188) and the Mackensie case (A.J.I.L., 1926, pp. 595 ss). However, the theory of effective nationality appears to be a solution more consistent with public international law. A purely theoretical nationality is not in itself sufficient for the exercise of diplomatic protection; if several States consider an individual their national, only that State with which a real and effective bond exists may intervene on the individual's behalf.

Totally different from the first hypothetical situation, the second is a situation where the individual holds simultaneously the nationality of the claimant State (i.e., the United States) and the nationality of the respondent State (i.e., Iran). The crux of the matter then is to determine whether that individual may bring a claim against Iran, a State of which he is a national. Therefore, it becomes necessary to ascertain the present state of international law on the issue before the U.S.-Iran Claims Tribunal.

Two positions have been argued before the Tribunal: that of effective nationality and that of non-responsibility -- respectively

invoked by the claimant and by the Government of Iran. The first principle permits an arbitral tribunal established by inter-State agreement to adjudicate a claim against the Government of the respondent State, even though the claimant simultaneously holds the nationality of that State (in this instance the nationalities of Iran and the United States), on condition that the claimant has a more predominant link with the United States. According to the second principle, an individual holding dual nationality may not institute international action against either of the States of which he is a national. In other words, no one can sue his own government before an international tribunal and any such suit may not be espoused by other States.

It remains then, to assess the weight to be given to each of these two principles. One important event marks the evolution of international law and the practice of States on the matter, that of the Hague Convention of 1930. A brief analysis of the situation prior and subsequent to 1930 is therefore appropriate.

A. DECISIONS PRIOR TO 1930

(1) The theory of effective nationality first emerged, albeit tacitly, in a decision rendered in 1834 under the Treaty of Paris of 30 May 1814 concluded between France and Great Britain. The claim of James Louis Drummond, holding both French and British nationalities, was rejected on the grounds, "That the property was seized in consequence of a French decree against emigrants, and not against British subjects, Drummond was technically a British subject domiciled (at the time of seizure) in France, with all the marks and attributes of French character... The act of violence that was done towards him was done by the French Government in the exercise of its municipal authority over its own subjects." (Knapp, Privy Council Reports, Vol. II, p. 295).

On the other hand, a decision rendered in 1872 in the Alexander case by the British-American Civil War Commission, established under the Treaty of Washington of 8 May 1871 between Great Britain and the United States, is the first direct instance of the theory of "non-responsibility." Alexander was born in the United States of a British father, and he simultaneously held U.S. nationality, by operation of jus soli, and British nationality, by operation of jus sanguinis. A claim was filed against the United States for "occupation of and damage to real property in Kentucky by the forces of the United States during the Civil War." The jurisdiction of the Commission

was objected to, on grounds that, "...if it should be held that he had at birth a double allegiance, he could not assert, as against the United States, the character of a British subject; that the United States had the right to regard him as a citizen and that against this right no foreign Government could set up a claim founded on its municipal law. The Commission declared, "We are of opinion that the Commission has no jurisdiction of this claim and therefore the demurrer is allowed." Further, U.S. Commissioner Frazer submitted the following opinion, which is relatively well-known and with which the President of the Commission, Count Corti, concurred:

> "The practice of nations in such cases is believed to be for their sovereign to leave the person who has embarrassed himself by assuming a double allegiance to the protection which he may find provided for him by the municipal laws of that other sovereign to whom he thus also owes allegiance. To treat his grievances against that other sovereign as subjects of international concern would be to claim a jurisdiction paramount to that of the other nation of which he is also a subject. Complications would inevitably result, for no government would recognize the right of another to interfere thus in behalf of one whom it regarded as a subject of its own. It has certainly not been the practice of the British Government to interfere in such cases, and it is not easy to believe that either government meant to provide for them by this treaty. In Drummond's case the terms of the treaty were quite as comprehensive as those of this treaty, and yet it was there held that the claimant was not within the treaty, not being within its intention. This was held even after it was ascertained that he was not a French subject, he having merely evinced his intention to regard himself as a French subject." (Moore, International Arbitrations, Vol. III, pp. 2529-31).

(2) The Venezuelan Arbitral Commissions of 1903-1905, established by treaties Venezuela signed separately with Great Britain, Italy, and France, among others, were called on to consider the issue of dual nationality. Cited in the majority decision (p. 9) as examples of the application of the principle of effective nationality by the

Venezuelan arbitral commissions were: the Stevenson case decided by the British-Venezuelan Commission, the Massiani case decided by the French-Venezuelan Commission, and the Miliani case decided by the Italian-Venezuelan Commission.It is true that factors of effective nationality were invoked in these cases, as they were elsewhere in all the other cases of dual nationality decided by the Venezuelan arbitral commissions, but this was only a minimal part of the substance of the issue expressed there, the entirety of which has escaped the attention of the majority in its analysis of these cases. Conflict of nationality was considered by the Venezuelan arbitral commissions in relation to the predominance of the nationality of the defendant State.

Professor Basdevant made some very valuable comments in this respect:

"La solution positive a consisté dans tous les cas où existait un conflit de nationalité, à faire prévaloir la nationalité vénézuelienne en declarant la commission mixte incompétente. Sur quels motifs juridiques cette solution s'est-elle appuyée? A cet égard on voit intervenir plusieurs idées parfois peu concordantes dont paraît s'inspirer le surarbitre quand il prononce." (Le conflit de nationalité dans les arbitrages vénézueliens de 1903-1905," Revue de droit international privé et de droit pénal international, 1909, p. 47).[1]

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[1] Translation: "In all claims involving a conflict of nationality, the practical solution was to uphold the Venezuelan nationality and declare the mixed commission as not having jurisdiction. On what legal grounds was this solution based? It appears that several reasons inspired the umpire when he made his decision, and these not always in concurrence."

Basdevant continued by explaining that,

"Pour justifier l'incompetence de la commission mixte, il a été dit plusieurs fois que le conflit de nationalité déterminée par la loi de l'Etat responsable devait l'emporter sur celle déterminée par la loi de l'Etat réclamant. Cette idée prend une grande importance devant la commission Grande-Bretagne-Vénézuela : dans l'affaire Mathison l'agent britannique déclare, le surarbitre répète après lui comme chose certain que si le réclamant est à la fois sujet britannique et citoyen Vénézuelien, sa plainte ne doit pas être entendue par la commission. On trouve là le développement et l'application à un cas nouveau de la pratique d'apres laquelle la Grande Bretagne s'abstient de protéger les sujets britanniques vis-à-vis d'un Etat étranger qui attribue à ceux-ci sa propre nationalité. De ce qui est une pratique anglaise, plus ou moins établie d'ailleurs, certaines de nos sentences veulent faire une règle générale. Le surarbitre Ralston dans l'affaire Miliani, le commissaire Vénézueliens dans les affaires des héritiers Maninat et des héritiers Massiani, le surarbitre Plumley dans l'affaire des héritiers Maninat, déclarent qu'un individu dans ces conditions sera considéré comme Italien (ou comme Francais) par l'Italie (ou par la France) à l'égard de tout pays à l'exception du Vénézuela. Cette préponderance donnée dans notre espèce à la loi du Vénézuela, on cherche à la justifier par l'exemple anglais qui n'est pas décisif." (Basdevant, loc. cit., pp. 49-50).[1]

[1] Translation: "In order to justify the mixed commissions' lack of jurisdiction, on several occasions it was declared that the conflict of nationality implied this lack of jurisdiction, or yet, (the same concept in another form) that the law of the liable State must prevail over the law of the claimant State. This concept was deemed significant by the British-Venezuelan Commission. In the Mathison case, the British agent contended, and the umpire concurred, that if a claimant was both a British subject and a Venezuelan citizen, the claim could not be heard by the Commission. This event dates the emergence and development of a practice by which Great Britain would refrain from protecting British subjects against a foreign State considering them its own nationals. Of a more or less established British practice, some of our judgements would like to form a general rule. Umpire Ralston in the Miliani case, the Venezuelan commissioner in the cases of the Maninat heirs and the Massiani heirs and Umpire Plumley in the Maninat heirs case, declared that an individual in that position would be considered as Italian (or as French) by Italy (or by France) with respect to all other countries with the exception of Venezuela. From the weight given, in this instance, to the law of Venezuela, attempts have been made to justify the British practice as a precedent, which is not a decisive one."

It is pointless to elaborate on explanations already so clearly stated by Professor Basdevant. In essence, respect for the sovereignty of the defendant State, in this instance Venezuela, and for her laws led the various commissions to declare their lack of jurisdiction to hear dual nationals' claims against Venezuela when the claimants simultaneously held Venezuelan nationality. The principle of non-responsibility was invoked in the Mathison case by the British agent himself. Umpire Frank Plumley supported the principle and added as a supplementary justification that jus soli, insofar as it is "the rule of nature," must prevail over jus sanguinis. (IX R.I.A.A. 485, 489, 490, 494).The same umpire applied the same jurisprudence in the Stevenson case. (Ralston, Venezuelan Arbitrations of 1903, 1904, pp. 438 ss).

In the Maninat case, the French Commissioner invoked the Protocol of 19 February 1902 which refers to "claims for compensation by the French" -- the term referring to the French and not stating that claimants must be solely and exclusively French. The umpire, however, deemed the Protocol to be an agreement, and that the term "French" employed therein designated those who were French according to the laws of both countries signatory to the agreement.Besides that, he insisted on the primacy of jus soli and the significance of domicile (Report of the French-Venezuelan Mixed Commission of 1902, pp. 73, 74). The same umpire gave the same reasoning in the Massiani case (10 R.I.A.A. 159). Umpire Ralston was inspired by that reasoning when faced with a conflict of nationality before the

Italian-Venezuelan commission. Various factors such as domicile, jus soli, family life, and moveable and immovable property were cited as supplementary grounds for rejecting the claim.

(3) The Canevaro case between Italy and Peru, decided 3 May 1912 by the Permanent Court of Arbitration. This frequently-cited case concerned a claim brought by the Italian Government against the Government of Peru on behalf of the three Canevaro brothers, of whom one, Rafael, was Italian by jus sanguinis and Peruvian by jus soli. One of the issues considered by the court was whether Rafael Canevaro was entitled to file claim as an Italian national. The court declared:

> "... as a matter of fact, Rafael Canevaro has 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 Consul General for the Netherlands, after having secured the authorization of both the Peruvian Government and the Peruvian Congress... under these circumstances, 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." (Scott, Hague Court Reports, 1916, pp. 286-287).

(4) Conflict of nationality before the U.S.-Venezuela Mixed Claims Commission established by the agreement of 5 December 1885 between the two countries. The Mixed Claims Commission considered the issue of dual nationality arising in the claims of Narcisa de Hammer and Amelia de Brissot, the widows of two U.S. nationals, Hammer and Brissot. Mrs. de Hammer and Mrs. de Brissot were Venezuelans by birth who had acquired U.S. nationality through their

marriages to U.S. citizens. The Venezuelan and U.S. commissioners as well as the President of the commission were all of the opinion that the commission lacked jurisdiction to hear the claims. The commission was obviously influenced by the predominant importance of nationality acquired at birth, and domicile appeared to have played a decisive role in the decision (see Weis, Nationality and Statelessness in International Law, London, 1956, p. 177; and Moore, loc. cit., p. 2454-61). On the other hand, the commission declared itself as having jurisdiction in the Willet case. A woman, Venezuelan by birth, who had maintained her Venezuelan domicile and had acquired U.S. nationality through her marriage to William E. Willet, a U..S. national, had presented a claim in the capacity of administratrix of her husband's estate. Her claim was declared admissible. (Moore, loc. cit., pp. 2254-58).

(5) The Mixed Arbitral Tribunals established after the first World War by virtue of various peace treaties to settle the claims of nationals of the allied Powers against former enemy States and their nationals. Several cases involving dual nationality were adjudicated by the Mixed Arbitral Tribunals; those cited in the majority decision (p. 10) were: the Hein case, Anglo-German commission; Barthez de Montfort, French-German commission; and the Born case, Hungary-Serbo-Croat, Slovene State commission. It should be emphasized that the jurisprudence of the Mixed Arbitral Tribunals must be interpreted in the light of the historical context in which they were established and in the light of the terms of the peace treaties establishing them. Those particular factors significantly reduce the weight of their

jurisprudence. In the Baron Frédéric de Born case decided 12 July 1926, the Hungarian-Serbo-Croat, Slovene State commission raised factors of effective nationality as criteria to establish the Tribunal's jurisdiction (VI T.A.M. (1926) p. 499). In George S. Hein v. Hildersheimer Bank decided 10 May 1922, the Anglo-German commission sidestepped the plea of lack of jurisdiction in the following manner:

> "The Tribunal find as a fact that the money was in the current account of the Creditor with the Debtor Bank. They do not think it necessary to decide in this case the effect of Article 278. The Creditor had become a British national, and, as he was residing in Great Britain on January 10th, 1920, he has acquired the right to claim under Article 296 through the British Clearing Office, and, apart from Article 278, it is immaterial whether he has or has not lost his German nationality." (II id. (1922) p. 71).

