Claims of Dual Nationals and the Development of Customary International Law

Issues Before the Iran-United States Claims Tribunal

Mohsen Aghahosseini

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CLAIMS OF DUAL NATIONALS AND THE DEVELOPMENT OF CUSTOMARY INTERNATIONAL LAW

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Issues Before the Iran-United States Claims Tribunal

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For the blemishes that remain - and they are a good many - the responsibility rests with me alone.

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SOME INTRODUCTORY AND ORIENTATIONAL REMARKS

1.1 The Relevance of the Present Enquiry

The issue of whether a dual national may, at the international level, assert a claim against one of his States of nationality has long troubled the international law of claims. Indeed, ever since it was first addressed by a tribunal – and this goes back to well before the middle of the nineteenth century – one or the other of two rules of customary international law has been said to be applicable.

The first, widely known as the rule of 'non-responsibility', mainly relies on the principle of equality of States and, as a corollary of that principle, holds that a State may not espouse the claim of one of its nationals where he is also a national of the respondent State. To its adherents, this rule has always been the single exact rule of customary international law, believing, as they do, that the instances of non-compliance, if any, are simply the product of some very special circumstances. The second, widely – though as will be seen, imprecisely – known as the rule of 'effective or dominant' nationality, allows the espousal of such a claim where the individual is more closely attached to the claiming State. To its proponents, the choice of one State over the other on the basis of the individual's stronger attachments cannot possibly infringe the 'equality' of the two States.

For an overview of the controversy, one need only refer to four of the more recent pronouncements, made not long after each other. *First*, the *Salem* Case, decided by an *ad hoc* arbitral tribunal in 1932, in which it was said that '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…'[1] *Second*, the *Reparation* Case, where the International Court of Justice in its Advisory Opinion given in 1949 referred to the 'ordinary practice whereby a State, does not exercise protection on behalf of one of its nationals against a

1 II R.I.A.A. 1165, at 1187.

State which regards him as its own national'.[2] *Third*, the *Nottebohm* Case, where the International Court again, this time in 1955, spoke of international arbitrators giving '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'.[3] And *fourth*, the *Mergé* Case, another 1955 decision, in which the Italian-United States Conciliation Commission stated that '[t]he 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'.[4]

Such was the setting when, back in 1983, the Iran-United States Claims Tribunal (the 'Tribunal') – justifiably described by some as the most consequential arbitral institution in history – was first called upon to pass judgment on this highly sensitive subject. The result was a Decision rendered in 1984, in which a full panel of the Tribunal, having first concluded that the issue had not been addressed in the constituent instruments of the Tribunal, turned to customary international law, and held that the solution to the presented problem lay in the application of the rule of dominant nationality, but with an important caveat related to the claimant's use of his non-dominant nationality.

It has now been suggested, with reference to that Decision and its salient features, that the Tribunal 'can be credited for largely resolving one of the most vexing questions of modern international claims practice'.[5] Clearly, if that is the case, the Tribunal's treatment of the issue, and its contribution to the development of the law in that respect, must surely be given the closest of attention, particularly in view of the upsurge in the number of dual nationals, estimated at present to total hundreds of millions globally.

But the Tribunal's jurisprudence on the subject has not been limited, contrary to an apparently common impression, to the choice of the rule of dominant nationality with certain special characteristics. With some one hundred and thirty Cases of dual nationality on its docket, the Tribunal has had to apply its proposed solution to a multitude of situations, covering almost every conceivable eventuality.

2 Case *concerning Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports (1949), 186, at 189.

3 *Nottebohm* (*Liechtenstein* v. *Guatemala*), Second Phase, ICJ Reports (1955), 4, at 22.

4 14 R.I.A.A. 236, at 247.

5 David J. Bederman, *Eligible Claimants Before the Iran-United States Claims Tribunal*, in R.B. Lillich and D.B. Magraw (eds.), THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY, Irvington on Hudson (NY): Transnational, 1998, 47, at 79.

The result is a wealth of empirically tested rules and guidelines that must be of great interest to those who may in future be called upon to deal with similar problems.

These, then, are the two main reasons for the present enquiry: *first*, to examine whether, and if so how, this deep-rooted problem of international law has been resolved by the Tribunal; and, *second*, to offer a systematic study of the application of the Tribunal's proposed solution in individual instances. The outcome of the enquiry will then allow an informed judgment to be made on the likely future impact of the Tribunal's case law. For orientation purposes, however, a word or two must be said at the outset about the circumstances leading to the creation of the Tribunal and about the Tribunal itself.

1.2 A Few Historical Notes

The Islamic Revolution of Iran, which gathered momentum as from late 1978, resulted in the overthrow of the Shah's regime, and in its replacement by a provisional government, in February 1979. The pre-Revolution turmoil and the discomforts it brought about, together with crippling strikes in public and banking services, led to the exodus from Iran of many thousands of Iranians and expatriates. Chief among the latter were American expatriates – 45´000 in number – who worked on a host of military and civil projects.

In October 1979, the Shah, having spent time in Egypt, Morocco, the Bahamas, and Mexico, was admitted to the United States, assertedly on medical grounds. This led to the fear among some of the revolutionary forces that a coup d'état similar to that made by the United States Central Intelligence Agency back in 1953, might be in the offing. On that earlier occasion, the nationalist and popular government of Iran had been toppled, and the Shah, then in exile in Italy, had been restored to the throne. Reacting to the perceived threat, a group of university students[6] who called themselves 'The Followers of Imam [Khomeini]'s Line' stormed the United States embassy in downtown Tehran on 4 November 1979, and took the fifty odd embassy staff as hostages. They demanded that the Shah be extradited to Iran.

6 They were reportedly 400 in number. See the interview with Mr. A. Zarghami, one of the students who took part in the occupation of the embassy, in the Persian daily Kayhan, 5 November 2000.

The venture as originally planned was apparently intended as a 'symbolic protest', to last for a short period only.[7] But the popular support it was immediately given, and its sanctioning shortly thereafter by the leadership of the Revolution, hardened the stance of the students, and made it increasingly difficult to resolve, even by those elements in the government of Iran who tried to do so. Indeed, Iran's provisional government was one of the earliest victims of the ensuing crisis.

The United States' first reaction was to freeze, through a series of presidential orders issued on 14 November 1979, all of Iran's monies and assets within the United States jurisdiction. Hundreds of United States natural persons and corporations who had earlier instituted legal actions against Iran in United States courts then applied for and were granted judicial attachments against Iran's blocked assets. The United States further referred the matter to the International Court of Justice, before which Iran declined to appear. The Court eventually found Iran responsible for failing to protect the United States embassy and for the continued detention of the embassy's personnel.[8]

Although the Shah left the United States in December 1979, and died in Egypt in July 1980, the detention continued for some time, during which a great many attempts at mediation failed, as did an armed rescue attempt by the United States. The end, however, came when, with the government of Algeria acting as a mediator, the leadership of the Revolution in September 1980 referred the issue to Iran's Parliament (Majlis), where Iran's demands for the release of the detainees were promptly formulated. These were mainly four: (i) an undertaking by the United States not to intervene, politically or militarily, in Iran's affairs; (ii) restoration of Iran's financial position to that which existed prior to 14 November 1979, through *inter alia* the lifting of the freeze orders; (iii) termination of all litigation instituted by the United States and its nationals in United States courts and the cancellation of all judicial attachments obtained therein; and (iv) return of the assets of the Shah and of his close relatives to Iran.

7 See the New York Times, 5 November 2002, quoting Mr. M.A. Asgharzadeh, a spokesman for the students: 'We only wanted to be more creative and show our symbolic protest to America's interference in Iran's politics for 48 hours. But things got out of our control'. Other students interviewed in Persian dailies have verified this version. For two detailed but rather inconsistent expositions of the event, see: Dr. E. Yazdi, Iran's Foreign Minister at the time, ISNA News Agency, 2 November 2003, http://Khabarnameh.gooya.com/politics/archives/001335.php; and Mr. M. Mirdamadi, one of the students' leaders, ISNA News Agency, 24 November 2003, http://Khabarnameh.gooya.com/politics/archives/001562.php.

8 Case *Concerning United States Diplomatic and Consular Staff in Tehran* (*United States of America* v. *Iran*), Judgment, ICJ Reports (1980), 3.

With the United States' agreement 'in principle' with the conditions set by the Majlis, a period of intensive negotiations between Iran and the United States followed. A notable feature of this was the absence of any face-to-face contact between the two sides, who conveyed their messages through the Algerian intermediaries. The outcome was the adherence, on 19 January 1981, by the two governments of Iran and the United States to what are known as the Algerian Declarations.[9]

1.3 The Algerian Declarations

These are principally three.[10] *First*, there is the 'General Declaration',[11] consisting of two 'General Principles' (General Principles 'A' and 'B'), four 'Points' (Paragraphs 1-16), and a final Paragraph on Settlement of Disputes (Paragraph17). Principle 'A' reflects the commitment by the United States to 'restore the financial position of Iran, in so as far as possible, to that which existed prior to November 14, 1979'. Principle 'B' speaks of Iran's and the United States' purpose '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'.

In Point I, which bears the title of 'Non-Intervention in Iranian Affairs', the United States 'pledges that it is and from now on it will be the policy of the United States not to intervene, directly or indirectly, politically or militarily, in Iran's internal affairs' (Paragraph 1). In Points II and III, the joint title of which is 'Return of Iranian Assets and Settlement of U.S. Claims', the two issues of (i) the mechanism through which Iran's frozen assets were to be returned to Iran

9 In the pronouncements of the Tribunal, and in the writings of many commentators, the Declarations are often referred to as the Algiers Declarations. In so far as this designation points to the place in which the Declarations were made, and not to the fact that they were made by the Government of Algeria, it is an inaccurate designation.

10 The Declarations, together with the reports of the activities of the Arbitral Tribunal established there under, are reprinted in the 'IRAN-UNITED STATES CLAIMS TRIBUNAL REPORTS', published for the period 1983-1993 by Grotius Publications Ltd., and since 1993 by Grotius, Cambridge University Press (hereinafter, 'IRAN-U.S. C.T.R.'). Of these, 37 volumes, covering the Tribunal's activities up to 2003, have so far been published. The texts of the Declarations will be found in 1 IRAN-U.S. C.T.R. 3-15. For ease of reference, they are also reproduced here as Annex 1.

11 The full title of which is: 'Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration), 19 January 1981'.

(Paragraphs 1-9),[12] and (ii) the nullification of the United States' trade sanctions and claims against Iran (Paragraphs 10-11), are dealt with.

An important feature of the arranged mechanism is Iran's agreement to deposit U.S. $1 billion of its received funds in a special interest-bearing Security Account to be opened with a central bank,[13] and to replenish the Account to the level of U.S. $500 million whenever the balance fell below that figure (Paragraph 7). All funds in the Security Account are 'to be used for the sole purpose of securing the payment of, and paying, claims against Iran', submitted to binding arbitration envisaged under other provisions of the Declarations.

With regard to the nullification commitment, the United States undertakes to: (i) revoke all trade sanctions directed against Iran in between 4 November 1979 and the date of the Declarations (Paragraph 10); (ii) withdraw the claims then pending before the International Court of Justice; and (iii) thereafter bar and preclude the prosecution against Iran of any pending or future claim of the United States or a United States national relating to the seizure or subsequent detention of the United States nationals, or resulting from popular movements in the course of the Islamic Revolution (Paragraph 11). Under the same Paragraph 11, the United States further undertakes to bar and preclude the prosecution against Iran of any pending or future claim by non-United States nationals before the courts of the United States.

Point IV, with the heading of 'Return of the Assets of the Family of the Former Shah', reflects the commitment by the United States to, upon certain conditions, gather information, freeze, and return to Iran the property of the former Shah and his close relatives situated in the United States (Paragraphs 11-15). It also provides for the resolution of any dispute concerning the United States' fulfilment of its obligations under point IV through binding arbitration envisaged under the Declarations (Paragraph 16).

The General Declaration ends with an independent clause on settlement of disputes (Paragraph 17), according to which any dispute as to the interpretation or performance of the General Declaration other than those related to point IV, may also be referred to the said binding arbitration.

12 This was done mainly through the Bank of England acting as depositary of an Escrow Fund in the name of the Algerian Central Bank. See the 'Technical Arrangement between Banque Centrale d'Algérie and the Governor and Company of the Bank of England and the Federal Reserve Bank of New York, 20 January 1981', 1 IRAN-U.S. C.T.R. 20.

13 The parties later selected De Nederlandsche Bank N.V. at Amsterdam for this purpose. See the 'Technical Agreement with De Nederlandsche Bank N.V., 17 August 1981', 1 IRAN-U.S. C.T.R. 29.

Second, there is the 'Claims Settlement Declaration',[14] consisting of eight Articles. Under Article I, Iran and the United States agree to promote the settlement, by the parties directly concerned, of claims described in Article II, within a period of six months from the date of the Declaration and extendable once for three months at the request of either Iran or the United States. Any such claims not settled within that period 'shall be submitted to binding third-party arbitration'. The rest of the Declaration addresses the features of this third-party arbitration.

Thus, under Article II, an 'international arbitral tribunal (the Iran-United States Claims Tribunal)' is established to hear three general categories of claims. First, the claims[15] of nationals of Iran against the United States and those of nationals of the United States against Iran, if such claims were outstanding on the date of the Declarations and arose out of debts, contracts, expropriations or other measures affecting property rights (Article II (1)).[16] Second, the 'official claims' of Iran and the United States against each other, arising out of 'contractual arrangements between them for the purchase and sale of goods and services' (Article II (2)). And third, disputes between the two parties with regard to the interpretation or performance of any provision of the General Declaration (Article II (3)).

Article III provides for the Tribunal's composition, its rules of procedure, the manner in which the claims may be presented, and a deadline for such presentation. Thus, under Article III (1), the Tribunal consists of nine members:[17] three appointed by each party, and the remaining three, of which one is appointed as President, by the mutual agreement of the six party-appointed members. Claims may be heard by the 'Full Tribunal', or by a panel of three.[18] Under Article III (2), the members are appointed, and the Tribunal shall conduct its business, in

14 The full title of which reads: '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 (Claims Settlement Declaration), 19 January 1981'.

15 The Tribunal's jurisdiction also extends to any 'counterclaim' arising out of the same contract, transaction or occurrence that constitutes the subject matter of a claim.

16 Of these, two types of claims are excluded, namely: (i) those identified in Paragraph 11 of the General Declaration, noted at page 6 above; and (ii) claims arising under any contract specifically providing for the sole jurisdiction of the competent courts of Iran.

17 The said Article III (1) envisages the possibility of 'such larger multiple of three' members as the parties may find necessary for the expeditious conduct of the Tribunal's business. But although Iran initially proposed to appoint nine members (leading to a Tribunal of 27 members), this never materialised.

18 Hence, the Tribunal's three 'Chambers'. Of the three members in each Chamber, two are party-appointed members, while the third (acting as 'Chairman') is a mutually appointed member.

accordance with the UNCITRAL Rules,[19] except to the extent modified by the parties or by the Tribunal to ensure that the Claims Settlement Agreement can be carried out. Under Article III (3), the claims of nationals may be presented to the Tribunal either by the claimants themselves or, where the claim is for less than U.S. $250'000, by the government of such nationals.[20] Finally, under Article III (4), claims are to be filed with the Tribunal no later than one year after the date of the Declarations, or six months after the appointment of the Tribunal's President, whichever is the later.[21] This does not apply, of course, to any dispute arising out of the interpretation or application of the Declarations.

Article IV speaks of the finality and binding nature of Tribunal's awards and decisions, and of their enforceability, if rendered against either of the two governments, 'in the courts of any nation in accordance with its laws'.

Article V determines the law applicable to the substance of the presented disputes:

> 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.

Article VI states that the seat of the Tribunal shall be The Hague or any other place agreed to by the parties (Article VI (1));[22] that each party shall designate an Agent to represent it before the Tribunal (Article VI (2)); that the expenses of the Tribunal shall be borne equally by the parties (Article VI (3)); and that any question concerning the interpretation or application of the Claims Settlement Declaration shall be decided by the Tribunal if requested by either party (Article VI (4)).

Article VII defines certain key terms in the Declaration. Thus, under Article VII (1), a 'national' of Iran or of the United States, as the case may be, is said to mean:

19 The Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), UN GAOR, 31st Sess., Supp. No. 17, UN Doc. A/31/17 (1976), reprinted in [1976] VII UNCITRAL Y. B. (part I) 22; 15 ILM 701 (1976).

20 In the jargon of the Tribunal, the latter claims are termed the 'small claims'.

21 In the event, this came to be 19 January, 1982. In practice, the deadline set by the parties was very strictly observed by the Tribunal, resulting, in some instances, in the refusal of claims filed with a delay of only one day. See, for instance, Refusal Case No. 1 (*Re Cascade Overview*), 1 IRAN-U.S. C.T.R. 127, and Refusal Case No. 2 (*Re Jahanger*), *ibid*, 128.

22 In the event, the parties adhered to this original choice of place.

> (a) a natural person who is a citizen of Iran or the United States;
> (b) a corporation or other legal entity organised under the laws of Iran or the United States in which an interest equivalent to fifty percent or more of the capital stock is held by natural persons who are citizens of such country.

Under Article VII (2), 'Claims of nationals' of Iran or the United States are identified as

> claims owned continuously, from the date on which the claim arose to the date on which this Agreement enters into force, by nationals of that state …[23]

Under Article VII (3), 'Iran' is defined as 'the Government of Iran, any political subdivision of Iran, and any agency, instrumentality or entity controlled by the Government of Iran or any political subdivision thereof'. Under Article VII (4), the 'United States' is defined *mutatis mutandis*.[24]

Third, there is the 'Undertakings',[25] also dated 19 January 1981. It deals with the mechanism through which Iran's assets – deposits, securities, funds, and gold bullion – were to be returned to Iran. A very significant feature of this was the agreement by Iran to repay immediately all the loans, matured or otherwise, taken out or guaranteed by the government of Iran or any of its controlled entities from a syndicate of banking institutions of which a United States banking institution was a member.

To implement the above-mentioned instruments, a number of technical 'agreements' and 'arrangements' were subsequently made between the fiscal agents of the two governments and certain other banking institutions.[26]

23 As further stated in the same Article VII (2), 'claims of nationals' include 'claims that are owned indirectly by such nationals through ownership of capital stock or other proprietary interests in juridical persons, provided that the ownership interests of such nationals, collectively, were sufficient at the time the claim arose to control the corporation or other entity, and provided, further, that the corporation or other entity is not itself entitled to bring a claim under the terms of this Agreement'. The provision finally stipulates that claims referred to the Tribunal 'shall be considered … excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court'.

24 The last Article of the Claims Settlement Declaration (Article VIII) determines the date on which the Declaration enters into force, to wit, when the Government of Algeria receives from both Iran and the United States a notification of adherence. In the event, this notification was received on 19 January 1981.

25 'Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with Respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria, 19 January 1981.'

26 All reprinted in 1 IRAN-U.S. C.T.R. 16-56.

1.4 The Tribunal

The Tribunal, justifiably described as '[t]he largest and the most important international arbitration to date',[27] officially commenced its work as from July 1981. One of its earlier tasks was to set its rules of procedure by effecting the necessary changes to the UNCITRAL Rules, as authorised by the Claims Settlement Declaration.[28] The outcome was the 'Final Tribunal Rules of Procedure' dated 3 May 1982 (hereinafter, the 'Tribunal Rules').[29]

Under a Presidential Order,[30] jurisdiction to hear disputes or questions related to the interpretation or application of the Declarations was given to the 'Full Tribunal of nine members'. The consideration of the official claims as well as the claims of nationals, on the other hand, was assigned to the Tribunal's three Chambers. The Order further authorized the Chambers to relinquish jurisdiction in favour of the Full Tribunal, at any time prior to the issuance of a final award, where the dispute raised 'an important issue', or where the resolution of an issue 'might result in inconsistent decisions or awards by the Tribunal'. Further, relinquishment to the Full Tribunal was compulsory where a majority for a decision or an award could not be formed within a Chamber.

For a closer familiarity with the Tribunal and its work up to the present, some basic statistical data, last released in November 2006,[31] may prove helpful. Within the deadline set by the Claims Settlement Declaration, namely 19 January 1982,

27 Richard B. Lillich, 76 American Society of International Law Proceedings (1982), 1, at 5-6.

28 As noted by one of the Tribunal's original members, the parties considered it 'necessary to modify the UNCITRAL Rules in order to apply them to the new circumstance that had a number of characteristics that were markedly different from typical commercial cases contemplated by the UNCITRAL drafters'. Howard H. Holtzmann, *Drafting the Rules of the Tribunal*, in David D. Caron & John R. Crook (eds.), THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION, Ardsley (NY): Transnational Publishers, 2000, 75. For a summary of the material modifications made by the Tribunal, see CHARLES N. BROWER & JASON D. BRUESCHKE, THE IRAN-UNITED STATES CLAIMS TRIBUNAL, The Hague: Martinus Nijhoff Publishers, 1998, at 16-20; MATTI PELLONPÄÄ & DAVID D. CARON, THE UNCITRAL ARBITRATION RULES AS INTERPRETED AND APPLIED: SELECTED PROBLEMS IN LIGHT OF THE PRACTICE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL, Helsinki: Finnish Lawyer's Publishing, 1994, at 339.

29 Reprinted in 2 IRAN-U.S. C.T.R. 405-442.

30 Presidential Order No. 1, dated 19 October 1981, reprinted in 1 IRAN-U.S. C.T.R. 95, as amended by Presidential Order No. 8, dated 24 March 1982, reprinted in 1 IRAN-U.S. C.T.R. 97.

31 The Tribunal's Communiqué, and its Registry's Quarterly Report, issued on 16 November 2006.

a total of 3´952 Cases were filed with the Tribunal's Registry.[32] These involved all three general categories of claims covered by the Tribunal's jurisdiction:

First, the claims of nationals, of which there were 3´844 Cases. It must be noted here that although the Algerian Declarations reflect a reciprocal system under which nationals of the United States and of Iran were equally entitled to assert claims against the government of the other, in practice virtually all the claims presented in this category belonged to the nationals of the United States. This was because of the fact that the events surrounding the 1979 Revolution had affected the nationals of the United States, natural and juridical, in their relations with Iran, and not the nationals of Iran in their relations with the United States. Iran, as defined by the Declarations, was of course entitled to assert counterclaims against the submitted claims,[33] and almost invariably did so.

The claims of nationals were of two types: the 'small claims',[34] of which there were 2´884 Cases, and the 'large claims', of which there were 960 Cases.[35] A handful of the former type were earlier heard and resolved by the Tribunal. In June 1990, however, the governments of Iran and the United States concluded a complex settlement agreement whereby the bulk of the then existing small claims of the United States nationals were settled against a lump sum paid by Iran. The settlement was then submitted to the Tribunal, on the basis of which an Award on Agreed Terms was issued,[36] terminating the said Cases.[37] The rest of the small claims, all of banking nature, were later withdrawn on the basis of settlement agreements concluded outside the Tribunal by the banks concerned. The resolution of the large – or more than U.S. $250´000 – claims of nationals, on the other hand, has taken much longer time, twenty-one years to be precise, for the Award in

32 Initially, the Registry refused 56 Cases for failing to meet the filing requirements. Of these, 8 were subsequently filed, the decisions of the Registry having been reversed on appeal to the Chambers.

33 See footnote 15 above.

34 As described on page 8 above.

35 Very minor variations, such as one or two reclassifications, are disregarded here.

36 Under Article 34 of the Tribunal Rules, '[i]f, before the award is made, the parties agree on a settlement of the dispute, the [Tribunal] shall either issue an order for the termination of the arbitral proceeding or, if requested by the parties and accepted by the [T]ribunal, record the settlement in the form of an arbitral award on agreed terms'.

37 Award on Agreed Terms No. 483, filed on 22 June 1990, 25 IRAN-U.S. C.T.R. 327. The funds received pursuant to this settlement agreement were placed by the United States into an interest bearing account, out of which the covered claims, later adjudicated by the United States under an administrative procedure and in accordance with the Tribunal's precedent, were satisfied.

the last of these was issued as late as February 2003.[38] Today, then, no claim in this category, of either type, remains on the Tribunal's docket.

Second, the official – or inter-governmental – claims,[39] arising, as noted before, out of contractual arrangements between Iran and the United States for the purchase and sale of goods and services. Of the 33 Cases submitted in this category, 14 still remain, including two of the largest Cases, in monetary terms, ever submitted to the Tribunal.[40]

Third, the claims relating to the interpretation or performance of the Algerian Declarations.[41] Of the 75 Cases brought before the Tribunal, only three remain to be resolved. What the above shows, in short, is that of a total of 3´952 Cases filed, only 17 remain. This, however, must not create the wrong impression that the end of the Tribunal's life is in sight. Only one of the remaining Cases, Case B/1, involves well over one thousand contracts. There, the process of exchanging briefs will, if all goes well, take many more years to complete, and so will of course the arduous task of deliberating and finalizing the award in such a complex Case.

To date, the Tribunal has issued 683 Awards (including Awards on Agreed Terms, Interlocutory Awards, Interim Awards, and Partial Awards);[42] 133 Decisions;[43] and nearly 21´000 Orders. It has received over 29´000 documents, each document amounting, at times, to many volumes, and has held a total of 477 Hearing and Pre-hearing conferences.

In pecuniary terms, the Tribunal has so far awarded the United States' parties, out of the Security Account, over two and a half billion dollars, and this excluding interest, which in each instance must be calculated by the Escrow Agent in charge

38 *Riahi* v. *Iran*, 37 IRAN-U.S. C.T.R. 11.

39 On the Tribunal's docket, the official claims are given a serial number with the prefix B.

40 Cases B/1 and B/61, arising out of multi-billion dollars military contracts concluded between Iran and the United States prior to the 1979 Revolution.

41 These have a serial number with the prefix A.

42 Typically, an Interlocutory Award is rendered where the Tribunal addresses and determines one or more disputed issues, related either to jurisdiction or to the merits, prior to the final disposition of the Case. Where such preliminary determination is in response to a request for an interim measure of protection related to the Case at hand, the outcome is often an Interim Award. A Partial Award, on the other hand, is issued when only some and not all of the claims in a proceeding are finally disposed of. In all the above-mentioned instances, the final disposition of the entire Case is done through a Final Award. Otherwise – where no Interlocutory, Interim, or Partial Award has first been issued – the final disposition is done through an Award.

43 Decisions, as against Awards, are normally rendered in interpretative Cases.

of the Security Account. The Iranian parties have received over half a billion dollars, again excluding interest.

1.5 Cases of Dual Nationality Before the Tribunal

Of the Cases that came before the Tribunal for consideration, some one hundred and thirty[44] involved the issue of dual nationality. Certain broad characteristics of these Cases may be initially noted here.

First, the claims presented in these Cases belonged exclusively to the category of the claims of nationals. The reason for this is clear enough. The remaining two categories of claims coming within the Tribunal's jurisdiction, namely, the official claims and the claims related to the interpretation or enforcement of the Declarations, could only be asserted by the government of Iran or the government of the United States. No room, therefore, for the issue of dual nationality in those two categories. *Second*, and within that category, the claims presented were exclusively of the large type. It is true that amongst the small claims, too, some belonged to dual nationals. But because the small claims were terminated pursuant to a settlement agreement, no claim of this type belonging to a dual national was litigated before the Tribunal. *Third*, the claims presented there belonged to natural, and not juridical, persons. This was due to the special terms of the Algerian Declarations under which, as will be noted later, the possibility of a juridical claimant with dual nationality is forestalled. *Fourth*, and a few exceptions apart,[45] the claimants in these Cases were, factually, dual nationals of Iran and the United States, rather than of Iran, or of the United States, and a third country. And *finally*, the claims at issue were asserted by dual nationals relying on their United States nationality, and not on their Iranian nationality. This was because, factually again, none of the very few nationals of Iran who asserted claims against the United States had a second nationality, whether of the United States or of a third country. In short, then, some one hundred and thirty Cases in which natural persons with two nationalities, mainly of Iran and the United States, asserted large claims against Iran, relying on their United States nationality.

These individuals had acquired their dual nationality status for a variety of reasons. There were those who were born with sole Iranian nationality, went to the United States, often for furthering their education, and were later naturalized there. There were those – though less in number – who were born with sole United

44 The figure is based not on any officially released statistics, but on the writer's own count.

45 A handful of Cases in which the second nationality was that of a third State will, because of their own peculiarities, be separately treated. See pages 159-170 below.

States nationality, and later acquired Iranian nationality by virtue of their marriage to Iranian nationals. And finally, there were those who were born to Iranian and United States' parents, and acquired dual nationality because of the operation of the laws of Iran and the United States. All, however, had one thing in common: the possession of financial interests in Iran, for the asserted violation of which they came before the Tribunal. These interests – in the form mainly of ownership of immoveable property and shares in corporations, but also of contractual nature – were often very substantial, assertedly amounting, in one Case alone,[46] to over one billion United States dollars.

46 *Golshani* v. *Iran*, 29 IRAN-U.S. C.T.R. 78.

2

THE TWO EARLIER AWARDS BY A CHAMBER

Dual nationality[1] is a status possessed by a significant and now increasing number of individuals all over the globe.[2] Traditionally, it has been strongly discouraged. It has been said, for example, that the United States

> would as soon tolerate a man with two wives as a man with two countries; as soon bear with polygamy as that state of double allegiance which common sense so repudiates that it has not even coined a word to express it.[3]

1 'Dual nationality' and 'dual citizenship' are often used interchangeably, though under certain national laws, including the United States law, there exists a technical distinction between a 'national' and a 'citizen'. Where the distinction is observed, every citizen is also a national and enjoys full measure of political rights, but the reverse is not always the case, for there may be non-citizen nationals not entitled to certain rights, such as the right to vote or to move freely to all parts of the national territory. No such distinction is made under the Iranian law, nor is the distinction recognized on the international plane. Since the present work is mainly concerned with the international aspects of the topic, the internationally recognized term of 'national' may be more accurately used.

2 For two in-depth and recent studies of the subject, see: D.A. Martin and K. Hailbronner (eds.), RIGHTS AND DUTIES OF DUAL NATIONALS: EVOLUTION AND PROSPECTS, The Hague/London/New York: Kluwer Law International, 2003; T.A. Aleinikoff and D. Klusmeyer (eds.), FROM MIGRANTS TO CITIZENS: MEMBERSHIP IN A CHANGING WORLD, Washington D.C: Carnegie Endowment for International Peace, 2000. In the latter, it is estimated, for instance, that now some 'five million' Australians, 'millions' of Americans, and 'several millions' of Western Europeans, are dual nationals. (at 478)

3 George Bancroft, the United States diplomat who negotiated the Bancroft treaties on nationality issues with European powers, in a letter dated 26 January 1845 to Lord Palmerston, the then British foreign secretary. The letter is reprinted in Sen. Ex. Doc. 38, 36th Cong., 1st Sess. 164 (1860), and quoted in D.A. Martin, *New Rules on Dual Nationality for a Democratizing Globe: Between Rejection and Embrace*, 14 Georgetown Immigration L. J. (1999), 1, at footnote 24. For a similarly strong but more recent view, see G.A. GEYER, AMERICANS NO MORE: THE DEATH OF CITIZENSHIP, 1st Ed., New York: Atlantic Monthly Press, 1996, at 68, 312.

A much more moderate language is employed in the Preamble to the Hague Convention of 1930, which nevertheless finds it 'in the general interest of the international community to secure that all its members should recognize that every person should have a nationality and should have one nationality only'.[4] Those who find dual or multiple nationality undesirable mainly refer to the resultant divided loyalties, divided identities, and divided national interests. They also point out to the practical difficulties it normally brings about, in relation particularly to diplomatic protection, taxation, military service, civil status, and the like.

Others, especially in recent years, have suggested that although dual nationality is not 'a virtue in itself', and should not therefore be proliferated in the absence of genuine links between the individual and his States of nationality, it is a fact of modern life and as such cannot be ignored. They refer in particular to globalization, rejection of discrimination against women, the end of the Cold War, and the ever-increasing cross-national commerce, contacts, and marriages as major factors contributing to the expansion of the incidence of plural nationality. The focus of the international system, they suggest, should now shift from rejecting this phenomenon toward regulating its objectionable aspects.[5]

2.1 The Legal Setting

Turning now to its legal aspects, dual nationality results, at times, from the operation of the two rules of *jus sanguinis*[6] and *jus soli*[7] in respect of a single person, and, at other times, from an individual marrying another with a different nationality, where the laws involved bestow a new nationality without requiring the loss of the original one. It also comes about when an individual is naturalized by his adopted country, but retains the nationality of his native country, either deliberately or because of the refusal of the native country to release him automatically from his original nationality upon naturalization. Any of these cases may in fact come about as a result of the combined operation of the laws of Iran and of the United

4 'The Convention Concerning Certain Questions Relating to the Conflict of Nationality Laws', opened for signature April 12, 1930, 179 L.T.S. 89.

5 For an exhaustive review of the arguments of the 'endorsers' and the 'oppositionists' of dual nationality, see D.A. Martin, footnote 3 above, at 4-21.

6 Nationality based on blood relationship (literally, 'right of blood'). Historically, this was the rule of the civil law countries in Europe.

7 Nationality based on the place of birth (literally, 'right of the soil'). Historically, this was a tenet of the common law of England.

States, the two parties to the Algerian Declarations. This calls for a short review of the main characteristics of these two laws on the subject.

2.1.1 The Main Features of Iranian Law on Nationality

The Iranian law on nationality[8] has two prominent features: *First*, although it is generally based on the rule of *jus sanguinis*, it bestows nationality rather liberally;[9] and *second*, it does not recognize the concept of dual nationality. Thus, with regard to its first feature, the following are considered Iranian nationals: any person born, whether in Iran or in a foreign country, to a father of Iranian nationality (Article 976 (2) of the C.C.I.);[10] any person born in Iran to unknown parents (Article 976 (3) of the C.C.I.); any person born in Iran to foreign parents, one of whom was born in Iran, (Article 976 (4) of the C.C.I.); any person born in Iran to a father of foreign nationality, and residing in Iran for at least one year immediately after attaining the age of eighteen (Article 976 (5) of the C.C.I.);[11] and any woman of foreign nationality marrying an Iranian husband (Article 976 (6) of the C.C.I.).[12]

8 This will be found, mainly, in Book Two (On Nationality) of Volume 2 (On Persons) of the Civil Code of Iran (the C.C.I.), containing 16 Articles (Articles 976 to 991). Volume 2 of the Code was enacted in 1934 and, as with other parts of the Code, has since been subjected to only minor amendments. See M.A.R. TALEGHANY, THE CIVIL CODE OF IRAN: TRANSLATED FROM THE PERSIAN, Littleton (Colorado): Rothman & Co, 1995.

9 As noted by Brownlie, the two principles are not mutually exclusive. Indeed, 'in varying degrees the laws of a very large number of states rest on both'. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 6th Ed., Oxford: Oxford University Press, 2003, at 379.

10 Paragraph (1) of the Article provides, in part, that all residents of Iran are regarded as nationals of Iran, save those whose foreign nationality is established.

11 Though a person covered by paragraphs (3) or (4) of Article 976 may, if he or she wishes to take or retain the nationality of his or her father, do so by submitting an application, having reached the age of eighteen, to the Ministry of Foreign Affairs, together with a certificate issued by the State of the father's nationality, to the effect that the certifying State shall recognize the applicant as its national (Article 977, as amended).

12 Though she may revert to her former nationality upon divorce or death of her husband, and the fulfilment of certain requirements (Article 986). Conversely, under Article 987 (as amended), an Iranian woman who marries a foreign national retains her Iranian nationality, unless the law of her husband's State of nationality imposes on her the nationality of the husband, or gives her the choice between her Iranian nationality and the nationality of the husband, and she, with justifiable reasons, opts for the husband's nationality. In the former case only, she may re-acquire her Iranian nationality upon divorce or death of her husband by the mere submission of a request to the Ministry

Naturalization is also envisaged,[13] if certain conditions, including a five-year (continuous or intermittent) prior residency in Iran,[14] are met. The wife and minor children of a person acquiring Iranian nationality in accordance with the provisions of Iranian law are also granted Iranian nationality, though they may, if they wish, accept the former nationality of the husband or father by so informing the Iranian authorities within a year of the husband's naturalization (in the case of a wife) or of attaining the age of eighteen years (in the case of children).[15]

The second feature of the Iranian law, as stated above, is its refusal to recognize the status of dual nationality. Though not expressly stated, this is implied in some of the provisions just noted. Thus, for example, Article 986 of the Code speaks of the possibility of a non-Iranian woman who has become an Iranian national by virtue of her marriage to a national of Iran, to 'revert' to her former nationality after the divorce or death of her husband. Similarly, Article 987 speaks of the possibility of 're-acquisition' of Iranian nationality by an Iranian woman on whom the foreign nationality of the husband is imposed, upon the divorce or death of her husband.

More specific on the point are Articles 988 and 989 of the Code, read together. The former sets the conditions that must be met by any Iranian who wishes to abandon his Iranian nationality. These are: attaining the age of twenty-five; securing the permission of the Council of Ministers; an undertaking by the applicant to transfer to Iranian nationals his rights to immovable property in Iran within a certain period; and completion of military service.[16] The latter Article then states that any Iranian who without due observance of the law's requirements has acquired foreign nationality after the year 1901, his foreign nationality shall be regarded as 'non-existent', and he will be considered as a national of Iran. His immovable property, however, will nevertheless be sold under the supervision of the local prosecutor and, after the deduction of transfer expenses, he will be given the value therefor. Such a person will, further, not be eligible for certain municipal or governmental posts.

of Foreign Affairs.

13 Article 979 of the Code.

14 Though this requirement may, under special circumstances, be dispensed with (Article 980).

15 Article 984 of the Code.

16 Under Note A (as amended) to Article 988, persons who apply under this Article 'for abandoning their Iranian nationality in order to acquire a foreign nationality' must also leave Iran within three months after the issuance of the certificate of abandonment.

2.1.2 The Main Features of United States Law on Nationality

The United States law, on the other hand, adopts a strong form of *jus soli*, though it, too, recognizes *jus sanguinis*. Under the former principle, initially codified in the Fourteenth Amendment (1868), all persons born in the United States and subject to United States jurisdiction[17] automatically acquire United States citizenship. This is now further reflected in § 301 (a) of the Immigration and Nationality Act of 1952 (hereinafter, the 'INA (1952)');[18] a consolidating Act that together with its amendments form the foundation of the present law on the subject.

Under the latter principle, first established by an Act of 1790 and now also reflected in § 301 of the INA (1952), all persons born abroad of parents who are both United States citizens, inherit United States citizenship. In order, however, to avoid transmitting nationality indefinitely (in cases where a family has lost significant connection to society), the law imposes certain residency requirements. Thus, in the case just mentioned, there must be proof of the residency of at least one of the parents in the United States (§ 301 (c)). Where one parent is a citizen and the other a national,[19] the citizen parent must have been physically present in the United States for at least one year prior to the child's birth (§ 301 (d)). Where one parent is a citizen and the other an alien, the citizen parent must have been physically present in the United States for no less than five years, at least two years of which after attaining the age of fourteen (§ 301 (g) as amended in 1986).[20]

Naturalization is also envisaged. As with the Iranian law, the United States law requires a five-year residency (§ 316).[21] A shorter period of residency – three years – is required of the spouses of United States citizens (§ 319 (a)). The

17 The reference to jurisdiction excludes children born to diplomats and, formerly, excluded members of any Native American tribe. See DAVID WEISSBRODT, IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL, 4th Ed, St. Paul (Minn.): West Group, 1998, at 331.

18 8 U.S.C. – Alien and Nationality (Codification of the Immigration and Nationality Act, Pub. L. 414, ch. 477, 66 Stat. 163, June 27, 1952.)

19 Such as Filipinos who, before the Philippines obtained its independence in 1946, were designated as 'non-citizen nationals'. § 308 of the INA (1952)

20 The law formerly required that in this particular case the child, too, reside in the United States for a specified period in order to retain his United States citizenship. This requirement was eliminated in 1978.

21 Though here, the petitioner must have continuously resided in the United States for five years as a lawfully admitted permanent resident and, during the five years immediately prior to filing the petition, must have been physically present in the United States for at least half of that time. The purpose of the residency requirement is *inter alia* to 'enable candidates to discard their foreign attachments'. D. WEISSBRODT, footnote 17 above, at 345.

petitioner for naturalization must acknowledge his 'intention in good faith to become a citizen of the United States' and 'to reside permanently in the United States'. He must, further, take 'the oath of renunciation and allegiance'. In taking the oath, the petitioner *inter alia* declares, in open court:

> That I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and the laws of the United States of America against all enemies, foreign or domestic; that I will bear true faith and allegiance to the same ...[22]

A citizen may lose his United States citizenship because of 'denaturalization' or 'expatriation'. The former, which only pertains to naturalized citizens, is a process under which a naturalization found to have been procured 'illegally' or 'by concealment of a material fact or by misrepresentation', is judicially revoked.[23] The latter, applicable to both naturalized and native citizens, is defined as 'the *voluntary* act of abandoning one's country and becoming the citizen or subject of another'.[24]

The earlier law required the consent of the sovereign in expatriation. This, however, was abandoned by an 1868 Statute,[25] which spoke of expatriation as 'a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty and pursuit of happiness'. The Statute was the result of the public outcry in the United States over the decision by Great Britain to discipline as British subjects three natives of Ireland who had been naturalized in the United States.[26] But although it was originally enacted to protect the rights of those who became naturalized United States citizens, it was later construed to be equally applicable to United States citizens naturalized by other countries.[27] In that same

22 § 337 (a) of the INA (1952).

23 § 340 (a) of the INA (1952). Further, under § 340 (d), where a naturalized citizen takes up permanent residence in a foreign country within one year of his naturalization, this shall be considered as *prima facie* evidence of his lack of intention at the time of his application for citizenship to reside permanently in the United States. The naturalized citizen may, however, rebut the evidence by establishing his intention in good faith to reside permanently in the United States.

24 D. WEISSBRODT, footnote 17 above, at 381. (Italic original)

25 The Expatriation Act of 1868 (15 Stat. 223). The same principle is reflected in Article 15 (2) of the Universal Declaration of Human Rights (10 December 1948): 'No one shall be … denied the right to change his nationality.' G. A. Res. 217 A (III), 3 UN GAOR (Resolutions, part 1), at 71, UN DOC. A/810 (1948).

26 See A.J. Mikva and G.L. Neuman, *The Hostage Crisis and the 'Hostage Act'*, 49 University of Chicago Law Review (1982), 292, at 307-329.

27 *Ibid*, at 382.

1868 year, the United States initiated a series of treaties[28] under which each of the member countries would regard as citizens of the other those of its subjects who were naturalized by the other.

The grounds for expatriation were first laid down in the Expatriation Act of 1907,[29] and later expanded. They included: naturalization in a foreign State or taking an oath of allegiance to a foreign State; return of a naturalized citizen to his country of origin and living there for a specified period of time; service in the military or government of a foreign State; voting in a political election in a foreign State; court martial conviction and discharge from the armed forces for desertion in time of war; leaving the Unites States in time of war to avoid military service; and conviction for treason against the United States.

The earlier law, further, applied an 'objective test of intent', in the instances in which proof of intent was required. In the case of marriage, for instance, what had to be shown was the intention to marry an alien.[30] This test was later abandoned in favour of the test of the citizen's 'subjective' intent: there must now be proof of his intention to relinquish his United States citizenship.[31] Some of the earlier grounds for expatriation were also subsequently held by the courts to be unconstitutional.

As the law now stands,[32] the grounds for expatriation are: obtaining naturalization in a foreign State, with intent to relinquish the United States nationality; taking an oath or making other formal declarations of allegiance, with intent to shift allegiance; entering into the armed forces of a foreign country engaged in hostilities against the United States, with intent to relinquish the United States nationality; formal renunciation of the United States citizenship; and acts of treason and subversion.[33] This subjective intent, the proof of which is now required for

28 Known, after the name of the United States diplomat who negotiated them with European powers, as 'the Bancroft Treaties'.

29 34 Stat. 1228.

30 *Savorgnan* v. *United States*, 70 S. Ct. 292.

31 *Afroyim* v. *Rusk*, 87 S. Ct. 1660, decided by the Supreme Court in 1967. In 1988, Congress amended the INA to reflect the Court's ruling in *Afroyim*. The law now provides that a person shall lose his United States nationality by 'voluntarily performing [an expatriating act] with the intention of relinquishing United States nationality'. § 349 (a) of the INA (1952)

32 See D. WEISSBRODT, footnote 17 above, at 391-93.

33 A 1996 legislation provides a new exclusion ground: persons determined by the attorney general to have renounced United States citizenship 'for the purpose of avoiding taxation'. § 212 (a) (10) (E), of the INA (1952) as added by the Illegal Immigration Reform and Immigrant Responsibility Act (1996) § 352.

expatriation, creates a peculiar anomaly when contrasted with the rule applicable in cases of naturalization. As noted by a commentator:

> An immigrant who naturalizes in the United States must renounce citizenship elsewhere; a U.S. citizen who naturalizes in another country cannot have his or her U.S. citizenship removed unless he or she expressly intends to lose it. The first rule seeks to prevent dual citizenship; the second rule virtually guarantees dual citizenship.[34]

It remains to be said that although the United States law does not prohibit dual nationality as such, the United States has on record declared its disapproval of the concept.[35] And this, because of the unitary allegiance which the United States expects of its citizens. In the words of the United States Supreme Court, one 'cannot turn [his United States citizenship] into a fair-weather citizenship … An American citizen owes allegiance to the United States wherever he may reside'.[36] The renunciatory oath required by Statute, too, reveals the law's strong opposition to dual nationality.

In practice, however, a much more tolerant approach has been adopted. It is reported, for instance, that it has become 'increasingly common for U.S. government officials … to advise prospective citizens that [the taking of the oath of naturalization] will not result in loss of their earlier citizenship';[37] a practice that has been criticized.[38]

Such being the main features of the laws of Iran and the United States on nationality, it will be readily noted that as a result of the confluence of these two laws dual nationality may materialize in a number of instances, namely: a child born in the United States to an Iranian father; a child born in Iran to parents with

34 T.A. Aleinikoff, *Between Principles and Policies: U.S. Citizenship Policy*, in T.A. Aleinikoff and D. Klusmeyer (eds.), FROM MIGRANTS TO CITIZENS: MEMBERSHIP IN A CHANGING WORLD, Washington D.C: Carnegie Endowment for International Peace, 2000, 119, at 137.

35 See M.L. NASH, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, Washington D.C: Department of State, 1979, at 271, referring to a statement by the State Department in 1979, in which it is declared that '[t]he United States Government is opposed to dual nationality as a matter of policy'.

36 *Kawakita* v. *United States*, 72 S. Ct. 950.

37 D.A. Martin, footnote 3 above, at 20.

38 'To give assurances that dual nationality may continue, in the teeth of an express oath, is virtually to invite false swearing and to place the individual at some risk … of perjury prosecution and even denaturalization.' *Ibid.*

United States citizenship, one of whom born in Iran;[39] a child born in Iran to parents with United States citizenship, he residing in Iran for at least one year after attaining the age of eighteen;[40] a female United States citizen marrying an Iranian husband; a United States citizen who naturalizes in Iran with no intention to relinquish his or her original citizenship; a national of Iran who naturalizes in the United States without observing the conditions set by the Iranian law for the renunciation of Iranian nationality; and, finally, the wife and minor children of a United States citizen who naturalizes in Iran.[41]

2.1.3 The Situation at the International Level

Plainly enough, a dual national is not a half-national of each of his two countries of nationality. He is a full national of both, meaning that he has a full allegiance/protection relationship with both. Now this by its very nature – each of the two countries having the right to treat him as its national[42] – can give rise to conflicts on the international plane, often in relation to military service, taxation, or voting, but also in respect of property or personal injury claims. The former instances have been more readily resolved, mainly through mutually agreed provisions in bilateral and multilateral treaties.[43] The latter instance, especially when the

39 The same is the case where, in the situation just described, only one parent is a United States citizen and the other is either a United States national or an alien, provided that the residency requirements of the United States law are met.

40 Again, the same is the case where, in the situation just described, only one parent is a United States citizen and the other is either a United States national or an alien, provided that the residency requirements of the United States law are satisfied.

41 Though the wife and children may, as noted before, choose to abandon their Iranian nationality in favour of the former nationality of the husband or father after the passage of some time.

42 '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 3 of the 1930 'Hague Convention Concerning Certain Questions Relating to the Conflict of Nationality Laws', opened for signature on 12 April 1930, 179 L.T.S. 89.

43 See, for example, 'The Protocol Relating to Military Obligations in Certain Cases of Double Nationality', opened for signature 12 April 1930, 178 L.T.S. 227; the 'Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality', opened for signature 6 May 1963, 634 U.N.T.S. 221; Europ. T.S. No. 43; and the 'European Convention on Nationality', opened for signature 6 November 1997, Europ. T.S. No. 166; 37 ILM 44 (1998).

nationalities of both the claimant and the respondent States have been at issue, has proved more problematic. It is the latter with which we are here concerned.

The subject will of course be treated extensively in due course. Here, and in order only to complete the general picture on the background, a word must be said about the traditional treatment of the issue by customary international law. Historically, with regard to the claim of a dual national against one of his two States, two rules have been adopted:

First, the rule of 'non-responsibility', according to which the application of the well-established principle of equal sovereignty of States requires, as a matter of course, that where the nationality of both the claimant and the respondent States compete with each other at the international level, the responsibility of the respondent States may not be engaged, for otherwise the nationality of the claimant States would be given preference with no justification. To the proponents of this rule, the scope of the application of the alternative rule of 'dominant nationality' is restricted to the instances of conflict of nationality under private law, *i.e.*, where two nationalities compete before a court of a third State.

Second, the rule of 'dominant nationality', according to which the claim of an individual possessing the nationalities of both the claimant and the respondent States may be validly entertained at the international level if he can establish that his ties with the claimant State, at the relevant times, were stronger. The justification for this preference, it is argued, lies in the very existence of stronger ties, the proof of which leaves no room for the equality argument.

2.2 The Two Earlier Awards by Chamber Two

It was against this background that the Tribunal began its consideration of the claims presented by dual nationals of Iran and the United States. In line with other Cases before the Tribunal, the defendants in these claims were ordered to submit their statements of defence. In all, the defendants – the Government of Iran and/or its named agencies – challenged the Tribunal's jurisdiction, pointing out to the Iranian nationality of the claimants and relying on the terms of the Algerian Declarations and on the rule of non-responsibility in international law.

Faced with this, the Tribunal's three Chambers in 1982 issued Orders in which the parties were instructed first to brief the Tribunal on the specific issue of the Tribunal's jurisdiction over such claims. In the briefs submitted, each of the claimants argued that the text of the Algerian Declarations was clear and unambiguous. It required only the proof of the nationality of the claimant State and, that being the case, the fact that a claimant possessed an additional nationality, including the nationality of the respondent State, was simply irrelevant. As an

alternative ground, however, they submitted that if the Tribunal came to the conclusion that the proof of nationality of the claimant State was not dispositive of the issue, it was required to apply the doctrine of 'active and effective' nationality.

The defendants, on the other hand, continued to argue that under both the terms of the Algerian Declarations and the rule of non-responsibility, which they believed to be the only rule of customary international law on the subject, the Tribunal was precluded from entertaining such claims. Only with regard to one situation did Iran speak in its earlier briefs of the possible application of the rule of dominant nationality, namely, where a female United States citizen by birth acquired Iranian nationality because of her marriage to an Iranian husband.

With the written exchanges completed in three Cases, they were orally heard by Chamber Two of the Tribunal in late 1982. These were: *Esphahanian* v. *Bank Tejarat*;[44] *Golpira* v. *Iran*;[45] and *Mahmoud* v. *Iran*.[46] The first was heard on 25 October 1982, and the second and the third on 5 November 1982.

On 19 November 1982, when these Cases were under deliberation, the Government of the United States submitted to each of the Tribunal's Chambers a General Memorial.[47] It was there suggested that since the Tribunal's decisions on the subject would set important precedents with 'significant consequences for the future of international claims settlement agreements', the General Memorial was being offered to 'assist the Tribunal'. Perhaps not surprisingly, the United States in this General Memorial supported the American claimants' textual interpretation of the Declarations, and went on to suggest that if the Tribunal were to reject that position and come to the conclusion that, because of the ambiguity of the text, the pertinent rule of international law had to be resorted to, then that rule would be the rule of dominant and effective nationality only.

On 11 January 1983, Iran invited Chamber Two to suspend the consideration of the three Cases it had heard, and to give Iran reasonable time likewise to prepare a General Memorial in rebuttal of the United States' Memorial. The Chamber rejected this request,[48] on the ground that the United States' Memorial had not been admitted into evidence, and was therefore not to be considered by the Chamber in any of the Cases at issue.

On 25 February 1983, Iran, pointing out to the importance of maintaining consistency in the decisions of the Tribunal, and relying on Article VI (4) of the

44 2 IRAN-U.S. C.T.R. 157.
45 2 IRAN-U.S. C.T.R. 171.
46 9 IRAN-U.S. C.T.R. 350.
47 'Memorial of the United States on the Issue of Dual Nationality'.
48 Order of 31 January 1983, not reprinted.

Claims Settlement Declaration,[49] requested the Full Tribunal to intervene and to consider the issue itself.[50] This formed the basis of an interpretative Case that was docketed, and later became known, as Case No. A/18 ('A/18'). Iran further invited the Tribunal to order the stay of proceedings in all dual nationality claims, until such time as the Full Tribunal's decision was rendered. This was granted, save in the three Cases already heard by Chamber Two. On 29 March 1983, Chamber Two rendered Awards in two of the Cases it had heard,[51] but not in the third.[52]

Nasser Esphahanian was at birth a national solely of Iran, having been born in Iran to Iranian parents. He was raised and received his early education in Iran. At the age of seventeen, he went to the United States on a student visa. Graduated in 1950, he served briefly in the United States Army, married a United States native, and began working with a number of United States-registered companies. He acquired his permanent resident status in 1954, and was naturalized a United States citizen in 1958.

In 1970, Mr. Esphahanian, then the Middle East area general manager for his United States' employer company ('HCC'),[53] returned to Iran. From then until 1978, he and his family stayed in Iran for nine months each year and in the United States for the remaining three months. For part of that period, he also served as the managing director of a company registered in Iran ('IMICO') in which 49% of the shares were held by SEDCO. Of the remaining shares in IMICO, 32% were held by Mr. Esphahanian and 19% by some Iranian nationals, all assertedly as SEDCO's nominee shareholders. In 1978, Mr. Esphahanian went back to the United States and did not return to Iran thereafter.

49 Under which '[a]ny question concerning the interpretation or application of this Agreement shall be decided by the Tribunal upon the request of either Iran or the United States'.

50 'Request for the Tribunal's View Concerning the Inadmissibility of the Claims Filed by the Nationals of the United States against the Government of the Islamic Republic of Iran'.

51 *Esphahanian* v. *Bank Tejarat*, 2 IRAN-U.S. C.T.R. 157; *Golpira* v. *Iran*, 2 IRAN-U.S. C.T.R. 171. It may be noted here that on the date of issuing these two Awards, Chamber Two issued a third Award on a dual nationality Case, *Haroonian* v. *Iran* (2 IRAN-U.S. C.T.R. 226). But this was a Case in which the claimant had admitted in her statement of claim that she had acquired her United States nationality after the date of the Declarations. The claim was therefore summarily dismissed, without any hearing and with no reference to the issue of dual nationality. The issue of nationality acquired subsequent to the date of the Declarations will be discussed in due course.

52 *Mahmoud* v. *Iran*, 9 IRAN-U.S. C.T.R. 350, in which the Award was issued much later, on 27 November 1985.

53 HCC was a subsidiary of a United States-registered company, SEDCO Inc.

Esphahanian's claim arose out of a cheque in the amount of U.S. $704'691.85, dishonoured for insufficient funds. This was a cheque drawn by the 'Iranian Bank', the predecessor of the respondent 'Bank Tejarat',[54] upon its account with the City Bank of New York and to Esphahanian's order. Esphahanian had obtained this cheque in exchange for certain certificates of deposit, denominated in Rials, which he throughout his stay in Iran had from time to time purchased out of his personal income.

The Chamber's first task was to determine whether it had jurisdiction to entertain the claim. The pertinent provisions in the Algerian Declarations were three: *First*, Article II (1) of the Claims Settlement Declaration, under which, as noted before, the present Tribunal is established for the purpose of, *inter alia*, deciding 'claims of nationals of the United States against Iran and claims of nationals of Iran against the United States'. *Second*, Article VII (1) (a) of the said Declaration, which defines the term 'national' as 'a natural person who is a citizen of Iran or the United States'.[55] And *third,* Article VII (2) of that Declaration, according to which ''[c]laims of nationals' of Iran or the United States, as the case may be, means claims owned continuously, from the date on which the claims arose to the date on which this Agreement is entered into force, by nationals of that States …'.

By a majority of two to one, the Chamber found: *that* since the Algerian Declarations constitute a treaty under international law, they may be interpreted in accordance with the pertinent provisions, to wit, Articles 31 and 32, of the Vienna Convention on the Law of Treaties (1969);[56] *that* the textual interpretation

54 By the time of instituting the claim, Bank Tejarat had been nationalized by Iran.

55 As noted before, Article VII (1) then goes on to define 'national' in terms of 'a corporation or other legal entity'.

56 *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;

of the claimant, who reads the text as simply requiring the proof of the nationality of the claimant State, cannot be accepted, nor can the textual interpretation of the respondent, who suggests that because Iran does not recognize the concept of dual nationality, it may not be presumed to have consented to its inclusion in an international treaty;[57] and *that* in the absence of any specific provision on this point in the Declarations, resort may be had, in accordance with Article 31 (3) (c) of the Vienna Convention, to 'any relevant rules of international law applicable in the relations between the parties'.

Turning then to the 'considerable body of law, precedents and legal literature' in international law on the subject of dual nationals' claims, the majority found, further, *that* the applicable rule of international law is that of 'dominant and effective nationality', which rule, if applied to the text of the Declarations, would lead to the conclusion that

(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 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.

(UN Doc. A/CONF. 39/27, May 23, 1969, 1155 U.N.T.S. 331; reprinted in 8 ILM 679 (1969)).

57 The claimant's textual interpretation, say the majority, would lead to the absurd result that dual nationals are permitted under the Declarations to present claims to the Tribunal against either government or both. The respondent's contention, on the other hand, is not by itself dispositive of the issue, particularly because a 1955 Treaty of Amity between Iran and the United States recognizes the concept of dual nationality by excluding such nationals from certain privileges. (The Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran, *signed* on 15 August 1955 and *entered into force* on 16 June 1957, 284 U.N.T.S. 93; 8 U.S.T. 899, T.I.A.S. No. 3853) In fact, these were only two of the parties' many arguments in relation to the textual interpretation of the Declarations, as to which the majority remain silent. Still, since the legal arguments presented to the Chamber, and the Chamber's treatment of those arguments, are more or less identical with those presented to and addressed by the Full Tribunal in Case No. A/18, they will be dealt with in the context of that Case.

> this Tribunal has jurisdiction (a) over claims against Iran by dual Iran-United States nationals when the dominant and effective nationality of the Claimant is that of the United States and (b) over claims against the United States of dual Iran-United States nationals when the dominant and effective nationality of the Claimant is that of Iran.[58]

However:

> To this conclusion we add an important caveat. There is precedent for denying jurisdiction on equitable grounds in cases of fraudulent use of nationality. Such a case might occur where an individual disguises his dominant and effective nationality in order to obtain benefits with his secondary nationality not otherwise available to him. *See Flegenheimer Case* (United States v. Italy), 14 R.I.A.A. 327, 378 (1958) (*dicta*).[59]

Proceeding to apply these findings on law to the facts of the Case, the majority first 'framed the jurisdictional issue' before the Chamber. That issue, said the majority, was whether Esphahanian's factual connections with the United States 'in the period preceding, contemporaneous with and following his naturalization as a United States citizen' were more effective than his factual connections with Iran during the same period. A review of such connections then led the majority to conclude that although Esphahanian's contacts with Iran had been 'significant', his factual connections with the United States had been stronger. His 'dominant and effective' nationality at 'all relevant times', therefore, was that of the United States.[60]

As to the application of the 'important caveat', the majority noted that during his 1970-8 stay in Iran, Mr. Esphahanian had allowed SEDCO to use his name as its nominee shareholder in IMICO, possibly, if not certainly, because he had Iranian nationality and hence could disguise the true extent of SEDCO's ownership in IMICO.[61] But although this was 'a kind of use of a second nationality that may cause the Tribunal to deny a claim',[62] it did not seem to be relevant to the Case at hand, because there was no evidence that Mr. Esphahanian had used that subterfuge to secure benefits restricted to nationals of Iran. In fact, this was an

58 *Esphahanian*, 2 IRAN-U.S. C.T.R. 157, at 166.
59 *Ibid.*
60 *Ibid*, at 166-167.
61 Which by law had to be limited to the minority of 49%.
62 *Ibid*, at 67.

issue relevant to another claim before the Tribunal, in which SEDCO asserted the nationalization of its subsidiary IMICO by Iran.[63]

On the merits of the Case, the majority held that even though the respondent Bank had probably tried to meet its obligations, it remained its responsibility to ensure the sufficiency of its funds with the City Bank, on which the cheque had been drawn. On that basis, the majority upheld the claim in the amount of the cheque.

