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CONCURRING OPINION OF RICHARD M. MOSK

TO DECISION IN CASE NO. A18

I believe that, because the plain language of the Claims Settlement Declaration[1] gives the Tribunal jurisdiction over so-called "dual nationals" (that is, nationals of the United States and Iran), the Tribunal's discussion of customary international law concerning the rights of "dual nationals" is not necessary. If such international law is deemed to be applicable, I believe the Tribunal, for the most part, correctly states international law as it applies to claims of "dual nationals." There is no majority for either the position that the Tribunal has no jurisdiction over any "dual nationals" or the position that the Tribunal has jurisdiction over all "dual nationals." Accordingly, in order to aid in the formation of a majority opinion so that the numerous "dual national" cases that have been stayed can progress, I concur in the Tribunal Decision.[2]

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[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.

[2] I also agree with the concurring opinion of Members Holtzmann and Aldrich and write this separate opinion only to expand upon some of the points they make.

Article II, paragraph 1, of the Claims Settlement Declaration expressly provides for Tribunal jurisdiction over claims of "nationals" of the United States against Iran and of "nationals" of Iran against the United States. Article VII, paragraph 1, of the Claims Settlement Declaration states as follows:

> 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 . . . .

Nationality and citizenship are not identical. "Every citizen is a national, but not every national is necessarily a citizen of the State concerned . . . ." P. Weis, Nationality and Statelessness in International Law 5-6 (2d ed. 1979). Citizenship is a term of municipal law, not of international law. Id. at 6; I L. Oppenheim, International Law 650 (H. Lauterpacht, 8th ed. 1955). The Parties to the Algiers Declarations[3] thus provided, in effect, that the term "national" as applied to individuals, shall have the same meaning as the term "citizen" under the municipal law of the country in question. Therefore, only persons who are citizens of the United States or Iran may assert claims before this Tribunal. Other persons who are nationals, but not citizens, may not present claims, even though their claims might have been presentable under customary international law.

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[3] Claims Settlement Declaration and Declaration of the Government of the Democratic and Popular Republic of Algiers ("General Declaration") and the related Undertakings.

A United States "citizen" under the law of the United States may be a national of another country. Perkins v. Elg, 307 U.S. 325, 329 (1939); 8 M. Whiteman, Digest of International Law 64 et seq. (1967). The Parties to the Algiers Declarations, by defining nationality in terms of citizenship, have provided for Tribunal jurisdiction over claims against Iran by all United States citizens, including those who also retain Iranian nationality. I cannot understand how the Tribunal concludes that the "definition of 'nationals' as 'citizens' in the Claims Settlement Declaration was an inadequate way to raise the issue of dual nationality."

There is no indication in the Algiers Declarations that the Parties intended to exclude from the Tribunal's jurisdiction the claims of United States citizens who also happen to be nationals of Iran. Indeed, when the Parties did intend to exclude from the Tribunal's jurisdiction claims of certain United States citizens they provided so expressly. For example, Article II, paragraph 1, of the Claims Settlement Declaration excludes certain claims of United States citizens, including claims related to the seizure of the 52 United States citizens on November 4, 1979. That the Governments would have expressly provided for the exclusion of claims by "dual nationals", if that was their intent, is further indicated by the fact that they did so in another agreement between them. See Treaty of Amity, Economic Relations, and Consular Rights between the United States of

America and Iran, entered into force June 16, 1957, 284 U.N.T.S. 93, 8 U.S.T. 899 (Article XVII excludes "dual nationals" from the benefits of certain exemptions).

The issue of dual nationality has long been a major subject of public international law (see, e.g., M. Katz & K. Brewster, The Law of International Transactions and Relations 40 et seq. (1960)) and is, according to both Iran and the United States, expressly covered in various treaties to which they are Parties. If, as Iran contends, this issue were such a sensitive one, Iran might have been expected to have ensured that "dual nationals" were expressly excluded from the Tribunal's jurisdiction.

One of the purposes of the Algiers Declarations was to shift litigation by United States nationals against Iran in United States courts to the Tribunal, and to terminate attachments of Iranian assets in the United States obtained by United States nationals. See General Principle B of the General Declaration and Article VII, paragraph 2, of the Claims Settlement Declaration.[4] It appears from the

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[4] General Principle B states: "It is the purpose of both parties, within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, to terminate all litigation as between the government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration."
Article VII, paragraph 2 provides: "Claims referred to the Arbitral Tribunal shall, as of the date of filing of such claims with the Tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court."

efforts by Iran to obtain dismissals of cases in the United States that Iran did not wish to permit "dual nationals" to maintain actions and attachments against Iran in United States courts. As the Algiers Declarations link the termination of litigation in United States courts to the settlement and resolution of claims through binding arbitration by the Tribunal[5] (General Principle B of the General Declaration) it follows that the Tribunal has jurisdiction over the claims of persons who have been United States citizens at the relevant times and whose claims were suspended or terminated pursuant to the General Declaration, as long as the Tribunal has subject matter jurisdiction over such claims. Indeed, in arguing for the dismissal of cases brought by "dual nationals" in United States courts, Iran itself asserted that the Tribunal had jurisdiction over such cases.[6]

It has been suggested that to interpret "nationals" to include all "dual nationals" would enable a "dual national" to bring a claim to this Tribunal against either Iran or the United States, or both - a result which would be "absurd."