It is clearly evident from this decision that the mere fact that the claimant held the nationality of one of the victorious Powers was sufficient to justify the jurisdiction of the Tribunal, and it appears appropriate when taking into account the wording of the terms of the Treaty of Versailles granting jurisdiction to the Mixed Arbitral Tribunals. However, this decision, cited by the majority, in no way constitutes a precedent supporting the theory of effective nationality. The citation is therefore inappropriate.

In the Barthez de Montfort case heard by the French-German commission, a claimant holding both French and German nationalities introduced a claim against the German Government. Applying the principle of effective nationality, the claimant was considered French and her claim was therefore declared admissible. (VI T.A.M.

(1926) pp. 806-809). The grounds for the decision are worthy of review and analysis:

"Attendu qu'il faut en conclure au maintien de la nationalité francaise de la requérante;

Attendu qu'on se trouve, par conséquent, en présence d'un conflit de loi, la requérante étant restée Francaise selon la législation francaise et étant devenue Allemande selon la loi allemande;

Attendu que les tribunaux nationaux tranchent un tel conflit en appliquant leur propre législation, la lex fori;

Attendu qu'un tel système basé, non sur les principes généraux du droit et variant avec la nationalité du tribunal saisi du litige, ne saurait être adopté par le Tribunal arbitral mixte dont la juridiction n'est pas restreinte au territoire et à la lègislation d'un Etat, mais s'etend aux territoires des puissances ayant signé le Traité de paix;

Attendu donc qu'il y a lieu d'appliquer les principes généraux du droit international privé et que, sous ce rapport, il semble utile de rappeler une résolution de l'Institut du droit international votée le 8 Septembre 1888 dans sa session de Lausanne, sur la nationalité d'un Autrichien ayant, à la suite de la nomination à une université prussienne, acquis la nationalité allemande et qui se prononcait comme suit: 'Nous pensons qu'il est naturel de le considérer comme étant seulement le ressortissant de l'Etat auquel l'unissent le droit et le fait dont il est le national et sur le territoire du quel il réside et au service dequel il se trouve. C'est pour ainsi dire la nationalité active qui doit être envisagée et non la nationalité un peu théorique qui peut subsister à côté de celle-ci.' (v. Annuaire de l'Institut, 1888-89, p. 25);

Attendu que le principe de la nationalité active qui a présidé à cette résolution forme une base adéquate pour trancher le présent conflit de loi;

Que sous ce rapport, il faut relever le fait que la requérante, née à Montpellier, n'a jamais cessé d'avoir son domicile en cette ville et d'y remplir ses devoirs civiques;

Attendu que d'autre part, pour juger des relations de la requérante avec l'Allemagne, il est seulement établi que, pendant la querre, elle s'est réclamée de la nationalité allemande, à fin de faire virer les intérêts de sa creance inscrite au Reichsschuldbuch à la Würtembergsche Vereinsbank;

Attendu que dans ces conditions, il y a lieu de considérer la requérante comme Francaise..." (VI T.A.M. (1926) p. 809)[1]

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[1]. Translation: "Whereas it must be concluded that claimant has maintained her French nationality;

Whereas as a consequence there exists a conflict of laws, claimant having remained a French national by virtue of French law and having become a German national by virtue of German law;

Whereas municipal courts resolve such a conflict through applying their own law, the lex fori;

Whereas such a system is not based on general principles of law and varies according to the municipal court hearing the case, the jurisdiction of the Mixed Arbitral Tribunal is not limited to the territory and laws of one State, but rather extends to the territories of the Powers signatory to the Peace Treaty;

Whereas it is therefore appropriate to apply the general principles of private international law and, in this connection, it would be expedient to recall a Resolution of the Institute of International Law adopted on 8 September 1888 in its session at Lausanne, concerning the nationality of an Austrian who, subsequent to his appointment to a Prussian university, acquired German nationality. The Institute decided as follows: 'We think it natural to consider him as being solely the national of the State to which he is linked both by law and by fact, that on whose territory he resides and in whose service he acts. It is the active nationality which must be considered and not the nationality which is merely theoretical and lingers along-side.' (See: Annuaire de l'Institut, 1888-89), p.25);

Whereas the principle of active nationality which has presided over this resolution forms an adequate basis for resolving the present conflict of laws;

Whereas in this connection it should be noted that the claimant, born in Montpellier, has never ceased to maintain her domicile in that city and to fulfill her civic duties there;

Whereas on the other hand, in assessing the claimant's ties with Germany, it is simply established that during the war she claimed German nationality in order to transfer the shares of her trust entered in the Reichsschuldbuch in the Würtembergische Vereinsbank;

Whereas given these circumstances, it is deemed appropriate to consider the claimant as French...."

The precedent cited therein in support of the decision is both derisory and inadequate: it was a question of determining whether a dual German-Austrian national candidate at the Institute of International Law could use his second nationality rather than his first -- the German group at the Institute not allowing any further admission of new members of that nationality. The principle of effective nationality which the Institute applied on that occasion can by no means be considered a precedent to resolve the totally different question of bringing suit before an international tribunal.

(6) The Mixed Claims Commission, established under agreements Mexico concluded separately with Great Britain, France, Germany, and the United States, among others, also considered the issue of dual nationality. The theory of non-responsibility was invoked there and claims by dual nationals were subsequently dismissed. In the Carlos L. Oldenbourg case of 19 December 1929 heard by the British-Mexican Commission, the Mexican agent held that, "Even if the British nationality of the claimant and his sisters were established they possessed at the same time Mexican citizenship; in other words, that the Commission was faced by a case of dual nationality. In such cases, the principle generally followed has been that a person having dual nationality cannot make one of the countries to which he owes allegiance a defendant before an international tribunal. A person cannot sue his own Government in an international court, nor can any other Government claim on his behalf." (Borchard, The Diplomatic Protection of Citizens Abroad, p. 587; Ralston, The Law and Procedure of International Tribunals, p. 172). The British agent

concurred, saying, "The British Government, in case of such duality, held the same view as expressed by the authorities whom his Mexican colleagues had quoted." The claim was then dismissed. (V R.I.A.A. 75).

The case of Fredric Adams and Charles Thomas Blackmore before the same British-Mexican Commission (decision of 3 July 1931) was a claim against the Mexican Government for alleged damages suffered by British nationals. It was contended by the Mexican agent that Mr. Blackmore was born in Mexico and therefore was a Mexican and, "If at the same time the British law regarded him as a British subject, the conclusion must be that he possessed dual nationality and was not entitled to claim before this commission." The dual nationality of the claimant having been verified, his claim was then dismissed (V R.I.A.A. 216-17). The Coralie Davis Honey case was also a case involving dual nationality and the claim was declared inadmissible as well (decision of 26 March 1931).

The Georges Pinson case decided by the French-Mexican Commission on 24 April 1928 is a rather well-known case and has been cited by various authorities as a precedent for the theory of effective nationality (Paul de Visscher, Recueil des Cours, 1973, p. 162). In response to an invocation of the theory of non-responsibility by the Mexican agent, the President of the arbitration stated:

> "tout en reconnaissant le bien-fondé de cette doctrine pour les cas où l'individu en question est effectivement considéré et traité comme sujet par chacun des deux Etats en cause, et ce en vertu de dispositions légales qui ne dépassent pas les bornes que leur

trace le droit international public écrit ou coutumier, je crois pourtant devoir formuler certaines réserves quant à son admissibilité dans les cas où l'une ou l'autre de ces deux conditions ne se trouverait pas remplie. Car si, dans la seconde hypothèse, c'est l'Etat défendeur qui, dans sa législation nationale, n'observe pas les restrictions posées par le droit international à sa souveraineté nationale, la prétention de double nationalité du réclamant ne tiendrait pas debout devant un tribunal international. De même, il serait très difficile d'admettre l'exception de double nationalité dans la première hypothèse; car il serait évidemment contraire à l'equité de permettre à un Etat de traiter constamment comme sujet étranger un individu déterminé, mais de lui opposer, après, sa nationalité double, dans le seul but de se défendre contre une réclamation internationale." (V R.I.A.A. 588, 589).[1]

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[1] Translation: "While recognizing the soundness of this doctrine for cases where the individual in question is actually considered and treated as a subject by each of the two interested States, and this by virtue of legal provisions not surpassing the limits set by public international law, whether codified or customary, I nevertheless believe certain reservations must be formulated when faced with its admissibility in instances where one or the other of these two conditions are not fulfilled. Because, if in the second hypothetical situation the defendant State does not observe restrictions imposed by international law on national sovereignty in its national legislation, the assumption of dual nationality by the claimant will not be upheld before an international tribunal. Equally, it would be very difficult to admit a plea of dual nationality in the first hypothetical situation; because it would obviously be contrary to equity to permit a State to consistently treat an individual as a foreigner and then later to object to that individual as a dual national for the sole purpose of defending itself against an international claim."

The wording of the foregoing passage is clear enough to leave no doubt as to the meaning and significance of the notion of "effectiveness" expressed therein. Effectiveness does not necessarily mean the theory of effective nationality. The principle of non-responsibility of a State towards its own nationals at the international level is sound when the defendant State, in accordance with its own municipal legislation and in conformity with public international law, considers the claimant its own national and has always treated him as such.

The reservations are with respect to the two instances of abusive practice of States, i.e., an instance where the municipal legislation of a State does not conform to public international law, and secondly, an instance whereby a State consistently treats an individual as a foreigner only to abruptly object to his foreign nationality for the sole purpose of defending itself against an international claim. The decision therefore does not stray from the jurisprudence of the Mexican arbitral commissions whereby claims of dual nationals against their own Government were declared inadmissible.

* * *

The majority decision begins its analysis of international legal precedents by stating, "...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-responsibility, expressed in Article 4 of the Hague Convention, by the principle of effective nationality as expressed in Article 5 of the said convention" (p. 9). Its presupposition thus declared, the majority attempts to justify it by referring to the jurisprudence of the Venezuelan arbitrations of 1903 and 1905, the Canevaro case (Permanent Court of Arbitration, 1912), the jurisprudence of the Mixed Arbitral Tribunals, the Nottebohm case (I.C.J. 1955), and finally, the jurisprudence in the Mergé case (Italian-U.S. Conciliation Commission, 1955). These latter two took place in the second half of this century.

Following an examination of international decisions, the contrary clearly seems to me to be the case. The principle of non-responsibility for the international claims of individuals claiming against a State of which they are a national has been affirmed by international practice. Following a long line of judicial precedent, only one single claim has been declared admissible: the Willet case decided by the U.S.-Venezuela Mixed Claims Commission under the agreement of 5 December 1885. This case, however, contains certain unique distinguishing features which would prohibit its being considered as derogating from the general principle.

Mrs. Willet was Venezuelan by birth, had always resided there, and had acquired U.S. nationality through her marriage to William E. Willet. Even though her claim against Venezuela was declared admissible, she was acting in the capacity of administratrix of the estate of her deceased husband, who was exclusively a U.S. national. The Commission took into account the unique capacity of Mrs. Willet when admitting her claim: "...The point, however, is more speculative than real in this case because it is very clear that whatever may be the status of Mrs. Willet or of her children with respect to their citizenship of the United States, whether full or limited, there can be no doubt whatever, that her husband and their father was a citizen, at the time the injury in this case occurred, and continued to hold a claim against the Government of Venezuela until he died intestate in 1862.This being the case, Mrs. Willet claimed before the old Commission as administratrix and clearly had the right to represent a claim of a citizen of the United States, whatever may have been her own personal status"(Moore, op. cit,, p. 2257). (A nearly identical case, Hally, was also declared admissible by the British-American Civil War Commission established under the Treaty of Washington of 8 May 1871).

With the exception of that one single case which stands out by its very special context, all dual national claims against their own State were declared inadmissible. The principle of non-responsibility was affirmed by the Venezuelan arbitrations of 1903-1905 in particular. Thus reference to the Venezuelan jurisprudence by the majority is absolutely inappropriate. Several passages from Professor

Basdevant's article on the Venezuelan arbitrations of 1903-1905 have been quoted here to show the overriding factors influencing the various arbitral commissions in their determination of admissibility of claims (see supra pp. 10-12).

