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IRAN—UNITED STATES CLAIMS TRIBUNAL REPORTS

Volume

5

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The Settlement Agreement provides, that upon fulfilment of these conditions, "Claimants' claim against the Air Force of the Islamic Republic of Iran in Case No. 434, shall gratuitously be considered as terminated" and the Parties "release and forever discharge each other from any and all claims, counterclaims, costs, fees and expenses relating to or arising out of Claimants' claims against Respondents in Case No. 434 . . ."

Moreover, "[u]pon payment of the Agreed Sum, any claim by TWA against Respondents now pending in the U.S. Courts or elsewhere shall be considered terminated".

A copy of the Joint Request and the Settlement Agreement are attached hereto.[1]

The Tribunal finds that an award on agreed terms may be issued upon the submissions before it, in accordance with Article 34 of the Tribunal Rules and the standards applicable thereto.

Based on the foregoing,

THE TRIBUNAL AWARDS AS FOLLOWS:

The settlement is hereby recorded as an Award on Agreed Terms binding on all the parties. Consequently, the parties are bound to fulfill the conditions set forth in the Settlement Agreement.

The payment of U.S. $500,000.00 referred to above shall be made out of the Security Account established pursuant to paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria dated 19 January 1981.

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

[1 Not reprinted. See Editorial Note.]

IRAN-UNITED STATES, CASE NO. A/18

Full Tribunal: Lagergren, *President;* Mangård, Riphagen,[1] Holtzmann,[2] Aldrich,[2] Mosk,[3] Kashani,[4] Shafeiei,[4] Ansari,[4] *Arbitrators*

Signed 6 *April* 1984 [5]

The following is the text as issued by the Tribunal:

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

[1 Concurring Opinion, see p. 273 below.]
[2 Concurring Opinion, see p. 267 below.]
[3 Concurring Opinion, see p. 269 below.]
[4 Concurring Opinion, see p. 275 below.]
[5 Filed 6 April 1984.]

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 v. Bank Tejarat*, Case 157, Chamber 2, Award No. 31-157-2;[1] *Golpira v. The Government of the Islamic Republic of Iran*, Case 211, Chamber 2, Award No. 32-211-2.[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[3] 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

[1 2 IRAN-U.S. C.T.R. 157.]
[2 2 IRAN-U.S. C.T.R. 171.]
[3] 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.

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.

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 the 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 cannot 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,[1] 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 on the Law of Treaties (the "Vienna Convention").[2]

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".[3]

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. The Tribunal cannot agree that the text is so clear and unambiguous as to make further

[1] Decision in Case A-1, Issue 1, dated 30 July 1982 [1 IRAN-U.S. C.T.R. 189].
[2] U.N. Doc. A/CONF. 39/27, 23 May 1969; reprinted in 8 I.L.M. 679 (1969).
[3] *Id.* Article 31 (1).

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",[1] 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 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

[1] 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.

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.[1] 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 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.[2]

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

[1] 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.

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

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,[1] it is also not, as noted above, a tribunal 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,[2] 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,[3] 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 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

[1] 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).

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

[3] *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.

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.[1]

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 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).

[1] *Nottebohm Case* (Liechtenstein v. Guatemala) ICJ Reports (1955) 4, 22.

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.[1] Maury in "L'Arrêt Nottebohm et la Condition de 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 pre-

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

dominant 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.[1] 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.

To this conclusion the Tribunal adds an important caveat. In cases where the Tribunal finds jurisdiction based upon a dominant and

[1] 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.

effective nationality of the claimant, the other nationality may remain relevant to the merits of the claim.

[The following note is attached to the signatures of the Iranian arbitrators:]

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.[1]

CONCURRING OPINION OF MEMBERS HOLTZMANN AND ALDRICH [2]

While we concur in the decision of the Tribunal in this case, we would have preferred a decision that the Tribunal has jurisdiction over claims against Iran by all persons who were at the relevant times citizens of the United States, including those who were also citizens of Iran. We believe it would have been justifiable to conclude that the text of the Claims Settlement Declaration, by defining "nationals" as "citizens", a term of municipal law, makes clear that all nationals, including dual nationals, are entitled to bring claims to this Tribunal. Our reasoning is as follows.

By defining a "national" as a "citizen" in Article VII, paragraph 1, the Parties have thus provided that, for purposes of this agreement, the term "national" shall have the same meaning as the term "citizen" under the national law of the country in question. It is indisputable that the term "citizen" under the laws of the United States includes all citizens, including those who retain also another nationality. Thus, the definition in Article VII of national as coextensive with citizen can only be understood as meaning that the Tribunal has jurisdiction over claims against Iran by all United States citizens, including those who also retain Iranian nationality.

Iran has argued that the disjunctive "or" in Article VII, paragraph 1, precludes this interpretation, but we find that argument unpersuasive. The structure of that provision, particularly the phrase "as the case may be", makes it clear that under Article VII, paragraph 1, a national of Iran is defined as a natural person who is a citizen of Iran and that a national of the United States is defined as a natural person who is a citizen of the United States.

This analysis of the meaning of "national" is also the interpretation that is most consistent with the object and purpose of the Algiers Declarations. As the Tribunal notes, it seems clear that a major obstacle to the resolution of the crisis then existing in the relations between Iran and the United States was the existence of litigation in United States courts, brought against Iran by citizens of the United States and often involving judicial attachments of Iranian

[1] See p. 275 below. See also Statement by Iranian Prime Minister Mousavi at p. 428 below.]
[2] Signed 6 April 1984; filed 9 April 1984.]

assets. As is stated in General Principle B, that obstacle was overcome by the creation of a new, substitute forum — this Tribunal — to which the American claimants could have access in lieu of the courts of the United States. This object and purpose would have been partially frustrated if the claims of some United States citizens (those who were dual nationals) were left in United States courts. It cannot be assumed that "nationals" has a different meaning in General Principle B from its meaning in Articles II and VII of the Claims Settlement Declaration. If dual nationals cannot bring their claims to this Tribunal, then they could have remained, with their attachments, in the courts of the United States, and such a result would have interfered with the return of Iranian assets and the termination of litigation in American courts, which was the object and purpose of these treaty provisions.

This conclusion is strengthened by the fact that certain claims and claimants have been specifically excluded from the jurisdiction of this Tribunal. Examples are certain claims by or on behalf of the 52 United States nationals referred to in paragraph 11 of the General Declaration and claims arising under certain contracts referred to in Article II, paragraph 1, of the Claims Settlement Declaration. If there remained any doubts about jurisdiction over claims by dual nationals, application of the maxim *expressio unius est exclusio alterius* would dispel them.

The subsequent practice of the two Parties is consistent with this interpretation in that the United States suspended litigation in the United States by all United States citizens, including dual nationals, and the lawyers representing Iran in at least one such case involving dual nationals urged dismissal or suspension of the proceedings on the ground that the Declarations required the claimants to come to this Tribunal. Although it is unclear whether the dual nationality of the claimants in that case was apparent at the time, the Iranian surname must have suggested the possibility.

We deeply regret the tone and content of the "Declaration" which the three Iranian arbitrators have inserted above their signatures on the Decision. Such libelous and baseless invective has no place in an international arbitral tribunal, and merits no reply. A factual error relating to the Tribunal's Rules does, however, require correction: the choice of the third-country arbitrators was not the result of an "imposed mechanism of the UNCITRAL Rules". The UNCITRAL Rules were not "imposed"; they were mutually agreed upon by both Governments in the Claims Settlement Declaration. Nor are the Rules unfair; they were recognized by the General Assembly of the United Nations as being "acceptable in countries with different legal, social and economic systems" and were unanimously recommended by that body.[1]

CONCURRING OPINION OF RICHARD M. MOSK TO DECISION IN CASE NO. A/18 [2]

I believe that, because the plain language of the Claims Settlement Declaration[3] 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.[4]

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[5]

[1] Resolution 31/98, adopted 15 December 1976.

[2] Signed 10 April 1984; filed 10 April 1984.]

[3] 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.

[4] 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.

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

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.

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.

Among the purposes of the Algiers Declarations were to shift litigation by United States nationals (as that term is defined in the Claims Settlement Declaration) against Iran in United States courts to the Tribunal and to terminate attachments of Iranian assets in the United States obtained by such United States nationals. *See* General Principle B of the General Declaration and Article VII, paragraph 2, of the Claims Settlement Declaration.[1] It appears from the 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[2] (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.[3]

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". *Esphahanian v. Bank Tejarat*, Award No. 31-157-2 (29 March 1983).[4] 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.

[1] 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 litigations 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.

[2] 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.

[3] 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 that in the possibility that "dual nationals" could bring claims before the Tribunal.

[4] 2 IRAN-U.S. C.T.R. 157.]

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.[1]

Thus, some United States citizens have not been able to renounce their Iranian nationality or have not been willing to do so because of their reluctance to give up their properties and foresake their right to visit family in Iran. Their court actions in the United States have been

[1] 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 father 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.

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.[1]

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.

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.

Concurring Opinion of Willem Riphagen [2]

1. I concur in the Decision in rejecting *both* contentions to the effect that the Tribunal — *a priori* and *per se* — has, respectively has no jurisdiction over claims by persons who are, under U.S. law, citizens of the United States of America, and are, under Iranian law, citizens of the Islamic Republic of Iran (hereinafter referred to as "dual nationals").

2. I also concur with the majority in holding that the Tribunal is *not* faced with the question of "diplomatic protection" in the classic public international law sense of that notion, though it is certainly relevant that even there where international courts and tribunals were faced with the question of the *persona standi* of a *state*, rather than of an *individual*, before such international court or tribunal, there is a clear tendency — as noted in the Decision — to search for what is then often called the "dominant" or "effective" nationality.

3. That the Tribunal is not faced with the question of "diplomatic protection" is confirmed by a comparison between the system of dispute settlement, as embodied in the Algiers Declarations, and the

[1] 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).

[2] Filed 11 April 1984.]

system underlying other arrangements dealing with the procedures of settlement of disputes between states only. In this connection, and among other differences — some of which are noted in the Decision — one may point to the difference between Art. V of the Claims Settlement Declaration and, e.g. Art. 37 of the Statute of the I.C.J. The enforcement of the Tribunal's Awards through the Security Account, and the particular jurisdictional exception, contained in Art. II(1) in five of the Claims Settlement Declaration (forum selection clauses) are also illustrative in this respect.

4. At least within the framework of such particular system as the one to which this Tribunal belongs, dual nationality raises questions, not so much relating *separately* to "jurisdiction" only, or to the choice of the "better" (i.e. the "dominant" or "effective") nationality only, but rather relating to the search for the *most relevant* nationality *within a specific context* (including the context of *persona standi* before this Tribunal).

5. Indeed the *fact* that the person presenting the claim is a citizen of Iran, under the law of the Islamic Republic of Iran, *as well as* a citizen of the United States of America, under United States law, may well remain relevant within specific contexts.

Thus, e.g., it is — even within the framework of "diplomatic protection" — often admitted that, if one State treats a dual national as an alien (i.e. by arbitrarily discriminating against that person as compared with its own citizens) a claim may validly be brought before an international Tribunal on the basis of that persons other nationality. It is also often admitted that no international protection is given to a dual national as regards rights acquired by him through the use of his "other" nationality, if such rights are validly reserved to its citizens by the other state.

In *both* cases the *merits* of the particular claim are involved. (Incidentally, it would not seem that either of those cases is a case where the doctrine of estoppel, as applied in the relationships between private individuals under municipal law, could be applicable by analogy).

6. Quite apart from the foregoing considerations relating to the merits of the claim, the search for the most relevant nationality within a specific context cannot be undertaken without taking into account the "cause" of dual nationality.

Grosso modo dual nationality is caused by divergent municipal nationality provisions as regards (a) acquisition of nationality at birth (*ius sanguinis* versus *ius soli*); or (b) the effect of change of family status (such as marriage, in which case some municipal legislations attach automatic consequences, while some other make the acquisition of another nationality dependent upon a unilateral declaration to that effect of the person concerned); or (c) change of nationality through naturalization.

7. The relevance — for the purpose of determining the most relevant nationality in a particular context — of, on the one hand, social conduct (such as the choice of one's habitual residence and of one's centre of interests, family ties, and participation in the social life of a particular community) and, on the other hand, of the presence or absence of deliberate acts aimed at the relinquishment from the "other" nationality, is clearly different in the various cases of dual nationality.

8. This concurring opinion is certainly not the place to enter into casuistics.

I understand the Decision as leaving it to each Chamber to decide in view of the detailed circumstances of each particular case, in accordance with the above considerations.

Dissenting Opinion of the Iranian Arbitrators in Case A/18 Concerning the Jurisdiction of the Tribunal over Claims Presented by Dual Iranian-United States Nationals against the Government of Iran[1]

INTRODUCTION

A. The Facts

The Algiers Declarations adhered to by the Government of the Islamic Republic of Iran and the Government of the United States on January 19, 1981, register in the chronicle of relations between Iran and the United States. One notable occurrence marking these relations was the conspiracy leading to the 1953 events. Checking a grass roots movement in Iran, the 1953 conspiracy brought the new Iranian Government into close association with the United States Government. It also paved the way for the conclusion of large-scale oil contracts between the newly-installed Iranian regime and American oil companies, and these companies soon manoeuvred themselves into position to control and exploit the Iranian petroleum industry. Extensive exchange in the economic, social, political, and especially, military spheres further united the two governments. This process,

[1 Filed 10 September 1984.]

however, was abruptly reversed in 1979, when the hostage crisis and seizure of the United States Embassy compound precipitated the severance of all political, economic and military relations between Iran and the United States. The occupation of the United States Embassy compound in Tehran was viewed as necessary to prevent the re-occurrence of what was engineered from those same premises in 1953. For its part, the United States Government imposed economic measures against Iran. An Executive Order by the President blocked all Iranian government assets located in the United States or held abroad by persons subject to the jurisdiction of the United States. A military incursion, albeit unsuccessful, was launched on Iranian territory. The crisis in the relations between the two nations entailed wider ramifications, and so numerous countries, international organizations, and even Pope John Paul II presented proposals for defusing the situation, but all to no avail. For its own part the Iranian nation, viewing itself as the victim of injustice, particularly since 1953, had determined to find an appropriate means of asserting its rights. A solution to the crisis was finally found through the intervention by the Government of the Democratic and Popular Republic of Algeria. Following a period of indirect negotiations, the Algiers Declarations were concluded on January 19, 1981.[1] In the preamble, the Algerian Government declared itself as having served, at the two governments' request, as the intermediary in seeking a "*mutually acceptable*" solution to the crisis. Therein also lies revealed the object of the Declarations: an amicable resolution of the crisis between the United States and Iran. The second Declaration, entitled the "Claims Settlement Declaration", provides for the establishment of an arbitral tribunal. The Tribunal's mandate is founded upon the common intent of the two governments to bring about settlement of the claims of nationals of each country against the government of the other through binding arbitration. The composition and jurisdiction of the Tribunal were provided for in the Declaration. It was to be composed of nine members: one-third neutral and one-third appointed by each of the two governments party to the Declarations. Claims were to be decided either by the Full Tribunal or by a panel of three members of the Tribunal. In execution of that Declaration, the

[1] These Declarations together comprise three separate, but inter-dependent, instruments:
(1) Declaration of the Government of the Democratic and Popular Republic of Algeria (hereinafter called "The Declaration");
(2) Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims (hereinafter called "The Claims Settlement Declaration");
(3) Undertaking of the Government of the United States of America and the Government of the Islamic Republic of Iran.

