IRAN-UNITED STATES CLAIMS TR

A8—81
A1-18

دیوان داوری دعاوی ایران - ایالات متحده

ORIGINAL DOCUMENTS IN SAFE

Case No. A-18 Date of filing: 6 APRIL 84

** AWARD - Type of Award _____
- Date of Award _____
_____ pages in English _____ pages in Farsi

** DECISION - Date of Decision 6 APRIL 84
27 pages in English _____ pages in Farsi

** CONCURRING OPINION of _____

- Date _____
_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of _____

- Date _____
_____ pages in English _____ pages in Farsi

** DISSENTING OPINION of _____

- Date _____
_____ pages in English _____ pages in Farsi

** OTHER; Nature of document: _____

_____

- Date _____
_____ pages in English _____ pages in Farsi

IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

A18-81
N-M-1

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری دعاوی ایران - ایالات متحده
FILED - ثبت شد
Date ۱۳۶۳/۱/۱۷ تاریخ
6 APR 1984
No. A18 شماره

CASE NO. A/18

Request for interpretation of Article VII, paragraph 1, of the Claims Settlement Declaration in regard to whether the Tribunal has jurisdiction over claims against Iran by persons who are, under United States law, citizens of the United States of America and are, under Iranian law, citizens of the Islamic Republic of Iran.

DECISION

Parties:

The Islamic Republic of Iran, represented by:
Mr. Mohammad K. Eshragh, Agent of the Islamic Republic of Iran
Professor François Rigaux
Professor Derek Bowett
Dr. Sayed Hossein Safaei, Legal Adviser to the Agent
Dr. Khalil Khalilian, Legal Adviser to the Agent

The United States of America, represented by:
Mr. John R. Crook, Agent of the United States
Ms. Jamison Selby, Deputy Agent of the United States
Professor Richard B. Lillich
Mr. Henry Lerner, Department of State
Mr. David P. Stewart, Adviser to the Agent
Ms. Elisabeth J. Keefer, Adviser to the Agent
Mr. John Reynolds, Adviser to the Agent

I. Procedural Background

A large number of claims have been filed against Iran by claimants who, under United States law, are United States citizens and, under Iranian law, are Iranian citizens. During the summer of 1982 the Chambers issued Orders inviting memorials by parties on the question of the effect of this so-called dual nationality on the Tribunal's jurisdiction. A number of claimants filed memorials on the issue. In connection with these Orders, the United States of America ("United States") filed a Memorial on the Issue of Dual Nationality on 19 November 1982. During 1982 the Islamic Republic of Iran ("Iran") made written submissions of its views on dual nationality in various cases in the Chambers.

Chamber Two held hearings in three cases (Case 157 on 25 October 1982, and Cases 211 and 237 on 5 November 1982) at which, among other things, oral arguments were presented by both parties on the dual nationality issue. Chamber Two issued Awards in two of these cases on 29 March 1983 to which a dissenting opinion was filed on 12 October 1983. Nasser Esphahanian and Bank Tejarat, Case 157, Chamber 2, Award No. 31-157-2; Golpira and The Government of the Islamic Republic of Iran, Case 211, Chamber 2, Award No. 32-211-2. These two Awards cannot, of course, be affected by the present decision, as they are final and binding awards pursuant to Article IV, paragraph 1, of the Claims

Settlement Declaration[1] and Article 32, paragraph 2, of the Tribunal Rules.

On 25 February 1983, Iran requested, under Article VI, paragraph 4, of the Claims Settlement Declaration "the Full Tribunal's view concerning the inadmissibility of the claims filed by the nationals of Iran against the Government of the Islamic Republic of Iran". The request also stated that the proceedings on claims of dual nationals before the Tribunal's three Chambers should be stayed pending the Full Tribunal's decision.

The United States filed a reply to Iran's request on 25 April 1983, referring to the Memorial it had filed on 19 November 1982.