In the Canevaro case (1912), the Permanent Court of Arbitration in fact also confirmed the principle of non-responsibility. The Court noted that Canevaro on several occasions acted as a Peruvian citizen and stated that under the circumstances, no matter what his status as a national might be in Italy, Peru had the right to claim him as a citizen and to deny his status as an Italian claimant. (XI R.I.A.A. 406).

The effect of this decision on the issue of dual nationality is that from the moment a defendant State establishes that the claimant has actually acted as its national, the principle of non-responsibility will prevail even when the claimant has stronger or more prominent ties with the other State.

The only decisions truly departing from the principle of non-responsibility were those of the Mixed Arbitral Tribunals established under the peace treaties signed after the First World War between the Allied Powers and the former enemy States. The Mixed Arbitral Tribunals did admit claims against the defeated States by dual nationals holding the nationalities of both the defendant and the claimant

States. The majority was entirely correct in citing the jurisprudence of those Tribunals -- nevertheless, too much importance should not be attached to the jurisprudence of those tribunals, which were established to the sole advantage of the victorious Powers. To establish jurisdiction, the Mixed Arbitral Tribunals confined themselves merely to verifying that the claimant held the nationality of one of the victorious States, whose nationals were intended to benefit from the peace treaties signed with the former enemy States. That established, no significance was attached to the fact that a claimant might also be holding the nationality of one of the defeated States. This attitude is clearly evident in the Hein decision rendered by the Anglo-German commission (II T.A.M. (1923) p. 71). Other decisions also reflected this attitude. In the Daniel Blumenthal case decided 24 April 1923, the French-German commission declared:

> "Attendu que le défendeur conteste à tort la vocation du requérant dans la présente affaire; qu'il résulte en effet des pièces produites à l'audience de jugement que Daniel Blumenthal a été réintégré dans la nationalité francaise par le décret du Président de la République du 10 Octobre 1914; que, d'autre part, l'intéresée a été déchu de la nationalité allemande, le 18 avril 1918, en vertu du paragraphe 27 de la loi sur l'indigénat et de l'ordonnance du ler février 1916; qu'il s'agit, dans l'un et l'autre cas, d'actes de souveraineté, d'ordre interne; que le Tribunal arbitral doit se borner à constater que, pendant la période comprise entre le 10 Octobre 1914 et le 18 Avril 1918, Blumenthal était considéré comme Francais par la France, et comme Allemand par l'Empire; que le fait que l'interessé est citoyen francais depuis le 10 Octobre 1914 suffit pour le mettre au bénéfice des dispositions du Traité de Versailles édictées en

faveur des ressortissants des Puissances alliées et associées." (III T.A.M. 616).[1]

The Oskinar case was decided in the same manner by the same Tribunal on 29 October 1926. The case concerned a Frenchwoman by birth who acquired Turkish nationality through her marriage to a Turkish national. The Tribunal declared:

> "...il suffit de constater que, si dame Oskinar est, peut- être, considérée comme Ottomane par la Turquie, elle a indubitablement conservé, aux yeux de la France, sa nationalité d'origine; que ce seul fait suffit, dès lors, pour mettre la requérante au bénéfice des dispositions du Traité de Versailles édictées en faveur des ressortissants des Puissances alliées et associées (Cf. sentence du 24 avril 1925, dans la cause Daniel Blumenthal contre Etat allemand, Recueil, t. III, p. 618 et 619)..." (VI T.A.M. p. 790).[2]

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[1] Translation: "Whereas the defendant has contested the claimant's right to claim in the present case; in fact, evidence produced at the hearing has established that Daniel Blumenthal was reinstated as a French national by Presidential decree on 10 October 1914; moreover, he was stripped of his German nationality on 18 April 1918 by virtue of Paragraph 27 of the local law and the order of 1 February 1916; both of which were acts of sovereignty of a municipal nature; the Arbitral Tribunal must limit itself to stating that during the period 10 October 1914 to 18 April 1918, Blumenthal was considered French by France and German by the Empire; the fact that he has been a French citizen since 10 October 1914 is in itself sufficient to allow him to take advantage of the dispositions of the Treaty of Versailles concluded on behalf of the nationals of the allied and associated Powers."

[2] Translation: "...suffice it to state that even if Mrs. Oskinar were considered an Ottoman by Turkey, she has certainly retained, in the eyes of France, her original nationality; this sole fact in itself permits the claimant to take advantage of the dispositions of the Treaty of Versailles concluded on behalf of the nationals of the allied and associated Powers (compare the decision of 24 April 1925 Daniel Blumenthal v. the German State, Recueil, Vol. III, p. 618 and 619)..."

In each case preference was given either to the nationality of origin or to a nationality subsequently acquired in order to declare as prevailing the nationality of the Allied Powers. The reasoning leading the Tribunal to its decisions appears blatantly discriminatory. In this connection, two decisions are particularly significant: the Grigoriou decision of 28 Janury 1924 rendered by the Greek-Bulgarian commission (III T.A.M. 977) and the Apostolidis decision of 23 May 1928 rendered by the French-Turkish commission (VIII T.A.M. 373).

The first decision concerned a claim against Bulgaria by M. Grigoriou, a naturalized Bulgarian of Greek origin. The Greek law of 31 December 1913 permitted Greeks to acquire a foreign nationality on condition that prior authorization by the Greek Minister of Foreign Affairs be obtained. In the absence of such authorization, the individual would continue to be considered Greek. The Tribunal upheld Grigoriou's nationality of origin in declaring as follows:

> "Att. que, quoique le reguérant ait solicitée et obtenu sa naturalisation en Bulgarie, le fait d'avoir agit sans l'autorisation du governement de son pays d'origine permet au Tribunal de considérer valablement qu'au regard de la loi hellénique, M. Grigoriou n'a jamais perdu sa nationalité grecque;
>
> Att. que la condition essentielle pour qu'une naturalisation faite à l'étranger soit valable dans le pays d'origine est qu'elle se soit conformée, non seulement à la loi du pays où elle a eu lieu, mais encore à la loi nationale;
>
> Att. que le Tribunal n'ayant pas à apprécier le côté moral de la question et devant se borner à en donner la solution strictement juridique, est obligé d'écarter l'exception soulevée par le défendeur en présence du fait que le requérant n'ayant pas perdu sa nationalité grecque est en droit d'invoquer le

bénéfice du Traité de Neuilly, art. 51, 52, en sa qualité de ressortissant hellène..." (III T.A.M. 977).[1]

On the other hand, the grounds for the decision rendered 23 May 1928 by the French-Turkish commission are completely the opposite. The case involved a claim against Turkey by Apostolidis, a Turk by origin who had been naturalized French. Given a situation identical to that of the preceding case, the Tribunal acted to the contrary and upheld the acquired nationality in spite of the fact that the naturalization had been obtained without prior authorization by the Ottoman Empire. The plea of lack of jurisdiction was denied:

"Attendu que le fait que l'auteur des requérants a été naturalisé francais n'a pas été contesté par le défendeur;

Att. cependant que le défendeur a invoqué l'art. 5 de la loi turque du 19 janvier 1869 (6 Chewal 1285) prescrivant que la naturalisation d'un sujet ottoman sans l'autorisation préalable du gouvernement impérial sera considérée comme nulle et non avenue;

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[1] Translation: "Whereas even though the claimant sought and obtained naturalization in Bulgaria, the fact that he acted without the authorization of the Government of his country of origin permits the Tribunal to validly consider M. Grigoriou as never having lost his Greek nationality with respect to Hellenic law;

Whereas the essential condition for a naturalization acquired abroad to be recognized in the country of origin is that such (naturalization) conform not only to the law of the country where it took place but also to national law;

Whereas the Tribunal, not having considered the moral aspect of the question and confining itself to rendering a strictly legal solution, is obliged to reject the plea made by the defendant in light of the fact that the claimant, not having lost his Greek nationality, is entitled to invoke the provisions of the Treaty of Neuilly, Articles 51, 52, as a Hellenic national..."

Att. que le défendeur, se basant sur cet article, a fait valoir que l'auteur des requérants, qui n'avait pas obtenu ladite autorisation, a conservé sa nationalité turque sans acquérir la nationalité francaise et qu'en conséquence, le Tribunal n'est pas compétent pour connaître de la demande;

Att. que, d'après les principes du droit international public, les effets de la naturalisation doivent être reconnus non seulement par les autorités de l'Etat qui a accordé cette naturalisation, mais également par les autorités judiciaires et administratives de tous les autres Etats;

Att. que dans le cas où exceptionnellement la législation d'un Etat exige pour la validité de la naturalisation de ses nationaux une autorisation gouvernementale préalable, une telle disposition ne saurait lier que les autorités dudit Etat;

Att. qu'il s'en suit que si dans l'espèce les autorités administratives et judiciaires turques pourront refuser de reconnaître les effect de la naturalisation de l'auteur des demanders, toutes les autres autorités judiciares, et parmi elles le Tribunal arbitral mixte qui, en ce qui concerne le droit international public, n'est pas lié par la législation intérieure de l'un des Etats contractants, sont tenues d'admettre la validité du changement de nationalité et de reconnaître les demandeurs comme ressortissants francais;

Att. qu'en conséquence le Tribunal est compétent pour statuer sur le différend..." (8 T.A.M. 373).[1]

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[1] Translation: "Whereas the defendant has not contested the fact that the deceased father of the claimant was naturalized French;

Whereas the defendant has however invoked Article 5 of the Turkish Law of 19 January 1869 (6 Shawwal 1285) prescribing that naturalization of an Ottoman subject without prior authorization of the Imperial Government shall be considered as null and void;

Whereas based on this article the defendant has contended that the deceased father of the claimant did not obtain such authorization and has retained his Turkish nationality without acquiring French nationality and, as a consequence, the Tribunal lacks jurisdiction to hear the claim;

Whereas according to principles of public international law, the act of naturalization must be recognized not only by the State granting the nationality but by the judicial and administrative authorities of all other States as well;

Whereas in a situation where the law of a State requires that prior Government authorization be obtained in order for naturalization of its nationals to be considered valid, such provision would bind only the authorities of said State;

How then may this contradiction in the two decisions be reconciled? In the first case, the nationality of origin, which the Tribunal upheld, was that of an Allied power. In the second case, where the nationality of origin was that of a defeated State, the Tribunal chose to uphold the acquired nationality, which was that of an Allied power. Hence, the jurisprudence of the Mixed Arbitral Tribunals, to which the majority has referred, is not an expression of the state of public international law.

It should also be understood that the theory of non-responsibility was never invoked before the Mixed Arbitral Tribunals. It was invoked and admitted before the Mexican Arbitral Commissions, and the jurisprudence of these Commissions, as has been cited supra (pp.18-21) confirmed the principle of non-responsibility for claims by dual nationals.In its decision of 26 March 1931 in the Honey case when declaring on the dual nationality of Richard Honey, the Anglo-Mexican arbitral commission expressed in clear terms the position of public international law:

(continued from preceding page)

Whereas it follows that if in the present case the administrative and judicial authorities of Turkey refuse to recognize the naturalization of the principal of the claimants, all other judicial authorities, among them the Mixed Arbitral Tribunal who, in its concern for public international law is not bound by the municipal legislation of one of the contracting States, are obliged to accept the change of nationality as valid and to recognize the claimants as French nationals;

Whereas as a consequence the Tribunal has jurisdiction to settle the dispute..."

"The Commission must therefore regard Mr. Richard Honey as a man possessing dual nationality, and it is an accepted rule of international law that such a person cannot make one of the countries to which he owes allegiance a defendant before an international tribunal. It is obvious that this can neither be done by the executrix of his will, on behalf of his estate.

5. The motion to dismiss is allowed." (Further Decisions and Opinions of the Commissioners, London: His Majesty's Stationery Office, 1933, p. 13).

It therefore appears that with the exception of the decisions of the Mixed Arbitral Tribunals, which must be viewed in their very particular historical context, international legal precedent confirms the principle of non-responsibility. As Ralston points out: "The general rule of the Commission may be summed up as being, as indicated, that where a claimant is a citizen by the respective laws of both demandant and respondent countries, no recovery may be had, because it is the right of neither State to force upon the other its law in determining the question of right, and in parity of right the claim fails." (The Law and Procedure of International Tribunals, 1926, p. 172).