As for the other two Cases heard by the Chamber, the same majority applied the jurisdictional guidelines enunciated in *Esphahanian* to *Golpira*, signed later that same day. On the facts of the latter Case, they came to the conclusion that the claimant's 'dominant and effective' nationality was that of the United States, and that 'all his actions relevant to this claim could have been done by a non-Iranian'.[64] On the merits, however, the majority concluded that the claimant's asserted property had not been taken by the respondent, and hence dismissed the claim. The Award in the third Case, *Mahmoud*, was not rendered, because of the events described in the next Chapter, until 27 November 1985.[65]

In each of the two Awards, the minority member, the arbitrator appointed by Iran, appended a handwritten note to his signature at the end of the English text.[66] There, he stated that he declined 'to take part in the making of a decision which in the part dealing with jurisdiction cannot be legally justified, but tainted with improper motives. These motives shall be disclosed in my separate opinion'.[67]

That promised 'separate opinion' was filed on 2 October 1983.[68] Having exhaustively reviewed the sources of substantive international law on the subject, including the case law of both prior to and post Second World War, he suggested that the applicable rule was that of non-responsibility. The rule of dominant nationality, he stated, was reserved for resolving a conflict of nationality in two instances only: (i) before a court of a third State when nationality is a precondition

63 *SEDCO* v. *IMICO*, 21 IRAN-U.S. C.T.R. 31, at 60. In the event, however, the issue turned out to be irrelevant in this second Case as well. This was because the Tribunal there came to the conclusion that the fair market value of IMICO at the time of the alleged expropriation was at, or below, zero. Hence, the issue of the validity of the claim based on Mr. Esphahanian's shares was of no practical concern.

64 *Golpira* v. *Iran*, 2 IRAN-U.S. C.T.R. 171, at 174-5.

65 *Mahmoud* v. *Iran*, 9 IRAN-U.S. C.T.R. 350. There, the claim was rejected on the jurisdictional ground that the claimant had failed to establish her United States' dominant and effective nationality during the relevant period.

66 He refused to sign the Persian texts of the two Awards, required by the Tribunal Rules.

67 *Esphahanian*, 2 IRAN-U.S. C.T.R. 157, at 170; *Golpira*, 2 IRAN-U.S. C.T.R. 171, at 177.

68 'Dissenting Opinion of Dr. Shafie Shafeiei on the Issue of Dual Nationality', 2 IRAN-U.S. C.T.R., at 178.

for the application of a law by the court; and (ii) before an international tribunal when nationality is a precondition for the exercise of diplomatic protection, and more than one State seeks to do so. Turning next to the interpretation of the Algerian Declarations, he found that the applicable rule of substantive international law, the rule of non-responsibility, was in perfect harmony with the Declarations and the circumstances surrounding their conclusions.[69]

As for the application by the majority of the rule of dominant and effective nationality to the facts of the two Cases, he noted the close connections, social and financial, of each of the two claimants with Iran, and concluded that both were individuals born, raised, and educated in Iran, maintaining their ties with that country even after they were naturalized as Americans. Their claims, too, concerned assets and rights situated or acquired in Iran, due to the claimants' Iranian nationality. The claimants were simply Iranians who now relied on their previously disguised United States nationality in order to present their claims against Iran. The majority, he noted, proposed to allow an international claim in such circumstances, and yet:

> If such a solution, unique in the annals of international jurisprudence, were repeated, it would throw open the doors to the fraudulent abuse of dual nationality. Nationality is the expression of membership in a set of moral and spiritual values. It is to be deplored that the love of wealth induces men to betray the values of the people from whom they have sprung and among whom they were nurtured and educated. The wisdom of the traditional solution of international jurisprudence, declaring such claims inadmissible, must instead be affirmed.[70]

2.3 Iran's Reaction to the Two Awards

Not surprisingly, the two Awards by the Chamber were not welcomed by Iran. As noted before, Iran had prior to the issuance of these Awards referred the issue to the Full Tribunal, and had requested that the proceedings in these Cases be stayed pending the Full Tribunal's decision; a request that had been rejected by the Chamber. In a letter later addressed to the Tribunal's President, Iran objected to Chamber Two's decision not to suspend its consideration of the Cases in question. By doing so, Iran wrote, the Chamber had pre-emptively violated Iran's right to seek consistency in the interpretation and application of the issue by

69 Once again, these points being more or less identical with those raised in the dissenting opinion of the minority members in A/18, they will be dealt with in that context.

70 2 IRAN-U.S. C.T.R., at 225.

securing the Full Tribunal's authoritative view on the subject. Concluding that, for the said reason, the issued Awards had not been validly made, Iran urged the President not to certify them, as required by the Algerian Declarations, for payment out of the Security Account. This request, too, was rejected, and the Awards were certified and paid.[71]

In another move, Iran on 30 June 1983 referred the issue to a Hague local court, appealing against the Chamber's decisions on the ground that under Dutch law, they had been 'illegally' made.[72] Fearful that this might open the floodgates, the Dutch authorities hurriedly presented to the Dutch Parliament a bill under which the review of the Tribunal's decisions by the local courts was to be allowed, but only in the very limited cases of improper proceedings or manifest violations of public order or morals. The bill was later withdrawn when Iran withdrew the appeal. In the meantime, Case A/18 continued.

71 Indeed, as will be seen shortly, the Full Tribunal in its later Decision in A/18 specifically stated that the Awards made by Chamber Two could not 'be affected by the present decision, as they are final and binding Awards'. 5 IRAN-U.S. C.T.R. 251, at 252.

72 See Iranian Assets Litigation Reporter (19 August 1983), at 7043.

3

THE CASE BEFORE THE FULL TRIBUNAL

Of all the Cases litigated before the Tribunal, and those include Cases in which giant multi-national oil companies sued Iran for hundreds of millions of dollars, none was so hotly and passionately contested as this interpretative Case between the two States. Extensive memorials containing legal opinions by eminent publicists were first exchanged, followed by a two-day hearing on 10 and 11 November 1983, during which the parties' oral arguments were presented.

3.1 The Issue Presented for Decision

The issue formulated for the Tribunal's determination was whether, under Article VII (1) of the Claims Settlement Declaration,

> the Tribunal has jurisdiction over claims against Iran by persons who are, under the United States law, citizens of the United States of America and are, under Iranian law, citizens of the Islamic Republic of Iran.[1]

3.2 The Parties' Positions

In line with its earlier stance before Chamber Two, Iran argued before the Full Tribunal that under the terms of the Algerian Declarations, the Tribunal lacked jurisdiction to hear claims submitted by dual nationals of both the United States and Iran. And this mainly for the following reasons:

First, the textual interpretation of Article VII (1) excludes from the Tribunal's jurisdiction claims submitted by such claimants. This is borne out by the plain meaning of the text, which speaks of a 'national' of Iran or the United States,

1 *Iran* and *the United States*, Case No. A/18, 5 IRAN-U.S. C.T.R. 251.

and goes on to define this as, *inter alia*, 'a natural person who is a citizen of Iran or the United States'. What the term 'national' ordinarily refers to is the normal status of a person with one nationality only, and not the abnormal status of a person with dual nationality. Besides, the text employs the disjunctive article *or*, and not the coordinating conjunction *and*: it states that a national is 'a natural person who is a citizen of Iran or of the United States', and not 'a natural person who is a citizen of Iran and of the United States'.

The definition of the term national as a citizen, on which the United States heavily relies, is quite irrelevant. This is because the question before the Tribunal is one of international law, and not of domestic law. Further to be noted in this respect is the fact that when the same Article VII (1) proceeds to define the term 'national' in relation to a juridical person, it speaks of the ownership and control of the entity or corporation[2] and, by doing so, rejects the possibility of dual nationality of a juridical person.

The above reading of the text, in Iran's view, was reinforced by two recognized rules of interpretation. Under the first, in cases of doubt, a State's submission to the jurisdiction of an international forum must be construed 'restrictively'. Under the second, a treaty text can confer jurisdiction on an international tribunal only to the extent that it reflects the 'converging will' of the parties. In the Case at hand, Iran, not recognizing dual nationality, could not be presumed to have consented to the Tribunal's jurisdiction over the claims of dual nationals when it adhered to the Algerian Declarations.

Further support for all this, according to Iran, was to be found in the reciprocal nature of the Algerian Declarations, requiring equal treatment of the parties thereto. This equality would be violated if nationals of one party were allowed to bring claims against their own State, espoused by the other State. Similarly violated in such a case would be the recognized principle of equality of States, of which the rule of non-responsibility is a corollary.

Second, what the parties agreed to in the Declarations was wholly consistent with the pertinent rules of customary international law, to which the Tribunal was entitled to resort under Article V of the Claims Settlement Declaration,[3] if it found that the text was not clear enough, or was silent on the issue. Because the parties by adhering to the Algerian Declarations intended the Tribunal to adjudicate international claims in the context of diplomatic protection,[4] Article VII (1) had

2 See pages 8-9 above.

3 Quoted on page 8 above.

4 As argued by Iran, claims submitted to the Tribunal were of international character, and were adjudicated on the basis of diplomatic protection, mainly because: (i) the Tribunal was established through the Algerian Declarations to resolve inter-State disputes;

to be read in line with the customary international law relevant to the exercise of diplomatic protection. And if this was done, it would be readily seen that States practice, judicial pronouncements, and legal literature all disallowed the exercise of diplomatic protection where the claimant also possessed the nationality of the respondent State.

The United States, on the other hand, argued *primarily* that under the terms of the Algerian Declarations, any individual with the nationality of both Iran and the United States was entitled to assert claims against either of the two States. This was because the plain language of Article VII (1) simply required the proof of nationality of Iran or the United States. The fact that a claimant happened to additionally possess the nationality of the respondent States was therefore quite irrelevant. As to Iran's reliance on the disjunctive *or*, this was syntactically explained by the phrase 'as the case may be'. Thus: 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. Iran, on the other hand, reads into the text something that does not exist: a natural person who is a citizen of Iran or the United States, 'but not of both'.

Further, the term 'national' is defined in Article VII (1) by reference to citizenship under domestic law. Thus, a national of the United States is there defined, *inter alia*, as a natural person who is a citizen of the United States under the United States law, and, pursuant to the United States law, the ordinary meaning of a United States citizen includes a citizen who is a dual national. Further still, the text of the Declarations establishes clearly that the parties, in the instances in which they wished to exclude certain claimants from the Tribunal's jurisdiction, did so expressly.[5] This was consistent with the parties' past practice, as reflected in their Treaty of Amity. There, they intended to deprive dual nationals from receiving treaty benefits, and they said so expressly.[6] Finally, this interpretation

(ii) the Declarations were adhered to in order to address an international crisis; (iii) the Tribunal's awards could not be challenged as contrary to public international law, a characteristic only of awards issued pursuant to the exercise of diplomatic protection; and (iv) payments were made to one of the two governments and not to the individual claimants, though the latter could be the ultimate recipients.

5 A reference to Paragraph 11 of the General Declaration, under which certain claimants are expressly excluded from the Tribunal's jurisdiction. See page 6 above.

6 A reference to Article XVII of the Treaty, under which certain tax exemptions granted to consular officers and employees 'shall not apply to nationals of the sending state who are also nationals of the receiving state …' The Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran, *signed* on 15 August 1955 and *entered into force* on 16 June 1957, 284 U.N.T.S. 93; 8 U.S.T. 899, T.I.A.S. No. 3853.

of the text was in line with the modern practice of the United States and many other countries, where language identical to that of Article VII is interpreted as including dual nationals.

The clarity of the text, according to the United States, made it unnecessary for the Tribunal to resort, for the purposes of interpretation, to international law. However, unlike Iran which, as previously noted, argued that resort to customary international law also led to the application of the rule of non-responsibility, the United States submitted that if, contrary to the United States' primary position, such a reference had to be made, the result would be a different outcome, namely, the applicability of the rule of dominant nationality.

In support of this *subsidiary* position, the United States argued that the adjudication of claims before the Tribunal was not strictly speaking an exercise of diplomatic protection. As with the Mixed Arbitral Tribunal established under the Treaty of Versailles,[7] the Declarations grant rights to certain nationals of Iran and the United States that can be directly enforced before an arbitral tribunal. Awards against Iran are enforceable through the Security Account and, under Article IV (3) of the Claims Settlement Declaration, awards of the Tribunal against either government 'shall be enforceable against such government in the courts of any nation in accordance with its laws'.

At any rate, argued the United States, the rule of dominant and effective nationality had long been invoked by international arbitral tribunals. The old rule of non-responsibility had been criticized on both theoretical and practical grounds, as a result of which it had been abandoned, particularly in the major post-War international decisions, in favour of the rule of stronger links, which rule is in line with the preservation of the claimants' human rights, as set forth in the Universal Declaration of Human Rights.[8]

3.3 The Tribunal's Decision

The Full Tribunal issued its Decision on 6 April 1984,[9] some five months after the Case was orally heard. There, the Tribunal first concluded, in line with the

7 The Treaty of Peace Between the Allied and Associated Powers and Germany (Treaty of Versailles), June 28, 1919, reprinted in 13 Am. J. Int'l L., Supplement (1919), 151; 22 USBS 43.

8 The Universal Declaration of Human Rights, G. A. Res. 217 A (III), UN GAOR (Resolution, part 1), at 71, UN Doc. A/810 (1948).

9 *Iran* and *the United States*, 5 IRAN-U.S. C.T.R. 251.

parties' suggestion and its own precedents,[10] that the Algerian Declarations constitute a treaty under international law and as such may be interpreted in accordance with the pertinent provisions of the Vienna Convention on the Law of Treaties (1969),[11] Article 31 of which states, as noted before, that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

3.3.1 The Lack of Clarity of the Text

Applying this provision, the Tribunal rejected the parties' primary position that the text was clear and unambiguous, and hence needed no further analysis. Relying, further, on a formally stated position of the United States in support of the rule of dominant nationality,[12] the Tribunal found that if the United States wished to adopt a different stance in the Algerian Declarations – that is to say, to extend the Tribunal's jurisdiction to the claims of all dual nationals – it was expected to do so more clearly. A simple definition of the term 'national' in the Claims Settlement Declarations as 'citizen' was an inadequate means for achieving such a purpose.

It also rejected Iran's argument that the Tribunal's jurisdiction was limited to the parties' 'converging will'. The Vienna Convention, said the Tribunal, calls for the objective interpretation of the terms 'in their context and in the light of the treaty's object and purpose', and not for any demonstration of the subjective submission by the parties to all the implications of the agreed terms.

3.3.2 The Customary International Law

Having found that the text itself was not adequately clear on the issue, the Tribunal proceeded to seek the answer in the applicable rules of international law, as authorized by the Declarations,[13] and by Article 31, paragraph 3 (c) of the Vienna

10 As reflected in, for instance, *Iran* and *the United States*, Case No. A/2, 1 IRAN-U.S. C.T.R. 189, at 190.

11 UN Doc. A/CONF. 39/27, May 23, 1969, 1155 U.N.T.S. 331; reprinted in 8 ILM 679 (1969).

12 Reflected in a Memorandum prepared by the State Department's Assistant Legal Adviser, dated 19 February 1962, and submitted to the Tribunal by the United States at the hearing of the Case.

13 Article V of the Claims Settlement Declaration, quoted on page 8 above.

Convention.[14] Here, the Tribunal first took up for examination the Hague Convention of 1930,[15] Article 4 of which reads:

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

But this provision, said the Tribunal, had to be treated 'very cautiously'. *First,* it belonged to a Convention concluded more than fifty years earlier, and to which only twenty States had adhered. *Second*, it concerned 'diplomatic protection', a concept which had been greatly changed since the Convention, and which continued to be in a process of transformation, making it necessary to distinguish between the instances of consular and claims-related protection.[16] *Third*, it was intended to apply, by its own terms, solely to cases of diplomatic protection by *States*, where they, by taking up the claims of their nationals, in reality assert their own rights.[17] It was not intended to be applied in cases where a dual national by himself asserts his own claim before an international tribunal against one of the States of which he is also a national. Such proposal was in fact made but rejected during the Conference. *Fourth,* while this Tribunal is an international tribunal established by a treaty, and is entrusted to resolve some disputes of intergovernmental nature on the basis of public international law,[18] other Cases before the Tribunal, including those brought by dual nationals, involve claims by private parties against a government or government controlled entities, to be resolved on the basis of municipal laws and general principles of law.

In fact, the object and purpose of the Algerian Declarations was not to afford diplomatic protection in the normal sense, but to 'resolve a crisis' in the relations between the two countries. One obstacle, however, was the existence of a host

14 Under which 'any relevant rules of international law applicable in the relations between the parties' may be taken into account. See pages 27-28 above, footnote 56.

15 'The Convention Concerning Certain Questions Relating to the Conflict of Nationality Laws', opened for signature on 12 April 1930 at The Hague, 179 L.T.S. 89.

16 This is more clearly explained in *Esphahanian.* The non-responsibility rule, says the Chamber in that Case, is most commonly applied 'not in cases of espousal of claims, but in instances of diplomatic or consular protection of dual nationals physically present in a State which considers them as its own nationals'. (2 IRAN-U.S. C.T.R. 157, at 164)

17 As stated by the Permanent Court of International Justice: '… 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'. The *Panevezys-Saldutiskis Railway* Case, PCIJ, Series A/B, No. 76 (1939), 4, at 16.

18 Such as the Cases involving official claims or the interpretative Cases.

of litigation in United States courts brought by a number of United States nationals against Iran, which litigation often involved judicial attachments of Iran's properties and assets. In order to overcome that obstacle, this Tribunal was created as a substitute forum. As such, the Tribunal, though not an organ of a third State, is also 'not a tribunal where claims are espoused by a State at its discretion and decided solely by reference to public international law'. Because of this hybrid nature of the Tribunal, Article 5 of the 1930 Hague Convention finds some relevance:

> 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 laws 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.[19]

Having so characterized the Tribunal, the Decision turned to the pertinent case law, which, as the Decision rightly noted, was extensive and belonged mainly to pre-Second World War. The Tribunal, however, saw no need to review and to comment on this body of law because, in its view, whatever the position prior to 1945, 'the better rule at the time the Algerian Declarations were concluded and today is the rule of dominant and effective nationality'.[20]

In support of this, the Tribunal relied on two Cases: *Nottebohm*,[21] decided on 6 April 1955 by the International Court of Justice, and *Mergé*,[22] decided on 10 June 1955 by the Italian-United States Conciliation Commission established under the Peace Treaty of 1947. In the first, the International Court states, *obiter dictum*, that:

19 The above-mentioned four points in the A/18 Decision are more or less identically borrowed from Chamber Two's Award in *Esphahanian*. The only noticeable difference is in point *four*, with regard to which the Chamber goes slightly further than the Decision and suggests that: 'In applying international law, the Tribunal finds itself in a position similar to that of a court of a third State faced with the claim of a dual national against one of the States of his nationality.' Based on this, the Chamber concludes that the Tribunal must construe 'Articles 4 and 5 of the Hague Convention together'. (2 IRAN-U.S. C.T.R. 157, at 162)

20 5 IRAN-U.S. C.T.R. 251, at 262-3.

21 (*Liechtenstein* v. *Guatemala*), ICJ Reports (1955), 4.

22 (*United States* v. *Italy*), 14 R.I.A.A. (1955), 236.

> 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 …
>
> 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.[23]

And in the second, it is stated 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 wherever such nationality is that of the claiming State.[24]

These, said the Tribunal, were 'the two most important decisions on the subject in the years following the Second World War', both having 'decisive effect'. The effects of the judgement in *Nottebohm*, in particular, 'have radiated throughout the international law of nationality'.[25]

Finally, the Tribunal turned to the legal literature on the subject and noted that 'some of the most competent international lawyers' have supported the principles applied in *Nottebohm* and *Mergé*. Such a trend toward the acceptance of the rule of dominant and effective nationality, observed the Tribunal, 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'.[26]

3.3.3 The Interpretation of the Algerian Declarations

Based on its review of customary international law, the Tribunal concluded that the pertinent rule of international law which pursuant to Article 31 (3) (c) of the Vienna Convention could be taken into account for the interpretation of the Algerian Declarations was the rule of 'real and effective' nationality. That meant that, in the absence of any clear exception in the Declarations, the references there

23 *Nottebohm*, ICJ Reports (1955), 4, at 22.
24 *Mergé*, 14 R.I.A.A. (1955), 236, at 247.
25 IRAN-U.S. C.T.R. 251, at 263.
26 *Ibid*, at 264.

to 'national' and 'nationals' had to be understood as consistent with the said rule. Accordingly,

> 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 claimant State.[27]

To the above-quoted conclusion, however, the Tribunal went on to add, without any preliminaries, what it called 'an important caveat':

> In cases where the Tribunal finds jurisdiction based upon a dominant and effective nationality of the claimant, the other nationality may remain relevant to the merits of the claim.[28]

3.4 The Views of Individual Members

Of the nine members of the Full Tribunal, three members, appointed by Iran, appended to the Decision a short but strongly worded 'Declaration',[29] in which they first criticized 'the composition of the so-called neutral arbitrators'; a composition which, as they saw it, had been brought about by the 'imposed mechanism of the UNCITRAL Rules', and was so 'unbalanced as to have made the Tribunal lose all credibility to adjudicate any dispute' between Iran and the United States.

With regard to the Decision itself, they suggested that the principle of non-responsibility of States *vis-à-vis* their nationals before international tribunals, a corollary of the principle of equal sovereignty of States, enjoyed the support of the 1930 Hague Convention, the 1949 Advisory Opinion of the International Court of Justice, the 1965 Resolution of the Institute of International Law, and the practice of States. Its validity could not be affected by a 'Decision rendered merely to demonstrate loyalty to the United States and to damage the prestige of the Islamic Republic of Iran and the Third World'.

Iran's adherence to the Algerian Declarations, they further suggested, was based on the principle of the equality of States, and on the United States' under-

27 As the Tribunal noted, the interpretation requested in this Case related to claims asserted against Iran, but the Decision equally applied to any claim against the United States. *Ibid*, at 265, footnote 1.

28 *Ibid*, at 265-6.

29 *Ibid,* at 266.

taking not to intervene in Iran's internal affairs.[30] The exercise of protection by the United States on behalf of Iranian nationals was an infringement of that commitment and amounted to 'a system of 'capitulation' that was defeated by the long-lasting struggle of the Third World nations and particularly the Muslim nation of Iran'. They concluded their Declaration by indicating their intention to write a dissenting opinion, in which the lack of 'credibility' of the Decision would be demonstrated.

Of the six members who formed the majority, four wrote 'concurring opinions'. Three, appointed by the United States, said that although they concurred in the Decision, they had a preference for the United States' primary position, that is to say, for the affirmation of jurisdiction over the claim of any dual national who established his nationality of the claimant State at the relevant times.[31] This, they suggested, was justified by the definition of a 'national' in the Algerian Declarations as a 'citizen' under the domestic law of Iran or the United States, and by the fact that under the United States law the term 'citizen' includes a person who retains another nationality.

Such interpretation of the text, they stated, was most consistent with the object and purpose of the Declarations: the resolution of the crisis then existing in the relations between Iran and the United States. This was to be done, partly, through the termination of all legal proceedings against Iran in the courts of the United States, and the submission of the claims involved in those proceedings to the present arbitral Tribunal, allowing as a result the return of Iran's property and assets. The exclusion of claims of dual nationals from the jurisdiction of the Tribunal, they suggested, would have partially defeated this object and purpose by allowing the possible continuation of such claims and the attachments thereto in the courts of the United States, thus interfering with the return of Iran's assets.[32]

They ended their brief opinion by deeply regretting the 'tone and content' of the three Iranian arbitrators' 'Declaration', which they found to be 'libellous and baseless invective'. In particular, they took exception in the characterization of the UNCITRAL Rules as an 'imposed mechanism'. The Rules, they insisted, were mutually agreed upon by both Iran and the United States in the Declarations.

30 This was a reference to Point I of the General Declaration, quoted on page 5 above.

31 'Concurring Opinion of Members Holtzmann and Aldrich', 5 IRAN-U.S. C.T.R., at 267; Concurring Opinion of Richard M. Mosk', *Ibid*, at 269.

32 This is an argument, it will be recalled, on which the majority rely in the Decision to support a different proposition, namely, that the claims of dual nationals before the Tribunal do not represent cases of diplomatic protection proper.

The remaining 'concurring opinion' belonged to Professor Riphaghen, a third-country arbitrator.[33] There, he first agreed with the conclusion in the Decision that the system of dispute settlement embodied in the Algerian Declarations was not based on 'diplomatic protection' in the classic public international law sense, namely, disputes between States, though even in such situations, whenever the *persona standi* of a *state* rather than an *individual* before an international forum has been at issue, there has been a clear tendency towards the application of the rule of dominant nationality.

Next, he suggested that, at least within the particular system to which the Tribunal belongs, the task with regard to a dual national's claim was not to address *separately* the issue of *jurisdiction*, or *dominant* nationality. It was, rather, to search for the *most relevant* nationality within *a specific context*, which often related to the substance of the claim.[34] He referred, by way of examples, to: (a) where a State treats a dual national as an alien by arbitrarily discriminating against him as compared with its own citizens, in which case the dual national may, even within the framework of diplomatic protection, validly bring a claim against that State on the basis of his other nationality; and (b) where the rights allegedly interfered with are validly reserved for the citizens of the respondent States, and the dual national acquires such rights through the use of his nationality of the respondent State, in which case it is often admitted that no international protection is granted. Both these instances, he suggested, involved the merits of the claim.[35]

Besides, the search for the *most relevant* nationality within *a specific context* called for an enquiry into the 'cause' of dual nationality, *e.g.* deliberate social conduct or involuntary operation of law both with regard to the acquisition of the second nationality and the retention of the original one. All these points, he suggested, were to be addressed by the Chambers in the light of special circumstances of each particular claim.

The joint dissenting opinion of the Iranian arbitrators, to which they had alluded in their 'Declaration',[36] was filed on 10 September 1984.[37] In this detailed review of all the pertinent issues in the Case, they first deplored the Decision for not being founded upon a good faith interpretation of the Algerian

33 'Concurring Opinion of Willem Riphagen', 5 IRAN-U.S. C.T.R., at 273.

34 *Ibid*, at 274. Italics are original.

35 *Ibid*, at 275.

36 See pages 41-42 above.

37 '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' (hereinafter sometimes cited as the 'dissenting opinion'). 5 IRAN-U.S. C.T.R., at 275.

Declarations. Referring to the rules of interpretation as embodied in Articles 31 and 32 of the Vienna Convention (1969) they suggested:[38] *that* the ordinary and normal meaning of the term 'national' designates a person with one nationality only, while statelessness and dual or multiple nationality constitute anomalies. The parties to the Declarations, therefore, must have used the term as referring to the normal status of nationality; *that* the Declarations set up a bilateral, and not a unilateral, system of recourse, allowing the nationals of each party to assert claims against the other party. In that sense, it is a system different from the many peace treaties concluded after the two World Wars. It is in conformity with this system that the disjunctive *or* is used in Article VII of the Claims Settlement Declaration; *that* this interpretation is consistent with the object and purpose of the Declarations in their context. Thus, Principle B of the General Declaration states that '[i]t is the purpose of both parties … to terminate all litigation between the government of each party and the nationals of the other …' There is no room within this context for the claims of nationals against their own States; *that* the Declarations were essentially drafted by the United States. Any ambiguity in the text must therefore be construed against the United States: *verba ambigua accipiuntur contra proferentem*; and finally, *that* clauses conferring jurisdiction on an international forum must be interpreted restrictively.

On all these points of textual interpretation, said the dissenting members, the Decision remained 'entirely mute'.[39] What it did, instead, was simply to assert that the text was not clear on the subject and to resort, on that basis, to Article 31 (3) (c) of the Vienna Convention, under which 'there should be taken into account, together with the context … any relevant rules of international law applicable in the relations between the parties'. Yet this provision 'could never alone impose a conclusion the treaty itself did not sanction'.[40] It was, in other words, only a complementary source of interpretation and not, as the Decision suggests, an exclusive source of the solution.

Still, and assuming that the text itself could be so readily overlooked, the task of the Tribunal was to identify the rule of international law applicable to the claim of a dual national before an international tribunal against a State of which he was a national. That rule, suggested the dissenting members, was the rule of non-responsibility, and not the rule of dominant nationality. In this context, they referred in particular to two preliminary points:[41]

38 *Ibid*, at 279-88.
39 *Ibid*, at 289.
40 *Ibid*.
41 *Ibid*, at 291-298.

First, the international character of the Tribunal. Article V of the Claims Settlement Declaration,[42] they noted, might on a superficial reading cast doubt on the application of international law by the Tribunal, and thus on the international character of the Tribunal. But the fact that resolution of some of the claims before the Tribunal involves issues of municipal law and general principles of law, rather than the interpretation and application of public international law, does not mean that what is being determined is the right of the individual, and not of his nation. In fact, recourse to municipal and private international law by international tribunals is rather common. In such cases, municipal law forms an element of international law, and the international tribunal, having first addressed and resolved that element, turns to the main issue: whether the State has met its international obligations under international law.[43]

Second, the international nature of the claims before the Tribunal. These claims are of inter-State character, submitted to the Tribunal by means of the classic process of diplomatic protection. Even though some of the claims submitted to the Tribunal were originally of private nature within the domestic jurisdiction of Iran or the United States, this changed when the two governments intervened and made them part of their overall dispute settlement.[44]

Having emphasized that the Tribunal is of international character, and that the claims submitted thereto by nationals, including dual nationals, are subject to classic rules of diplomatic protection, the dissenting members went on to identify the pertinent rule of customary international law applicable in such a case. They did so by an exhaustive review of international conventions, jurisprudence, and legal doctrine.

As to international conventions,[45] they first noted that the Hague Convention of 1930 proposes two different solutions to two quite distinct situations. *First*, the conflict of nationality before an international forum, where the admissibility

42 Quoted on page 8 above.

43 In support of this, the dissenting opinion cites the *Serbian and Brazilian Loans* Cases decided in 1929, where the Permanent Court of International Justice first resorted to municipal statutes of Serbia and Brazil in order to determine their contractual obligations, and then turned to the question whether the disputed practices by the two States violated public international law. (PCIJ, Series A, Nos. 20/21, at 16-49 and 101-126.)

44 Relying on the *Mavrommatis* Case decided by the Permanent Court of International Justice in 1924: '… it is true that the dispute was at first between a private person and a State – *i.e.* between Mr. 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'. (PCIJ, Series A, No. 2, at 12.)

45 5 IRAN-U.S. C.T.R., at 299-304.

of the claim of a dual national against his own State is involved. This is an issue for public international law to resolve, and is addressed in Article 4 of the Convention, under which a State is not entitled to extend diplomatic protection to one of its nationals against a State of which he is also national. *Second*, the conflict of nationality before a court of a third State, where the determination of nationality is necessary for the application of municipal law. This is an issue for private international law to resolve, and is addressed in Article 5 of the Convention, under which, within a third State, a person having more than one nationality shall be treated as if he had only one nationality, to be determined on the basis either of the country of his habitual residence or the country with which he is in fact most closely connected.

Challenging the grounds on which the Decision relies for not applying Article 4 of the Convention, the minority members suggested that Article 4 is part of a coherent system under which States are at liberty to grant nationality to individuals through their laws.[46] That liberty would lead to disorder if not regulated at the international level, a disorder that the Convention seeks to prevent through the rules reflected in Articles 4 and 5. As for the assertion that only a limited number of States were parties thereto, they noted that the Convention was in fact approved by a near-unanimity (40 to 1) and, as stated in the *Mergé* Case, expresses a *communis opinio juris*.[47] Besides, the principle of non-responsibility – itself based on the principle of the sovereign equality of States – was later confirmed by the Institute of International Law at its Warsaw session in 1965:

> 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

46 That system is reflected in the first three Articles 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.

47 14 R.I.A.A. (1955), 236, at 243.

> respondent States may be rejected by the latter and is inadmissible before the court (jurisdiction) seized of the claim.[48]

Turning to the case law, the dissenting members offered an exhaustive review of all the major decisions on the subject, rendered by international judicial fora both before and after the Second World War.[49] This led them to suggest that, contrary to a first sight impression, these decisions do not allow the conclusion that there were two lines of thought: one supporting the rule of non-responsibility, and the other the rule of dominant nationality. Dealing first with the earlier precedents, they concluded that these coherently supported the rule of non-responsibility. The only exceptions were the Cases decided by the mixed arbitral tribunals established pursuant to peace treaties concluded after the First World War between the Allied Powers and their former enemy States. But in reality, these tribunals were exclusively concerned with the proof of nationality of the victorious States. Once such proof was offered, it did not matter whether or not that nationality was dominant.

So was the situation after the Second World War, on which the Decision exclusively relies. An example of this is the *obiter dictum* of the International Court of Justice in its Advisory Opinion of 11 April 1949, in the *Reparation for Injuries* Case, where the Court referred to '[t]he ordinary practice whereby a State does not exercise protection on behalf of one of its nationals against a State which regards him as its own nationals'.[50]

The contrary authorities cited by the Decision are: a passage in the judgement of the International Court of Justice in *Nottebohm*[51] decided in April 1955; and the decisions made by several mixed commissions established pursuant to a Treaty of Peace signed between the victorious Powers and Italy in 1947, of which the *Strunskey-Mergé*, decided by the Italian-United States Conciliation Commission in June 1955, was an example.[52]

48 Annuaire de l'Institut de droit international (1965), Vol. 51-II, 268, at 270-271. It is to be noted that there, the Rapporteur had proposed that an exception to that rule be made for the cases in which the 'active' nationality of the individual was that of the claimant State, but this was rejected by the Institute. See the draft Resolution, *Ibid*, Vol. 51-I, at 173.

49 5 IRAN-U.S. C.T.R., at 304-27.

50 Case *Concerning Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports (1949), 174, at 186.

51 ICJ Reports (1955), 4, at 22.

52 14 R.I.A.A. (1955), 236. The ruling was then followed by the Commission in some other Cases, and by the French-Italian Commission established pursuant to the same Treaty.

As to the passage in *Nottebohm*, suggested the dissenting members, a close examination of the judgement shows that the International Court had not turned away from its Advisory Opinion rendered six years earlier. *First*, an explicit reference in the judgement to Article 5 of the Hague Convention on the next page of the quoted passage demonstrates that the Court was there referring not to Article 4, but to Article 5, situation. *Second,* as is well known and is correctly noted by the Decision, *Nottebohm* did not involve a claim against a State of which the claimant was a national. He was a German national by birth who had long resided in, but not acquired the nationality of, Guatemala, the defendant State. Liechtenstein, however, had naturalized him not on the basis of any genuine link, but merely in order to 'enable him to substitute for his status as a national of a belligerent State that of a neutral State.'[53] The Court noted the elements of fraud in all this, and rejected the claim as inadmissible.

Thus, all references to 'real and effective' nationality in the judgement must be understood in this way, that a State cannot offer protection to an individual where the nationality conferred is not based on genuine links, even where the individual is solely of the nationality of that State. This is a rule recognized by the Hague Convention itself, where it speaks of the freedom of States to confer nationality, but stipulates at the same time that the nationality conferred must conform to the rules of international law.

It is in view of this, that some have suggested that the judgement in *Nottebohm* does in fact extend the scope of the rule of non-responsibility. Under the Hague Convention, the enquiry into genuine links becomes relevant only in cases of conflict of nationalities. Under *Nottebohm*, there must be proof of genuine links even where there is no conflict of nationalities, and there is only one nationality. This point of the judgement, noted the minority, has in fact been confirmed by the Resolution adopted by the Institute of International Law at its 1965 Warsaw session.[54]

As to the *Mergé* precedent, the Commission there seems to have been under the impression that the two principles of non-responsibility and dominant nationality have the same field of application, hence speaking of reconciling the two principles, while, in fact, they have different areas of application and provide two different solutions to two different situations of conflict of nationality; a distinction

53 ICJ Reports (1955), 4, at 26.

54 Article 4 (c) of the Resolution reads: '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 circumstance 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, at 271.

clearly noted in the Harvard Draft Convention on the Responsibility of States,[55] and subject of discussions Nos. 2 and 3 in the International Law Commission's 'Report on Multiple Nationality'.[56]

Besides, this too was a Case decided on the basis of a Peace Treaty. In fact, when the Italian government invoked the principle of non-responsibility, the United States did not seek to challenge that principle in favour of the principle of effective nationality but, as quoted in the Commission's decision, argued that the issue had to be resolved on the basis of the rules provided in the Treaty, the intention of which was to protect both the direct and the indirect interests of the United Nations nationals in their property in Italy. In the words of the United States Agent:

> 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.[57]

It was in that context, and in all likelihood in the light of similar decisions of the Mixed Arbitral Tribunals of post-World War I, that the *Mergé* precedent and those that followed it were decided, in all of which the overriding concern was for reparation for damages suffered by victims of war launched by the defendant States.

Finally, the dissenting members referred to support for the principle of non-responsibility in legal doctrine,[58] pointing out in particular to the writings of Oppenheim,[59] Bar-Yaacov,[60] Fitzmaurice,[61] and Jessup,[62] as well as the 1965 Resolution of the Institute of International Law at its Warsaw session, reflecting the unified view of authors representing diverse legal systems.

Offering a summary of their arguments in the final part of their dissenting opinion, the minority members suggested that by ignoring the established rules

55 23 Am. J. Int'l L., Supplement (1929), 133, at 135.
56 UN Doc. A/CN-4/83, 22 April 1954.
57 14 R.I.A.A. (1955), 236, at 238.
58 5 IRAN-U.S. C.T.R., at 327-8.
59 INTERNATIONAL LAW: A TREATIES, edited by H. Lauterpacht, 8th Ed., Vol. I (Peace), London: Longman, 1955, at 667.
60 DUAL NATIONALITY, London: Stevens and sons, 1961, at 76, 232, 238.
61 92 Recueil des cours (1957- II), 1, at 193.
62 A MODERN LAW OF NATIONS: AN INTRODUCTION, USA: Archon Books, 1968, at 100.

of interpretation in favour of the applicable rule of international law, the majority had yielded to 'the present wishes of the United States Government.'[63] And, by supporting the application of the rule of dominant nationality in cases involving the nationality of the respondent State, even though in 'the long history of the relevant legal precedents' there existed not a 'single case' to that effect, they had acted *ultra virus*. Their Decision, thus, was null and void *ab initio*.[64]

The dissenting opinion concludes with a sharp criticism of the 'degenerated system' of 'international arbitration' in the hands of 'professional' arbitrators who are 'concerned not with the quality … but with the quantity of their decisions':

> 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 … [which] is an indispensable part of national sovereignty, and as such should be closely protected.[65]

3.5 Iran's Reaction to the Decision

Iran's reaction to the Decision was strong and uncompromising. In a 'Statement' signed on 24 April 1984,[66] the then Prime Minister of Iran strongly criticized 'the exercise of influence by the United States over the Tribunal'. He noted that 'the adherence of the Islamic Republic of Iran to the Algerian Declarations was on the basis of the sovereign equality of States'; a well-established principle of international law under which States bore no 'responsibility before international fora *vis-à-vis* their own nationals'. And yet the Tribunal, submitting to the United States' pressure and in violation of this principle, 'has assumed jurisdiction to entertain the claims of certain Iranian nationals who have clandestinely acquired United States nationality in contravention of the laws of Iran'. This was unacceptable:

63 5 IRAN-U.S. C.T.R., at 329.

64 *Ibid*, at 335.

65 *Ibid*, at 336-7.

66 See the 'Statement by the Prime Minister of Iran, Mr. Musavi, Regarding the Tribunal's Decision in Case A/18, signed 24 April 1984', 5 IRAN-U.S. C.T.R., at 428. The translation of the 'Statement' there reprinted suffers from many inaccuracies. A more accurate translation was released on 6 May 1984, though this is not reprinted.

> The Islamic Republic of Iran openly declares that it considers the decision of the Full Tribunal regarding dual nationals to be unlawful and biased, that it shall never appear before any international tribunal to encounter its own nationals, and that it shall boycott any session of the Iran-United States Claims Tribunal entertaining the issue of dual nationals.

The 'Statement' ended with a pledge that, 'should the Tribunal decide in the absence of Iran to consider the claims presented by dual nationals', the government of Iran would take any 'appropriate measure to safeguard both its pecuniary and moral interests'.

Now, it will be noted that the threatened 'boycott' related to the participation of Iran in 'any session' of the Tribunal, and did not extend to the submission of written pleadings. Nevertheless, it was not until early 1988 that Iran informed the Tribunal of its intention to file briefs and evidence in the proceedings dealing with the issue of the claimants' dominant nationality, and began to do so shortly thereafter. Eventually, Iran also decided to take part in the hearings of such claims, the first of which being the hearing in *Gabay* v. *Iran* held on 1-3 May 1991.[67]

In the meantime, the Chambers first established schedules for the submission of evidence and briefs regarding the claimants' dominant nationality, and proceeded thereafter to deal, without holding hearings,[68] with the Cases in which the evidence submitted by the claimants clearly required the rejection of the claims for lack of jurisdiction. This happened, for instance, in *Mobasser* v. *Iran* decided in April 1986,[69] in which the claimant by his own admission had acquired his United States nationality subsequent to 19 January 1981, and was hence not a United States national during the 'relevant period'.[70] In all such instances, the Iranian arbitrators concurred in the dismissal, maintaining their stance on the inadmissibility of the claims.[71] Where evidence before the Chambers did not call for the

67 27 IRAN-U.S. C.T.R. 40.

68 The exception was *Mahmoud* v. *Iran*, decided in November 1985 (9 IRAN-U.S. C.T.R. 350). There, as noted before, a hearing on the issue of the claimant's nationality had been held prior to the Decision in A/18. In its Award, the Chamber found that the claimant had failed to establish her dominant and effective United States nationality during the relevant period, and thus dismissed the claim for lack of jurisdiction. Certain special features of the Award will be examined in due course.

69 10 IRAN-U.S. C.T.R. 177.

70 The issue of the 'relevant period' is discussed in Chapter Five below.

71 See to the same effect: *Khosrowshahi* v. *Iran*, decided in December 1987 (17 IRAN-U.S. C.T.R. 266); *Nourafchan* v. *Iran*, decided in February 1988 (18 IRAN-U.S. C.T.R. 88); and *Jafari* v. *Iran*, decided in February 1988 (18 IRAN-U.S. C.T.R. 90), in all of which the claims were dismissed because the claimants had obtained their United States nationality after the date of the Declarations. See also *Khubiar* v. *Iran*, decided in June 1986 (11

summary dismissal of the claim, jurisdictional issues, including the issue of the claimant's nationality, were joined to the consideration of the merits.[72]

The only Case in which the dominant nationality of the claimant was upheld in this period – the period between the full Tribunal's Decision in 1984 and Iran's full participation in the proceedings in 1988 – was *Saghi* v. *Iran*.[73] This was a Case that involved three claimants, a father (James M. Saghi) and his two sons (Michael R. Saghi and Allan J. Saghi). In an Interlocutory Award issued in January 1987, Chamber Two of the Tribunal found that the first two did not, contrary to Iran's contention, possess Iranian nationality, and hence the issue of their dominant nationality did not arise.[74] As for Allan, however, the Award found that he was a dual national of Iran and the United States and, further, that his dominant nationality was that of the United States. The claims of all three were therefore found to be within the Tribunal's jurisdiction, and were set for later consideration on the merits.[75]

There, however, the Iranian member of the Chamber refused to take part in the deliberations of the Case and declined to sign the Interlocutory Award. In a Declaration appended to the Award, he stated that in the absence of any agreement on the part of the Government of Iran to arbitrate its disputes with its own nationals – in other words, in the absence of any *clause compromisoire* – the arbitrators were not authorized to 'intervene in such claims'. He also noted that in the absence of his participation, what had been issued by the majority did not qualify as an 'award', but simply represented a 'legal opinion'.[76] This was briefly responded to by the other two members of the Chamber, who stated that while they 'understood the reasons' why their colleague 'felt it necessary to refuse to participate in the deliberation and signature of the Interlocutory Award', it was clear to them that he, too, understood the reasons why they felt obliged to proceed without him. To them, 'a continuing international Tribunal with many cases on

IRAN-U.S. C.T.R. 180), where the claimant failed to submit evidence in support of his alleged United States nationality.

72 This was the case, for instance, in *Gabay* v. *Iran*, Order of 5 December 1986 (not reprinted), and *Ghaffari (A)* v. *Iran*, Order of 2 February 1988 (not reprinted).

73 14 IRAN-U.S.C.T.R. 3.

74 The Interlocutory Award speaks of James's Iraqi nationality at birth and of his naturalization as a United States national later on, but does not address the issue of dual nationality in that context. The Tribunal's treatment of dual national claimants whose second nationality was that of a third State will be examined in Chapter Six below.

75 The Case is examined in more detail in Chapter Five below.

76 'Declaration of Hamid Bahrami-Ahmadi with Respect to the Legal Opinion Issued by Two Members of Chamber Two, in Connection with Case No. 298', 14 IRAN-U.S. C.T.R., at 8.

its docket' could not allow its work to be 'frustrated'. The issued Award, they concluded, was final and binding.[77]

77 'Comments on the Declaration of Judge Bahrami-Ahmadi', *ibid*, at 9.

4

SOME GENERAL COMMENTS ON THE DECISION

Nothing worthwhile seems likely to result from a point by point review of the arguments made by the majority members in support of their ruling; a task already performed by the minority members in their dissenting opinion.[1] In order, however, to assess the possible impact of the Decision on the development of international law on the subject, the main grounds on which the Decision rests must first be briefly examined. This requires a few introductory remarks.

4.1 Introductory Remarks

There can be little doubt that in coming to support the rule of dominant nationality, the majority was heavily influenced by a desire to promote, in line with the recent progressive trend in international law, the rights of individuals *vis*-à-*vis* States. This much, indeed, is stated in the Decision itself:

> 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.[2]

1 See, further: Admissibility of Claims Brought by Dual Nationals Before International Tribunals: A Scholarly Criticism of the Decision by the Iran-United States Claims Tribunal on this Subject, lecture delivered by Professor Francois Rigaux at the Hague Academy of International Law, 29 May 1984; *Changements et continuité du droit international, Cours general de droit international public*, 195 Recueil des cours (1985-VI), 9, delivered by Professor Philip Cahier; GEORGE H. ALDRICH, THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL: AN ANALYSIS OF THE DECISIONS OF THE TRIBUNAL, Oxford: Clarendon Press, 1996, at 54-79; Peter E. Mahoney, *The Standing of Dual Nationals Before the Iran-United States Claims Tribunal*, 24 Virginia J. Int'l L. (1984), 695.

2 5 IRAN-U.S. C.T.R. 251, at 265.

The issue of dual nationals' claims before international tribunals belongs to the wider subject of State responsibility, and is hence affected by the debate over the conceptual basis of that wider subject.[3] Under the traditional view, only States, and not individuals, are regarded as subjects of international law. An injury to an individual is an injury to his State of nationality, and it is thus that State alone which is entitled to seek the remedies of international law. This leads to certain results, namely, *that* a State can only be responsible to other States, *that* in the absence of the link of nationality, there is no right of intervention, and *that* States are at liberty to treat their own nationals as well as stateless persons with immunity from the rules of international law.

The rule of non-responsibility under which a dual national may not assert a claim before an international tribunal against one of his States of nationality operates within this concept of State responsibility:[4] the intervention by one of the two States against the other violates the liberty of treatment by the latter, and hence the principle of equality of States.

The opponents of the rule of non-responsibility argue that all this has now changed, requiring a new conceptual approach to the issue of dual nationals' claims.[5] While they do not question the continued existence of the State-based system of international law, they draw attention to the recent creation of certain fundamental rights for individuals under international law, offering protection without requiring the direct intervention of States. This is a reference mainly to a large body of codified international law since the Second World War on human rights.

Chief among them is the United Nations Charter (1945), Article 55 of which speaks of 'universal respect for, and observance of, human rights'.[6] The Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948 is another,[7] three provisions of which are especially relevant. Thus, under

3 See Peter E. Mahoney, footnote 1 above, at 696.

4 *Ibid*, at 698.

5 P. McGarvey-Rosendahl, *A New Approach to Dual Nationality*, 8 Houston J. Int'l Law (1986), 305.

6 This has led a commentator to suggest that: 'The individual now becomes a subject of international law … He is directly protected by this law and can even in some cases seek his own remedy. And States can no longer rely on the plea of domestic jurisdiction.' J. P. Humphrey, *The International Law of Human Rights in the Middle of Twentieth Century*, in R. B. Lillich and F. C. Newman (eds.), INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY, Boston: Little, Brown & Co, 1979, 1, at 5.

7 'The Universal Declaration of Human Rights' (10 December 1948), G. A. Res. 217 A (III), 3 UN GAOR (Resolutions, part 1), at 71, UN Doc. A/810 (1948).

Article 13 (2), '[e]veryone has the right to leave any country, including his own, and to return to his country'; under Article 15 (1) and (2), '[e]veryone has the right to a nationality' and '[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality'; and under Article 16 (3), '[f]amily is the natural and fundamental group unit of society and entitled to protection by society and the State'.[8]

Yet another is the 1979 United Nations Convention on the Elimination of All Forms of Discrimination against Women,[9] leading inevitably to an increasing number of dual nationals. All these show, according to the opponents of the rule of non-responsibility, that the traditional goal of avoiding dual nationality cases has been overridden by the developments in the field of international law of human rights, offering a number of measures of protection.[10] The argument, more specifically, is that countries accepting dual nationality as a necessary consequence of improvement of human rights norms would not at the same time intend to weaken the position of the beneficiaries of such norms.

To this may be added another significant development: the proliferation in recent years of Bilateral Investment Treaties. Though these are admittedly cases of special nature, and the States parties thereto still retain a good deal of control in creating the appropriate conditions for economic cooperation amongst themselves, the fact remains that under these Treaties individuals are given direct access to international tribunals, before which they may assert claims against the recipient

8 The Declaration, being a Resolution of the General Assembly, is not technically speaking a legally binding instrument. The International Court of Justice has spoken, however, of the parity between the principles of the Declaration on human rights and those of the United Nations Charter. Case *Concerning United States Diplomatic and Consular Staff in Tehran* (*United States v. Iran*), ICJ Reports (1980), 3, at 42.

9 'The UN Convention on the Elimination of All Forms of Discrimination against Women' (18 December 1979), G. A. Res. 34/180 (annex), 34 UN GAOR Supp. (No. 46), at 193, UN Doc. A/Res/34/180 (1980), 1249 U.N.T.S. 13; reprinted in 19 ILM 33 (1980).

10 This shift of thrust from protection of States' interests to protection of the individual's human rights has led some commentators to suggest that the traditional concept of dual nationality based on conflict of laws doctrine should now be updated and replaced with the concept of dual nationality as a human right. See, for instance, P. McGarvey-Rosendahl, footnote 5 above, at 321-5.

States without the intervention of their national States,[11] or indeed, irrespective of their nationality.[12]

The rule of non-responsibility has been challenged on an additional ground, namely, the behaviour of the countries behind the Iron Curtain before the fall of Communism. The rule, it has been said, was justified in the nineteenth and the beginning of the twentieth centuries under the sound assumption that an individual was not entitled to the protection of two countries; for during that period, if an individual was injured by the action of his original country, he generally was able to seek redress as a citizen. This ceased to be the case, however, when Communist countries – whose nationality laws were based on the principle of *jus sanguinis* – declined to offer protection to claimants who had resided in the Free World, and who had sought compensation for injuries to their persons or property by deliberate actions of persecution, socialization, and the like in their native countries.[13]

This questioning of the continued conceptual strength of the rule of non-responsibility has been coupled with the defence of the concept of 'link' in general, on which the competing rule, namely, the rule of dominant nationality, is said to have been based. It has been pointed out, in particular, that the concept of link has long been employed, not only at the domestic level – where domestic legislation has often relied on it as a connecting factor – but also at the international level.[14] Such has been the case, for instance, with regard to the 'recognition' of nationality on the international plane, as confirmed by the International Court in *Nottebohm*[15] and, much earlier, by the replies of some governments to the questions put to them by the Preparatory Committee for the Hague Codification

11 Diplomatic protection is expressly excluded, for instance, in the arbitrations conducted by the International Centre for Settlement of Investment Disputes (ICSID), created under the 1965 Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 575 U.N.T.S. 159.

12 Under Article 201.1 of the North American Free Trade Agreement (NAFTA), for instance, 'national' is defined *inter alia* as '… a natural person who is a citizen or permanent resident of a Party…' 32 ILM 289 (1993). But see *Feldman Karpa* v. *United Mexican States*, where a tribunal constituted under the ICSID's Additional Facility held that, despite the above provision, 'citizenship rather than residence … is the main connecting factor between a state and an individual. Residence, even permanent … only fulfils a subsidiary function which, as a matter of principle, does not amount to, or compete with, citizenship'. Interim Decision on Preliminary Jurisdictional Issues, 40 ILM 615 (2001), at 619.

13 Z.R. Rode, *Dual Nationals and the Doctrine of Dominant Nationality*, 53 Am. J. Int'l L. (1959), 139, at 143.

14 IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 6th Ed., Oxford: Oxford University Press, 2003, at 396 *et seq*.

15 The Case is discussed below, at 93 *et seq*.

Conference.[16] As noted by Brownlie, link is also the basis on which international law has rested 'in dealing with the situations where a state has no nationality legislation and where certain parts of the population are outside nationality legislation'. It is, further, 'considered to underlie much of the state practice on state succession and the continuity of states'.[17]

Closer to our subject, the concept of link is employed in cases of dual or multiple nationality for the purpose of selecting a single nationality, where such a selection is required: (i) by a court of a third State in order to determine the applicable law; and (ii) by an international tribunal in order to determine the State entitled to exercise diplomatic protection in a case not involving the nationality of the respondent State.[18]

Now on the grounds mentioned above, the Decision may be regarded as an innovative step: the improvement of traditional law alongside the modern trends toward greater protection of human rights, through the gradual rejection of the rule of non-responsibility and its replacement with the concept of link in the instances in which nationality is a prerequisite of the admissibility of an international claim.[19] Indeed, as suggested by a commentator:

> A rule embracing more individuals within the realm of possible protection, acts as a deterrent to those States who would commit acts in violation of international law.[20]

Still, and whatever the value of this step in general, one preliminary enquiry must be made first, namely, whether the Algerian Declarations provided a legitimate

16 Extracts of which are quoted in BROWNLIE, footnote 14 above, at 375-7 and 396. According to the German government, for example: '[A] State has no power to confer its nationality on all the inhabitants of another State or on all foreigners entering its territory. Further, if the State confers its nationality on the subjects of other States without their request, when the persons concerned are not attached to it by any particular bond, as, for instance, origin, domicile or birth, the State concerned will not be bound to recognize such naturalization.'

17 BROWNLIE, footnote 14 above, at 396.

18 As noted on page 96 below, these applications of the concept of link in cases of dual or multiple nationality were recognized by the dissenting members in A/18.

19 See Peter E. Mahoney, footnote 1 above, at 722, who suggests that the Decision represents 'a significant contribution to the resolution of a doctrinal dispute in international law'.

20 *Ibid*, at 725. To him, 'this affirmation of individual rights by the Iran-United States Claims Tribunal is an especially timely and significant precedent' in view of the fact that these rights had not, prior to the Tribunal's Decision, been clearly tested before an international tribunal. *Ibid*, at 727.

ground for the Tribunal to lend its support to what it regarded as 'the contemporaneous development of international law'. Whether, in other words, the Tribunal had been authorized to resolve the disputed issue by resorting to the customary international law and, having done so, by invoking what it came to describe as 'the better rule' of customary international law.[21] The issue is, of course, one of interpretation of the Declarations.

4.2 The Declarations as a Permissible Means

That this is a pertinent enquiry, is clear enough. In the words of the International Court of Justice:

> When States sign an arbitration agreement, they are concluding an agreement with a very specific object and purpose: to entrust an arbitral tribunal with the task of settling a dispute in accordance with the terms agreed by the Parties, who define in the agreement the jurisdiction of the tribunal and determine its limits.[22]

The Tribunal's task, as the Decision itself recognizes,[23] was to interpret the relevant terms of the Algerian Declarations in accordance with Articles 31 and 32 of the Vienna Convention, in order to ascertain whether it had been vested with jurisdiction to hear claims of dual Iran-United States nationals against Iran or the United States. And under those Articles, as noted before, the Tribunal was required to determine the 'ordinary meaning' of the pertinent terms of the Declarations in their 'context' and in the light of the 'object and purpose' of the Declarations. It was to have recourse, further, to supplementary means of interpretation, including the 'preparatory work' and the 'circumstances' under which the Declarations had been adhered to. Besides, since the rules referred to in those Articles are not exhaustive, the Tribunal was also required to apply other rules of interpretation of customary international law, including (i) the rule requiring restrictive interpretation of clauses conferring jurisdiction on international judicial fora,[24]

21 'The Tribunal is satisfied that, whatever the state of the law prior to 1945, *the better rule* at the time the Algerian Declarations were concluded and today is the rule of dominant and effective nationality.' 5 IRAN-U.S. C.T.R. 251, at 262-3. (emphasis added)

22 Case *Concerning the Arbitral Award of 31 July 1989*, ICJ Reports (1991), 70.

23 5 IRAN-U.S. C.T.R. 251, at 259. So does the dissenting opinion. *Ibid*, at 328.

24 See J. H. RALSTON, THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS: BEING A RÉSUMÉ OF THE VIEWS OF ARBITRATORS UPON QUESTIONS ARISING UNDER THE LAW OF NATIONS AND OF THE PROCEDURE AND PRACTICE OF INTERNATIONAL COURTS, 2nd Ed., California: Stanford University Press, 1926, Sec. 37; KENNETH S. CARSLTON, THE PROCESS OF INTERNATIONAL ARBITRATION, New York: Columbia University Press, 1946, 62-4.

and (ii) the rule requiring interpretation against the position of the drafting party in cases of ambiguity (*Verba ambigua accipiuntur contra proferentem*).

But while these elements of interpretation were most extensively addressed in the parties' pleadings, and are referred to in the Decision under the title of 'Contentions of the Two Governments', the Tribunal declines to take note of them when it comes to offer its 'Reasons for Decision'. What it does instead is to reject the parties' contentions on the clarity of the text in just one, albeit long, paragraph,[25] on the basis of which it concludes that '[t]he Tribunal cannot agree that the text is so clear and unambiguous as to make further analysis unnecessary'.[26]

What the Tribunal means by 'further analysis' is the treatment of the subject in customary international law. Thus, and having by-passed these basic elements of interpretation, the Tribunal abruptly resorts to paragraph 3 (c) of Article 31 of the Vienna Convention in search of the solution offered by customary international law. This is particularly unhappy in view of the fact that some of these elements of interpretation – such as the rules of restrictive interpretation and *contra proferentem* – are meant to apply precisely in the instances in which the text is found to be unclear and ambiguous.

They are, indeed, devised to ensure, *inter alia,* that an international tribunal, which is of exceptional jurisdiction, will not derogate from the mandate for which it is established. In fact, this is a point confirmed by the Full Tribunal in two Cases decided back in 1982, the first year of the Tribunal's activities. One was Case A/1, in which it was stated that:

> [I]t is an undisputed fact that the extent of the Tribunal's jurisdiction has been determined by Iran and the Unites States in the Algiers Declarations, which contain detailed provisions on the jurisdiction of the Tribunal, and that, consequently, the Tribunal has no jurisdiction over any matter not conferred on it by these Declarations.[27]

The other, in which the strictly limitative jurisdiction of the Tribunal was more emphatically pronounced, was Case A/2:

> It can be easily seen that the parties set up very carefully a list of the claims and counter claims which could be submitted to the arbitral tribunal. As a matter of

25 See page 37 above.

26 5 IRAN-U.S. C.T.R. 251, at 259-30. The Award in *Esphahanian* is equally short, if not shorter, on the issue. See pages 27-28 above.

27 *Iran* and *the United States*, Case A/1 (Issue II), 1 IRAN- U.S. C.T.R. 144, at 152.

> fact, they knew well that such a Tribunal could not have wider jurisdiction than that which was specifically decided by mutual agreement.[28]

Indeed, the Tribunal's resolve to stay within its specifically defined jurisdiction is such that even in the instances in which it is requested to record a settlement agreement as an Award on Agreed Terms,[29] it does not do so until it first satisfies itself, albeit on a *prima facie* basis, that it has jurisdiction over the settled dispute. With regard to the rule of restrictive interpretation, at any rate, the Tribunal's case law prior to the Decision in A/18, was abundantly clear: 'It is a well established principle of international law that provisions conferring jurisdiction upon an arbitral tribunal shall be interpreted in a restrictive manner.'[30]

The minority members argue in their dissenting opinion that had the Tribunal addressed these rules of interpretation, it would necessarily have come to a different conclusion, that is to say, it would have found the answer to the disputed issue in the text of the Declarations.[31] This, which may or may not be true, is not what is suggested here. It is, rather, that a Tribunal whose jurisdiction is limited to what 'was specifically decided by mutual agreement' – a Tribunal which is established to hear only those claims and counterclaims which were 'very carefully' listed by the parties – was expected to say a word or two on why, in its view, certain established rules of interpretation specifically designed to achieve such a purpose, were not found relevant.

This, indeed, is what was done in, for instance, the *Mergé* Case, on which the Decision heavily relies. There, the Commission first emphasized that the Treaty of Peace in question had to 'be performed only within the limits of what [had] been agreed', and that the parties had been free to insert in the Treaty any 'specific rule to govern cases of dual nationality, apart from or even in conflict with the

28 *Iran* and *the United States*, Case A/2, 1 IRAN-U.S. C.T.R. 101, at 103.

29 Under Article 34 of the Tribunal Rules. See page 11, footnote 36, above.

30 *Iran* and *the United States*, Case B/24, 5 IRAN-U.S. C.T.R. 97, at 99. See, to the same effect: *Grimm* v. *Iran*, 2 IRAN-U.S. C.T.R. 78, at 80; *Lianosoff* v. *Iran*, 5 IRAN-U.S. C.T.R. 90, at 93; and *Iran* and the *United States*, Case B/16, 5 IRAN-U.S. C.T.R. 94, at 95. More recently, however, the Tribunal has questioned whether this principle 'has any role to play in the interpretation of treaties today'. See: *The United States* and *Iran*, Decision No. DEC 130-A28-FT (19 Dec. 2000), 36 IRAN-U.S. C.T.R. 5, at 25. *Iran* and *The United States*, B1 (Counterclaim), Interlocutory Award No. ITL 83-B1-FT (9 Sep. 2004) (not yet published). And yet the few authorities on which the Tribunal has relied in support of this deviation from its earlier precedents all seem to be questioning the applicability of the rule of restrictive interpretation in determining a party's scope of treaty obligations, rather than in determining an international tribunal's scope of jurisdiction.