On 10 May 1983, the Tribunal scheduled a hearing for 6 October 1983, with memorials to be submitted by 15 September 1983. By its Order dated 7 September 1983, the Tribunal postponed the hearing to 10 November 1983. In response to a request by Iran on 8 September 1983, the Tribunal by Order dated 12 September 1983 likewise extended the final filing date for memorials to 17 October 1983.

---

[1] Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran.

On 11 October 1983, Iran requested a postponement of the hearing and an extension of two months in which to file its memorial. The United States, on 19 October 1983, filed a statement opposing this request. By its Order of 20 October 1983, the Tribunal denied the request. On 21 October 1983, Iran filed a "Memorial on the issue of claims brought by Iranians taking advantage of American nationality." On 25 October 1983, the Tribunal accepted the Iranian Memorial despite its late filing. On 27 October 1983, Iran filed Exhibits to its 21 October Memorial and again requested a postponement of the hearing. The Tribunal denied this request in an Order of 1 November 1983.

A hearing on the dual nationality question was held before the Full Tribunal on 10 and 11 November 1983.

II. Issue Presented

The question now before the Tribunal is whether the Claims Settlement Declaration grants the Tribunal jurisdiction over claims against Iran filed by persons who, during the relevant period which is from the date the claim arose until 19 January 1981, were Iranian citizens under the law of Iran and United States citizens under the law of the United States.

The relevant provisions of the Claims Settlement Declaration which the Tribunal must interpret are Article II, paragraph 1, and Article VII, paragraph 1 (a).

Article II, paragraph 1, states:

> An international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States ....

Article VII, paragraph 1 (a), states:

> 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;....

III. Contentions of the Two Governments

A. Contentions of the Islamic Republic of Iran

Iran takes the position that persons, who under Iranian law are Iranian citizens, may not bring before this Tribunal claims against Iran, irrespective of whether they may also be United States citizens. Iran's argument is summarized in the following paragraphs.

The jurisdiction of the Tribunal in this case is to be determined by reference to the Claims Settlement Declaration and particularly Article VII, paragraph 1 (a), thereof. The parties bound by the Declaration of the Government of the Democratic and Popular Republic of Algeria (the "General Declaration") and the Claims Settlement Declaration (collectively referred to as the "Algiers Declarations") intended the function of the Tribunal to be the adjudication of

international claims on the basis of the exercise of diplomatic protection. Therefore Article VII, paragraph 1 (a), interpreted in accordance with rules of international law, must be read in a manner consistent with the customary international law relevant to the exercise of diplomatic protection.

The plain language of this Article excludes jurisdiction over claims brought by Iranian citizens who may at the same time be United States citizens. That the word "national" is defined as a "citizen" does not indicate that the parties intended to depart from the traditional rule of diplomatic protection, which requires the aggrieved person to possess the nationality of the claimant State according to that State's internal laws. In addition, the ordinary meaning of "national" is a person who is a national of one state and one state only. Dual nationality has been recognized as an abnormal status and thus can not fairly be said to be within the ordinary meaning of the term "national". Thus the word "national" in Article VII, paragraph 1 (a), encompasses solely persons with exclusive Iranian or United States nationality. In addition, the use of the disjunctive article "or" excludes a person who would be simultaneously a citizen of Iran and the United States.

Any domestic definition of "citizen" is irrelevant as the issue before the Tribunal is one of international law, not domestic law.

This textual interpretation is supported by several other points. Article VII, paragraph 1 (b), through its requirements of ownership and control of corporations, forecloses the possibility of the dual nationality of corporations. This indicates an intention which should apply to natural persons as well. Moreover, the rules of interpretation under international law show the following: that, in the event of any doubt, a clause submitting a State to the jurisdiction of an international tribunal should be construed restrictively; that this principle cannot in this case be counter-balanced by the rule of interpretation which suggests that all language should have a "useful effect", since Article VII, paragraph 1 (a), would still have useful effect if the claims of dual nationals were excluded; and that ambiguities should be construed against the State which drafted the treaty, the United States in this case.