I ask, on what basis does the majority conclude that, "...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-responsibility, expressed in Article 4 of the Hague Convention, by the principle of effective nationality as expressed by Article 5 of the said Convention"? This statement has been contradicted by our examination of judicial precedent. It is also refuted by the following references whose bearing on the question cannot be disputed:

An extract from the well-known Salem decision rendered in Berlin on 8 June 1932 clearly shows that the principle of non-responsibility was the single precise expression of international law and that the theory of effective nationality was far from constituting a principle of international law. An arbitral tribunal was established under the agreement of 20 January 1931 between the United States and Egypt. It was presided over by Dr. Walter Simon and its purpose was to settle a claim against the Egyptian Government brought by the Government of the United States on behalf of one of its nationals. Salem had been naturalized a U.S. citizen on 18 December 1908 but the Egyptian Government, in order to contest the claim, contended that Salem simultaneously held both U.S. and Egyptian nationalities and that his Egyptian nationality was the effective one. The Tribunal declared:

> "The principle of the so-called 'effective nationality' the Egyptian Government referred to does not seem to be sufficiently established in international law. It was used in the famous Canevaro case, but the decision of the Arbitral Tribunal appointed at that time has remained isolated. In spite of the Canevaro case, the

> practice of several governments, for instance the German, is that if two powers are both entitled by international law to treat a person as their national, neither of these powers can raise a claim against the other in the name of such person (Borchard, I.C., p. 588). Accordingly the Egyptian Government need not to refer to the rule of 'effective nationality' to oppose the American claim if they can only bring evidence that Salem was an Egyptian subject and that he acquired the American nationality without the express consent of the Egyptian Government." (II R.I.A.A. 1187).

The Egyptian Government was unable to present evidence establishing the Egyptian nationality of Salem, which would have led the Tribunal to reject the claim. As it turned out, other than his U.S. nationality, Salem held Iranian nationality, although that nationality had not been lawfully acquired.

The principle of non-responsibility was also expressed in the first paragraph of Article 16 of the 1929 Harvard Draft Convention on the Responsibility of States:

> "(a) A State is not responsible if the person injured or the person on behalf of whom the claim is made was or is its own national." (A.J.I.L., Spec. Supp. 22 (1929) p. 138).

The commentary on this paragraph clearly explains the reasoning behind the principle:

> "The first paragraph reflects a well-established rule that on behalf of a person having dual nationality, one of the States of which he is a national cannot make the other State of which he is a national a defendant before an international Tribunal." (id. at 200).

The International Court of Justice, as well, 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." (I.C.J. Reports, 1949, p. 186).

Therefore, contrary to what is stated by the majority, the principle of non-responsibility is well-established in international law and is confirmed by Article 4 of the Hague Convention of 12 April 1930 concerning Certain Questions relating to the Conflict of Nationality Laws.

B. SOURCES OF INTERNATIONAL LAW WHICH HAVE CODIFIED CUSTOMARY INTERNATIONAL LAW

The two basic sources treating the question of the jurisdiction of a tribunal over dual national claims are the Hague Convention of 12 April 1930, which concerns various related questions on the conflict of nationality laws, and the Resolution adopted on 10 September 1965 at the Warsaw session of the Institute of International Law.

1. Article 4 of the 1930 Hague Convention provides that:

> "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses."

The interesting point about Article 4 is that it was the subject of a long debate at the Hague Conference, it was approved by a large majority- including the delegate of the Government of the United States, (29 votes to 5, with 13 States absent or abstaining)- and the Convention containing the Article was approved by 40 votes to 1. (See the references in the report by Professor Herbert W. Briggs, Annuaire de l'Institut de droit international, Vol. 51-1 (1965), p. 153, notes 3 and 4).

Long before the Hague Convention, Edwin M. Borchard definitively stated the position of public international law on the issue:

> "The principle generally followed has been that a person having dual nationality, cannot make one of the countries to which he owes allegiance a defendant before an international tribunal. In

other words, a person cannot sue his own government in an international court, nor can any other government claim on his behalf." (The Diplomatic Protection of Citizens Abroad, 1916, p. 588).

Article 4 of the 1930 Hague Convention was also preceded by Article 16 of the 1929 Harvard Draft Convention on the Responsibility of States (see supra p. 33). That Article 4 of the Hague Convention adequately expressed customary law was stated by N. Bar-Yaacov: "The general attitude of States in the matter found clear expression in the provisions of Article 4 ... which embodied the customary rule of International Law." (Dual Nationality, London, 1961, p. 76). The Italian-U.S. Conciliation Commission stated in the Mergé case (1955) that, "The Hague Convention, although not ratified by all the nations, expresses a communis opinio juris, by reason of the near-unanimity with which the principles referring to dual nationality were accepted..." (International Law Reports, 1955, p. 450).Gerhard von Glahn stated his view that, "In general, States today follow in practice almost all of those provisions despite the absence of general conventional rule." (Law Among Nations, London, 1981, p. 207). As will be elaborated on below the principle as expressed in Article 4 was also confirmed by Article 4 of the 1965 Resolution of the Institute of International Law.

In spite of the facts, in its decision the majority has attempted to minimize the importance of Article 4 of the Hague Convention: "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..."

(p. 8). The majority also adds, "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."

From this rejection of the proposal, it appears the majority would wish to deduce that direct recourse to an international tribunal by a dual national is not prohibited by Article 4 of the Hague Convention. This deduction cannot be admitted. In fact, during the course of discussion of the draft text of the Convention at its first session, the Yugoslav delegate proposed the addition of a new paragraph to Article 4. According to the Yugoslav proposal, an individual holding two or more nationalities cannot prevail upon one of them in order to bring suit before an international tribunal or commission against one of the other States of which he is also a national. However, the view was taken that direct recourse to an international tribunal is a rare occurrence; a claim is generally brought on behalf of an injured individual by a State of which the injured is a national. Even so, the same reasons prevent a claim from being brought against a State of which the injured is a national, whether that suit be brought directly by the injured individual himself or by a State on his behalf. No one may assert another nationality against his own State; therefore, no one may prevail upon another nationality in order to claim against his

own State, no matter whether that claim be brought by the individual himself or by another State. Based on the foregoing view, the Commission did not deem it necessary to add any further stipulation to Article 4 of the Convention. As the first Commission's rapporteur, J. Gustavo Guerrero, explained: "The commission did not adopt this proposal in the convention, given that it foresaw a situation too specific to be of concern to most States..." (Report of the First Commission, Procès-Verbaux, p. 307).

The majority continues its reasoning in stating, "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. 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."

It must first be emphasized that the position of this Tribunal vis-à-vis Iran and the United States is not that of a tribunal in a third State. The Tribunal constitutes an Iran-U.S. arbitral body, established by inter-State agreement on 19 January 1981 between the

Governments of Iran and the United States, whose purpose is to settle the claims against the Government of each party by the nationals of the other party.

Furthermore, a conflict of nationality raised before the court of a third State should never be confused with the question of a conflict of nationality before an international tribunal: the former is an issue of the application of municipal law whereas the latter is an issue of admissibility of a dual national claiming against his own government. In a third State, when dealing with a foreigner, a tribunal or administrative organ could be led to refer to, or even apply, the foreigner's municipal law in order to resolve certain points. The difficulty arises when the foreigner holds more than one nationality. In any event, a third State must treat a dual national as though he had only one nationality because it is not conceivable that he be treated in any other manner in legal and administrative matters.

Which nationality should be upheld in a third State when the individual holds more than one? From among the possible subjective and objective criteria, Article 5 of the 1930 Hague Convention adopts the concept of effective nationality which is objectively ascertainable. The concept of effective nationality was therefore embodied in Article 5 to resolve a conflict of nationality before the court or administrative authority in a third State when the determination of nationality is necessary to apply a municipal law or administrative measure. It is quite a different matter when nationality is an issue involving the jurisdiction of an international tribunal.

In accordance with Article II of the Claims Settlement Declaration, an international arbitral tribunal (the Iran-U.S. Claims Tribunal) was established for the purpose of settling the claims of U.S. nationals against Iran and the claims of Iranian nationals against the United States. The nationality of the claimant is an essential factor which prescribes the jurisdiction of the Tribunal. It cannot be taken lightly. Given that condition, the solution to a conflict of nationality raised before the Tribunal is dictated by the principle embodied in Article 4 of the 1930 Hague Convention, i.e., the principle of non-responsibility.

2. The question was reviewed by the Institute of International Law at its sessions at Cambridge (1931) and at Oslo (1932). The eminent American jurist, Edwin M. Borchard, professor of international law at Yale University, had written a report and it was on the basis of this report that the issue was discussed. Professor Borchard, considered by many to be the leading authority on the subject of diplomatic protection, had written in his report:

> "C'est une règle bien établie du droit international d'un individu possédant deux nationalités ne peut exiger que l'un des pays auxquels il doit allégeance, soit traduit comme défendeur devant un tribunal international." (Annuaire de l'Institut de droit international, Vol. 36-I (1931), p. 289).[1]

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[1] Translation: "It is a well-established rule of international law that a person having dual nationality cannot make one of the countries to which he owes allegiance a defendant before an international tribunal."

The rule was formulated by Borchard in the proposed Resolution as follows:

> "La protection diplomatique peut être exercée en vue de présenter une reclamation pour un préjudice subi par une personne, à condition que:
>
> a) au moment où le dommage a été causé, la personne qui a subi le dommage d'où la demande a surgi, ait été un national de l'Etat requérant et n'ait pas été un national de l'Etat contre lequel la demande est introduite..." (Annuaire de l'Institut de droit international, Vol. 37 (1932) p. 278).[1]

The entire Resolution was finally rejected, but for reasons irrelevant to the question under discussion here.

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[1] Translation: "Diplomatic protection may be exercised to present a claim for an injury suffered by an individual, on condition that:

a) at the moment the injury was caused, the individual who suffered the injury wherein the claim arises, was a national of the claimant State and not a national of the State against which the claim is presented..."

3. The Institute of International Law took the question up again at its session in Warsaw (1965), and it was again on the basis of the report of an eminent American jurist -- this time, Professor Herbert W. Briggs, professor of international law at Cornell University and at that time a member of the United Nations International Law Commission. In his first proposed resolution he left open the question of dual nationality (see: Annuaire de l'Institut de droit international, Vol. 51-I (1965) p. 123, note 1).

However in his second report, Professor Briggs made the following consideration:

> "Si l'on admet que lorsqu'un Etat cause un dommage à l'un de ses propres nationaux, il n'encourt d'ordinaire pas, au sens du droit international, une responsabilité qui rendrait possible la présentation à son encontre, d'une réclamation internationale en faveur de ce national, le problème consiste dès lors à essayer de découvrir s'il existe des critères en vertu desquels la nationalité de l'Etat requérant peut être considérée comme l'emportant sur celle de l'Etat requis aux fins de décider si de telles réclamations sont recevables." (id. at p. 157).[1]

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[1] Translation: "If it is admitted that when a State causes injury to one of its own nationals it does not ordinarily incur, under international law, responsibility permitting an international claim to be brought against it by that national, then the problem consists of determining whether there exist criteria by which the nationality of the claimant State could be considered as prevailing over that of the defendant State for the purpose of deciding if such claim be admissible."

Following a detailed study of the jurisprudence on the matter, he submitted a proposed Resolution permitting one exception to the traditional rule of non-responsibility, in the instance where the protected individual held "active" nationality of the claimant State. The proposed Article 4 provided as follows:

> "Une réclamation internationale en faveur d'un individu qui possède en même temps, les nationalités de l'Etat requérant et de l'Etat requis est irrecevable, sauf lorsqu'il peut être établi que la nationalité 'active' de cet individu est celle de l'Etat requérant..." (id., at p. 137).[1]

This solution raised heated criticism, notably that of Messrs. Bindschedler (id., vol. 51-II, p. 176) and Quincy Wright (id., p. 220), professors emeritus at the Universities of Chicago and of Virginia. Bindschedler restated his criticism during the open debate, saying:

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[1] Translation: "An international claim on behalf of an individual who possesses at the same time the nationalities of both the claimant and the respondent States is inadmissible, unless it can be established that the 'active' nationality of that individual is that of the claimant State..."

> "Ceci va à l'encontre d'un principe le mieux établi du droit international public. Certes, quelques décisions de la Commission de Conciliation Etats-Unis/-Italie ont statué en ce sens, mais il s'agissait de cas spéciaux. Cette jurisprudence n'est pas acceptée comme une règle générale..." (id., p. 182).[1]

Among the other speakers criticising along the same line were Mr. Zourek (id. p. 192) and Mr. Rosenne (p. 227), who led to the submission of a new text (p. 232), which after some amendments was finally adopted. On the other hand, the solution was welcomed by other speakers, among them Mr. Quadri, who declared he was satisfied with Article 4 (p.190).