31 5 IRAN-U.S. C.T.R., at 329-31.

generally recognized rules of international law'. Having made those determinations, the Commission went on to make a thorough review of 'the letter' and 'the spirit' of the Treaty, and turned to 'the general principles of international law' only after its 'every effort of interpretation' failed to provide a textual answer.[32] In the present Decision, the Tribunal was likewise expected to make a similar 'effort of interpretation' in search of a textual answer. It failed to do so.

Turning now to the Decision's reliance on Article 31 (3) (c) of the Vienna Convention (1969), that provision states that together with the context and alongside certain other elements, 'any relevant rules of international law applicable in the relations between the parties' to the treaty 'shall be taken into account'. The Decision, however, is once again silent on two material qualifications in the provision.

First, the provision speaks, not of the relevant rules of international law in general, but of any such rules 'applicable in the relations between the parties'. And yet the Decision, having rejected the clarity of the text, proceeds immediately to search for the relevant rule of international law in general and, by doing so, fails to address that expressly stated qualification; a qualification which, particularly in view of the non-recognition of the concept of dual nationality by Iranian law, deserved some attention.

Second, the provision stipulates, not that such rules be given a determinant role, but that they 'shall be taken into account' together with the 'context'. This prompts the dissenting members to suggest, as noted earlier, that the provision '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'.[33] But here, too, the Decision offers no explanations as to why the provision alone could be relied upon as the source of the Tribunal's jurisdiction.

The issues just discussed may now be summarized. In this interpretative Case, the Tribunal was required to determine whether the claims of dual Iran-United States nationals came within the definition of those claims that were, in the words of the Tribunal, 'very carefully' listed in the Algerian Declarations. In its Decision, the Tribunal first summarily dismisses the parties' contentions on the clarity of the text, and then proceeds to identify the relevant rule of international law on the subject, relying on Article 31 (3) (c) of the Vienna Convention of 1969. In doing so, the Decision declines to address: (i) a number of elements and rules of interpretation that are reflected in the Vienna Convention or else are established under international law. Significantly, these elements and rules, extensively pleaded

32 14 R.I.A.A. (1955), 236, at 239-41.
33 5 IRAN-U.S. C.T.R., at 329-330.

by the parties, were pertinent to the determination of the parties' agreement as reflected in the text and, as such, had to be given priority over any possible rule of international law on the claims of dual nationals; and (ii) two material points in Article 31 (3) (c) of the Vienna Convention, namely, that the rule in question must be shown to be 'applicable in the relations between the parties', and that even then, it can only 'be taken into account' alongside certain other relevant elements.

This treatment of the central issue of textual interpretation of the Algerian Declarations justifies the suggestion, here made, that whatever the merits of the rule of customary international law favoured by the Tribunal, the case for its application under the Declarations is not well explained. And this in disregard of the mandate in Article 32 (3) of the Tribunal Rules of Procedure, according to which '[t]he arbitral Tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given'.[34] Here, then, is a potential point of weakness, affecting the authority of the Decision.

4.3 The Issue of Terminology

The Tribunal's findings on the relevant rule of customary international law will be commented upon presently. Before that, however, a point of some importance – the Tribunal's use of pertinent terms – must be addressed.

4.3.1 The Imprecision of the Terms Used[35]

The Award in *Esphahanian* refers to the terms 'effective'[36] and 'dominant'[37] interchangeably. To give but one example: '[T]he Tribunal is led to adopt the notion of effective or dominant nationality'.[38] Here, the term 'effective', used synonymously with the term 'dominant', is meant to refer to 'closer connection', as evidenced by the Award's reference in the next paragraph to Article 5 of the

34 2 IRAN-U.S. C.T.R. 433.

35 See, generally, M. Aghahosseini, *The Claims of Dual Nationals Before the Iran-United States Claims Tribunal: Some Reflections*, 10 Leiden Journal of International Law (1997), 21, at 27-33.

36 Substituted at times with the terms 'real' (2 IRAN-U.S. C.T.R. 157, at 163), or 'active' (*Ibid*).

37 Substituted at times with the term 'predominant' (*Ibid*, at 162).

38 *Ibid*.

Hague Convention; an Article which speaks, it will be recalled, of the country with which the individual is 'most closely connected':

> [I]t seems to the Tribunal that, since the beginning of the century, there has been a very strong tendency to limit the principle of non-responsibility, expressed in Article 4 of the Hague Convention, by the principle of effective nationality as expressed by Article 5 of the said Convention.[39]

At the same time, however, the Award seems to distinguish between the two terms, where it speaks of dominant *and* effective nationality: '[W]e conclude that the Tribunal has jurisdiction … when the dominant and effective nationality of the Claimant is that of [the claiming State].'[40] Such a distinction is also evidenced by the Award's occasional use of the term 'more effective' nationality:

> We may now frame the jurisdictional issue before us: Were Esphahainan's factual connections with the United States … more effective than his factual connections with Iran ...?[41]

The same laxity in the use of terms will be found in the A/18 Decision. There, too, the Tribunal at times refers to the rule of 'dominant and effective'[42] nationality, and at other times to 'real and effective' nationality.[43] In the first, 'effective' nationality is distinguished from 'dominant' nationality, while in the second, it is distinguished from 'real' nationality.

Such is also the case with all the Tribunal's subsequent Awards on the subject, an example of which will be found in *Mahmoud***.** There, the Tribunal first states that '[the] search for the stronger factual ties implies that, when each of two nationalities is real and effective, the Tribunal is to determine which one is dominant'.[44] And yet the same Award, having noted that the evidence in support of the claimant's dominant nationality is 'evenly balanced', concludes that she 'has failed to satisfy the Tribunal that her 'dominant and effective' nationality during the relevant period was that of the United States'.[45] Here, then, we have the term 'real and effective' distinguished from the term 'dominant'. The Tribunal's search for the claimant's 'stronger ties', and its finding that the evidence

39 *Ibid.*
40 *Ibid*, at 166.
41 *Ibid.*
42 5 IRAN-U.S. C.T.R. 251, at 263.
43 *Ibid*, at 265.
44 9 IRAN-U.S. C.T.R. 350, at 353.
45 *Ibid*, at 354-5. (emphasis added)

in that respect is 'evenly balanced', show necessarily that the real and effective nature of each of the claimant's two nationalities were already ascertained. The Tribunal's subsequent reference to the claimant's failure to establish her United States 'dominant and effective' nationality would therefore be in conflict with its earlier finding, unless the term 'effective' is here used in a different sense, synonymous with the term 'dominant'.

This looseness in the use of terms will likewise be seen in the judgements of other international judicial bodies, of which the judgement of the International Court of Justice in *Nottebohm* is one example. There, as will be soon noted in greater detail, the Court first formulates the legal issue on which it must pronounce itself, namely, whether the nationality bestowed on Nottebohm by the claimant State 'has the international effect'[46] of allowing the exercise of protection against the respondent State. Noting that

> [i]nternational practice provides many examples of acts performed by States in the exercise of their domestic jurisdiction which do not necessarily or automatically have international *effect*, which are not necessarily and automatically binding on other States,[47]

the Court proceeds to hold that nationality, in order to have international effect, must be based on 'the individual's genuine connection with the State';[48] it must be 'real and effective, and not merely the verbal preference of the individual seeking it for the country which grants it to him'.[49]

The sense in which the term 'effective' nationality is used in the above passages is clear: an effective nationality is one which enjoys international effect; a nationality which is recognized on the international plane. Yet the Court in the same judgment uses the term in a different sense:

> 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.[50]

And again:

46 ICJ Reports (1955), 4, at 21. (emphasis added)

47 *Ibid.* (emphasis added) See further, *ibid*, at 22, where the Court speaks of 'recognizing the *effect*' of a nationality, and of 'determining whether full international *effect*' is to be given to a nationality. (emphases added)

48 *Ibid*, at 23.

49 *Ibid*, at 24.

50 *Ibid*, at 22.

> This notion [of real and effective nationality] is inherent in the provisions of Article 3, paragraph 2, of the Statute of the Court.[51]

That Article, it may be noted, refers to the determination of the nationality of a person, for the purposes of membership of the Court, on the basis of the State 'in which he ordinarily exercises civil and political rights'.[52] In these two last examples, then, the term 'real and effective' nationality is meant to reflect the concept of 'stronger ties', that is to say, the concept of dominant nationality.[53]

The same inexactness in the use of terms will be found in the writings of scholars. Leigh, for instance, suggests that the rule of 'effectiveness' does not violate the principle of 'equality' of States, and hence does not lead to international friction. He then says, in explanation, that such international friction might be caused where 'the link between an individual and his two States are more or less equally strong', but not in cases of 'effective nationality against the State of formal nationality'.[54] Clearly, 'effective nationality' is here contrasted with 'formal nationality', with no application in cases where the links between the dual national and his two States of nationality are 'more or less equally strong'. It is, in other words, not quite the same thing as 'dominant nationality', under which the two nationalities must compete, even where both are based on strong links.[55]

Yet another example is provided by García Amador's reports to the International Law Commission, where the expression 'stronger and more genuine' ties is employed.[56] Closer to our time, John Dugard, the International Law Commission's Special Rapporteur on Diplomatic Protection, occasionally speaks in his reports of the 'principle of preponderance of effectiveness'.[57]

51 *Ibid.*

52 'A person who for the purposes of membership in the Court could be regarded as a national of more than one state shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights.'

53 See, further, the *Mergé* Case, in which the Conciliation Commission specifically states that, in cases of dual nationality, 'effective nationality does not mean only the existence of a real bond, but means also the prevalence of that nationality over the other'. 14 R.I.A.A. (1955), 236, at 247.

54 Guy I.F. Leigh, *Nationality and Diplomatic Protection*, 20 Int'l & Comp. L. Q. (1971), 453, at 461.

55 As will be seen presently, in many of the Cases decided by the Tribunal, the evidence in support of the claimant's two nationalities was found to be evenly balanced.

56 See, for instance, Article 21 (4) of his Third Report, A/CN.4/111, in Yearbook of International Law Commission (1958), Vol. II, 47, at 61: 'In cases of dual or multiple nationality, the right to bring a claim shall be exercisable only by the State with which the alien has the stronger and more genuine legal or other ties.'

57 See, for instance, his First Report, A/CN.4/506, para. 158 (2000).

Now, there are difficulties with these laxities in the use of appropriate terms. *First*, and linguistically speaking, the term 'effective' (or 'real and effective') does not readily capture the concept of 'dominance'; a concept which conveys the element of relativity, or preponderance. It stands, on the contrary, in contrast with the term 'ineffective' (or 'unreal').

Secondly, and more importantly, it is likely to lead to ambiguities. Two instances of this will be found in the A/18 Decision itself. One instance is the different senses in which the majority and the minority in A/18 understood the term 'effective' as used in the *Nottebohm* Case. While the majority clearly thought that 'effective' nationality referred to in *Nottebohm* meant 'dominant' nationality, the minority believed, equally clearly, that the 'effectiveness' of a nationality perceived in that Case 'must be understood in terms of its 'validity''.[58]

Another instance is the Decision's reference to the following observation by Professor Brownlie:[59]

> [T]he principle of effective link is not to be regarded as forcing a choice. If the facts are consistent with a substantial connection with both states, then the individual cannot expect international law to give him a privileged position as against other nationals of the two states – as would happen if he has a remedy in the international forum against his own government. When, however, 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.

It will be seen that in this passage, very much in line with the observation quoted earlier from Leigh, the compatibility of the principle of 'effective link' with the rule of 'equality of States' is defended. It is said in explanation, however, that the principle has no application in circumstances in which an individual has a 'substantial connection' with two States, but rather in cases where 'a choice can be made' between a 'substantial connection' and a 'tenuous link'. In short, 'effective' nationality is contrasted with and defended against 'formal' nationality based on 'tenuous links'.[60]

58 5 IRAN-U.S. C.T.R. 332.

59 BROWNLIE, footnote 14 above, at 389-90 (references omitted).

60 It may be additionally noted that elsewhere in his writings Professor Brownlie specifically speaks of the survival of the rule of non-responsibility under the *Nottebohm* regime of effective nationality (39 BYIL (1963), 284, at 361). He also quotes with approval (footnote 14 above, at 471) the reference by Judge Jessup in his Separate Opinion in *Barcelona Traction* to 'the traditional rule that a State is not guilty of a breach of international law for injuring one of its own nationals'. *Barcelona Traction Case* (Second

And yet reference to this passage was made in A/18 Decision as supportive of the rule of 'effective' nationality;[61] which rule was then applied in the instances in which a choice had to be made not between a 'tenuous' and a 'substantial' link, but between two 'more or less equally strong' nationalities. One such Case, namely *Esphahanian,* has already been noted, in which the Tribunal, having reviewed the relevant facts, observed that although 'Esphahanian's contacts with the United States were long and consistent', his 'contacts with Iran' even after 'he went to the United States to study have been significant' as well.[62]

Indeed, as will be shown later,[63] a great number of dual national claimants whose dominant nationality came up for decision by the Tribunal were individuals who were born of sole Iranian nationality, and who remained so until naturalized by the United States in their thirties, forties, and fifties. Others were children born to Iranian and United States' parents, later raised and educated partly in Iran and partly in the United States. Others still were United States nationals who married Iranian nationals, acquired Iranian nationality by virtue thereof, and moved to and lived in Iran for many years. That such individuals should have more or less equally substantial connections with both their countries of nationality was only to be expected.

4.3.2 Suggested Terms

Such ambiguities and confusions need not exist and, it is submitted, will not exist if the three distinct concepts of 'validity', 'effectiveness', and 'dominance' are clearly distinguished and properly labelled. This will now be explained.

Phase), ICJ Reports (1970), at 192. Whatever Professor Brownlie's preferences, therefore, he does not seem to be questioning the applicability of the rule of non-responsibility.

61 5 IRAN-U.S. C.T.R. 251, at 265. A similar but more recent error is made by the International Law Commission. In its Report on Draft Articles on Diplomatic Protection, the Commission refers to the United Nations Compensation Commission (established by the Security Council to provide compensation for damages caused by Iraq's occupation of Kuwait) as an institution that applies the rule of dominant nationality. (Report of the International Law Commission, fifty-fourth session (2002), UNGAOR, 57th session, Supp. No. 10, at 185-6, UN Doc. A/57/10). This is so, says the Law Commission, because the Compensation Commission considers the claims of dual citizens of Iraq if they 'possess bona fide nationality of another State'. (*Ibid*, at 186) It will be readily appreciated, however, that this has nothing to do with the rule of dominant nationality, for the Iraqi nationality of these citizens may also be 'bona fide', and indeed dominant, and yet their claims against Iraq will be heard. See further page 262, footnote 59, below.

62 2 IRAN-U.S. C.T.R. 157, at 166-7.

63 See Chapter Six below.

The nationality of a person may come up for examination by an international tribunal for three different purposes: (i) for the purpose of determining its status at the domestic level; (ii) for the purpose of determining its status at the international level; and (iii) in the case of a dual national, for the purpose of determining its status *vis-à-vis* the national's second nationality. Before dealing with these, however, three preliminary points must be made.

First, it is commonly accepted that '[i]n principle, questions of nationality fall within the domestic jurisdiction of each state'.[64] Indeed, as early as 1923, the Permanent Court of International Justice stated (*dictum*) in its Advisory Opinion that '[i]n the present state of international law, questions of nationality are, in the opinion of this Court, in principle within the reserved domain of a State.'[65] The rule is also reflected in Article 1 of the Hague Convention of 1930, which provides that '[i]t is for each State to determine under its own law who are its nationals'.[66] The judgment of the International Court of Justice in the *Nottebohm* Case is in accord:

> It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its organs in accordance with that legislation.[67]

Second, it is also generally admitted that this freedom of State is not absolute, but restricted by limitations imposed by international law.[68] In the *Nationality*

64 Manley O. Hudson (as Special Rapporteur of the International Law Commission), Yearbook of International Law Commission (1952), vol. II, 3, at 7, quoted in BROWNLIE, footnote 14 above, at 373.

65 Advisory Opinion concerning the *Tunis and Morocco Nationality Decrees*, PCIJ Series B, No. 4 (1923), 24.

66 The Convention Concerning Certain Questions Relating to the Conflict of Nationality Laws (1930), 179 L.T.S. 89. More recently, this rule has been endorsed by the 1997 European Convention on Nationality, Article 3 (1) of which reads: 'Each State shall determine under its own law who are its nationals.' Europ. T.S. No. 166; 37 ILM 44 (1998). For a detailed review of the pertinent sources of this rule, see the First Report of the International Law Commission's Special Rapporteur on Diplomatic Protection (2000), footnote 57, at 34-5.

67 ICJ Reports (1955), 4, at 20. See, further, *Flegenheimer*, 14 R.I.A.A. (1958), 327, at 337.

68 Indeed, there are those who believe that the very freedom of sovereign States to regulate matters of nationality is a freedom provided by international law: 'International law gives to sovereign states the competence to determine by municipal law who are their nationals…' J. Kunz, *The Nottebohm Judgment (Second Phase)*, 54 Am. J. Int'l L.

Decrees Case just quoted, the Permanent Court stated, having first affirmed that questions of nationality were within the reserved domain of a State, that this was nevertheless 'essentially a relative question' that depended on 'the development of the international relations'[69] Similarly, the Harvard Research Draft Convention on Nationality (1929)[70] states in its Article 2 that 'under international law the power of a state to confer its own nationality is not unlimited'; and the commentary thereto offers examples of such limitations. To the same effect is Article 1 of the Hague Convention. Having stated, as just noted, that '[i]t is for each State to determine under its own law who are its nationals', the Article continues:

> 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.[71]

A more recent reference to the existence of such limitations will be found in the International Law Commission's Draft Articles on Diplomatic Protection, Article 3 (2) of which, adopted by the Commission at its fifty-fourth session in 2002, states:

> For the purposes of diplomatic protection of natural persons, a State of nationality means a State whose nationality the individual sought to be protected has acquired by birth, descent, succession of States, naturalization or in any other manner, *not inconsistent with international law*.[72]

(1960), 536, at 546.

69 PCIJ, Series B, No. 4 (1923), 24.

70 23 Am. J. Int'l Law, Supplement (1929), 13 *et seq*.

71 This was in line with the replies given by some governments to the questions put to them by the Preparatory Committee for The Hague Codification Conference (League of Nations, in S. Rundstein, Conference for the Codification of International Law, Bases of Discussion: I. Nationality, 1929, Geneva: s.n., 13). These governments suggested that even if the discretion of a State to legislate with regard to the acquisition or loss of nationality may be unlimited, the duty of another State to recognize the effect of such legislation is not unlimited. The freedom of a State in regulating its nationality laws, in other words, should not be extended to where the sovereignty of another State is encroached. See the discussion of the topic in BROWNLIE, footnote 14 above, at 375-77.

72 Emphasis added. The texts of these Articles together with the Commentaries thereto are reproduced in: Report of the International Law Commission, footnote 61 above. See, to the same effect, Article 3 (2) of the European Convention on Nationality (1997) which requires the consistency of national legislation with, *inter alia*, 'principles of law generally recognized with regard to nationality'. Europ. T.S. No. 166; 37 ILM 44 (1998).

The requirement of conformity with the pertinent rules of international law has led some commentators to suggest that 'nationality is no longer exclusively within the reserved domain of States'.[73] Brownlie states that '[t]here are compelling objections of principle to the doctrine of the freedom of states in the present context'.[74] Referring to Article 1 of the Hague Convention, he comments that the latter part of it deprives the principle of autonomy of its integrity'. This, he says, is because once exceptions and limitations to the discretion are admitted, 'the force of emphasis on discretion in legislation is much diminished', and the existence of limits to the discretion may not be 'concealed by the device whereby the exercise of the discretion occurs but is not recognized by other states'.[75]

Third, it is equally well-settled that, although there is a strong presumption in favour of the regularity of a confirmed nationality,[76] an international tribunal is not only entitled but duty bound to determine, when so requested, the legal status of a nationality both at the domestic and at the international levels.[77] Indeed, it may do so as with any other contested fact submitted to the tribunal for determination, and as part of the claimant's contentions;

> According to the prevailing view in international judicial decisions, there is no doubt that an international tribunal is entitled to investigate the circumstances in which a certificate of nationality has been granted … These decisions are in accordance with a more general rule … the rule that an international tribunal is competent to decide upon the validity of a rule or an act under municipal law if such rule or act is relevant to the international dispute under examination.[78]

4.3.2.1 Valid Nationality

As just stated, there may be cases in which the legal status of a nationality at the domestic level becomes an issue before an international tribunal. This happens where the very existence, or the regularity of acquisition, of a nationality is challenged before the international tribunal. The issue was first raised in the

73 Guy I.F. Leigh, footnote 54 above, at 453.

74 Footnote 14 above, at 386.

75 *Ibid,* at 389-90. It is to be noted, however, that the Court in *Nottebohm* did not find it 'necessary to determine whether international law imposes any limitations on [the State's] freedom of decision in this domain', even though the issue had been specifically raised by the defendant State. ICJ Reports (1955), 4, at 20.

76 L. OPPENHEIM, INTERNATIONAL LAW, 9th ed, edited by R. Jennings and A. Watts, Vol. 1, Parts 2-4, London and New York: Longman, 1996, at 856.

77 See Mervyn Jones, *The Nottebohm Case*, 5 Int'l & Comp. L.Q. (1956), 230, at 242-3.

78 Judge Guggenheim in his dissenting opinion in *Nottebohm,* ICJ Reports (1955), at 51-2.

Medina Case, decided in 1862 by the United States-Costa Rica Claims Commission. There, Costa Rica had contended that Medina and his sons, originally nationals of Argentina, had been granted United States citizenship in disregard of the conditions set by the United States law. Despite the Medinas' argument that their naturalization certificate was conclusive and could not be rejected as proof until revoked by a competent United States court, the umpire reviewed the facts and, concluding that the Medinas had not resided in the United States before or after their naturalization as required by the United States law, dismissed the claim for the claimants' lack of standing:

> The claimants having chosen to place themselves under the jurisdiction of this commission, must bring before it proofs which are really true and not merely considered so by a fiction introduced by the municipal law of the United States.[79]

A more extensive review of the issue, however, was made in the *Flegenheimer* Case, decided in 1958 by the Italian-United States Conciliation Commission,[80] established, as noted earlier, pursuant to a Peace Treaty between the two countries in 1947. The claimant's father, Samuel Flegenheimer, was born in 1848 of sole German (the Grand Duchy of Baden) nationality. He emigrated to the United States and was there naturalized in 1873. Only a year later, he returned to Germany (this time to Wurttemberg), where he married three times and resided until his death in 1929. In 1894 and while in Wurttemberg, he was naturalized a German citizen. The claimant Albert, who was born in 1890, was included in the certificate of naturalization.

The claimant came to know of his father's naturalization as a United States citizen only in 1933, four years after his father's death. Fearful of the increasing measures of racial persecutions taken by the nationalist socialist regime in Germany, he began to enquire whether he had preserved his father's United States nationality *jure sanguinis*, or else he could eventually recover it. For many years thereafter, he was given ambiguous and at times negative answers by the United States authorities. However, in 1952, a year after he instituted his claim against Italy, he was given a certificate of nationality based on an administrative decision. On the merits, he asserted that the sale by him of his capital stock in Italy in 1939 was void, having occurred under conditions of force or duress brought about by racist legislation enacted in Italy in 1938.

79 J. B. MOORE, HISTORY AND DIGEST OF INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY, Vol. III, 2583, at 2588. The same is said in the *Salem* Case, decided in 1932. II R.I.A.A. 1165, at 1184-5.

80 14 R.I.A.A. (1958), 327.

The Italian government denied that Albert Flegenheimer was a United States national at the relevant dates, and requested the Commission to declare the claim inadmissible on that ground. The United States argued, on the other hand, that the certificate of nationality issued to the claimant under United States law constituted legally valid proof of his nationality, which proof was, absent fraud or favouritism, binding on the Commission.[81]

The Commission rejected the United States' argument. On a detailed review of the subject, it came to the conclusions: *that* there existed a 'presumption of truth *amnia rite acta praesumantur* of the decisions rendered by the official authorities of a State acting in the sphere of their duties and in matters over which they have internal jurisdictional power';[82] *that* although this was a presumption with regard to which international jurisdictions had to 'act with the greatest caution',[83] it was only a *juris tantum* presumption which could be investigated and reverted by an international tribunal in cases of serious doubts; and *that* the claimant's certificate of nationality could therefore be examined by the Commission in order to satisfy itself of the 'existence or inexistence' of the certified nationality 'in full compliance with the law, at the national level':[84]

> It is the duty of this Commission to establish Albert Flegenheimer's true nationality at the relevant dates … and it has a right to go into all elements of fact or law which would establish whether the claimant actually was, at the aforementioned dates, vested with the nationality of the United States … It must therefore freely examine whether an administrative decision such as that taken in favour of Albert Flegenheimer in the United States, was of such a nature as to be convincing.[85]

Applying these findings on law to the facts of the Case, the Commission found: *that* Albert Flegenheimer did acquire United States nationality by filiation at birth in 1890; *that* he acquired German nationality by virtue of his naturalization in Wurttemberg in 1894 and thereby lost, both under the United States and German laws, his United States nationality; *that* he lost his German nationality and became stateless as a result of a 1940 German decree which declared that he had forfeited his German nationality; and *that* the certificate of nationality issued to him by the United States authorities was not of a nature to prove, to the full satisfaction of the law, that the claimant was a national of the United States as required by

81 *Ibid*, at 338.
82 *Ibid*, at 344.
83 *Ibid*, at 347.
84 *Ibid,* at 337.
85 *Ibid,* at 338.

the Peace Treaty. The Commission therefore rejected his claim as being inadmissible.[86]

It will be noted that here the Commission examined the claimant's certificate of nationality on the basis of the United States law, and rejected the 'validity' and 'existence' of his certified nationality at the national level.[87] Other circumstances mentioned by the Commission as justifying the rejection of the validity of a nationality by an international body included fraud,[88] duress, serious errors, inconsistency with the Law of Nations such as compulsory naturalization of aliens, and the adoption of legislation which on its face was contrary to the State's obligations.[89]

The principle enunciated in *Flegenheimer* was very recently endorsed by a tribunal established under the International Centre for Settlement of Investment Disputes (ICSID).[90] It was there held that by acquiring his Canadian nationality, the claimant had automatically lost his Italian nationality under the Italian law, and was therefore not entitled to assert a claim on the basis of a Bilateral Investment Treaty between Italy and the respondent State, the United Arab Emirates. And this, even though the claimant had provided the tribunal with two Italian passports, five certificates of nationality, and a letter from the Italian Ministry of Foreign Affairs certifying that the claimant was entitled to the protection of the Treaty in question. The Italian authorities had issued these documents, said the tribunal, unaware of the fact that the claimant had acquired his second nationality without taking steps to preserve his Italian nationality.

These, then, are the instances in which the international tribunal examines, for international purposes, the 'validity and the actual existence' of the nationality in question. The enquiry, in other words, is directed at the basic issue of whether or not the nationality invoked has been regularly, or validly, obtained under the domestic law. For instances of this nature, it is thus suggested, the appropriate term would, depending on the outcome of the enquiry, be either 'valid' or 'invalid' nationality, always of course for international purposes.

86 *Ibid*, at 389-90.

87 In the words of the Commission itself: 'This Commission is hence called upon to pass on *the validity and the actual existence* of the American nationality of [the claimant].' *Ibid*, at 349. (emphasis added)

88 Which may be either on the part of the administration of a State or on the part of the individual. BROWNLIE, footnote 14 above, at 388.

89 In which case the legislation itself may constitute the breach of an obligation. BROWNLIE, *Ibid,* at 376, referring to Fitzmaurice, 92 Recueil des cours (1957-II), at 89.

90 *Soufraki* v. *The United Arab Emirates*, Case No. ARB/02/7, 7 July 2004, available online at the Investment Treaty Arbitration (ITA) Resource website: http://ita.law.uvic.ca/chronological_list.htm.

4.3.2.2 Effective Nationality

Next, an international tribunal may, having established that a nationality is regularly or validly acquired at the domestic level, find it necessary to determine the legal status of that nationality at the international level and *vis-à-vis* other States. Indeed, a nationality conferred by a State may become relevant at the international level for a number of reasons, including diplomatic protection, specific treatment, and international jurisdiction. And the question here is whether a nationality so granted at the domestic level is entitled to automatic recognition and effect on the international plane. The answer is in the negative. As stated by the International Court:

> International practice provides many examples of acts performed by States in the exercise of their domestic jurisdiction which do not necessarily or automatically have international effect, which are not necessarily and automatically binding on other States or which are binding on them only subject to certain conditions.[91]

The reason for this is clear enough: once a State applies to an international tribunal, it places itself on the international plane and there, it is the international law, and not the domestic law of the State in question, which determines the international effect of the State's act.[92]

With regard specifically to our subject, one such condition set by international law for the international recognition – the international effect – of nationality (or of nationality granted through naturalization , in any case) is the existence of genuine connection between the national and the granting State. Such at any rate was the ruling of the International Court in *Nottebohm*, a Case which will be discussed in greater detail shortly. There, the Court, having first noted that the 'naturalization of Nottebohm was an act performed by Liechtenstein in the exercise of its domestic jurisdiction', went on to formulate the issue before the Court as 'whether that act has the international effect'[93] of entitling the granting State the right to exercise protection against the respondent State, Guatemala. A review of the facts then led the Court to conclude that because the naturalization of Nottebohm by Liechtenstein was not based on any genuine link between the two, it did not give rise to an obligation on the part of the respondent State to recognise the 'effect of that nationality'.

91 *Nottebohm*, ICJ Reports (1955), 4, at 21.
92 *Ibid*, at 20-21.
93 *Ibid*, at 21.

Now, it is submitted that in all such instances in which the 'effect' of a nationality on the international plane – and more precisely its 'effect' *vis-à-vis* the respondent State – is at issue, the appropriate term would, depending on the outcome of the enquiry, be either 'effective' or 'ineffective' nationality.

It may be thought that the distinction between the two categories of cases mentioned above is not all that clear: in both, the investigation is made not by a domestic court, but by an international tribunal; in both, the investigation is ultimately conducted not under domestic, but under international law; and in both, the legal status of the nationality is determined not for domestic, but for international purposes. Indeed, the legal status of the investigated nationality will most likely remain unchanged at the domestic level, whatever the result of the finding by the international tribunal.

All these are true. But the fact still remains that, at the international level, the consequences of a finding that a nationality is domestically 'non-existent' or 'invalid' are quite different from those of a finding that the nationality is 'ineffective' *vis-à-vis* the respondent State. In the former, the nationality can no longer be invoked on the international plane for any purposes whatsoever. In the latter, it may still be invoked, save for the purpose for which the nationality is held to be ineffective.

That the two are different is well reflected in the *Nottebohm* Case. Even though the respondent State had there invited the Court to declare, *inter alia*, that Nottebohm had not 'properly acquired Liechtenstein nationality in accordance with the law of the Principality',[94] the Court denied the international effect of his nationality 'without considering [the question] of the validity of Nottebohm's naturalization according to the law of Liechtenstein'.[95] In fact, the Court went further and made it clear that it was not rejecting the international effect of Nottebohm's nationality in general, but merely its effect *vis-à-vis* the respondent State. Referring to the formulation of the issue by the counsel for the claimant State as whether Mr. Nottebohm's nationality of Liechtenstein was one which had to be recognized by all other States, the Court stated:

> This formulation is accurate, subject to the twofold observation that, in the first place, what is involved is not recognition for all purposes but merely for the purposes of the admissibility of the Application, and, secondly, that what is involved is not recognition by all States but only by Guatemala.[96]

94 *Ibid,* at 11.
95 *Ibid*, at 20.
96 *Ibid*, at 17.

4.3.2.3 Dominant Nationality

Unlike the two concepts of 'valid' and 'effective' nationality which pertain to the determination of the legal status of a single nationality, the concept of 'dominant' (or 'predominant') nationality finds relevance, obviously enough, only where two or more nationalities are involved. Further still, it finds relevance only where both the validity and the effectiveness of each of the individual's two (or more) nationalities have first been ascertained. This is because at the international level, an invalid nationality cannot possibly compete with a valid nationality, nor can a valid but ineffective nationality compete with a valid and effective nationality, so as to give rise to the issue of dominant nationality. In other words, a nationality determined by an international tribunal not to have been validly acquired at the domestic level, or not to be effective at the international level, is, for international purposes, irrelevant.

But where the municipal validity and the international effectiveness of an individual's two (or more) nationalities have been recognized, it may still become necessary for an international tribunal to determine which of the two (or more) is to prevail over the other for a given purpose. As stated in *Nottebohm*, where an international tribunal is confronted with a situation in which two States have conferred their nationalities upon an individual, and is thus faced with two contradictory assertions 'of equal weight', it must identify one of the two as prevailing; for otherwise it would 'allow the contradiction to subsist and thus fail to resolve the conflict'.[97]

Such, in fact, has been the case with every dual national claimant whose dominant nationality has been an issue before the Tribunal. As stated before[98] – and with the exception of a very few instances which will be noted shortly[99] – these were all individuals with validly acquired Iranian and United States nationalities, and with cultural and financial ties to both countries. In none of the Cases involved, did either of the claimant's two nationalities present a *Nottebohm* like situation, where the International Court rejected the international effect of the claimant's Liechtenstein nationality on the basis of the circumstances under which it had been granted; nor a *Drummond* like situation, where the British Privy Council spoke of the claimant as being 'technically' a British subject, but 'in substance' a French subject.[100] In all, to the contrary, the Tribunal was faced

97 *Ibid,* at 21.

98 See page 69 above.

99 See Chapter Six below.

100 Knapp, II Privy Council Reports, 295, at 313; 12 Eng. Rep. (1901), 492, at 500. The Case is discussed at pages 89-91 below.

with two valid and otherwise internationally effective nationalities, one of which had to be identified, for the Tribunal's purposes, as representing stronger ties.

In all instances of this nature, it is suggested, the only exact term for the nationality so identified would be 'dominant' (or 'predominant') nationality.[101] And this, not only because the term correctly conveys the concept of 'prevalence', but also because other terms commonly employed for this purpose are either inexact or redundant, or both.

One such term is 'effective' (or 'real' or 'active') nationality. And yet, to speak of a dual national's 'effective' (or 'real' or 'active') nationality implies, wrongly, that his second nationality is 'ineffective (or 'unreal' or 'inactive'). Besides, since the term is appropriately employed to convey the concept of a nationality with international effect, its use for the entirely different concept of 'dominant' nationality is likely to create unnecessary confusion.[102]

Yet another such term is 'more effective', as if the concept of effectiveness in the sense just described is capable of admitting degrees. The fact is, however, that on the international plane and for a given purpose, a nationality is either effective or not effective at all, leaving no room for a 'more' or, by implication, a 'less' effective nationality. The same holds true of the term 'preponderance of effectiveness', and of the curious term 'more genuine' nationality.

Equally problematical is the term 'effective or dominant' nationality, in which two different terms of art are synonymously used. Besides, this is incompatible with the Tribunal's sound statement in *Mahmoud* that 'when each of two nationalities is real and effective, the Tribunal is to determine which one is dominant'.[103] Finally, in the term 'effective and dominant' nationality, we have at best a redundancy, for it is difficult to imagine a dominant but ineffective nationality.

101 In its recently produced Draft Articles on Diplomatic Protection, the International Law Commission employs the term 'predominant' nationality (in place of the terms 'effective' or 'dominant' nationality suggested by the Commission's Special Rapporteur), and states very briefly in its Commentaries that the term 'predominant' captures the element of relativity 'more accurately' than the terms 'effective' or 'dominant'. (Report of the International Law Commission on Diplomatic Protection (2002), footnote 61 above, Draft Article 6 and the Commentaries thereto, at p. 186). The fact is, however, that the term 'effective' does not, as noted, convey the element of relativity at all, and there is linguistically no support for the suggestion that the term 'dominant' reflects the notion of relativity less accurately than the term 'predominant'. The Report's contrasting the term 'predominant', on the one side, with the terms 'effective' and 'dominant', on the other, shows that there, too, these concepts have not been properly distinguished.

102 Hence, the need for the explanation in the *Mergé* Case that, in cases of dual nationality, 'effective nationality does not mean only the existence of a real bond, but means also the prevalence of that nationality over the other'. 14 R.I.A.A. (1955), 236, at 247.

103 9 IRAN-U.S. C.T.R. 350, at 353. See pages 65-66 above.

All these may now be summarized. An international tribunal is entitled to examine whether a given nationality is in fact and regularly acquired at the domestic level. Where the answer is in the affirmative, the nationality is 'valid' for international purposes. Next, the international tribunal may be required to determine whether a validly obtained nationality should, for a specific purpose, be given international effect. Where the answer is in the affirmative, the nationality is 'effective' at the international level. Finally, and with respect only to an individual with two or more 'valid' and 'effective' nationalities, the international tribunal may be required to identify the nationality based on stronger ties. The nationality so identified is the individual's 'dominant' nationality. This means that, based on the ruling in the A/18 Decision, a claimant who possesses, validly and effectively, the nationalities of both the claimant and the respondent States, must establish that his 'dominant' nationality is that of the claimant States.

4.4 The Decision's Interpretation of Customary International Law

As noted earlier, the Decision in A/18 concludes that the Algerian Declarations are silent on the issue of claims of dual nationals and, on that basis, proceeds to seek the answer in the pertinent rule of customary international law. There, and under the title of 'Reasons for the Award', the Decision takes up for consideration: (i) the codified sources of international law; (ii) the international case law; and (iii) the legal literature. Each of these will now be briefly reviewed.

4.4.1 Sources Codifying International Law

Here, the Tribunal singles out for examination Article 4 of the Hague Convention of 1930 and finds a number of reasons for not following it: (i) it is a provision belonging to a treaty which is more than fifty years old, and to which only twenty States are parties; (ii) it concerns diplomatic protection, a concept which has since been expanded, making it necessary today to distinguish between consular and claims-related types of protection; (iii) it does not apply to claims which, as with the claims before the Tribunal, are asserted before an international tribunal by nationals themselves; (iv) it applies by its own terms solely to diplomatic protection by a 'State', and hence, its applicability to a dispute which, as with the claims of dual nationals before the Tribunal, involves the determination of the rights of a private party primarily on the basis of municipal law and general principles of law, is debatable; and (v) it does not apply to claims of dual nationals before this Tribunal which, in so far as such private claims are concerned, was established

to act as a type of substitute forum for the courts of the United States so as to resolve a crisis; a substitute forum which, though not an organ of a third State, is also not a tribunal where claims are espoused by a State at its discretion.[104]

Little can be usefully added to the arguments exhaustively made by the majority members against, and by the minority members in favour, of the application of Article 4 of the Hague Convention; arguments which no doubt will be carefully examined by those who may in future be called upon to make decisions in like circumstances. Three general points, however, are worth noting in this respect, the last one with some future practical relevance.

First, the rejection of Article 4 by the majority on the basis of the limited number of the States parties to the Convention, and of the Convention's old age (ground (i) above) is unconvincing. This is so not only because the rule of non-responsibility endorsed by the Convention had the support of other respectable codified sources both at the time of the Convention[105] and, as noted by the dissenting members, long thereafter,[106] but also because the very two Cases which the majority describes as '[t]he two most important decisions on the subject in the years following the Second World War'– the very two precedents which the majority invokes in support of the rejection of the rule of non-responsibility – have both referred to the Convention with approval.

Thus, in *Nottebohm*, the International Court relies on Article 1 of the Convention in support of its finding that for a nationality to be recognized on the international plane, it must be consistent with international criteria;[107] and on Article 5 of the Convention in support of its finding that questions of nationality arising

104 The Tribunal has since affirmed this in its later pronouncements: 'Tribunal Awards uniformly recognize that no espousal of claims by the United States is involved in the cases before it.' *Iran* and *the United States*, Case No. A/21, 14 IRAN-U.S. C.T.R. 324, at 330. See further, *Iran* and *the United States*, Cases Nos. A/15 (IV) and A/24, 34 IRAN-U.S. C.T.R. 105, at 148.

105 To the same period belongs the Harvard Draft Convention on the Responsibility of States (1929), Article 16 (a) of which states: 'A State is not responsible if the person injured or the person on behalf of whom the claim is made was or is its national'. (23 Am. J. Int'l & Comp. L., Supplement (1929), 133). The commentary to that Article then states: 'The first paragraph [paragraph (a)] reflects a well-established rule that on behalf of a person having dual nationality, one of the States of which he is a national cannot make the other State of which he is a national a defendant before an international Tribunal'. *Ibid*, at 200.

106 Namely, the Institute of International Law in its 1965 Resolution adopted at its Warsaw session, quoted on pages 46-47 above.

107 ICJ Reports (1955), 4, at 23.

in a third State must be resolved by reference to the individual's genuine links.[108] In *Mergé*, the Commission is even more explicit:

> The Hague Convention, although not ratified by all the Nations, expresses a *comunis opinio juris*, by reason of the near unanimity with which principles referring to dual nationality were accepted.[109]

The suggestion here is not that the rule of non-responsibility receives support in either of these two precedents. Indeed, as will be seen shortly, the judgment in *Nottebohm* makes no specific reference to Article 4 of the Convention, and the Award in *Mergé* finds no incompatibility between that Article and the concept of dominant nationality. The suggestion is, rather, that the support that they both expressly give to the Convention as a whole leaves no room for the dismissal of the Convention on the ground of its age or the number of the parties thereto.

It remains to be added in this connection that the reference in the A/18 Decision to the Convention's old age has its origin in the Award in *Esphahanian*.[110] Oddly enough, however, that Award invokes the old age of this 1930 Convention while it traces the decline of the rule of non-responsibility to the 'beginning of the twentieth century':

> In any event, it seems to the Tribunal that, since the beginning of the century, there has been a very strong tendency to limit the principle of non-responsibility, expressed in Article 4 of the Hague Convention, by the principle of effective nationality as expressed by Article 5 of the said Convention.[111]

It is perhaps because of this seeming incompatibility – tracing the decline of the rule of non-responsibility to the beginning of the twentieth century and, at the same time, characterizing a 1930 Convention in support of the rule as an old Convention – that the Decision in A/18 declines to follow the reference in *Esphahanian* to the beginning of the century, saying, instead, that:

108 *Ibid.*

109 14 R.I.A.A. (1955), 236, at 243.

110 2 IRAN-U.S. C.T.R. 157, at 161.

111 *Ibid*, at 162. Equally oddly, the above-quoted passage follows immediately the Award's references to the Advisory Opinion of the International Court of Justice in 1949 (ICJ Reports, (1949), 174, at 186), and the Resolution of the Institute of International Law in 1965 (Annuaire de l'Institut de droit international, Vol. 51-II, at 270-1), both unequivocally supporting the rule of non-responsibility reflected in Article 4 of the Hague Convention.

> [T]he Tribunal is satisfied that, whatever the state of the law prior to 1945, the better rule at the time the Algiers Declarations were concluded and today is the rule of dominant and effective nationality.[112]

Second, the Decision speaks of the necessity in modern times for differentiating between consular and claims-related types of protection (ground (ii) above). And yet the latter is simply a corollary of the former, and must fulfil the same conditions. Indeed, the very Case of *Nottebohm* on which the majority heavily relies, treats them equally:

> *Diplomatic protection* and *protection by means of international judicial proceedings* constitute measures for the defence of the rights of the State. As the Permanent Court of International Justice has said and has repeated 'by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right – its right to ensure, in the person of its subjects, respect for the rules of international law'. (PCIJ, Series A, No. 2, p. 12, and Series A/B, Nos. 20-21, p. 17).[113]

Closer to our time, we have the International Law Commission's Draft Articles on Diplomatic Protection (2002), in which no such distinction is proposed. Indeed, Article 1 of the Draft Articles simply defines diplomatic protection in terms of

> resort to *diplomatic action* or *other means of peaceful settlement* by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State.[114]

The continued relevance of the traditional form of diplomatic protection has also been recently confirmed by the International Court of Justice in the Case of *LaGrand* (*Germany* v. *United States of America*), where it was held that the 1963 Vienna Convention on Consular Relations[115] creates rights not only for the

112 5 IRAN-U.S. C.T.R. 251, at 262-3.

113 ICJ Reports (1955), 4, at 24. (emphases supplied)

114 Report of the International Law Commission on Diplomatic Protection (2002), footnote 61 above. (emphases supplied) For two detailed reviews of the current practice on diplomatic protection, see: Francisco Orrego Vicuña, Interim Report on 'the Changing Law of Nationality of Claims', in International Law Association, Report of the 69th Conference (2000), published by the International Law Association, at 634 *et seq*; Rudolf Dolzer, *Diplomatic Protection of Foreign Nationals*, in R. Bernhardt (ed.), ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, Vol. I, Amsterdam: North Holland, 1992, 1067-70.

115 596 U.N.T.S. 261.

sending State, but for the detained person, the latter right in turn giving rise to the right of diplomatic protection by the national State of the person concerned.[116] It is worth mentioning that in this Case, the United States had argued that 'the right of a State to provide consular assistance to nationals detained in another country, and the right of a State to espouse the claims of its nationals through diplomatic protection, are legally different concepts'.[117]

Clearly, what the Decision means to suggest, when it speaks of the necessity today of distinguishing between consular and claims-related types of protection, is that because of the changes that have supposedly occurred in the concept of diplomatic protection since the 1930 Convention, the prohibition against such protection must now be confined to consular type, and no longer applied to claims-related type. Interestingly, the Warsaw resolution of the Institute of International Law,[118] adopted some thirty-five years after the Hague Convention, speaks not of the prohibition of diplomatic protection, so as to leave room for this argument in the Decision, but of the inadmissibility of 'an international claim'. The Decision, however, chooses not to mention the resolution, even though this is specifically referred to in the *Esphahanian* Award.

Third, the Decision's three remaining grounds for rejecting Article 4 of the Hague Convention are all arguments not against the application of the rule of non-responsibility in general, but against its application to claims of dual nationals before the Tribunal, because of certain perceived characteristics of such claims and of the Tribunal itself. Thus, the Decision in ground (iii) invokes the fact that claims of dual nationals before the Tribunal are asserted by the claimants themselves; in ground (iv) speaks of such claims as being the claims of private parties, to be resolved primarily on the basis of municipal or general principles of law; and in ground (v) refers to the institutional peculiarity of this Tribunal, in so far as the claims of dual nationals are concerned.

The necessary implication of these arguments is clear enough: the rule of dominant nationality is applicable, not in general, but only in cases in which the claim is asserted by the individual himself, it is determined as the individual's own right, and by a tribunal which is neither an organ of a third State nor a court

116 40 ILM 1069 (2001), at 1087-9.

117 *Ibid*, at 1087. See, to the same effect, Case *Concerning the Vienna Convention on Consular Rights* (*Paraguay* v. *United States of America*), Order of 9 April 1998, 37 ILM 810 (1998) (the *Beard* Case). See also the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia* v. *Yugoslavia*), where Croatia invites the International Court to adjudge and declare that Yugoslavia 'has an obligation to pay to ... Croatia, in its own right and as *parens patriae* for its citizens, reparations for damages …' ICJ Press Release 2002/34 (19 Nov. 2002).

118 Quoted on pages 46-47 above.

of inter-State proper; it is applicable, in other words, in the instances that fall outside the scope of diplomatic protection. But then this proposed limited scope of application for the rule of dominant nationality presents difficulties.

It is, for one thing, inharmonious with the Decision's general objective. That objective, as stated in the Decision itself, was to uphold a rule 'consistent with the contemporaneous development of international law to accord legal protections to individuals, even against the State of which they are nationals'.[119] If so, the characterization of the Tribunal, in so far as it is called upon to resolve the claims of dual nationals, not as an inter-State judicial organ, but as a *sui generis* forum, would not serve that objective. Nor would the characterization of dual nationals' claims before the tribunal as private claims. These are grounds, in other words, which tend to limit the international law's legal protections to a limited class of claims before a particular type of tribunal.

It is, for another, inconsistent with the Decision's overall conclusion that the rule of dominant nationality is of general application:

> 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 nationality.[120]

Now, this 'considerable body of law and legal literature' relates to diplomatically protected cases of dual nationality, and not to cases with the alleged peculiarities of the claims before this Tribunal. Thus, if one comes to the conclusion, as does the Decision, that the rule of international law applicable to the claims of dual nationals is that of dominant nationality, then there would be no consistency in suggesting, at the same time, that the reason why the contrary rule of non-responsibility in the Hague Convention should not be applied to the claims of dual nationals before this Tribunal is the peculiar nature of these claims and the Tribunal.

Curiously, this proposed restriction in the application of the rule of dominant nationality seems to have been, from the point of view of legal reasoning, quite unnecessary. It will be recalled that the Decision, having found that the Algerian Declarations were silent on the issue of dual nationals' claims, and relying on Article 31 (3) (c) of the Vienna Convention, seeks the solution in the relevant rule of international law. The Decision's conclusion, therefore, that the said rule is the rule of dominant nationality, completes the process of reasoning for the

119 5 IRAN-U.S. C.T.R. 251, at 265.
120 *Ibid*, at 260.

application of that rule under the Declarations, making it unnecessary to further restrict its scope to non-diplomatically protected cases.

As a matter of fact, of those sources of international law which support the rule of dominant nationality, none suggests that its application is so restricted. To the contrary, in all, the applicability of the rule is advocated precisely in the instances in which diplomatic protection is extended. The Case of *Mergé*, on which the Decision relies, is but one example. It says, categorically, 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. But it must not yield when such predominance is not proved.[121]

And more recently, the International Law Commission in its Draft Articles on Diplomatic Protection (Article 6) states:

> A State of nationality may not exercise *diplomatic protection* in respect of a person against a State of which the person is also a national unless the nationality of the former State is predominant, both at the time of injury and at the date of the official presentation of the claim.[122]

It will be seen that in both these statements, the application of the rule of dominant nationality is advocated in the cases in which States seek to exercise diplomatic protection. Thus, the Decision, having come to the conclusion that the rule of dominant nationality is the applicable rule of customary international law, could well have refrained, when dealing with the Hague Convention, from attempting to curtail the scope of the application of the rule to 'privately asserted' claims before a *sui generis* tribunal.

It remains to be said that, at any rate, the reasons offered in the Decision for distinguishing the claims of dual nationals before this Tribunal from those in which diplomatic protection is exercised do not seem very convincing. As noted before, the Decision in this respect refers to the fact that under the Declarations individuals are authorized directly to present their claims to the Tribunal. Yet this authorization, which was by no means unprecedented in practice,[123] was made purely for reasons of expediency and practicality. The United States' natural and juridical

121 14 R.I.A.A. (1955), 236, at 247. (emphasis added)

122 Report of the International Law Commission on Diplomatic Protection (2002), footnote 61 above. (emphasis added)

123 See the dissenting opinion in *Esphahanian*, 2 IRAN-U.S. C.T.R., at 197-8.

persons were accorded direct access to the Tribunal because of the sheer number of their claims. But for this procedural device, the United States government would have been required to take active part in the presentation, if not in the preparation, of thousands of claims ranging from the alleged expropriation of a modest farmland to the asserted breach of a multi-billion dollar petroleum contract. Such an indispensable practical and procedural mechanism cannot possibly have any impact on the applicability or otherwise of the rule of non-responsibility to the claims in question.

The Decision further relies on the asserted private nature of the claims of dual nationals before this Tribunal, and on the alleged *sui generis* character of the Tribunal when dealing with such claims. However, as the dissenting members note,[124] what is disregarded here is the reciprocal element in the Declarations on the basis of which the governments of Iran and the United States agreed to settle the claims of their nationals through the mechanism of arbitration, making the Tribunal an unmistakable product of diplomatic protection by States acting on behalf of their nationals. But for the intervention and protection of the two governments, these nationals could not have conceivably asserted their claims against either government before the Tribunal – there was no *compromis* between them and the respondent State. With the Declarations signed, on the other hand, these nationals were forced to pursue their claims before the Tribunal; a classic example of diplomatic protection.

As to the suggested institutional peculiarity of the Tribunal *vis-à-vis* the claims of private claimants, the Decision speaks not of what the Tribunal is, but of what it is not. It only says that although the Tribunal is not an organ of a third State, it is also not an inter-State judicial organ. The fact is, however, that the evidence establishing the inter-State nature of the Tribunal and of its work, even where this relates to non-governmental claims, is simply too compelling to question. This evidence, to which the dissenting members also refer,[125] includes: the mechanism adopted by the two governments for the settlement of their disputes;[126] the title of the instrument that created the Tribunal;[127] the name given to the Tribunal, identifying the governments of Iran and the United States as exclusive parties thereto;[128] the formal statements made by the officials of the United States govern-

124 5 IRAN-U.S. C.T.R., at 294.

125 *Ibid.* at 291 *et seq*.

126 Namely, the peaceful resolution of an international crisis in their relations.

127 Namely, 'the Declaration … concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran'.

128 Namely, 'The Iran-United State Claims Tribunal'.

ment after the conclusion of the Declarations;[129] and a ruling by the United States Supreme Court.[130]

All this is further supported, if further support is needed, by Case A/18 itself, and the Decision to which it led. The admissibility or otherwise of some one hundred and thirty Cases was there determined in a proceeding to which only the two governments were parties, and in which the supposedly true claimants were absent. It is hard to imagine a more concrete example of the espousal of originally private claims by the government concerned, and before a Tribunal belonging to the public order.

4.4.2 The Decision's Treatment of the Case Law

It will be recalled that while the Award in *Esphahanian* speaks of a process of replacing the rule of non-responsibility with the rule of dominant nationality 'since the beginning of the century',[131] the Decision in A/18 declines to go back that far. It states, instead, that 'whatever the status of the law prior to 1945 … the better rule at the time of the Algerian Declarations' was that of dominant nationality.[132]

This reference in the Decision to the middle of the twentieth century as a material date is supported by other proponents of the rule of dominant nationality. Rode, for instance, states that although throughout the nineteenth century and the first part of the twentieth century the two rules of non-responsibility and dominant nationality were interchangeably applied by international claims commissions, the former gradually gained more favour towards the end of that period. In line with the Decision, however, he states that this trend was reversed in the second half of the twentieth century, as the result of two important decisions: those in *Nottebohm* and *Mergé*.[133]

It has been suggested that the gradual emphasis by international tribunals on the rule of non-responsibility in the first half of the twentieth century was due partly to Edwin M. Borchard, who unequivocally defended the rule in his treatise, *The Diplomatic Protection of Citizens Abroad*, published in 1915, and who played

129 Which statements are extensively quoted in the dissenting opinion, 5 IRAN-U.S. C.T.R., at 295-6.

130 In *Dames & Moore* v. *Donald T. Regan*, 453 U.S. 654, at 670-680.

131 2 IRAN-U.S. C.T.R. 157, at 162.

132 5 IRAN-U.S. C.T.R. 251, at 262-3

133 Z.R. Rode, footnote 13 above, at 141-3. See to the same effect, Peter E. Mahoney, footnote 1 above, at 704-8.

an influential role at the Hague Conference that adopted the Hague Convention of 1930.[134] A typical Case endorsing the rule of non-responsibility in that period is *Salem*, decided in 1932. There, the United States had asserted a claim against Egypt for the alleged mistreatment of a United States naturalized citizen, George Salem. The arbitral tribunal held, however, that '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'.[135]

The Decision's refusal to address the earlier case law has been criticized, on the ground that '[b]y passing over a consideration of arbitral precedent before 1945, the Full Tribunal may have failed to refute arguments for non-responsibility based on older arbitral decisions.'[136] This, however, does not seem to be a valid criticism, for it assumes that in the Tribunal's view, the pre-1945 law also rejected the rule of non-responsibility. And yet there is no evidence in the Decision that such was the Tribunal's view. To the contrary, by speaking of the 'decisive effects' of the two judgments in *Nottebohm* and *Mergé*, the Tribunal seems to have accepted the earlier existence of the rule of non-responsibility, if not its gradual prevalence over the rule of dominant nationality. At any rate, a comprehensive review of the very early decisions may be here dispensed with, not only because they are old, but more importantly because they are inexact and capable of being differently interpreted. A few examples will suffice.

The Case of *Drummond*,[137] decided in 1834 and regarded as the earliest known decision on the subject of a dual national's claim, is commonly referred to as explicitly supporting the rule of dominant nationality.[138] The claim by the heirs of James Louis Drummond for the confiscation of his property in France was there rejected first by a domestic claims commission and, on appeal, by the

134 Z.R. Rode, *ibid*, at 141. The Decision in A/18 is of the same opinion, though it questions the precedents on which Borchard relied in his treatise. 5 IRAN-U.S. C.T.R. 251, at 262.

135 II R.I.A.A., 1165, at 1187.

136 Peter E. Mahoney, footnote 1 above, at 723.

137 Knapp, II Privy Council Reports, 295; 12 Eng. Rep. (1901), 492.

138 See, e.g.: Peter E. Mahoney, footnote 1 above, at 700-1; Z.R. Rode, footnote 13 above, at 140.

British Privy Council.[139] This is the often-cited passage from the 'advice' of the Privy Council:

> [T]hough formally and literally, by the law of Great Britain, he (James Louis Drummond) was a British subject, the question is, whether he was a British subject within the meaning of the treaty. He 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, within the meaning of the treaty ... neither the law of nations, nor any treaty, bound the French Government to act otherwise than as it thought fit towards its own subjects.[140]

It will be noted that the latter part of the above-quoted passage is an endorsement of the rule of non-responsibility; hence Borchard's reference in his treatise to the decision as one of the seven precedents supporting the rule of non-responsibility.[141] The 'advice', however, also contains the following:

> [A]lthough James Lewis Drummond was technically a British subject … yet he was also … in form and in substance, a French subject, domiciled [at the time of the seizure] in France, with all the marks and attributes of French character ...[142]

The reference in this passage to 'domicile' has led some to suggest that:

> The essence of the doctrine is that where there is a conflict between two governments regarding the nationality of a claimant, who is a dual national, the nationality of claimant's habitual residence should prevail over his other nationality.[143]

139 Under certain treaties concluded in 1814 and 1815, the French and the British governments appointed commissioners to examine and settle claims of British subjects against the French government for the seizure of their property in France. The commissioners failed to agree and, based on a separate agreement concluded in 1818, France paid a lump sum settlement amount to be awarded to qualified claimants by the British commissioners. Pursuant to a statute passed by British Parliament, appeals from the commissioners' awards were heard by the Privy Council.

140 Knapp, II Privy Council Reports, 295, at 311-2; 12 Eng. Rep. (1901), 492, at 499.

141 E.M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS, New York: The Banks Law, 1915, at 588.

142 Knapp, II Privy Council Reports, 295, at 313; 12 Eng. Rep. (1901), 492, at 500.

143 Z.R. Rode, footnote 13 above, at 140. Drummond was the great grandson of a British subject, the Earl of Melfort, who had fled to France as a political refugee in the late seventeenth century. Thus, the Privy Council's observation that '[h]e and his family had resided in France for more than a century'.

The same passage, however, refers to Drummond's 'technical' British nationality, standing against his French nationality of 'substance', lending support to the proposition that as between a technical and a substantive nationality, the latter must prevail. This, indeed, is how the decision was read by the American commissioner in the *Laurent* Case.[144] The point in *Drummond*, he says, was that

> where a treaty speaks of the subjects of any nation it means those who are actually and effectually under its rule and government, and not those who for certain purposes under the mere municipal obligations of a country may be held to maintain that character.[145]

In short, then, there is here a brief decision capable of lending support to three different rules: (i) the rule of non-responsibility; (ii) the rule of dominant nationality based on 'domicile'; and (iii) the rule of prevalence of substantive nationality over technical nationality.

In fact, it was subsequently discovered that, contrary to the assumption throughout the proceedings before the Privy Council, Drummond was not born in France, but in Avignon,[146] and was therefore not a French subject at all. A rehearing was then requested, but denied by the Council, on the ground that what was important was the fact that he and his father had by their conduct sufficiently indicated their intention to accept the character of French subjects. Hence, the fact of his birth at Avignon did not merit any change in the earlier outcome.[147] In other words, the mere fact that he had evinced his intention to regard himself as a French subject led to the non-responsibility of the French government.[148]

The Case of *Martin* decided in 1871,[149] on the other hand, is apparently the earliest of the decisions commonly cited in support of the rule of non-responsibility. This was a claim brought before the American-Mexican Claims Commission established under a convention of 4 July 1868, which provided for the resolution of, *inter alia*, the claims of citizens of the United States against the government

144 J.B. MOORE, footnote 79 above, 2671.

145 *Ibid*, at 2680.

146 A city under the dominion of the Pope.

147 Knapp, II Privy Council Reports, 295, at 327; 12 Eng. Rep. (1901), 492, at 507.

148 And this was how the decision was interpreted by the British commissioner in *Laurent* Case: 'Drummond's case … was *not* determined on the mere fact of the claimant being domiciled in France, *but that* from special circumstances … he had voluntarily taken upon himself the character of a French subject, and having done so, the new French Government had a right to treat him as such …'. J. B. MOORE, footnote 79 above, at 2685-2686.