The alleged previous treaty practice of the parties, as invoked by the United States (see below at Section III B), has no bearing on the issue. The Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States, 284 U.N.T.S. 93, (the "Treaty of Amity") excludes dual nationals from receiving benefits under the Treaty. The termination or suspension of litigation before United States courts is also irrelevant because those actions arise under municipal law which has no bearing on international law issues before this Tribunal.

An interpretation providing for jurisdiction over the claims of dual nationals would violate the "reciprocal nature" of the Algiers Declarations -- i.e., the equal treatment and respect that must be accorded each government -- and would be contrary to the established exercise of diplomatic protection. It would violate the equality of States, the main basis of the rule of non-responsibility, which is the recognized principle to be applied in this context.

The Tribunal is to adjudicate claims on the basis of the exercise of diplomatic protection because a) the terms of the General Declaration indicate that the Tribunal was created to resolve interstate conflicts between Iran and the United States; b) the Algiers Declarations were arrived at to end an international crisis and not for the sole purpose of settling private international disputes; c) the sums paid in satisfaction of awards will be to one of the two Governments and not directly to individual claimants even though payment may ultimately be made to them; d) awards made under any arrangement other than by way of diplomatic protection could subsequently be challenged as contrary to public international law; and e) the Governments are required, in effect, to endorse the claims of their nationals; it is quite immaterial that in some cases, for the sake of convenience, the individuals concerned have been authorized to conduct their cases themselves.

The international law pertaining to the exercise of diplomatic protection clearly prohibits claims by persons who possess the nationality of both the claimant and respondent States. This prohibition is evidenced by the traditional sources of international law. State practice has traditionally supported the proposition that dual national claims are prohibited. Even if American practice has changed since World War II, such recent practice is not sufficient to displace the traditional rule. Moreover, international decisions which allow the claims of dual nationals should be disregarded because they either involved situations where effectiveness was always decided in favour of the respondent State or where the tribunals were established in the exclusive interest of nationals of victorious States. Finally, Iran's position finds support in the writings of various prominent legal scholars.

B. Contentions of the United States of America

The position of the United States is summarized in the following paragraphs.

The United States takes the position that by the express terms of the Claims Settlement Declaration the Tribunal has jurisdiction over claims of a United States citizen against Iran whether or not that person is also a citizen of Iran. The definition of "national" by reference to citizenship under national law was intended to make that clear. The United States submits that only if it is determined that the Claims Settlement Declaration is in any way

ambiguous on this point should there be resort to international law as a guide to interpreting the language of the Declaration. In the event the Tribunal deems it necessary to resort to international law to interpret such language, modern international law would result in an interpretation which would make the determination of jurisdiction depend on the dominant and effective nationality of each dual national claimant.

Article VII, paragraph 1 (a), by its own terms confers jurisdiction over the claims of United States citizens. The clause "as the case may be" necessarily correlates the two-part introductory clause with the two-part definition in subparagraph (a). Therefore the correct reading of the Article is simply that a national of Iran means a natural person who is a citizen of Iran under Iranian law, and a national of the United States means a natural person who is a citizen of the United States under United States law.

The ordinary meaning of "United States citizen" includes a citizen who is a dual national. The ordinary meanings of "national" and "citizen" in international legal usage are different. "Nationality" stresses the international aspect of state membership and is determined with reference to international law. "Citizenship" stresses the application of municipal law. Under United States law, a United States citizen may also be a national of another country. Therefore, Article VII, paragraph 1 (a), for United States claimants means that "a national of the United

States is a natural person who is a citizen of the United States, and United States citizens may be dual nationals".

Iran's interpretation of Article VII, paragraph 1 (a), is contrary to its plain meaning. Iran reads the provision disjunctively to state that a national means a "citizen of Iran or a citizen of the United States but not of both". This interpretation, however, adds language to the Claims Settlement Declaration which the parties did not agree to include. It is also syntactically erroneous because it isolates the two clauses from the clauses separated by "as the case may be" without giving effect to those connecting words.