Tribunal was in fact established and claims were filed there over a period of three months, from October 19, 1981 to January 19, 1982. Among these were a certain number of claims filed against the Iranian Government by Iranians holding both Iranian and United States nationalities. In order to demonstrate the Tribunal's jurisdiction, these claimants asserted their United States nationality, contending that it was the effective and dominant one. The Iranian Government has vigorously contested the jurisdiction of the Tribunal over those claims and maintained that the Algiers Declarations bar claims by Iranian nationals against the Iranian Government from the jurisdiction of the Tribunal. In particular the Iranian Government has invoked the principle of non-responsibility, according to which a dual national may not avail himself of one of his nationalities in order to bring an international claim against his own government.

On February 25, 1983, the Iranian Government duly seized the Full Tribunal with a request that it interpret the Algiers Declarations in order to determine whether such claims by Iranian nationals against the Government were admissible. However, despite the fact that the issue was brought before the Full Tribunal, the majority arbitrators in Chamber Two precipitately rendered awards in two cases involving dual nationality and thus prejudiced the issue submitted before the Full Tribunal. The Full Tribunal majority[1] rendered its decision on April 6, 1984, wherein it declared its jurisdiction over claims presented against the Iranian Government by dual Iranian-United States nationals when the effective and dominant nationality of the claimant is that of the United States. The conclusion reached by the majority is not founded upon a good faith interpretation of the Algiers Declarations, nor is it an adequate expression of substantive international law. The decision is deplorable, as are the reasons inspiring it.

The manner in which the majority decision sets forth the facts is equally lamentable. The two relatively voluminous memorials submitted to the Tribunal by the Iranian Government contained an exhaustive study of general rules of interpretation and international jurisprudence on the interpretation of treaties, the position of substantive international law and the practice of States concerning dual nationality, as well as examination of the inter-State quality of this Tribunal. The United States Government confined itself to a short

[1] The word "majority" is used merely for convenience. As revealed in our statement attached to the Award, this "majority" is composed of three American arbitrators and three so-called "neutral" arbitrators, one of whom was challenged by the Iranian Government even before the commencement of the Tribunal's work. The other one was imposed on the Tribunal without the consent of one of the arbitrating parties.

memorial, which was accepted in the spirit of good will even though submitted on the same day as the hearing. Yet the majority decision accords a large place to the contentions of the United States Government, while failing even to accurately indicate all the points and arguments raised by the Iranian Government.

B. The Issue Presented

The jurisdiction of this Tribunal is defined under Article II, paragraph 1 of the Claims Settlement Declaration:

> 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 . . .

Three essential criteria are set forth in this paragraph, namely:

> (1) *ratione personae.* "The claims of nationals of the United States against Iran" and those of nationals of Iran against the United States;[1]
> (2) *ratione materiae.* "and arise out of debts, contracts, expropriations or other measures affecting property rights"; and
> (3) *ratione temporis.* A stipulation whereby claims must be "outstanding" on the date of the agreement.

The first criterion raises an issue particularly pertinent to the claims of natural persons holding dual Iranian-United States nationality. These individuals are actually asserting their United States nationality, acquired through naturalization and concealed up to now, so that they may present claims against the Iranian Government which objects to the jurisdiction of the Tribunal over these claimants' claims.

Provisions of the Algiers Declarations pertinent to this issue were submitted to the Full Tribunal. The proper legal solution must therefore be sought through interpretation of the relevant provisions of the Declarations, in light of their object and purpose and of their context. Examination of customary international law also plays a helpful, if supporting role. In the following discussion, therefore, the problem of interpretation shall be studied first (Part I), followed by a consideration of the present position of international law on the issue (Part II).

[1] The apparent reciprocal nature of the clause should not be allowed to distort the reality. While thousands of claims have been brought before this Tribunal by American nationals and corporations against the Government of the Islamic Republic of Iran, not more than a few insignificant claims have been filed by the nationals of Iran against the Government of the United States. For more details, see our Dissenting Opinion in Case A/2 [1 IRAN-U.S. C.T.R. 104].

PART I: INTERPRETATION OF THE ALGIERS DECLARATIONS WITH RESPECT TO ADMISSIBILITY OF DUAL NATIONAL CLAIMS

The question here is whether the Algiers Declarations confer jurisdiction upon the arbitral tribunal established thereunder over claims by certain Iranians asserting United States nationality in order to claim against Iran. Specifically, it is a question of determining the meaning and bearing of relevant contractual provisions: the provisions of Articles II(1) and VII(1-a) of the Claims Settlement Declaration. Interpretation of these provisions is subject to the customary rules of interpretation found in substantive international law (Point 1); and it is in reference to them that the question of jurisdiction must be resolved (Point 2).

1. The general rule of interpretation is provided under Articles 31 and 32 of the Vienna Convention on the Law of Treaties of May 23, 1969 (the Vienna Convention).[1] The Vienna Convention in fact embodies customary rules derived from jurisprudence and international doctrine. These articles provide:

> *Article 31. General Rule of Interpretation*
>
> 1. 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.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

[1] U.N. Doc. A/CONF. 39/27, May 23, 1969.

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. Supplementary Means of Interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

These provisions give rise to a few observations:

(a) It would be a grave error in judgment to believe that these articles would bar an examination of the common intent of the parties to the treaty from the process of interpretation in order to determine the meaning and bearing of a disputed provision. Generally considered to be declarative of customary law, these articles in fact specify how the common intent of the States party to the treaty regarding a point at issue shall be determined. For this purpose it suggests a method relying on the text to determine the meaning and the bearing of the contractual provisions. However, in reality,

> To use the text as the starting point is thus not to minimize the importance of the common intent of the parties: but rather, to reveal it through examination of the instrument in which it is expressed.[1]

It is therefore a question of discerning the common intent of the States party to the treaty. The terms, taken in their ordinary meaning and context and in light of the object and purpose of the treaty, are relied on because they are the most certain means for expressing the common intent. To this end, the above articles also prescribe recourse to the preamble and preparatory work of the treaty and circumstances

[1] M.K. Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités", *R.C.A.D.I.*, Vol. 151 (1976-III), pp. 25-26. Translated from the original French:
"Prendre le texte comme point de départ, ce n'est donc pas minimiser l'importance de l'intention des parties, mais procéder à sa découverte par l' examen de l'instrument par lequel elle s'est exprimée."

of its conclusion, as well as other instruments facilitating disclosure of the common intent of the States party to the treaty with respect to the point at issue. Indeed, this reasoning finds specific support in the last paragraph of Article 31 of the Vienna Convention, whereby "A special meaning shall be given to a term if it is established that the parties so intended."

(b) The terms "object", "purpose", and "aim", are also frequently used in international jurisprudence. It is established in international practice that these terms are held to be, if not synonymous, then at least largely inseparable in so far as matters of interpretation are concerned. It is important to note that,

> The object and purpose of a treaty are actually a matter of a *subjective* object and purpose intended by the parties. It is not a matter of an objective, *independent* and specific object and purpose based on which it would be possible to indicate that which the parties should have done: to interpret it in light of that object and purpose would perhaps not be interpreting the treaty, but rather to revise it.[1]

On the other hand, customary international law furnishes other, complementary means of interpretation for the Tribunal, when the provisions of the Vienna Convention are not in themselves sufficient to clearly discern the intent of the contracting parties, such as the rule of restrictive interpretation of clauses conferring jurisdiction upon an international tribunal, and the rule of *contra proferentem.*

2. In light of the foregoing, one must determine the meaning of the provisions in the Algiers Declarations relating to the jurisdiction of the arbitral tribunal established thereunder, and their bearing upon the claims of Iranian nationals asserting their United States nationality in order to claim against the Government of Iran. Article II, paragraph 1 of the Claims Settlement Declaration has defined the jurisdiction of the Tribunal:

> 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 . . .

[1] *Id.*, p. 57. (Emphasis added). Translated from the original French:
"Il s'agit en effet de l'objet et du but du traité, donc d'un objet et d'un but subjectifs voulus par les parties: il ne s'agit pas d'un objet et d'un but objectifs, indépendants et intrinsèques, sur la base desquels il serait possible d'indiquer ce que les parties auraient dû faire; interpréter à la lumière d'un tel objet et d'un tel but serait peut-être non pas interpréter le traité, mais le réviser."

The term "national" has been defined by Article VII, paragraph 1:

> For the purposes 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 . . .

Nothing in the context, preamble, or preparatory work indicates a converging will of the two governments to extend the tribunal's jurisdiction to dual nationals. It remains to determine whether the above-cited articles confer such a jurisdiction upon the Tribunal or not. The United States Government maintains that the term "citizen", as defined by United States municipal law, includes any person having United States nationality, whether or not he has any other nationality as well. According to the Iranian Government, a normal reading of the text, and in particular the disjunctive "or", excludes dual Iranian-United States nationals from the sphere of application of these articles.

It is thus necessary to proceed to an examination of the facts of the issue to determine the ordinary, normal meaning of the term "national" and the bearing of these provisions upon the issue of dual nationality before this Tribunal.

(a) It seems very clear that the term "national", in its ordinary and normal sense, designates an individual who is the national of one State, *and only one State.* Statelessness, dual nationality, or multiple nationality is an anomaly and therefore cannot enter into the ordinary meaning of the term "national". Dr. J. H. W. Verzijl has stated as much in his treatise on international law:

> Section 6. Abnormal Situations: Dual or Multiple Nationality and Statelessness.
>
> The normal function of nationality as delimiting the mutual spheres of competence between States by means of their personal substratum, their "people", is impaired by the fact that many individuals possess two or even more citizenships, and also by the fact that other individuals have no nationality. These two abnormal situations of dual or multiple nationality and of statelessness (a) spring from various causes, (b) entail inconvenience of varying gravity for the persons concerned and (c) call for legal measures aimed at their elimination or, at least, as far as possible, at an alleviation of their consequences. (V *International Law in Historical Perspective*, 1972, p. 48)

The term "national", as it has been employed in the Algiers Declarations, refers to the normal status of nationality, namely, individuals who are exclusively Iranian or exclusively American.

That conclusion is confirmed by the provisions of a lump sum agreement concluded between the Governments of Egypt and the United States on May 1, 1976, the purpose of which was to settle claims of United States nationals against the Egyptian Government.[1] Article III of that agreement, the text of which is almost identical to Article VII of the Claims Settlement Declaration, is as follows:

> 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. (*T.I.A.S.* 8446; 27 *U.S.T.* 4214).

However, Article 4 of the Agreed Minute signed the same day by the two Governments made specific stipulations concerning the term "national", by virtue of which:

> 4. 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.

Thus, Article 4, annexed as a Note to the provisions of Article III, would lead one to assume that dual nationality does not normally enter into the meaning of "national", or even "citizen". If it is intended that the term "national" be extended to include dual nationals, specific provision must be made to that effect. No such stipulation is present in the Algiers Declarations. An exclusively Iranian citizen may present a claim against the United States Government and an exclusively United States citizen may present a claim against the Iranian Government. But an individual holding dual

[1] It should be noted that the Agreement between the United States and Egypt was concluded nearly twenty years after the Egyptian Revolution. Furthermore, the Agreement did not provide for the settlement of disputes through an international forum such as the one provided by the Algiers Declarations, but for the payment of a lump sum to the United States Government to be divided among the American claimants. Hence, it was in fact to the advantage of the Egyptian Government that as many claims as possible be settled through the paid lump sum. Otherwise, the Egyptian Government would not have agreed to be answerable to its nationals.

Iranian-United States nationality can present a claim against neither government.

(b) Furthermore, Article II, paragraph 1 of the Claims Settlement Declaration provides for a bilateral system of recourse, inasmuch as United States nationals may claim against Iran and Iranian nationals may claim against the United States:

> . . . claims of nationals of the United States against Iran and claims of nationals of Iran against the United States . . .

This provision distinguishes the Algiers Declarations from the many peace treaties concluded after the two World Wars, whereby a unilateral system of recourse was established in favor of the victorious Powers against the defeated States, but not the reverse. From this observation it may be deduced that the disjunctive "or" inserted in the first paragraph of Article VII of the Claims Settlement Declaration:

> . . . 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

precludes the application of the Declarations to those who are a citizen of Iran "*and*" the United States. This conclusion, which would appear to be dictated by elementary principles of semantics, is otherwise supported by its cohesiveness with Article II, paragraph 1. The conditions for the admissibility of natural persons before the Tribunal have been very precisely defined so as to exlude any possibility of dual nationality in those concerned. This conclusion thus constitutes a coherent interpretation leading to an equal solution for the two categories of claimants provided for under that article.

(c) Furthermore, examination of the object and purpose of the Algiers Declarations, as viewed in their true context, casts substantial light on the meaning of the expression "claims of nationals of the United States against Iran" — the present point at issue. Paragraph B of the General Principles of the General Declaration states that:

> It is the purpose of both parties . . . 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. (Emphasis added)

The purpose thus stated, the General Declaration further clarifies the use of the disjunctive "or" in Article VII, paragraph 1. As already

mentioned, 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, so closely allied, particularly during the two decades preceding the Iranian Revolution. At the time of the conclusion of the Algiers Declarations the re-establishment of these relations appeared nearly inconceivable, at least in the near future. The United States Government wished of course to protect the interests of certain United States nationals which had had contractual relations with the former Iranian regime. On the other hand, the Government of Iran wished to withdraw its assets and deposits from the United States, and had at the same time expressed its willingness to clear up its legitimate debts with Americans. In this context, there was an urgent need to make some sort of settlement between the Iranian and the American Governments — but this need did not exist for the resolution of any possible dispute between the Iranian Government and Iranian nationals.