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[5] Despite the language of the Algiers Declarations, Iran has argued that even if the Tribunal does not have jurisdiction over a claim by a "dual national", the claim cannot be maintained in United States courts.

[6] In spite of the surnames of the claimants in those cases, Iran contends it did not necessarily know of the "dual nationality" of such claimants. Nevertheless, Iran's failure at that time even to suggest a distinction between United States citizens who were "dual nationals" and those who were not, indicates that Iran was more interested in the termination of United States litigation than in the possibility that "dual nationals" could bring claims before the Tribunal.

Esphahanian v. Bank Tejarat. Award No. 31-157-2 (29 March 1983). Such a theoretical possibility should be accorded little weight. There is no indication that any claimant has asserted before this Tribunal a claim against both the United States and Iran.

Jurisdiction over "dual nationals" is not unprecedented in international claims practice. See, e.g., Friedberg, Unjust and Outmoded - The Doctrine of Continuous Nationality in International Claims, 4 Int'l Law. 835, 848 (1970); R. Lillich, International Claims: Postwar British Practice 31-33 (1967); I R. Lillich and B. Weston, International Claims: Their Settlement By Lump Sum Agreements 57-60 (1975); Hein v. Hildesheimer Bank (Great Britain v. Germany), 2 Trib. Arb. Mixtes 71 (1922); Blumenthal Case (France v. Germany), 3 Trib. Arb. Mixtes 616 (1923); Grigoriou Case (Greece v. Bulgaria), 3 Trib. Arb. Mixtes 977 (1924); Apostolidis Case (France v. Turkey), 8 Trib. Arb. Mixtes 373 (1928).

Moreover, States by agreement can, and have, granted their nationals rights directly enforceable in a designated international tribunal against another State or even against themselves. See,e.g., Steiner and Gross v. Polish State (Upper Silesian Arb. Trib.), 4 Ann. Dig. of Pub. Int'l L. Cases, Years 1927-28, 291-92 (A. McNair & H. Lauterpacht, eds. 1931); Charter of the Supreme Restitution Court, Annex to Chapt. 3 of the Convention on the Settlement of Matters

Arising out of the War and the Occupation of 26 May 1952, as amended on 23 October 1954, Chapt. 4, reprinted in (German) Bundesgesetzblatt, 1955 II, 431-32; C. Norgaard, The Position of the Individual in International Law 238-39 (1962).

It may be, as implied by the Tribunal, that the use by a United States citizen of his or her Iranian nationality in a fraudulent or other inappropriate manner might adversely affect the claim by that person. Cf. Flegenheimer Case, XIV U.N. Rpts. Int'l Arb. Awds. 327, 398 (U.S.-Ital. Conc. Comm. 1958). But it should be noted that Iranian law imposes Iranian nationality on a broad spectrum of people, makes it very difficult to renounce that nationality and drastically penalizes persons who succeed in doing so.[7]

Thus, some United States citizens have not been able to renounce their Iranian nationality or have not been willing to so so because of their reluctance to give up their

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[7] Iranian citizens cannot abandon their nationality until, inter alia, they reach the "full age" of 25, they have the approval of the Council of Ministers and they make arrangements to transfer to Iranian nationals all rights in real property in Iran (including that which they "may acquire by inheritance"). Those who renounce their Iranian nationality must leave Iran or be expelled, and such persons can only thereafter visit Iran once, and then, only with "special permission" from the Council of Ministers. Article 988 of the Iranian Civil Code. The following are examples of those who are deemed Iranian nationals: a woman who marries an Iranian national; children of an Iranian father; and those who have a parent of foreign nationality, and who are born in Iran and who continue to reside in Iran for one year immediately after reaching the full age of 18. Article 976 of the Iranian Civil Code.

properties and foresake their right to visit family in Iran. Their court actions in the United States have been terminated or suspended. These factors should be taken into consideration if and when the use, or alleged misuse, by "dual nationals" of their Iranian nationality is at issue.[8]

For the foregoing reasons, I suggest that the Claims Settlement Declaration, interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose" (Vienna Convention on the Law of Treaties, Article 31, paragraph 1, reprinted in 8 I.L.M. 679 (1969)), does not divest the Tribunal of jurisdiction over a claim because it was brought by a "dual national."

As noted above, if international law concerning dual nationality is applicable, I agree with the Tribunal's conclusion as to the treatment of "dual nationals" under international law.

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[8] As to whether Iranian nationality laws conform to accepted international standards, see, e.g., Art. 9(1), Convention on the Elimination of All Forms of Discrimination Against Women, December 18, 1979, entered into force Sept. 3, 1981, G.A. Res. 34/180 (annex), 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/Res/34/180 (1980), reprinted in 19 I.L.M. 33 (1980); Art. 15(2); Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/180 at 71 (1948).

To assist the Tribunal in issuing a majority opinion, so that cases brought by "dual nationals" can be heard, I concur in the Decision by the Tribunal.

Dated, The Hague
10 April 1984

Richard M. Mosk