The interpretation of Article VII, paragraph 1 (a), by the United States is supported by the Algiers Declarations as a whole, the practice of the parties and modern claims settlement practice generally. The interpretation is consistent with the obligation placed on the United States to terminate legal proceedings brought in United States courts by United States citizens against Iran. Moreover, when the parties wanted to establish exclusions, they did so clearly and expressly; the Agreement in several instances very carefully articulates the exclusion of certain claimants from the jurisdiction of the Tribunal. To resort to implication to create another exclusion (for dual nationals) would be unjustified.

As regards the practice of the parties, when Iran and the United States intended to exclude dual nationals from

receiving treaty benefits, as in the Treaty of Amity, they have done so expressly. The grant of jurisdiction over claims of dual nationals is consistent with the modern practice of the United States and many other nations. Moreover, the exact language of Article VII, paragraph 1(a), by its use in such modern practice, has long been understood to include dual nationals.

Since the express language of the Claims Settlement Declaration supports the United States position, resort to international law for interpretation is not necessary. Iran incorrectly assumes that the Claims Settlement Declaration must be consistent with the customary international law pertaining to the exercise of diplomatic protection. On the contrary, the clauses of a treaty must be strictly followed, even when they deviate from general rules of international law. Moreover, the general character of the Tribunal does not support Iran's position that the Tribunal's function is the exercise by states of diplomatic protection. As with the Mixed Arbitral Tribunals established under the Treaty of Versailles, the Claims Settlement Declaration grants certain nationals -- United States and Iranian citizens -- rights that are directly enforceable before an international tribunal. Awards in favour of United States citizens are enforceable against Iran directly from the Security Account, and Article IV, paragraph 3, of the Claims Settlement Declaration provides that any award "against either government shall be enforceable against such government in the courts of any nation in accordance with its law". In this

sense Iran's assumption concerning the nature of the Tribunal is unfounded.

Should the Tribunal find that the Claims Settlement Declaration is ambiguous with respect to jurisdiction over all claims by United States citizens against Iran regardless of whether or not they are also Iranian citizens, the Tribunal, in accordance with Article V of the Declaration, should turn to international law for guidance in interpreting the language in question.

If customary international law is to be applied, the Tribunal should, in each case involving a dual national, resolve the issue by determining the dominant and effective nationality of the dual national claimant. The principle of effective nationality has long been applied to resolve conflicts of nationality in international arbitration. The development of the law has resulted in a departure from the older theory of absolute non-responsibility which held States absolutely non-responsible for the claims of persons who were nationals of both the claiming and respondent States. That absolute non-responsibility theory has been much criticized on the following grounds: that it is an inaccurate oversimplification of the body of precedents; that it is based on a theoretically true, but in practice false, assumption that such claimants would otherwise enjoy the protection of two nations; that it gives inequitably undue weight to municipal laws providing for nationality on the basis of jus sanguinis or restricting voluntary expatriation; and that it requires international tribunals

to abstain from international law determinations of the nationality of the claimants, and thereby harms nationals of States whose nationality laws make it impossible or difficult to change nationality and punishes them because of nominal and possibly irrelevant ties to the respondent State. As a consequence of such criticisms, the absolute non-responsibility theory has been rejected in favour of determinations of effective nationality in the major post-war international precedents.

Iranian citizenship which results solely from Iran's legal restrictions on voluntary expatriation or its automatic imposition of citizenship on certain persons as, for example, United States-born wives and children of Iranian men, cannot predominate over genuine links with the United States especially as such Iranian nationality policies are contrary to the human rights of the claimants as set forth in the Universal Declaration of Human Rights.