149 *Ibid*, 2467.

of the Mexican Republic. There, the claim of Mr. Martin, a United States citizen, against the Mexican Republic for alleged unpaid salary was dismissed on the ground that he, having served in the Mexican navy, had become a naturalized Mexican in accordance with the Mexican law. It was the 'international duty' of 'all enlightened governments', said the Commission, to recognize the naturalization of their subjects in other countries; a duty which, even though not universally adopted by all legislations, had become 'a part of the law of nations, and now constitutes a rule to decide questions pending between sovereign nations'. This was then applied to the Case at hand:

> John T. Martin, a native of North Carolina, acquired the Mexican citizenship according to the laws of that country; by the same fact he was deprived of the American citizenship; and, this being his condition at the time of acquiring the right alleged by him, it is evident that he had no legitimate personality to prefer a claim against the Republic of Mexico.[150]

Now whatever might be thought of the above rationale, it seems clear that, as the Commission saw it, Mr. Martin was not a dual national, but a United States national who had acquired Mexican citizenship and, by that very act, had lost his American nationality. On that basis, the Case may be regarded as not involving the issue of dual nationality at all, and hence not supportive of the rule of non-responsibility proper.

It must be emphasized that the intention here is not to deny the research value of a mass of early case law on the subject for other purposes. It is, rather, to reiterate that because of the commonly admitted prevalence of the rule of non-responsibility in the case law prior to the Second World War,[151] and because of the Decision's exclusive reliance on a perceived change thereafter, a case by case study of these rather ambivalent early precedents is unlikely to prove helpful.

Proceeding therefore to the two judgments on which the Decision in A/18 relies, it must be stated first that *Nottebohm* was not, as the Decision itself rightly notes, a case of dual nationality. Friedrich Nottebohm was born in Hamburg in 1881, with sole German nationality. In 1905, he went to Guatemala and resided there until 1939, establishing his business in association with his brothers. In early 1939, he left Guatemala and was in Liechtenstein (Vaduz) in October that year.

150 *Ibid.*

151 See, amongst others, the Report of the International Law Commission on Diplomatic Protection (2002), footnote 61 above, at p. 184: 'In the past, there was strong support for the rule of non-responsibility according to which one State of nationality might not bring a claim in respect of a dual national against another State of nationality.'

In that same October – and this was when his country of origin had been at war for one month – he applied for and was granted naturalization by Liechtenstein; a country with which his actual connections had been 'extremely tenuous'. In fact, Liechtenstein required for naturalization a three-year residency, from which requirement he received dispensation. He returned to Guatemala shortly after his naturalization and stayed there until 1943, when he was deported to the United States as a result of war measures taken against him. In 1946, he tried to return to Guatemala and, having been refused permission, went to Liechtenstein. His assets in Guatemala were finally seized in 1949. The Case by Liechtenstein against Guatemala was instituted before the International Court of Justice in 1951, and was decided in 1955.[152]

One of the objections raised by Guatemala against the admissibility of the claim related to Nottebohm's Liechtenstein nationality; and the issue as formulated by the Court was whether the unilateral act of granting nationality by Liechtenstein was one which could be relied upon against Guatemala in regard to the exercise of protection.[153] In its judgement, the Court first held: *that* it was exclusively within the domestic jurisdiction and competence of Liechtenstein to determine by legislation the conditions under which its nationality could be acquired or granted; and *that* this unilateral act did not have an automatic application on the international plane, where international law is called upon to resolve possible cases of 'contradictory assertions' of equal weight by sovereign States. To the contrary, for that unilateral act to have international effect – to be recognized internationally and to permit protection – certain requirements of international law had to be met.[154]

Thus far, nothing new of course; it being a further affirmation of two long-established rules of international law, as previously noted.[155] What is regarded by some as new, however, is the Court's further ruling that because nationality 'is a legal bond having as its basis a social fact of attachment', it only entitles a State 'to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national'.[156]

Appling these rules to the Case at hand, the Court observed that the Liechtenstein nationality acquired by Mr. Nottebohm did not have as its basis a social fact of attachment. It was obtained, to the contrary, with the sole aim of allowing him

152 *Nottebohm* (*Liechtenstein* v. *Guatemala*), second phase, ICJ Reports (1955), 4.
153 *Ibid*, at 20.
154 *Ibid*, at 21.
155 See pages 70-72 above.
156 ICJ Reports (1955), 4, at 23.

'to substitute for his status as a national of a belligerent State that of a national of a neutral State'.[157] His links with Guatemala, on the other hand, had been substantive. He had settled there for 34 years, and had made that country the centre of his interests and business activities. Based on these findings of facts, the Court concluded that Liechtenstein was not entitled to represent Nottebohm against Guatemala, and accordingly dismissed the claim as inadmissible.

Before addressing other aspects of the judgement, two short reminders might be in order. *First*, the Court clearly indicated that what it was rejecting was the right of Liechtenstein to exercise protection against Guatemala and not against other States in general.[158] *Second*, Nottebohm had, because of his naturalization by Liechtenstein, lost his German nationality. Hence, not only was he not a dual national but, in so far as his claim against Guatemala was concerned, he was left with no State of nationality to protect his interests at the international level.

This, then, was all that was decided (*ratio decidendi*) in *Nottebohm*: a respondent State is under no obligation to recognize, and a claimant State is not entitled to exercise diplomatic protection on the basis of, a nationality granted in the absence of genuine links between the individual and the granting State.[159] However, the Court, evidently in order to buttress its decision, further spoke of the relevance and wider application of the requirement of links in other situations in which nationality was in issue at the international level.

Because nationality is within the domestic jurisdiction of the State, says the Court, cases of conflict may arise at the international level, which cases will then have to be settled by 'international arbitrators' or 'the courts of a third State'. Though not very clearly, the Court seems to identify three such situations, in all of which, according to the Court, the rule of 'real and effective' nationality has been applied.

First, where an individual with a single nationality is before an international arbitrator (or tribunal), and while his State of nationality seeks to exercise pro-

157 *Ibid*, at 26.

158 *Ibid*, at 22 and 26. The implication is, that had the wrongs in question been committed by a State with which Nottebohm had no factual connections, Liechtenstein might have been able to exercise protection. But then this is difficult to conceptually reconcile with the Court's characterization of Nottebohm's Liechtenstein nationality as being based on no 'bond of attachment'. If, in other words, the problem lied with the naturalization itself, then it would be difficult to see how it could be relied upon against any other State.

159 'The *Nottebohm* principle is essentially the assertion that in referring to institutions of municipal law, international law has a reserve power to guard against giving effect to ephemeral, abusive, and simulated creations.' BROWNLIE, footnote 14 above, at 467.

tection, the defendant State contests the effect of the invoked nationality *vis-à-vis* itself:

> In most cases arbitrators have not strictly speaking had to decide conflict of nationality as between States, but rather to determine whether the nationality invoked … had been conferred by the applicant State in circumstances such as to give rise to an obligation on the part of the respondent State to recognize the effect of that nationality.[160]

This, as the Court notes, is the same situation as that in *Nottebohm*, and its essential elements are: a single nationality; before an international arbitrator (or tribunal); and involving the exercise of protection.
Second, where an individual with two nationalities is before a court of a third State and the issue for determination is again whether the nationality on which reliance is made deserves recognition:

> The courts of third States … have dealt with [such a situation] not in connection with the exercise of protection, which did not arise before them … [T]hey have had, not indeed to decide such a dispute as between the two States concerned, but to determine whether a given foreign nationality which had been invoked before them was one which they ought to recognize.[161]

Here, then, the main features are: an individual with two nationalities before a court of a third State, not involving, however, a dispute between the two States of nationality, and hence not involving the issue of diplomatic protection.
Third, where an individual with dual nationality is before an international arbitrator (or tribunal), involving the exercise of protection:

> 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, 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 …[162]

As noted before, it is this passage in *Nottebohm* on which the majority members in A/18 essentially rely. The minority members, on the other hand, reject this

160 *Ibid*, at 21-2.
161 *Ibid*, at 22.
162 *Ibid*.

reliance. They suggest that the practice to which the Court refers in this passage concerns a situation other than that addressed in Article 4 of the Hague Convention, namely, where the two nationalities in conflict are those of the claimant and the respondent States.

Outside Article 4 situation, they state, arbitrators have indeed shown preference for the rule of dominant nationality, when, for instance, the conflict has been between the nationality of the State which has concluded the treaty and the nationality of a third State. As for the rule of non-responsibility endorsed by Article 4, they suggest, the Court in *Nottebohm* not only did not seek to supersede that rule but, by requiring the proof of genuine links even in cases of single nationality, in fact gave it a supplementary ground.[163]

These diametrically opposing views of what was decided in *Nottebohm* are not confined to the Tribunal's members in A/18. There are those who, convinced that the Court in that Case gave the concept of genuine links the 'undoubted authority of a rule of international law',[164] go as far as to wonder whether that concept has now replaced the concept of nationality for the purpose of diplomatic protection.[165]

In contrast, the Italian-United States Conciliation Commission in *Flegenheimer*, decided only three years after *Nottebohm*, denies that the Court in *Nottebohm* intended to make the existence of genuine links a condition for the exercise of protection under international law. The Court, says the Commission, distinctly limited the scope of its decision to the facts and circumstances of the Case. It did so by declaring that what was involved was not recognition by all States, but by Guatemala only; and not recognition for all purposes, but for the purpose of the admissibility of the Application before the Court.[166] A restrictive interpretation of *Nottebohm* was similarly advocated by the 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (12th Draft).[167] Article 23 (3) of the Draft Convention incorporates a very modified version of the *ratio* in *Nottebohm*:

163 5 IRAN-U.S. C.T.R., at 322-4.

164 R. DONNER, THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW, Helsinki: Societas Scientiarum Fennica, 1983, at 87.

165 *Ibid*, at 72.

166 14 R.I.A.A. (1958), 327, at 376. The Commission then goes on to speak against the application of the concept of link in cases of single nationality, and to make it clear that 'it is by virtue of the rules of state positive law, and not on the grounds of social, family, sentimental or business effectiveness that it is led to objectively determine' the nationality of Flegenheimer. *Ibid,* at 377-8.

167 Published with parts of the *Rapporteurs*' explanatory notes in 55 Am. J. Int'l L. (1961), at 545-84.

> A State is not entitled to present a claim on behalf of a natural person who is its national if that person lacks a genuine connection of sentiment, residence, or other interests with that State.[168]

And the drafters of the Convention, Professors Sohn and Baxter, state in their explanatory notes why they thought it 'wise to confine the principle of that Case as closely as possible to its facts.'[169] To them, '[t]he reach of the holding in [*Nottebohm*] is by no means clear'. It is not clear, for instance, whether it would be applicable in cases of dual nationality, or of natural-born citizens. Of far more import, they say, is the conceivable extension of the ruling to the situation of a dual national of both the claimant and the respondent States:[170]

> Such a result would create responsibility where hitherto none had been thought to exist. What was on the facts of the *Nottebohm Case* a restraint upon the international presentation of claims would under other circumstances thus liberalize the power of a State to present a claim on behalf of one who had both its nationality and that of the respondent State.[171]

A sceptical approach was also adopted by the International Law Commission in its Draft Articles on Diplomatic Protection (2002), where reference is made, in Article 3 (2), to nationality 'acquired by birth, descent, succession of States, naturalization or in any other manner, not inconsistent with international law'.[172] The commentary to the Article notes the absence in the provision of any genuine link requirement suggested in the *Nottebohm* Case, and says specifically that 'there were certain factors that served to limit *Nottebohm* to the facts of the case in question'. Those facts suggest, says the Commission, that the Court in *Nottebohm* 'did not intend to expound a general rule'.[173]

The controversy over *Nottebohm* is not confined to the scope of its application, but extends to the desirability of its ruling in terms of policy. While there are those who have welcomed the judgment as a right step towards the eventual dropping of the requirement of formal nationality for the purposes of diplomatic protection,

168 See, to the same effect, Article 4 (c) of the Resolution of the Institute of International Law at its Warsaw session (1965), quoted on page 48, footnote 54, above.

169 Sohn and Baxter, Harvard Law School (1961), 199, at 203, quoted in M. M. WHITEMAN, DIGEST OF INTERNATIONAL LAW, Vol. 8, Washington D.C: Department of State Publications, 1967, at 1260-1.

170 That is, of course, precisely what was done by the Tribunal in its A/18 Decision.

171 Sohn and Baxter, footnote 169 above.

172 Report of the International Law Commission, footnote 61 above.

173 *Ibid*, at 175-6.

and hence towards greater accessibility to international justice, others have criticized it on the grounds: *that* it in effect put Nottebohm into the situation of a stateless person;[174] *that* the tests it proposed for the proof of genuine connections are subjective and hence difficult to apply;[175] and *that* by insisting on the requirement of link, it simply made international justice less accessible to individuals.[176]

What is to be made of these seemingly irreconcilable views, one speaking of the judgment's 'decisive' effect on the international law of nationality as a whole, including the law relating to the claim of a dual national against his own State of nationality, and the other suggesting that the judgment had nothing to do with the latter type of claim and, even within the limit of cases of single nationality, it had to be confined to the facts of the Case?

Perhaps the truth lies, as it often does, somewhere in between. There can be no denial that the Court in that Case strongly supported the concept of genuine link as a condition for the recognition of nationality on the international plane. It did so with regard to a claimant with a single nationality, whose claim was then rejected because of the absence of any such link between him and his protecting State. Beyond that, the Court spoke, *obiter dictum*, of the wider application of the concept of link to the claim of a dual national before a court of a third State, and before an international arbitrator. As for the former, this was simply an affirmation of a widely admitted rule; and so was the case with the latter, if it was meant to refer to two nationalities other than the nationality of the respondent State. This much is rather clear.

The question remains, then, whether the Court meant to extend the reach of the concept to instances of dual nationality involving the nationality of the respondent State. Here, it is suggested, caution must be exercised; and this for a number of reasons.

First, the focus of the Court's attention throughout the judgment is on the requirement of genuine links, the absence of which renders the nationality ineffective for the purposes of diplomatic protection at the international level. It is really difficult to see the relevance of this to the quite different concept of dominant nationality in its proper sense, under which two nationalities, often based on more or less equally strong links, are required to compete. More concretely, it is difficult to see the relevance of the Court's insistence on genuine links to an *Esphahanian*

174 J. Kunz, footnote 68 above, at 562.

175 *Ibid*, at 554.

176 Mervyn Jones, footnote 77 above. See also the Report of the International Law Commission, footnote 61 above, at 176, where the Commission says that it is particularly mindful of the fact that if the genuine link requirement is 'strictly applied, it would exclude millions of persons from the benefit of diplomatic protection …' *Ibid*, at 176.

type of Case – a rather typical of the Cases before the Tribunal – in which the claimant's strong genuine connections with both the claimant and the respondent States were readily affirmed by the Chamber.[177]

Second, it will be recalled that the Court in an Advisory Opinion given in 1949[178] refers to the 'ordinary practice whereby a State, does not exercise protection on behalf of one of its nationals against a State which regards him as its own national'.[179] If the reference in *Nottebohm* to the preference of international arbitrators for the concept of stronger ties was to the same type of situation, one would have justifiably expected the Court to offer a word or two of explanation. And this, especially in view of the fact that in neither of these two passages the Court proposes to offer its judgmental view of the law. To the contrary, in both, the Court simply refers to the practice by others. In the absence of any relevant developments in between 1949 and 1955, one cannot readily assume that the Court in these two passages, one speaking of the practice of not exercising protection and the other of adopting the concept of dominant nationality, had the same type of situation in mind.

Third, as previously noted, it is generally admitted, even by those who support the application at present of the rule of dominant nationality, that during the first half of the twentieth century this rule had been increasingly substituted, in situations involving the nationality of the respondent State, with the rule of non-responsibility. What they argue is that this course was reversed by the decisions in *Nottebohm* and shortly thereafter in *Mergé*. If so, the reference in *Nottebohm* to *the practice of international arbitrators* cannot be to such a practice in the instances involving the nationality of the respondent State.

Finally, the facts that the Court interchangeably uses the two different concepts of 'genuine link' and 'stronger link';[180] that it does not name any of the 'numerous cases' to which it alludes; that it makes no reference to the rule of non-responsibility, and that it cites with approval some of the provisions of the Hague Convention of 1930, make it all the more difficult to conclude with any degree of certainty that the Court, when speaking of the rule of stronger links, is also mindful of the cases involving the nationality of the respondent State.

None of these is to deny the relevance of the judgment in *Nottebohm*. There, the highest international judicial authority unequivocally and strongly endorsed the concept of link as a precondition for the recognition of nationality at the

177 See page 29 above.

178 Case *concerning Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports (1949), 174.

179 *Ibid*, at 186.

180 See pages 66-67 above.

international level, and that of course must have its consequences on the law of nationality as a whole, including the law of nationality relevant to the claims of dual nationals. What is questioned, with respect, is the reliance by the majority members in A/18 on *Nottebohm*'s 'decisive' and 'radiating' effects[181] in situations in which a dual national brings a claim against one of his States of nationality.

There is, at any rate, no factual evidence of the suggested 'decisive' and 'radiating' effects of the judgment. As to the case law, of the two notable decisions rendered thereafter, *Mergé* supports the application of the rule of dominant nationality in the case of a dual national claiming against one of his States of nationality, though on the basis of its own reasoning, as will be seen shortly. *Flegenheimer*, on the other hand, declines to follow the rule of link, even in a case involving a single nationality.[182] No sign, therefore, of any move towards unification of positions here.

The same is true of the attitude of non-judicial bodies. The Institute of International Law, for instance, unequivocally supports the rule of non-responsibility at its Warsaw session in 1965,[183] and the 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (1961) proposes a very restricted interpretation of *Nottebohm*.[184] On the other hand, the International Law Commission in its 2002 Draft Articles on Diplomatic Protection (Article 6) endorses the rule of dominant nationality in the instances involving the nationality of the respondent State.[185] No sign, therefore, of any 'radiating' effect here, either.

The next, and the only other, precedent on which the majority members in A/18 rely in support of their suggested solidification of the rule of dominant nationality after the Second World War is, as noted before, the *Mergé* Case.[186] The judgment in this Case was the leading one in a series of Cases[187] decided on the subject by the Italian-United States Conciliation Commission created under a 1947 Treaty of Peace between the United Nations and Italy.

The dissenting members in A/18 reject the precedential value of the Commission's decisions, on the ground that these were made pursuant to a Peace Treaty

181 5 IRAN-U.S. C.T.R. 251, at 263.

182 See page 96 above.

183 See pages 46-47 above. To the same effect is the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, referred to at page 249 below.

184 See pages 96-97 above.

185 See page 86 above.

186 14 R.I.A.A. (1955), 236.

187 More precisely, 51 Cases.

between a victorious power and a defeated State and, as such, under the influence of the jurisprudence of the Mixed Arbitral Tribunals established after World War I to offer reparation for damages incurred by victims of war launched by the defendant States. In particular, they cite the submission of the United States Agent before the Commission, who argued that the rule of non-responsibility was based on the principle of equal sovereignty of States, whereas the Treaty of Peace in question had not been negotiated between two equal powers.[188]

This point in the dissenting opinion is not quite accurate, for the submission of the Agent was specifically addressed and rejected by the Commission on the ground that to admit the argument was to deny that a peace treaty was a treaty.[189] But the Agent's representation does show, interestingly, that in the view of the United States, the judgment in *Nottebohm,* issued a few months earlier, had not affected the application of the rule of non-responsibility in cases involving the nationality of the respondent State and brought under a treaty negotiated between two equal sovereigns.

Mrs. Florence Strunsky-Mergé was a dual national of the United States and Italy. She was born in 1909 in New York City, and hence a United State national *jus soli* under the United States law. In 1933 she married an Italian national, Mr. Mergé, and thus acquired Italian nationality by virtue of Italian law. For four years after their marriage, the couple lived in Italy, where the husband worked as a government employee. In 1937, Mr. Mergé was sent to the Italian Embassy in Tokyo to work as a translator. Mrs. Mergé accompanied her husband, both travelling on service passports issued by the Italian government, and they stayed there until 1946. She then went to the United States on her United States passport, and remained there for nine months. In 1947, she returned to Italy on the same passport, having been granted a visa as a visitor, and thereafter resided there with her husband.

In 1948, the United States Embassy in Rome presented her claim for compensation for the loss of certain items of personal property in Italy as a result of the war measures; which claim was rejected by the Italian government on the ground that she was, under Italian law, a national of Italy. In 1950, her claim was submitted to the Commission for resolution.

The United States argued before the Commission that under the terms of the Peace Treaty all United Nations nationals, as defined by the Treaty, were entitled to claim; it being irrelevant if they possessed Italian nationality as well. It also argued, as was just noted, that the 'principle' of non-responsibility belonged to

188 See page 49 above.
189 14 R.I.A.A. (1955), 236, at 241.

treaties negotiated between equal sovereigns, and not to the Peace Treaty at hand, under which Italy had not at the time of its conclusion been considered a sovereign State by the victors. Italy, on the other hand, argued that the Treaty was from the juridical point of view an international convention and not a unilateral act, and was thus subject to the normal rules governing the interpretation of treaties. It further relied on the 'universally recognized and constantly applied'[190] principle of non-responsibility.

The Commission thought it advisable, in view of the importance of the issue and the frequency of its occurrence, to 'take up the examination of the complex problem of dual nationality in all its aspects'.[191] Upon a detailed review of the Treaty, the Commission first concluded that neither 'the letter' nor 'the spirit' of the Treaty indicated that the issue of dual nationality had entered the drafters' minds. The Commission also addressed and rejected, as noted before, the United States' argument that the Treaty lacked the principle of legal equality and, because of that, could not have applied to it any principle of international law based on the equality of States. The inequality of a treaty of peace, said the Commission, manifests itself in the very contents of the treaty, and not in the capacity of the defeated State which concludes the treaty. In the absence of any such manifestation in the terms of a treaty, there is no reason why rules of international law applicable to ordinary treaties should not be applied, where necessary.

Having found no reference to the issue of dual nationality in the Treaty itself, the Commission turned to the principles of international law. Here, it first referred to Articles 4 and 5 of the Hague Convention. Article 4, said the Commission, endorses the principle of non-responsibility 'within the system of public international law', while Article 5 supports the principle of dominant nationality 'within the system of private international law'.[192] As to precedents:

> Uniformity … in this field does not exist, but it can be stated that the *ratio* of nearly all the arbitral and judicial decisions on the international level is either one or the other of the two afore-mentioned principles.[193]

One of the examples cited by the Commission for this lack of uniformity – the authorities choosing of 'one or the other of the two … principles' of non-responsibility and dominant nationality – was the 1949 Advisory Opinion of the International Court of Justice in support of the principle of non-responsibility, as

190 *Ibid*, at 239.
191 *Ibid*, at 238.
192 *Ibid*, at 242.
193 *Ibid*, at 243.

compared with the 1955 judgment of the same Court in *Nottebohm*, endorsing the principle of dominant nationality.[194]

The same was the case, said the Commission, with the legal literature on the subject. There was, on the one hand, the 'excellent report' by Professor Borchard in support of the principle of non-responsibility, submitted to and unanimously approved by the 1931 Cambridge session of the Institute of International Law, at which 'jurists representing the most varying legal systems in the world participated'.[195] There were, on the other hand, jurists 'of such universal authority as A. de la Pradelle and Basdevant, who not only recognize[d] but adopt[ed] the rule of dominant nationality'.[196]

Thus far, the decision reflects a rather balanced description of the law as it then stood: 'the existence and the practice of two principles in the problem of diplomatic protection in dual nationality cases'.[197] The Commission, however, then goes on to pose a 'prior question', namely, whether those two principles, the principles of non-responsibility and dominant nationality, are 'incompatible with each other, so that the acceptance of one of them necessarily implies the exclusion of the other'.

It will be readily appreciated that what the Commission here has in mind is not the application of the two principles in two different fields of law – in which case there can be no question of incompatibility – but their application in the single field of claims by dual nationals against their States of nationality. The answer to the question, says the Commission, is in the negative: 'The Commission is of the opinion that no irreconcilable opposition between the two principles exists; in fact, to the contrary, it believes that they complement each other reciprocally'.[198]

The passage just quoted may give the impression that, in speaking of the complementary nature of the two principles, the Commission is only offering its own view on the issue. But this is not the case. What the Commission there suggests is that this must have also been the view of those who have in the past spoken of one or the other of the two principles:

> The principle according to which a State cannot protect one of its nationals against another State which also considers him its national and the principle of effective, in the sense of dominant, nationality, have both been accepted by the Hague Conven-

194 *Ibid*, at 244.
195 Annuaire de l'Institut de droit international (1931), Vol. I, 481.
196 14 R.I.A.A. (1955), 236, at 245.
197 *Ibid*, at 246.
198 *Ibid*.

> tion (Articles 4 and 5) and by the International Court of Justice (Advisory Opinion of April 11, 1949 and the Nottebohm Decision of April 6, 1955). If these two principles were irreconcilable, the acceptance of both by the Hague Convention and by the International Court of Justice would be incomprehensible.[199]

Having asserted that the two principles are, and have always been considered to be, reconcilable, the Commission sets to describe their interaction in the case of a dual national asserting a claim against one of his States of nationality:

> 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 because the first of these two principles is generally recognized and may constitute a criterion of general application for the elimination of any possible uncertainty.[200]

The Commission next offers certain guidelines according to which the dominance of a claimant's United States nationality over his Italian nationality may be proved. However, 'United States nationals who did not possess Italian nationality but the nationality of a third State can be considered 'United Nations nationals' under the Treaty, even if their prevalent nationality was the nationality of the third State'.[201]

Finally, the Commission applies those guidelines to the Case at hand and finds that Mrs. Mergé, whose family had not had its habitual residence in the United States since her marriage, who had travelled to Japan on an Italian passport, and who had lived in there for nine years with her husband as an official of the Italian Embassy, could not be considered as having dominant United States nationality within the meaning of the Treaty.

Now, it is submitted that the decision in *Mergé* – based as it is on the concept of the compatibility of the two rules of non-responsibility and dominant nationality in the field of a dual national's claim against his own State of nationality – suffers from some serious failings. *First*, it offers an interpretation of the law not previously endorsed by any source in the long history of the subject; and the Commission, naturally enough, cites no authority in support.[202] *Second*, it is contradicted by the Commission's own earlier remark, as noted before,[203] that 'the *ratio* of nearly

199 *Ibid.*

200 *Ibid*, at 247.

201 *Ibid.*

202 But now see BROWNILE, who suggests that '[a]s a matter of principle the two rules usually cited in opposition are not incompatible'. Footnote 14 above, at 390.

203 See page 102 above.

all the arbitral and judicial decisions on the international level' supports 'one *or* the other of the two afore-mentioned principles'(emphasis added). *Third*, it assumes that Articles 4 and 5 of the Hague Convention have the same field of application, an assumption not in harmony with the Commission's earlier observation that Article 4 operates 'within the system of public international law', while Article 5 has its application 'within the system of private international law'.[204]

Fourth, it says, on the one hand, that '[t]he Hague Convention … expresses a *comunis opinio juris*, by reason of the near-unanimity with which the principles referring to dual nationality were accepted'. This presumably also applies to Article 5 of the Convention which endorses the rule of dominant nationality in cases not involving the nationality of the respondent State. But then the decision rules, on the other hand, that claims of dual nationals of the United States and a third State will be heard, 'even if their prevalent nationality was the nationality of the third State'.[205] To put it differently, here is a Convention which speaks of two rules: (i) the rule of non-responsibility applicable in cases involving the nationality of the respondent State (Article 4); and (ii) the rule of dominant nationality applicable in cases involving the nationality of a third State (Article 5). The Commission first endorses the Convention as expressing a *comunis opinio juris*. It then goes on to hold that both rules are compatibly applicable in the former cases, and neither is applicable in the latter cases.

Fifth, although on the face of it the two rules are both endorsed and are said to be applicable side by side in cases involving the nationality of the respondent State, the Commission does in reality propose the application of the rule of dominant nationality to the exclusion of the rule of non-responsibility.[206] This is because what is said there is that the rule of non-responsibility must yield before the rule of dominant nationality whenever it is established by the claimant that his dominant nationality is that of the claimant State; and that, of course, is precisely the result obtained where the rule of dominant nationality is exclusively applied.

204 The same may be said of the Commission's assumption that the 1949 Advisory Opinion of the International Court of Justice and the Court's reference to the practice of international arbitrators in dual nationality cases have the same single situation in mind; an assumption for which, as submitted before, there is no convincing evidence.

205 This stark departure from the rule of dominant nationality reflected in Article 5 of the Hague Convention may not be attributed to any peculiarities of the Treaty itself, for in that respect, as in respect of a dual national possessing the nationalities of both the claimant and the respondent States, the Commission was simply concerned with the definition of the term 'United Nations [there, United States] national' under the Treaty.

206 See N. BAR-YAACOV, DUAL NATIONALITY, London: Stevens and Sons, 1961, 238. See, further, Leigh, footnote 54 above, at 475.

The Commission, presumably aware of this, seeks to establish a distinction by twice drawing attention to the element of proof under its formulation: '[W]hen such predominance is not proved … the first of these two principles [the principle of non-responsibility] is generally recognized and may constitute a criterion of practical application for the elimination of any possible uncertainty.'[207] But then in the normal application of the rule of dominant nationality, too, it lies with the claimant to prove his dominant nationality of the claimant State, as is the case with any other jurisdictional or substantive element of the claim.[208]

It remains to be said that although, as noted before, the Decision in A/18 describes the *Mergé* Case as one of the 'two most important decisions on the subject in the years following the Second World War', it refuses to endorse the basic premise in that Case, namely, the compatibility of the two rules of non-responsibility and dominant nationality. In fact, by coming to the conclusion that the rule of dominant nationality is 'the better rule', the Decision in A/18 clearly rejects the notion of compatibility in *Mergé*.

4.4.3 Legal Literature

In support of the rule of dominant nationality, the Decision in A/18 last relies on legal literature, citing 'some of the most competent international lawyers'.[209] The minority members, on the other hand, refer to an equally impressive list of authorities who endorse the rule of non-responsibility.[210] The existence of these divergent views is perhaps not too surprising, given the importance and sensitivity of the subject. It shows, more relevantly, the futility of any attempt at resolving the issue on the basis of this source; the counting of heads, as it were. Two brief observations, however, may be worth making in this regard:

First, some of the authorities cited by the Decision appear to be thinking of the concept of 'link' in general, rather than the rule of 'dominance' in the specific instances in which the nationalities of both the claimant and the respondent States are involved. An example of this is Basdevant. He wrote, says the Decision,[211]

207 14 R.I.A.A. (1955), 236, at 247. See also *ibid,* at 248.

208 Thus, under Article 24 (1) of the Tribunal Rules: 'Each party shall have the burden of proving the facts relied on to support his claim or defence'. 2 IRAN-U.S. C.T.R. 427. In practice, too, the Tribunal has in every Case of dual nationality made it clear that the dominance of nationality must be established by the claimant.

209 5 IRAN-U.S. C.T.R. 251, at 264-5.

210 5 IRAN-U.S. C.T.R. 275, at 327-8.

211 *Ibid*, at 264.

'that effective nationality must prevail, because nationality is the juridical translation of a social fact'.[212] This seems a defence of the concept of genuine connection, rather than an endorsement of the rule of dominant nationality, under which two effective nationalities, each reflecting 'the juridical translation of a social fact', compete with one another.

Second, the Decision seems to have misapprehended the purport of some of the passages it cites in support of the rule of dominant nationality. Leigh, for instance, is relied upon for having 'asserted his belief that 'any attempt to reconcile the two [rules of non-responsibility and effectiveness] is likely to result in a victory for the effectiveness theory'.'[213] In fact, however, Leigh is not in the cited passage expressing any preference for the rule of effectiveness. He is there referring to the *Mergé* Case which, as noted earlier, proposes the side by side application of the two rules of non-responsibility and dominant nationality. He then notes the obvious,[214] namely, that if one tries to do that, it is the rule of dominant nationality that will in action prevail over the rule on non-responsibility.[215]

4.5 A Summary of the Comments Made in This Chapter

Although the concept of nation-State continues to govern international relations, significant developments since the Second World War, particularly in the field of human rights, have considerably strengthened the role of the individual on the international plane. More relevant to our subject, the individual is now increasingly vested – notably under the United Nations Charter, the Universal Declaration of Human rights, and other similar instruments – with certain basic rights; rights which he enjoys not by virtue of his nationality, but as a human being. These rights will of course require protection, and hence greater accessibility to international justice.[216] As stated in the Preamble to the American Convention on

212 Basdevant, Conflits de Nationalités dans les Arbitrages Vénézuéliens de 1903-1905, Revue de Droit international privé et de droit pénal international (1909), 41, at 60-1.

213 5 IRAN-U.S. C.T.R. 251, at 265.

214 As does Bar-Yaacov before him. See page 105 above.

215 '… it is perhaps not unlikely that attempts will frequently be made to reconcile the two principles, as was done in the *Mergé* case. Yet as that case shows, any attempt to reconcile the two is likely to result in a victory for the effectiveness theory'. I.F. Leigh, footnote 54 above, at 475.

216 There are instances in which the individual may now directly assert the violation of its human rights before international bodies, *e.g.*, the United Nations Human Rights Committee, the European Court of Human rights, and the African Commission on Human

Human Rights (1969), 'the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality ... [T]hey therefore justify international protection'.[217]

The Decision in A/18 is in line with this progressive trend. That the rule it endorses does provide the individual with a greater degree of accessibility to international justice is evidenced by the fact that, had the Tribunal opted for the opposite rule of non-responsibility, a good number of claimants whose claims were in the event heard by the Tribunal would not have been given that opportunity. On broad policy considerations, therefore, the Decision deserves commendation.

The question mainly addressed in the present Chapter, however, was whether the Algerian Declarations vested the Tribunal with the authority to lend its support to this admittedly progressive trend. That this is a legitimate enquiry is clear enough: the favourable reception of a concept in an international instrument is one thing, its application as a rule of law by a bilaterally-established judicial forum, is another. As the Award in *Esphahanian* rightly reminds us when it sets to review the pertinent precedents on the subject:

> In this field, there is a considerable number of judicial or arbitral decisions, and there is certain diversity, as arbitral tribunals had to respect, in each case, the limits imposed by the bilateral agreements which established those tribunals.[218]

The Iran-United States Claims Tribunal, being one such tribunal, was likewise expected to respect the terms of the bilateral agreement, the Algerian Declarations, on the basis of which it was established. To that end, the Tribunal was required to demonstrate, *first*, that the Algerian Declarations themselves did not, if read with the aid of recognized rules of interpretation, provide an answer to the issue of dual nationals' claims, and *second*, that what the Tribunal proposed to apply was not only an established rule of customary international law, but a rule applicable in the relations between the parties to the Algerian Declarations. These two are, it will be recalled, expressly required by Article 31 (3) of the Vienna Convention, on which the Decision relies.

But then, by its almost dismissive treatment of the text of the Declarations in favour of an assumed rule of customary international law, and by its total silence on the applicability of that rule in the relations between Iran and the United States, the Decision in A/18 leaves itself open to justified criticism on these grounds.

and People's Rights.

217 1144 U.N.T.S. 123.

218 2 IRAN-U.S. C.T.R. 157, at 162.

Once again, it is not suggested here that, had the Tribunal addressed these issues more vigilantly, it would necessarily have come to a different conclusion. It is suggested, rather, that this would have produced a more convincing Decision, whatever its outcome.

Next, the preliminary issue of terminology was examined. This was done at some length because, as suggested, the use of imprecise terms in the Decision and in almost all other sources of the law has resulted in ambiguities and misunderstandings. The correct term for the concept under consideration, it was suggested, is 'dominant' (or 'predominant') nationality, rather than the term 'effective' or 'real' nationality, or terms of similar import. It is this term alone that correctly reflects the nature of the exercise, namely, the evaluation of two internationally 'valid' and 'effective' nationalities for the purpose of identifying the nationality based on stronger ties.

In its search for the pertinent rule of international law, the Decision first takes up for examination the Hague Convention of 1930, Article 4 of which endorses the rule of non-responsibility. In order to show the inapplicability of that Article to the Cases before the Tribunal, the Decision characterizes the Convention as 'old' and supported only by a limited number of State parties. Such characterization of the Convention, it was suggested, is unjustified, if only because the very two Cases on which the Decision exclusively relies in its rejection of the rule of non-responsibility, *Nottebohm* and *Mergé*, both refer to the Convention with approval. What is disregarded by the Decision, besides, is the endorsement of the rule of non-responsibility by the Institute of International Law long after the Hague Convention.

More importantly, the Decision, having first correctly noted that Article 4 relates to diplomatically protected claims, proceeds to reason that the claims of dual nationals before the Tribunal are not of that nature. As a result, what is rejected in this part of the Decision is not the rule of non-responsibility in general, but its application in especial situations not involving diplomatic protection. This imposes a severe limitation on the application of the rule of dominant nationality and, for that reason, is inharmonious with the Decision's endorsement of the general application of the rule in its consideration of other sources of the law.

As to the case law, the Decision does not find it helpful to examine the status of the law prior to 1945. Indeed, in the entire text of the Decision only two Cases of *Nottebohm* and *Mergé*, both decided in 1955, are considered, and very briefly at that.[219] Still, the task of the Tribunal was to determine the rule applicable

219 Thus, no reference even to the 1949 Advisory Opinion of the International Court of Justice in the Case *Concerning Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports (1949), 174.

at the time of the Declarations in 1981 and hence, if it can be established, as suggested by the Decision, that these two precedents had finally resolved the controversy in favour of the rule of dominant nationality, there can be no objection in principle to the Decision's refusal to concern itself with the earlier case law. The question is, then, whether the two Cases invoked by the Decision did have the suggested effect.

Nottebohm stands for the proposition that a nationality not based on a genuine connection will not entitle the granting State to exercise protection *vis-à-vis* another State. This being the case, it is hard to share the view expressed in the Decision that *Nottebohm* was in line with the modern trend of providing the individual with greater access to international justice or legal protections. Friedrich Nottebohm was one such individual, and although he had only one nationality, the State of his nationality was held not to be entitled to exercise protection on his behalf.[220]

Indeed, certain observations in the *ratio* of the judgment seem to be quite incompatible with the doctrinal content of the modern trend. It is there said, for instance, that '[n]aturalization is not a matter to be taken lightly … It involves [the individual's] breaking of a bond of allegiance and his establishment of a new bond of allegiance'.[221] And yet it is the basic arguments of those who support the modern trend *that* an individual is fully capable of having more than one allegiance; *that* the individual should thus not be required to break the old bond if he wishes to establish a new one; and *that* his rights *vis-à-vis* his States of nationality should be equally protected at the international level. In fact, the claims of dual nationals mostly come about precisely because they continue to retain their connections – their financial connections, at any rate – with the countries of origin.

Still, we have in the *Nottebohm* judgment an unequivocal and articulated support for the concept of factual links in general, and there can be little doubt that in any abstract conflict between the two rules of dominant nationality and non-responsibility, it is the former rule, the one that relies on the criterion of stronger factual links, and not the latter rule, the one that denies the relevance of factual links, that would find support in the judgment.

We have, further, the reference *obiter* to the 'international arbitrators' giving their preference in 'numerous cases of dual nationality' to the nationality based on 'stronger factual ties'. But although the general bearing of this, too, may not be denied, its relevance to the specific case of a dual national asserting a claim against one of his States of nationality must not be exaggerated. And that, for

220 In fact, the International Court has twice placed restrictions on the right of diplomatic protection: in *Nottebohm*, in relation to natural persons, and in *Barcelona Traction* (Second Phase), ICJ Reports, (1970), 3, in relation to juridical persons.

221 ICJ Reports (1955), 4, at 24.

a number of reasons: there is in the judgment no indication that this is a reference to the specific case just mentioned, rather than to the case of a dual national possessing the nationalities of the claimant State and a third State; no discussion, however brief, of the rule of non-responsibility; and no evidence of any intention on the part of the Court to question its own *obiter* just six years earlier in support of the application of the rule of non-responsibility in cases involving the nationality of the respondent State.[222]

No such uncertainties with respect to the *Mergé* Case, the only other precedent on which the Decision in A/18 relies; for there the Commission deals with the specific case of a dual national seeking redress from one of his States of nationality, and unequivocally endorses the application of the rule of dominant nationality in that context. But then this was a rather peculiar precedent whose central theme – the side by side applicability of the two rules of non-responsibility and dominant nationality – not only had no support in the then existing jurisprudence, but was clearly disregarded by the A/18 Decision itself. A precedent which first describes the Hague Convention of 1930 as expressing a *comunis opinio juris*, but then proposes a solution which results, in practice at any rate, in the total exclusion of the rule of non-responsibility contained in Article 4 of that Convention.

In short, while the overall relevance of *Nottebohm* to the claims of dual nationals in general, and the impact of *Mergé* on the claims of dual nationals against one of their States of nationality, may not be denied, the presence of certain weighty considerations, noted above, makes it difficult to share the Full Tribunal's characterization of these as '[t]he two most important decisions on the subject in the years following the Second World War', with 'a decisive effect'. As far as the specific subject of claims by dual nationals involving the nationalities of both the claimant and the respondent States is concerned, there is no reason to believe that the old controversy was finally resolved by these two pronouncements in favour of the rule of dominant nationality.

Such was the evidence on which the Decision in A/18 relies in support of its endorsement of the rule of dominant nationality. Whatever view one may take of this evidence, there can be little doubt that the Decision's choice of this rule will have its influence on the future development of customary international law on the subject; and this, not only because of the unique stature of the Tribunal, but also because of the diligence with which the issue was addressed by the two States parties in their pleadings, and by the Tribunal in its Decision. But more on that in Chapter Eight below, where the issue of the possible impact of the Tribunal's jurisprudence will be addressed.

222 See page 47 above.

As noted, the A/18 Case did not involve any concrete claim. It was an interpretative Case in which the Full Tribunal defined the term 'national' as used in the Algerian Declarations and, on that basis, offered certain directives to be observed by the Chambers when they came to deal with individual claims. Under the Algerian Declarations, it was there held, the claim of a dual national of Iran and the United States may be heard if the claimant can establish that during the relevant period his dominant nationality was that of the claimant State and, further, that his claim met the test of the caveat. The application by the Chambers of these three salient features – *relevant period, dominant nationality,* and the *caveat* – will form the subject-matters of the three Chapters that will follow.

5

THE RELEVANT PERIOD

As noted earlier, the Decision in A/18 holds that the Tribunal has jurisdiction over the claim of a dual Iran-United States national if he can establish, *inter alia*, that his dominant nationality 'during the relevant period' was that of the claimant State.[1] The Decision then describes the relevant period: 'from the date the claim arose until 19 January 1981'.[2] This requirement of continuous nationality originates not from the Decision, but from the Declarations, where 'claims of nationals' are defined as

> claims owned continuously, from the date on which the claim arose to the date on which this Agreement enters into force [19 January 1981], by nationals of …[3]

It will be recalled that the issue before the Full Tribunal in A/18 was, exclusively, the interpretation of the term 'national' in the pertinent provisions of the Algerian Declarations. And what the Tribunal there said was that in relation to a dual national, the term 'national' meant a 'dominant national'. Other jurisdictional requirements of the Declarations were therefore not affected by the Decision. This is a point confirmed by the Tribunal on many occasions. Thus, for instance, the Award in *Hakim* v. *Iran* states with reference to the date on which a claim arises and 19 January 1981, that:

> These two dates determine the jurisdiction of the Tribunal, since Article VII, paragraph 2, of the Claims Settlement Declaration states, in part, ''claims of nationals' of Iran or the United States, as the case may be, means claims owned

1 5 IRAN-U.S. C.T.R. 251, at 265.
2 *Ibid.*
3 Claims Settlement Declaration, Article VII (2).

> continuously, from the date on which the claim arose to the date on which this Agreement enters into force, by nationals of that state …[4]

The corollary of this is, that a claimant with dual nationality is required to establish his dominant nationality of the claimant State as from the very beginning, and then throughout, the relevant period, in exactly the same way as a claimant with a single nationality is required to establish his nationality of the claimant State from the beginning, and then throughout, the said period. The point, however, is not clearly reflected in the formulation of the issue by the Full Tribunal or in the similarly worded formulations by the Chambers in the Cases before them, as will be noted shortly. But before that, a few words about the concept in customary international law.

5.1 The Requirement of Continuous Nationality in International Law

In general, the capacity of a State under international law to adopt the claim of an injured person requires, *first*, the proof of the nationality of the claimant State at the time of the alleged injury, and *second*, the uninterrupted continuity of such nationality for sometime thereafter.

The *first* requirement is universally admitted,[5] even by those who challenge the requirement of continuity.[6] It is based on the fact that in presenting a claim, the State does not act as a 'claim agent', but for the protection of its own interests:

> [I]n 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

4 24 IRAN-U.S. C.T.R. 269, at 270. See, to the same effect, *Malek* v. *Iran*, 19 IRAN-U.S. C.T.R. 48, at 51.

5 For a few exceptional cases in which protection may be exercised in relation to non-nationals, see: Francisco Orrego Vicuña, Interim Report on 'the Changing Law of Nationality of Claims', in International Law Association, Report of the 69th Conference (2000), published by the International Law Association, at 636-7; I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 6th Ed., Oxford: Oxford University Press, 2003, at 459-60. It must be emphasized that these are in reference to diplomatically protected claims only. Outside that area, even the very requirement of nationality may be dispensed with, as, for instance, in the case of NAFTA claims, where 'permanent residency' is at times a sufficient qualification. See page 58, footnote 12, above.

6 In relation to a 1947 Agreement between the United States and Italy (commonly known as the Lombardo Agreement of 1947), the United States Congress passed legislation

> own right, the right to ensure in the person of its nationals respect for the rules of international law.[7]

For as long as this State-oriented system continues to exist, there must therefore be a sufficient link between the State and the individual to engage the State's interest; a link provided by the bond of nationality.[8] Thus, for example, in the *Ambiati* Case in which the claimant had acquired the nationality of the claimant State some two years after the date of the asserted injury, it was held that there was no standing to bring the claim.[9] To this requirement, the International Law Commission has, in its Draft Articles on Diplomatic Protection provisionally adopted in 2002,[10] proposed an exception:

> … a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the time of the injury, provided that the person has lost his or her former nationality and has acquired, for a reason unrelated to the bringing of the claim, the nationality of that State in a manner not inconsistent with international law.[11]

Under the same Draft Articles, however, the suggested exception would not apply in cases in which the former nationality was that of the respondent State:

in 1958 under which persons who had become United States citizens after the date of their injury, and indeed after the date of the Agreement, were considered as qualified claimants. But, as others have observed, this did not as such violate the requirement here under discussion, for it was a measure adopted in the very special circumstances of the case, including the existence of a surplus in the fund supplied by Italy, after the claims of those who qualified under the general rule had been satisfied. See, B. M. Peselj, *The Rule of Nationality of Claimant, Due Process of Law and the United States Congress,* 53 Am. J. Int'l L. (1959), 144.

7 The *Panevezys-Saldutiskis Railway* Case, PCIJ, Series A/B, No. 76 (1939), 4, at 16. See also the *Mavrommatis* Case, PCIJ, Series A, No. 2 (1924), 12.

8 For a recent confirmation of this, see *Feldman Karpa* v. *United Mexican States*, a Case decided under the Additional Facility of ICSID: '[U]nder general international law, citizenship rather than residence … is the main connecting factor between a state and an individual.' Interim Decision on Preliminary Jurisdictional Issues, 40 ILM 615 (2001), at 619.

9 The *Ambiati* Case (*United States* v. *Venezuela*), J. B. MOORE, HISTORY AND DIGEST OF INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY, Vol. III, at 2347. See, further, the *Panevezys-Saldutiskis Railway* Case, PCIJ, Series A/B, No. 76 (1939), 4, at 16-17.

10 Report of the International Law Commission on Diplomatic Protection, fifty-fourth session (2002), UNGAOR, 57th session, Supp. No. 10, UN Doc. A/57/10.

11 Article 4 (2), *ibid*, at 178.

> Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury incurred when that person was the national of the former State of nationality and not of the present State of nationality.[12]

As for the *second* requirement:

> It is a well-established principle of international jurisprudence that a claim must be national from the point of view of the demanding State from its origin until its presentation as a claim of international law.[13]

The probable essence of the requirement is said to be a 'desire to prevent the individual choosing a powerful protecting state by a shift of nationality'[14] – to prevent protection shopping – though this has been rejected, mainly on the ground that 'if the legal wrong is to the state of origin, then the wrong has matured at the time of injury and is unaffected by subsequent changes in the status of the individual'.[15] Justification for the requirement is also offered on doctrinal grounds. It is said, for instance, that since the State of which the individual is a national at the time of the injury is the only one suffered, it is that State alone which has sufficient interest to entitle it to bring a claim. As others have noted, however, this is inconsistent with the result of the operation of the rule, which prevents such a State from pursuing the claim in the case of a subsequent change of nationality.[16]

The rule has been criticized, on the other hand, for its apparent incompatibility with the legal fiction – the so-called Vattelian fiction – that the State alone is the

12 Article 4 (3), *ibid.*

13 Judge Huber in the *Benchiton* Case, Annual Digest (1923-4), at 189. See further, HERBERT W. BRIGGS, THE LAW OF NATIONS: CASES, DOCUMENTS AND NOTES, 2nd Ed., New York: Appleton-Century-Crofts, 1952, at 733-5; G. SCHWARZENBERGER, INTERNATIONAL LAW, 3rd Ed., Vol 1 (International Law as Applied by International Courts and Tribunals), London: Stevens and sons, 1957, at 596-600; L. OPPENHEIM, INTERNATIONAL LAW, 9th Ed., edited by R. Jennings and A. Watts, Vol. 1, Parts 2-4, London and New York: Longman, 1996, at 512-3. For those who question the rule, see, e. g., Jennings, 121 Recueil des cours (1967-II), 323, at 474-7; D. P. O'CONNELL, INTERNATIONAL LAW, Vol. II, 2nd Ed., London: Stevens and sons, 1970, at 1033-9; Fitzmaurice, Separate Opinion, *Barcelona Traction* Case (Second Phase), ICJ Reports (1970), at 99-103.

14 BROWNLIE, footnote 5 above, at 461. See also H. F. VAN PANHUYS, THE ROLE OF NATIONALITY IN INTERNATIONAL LAW: AN OUTLINE, Leiden: Sijthoff, 1959, at 92.

15 BROWNLIE, footnote 5 above, at 460-1.

16 O'CONNELL, footnote 13 above, at 1118.

holder of the international claim,[17] and for its incongruity with the modern tendency of regarding the individual as a subject of the international law.[18] It has been blamed, further, for placing the individual, at times, 'in a most unenviable position' where 'neither the State, of which he had been a national at the time of the injury, nor the State of which he becomes a national prior to the presentation of the claim is entitled to exercise diplomatic protection on his behalf', leaving him without a remedy.[19] More broadly, the viability of the rule has been conceptually questioned on the asserted ground that at the international level, it is now increasingly the right of the individual and not the right of the espousing State, that is being considered and enforced.[20] Still, as Leigh concludes:

> Notwithstanding the weak rationale upon which the requirement of continuous nationality is based, the undesirable consequences to which it leads and the fact that, at least in some cases, the new national State has an interest of its own in bringing a claim, international tribunals do not yet seem prepared to forgo its application. Thus, in 1939, the Permanent Court of International Justice unequivocally reaffirmed the rule in *Panevezys-Saldutiskis Railway* case … Further, since the Second World War, the rule has been given new support as a result of its repeated application by the United States International Claims Commissions.[21]

If the starting point of the requirement of continuity – the time of the injury – is generally agreed upon, its precise duration is not. While the majority of States and writers favour the continuation of nationality until the date of the issuance of the award,[22] others speak of the time at which the claim is presented to an

17 See, e. g., Wilhelm Karl Geck, *Diplomatic Protection*, in R. Bernhardt (ed.), ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, Vol. I, Amsterdam: North Holland, 1992, at 1046.

18 An exhaustive study of the subject will be found in the Addendum to the First Report of the International Law Commission's Special Rapporteur on Diplomatic Protection. A/CN.4/506, Add. 1, at 2-16 (2000).

19 Guy I. F. Leigh, *Nationality and Diplomatic Protection*, 20 Int'l & Comp. L. Q. 453 (1971), 453, at 456.

20 Francisco Orrego Vicuña, footnote 5 above, at 638-9. See, further, S. Friedberg, *Unjust and Outmoded – The Doctrine of Continuous Nationality in International Claims*, 4 International Lawyer (1970), 835.

21 *Ibid,* at 458. See, further, BROWNLIE, footnote 5 above, at 461, where he observes that the rule 'appears to be well-entrenched in the practice of states'.

22 BROWNLIE*, ibid*; BRIGGS, footnote 13 above, at 733-4; MALCOLM N. SHAW, INTERNATIONAL LAW, 4th Ed., Cambridge: Cambridge University Press, 1997, at 565.

international judicial forum, or, in its absence, the time at which a diplomatic claim is formally presented.[23]

These, however, need not be addressed here, for it is admitted by all hands that States may, through the agreements they conclude for the settlement of their claims, determine, vary or indeed entirely dispense with the requirement of continuity;[24] and when they do, the terms of their agreements must be strictly respected. In fact, this is a point on which the Tribunal has had an occasion to pronounce itself. In *Lianosoff* v. *Iran*,[25] the claimant, a United States national, asserted a claim which he admitted to have been initially owned by his late father, who was originally a Russian but at the time the claim arose a stateless person. The claimant argued that in so far as the claim was owned by a national of *any* country, it was owned by a national of the United States. The rule of continuous nationality, he suggested, was subject to a number of 'inherent exceptions' and, as such, there was no justification for its 'rigid application' in the circumstances of his case.

The Tribunal observed that had it not been for the specific provisions of the instruments from which it derived its jurisdiction, there might have been some room for the claimant's argument. Relying on O'Connell, however, the Tribunal went on to 'draw a clear distinction between cases where a Tribunal is acting pursuant to an agreement which expressly embodies the requirement of continuous nationality, and cases where there is no such written agreement'. In the former cases:

> The tribunal may entertain only such claims as the parties agree to present to it, and if the parties expressly or by implication reserve claims where the injured individual was not at both relevant points of time a national of one party the tribunal is bound by this limitation. (D. P. O'Connell, International Law, 2nd ed. 1970, Vol.Two, p.1034).[26]

And this is precisely what the parties to the Algerian Declarations have done: they have adopted the rule of continuous nationality and, as we have seen, defined it in terms of nationality possessed uninterruptedly from the time of the asserted injury to the date on which the Declarations entered into force, that is, 19 January 1981.

23 VAN PANHUYS, footnote 14 above, at 86.
24 BROWNLIE, footnote 5 above, at 483-4.
25 5 IRAN-U.S. C.T.R. 90.
26 *Ibid*, at 92.

5.2 The Tribunal's Treatment of the Issue

The Tribunal's treatment of the requirement of continuous nationality may now be examined. The first point to be noted in this respect is the formulation of this jurisdictional requirement in the Tribunal's case law.

5.2.1 The Formulation of the Issue by the Tribunal

The Award in *Esphahanian* makes no reference to Article VII (2) of the Claims Settlement Declaration in which, as noted before, the requirement of continuous nationality is set.[27] Instead, and having first concluded that the better rule of customary international law on the subject is the rule of 'dominant and effective' nationality, it proceeds to 'frame the jurisdictional issue' before the Chamber as follows:

> Were Esphahanian's factual connections with the United States 'in the period preceding, contemporaneous with and following' his naturalization as a United States citizen more effective than his factual connections with Iran during the same period? *See Nottebohm*, [1955] I.C.J. Rpts. at 24.[28]

It will be seen that the phrase 'in the period preceding, contemporaneous with and following his naturalization' is borrowed from the judgment in *Nottebohm*. But then that formulation in *Nottebohm* – concentrating as it does on the claimant's naturalization – belongs to a Case in which, as we have seen, the issue before the Court was the circumstances under which the claimant had been naturalized. It has, therefore, nothing to do with the requirement of continuous nationality – and hence with the 'relevant period' – in the Declarations.

To be more concrete, it will be recalled that Mr. Esphahanian was naturalized a United States citizen in August 1958, and his claim arose in December 1978.[29] He was thus required, under the terms of the Algerian Declarations as interpreted by the Chamber, to establish his dominant United States nationality throughout the period December 1978 (the date on which his claim arose) to 19 January 1981 (the date on which the Declarations entered into force). The Chamber's formulation, however, focuses not on this period, but on the date of the Claimant's

27 Quoted on page 113 above.
28 2 IRAN-U.S. C.T.R. 157, at 166.
29 *Ibid*, at 158-9.

naturalization back in 1958. This, then, is the first problem with the Chamber's formulation.

The second problem likewise stems from the Chamber's reliance on the formulation in *Nottebohm* out of its proper context. There, the Court speaks of reviewing the factual connections between the claimant and Liechtenstein 'in the period preceding, contemporaneous with and following' the naturalization in order to determine whether those factual connections were 'sufficiently close' to make it 'possible to regard the nationality conferred … as real and effective'.[30] This is logical enough.[31]

As formulated by the Chamber in *Esphahanian*, on the other hand, the claimant is required to establish that his factual connections with the United States 'in the period preceding, contemporaneous with and following' his naturalization were 'more effective' than his factual connections with Iran during the same period. This, if strictly followed, places on the claimant a harsh burden not required either by the terms of the Declarations – which are concerned with the relevant period only – nor by the rule of dominant nationality upheld in the Award. In other words, there is nothing in either to require the proof by Mr. Esphahanian that his factual connections with the United States *preceding* or *following* the relevant period were 'more effective' than his factual connections with Iran.[32]

In short, the formulation of the jurisdictional issue in *Esphahanian* wrongly identifies the claimant's naturalization as the material time. But even if this is rectified by substituting the term 'naturalization' with the term 'relevant period', the problem still persists, for the formulation speaks of proof of more effective factual connections both before and after the relevant period.

The Decision in A/18 employs, as we have seen, a language different from the one adopted in *Esphahanian*.[33] It says that the Tribunal has jurisdiction over claims by dual Iran-United States nationals when the dominant and effective nationality of the claimant is that of the claimant State 'during the relevant period from the date the claim arose until 19 January 1981'.

30 ICJ Reports (1955), 4, at 24.

31 Except that 'naturalization', referring as it does to the issuance of an official certificate to that effect by an organ of a State, does not readily lend itself to the idea of 'the period contemporaneous with'. A more precise formulation would therefore have been 'the period preceding and following the naturalization'.

32 The dissenting member in *Esphahanian* suggests that '[t]he Claimant's situation should be examined from 1958 onwards, the date on which he was naturalized a U.S. citizen'. 2 IRAN-U.S. C.T.R. 157, at 216. But this, too, is problematic, as will be seen presently.

33 This is one of the very few points of variance between the two judgements which, as stated before, are almost identical in all other respects.

This formulation, in so far as it identifies the 'relevant period' – and not the 'naturalization' – as the material time, is obviously an improvement on the earlier formulation in *Esphahanian*. But then, it suffers from undue generality. The Full Tribunal's task in A/18, it will be recalled, was to provide guidelines to the Chambers for their future treatment of dual nationality claims. By simply referring to the requirement of continuous nationality as set in the Claims Settlement Declaration, and saying nothing about the application of that requirement in conjunction with the rule of dominant nationality, the Chambers were not furnished with any such guidelines on the issue. They were, for instance, not provided with any advice on the span of time during which relevant factors in the claimant's life could be legitimately considered; an issue which will be addressed in the next section of the present Chapter.

More importantly, the reference in the Claims Settlement Declaration to 'claims owned continuously' is made in relation to instances of single nationality and, as such, it ensures the continuity without interruption of the claim's status throughout the relevant period. In other words, a claim not owned by a national of the claimant State for any part of the relevant period, however short, would fail to meet the requirement of continuity. In contrast, the formula in the A/18 Decision, which requires proof of the claimant's 'dominant … nationality … during the relevant period', does not necessarily ensure the continuity without interruption of the claimant's dominant nationality throughout that period.

There may be a case, for instance, in which the claimant's dominant nationality during an early but shorter part of the relevant period is judged to be that of the respondent State. By the steps he takes thereafter – such as marrying or taking up permanent residence – he establishes his dominant nationality of the claimant State during the latter but longer part of the relevant period. Here, the claimant's dominant nationality 'during the relevant period' is on aggregate that of the claimant, and not of the respondent, State. And yet, there has been no continuity without interruption in his dominant nationality of the claimant State. Based on the fact that the Tribunal in A/18 required the replacement, in the instances of dual nationality, of the term 'national' with the term 'dominant national', his claim must fail, but not on the basis of the formula adopted by that Decision in relation to the requirement of continuity.

It remains to be said that the example given above is not a remote possibility; and that for two reasons. *First*, as the Cases before the Tribunal demonstrate, the relevant period can at times be of a very long duration. In *Khatami* v. *Iran*, for instance, one of the claims had assertedly arisen in 1976, thus a relevant period of some five years. In the words of the Tribunal, 'the relevant period, for purposes

of the inquiry into Dr. Khatami's dominant and effective nationality, is the period between 1976 and January 1981'.[34]

In fact, the claimant had asserted another claim which, according to him, had arisen 'in or about 1963'.[35] This, however, was dismissed on the ground that he, having become a United States citizen through naturalization in 1971, was prior to that date a sole Iranian national and, as such, not entitled to pursue a claim against Iran going back to 1963. But for that reason, and had he become a dual Iran-United States citizen prior to 1963, there would have been a relevant period of some eighteen years, during which a shift of dominance would not have been difficult to imagine.[36]

Second, and as the Tribunal has itself noted on occasions, there can be multiple changes of dominance in the life of a claimant. Such was the case, for example, in *Diba and Gaulin* v. *Iran*,[37] decided in October 1989. Mr. Benny F. Diba, one of the two claimants in the proceedings, was born in Iran in 1929, of sole Iranian nationality. He went to the United States in 1950, after completing his primary and secondary education in Iran. In 1953, he married a United States citizen by birth, to which marriage two children were born, both with United States nationality. Having graduated from a college in the United States in 1957, Mr. Diba worked for a number of United States' corporations until 1967. He obtained his United States nationality in 1959.

In 1967, however, he divorced his wife and returned to his country of origin after a seventeen-year stay in the United States. In Iran, he married in the same year an Iranian national by birth. To this marriage, too, two children were born, both with dual Iran-United States nationality. During this period in his life, Mr. Diba became involved in diversified business interests, and acquired substantial real and business property in Iran. In November 1978, Mr. Diba left Iran, going first to Europe, and then in August 1979 to the United States, where he resided and worked thereafter.