During the course of the debates, Professor Briggs declared that he had accepted the amendment submitted by Messrs Bindschedler and von der Heydte:

> "L'alinéa a) consacre désormais le principe posé dans l'article 4 de la Convention de la Haye du 12 avril 1930 relative aux conflits de lois sur la nationalité." (id. p.241).[2]

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1 Translation: "This is counter to a principle well-established in public international law. Of course some of the decisions of the Italian-United States Conciliation Commission were ruled along that line but those were special cases. That jurisprudence cannot be accepted as a general rule..."

2 Translation: "Paragraph a) will hereafter consecrate the principle set forth in Article 4 of the Hague Convention of 12 April 1930 concerning the conflict of laws on nationality."

The text finally adopted in the Resolution is as follows:

> "Article 4. a) Une réclamation internationale présentée par un Etat en raison d'un dommage subi par un individu qui possède en même temps les nationalités de l'Etat requérant et de l'Etat requis, peut être rejetée par celui-ci et est irrecevable devant la jurisdiction saisie. (id., p. 262).
>
> "Article 4. a) An international claim presented by a State for injury suffered by an individual who possesses at the same time the nationalities of both claimant and respondent States may be rejected by the latter and is inadmissible before the court (jurisdiction) seised of the claim." (id., pp. 270-271).

The resolution was passed with 31 votes, including those of three American members, i.e., Professors Briggs, Schachter and Wright. Among the 7 abstentions, there was only one American, Professor Jessup.

Of course the Institute's Resolution does not constitute an international convention. Nevertheless, the fact that the Institute brings together experts on public international law, representing different judicial systems, makes the Resolution of acute doctrinal interest and allows it to be considered as the faithful expression of the state of public international law.

Once again the majority has remained silent on the significance of the Resolution and any allusion to it was made only to minimize its importance.

C. DECISIONS SUBSEQUENT TO THE SECOND WORLD WAR

Have the solutions of substantive international law, such as those expressed in Article 4 of the Hague Convention of 1930 and in the 1965 Resolution of the Institute of International Law, been contradicted by recent judicial practice? Two precedents have sometimes been cited as doing so during the intervening period. They both date from the same year: the Nottebohm judgement of the International Court of Justice (6 April 1955), and the Mergé decision of the Italian-United States Conciliation Commission (20 June 1955).

1. The Nottebohm Judgement

The majority decision has referred to the Nottebohm judgement, rendered 6 April 1955 by the International Court of Justice, to support the theory of effective nationality. There is a statement in that judgement which, taken out of context, could lead one to believe that the International Court of Justice was turning away from its Advisory Opinion rendered six years earlier and was advocating the principle of effective nationality when the dual nationality coincides with one of the two States referring to the international tribunal. The passage is as follows:

> "International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the real and effective nationality, that which accorded with the facts..." (I.C.J. Reports, 1955, p. 22).

On the following page of the same judgement, the Court explicitly refers to Article 5 of the Hague Convention, thus confirming that the arbitral practice alluded to is not the situation foreseen in Article 4, i.e., a situation where the two nationalities in conflict are those of the two States establishing the international tribunal. Excluding that situation, there indeed exist instances where arbitrators have shown preference for the effective nationality, for example, when a claimant had both the nationality of the State concluding the treaty on behalf of its nationals and the nationality of a third State.

Well-known as the Nottebohm case is, it is still worth recalling the fact which led the International Court of Justice to render the judgement of 6 April 1955. Nottebohm was of German origin, had long had his domicile in Guatemala, and had been naturalized by the Principality of Liechtenstein on 13 October 1939. In 1955, Liechtenstein brought a claim on behalf of its national, Nottebohm, against the Government of Guatemala. The claim was for property damage and moral injury suffered by Nottebohm as a result of wartime measures imposed on him by Guatemala. Liechtenstein had extended its nationality to Nottebohm following an accelerated and almost overnight administrative procedure. Nottebohm's petition for naturalization obviously lacked sincerity and did not correspond to any factual links with the people of Liechtenstein. He sought the naturalization "to enable him to substitute for his status as a national of a belligerant State that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life or of assuming

the obligations -- other than fiscal obligations -- and exercising the rights pertaining to the status thus acquired." (id. at 26).

The elements of fraud in the petition for naturalization and of abuse in its granting were conspicuous. In light of these circumstances the Court called on the theory of effective nationality to declare inadmissible the claim brought against the Government of Guatemala by the Government of Liechtenstein on behalf of Nottebohm. The concept of effectiveness operates as a restraining factor upon a principle requiring the international judicial system to recognise the legal effect of a State's grant of nationality. The restraining role attributed to the concept of effectiveness for the purpose of avoiding obvious instances of abuse is even expressed in the Court's judgement. Far from superseding the principle of non-responsibility, the principle of effective nationality creates, in the Nottebohm judgement, supplementary grounds (and, according to some authorities, new grounds) of non-responsibility.

It should be emphasized that Nottebohm was not a case involving dual nationality. Nottebohm did not hold and never had held the nationality of Guatemala, the defendant State, and he had lost his nationality of origin upon his naturalization. He held solely the nationality of Liechtenstein. The principle of effective nationality was regarded in this case as an urgent international moral necessity: a State may not offer diplomatic protection to one of its naturalized citizens, when that naturalization was granted in the absence of any real and effective ties.If one wishes to generalize the solution applied

in the Nottebohm judgement, without extending its facts, it could be said only that for any claim brought before an international tribunal, the tribunal should verify whether the claimant has an effective link with the claimant State. In the spirit of Nottebohm this should be done even when there exists no conflict of nationalities, in other words, even if the claimant has no other nationality but that of the claimant State (which was Nottebohm's position -- it was never considered that he had retained his original nationality). Given the foregoing, how could the principle of effectiveness ever be expected to play another role -- i.e., that of rendering nugatory the nationality of the defendant State, judged "less" effective?

The solution thus handed down by the International Court of Justice in 1955 to deal with the problem of abuse in granting nationality as raised in Nottebohm was confirmed by Article 4, Paragraph (c) of the Resolution of the Institute of International Law adopted at its Warsaw session in 1965:

> "c) An international claim presented by a State for injury suffered by an individual may be rejected by the respondent State or declared inadmissible when, in the particular circumstances of the case, it appears that naturalization has been conferred on that individual in the absence of any link of attachment." (Annuaire de l' Institut de droit international, 1965, vol. 51-II, p.271.)

Nevertheless, the majority asserts that Nottebohm "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." As shown above, this affirmation does not withstand an examination of the facts contained in Nottebohm.

2. The Mergé decision

In the Strunsky-Mergé case, the Italian-U.S. Conciliation Commission, established under Article 78 of the peace treaty signed between the two States in Paris on 10 February 1947, was called on to adjudge damages suffered through Italian acts during World War II by a person holding the nationalities of both States. The defendant State, Italy, invoked the principle of non-responsibility for the claim.

The Commission, presided over by Mr. de Yangas Messia, declared the coexistence in international law of two principles: "(a) the principle according to which a State may not afford diplomatic protection to one of its nationals against the State whose nationality such person possesses;" and "(b) the principle of effective or dominant nationality." Having been embodied respectively in Articles 4 and 5 of the Hague Convention of 1930, these two principles had been confirmed by prevailing doctrine and applied by international tribunals. The Commission concluded that the two principles were neither contradictory nor irreconcilable and it explained its reasoning as follows: "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 claiming State. But it must not yield when such predominance is not proved." The Commission finally decided that as the claimant could not be considered as having dominant U.S. nationality, the Government of the United States was not justified in presenting a claim on her behalf against the Italian Government.

This view taken by the Italian-U.S. Commission, the notion of a complementary character of the two principles, is open to criticism and appears to be the result of a misunderstanding. According to the Commission, the first principle, embodied in Article 4 of the Hague Convention, is based on the principle of the sovereign equality of States -- it leads to the inadmissibility of a claim by a dual national against the Government of one of the States of which he is a national and is a principle of public international law. The second principle, embodied in Article 5 of the Hague Convention and leading to the conclusion that the effective nationality prevails, is a principle of private international law: "it would have to be projected into the realm of public international law in order for the two principles contained in Articles 4 and 5 of the Hague Convention to be reconciled. In reality, the two principles have distinct areas of application and provide different solutions to two hypothetical conflicts of nationality. The Commission's conclusion "is therefore unprecedented and creates an innovation which is very debatable." (B. Knapp, "Quelques considerations sur la jurisprudence de la Court International de Justice en matière de nationalité," (Annuaire Suisse de droit international, 1960, p. 176).Other authorities have made the same criticism. (See notably: Bar-Yaacov, op. cit., p. 237; and P.M. Blaser, La Nationalité et la protection juridique international, pp. 62-63).

The distinction between the two problems, i.e., the conflict between the nationality of the claimant State and the nationality of the respondent State (Hague Convention, Article 4), and the conflict

between two nationalities when one or both are of third States, whether before an international Tribunal or a municipal court (Hague Convention, Article 5), has already been made very accurately in the Harvard Draft Convention on the Responsibility of States (op. cit.) as well as having been the subject of discussions no. 2 and 3 of the Rapport sur la nationalité multiple by the International Law Commission (U.N. Doc. A/CN-4/83, 22 April 1954).

It should equally be noted that in the Mergé case, when the Italian Government pleaded non-responsibility, the U.S. Government, far from contesting that principle and advocating the principle of effective nationality, implicitly supported the traditional solution in its position which was reproduced in the decision as follows:

"Position of the United States of America:

a) The Treaty of Peace between the United Nations and Italy provides the rules necessary to a solution of the case. The first sub-paragraph of paragraph 9 (a) of Article 78 states:

> "United Nations nationals' means individuals who are nationals of any of the United Nations, or corporations or associations organized under the laws of any of the United Nations, at the coming into force of the present Treaty, provided that the said individuals, corporations or associations also had this status on September 3, 1943, the date of the Armistice with Italy.'

All United Nations nationals are therefore entitled to claim, and it is irrelevant for such purpose that they possess or have possessed Italian nationality as well.

b) The intention of the drafters of the Peace Treaty was to protect both the direct and indirect interest of the United Nations nationals in their property in Italy.

c) The principle, according to which one State cannot afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses, cannot be applied

to the Treaty of Peace with Italy because such principle is based on the equal sovereignty of States, whereas this Treaty of Peace was not negotiated between equal Powers but between the United Nations and Italy, a State defeated and obliged to accept the clauses imposed by the victors who at that time did not consider Italy a sovereign State."

Thus, far from contesting the principle by which a State cannot afford protection to one of its nationals against another State of which he is also a national, the U.S. Government confined itself to invoking the obligations, in derogation from common law, which a peace treaty imposes on a defeated power.

The historical context in which the Italian-U.S. Conciliation Commission is placed -- that of an arbitral body established by a peace treaty between a victorious Power and defeated States -- casts considerable doubt on the weight of the Mergé jurisprudence. The notion of reparation for damages suffered by victims of war measures imposed by the defendant States and extending as much as possible the latter's liability, was present in the jurisprudence of the post-World War I Mixed Arbitral Tribunals. In all likelihood, the Italian-United States Conciliation Commission was no stranger to that idea.

D. LEGAL WRITINGS

The principle of non-responsibility, accepted by international jurisprudence and embodied in Article 4 of the Hague Convention, is supported by legal writings. See notably: Oppenheim, International Law, Vol. I, 8th edition, edited by Lauterpracht, 1955, p. 348; N. Bar-Yaacov, Dual Nationality, London: 1961, pp. 210, 238; Nguyen Quoc Dinh, P. Daillier, A. Pellel, Droit international public, 1980, p. 711; and Gerhard von Glahn, Law Among Nations, London 1981, p. 207.

Bernard Audit was one of the first to comment in French on the Algiers Declarations. He foresaw certain difficulties in their execution and specifically mentioned the issue of dual nationality:

> "Le terme 'ressortissant' désigne aussi bien les personnes physiques que les personnes morales. Les première soulèveront peut-être les difficultés traditionnelles relatives aux cas de double nationalité, d'autant que certains Iraniens sont susceptibles d'avoir acquis la nationalité américaine depuis les bouleversements intervenus en Iran. Or, la Déclaration prévoit notamment des demandes en indemnisation pour expropriation ou autres atteintes à la propriété. Mais un tel changement de nationalité ne serait opposable á l'Etat Iranien, conformément à une règle traditionnelle, qu'autant que l'intéressé aurait perdu la nationalité Irannienne." (Journal du droit international, 1981, No. 4, p. 757).[1]

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[1] Translation: "The term 'national' denotes both natural persons and legal entities. The first (type) will perhaps raise the traditional issue of dual nationality inasmuch as some Iranians must have acquired U.S. nationality following the upheaval in Iran. The Declaration specifically foresees claims of indemnity for expropriation or other measures affecting property rights. But such change of nationality can be objected to by Iran, in conformity with the traditional rule, unless the individual concerned has lost his Iranian nationality."