IV. Reasons for Decision

As the Tribunal has previously held,[2] and as the Parties have agreed, the Algiers Declarations constitute a treaty under international law and should be interpreted in accordance with Articles 31 and 32 of the Vienna Convention

---

[2] Decision in Case A-1, Issue 1, dated 30 July 1982.

on the Law of Treaties (the "Vienna Convention").[3]

Thus, the task of the Tribunal is to interpret the relevant provisions of the Algiers Declarations "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."[4]

The United States argues that the text is clear and unambiguous and that, by defining "nationals" as "citizens", a term of municipal law, it makes clear that all nationals of the United States and of Iran, including dual nationals, are entitled to bring claims in this Tribunal.

Iran also asserts that the text is clear and unambiguous in that the ordinary meaning of the word "national" excludes dual nationals, as does the use of the disjunctive article "or". Moreover, Iran argues that a treaty text can confer jurisdiction on an international tribunal only to the extent that it reflects the "converging will" of the two States and that Iran, not recognizing dual nationality, could not be presumed to have accepted such jurisdiction when the Claims Settlement Declaration was signed.

Neither of these arguments can be accepted.

---

[3] U.N. Doc. A/CONF. 39/27, 23 May 1969; reprinted in 8 I.L.M. 679 (1969).

[4] Id. Article 31(1).

The Tribunal cannot agree that the text is so clear and unambiguous as to make further analysis unnecessary. Moreover, definition of "nationals" as "citizens" in the Claims Settlement Declaration was an inadequate way to raise the issue of dual nationality. In view of the formal, recorded position of the United States with respect to claims by dual nationals, that is, that a "State is not required to recognize a claim asserted against it by another State on behalf of an individual possessing the nationality of both States, unless such individual has a closer and more effective bond with the claimant State"[5], it would be expected that, if the United States wished to propose a different rule which ignored the relative closeness of ties, it would have done so more clearly. With respect to the additional Iranian argument, the Vienna Convention does not require any demonstration of a "converging will" or of a conscious acceptance by each Party of all implications of the terms to which it has agreed. It is the "terms of the treaty in their context and in the light of its object and purpose" with which the Tribunal is to be concerned, not the subjective understanding or intent of either of the Parties.

Paragraph 3(c) of Article 31 of the Vienna Convention directs the Tribunal to take into account "any relevant rules of international law applicable in the relations between the parties." There is a considerable body of law and legal literature, analyzed herein, which leads the

---

[5] As stated in the Memorandum of State Department Assistant Legal Adviser George Spangler dated 19 February 1962 which was submitted by the United States at the Hearing.

Tribunal to the conclusion that the applicable rule of international law is that of dominant and effective nationality.

1. The 1930 Hague Convention

On 12 April 1930, a convention was concluded at The Hague "Concerning Certain Questions relating to the Conflict of Nationality Laws" (the "Hague Convention"). As Article 1 of that Convention makes plain, a determination by one State as to who are its nationals will be respected by another State "in so far as it is consistent" with international law governing nationality. International law, then, does not determine who is a national, but rather sets forth the conditions under which that determination must be recognized by other States.

Article 4 of the Convention provides: "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses." But this provision must be interpreted very cautiously. Not only is it more than 50 years old and found in a treaty to which only 20 States are parties, but great changes have occurred since then in the concept of diplomatic protection, which concept has been expanded. See Siorat, Juris-Classeur Droit International, La Protection Diplomatique, Fasc. 250-B., No. 20 (1965); Kiss, Répertoire de Droit International, Dalloz, Protection Diplomatique No. 14. This concept continues to be in a process of transformation, and it is necessary to distinguish between different types of protection, whether consular or claims-related.

Moreover, the negotiating history of Article 4 of the Hague Convention suggests that its application is doubtful in a case, such as the present one, where a dual national, by himself, brings before an international tribunal his own claim against one of the States whose nationality he possesses. Such a proposal was made during the Conference, but it was rejected. See Kosters, XXV Rev. de Droit Intern. Privé 412, 424 (1930).