In short, it was not the purpose of the parties to terminate all litigation between the nationals of one State and that State itself.

(d) It remains to examine the two arguments advanced by the United States Government in support of the admissibility of claims of dual Iranian-United States nationals against Iran. The first argument, as mentioned before, is drawn from the definition of "citizen", according to which a "United States citizen" allegedly includes a citizen who is a "dual national". By this it is contended that any dual national who is considered both Iranian and American is American and thus a "United States citizen". However, this assertion does not resolve the difficult issue of the admissibility of a claim by such a citizen against Iran, of which that citizen also holds nationality. Particular note should be taken of the term "citizen" as it was employed in relevant provisions of the 1976 agreement concluded by the Governments of the United States and Egypt. In that agreement, the purpose of which was nearly identical to that of the Algiers Declarations, the two governments party to the agreement found it necessary to specifically express their intent to extend the application of the agreement to cases involving dual nationals. That is to say, the term "citizen" was not in itself adequate to resolve the issue raised by dual nationality.

The second argument, to which the majority decision implicitly alludes, is drawn from the commitment of the United States Government to terminate all legal proceedings in United States courts involving claims of United States nationals against Iran. The orders issued on November 14, 1978 by the United States President blocked

the assets of the Iranian Government and deprived it of its State immunity. In violation of its international responsibility concerning the immunity of public assets of Iran, the United States administration thereby threw open the doors to legal action against Iran. Licenses were granted by the United States Government in order to attach Iranian property. The extremely unfavorable psychological climate existing at that time in the United States judicial milieu also facilitated the lodging of claims by United States claimants against Iran and the issuance of attachment orders against Iranian property. This was all the more so since Iran was absent from the court proceedings and had no means of defense. However, it should be noted that these licenses illegally granted to attach Iranian property were revocable — they did not create some sort of acquired right for United States claimants. In concluding the Algiers Declarations, the United States Government undertook to terminate the legal proceedings lodged in United States courts against Iran and to lift the attachment orders concerning Iranian public assets subject thereto. For its part, and to show that financial considerations played no part in the resolution of the hostage crisis, the Government of the Islamic Republic of Iran undertook substantial financial commitments: $3.667 billion was placed at the disposal of the Federal Reserve Bank of New York for the pre-payment of bank loans not yet due; $1.418 billion was deposited in an Escrow Account in London to guarantee other United States bank claims; and $1 billion was deposited in a Security Account to guarantee execution of any eventual arbitral awards against Iran. It is obvious that the annulment of the attachment orders obtained in the above-mentioned circumstances cannot establish the jurisdiction of this Tribunal. It is also obvious that the definition of United States nationals given for that purpose by the United States administration and municipal law cannot impose itself upon the Tribunal, whose jurisdiction is defined by inter-State agreement and which conforms to international law.

(e) On the basis of the evidence submitted to the Tribunal, it may be regarded as an established fact that the Declarations were essentially drafted by the United States Government. See, for example, the Affidavit of Robert B. Owen, the then Legal Advisor to the United States Department of State in Case A/15 Claim IVF. It is a rule of customary international law that when the drafting of a treaty is attributable to one of the parties, any possible ambiguity in its terms must be interpreted to the disadvantage of the drafting State. This is expressed by the maxim, "*Verba ambigua accipiuntur contra proferentem.*"

This rule appears justified by the simple reason that, as Charles

Rousseau pointed out, "Having had the opportunity to draft it more explicitly, the drafting State must itself bear the consequences of its negligence. This has frequently been applied to ambiguous provisions by international jurisprudence."[1]

(f) The final point to consider concerns the rule of restrictive interpretation of clauses conferring jurisdiction upon an international tribunal, and the reasons justifying the application of this rule to the present case. A study of international practice shows that when the meaning of a clause conferring jurisdiction upon an international court is doubtful, whatever form the clause may take, that clause must be restrictively interpreted. As the Permanent Court of International Justice has declared:

> . . . 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 is simply that:

> . . . 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 or pacific settlement. (Permanent Court of International Justice, *Eastern Carelia Case*, Series B, No. 5, p. 27)

Jurisdiction therefore ceases at the point when it is no longer clear that the State concerned has unequivocally consented to submit to international adjudication. The Permanent Court of International Justice has so stated:

> 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 favour of it is preponderant. (*Chorzów Factory Case*, Series A, No. 8, p. 32)

The rule of restrictive interpretation is equally applicable to arbitration cases, for identical reasons. As the sole arbitrator indicated in the *Kronprins Gustaf Adolf* case:

[1] I *Principes Généraux du Droit international publique,* Pedone, §443. Translated from the original French:
"Etat rédacteur ayant la possibilité de la formuler d'une manière plus explicite, il ne doit s'en prendre qu'à lui-même des conséquences de sa négligence . . . [Elle a été] fréquemment appliquée par la jurisprudence internationale aux dispositions ambiguës."

> . . . considering the natural state of liberty and independence which is inherent in sovereign States, they are not to be presumed to have abandoned any part thereof, the consequence being that the high contracting Parties to a Treaty are to be considered as bound only within the limits of what can be clearly and unequivocally found in the provisions agreed to and, . . . those provisions, in case of doubt, are to be interpreted in favor of the natural liberty and independence of the Party concerned (Sweden/U.S.A., 18 July 1932, II *R.I.A.A.* p. 1254).

The same rigidity of restrictive interpretation is found in the jurisprudence of claims commissions. As stated by the umpire in the *Columbian Bonds* case:

> . . . in all cases in which reasonable doubt exists as to its competence, and especially in those now under consideration which interest directly the credit and the good faith of one of the contracting parties, the commission is bound to decline to entertain them, and to construe it powers in a limited and not in an extensive sense.[1]

From the foregoing it would follow that the provisions of Articles II(1) and VII(1) of the Claims Settlement Declaration, taken in their ordinary meaning and interpreted in the context of the Algiers Declarations and in light of their object and purpose, do not confer jurisdiction upon the Tribunal for the claims of dual Iranian-United States nationals against the Iranian Government. That is the single and sole interpretation in good faith "*. . . which is in harmony with the natural and reasonable way of reading the text, having due regard to the intention of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court . . .*" (*I.C.J. Reports* 1952, Judgement of July 22, 1952, *Anglo-Iranian Oil Co.*, p. 104.)

In any event this conclusion is supported by the exigencies of restrictive interpretation of arbitral clauses as well as by application of the customary rule of *contra proferentem*.

However, under Section IV, entitled "Reasons for Decision", the majority devotes merely two pages to interpretation of the contractual provisions of the Algiers Declarations concerning the admissibility of the claims of dual Iranian-United States nationals before the Tribunal. The majority decision rejects both the United States' argument contending that the text was clear on its face, and the Iranian argument contending that, "Iran, not recognizing dual

[1] United States/Columbian Mixed Commission, 18 May 1866. Moore, IV *International Arbitrations*, p. 3614; De La Pradelle et Politis, II *Recueil arbitrages internationaux*, p. 488.

nationality, could not be presumed to have accepted such jurisdiction when the Claims Settlement Declaration was signed."

Having declared that the text is not clear, the majority then goes on to deal with the customary rules of interpretation whereby a treaty must be interpreted 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. Astonishingly, however, it stops there. In short, the majority chooses not to comprehend the elementary point that it was required, given the various facts at issue, to elucidate the meaning of contractual provisions and their bearing on the disputed issue submitted for its examination. It also had the duty to respond to the arguments of the Iranian Government. In fact the memorials submitted to the Tribunal by Iran devote a lengthy section to the ordinary meaning attributable to the terms of the provisions of the Algiers Declarations concerning the Tribunal's jurisdiction, the preamble, their context, the circumstances under which they were concluded, and other facts concerning the issue, facilitating the Tribunal's determination of the meaning of the provisions relevant to dual nationals. Other general rules of interpretation, such as restrictive interpretation of clauses conferring jurisdiction upon an international court and particularly the rule of *contra proferentem* were extensively treated by Iran. A simple reading of the two above-mentioned pages (pages 15 and 16 of the majority decision) is sufficient to establish that the majority remains entirely mute on every point which would have clearly led to a declaration of lack of jurisdiction. Following this suspicious silence, the majority by-passes all the relevant issues and goes on to deal with Article 31, paragraph 3(c) of the Vienna Convention to interpret the provisions submitted before it.

Article 31, paragraph 3 stipulates:

> 3. There shall be taken into account, together with the context:
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) *any relevant rules of international law applicable in the relations between the parties.* (Emphasis added)

The terms of paragraph 3(c), to which the majority refers, are clear enough. However, the point is that paragraph 3(c) could never alone impose a conclusion the treaty itself did not sanction. Paragraph 3(c)

could act as support for a solution drawn from interpretation of the treaty. Thus, the essential elements for determining the meaning of a disputed provision are the terms in their ordinary meaning and in their context, the object and purpose stated in the treaty preamble, the preparatory work and the circumstances under which the treaty was concluded, and other instruments stated in the first and second paragraphs of the above-mentioned Article 31. The solution dictated by these instruments can, as a final resort, be confirmed by a relevant rule of international law.

The majority interpretation must be deplored in that it is in manifest contradiction with elementary rules of logic, does not adhere to good faith, and above all, is contrary to solutions generally accepted in public international law.

PART II: INTERNATIONAL LAW AND THE ISSUE OF DUAL NATIONALS

Article 31, paragraph 3 of the Vienna Convention offers several subsidiary elements to the Tribunal which it may take into consideration when determining the meaning of the disputed provision. In particular, paragraph 3(c) refers to "any relevant rules of international law applicable in the relations between the parties". Of course paragraph 3(c) cannot be the source for any particular solution not sanctioned by the treaty itself. Aided by all the facts of the issue, the solution is dictated by research into the meaning of relevant contractual provisions. International law thus constitutes a complementary source of interpretation; within this framework must be regarded the general solutions found in international law for the issue of dual nationality when it is a condition for admissibility of a claim before an international tribunal. It is therefore highly regrettable that the majority relies exclusively upon paragraph 3(c) to impose upon Iran a solution not derived from interpretation of the Algiers Declarations.

The question is thus to determine what solution is found in international law for the problem of dual national claims before an international tribunal against a State of which the individual concerned is a national.

Two principles have been maintained before the Tribunal: namely, non-responsibility and effective nationality, respectively invoked by the Islamic Republic of Iran and the United States Government. According to the first, a dual Iran-United States

national (in other words, a person having the nationality of the two States which established this Tribunal) may not assert his United States nationality in order to bring an international claim against the Iranian Government; such a claim is inadmissible. On the other hand, the second principle permits such a claim to be brought, on condition that the claimant have predominant ties with the United States. It is thus a matter of determining, through examination of conventions and jurisprudence, the value which may be accorded each of these two principles.

A. The Solutions Found in International Conventions

The Hague Convention of April 12, 1930 concerning Certain Questions relating to the Conflict of Nationality Laws (the Hague Convention), constitutes an essential source available to the Tribunal in its consideration of the present jurisdictional issue. However, application of the Hague Convention is linked to the character of the Tribunal and the claims brought before it. It is therefore important first to look into that character (Section 1) and then to go on to consider the provisions of the Hague Convention and its application to the present issue (Section 2).

Section 1.

Without expressly stating so, the majority seems to recognize the international character of the Tribunal (Point 1), but it casts doubt on whether the claims the Tribunal is called upon to decide are also inter-State in nature (Point 2).

1. (a) The international character of the Tribunal is unquestionable. The Tribunal's very creation springs from an international source; its existence, powers, function and jurisdiction are drawn from a political act related to public international law, concluded between the Iranian and United States Governments. Two-thirds of the Tribunal's members are appointed by the two governments party to the Declarations, and the remaining one-third are neutral members. In accordance with Article VI(2), each State designates an agent at the seat of the Tribunal to represent it to the Tribunal and to receive notices or other communications directed to it or to its nationals, agencies, instrumentalities or entities in connection with proceedings before the Tribunal. Further, Article VI(3) stipulates: "The expenses of the Tribunal shall be borne equally by the two governments." The Tribunal also is to apply international law. These traits attest to the international character of this Tribunal, as established by inter-State agreement.

1. (b) It is of particular importance to discern the exact bearing of Article V of the Claims Settlement Declaration. A superficial reading might lead one to believe that the Tribunal is not to apply international law and thus would cast certain doubt on the international character of the Tribunal. Article V 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.

Still, it would be well to state first that an international tribunal which, due to its nature, must apply principles of public international law, is not barred from applying municipal law or resorting to a conflict of laws mechanism found in private international law. Recourse by an international tribunal to municipal laws and rules of private international law is rather common and occasionally even indispensable. International tribunals refer to pertinent rules of municipal law to settle preliminary or incidental issues such as the nationality of natural or juridical persons, the status of heirs, or the conditions of validity of a contract, as well as other formalities which must be resolved at an early stage. It should be pointed out that the function of an international adjudicator applying municipal law in connection with an international issue is radically different from that of a municipal one; the institutions of municipal law thus transposed by the international adjudicator form elements of international law. The main issue which an international tribunal is called upon to decide is whether the respondent State has respected its international responsibility towards the rights of foreign nationals. That issue must be settled in light of principles of international law. On these points may be cited the Serbian and the Brazilian Loans cases decided by the Permanent Court of International Justice in 1929. The two cases are similar. The issue submitted for the court's decision was that of determining whether the payment of loans issued in France by the Serbian and Brazilian Governments should have been effected "at gold value" or in "paper francs". To settle the question, the court referred to rules of private international law and municipal statutes of the Serbian and Brazilian States. The contractual obligations of these latter having thus been defined thereby, the main task of the court was to establish whether or not the disputed practices by these States

constituted a violation of public international law. (P.C.I.J., Series A, Nos. 20/21, pp. 16-49 and pp. 101-126).