In view of the fact that the Institute of International Law brings together authorities representing distinctly different judicial systems, their 1965 Resolution is of particular doctrinal interest. The majority, however, cites an author who places even the existence of this rule in doubt. In 1935 the U.S. Department of State refused to espouse the claim of two U.S. citizens against the Dominican Republic on grounds that the claimants also held that nationality. The State Department relied upon an opinion in which it was stated:

> "...Consequently, under generally accepted principles of international law, and in accord with the practice of the Department, this Government could not espouse a claim on their behalf against the Dominican Republic..." (Hackworth, Digest of International Law, 1942, Vol. III, pp. 354-355).

Therefore, the author the majority has cited has set himself against the position of public international law.

I have quoted various passages from the article by Professor Basdevant (supra,pp 10-12). This article suggests the principle of non-responsibility for claims of dual nationals against their governments. Furthermore, Basdevant attended the 1965 Warsaw session of the Institute of International Law and he voted for the Resolution. Therefore, the majority's reference to Basdevant in its decision is inappropriate.

II

The principle of non-responsibility should be upheld because it constitutes the solution favoured by substantive international law. It remains to determine: (A) that this solution is, even in the absence of express provisions, in harmony with the text of the Algiers Declarations, and (B) that contrary to the majority view, the circumstances preceding the signing of the Declarations do not require application of the theory of effective nationality.

A. It is of fundamental importance first to interpret the provisions of Articles II and VII of the Claims Settlement Declaration, and specifically, the term "nationals of the United States." Such an interpretation, which would determine the extent of the jurisdiction of the Tribunal, must take into consideration as much the juridical nature of the Declarations as the rules of interpretation governing the agreement establishing the Tribunal.

(1) It should first be recalled that the Iran-United States Claims Tribunal is an arbitral tribunal, established under an agreement concluded between two States, a tribunal with its origins in international law. The Algiers Declarations belong to a well-established and recognized practice: that of international conventions whereby States, in the exercise of diplomatic protection, establish a mixed arbitral tribunal to hear claims between their nationals and another State.

The juridical nature of the Tribunal is underscored by several specific commitments in the Declarations, notably:

- the U.S. Government undertakes to revoke all economic sanctions directed against Iran (Article X);

- it also undertakes to withdraw any action pending before the International Court of Justice (Article XI).

Contrary to what the majority believes, the fact that the nationals of each State are personally entitled to bring their claims directly before the Tribunal does not affect the inter-State nature of the Tribunal; nor is this procedural rule without precedent in international practice. Following World War II, individual claimants brought their claims directly before the Mixed Arbitral Tribunals established under the peace treaties. Furthermore, the fact that the government of the State of which the claimant holds nationality may present the claim when such claim is for a sum less than $ 250,000 (Article III.3) confirms the inter-State nature of the jurisdiction.

(2) The jurisdiction of the Tribunal has been defined by Article II of the Claims Settlement Declaration, which states:

> "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 any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date of this agreement, whether or not filed with any court,

> and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights, excluding claims described in paragraph 11 of the Declaration of the Government of Algeria of January 19, 1981 and claims arising out of the actions of the United States in response to the conduct described in such paragraph, and, excluding claims arising under a binding contract between the parties specifically providing that any dispute thereunder shall be within the sole jurisdiction of the competent Iranian courts, in response to the Majlis position."

The Tribunal therefore has jurisdiction to hear the claims of nationals of the United States against Iran, and those of Iranian nationals against the United States.

Article VII of the same Declaration stipulates:

> "For the purpose of this agreement:
>
> 1. 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, and (b) a corporation or other legal entity which is organized under the laws of Iran or the United States."

The general rule of interpretation which should be applied when interpreting Articles II and VII is the rule contained in Article 31 of the Vienna Convention of 23 May 1969 on the Law of Treaties. Article 31 § 1 provides that, "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." This provision is well-known, so a detailed commentary is dispensed with here.

One observation should nevertheless be made, concerning the interpretation of the "ordinary meaning" of the terms in Articles II and VII.1 in accordance with the provisions of the said Article 31. Such interpretation would not bar recourse to a complementary means of interpretation when the methods prescribed by the Vienna Convention are not in themselves sufficient to determine the intent of the contracting parties. Recourse is open to various "maxims" or "principles" whose authority has been, and will continue to be, infinitely debated. Nothing prevents an examination of international practice which shows that in case of doubt concerning the meaning of any clause granting jurisdiction for international judgement, the clause must be restrictively interpreted. As stated by the International Court of Justice, "Every Special Agreement, like every clause conferring jurisdiction upon the Court, must be interpreted strictly." (Free Zones Case, Series A/B, No. 46, pp. 138-139).

The reasoning for this is simply that in a system where "no State can, without its consent, be compelled to submit its dispute with other States either to mediation or to arbitration, or to any other kind of pacific settlement" (P.C.I.J., Eastern Carelia Case, Series B, No. 5, p. 27), jurisdiction ceases to exist at the point where it is no longer clear that the interested State has unequivocally consented to submit to international adjudication. The Permanent Court of International Justice has emphasized that, "It is true that the Court's jurisdiction is always a limited one, existing only in so far as States have accepted it; consequently, the Court will, in the event of an objection -- or when it has automatically to consider the

question -- only affirm its jurisdiction provided that the force of the arguments militating in favor of it is preponderant." (Chorzów Factory Case, Jurisdiction, Series A, No. 9, p. 32). This rule of restrictive interpretation is equally upheld in arbitration, for identical reasons.

Restrictive interpretation is even more imperative here, inasmuch as the issue of dual nationality becomes basically a problem of State sovereignty and anything touching on State sovereignty must be restrictively interpreted. (See: Rousseau, Droit international public, 1970, Vol. I, pp. 273-274).It is also witness to the wisdom of international tribunals in remaining true to the mandate entrusted to them. That is what contributes to the development of international institutions.

No matter what particular circumstances surrounded the conclusion of the Algiers Declarations, they do not alter the fact that the latter were essentially drafted by the U.S. Government. By virtue of a customary rule of international law, when the drafting of a treaty is attributed to one single party, in case of doubt, its terms shall be interpreted to the disadvantage of the drafting State. It is expressed in the adage, Verba ambigua accipuntur contra proferentem. This rule is justified by the simple reason that, as Ch. Rousseau said, "Etat

rédacteur ayant la possibilité d'être plus explicite, il ne doit s'en prende qu'à lui même des consequences de la negligence et elle a été fréquemment appliquée par la jurisprudence internationale aux clauses ambiguës." (Droit international public, Vol. I, pp. 297, 298).[1]

(3) The silence of the Declarations on the issue of dual nationality is even more significant in light of a similar agreement signed May 1, 1976 between the United States and Egypt. That agreement, concluded just shortly before the Algiers Declarations, appears to be the most recent agreement signed by the United States with a revolutionary government since World War II. Its purpose is equally to settle any disputes between nationals of the United States and the Government of Egypt. Article III of that agreement was drafted in terms almost identical to those of Article VII of the Claims Settlement Declaration. Compare:

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[1] Translation: "The drafting State, having had the opportunity to be more explicit, should bear the consequences of its negligence itself. This has frequently been applied to ambiguous clauses by international jurisprudence."

> "Article III. For the purpose of this Agreement, the term 'national of the United States' means (a) a natural person who is a citizen of the United States, or who owes permanent allegiance to the United States, and (b) a corporation or other legal entity which is organized under the laws of the United States, any State or Territory thereof or the District of Columbia, if natural persons who are nationals of the United States own directly or indirectly, more than 50 per centum of the outstanding stock or other beneficial interest in such legal entity."

However, the U.S. Government saw fit to annex a stipulation to this agreement with Egypt. Article 4 §1 of the Annex agreed to the same day by the two Governments provides that:

> "1. With regard to Article III of the referenced Agreement on the definition of 'national of the United States, the Government of the United States recognizes and applies the principle of international law concerning the dominant and effective nationality of dual nationals."

There is no such specific provision in the Algiers Declarations. Yet it would seem that if the U.S. Government had had the same intention of extending the application of that principle to dual nationals under the Claims Settlement Declaration, it would have inserted the same language in the relevant part of the Claims Settlement Declaration, the more so since it was the United States that drafted it.

(4) It seems equally essential to note that Article II of the Claims Settlement Declaration provides for a bilateral system of recourse for both U.S. nationals against Iran and Iranian nationals against the U.S. It is that which distinguishes it from the numerous peace treaties concluded after the two World Wars, whereby a system of unilateral recourse in favor of the nationals of the victorious Powers was established against the defeated States, but not the reverse. From this observation it may be deduced that the conjunction

"or" in Article VII, Paragraph 1 of the Claims Settlement Declaration whereby "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" (emphasis added) would exclude application of the Declaration to those having U.S. nationality AND Iranian nationality. Such a formulation would at least be more compatible with the principle of non-responsibility than with the principle of effective nationality.

B. In support of the theory of effective nationality, the majority also evokes the facts and circumstances surrounding the signing of the Algiers Declarations.In particular, it alludes to the freezing and return of Iranian assets in the United States. The majority analysis of these facts and circumstances is erroneous and cannot justify the jurisdiction of the Tribunal over dual national claims against Iran.

Actually, the Government and certain banking institutions of Iran had deposited funds -- gold bullion and securities -- in the United States. This property enjoyed sovereign immunity and that fact constituted the primary reason for Iran to deposit those assets there in the first place. The deposit conferred two obligations on the United States: one material and the other, more importantly, moral. In November 1979, the Iranian assets were frozen by order of the U.S. President. This act was not in accordance with international legal principles. But aside from that, the freeze order stripped the Iranian assets of their sovereign immunity and placed them at the mercy of U.S. claimants who sought and were able to obtain court orders for attachments against the assets. The extremely unfavorable,

even hostile, psychological climate against Iran existing at that time in the U.S. judicial milieu favored the issuance of these attachments. The obtaining of the attachments was also facilitated by the fact that Iran was not represented to defend herself at the hearings.

In January 1981, owing to the mediation of the Democratic and Popular Government of Algeria, the U.S. and Iranian Governments agreed to settle their disputes amicably and signed the Algiers Declarations. The release and free transfer of Iranian assets was an essential objective of the Declarations.

To prove that financial considerations played no part in the hostage crisis, the Government of the Islamic Republic of Iran, for its part, generously proved its good faith in thereby assuming substantial financial commitments: $ 3.667 billion was placed at the disposition of the Federal Reserve Bank of New York for the early repayment of bank loans not yet fallen due; $ 1.418 billion was deposited in an escrow account in London to guarantee other U.S. banking claims; and $1 billion was deposited in a security account to guarantee execution of any eventual arbitral awards against Iran.

It is true that certain U.S. claimants were able to obtain attachments against the Iranian assets. But these attachments, obtained under the aforementioned conditions, certainly do not constitute a legitimate right, and so their dissolution could not be construed as justifying the jurisdiction of the Tribunal.

With respect to the mutual intention of the two Governments party to the Algiers Declarations, the majority declares: "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."

The obligation of States stems uniquely from their own will. A State is bound only by that to which it has expressly consented. I therefore completely agree that the interpretation of an international treaty must be based on a close scrutiny into the mutual intent of the States party to the treaty. Furthermore, the notion of "presumed intent" seems to me deceptive and unjust. To ascertain the intent of the parties, the facts must be viewed in their particular context. It must be determined which moment in time one must select in order to ascertain, or even (as the majority has) to presume, the common intent of the two Governments party to the Algiers Declarations. The majority has chosen the present time as its criterion, and that, to me, seems highly unfair.

Personally, I would recall the moments just prior to the signing of the Algiers Declarations. The Iranian people, acutely believing themselves to be the victims of injustice suffered since 1953, had discovered a means to assert their rights. The U.S. Government, believing itself to be the victim of an attack on the principles of

international law, perceived an appropriate means to re-establish order. After all efforts for amicable settlement by international organizations had ended in failure, a solution to the crisis was finally realized thanks to the influence of the Democratic and Popular Republic of Algeria. In the preamble, the Government of Algeria declares itself as having served as an intermediary in the search for a "mutually acceptable" solution to the crisis in the relations between the Iranian and United States Governments.