Another reason why the applicability of Article 4 to the claims of dual nationals before this Tribunal is debatable is that it applies by its own terms solely to "diplomatic protection" by a State. While this Tribunal is clearly an international tribunal established by treaty and while some of its cases involve disputes between the two Governments and involve the interpretation and application of public international law, most disputes (including all of those brought by dual nationals) involve a private party on one side and a Government or Government-controlled entity on the other, and many involve primarily issues of municipal law and general principles of law.[6] In such cases it is the rights of the claimant, not of his nation, that are to be determined by the Tribunal. This should be contrasted with the situation of espousal of claims in international law

---

[6] Article V of the Claims Settlement Declaration provides:

> The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.

which the Permanent Court of International Justice described as follows: "...in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law."[7] Moreover, the object and purpose of the Algiers Declarations was to resolve a crisis in relations between Iran and the United States, not to extend diplomatic protection in the normal sense. It seems clear that a major obstacle to the resolution of that crisis was the existence of much litigation in the courts of the United States brought against Iran by citizens of the United States, often involving judicial attachments of Iranian assets. In order to overcome that obstacle and permit the return of these assets and the termination of that litigation, a new substitute forum -- this Tribunal -- was established.

It is also noteworthy that Article 5 of the Hague Convention recognized the principle of the stronger link for purposes of decisions by third States in cases of dual nationality. Although this Tribunal is not an organ of a third State,[8] it is also not, as noted above, a tribunal

---

[7] The Panevezys-Saldutiskis Railway Case, PCIJ, Series A/B, No. 76 (1939) 4, 16.

[8] Compare the decision of the European Commission of Human Rights holding that the Allied-German Supreme Restitution Court in the Federal Republic of Germany, which applies and interprets German law, is an international tribunal. II Yearbook of the European Convention on Human Rights, 288 (1958-1959).

where claims are espoused by a State at its discretion and decided solely by reference to public international law.

2. Precedents

In this field, there is a considerable number of relevant judicial and arbitral decisions, most of them prior to the Second World War, supplemented and interpreted by the writings of scholars. The writing of at least one scholar, Professor E.B. Borchard[9], apparently had a considerable effect, not only because of the later writers who have echoed his views which favored the rule of non-responsibility, but also because of his influence on the Hague Conference that adopted the 1930 Convention discussed above. In fact, the precedents on which Borchard relied did not generally support his conclusion[10], and the Parties in the present case have acknowledged that the law prior to 1930 was uncertain. Iran, however, considers the conclusion of the 1930 Convention a decisive turning point that crystalized the rule of non-responsibility. The United States, on the other hand, points to the limited number of parties to that Convention and the practice of States, particularly in the conclusion and interpretation of claims settlement agreements since the Second World War. The Tribunal, having

---

[9] See E.M. Borchard, The Diplomatic Protection of Citizens Abroad 588 (1927).

[10] See Griffin, "International Claims of Nationals of Both the Claimant and Respondent States - The Case History of a Myth," 1 The International Lawyer 400, 402 (1966-67) and the State Department Memorandum prepared by Mr. Griffin and dated 6 November 1957 which was submitted by the United States at the Hearing.

had the benefit of extensive written and oral argument of these issues by eminent counsel, does not believe it would be worthwhile for it to recite and comment upon the many precedents cited by the Parties, for the Tribunal is satisfied that, whatever the state of the law prior to 1945, the better rule at the time the Algiers Declarations were concluded and today is the rule of dominant and effective nationality.

The two most important decisions on the subject in the years following the Second World War have had a decisive effect. First, the International Court of Justice, in the Nottebohm Case, on 6 April 1955, stated the following:

> International arbitrators have ... given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.
>
> Similarly, the courts of third States, when they have before them an individual whom two other States hold to be their national, seek to resolve the conflict by having recourse to international criteria and their prevailing tendency is to prefer the real and effective nationality. 11

While Nottebohm itself did not involve a claim against a State of which Nottebohm was a national, it demonstrated the acceptance and approval by the International Court of Justice of the search for the real and effective nationality

---

11 Nottebohm Case (Liechtenstein v. Guatemala) ICJ Reports (1955) 4, 22.

based on the facts of a case, instead of an approach relying on more formalistic criteria. The effects of the Nottebohm decision have radiated throughout the international law of nationality.