In light of the foregoing, it can be declared that the provisions of Article V of the agreement creating the Tribunal do not depart from the usual practice of international courts. Actually, the first sentence of Article V, stating that "The Tribunal shall decide all cases on the basis of respect for law", is nothing extraordinary. In fact it is essentially based on Article 37 of the Hague Convention of October 18, 1907, on the Pacific Settlement of International Disputes, whereby "International arbitration has for its object the settlement of disputes between states by judges of their own choice and *on the basis of respect for law.*"[1] In other words, the Tribunal shall base its decisions on law, not equity, and that law can be no other than international law. Equal reference in Article V to choice of law rules and commercial law, as well as other provisions and elements, appears fully justifiable due to the nature and diversity of the claims brought before the Tribunal. The claims and counterclaims filed with the Tribunal are diverse and result from contracts of sale, construction and technical assistance, as well as from expropriations, nationalizations, banking operations, tax and social security premiums, etc. The preliminary issues raised in these claims must of course be settled with reference to contractual provisions, applicable laws, and banking and commercial usages. The contractual obligations of the concerned State thus determined, it remains to resolve the main issue: whether practices by the Iranian or United States Government *vis-à-vis* foreign nationals conform to their international responsibility and whether the minimum standard of justice or the "equitable treatment" to which foreign nationals are entitled has been observed by the Iranian or the United States Government. These issues must be assessed with respect to international law.

Chamber Two unanimously so decided the issue of a clause designating applicable law invoked by a claimant for evaluation of damages and interest. The case was between a United States company (CMI) and the Iranian Ministry of Roads and Transportation and concerned a contract of sale subject to the laws of the State of Idaho. According to Chamber Two:

> It is difficult to conceive of a choice of law provision that would give the Tribunal greater freedom in determining case by case the law relevant to the issues before it. Such freedom is consistent with, and perhaps almost essential to, the scope of the tasks confronting the Tribunal, which

[1] I Bevans 577. Emphasis added.

include not only claims of a commercial nature, such as the one involved in the present case, but also claims involving alleged expropriations or other public acts, claims between the two Governments, certain claims between banking institutions, and issues of interpretation and implementation of the Algiers Declarations. Thus, the Tribunal may often find it necessary to interpret and apply treaties, customary international law, general principles of law and national laws, "taking into account relevant usages of the trade, contract provisions and changed circumstances", as Article V directs.

Although convinced that the laws of the State of Idaho would lead to the same result in determining damages, the Chamber ruled that it:

> . . . prefers to analyze the damage questions in accordance with general principles of law, rather than by reference to the Code as incorporated in the statutory law of Idaho (Award No. 99-245-2, p. 9).[1]

The institution established is thus, by its source and function, a true international tribunal.

It remains to demonstrate that the claims the Tribunal is called upon to decide are inter-State claims brought before it by means of the classic process of diplomatic protection.

2. (a) The mechanism for the settlement of claims between the Governments of the Islamic Republic of Iran and the United States is the perfect expression of diplomatic protection whereby two governments, acting in the political interest of their nations and at the same time to protect the interests of their nationals, convene an arbitration to settle their respective disputes. It is true that the claims of United States nationals against the Iranian Government and the claims of Iranian nationals against the United States Government were originally private claims arising under Iranian or United States jurisdiction and, as such, subject to Iranian or United States municipal laws. However, due to political intervention by the two governments concerned, these private claims became inter-State disputes, the settlement of which is part of the commitments undertaken by the two governments in the Algiers Declarations of January 19, 1981.

The Permanent Court of International Justice ruled in that way in the *Mavrommatis* case when the inter-State character of the case was contested by the British Government:

> In the case of the Mavrommatis concessions it is true that the dispute was at first between a private person and a State — i.e. between Mr.

[1 4 IRAN-U.S. C.T.R. 263, 268.]

> Mavrommatis and Great Britain. Subsequently, the Greek Government took up the case. The dispute then entered upon a new phase; it entered the domain of international law, and became a dispute between two States. (P.C.I.J., Series A, No. 2, p. 12)

2. (b) The context in which the Algiers Declarations were concluded affirms the inter-State nature of the claims of which the Tribunal is seised. The Declarations in fact brought a peaceful solution to an international crisis between the Iranian and United States Governments. In the Declarations the two governments undertook, *inter alia,* "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" (Declaration, Point B). It is also significant to point out that the instrument creating the Tribunal is entitled:

> 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.

The Tribunal itself is named, "The Iran-United States Claims Tribunal" (Claims Settlement Declaration, Article II). The parties to the arbitration set up under the Algiers Declarations are thus exclusively the two governments: Iran and the United States. The Declarations and the international arbitral tribunal established thereunder have as their sole mandate the resolution of an inter-State conflict.

2. (c) Official statements by the highest-ranking officials in the United States Government, as well as a United States Supreme Court decision, are all in perfect agreement with the fact that the Algiers Declarations and the provisions therein for the settlement of claims result from political intervention by the United States Government and were concluded to protect the interests of the United States and its nationals. On behalf of the Carter administration, Alexander M. Haig, Jr., then-Secretary of State, declared that the Algiers Declarations and the mechanism for the settlement of claims against Iran were the result of an official political decision taken in United States interests:

> . . . the surest way of resolving many of the financial problems between the United States and Iran consistent with the interests of U.S. claimants and the broader interests of the United States in the Persian Gulf area, a

region of strategic importance to the United States. (20 *International Legal Materials*, 1981, p. 365)

It appears even more clearly in the "Statement of Interests" filed with United States Courts in 1981 by the United States Department of Justice:

> The Agreement with Iran is only the latest in a historical practice of claims settlement which confirms the President's constitutional authority to settle international claims to bind American claimants . . .
>
> Typically, rather than renounce claims of American nationals, the Executive has utilized two primary methods to settle such claims and has often done so through Executive Agreement. First, the Executive Branch has espoused single or multiple claims arising out of specific events or covering a specific period of time, often accepting lump sum payments in full settlement of American claims. Second, *the United States has agreed to settle claims through the establishment of arbitration mechanisms, and has made that arbitration binding, exclusive and non-reviewable.* (*Id.*, pp. 368-369. Emphasis added)

The "Statement" particularly emphasizes:

> International claims are claims of the United States, and once their settlement has been provided for in a claims agreement . . . the agreement is a 'full and final settlement of those claims', even without the approval of the individual whose claim has been settled. The Executive has exercised unreviewable discretion as to whether to present a claim, and when he does, in determining time, extent and means of pressure in presenting it.
>
> Further, the Executive Branch "may take such settlement [of a claim] as it deems appropriate". This authority has allowed the President *to sacrifice certain claims for overriding foreign policy reasons, and to release some or all of a foreign nation's previously blocked assets as part of an overall claims settlement.*
>
> *Even where, as here, a national's claim has entered the domestic judicial system, that does not defeat the President's authority to resolve that claim by international agreement.* (*Id.*, pp. 370-371. Emphasis added)

These statements word-by-word reveal the inter-State character of the claims of which the Tribunal is seised, and which were brought before it by means of diplomatic intervention taken in the exercise of powers conferred by the Constitution of the United States upon the United States President. The United States Supreme Court has so ruled in *Dames & Moore v. Donald T. Regan*:

> Not infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are "sources of friction" between the two sovereigns. *United States v. Pink* 315 U.S. 203, 225 (1942). To resolve these difficulties, nations have often entered into agreements settling the claims of their respective nationals. As one treatise writer puts it, international agreements settling claims by nationals of one state against the government of another "are established international practice reflecting traditional international theory". L. Henkin, *Foreign Affairs and the Constitution* 262 (1972). Consistent with that principle, the United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries. Though those settlements have sometimes been made by treaty, there has also been a longstanding practice of settling such claims by executive agreement without the advice and consent of the Senate. Under such agreements, the President has agreed to renounce or extinguish claims of United States nationals against foreign governments in return for lump sum payments or the establishment of arbitration procedures. To be sure, many of these settlements were encouraged by the United States claimants themselves, since a claimant's only hope of obtaining any payment at all might lie in having his government negotiate a diplomatic settlement on his behalf. But it is also undisputed that the "United States has sometimes disposed of the claims of citizens without their consent, or even without consultation with them, usually without exclusive regard for their interests, as distinguished from those of the nation as a whole." Henkin, *supra* at 263. Accord, The Restatement (Second) of Foreign Relations Law of the United States §213 (1965) (President "may waive or settle a claim against a foreign state . . . even without the consent of the [injured] national"). It is clear that the practice of settling claims continues today. Since 1952, the President has entered into at least 10 binding settlements with foreign nations, including an $80 million settlement with the People's Republic of China.
>
> Crucial to our decision today is the conclusion that Congress has implicity approved the practice of claim settlement by executive agreement. (453 U.S. 654 at 679-680)

2. (d) The majority in vain tries to cast doubt upon the inter-State nature of the claims before the Tribunal. These claims are true inter-State claims brought before an international tribunal by means of the classic method of diplomatic protection. The fact that Article III(3) of the Claims Settlement Declaration permits claims of more than $250,000 to be presented directly to the Tribunal by the claimants themselves in no way affects the inter-State nature of the Tribunal and the claims it is called upon to decide. Actually, a government may choose to espouse its nationals' claims against another government and arrange by political agreement for an international arbitration to

settle those disputes — whether or not it authorizes its nationals personally to present their claims in no way affects the nature of the diplomatic protection the government is extending. It is merely a matter of a simple procedural technique justified by the convenience it affords in view of the great number of claims (see: Brownlie, *Principles of Public International Law*, 3rd edition, 1982, p. 578). This procedural technique has precedents in international practice. Direct recourse was allowed before the Central American Court of Justice 1908-1918 and the Mixed Arbitral Tribunals established under the Peace Treaties of 1919. It is also allowed before the European Court of Human Rights and the Arbitral Commission against the German Government established by the 1952 Convention on the Settlement of Matters Arising out of the War and the Occupation (332 *U.N.T.S.* 219).

2. (e) And finally, the substantially significant evidence of the Single Article Act adopted by the Iranian Parliament authorizing the Iranian Government to agree to an arbitration *with the United States Government* leaves no doubt as to the inter-State nature of the disputes brought before the Tribunal:

> *Bill Concerning the Settlement of Financial and Legal Disputes of the Government of the Islamic Republic of Iran with the Government of America*
>
> *Single Article* — The Government is authorized by observing the provisions approved by the Islamic Consultative Assembly (the Majlis) to take steps by means of consensual arbitration *to settle the financial and legal disputes between the Government of the Islamic Republic of Iran and the Government of America,* which did not arise out of the Islamic Revolution of Iran and the seizure of the Center of American plotting.
>
> *Note:* With respect to those disputes the settlement of which in competent tribunals of Iran has been provided for in the respective contract, they are excluded from being subject to this Single Article.

This law, which was notified to the United States Government and to which Article II(1) of the Claims Settlement Declaration makes express reference, constitutes unequivocal proof establishing the inter-State nature of the claims brought before the Tribunal by means of intervention and diplomatic protection.

The foregoing leads to the conclusion that the Iran-United States Claims Tribunal is an international tribunal which was created by diplomatic intervention, and that the claims brought before it are inter-State claims. The character of the Tribunal and the nature of the claims having been thus defined, it follows that the admissibility of

dual national claims is thus subject to the classic rules of diplomatic protection, in particular to the provisions of Article 4 of the Hague Convention of 12 April 1930.

Section 2.

1. Article 4 of the 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.

At the same time, Article 5 of the same Convention provides:

> Within a third State, a person having more than one nationality shall be treated as if he had only one. Without prejudice to the application of its law in matters of personal status and of any conventions in force, a third State shall, of the nationalities which any such person possesses, recognize exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected.

The conflict of nationality raised before a court of a third State (where nationality is criterion for application of municipal law) should not be confused with the conflict of nationality before an international court (where nationality is the criterion for admissibility of the claim of a dual national against his own government). In fact, the Hague Convention sets forth two different solutions for the conflict of nationalities as it arises in two distinctly separate domains: that of private international law and that of public international law. It thus intentionally dispels any confusion as to the domain of application of the theory of effective nationality. The concept of effective nationality is embodied in Article 5 to resolve a conflict of nationality before a court of administrative authority in a third State where the determination of nationality is necessary for the application of a municipal law or an administrative measure. It is entirely another matter when nationality is a precondition for the jurisdiction of an international tribunal. The solution for the conflict of nationality raised under these circumstances before the Tribunal is dictated by the principle embodied in Article 4 of the Hague Convention.

The majority, however, tries to avoid applying the Hague Convention to the issue before the Tribunal. Under the heading "The 1930 Hague Convention" (p. 17), it declares:

> 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 . . .

Next, and without any indication of what those changes are which have allegedly occurred in the concept of diplomatic protection, or what direction those changes have taken, the majority adds:

> 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.

From the fact that this proposal was rejected, it appears that the majority wishes to deduce that direct recourse to an international tribunal by a dual national is not barred by Article 4 of the Hague Convention. That deduction cannot be accepted. The spirit of bad faith in which the majority proceeds to such an approach for the sole purpose of avoiding application of the Hague Convention to the present issue is deplorable. Such a spirit is not worthy of an international tribunal and does not favor the development of international institutions.

2. Article 4 actually gave rise to a long debate at the Conference in The Hague. 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). The entire Convention, containing that article, was approved by 40 votes to 1 (see the references given by Professor Herbert W. Briggs, the Rapporteur to the Conference, in *Annuaire de l'Institut de droit international,* Vol. 51-1 (1965), p. 153, notes 3 and 4).

Article 4 of the Hague Convention is thus the expression of customary law. As N. Bar-Yaacov stated: "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,* 1961, p. 76). The Italian-United States Conciliation Commission in the *Mergé* case (1955) affirmed 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 convention rule," (*Law Among Nations*, 1981, p. 207). The principle embodied in Article 4 was also confirmed by the Institute of International Law in its 1965 Resolution (as will be further discussed hereinbelow). That is to say, contrary to what the majority advances, the Hague Convention is of primordial and fundamental interest.

3. The fact that the claim is presented directly before the Tribunal by the injured party himself in no way affects the principle contained in Article 4 of the Hague Convention. In practice, direct recourse before an international tribunal is rare and claims are usually presented on behalf of the injured party by the State of which he is a national. Nevertheless, the same reasons barring a claim against a State of which the injured party is a national apply, whether that claim be directly presented by the injured party himself, or presented on his behalf by another State.