The Tribunal found on these facts that during his first stay in the United States, between 1950 and 1967, the claimant had become integrated into American society,

34 30 IRAN-U.S. C.T.R. 267, at 274. See further, *Bavanati* v. *Iran,* 31 IRAN-U.S. C.T.R. 36, in which the relevant period was determined to be six years.

35 30 IRAN-U.S. C.T.R. 267, at 273.

36 The longest relevant period asserted before the Tribunal was in *Lianosoff* v. *Iran*, 5 IRAN-U.S. C.T.R. 90. There, the elements allegedly giving rise to the claim arose in 1918, 1923, and 1953, thus establishing a relevant period (until 1981) of 63, 58, and 28 years, respectively. But this was a very exceptional case, dismissed by the Tribunal, as noted, because of the claimant's failure to establish that the claim had been owned continuously by a national of the United States.

37 23 IRAN-U.S. C.T.R. 268.

so that his dominant nationality by 1967 was probably that of the United States, though no decision on that point was necessary for the resolution of the Case. However, the facts that he divorced his American wife, married an Iranian national, and became involved in various businesses in Iran during the eleven years which he subsequently spent there, compelled the conclusion that by the time his claim allegedly arose – either in November 1978 or in the summer of 1979 – his dominant nationality had become that of Iran.

In this, then, we have the example of an originally Iranian national who later acquires dominant United States' nationality, only to lose that status later still in favour of dominant Iranian nationality. It will have been noted that in this instance, the date on which the claim allegedly arose – November 1978 or the summer of 1979 – was either prior to or concurrent with the date of the claimant's return to the United States in August 1979. Had the claimant returned to the United States a year or two earlier, there is no reason to believe that the Tribunal would not have come to the conclusion, given especially the claimant's previous exposure to American life, that there had been yet another turn in the claimant's status, becoming a dominant United States national by the time his claim arose. As will be seen in the next Chapter, such previous exposure has on many occasions led the Tribunal to affirm a claimant's dominant United States nationality as from the very date on which that nationality was acquired.

Another Case with rather similar facts and outcome was *Sobhani* v. *Iran*,[38] decided in May 1995. Mr. Sobhani was born in Iran in 1935 of sole Iranian nationality. He lived there until 1956, when he left Iran for the United States to receive further education. He became a naturalized United States citizen in 1966, and stayed there until 1975. Based on the evidence submitted by him, the Tribunal came to the conclusion that during his stay in the United States, Mr. Sobhani had been 'fully integrated into American society', so much so that by the end of that period, 'it could be assumed' that his dominant nationality had become that of the United States.[39]

The Tribunal noted, however, that 'the period 1975-1976 marks a major change in the Claimant's life'. He returned to Iran, first working with an American company, and later setting up his own businesses. He married his second wife in Iran, and assertedly purchased an apartment and several pieces of land there. These, together with the 'particularly relevant' fact that he chose to remain in Iran after the 1979 Revolution – and, indeed, after the seizure of the United States Embassy in Tehran in November 1979 – led the Tribunal to conclude that Mr.

38 31 IRAN-U.S. C.T.R. 26.

39 *Ibid*, at 31.

Sobhani had failed to establish that his 'once dominant links to the United States remained dominant after 1976 and during the relevant period'.[40]

Returning to the formulation of the requirement of continuous nationality, the first Chamber Case in which the issue was addressed after the Decision in A/18 was *Mahmoud* v. *Iran*,[41] decided in November 1985. There, Chamber Two of the Tribunal, having first referred to the adoption of the rule of dominant nationality by the Full Tribunal, stated that in applying the rule:

> The Tribunal must examine the Claimant's contacts with the United States and her contacts with Iran during the period preceding, contemporaneous with and following the date the claim arose in order to determine which connection predominated during the relevant period.[42]

The same was said in *Khajetoorians* v. *Iran*, decided in January 1991.[43] The reference in the first part of this formulation to the claimant's contacts 'during the period preceding, contemporaneous with and following the date the claim arose' relates, not to the requirement of continuous nationality, but to the span of time during which the relevant facts in the life of a claimant may be considered, an issue which will be examined soon.[44] As such, the formulation does not suffer from the problems associated with the formulation in *Esphahanian*, for it clearly states, in the second part, that the aim of the enquiry is the determination of the claimant's dominant connection 'during the relevant period'. It does, however, share the problem with the formulation in A/18 of referring to the proof of dominant nationality 'during', rather than 'throughout', the relevant period.

This first part of the formulation was not, at any rate, adopted in any Case other than the two just mentioned. In all other instances, the Chambers simply referred to the need, in line with the Decision in A/18, of determining the claimant's dominant nationality 'during the relevant period', a typical example of which is *Saghi*:

> In accordance with the findings that Allan J. Saghi is a national both of the United States and of Iran, and in accordance with the Decision in Case No. A18 … the

40 *Ibid*, at 32-33. For two further Cases in which the claimants, originally of sole Iranian nationality, were judged to have first acquired dominant United States nationality and then dominant Iranian nationality, see, *Ghaffari (A)* v. *Iran*, 25 IRAN-U.S. C.T.R. 178, and *Bakhtiari* v. *Iran*, 25 IRAN- U.S. C.T.R. 289.

41 9 IRAN-U.S. C.T.R. 350.

42 *Ibid*, at 353.

43 26 IRAN-U.S. C.T.R. 37, at 41.

44 See page 151 below.

> Tribunal proceeds to a determination of the dominant and effective nationality of Allan Saghi during the relevant period.[45]

It remains to be noted that on a few occasions the Chambers referred in their formulation of the issue to terms other than 'dominant nationality'. In *Mohtadi*, for instance, it was said that the Tribunal was required to determine whether the claimant 'had stronger ties with Iran or the United States during [the relevant] period'.[46] The idea, however, remained the same: proof of dominant nationality or stronger ties during, rather than throughout, the relevant period.

All these may now be briefly stated. Because the 'relevant period' may in some cases turn out to be of a very long duration, and because a claimant's dominant nationality may shift from one to another during that period, the formulation by the Full Tribunal in Case A/18, and those with identical or similar wordings adopted by the Chambers, are not very precise. What these formulations require is the proof of dominant nationality 'during the relevant period', while the application of the rule of dominant nationality in conjunction with the requirement of continuous nationality in the Declarations calls for the proof of dominant nationality 'throughout the relevant period'. The formulation of the issue in *Esphahanian* is wholly unsatisfactory.

5.2.2 The Application of the Requirement

The Tribunal's case law reflects a pattern of consistent and strict observance of the requirement of continuous nationality set in Article VII (2) of the Claims Settlement Declaration. Clearly enough, proof of the dominant nationality of the claimant State throughout the relevant period requires, as a precondition, proof of the nationality of the claimant State throughout the said period. Thus, in every Case of dual nationality decided after A/18, the Tribunal has made it clear that before proceeding to the determination of the claimant's dominant nationality, it must satisfy itself that the claimant held the nationality of the claimant State during the relevant period. Here is a typical example:

> The Tribunal has first to determine whether the Claimant was, from the time the claim arose until 19 January 1981, a national of the United States or of Iran or of both countries. If the Tribunal concludes that the Claimant holds both nationalities,

45 14 IRAN-U.S. C.T.R. 3, at 7.
46 32 IRAN-U.S. C.T.R. 124, at 128.

> it will have to determine which one is 'dominant and effective' during the relevant time …[47]

There are instances in which slightly different wordings are employed. In *Mahmoud*,[48] for instance, the Tribunal states that 'when each of two nationalities is real and effective, the Tribunal is to determine which one is dominant'.[49] And in *Malek*,[50] it is said that '[i]f the Tribunal arrives at the conclusion that the Claimant effectively holds those two nationalities [Iranian and the United States], it will have to determine which one is 'dominant and effective''.

But some of these variations are, as noted before, due to laxity in the use of proper terms. The concept they seek to reflect, however, remains the same: before a claimant's dominant nationality is addressed, he must prove his internationally recognized (or 'effective' or 'real')[51] nationality of the claimant State throughout the relevant period. And this is a requirement from which there have been no deviations in the Tribunal's case law, under which any interruption throughout the relevant period in the ownership of the claim by a national of the claimant State has led to the dismissal of the claim for not meeting the demand of Article VII (2).[52]

The Case of *Lianosoff* has already been noted,[53] in which the claim presented by a United States national but initially owned by his allegedly stateless father was rejected for failing to meet this requirement. There, it will be recalled, the Tribunal distinguished between the instances in which continuity is required as a general underlying doctrine, and those in which it is embodied in a constituting

47 *Danielpou*r (*M*) v. *Iran*, 22 IRAN-U.S. C.T.R. 118, at 120.

48 9 IRAN-U.S. C.T.R. 350, at 353.

49 The same formula is used in *George E. Davidson (Homayounjah)* v. *Iran,* 34 IRAN-U.S. C.T.R. 3, at 14-5.

50 19 IRAN-U.S. C.T.R. 48, at 51. (Interlocutory Award)

51 Both nationalities must be internationally effective because, as discussed earlier, an internationally ineffective nationality may not be invoked before an international tribunal, and that being the case, the issue of its competing with the claimant's second, and effective, nationality will not arise in the first place.

52 Where, on the other had, the Tribunal has come to the conclusion that the claim arose sometime after the relevant period, it has rejected the claim for failing to meet the requirement of Article II (1) of the Claims Settlement Declaration, under which a claim must be outstanding on the date of the Declarations. See, for instance, *Kahen* v. *Iran*, 18 IRAN-U.S. C.T.R. 289, at 290: 'According to the Claimant's own assertion the alleged expropriation took place in the latter part of 1981. Pursuant to Article II, paragraph 1, of the Claims Settlement Declaration claims of nationals are within the jurisdiction of the Tribunal only if, *inter alia,* such claims were outstanding on 19 January 1981.'

53 *Lianosoff v. Iran*, 5 IRAN-U.S. C.T.R. 90. See page 118 above.

instrument as a condition for jurisdiction. In the latter cases, said the Tribunal, the issue was a matter of interpretation and, as such, it had to be strictly applied. The Tribunal further stated that if the claimant's father was stateless, as asserted, then 'that fact does not operate to put him in a more favourable position than would have obtained had he kept his Russian nationality'.[54] Further review of the Tribunal's precedents on the subject may best be made with reference to the various distinct issues that have come before the Tribunal for decision in relation to this requirement.

5.2.2.1 The Importance of Formal Conferment of Nationality

It has been suggested, with reference to the rule of link in *Nottebohm*, that 'the logical next step' in the field of State protection is to dispense with the requirement of formal nationality in favour of link:

> [A] desirable future development would be for the requirement of formal nationality for the purposes of diplomatic protection to be dropped. Instead of requiring both nationality in the formal sense and an effective link for the purposes of diplomatic protection, let an effective link be the only requirement. This would permit a State to bring a claim on behalf of any individual effectively connected with it, irrespective of whether the individual is also a national of that State in the formal sense.[55]

There are difficulties with this suggestion which, in effect, proposes protection on the part of the State without requiring allegiance on the part of the individual and, further, disregards the choice made by the individual not to become a national of the State of link. It is a suggestion, at any rate, which the Tribunal has consistently rejected in its practice. It has done so by dismissing for lack of jurisdiction the claims of those who, while not questioning the requirement of continuous nationality, have invited the Tribunal to recognize their nationality of the claimant State in the absence of a formally granted nationality.

Such was the case, for example, in *Nourafchan*. There, one of the two claimants, George Nourafchan, was born in Italy in 1951 to Iranian parents, thus acquiring Iranian nationality at birth. After graduating from high school in Italy, he went to the United States in 1970,[56] where he continued his further education, joined the real estate business of his brothers, and was naturalized a United States'

54 *Ibid*, at 92.

55 Guy I.F. Leigh, footnote 19 above, at 470.

56 Apparently, he also acquired Italian nationality at birth, a nationality which he renounced later in 1972.

citizen in September 1980. It was his claim that his rights to a piece of land in Iran had been adversely affected by a law enacted in Iran in June 1979, which law authorized the nationalization of undeveloped land if not developed by the owners within a specified period. As admitted by him, however, there had been no official act of confiscation until the end of 1981.

In an Interlocutory Award rendered in December 1989,[57] the Tribunal first held that since the issue of the date on which the claim arose had not been fully briefed by the parties, this would be joined to the consideration of the merits; a course of action which the Tribunal routinely took in similar situations. The Tribunal then went on to consider the status of the claimant's nationality in the period September 1980, the date he acquired his United States nationality, and 19 January 1981, the end of the relevant period. It did so 'on the hypothesis that [the] claim arose during this period without prejudice to [the Tribunal's] future decision on this point'.[58] The Interlocutory Award found, further, that because the claimant had fully integrated into American society prior to his naturalization, his dominant nationality was that of the United States as from the very date of his naturalization.

The Final Award in the Case was issued some four years later, in October 1993.[59] There, the Tribunal noted that in his pleadings submitted after the Interlocutory Award, the claimant seemed to have 'settled upon June 1979' as the date of the alleged expropriation of his land, a date clearly prior to the date of his naturalization. It was his argument, however, that because of his long and exclusive exposure to American life, he was by June 1979 'in effect already a United States citizen'. Indeed, if 'such citizenship was not officially recognized until September … 1980', this 'was merely a pronouncement of the fact that was already a reality'. The Tribunal rejected this argument and dismissed the claim for lack of jurisdiction: the claim had not been 'owned continuously by a United States national form the date it arose to the effective date of the Claims Settlement Agreement'.[60]

A similar, though not identical, issue was raised in *Kiaie*,[61] where a mother and her daughter asserted the expropriation by the respondent of their shareholding rights in, amongst others, an Iranian company (WIG). The mother, Julia Kiaie, was a dual national of Iran and the United states at birth, by virtue of being born of an Iranian father who himself held the nationalities of both Iran and the United States. The daughter, Jacqueline Kiaie, was an Iranian national at birth, by virtue

57 23 IRAN-U.S. C.T.R. 307.
58 *Ibid*, at 313.
59 29 IRAN-U.S. C.T.R. 295.
60 *Ibid*, at 306.
61 32 IRAN-U.S. C.T.R. 42.

of being born of an Iranian father. She also acquired United States nationality through naturalization in March 1980.

After a number of alterations in their earlier pleadings, the claimants finally placed the date of the asserted interference with their ownership rights in WIG in April 1980, thus after the acquisition of United States nationality by Jacqueline. The Tribunal, however, rejected this date and, on the basis of the evidence before it, came to the conclusion that WIG had in fact been expropriated in November 1979.[62] This meant, of course, that the wrong complained of had occurred when Jacqueline was of sole Iranian nationality and, as far as this claimant was concerned, her claim failed for not meeting the requirement of continuity.

She argued, however, that by virtue of her mother's United States nationality, she herself had acquired United States nationality at birth. If she obtained a naturalization certificate in 1980, this was because she was not aware at the time that she was entitled to United States nationality through her mother, and was poorly advised on the subject by her lawyer. She argued, further, that she had first applied for naturalization in late 1977, and that the delay in her naturalization was due to loss of her files by the United States Immigration and Naturalization Service.

As to the first argument, the Tribunal noted the admission at the hearing by the claimants' counsel that despite extensive research, he was unable to express himself on whether Jacqueline was entitled to United States nationality at birth. That argument was therefore rejected for lack of proof. As to the second argument, the Tribunal again noted the inability of Jacqueline to produce any evidence in support of her alleged application for naturalization in 1977. It then went on to state that:

> In any event, the Tribunal notes that the power to confer nationality on an individual rests exclusively with the Government of the country, nationality of which is claimed. The Tribunal is unable to find a person to be a national of the United States as of a date when the United States had not yet conferred United States nationality on that person.[63]

Having rejected these two arguments, the Tribunal dismissed the claim of Jacqueline for not having been owned continuously by a United States national

62 *Ibid*, at 55.

63 *Ibid,* at 57. In his Interim Report to the International Law Association, Francisco Orrego Vicuña writes that '[a] declaration of intention to acquire the nationality of the claiming State has also been considered enough to spouse the claim'. Footnote 5 above, at 636. He provides no reference to any such instances, however.

throughout the relevant period.[64] The claim of her mother was also dismissed for lack of proof of ownership interests in the entities concerned.

The relevance of formal conferment of nationality has been further affirmed by the Tribunal in relation to certain other issues raised by the parties. In *Nemazee*,[65] the respondent had challenged the United States nationality of one of the two claimants, Luz Belen Nemazee, who was born in Puerto Rico of Puerto Rico-born parents. The respondent's argument, disputed by the claimant, was that her United States nationality rested on an incorrect application of the United States nationality laws by the United States authorities. The Tribunal, noting that the claimant's United States nationality was evidenced by her birth certificate and passport, declined to address the merits of the respondent's allegation:

> [I]n the absence of manifest grounds for questioning the validity of the certification of citizenship, it is not incumbent upon an international tribunal to investigate either the merits of the national legislation on the basis of which nationality has been conferred or the conformity to such legislation of the acts by which the State in question has granted such nationality. These are both matters of domestic jurisdiction. For the purpose of the Tribunal's determination, the submission of convincing evidence that citizenship has been conferred must suffice.[66]

The issue of whether or not an international tribunal may, under customary international law, examine the validity of a conferred nationality has been addressed earlier.[67] Suffice it to note here that while the Tribunal in the Case at hand did not go as far as denying the existence of such an authority, it required 'manifest grounds' for interfering with what it considered to be 'matters of domestic jurisdiction'. Evidently, the respondent's offer to demonstrate that the laws of the claimant State did not entitle her to the officially certified citizenship fell short of a 'manifest ground'.[68]

64 *Ibid.* The Award states in its *dipositif* that the claim 'is dismissed for lack of jurisdiction under Article II, paragraph 1, of the Claims Settlement Declaration'. *Ibid*, at 72. This is inaccurate. It will be recalled that Article II, paragraph 1, requires a claim to be 'outstanding' on the date of the Declarations, a condition met by the present claim. The requirement of continuous nationality, for the lack of which the claim was rejected here, is set in Article VII (2) of the Claim Settlement Declaration.

65 25 IRAN-U.S. C.T.R. 153.

66 *Ibid,* at 157.

67 See pages 69-75 above.

68 See to the same effect, *Berookhim* v. *Iran*, 25 IRAN-U.S. C.T.R. 278, at 283-4 (where the validity of the claimant's naturalization as a United States citizen was disputed by the respondent on the ground that the claimant had failed to fulfil the requirement of prior continuous residency set by the laws of the United States), and *Bakhtiari* v. *Iran*, 25

The validity of the United States nationality of the claimant was in a few instances challenged by the respondent on yet another ground, namely, the commission of an expatriating act. As noted earlier,[69] the United States law provides – or at any rate did so at the time relevant to the issue here – that the commission of certain acts by a person after his naturalization will have an expatriating effect, requiring the United States authorities to take legal steps to revoke the granted nationality.

The issue was first raised in *Samrad*,[70] involving a claim by a mother and her four children. The mother, Parvin Mariam Samrad, was born in Germany in 1933 to a German mother and an Iranian father, thus under the laws of Iran an Iranian national at birth by virtue of her father's Iranian nationality. In 1939, the family moved to Iran and, in 1951, to the United States, where she was naturalized a United States citizen in 1958. In 1959, however, she together with her husband and children – there were two at the time – went to Iran and stayed there until 1977, when she again moved to the United States and settled there. She admitted that while in Iran, she voted in one election in 1975, though she contended that she did so because she feared that she would otherwise encounter difficulties obtaining an exit visa.

The respondent challenged the 'continued validity' of Parvin's United States nationality[71] on the ground that her moving to, and long stay in, Iran was an expatriating act under the laws of the United States:

> If a person who shall have been naturalized shall, within five years [amended in 1986 to one year] after such naturalization, return to the country of his nativity, or go to any other country, and take permanent residence therein, it shall be considered *prima facie* evidence of a lack of intention on the part of such person to reside permanently in the United States at the time of filing his application for naturalization and in the absence of countervailing evidence, it shall be sufficient in the proper proceedings to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization.[72]

IRAN-U.S. C.T.R. 289, at 295-6 (where the respondent argued that the claimant had fraudulently acquired his United States nationality by giving a wrong date of birth in his petition for naturalization).

69 See pages 20-22 above.

70 26 IRAN-U.S. C.T.R. 44.

71 *Ibid*, at 51.

72 § 340 (d) of the INA, 8 U.S.C. § 1451 (d). The section also makes it compulsory for the diplomatic and consular officers of the United States abroad to inform the United States Department of Justice of any such cases, and for the United States attorneys, upon

The Tribunal nevertheless declined to examine the issue. Instead, it simply noted that in response to the challenge, Parvin had in addition to her certificate of naturalization and copies of her United States passports

> submitted a letter from the United States Department of State … which states that 'there is absolutely no evidence that Mrs. Samrad has lost her United States citizenship by performing an act made expatriating by statute … or that her naturalization was cancelled …'[73]

It then stated that this evidence satisfied the Tribunal of the claimant's continuous United States nationality since her naturalization in 1958, and on that basis proceeded to examine her dominant nationality throughout the relevant period which, in the event, was found to be that of Iran.

Here, the Tribunal seems to have interpreted the respondent's argument as a denial of the continued existence of Parvin's United States nationality; as suggesting, in other words, that by committing an expatriating act, she had in fact lost her United States nationality. Hence, the Tribunal's dismissal of the argument on the ground that there was no evidence of the revocation of the claimant's nationality by the United States authorities. Given the fact, however, that the respondent was itself fully aware, in this and in other like Cases, of the absence of any formal cancellation of the nationality in question, this narrow reading of the argument by the Tribunal seems unjustified. In fact, in the Awards issued subsequently and involving the same issue, the more expansive scope of the argument was accurately noted by the Tribunal.

Briefly stated, what was argued by the respondent was that under the laws of the United States, an expatriating act is considered to be as incompatible with the granted naturalization as to require its cancellation by competent United States authorities.[74] The fact that those authorities had not – for whatever reasons, including the lack of knowledge – taken the legally required steps to revoke the nationality was immaterial. What was material was the fact that a State which

affidavit showing good cause therefor, to institute proceedings for the cancellation of the certificate of naturalization.

73 26 IRAN-U.S. C.T.R. 44, at 51.

74 In providing that residence in a foreign country after naturalization will have an expatriating effect, the United States law is not alone. Indeed, the United Nations Convention on the Reduction of Statelessness (1961) provides in its Article 7 (4) that a naturalized person who resides abroad for seven consecutive years may be expatriated unless he expresses his intention to retain his nationality. UN Doc. A/CONF. 9/15, 1961; 989 U.N.T.S. 175, No. 14458. The Convention entered into force on 13 December 1975.

by its own laws considers a nationality as deserving revocation may not, at the same time, consider it as a 'validly' conferred nationality. That State should not at any rate be allowed to assert the 'effectiveness' of the nationality in question at the international level. This international Tribunal must therefore reject such a nationality as being not 'valid', or 'effective', on the international plane.

Such, indeed, was how the argument was understood by the Tribunal in *Bavanati* v. *Iran*,[75] where the claimant had left the United States only one month after his naturalization in February 1974, and resided in Germany on a resident permit until 1983:

> The Respondent emphasizes that Mr. Bavanati left the United States just one month after the date of his naturalization and argues that the Tribunal should therefore not consider the Claimant a United States national. In support of this, Iran invokes [the pertinent provisions of the United States law] and also relies on certain international jurisprudence.[76]

Having correctly noted the respondent's argument – that under the circumstances 'the Tribunal' should not 'consider the claimant a United States national' – the Tribunal surprisingly repeats its response in *Samrad*, namely, that there was no evidence of the cancellation of the claimant's nationality by the United States authorities; a response that fails to address the real argument, whatever its merits:

> The Tribunal is not convinced by the Respondent's argument that the Claimant lost his United States nationality by leaving the United States one month … after his naturalization. The provision of the U.S. Immigration and Nationality Act that is invoked by the Respondent provides that the U.S. Government shall – upon affidavit showing good cause therefor – initiate a procedure in order to revoke the acquired United States nationality of one who takes up permanent residence outside the United States within five years of his or her naturalization … There is no evidence before the Tribunal that the United States Government ever initiated such a procedure against Mr. Bavanati. Moreover, there is ample evidence in the file that the United States … has consistently treated Mr. Bavanati as one of its nationals.[77]

The Tribunal's bypassing the respondent's submission was unfortunate, additionally because this was an appropriate occasion for a current international judicial forum

75 31 IRAN-U.S. C.T.R. 36.

76 *Ibid*, at 38.

77 *Ibid*, at 40-41. The Case was eventually dismissed because of the claimant's failure to establish that his dominant nationality throughout the relevant period was that of the United States.

to shed new light on the extent to which an international tribunal may legitimately review the validity or effectiveness of a domestically conferred jurisdiction. As previously noted, it was held in *Nottebohm*[78] that a nationality granted in the absence of genuine links had no international effect *vis-à-vis* the respondent State, and in *Flegenheimer*[79] that an international tribunal was entitled 'to determine whether, behind the nationality certificate or the acts of naturalization produced, the right to citizenship was regularly acquired'.[80]

Admittedly, in the two Cases just mentioned, the very act of conferring nationality had been challenged. In the Case before the Tribunal, on the other hand, it was not the act of granting nationality, but the retroactive effect of the claimant's conduct on the granted nationality, which was at issue. Still, the Tribunal was required to ascertain, before addressing the issue of the claimant's dominant nationality, the effectiveness of the claimant's two nationalities and, in that context, the possible effect of an expatriating act on one of them. Besides, had the Tribunal considered the issue as relevant, it would have become necessary for the United States, the protecting State, to express itself on the matter; and it would have been interesting to learn whether the United States was, in view of its own law, prepared to support the effectiveness of the claimant's nationality under the circumstances.

The issue was next raised in *Ghaffari (F)*,[81] in which the respondent again contested the 'validity and effectiveness' of the United States nationality of the claimant because of his alleged failure to meet the United States law's requirement of continuous residence throughout the period in which his petition for naturalization was pending and during the five years after his naturalization.[82]

It will be noted that here, the contention rested on two grounds: *that* in the absence of continuous residence throughout the period in which the petition was pending, the nationality had not been validly acquired; and *that* the commission of an expatriating act thereafter had at any rate rendered the nationality ineffective. In the Award issued, however, the Tribunal seems to treat the two separate grounds as one.

78 See pages 92-94 above.

79 See pages 73-75 above.

80 And now see *Soufraki* v. *The United Arab Emirates*, a recent ICSID Case noted on page 75 above, in which the tribunal examined the assertedly Italian nationality of the claimant, and came to the conclusion that, despite the claimant's Italian passports and the certificates of nationality issued to him by the Italian authorities, he had in fact lost his Italian nationality when acquiring his Canadian nationality, and was therefore not entitled to assert a claim against the respondent as an Italian national.

81 31 IRAN-U.S. C.T.R. 60.

82 *Ibid,* at 64.

First, the Tribunal notes the absence of any actions by the United States for the revocation of the claimant's naturalization on the ground of his alleged expatriating act. Citing then its precedents in *Bakhtiari*, *Berookhim*, and *Nemazee* in support, it comes to the conclusion that in the 'absence of manifest grounds to the contrary, the Tribunal will not question the validity or effectiveness of an act of naturalization by a competent national authority'.[83] As noted before,[84] however, what was contended in those three Cases was the irregularity in the acquisition of nationality, and not the effect of an expatriating act thereafter; the latter issue having been before the Tribunal in *Samrad* and *Bavanati*.[85]

Second, the Tribunal cites, amongst others, the *Flegenheimer* Case in support of its further observation that '[a]lthough international tribunals may consider a party's nationality to determine its effectiveness, in the circumstances of this Case, the evidence in the record does not warrant such investigation'.[86] Once again, the issue in *Flegenheimer* was, as noted earlier,[87] whether at the relevant times the claimant 'actually was … vested with the nationality of the United States'; whether his 'right to citizenship was regularly acquired'.[88] And the Italian-United States Conciliation Commission found that, despite an administrative decision by the United States authorities to the contrary, Flegenheimer was not under the United States law a national of the United States at the relevant times; a question therefore of the 'existence' or 'validity', rather than of the 'effectiveness', of the nationality in question.

In fact, a Case more directly on the point was *Medina*,[89] to which reference was made earlier.[90] As with *Ghaffari,* the claimants in *Medina* had failed to meet the residency requirement of the United States law both before and after their naturalization. The Umpire found that the claimants had no standing before the Commission: they had not been residents of the United States for the term of five years, which the law required as a period of probation and proof of a determined and constant intention to become a *bona fide* citizen of the United States. Moreover, having collected their naturalization papers, they had gone back to reside in Costa Rica. Referring to the United States judge who had granted the nationality, the Umpire stated:

83 *Ibid*, at 64-5.
84 See pages 130-131 above.
85 See pages 131-134 above.
86 31 IRAN-U.S. C.T.R. 60, at 65.
87 See pages 73-75 above.
88 14 R.I.A.A. 327, at 338.
89 MOORE, footnote 9 above, 2583.
90 See page 73 above.

> Had [the facts] been presented to [him], he could not have granted the certificate of naturalization; and should the case be legally brought now before [him], he could not hesitate a moment to set aside the certificate.[91]

A very detailed review of the issue was made in *Khosravi*,[92] the last Case on the subject. Mr. Khosravi, a national of Iran by virtue of his birth in 1937 in Iran to an Iranian father, was naturalized a United States citizen in 1970. In 1973, however, he went back to Iran and accepted a position in a large construction company. There, he married an Iranian woman in 1975, and made a down payment in the same year for an apartment to be constructed in Tehran. He left Iran in1979, first for Europe and then for the United States. The respondent invoked the pertinent provision of the United States law on the requirement of five years continuous residence after naturalization.[93] This time, the Tribunal clearly distinguished the different aspects of the respondent's argument and addressed them separately.

First, the 'validity' aspect of the argument:

> The Respondent points out that 'one of the important elements considered by the United States [law] for granting nationality is the intent to permanently reside in the United States'… The Respondent contends that the Claimant's departure from the United States … within the specified five-year period from his naturalization in 1970 showed that he did not in fact have the requisite intent permanently to reside in the United States. According to the Respondent, this means that the 'Claimant's nationality lacks one of its essential elements' and so, even though it has not been annulled, it 'has lost its effect as a *valid* nationality'.[94]

As to this, the Tribunal first recalled its observations in its earlier Cases that the conferral and withdrawal of nationality is the prerogative of States, and that in the absence of manifest ground to the contrary, the Tribunal would not question the validity or effectiveness of an act of naturalization by a competent national authority. With regard to this particular provision of the United States law, however, the Tribunal went on to add that the Respondent's argument was

> based on a misconception of the effect of the United States provision and the role of an international tribunal. While departure from the United States within five years of naturalization is considered a serious matter under the legislation, it is not the

91 MOORE, footnote 9 above, 2583, at 2589.
92 32 IRAN-U.S. C.T.R. 73.
93 The provision is quoted on page 131 above.
94 32 IRAN-U.S. C.T.R. 73, at 84-5. (emphasis added)

> sole consideration set out therein. In addition, for a person's naturalization to be liable to be revoked, the provision requires that it be shown that the individual has taken up permanent residence in the country to which he goes. Moreover, there must be no countervailing evidence. Most importantly, the provision is not self-executing; the United States authorities must in fact act to revoke the nationality.[95]

Noting again that no steps had been taken by the United States authorities to revoke the claimant's nationality, the Tribunal stated that it was 'in no position to itself act on the basis of the legislative provision in question'. It therefore concluded that the provision 'does not establish sufficient grounds for regarding the Claimant's United States nationality as invalid for the purposes of international law'.[96]

This calls for a few observations. The facts that under the provision it had to be shown that the naturalized person took up 'permanent residence' in a foreign country, and that there was no 'countervailing evidence', were no grounds for the rejection of the respondent's argument. These were matters about which the Tribunal was fully briefed in relation to the issue of the claimant's dominant nationality, and on which the Tribunal expressly pronounced itself in that context. Specifically, the claimant had argued that when in 1973 he returned to Iran, 'he intended only to stay [there] for a limited period of time'.[97] But the Tribunal, having made a detailed review of the claimant's conduct after his return to Iran, held that although the claimant had by 1973 established stronger ties with the United States, it was his Iranian nationality that was dominant by 1979.[98] This shows, clearly, that in the Tribunal's view, the claimant had taken up 'permanent residence' in Iran after his return, and that there was no 'countervailing evidence' to such conclusion.

As to the fact that the provision under discussion is not self-executing, this, too, provided no answer to the respondent's argument. Obviously enough, and as the Tribunal itself notes elsewhere in the Award,[99] had the provision been self-executing, or had the authorities acted upon it, the claimant would not have been a dual national in the first place.

More generally, this part of the ruling by the Tribunal is hard to reconcile with the *Medina* Case just noted, in which the Umpire on the basis of this very provision of the United States law refused to recognize the United States national-

95 *Ibid*, at 86.
96 *Ibid.*
97 *Ibid*, at 90.
98 *Ibid*, at 90-91.
99 *Ibid*, at 88, footnote 8.

ity of the claimants because, as he put it, the United States judicial authority who had granted the nationality could not have hesitated a moment to set it aside, had the facts been brought before him.[100] The Tribunal's statement in the quoted passage that the respondent's argument 'is based on a misconception of the effect of the United States provision and the role of an international tribunal' thus seems unwarranted in view of this clear precedent by an international tribunal.

Second, the 'effectiveness' aspect of the argument:

> The Respondent also asserts that the Claimant's departure from the United States shows that the Claimant did not acquire the nationality in good faith 'but merely as a matter of convenience'. This means, the Respondent contends, that the United States nationality of the Claimant cannot be considered *effective* …[101]

With regard to this argument, the Tribunal, in line with its precedents and relying on *Flegenheimer* and *Nottebohm*, recognized the right of an international tribunal to examine the circumstances under which a nationality was granted, and to deny it international effect if the requirements of international law were not met. Turning to the facts of the Case at hand, however, it concluded that the respondent's allegations did not raise sufficient grounds for the Tribunal to deprive the claimant's United States nationality of its international effect. And this because:

> The Claimant had lived in the United States for twelve years prior to his naturalization as a United States citizen, and he remained there for another two years; he had also purchased a house, been employed, married and had a child, in the United States.[102]

That it is for the international tribunal to judge for itself whether the alleged facts are grave enough to merit the deprivation of a given nationality of its international effect, is clear enough. There is, however, a problem with the Tribunal's conclusion on the facts of the Case. What the Tribunal says in effect is that given the circumstances of the Case, the claimant's expatriating act of returning to his country of origin two years after his naturalization is not serious enough to justify the rejection of the international effect of his naturalization. But this is in conflict with the position of the granting State itself, which considers the act grave enough to merit the cancellation of the naturalization.

100 See pages 135-136 above.
101 32 IRAN-U.S. C.T.R. 73, at 85. (emphasis added)
102 *Ibid*, at 87.

It may be thought that the steps taken by the claimant and referred to by the Tribunal – living in the United States for twelve years before and for two years after his naturalization, and his marriage, employment, and purchasing of a house there – all constitute the very 'countervailing evidence' to the absence of which the United States law refers before a naturalization can be revoked. But this cannot be the case, for these are the steps taken by the claimant prior to his return to his country of origin, while the 'countervailing evidence' of which the United States law speaks is evidence belonging to the individual's post-return, establishing that despite his leaving the United States, it was still his intention to permanently reside in the United States. And with regard to such evidence, the Tribunal itself concludes[103] that as from the date of his return to Iran in 1973, the claimant gradually severed his links with the United States in favour of his links with Iran, so much so that by the time his claim arose in 1979, his dominant nationality had become that of Iran. In the Tribunal's view, therefore, there existed no 'countervailing evidence' militating against the applicability of the United States law to the claimant's case.

Third, the 'dominance' aspect of the argument:

> The Respondent also argues that, even if the Claimant's two nationalities are both valid and effective in international law, the United States legislation referred to above is relevant to the question as to which of the Claimant's two nationalities is dominant … Such a person, the Respondent concludes, cannot be regarded as having made a genuine and sincere choice of allegiance to the United States so as to permit his United States nationality to be regarded as *dominant*.[104]

It is to be noted that this was the first and the only Case in which this aspect of the argument was addressed by the Tribunal. In response, the Tribunal repeated its earlier observations that departure from the United States was not the only condition set by the provision, nor was the provision self-executing, and on that basis concluded that the Tribunal was neither bound nor limited by the evidentiary provision of the legislation. To the contrary, the Tribunal's task under international law was to determine the claimant's dominant nationality by assessing 'all the available factual evidence directly concerning the Claimant's behaviour and attachments'. This much, it is suggested, is readily understandable.

What is not readily understandable, however, is the Tribunal's finding immediately thereafter that '[t]he United States legislation relied upon by the Re-

103 See page 137 above.

104 32 IRAN-U.S. C.T.R. 73, at 88. (emphasis added)

spondent simply is not directly relevant to this assessment'.[105] Indeed, the claimant had petitioned for and acquired United States nationality subject to the conditions set by the United States law, including a five-year post-naturalization residence in the United States. He was, or must have been, aware that, as viewed by the laws of the United States, the fulfilment of this residency requirement was a significant indicator of his attachments to his adopted country. The fact that despite the legislation he chose to return to his native country cannot therefore be ignored in assessing his attachments to each of the two countries. In reality, to dismiss the legislation as not being directly relevant[106] is tantamount to holding that the claimant's decision to return to his country of origin in spite of the prohibition was the same as if he had made that decision in the absence of the prohibition.

5.2.2.2 Claims Asserted on Alternative Grounds

It must be noted, however, that the Tribunal's insistence on the formally granted nationality of the claimant State throughout the relevant period has not prevented the Tribunal from entertaining a claim where, despite the apparent absence of the requirement, an alternative ground for asserting the claim has been open to the claimant. This was the case in *Isaiah* v. *Bank Mellat*,[107] decided by Chamber Two on 30 March 1983, that is, a day after the same Chamber's Awards in *Esphahanian* and *Golpira*.

Mr. Isaiah had been naturalized a United States citizen in 1972, but, apparently because his original nationality was that of India and not of Iran, no jurisdictional objection was raised by the respondent on that ground. Nor, surprisingly, was the issue addressed *sua sponte* by the Chamber,[108] which only a day before had upheld the rule of dominant nationality.[109]

Mr. Isaiah conducted business in Iran through an Iranian partner. In 1978, he instructed his partner to pay him his share of the profit for part of that year – U.S. $380´000 – by arranging a bank transfer in the same amount to the account of an Israeli national designated by Mr. Isaiah. This was duly done through a

105 *Ibid.*

106 There is no indication in the Award that the legislation was regarded as being indirectly relevant, either.

107 2 IRAN-U.S. C.T.R. 232.

108 The Tribunal's treatment of the claimants with dual nationality of the United States and a third State is addressed in Chapter Six below.

109 The Chamber was there concerned, of course, with the instances involving the nationalities of both the claimant and the respondent States, but the rule of dominant nationality it endorsed was framed in general terms. See Chapter Six below.

cheque drawn on Chase Manhattan Bank by the International Bank of Iran, the predecessor to the respondent, Bank Mellat. On 2 January 1979, the cheque was presented to Chase Manhattan Bank in New York, but payment was refused for insufficient funds.

The Chamber noted that the claim, as originally presented, was for dishonour of the cheque and, as such, led to an 'obvious and insurmountable problem', calling for the claim's dismissal.[110] This was because the payee was a national of Israel and hence, when the claim for dishonour of the check arose, it was not owned by a United States citizen. In other words, the requirement of continuous nationality of the Claims Settlement Declaration had not been met.

Sometime during the course of the proceedings, however, the claimant had asserted an alternative basis for his claim; that of 'unjust enrichment'. It had been argued by him that the respondent Bank had received the funds in question, of which he was the beneficial owner, in exchange for the cheque. By retaining those funds for its own benefit, the Bank had been unjustly enriched to the detriment of the claimant.

The Chamber found that the claim, as alternatively pleaded, was within the Tribunal's jurisdiction, for it was a claim continuously held by the claimant from the date it arose to the date on which the Declarations were adhered to.[111] The Chamber further upheld the claim on the merits, and awarded the claimant the relief he had requested. It will be noted that the Case, having itself emphasised on the requirement of continuous nationality, may not be regarded as rejecting, though it might be considered by some as by-passing, the said requirement.

5.2.2.3 Nationality in Light of the Claim

Yet another Case with bearing on the subject may now be noted: *Schott* v. *Iran*, decided by Chamber One of the Tribunal in March 1990.[112] The claimant, Robert R. Schott, was not a dual national, but of sole United States nationality. He asserted eight separate claims against Iran for the alleged expropriation of his ownership interests. Of these, one related to his shares in Tehran Beton, a privately

110 2 IRAN-U.S. C.T.R. 232, at 235.

111 But see *Dallal* v. *Iran*, 3 IRAN-U.S. C.T.R. 10, in which the claimant's reliance on unjust enrichment as an alternative basis to his original claim for dishonour of two cheques was rejected on the ground that the alternative ground, first put forward in a post-hearing brief, constituted a late submission. The claim as originally pleaded by the claimant was dismissed on the merits.

112 24 IRAN-U.S. C.T.R. 203.

owned company registered in Iran and allegedly nationalized by the Government of Iran under a law enacted in July 1979.

As admitted by the claimant, these shares were placed in the name of her daughter, Barbara Schott Mostofi. He contended that this was done for the purposes of convenience, and that the shares were assigned to him in May 1981, so as to enable him to pursue this claim together with his other claims asserted before the Tribunal. Mrs. Mostofi, however, was a dual national of Iran and of the United States: she was born in Iran as a United States national, and later acquired Iranian nationality by virtue of her marriage to an Iranian national.

The respondent contended, on the other hand: *that* the shares belonged not to the claimant but to Mrs. Mostofi, in whose name they were registered; *that* Mrs. Mostofi's dominant nationality was Iranian and, for the said reason, the Tribunal lacked jurisdiction over her claim; *that* the asserted assignment was at any rate legally invalid because it was not registered in the company's share registration book as specifically required by Iranian law; and *that* the alleged assignment, even if legally effective, had been admittedly made in May 1981, after the end of the relevant period, and thus did 'not meet the ownership continuity requirement of the Claims Settlement Declaration'.[113] On the merits, the respondent denied that the 1979 Act had in any way affected the shares in question.

The Chamber, having ascertained the United States nationality of the claimant, decided not to address as preliminaries other jurisdictional issues raised by the respondent. Such issues, said the Chamber, could be more appropriately dealt with in connection with the merits of each of the asserted claims.[114] With regard to the merits of the claim just mentioned, the Chamber found that although the Act invoked by the claimant had led to the expropriation of the ownership interests of a major shareholder in Tehran Beton, it had not affected the claimant's ownership rights in the company. Such a finding on the merits, concluded the Chamber, made it unnecessary to examine the issues of the claimant's *locus standi* and the

113 *Ibid*, at 206. In fact, there seems to be some confusion on the part of the respondent with respect to this part of the defence. The defence of lack of continuity may be raised only where what is challenged is the continuous ownership of the claim by a national of the claimant State *throughout the relevant period*. This was the case with respect to the respondent's first defence, namely, that the claim, when it originally arose, was not owned by a United States national. The respondent's alternative defence, however, that the alleged assignment had taken place after the relevant period related not to the absence of continuity, but to the claimant's *lack of standing* to assert a claim on the date of the Algerian Declarations.

114 *Ibid*, at 215.

assignment of shares raised by the respondent. The claim was accordingly dismissed.

Here, then, we have a precedent under which jurisdictional issues, including the requirement of continuous ownership of the claim, were left unexamined because of the claimant's failure to prove his claim on the merits. On purely legal considerations, this course of action, taken by the Tribunal also in many non-dual nationality proceedings, is clearly unwarranted. This is because a judicial forum such as the Tribunal with specifically defined jurisdiction has no authority to examine the merits of a claim until such time as it has first ascertained that the claim comes within the scope of its defined jurisdiction. The practice has been defended, however, on the ground of judicial economy, especially in the instances in which the substance of the claim did not on the face of it look particularly convincing.

But Mr. Schott had another claim in which the requirement of continuous nationally was also at issue; a claim based on the asserted expropriation of his shares in the Iranians' Bank, the predecessor of the later nationalized Bank Tejarat. Here again, some of the shares were, as admitted by Mr. Schott, registered in his daughter's name. He admitted, further, that at the time he purchased the shares, he could not do so in his own name, being as he was a non-Iranian. This was because the foreign ownership of the Iranians' Bank was by law limited to a certain percentage, already exhausted.[115] However, he took no steps to have the shares registered in his own name when a major foreign shareholder sold most of its shares in 1978. He alleged that his daughter's rights to the shares were transferred to him in January 1982.

The grounds on which the defence rested were identical to those invoked by the respondent with respect to the claimant's shares in Tehran Beton, with this additional element that since Mrs. Mostofi was able to originally acquire these shares only in her capacity as an Iranian national, the claim did not qualify as one 'owned continuously' by a United States national for the purposes of the Claims Settlement Declaration.[116]

In the part of the Award dealing with this claim, the Chamber found as facts: *that* the shares in question were registered in Mrs. Mostofi's name; *that* at the time these shares were acquired, the legal limit set for foreign ownership had already been reached; and *that* consequently, the only way in which she was able to purchase the shares was by making use of her Iranian nationality. These facts

115 In further support of this, the respondent produced in evidence a signed statement by Mrs. Mostofi, in which she had undertaken to sell her shares to nationals of Iran if she were to abandon her Iranian nationality.

116 24 IRAN-U.S. C.T.R. 203, at 209.

then led the Chamber to conclude, in law: *that* because of Mrs. Mostofi's reliance on her Iranian nationality, her nationality for the purpose of determining the Tribunal's jurisdiction was, irrespective of her dominant and effective nationality, Iranian; *that*, for the said reason, Mr. Schott was 'estopped from arguing that Mrs. Mostofi's dominant and effective nationality was American'; and finally, *that* because at the time of the nationalization of Bank Tejarat in 1979 the shares were held by Mrs. Mostofi, the requirement of continuous ownership of the claim by a United States national had not been met. This claim, too, was accordingly dismissed.[117]

The Chamber's reference to the rule of 'estoppel' relates to the Full Tribunal's 'caveat' in A/18, and will therefore be discussed in its proper place. What is of interest here is the effect, in the Chamber's view, of the application of the 'caveat' on the requirement of continuous nationality. As noted before, and will be examined more closely later, the Full Tribunal in its Decision in A/18 considered the 'caveat' to be a matter for the merits of a claim. The rules of dominant nationality and continuous ownership of the claim, on the other hand, are both jurisdictional requirements and, as such, must be ascertained before the merits of a claim are examined.

Disregarding, for the sake of clarity, the presence of Mr. Schott in the proceedings – assuming, in other words, that the claim had been asserted by Mrs. Mostofi herself – the Chamber in such a case was required, pursuant to the Decision in A/18, first to ascertain its jurisdiction by examining the status of Mrs. Mostofi's dual and dominant nationality throughout the relevant period. The issue of whether she had acquired the shares in question by making use of her Iranian nationality was then to be examined as part of the substance of the claim, with an affirmative answer leading to the dismissal of the claim on the merits.

What we have in this Chamber Case is, instead, first an enquiry made into the nationality through which the asserted rights had been acquired and, on the basis of a finding that this had been Mrs. Mostofi's Iranian nationality, to the conclusion that the requirement of continuous ownership of the claim had not been made and, hence, to the dismissal of the claim for lack of jurisdiction. The material difference between the rejection of a claim for lack of merits and its rejection for lack of jurisdiction will be readily appreciated: in the former, the claim may not be asserted anywhere else while, in the latter, it may still be pursued before a forum with jurisdiction.

Still, the discussion above is not meant to reflect a critical view of the course of action taken by the Chamber, but merely to draw attention to the difference

117 *Ibid*, at 218.

between the approach made to the issue by the Chamber and the approach suggested by the Full Tribunal in Case A/18. Indeed, any judgement on the subject must await a critical examination in due course of whether the instances covered by the 'caveat' may properly be regarded as issues related to the jurisdiction or the merits of a claim.

5.2.2.4 Nationals or a National?

Article VII (2) of the Claims Settlement Declaration speaks of 'claims owned continuously … by nationals of that state', meaning nationals of Iran or the United States, as the case may be. Does this mean that the claim must remain with the same single national throughout the relevant period? Or that the requirement is still met if the claim is assigned by the original owner to another, provided that both are nationals of the claimant State?

The Tribunal has had no occasion to specifically address this question; there having been no incidence of a change of ownership during the relevant period among nationals of the claimant State. Some of the Tribunal's pronouncements, however, strongly imply that in the Tribunal's view, a change of this nature, either through inheritance or voluntary transfer, does not violate the requirement of continuous ownership.

One such implication is to be found in *Lianosoff* Case, previously noted.[118] There, the claim of a United States national initially held by his allegedly stateless father was rejected for failing to meet the requirement of continuous nationality, not because there had been a change in the claim's ownership, but because at none of the dates suggested for expropriation 'was the claim vested in *a* United States national' and, prior to the acquisition of the claim by the claimant, 'no indication of the existence of any factors throughout this period which would have served to attach the claim in any way to *a* United States national'.[119]

Another statement in support – perhaps more directly on the point, though still an *obiter dictum* – will be found in *Saboonchian* v. *Iran*,[120] where the Tribunal reads the requirement of continuous nationality set in Article VII (2) of the Claims Settlement Declaration as limiting 'the Tribunal's jurisdiction to claims owned continuously by nationals *of the same country* from the date the claim arose to 19 January 1981'.[121]

118 5 IRAN-U.S. C.T.R. 90. See page 118 above.
119 *Ibid*, at 93. (emphases added) See, to the same effect, *Schott*, 24 IRAN-U.S. C.T.R. 203.
120 27 IRAN-U.S. C.T.R. 248. The Case is further discussed on page 149 below.
121 *Ibid*, at 254. (emphasis added)

Such a reading would at any rate be more consistent with the language of Article VII (2), which refers to 'claims owned continuously … by nationals' of the claimant State, and not by 'the claimant'. It would, further, be in harmony with the reason behind the requirement of continuous nationality: to ensure the sufficient interest of the claiming State in the claim at all relevant times. What is relevant, therefore, is the continuity of the nationality of the claim, and not of its original owner.

5.2.2.5 Assumption of the Relevant Period

In a great number of Cases, the Tribunal has heard and issued awards on jurisdictional issues, including the issue of nationality, prior to its consideration of the merits. There have been instances, in such Cases, where the date of the alleged injury was in dispute, or was not clearly specified by the claimant in his earlier pleadings. In all such instances, the Tribunal has proceeded to pronounce itself on the status of the claimant's nationality in the relevant period, without first determining the date of the injury, and hence without a prior determination of the exact duration of the relevant period.[122]

The Tribunal has in all such instances 'assumed' the date of the asserted injury, and hence the duration of the relevant period. This was first done in *Malek*.[123] There, the claimant, an originally Iranian national who was naturalized by the United States on 5 November 1980, contended in his statement of claim that his bank shares and real estate in Iran had been expropriated by the respondent on 28 February 1981. This was a date subsequent to the date of the Algerian Declarations, and thus placed the claim outside the scope of the Tribunal's jurisdiction.

The respondent, on the other hand, argued that even if the claimant's admission with regard to the date of the alleged taking were to be disregarded, any possibly relevant legislative measures against the claimant's bank shares and real property had been taken in June and July 1979, respectively. This, too, put the claim outside the Tribunal's jurisdiction for having occurred prior to the date of the claimant's naturalization.

In an Interlocutory Award issued in June 1988, Chamber Three of the Tribunal noted that in a letter submitted to the Tribunal after the statement of claim, the

122 See *Malek* v. *Iran*, 19 IRAN-U.S. C.T.R. 48, at 54 (Interlocutory Award); *Hemmat* v. *Iran*, 22 IRAN-U.S. C.T.R. 129, at 132 (Interlocutory Award); *Nourafchan* v. *Iran*, 23 IRAN-U.S. C.T.R. 307, at 317 (Interlocutory Award); *Nemazee* v. *Iran*, 25 IRAN-U.S. C.T.R. 153, at 158 (Partial Award); *Etezadi (C)* v. *Iran*, 25 IRAN-U.S. C.T.R. 264, at 268 (Partial Award); and *Monemi* v. *Iran*, 28 IRAN-U.S. C.T.R. 232, at 239-40.

123 19 IRAN-U.S. C.T.R. 48. (Interlocutory Award)

claimant had stated that he wished to 'elaborate' on the date of the alleged expropriation, and that he would in due course establish to the Tribunal's satisfaction that 'the expropriation in question effectively took place between the dates of November 5, 1980 and January 19, 1981';[124] that is to say, between the date of his naturalization as a United States citizen and the date on which the Declarations came into force. The Chamber noted, further, that the respondent's reference to June and July 1979 as possible dates of interference with the claimant's ownership rights had only been made in the respondent's latest submission, on which the claimant had not been given any opportunity to comment.

Under these circumstances, the Chamber decided to join the issue of the date of the asserted injury to the consideration at a later stage of the merits of the Case. It proceeded, however, to examine the status of the claimant's nationality during the relevant period 'on the hypothesis that the claim arose between 5 November 1980 and 19 January 1981',[125] as suggested by the claimant in his letter to the Tribunal. The Chamber added, further, that it reserved its right to revert to this jurisdictional question if the outcome of its later decision so required.

A review of the relevant facts in the claimant's life then led the Chamber to conclude that the United States nationality of the claimant was his dominant nationality 'as soon as it was acquired' on 5 November 1980. Although the claimant had never wholly severed his cultural and sentimental ties with Iran, he was, as a skilled physician, 'a prime example of what has been referred to as the 'brain drain' from original countries to countries able to attract scientists and specialists by the professional opportunities they could offer them'.[126]

The Award on the merits of the Case was issued some four years later, in August 1992.[127] Upon a detailed examination of the parties' allegations and evidence on the date of the alleged injury, the Chamber found that during the limited period 5 November 1980 to 19 January 1981, no measures giving rise to a claim had been taken by the respondent with respect to either the claimant's bank shares or his landed property. The Case was therefore dismissed for lack of jurisdiction.

Another Case with similar facts and identical outcome was *Nourafchan*, discussed earlier.[128] There, too, the dominant nationality of one of the two claimants was held to be his United States nationality as from the very date of his naturalization on 19 September 1980. As a result, he was found to have been of

124 *Ibid*, at 53.
125 *Ibid*, at 54.
126 *Ibid*, at 55.
127 *Malek* v. *Iran*, 28 IRAN-U.S. C.T.R. 246.
128 See pages 127-128 above.

dominant United States nationality – and hence meeting the requirement of continuous nationality – throughout the relevant period, 'on the hypothesis that his claim arose during this period'.[129] On the merits, decided nearly four years after the issuance of the Interlocutory Award, it was found that the claim as asserted arose prior to the claimant's naturalization, and hence was not continuously held by a United States national throughout the relevant period.[130]

The unsatisfactory nature of this practice is well demonstrated by the outcome of the two Cases just mentioned. In each, the Tribunal went through the arduous and time-consuming process of rendering an award on the claimant's dominant nationality during an assumed relevant period, only to come to the conclusion, after years of further litigation, that the relevant period first assumed by the Tribunal was inaccurate; that the claim in fact arose outside the relevant period hypothetically determined by the Tribunal.

It is true of course that the problem here stems from the fact that while continuous nationality is a jurisdictional requirement, the date of the alleged injury – which forms the starting point of the relevant period – belongs to the merits of a claim. It is also true that under its Rules of Procedure, the Tribunal is required in general to express itself on its jurisdiction as a preliminary issue.[131] Still, nothing in these would have prevented the Tribunal – at least in the instances in which the date of the asserted injury was on the face of it questionable, or was capable of being resolved without much effort – to require the parties to brief the Tribunal on this additional point as part of their pleadings on jurisdiction. As for the instances in which the starting point of the relevant period was assumed because of the claimant's failure to clearly specify the date of the injury,[132] a demand by the Tribunal that the date be so specified would have been in line with Article 18 of the Tribunal Rules, under which a statement of claim must contain the claim's particulars, including the facts supporting the claim.[133]

A prior examination of the date of the asserted injury as part of the Tribunal's jurisdictional enquiry – instead of making an assumption in that respect – was in fact made in *Gabay*.[134] This was a Case in which the claimant, a naturalized United States citizen since April 1980, contended that his family's property

129 23 IRAN-U.S. C.T.R. 307, at 313 (Interlocutory Award).

130 29 IRAN-U.S. C.T.R. 295, at 306.

131 Under Article 21 (4) of the Tribunal Rules: 'In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.' Reprinted in 2 IRAN-U.S. C.T.R. 405, at 426.

132 Such as in *Monemi* v. *Iran*, 28 IRAN-U.S. C.T.R. 232, at 239.

133 Reprinted in 2 IRAN-U.S. C.T.R. 405, at 421-3.

134 27 IRAN-U.S. C.T.R. 40.

interests in Iran had been expropriated by the respondent in November of the same year, a contention that was challenged by the respondent. The Tribunal declined to examine the status of the claimant's nationality during an assumed relevant period which, as suggested by the claimant, began in November 1980 and ended on 19 January 1981. Instead, the Tribunal first addressed the suggested date of the alleged injury and, having concluded that no measures had been taken by the respondent against the claimant's interests prior to 19 January 1981, held that there was no need to examine other disputed jurisdictional issues in the Case.[135]

It will have been noticed that in the Case just mentioned, a prior ruling on the date of the alleged injury led to the dismissal of the claim not because the claim failed to meet the requirement of continuous nationality, but because it was not outstanding on 19 January 1981, the date of the Algerian Declarations. In *Saboonchian*,[136] however, such a prior ruling resulted in the rejection of the claim, as alternatively pleaded by the claimant, for failing to satisfy the continuous nationality requirement.

This was a claim by an Iranian national at birth who had acquired United States nationality in 1960. It was his claim that the respondent had in 1975 expropriated without compensation a farmland in Iran originally owned by his father – of sole Iranian nationality – and partly passed to him in 1979 by way of inheritance. The Tribunal first issued an Order in which it noted that the claimant was 'apparently' a national of Iran and the United States during the relevant period, but postponed any 'definitive conclusions' on this and on all other jurisdictional issues, including the issue of continuous nationality, to the consideration of the merits of the Case.[137]

In the Award issued, the Tribunal found that the claimant's father had no ownership interests in the property but, at most, a claim to challenge the legality of certain administrative decisions that had denied him such ownership back in 1975; a possible claim which the claimant's father did not pursue up to his death in 1979. The claim was therefore dismissed for the claimant's lack of ownership interests in the property. But the claimant had invited the Tribunal, alternatively, to hear and determine the claim itself, meaning, the claim to obtain title to the farm originally owned by his father and inherited by him. Here, the Tribunal noted the lack of continuity of the claim's ownership by a United States national, it having been owned from the time it arose in 1975 to 1979 by the claimant's father. On this alternatively pleaded ground, too, the claim was dismissed.

135 *Ibid*, at 47-8.
136 27 IRAN-U.S. C.T.R. 248.
137 *Ibid*, at 249-50.

In these two last-mentioned Cases, then, we have the Tribunal's practice of first turning to and determining issues of merits, when the determination of jurisdictional issues so required. There seems to be no reason why the same course of action should not have been taken in the earlier-mentioned Cases of *Malek* and *Nourafchan*, thereby avoiding years of additional and unnecessary litigation.

5.2.2.6 The Earliest Date

Where the claims have been more than one, and the claimant has suggested different dates for his claims, the Tribunal has invariably extended the relevant period to the date of the earliest claim:

> The Tribunal notes that in this Case there are in fact two different Claims, and that the Claims allegedly arose on different dates … In these circumstances, the Tribunal will assume that the relevant period extends from the earliest date specified by the Claimant …[138]

The same has been the Tribunal's practice where, in a situation just described, the dates of some of the claims have been left unspecified. Here, the Tribunal has additionally assumed that the unspecified dates fall within the relevant period so determined:

> The Tribunal notes that in this Case there are in fact four different Claims and that the dates on which they arose remain partly unspecified by the Claimant … In these circumstances, the Tribunal will assume that the relevant period extends from the earliest date specified by the Claimant … The Tribunal will further assume that the Claims for which the dates remain unspecified arose during that period.[139]

The practice has been evidently mandated by practical and judicial economy considerations, for it would no doubt have been difficult and time-consuming for the Tribunal first to determine, in respect of a single claimant, as many relevant periods as his asserted claims, and then examine the claimant's status with regard to each relevant period. On purely legal considerations, however, the practice is hard to justify. This is because under the express terms of the Claims Settlement

138 *Bakhtiari* v. *Iran*, 25 IRAN-U.S. C.T.R. 289, at 295.

139 *Etezadi (C)* v. *Iran*, 25 IRAN-U.S. C.T.R. 264, at 268 (Partial Award). See further: *Nazari* v. *Iran*, 26 IRAN-U.S. C.T.R. 7, 12 (Interlocutory Award); *Malekzadeh* v. *Iran*, 29 IRAN-U.S. C.T.R. 3, at 10 (Partial Award).

Declaration, the relevant period for each claim extends from the date on which *that* claim arose to the date on which the Declarations were adhered to.

Thus, for instance, where a claimant asserts two different claims, the first arising in 1975 and the second in 1979, there is no legal justification for rejecting his second claim on the basis of his failure to prove his dominant nationality of the claimant State as of 1975, the starting point of the relevant period with respect to the first claim. With regard to the second claim, he is required to prove his dominant nationality of the claimant State as of 1979 only. It must be admitted, however, that the existence of a very large gap between the dates of one's different claims is a remote possibility. The Tribunal, at any rate, has encountered no such situation.

5.2.3 The Span of Time in Which Facts May Be Considered

The relevant period or the relevant time,[140] throughout or at which the claimant's dominant nationality must be established, should not be confused with the span of time in which the claimant's factual connections with his States of nationality may be considered in order to determine his dominant nationality during the relevant period or at the relevant time. The Tribunal's jurisprudence on the first issue having been reviewed, its approach to the second issue may now be examined.