A few months later, on 10 June 1955, the Italian-United States Conciliation Commission set up by application of the Peace Treaty of 1947, decided in the Mergé Case that the principle "... based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State." Mergé Case (United States v. Italy) 14 R.I.A.A. 236, 247 (1955). The Commission then applied this same analysis in numerous other similar cases involving dual nationals. The Franco-Italian Conciliation Commission also decided several claims of dual nationals according to the "link theory". See Rambaldi Claim (France v. Italy) 13 R.I.A.A. 786 (1957); Menghi Claim (France v. Italy) 13 R.I.A.A. 801 (1958); Lombroso Claim (France v. Italy) 13 R.I.A.A. 804 (1958).

3. Legal Literature

Support for the principles applied in these cases is shared by some of the most competent international lawyers. Basdevant wrote that effective nationality must prevail, because nationality is the juridical translation of a social fact.[12] Maury in "L'Arrêt Nottebohm et la Condition de

---

[12]Basdevant, "Conflits de Nationalités dans les Arbitrages Vénézuéliens de 1903-1905", Rev. de Droit Intern. Privé 41, 60-61 (1909).

Nationalité Effective," 23 Rabels Zeitschift 515 (1958),expressed his doubts about the alleged rule forbidding a State to act against another State in cases of dual nationality, and concluded that the Nottebohm decision has a general scope. In "Cours Général de Droit International Public", 136 Recueil des Cours 162-63 (1972), Paul de Visscher wrote:

> La doctrine du lien effectif ou du rattachement dominant a été régulièrement appliquée au cours du XIXe siècle mais, parce qu'elle le fut généralement pour rejeter des demandes, la doctrine, constatant par ailleurs que les Etats eux-mêmes répugnaient à accorder leur protection à des nationaux qui possédaient en même temps la nationalité de l'Etat fautif, en est venue à enseigner qu'en "règle générale" les demandes formées au profit de doubles nationaux sont irrecevables....[L]'idée s'est implantée que toute demande de protection introduite au profit d'un double national devait être déclarée irrecevable.
>
> Cette règle...que l'Institut de droit international a cru devoir réaffirmer en 1965, n'est pas l'expression correcte du droit en vigueur... en prononçant l'arrêt Nottebohm, la Cour internationale a bel et bien entendu affirmer un principe général....

De Visscher concluded that the decision in the Mergé Case "...paraît résumer assez exactement l'état du droit applicable...." Id. at 163.

Recent legal literature has suggested that the "actually dominant theory", Rousseau, Droit International Public, Précis Dalloz, 112 (1976), is, at least before international tribunals, the effective nationality theory. See Batiffol et Lagarde, I Droit International Privé No. 82 (7th ed. 1981); Siorat, Juris-Classeur Droit International, La Protection Diplomatique, Fasc. 250-B, No. 20 (1965);

Reuter, Droit International Public, Themis, 236 (5th ed. 1976); [1961] 2 Y.B. Int'l Law Comm'n 46,49, U.N. Doc. A/CN.4/134, Add. 1; 1977 Digest of United States Practice in International Law 693-94; Rode, "Dual Nationals and the Doctrine of Dominant Nationality", 53 Am. J. Int'l L. 139 (1959); Messia, "La protection diplomatique en cas de double nationalité," 1960 Hommages Basdevant 556; Donner, The Regulation of Nationality in International Law 95 (1983). Brownlie pointed to the need for a predominant link to be proved and states that where a choice can be made, "then the principle of equality is not necessarily infringed, although it might be if tenuous links acknowledged by a municipal law were allowed to render the claim inadmissible." See Brownlie, Principles of Public International Law 399 (3rd ed., 1979). Leigh asserted his belief that "any attempt to reconcile the two is likely to result in a victory for the effectiveness theory." See Leigh, "Nationality and Diplomatic Protection", 20 The International and Comparative Law Quarterly 453, 475 (1971).