Actually, long before the Hague Convention, Borchard expressed the state of public international law on the issue before us as the following:

> 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)

It is to be noted that during the First Committee's discussion of the Project for the Hague Convention, the Yugoslav delegate moved that the following additional provision be added to Article 4: "a person possessing two or more nationalities may not plead that he is a national of one State, in order to bring a personal action through an international tribunal or commission in respect of another State of which he is also a national". This proposal was viewed as a restatement of the obvious and as such the First Committee did not consider it expedient to add any supplementary precision to Article 4 of the Convention. The Rapporteur of the First Committee, J. Gustavo Guerrero, stated that the Committee did not incorporate this proposal into the text of the Convention, "since it deals with a case that is so rare as to be of little interest to the majority of States . . ."[1]

[1] *Minutes of the First Committee*, p. 305; Weis, *Nationality and Statelessness in International Law*, 1956, p. 184.

One year later, the British-Mexican Commission expressed the bearing of the principle embodied in Article 4 of the 1930 Hague Convention in the decision it rendered in the *Honey* case on March 26, 1931:

> 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 ... (*Further Decisions and Opinions of the Commissioners*, p. 14)

The principle embodied in Article 4 bars admission of an international claim by or on behalf of a dual national against one of the States of which he is also a national.

4. Whatever the character of the Tribunal and the nature of the claims filed therewith, the Tribunal is obliged to respect the principle contained in Article 4 of the Hague Convention. Actually, the Convention embodies two fundamental principles. The first principle is set forth under Articles 1, 2 and 3 of the Convention:

> Article 1. It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.
>
> Article 2. Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.
>
> Article 3. Subject to the provisions of the present Convention, a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses.

Article 4, containing the second principle, provides:

> Article 4. A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.

International law thus recognizes the right of each State to determine the conditions whereby its nationality is granted and to determine through its own laws who its nationals shall be. However, H. Battifol has pointed out:

> 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 ... [1]

Article 4 of the Hague Convention is thus what logically follows from the principle of the liberty of States to attribute nationality as set forth in the first three articles of the Hague Convention.

5. The issue of dual nationality was taken up again by the Institute of International Law at its Warsaw session in 1965. In the draft resolution, the Rapporteur proposed an exception to the principle of non-responsibility for instances where the person asserting protection had the active nationality of the respondent State. Article 4 of the draft resolution initially was proposed in the following terms:

> 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. [2]

This solution raised heated criticism, notably that of R. L. Bindschedler (*Id.*, Vol. 51-I, p. 176) and Quincy Wright, professor emeritus at the Universities of Chicago and of Virginia (*Id.*, p. 220). Bindschedler restated his criticism during the open debate, saying:

> 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. [3]

[1] (I *Droit international privé*, 1981, p. 80 §78). Translated from the original French:
"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 éta-blir ..."

[2] *Annuaire de l'Institut de droit international*, 1965, Vol. 51-I, p. 173. Translated from the original French:
"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."

[3] *Id.*, Vol. 51-II, p. 182. Translated from the original French:
"Ceci va à l'encontre d'un principe le mieux établi de 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."

During the course of these debates, the Rapporteur, Professor Herbert W. Briggs, declared that the amended resolution submitted by Messrs. Bindschedler and Von der Heydte was being accepted.

The text finally adopted was as follows:

> 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).

Of course the Institute's Resolution does not constitute an international convention. Nevertheless, the fact that the Institute assembles in unity the experts on public international law, representing different legal systems, makes the Resolution of acute doctrinal interest and adequately allows it to be considered as the state of public international law.

All of the foregoing demonstrates that the principle embodied in Article 4 of the 1930 Hague Convention is in fact the corollary of the principle of the sovereign equality of States; and as such has been upheld by international practice, the principle still maintains its force and pertinence.

B. The Solutions Found in Jurisprudence

A priori it might be assumed that international arbitrators faced with the problem of dual nationality have adopted two different solutions: non-responsibility and effective nationality. That assumption is too simplistic. In fact, international practice, carefully considered and properly understood, leads one to the conclusion that there exists only one single solution to the conflict of dual nationality each time the conflict involves the nationalities of the respondent and claimant States. Not a trace of the theory of effective nationality can be found in jurisprudence. Thus as complete a description as possible of the decisions rendered in jurisprudence is necessary (Section 1), as is their explanation (Section 2). The post-World War II decisions merit a separate section (Section 3).

Section 1: Description of the Decisions

1. *Drummond.* The first case involving dual nationality was *Drummond,* decided April 10, 1934 by virtue of the Treaty of Paris dated May 30, 1814 concluded between France and Great Britain subsequent to the French Revolution. That treaty provided for the

appointment of a commission "to examine and settle claims of British subjects against the French Government". The property of James Lewis Drummond, who emigrated from England in 1783, was confiscated in 1792 and sold in 1794 by the French authorities. The claim filed with the Commission was for reparation for damages suffered by Drummond due to the confiscation of his property. However, the claim thus presented against France was rejected on the grounds

> [t]hat 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, II *Privy Council Reports*, p. 295).

This decision has been cited as the first, albeit tacit, emergence of the notion of effective nationality; it has also been cited to support the theory of non-responsibility.

Actually, the theory of non-responsibility finds its first express occurrence and its justification in the case of *Executors of R.S.C.A. Alexander,* decided in 1872 by the British-American Civil War Commission established under the Treaty of Washington concluded May 8, 1871 between Great Britain and the United States. Alexander was born in the United States of a British father; he held both United States nationality *jus soli,* and British nationality *jus sanguinis.* His 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 contested 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." United States Commissioner James S. Frazer also submitted the following opinion, which is relatively renowned and in which the presiding commissioner, 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, III *International Arbitrations* pp. 2529-31).

2. Following the civil wars and revolutions in Latin America, several mixed arbitral commissions were established under agreements concluded between various Latin American countries and the other countries affected by these events. On several occassions the commissions dealt with a conflict of nationalities.

A conflict of nationalities was raised before the *United States-Venezuelan Mixed Claims Commission* established under the agreement concluded December 5, 1885 between the United States and Venezuela. The Mixed Claims Commission considered the issue of dual nationality raised in the claims of *Narcisa de Hammer* and *Amelia de Brissot*, presented on behalf of the widows and respective children of two United States nationals, Hammer and Brissot. Mrs. de Hammer and Mrs. de Brissot were Venezuelans by birth who had acquired United States nationality upon their marriages to United States citizens. The Venezuelan and United States 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 appeared influenced by the preponderant importance of the nationality acquired at birth, and domicile appeared to have played a decisive role in the decision (Moore, *op. cit.*, pp. 2456-2461). On the other hand, the Commission declared itself as having jurisdiction in the *Willet* case. A woman, Venezuelan at birth, who had maintained her Venezuelan domicile and had acquired United States nationality upon her marriage to William E. Willet, a United States national, had presented a claim in the capacity of administratix of her husband's estate. Her claim was declared admissible. (Moore, *op. cit.*, pp. 2254-58).

Other arbitral commissions were established during the period 1903-1905 by various treaties Venezuela concluded separately with, among others, Great Britain, Italy and France. The Venezuelan arbitral commissions of 1903 considered the issue of dual nationality too:

The *Mathison* case and the *Stevenson* case were rejected by the British-Venezuelan Commission (IX *R.I.A.A.* pp. 485 and 494). The Umpire in the *Stevenson* case declared that

> In the opinion of the umpire, where, as in this case, there appears to be a conflict of laws constituting Mrs. Stevenson a British subject under British Law and Venezuelan under Venezuelan Law the prevailing rule of public law, to which appeal must be taken, is that she is deemed to be a citizen of the country in which she has her domicile . . . (*Id.*, p. 500).

The French-Venezuelan commission rendered decisions in the *Maninat* case (1905) and the *Massiani* case (1905) (X *R.I.A.A.* pp. 55 and 159). The claims were rejected by the commission for the reason that, "In a conflict of laws as to the nationality the law of the place of domicile should prevail." (*Id.*, at 78 and 183).

The Italian-Venezuelan commission also rendered similar decisions in four cases of dual nationality: the *Brignone* case (X *R.I.A.A.* p. 542), the *Miliani* case (*id.*, p. 584), the *Giacopini* case (*id.*, p. 594), the *Poggioli* case (*id.*, p. 669). These claims were all declared inadmissible and domicile appears to have been an important criterion.

3. The *Canevaro* case (Italy/Peru) decided May 3, 1912 by the Permanent Court of Arbitration is frequently cited. It 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 *jus sanguinis* and Peruvian *jus soli*. One of the issues considered by the court was whether Rafael Canevaro could be admitted as an Italian claimant. The court, noting that Rafael Canevaro had on several occasions acted as a Peruvian citizen, declared that under these circumstances, whatever Rafael Canevaro's status as a national may have been in Italy, the Government of Peru had a right to consider him a Peruvian citizen and to deny his status as an Italian claimant. (Scott, *Hague Court Reports*, 1916, pp. 284-296).

4. The issue of dual nationality was again raised before the *Tripartite Claims Commission* established by the United States, Austria and Hungary in 1928. The claims of Alexander Tellech, a dual Austrian-United States national, was rejected. The Commission

pointed out that "citizenship is determined by rules prescribed by municipal law" and added:

> Possessing as he did dual nationality, [Mr. Tellech] voluntarily took the risk incident to residing in Austrian territory and subjecting himself to the duties and obligations of an Austrian citizen arising under the municipal laws of Austria. (VI *R.I.A.A.* p. 249).

The same reasoning is found again in a similar case concerning a dual Austrian-United States national, Max Fox (*Id.*, pp. 249-50).

5. *The Mixed Arbitral Tribunals (T.A.M.).* The Mixed Arbitral Tribunals were established by virtue of the various treaties of peace to settle claims of the nationals of the Allied Powers against the former enemy States and their nationals. Several cases involving dual nationality were decided by the Mixed Arbitral Tribunals, including: *George S. Hein* v. *Hildersheimer Bank* decided by the Anglo-German commission on April 26 and May 10, 1922 (II *T.A.M.* p. 71); *Oskinar* v. *the German State* decided by the French-German commission on October 29, 1924 (VI *T.A.M.* p. 787); *Barthez de Montfort* v. *Treuhander* decided by the French-German commission on July 10, 1926 (VI *T.A.M.* p. 806); *Baron Frédéric de Born* v. *the Serbo-Croatian-Slovene State* decided by the Hungarian/Serbo-Croatian-Slovene commission on July 12, 1926 (VI *T.A.M.* p. 499); *Grigoriou* v. *the Bulgarian State* decided by the Greek-Bulgarian commission on January 28, 1924 (III *T.A.M.* p. 977); *Daniel Blumenthal* v. *the German State* decided by the French-German commission on April 24, 1923 (III *T.A.M.* p. 616).

6. *The Mixed Claims Commission,* established under various 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 decided December 19, 1929 by the British-Mexican Commission, the Mexican agent contended 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 in that contention, declaring that "the British Government, in cases of such duality, held the same view as expressed by the authors whom his Mexican Colleague had quoted". The claim was then dismissed. (V *R.I.A.A.* p. 75).

The case of *Fredrick Adams and Charles Thomas Blackmore* before the same British-Mexican Commission (decision of 3 July 1931) was a claim against the Mexican Government for damages suffered by two British nationals. It was contended by the Mexican agent that Mr. Blackmore, having been born in Mexico, was thus 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 British Agent agreed as to the dual nationality of Mr. Blackmore, and on that ground abandoned that part of the claim. (V *R.I.A.A.* pp. 216-217). The *Coralie Davis Honey* case also was a case of dual nationality and was declared inadmissible. (Decision of March 26, 1931, *Id.*, p. 133).[1]

7. It is important to refer to the decision rendered on March 29, 1933 in the *Central Rhodope Forests* case between Greece and Bulgaria wherein it was established that,

> [Given that the claimant was equally a national of the defendant State] under these circumstances, according to international common law, it would not be admissible to recognize the Greek Government as having the right to present claims to their benefit for these damages, since these were caused by their own government.[2]

Finally, an *obiter dictum* of the International Court of Justice warrants a privileged place in our description of international precedents. In its Advisory Opinion rendered April 11, 1949, in the case concerning *Reparation for Injuries Suffered in the Service of the United Nations*, the Court referred to "The ordinary practice whereby a State

[1] Other cases involving dual nationality have been cited by Edwin M. Borchard (*The Diplomatic Protection of Citizens Abroad*, 1916, p. 588) in support of the principle of non-responsibility. These are: the *Martin* case decided in 1868 by the Mexican-United States Claims Commission (Moore, *op. cit*, p. 2467), the *Boyd* case decided in 1873 by the British-United States Claims Commission (*id.*, p. 2465), and the *Lebret* case decided in 1880 by the French-United States Commission (*id.*, p. 2488, 2492). These precedents, which perhaps because of their reasoning have remained completely isolated, were all decisions to reject the claim.

[2] III *R.I.A.A.* p. 1421. Translated from the original French:
"Dans ces conditions [étant donné que le demandeur était également le ressortissant de l'état défendeur] il ne saurait être admissible, selon le droit international commun, de reconnaître au Gouvernement hellénique le droit de présenter des réclamations à leur profit pour ces faits dommageables, étant donné que ceux-ci ont été causés par leur propre Gouvernement."

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).

8. Within the framework of the Treaty of Peace with Italy signed February 10, 1947 in Paris, several mixed conciliation commissions were established to settle the claims of nationals of the victorious powers against Italy. It occurred that these commissions were called upon to decide cases involving dual nationality. The *Strunsky-Mergé* case decided by the Italian-United States Conciliation Commission is rather renowned and is frequently cited in support of the theory of effective nationality. The Commission, presided over by Don José de Yanguas Messía, declared the co-existence of two principles in international law, namely, the principle of non-responsibility and that of effective nationality; and it concluded that the first principle "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, since the claimant could not be considered as having dominant United States nationality, the Government of the United States was not entitled to present a claim against the Italian Government in her behalf. (XIV *R.I.A.A.* pp. 236-248).

The same commission applied the jurisprudence of *Mergé* to other cases of dual nationality. The French-Italian Commission established by virtue of the same treaty also settled several cases of dual nationality in the same manner as the Italian-United States Commission did.

Section 2: Explanation of the Decisions

1. It seems appropriate to set aside at the outset the decisions concerning dual nationality which were poorly motivated or rather isolated and thus are not of much importance to theory. The precedents representing international practice in the matter and frequently cited in support of one or the other theory are the cases of: *Alexander* (1872), *Drummond* (1834), those decided by the various Venezuelan arbitral commissions (1855-1905), the *Canevaro* case (1912), the cases of *Tellech* and *Fox* (1928), and those decided by the various Mexican arbitral commissions (1927-1931). Finally, it would be appropriate to cite the jurisprudence of the mixed arbitral tribunals and commissions set up after the first and second World Wars, the *Mergé* jurisprudence (1955) in particular.