It is certain beyond a shadow of a doubt, that the Iranian Government never intended to entitle its own nationals to bring her before an international tribunal. Such a solution would be an insufferable blow to the sovereign rights of the Iranian people, a people who would have preferred the greatest hardships and harshest sacrifices to any such amicable agreement embodying that blow.

It is therefore outrageous to state today that Iran 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..." The theory of effective nationality is not the only solution existing in international law. Another, much more sound and substantial solution is in force -- the principle of non-responsibility -- a principle codified by Article 4 of the Hague Convention of 1930, affirmed by the International Court of Justice in 1949, and reaffirmed by the Institute of International Law in 1965.

III

The majority's application of the theory of effective nationality to two cases before the Tribunal bears witness to the great confusion surrounding the role attributed to that theory in international practice. One should note the fundamental difference between the circumstances in which it was applied to international proceedings in former jurisprudence and the circumstances which characterize the present proceedings before the Tribunal.

The Venezuelan arbitrations of the beginning of the twentieth century concerned individuals who had acquired property on the territory of the defendant State, were usually domiciled there, and after having acquired the nationality of that State, nevertheless wished to hold that their original nationality prevailed -- a nationality that, although not lost, could scarcely still be considered active. The notion of active or effective nationality so often raised in those arbitrations serves there as a convenient means for justifying non-responsibility for the claim. In other words, effective nationality was invoked in order to reject the claim of a dual national against his own government. The inconsistent jurisprudence of the post-World War I Mixed Arbitral Tribunals under the peace treaties concluded between victorious Powers and defeated States may be disregarded. So may that of the Italian-U.S. Conciliation Commissions established by the Treaty of Paris of 10 February 1947 -- both of which must be viewed in their very particular context.

Whether based on the principle of non-responsibility or effective nationality, international practice has consistently declared inadmissible the claim of a dual national against his own government. International precedent yields only one single exception: the Willet claim against Venezuela, which was declared admissible by the U.S.-Venezuela Mixed Claims Commission under the agreement of 5 December 1885 in spite of the fact that Mrs. Willet was a dual U.S.-Venezuelan national. That case, however, presents some unique characteristics and is thus not a true exception to international practice (see supra p. 24-25).

The majority decision to admit the claims of dual nationals against Iran is therefore counter to consistent international practice.

With great regret, I feel myself compelled to point out that the majority's description of facts in the two accepted cases of dual nationals either minimizes or omits critical information supplied by the Respondent. Some statements are even false. The two decisions, as they stand, leave the impression that the Tribunal was faced with two individuals domiciled in the United States who have established their entire family and professional life there, and that the Iranian Government is theoretically continuing to consider them as Iranians only in order to invoke the principle of non-responsibility.

On the contrary, the cases concern two individuals of Iranian origin who owe their whole being to the Iranian people. The claims concern assets and rights located in Iran and acquired thanks to

Iranian nationality, and in relation to which the two claimants are now asserting their U.S. nationality as prevailing, a nationality acquired later on by naturalization, in order to claim against Iran. The two cases merit separate scrutiny.

A. Esphahanian. Case No. 157

The majority decision describes Esphahanian's situation in the United States even prior to his naturalization, stating that he left Iran for the United States at an early age, completed his studies and his military service there, worked there, and married an American woman.

These details do not appear so significant to me. In reality, Esphahanian was one of the many Iranian students who leave to pursue their higher education in the United States, but who generally remain under the care of the Iranian people. Each year, especially prior to the Islamic Revolution, large sums of money were set aside and transferred from Iran to the United States to pay for studies carried out there -- a sum constituting an important financial source for American educational institutions.

It is true, as the majority has indicated, that he married an American woman. However, the extract from his birth record establishes that his wife was naturalized as an Iranian, a fact which does not feature in the grounds for the majority decision. As for his military service, it is well-known that military service is compensated

in the United States; moreover, I wonder how he could have accomplished that service in 1952 although he was naturalized only in 1958.

The Claimant's situation should be examined from 1958 onwards, the date on which he was naturalized a U.S. citizen. Specifically, the determination of Esphahanian's nationality raises two problems, both of which bear upon a third, concerning the merits of his claim. These problems are as follows:

(1) Esphahanian's claim is for alleged non-payment of a check issued by an Iranian bank to his order on 21 December 1978 in Tehran in the amount of $704,691.85 drawn on Citibank of New York. The check was not honored by Citibank. The amount of the check represented the sum of IR 50,000,000 deposited by Esphahanian in an account and converted on December 21 for transfer to the United States. The amount of the check is too substantial to overlook, and the manner in which Esphahanian was able to acquire such a sum raises a difficult question, one which the majority arbitrators have in vain attempted to dispense with.

Esphahanian states that he was employed by an American company, Houston Contracting Company (HCC), and was assigned to work in Iran and other countries of the Middle East from August 1970 until December 1978. He was domiciled with his wife in Iran and spent only his summer vacations in the United States. During that period he was paid $610,000 salary and expenses by his employer. He was able to

deposit the entire $610,000 earnings paid by his employer, plus $173,913 interest on his deposits, plus $25,000 consulting fees, plus $50,000 representing his share of business transactions made with his brother from 1950-1960. He has stated that these transactions consisted of the sale of certain goods, such as radio receivers, brought by Esphahanian from the United States and sold by his brother on the black market in Iran.

According to documents furnished by Esphahanian, from 1970 to 1978 he received $487,429.24 salary, of which $57,030.62 and $61,349.50 must be deducted for taxes paid to the United States and Iran, respectively. The net amount remaining to Esphahanian is $369,038.12 and not the $610,000 he alleges or even the $478,345 stated by the majority arbitrators in their decision. No evidence was presented to substantiate the reimbursement of expenses by his employer and still less the other sums. No doubt Esphahanian was indeed the holder of various deposit accounts; nevertheless, interest in the amount of $173,913 seems rather excessive to me. It is also difficult to understand why Esphahanian would be paid $50,000 now for business transactions made 15 years earlier with his brother. In all sincerity, no one could believe that Esphahanian did not spend one single penny of his salary over a period of almost nine years and that he was able to deposit in the bank absolutely everything he earned during that time.

Even were we to suppose that the various sums indicated are correct, their total sum equals $618,612.12, i.e., $86,070 less than

the amount of the check in question. The discrepancy becomes even more significant when one discovers that Esphahanian purchased two houses in the United States during almost exactly the same period: one in 1975 and the other in 1979. He must also have paid the expenses of his son's education at Philips Academy, even though this latter was reimbursed by his employer.

Esphahanian's explanations, although accepted by the majority, are not convincing and a further search should be made into his resources. One pertinent document submitted by the Respondent casts some light on the matter of Esphahanian's activities in Iran. In an affidavit filed 29 November 1972 by Esphahanian at the Commercial Registration Office in Tehran, two businessmen (commerçants) providing their identity and commercial license numbers, attested to the fact that Mr. Esphahanian was a businessman (commerçant). In the Iranian Commercial Code, as in the French Commercial Code, a businessman (commerçant) is defined as an individual who habitually exercises business activities, acts which have been clearly defined by law. Esphahanian also owns 6 bearer shares out of a total 10, and 26 nominative shares out of a total 90, in the company Sedco. In a case involving the company at present pending before the Tribunal, it has been alleged that Esphahanian is the nominal owner of these shares, the shares actually belonging to the U.S. company. If that were so, might not the stocks have been issued in the name of Esphahanian, an Iranian, in order to disguise the true extent of the U.S. company's participation in the Iranian company? The question remains to be examined.

It appears then, that Esphahanian was not a simple employee of an American company, assigned to work in Iran and other countries of the Middle East. He was domiciled in Iran for nine years and conducted business transactions there -- activity which enabled him to buy two houses in the United States and to transfer $704,691 there. In other words, his domicile and center of interest (two essential criteria to establish effective nationality) were located for nine years in Iran. The fact that his wife is still unable to speak Farsi after nine years in Iran does not seem to me to be of great consequence.

Esphahanian must therefore be considered an Iranian. He is like many other Iranians who left Iran during a period of unrest and returned there during a period of economic expansion to make a fortune thanks to their Iranian nationality and then transferred that fortune to the United States. They now hold their U.S. nationality as prevailing, a nationality heretofore disguised, in order to present a claim against Iran. Such an illustration demonstrates just one of the ways dual nationality can be abused and attests to the wisdom of international jurisprudence which rejects the claims of dual nationals lodged against their own States.

(2) The various Iranian passports issued to Esphahanian and renewed time and time again demonstrate his frequent use of his Iranian passport. On his passport application, Esphahanian represents himself as being exclusively an Iranian national. The justification

offered by the majority on this point is not convincing. They state, "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" (p. 17).

It is true that Article 988 of the Iranian Civil Code requires prior authorization by the Council of Ministers for renunciation of Iranian nationality and acquisition of a foreign nationality. Those who acquire a foreign nationality without following the provisions of Article 988 will still be considered Iranians. But as the Agent of the Government of Iran clearly explained at the hearing, the authorization by the Council of Ministers is a mere administrative formality. It is not contrary to international law for the Iranian Civil Code to impose certain conditions on the renunciation of Iranian nationality, when that renunciation results in the acquisition of a foreign nationality. Furthermore, contrary to a state of dire necessity, which under certain conditions could be considered as an extenuating circumstance excusing an offense, the rigour of the law does not justify defrauding the law. Be that as it may, Iranian legislation in 1959 liberalized that law by easing the conditions for recognition of a foreign nationality acquired outside legal provisions. By means of a note added to Articles 988 and 989 on 10 February 1959, the Council of Ministers may, at their discretion and upon the proposal of the Minister of Foreign Affairs, recognize the foreign nationality of the individuals envisaged

in that Article. Those individuals may, following authorization by the Minister of Foreign Affairs, enter and stay in Iran.

Thus fraud was not the only means by which Esphahanian could have entered Iran. There were also honest and legal means to do so. He could have declared his U.S. nationality, had it recognized, and then entered Iran on a visa as many thousands of Americans did. The majority arbitrators continue their reasoning by stating, "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." This is a distortion of the facts and reality. Following 1953, excellent relations existed between the Imperial Government of Iran and the Government of the United States. Prior to the Revolution, thousands of Americans were domiciled in Iran and all facilities were accorded them. I seriously doubt that an agent of the Imperial Government would confiscate a passport issued by the U.S. Government.

Esphahanian's statement becomes even more of a fiction when it is seen that he used his Iranian passport to enter Saudi Arabia and Lebanon. It was not from fear of confiscation that Esphahanian did not present his U.S. passport to the immigration authorities at the border of those two countries.

On other documents as well, Esphahanian always represented himself as an Iranian, and even exclusively as an Iranian: for example, the declaration with respect to his shares in IMICO at the Commercial Registration Office, his passport applications, the official procuration act of 12 October 1972, and especially for opening a bank account and transferring the amount of the check in question to the United States. It is therefore a denigration of moral and spiritual values to permit Esphahanian now to deny his Iranian nationality and to hold a heretofore disguised nationality, his U.S. one, as prevailing in order to claim against Iran.

(3) As stated above, Esphahanian's claim concerns the alleged non-payment of a check in the amount of $704,691.85 issued 21 December 1978 to his order by an Iranian bank drawing on the Citibank of New York. The amount of the check represents the sum of IR 50,000,00 -- the balance of a deposit account converted 21 December 1978 into U.S. dollars for transfer to the United States.

The Respondent has explained in its memorial filed 20 April 1982 and elaborated at the hearing of 25 October 1982, that a circular dated 14 November 1978 of Bank Markazi prohibited the transfer abroad of foreign exchange. The issuance of the check in question and the transfer of funds to the United States was contrary to the existing foreign exchange regulations of Bank Markazi Iran. The check in question, which was an operation of foreign exchange trans-

fer, is thus null and void. Esphahanian is entitled only to the Iranian rials he deposited at the bank. A copy of the Bank Markazi circular of 5 November 1978 has also been submitted to both the Tribunal and the Claimant.