While the Algerian Declarations define the relevant period as 'from the date on which the claim arose to the date on which this Agreement enters into force', they do not, because of their silence on dual nationality, address the issue of the stretch of time during which a dual national claimant's relevant connections with his countries of nationality may be taken into account.

The Award in *Esphahanian* speaks of the quest for the claimant's 'more effective factual connections' with the United States 'in the period preceding, contemporaneous with and following his naturalization as a United States citizen'.[141] In this, as noted before,[142] the Award wrongly concentrates on naturalization as the material time and, further, confuses the relevant period with the span of time during which the claimant's status may be considered. Still, and

140 The enquiry may relate to a single material event, such as the event of naturalization in *Nottebohm*, rather than to a material period, such as the relevant period set by the Declarations.

141 2 IRAN-U.S. C.T.R. 157, at 166.

142 See pages 119-121 above.

putting these problems aside, we have the formulation of 'the period preceding, contemporaneous with and following' the material time.

The Full Tribunal in its Decision in A/18 does not specifically address the issue of the span of time, as against the relevant period. All it says in this regard is that '[i]n determining the dominant and effective nationality, the Tribunal will consider all relevant factors …'[143] In *Mahmoud*, however, the two different issues are for the first time distinguished. The search for the stronger factual ties, says the Award, requires the Tribunal to

> examine the Claimant's contacts with the United States and her contacts with Iran during the *period preceding, contemporaneous with and following the date the claim arose* in order to determine which connection predominated *during the relevant period*.[144]

This is then more clearly explained in *Malek*, where the Tribunal, referring to the relevant period, states:

> Although this period of time is crucial for the determination of the Tribunal's jurisdiction, it is not the only one to be considered in order to determine if the United States (or Iranian as the case may be) nationality of a Claimant is his 'dominant and effective' nationality at the relevant time. Obviously, to establish what is the dominant and effective nationality at the date the claim arose, it is necessary to scrutinize the events in the Claimant's life preceding this date. Indeed, the entire life of the Claimant, from birth, and all other factors which, during this span of time, evidence the reality and sincerity of the choice of national allegiance he claims to have made, are relevant.[145]

There must, therefore, be a determination of the claimant's dominant nationality throughout – at any given moment of – the relevant period, but no more. Such a determination, however, cannot be made – certainly not with regard to the starting point of the relevant period – without considering the 'preceding' facts. Still, the aim in such consideration, it must be emphasised, is not to determine the claimant's dominant nationality in the span of time 'preceding', but to shed light on the claimant's status throughout, that period.

The same is true with regard to the facts 'following' the relevant period, which facts may be considered, not for determining the claimant's status after the relevant

143 5 IRAN-U.S. C.T.R. 251, at 265.
144 9 IRAN-U.S. C.T.R. 350, at 353. (emphases supplied)
145 19 IRAN-U.S. C.T.R. 48, at 51.

period, but again exclusively for the purpose of a more accurate assessment of the claimant's status throughout that period. Where, for instance, a dual national acquires a dwelling house in the claimant country during the relevant period, this may be regarded as the manifestation of a desire on his part to take up residence in that country. Where, however, he sells the house shortly after the relevant period, his intention during the relevant period to reside in the claimant country cannot be so readily assumed.

In fact, the above seems to be consistent with the judgment in *Nottebohm* as well; a judgment from where the reference in *Esphahanian* to the facts 'following' the material time is borrowed.[146] This is because in there, too, the Court focuses on 'the time of … naturalization', when it comes to formulate the issue before it:

> At the time of his naturalization does Nottebohm appear to have been more closely attached by his tradition, his establishment, his interests, his activities, his family ties, his intentions for the near future to Liechtenstein than to any other State?[147]

In fact, the formulation of the issue in *Esphahanian*, referring as it does to the determination of the claimant's status in the period 'following' the material time, constitutes an anomaly in the Tribunal's precedents. In all other Cases, the adopted formulations either make no reference to the facts 'following' the relevant period or, in a very few instances in which they do, they make it clear that such facts may be considered exclusively for the purpose of determining the claimant's status during the relevant period. An example of the latter type is *Samrad*:

> While each Claimant's standing is dependent upon his or her dominant and effective nationality during the period between the date the claim arose and 19 January 1981, events preceding and following that period remain relevant to determining the Claimant's dominant and effective nationality during the period.[148]

Indeed, in that very Case the Tribunal concluded with respect to one of the claimants that her dominant nationality had sometime after the relevant period

146 See page 119 above.

147 ICJ Reports (1955), 4, at 24. It is worth noting, as does professor Brownlie, that although Nottebohm was not at the time of his principal losses in the period 1943-51 of effective Liechtenstein nationality, he arguably was so at the commencement of the proceedings in 1955, having by then resided in Liechtenstein for nine years. And yet this did not help him, even though '[a]s a question of principle it is surely consonant with the doctrine of effective link to permit curing by subsequent changes'. BROWNLIE, footnote 5 above, at 401.

148 26 IRAN-U.S. C.T.R. 44, at 52.

become that of the United States, but dismissed the claim nevertheless, on the ground that her dominant nationality during the relevant period remained that of Iran:

> It is apparent that [the claimant] did eventually become integrated in American society, as is shown by her civic and economic activities in the 1980s. However, the evidence does not establish that [the claimant] initially settled in the United States with the intention of abandoning her ties with Iran and becoming integrated in American society. The Tribunal concludes that [the claimant] has failed to prove that her dominant and effective nationality when her claim arose … was that of the United States.[149]

Now failure to distinguish between the two wholly different concepts of the relevant period and the span of time during which the claimant's life may be looked at has led one observer to argue that, by interpreting the Decision in A/18 as giving a licence to look at the claimant's entire life, the Tribunal's Chambers have 'revised' the time period set by the A/18 Decision.[150] He finds this 'problematic', particularly in relation to the consideration of the facts belonging to *after* the relevant period:

> The Claims Settlement Declaration does *not* require that a claim have been owned by an American or Iranian *after* January 1981. So, to the extent that the Tribunal, for the purposes of the dominant and effective nationality inquiry, looks at the claimant's life after the Claims Settlement Declaration, this would appear not to be warranted by the text of the Declaration itself.[151]

As seen above, however, the Chambers have by no means tried to 'revise' the time frame of the relevant period, as originally set by the Declarations in relation to claimants with single nationality, and subsequently affirmed by the A/18 Decision in relation to claimants with dual nationality. If they have referred to

149 *Ibid*, at 54.

150 David. J. Bederman, *Nationality of Individual Claimants Before the Iran-United States Claims Tribunal*, 42 Int'l & Comp. L. Q. (1993), 119, at 127-8.

151 *Ibid*, at 128. The writer repeats this argument in a later work, where he concludes that 'the Tribunal's examination of a claimant's entire life (in preference to the much more narrow time-frame of the 'relevant period' in A/18), although justified in those rare instances where it is impossible to know precisely when a claim accrued, does work an injustice in other circumstances'. *Eligible Claimants Before the Iran-United States Claims Tribunal*, in R. B. Lillich and D. B. Magraw (eds.), THE IRAN- UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY, Irvington on Hudson (NY): Transnational, 1998, 47, at 80.

factors outside the relevant period, this has been for the sole purpose of determining the claimant's status during that period.

It remains to be said that the Tribunal's consistent practice of considering the post-relevant period status of a dual national claimant merely for the purpose of shedding light on his status during the relevant period, has had immense practical consequences. Since all such claimants, or nearly all of them, had settled in the United States after the relevant period, the choice of a contrary rule by the Tribunal would have obviously led to the affirmation of jurisdiction in many of the instances in which jurisdiction was in the event denied.

5.3 A Summary of this Chapter

The rule of continuous nationality is well established in international law. It requires the ownership of the claim by a national of the claimant State from the date on which the wrong is assertedly committed to the date on which the claim is diplomatically presented, or is submitted for determination to a judicial forum, or is judicially resolved. This duration is often referred to as the 'relevant period'.

It is equally well established that the parties to a treaty are free to stipulate in their agreement the exact extent of the relevant period, or to dispense with it altogether. The parties to the Algerian Declarations have adopted the rule, and they have defined it in terms of uninterrupted ownership of the claim by a national of the claimant State from the date of the asserted injury to the date of the Declarations.

In its Decision in A/18, the Full Tribunal concluded that in respect of a dual national, the term 'national' as used in the Declarations meant a 'dominant national' of the claimant State. Based on this interpretation of the text, a dual national claimant was required to prove, in order to bring his claim within the Tribunal's jurisdiction, that his dominant nationality was that of the claimant State throughout the relevant period. Clearly enough, proof of the dominant nationality of the claimant State throughout the relevant period requires the prior proof of the nationality of the claimant State throughout that period.

Though the formulations of the issue by the Tribunal, and especially the one by Chamber Two in *Esphahanian*, are imperfect, the Tribunal has strictly observed the requirement. Indeed, the Tribunal has expressly spoken of a distinction between continuous nationality as a general requirement of law, in which case there might be room for some degree of flexibility in its application, and continuous nationality stipulated in the agreement from which the forum derives its jurisdiction, in which case it must be rigidly applied.

One noticeable feature of the Tribunal's practice, itself a result of the strict application of the rule, has been the determinant role given to formal conferment of nationality. This has had two results. On the one hand, the Tribunal has consistently rejected the argument that strong factual connections should be regarded as tantamount to formally conferred nationality. On the other, and despite reserving its authority to do so, the Tribunal has invariably declined to examine either the circumstances under which a challenged nationality was formally conferred, or the effect of a national's expatriating conduct on the validity, effectiveness, or dominance of his nationality. In doing so, the Tribunal has, in practice at any rate, shown a disinclination to follow the contrary jurisprudence of other international tribunals.

Another noticeable feature has been the Tribunal's practice of 'assuming' a starting point for the relevant period, in cases in which jurisdictional issues were decided at a preliminary stage, and the issue of the time of injury had not been fully briefed by that stage. In such instances, the Tribunal has pronounced itself on the status of the claimant's nationality throughout a 'hypothetical' relevant period, reserving its right to revert to the subject at the merits stage. This has in certain cases led to some unsatisfactory results.

Finally, the Tribunal has distinguished, as it should have, the two separate issues of (i) the relevant period, and (ii) the span of time within which the pertinent facts in the life of a claimant could be taken into account. With the exception of one or two anomalous formulations, the Tribunal has made it clear that the facts preceding or following the relevant period may be considered solely for the purpose of shedding light on the claimant's status throughout the relevant period. The limitation thus put on the relevance of facts belonging to post-relevant period has had significant consequences for many of the claimants before the Tribunal.

6

THE CRITERIA OF DOMINANCE

The Award in *Esphahanian* makes no reference, in the section dealing with the legal issues, to the criteria relevant to the determination of a claimant's dominant nationality. Relying on a passage in *Nottebohm,* it simply speaks of dominant nationality 'based on stronger factual ties between the person concerned and one of the States whose nationality is involved'.[1] However, some such criteria are by implication identified in the section of the Award dealing with the application of the law to the facts of the Case.

The Decision in A/18, on the other hand, does refer to such criteria, but in a very general term: '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 attachments.'[2] This generality is understandable. *First*, because the parties were prior to the Decision exclusively concerned with the main subject of responsibility, they had not found it particularly timely to brief the Tribunal on the secondary issue of relevant factors. *Second*, and as noted earlier, this was not, unlike *Esphahanian*, a concrete Case. The Tribunal could therefore leave it to the Chambers to identify the relevant factors, and to assess their importance in any given instance, when they came to deal with individual Cases.

The practice of the Chambers on this issue forms the subject matter of the present Chapter. But before that, this seems to be as good a place as any to note briefly two categories of Cases in relation to which the Tribunal has not addressed the criteria of dominance: the first, because of the inapplicability of the rule of dominant nationality; and the second, because of the absence of any concrete example.

1 2 IRAN-U.S. C.T.R. 157, at 163 & 167.

2 5 IRAN-U.S. C.T.R. 251, at 265.

6.1 Juridical Persons

Under customary international law, where a shareholder asserts that his own legal rights have been affected by the respondent's act – such as where he claims that his shares in a corporation have been expropriated, or that he has been denied dividends – his claim is regarded as a personal one and, as such, subject to the normal rules of espousal.[3] The same is the case under the Declarations, according to which claims may be asserted for 'expropriations or other measures affecting property rights'.[4]

In fact, the Declarations go further. They allow the assertion of a personal claim by a shareholder where he 'indirectly' owns the claim 'through ownership of capital stock or other proprietary interests' in a juridical person, provided that: (i) the collective ownership interests of the nationals of the claimant State were sufficient at the time the claim arose to control the juridical person; and (ii) the juridical person was not itself entitled to assert the claim under the Declarations.[5] Clearly enough, in all such cases in which a personal claim, whether direct or indirect, is asserted, the nationality of the claimant State or, in the case of a dual national, the dominant nationality of the claimant State must be proved.

Where, on the other hand, an entity with a separate legal personality is harmed,[6] the claim belongs to the entity itself[7] and, that being the case, the question of the entity's 'nationality' for the purpose of exercising diplomatic protection arises. Though international law does not offer a clear answer, Brownlie concludes, provisionally, that '[i]n general the evidence supports a doctrine that some substantial and effective connection between the legal entity and the claimant state is required'. He notes, however, that 'there is no certainty as to the criteria for determining such connection'.[8]

Some such criteria commonly employed in practice and jurisprudence are: place of incorporation, control, domicile, seat (*siège social*), and substantial beneficial interests owned by nationals of the claiming State. But in *Barcelona Traction* (Second Phase), the International Court specifically rejected the argument that 'in the particular field of the diplomatic protection of corporate entities' there

3 *Barcelona Traction* (Second Phase), ICJ Reports (1970), 3, at 36.

4 Article II (1) of the Claims Settlement Declaration, referred to on page 7 above.

5 Article VII (2) of the Claims Settlement Declaration, quoted on page 9, footnote 23, above.

6 In this case, too, the shareholder is indirectly affected, but through his *interest* and not through his *rights*. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 6th Ed., Oxford: Oxford University Press, 2003, at 469.

7 *Barcelona Traction* (Second Phase), ICJ Reports (1970), 3.

8 BROWNLIE, footnote 6 above, at 464.

existed 'an absolute test' of the 'genuine connection', such that was applied in *Nottebohm* in relation to the naturalization of an individual. The tests applicable in respect to corporate entities, the Court said, were 'of a relative nature', requiring sometimes that links with one State be weighed against those with another.[9]

For our purposes, however, the issue need not be pursued further. This is because in line with many other settlement agreements,[10] the Algerian Declarations have themselves defined nationality in terms covering juridical entities, and have identified the requirements that such entities must meet in order to qualify as nationals. As noted earlier,[11] these requirements are two. *First*, the creation of the entity under the laws of the claimant State, and *second*, the holding, directly or indirectly, of an interest in the entity equivalent to fifty per cent or more of its capital stock by natural persons who are citizens of the claimant State.

It will be readily appreciated that the presence of these two requirements, one relating to the status of the entity and the other to the status of its shareholders, eliminate the possibility of a dual national juridical person qualifying as a claimant under the Declarations. For that reason, the Tribunal has not been presented with any claim involving a dual national entity, and hence has had no reason to address the criteria of dominance in that respect.

6.2 Dual Nationals of the Claimant State and a Third State

The second category of Cases in relation to which the criteria of dominance have not been dealt with by the Tribunal, though this time for a different reason, has been the one involving dual nationals of the claimant State and a State other than the respondent State. Before this is explained, and by way of introduction, a short reference to the treatment of the subject in international law must be made.

Leaving aside some very early and unclear precedents, the Case of *Salem*,[12] decided in 1932 by an *ad hoc* arbitral tribunal established pursuant to a special agreement between Egypt and the United States, provides a useful opening. George J. Salem was born in Egypt in 1883. He went to the United States in 1903, and was naturalized there in 1908. A year later he returned to Egypt with an American passport and, with the exception of several journeys to the United States, resided and worked there for long thereafter.

9 ICJ Reports (1970), 3, at 42.

10 As to which see, R.B. Lillich, *The Jurisprudence of the Foreign Compensation Commission: Eligible Claimants*, 13 Int'l & Comp. L. Q. (1964), 899, at 908-11.

11 See page 9 above.

12 *Salem* Case (*Egypt* v. *U.S.*), II R.I.A.A. 1165.

In 1913, Salem was mixed up in a criminal process in Egypt. In reply to an enquiry by the Egyptian authorities who had doubted Salem's American nationality, the United States Diplomatic Agent in Cairo replied that because of his protracted residence in Egypt and his inability to rebut the presumption of expatriation, Salem was no longer registered with the Agency as an American citizen, and thus no longer entitled to the United States diplomatic protection. However, in a visit to the United States in the same year, Salem managed to procure a new American passport, valid for one year. But when in 1916 and in relation to another criminal proceedings his United States nationality was again doubted, the Agent repeated the views he had earlier expressed.

In 1919, Salem was accused by Egypt's General Prosecutor of having forged a document of sale. In the same year, and despite the pending criminal proceedings, he obtained an Egyptian passport on which he visited the United States, and was there granted a new American passport. The criminal proceedings lasted until 1921, when a local criminal court of appeal finally declared that it lacked jurisdiction. The court did so on the basis of a formal communication by the United States Agent who now certified that George Salem was an American citizen entitled to full protection of the United States, and that such had been his status without interruption since his naturalization in 1908.[13]

Salem then asserted before the Mixed Courts[14] a claim against the Egyptian government for damages he had assertedly suffered because of the forgery proceedings and the retention of his documents in the process. The claim was finally rejected by the Mixed Court of Appeal in 1926, which found that the appeal lodged by Salem was admissible in law but devoid of any factual basis. The United States then took up and presented the claim through diplomatic channels, the failure of which led to an arbitration agreement between the two governments signed in 1931.

The tribunal's detailed award stands for three main and clearly stated propositions. *First*, that the tribunal was entitled to examine the existence and the validity of Salem's challenged American nationality, and the conformity of its

13 As later noted by the arbitral tribunal, the Agent's certificate failed to show when or under what conditions Salem regained his American citizenship. *Ibid*, at 1199.

14 These Mixed Courts had been established pursuant to an agreement between Egypt and the 'capitulatory powers' for the purpose of hearing claims of foreigners in Egypt. The arbitral tribunal found that the Courts exercised international jurisdiction, as a substitute for diplomatic channels. For exceptional reasons, however, the arbitral tribunal decided to examine the merits of Salem's claim without taking into consideration the Courts' decisions. *Ibid*, at 1191-4.

bestowal with general principles of international law.[15] Such was the case, said the tribunal, even though the parties to the arbitration agreement had created the tribunal specifically to examine the claim of the United States against Egypt 'arising out of treatment accorded George J. Salem *an American citizen* …'[16]

Second, that in the instances in which dual nationality is involved, and the two nationalities are those of the claimant and the respondent States, the applicable rule is the rule of non-responsibility:

> 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.[17]

Third – and this is in relation to the issue here under discussion – that in the instances involving dual nationalities of the claimant State and a third State, the respondent State may not challenge the claim by invoking the nationality of the third State,

> the rule of international law being that in a case of dual nationality a third power is not entitled to contest the claim of one of the two powers whose national is interested in the case by referring to the nationality of the other power.[18]

As to the facts of the Case, the arbitral tribunal found that despite certain 'grounds of suspicion', Salem had validly acquired and continued to hold his United States nationality,[19] and that notwithstanding his repeated representations to the contrary, he was not an Egyptian but, by virtue of his father's nationality, a Persian subject at the time of his naturalization by the United States.[20] These led the arbitral tribunal to examine the substance of the claim, on the basis of which the Case was finally dismissed.

15 *Ibid*, at 1180-86. As we have seen, this proposition was later confirmed in the *Flegenheimer* Case. See pages 73-75 above.

16 Paragraph 1 of the agreement (emphasis added). The agreement is reprinted in II R.I.A.A. at 1163-4.

17 *Ibid*, at 1187. Interestingly, this was a proceeding in which the respondent State (Egypt) had invoked the rule of dominant nationality, while the claimant State (the United State) had challenged the rule, arguing that '[i]f double nationality should be admitted, the principle of effective nationality cannot be acknowledged.' *Ibid*, at 1179.

18 *Ibid*, at 1188. (reference omitted)

19 *Ibid*, at 1184-6.

20 *Ibid*, at 1187-8.

Another Case of possible relevance is *Nottebohm*. It is of 'possible relevance' because there is no direct reference in the judgment to the subject here in mind. Brownlie, however, suggests that the principles endorsed by the Court 'extend logically' to the situations involving the nationality of a third State. He also notes the fact that the Court in its formulations refers in general terms to 'the courts of third States'.[21] These are compelling considerations, though it may be suggested, with regard to the second point, that the formulation more relevant to the issue is perhaps the one referring, in equally general terms, to the decisions of international arbitrators: 'International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection…'[22] Such, at any rate, is the view of the dissenting members in A/18 who, as noted earlier, argue that the Court in this passage refers exclusively to the instances involving the nationalities of the claimant and a third State.[23]

Next, there is the *Mergé* Case, in which the applicability of the rule of dominant nationality in the instances involving the nationality of a third country was unequivocally rejected. As previously noted, one of the rules established in that Case by the Italian-United States Conciliation Commission for the application by the Commission in later proceedings stated that 'United States nationals who did not possess Italian nationality but the nationality of a third State' qualified as 'United States nationals' under the Treaty, 'even if their prevalent nationality was the nationality of the third State'.[24]

This ruling in *Salem* and in *Mergé* was later confirmed in *Flegenheimer*. It will be recalled that this was a Case in which the Italian-United States Conciliation Commission found that Albert Flegenheimer, on whose behalf the claim had been asserted by the United States, was not in fact a United States national, and on that ground rejected the claim as inadmissible.[25] Having so dispensed with the claim, however, the Commission went on to investigate, in the 'interest of an exhaustive analysis'[26] of the claim, a number of legal issues raised by the parties, the United States and Italy.

Two such issues were the 'theory of effective nationality', and whether or not it had a place in the instances involving the nationality of a third State. Italy had argued that Flegenheimer was not an American national, and that, even if

21 BROWNLIE, footnote 6 above, at 391.
22 The passage is fully quoted on page 95 above.
23 See pages 95-96 above.
24 14 R.I.A.A. (1955), 236, at 247.
25 See pages 73-75 above.
26 14 R.I.A.A. (1958), 327, at 375.

he were to be considered as such, his American nationality was nominal and ineffective, due to his long and close association with Germany.[27] The United States, on the other hand, had argued that Flegenheimer was in fact an American national, and that once this was established, Italy as a third State was not entitled to challenge the effectiveness of this nationality.

As to the first, the Commission concluded that the scope of the application of the 'theory of effective or active nationality' was restricted to cases of dual nationality, and had not been extended to instances of single nationality by the decision of the International Court in *Nottebohm*. There was, said the Commission, no rule of general international law requiring the existence of effective link as a condition for the exercise of diplomatic protection.[28] As to the second, the Commission held that even within the limited area of dual nationality cases, the theory could not be invoked by a third State whose nationality was not involved.[29]

In short, then, there is the *Salem* Case, which rejects the application of the rule of dominant nationality in the instances involving the nationalities of the claimant State and a third State. In coming to this conclusion, *Salem* is consistent, for it also rejects the application of the rule of link in situations involving the nationalities of both the claimant and the respondent States. No such consistency, however, in *Mergé*; a Case which strongly supports the rule of link in the instances involving the nationality of the respondent State, but finds it inapplicable in the instances involving the nationality of a third State. No consistency, either, in *Flegenheimer*; a Case which dismisses the rule of link in the instances of single nationality, finds it applicable in the instances of dual nationality involving the nationality of the respondent State, and rejects it in cases in which the nationalities of the claimant and a third States are at issue. Still, the fact remains that all three are united in holding that in a dual nationality proceeding not involving the nationality of the respondent State, there is no room for the application of the rule of dominant nationality, or indeed of the rule of non-responsibility. In other

27 *Ibid.*

28 *Ibid*, at 376. See page 96 above.

29 *Ibid*, at 377. Very recently, this second argument was invoked in an ICSID litigation, but the tribunal found no occasion to express itself on the issue. In *Soufraki* v. *The United Arab Emirates*, cited at page 75, footnote 90 above, the respondent contended primarily that the claimant was not a national of Italy, but a sole national of Canada, and was therefore not entitled to the protection of a Bilateral Investment Treaty between Italy and the United Arab Emirates. It contended, alternatively, that even if the tribunal were to conclude that the claimant had retained his Italian nationality, the tribunal lacked jurisdiction because the claimant's dominant nationality was his Canadian nationality. As noted earlier, the tribunal upheld the respondent's primary contention and hence found it unnecessary to address its alternative contention.

words, all that must be proved in such a situation is the nationality of the claiming State.[30]

Against this evidence we have the possible approval by the *Nottebohm* Case of the rule of dominance in such a situation and, perhaps more convincingly, the sound argument that once that rule is adopted in the instances involving the nationality of the respondent State, there is no logical reason why it should be rejected in the instances involving the nationality of a third State. With this background in mind, the status of the issue in the Tribunal's jurisprudence may now be examined.

The Decision in A/18 is silent on the issue,[31] once again because the parties to the Case, being preoccupied with a problem of much greater significance, had not addressed the subject in their pleadings, and had therefore not invited the Tribunal to pronounce itself on the issue.[32] A brief reference to the subject, however, will be found in the dissenting opinion of the minority members. This, it will be recalled, is where they suggest that the passage in *Nottebohm* on which the majority members rely in support of the rule of dominant nationality relates to dual nationality cases not involving the nationality of the respondent State. They then state that '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 … and the nationality of a third State'.[33]

30 This is now further supported by Article 5 of the International Law Commission's Draft Articles on Diplomatic Protection: 'Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that individual is not a national.' Report of the International Law Commission, fifty-fourth session (2002), UNGAOR, 57th session, Supp. No. 10, UN Doc. A/57/10). But see Article 4 (b) of the 1965 Warsaw Resolution of the Institute of International law. Annuaire de l'Institut de droit international (1965), Vol. 51-II, 268, at 270-271.

31 And so is the Award in *Esphahanian*.

32 Leading one observer to suggest that the Tribunal's basic Decisions in *Esphahanian* and A/18 'related solely to persons with both Iranian and United States nationality, not to Iranian or American claimants who also had the nationality of a third State'. GEORGE H. ALDRICH, THE JURISPRUDENCE OF THE IRAN-UNITES STATES CLAIMS TRIBUNAL, Oxford: Clarendon Press, 1996, at 56. This is quite true. But in so far as it is relied upon to suggest the irrelevancy of the said Decisions to the latter type of dual nationality claim, it must not be forgotten that both these Decisions heavily relied on the *Nottebohm's* general theory of link, and referred with approval to Article 5 of the 1930 Hague Convention, an Article in which the rule of dominant nationality before the court of a third State was advocated.

33 5 IRAN-U.S. C.T.R., at 323.

The earliest such Case before a Chamber has already been noted:[34] *Isaiah* v. *Iran* decided in March 1983, thus prior to the Decision in A/18, but after the Award in *Esphahanian*. The Award in *Isaiah* refers to the evidence submitted by the claimant 'showing that, while originally a citizen of India, he became a citizen of the United States in 1972'.[35] Surprisingly, however, this possible jurisdictional objection was not raised by the respondent, nor was it addressed by the Chamber *sua sponte*, even though in matters pertaining to its jurisdiction the Tribunal is not restricted to the issues raised by the parties. Because of this silence, it is not even clear whether the claimant had retained his original Indian nationality after his naturalization in 1972, and was thus a dual national at the time of his asserted injury in 1979.

Similarly silent on the issue is *Dallal* v. *Iran*,[36] decided in June 1983, thus again prior to the Decision in A/18. Only a footnote in the dissenting opinion of the minority member refers to the evidence before the Tribunal showing that 'Mr. Dallal is a national of the United States. He was formerly Iraqi and became a naturalized citizen of the United States in 1974'.[37] Apparently, the respondent in its pleadings had referred to the claimant 'as an Iraqi'. This, however, was not to object to the Tribunal's jurisdiction, but to make 'a point as to which nationality was totally irrelevant'. The absence of any jurisdictional objection by the respondent may have been the result of a conviction on its part that the claimant had lost his Iraqi nationality upon his naturalization as a United States citizen, though the reference to the claimant 'as an Iraqi', albeit in a different context, does not lend support to this explanation. At any rate, there is no reference to the subject either in the Award, which rejects the claim on the merits with no reference to jurisdictional points, or in the dissenting opinion.[38]

The first Case coming before a Chamber after the Decision in A/18 and involving the nationality of a third State was *McHarg, Roberts, Wallace & Todd* v. *Iran*, in which two of the claimants, Messrs McHarg and Roberts, were originally British nationals naturalized as United States citizens in 1960 and 1967, respectively. The respondent argued that these two had not shown that they had renounced

34 See pages 140-141 above.

35 2 IRAN-U.S. C.T.R. 232, at 235.

36 3 IRAN-U.S. C.T.R. 10.

37 'Dissent of Howard M. Holtzmann', *ibid*, at 23.

38 *Ibid*, at 23. The International Law Commission in its Report on Diplomatic Protection (footnote 30 above) states, citing *Dallal* in support, that the inapplicability of the rule of dominant nationality to Cases involving the nationality of a third State 'has more recently been upheld by the Iran-United States Claims Tribunal'. This is inaccurate, there being, as just noted, no discussion of the issue in that Case.

their British nationality, nor had they established that, if they were dual nationals, their 'dominant nationality in terms of all the relevant factors … was their U.S. nationality…'[39] The Tribunal was brief on the issue. It simply said that, on the basis of the 'evidence and explanations' presented at the Hearing, it was satisfied that if these two had 'dual citizenship, as to which there is no evidence, their dominant nationality would be American, *See generally Case No. A/18 …*'[40]

Next, there was *Saghi* v. *Iran*, decided in January 1987.[41] As previously noted,[42] this was a claim by a father (James M. Saghi) and his two sons (Michael R. Saghi and Allan J. Saghi), asserting that their interests in certain Iranian corporations had been expropriated by the respondent. All three had contended that they were 'United States nationals and only United States nationals'.[43] The respondent, on the other hand, had argued that all three were Iranian nationals under the laws of Iran.

In an Interlocutory Award which exclusively dealt with the issue of the claimants' nationalities, the Tribunal found that the father, James, had never been a national of Iran, but a national of Iraq at birth who had subsequently acquired United States nationality through naturalization. It further found that Michael was at birth and thereafter of sole United States nationality, while Allan, who was also a United States national at birth, had subsequently applied for and acquired Iranian nationality by virtue of his birth in Iran to non-Iranian nationals.

Having thus identified Allan as the only one amongst the claimants with dual nationality of Iran and the United States, the Interlocutory Award proceeded to determine his dominant nationality at the relevant times, and concluded that this was his United States nationality. The consideration of all the remaining jurisdictional issues and of the merits of the Case was then reserved for a later stage. Once again, therefore, no discussion in the Award of the issue of dual nationality

39 *McHarg, Roberts, Wallace & Todd* v. *Iran*, 13 IRAN-U.S. C.T.R. 286, at 289.

40 *Ibid*, at 300. This has led the International Law Commission's Special Rapporteur on Diplomatic Protection to suggest that in the instances involving the nationality of a third State, the Tribunal has required less strict evidence of the dominant nationality of the claiming State. See his First Report to the Commission, A/CN.4/506 (2000), at 56.

41 One observer of the Tribunal's jurisprudence has inaccurately identified *Saghi* as the first Case in which the Tribunal faced the issue of dual nationality involving the nationality of a third State. ALDRICH, footnote 32 above, at 56.

42 See pages 52-53 above.

43 14 IRAN-U.S. C.T.R. 3. (Interlocutory Award)

of a third State in relation to James, and no evidence of any jurisdictional objection on that ground by the respondent.[44]

Next was the Case of *Panacaviar, S.A.* v. *Iran*, in which Panacaviar and its sole shareholder, one Mr. Paul Donin de Rosiere, sought compensation for the alleged breach of a contract by the respondent.[45] Mr. de Rosiere's nationality having been questioned by the respondent, the Tribunal issued an Order in which it observed that the claimant had by his own admission acquired his United States nationality through naturalization. This, said the Tribunal, meant that he

> must prove not only his naturalization, but also his dominant and effective nationality in accordance with the holding of Case A-18 … While the dispositif in that Case relates only to persons having both the United States and Iranian nationality, it appears that the reasoning of Case A-18 may apply equally to persons having the United States nationality and that of any other State. At the same time, the requirement to prove dominant nationality does not apply to all claimants who are United States nationals by virtue of naturalization, but only to those who also retain the nationality of another State.[46]

Mr. de Rosiere was accordingly ordered to submit to the Tribunal his brief and evidence on whether he was a dual national and, if so, whether his dominant nationality was that of the United States. He was also instructed to brief the Tribunal on the applicability of the rule of dominant nationality to claimants whose dual nationality did not include Iranian nationality. The Tribunal's initial inclination in the above-quoted passage to apply the rule of dominant nationality to instances of third State nationality will have been noticed. The Case, however, was later withdrawn by the parties and terminated by the Tribunal,[47] divesting the Tribunal of the opportunity to pronounce itself on the subject more definitively.

An even stronger indication on the part of the Tribunal that proof of dominant nationality is also required in the instances involving the nationality of a third State will be found in the next Case on the subject. This was *Uiterwyk Corp.* v.

44 See also *Daley* v. *Iran* (a small claim), 18 IRAN-U.S. C.T.R 232 (no discussion of dominant nationality in respect of a husband and wife claimants who established their United States nationality and asserted that they had renounced their previous British citizenship upon naturalization as American citizens).

45 The procedural history and some of the facts of the Case are given in an Interim Award issued by the Tribunal in response to a request for interim measures of protection by the respondent. 13 IRAN-U.S. C.T.R. 193.

46 Order of 24 February 1986, issued by Chamber One of the Tribunal. (not reprinted)

47 Order of 14 September 1987, reprinted in 18 IRAN-U.S. C.T.R. 63.

Iran,[48] in which the United States nationality of the stockholders of Uiterwyk Corp., five individual members of the Uiterwyk family,[49] had been disputed by the respondent. In its Award issued in July 1988, the Tribunal first noted that the individuals concerned were all born in the Netherlands, and all acquired United States nationality through naturalization. It then stated:

> The oath of allegiance taken on assuming United States citizenship includes an express renunciation of any former citizenship. Further, the affidavit of a Dutch attorney indicates that under the law of The Netherlands, any pre-existing Dutch citizenship would be relinquished upon such naturalization. The Tribunal therefore finds that the requirements of proving dominant and effective United States nationality, as enunciated in Decision … A18 … do not apply to any of the five individual Claimants.[50]

Here, the Tribunal seems to be invoking two independent grounds for not considering the claimants as dual nationals: the renunciatory effect of the oath of allegiance, and the mandate of the Dutch law. The fact is, however, that the claimants did not lose their Dutch nationality because of the first, but only because of the combination of the two. This is evidenced by the Tribunal's practice of consistently recognizing the dual nationality status of native Iranians who were later naturalized as citizens of the United States. Clearly, they too had taken the oath of allegiance in assuming their United States citizenship. Still, there is a clear indication in this Award that, had the individuals concerned retained their Dutch nationality, 'the requirements of proving dominant and effective United States nationality, as enunciated in Decision … A18' would have had to be met.

Equally clear statements to that effect were made in *Asghar*. There, the claimant, who sought compensation for the respondent's alleged failure to transfer his deposits abroad, had stated that he 'was born in Pakistan and became a naturalized United States citizen in 1966'.[51] The respondent, on the other hand, had argued, *first*, that Mr. Asghar was a national of Pakistan who had opened his savings accounts by presenting his Pakistani passport and identity card, and *secondly*, that even if his United States nationality were to be established, he was 'subject to the rules of dual nationality and, taking into account his reliance on his Pakistani nationality, his dominant nationality [was] Pakistani'.[52]

48 19 IRAN-U.S. C.T.R. 107.
49 These members had also appeared as individual claimants in the Case.
50 19 IRAN-U.S. C.T.R. 107, at 118.
51 24 IRAN-U.S. C.T.R. 238, at 239.
52 *Ibid*, at 240-1.

The Award, issued in March 1990, stated that the 'Tribunal first has to determine whether Asghar was at the crucial dates … a national of the United States, or, of both the United States and Pakistan'. Having examined the facts of the Case, the Award held that there was no evidence that Mr. Asghar had retained his Pakistani nationality after his naturalization. No evidence either that he had opened his savings accounts with any document other than his United States passport. Thus:

> Since it has been satisfactorily proved that Asghar possessed United States nationality since 1966, and there is no proof that since that time he retained his Pakistani nationality, there is no need for the Tribunal to determine, for purposes of its jurisdiction, the dominant and effective nationality of Asghar at the relevant time in accordance with the findings in Case No. A18 …[53]

Once again, we have in this precedent a clear suggestion by the Tribunal that, had the claimant retained his Pakistani nationality, he would have been required to establish the dominance of his United States nationality throughout the relevant period. The same was the position adopted by the respondent State in its pleadings, and there is no evidence to suggest that the claimant State was of a different view.

This was the last of the Cases on the subject, meaning that before the Tribunal there has been no concrete case of the application of the rule of dominant nationality to a claimant possessing the nationalities of the claimant States and a third States. This absence was unfortunate, for otherwise it would have been particularly interesting to observe the Tribunal's application of the criteria of dominance, discussed in the next sub-section, in relation to two nationalities neither of which was that of the respondent State.[54]

The present review of the claims of dual nationals of the claimant State and a third State may now be briefly concluded. The weight of evidence in international case law seems to be against the application of the rule of dominant nationality in such instances, suggesting instead that the mere proof of the nationality of the claimant State would suffice. As for the Tribunal's jurisprudence, there

53 *Ibid*, at 242.

54 Some have indeed questioned the workability of such an exercise. To them, 'the dominant and effective nationality test only really works, in an evidentiary sense, when the two opposing nationalities are those of the States party to arbitration. How else can claim of real attachment to one or the other country be effectively tested and rebutted?' David J. Bederman, *Eligible Claimants Before the Iran-United States Claims Tribunal*, in R.B. Lillich and D.B. Magraw (eds.), THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY, Irvington on Hudson (NY): Transnational, 1998, 47, at 64.

is first an initial period during which the issue seems not to have been focused upon either by the respondent State or by the Tribunal. This is later changed, with the respondent State arguing, and the Tribunal giving strong indications, that in such instances, too, the claimant must establish that his dominant nationality throughout the relevant period was that of the claiming State. The Tribunal, however, has had no occasion to apply the rule in practice.[55]

6.3 The Criteria of Dominance

It is to be noted at the outset that the determination of the criteria of 'link' or 'attachment' may become relevant in different contexts. One such context, as we have seen, is where the effectiveness of a given nationality at the international level is examined. Another is where adequate connection for attaching a stateless person to a country is discussed.[56] Yet another is where the determination of a dual national's dominant nationality is at issue.

Now, although the criteria employed in these contexts may be very similar, they are not always the same and, at any rate, are looked at from different perspectives. With regard to the second of the above-mentioned contexts, for instance, the International Law Commission has discussed the issue whether, in the case of an individual who does not acquire any nationality at birth, the place of birth would provide a sufficient link, or else there must be proof of other additional grounds of attachment.[57] Clearly, issues of this nature are not directly relevant to the present discussion which, as its title suggests, is restricted to the identification of criteria pertinent to the determination of a dual national's dominant nationality. With this in mind, the treatment of the issue by the Tribunal will now be addressed. First, a few factors which have received special attention in the Tribunal's case law will be reviewed, followed by a review of factors with general relevance.

55 In view of the absence of any concrete application of the rule in the Tribunal's practice, the suggestion by Mr. Bederman, *ibid*, at 80, that the Tribunal has, by requiring proof of dominant United States nationality over the nationality of a third State, erected some unnecessary roadblocks in some individual claims, is factually inaccurate.

56 This was a subject discussed by the International Law Commission at its fifth session in relation to its draft Convention on the Elimination, and the Reduction, of Future Statelessness. Yearbook of International Law Commission (1953), Vol. I, 170.

57 *Ibid*, at 185 *et seq*.

6.3.1 Criteria of Especial Relevance

It will be recalled that the Decision in A/18 directs the Chambers to consider, when they come to determine the dominant nationality of a claimant, 'all relevant factors, including habitual residence, center of interests, family ties, participation in public life and other evidence of attachments.'[58] The all-inclusive feature of this formulation is in fact shared by almost all other formulations suggested by the proponents of the rule of dominant nationality. A typical example of this is the reference in *Nottebohm* to the practice of international arbitrators in determining an individual's dominant nationality:

> 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.[59]

6.3.1.1 Habitual Residence

It will be noted, however, that although all-inclusive, both formulations give a prominent place to 'habitual residence':[60] *Nottebohm* expressly speaks of its importance, and the A/18 Decision refers to it as the first of the pertinent factors. This is understandable, for residence is an important element not only because it normally reflects a deliberate choice, but also because it often entails many of the other relevant factors, including employment, participation in public life, education of children, and the like. It is perhaps for this reason that not only in international case law, but also in international conventions and academic writings,

58 See page 157 above.

59 ICJ Reports (1955), 4, at 22.

60 It will be noted that the formulation uses the term 'habitual residence' rather than 'domicile'. Domicile (an originally Roman law concept adopted by the Anglo-American jurisprudence) refers to the fact of residence plus an intention to settle (*animus manendi*). See, Nygh, *The Reception of Domicile into English Private International Law*, Tasmanian U. L. Rev. (1961), 555. Thus, one may have more than one residence, but only one domicile. Black's Law Dictionary, 5th Ed. (1979), at 435. Habitual residence is said to be 'something more than regular residence'. See David J. Bederman, footnote 54 above, at 72-3 and the references given there. Mr. Bederman states that: 'The Tribunal might even be credited with preferring an 'international' term of art, as opposed to adopting a legal concept used (almost exclusively) by one of the States party to the arbitration'.

residence is invariably suggested, by those who endorse the rule of dominance, as a significant factor for the determination of dominant nationality.

In the case law, reliance on residence dates back, as previously noted, to the *Drummond* Case, commonly regarded as the first decision in support of the rule of dominance.[61] Indeed, the emphasis on residence in the early decisions has led some commentators to suggest that under those decisions residence was regarded as the determining, or the only relevant, factor.[62] Closer to our time and in addition to *Nottebohm*, reference to residence as an important element will be found in *Mergé*.[63] There is, however, the *Flegenheimer* Case, in which it is stated that '[t]here does not in fact exist any criterion of proven effectiveness for disclosing the effectiveness of a bond with a political collectivity …'[64] But as the Case itself makes it clear, this relates to instances of single nationality only.

Codified sources of international law have similarly given a special place to this factor. It will be recalled, for instance, that Article 5 of the Hague Convention refers, albeit in relation to the determination of a person's dominant nationality within a third State, to the nationality of the country in which he is 'habitually and principally resident', or else is 'most closely connected'.[65] The European Convention on Nationality (1997), too, provides, with respect to military obligations, that persons with multiple nationality of the member States shall, in the absence of any special agreement, 'be subject to military obligations in relation to the State Party in whose territory they are habitually resident'.[66]

Finally, reference may be made to a Report on Multiple Nationality submitted for discussion to the International Law Commission. There, the Special Rapporteur Córdova characterizes multiple nationality as 'an evil and a constant source of friction between States and quite often a hardship to the individuals themselves'.[67] The logical remedy, he says, is to deprive a person with two or more nationalities

61 See pages 89-91 above.

62 See page 90 above.

63 'In order to establish the prevalence of the United States nationality in individual cases, habitual residence can be one of the criteria of evaluation, but not the only one. The conduct of the individual in his economic, social, political, civic and family life, as well as the closer and more effective bond with one of the two States must also be considered.' 14 R.I.A.A. (1955), 236, at 247. The residence link is also referred to in many of the guidelines set by the Case.

64 14 R.I.A.A. (1958), 327, at 377.

65 See page 39 above.

66 Europ. T.S. No. 166; 37 ILM 44 (1998). See also references to 'habitual residence' in various provisions of the United Nations Convention on the Reduction of Statelessness (1961), UN Doc. A/CONF. 9/15, 1961; 989 U.N.T.S. 175, No. 14458.

67 Yearbook of International Law Commission (1954), Vol. II, 42, at 48.

of all but his 'effective nationality'.[68] Effective nationality of a person, he then proposes, must be made primarily on the basis of his 'residence' and, only where this factor does not apply, on the basis of other relevant factors.[69]

Turning now to the treatment of this factor by the Tribunal, it is not surprising, in view especially of the guidelines in the A/18 Decision, to find that in almost every Case in which the Tribunal has set to determine a claimant's dominant nationality, it has considered the status of his residence as a relevant factor. A review of these Cases, however, reveals two special features.

First, the Tribunal has consistently examined the status of a claimant's residence throughout his or her life up to the beginning of the relevant period. In doing so, it has rejected the suggestion that the enquiry should be extended into the relevant period as well:

> The Tribunal's most glaring error … is the manner it treats – or, more accurately, fails to treat – the period from September 1979 to 19 January 1981 that, under the Full Tribunal's decision in Case No. A18, is crucial for the purpose of determining dominant and effective nationality. Throughout that period, and starting well before it, [the claimant] and her husband made their home in California, where they had previously lived when first married.[70]

The suggestion has, legally speaking, some merit. Indeed, references in international law sources to residence are ordinarily to the claimant's residence at the material time; and the material time under the Declarations is of course the relevant period. It is also clear that where the claimant's dominant nationality at the starting point of the relevant period is established, the status of his residence during the relevant period must be looked at for the purpose of ensuring the continuation of his dominant nationality throughout that period. But save such a case, the reliance by the Tribunal on the element of residence during the relevant period would, in the circumstances of the claims before the Tribunal, have unduly disturbed the balance in favour of the claimants.

68 *Ibid*, at 49.

69 *Ibid*, at 50. These points in the Report are supported by a 'Survey of the Problem of Multiple Nationality', prepared by the Secretariat of the United Nations and annexed to the Report. *Ibid*, at 52-111. The Survey contains extensive references to the literature on the points addressed by the Rapporteur.

70 'Dissenting Opinion of Richard C. Allison' in *Perry-Rohani* v. *Iran*, 22 IRAN-U.S. C.T.R., at 201-2. (Reference omitted)

This is because these were individuals who almost all resided in the United States throughout the relevant period.[71] They did so either because of a choice they made earlier or, more often, because of the revolutionary events at that time. The Tribunal's refusal to give weight to residence in the claimant country during the relevant period is therefore quite understandable. What is not so understandable is the position adopted by the Tribunal in a few Cases in which during the relevant period the claimant resided in a third country. In these instances, the Tribunal specifically stated that it considered such a residence as a factor operating against the dominance of the United States nationality of the claimant.[72]

Similarly rejected in the Tribunal's practice has been the suggestion that the residence factor, just like any other pertinent factor, should be taken into account as from the date on which the claimant acquired his second nationality, and not before that. The reason for this, the argument goes, is that the acts done by a person with his earlier sole nationality cannot possibly be relevant to his later acquired second nationality:

> I believe that from a legal point of view, the Tribunal is not at liberty to treat those acts that the Claimant took exclusively under his Iranian nationality … as acts which would prove the dominance of his future United States nationality. In other words, until the very moment that he actually acquired and gained his second nationality, the Claimant was acting solely as an Iranian national …[73]

But whatever the merits of this argument, it is at odds with the early formulation of the issue by the Full Tribunal in A/18, as later expanded in *Malek*. That formulation, as we have seen, calls for the examination of the pertinent events in the claimant's life from birth.[74] It is an argument, at any rate, which has been clearly rejected in the Cases in which the dominance of the claimant's adopted nationality has been upheld as from the very date of naturalization. Here is one such example:

71 The Dissenting Opinion in *Esphahanian* suggests (2 IRAN-U.S. C.T.R., at 214-5) that in the Venezuelan arbitrations in the early twentieth century, the domicile link served as a convenient means of upholding the rule of non-responsibility because the claimants there were often residents of the respondent State at the material time. If so, the situation there was the opposite of the situation before the Tribunal.

72 *Abboud* v. *Iran*, 24 IRAN-U.S. C.T.R. 265, at 268; *Bavanati* v. *Iran*, 31 IRAN-U.S. C.T.R. 36, at 42.

73 'Dissenting Opinion of Judge Parviz Ansari', 22 IRAN-U.S. C.T.R., at 166.

74 See page 152 above.

> The Tribunal thus concludes that the Claimant's years of residence in the United States prior to her naturalization so integrated her into American society that her dominant and effective nationality was that of the United States upon her naturalization on 15 February 1980.[75]

Second, the Tribunal has in its practice considered residence not as a factor with a determinant effect of its own, but rather as a factor capable of affecting the claimant's overall attachment to his or her other nationality.[76] The Case of *Nemazee* provides an example of this. There, one of the two claimants, Luz Belen, was a national of the United States by virtue of her birth in 1921 in Puerto Rico, and a national of Iran by virtue of her marriage in 1944 to an Iranian national. In 1946, the couple left the United States for Hong Kong, and a year later they moved to Tehran, where they lived for the next thirty-two years. The couple departed Iran in 1979 and relocated in the United States. It was her claim that her property in Iran had been expropriated by the respondent in January 1980. Addressing the issue of her dominant nationality, the Tribunal said that the facts in the Case

> raise the question whether it is probable that a person who has lived in a state for over thirty years … still could retain the dominant nationality of another state. While the person may not have become emotionally attached to the new country merely because she has resided there for a long time, such prolonged residence may have the effect of alienating the person from her roots. The issue before the Tribunal is whether or not Luz Belen Nemazee has resisted this effect sufficiently to preserve the dominance of her original United States nationality.[77]

The point was also made clear in *Ladjevardi*. There, the claimant had adduced evidence establishing her residence in the United States in the period between her departure from Iran in 1978 and the date of her claim in 1979. The Tribunal

75 *Hemmat* v. *Iran*, 22 IRAN-U.S. C.T.R. 129, at 134.

76 See to the same effect: *Ebrahimi* v. *Iran*, in which one of the claimants, a United States national by birth, had married an Iranian husband in Iran and continued to reside there for some time. It was nevertheless held that her residence in Iran after the marriage, considered in the context of her whole life, had not adversely affected her dominant United States nationality. 22 IRAN-U.S. C.T.R. 138, at 144 -45.

77 25 IRAN-U.S. C.T.R. 153, at 158. In the event, the Tribunal found that although the issue was a close one, the claimant's exposure to Iranian influences during her long residence in Iran had, by the time of her departure in 1979, resulted in the dominance of her Iranian nationality over her earlier dominant United States nationality, so much so that her full reintegration into American society required more time than the few months she resided in the United States between her arrival there and the time her claim allegedly arose. *Ibid*, at 159-60.

stated, however, that such evidence 'relates principally to the fact of her residence in the United States, but does not include proof of her lifestyle or community activities'.[78] In other words, it is the result brought about by residence – lifestyle or community activities – and not the fact of residence, with which the Tribunal is primarily concerned. It will be noted that this approach to the residence factor is quite different from the one made in, for instance, the *Mergé* Case where, in some circumstances identified by the Commission, residence is given a weight of its own:

> With respect to cases of dual nationality involving American women married to Italian nationals, the United States nationality shall be prevalent in cases in which the family has had habitual residence in the United States and the interests and the permanent professional life of the head of the family were established in the United States.[79]

With the above-mentioned two features in mind, the Tribunal's general treatment of this factor may now be summarily stated. As noted before, the Tribunal has in its case law almost invariably referred to the status of the claimant's residence when determining his dominant nationality.[80] With regard to its assessment approach, the Tribunal has very often first noted the length of the claimant's residence in each of his two countries of nationality, prior to the relevant period and irrespective of his nationality at the time. It has then proceeded to examine whether residence, not in isolation but always in combination with other pertinent factors, has resulted in the claimant's integration into one or the other of his countries of nationality. Here is a typical example:

> [B]etween 1945 [the date of the claimant's birth] and 1981 [the date of the Declaration] Joan Ward Malekzadeh resided twenty-four years in the United States and about eleven years in Iran. In light of the above, the pertinent issue in this Case is to determine whether the other evidence concerning Joan Ward Malekzadeh's life outweighs the fact that she lived twice as long in the United States as in Iran.[81]

78 29 IRAN-U.S. C.T.R. 367, at 381.

79 14 R.I.A.A. (1955), 236, at 247.

80 See, *e.g.*, *Riahi* v. *Iran*, 28 IRAN-U.S. C.T.R. 176, at 186; *Karubian* v. *Iran*, 32 IRAN-U.S. C.T.R. 3, at 26; *Khosravi* v. *Iran*, 32 IRAN-U.S. C.T.R. 73, at 89; *Aryeh (O. & E.)* v. *Iran*, 33 IRAN-U.S. C.T.R. 460, at 466.

81 *Malekzadeh* v. *Iran*, 29 IRAN-U.S. C.T.R. 3, at 11. See, further, *Nazari* v. *Iran*, 26 IRAN-U.S. C.T.R. 7, at 13; *Boroumand* v. *Iran*, 29 IRAN-U.S. C.T.R. 59, at 64; *Ghaffari(F)* v. *Iran*, 31 IRAN-U.S. C.T.R. 60, at 66; *Aryeh (V. , L., & J.)* v. *Iran*, 33 IRAN-U.S. C.T.R. 272, at 305.

6.3.1.2 Naturalization

Another factor that appears to have received consistent attention in the Tribunal's practice is naturalization. Indeed, the Tribunal in *Mahmoud* states that:

> The fact of voluntary naturalization is one which creates a strong and not easily rebuttable presumption (Cf. Jennings, R., 'General Course on Principles of International Law', *Recueil des Cours*, 121, 1967/II, P. 459).[82]

It must be noted, however, that Jennings in the reference cited by the Tribunal, and Brownlie on which Jennings there relies, are both concerned with a very different proposition, namely, the existence of a presumption in favour of the validity of the juridical act of naturalization:

> If voluntary naturalization … is not to be *conclusive* evidence of nationality … it must be regarded as creating a presumption. Brownlie puts the reasons for such a presumption clearly and convincingly: 'In applying the principle of genuine link, two considerations are relevant. In the first place, there is a presumption of the validity of an act of naturalization since the acts of governments are presumed to be in good faith ...'
>
> This proposition … seems to be unassailable … If the law is to work in practice … the presumption created by a juridical act such as voluntary naturalization must be regarded by any tribunal as a very strong presumption, not easily rebutted.[83]

It will be appreciated that this proposition – made in response to those who argued that the ruling in *Nottebohm* would encourage international tribunals readily to question the validity of naturalizations at the international level – has nothing to do with the weight of naturalization as a criterion of dominance. The Award in *Mahmoud*, in other words, seems simply to confuse the presumption of the validity of the act of naturalization with an assumed presumption of dominance.

Still, the argument remains that naturalization reflects a deliberate choice[84] and as such must have its special place amongst other criteria of dominance. In the Tribunal's case law, the first reference to this will be found in the concurring

82 9 IRAN-U.S. C.T.R. 350, at 355.

83 R.Y. Jennings, 121 *Recueil des cours* (1967-II), 323, at 459-60. (reference omitted)

84 Brownlie (footnote 6 above, at 383) refers to the 'importance' of naturalization because it contains the 'element of deliberate association of individual and state'. But there, too,

opinion of a majority member in A/18. There, as noted before,[85] it is suggested *that* what must be determined is not the dominant nationality of a person in general, but his 'most relevant nationality within a specific context', and *that* such a determination may not be made without considering the 'cause' of dual nationality, namely, whether it is acquired automatically or through the deliberate act of naturalization.[86]

With regard to naturalization obtained in the United States in particular, it has been suggested that two additional facts reinforce its significance.[87] *First*, the fact that in the oath of allegiance which every candidate must take, he expressly pledges allegiance to the United States and renounces all allegiance and fidelity to any other State. By making such a solemn oath, the candidate becomes 'entitled to the presumption that he or she will be faithful to it. Indeed, the United States relies on that presumption when it grants the privileges of citizenship'.[88] *Second*, the fact that every candidate is required by law to fulfil the requirement of long residence in the United States prior to naturalizations. For these reasons, the suggestion goes, the dominance of the United States nationality of a naturalized United States citizen must be recognized on the basis of the very act of naturalization.

These call for some comments. It is true that voluntary naturalization reflects a deliberate choice on the part of the individual concerned, and as such creates a concrete ground for the recognition of the adopted nationality on the international plane. But this is with regard to a person with a single nationality, that is to say, a person who makes a deliberate choice in favour of his adopted nationality and against his original nationality. Not so with regard to a person who retains his original nationality despite his naturalization, for such a case reflects a wholly different deliberate choice, the choice of adopting a new nationality and at the same time retaining the existing one.

Such, of course, has been the status of all naturalized American claimants before the Tribunal. Indeed, they were individuals who retained their original Iranian nationality despite the mandate of Iranian law to the contrary. The task of the Tribunal here, in short, was to determine the dominant nationality of

he is speaking of naturalization as a viable ground for conferment of nationality, and not of its relative strength vis-à-vis other factors pertinent to the determination of dominant nationality. In fact, he does not in his PRINCIPLES address the 'criteria of dominance', though he does briefly discuss the 'criteria of effectiveness' in general and without proposing to compare the relative strengths of those factors. *Ibid*, at 402-4.

85 See page 43 above.

86 'Concurring Opinion of Willem Riphagen', 5 IRAN-U.S. C.T.R., at 274-5.

87 See the 'Separate Opinion of Howard M. Holtzmann', 25 IRAN-U.S. C.T.R., at 203-6.

88 *Ibid*, at 204.

individuals who had made the deliberate choice of: (i) acquiring United States nationality in violation of Iranian law; and (ii) maintaining their allegiance to Iran in violation of the mandate of their oath of allegiance to the United States. Clearly, there is in here no room for a presumption of dominance in favour of one or the other of the two nationalities on the basis of a deliberate choice.[89]

The foregoing equally undermines the argument based on the pledges made in the oath of allegiance. It is argued, as just noted, that a person who solemnly pledges to owe allegiance to the United States and to no other country is entitled to the presumption that he will be faithful to his pledge. And yet, with respect to dual nationals before the Tribunal – indeed, with respect to all naturalized Americans who choose to retain their original nationality – there is no room for such a presumption. This is because the very choice made by these individuals to retain their original nationality demonstrates the absence of any intention on their part to remain faithful to the pledge they made in their oath of allegiance; the pledge to renounce allegiance to any State other than the Unites States. The alternative is to propose that they intended to retain the nationality of their country of origin, but not to owe any allegiance thereto; an unconvincing proposition on the face of it.

As for the argument that naturalization in the United States requires a long period of prior residence – five years in normal circumstances[90] – it must be noted that this fact is already taken into consideration, *first*, in relation to the enquiry made into the effectiveness of the claimant's nationality, and *second*, when the length of the claimant's residence in the United States is contrasted with the length of his residence in Iran. And that being the case, there seems to be no justification for relying on this fact still further, this time as an element reinforcing the significance of naturalization.

At any rate, the Tribunal has in none of its Cases 'presumed' the dominance of a claimant's nationality on the basis of naturalization, requiring the respondent to 'rebut' the presumption; not even in *Mahmoud*, the only Case in which reference to that effect was made. As will be seen shortly, in that Case, too, the Tribunal simply assessed the weight of the claimant's voluntary naturalization in conjunction

89 This is yet another manifestation of the point suggested earlier, namely, that criteria of effectiveness are not necessarily identical with the criteria of dominance. In the context of a naturalized person who renounces his original nationality, naturalization constitutes a criterion of effectiveness because it reflects the expression of a preference. In the context of a person who chooses to retain his original nationality, on the other hand, naturalization does not constitute a criterion of dominance because in reality no preference is thereby expressed.

90 8 U.S.C. § 1427 (a).

with other relevant factors, and on that basis came to the conclusion that the claimant had failed to establish her dominant nationality of the claiming States. It did not, in other words, require the respondent to disprove the dominance of a nationality which the claimant had acquired through naturalization.

One last point with regard to naturalization deserves mentioning. The Tribunal has paid attention to the timing of naturalization. Thus, where the claimant has applied for naturalization soon, or within a reasonable time, after he became entitled to do so, the Tribunal has considered this as a factor indicating an intention on his part to speed up his integration into the community of the adopted country.[91] Conversely, an inordinate delay in seeking naturalization has been regarded as a negative factor. A precedent to that effect is *Mahmoud* in which the Tribunal spoke, as just noted, of the significance of naturalization. The claimant in that Case, however, had 'sought U.S. nationality only after nine years or more of residence in the United States (although the United States law would have permitted her to apply much earlier)'.[92] This led the Tribunal to ask the question: 'How much weight is to be given to the fact of naturalization when the Claimant has waited so long before applying to become naturalized?' The answer, said the Tribunal, was that

> where a party makes a deliberate decision to postpone the acquisition of a nationality and within that same period that party has been able to benefit from another nationality with respect to the property at issue, a benefit that could not have otherwise been enjoyed, the evidentiary burden of proof on that party is higher.[93]

It need not be emphasized that justifications for the inordinate delay may be adduced by the claimant[94] and, even where he fails to do so, the factor may lose its importance in the light of other circumstances. As stated by the Tribunal in *Ghaffari*, a delay for several years in applying for United States citizenship,

91 *George E. Davidson* (*Homayounjah*) v. *Iran,* 34 IRAN-U.S. C.T.R. 3, at 15.

92 She was born in France in 1924 to Iranian parents, married a naturalized United States citizen in Tehran in 1969, moved with her husband to the United States in the same year, and resided in that country thereafter. She was naturalized in the United States in 1979.

93 9 IRAN-U.S. C.T.R. 350, at 355. This second point in the quoted passage, the enjoyment of benefits reserved for the nationals of the respondent State, will be discussed later in this Chapter and, in the context of the 'caveat', in Chapter Seven below.