A simple reading of the international precedents cited above leaves the initial impression that the tide of jurisprudence is marked by two currents: that of non-responsibility and that of effective or dominant nationality. The first current is represented by the *Alexander* jurisprudence and the Mexican arbitrations (1927-1931). The second is represented by the Venezuelan jurisprudence (1885-1905), *Canevaro* and the arbitral tribunals and commissions established after the first and second World Wars. This relatively simplistic view does not withstand a careful examination of international precedents which clearly demonstrate that, save the jurisprudence of the tribunals established by peace treaties following the first and second World Wars, international precedents have unanimously upheld the principle of non-responsibility with respect to claims before an international tribunal by dual nationals against one of their governments. What is particularly striking is the unity of reasoning which all the various arbitrators and arbitral tribunals followed in concluding by upholding the principle of non-responsibility. Apart from a few apparent contradictions, international precedents exhibit an appreciable coherence in their reasoning. In essence, the principle of non-responsibility, with respect to claims before international tribunals by dual nationals against a State of which the claimant is a national, finds its justification in the principle of the sovereign equality of States. It is based on the principle of equal rights with respect to the systems by which independent and sovereign States attribute nationality.

Furthermore, the State does not incur any responsibility in international law *vis-à-vis* its own national, and consequently the relations between a State and its national with respect to the legal system of that State are of no concern in public international law. These are the same basic concepts invoked in the above-cited jurisprudence in application of the principle of non-responsibility. The United States commissioner, Frazer, was the first to express the principle in the *Alexander* case decided in 1872:

> . . . 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. (Moore, *op. cit.*, pp. 2531).

A thorough reading of *Drummond* (Knapp, P.C. Rep. 295; 12 Eng. Rep. 492) shows that it, too, consists of a decision to reject the claim

of a dual national against his own government for the same reasons, albeit implicit, which were stated in *Alexander*. The Drummond family was of English origin who had sought refuge and been domiciled in France for more than a century. James Lewis Drummond was born in France (Avignon) and had spent most of his life in France. Although an English subject, he exhibited all the marks and attributes of a Frenchman. As a result, the revolutionary authorities in France had justly held him to be a French subject and had confiscated his property inasmuch as it belonged to a Frenchman who had emigrated abroad. In due course a claim was presented to the commission established under the Treaty of Paris of May 30, 1814, to examine and liquidate the claims of the British Majesty against the Government of France. It was established before the commission that James Lewis Drummond, "might be a British subject and might also be a French subject; and if he were a French subject, then no act done towards him by the Government of France could be considered an illegal act . . ." The claim was rejected for the reason that, ". . . 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". It is clearly apparent that the decision was inspired by the same concepts as the decision in *Alexander* was, "for no government would recognize the right of another to interfere thus on behalf of one whom it regarded as a subject of its own".

2. It is particularly important to determine the exact bearing of the jurisprudence of the Venezuelan arbitrations, so frequently cited in support of the existence of the theory of "effective nationality" in international law. It is true that various criteria of effective nationality, particularly domicile, were raised by the arbitrators when rejecting the claims of dual nationals. Nevertheless, a careful analysis of the reasoning followed by the arbitrators indicates that the basic concept leading the arbitrators to reject dual national claims was that of the need for according due respect to the principle of sovereign equality of States. This is clearly apparent in the cases of *Narcisa de Hammer* and *Amelia de Brissot* wherein the Venezuelan arbitrator made the following observations before referring to the claimant's domicile:

> Every independent State has the right to determine who is to be considered as citizen or foreigner within its territory, and to establish the manner, conditions and circumstances, to which the acquisition, or loss of citizenship, are to be subject. But for the same reason that this is a right appertaining to every sovereignty and independence, no one can pretend to give an extraterritorial authority to its own laws regarding citizenship, without violence to the principles of international law, according to which the legislative competence of each state does not extend beyond the limits of its own territory. (Moore, *op. cit.*, p. 2457).

The two other arbitrators concurred with the Venezuelan arbitrator and they declared the claims inadmissible. Recourse to domicile therefore was completely superfluous. The guiding concept was to resolve a conflict of nationalities based solely on the primacy of the nationality of the defendant State, in that instance Venezuela. On this point in particular, several passages from Professor Basdevant's article written just shortly afterwards are very interesting and shed a great deal of light on the weight of the jurisprudence of the Venezuelan arbitrations of 1903-1905:

> 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.[1]
>
> . . .
>
> 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 nationality determined by the law of the responsible State must prevail over that determined by 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

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

given in this instance to the law of Venezuela, attempts have been made to justify the British practice as a precedent, which is not decisive.[1]

It is pointless to elaborate on explanations already so clearly stated by Professor Basdevant. In essence, it is clear that the rationale inspiring the Venezuelan jurisprudence on the issue of dual nationality was respect for the sovereignty of the defendant State — in that instance Venezuela — and the desire to hold the laws of that defendant State as prevailing over any other law permitting a dual national to claim against Venezuela when he also held that nationality.

These ideas were expressed in more specific terms in the *Heirs of Jean Maninat* case. The umpire first declared that the agreement establishing the tribunal was silent on the problem of dual nationality and then he stated:

> This process of reasoning seems to dispose of all genuine doubt as to what is meant by this term as used in the protocol, yet were there room for doubt the ordinary rules of interpretation would be efficient aids. Among others, there is the rule of interpretation that where the agreement is susceptible of two interpretations that interpretation is to be taken which is least onerous upon the party who must render the service or suffer the loss under the agreement.
>
> (Woolsey, Intro. Int. Law. sec. 113. Bouvier Law Dict., vol. 1, p. 124. *Id.*, p. 1107; *id.*, p. 429; *id.*, p. 416. Bouvier Law Dict., vol. 1, p. 1106, citing 71 Wisconsin 177).

He next defined the framework for reasoning in all cases of dual nationality as the following:

> When by the law of the respondent Government the claimant is a Venezuelan, France may not intervene, as to do so would make her law

[1] *Id.*, pp. 49-50. Translation from the original French:
"Pour justifier l'incompétence de la commission mixte, il a été dit plusieurs fois que le conflit de nationalité ... impliquait cette incompétence, ou encore — c'est la même idée sous une autre forme — que la 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-Vénézuéla : dans l'affaire Mathison l'agent birtannique 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'après 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 vénézuélien 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 Français) par l'Italie (ou par la France) à l'égard de tout pays à l'exception du Vénézuéla. Cette prépondérance donnée dans notre espèce à la loi du Vénézuéla, on cherche à la justifier par l'exemple anglais qui n'est pas décisif ..."

> superior to the law of Venezuela, which is not permissible as between two sovereign nations. The right of Venezuela, as the respondent Government, to regulate her own internal affairs and to determine who are her citizens, involving mutual protection and support, is too essential an attribute of sovereignty to be invaded or disturbed. If the treaty bore unmistakable evidence that this attribute of sovereignty had been abdicated, it would be the duty of this tribunal to act accordingly, but it bears no such evidence. (X *R.I.A.A.* pp. 78-79).

In the case the French commissioner referred to the Protocol of 19 February 1902 which provided for "claims for compensation presented by the French"[1] and declared that this term therefore covered the French, and that "The protocol says in no way that it is indispensable to prove that the nationality of the claimants was solely and exclusively French." (*Id.*, p. 73). Nevertheless, Umpire Plumley observed that:

> In this protocol France is permitted to intervene only on behalf of Frenchmen who are recognized as such by the laws of Venezuela, and whatever equities may exist between the claimants and Venezuela, none can be considered by this tribunal except those which are thus presented. (*Ibid.*, p. 79).

The same reasoning was upheld again by Umpire Plumley in the *Heirs of Massiani* case:

> ... to be sovereign and independent each country must be master of its internal policy and subject neither to advice nor control by any other country nor by all other countries in respect to such matters. France would not brook that Venezuela should name to her who are her citizens within her domain ... (*Ibid.*, p. 184).

In the *Brignone* case decided by the Italian-Venezuelan Commission, the entire passage from the *Alexander* decision was quoted, which well illustrates the attitude which that commission took in tackling the issue of dual nationality (*ibid.*, pp. 548-549).

It would be a grave error in judgement to interpret the Venezuelan arbitrations as establishing the so-called theory of effective nationality. In that jurisprudence there was no question of holding the most effective nationality as prevailing. Rather, it was a matter of holding the nationality determined by the laws of the respondent State as prevailing, on principle out of due respect for the sovereignty of that State.

[1] "les demandes d'indemnités présentées par des Français"

3. The Permanent Court of Arbitration also essentially confirmed the principle of non-responsibility in the *Canevaro* case of 1912. The Court noted that Canevaro on several occasions had acted as a Peruvian citizen and stated that under those 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. (Scott, *Hague Court Reports*, 1916, p. 287).

It results from this decision that in cases of dual nationality, from the moment the respondent State establishes that the claimant has actually acted as its own national, the principle of non-responsibility shall prevail, even when the claimant has stronger or more intense links with the other State. The decision to reject the cases of *Alexander Tellech* and *Max Fox* (VI *R.I.A.A.* pp. 249-250) may also be interpreted in this same sense.

4. It is equally important to determine the exact bearing of the jurisprudence of the *Georges Pinson* case decided by the French-Mexican Commission on October 19, 1928. *Pinson* is a fairly well-known case and has been cited by certain authors as a precedent for the theory of effective nationality. In response to invocation of the theory of non-responsibility by the Mexican agent, the President of the commission, J. H. W. Verzijl, held:

> While recognizing the soundness of this doctrine for cases where the individual in question is *effectively* considered and treated as a subject by each of the two States party to the suit, and this by virtue of legal provisions which do not surpass the limits set by codified or customary public international law, I nevertheless believe certain reservations must be made to its admissibility in cases where one or the other of these two conditions is not fulfilled. Since if, in the second hypothesis, it is the defendant State which in its national legislation does not observe the restrictions imposed by international law on national sovereignty, the pretension to dual nationality by the claimant will not stand before an international tribunal. Equally, it would be very difficult to admit a plea of dual nationality in the first hypothesis, since it would obviously be contrary to equity to permit a State to consistently treat an individual as a foreigner and then to object to that individual's dual nationality later for the sole purpose of defending itself against an international claim.[1]

[1] V *R.I.A.A.* p. 327 at 381. Translated from the original French:
"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 international."

The wording of the foregoing passage is clear enough to leave no doubt concerning the meaning and significance of the concept of "effectiveness" expressed therein. Effectiveness does not necessarily mean the theory of effective nationality. The principle of "non-responsibility of a State *vis-à-vis* its own nationals" at the international level is entirely sound when the defendant State, in accordance with its own national legislation and in conformity to public international law, considers the claimant as its own national and has always treated him as such. The reservations are with respect to two hypothetical abusive practices by States: first, an instance where the national legislation of the State does not conform to public international law; the second, an instance where the State consistently treats a certain individual as a foreigner and only later abruptly objects to his foreign nationality for the sole purpose of defending itself against an international claim. The *Pinson* decision thus does not deviate from the jurisprudence of the Mexican arbitral commissions which declared inadmissible the claims of dual nationals against their own Government.

5. Following a long line of judicial precedents, only one single dual national claim has been declared admissible: the *Willet* case decided by the United States-Venezuela Mixed Claims Commission under the agreement of December 5, 1885. Nevertheless, this case contains certain unique distinguishing features which preclude it from being considered as derogating from the general principle. Mrs. Willet was Venezuelan by birth, had always resided in Venezuela, and had acquired United States nationality through her marriage to William E. Willet. Her claim against Venezuela was declared admissible, but in fact, Mrs. Willet was acting in the capacity of administratrix of the estate of her deceased husband who was exclusively a United States 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 [United States] 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).

With the exception of this one case which stands out by its own very special context, all dual national claims against their own State were declared inadmissible. As so well stated by Ralston:

> . . . the general rule of commissions 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 laws in determining the question of right, and in parity of right the claim fails. (*The Law and Procedure of International Tribunals*, 1926, p. 172).

This principle, based on the principle of equal sovereignty of States, was derogated from by the jurisprudence of the tribunals established by virtue of the peace treaties concluded after the first and second World Wars.

6. Only the decisions of the Mixed Arbitral Tribunals established under the peace treaties concluded after the first World War between the Allied Powers and their former enemy States deviated from the principle of non-responsibility: the Mixed Arbitral Tribunals declared admissible the claims of dual nationals holding the nationality of both the defendant and respondent States, just so long as the claim was against one of the defeated States.

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 fact 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 conspicuous in the *Hein* decision rendered by the Anglo-German commission (II *T.A.M.* pp. 71 *et seq.*). The Tribunal confined itself to skirting the objection to its 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 *T.A.M.* p. 72).

The *Oskinar* case was decided in the same way by the French/German Tribunal on October 29, 1924. The case concerned a Frenchwoman by birth who acquired Turkish nationality through her marriage to a Turkish national. The Tribunal declared:

> . . . it is sufficient to state that even if Mrs. Oskinar were perhaps considered an Ottoman by Turkey, she has certainly retained, in the eyes of France, her original nationality; *this sole fact in itself is sufficient for the claimant to benefit from the provisions of the Treaty of Versailles concluded in favor of the nationals of the allied and associated Powers* (Cf. the *Daniel Blumenthal v. the German State* decision of 24 April 1925, *T.A.M.*, Vol. III, pp. 618 and 619) . . .[1]

In each case preference was given either to the nationality of origin or to a nationality subsequently acquired, in order to declare the nationality of the Allied Powers as prevailing. The reasoning which led the Tribunal to its decisions appears blatantly discriminatory. In this connection two decisions are particularly significant: the *Grigoriou* decision of January 28, 1924 rendered by the Greek-Bulgarian commission and the *Apostolidis* decision of May 23, 1928 rendered by the French-Turkish commission. The first decision concerned a claim against Bulgaria by Dimitri Hadji, a naturalized Bulgarian of Greek origin. The Greek law of December 31, 1913 in fact permitted Greeks to acquire a foreign nationality on condition that prior authorization by the Greek Minister of Foreign Affairs be obtained. Absent that authorization, the individual would continue to be considered Greek. The Tribunal upheld Grigoriou's nationality of origin in declaring:

> Whereas the essential condition for a naturalization acquired abroad to be valid in the country of origin is that [the naturalization] conform not only to the laws of the country where it took place but also to national laws;
>
> Whereas the Tribunal, not having to appreciate the moral side of the question and having to confine itself to rendering a strictly legal solution,

[1] VI *T.A.M.* p. 787 at 790. Emphasis added. Translated from the original French:
". . . 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) . . ."