This trend toward modification of the Hague Convention rule of non-responsibility by search for the dominant and effective nationality is scarcely surprising as it is consistent with the contemporaneous development of international law to accord legal protections to individuals, even against the State of which they are nationals. Moreover, as the Griffin memorandum (supra Note 10) reveals, many of the relevant decisions, even in the 19th century, reflected similar concerns by giving weight to domicile.

Thus, the relevant rule of international law which the Tribunal may take into account for purposes of interpretation, as directed by Article 31, paragraph 3(c), of the Vienna Convention, is the rule that flows from the dictum of Nottebohm, the rule of real and effective nationality, and the search for "stronger factual ties between the person concerned and one of the States whose nationality is involved." In view of the pervasive effect of this rule since the Nottebohm decision, the Tribunal concludes that the references to "national" and "nationals" in the Algiers Declarations must be understood as consistent with that rule unless an exception is clearly stated. As stated above, the Tribunal does not find that the text of the Algiers Declarations provides such a clear exception.

For the reasons stated above, the Tribunal holds that it has jurisdiction over claims against Iran by dual Iran-United States nationals when the dominant and effective nationality of the claimant during the relevant period from the date the claim arose until 19 January 1981 was that of the United States.[13] In determining the dominant and effective nationality, the Tribunal will consider all relevant factors, including habitual residence, center of interests, family ties, participation in public life and other evidence of attachment.

---

[13] The question of interpretation posed in this case by the Government of Iran relates only to claims against Iran; however, it follows that the reasoning in this Decision is equally applicable to any claims against the United States.

To this conclusion the Tribunal adds an important caveat. In cases where the Tribunal finds jurisdiction based upon a dominant and effective nationality of the claimant, the other nationality may remain relevant to the merits of the claim.

Dated, The Hague
6 April 1984

Gunnar Lagergren
(President)

Nils Mangård

Willem Riphagen
Concurring Opinion

Howard M. Holtzmann
Concurring Opinion

George H. Aldrich
Concurring Opinion

Richard M. Mosk
Concurring Opinion

The Iranian members of the Tribunal make the following Declaration:

IN THE NAME OF GOD

The present Decision is yet another clear manifestation of a bad faith interpretation rendered by this Tribunal. The composition of the so-called neutral arbitrators, itself the result of the imposed mechanism of the UNCITRAL Rules, is so unbalanced as to have made the Tribunal lose all credibility to adjudicate any dispute between the Islamic Republic of Iran, as a Third World revolutionary country, and the United States, as the symbol of the world capitalism. The Tribunal is now composed of two Swedish arbitrators, one of whom persists in staying on despite the fact that he was rightly disqualified by the Islamic Republic prior to the commencement of the Tribunal's judicial proceedings over two years ago, and of an agent of the Dutch

Government's Ministry of Foreign Affairs, the NATO military ally of the United States.

The doctrine of non-responsibility of States vis-à-vis their nationals before international tribunals is based on the principle of the equal sovereignty of States and is supported, inter alia, by the 1930 Hague Convention, the 1949 Opinion of the International Court of Justice, the 1965 Resolution of the Institute of International Law, and by the practice of States. Its validity cannot be affected by the present Decision rendered merely to demonstrate loyalty to the United States and to damage the prestige of the Islamic Republic and the Third World.

The adherence of the Islamic Republic of Iran to the Algiers Declarations was based on the principle of equal sovereignty of States and on the United States' commitment not to further intervene in the internal affairs of Iran. The Islamic Republic shall never allow the infringement of its sovereign rights by a number of Iranian nationals who by resorting to the protection offered to them by the United States seek to evade the relevant Iranian law and jurisdiction and to resurrect a system of "capitulation" that was defeated by the long-lasting struggle of the Third World nations and particularly the Moslem nation of Iran.

As will be discussed in our Dissenting Opinion, the present Decision is void of any credibility.

Mahmoud M. Kashani Shafie Shafeiei Parviz Ansari