94 'To be sure, one factor weighing against the Claimant is his delay in applying for United States nationality … However, this delay was credibly explained at the Hearing by the Claimant …' *Mohtadi* v. *Iran*, 32 IRAN-U.S. C.T.R. 124, at 130. See, further, *Malek* v. *Iran*, 19 IRAN-U.S. C.T.R. 48, at 52.

although 'could be important in some circumstances', is 'of limited importance in the context of all the evidence presented in this Case'.[95]

6.3.1.3 Minors as Claimants

In a number of Cases, claims owned by minors were presented to the Tribunal by their parents. This raised the question of whose dominant nationality had to be established, the dominant nationality of the minor or that of his representing parent. One such Case was *Samrad* in which a mother, herself a claimant and a dual national of Iran and the United States, had additionally presented a claim on behalf of her minor daughter, also a dual national of Iran and the United States. She argued that although both she and her daughter were of dominant United States nationality, it was 'her own nationality that should be dispositive for jurisdictional purposes'. Iran, on the other hand, contended that 'the nationality of the beneficiary of the action must control, rather than that of the representative'.[96]

The Tribunal, relying on its decision in *Abboud*,[97] stated that '[i]t has been the practice of the Tribunal to consider the nationality of a minor Claimant rather than the nationality of the parent or a guardian'.[98] This appears to be in conformity with the provisions of the Algerian Declarations, under which proof of the nationality of the *owner* of the claim is a jurisdictional requirement. It has, at any rate, been consistently adhered to by the Tribunal.[99]

The fact, however, that the nationality of the parent or the guardian is legally irrelevant does not mean that it is factually irrelevant as well. Indeed, it is difficult to see how the dominant nationality of a minor can be determined in total disregard of the nationality of his parents. Thus, in *Samrad* itself, where it was found that the minor's father was of sole Iranian nationality and her mother was not of dominant United States nationality, it was stated that although such a finding did not preclude a different decision with regard to the minor, it did 'place a heavy

95 *Ghaffari (F)* v. *Iran*, 31 IRAN-U.S. C.T.R. 60, at 66.
96 26 IRAN-U.S. C.T.R. 44, at 56-7.
97 24 IRAN-U.S. C.T.R. 265, at 268.
98 26 IRAN-U.S. C.T.R. 44, at 56.
99 See, for instance, *Perry-Rohani* v. *Iran*, 22 IRAN-U.S. C.T.R. 194; *Ebrahimi* v. *Iran*, 22 IRAN-U.S. C.T.R. 138; *Monemi* v. *Iran,* 28 IRAN-U.S. C.T.R. 232; *Malekzadeh* v. *Iran*, 29 IRAN-U.S. C.T.R. 3; and *Aryeh (V., L., & J.)* v. *Iran* 33 IRAN-U.S. C.T.R. 272.

burden upon [the minor] to show that her integration in American society was more rapid and more complete than that of her mother'.[100]

In *Sabet*, the respondent Iran took this further. It suggested that the 'child's nationality should follow that of his or her parents, because it is not possible for minors to make their own decision to form close links with any country'.[101] The Tribunal rejected this proposition, making it clear that although the dominant nationality of the parents or guardian is factually relevant to the determination of the dominant nationality of a minor, it 'is by no means dispositive in making this determination'.[102] In fact, there have been occasions on which the Tribunal has concluded that the dominant nationality of a minor claimant was different from that of his parents or guardian.[103]

One final issue must be noted here, namely, whether the criteria of dominance applicable in the case of a minor are the same as those pertinent to the determination of the dominant nationality of an adult. On this, two precedents of the Tribunal seem to have come to different conclusions. In *Samrad*, the Tribunal stated that '[r]ecalling the criteria enunciated in Case No. A/18, it remains necessary for [the minor claimant] to show that her habitual residence and family ties, her center of interests and participation in public life focused upon the United States'.[104] In contrast to that, the Tribunal in *Sabet*, where the issue was more specifically addressed, stated that:

> The criteria set forth in Case A/18 to evaluate the dominant and effective nationality of an individual – habitual residence, center of interests, family ties, participation in public life, and other evidence of attachment – are better-suited to determining an adult's nationality than that of a child. A minor does not possess the level of

100 26 IRAN-U.S. C.T.R. 44, at 56. See also *Perry-Rohani* v. *Iran,* where the Tribunal concluded that the two minor claimants had failed to establish their dominant United States nationality because, *inter alia*, of the Tribunal's finding that their mother, herself a claimant in the Case, was not of dominant United States nationality. 22 IRAN-U.S. C.T.R. 194, at 199.

101 *Sabet (Aram, Karim and Reja)* v. *Iran*, 35 IRAN-U.S. C.T.R. 3, at 10 (Partial Award). See also *ibid*, para. 19, where the Partial Award refers to the submission of the respondent's counsel at the hearing of the Case: '[T]he dominant and effective nationality of minor children cannot be ascertained by examining their own conduct; one must consider other factors, such as the nationality of a child's parents and grandparents …'

102 *Ibid*, at 13-14.

103 See, for example, *Monemi* v. *Iran,* 28 IRAN-U.S. C.T.R. 232, where a mother, herself a claimant in the Case, was found to be of dominant United States nationality, but not her three children, on whose behalf the mother had also asserted claims. See to the same effect, *Malekzadeh* v. *Iran*, 29 IRAN-U.S. C.T.R. 3.

104 26 IRAN-U.S. C.T.R. 44, at 56.

> maturity necessary to determine where he or she wishes to live, let alone to show allegiance to a particular nation.[105]

The Tribunal then went on to stress the relevance in such cases of the intentions that the parents or guardian express for the nationality of the minor children and the arrangements they make in that regard.[106]

Based on the above brief review, the Tribunal's rulings with regard to a claim owned by a minor and submitted on his behalf by his parent or guardian may be summarized. *First*, what must be proved is the dominant nationality of the minor and not that of his parent or guardian. *Second*, the nationality of the parent or guardian, though legally irrelevant, is factually relevant to the determination of the minor's dominant nationality, but it is not dispositive of it. *Third*, the criteria upon which the dominant nationality of a minor may be proved are not identical to those suited to the determination of the dominant nationality of an adult. In the case of a minor, the arrangements made, and the intentions expressed, by the parents or guardian must be taken into account.

6.3.1.4 Issues Pertinent to the Merits

As a general rule, issues contested on the merits are irrelevant to jurisdictional determinations. Thus, a claimant may not argue, for instance, that because his property interests were assertedly expropriated by the respondent government, he no longer had any financial ties to the respondent country. As stated by the Tribunal in *Berookhim*, such an argument, to the extent it relies on the subject matter of the claim, 'remain[s] immaterial as evidence of [the claimant's] dominant and effective nationality. The Tribunal cannot base its jurisdiction on the presumption that the Claimant will eventually prevail on the merits.'[107] Conversely, the respondent government may not rely on the assertedly expropriated property interests as evidence of the claimant's financial links to the respondent country:

105 35 IRAN-U.S. C.T.R. 3, at 13 (Partial Award).

106 *Ibid*, at 14.

107 *Berookhim* v. *Iran*, 25 IRAN-U.S. C.T.R. 278, at 286 (references omitted). But see *Saghi* v. *Iran*, where the Tribunal, in support of its conclusion that one of the claimants was of dominant United States nationality relied *inter alia* on his allegation that 'his property interests in Iran were expropriated, thereby extinguishing his only remaining link with Iran'. 14 IRAN-U.S. C.T.R. 3, at 8. As to this latter view, see also the 'Dissenting Opinion of George H. Aldrich' in *Mahmoud*: '[T]he connection with Iran evidenced by the Claimant's ownership of property in Iran was extinguished by the acts giving rise to the claims.' 9 IRAN-U.S. C.T.R., at 356.

> While the fact that a dual Iran-United States national owns property in Iran or the United States, as the case may be, is generally evidence of attachment to that country, the Tribunal cannot deny the Claimant standing on the ground that she owned the allegedly expropriated property interests in Iran. The Claimant's alleged ownership of those interests forms a part of the merits … and the Tribunal has not yet determined whether those interests, if eventually proved, were expropriated or not. If they were, the Claimant did not necessarily own any property in Iran during the relevant period.[108]

Now, it will be recalled that according to the Full Tribunal in A/18, the issues covered by the caveat belong to the merits of a dispute[109] and, based on the above-quoted passage, must be regarded as irrelevant to the determination of the jurisdictional issue of dominant nationality. Such, indeed, has been the view of the Tribunal expressed in two Cases dealing with the subject.

One is *Riahi*, where the respondent argued that the claimant had acquired the property in question by identifying herself as an Iranian rather than as an American in order to obtain benefits available only to nationals of Iran. The Tribunal, however, declined to consider the argument at that stage of the proceedings. The respondent's argument, said the Tribunal, 'touches the actual merits, and does not relate to the preliminary issue of the Claimant's dominant and effective nationality'.[110] The other is *Malekzadeh*, in which the Tribunal, faced with an identical argument, again stated that the submission formed a part of the merits of the Case and, as such, could not be examined at the jurisdictional stage dealing with the issue of the claimant's dominant nationality.[111]

And yet in two other Cases the Tribunal seems to have adopted a different stance. The first is *Mahmoud*, a Case already considered in other contexts.[112] The claimant, Mrs. Mahmoud, was born in France in 1924 to Iranian parents, and hence of Iranian nationality at birth under Iranian law. She moved to the United States in 1969, and became a United States naturalized citizen in August 1979. She, together with her father, inherited the landed property in dispute from her mother who had died in Tehran in 1970. Between 1975 and 1978, she and her father sold parcels of the land. It was her claim that the remainder was expropri-

108 *Lawrence* v. *Iran*, 25 IRAN-U.S. C.T.R. 190, at 194 -5, citing, *inter alia*, *Case Concerning Certain German Interests in Polish Upper Silesia* (*Germany* v. *Poland*), PCIJ, Series A, No. 6 (1925), 19 (Judgment on Jurisdiction); *Protiva* v. *Iran*, Final Award, 31 IRAN-U.S. C.T.R. 89, at 104.

109 This and other aspects of the caveat will be addressed in Chapter Seven below.

110 28 IRAN-U.S. C.T.R. 176, at 188.

111 29 IRAN-U.S. C.T.R. 3, at 12.

112 See, *e.g.,* page 177 above.

ated in March/April 1980. The respondent denied any interference with the property.

Having established that the claimant was a dual national of Iran and of the United States, the Tribunal proceeded to determine her dominant nationality during the relevant period. There, the Tribunal examined the facts in the claimant's life pertinent to such a determination, including, as noted before,[113] the claimant's late application for naturalization. Turning to the property in question, the Tribunal found that under the provisions of Iranian law applicable to the issue, she was entitled to keep the property for one year from the date of her naturalization in August 1979, which period had not expired by the time of the alleged expropriation in March/April 1980. There was, therefore, no question of her enjoying the property rights in violation of Iranian law. Nor was there any question of a fraudulent use of nationality, as she had acquired the property while she was solely of Iranian nationality.[114]

But then the Tribunal noted that she had postponed the acquisition of her United States nationality, and that 'it was only as an Iranian national that [she] was able to inherit the property in 1970 and to continue to enjoy the benefits as landowner and conduct property transaction which occurred up to the fall of 1978'.[115] These led the Tribunal to place a 'higher evidentiary burden of proof' on her, and to conclude that in the circumstances of the Case, she had 'failed to satisfy the Tribunal that her dominant and effective nationality during relevant periods was that of the United States'.[116]

The Tribunal's interpretation of the pertinent provisions of Iranian law will be examined in the context of the caveat in the next Chapter. Suffice it to note here that the suggestion by the Tribunal that it was only as an Iranian national that she was able to inherit the property is not accurate. This is because no provision of the law of Iran bars a non-Iranian from acquiring landed property in Iran through inheritance. What the law does prohibit is the retention of the inherited property after a specified period. Still, we have in this precedent a clear ruling that where a claimant enjoys, through a given nationality, certain benefits with respect to the subject-matter of the dispute which otherwise could not have been enjoyed, this is a factor relevant to the determination of the claimant's dominant nationality. And this, even where the claimant is legally entitled to enjoy the rights in question through the use of that nationality, and there is no question of a fraudulent use of nationality.

113 See page 180 above.
114 9 IRAN-U.S. C.T.R. 350, at 354.
115 *Ibid.*
116 *Ibid*, at 355.

The second is *Schott*, a Case also previously considered, albeit in the context of the requirement of continuous nationality.[117] It will be recalled that in there, the claimant's daughter (Mrs. Mostofi), who owned the claim for part of the relevant period, had acquired the rights in dispute by making use of her Iranian nationality. Because of that, said the Tribunal,

> Schott is estopped from arguing that Mostofi's dominant and effective nationality was American for the purpose of the Tribunal's jurisdiction over this portion of the claim. Consequently, the Tribunal finds that for the purpose of determining its jurisdiction over this claim, Mostofi's nationality is Iranian.[118]

It must be mentioned that the rulings in these two Cases are not quite the same. In *Mahmoud*, the use of Iranian nationality is taken into account as one of many other factors pertinent to the determination of Mrs. Mahmoud's dominant nationality. In *Schott*, on the other hand, this is regarded as the only pertinent factor, making it unnecessary to examine other facts in Mrs. Mostofi's life. In *Mahmoud*, what is determined is the claimant's dominant nationality in general. In *Schott*, in contrast, it is emphasized that what is determined is Mrs. Mostofi's dominant nationality with respect to the asserted claim only.

Still, they both stand for the proposition, not followed in any other of the Tribunal's Cases, that issues related to the manner of the acquisition or retention of the subject-matter of the claim are pertinent to the determination of a claimant's dominant nationality. Whatever view one may take of this proposition, it seems clear that it does not fit well with the approach adopted in A/18, where the Full Tribunal made a clear distinction between factors pertinent to the determination of one's dominant nationality, on the one hand, and factors related to the acquisition or retention of the rights in dispute, on the other, the latter leading to the application of the 'important caveat'.

6.3.2 Other Criteria

Having so far examined certain criteria of especial significance, other factors of a more common nature on which the Tribunal has relied in its search for a claimant's dominant nationality may now be noted.[119] As a general rule, the Tribunal

117 See pages 141-145 above.

118 24 IRAN-U.S. C.T.R. 203, at 218.

119 For a review of the factors more commonly invoked by the Tribunal, see ALDRICH, footnote 32 above, at 61-75.

has taken into account any factor that in the circumstances of a Case has been found to be indicative of attachment. An exhaustive list of such factors is neither practical, in view of the limited space available, nor likely to be of particular precedential value, given their close association with the facts of each individual Case.

To provide an overview, however, some of the more recurring factors may be mentioned. They are: the claimant's schooling[120] and qualifications;[121] intention to settle;[122] centre of professional life;[123] centre of financial interests;[124] participation in public life;[125] lifestyle;[126] purchase of residential home;[127] integration into society and culture;[128] service in the armed forces;[129] participation in elections;[130] voluntary residence in Iran after the 1979 Revolution and particularly after the seizure of the United States Embassy there;[131] payment of taxes;[132] membership in professional societies;[133] extension, after naturaliza-

120 See, *e.g.*, *Danielpour (M)* v. *Iran*, 22 IRAN-U.S. C.T.R. 118, at 121; *Samrad* v. *Iran*, 26 IRAN-U.S. C.T.R. 44, at 56 and 59; *Sabet (Aram, Karim and Reja)* v. *Iran*, 35 IRAN-U.S. C.T.R. 3, at 14 (Partial Award).

121 See, *e.g.*, *Malek v. Iran,* 19 IRAN-U.S. C.T.R. 48, at 54 ; *Khatami* v. *Iran*, 30 IRAN-U.S. C.T.R. 267, at 274.

122 See, *e.g.*, *Golshani* v. *Iran*, 22 IRAN-U.S. C.T.R. 155, at 159; *Malek v. Iran,* 19 IRAN-U.S. C.T.R. 48, at 54-5.

123 See, *e.g.*, *Golpira* v. *Iran*, 2 IRAN-U.S. C.T.R. 171, at 174; *Hakim* v. *Iran*, 34 IRAN-U.S. C.T.R. 67, at 83.

124 See, *e.g.*, *Esphahanian* v. *Iran*, 2 IRAN-U.S. C.T.R. 157, at 166; *Hemmat* v. *Iran*, 22 IRAN-U.S. C.T.R. 129, at 133.

125 See, *e.g.*, *Berookhim* v. *Iran*, 25 IRAN-U.S. C.T.R. 278, at 286; *Karubian* v. *Iran*, 32 IRAN-U.S. C.T.R. 3, at 26.

126 See, *e.g.*, *Malekzadeh* v. *Iran,* 29 IRAN-U.S. C.T.R. 3, at 8-9; *Aryeh (V., L., & J.)* v. *Iran*, 33 IRAN-U.S. C.T.R. 272, at 305.

127 See, *e.g.*, *Perry-Rohani* v. *Iran*, 22 IRAN-U.S. C.T.R. 194, at 198; *Ghaffari (A)* v. *Iran*, 25 IRAN-U.S. C.T.R. 178, at 184; *Tavakoli* v. *Iran*, 33 IRAN-U.S. C.T.R. 206, at 218.

128 See, *e.g.*, *Khatami* v. *Iran*, 30 IRAN-U.S. C.T.R 267, at 278; *Sobhani* v. *Iran*, 31 IRAN-U.S. C.T.R. 26, at 31.

129 See, *e.g.*, *Esphahanian* v. *Iran*, 2 IRAN-U.S. C.T.R. 157, at 166; *Khatami* v. *Iran*, 30 IRAN-U.S. C.T.R. 267, at 279.

130 See, *e.g., Nemazee* v. *Iran*, 25 IRAN-U.S. C.T.R. 153, at 159; *Riahi* v. *Iran*, 28 IRAN-U.S. C.T.R. 176, at 188.

131 See, *e.g., Sobhani* v. *Iran*, 31 IRAN-U.S. C.T.R. 26, at 32-3; *Khosravi* v. *Iran*, 32 IRAN-U.S. C.T.R. 73, at 89.

132 See, *e.g., Esphahanian* v. *Iran*, 2 IRAN-U.S. C.T.R. 157, at 166; *Golshani* v. *Iran*, 22 IRAN-U.S. C.T.R. 155, at 159.

133 See, *e.g., Nemazee* v. *Iran*, 25 IRAN-U.S. C.T.R. 153, at 161; *Dadras International* v. *Iran*, 31 IRAN-U.S. C.T.R. 127, at 147.

tion, of passport issued by the original country;[134] frequency of visits to a country;[135] use of passport;[136] retention of significant family ties;[137] familiarity with language;[138] nationality of the spouse,[139] children,[140] and other close relatives;[141] and benefiting from student grants or favourable exchange rates.[142] With respect to the application of these tests, two general points deserve attention.

First, it has been suggested with reference to *Sobhani* that the Tribunal places 'greater weight upon what was done than upon what was said or intended by the claimant'.[143] This was a Case in which the claimant had argued that after his return to Iran in 1976, 'he always had the intention of going back ultimately to the United States'. He had, however, 'voluntarily stayed' in Iran until well after the 1979 Revolution. The Tribunal acknowledged that the claimant's contention concerning his intention might well be true, and that the intention of a dual national could have its importance. But it then went on to state that 'the Tribunal places more weight in determining a claimant's dominant and effective nationality on what was done rather than what was said or intended'.[144]

134 See, *e.g.*, *Mohtadi* v. *Iran*, 32 IRAN-U.S. C.T.R. 124, at 130; *Boroumand* v. *Iran*, 29 IRAN-U.S. C.T.R. 59, at 65.

135 See, *e.g.*, *Diba & Gaulin* v. *Iran*, 23 IRAN-U.S. C.T.R. 268, at 273; *Abrahamian* v. *Iran*, 23 IRAN-U.S. C.T.R. 285, at 287.

136 See, *e.g.*, *Saghi* v. *Iran*, 14 IRAN-U.S. C.T.R. 3, at 7; *Boroumand*, v. *Iran*, 29 IRAN-U.S. C.T.R. 59, at 65. However, the Tribunal has declined to attach any importance to the use of Iranian passport by an originally Iranian national naturalized in the United States. It has sated that since Iranian law permits such a person to travel to Iran only once and for the purpose only of selling his landed properties, the use of Iranian passport by such a person to enter and leave Iran is in effect forced upon him. *Esphahanian* v. *Iran*, 2 IRAN-U.S. C.T.R. 157, at 167-8; *Protiva* v. *Iran*, 23 IRAN-U.S. C.T.R. 259, at 263; *Etezadi (C)* v. *Iran*, 25 IRAN-U.S. C.T.R. 264, at 271.

137 See, *e.g.*, *Mahmoud* v. *Iran*, 9 IRAN-U.S. C.T.R. 350, at 354. *Hemmat* v. *Iran*, 22 IRAN-U.S. C.T.R. 129, at 133.

138 In particular, a poor quality of the spoken and written language of the adopted country has been regarded as a negative factor. See, *e.g.*, *Khatami* v. *Iran*, 30 IRAN-U.S. C.T.R. 267, at 278; *Khosravi* v. *Iran*, 32 IRAN-U.S. C.T.R. 73, at 90.

139 See, *e.g.*, *Mahmoud* v. *Iran*, 9 IRAN-U.S. C.T.R. 350, at 353; *Ghaffari (A)* v. *Iran*, 25 IRAN-U.S. C.T.R. 178, at 183.

140 *Aryeh (M)* v. *Iran*, 33 IRAN-U.S. C.T.R. 268, at 373; *Aryeh (O. & E.)* v. *Iran*, 33 IRAN-U.S. C.T.R. 460, at 466.

141 *George E. Davidson (Homayounjah)* v. *Iran*, 34 IRAN-U.S. C.T.R. 3, at 15; *Karubian* v. *Iran*, 32 IRAN-U.S. C.T.R. 3, at 26.

142 See, *e.g.*, *Bavanati* v. *Iran*, 31 IRAN-U.S. C.T.R. 36, at 41.

143 ALDRICH, footnote 32 above, at 68.

144 *Sobhani* v. *Iran*, 31 IRAN-U.S. C.T.R. 26, at 33.

A closer examination of the issue shows, however, that what was there involved was not an 'action' versus 'intention' situation, so as to require the Tribunal to choose one over the other. This is because whatever the claimant's original plan or intention, his stay in Iran was certainly intentional, or, as was put by the Tribunal, 'voluntary'.[145] It was the case, rather, of a person who, despite his original intention, had for reasons of his own decided to stay, and had acted accordingly.

The same is true of yet another Case on the subject, *Ghaffari (F)* v. *Iran*. There, the respondent had argued that when the claimant returned to Iran in 1975, it was his intention to stay there permanently. The Tribunal noted that the claimant had in fact left Iran in 1978, first for Greece and later for the United States. It then went on to hold that because of the primacy of action over intention, the claimant's intention in 1975 was immaterial.[146] Once again, there seems to be no intrinsic incompatibility here between an intention in 1975 to stay in Iran permanently, and a change of mind in 1978. This, too, was the case of a subsequent intentional act to leave Iran, prevailing over an earlier intention to stay. It was not the case of an action in competition with an intention.[147]

Second, in its assessment of the pertinent factors, the Tribunal has always looked at the totality of the evidence in the light of the special circumstances of a Case, rather than assigning a fixed value to an individual factor in isolation. For that reason, a factor regarded as significant in the circumstances of one Case has at times been given little or no weight in the circumstances of another Case.[148]

Thus, for instance, it was held in *Riahi* that the claimant's participation in a rather crucial referendum held in Iran in 1979 to determine the future political system of Iran was not of particular importance in the light of 'the whole context of events at the time and against the other facts of the Case'.[149] And this, despite the fact that voting in less important elections has, as noted before, been regarded by the Tribunal as a relevant factor. Similarly, it was held in *Ghaffari (F)* that the Claimant's inordinate delay in seeking United States naturalization, or his use

145 The claimant had been arrested by the Iranian authorities in September 1980 and detained until February 1981. But this belonged to a period immaterial to the Tribunal's consideration.

146 *Ghaffari (F)* v. *Iran*, 31 IRAN-U.S. C.T.R. 60, at 66.

147 See also *Sabet (Aram, Karim and Reja)* v. *Iran*, 35 IRAN-U.S. C.T.R. 3, at 14-15 (Partial Award).

148 This is in line with *Nottebohm*, where the International Court, referring to the criteria of effectiveness, stated that 'their importance will vary from one case to the next'. ICJ Reports (1955), 4, at 22.

149 28 IRAN-U.S. C.T.R. 176, at 187.

of an Iranian passport when visiting third countries, were, although of some importance in other circumstances, 'of limited importance in the context of all the evidence presented in this Case'.[150]

The fact that the weight of a given factor may vary in different circumstances is also well reflected in *Bakhtiari*. There, the claimant had been naturalized a United States citizen as early as 1945, and had served in the United States Army; two otherwise significant factors in support of his dominant United States nationality. The Tribunal nevertheless found him to be of dominant Iranian nationality, relying *inter alia* on a letter he had written to the former Shah of Iran, representing himself as a subject of the then monarch.[151]

6.3.3 The Burden of Proof

Before offering a few comments on these criteria and their application by the Tribunal, a word must be said about the onus of proof. The burden of establishing the dominant nationality of the claimant State lies with the claimant. This is because the nationality, and hence the dominant nationality, of the claimant State forms an element of the claim and, according to Article 24 (1) of the Tribunal Rules,[152] '[e]ach party shall have the burden of proving the facts relied on to support his claim or defence'.[153] The Tribunal's precedent is in accord, of which *Mahmoud* is a typical example: 'In the light of all the above considerations, the Claimant has failed to satisfy the Tribunal that her dominant and effective nationality during relevant periods was that of the United States.'[154]

150 31 IRAN-U.S. C.T.R. 60, at 66.

151 25 IRAN-U.S. C.T.R. 289, at 297. See also *Khatami* v. *Iran*, where the Tribunal attached particular significance to a 1978 letter written by the claimant to the former Shah, expressing his hope to return and 'kiss the soil of Iran'. 30 IRAN-U.S. C.T.R. 267, at 275.

152 2 IRAN-U.S. C.T.R. 405.

153 This is a reflection of a universally accepted rule: *actori incumbit onus probandi.*

154 9 IRAN-U.S. C.T.R. 350, at 355. See also: *Motamed* v. *Iran*, 21 IRAN-U.S. C.T.R. 28, at 29 ('There can be no doubt that the Claimants bear the burden of proof with respect to their nationality'); *Harounian* v. *Iran*, 23 IRAN-U.S. C.T.R. 282, at 284 ('It was the particular burden of the Claimant to substantiate his claim with supporting evidence of his United States nationality during the relevant period'); *Mohajer-Shojaee* v. *Iran*, 25 IRAN-U.S. C.T.R. 196, at 199 ('The Tribunal notes that under the Tribunal Rules each claimant bears the burden of proof with respect to its nationality'); *Khajetoorians* v. *Iran*, 26 IRAN-U.S. C.T.R. 37, at 43 ('The Tribunal concludes that [the claimants] have failed to prove that their dominant and effective nationality at the time their claims arose was that of the United States'); *Khatami* v. *Iran*, 30 IRAN-U.S. C.T.R. 267, at 280 ('Accordingly, the Tribunal finds, based on all the evidence before it, that the Claimant has not proven

It goes without saying that, as with any other civil litigation, the standard of proof is that of 'preponderance of evidence'. In *Riahi*, however, it was stated that:

> In these circumstances, the Tribunal finds that the evidence concerning the Claimant's attachment to Iran is not such as to outweigh her attachment to the United States. Consequently, the Tribunal determines that during the relevant period the Claimant's dominant and effective nationality was that of the United States.[155]

On the face of it, this may create the impression that, as the Tribunal saw it, the claimant did not have to show that her attachment to the United States outweighed her attachment to Iran, but only that her attachment to Iran did not outweigh her attachment to the United States. A closer examination of the Case reveals, however, that this was not the intention. In fact, the Tribunal in that Case had first concluded that the claimant, a native United States citizen, was exclusively attached to the United States during the first twenty-four years of her life. It had then proceeded to enquire whether the evidence pertaining to her life thereafter in Iran, including her marriage to an Iranian husband, had been such as to outweigh the earlier attachment; to which enquiry a negative answer was given in the above-cited passage. The Case is therefore not an anomaly and requires, in line with the Tribunal's other decisions, that the claimant's stronger ties with the claimant country be established by him.

6.3.4 Some Brief Comments on These Criteria and Their Application

Having reviewed the application of these criteria in the Tribunal's case law, a few brief comments on the subject may now be made. They are four in number.

First, the absence of any doctrinal justification for their application. It is true of course that the viability of these criteria has been hotly debated.[156] In connection with the criteria mentioned in *Nottebohm*, for instance, it has been sug-

that his attachment to the United States during the period in question was dominant over his attachment to Iran.')

155 28 IRAN-U.S. C.T.R. 176, at 188.

156 See, J. Kunz, *The Nottebohm Judgment (Second Phase)*, 54 Am. J. Int'l L. (1960), 536, at 564. See also BROWNLIE (footnote 6 above, at 402-3), who refers to the discussion of the issue by the International Law Commission in relation to its draft Convention on the Elimination, and the Reduction, of Future Statelessness at its fifth session. He concludes that '[i]n general the discussion showed the difficulty of codifying the criteria'.

gested that these are vague and subjective,[157] and as such are difficult to apply.[158] This suggestion has been challenged. It has been pointed out that both the object of the exercise and the tests employed are objective; and that the presence of an element of appreciation in the assessment of 'facts' cannot possibly be a bar to the application of a rule.[159]

It will be noted, however, that the above discussions relate to the viability of applying these criteria in place of the objective test of nationality for the purpose of determining an individual's attachment to a given country; and hence of recognizing his nationality at the international level. In other words, these criteria are there debated as evidence of the effectiveness of a nationality on the international plane. But whatever the outcome of the debate, the question will still remain, in relation to a person with two effective nationalities, whether these are appropriate tests for the determination of his dominant nationality.

That the considerations pertinent to the application of these tests in the context of effective nationality are not the same as those pertinent to their application in the context of dominant nationality stems from one simple but significant reality. In the former, the facts within a given test, and the tests in relation to each other, work alongside each other and in harmony. In the latter, they may well compete with one another. This must be explained.

One of the tests referred to in *Nottebohm* is the test of 'family ties'. Where the purpose is to determine the existence or otherwise of a sufficient link between an individual and a State, the application of this test provides either an affirmative or a negative answer. So does the application of any other relevant test, such as the 'centre of interests', or the 'place of education', and the like. The results obtained will then enable the tribunal to conclude either that a sufficient degree of connection exists, or that it does not. The important point to note here is that the facts pertinent to 'family ties', or the test of 'family ties' in relation to other tests, work in accord.

157 Judge Read in *Nottebohm*, ICJ Reports (1955), 4, at 46. See, further, Judge *ad hoc* Guggenheim who in his dissenting opinion (*ibid*, at 55-6) speaks of the subjective nature of tests such as the 'genuineness of the application', 'loyalty to the new State', 'creation of a centre of economic interests in the new State', and 'the intention to become integrated in the national community'.

158 Leigh states that '[u]ndoubtedly, it might well be difficult to determine with any degree of assurance either the centre of an individual's interests or the degree of attachment shown by him towards a particular country'. He suggests, however, that three of the criteria referred to in the *Nottebohm* judgment, namely, residence, family ties, and participation in public life, 'can be ascertained with relative ease and objectivity'. 20 Int'l & Comp. L. Q. (1971), 453, at 468-9.

159 BROWNLIE, footnote 6 above, at 403.

Not necessarily so where the aim is to determine the dominant nationality of an individual with two effective nationalities. Because both his nationalities are effective, such a person may well have 'family ties' in both his countries of nationality. Here, the application of the test involves an element of competition between the pertinent facts, for it requires the measuring of the dual national's 'family ties' in the claimant country with his 'family ties' in the respondent country.[160] And the conceptual question that must then be answered is whether this is a sensible exercise: whether and on what grounds different family links may be properly evaluated and compared.

The same is true of the application of the tests in relation to each other; for a dual national with two effective nationalities may well have, for instance, his 'family ties' in one country, and his 'centre of interests', or 'place of education', in the other.[161] This, too, requires the assigning of different values to different factors, and the doctrinal question, once again, is whether this is a viable exercise: whether and on what grounds one's 'family ties' in one country, for instance, can be rationally contrasted with his 'place of education' in another country.

The answers to the above-raised questions may of course be in the affirmative or in the negative. But that is not the point here. It is, rather, that whatever the answers, it is clear that the considerations relevant to the application of these tests as criteria of effectiveness are not necessarily the same as those pertinent to their application as criteria of dominance. In other words, the argument, for instance,

160 The alternative is to consider his 'family ties' in one country as cancelling out his 'family ties' in another, in which case the test becomes inoperative and no longer a test.

161 Such, in fact, has been the case with nearly all the claimants before the Tribunal. Claimants born to parents with Iranian and American nationalities quite naturally had ties, especially familial and cultural ties, in both countries. As to claimants who acquired their second nationality through naturalization or marriage, the very extended period each spent in his or her country of origin before acquiring a second nationality often led to the same result. To give a few examples, see, with regard to Iranians later naturalized by the United States: *Khosravi* (naturalized at the age of 33), 32 IRAN-U.S. C.T.R. 73; *Dadras* (naturalized at the age of 36), 31 IRAN-U.S. C.T.R. 127; *Karubian* (naturalized at the age of 36), 32 IRAN-U.S. C.T.R. 3; *Malek* (naturalized at the age of 40), 19 IRAN-U.S. C.T.R. 48; *Mohtadi* (naturalized at the age of 48), 32 IRAN-U.S. C.T.R. 124; *Khatami*, (naturalized at the age of 52), 30 IRAN-U.S. C.T.R. 267. And, with regard to originally United States nationals who later acquired Iranian nationality: *Nemazee* (*Luz Belen)* (acquiring Iranian nationality at the age of 23), 22 IRAN-U.S. C.T.R. 153; *Khosrowshahi* (acquiring Iranian nationality at the age of 24), 24 IRAN-U.S. C.T.R 40; *Perry-Rohani* (acquiring Iranian nationality at the age of 25), 22 IRAN-U.S. C.T.R. 194; *Ebrahimi (Marjorie)* (acquiring Iranian nationality at the age of 29), 22 IRAN-U.S. C.T.R. 138; *Etezadi (C)* (acquiring Iranian Nationality at the age of 30), 25 IRAN-U.S. C.T.R. 264; and *Riahi* (acquiring Iranian nationality at the age of 36), 28 IRAN-U.S. C.T.R. 176.

that a person's family links in a given country reflect his connection to that country does not necessarily provide a justification for the proposition that the measuring of a dual national's family links in his two countries of nationality – or a contrast between his family ties in one country and his schooling in another – is a proper test for the determination of his dominant nationality.

Now the judgment in *Nottebohm* makes no distinction between the application of these criteria as tests of effectiveness, and their application as tests of dominance. Indeed, while that Case is exclusively concerned with the issue of whether or not the claimant's Liechtenstein nationality should be recognized as effective at the international level, it speaks of these tests only in reference to the practice of international arbitrators in determining an individual's dominant nationality. This Tribunal, too, does not familiarize itself with the issue in its case law. The result is a host of Cases in which, for instance, the length of the claimant's residence in the claimant country is compared with the length of his residence in the respondent country, or his marital status is weighed against his delayed naturalization, without any rational explanation in support of the exercise. Here is but one example:

> Looking to the evidence as a whole, in support of the Claimant's dominant U.S. nationality are the act of naturalization in August 1979, marriage to a U.S. naturalized citizen since 1969 and the residence in the United States since 1969 with her husband who enjoyed permanent employment there.
> In support of a finding of dominant Iranian nationality are the facts that the Claimant had only Iranian nationality for the first fifty years of her life, that she sought U.S. nationality only after nine years or more of residence in the United States (although U.S. law would have permitted her to apply much earlier), that she became a U.S. national only eight months prior to the date her claim arose and that she retained significant family ties in Iran …[162]

It will be seen that here a number of factors widely different in nature – from the status of the claimant's marriage and the place of her husband's employment, on the one side, to her delayed application for naturalization and her family ties, on the other – are contrasted with each other without any conceptual discussions in this or in any other of the Tribunal awards as to the viability of such an exercise; as to why and by what measures, for instance, one's family ties in one country may be weighed against her delayed naturalization, or the place of her husband's employment. It bears repeating that the point here in mind is not the

162 *Mahmoud*, 9 IRAN-U.S. C.T.R. 350, at 353-4. (paragraph numbers omitted)

viability or otherwise of the exercise, but the lack of any doctrinal discussion thereto.

Second, the subjective nature of the tests. When applied as criteria of dominance, the tests in question are likely to be subjective. And this, not necessarily for the reasons suggested by some in relation to the determination of effective nationality,[163] but because of the very special nature of the enquiry here. It is true of course that in the contexts both of effectiveness and dominance, these tests simply reflect the relevant facts (an objective element), the appreciation of which in each case is left to the tribunal (a subjective element).[164] But the degrees of appreciation in the two contexts vary greatly. In the context of effectiveness, the tribunal is required to assess whether the relevant facts before it, as a whole and irrespective of the criteria to which they belong, reflect a sufficient degree of connection. In the context of dominance, on the other hand, the assessment extends to the facts in competition with each other, both within a given test and as between the tests.

The passage just cited from *Mahmoud* provides an illustration. If the task in that Case had been the determination, for instance, of the claimant's effective United States nationality, her residence in the United States since 1969 and her naturalization there in 1979 would have readily provided an affirmative answer, with a minimum degree of subjectivity involved. For the determination of her dominant nationality, on the other hand, the Tribunal had to identify a number of factors relevant to her United States and Iranian nationalities, and to compare them in strength. Indeed, this led the Tribunal to conclude that since the evidence in the Case was 'evenly balanced', the question for the Tribunal was 'how to weigh the significant factors'.[165] Clearly, the element of subjectivity is much stronger here.

A more concrete manifestation of the subjective nature of the exercise will be found in the treatment of the claimant in *Bavanati*. Mr. Bavanati had asserted claims in two separate Cases. The Case relating to his claim for expropriation was considered by the Tribunal, where the application of the tests of dominance led to the ruling that his dominant nationality during the relevant period was not

163 See the references cited at footnote 156 above.

164 As stated in *Nottebohm*: 'Different factors are taken into consideration, and their importance will vary from one case to the next …' ICJ Reports (1955), 4, at 22.

165 9 IRAN-U.S. C.T.R. 350, at 354-5.

that of the United States. The Case was therefore dismissed for lack of jurisdiction.[166] His other Case, relating to a bank claim, was for less than U.S. $250´000, and for that reason was covered by the terms of the lump sum agreement between Iran and the United States on the so-called small claims.

Under that agreement, it will be recalled,[167] the United States was to adjudicate the settled claims through its Foreign Claims Settlement Commission, applying the 'Tribunal precedent concerning both jurisdiction and the merits'.[168] This included of course the Tribunal precedent on the application of the tests of dominance. Yet, shortly before the Tribunal's Award, the Commission found, in respect of the bank claim, that Mr. Bavanati's dominant nationality during the relevant period was that of the United States.[169] In other words, through the application of the same set of tests to the same set of facts, and with regard to the same period of time, the Commission found that Mr. Bavanati was more American than Iranian, while the Tribunal came to the conclusion that this was not so.[170]

Third, the pertinent facts are not equally available to the parties. It has been suggested, for instance, that the 'evidence proving the genuine link and real intention is extremely private in nature and almost exclusively available to the individual involved'.[171] There is certainly an element of truth in this. It is true of course that some of the criteria commonly employed, such as a claimant's

166 '[T]he evidence shows that since 1974, when the Claimant moved to Germany, his habitual residence, center of interests, family ties, participation in public life and other attachments have been insufficient to support a finding that Mr. Bavanati's links to the United States were dominant over his links to Iran during the relevant period … The Tribunal therefore is of the opinion that Mr. Bavanati has not proved that his dominant and effective nationality during the relevant period was that of the United States.' *Bavanati* v. *Iran*, 31 IRAN-U.S. C.T.R. 36, at 42.

167 See page 11 above.

168 See the *United States of America* and *Iran*, Award on Agreed Terms No. 483, 25 IRAN-U.S. C.T.R. 327, at 334.

169 See 'Concurring Opinion of Koorosh H. Ameli', 31 IRAN-U.S. C.T.R., at 59.

170 Yet another example is provided by *Bakhtiari* v. *Iran*, though in a different context. The claimant in that Case had declined, while in Iran, to accept an appointment as mayor of the Iranian city of Khorramshahr. He relied on this as evidence of his dominant United States nationality because, he said, it reflected his refusal to accept any position 'inconsistent with his status as a United States citizen'. The Tribunal, on the other hand, found that the proposed appointment not only did not support the dominance of the claimant's United States nationality, but indicated that he 'was viewed as an Iranian national, capable of, and qualified for, public service'. 25 IRAN-U.S. C.T.R. 289, at 296-7.

171 'Dissenting Opinion of Assadollah Noori' in *George E. Davidson (Homayounjah)* v. *Iran,* 36 IRAN-U.S. C.T.R., at 46-47.

habitual residence, centre of financial interests, or place of employment, have external manifestations and, for that reason, the facts pertinent to them are equally accessible to the disputing parties. The evidence pertaining, for instance, to the place of the claimant's habitual residence would ordinarily be available to both the claimant and the respondent.

However, there are facts that, because of their more personal nature, generally fall within the exclusive knowledge of a claimant. Such is the case especially with regard to facts pertaining to his lifestyle or personal preferences, concerning which the Tribunal has often insisted on detailed information. Thus, for example, the Tribunal in *Boroumand* speaks of the claimant's failure to provide details of her assertedly American oriented lifestyle while living in Iran, and of her trips to the United States in that period. The affidavits submitted in support of the claimant's allegations in those respects, says the Tribunal, are 'short and largely lacking in specificity'.[172] Similarly, in *Ladjevardi,* the Tribunal refers to the claimant's failure to offer specific evidence concerning her exposure to 'American custom or culture at home' during the first twelve years of her life in Iran, and concerning her 'personal life' during the period she stayed in the United States.[173]

Clearly, an individual's 'lifestyle', 'personal life', and 'exposure to a given culture at home' are very private matters and as such are best known to him alone. In the Case last cited, for instance, the Tribunal demands, *inter alia*, a specific account of the claimant's childhood life in Iran. But then it is obvious that whatever account the claimant was able or willing to give in that respect, this was not a subject on which the respondent country could come up with its own rebutting account. To put it differently, a claimant's personal lifestyle, or the language he customarily spoke with friends, or the activities he participated in during his free time and the like are not factors with regard to which the respondent country would be able to meaningfully litigate.

Fourth, the national is put into a dilemma. Perhaps by far the most disagreeable feature of the exercise is the fact that the national is thereby put into the predicament of having to deny, or at least to belittle, his ties to one of the two countries of which he is an effective national. This point, which is apparently nowhere discussed, but which is fully borne out by the experiences of the Tribunal, deserves a closer attention.

172 29 IRAN-U.S. C.T.R. 59, at 64.

173 29 IRAN-U.S. C.T.R. 367, at 380. See also *Khajetoorians* v. *Iran*, 26 IRAN-U.S. C.T.R. 37, at 43, where the Tribunal refers to the claimants' failure to 'provide [] evidence of what language they customarily spoke with friends and family, what activities they participated in during their free time, or how much time they spent in Iran'.

As we have seen,[174] a dual national claimant is called upon to prove his dominant nationality of the claimant State only where his two nationalities are first found to be effective: '[The] search for the stronger factual ties implies that, when each of two nationalities is … effective, the Tribunal is to determine which one is dominant.'[175] He is, then, a person with ties to both countries; often with very strong ties to both countries, as evidenced by the majority of the Cases before the Tribunal.[176] His success at the jurisdictional level, however, depends on his showing that he is more attached to the claimant State. He is, in effect, forced to minimize, if not to deny, his attachments to one of his two countries of nationalities before an international tribunal. That this is what many of the claimants before the Tribunal have in fact done may be demonstrated by a few examples.

In *Golpira*, the dissenting member states that 'Golpira refused at the hearing to speak to me in Farsi, in order to convince the Tribunal that they were faced with an American who had broken all links with his former nationality'.[177] And yet, as the Award finds, he was born in Iran to Iranian parents, completed his high school, college and medical school in Iran, and left for the United States at the age of twenty-six.[178] In *Nemazee*, the claimant attempted to belittle his participation in a 1979 'momentous referendum that was to leave its mark on Iran's political system', by suggesting that 'his father's employees took his [national identity] card to the voting place merely to have it stamped'.[179] In *Khatami*, the need to deny links with the native country led the claimant not to disclose the fact of his marriage to an Iranian national in Iran and, when faced with the contrary evidence, to minimize his role in his own marriage:

> At the Hearing, the Claimant admitted to having entered into a second marriage with an Iranian woman but contended that the marriage ceremony had taken place

174 See page 78 above.

175 *Mahmoud* v. *Iran*, 9 IRAN-U.S. C.T.R. 350, at 353.

176 See the Cases cited at footnote 161 above. Indeed, the instances in which the Tribunal has specifically noted the existence of strong links with both nationalities are many. See, for instance, *Esphahanian* (2 IRAN-U.S. C.T.R. 157, at 166-7); *Mahmoud* (9 IRAN-U.S. C.T.R. 350, at 354-5); *Sobhani* (31 IRAN-U.S. C.T.R. 26, at 32); *Ghaffari (A)* (25 IRAN-U.S. C.T.R. 178, at 183); and *Etezadi (C)* (25 IRAN-U.S. C.T.R. 264, at 270-1).

177 2 IRAN-U.S. C.T.R., at 222.

178 *Ibid*, at 172.

179 25 IRAN-U.S. C.T.R., at 170 ('Dissenting Opinion of Judge Parviz Ansari').

> at the instigation of his family and that the marriage was dissolved shortly after the ceremony.[180]

In *Tavakoli*, the efforts by the claimants – a sister and two brothers – to depict themselves as all American with nothing to do with Iran and Iranian culture went as far as to irritate the Tribunal:

> [T]he Claimants' testimony concerning their day to day life in Iran sought to minimize to such an exaggerated degree the extent of their Iranian contacts during their childhood as to carry little credibility.[181]

It may be thought that the problem discussed here – the placing of the claimant in the position of having to minimize his links with one of his two countries of nationality before an official organ – is a problem of the very rule of dominant nationality, and not of the criteria employed for its application. This is not quite right. Where the tests are objective and impersonal – such as residence, the place of education, or the centre of professional life – the dual national claimant can simply provide the tribunal with facts, without being judgemental. It is only where tests of subjective and personal nature – such as cultural attachment, lifestyle, spoken language, participation in elections, and the like – are applied that the claimant is tempted, if not required, to take side.

All these may now be stated briefly. The tests applied by this and other tribunals for determining a dual national's dominant nationality are the same as those employed for the determination of a person's effective nationality. In both instances, any factor thought to be indicative of a personal, social, cultural, or financial attachment is taken into account. And yet there is a material difference in the way in which these tests operate in the two instances: while in the case of effective nationality the pertinent facts complement each other, in the case of dominant nationality they are weighed against each other. So far as regards effective nationality, the application of such tests makes perfect sense: the aim is to find out whether there exists sufficient connection between the individual and the State, and hence the relevance of any factor indicative of connection. In the case of dominant nationality, on the other hand, the question is how and on

180 30 IRAN-U.S. C.T.R. 267, at 278. As found by the Tribunal, this second marriage had taken place in 1972, 'during the course of his first marriage' to an American citizen, and just one year after his naturalization in the United States. Prior to the Hearing, however, the claimant had refused to admit that he had been present in Iran in 1972. *Ibid*, at 277.

181 33 IRAN-U.S. C.T.R. 206, at 217.

what doctrinal grounds connections can be assessed against connections; an issue not debated in the literature.

Next, because the pertinent facts are, in the search for dominant nationality, weighed against each other, a high degree of subjectivity is inevitably introduced into the exercise. Thus, for instance, the dual national's family ties in one country are evaluated against his family ties in another, or his schooling in one country is contrasted with his financial interests in another, without any yardstick with which the strengths of these elements can be assessed. Besides, some such facts are only known to the claimant, and for that reason are in danger of being withheld by him where he comes to regard them as not particularly helpful to his position.

The most troublesome aspect of the exercise, however, is that which puts the dual national claimant into the unenviable position of having to present himself as a national more of one rather than the other of his two countries of nationality. This happens especially where tests pertaining to the individual's personal attachments are applied, and is particularly taxing on those with more or less equal ties to the two communities, as was the case with many of the dual national claimants before the Tribunal.

7

THE 'IMPORTANT CAVEAT'

The last of the three salient features of the Decision in A/18 is its 'important caveat'. It will be recalled that in that Decision the Full Tribunal, having first upheld the rule of dominant nationality, went on to say that:

> To this conclusion the Tribunal adds an important caveat. In cases where the Tribunal finds jurisdiction based upon a dominant and effective nationality of the claimant, the other nationality may remain relevant to the merits of the claim.[1]

As already seen, this had its seeds in the *Esphahanian* Case, in which it was stated that:

> To this conclusion we add an important caveat. There is precedent for denying jurisdiction on equitable grounds in cases of fraudulent use of nationality. Such a case might occur where an individual disguises his dominant or effective nationality in order to obtain benefits with his secondary nationality not otherwise available to him. *See Flegenheimer Case* (United States v. Italy), 14 R.I.A.A. 327, 378 (1958) (*dicta*).[2]

What the Tribunal means to say in these passages is clear enough: the upholding of the rule of dominant nationality does not imply that the non-dominant nationality is of no relevance. To the contrary, it may become relevant in certain circumstances. The question is, what are those circumstances?

It is true of course that the formulation of the issue by the Full Tribunal in A/18 is controlling. But because that formulation is framed in very general terms,[3]

1 5 IRAN-U.S. C.T.R. 251, at 265-6.

2 2 IRAN-U.S. C.T.R. 157, at 166.

3 This was criticised at the time. See M. S. Feeley, *Dual Nationality – Decision Concerning the Question of Jurisdiction over Claims of Persons with Dual Nationality, Iran-United States Claims Tribunal, Case No. A/18, Apr. 6, 1984*, 26 Harvard International

its true meaning and its scope of application may not be fully understood without reference to its origins in the *Esphahanian* Case and beyond.[4] A comparison between the two, however, readily reveals certain distinct characteristics of the formulation in *Esphahanian*. *First*, it speaks of the caveat leading to the denial of 'jurisdiction'. *Second*, it limits the application of the caveat to 'fraudulent' use of nationality. *Third*, in its illustration of a fraudulent use, it refers to the case of an individual who at the time of obtaining the benefits in dispute has a dominant and a secondary nationality, and who disguises his dominant nationality in order to obtain benefits not otherwise available to him. This is while the formulation in A/18 speaks of the caveat as 'relevant to the merits' of a claim, and it says nothing about the scope of its application being limited to cases of fraudulent use. These must be briefly reviewed.

7.1 A Matter for Jurisdiction or for the Merits?

The first point to examine is whether the enquiry under the caveat is of jurisdictional nature, as suggested by the formulation in *Esphahanian*,[5] or is related to the merits of a dispute, as suggested by the formulation in A/18. The point

Law Journal (1985), 208, at 216: '[O]ne substantive criticism of the Tribunal's decision was its failure to explicate the circumstances in and the text by which a claimant's other nationality may remain pertinent.'

4 In fact, the Tribunal has itself referred in its later pronouncements to the continued relevance of the formulation of the issue in *Esphahanian*: 'Combining the discussions of the caveat in A/18 concurring opinions and in Chamber Two's interlocutory awards (as well as the anticipatory dicta in *Esphahanian*), the following conclusions can be drawn regarding the application of the caveat …' *Saghi* v. *Iran*, 29 IRAN-U.S. C.T.R. 20, at 37-8.

5 This is not to forget the lack of consistency on this point in *Esphahanian* itself. As we have seen (pages 28-29 above), the Award in that Case first refers to *two* jurisdictional tests, namely, the test of dominant nationality, and the test of the important caveat. However, when it comes to 'frame the jurisdictional issue' before the Tribunal, it only refers to *one* test, namely, the test of dominant nationality. Still later, the Award proceeds to examine both issues in the light of the facts of the Case and comes to the conclusion, before turning to the merits proper of the claim, that the claimant meets both tests: 'On the basis of these facts, the Tribunal concludes that Esphahanian's dominant and effective nationality at all relevant times has been that of the United States, and the funds at issue in the present claims are related primarily to his American nationality, not his Iranian nationality.' 2 IRAN-U.S. C.T.R. 157, at 168.

is not of merely academic interest, but of material consequences.[6] If the rejection of a claim on the basis of the caveat is regarded as a rejection on the merits, then that claim may no longer be asserted before any other forum. If, on the other hand, it is regarded as a dismissal for lack of jurisdiction, then the claim may be pursued before any forum in which the nationality of the claimant would be of no relevance.

It may be thought that, despite the contrary impression they create, the two formulations are not inconsistent in this respect: under both, the conduct of the claimant is considered as a part of the merits, and under both, the claim is rejected, where the claimant fails the test, for lack of jurisdiction. What, according to this interpretation, creates the impression of inconsistency is only the fact that while the formulation in *Esphahanian* focuses on the ground on which the claim is ultimately dismissed, *i.e.* jurisdiction, the formulation in A/18 concentrates on the nature of the enquiry, *i.e.*, the merits. There are, however, problems with this interpretation. *First*, as pointed out before, the text of the Decision in A/18 closely follows the text of the Award in *Esphahanian*. Thus, if the Full Tribunal were in agreement with the formulation in *Esphahanian*, there would have been no reason for such a radical departure on this point. *Second*, the language in A/18 does not readily lend itself to such an interpretation, for it speaks of the relevance of the other nationality after the jurisdictional stage: 'In cases where the Tribunal finds jurisdiction … the other nationality may remain relevant to the merits of the claim'. *Third*, and as will be seen shortly, the Cases that were decided pursuant to A/18 all speak not of rejecting these claims for lack of jurisdiction, but for failure to meet the test of the caveat.

Turning now to the question posed earlier, it seems clear that the enquiry under the caveat is not of jurisdictional nature. This is because the investigation is there directed at the conduct of the claimant[7] and, under the Algerian Declarations at any rate, conduct is irrelevant to the issue of jurisdiction.[8] Indeed, what the

6 See M. Aghahosseini, *The Claims of Dual Nationals Before the Iran-United States Claims Tribunal: Some Reflections*, 10 Leiden Journal of International Law (1997), 21, at 41-6.

7 And this is true whether the scope of the caveat is restricted to the instances of fraudulent use of nationality, as implied by the Award in *Esphahanian*, or is given a wider application, as will be seen shortly.

8 The same seems to be true of the international law in general, where the conduct-related issues are normally regarded as issues going to, or closely connected with, the merits of a claim. See the dissenting opinions of Judges Klaestad and Read in *Nottebohm*, where they state that the evidence related to the allegation of Mr. Nottebohm's fraudulent conduct in acquiring his Liechtenstein nationality could not be examined at the jurisdictional phase of the Case. ICJ Reports (1955), 4, at 33 and 48-9, respectively.

Algerian Declarations require, in respect of *ratione personae* jurisdiction, is the proof of nationality of the claimant, and not of his proper conduct. On the other hand, the enquiry does not seem to be of the merits nature either. Not, at any rate, if merits proper, that is to say, the claimant's strict legal rights, are in mind. In rejecting a claim for failing to meet the test of the caveat, the forum obviously passes no judgments on the asserted rights of the claimant or on the alleged violation of such rights by the respondent.

It is true of course that before this Tribunal Iran has adopted the position that a claim rejected by the Tribunal for failing the test of the caveat may not be asserted elsewhere.[9] But then this is based on Iran's general argument that under the special scheme of the Algerian Declarations, certain claims submitted to this Tribunal but rejected for whatever reasons – jurisdictional or substantive – may not be heard by any other judicial body. Iran's adopted position is therefore based on an alleged specific agreement by the parties to the Declarations, and does not seek to attribute *res judicata* effect to the claims dismissed by the Tribunal for failing to meet the caveat test.

Where, then, does the answer lie? Perhaps somewhere in between, as summarily noted by Iran in a brief submitted to the Tribunal long after the Decision in A/18:

> The function of the caveat … is the determination of the admissibility of a dual national's claim on the merits. It would decide whether the claim should be permitted to proceed further on the merits, having regard to the involvement of the nationality element in the materialization of the claim. The applicability of the caveat … should, therefore be decided at the outset of the Tribunal's excursion into the merits.[10]

This is akin to what has been termed, by Sir Gerald Fitzmaurice, as the 'substantive admissibility' phase of a proceeding, standing in between 'jurisdiction' and the 'ultimate merits' of a Case:

> There is a clear jurisprudential distinction between an objection to the jurisdiction of the tribunal, and an objection to the substantive admissibility of the claim. The latter is a plea that the tribunal should rule the claim to be inadmissible on some ground other than its ultimate merits: the former is a plea that the tribunal itself

9 'Brief of the Islamic Republic of Iran on the Issue of the Caveat in Case A/18 (A Response to the U.S. Memorial)', submitted to the Tribunal on 16 September 1994, at 11-2.

10 *Ibid*, at 10.

> is incompetent to give any ruling at all whether as to the merits or as to the admissibility of the claim. A successful challenge to the jurisdiction stops all further proceedings in the case … But an unsuccessful jurisdictional plea leaves open the possibility that a finding on the ultimate merits may still be excluded through a decision given against the substantive admissibility of the claim.[11]

It will be seen that the enquiry conducted pursuant to an objection to the 'admissibility' of the ultimate merits is very much like the enquiry conducted under the caveat, for in the latter, too, the plea is that despite the presence of *ratione personae* jurisdiction, there is reason for the Tribunal not to proceed to the examination of the ultimate merits of the claim. In fact, the first of the three examples given by Fitzmaurice as belonging to the category of 'substantive admissibility' is a nationality-related preliminary objection; the other two being preliminary objections based on exhaustion of local remedies and undue delay.[12] In support of this, it may be additionally noted that the passage in *Flegenheimer*, to which *Esphahanian* refers in its formulation of the caveat, speaks of objection to the 'admissibility of a legal action'.[13]

Fitzmaurice offers two reasons for the desirability of maintaining the distinction: 'its jurisprudential importance' and the 'considerable differences of treatment and procedure' involved in the two.[14] As far as the application of the caveat by the Tribunal is concerned, however, the strongest reason for addressing the issue distinctly from, and prior to, the merits proper of a claim seems to be the requirement of judicial economy and efficiency. It only makes sense that before embarking upon the complex and time-consuming process of establishing some such issues as the claimant's rights, the respondent's liability, or the amount of

11 Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-4: Questions of Jurisdiction, Competence and Procedure*, 34 BYIL (1958), 1, at 12-13 (footnotes omitted). Fitzmaurice there refers to the *Ambatielos* Case (*Greece* v. *United Kingdom*), Merits: Obligation to Arbitrate, ICJ Reports (1953), 10, at 22-3, and the *Nottebohm* Case (*Liechtenstein* v. *Guatemala*), Preliminary Objection, ICJ Reports (1953), 111, at 122.

12 *Ibid*, at 12, footnote 6.

13 'In international jurisprudence one finds decisions based on the *non concedit venire contra factum proprium* principle which corresponds to the Anglo-Saxon institution of estoppel; it allows a Respondent State to object to the admissibility of a legal action directed against it by the national State of the injured party…' 14 R.I.A.A. (1958), 327, at 378.

14 Fitzmaurice, footnote 11 above, at 13.

damages, the Tribunal should ascertain whether the claim is admissible on the merits.[15]

Here seems to be a convenient place for briefly recalling an alternative approach to the caveat – the functional approach[16] – which, as adopted by the Tribunal in two of the Cases before it, offers its own solution to the jurisdiction versus merits controversy. As previously noted, this was first advocated by a member of the majority in A/18, who said in his concurring opinion that with regard to the claim of a dual national, the task was not to address *separately* the issues of jurisdiction and dominant nationality. It was, rather, to search for the claimant's *most relevant* nationality within the *specific context* of his claim.[17] This was a process, he suggested, that often involved the issues of the merits, including the issues covered by the caveat enquiry.[18] In other words, the caveat enquiry under this approach is made as part of the search for the claimant's most relevant nationality in the context of his claim, always leading, however, to a ruling on the claimant's nationality.

The two Cases in question were *Mahmoud* and *Schott*, both of which have already been noted in relation to other issues. In *Mahmoud*, the Tribunal concluded that where a claimant postpones the acquisition of her United States nationality and in the meantime enjoys, through her Iranian nationality, certain benefits with regard to the rights in dispute, benefits that otherwise she would not have been able to enjoy, this is a pertinent factor in the determination of her dominant nationality.[19] In *Schott*, it was held that where a dual national of Iran and the United States relies on her Iranian nationality to acquire rights not available to non-Iranians, her dominant nationality with respect to such rights is Iranian.[20]

15 As will be seen presently, however, the Tribunal has not in practice always observed this common sense rule. Indeed, in *Karubian* (32 IRAN-U.S. C.T.R. 3) the Tribunal dismissed the claim for failing to meet the caveat test only after it addressed and ruled upon a number of disputed points belonging to the merits proper of the dispute.

16 For a general discussion of the issue, see IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 6th Ed., Oxford: Oxford University Press, 2003, at 395.

17 Such functional approach to nationality has been adopted in some multi-lateral treaties. See, for example, the Geneva Convention on the Status of Refugees (1951), Geneva, 189 U.N.T.S. 137, Article 16, para.3; the Vienna Convention on Diplomatic Relations (500 U.N.T.S. 95), Article 33, section 2. The International Court of Justice, too, has referred to it in the context of the nationality of ships. *IMCO* Case, ICJ Reports (1960), 23.