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 and 158, as a Hellenic national . . . [1]

Contrast the grounds for the decision rendered May 23, 1928 by the French-Turkish Commission. The case involved a claim against Turkey by Demetrius Apostolidis, a Turk by origin who had been naturalized French. Given a situation identical to that of the preceding case, this commission reasoned along totally opposite lines and upheld the acquired nationality despite the fact that the naturalization had been obtained without the prerequisite authorization of the Ottoman Empire. The plea of lack of jurisdiction was denied:

Whereas in the instance where the law of a State exceptionally 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;

Whereas it follows that if in the present case the administrative and judicial authorities of Turkey can refuse to recognize the naturalization of the principal claimant, all *other* judicial authorities, among them the Mixed Arbitral Tribunal which, in matters concerning public international law is not bound by the municipal legislation of one of the contracting States, are obliged to recognize the validity of the change of nationality and to recognize the claimants as French nationals; [2]

How then may this contradiction in the two decisions be reconciled? In the first case the tribunal upheld the nationality of origin, because it was that of an Allied power. In the second case, where the

[1] III *T.A.M.* p. 977 at 979. Translated from the original French:
"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 et 158, en sa qualité de ressortissant hellène . . ."

[2] VII *T.A.M.* p. 373 at 375. Translated from the original French:
"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 effets de la naturalisation de l'auteur des demandeurs, toutes les *autres* autorités judiciaires, 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 français;"

nationality of origin was that of a defeated State, the Tribunal chose to uphold the acquired nationality, again that of an Allied power.

7. The jurisprudence of the *Strunsky-Mergé* case falls within the same historical context. That case was decided by the Italian-United States Conciliation Commission established by Article 78 of the Peace Treaty concluded in Paris on February 10, 1947.

It is true that *Mergé* constitutes a very special reasoning, which shall be dealt with hereinbelow. It is nonetheless true that it was inspired by the same concept inspiring the Mixed Arbitral Tribunals established after the First World War: to extend as far as possible the responsibility of the States which had launched the war of aggression and especially to make them pay reparations to the victims of that war.

8. A pertinent passage from the celebrated decision rendered in Berlin on June 8, 1932 in the *Salem* case clearly illustrates that the principle of non-responsibility is the single exact expression of international law and shows that the theory of effective nationality is far from constituting a principle of international law. An arbitral tribunal was established by virtue of the agreement concluded between the United States and Egypt on January 20, 1931, and presided over by Dr. Walter Simon, to adjudicate a claim presented on behalf of George J. Salem by the United States Government against the Egyptian Government. Salem had been naturalized a United States citizen on December 18, 1908 but the Egyptian Government maintained, in order to contest the claim, that Salem held both United States and Egyptian nationality and that the latter one was his effective nationality. The Tribunal stated:

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, l.c., p. 588) Accordingly the Egyptian Government need not 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.* p. 1163 at 1187)

The Egyptian Government was unable to bring proof establishing Salem's Egyptian nationality; had it been so able, the Tribunal would

have rejected the claim regardless of whether his Egyptian nationality was effective or not. Actually, it was determined that besides his United States nationality, Salem held Persian, and not Egyptian, nationality, although that fact was held to be irrelevant. It is now permissible to question on what basis the majority states: "There is a considerable body of law and legal literature, analysed herein, which leads the Tribunal to the conclusion that the applicable rule of international law is that of dominant and effective nationality."[1]

Section 3: Post World War II Decisions

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 from the interim period have sometimes been cited as doing do. They both date from the same year: the *Nottebohm* judgement rendered by the International Court of Justice on 6 April 1955 (Point 1), and the *Mergé* decision rendered by the Italian-United States Conciliation Commission on 10 June 1955 (Point 2). These precedents merit separate examination.

a. The *Nottebohm* Judgement

The *Nottebohm* judgement, rendered 6 April 1955, has been cited in the majority decision in support of the theory of effective nationality. There exists one statement in *Nottebohm* which, taken out of context, could lead one to believe that the International Court of Justice was turning away from the Advisory Opinion it had rendered six years earlier and was now advocating the principle of effective nationality when the dual nationality involves one of the two States referring to the international tribunal.

The passage to which the majority decision refers is the following:

> 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).

However, 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 referred to 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 are indeed instances when arbitrators have shown preference for the effective nationality: for example, when a claimant has held both the nationality of the State concluding the treaty on behalf of its nationals and the nationality of a third State. As well known as the *Nottebohm* case is, it is still worthwhile to recall the facts which led the International Court of Justice to render its judgement of 6 April 1955.

[1] The last paragraph before the section entitled "The 1930 Hague Convention", pp. 16-17 of the majority decision.

Friedrich Nottebohm was German by birth, had long had his domicile in Guatemala, and had been naturalized by the Principality of Liechtenstein on 13 October 1939. In 1951, the Government of Liechtenstein instituted proceedings against the Government of Guatemala on behalf of its national, Nottebohm. 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 granted 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 link with the people of Liechtenstein. He sought the naturalization

> to enable him to substitute for his status as a national of a belligerent 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. It was therefore in light of these circumstances that the Court relied upon the theory of effective nationality to declare inadmissible the claim brought against the Government of Guatemala by the Government of Liechtenstein on Nottebohm's behalf. The concept of effectiveness operates as a measure of restraint upon a principle requiring international law to recognize the legality of a nationality granted by a State. This role of acting as a restrainer was attributed to the concept of effectiveness for the purpose of averting obvious instances of abuse and was even expressed as such in the Court's judgement. Far from superseding the principle of non-responsibility, the principle of effective nationality

creates, in the *Nottebohm* judgment, supplementary grounds — and, according to some authors, new grounds — of non-responsibility.

It should perhaps be pointed out 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 original German nationality when he became naturalized. He held solely the nationality of Liechtenstein. The principle of effective nationality was perceived in this case as an exigency of international morality: 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 the solution applied in the *Nottebohm* judgement were to be generalized without extending its facts, it could only be said that for any claim brought before an international tribunal, the tribunal must verify whether the claimant has an effective link with the claimant State. In accordance with the *Nottebohm* judgement, this should be done even when no conflict of nationalities has arisen: in other words, even when 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 which was that of a third State). Given the foregoing, how could the principle of effectiveness ever be expected to play any other role — i.e., that of rendering nugatory the nationality of the defendant State, deemed "less" effective?

The solution thus handed down by the International Court of Justice in 1955 to deal with abuse in granting nationality, as raised in *Nottebohm*, was confirmed by Article 4(c) of the Resolution adopted by the Institute of International Law 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. 262).

Nevertheless, the majority states 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 . . ." (Majority Decision, pp. 21-22). This statement does not withstand an examination of the facts of *Nottebohm*.

b. The *Mergé* case

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 adjudicate 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 Don José de Yanguas Messia, declared the co-existence of two principles in international law: "(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 United States 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-United States Commission, i.e., the concept 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, which leads to the conclusion that 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. Actually, the two principles have distinct areas of application and embody two different solutions to two different situations of conflict 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 especially: 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 situations — i.e., the conflict between the nationalities of the claimant State and the respondent State (Hague Convention, Article 4) and the conflict between two nationalities when one or both are that of third States, whether before an international tribunal or before a municipal court (Hague Convention, Article 5) — has already been made very accurately in the *Harvard Draft Convention on the Responsibility of States* (XXIII *Am. J. of Intl. L.*, Supplement, 1929, p. 135) as well as having been the subject of discussions no. 2 and 3 in the International Law Commission *Report on Multiple Nationality* (U.N. Doc. A/CN-4/83, 22 April 1954).

It should further be pointed out that in the *Mergé* case, when the Italian Government pleaded the principle of non-responsibility, the United States Government, far from contesting that principle and advocating the principle of effective nationality, instead implicitly supported the traditional solution of non-responsibility. In the position adopted by the United States Government, which was quoted in the decision, it was stated:

> *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. (XIV *R.I.A.A.* p. 238).

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 United States Government confined itself to invoking the obligations, derogatory to common law, that a peace treaty imposes on a defeated power.

The historical context in which is situated the Italian-United States Conciliation Commission (established by a peace treaty concluded between a victorious power and a defeated State) casts considerable doubt upon the weight of the *Mergé* jurisprudence. The overriding concern for reparation for damages suffered by victims of a war launched by the defendant States was also present in the jurisprudence of the post-World War I Mixed Arbitral Tribunals. In all likelihood, the Italian-United States Conciliation Commission was affected by that same attitude.

c. Legal Doctrine

The principle of non-responsibility, accepted by international jurisprudence and embodied in Article 4 of the Hague Convention, is supported by legal doctrine. See notably: Oppenheim, *International Law*, edited by Lauterpacht, 8th edition, 1955, Vol. I, p. 667, §310a; N. Bar-Yaacov, *Dual Nationality*, London: 1961, pp. 76, 232, 238; Nguyen Quoc Dinh, P. Daillier, A. Pellet, *Droit International public*, 1980, p. 711; and Gerhard von Glahn, *Law Among Nations*, London, 1981, p. 207. In particular, the opinion of two International Court of Justice judges attests to the substantive nature of the principle of non-responsibility for claims by dual nationals against one of the States of which they are also a national. Sir Gerald Fitzmaurice observes that:

> . . . the State of one of his nationalities can never give him, or his interests, diplomatic protection or support, or bring an international claim on his behalf, against the State of his other nationality, even if he is not at the time resident in that State, and is resident in the territory of the State desiring to claim. If this were not so, a dual national having a grievance against the authorities of one of his countries, in which he was resident,

would only have to remove to the other in order to be able to obtain foreign support. ("The General Principles of International Law Considered from the Standpoint of the Rule of Law", *R.C.A.D.I.*, Vol. 92 (1957-II), p. 193).

Judge Philip C. Jessup points out:

> In cases of dual nationality there has been confusion because some judicial decisions have suggested that there are tests provided by international law for establishing the priority of one nationality claim over another. Actually the cases establish that one state may not assert a claim of one of its nationals against another state of which he is also a national, on the ground that the second state is free under international law to treat its own national as it pleases, despite the fact that he has also the nationality of another State. In other words, the right of a state to deal unhampered with its own nationals has been considered a right superior to its duty to deal fairly with the nationals of another state. (*A Modern Law of Nations — An Introduction*, Archon Books, 1968, p. 100).

In particular, the Resolution of the Institute of International Law (1965), which assembles in unity the authors representative of diverse legal systems, presents unequivocal doctrinal interest. The significant weight of the said Resolution is even greater, given the fact that the *Mergé* jurisprudence was discussed during the drafting of the resolution but the Institute still elected to support the classic rule of non-responsibility.[1] In short, the *Mergé* jurisprudence does not express the state of international law.

* * *

CONCLUSION

(a) The sole duty of the Tribunal in the present case was to determine whether or not the Algiers Declarations of January 19, 1981, conferred jurisdiction upon the Tribunal to entertain claims against the Government of Iran presented by certain Iranians who asserted that they also possess United States nationality. The Tribunal was called upon to discern the meaning and scope of relevant provisions of the Declarations on this point, not to attempt to revise the text or to fill in any lacunae. In other words, the Tribunal's task was to clarify what has, or has not, been set forth by the parties in the said Declarations.

[1] *Annuaire de l'Institut de droit international*, 1965, Vols. 51-I and 51-II.

Within this framework, it should have done so in the manner outlined by the International Court of Justice: "*to seek the interpretation which is in harmony with a natural and reasonable way of reading the text*, having due regard for the intention of the Government of Iran at the time when it accepted the ... jurisdiction" *Anglo-Iranian Oil Co.*, Judgement, [1952] I.C.J. *Reports*, p. 104 (emphasis added). Among the recognized elements for interpretation, such as the text, preamble, context, circumstances, object and purpose expressed in the Declarations, nothing will be found to suggest that such extraordinary jurisdiction was in fact conferred upon the Tribunal. Nothing will be found, indeed, to suggest that the Iranian Government had the slightest intention to undertake to establish this Tribunal in order to settle claims of its own nationals against it. As shown above, in the 1976 Agreement concluded between the United States Government and the Egyptian Government, the United States Government inserted the provisions necessary to extend application of the agreement to dual nationals. Similar provision is conspicuously absent in the Algiers Declarations drawn up by that same government. This would lead one to conclude that the United States Government, conscious of the problem, had not intended to extend the Tribunal's jurisdiction to dual nationals when it concluded the Declarations. The facts of the issue submitted to the Tribunal, had they been interpreted in good faith, should have compelled the Tribunal to declare itself as lacking jurisdiction. It is particularly important to recall that the Algiers Declarations were concluded in the spirit of good faith, and that spirit must govern their execution or interpretation. As such, there should be no room for yielding to the present wishes of the United States Government, which apparently seeks to transform the Algiers Declarations (originally conceived as a pacific solution) into a means of exerting political pressure upon the Iranian Government. How else could the majority, instead of examining the elements of the issue in order to clarify the meaning of the relevant provisions of the Declarations, precipitately declare its jurisdiction merely on the basis of Article 31, paragraph 3(c) of the Vienna Convention of May 23, 1969:

> *There shall be taken into account, together with the context ... (c) any relevant rules of international law applicable in the relations between the parties.*

First, as has already been stressed, paragraph 3(c) can never by itself create jurisdiction for an ad hoc tribunal, especially when that jurisdiction would extend the obligations of only one party to the

agreement. Paragraph 3(c) simply permits account to be taken of international law when interpreting a treaty. But permission to *take into account* any relevant rule applicable in the relations between the parties is by no means tantamount to authorizing the Tribunal to retain a jurisdiction not conferred upon by the agreement solely on the basis of such a rule, if there exist one, or if it be applicable in the relations between the parties.

It is equally important to stress that in Award No. A-2 rendered on 26 January 1982,[1] the Tribunal stated that it derives its powers exclusively from the Algiers Declarations, and its jurisdiction is confined to that which was specifically decided by the two governments. At that time the Iranian Government had seized the Tribunal of a request for interpretation presented in connection with the admissibility of claims it had filed against United States nationals. After carefully examining the various provisions of the Claims Settlement Declaration defining the jurisdiction of the Tribunal, the Tribunal declared that:

> It can easily be seen that the parties set up very carefully a list of the claims and counterclaims which could be submitted to the arbitral tribunal. As a matter of fact, they knew well that such a Tribunal could not have wider jurisdiction than that which was specifically decided by mutual agreement.