As was stated above, the circular dated 14 November 1978 of Bank Markazi prohibited the conversion of Iranian capital to U.S. dollars and the transfer of same abroad. At the same time, the circular permitted the sale and export of foreign currency for the import of goods, provided that the relevant regulations for such transactions were complied with. Bank Markazi has also specified other situations whereby banks may sell and export foreign currency, although an examination of the list of such situations reveals that currency export is limited to exceptional cases, such as instances related to the reimbursement of loans or credits that were obtained from foreign sources with the prior approval of Bank Markazi, or transfer of interest earned from the activities of air transport companies, or of capital, or interest earned thereon, of companies which benefitted from the Law on Attraction and Protection of Foreign Investments.

According to other provisions of the list provided with the circular, certain categories of Iranians may also export currency under specifically defined conditions: Iranians travelling abroad may take up to IR 200,000 (approximately $2200), Iranians undergoing medical treatment abroad may transfer the cost of such treatment, and

Iranians studying abroad may transfer up to $ 700 per month. Finally, Article 14 of the declared list provides that "sale of commercial foreign exchange for purposes other than those mentioned in the list is in each case subject to the prior approval of Bank Markazi."

No objection has been raised as to the validity of the Bank Markazi circular. According to Article II (c) of the Monetary and Banking Law of Iran of 1972, Bank Markazi, as the authority responsible for the monetary and credit system of Iran, shall inter alia draw up regulations pertaining to foreign exchange transactions, commitments and guarantees, with the approval of the Currency and Credit Council, and it shall also control foreign exchange transactions.

The currency regulations embodied in the Bank Markazi circular of 14 November 1978, along with the attachment thereto, have been reported to the International Monetary Fund and are reflected in the Fund's Annual Report for 1979. It is important, moreover, to emphasize that both Iran and the United States are members of the International Monetary Fund. Article VIII, Section 2 (b) of the IMF Agreement provides as follows:

> "(b) Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this (Fund) Agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, cooperate in measures for the purpose of making the exchange

control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement."

As to the effects of this provision in the IMF Agreement, it is of particular interest to note that the Board of Executive Directors of the Fund, in a decision of 10 June 1949 (Decision No. 446-4), interpreted the concept of unenforceability of exchange contracts as laid down in Article VIII, Section 2(b) above, as follows:

"1. Parties entering into exchange contracts involving the currency of any member of the Fund and contrary to exchange control regulations of that member which are maintained or imposed consistently with the Fund Agreement will not receive the assistance of the judicial or administrative authorities of other members in obtaining the performance of such contracts. That is to say, the obligations of such contracts will not be implemented by the judicial or administrative authorities of member countries, for example by decreeing performance of the contracts or by awarding damages for their non-performance."

"2. By accepting the Fund Agreement members have undertaken to make the principle mentioned above effectively part of their national law. This applies to all members, whether or not they have availed themselves of the transitional arrangements of Article XIV, Section 2."

An obvious result of the foregoing undertaking is that if a party to an exchange contract of the kind referred to in Article VIII, section 2 (b) seeks to enforce such a contract, the tribunal of the member country before which the proceedings are brought will not, on the ground that they are contrary to the public policy (ordre public) of the forum, refuse recognition of the exchange control regulations of the other member which are maintained or imposed consistently with the Fund Agreement. It also follows that such contracts will be treated as unenforceable notwithstanding that under the private international law of the forum, the law under which

foreign exchange control regulations are maintained or imposed is not the law which governs the exchange contract or its performance.

The decision also makes it clear that member States of the IMF are obliged not to give assistance by their judicial or administrative authorities in obtaining the performance of exchange contracts involving the currency of a member of the Fund if the contract is contrary to exchange regulations of that member which are consistent with the IMF Agreement. This means that a court or administrative authority will have the right and duty to refuse enforcement of the contract. It is therefore most particularly incumbent upon this Iran-U.S. Claims Tribunal that it respect the currency regulations of Iran and the U.S. In regard to the present case, the Tribunal should not enforce a check which constitutes an act of foreign exchange transfer and has been issued contrary to the currency regulations of Iran.

The defence raised by the Government of Iran is well-founded and just. It is, furthermore, entirely decisive and definitive in Esphahanian's case, in which a simple transfer of capital abroad in the sense covered by Article VI, Section 3 of the IMF Agreement is involved. Nonetheless, the majority has completely neglected to examine and comment on this point raised in the defence.

B. Golpira. Case No. 211

An Iranian by origin who lived until the age of 26 in Iran, where he was raised and educated, Golpira left Iran for the United

States in 1953 after finishing his medical studies, without, however, severing his ties with Iran. In 1958 he married an Iranian woman in accordance with the culture and laws of Iran. In 1964 he was naturalized a U.S. citizen; it is from that moment that his situation must be examined.

I do not deem it necessary to elaborate upon all the details. Golpira refused at the hearing to speak to me in Farsi, in order to convince the Tribunal that they were faced with an American who had broken all links with his former nationality. I would yield before an Iranian who had sincerely become an American, but a document annexed to the memorial of the Iranian Government, submitted after the hearing, cast an overwhelming doubt on Golpira's sincerity. To acquire his U.S. citizenship on 14 February 1964, Golpira stood before the U.S. flag and took the following oath:

> "I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and the laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same;.... and that I take this obligation freely without any mental reservation or purpose of evasion: SO HELP ME GOD and acknowledgement whereof I have hereunto affixed my signature."

Further, the naturalized citizen must acknowledge the following:

> "It is my intention in good faith to become a citizen of the United States and take without qualification the oath of renunciation and allegiance prescribed by the Immigration and Nationality Act, and to reside permanently in the United States..."

A daughter was born to the Golpiras on 12 November 1965. Upon that occasion, Golpira knowingly and voluntarily presented himself at the Consular Section of the Iranian Embassy in Washington, declared himself Iranian on an official form and, based on his Iranian birth certificate, petitioned for an Iranian national identity card for his baby daughter. In my opinion, that constitutes an obvious lack of the principles of true faith and allegiance for the flag he has sworn to respect. The majority has chosen to remain indifferent to this fact. In reality Golpira has but a fictitious union with the United States. It also appears to me that his union with Iran is equally fictitious. He is in essence stateless, in spite of his legal possession of dual U.S. and Iranian nationality.

In Iran both primary and higher education are free. It is easy to appreciate the burden of the costs of higher education on the budget of a country like Iran. Admittedly, the fact that Golpira left Iran after finishing his medical studies in order to serve U.S. society appears justifiable, for such act represents an inherent human right, indispensable to the pursuit of happiness. But it is unfitting and inadmissible to permit him to use his U.S. nationality to set himself against the country which so nurtured and educated him.

CONCLUSIONS

(1) The Iranian people determined an appropriate means to resolve the crisis between them and the United States Government; the Algiers Declarations were signed on 19 January 1981 through the mediation of the Democratic and Popular Republic of Algeria. Any interpretation of those Declarations must fundamentally be based on scrutiny of the common intent of the two Governments party to the Declarations. Such interpretation is dictated as much by the principle of good faith as by the term "mutually acceptable" which appears in the preamble of the Declarations. It is inconceivable, and may by no means be assumed, that the Iranian Government would of its own accord undertake to establish an international tribunal to settle disputes between itself and its own nationals. Any such solution would decidedly have been resisted not only by the Iranian Government, but even more so by the Iranian people, who were prepared to make the greatest sacrifices and to use any means necessary to assert their rights.

(2) Some international agreements establishing a tribunal or arbitral commission to settle disputes between a State and the nationals of another State, leave wide powers to the discretion of that tribunal. Such is not the case in the 1981 Declarations. Article V specifically provides that the Tribunal must rule "on the basis of respect for law." Therefore, when examining the precedents in international law, the Tribunal must exercise strict reservations in taking note of any isolated arbitral awards based on more flexible solutions.

The said Article V expressly provides for the application of international law, which includes the principle of non-responsibility discussed hereinabove. That principle has been ratified, notably, by Article 4 of the Hague Convention of 1930, reaffirmed by Article 4 of the 1965 Resolution of the Institute of International Law, and restated obiter dictum by the International Court of Justice in its Advisory Opinion of 1949.

Effective nationality as a criterion was established in international law uniquely to resolve a conflict of nationality raised either: (a) before a court of a third State when nationality is a precondition of the application of a law by the judge presiding in the forum; or (b) before an international arbitral tribunal when nationality is a precondition of diplomatic protection by a State, and more than one State is attempting to exercise protection over the same individual. However, effective nationality as a criterion can not be maintained when nationality is a precondition of the admissibility of an international claim, and the conflict of nationality involves the nationality of the respondent State.

(3) With respect to the claims submitted to the Tribunal by dual nationals, it must be noted that these are individuals of Iranian origin, a nationality derived through paternity and reinforced, in most instances, by birth on Iranian territory.

The present claims before the Tribunal concern assets and rights located in Iran, but in relation to which the claimants rely on their

U.S. nationality, a nationality acquired later on through naturalization. It is certainly not contrary to international law that Articles 988 and 989 of the Iranian Civil Code impose certain conditions for the loss of Iranian nationality, when such loss results in the acquisition of a foreign nationality. Iranian law, of course, cannot prevent the acquisition of a foreign nationality, but if the conditions prescribed for the loss of Iranian nationality have not been met, an international tribunal would have to declare that the individual in question is to be considered as having two nationalities. Article 1 of the Hague Convention of 1930, concerning certain questions relative to the conflict of laws on nationality, recognizes the right of each State to set conditions for the granting of its nationality and to determine by its own legislation who shall be its nationals. However, as Battifol indicates:

> "Une limite positive est cependant reconnue à cette liberté des Etats : ceux-ci ne peuvent légitimement prétendre exercer la protection diplomatique de leurs nationaux à l'encontre des Etats qui considèrent ces derniers comme leurs propres ressortissants... La règle est posée par l'article 4 de la Convention de La Haye de 1930. Elle n'est au fond que la conséquence logique du principe de la liberté étatique, si on veut bien entendre la liberté non comme le désordre, mais comme la faculté pour chaque Etat de rechercher lui-même l'ordre à établir." (Droit international privé, 1981, Volume I, p. 80).[1]

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[1] Translation: "Nevertheless, a positive limit is recognized to this liberty of States (in the field of nationality): States may not legitimately exercise diplomatic protection on behalf of their nationals against other States which consider the latter as their own nationals. The rule is set forth in Article 4 of the Hague Convention of 1930. It is essentially merely the logical consequence of the principle of the liberty of States -- if liberty is viewed not as disorder, but as the faculty of each State itself to seek the establishment of order."

The U.S. nationality aquired by these dual nationals does remain valid, under certain conditions set forth in the Nottebohm judgement. Nevertheless, it is inadmissible to permit them to claim against the Iranian Government, which considers them, also in accordance with international law, as its own nationals.

(4) It is true that public international law recognizes the right of each State to organize the structure whereby its nationality may be attributed, taking into consideration its own demography. However, the United Kingdom could not be allowed to consider all U.S. citizens as British nationals merely by the fact that they speak English.

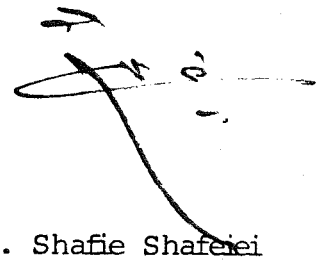
Another fundamental concept regarding nationality is the conformity of a national with certain legal and socio-cultural facts. The existence of a link between a State and its national is indispensable to the validity of the nationality within the international legal order. If that link exists, the nationality is valid and it cannot later be said, with regard to the relations between two States party to an international treaty, that the individual is more American than Iranian because his domicile and economic activities are located in the U.S. rather than Iran, and that his claim against Iran is therefore admissible, or vice versa.

(5) In one of the dual national cases decided by the Tribunal, the individual concerned has retained his close relationship with Iran, his country of birth where he was domiciled and exercised economic

activities from 1970 to 1978, i.e., nine years. Having disguised his U.S. nationality, he represented himself as exclusively Iranian. Iranian nationality enabled him to enter Iran, make a fortune there, buy two houses in the United States, and transfer $704,691 to the U.S.

It is therefore inadmissible to allow him subsequently to hold as prevailing his U.S. nationality, a nationality heretofore disguised, in order to claim against Iran. The search for international morality, which remains the essential lesson of the Nottebohm judgement, is undermined by the majority decision allowing an international claim in such circumstances.

If such a solution, unique in the annals of international jurisprudence, were repeated, it would throw open the doors to the fraudulent abuse of dual nationality. Nationality is the expression of membership in a set of moral and spiritual values. It is to be deplored that the love of wealth induces men to betray the values of the people from whom they have sprung and among whom they were nurtured and educated. The wisdom of the traditional solution of international jurisprudence, declaring such claims inadmissible, must instead be reaffirmed.



Dr. Shafie Shafeiei