It is therefore deplorable that the same Tribunal, contrary to the specific decision and mutual agreement of the parties, widened its jurisdiction simply to accommodate the claims of Iranians against the Iranian Government — something which the Iranian Government would by all means have avoided.

Furthermore, having admitted that the provisions of the Declarations are ambiguous and do not confer jurisdiction, the majority should have at least resorted to the rules of restrictive interpretation and *contra proferentem*. According to these rules, so well-established in international practice, clauses limiting sovereignty and conferring jurisdiction upon an international tribunal must be restrictively interpreted and ambiguous clauses must be interpreted against the drafting State. The majority, without expressing its views on the rules invoked and amply expounded upon by the Iranian Government, and without even answering the other arguments advanced by that Government concerning the meaning and bearing of disputed provisions, hastily proceeded to the provisions of Article 31(3)(c) of the

[1 1 IRAN-U.S. C.T.R. 101.]

Vienna Convention, without even taking into account the exact conditions for application of these provisions.

Moreover, no matter what consensual or sociological foundation legal principles are intended to be based upon, it is nonetheless true that rules of public international law must be binding and exhibit a certain consistency, permanence and especially generality. It must also be observed that two adjectives in Article 31(3)(c) of the Vienna Convention modify the noun "rule" in the said paragraph: "relevant" and "applicable in the relations between the parties", in this case, the relations between the Governments of the United States and Iran, two governments with diametrically opposed political and economic ideologies and practices. In any event, the principle of non-responsibility derived from the relevant provisions of the Algiers Declarations also constitutes the solution in international law.

(b) International law covers the principle of non-responsibility. This has been attested to by Article 4 of the 1930 Hague Convention, reaffirmed by Article 4 of the 1965 Resolution of the Institute of International Law, and referred to *obiter dictum* by the International Court of Justice in its 1949 Advisory Opinion. The criterion of effective nationality was established in international law solely to resolve a conflict of nationalities appearing either before a court in a third State when nationality is a condition for application of a law which the court is to apply, or before an international tribunal where nationality is a condition for the diplomatic protection and several States have exercised it on behalf of the same individual. But such a criterion does not exist for, and cannot be transplanted to, a situation where nationality is a condition for the admissibility of the claim and the claimant possesses the nationality of the respondent State in addition to the State on the basis of which nationality the claim is actually submitted.

The foregoing study of the international precedents sufficiently demonstrates that claims of dual nationals against their own governments have been consistently rejected. Aside from certain apparent divergences, the practice of international tribunals in substance exhibits a remarkable cohesiveness in the over-riding concepts and reasons motivating such dismissal. The decisions dismissing such claims are all based on the principle of equal sovereignty of States and on States' equal right to attribute nationality. Apart from the decisions rendered by the arbitral tribunals constituted after the First and Second World Wars which must, as already mentioned, be placed and understood in their own historical contexts, never has an international court or international tribunal entered into a determination of the effective nationality involving the nationality of the

respondent State. In the long history of the relevant legal precedents, not one single case can be found where an international tribunal resorted to the so-called theory of effective nationality to settle a conflict of nationalities where it involved the nationalities of the two States establishing the international forum. Due to its generality and substance, the unique mode of solution admitted in international precedents is considered as the source of a rule of public international law.

The passage from the decision of the International Court in *Nottebohm*, so often cited in support of the theory of effective nationality, was certainly not intended to apply to a conflict of nationalities involving the nationality of the respondent State, but to a conflict of nationalities involving the nationalities of the claimant State and a third State. The concept of the effectiveness of a nationality as it was perceived by the International Court in *Nottebohm* to avert the abuse of nationality both in its granting by a government and in its claiming by an individual, must be understood in terms of its "validity" and clearly distinguished from the concept of "effective nationality". The former arose in the *Canevaro* case, decided by the Permanent Court of Arbitration in 1912, and was developed by Presiding Commissioner J. H. W. Verzijl in the *Pinson* case in 1928. The concept was then relied on by the International Court of Justice in *Nottebohm* to allow the Court to reject a fraudulent assertation.

Whatever the meaning attributed to the passage in *Nottebohm*, that passage in no way constitutes a rule of international law applicable in the relations between the Governments of Iran and the United States. Rules of public international law, as has been shown, must be derived from a consistent, uniform or at least concordant, practice shared by the majority of States in the international community. This is how rules are distinguished from trends in jurisprudence or doctrine. States must admit a rule of law as it stands and consider it as being a legal rule having binding force. Thus, it is to established and recognized legal rules that Article 31, paragraph 3(c) of the Vienna Convention refers. At any rate, only that type of rule is applicable in the relations between the United States and Iran, parties to the Algiers Declarations. The majority, however, merely confines itself to stating 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.

It will be observed that the majority fails to furnish any explanation as to the date, formation, source, or evolution of the supposed rule, or to its application in the relations between the United States and Iranian Governments. In 1949, the International Court of Justice referred to the practice of States whereby "a State does not exercise diplomatic protection on behalf of one its nationals against a State which regards him as its own national . . ." [1949] I.C.J. *Reports*, p. 186. In 1955 following the *Nottebohm* judgment, the United States Government, far from contesting the soundness of the principle of non-responsibility for dual national claims, implicitly agreed to it in the *Mergé* case, wherein the United States confined itself to maintaining that the said principle, based on the sovereign equality of States, was not applicable in the relations between a victorious and a defeated State. Furthermore, the *Mergé* jurisprudence affirmed the existence of two principles. Still more important is the fact that in 1965 the Institute of International Law explicitly recognized that the claims of nationals may not be instituted before an international tribunal against their own government. How then, and at what precise moment, was the principle of non-responsibility abandoned in public international relations, and the rule of effective nationality became applicable in the relations between the Governments of Iran and the United States?

(c) The Iran-United States Claims Tribunal is an international forum, established by an agreement concluded between two States: a tribunal intrinsically a part of public international law. The Algiers Declarations follow a longstanding and recognized practice whereby two states, in exercising their diplomatic protection, establish a mixed arbitral tribunal to settle the claims of their nationals against each other. This fact gains even more force when it is observed that the Algiers Declarations were envisaged to solve a political crisis between Iran and the United States and thought of as a solution to their disputes as a whole, only one part of which were the claims of the nationals of each government against the other government. The relevant Iranian law, which was notified to the United States Government and to which Article II(1) of the Claims Settlement Declaration expressly refers, eliminates any last shred of doubt concerning the inter-State nature of the claims submitted to the Tribunal. That law is entitled:

> *Bill Concerning the Settlement of Financial and Legal Disputes of the Government of the Islamic Republic of Iran with the Government of America*

and authorizing the Iranian Government:

to settle the financial and legal disputes between the Government of the Islamic Republic of Iran and the Government of America

Thus no arbitral agreement whatsoever exists between the Iranian Government and American nationals, nor between the Iranian Government and its own nationals: there is just a Declaration between two governments. The Tribunal has the mandate, as the title of the instrument establishing it indicates, to settle the claims between the United States and Iran, the true parties to the arbitration.[1]

The positions taken by the highest-ranking officials of the United States Government and a decision by the United States Supreme Court all concur, word-by-word, in affirming the inter-State nature of the claims brought before the Tribunal by means of the classic method of diplomatic protection.

(d) International law recognizes the right of the United States Government to determine its own system for attributing nationality however it may see fit in order to respond to its technical and demographic needs. It equally recognizes the validity of Articles 988 and 989 of the Civil Code of Iran which stipulate certain conditions for the loss of Iranian nationality resulting from acquisition of a foreign nationality. Of course Iranian law may not prevent the acquisition of foreign nationality, but if the conditions set forth by the Iranian law for the loss of Iranian nationality are not respected, the United States nationality (having been acquired by Iranians under conditions contrary to Iranian law) remains invalid and untenable before Iran, even if accepted by all other States. Furthermore, another general condition for international recognition of a nationality is that it conform to certain legal and socio-cultural facts. The existence of a link between the State and its national is normally required for that nationality to be deemed valid under international law so as to prevent abuse of the naturalization process by States. But where it is demontrated that such a link exists, the nationality is sufficiently established, and in the relations between two States establishing an arbitral tribunal, one is not permitted to go beyond that in order to say, for instance, that a person is more American than Iranian

[1] See further, Article 139 of the Constitution of the Islamic Republic of Iran, in accordance with which:

"*Article 139.* The settling of litigation relating to public and state property and the referral thereof to arbitration is in every case dependent on the approval of the Council of Ministers, and the Assembly must be informed of these matters. In cases where one party to the dispute is a foreigner, as well as in important cases that are purely domestic, the approval of the Assembly must also be obtained. Law will specify the important cases intended here."

because he has his domicile in the United States and that his claim against Iran is therefore admissible, or vice versa.

* * *

Against this overwhelming evidence, the majority in the present case has concluded that the Tribunal does have jurisdiction to entertain claims presented by certain Iranian nationals against their own Government, provided that such nationals establish that they also hold United States nationality and that the latter is their effective nationality.

There is much to be said about this manifest disregard, in clear violation of International Law, for what the parties to the Algiers Declarations agreed to, and about the motive behind it. Although the present Dissenting Opinion may not be a convenient place for a detailed examination of these issues, two points of particular importance must be mentioned:

1. In assuming jurisdiction over these claims, the majority has exceeded its power and acted in *ultra vires*. As such, its decision is null and void *ab initio*.

This was recognized as early as 1873 by the Institute of International Law which under Article 27 of its Draft Regulations for International Arbitral Procedure declared that:

> An arbitral decision is null in the event of a null compromis, or of *excess of power*, or the proven corruption of one of the arbitrators, or of essential error.[1] (Emphasis added.)

Present doctrine unanimously holds as null and void any decision in which an arbitrator exceeds his powers, or which is rendered in violation of a procedural rule.[2]

[1] *Annuaire de l'Institut de Droit International*, 1st year, 1877, p. 133. Translated from the original French:

"La sentence arbitrale est nulle en cas de compromis nul ou *d'excès de pouvoir* ou de corruption prouvée d'un des arbitres ou d'erreur essentielle."

[2] See: N. Politis, *La justice internationale* (Hachette, Paris, 1924), pp. 91-92; E. Hambro, *L'exécution des sentences internationales* (Sirey, Paris, 1936); Balasko, *Causes de nullité de la sentence arbitrale* (1938); P. Fauchille, *Traité de droit international public*, Vol. I-Part 3 (1926), p. 566; M. Sibert, *Traité de droit international public*, Vol. II (Dalloz, Paris, 1951), pp. 454-456; D. P. O'Connell, *International Law*, Vol. 2 (2nd ed., London, 1970), pp. 1110-1111; P. Guggenheim, *Traité de droit international public*, Vol. II (1954), pp. 172-174; P. Reuter, *Droit international public* (Thémis, Paris, 1968) pp. 284-285; A. P. Sereni, *Diritto internazionale*, Vol. IV (1965), pp. 1690, 1729-30; *Rép. Dalloz de Droit international*, (1968) "Arbitrage (Droit international public), no. 109.

The United States Government has itself on occasion invoked excess of power as a ground for its refusal to execute decisions which have been rendered against it.[1]

It is abundantly clear that the Iranian Government never agreed to appear before an international tribunal to respond to the claims of its own nationals. As clearly stated by the Government of the Islamic Republic of Iran in its Memorandum of 21 October 1983, that Government "would never have accepted a provision derogating to the above mentioned principle and had it known that the Algiers Declarations could receive such tortuous a construction, he would never have entered into it, whatever consequences it would have." [sic]

In the absence of any mandate in this regard, the majority's *ultra vires* assumption of jurisdiction renders its decision void and unenforceable.

2. International arbitration has been defined and advocated as a peaceful and equitable means for settlement of inter-State disputes by neutral and mutually agreed-to arbitrators. Experience, however, has time and time again demonstrated that this is not how it works in practice, and that political and materialistic motives have permeated the institution.

It would have been particularly essential to the success of such a process that highly qualified, independent, and eminent arbitrators undertake this extremely delicate and sensitive task, for only then could the "neutrality" of arbitration have been assured. Regrettably, the task has now fallen into the hands of a group of "professional" arbitrators who, forming an exclusive club in the international arena, are automatically brought into almost any major dispute by the operation of predetermined methods. These "professional" arbitrators are concerned, not with the quality of their decisions, or with the rights and wrongs of the parties, but with the quantity of their decisions, made to satisfy their political and materialistic inclinations.

[1] See, for example:

— The case of the Northeastern Boundary Dispute between the United States and Great Britain in 1831. The King of the Netherlands was chosen as the arbitrator and was requested to decide between two lines demarcating the border of the State of Maine and the Canadian province of Nova Scotia. He chose a third line of his own devising. The United States Government refused execution of the decision because the arbitrator had exceeded his power. The case was resolved 11 years later, in 1842, following conclusion of another treaty. (Hyde, II *International Law*, 2nd edition, 1945, p. 1636).

— In the case concerning the border of Chamizal (Mexico/United States) decided in 1911, the United States abstained from execution of the arbitral decision for the reason that the arbitrators had exceeded their powers. The dispute was finally settled in 1964, i.e., 52 years later, by a treaty (T.I.A.S. 5515) concluded between the two States concerned (Hackworth, I *Digest of International Law*, pp. 409-418; Whiteman, III *Digest of International Law*, pp. 680-693.)

The present award is only a manifestation of the work of a degenerated system, under which sometimes as many as five "awards" are produced in a single day by this Tribunal. It would be quite wrong to expect awards of this nature to contain any careful examination of the relevant facts or any meaningful analysis of the legal issues.

The third world countries should not be dismayed by this type of decision. They should, instead, be very cautious in future before foregoing their judicial sovereignty in favor of an institution which is designed to safeguard the interests of the capitalist world. Judicial sovereignty is an indispensable part of national sovereignty, and as such it should be closely protected. In January, 1981, it was proposed that the Iran-United States Claims Tribunal be established as a forum for the peaceful and mutually acceptable settlement of the political crisis which had developed in the relations between Iran and the United States. The Government of Iran accepted this proposal in good faith, but the Tribunal, with its predominantly western composition, has in every respect betrayed the trust vested in it. The experience before this Tribunal has been a costly one which should not be repeated.