18 See pages 43, and 177-178 above.

19 See page 180 above.

20 See pages 141-144.

As suggested earlier, the two rulings are not identical.[21] More specifically, in *Mahmoud*, the conduct covered by the caveat was taken into account alongside other factors pertinent to the determination of the claimant's dominant nationality. If the outcome was a finding that the claimant had failed to demonstrate her dominant nationality of the claiming State, this was only because the evidence in relation to other factors was 'evenly balanced'.[22] In *Schott*, on the other hand, the conduct covered by the caveat was regarded as the only relevant factor, as a result of which the person concerned was 'estopped' from establishing her dominant nationality of the claiming State.[23] In *Mahmoud*, besides, the Tribunal pronounced itself on the status, during the relevant period, of the claimant's dominant nationality in general,[24] while in *Schott*, this was done exclusively with reference to the Tribunal's jurisdiction over her claim.[25]

Still, the two Cases share the view that the enquiry under the caveat must be made as a part of the determination of the claimant's dominant nationality. This may have the advantage of avoiding the classification of the caveat enquiry as truly jurisdictional or substantive. But then there is this problem that the conduct covered by the caveat test – generally, the misuse of the non-dominant nationality, as will be seen presently – has in reality very little to do with the concept of dominance and its tests. In other words, under this approach, particularly as formulated in *Mahmoud*, a person may be declared as not having the dominant nationality of the claimant country, even though he may in reality be much more closely attached to that country.

This is a problem satisfactorily avoided by the 'substantive admissibility' approach, under which a clear distinction is made between the enquiry into the claimant's dominant nationality, and the subsequent enquiry into his conduct *vis-à-vis* his non-dominant nationality. It remains to be emphasized that the functional approach here described has found no favour, save in the two Cases of *Mahmoud* and *Schott*, in the case law of the Tribunal, according to which the caveat issue is always examined separately, and only after the claimant's dominant nationality of the claiming State has first been established.

21 See page 186 above.

22 9 IRAN-U.S. C.T.R. 350, at 354-5.

23 24 IRAN-U.S. C.T.R. 203, at 218.

24 'In the light of the above circumstances, the Claimant has failed to satisfy the Tribunal that her dominant and effective nationality during relevant periods was that of the United States.' 9 IRAN-U.S. C.T.R. 350, at 355.

25 'Consequently, the Tribunal finds that for the purpose of determining its jurisdiction over this claim, Mostofi's nationality is Iranian.' 24 IRAN-U.S. C.T.R. 203, at 218.

7.2 The Scope of its Application

It is a fact that the parties to the two early Chamber Cases – *Esphahanian* and *Golpira* – did not brief the Tribunal on what was later formulated by the Chamber as the 'important caveat'; the reason, once again, being the parties' preoccupation with the much more fundamental issue of the Tribunal's jurisdiction over the claims of dual nationals. The fact, however, that the caveat was added by the Chamber *sua sponte* does not mean that it could have been left out. To the contrary, the Chamber had there concluded that in the absence of any provisions in the Algerian Declarations on the claims of dual nationals, the solution found in customary international law had to be imported into the Declarations. Clearly, this meant all the principles of customary international law pertinent to such claims, including the principles pertinent to the conduct of the parties to such claims. Indeed, the necessity to observe these principles, even if the caveat had not been expressed in the context of dual nationals' claims, stems from the very text of the Algerian Declarations which, as noted, directs the Tribunal to decide all Cases on the basis of respect for law, applying, *inter alia*, such 'principles of … international law as the Tribunal determines to be applicable'.[26]

Now under international law, certain types of conduct, considered as unseemly, bar the consideration of the claim on the merits.[27] This is the corollary of the fundamental principle of 'good faith', which is defined as the negation of 'literal and unintended' interpretation of words that might result in one of the parties gaining an 'unfair advantage' over another party,[28] and which is incisively affirmed by the International Court of Justice: 'One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith.'[29] The types of conduct that may come within the purview of this principle are varied and are accordingly given different labels, though a given conduct may for obvious reasons come within the operational ambit of more than one label.

26 Article V of the Claims Settlement Declaration.

27 This issue is dealt with in more detail in an Article by the present writer cited at footnote 3 above, at 41-6. However, certain points of presentation have been changed upon further reflection.

28 A. D'Amato, *Good Faith*, in R. Bernhardt (ed.), ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, Instalment 7, Amsterdam: North Holland, 1984, 107.

29 *Nuclear Tests* Case (*Australia* v. *France*), Judgment of 20 December 1974, ICJ Reports (1974), 268. This general principle is also reflected in a number of basic treaties and resolutions of international organizations. See, for example, Article 26 of the Vienna Convention on the Law of Treaties (23 May 1969), UN Doc. A/CONF. 39/27, 1155 U.N.T.S. 331; reprinted in 8 ILM 679 (1969), and Article 2, para. 2 of the United Nations Charter.

One such conduct is 'fraudulent' conduct, defined as the 'intentional and dishonest misrepresentation or suppression of material facts'.[30] That no right of action can have its origin in fraud (*Ex dolo malo oritur actio*) has been expressly confirmed by the Tribunal itself.[31] Another censurable conduct is the 'abuse of rights', defined as the injurious exercising of a right, *inter alia*, 'for an end different from that for which the right was created'.[32] The conduct is rejected on the ground that a legally developed society cannot 'permit the unchecked use of rights without regard to its social consequences'.[33] Similarly censurable is the absence of 'clean hands'. As stated by Borchard, '[i]t is an established maxim of all laws, municipal and international, that … a plaintiff or a claimant must come into court with clean hands.'[34] Finally, there is the conduct coming within the sphere of the doctrine of 'estoppel' in its narrower sense, under which a party is not permitted to adopt a position prejudicial to the other party and contrary to an earlier position he took and on which the other party was entitled to rely.[35]

30 J.B. MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY, Washington D.C: Government Printing Office, 1898, Vol. III, at 2621.

31 See *Tippetts, Abbett, McCarthy, and Stratton* v. *TAMS-AFA*, 6 IRAN-U.S. C.T.R. 219, at 228, where the Tribunal, referring to B. CHENG, GENERAL PRINCIPLES OF LAWS AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, London: Stevens & Sons, 1953, at 149 states: 'It is a principle in many municipal systems and in international law that no one should be allowed to reap advantages from their wrong, *Nullus Commodum Capere De Sua Injuria Propria*.'

32 A.C. Kiss, *Abuse of Rights*, in R. Bernhardt (ed.), ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, Instalment 7, Amsterdam: North Holland, 1984, 1.

33 SIR HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT, London: Stevens and sons, 1958, reprinted by Grotius Publications Ltd., Cambridge, 1982, at 162. The author also notes (*ibid*, at 164) that '[t]here is no legal right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused'. And for that reason he recommends 'studied restraint' in the application of the principle. As to the preclusion of abuse of rights by the principle of good faith, see the *Polish Upper Silesia* Case, PCIJ, Series A, No. 7, 30, and *Free Zone of Upper Savoy and District of Gex* Case, PCIJ, Series A/B, No. 46, 167.

34 E.M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS, New York: The Banks Law, 1915, at 713.

35 D.W. Bowett, *Estoppel Before International Tribunals and Its Relation to Acquiescence*, 33 BYIL (1957), 176. See also J.P. Müller, and T. Cottier, *Estoppel*, in: R. Bernhardt (ed.), ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, Instalment 7, Amsterdam: North Holland, 1984, at 78: '[A] representing party is barred ('estopped' or 'precluded') – without regard to truth or accuracy – from adopting successfully different subsequent statements on the same issue.' This general principle has also been applied by the International Court of Justice in *Temple of Preah Vihear* (Order of 25 April 1962, ICJ

In all the instances mentioned above, the party acting not in good faith is, on equitable grounds,[36] precluded, or 'estopped', from pursuing before an international tribunal his claim on the merits. 'Estoppel', in this wider sense, is a rule operating at the procedural level, a rule of evidence, standing in contrast to the rules of conduct, which pertain to the substance of a claim.

Now each one or more of these principles may become relevant to the conduct of a dual national claimant at various stages. He may have acquired his second nationality by eluding or breaking the laws of the State of his original nationality; he may have obtained his second nationality for conveniences only; he may have obtained the rights in question by concealing, or by neglecting to disclose, his dual nationality status; or he may have acquired, or continued to enjoy, the rights in dispute by relying on one nationality, while pursuing his claim by invoking another nationality. The question in such instances will then arise whether the conduct in question is such as to require the judicial forum not to hear the claim on the merits.

The point here suggested is, in short, that the Tribunal, having resorted to customary international law to fill a perceived gap in the Algerian Declarations on the problem of dual nationals' claims, could not possibly ignore the customary law's attitude towards unacceptable behaviour. The result was the adoption of the 'important caveat'; a caveat which, even though *sua sponte*, was not a novelty. The important caveat, in other words, simply reflected an affirmation by the Tribunal that the principles of customary international law relevant to the conduct of a party had, as between the parties to the Algerian Declarations, the additional force of treaty terms.

7.2.1 The Early Descriptions of the Areas of Application

With this in mind, it must now be seen whether the formulations offered by the Tribunal in *Esphahanian* and in A/18 accurately reflected the customary law. In support of its formulation of the caveat, the Award in *Esphahanian* cites one authority only, the *Flegenheimer* case, where it is said:

> In international jurisprudence one finds decisions based on the *non concedit venire contra factum proprium* principle which corresponds to the Anglo-Saxon institution

Reports (1962), 3, at 143-4), and in *North Sea Continental Shelf* (Judgment, ICJ Reports (1969), 3, at 26).

36 As will be seen shortly, 'fundamental considerations of equity' is considered by the Tribunal as part of its applicable law.

> of estoppel: it allows a Respondent State to object to the admissibility of a legal action directed against it by the national State of the allegedly injured party, when the latter has neglected to indicate his true nationality, or has concealed it, or has invoked another nationality at the time the fact giving rise to the dispute occurred, or when the national State has made erroneous communications to another State thus fixing the conduct to be followed by the latter.[37]

It will be seen that in the cited passage the basic rule is identified as corresponding to the 'institution of estoppel' in its broader sense. By this, and by referring to different types of conduct that come within the ambit of the application of the rule – neglecting to indicate, or concealing, one's true nationality; reliance on a nationality other than the one invoked before the tribunal; and making erroneous representations – the formulation offers a rather broad description of the customary international law relating to a party's conduct. In contrast, there is the formulation of the rule in *Esphahanian* that, although it exclusively refers to the quoted passage in *Flegenheimer*, it seeks to restrict the application of the rule to instances of 'fraudulent' use of nationality. Clearly, not every use of nationality coming within the strictures of the rule of 'estoppel' is a 'fraudulent' use, as the instances cited in *Flegenheimer* show.

Besides, the single instance of the fraudulent use given in *Esphahanian* is that of an individual who 'disguises his dominant or effective nationality in order to obtain benefits with his secondary nationality not otherwise available to him'.[38] This, too, has problems of its own. It focuses on the conduct of the individual at the time of acquiring the rights in question. He is perceived as a person who at that point of time has two nationalities, a dominant nationality and a secondary nationality. And he commits the 'fraudulent' act when he, at that point of time, disguises his dominant nationality in order to secure benefits with his secondary nationality not otherwise available to him.

But what is disregarded here is the fact that under the rules of customary international law pertinent to conduct, the enquiry is not restricted to the claimant's conduct at a given time, but extends to the totality of his conduct; to his conduct in cumulative terms. This will be examined later, suffice it to refer here to one example already noted, namely, the Case of *Mahmoud*. There, the claimant obtained the rights in question when she was of sole Iranian nationality. No question, then, of any impropriety on her part – no question of any concealment on her part – at that time. Indeed, the Tribunal specifically concluded that under the laws of Iran, she was fully entitled to acquire the property in question, and

37 *Flegenheimer* Case (*United States* v. *Italy*), 14 R.I.A.A. (1958), 327, at 378.
38 2 IRAN-U.S. C.T.R. 157, at 166.

to continue to enjoy her ownership up to and for some time after the date of the alleged expropriation. The fact was, however, that her entitlement to continue to enjoy such rights was the result of her decision to postpone her United States naturalization, and it was the cumulative effect of these two that triggered the rule on conduct. Indeed, as the formulation in the *Flegenheimer* Case makes clear, the rule may operate where the claimant simply relies on one nationality, when securing the rights in question, and on another, when pursuing his claim. Each act, in isolation and by itself, may be innocent enough, but not so when they are looked at in their totality.

In short, the operational scope of the principles of international law relating to conduct, of which principles the caveat is meant to be a reflection, is not restricted to what is stated in the formulation of the issue in *Esphahanian.* In particular: (i) the application of those principles is not limited to instances of 'fraudulent' use of nationality, but extends to any improper conduct which, under each and every one of those principles, calls for the barring of the claim at the stage of substantive admissibility; and (ii) what is relevant is not only the conduct of the claimant at the time of securing the rights in question,[39] but the totality of his conduct in relation to his acquisition of nationality, his securing the rights in question, his continuing to enjoy those rights, and the subsequent legal, or procedural, posture that he adopts before an international judicial body. For the reason last mentioned, the enquiry under international law is not limited to the case of a dual national who, as put by *Esphahanian*, 'disguises his dominant or effective nationality in order to obtain benefits with his secondary nationality not otherwise available to him'.[40]

As noted, the Full Tribunal in A/18 sets aside the formula in *Esphahanian* in favour of a much broader ruling: 'In cases where the Tribunal finds jurisdiction based upon a dominant and effective nationality of the claimant, the other nationality may remain relevant to the merits of the claim.'[41] But then what were the considerations for this change, one cannot tell. This is because of the fact that, even after the Chamber's decisions in *Esphahanian* and *Golpira,* the parties had not addressed the caveat-related issues in their submissions to the Full Tribunal,[42]

39 Though, as will be seen shortly, there may be instances in which a single act of the claimant, such as his acquisition of a second nationality or his obtaining the interests in question, is such as to constitute impropriety by itself.

40 2 IRAN-U.S. C.T.R. 157, at 166.

41 5 IRAN-U.S. C.T.R. 251, at 265-6.

42 Again because of their preoccupation with the more fundamental dispute with regard to the Tribunal's jurisdiction over the claims of dual nationals.

and the Full Tribunal itself offers no explanations in support of the change.[43] Clearly, however, the broad language used by the Full Tribunal reflects the pertinent principles of customary international law much more accurately than the limiting language employed by the Chamber. By rejecting any closed list of the circumstances under which the use of the secondary nationality may become relevant, the Full Tribunal offers a formula flexible enough to allow the application of those principles to specific facts of the Cases before the Tribunal.

7.2.2 The Application of the Caveat in Individual Cases

Starting with the *Esphahanian* Case itself, the Tribunal was there 'troubled' by the evidence that the claimant was the nominal holder in an Iranian company of a number of shares of stock of which the beneficial owner was Mr. Esphahanian's employer, the American corporation SEDCO. Noting that it was possible, if not certain, that he had been made SEDCO's nominee because of his Iranian nationality and in order to disguise the true extent of SEDCO's ownership, the Tribunal said that this was 'the kind of use of a second nationality that may cause the Tribunal to deny a claim'. In the event, however, the Tribunal admitted the claim because it found

> no evidence that [Mr. Esphahanian's] allowing his employer to use him as its nominee shareholder was a substantial part of his job. Thus, it does not seem that the Claimant used that subterfuge in any significant way to obtain benefits available only to Iranian nationals for which he is now claiming. This question is more relevant to SEDCO's claim … and will be considered in that context.[44]

43 Only a brief reference to it will be found in the 'Concurring Opinion of Willem Riphagen', 5 IRAN-U.S. C.T.R., at 274: '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.' See also the 'Concurring Opinion of Richard M. Mosk', *ibid*, at 272-3, who refers to the possibility 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'. (emphasis added) He there suggests, however, that in considering whether or not the dual national claimants before the Tribunal had misused their Iranian nationality, certain factors should be taken into account, namely, the asserted imposition of Iranian nationality on a broad spectrum of individuals by Iranian law, the asserted difficulty of renouncing Iranian nationality under that law, and the termination or suspension, under the terms of the Algerian Declarations, of the claims of these individuals originally submitted to United States courts.

44 2 IRAN-U.S. C.T.R. 157, at 167.

This is quite sound. It will be recalled that Esphahanian's claim was for a dishonoured cheque, the source of which had been his income derived from his work in Iran and deposited in the respondent bank.[45] The issue before the Tribunal, therefore, was whether the rights in dispute – the deposited money – had in any way been acquired by Esphahanian's reliance on his Iranian nationality; and the answer was clearly in the negative. His income, derived from the personal services he rendered in Iran, had nothing to do with his nominal shareholding, and thus with his Iranian nationality. As the Tribunal rightly noted, the issue of his nominal ownership of certain shares belonged to SEDCO's claim; a claim which, in the event, was dismissed for a different reason.[46]

In brief, then, what the Award in *Esphahanian* does, in the part dealing with the application of the law to the facts of the Case, is to identify as a possible instance of 'fraudulent' use of nationality the case of a person who relies on his nationality of the respondent State to acquire rights 'available only' to nationals of the respondent State, but who then seeks redress for the asserted violation of those rights by relying on his nationality of the claimant State. Admittedly, the Award's use of relevant terms is rather imprecise. In the above-quoted passage, it speaks of the rights 'available only' to nationals of Iran. In another passage, it refers to the rights in question as having been obtained from 'activities unrelated' to the claimant's Iranian nationality.[47] In yet another passage, it identifies such rights as 'primarily' related to the claimant's American nationality:

> On the basis of these facts, the Tribunal concludes that Esphahanian's dominant and effective nationality at all relevant times has been that of the United States, and the funds at issue in the present claim are related primarily to his American nationality, not his Iranian nationality.[48]

The general idea behind all these, however, remains the same, namely, that an international tribunal will not sanction the conduct of a person who seeks to, so to speak, blow hot and cold.[49] This is the first feature of the Tribunal's approach

45 See page 27 above.

46 See page 30, footnote 63, above.

47 2 IRAN-U.S. C.T.R. 157, at 167.

48 *Ibid*, at 168.

49 *Ibid*, at 167. The prohibition against blowing hot and cold is an old one: 'The position of persons exercising rights reserved to subjects is different. Whether they have been allowed to exercise them under a misapprehension as to their being subjects is immaterial. They have shown by their own acts that they wish to share in the privileges understood to belong to subjects only, and they cannot afterwards turn around and

in *Esphahanian* to the application of the caveat. But there is a second feature that is also reflected in the above-quoted passage. It will be seen that the Tribunal has first, and separately, determined the claimant's dominant nationality of the claiming State, and only then turned to the caveat enquiry.[50]

The earliest Case involving the issue of the caveat after the Full Tribunal's ruling in A/18 – indeed, the earliest Case in which the consideration of the caveat affected the outcome of the claim – was *Mahmoud*, decided in 1985.[51] As noted before, this was the first of the two anomalous Cases – the second being *Schott* – in which the caveat-related issues were considered as part of the Tribunal's determination of the claimant's dominant nationality. There, what led to the application of the caveat – to the tipping of the balance against the claimant's dominant American nationality – was the Tribunal's finding that 'it was only as an Iranian national that the Claimant was able to inherit the property … and to continue to enjoy its benefits as landowner' until the time of the alleged expropriation.[52]

Similarly, in *Schott*, what led to the application of the caveat – this time, to the 'estopping' of the claimant from arguing that, for the purpose of the claim, his daughter's dominant nationality was American – was the Tribunal's finding that the 'only way in which [the claimant's daughter] could acquire [the] shares in question was by making use of her Iranian nationality'.[53] In short, what led to the application of the caveat in these two Cases, albeit in the context of dominant nationality, was this fact that while the rights asserted by the claimants were only available to the nationals of Iran, the right to seek redress from Iran before this Tribunal was only available to nationals of the United States.

repudiate their liability to correlative responsibilities.' W. E. HALL, A TREATISE ON INTERNATIONAL LAW, 8th Ed., edited by A. P. Higgins, Oxford: Clarendon Press, 1924, at 297. (Reference omitted)

50 Both these two features will likewise be found in the Award in *Golpira*, issued, as noted, on the same day on which the Award in *Esphahanian* was issued. There, too, the Tribunal first determined that the claimant was of dominant American nationality, and then concluded that the damages sought were 'related primarily' to the claimant's American nationality, not his Iranian nationality. In particular, the Tribunal found that since the shares of stock in question were available to non-Iranians, 'the mere fact that Golpira's Iranian I.D. card number appears on his share certificates does not mean that he concealed his American nationality in order to obtain benefits available only to Iranians'. 2 IRAN-U.S. C.T.R. 171, at 174.

51 It is true that in *Mahmoud,* the caveat was not specifically referred to, but as was later confirmed by the Tribunal, 'the elements of the caveat were clearly there'. *Saghi* v. *Iran*, 29 IRAN-U.S. C.T.R. 3, at 37.

52 9 IRAN-U.S. C.T.R. 350, at 354.

53 24 IRAN-U.S. C.T.R. 203, at 218. See pages 143-144 above.

Before examining further areas of the caveat application in the case law of the Tribunal, a word or two must be said here about the interpretation in *Mahmoud* of certain provisions of Iranian law, on which interpretation the Tribunal has also relied in some later Cases. The basic facts pertinent to the caveat enquiry in that Case will be recalled. The claimant had inherited the real estate in dispute, situated in Iran, in 1970, when she was of sole Iranian nationality. She had become a naturalized United States citizen in August 1979, although she could have applied for such naturalization much earlier, and she had placed the date of the asserted expropriation of her property in March/April 1980.

The finding by the Tribunal that by retaining the ownership of the property the claimant had not violated the laws of Iran, was based on the Tribunal's interpretation of Articles 988 and 989 of the Civil Code of Iran, according to which interpretation the claimant was entitled to keep the property for one year after her naturalization as a United States national. And yet, there is no support for this reading of the two Articles. Article 988, as noted earlier,[54] lays down the requirements to be met by those nationals of Iran who wish to abandon their Iranian nationality, one of which requirements, reflected in clause 3 of the Article, is

> an undertaking by them in advance to transfer to nationals of Iran, by some means or other and within one year of abandoning their Iranian nationality, all the rights that they possess on landed property in Iran or which they may come to acquire by inheritance, even if Iranian law permits such ownership by foreign nationals …

Note A to the Article (as amended) then states that

> those who under this Article apply for abandoning their Iranian nationality and accept foreign nationality must, in addition to implementing the requirements of clause 3, leave Iran within three months of the issuance of the certificate of abandonment. If they fail to do so, the competent authorities shall order their expulsion and the sale of their property. The extension of the said deadline up to a maximum of one year requires the consent of the Ministry of Foreign Affairs.

Article 989 of the Code, on the other hand, addresses the case of a national of Iran who without due observance of the law's requirements acquires a foreign nationality. The foreign nationality of such a person, says the Article:

54 See page 18 above.

> shall be regarded as non-existent, and he shall be considered a national of Iran. All his immovable property shall nevertheless be sold under the supervision of the local prosecutor and, after the deduction of the transfer expenses, he shall be given the value therefor.[55]

Now Mrs. Mahmoud had acquired her United States nationality in August 1979, in disregard of the conditions set by Iranian law. Her case, therefore, was covered by the terms of Article 989, which provides, *inter alia*, for the sale of the property of such a person without referring to any respite. This is readily confirmed by the Tribunal: 'Article 989 applies also in cases such as that of the Claimant where a second nationality was acquired but no effort was made to renounce Iranian nationality.' In the light of this, it is surprising to find that the Tribunal concludes, in the next sentence and without giving any explanations, that: 'According to Iranian law, therefore, the Claimant could … have kept the property for one year from the date of her naturalization';[56] a period that had not expired by the time of the alleged taking in March/April 1980.

To read the one-year respite into Article 989 is not only unsupported by the rules of interpretation – for that respite is specifically mentioned in Article 988 and is absent in Article 989 – but, more importantly, goes against the very system of reward and penalty adopted by Iranian law on the subject. Under that system, in brief, a national of Iran who wishes to acquire a new nationality must first abandon his Iranian nationality and, in order to do that, he must meet certain legal requirements. Where he does so, he is rewarded with a one-year grace period to dispose of the landed property he owns, or may come to own through inheritance, in Iran. Where, on the other hand, he chooses to break the law by acquiring a foreign nationality without observing the stipulated requirements, he is penalized by, *inter alia*, the sale of his landed property under the supervision of the local public prosecutor.

The introduction of the one-year grace period into Article 988 calls for the conclusion that under the system adopted by Iranian law, where a national of Iran abides by the conditions set for the renunciation of his Iranian nationality and the acquisition of a new nationality, he will be given a maximum of one year from

55 The Article further provides that such a person shall not be eligible for certain municipal or governmental posts. It is interesting to note that, as reported, Iran's Ministries of Foreign Affairs and Finance have jointly prepared a bill, currently before Iran's Parliament (Majlis), under which the sanctions imposed by Article 989 will be removed. How this will be reconciled with Article 988 and with other parts of Article 989 is unclear. Interview with Dr. M.A. Hadi, Deputy Minister for Consulate and Parliamentary Affairs in the Ministry of Foreign Affairs, Ettela'at International, a Persian Daily, 7 June 2004.

56 9 IRAN-U.S. C.T.R. 350, at 354.

the date of his renunciation to dispose of his landed property in Iran. Where, however, he chooses to violate the conditions set by the law, he may still lawfully retain his property for the same period. Clearly, this is a 'manifestly absurd or unreasonable' result which, under Article 32 (b) of the Vienna Convention on the Law of Treaties (1969),[57] must be rejected. Indeed, as provided in that Article, a 'manifestly absurd or unreasonable' result must be rejected even where the application of the general rule of interpretation, set in Article 31 of the Convention, leads to such a result, let alone where, as in here, the application of that rule leads to the only logical result.[58]

The fact that the authority vested in the public prosecutor under Article 989 may be exercised immediately upon the renunciation of Iranian nationality is also supported by the text of Note A to Article 988, just quoted. That Note addresses the case of an Iranian national who has duly complied with all the law's requirements laid down in Article 988 and is thus issued with a 'certificate of abandonment', but who fails to meet one additional requirement set in the Note, namely, leaving Iran within three months of the date of the certificate. The competent authorities, says the Note, must order his expulsion and the sale of his property. No respite, of course, can be read into that provision. The reference to the prosecutor's mandate to order the national's expulsion and the sale of his property makes it abundantly clear that what the law requires is not a piecemeal imposition of penalties, expelling him immediately after his failure to leave Iran, but selling his property a year thereafter, or a year after the date of the certificate of renunciation.

In fact, what we have here is a person who, having been issued with a certificate of renunciation, is already given a year from the date of the certificate to dispose of his real property in Iran. Hence, when the law speaks of the forced sale of his property because of his later failure to leave Iran within three months, it cannot sensibly think of a forced sale a year after the national's failure to leave. What all these show is this, that under Article 988 and its Note A, where a national complies with all but one of the requirements for a lawful renunciation of Iranian nationality, he is deprived of any grace period. Article 989 may not therefore be

57 UN Doc. A/CONF. 39/27, 1155 U.N.T.S. 331; reprinted in 8 ILM 679 (1969). The Article is quoted in full on page 28, footnote 56, above.

58 As interpreted by the Tribunal, the relevant part of Article 989 should read as '… the foreign nationality of such a person shall be regarded as non-existent, and he shall be considered a national of Iran. All his immovable property shall nevertheless be sold under the supervision of the local prosecutor *after one year from the date of the acquisition of foreign nationality* …' And yet the italicised words are simply not to be found in the Article.

logically interpreted as granting a one-year respite to a national who fails to abide by any of the requirements set in Article 988 and its Note.

It remains to be said that the reading of a one-year grace period into Article 989 in *Mahmoud* had no determinative effect on the end result of the dispute. This was because the Tribunal in that Case did reject the claim for failing to meet the test of the caveat, albeit on the ground that the claimant, though committing no unlawful act, had been able to retain her property in Iran only as an Iranian national. A conclusion by the Tribunal that the sanctions in Article 989 were of immediate application would have likewise triggered the application of the caveat, though this time because of the claimant's retention of her immovable property in Iran in breach of Iranian law.[59]

Back to the application of the caveat by the Tribunal in post-A/18 Decision, it must be noted here that it was only as from 1988, when Iran ended its boycott of the proceedings in dual nationals' claims and began gradually to brief the Tribunal on the individual Cases,[60] that the parties – the United States and the individual claimants on the one hand, and Iran, on the other – turned their attention to, and addressed in detail, the caveat and its related issues. By then they had before them the application of the caveat to the facts of the Cases in *Esphahanian*, *Golpira*, and *Mahmoud*.

Briefly, the claimants and the United States argued[61] that the caveat, added

59 See also *Saghi* v. *Iran*, 29 IRAN-U.S. C.T.R. 20, at 36-7, and *George E. Davidson (Homayounjah)* v. *Iran*, 34 IRAN-U.S. C.T.R. 3, at 25. For a Case in which the reading of a one-year respite into Article 989 did affect the outcome, see *Mohtadi* v. *Iran*. The claimant in that Case was naturalized as a United States citizen on 24 July 1978, and the Tribunal found that his claim, related to his real property in Iran, arose either on 26 June or 2 July 1979. Based on this, the Tribunal held that because the claim in either event arose in less than one year after the claimant's acquisition of United States nationality, the caveat did not apply. As in *Mahmoud*, the Tribunal offered no justifications in support of this interpretation of Article 989. Instead, it cited *Mahmoud,* and additionally relied on a representation to that effect made by the respondent's counsel at the Hearing of the Case. (32 IRAN-U.S. C.T.R. 124, at 153-5) But then this representation had been withdrawn by the respondent who, in a properly filed post-Hearing general memorial, had expressly stated that Article 989 did not provide for any grace period, and that any suggestion on the respondent's part to the contrary had simply been an oversight. It was, at any rate, incumbent upon the Tribunal to satisfy itself of the correct interpretation of the Article, rather than rely on a subsequently withdrawn interpretation of the Article by one party.

60 See pages 51-52 above.

61 These arguments were later mainly consolidated in the 'Memorial of Dual Nationality Claimants on the Meaning of the 'Caveat' to the Dominant and Effective Nationality Rule Adopted by the Tribunal in Case No. A/18', prepared by Richard B. Lillich and Hamid Sabi, 1991, and the 'Memorial of the United States on the Issue of the Caveat

by the Tribunal without any prior briefings by the parties and in an opaquely worded single sentence, had no antecedents in customary international law. As such, the caveat had to be given not an expansive, but a restrictive reading. This was necessary, they submitted, in order not to cut back the positive thrust of the rule of dominant nationality enunciated by the Tribunal. More specifically, they suggested that the Tribunal should endorse, as a first step, a shift in the burden of proof, so that once the claimant established his dominant nationality of the claiming State, it would rest on the respondent to show that under a rule of positive international law the claimant's Iranian nationality precluded his claim on the merits.

They argued, next, that many of the doctrines of customary international law such as estoppel, abuse of rights, or lack of notice – assuming that these doctrines were germane to the issue of dual nationals – had already been invoked by Iran in relation to the proceedings before the Full Tribunal in A/18, and had been clearly rejected by the Tribunal's very choice of the rule of dominant nationality. This meant that in order for the caveat to apply, the conduct had to be of a very serious nature. The circumstances justifying the application of the caveat could not be determined in abstract, but always in the light of the especial facts of a given Case. In general, though, its application had to be restricted to instances in which the conduct was so unconscionable, fraudulent, or wrongful as to justify the dismissal of an otherwise meritorious claim.

Nothing of the sort could be attributed to the dual nationals before the Tribunal, whose reliance on their Iranian nationality when acquiring the rights in question was in fact encouraged, if not mandated, by Iranian law itself. Under that law, a dual national of Iran and a second country is not considered a foreigner, but solely a national of Iran. He was thus required to act, at least in areas other than land ownership, as an Iranian. There was therefore nothing abusive, fraudulent, deceitful, or otherwise improper if he did so. Similarly, there was nothing censurable about a dual national not informing Iran of his United States nationality, if only because Iran in any event would refuse to recognize such nationality. Nor were these dual nationals required to provide notice of their second nationality to Iran, again because that country refused to recognize such nationality.

Iran, on the other hand, argued[62] that contrary to the United States' misconception, what was said by the Tribunal in A/18 with regard to dominant

in Case A/18', October 1993. Both these Memorials were filed with the Tribunal in a number of dual nationality Cases.

62 These arguments were later consolidated in the 'Brief of the Islamic Republic of Iran on the Issue of the Caveat in Case A/18 (A Response to the U.S. Memorial)', submitted to the Tribunal on 16 September 1994.

nationality and the caveat did not constitute a 'rule' and an 'exception', so as to call for a narrow application of the exception. These are two rules meant to operate at different levels. The rule of dominant nationality is a procedural requirement and hence operates at the jurisdictional level. The caveat, in contrast, impinges upon the substance of a claim – with which the Tribunal did not deal in A/18 – and hence becomes operative only after the Tribunal satisfies itself of its jurisdiction.[63]

Next, Iran argued that the caveat, with solid support in doctrine[64] and States practice,[65] had as its legal basis the principle of good faith; a principle applicable to all the basic rules of international responsibility. More importantly, the caveat had, after the Tribunal's pronouncements in *Esphahanian* and A/18, the strength of a clearly stated Tribunal precedent, and hence was enforceable irrespective of its background in international law.

As to the scope of the caveat's application, Iran maintained that each and every one of the rules of general international law that precluded the consideration of the merits of a claim because of the claimant's lack of good faith remained relevant. These included estoppel, abuse of rights, fraudulent conduct, and clean hands. It is true that in its endorsement of the rule of dominant nationality the Tribunal refused to admit these concepts in order to deny jurisdiction to all dual nationals. But this cannot possibly mean that conduct relevant to the merits may not be examined at the merits stage of a claim, for the Tribunal itself expressly stated otherwise.

More concretely, Iran suggested that given the Iranian law's rejection of dual nationality and its strictness on the acquisition of certain rights by foreigners, the claim of any dual national of Iran and the United States with dominant United States nationality who, without disclosing his United States nationality, drew

63 The same seems to be true of general principles of international law. There, too, principles such as 'estoppel', 'clean hands', and 'abuse of rights' do not form exceptions to a general rule, but operate independently.

64 Citing, *inter alia*, BORCHARD: 'The representation by a naturalized American citizen abroad that he is not an American operates as a bar to recovery upon a claim before a commission having jurisdiction of claims of American citizens.' BORCHARD, footnote 34, 722.

65 Citing, *inter alia*, BORCHARD, *ibid*, at 720. He refers to the practice of the United States *vis-à-vis* natives of Russia and Turkey who were naturalized in the United States and then returned to their native countries: 'The Department of State holds that a naturalized American citizen of Russian (Turkish) origin who returns to his native country as a Russian (Turkish) subject, concealing the fact of his naturalization in order to evade Russian (Turkish) law, thereby so far relinquishes the rights conferred upon him by his American naturalization.'

advantages in Iran from his Iranian nationality and now seeks redress with regard to those advantages before this Tribunal must be rejected on the basis of various versions and applications of the principle of good faith. And this, whether those advantages were, under Iranian law, exclusively reserved for the nationals of Iran, or were available to non-Iranians only upon the fulfilment of certain conditions and requirements. Similarly inadmissible, according to Iran, was the claim of any such national who, in relation to his claim, misbehaved himself in any other way, engaging, for instance, in any fraud or deception, or in any act designed to elude or break the national laws of his countries of nationality.

In addition, Iran submitted that it bore no responsibility in respect of its actions towards dual Iran-United States nationals who concealed, or failed to give notice of, their United States nationality to Iran. This was so whether one believed that international responsibility required proof of fault (culpa),[66] or that the mere commission of an internationally wrongful act was sufficient.[67] If the former, Iran was not aware that it was acting against the property of an alien, and thus could not be at fault in its treatment of an alien, particularly because the alien himself was the source of this lack of awareness. If the latter, the responsibility of Iran could not be engaged because notice of the foreign nationality of the individual concerned was an essential element of the 'wrongfulness' of the act. This is because the wrong attributed to Iran was the breach within its territory of certain aliens' property rights, and such may not be established unless it is shown that their rights were violated as aliens, and not as Iranians.

Before proceeding further, and in order to have a better appreciation of the Tribunal's further precedents on the subject, a word or two must first be said about the privileges envisaged by the laws of Iran for the nationals of Iran. There is first the class of privileges reserved exclusively for the nationals of Iran, the prime example of which, as will be seen presently, is the right to own real property in

66 This is a view traditionally favoured. See, for instance, L. OPPENHEIM, INTERNATIONAL LAW: A TREATIES, 8th Ed., edited by H. Lauterpacht, Vol. I (Peace), London: Longman, 1955, at 343. To the same effect is the *Corfu Channel* Case (Merits), ICJ Reports (1949), 17.

67 As apparently favoured by the International Law Commission: 'Every internationally wrongful act of a State entails the responsibility of that State.' Article 1 of the Commission's Articles on Responsibility of States for Internationally Wrongful Acts (2001), adopted at 53rd Session of the Commission, Official Record of the General Assembly, 56th Session, No. 10, UN Doc. A/56/10, Ch. IV.E.1. But see the interpretation of an earlier though identical version of this Article by a former Special Rapporteur, G. Arangio-Ruiz: 'According to our understanding … the Commission seemed rather to believe that fault was a *sine qua non* condition of wrongfulness and responsibility'. Second Report on State Responsibility, Addendum, UN Doc. A/CN.4/425/ADD.1 (1989), para. 163.

Iran. Next, there is the class of privileges from which non-nationals can benefit, but only if certain prior conditions are met. In order to work in Iran, for instance, non-nationals require permission from the Ministry of Labour, and brokers may be of foreign nationality only subject to specific conditions. Finally, there is the class of privileges with respect to which quota are imposed on non-nationals. This is the case, for instance, with regard to foreign ownership of banking institutions, insurance companies, shipping or aviation companies, and investment in certain industries.

With regard to these restrictions two points, raised in the briefs of the United States and of individual claimants, warrant mention. *First*, with the exception of ownership of real property by foreign nationals, where the prohibition is absolute and leads to the forced sale of the property, the sanctions for violation of the law are not so drastic. Failure to observe quota, for instance, may result in the withdrawal of licences in the case of banking institutions or insurance companies, and in the refusal to allow the use of flags in the case of shipping or aviation companies. The foreign ownership, however, would not be illegal *per se* and not subject to confiscation.[68]

Second, these restrictions are all imposed on 'natural', and not juridical foreign nationals. Under Article 1 of Iran's Registration of Companies Act (1931), however, any corporation formed and registered in Iran in accordance with that Article is regarded as a national of Iran, irrespective of its stock ownership.[69] By structuring his business interests through a corporation established in Iran,[70] any natural foreign national could, so the argument goes, enjoy all the privileges reserved

68 This point has in turn been rebutted by Iran. Under Article 348 of the Civil Code of Iran, '[t]he sale of an object the purchase or sale of which is forbidden by law … is null and void', and under Article 365 of the same Code, '[a]n irregular sale does not in any way result in the passing of ownership'. These provisions clearly establish, according to Iran, that property rights and benefits obtained by a foreigner in violation of the law is *per se* illegal. Of the same purport are Articles 210 and 362 of the Code.

69 To the same effect is Article 1002 of the Civil Code of Iran.

70 As was done, for instance, by one of the claimants before the Tribunal, *Starrett Housing Corp.* v. *Iran*, 16 IRAN-U.S. C.T.R. 112.

for the nationals of Iran,[71] including the privilege of owning real property in Iran.[72]

Reverting to the chronological development of the subject in the Tribunal's jurisprudence, the first Case to be noted after *Mahmoud* is *Protiva*, in which the Tribunal provided further information as to the areas of application of the caveat. Having determined that during the relevant period the claimants were of dominant United States nationality, the Tribunal went on to say that:

> This jurisdictional determination … remains subject to the caveat added by the Full Tribunal in its decision in Case No. A/18 … The Tribunal will therefore in the further proceedings examine all circumstances of this Case also in light of this caveat, and will, for example, consider whether the Claimants used their Iranian nationality to secure benefits available under Iranian law exclusively to Iranian nationals or whether, in any other way, their conduct was such as to justify refusal of an award in their favour …[73]

It will be observed that the Tribunal in this passage identifies two distinct areas for the application of the caveat: the *first*, in line with the Tribunal's earlier pronouncements, is where the nationality of the respondent State is used for securing benefits reserved for the nationals of that State; and the *second* is where the conduct is in any other way such as to call for the rejection of the claim. Since the consideration of the substance of the claim was reserved for a later phase,

71 This argument has recently been rejected in relation to the Washington Convention for Settlement of Investment Disputes between States and Nationals of Other States. In *Soufraki* v. *United Arab Emirates*, cited at page 75, footnote 90 above, the tribunal noted that had the claimant contracted with the respondent State 'through a corporate vehicle incorporated in Italy, rather than contracting in his personal capacity, no problem of jurisdiction would now arise'. The tribunal went on to state, however, that it 'can only take the facts as they are and as it has found them to be.' *Ibid*, at 30.

72 This, too, has been challenged by Iran. The laws of Iran on the subject, it is pointed out, are based on a carefully considered policy of rejecting foreign controls in certain economic, financial, and industrial fields, on the one hand, and encouraging regulated foreign investments, on the other hand. Any attempt to circumvent this policy through a legal device is a *fraud a la loi*, specifically rejected by Article 426 of the Commercial Code of Iran, under which, '[i]f it is established before a court of law that the transaction was prompted by a desire to defraud … , the transaction is automatically rendered null and void …' There are at any rate fundamental differences between direct ownership of a restricted right, and the ownership of shares in a legal entity that owns that right.

73 23 IRAN-U.S. C.T.R. 259, at 263 (Interlocutory Award). See also *Khosrowshah*i v. *Iran*, 24 IRAN-U.S. C.T.R. 40, at 45 (Interlocutory Award).

the Tribunal found no occasion at that stage of the proceedings for the application of its interpretation of the caveat to the facts of the Case.

Such an occasion did arise in *Saghi*. It will be recalled that this was a Case in which the dual nationality, as well as the dominant United States nationality, of one of the three claimants, Allan J. Saghi, had first been affirmed in an Interlocutory Award.[74] By virtue of the United States nationality of his parents,[75] Allan, born in Tehran in 1957, was a national of the United States from birth. By virtue of his birth in Iran, he also had a claim to Iranian nationality,[76] a claim that he withdrew in 1975, when he reached the age of eighteen. In January 1977, however, he applied to the Iranian Consulate officials in the United States, where he was residing since 1975, for a reversion to Iranian nationality.[77] This was granted in the summer of 1977. His claims related to his ownership interests in two Iranian corporations, N.P.I. and Novin, assertedly expropriated by Iran in 1980.

In that summer of 1977, very shortly after Allan was granted his Iranian nationality, the owner and managers of N.P.I. executed several share transfers, reducing the foreign shareholdings to 25 percent of the total. In the lists they submitted to Iranian authorities, they presented Allan, who owned just over 48 percent of the total, as a non-foreign shareholder. The respondent argued that all these steps were taken in preparation for the implementation of a new law – the Law for the Expansion of Public Ownership of Productive Units (Law for Expansion) – which *inter alia* imposed a limit of 25 percent on foreign ownership in certain businesses, including the cellulose business in which N.P.I. was engaged. The claimants denied that the Law for Expansion applied to N.P.I.

With regard to the issue of the caveat, the Tribunal first recalled its previous pronouncements on the areas in which the rule was to be applied. One such area was of course where the claim by the dual national was for the benefits limited by Iranian law to persons of sole Iranian nationality. Referring to *Protiva* and

74 See pages 52 and 166 above.

75 His father being a dual United States-Iraqi national.

76 Under Article 976 of the Civil Code of Iran, any person who is born in Iran to a father of foreign nationality, and who resides in Iran for at least one year immediately after attaining the age of eighteen, is regarded as a national of Iran. Under Article 977 (b), however, he may apply within a year of his attaining the age of eighteen to remain in the nationality of his father.

77 In accordance with Article 990 of the Code: 'Those Iranian nationals who either themselves or their fathers have renounced Iranian nationality in accordance with the provisions of the law and wish to revert to their original nationality shall be reinstated in their original nationality upon request, unless the Government does not find it advisable to grant the request.'

Khosrowshahi, however, the Tribunal once again affirmed the caveat's second field of application:

> [T]he equitable principle expressed by this rule can, in principle, have a broader application. Even when a dual national's claim relates to benefits not limited by law to Iranian nationals, the Tribunal may still apply the caveat when the evidence compels the conclusion that the dual national has abused his dual nationality in such a way that he should not be allowed to recover on his claim.[78]

Turning next to the facts of the Case, the Tribunal found that the issue of whether the Law for Expansion applied to N.P.I. was not very clear. But this, said the Tribunal, needed no decision, for it appeared that, back in 1977, the claimants themselves believed that the foreign ownership of N.P.I. was limited to 25 percent of its capital, as evidenced by the facts that the share transfers left precisely that percentage for the foreign shareholders, and Allan was presented to the Iranian authorities as a national of Iran.[79] This led the Tribunal to conclude that in the context of the Case,

> Allan consciously sought and obtained Iranian nationality solely for the purpose of having certain shares in N.P.I. placed in his name to minimize the adverse effects of the Law for Expansion. The Tribunal holds that in these exceptional circumstances, fundamental considerations of equity require that Allan Saghi … should not be permitted to recover against Iran, even if the related benefits … were not limited to Iranians by Iranian law. To rule otherwise would be to permit an abuse of right.[80]

Interestingly, the Tribunal made it clear that the caveat in this Case did not exclude Allan as a claimant, but merely applied to those of his claims covered by the stated equitable considerations. As a result, of Allan's four claims, two were rejected on this ground, and two were admitted. The two rejected were his claims relating to: (i) the shares in N.P.I. registered in his name and beneficially owned by him; and (ii) the shares in N.P.I. registered in the names of certain Iranian employees of N.P.I. but beneficially owned by him. The two admitted were his claims relating to: (iii) the shares in N.P.I. registered in his name but beneficially owned by his father (James) and his brother (Michael); and (iv) his ownership interests in Novin

78 29 IRAN-U.S. C.T.R. 20, at 38.
79 *Ibid*, at 39.
80 *Ibid*, at 40.

corporation which, as found by the Tribunal, had nothing to do with the Law for Expansion. This calls for a brief comment.

In coming to the above conclusions the Tribunal seems to have been mindful of its consistently applied rule, confirmed in *Saghi* itself, that under the Algerian Declarations, what determines the nationality of the claim is the nationality of the beneficial, and not the nationality of the nominal, owner of the claim.[81] But then the rigid application of this rule in the Case has evidently resulted in some unsatisfactory results. It will have been noted that the censurable conduct in this Case was Allan's very acquisition of Iranian nationality in the summer of 1977. He had, in the words of the Tribunal, 'consciously sought and obtained Iranian nationality solely for the purpose of having certain shares in N.P.I. placed in his name …'

In this, we have a situation strikingly similar to, if not identical with, the one in *Nottebohm*, both involving nationality acquired for convenience only. As noted, the claimant in *Nottebohm* had by the time of the confiscation of his property in 1949 established sufficiently strong connection with the claiming State. The Court, however, went back to 1939, the time of the naturalization, and, having concluded that the acquired nationality lacked the foundation of genuineness at that time, refused to sanction the benefits that the claimant had intended to derive from his naturalization.[82] It did so by not recognizing the effect of the acquired nationality *vis-à-vis* the respondent State. In *Saghi*, too, the Tribunal found fault with Allan's acquired Iranian nationality, a nationality which evidently was not based on any genuine desire on his part to become wedded to Iranian society, but was sought 'solely for the purpose' of securing an economic gain. As with the Court in *Nottebohm*, the Tribunal refused to sanction the benefits that Allan had wished to derive from his acquisition of Iranian nationality. Here, this was done through the rejection of Allan's claim on the basis of the caveat.

And yet, while the Tribunal rejected his claims relating to the shares he held in N.P.I., and the shares that others held for him in that entity, it admitted his claims relating to the shares he nominally held for his American father and brother. In other words, we have here an Iranian nationality that Allan was not entitled to rely upon to acquire shares in N.P.I. for himself – for this amounted to an abuse of right – but was entitled to rely upon to acquire shares for undisclosed American nationals. This seems hard to justify.

81 *Ibid*, at 24-8.

82 'Naturalization was asked for … 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 …' The *Nottebohm* Case, ICJ Reports (1955), 4, at 26.

The Tribunal tries to support its conclusion by noting that the shares nominally held by Allan belonged to his father and brother, who were not dual nationals of Iran and the United States, and were therefore not covered by the caveat.[83] This is true, but the latter two had thought it necessary to secure the shares in question through the medium of Allan's Iranian nationality, fully aware of the circumstances under which that nationality had been obtained, and were now seeking redress as American nationals. Indeed, it is difficult to imagine that this was not a joint scheme, and hence difficult to see why participants therein should not have received equal treatment. No reason is given, at any rate, as to why the rules of conduct in international law should not be applied to non-dual nationals.

The Tribunal suggests additionally that '[t]he fact that Allan Saghi can be considered an Iranian national for the purposes of these shares does not affect [James and Michael] as claimants'.[84] But in the Case at hand, Allan was not considered an Iranian national for the purposes of the shares in question. To the contrary, it was his very acquisition of Iranian nationality that was questioned. Besides, the Tribunal's suggestion that the caveat does not exclude Allan as a claimant but merely applies to the instances covered by the equitable considerations, is difficult to reconcile with the Tribunal's decision to reject his claim relating to the shares beneficially owned by him but registered in the names of N.P.I.'s employees. Such ownership had obviously nothing to do with his Iranian nationality. He was entitled to beneficially own shares through others, just as, in the Tribunal's view, his American father and brother were entitled.

The caveat was next considered in *Khosrowshahi*, in which the dominant United States nationality of the claimants had been earlier upheld in an Interlocutory Award.[85] The Case involved, *inter alia*, the claimants' shares in two Iranian corporations, Alborz and DIBI. As to the former, it was argued by the respondent that the claimants had purchased the shares as Iranian nationals and for that reason had received favourable tax rates on their dividends. The Tribunal, however, saw no reason to apply the caveat to the circumstances of the Case, recalling its finding in *Golpira* that 'the mere fact that [the claimant's] Iranian I.D. card number appears on his share certificate does not mean that he concealed his American nationality in order to obtain benefits available only to Iranians'. Besides, as the claimants were at the time residing in the United States, their nationality was irrelevant to the tax rates levied against them.[86]

83 29 IRAN-U.S. C.T.R. 20, at 40.
84 *Ibid.*
85 See page 224, footnote 73, above.
86 30 IRAN-U.S. C.T.R. 76, at 88.

As to the latter, a publicly traded joint stock banking corporation, it was additionally argued by the respondent that the fact that the claimants' shares belonged to the 'A category' of the stock, which was reserved for the nationals of Iran, and not to the 'B category', which was reserved for foreign nationals and was subject to a 25% ceiling,[87] demonstrated that the claimants had concealed their Iranian nationality when they purchased the shares, and were now abusing their rights by invoking their United States nationality. This argument, too, was rejected by the Tribunal. *First*, the respondent had offered no evidence to show that, when buying the shares, the claimants had in any way misrepresented themselves or concealed their United States nationality. *Second*, the evidence showed that the 25% prescribed limit was never reached, and this meant that the claimants' shares could always fall below the permitted ceiling. *Third*, there was nothing to believe that the claimants had in any way secured any special benefits by their ownership of the 'A category' shares. All these led the Tribunal to conclude that there existed no evidence that the claimants had either secured benefits exclusively reserved for the nationals of Iran, or that their conduct in any other way had been such as to call for the rejection of their claim. This Award, too, calls for some brief comments.

The claimants here were individuals who had purchased shares set aside for the nationals of Iran; shares which, if transferred to foreign nationals, had to be registered under a different category. It is thus difficult to see how the claimants could nevertheless be said not to have concealed their American nationality when they purchased these shares. It is equally difficult to see how the respondent State could be held liable to certain United States nationals for the nationalization of the 'A category' shares reserved for Iranian nationals only. But be that as it may, for what is more discomforting is the Tribunal's further observation, of general import, that '[i]t seems clear that dual nationals could not have purchased 'B category' shares, as Iran would not recognize their non-Iranian nationality'.[88]

This observation seems to be quite alien to this area of the application of the caveat, as consistently explained by the Tribunal, namely, that a person who now appears before the Tribunal *qua* a United States national may not seek redress for the rights that he secured *qua* an Iranian national. Clearly, the fact that under

87 Under Article 6 of the Bank's Articles of Association: 'The stock belonging to Iranian subjects is classified as 'A category', and the stock owned by non-Iranian subjects is classified as 'B category'. Each 'B category' stock which is transferred to Iranian subjects shall be converted by the Bank into 'A category' stock and, conversely, each 'A category' stock transferred to non-Iranian subjects shall be changed by the Bank into 'B category' stock.'

88 30 IRAN-U.S. C.T.R. 76, at 99.

Iranian law the claimants were not permitted to purchase the shares in question as foreigners – or were only permitted to purchase them as Iranians – is a prime argument for the application of the caveat, and not an argument for its inapplicability.

Proceeding with the case law, the Tribunal in *Ebrahimi* identified yet another conduct not coming within the purview of the caveat. The Case involved the taking by the respondent of the claimants' shares in an Iranian construction company, G.M. It was asserted by the respondent that the legislative act relevant to the alleged taking[89] expressly provided for compensation to share owners of foreign nationality in cases affected by the Law.[90] The fact that the claimants had not availed themselves of this opportunity showed, according to the respondent, that the claimants concealed their foreign nationality from the respondent even after the expropriation of their shares; a clear instance of abuse of nationality.

Citing with approval the broad test of the caveat adopted in *Saghi*, the Tribunal nonetheless rejected the respondent's contention that the caveat covered the claimants' conduct. The claimants' shares, held the Tribunal, had been taken pursuant to a piece of legislation other than the Law suggested by the respondent, but even if this had not been the case, the mere fact that they had allegedly decided not to seek compensation under that Law, at a time when the creation of this Tribunal could not have been foreseen, did not amount to an abuse of their dual nationality.[91]

The issue of land ownership in Iran and its relation to nationality was comprehensively dealt with first in *Karubian*,[92] a Case decided by Chamber Two of the Tribunal, and involving the asserted expropriation of the claimant's four separate properties in various parts of Iran. The claimant, originally of sole Iranian nationality, had purchased these properties long after his naturalization as a United States citizen. The Tribunal, having first concluded that the dominant nationality of the claimant during the relevant period was that of the United States, proceeded to address the merits of the Case. There, it reviewed the relevant land reform legislation in Iran after the 1979 Revolution as well as the related actions taken by the respondent against the claimant's properties, and found that although these

89 This was the 'Law for the Managing and the Taking of Ownership of the Stocks in the Contracting and Consultant Engineering Entities' (1980).

90 Thus, under Article II (B) of that Law: 'The value of shares of foreign shareholders in the entities taken by the Government shall, upon the auditing and evaluation of each entity, be paid by the Government'.

91 30 IRAN-U.S. C.T.R. 170, at 195. See, further, *Ghaffari (F)* v. *Iran*, 31 IRAN-U.S. C.T.R. 60, at 86-7.

92 32 IRAN-U.S. C.T.R. 3.

did not amount to expropriation, they constituted 'measures affecting property rights', such measures being compensable under the Algerian Declarations.[93] It was only after this finding of fact on the merits proper that the Tribunal turned to the issue of the caveat. As such, the Case differs from the Tribunal's earlier practice of taking up the caveat examination prior to the merits proper.

An exhaustive review of the pertinent laws of Iran led the Tribunal to the conclusion that, save certain exceptions irrelevant to the claims of dual nationals before the Tribunal, the right to acquire real property in Iran by contract[94] was a right reserved to Iranian nationals.[95] As a result:

> The Tribunal must … assume that the Claimant purchased all the properties that are the subjects of these claims in his capacity as an Iranian national after he had acquired United States nationality. He now claims in respect of those properties as a national of the United States. If the Tribunal were to allow him to recover against the Respondent in these circumstances, it would be permitting an abuse of right. Consequently, the A/18 caveat must bar the Claimant's recovery.

It is worth noting here that the Tribunal in *Karubian* did not need to go through all the pieces of legislation pertinent to the issue of the acquisition of real property in Iran by a non-Iranian national. This is because whatever the true answer to that broader enquiry, the laws of Iran contain clear provisions on the more specific issue there before the Tribunal, namely, the purchasing of real property in Iran by a national of Iran who acquires a second nationality. These provisions are to be found, as noted, chiefly in Articles 988 and 989 of the Civil Code of Iran, under which such a person must dispose of his real property in Iran, and if he should fail to do so, his property would be sold by the State, 'even if Iranian law permits such ownership by foreign nationals'.[96] On that basis, a national of Iran who purchases real property in Iran after his acquisition of a second nationality does so illegally, rather than by relying on, in the words of the Tribunal, 'his capacity

93 Article II of the Claims Settlement Declaration.
94 Presumably, as against property acquired through inheritance.
95 32 IRAN-U.S. C.T.R. 3, at 38-40.
96 See the discussion of these Articles at pages 216-219 above.

as an Iranian national'.[97] The rejection of the claim on the basis of the caveat, however, meant that in the event, this distinction proved immaterial.

Still, this very clear precedent by Chamber Two was flatly violated in *Aryeh (M)* v. *Iran*, decided shortly thereafter by Chamber Three. The claimant in *Aryeh (M)* was born in 1927 in Iran, with sole Iranian nationality. He was naturalized as a United Stated citizen in January 1966, and purchased the real properties that formed the subject of his claim all *after* his naturalization. The Tribunal first found that throughout the relevant period, the claimant's dominant nationality was that of the United States.[98]

Turning to the caveat, Chamber Three began its analysis of the issue by noting the two separate situations consistently identified in the case law of the Tribunal as calling for the caveat's application, namely, where the claimant 'has enjoyed a benefit reserved to sole Iranian nationals', and where there has been 'some other abuse of nationality that might invoke the *caveat*'.[99] Unlike the claimant in *Saghi*, said the Chamber, the claimant in the Case at hand had 'in no way abused his nationality'. In addition, there was no evidence in support of the contention that the claim had to be rejected 'on the basis of the theories of clean hands, estoppel, misrepresentation, good faith, or state responsibility'. The pertinent question, said the Chamber, was thus whether the claimant had 'enjoyed a benefit reserved to sole Iranian nationals'.[100]

Now there are problems with all this. The Chamber seems first to accept, rightly, that to seek redress as a United States national for a benefit reserved to sole Iranian nationals is itself an instance of abuse of nationality, forming one of the two separate situations in which the caveat may come into play. Hence, the Chamber's reference to the second situation as where there exists 'some *other* abuse of nationality'. In the light of that, the Chamber's findings – immediately thereafter and before examining the possible use of reserved benefits by the claimant – that he had in no way abused his nationality, and that his case was not covered by any of the principles pertinent to conduct, are puzzling. This gives the impression that, as seen by the Chamber, there exist three separate fields for

97 The illegality of such a transaction is further reflected in a set of Regulations approved by Iran's Ministry of Justice in 1938 pursuant to the authority delegated to the Ministry by Iran's Parliament. Under Article 44 of these Regulations, addressed to the notary public offices: 'It is forbidden to draw up and register deeds of transactions of real property by nationals of Iran who have renounced their Iranian nationality and who, according to the laws of Iran, do not have the right to purchase real property in Iran.'

98 33 IRAN-U.S. C.T.R. 368, at 373.

99 *Ibid*, at 386.

100 *Ibid*, at 386-7.

the application of the caveat, namely: (i) where the nationality is abused; (ii) where principles of international law pertinent to the conduct of a party come into play; and (iii) where the use of reserved benefits are at issue. There is no support for this either conceptually or in the Tribunal's case law. In neither is the principle of 'abuse of rights' placed in a category different from the category of other equitable principles of international law pertinent to conduct; and in neither is there any room for the proposition that the use of reserved rights may form a basis for the operation of the caveat outside those equitable principles.

Equally problematic is the Chamber's dismissive and conclusory observation that the conduct at issue did not come within the purview of any on the censurable acts. This was, after all, a claimant who had violated the laws of his native country not only when he acquired a second nationality but also, as noted by the Chamber in a later part of the Award,[101] when he thereafter purchased the landed properties in question. He had not disclosed his true status to the Notary Public who would, if notified of the fact, have refused to register the transactions on the basis of which the claimant asserted ownership. The conclusion, therefore, that this was not a case of, for instance, lack of clean hands or good faith, or was not an instance of misrepresentation or concealment of a material fact, deserved some explanation.

Still, the Chamber, having independently surveyed the pertinent laws of Iran, reached the conclusions, in line with *Karubian*: *that* the right to purchase real property in Iran was, subject to certain exceptions, reserved for the sole nationals of Iran; *that* the claimant's case was covered by Article 989 of the Civil Code; *that* he had therefore secured the property in dispute by relying on his Iranian nationality;[102] and *that* this called for the application of the caveat.

The point of departure, however, came when the Chamber turned to examine the impact of the caveat on the claim. The material facts regarding the caveat in this Case were of course identical with those in *Karubian*, both involving the purchase of real properties in Iran by natives of Iran subsequent to their naturalization as United States citizens. *Karubian* had held, quite categorically, that this called for the application of the caveat and, equally categorically, that when the caveat operated, it barred the claim. This much was clear, not only to the Cham-

101 *Ibid*, at 393.

102 However, as it was just observed in relation to *Karubian*, a person whose situation is covered by Article 989 is not permitted to purchase real property in Iran in *any* of his capacities, including his capacity as a national of Iran. Because of the prohibition in that Article, anyone who does so by concealing his true nationality status, commits an illegal act, and the laws of Iran refuse to recognize the transaction as legally effective.

ber,[103] but also to the claimant himself, who submitted at the Hearing that: 'If you believe that the precedent in *Karubian* is persuasive or binding, then you should dismiss this case.'[104]

Evidently, Chamber Three did not find the decision in *Karubian* either persuasive or binding. Instead, it stated that under Iranian law, particularly Article 989 of the Civil Code, the penalty imposed on a person who abandoned his Iranian nationality and nonetheless retained his landed property, was not the uncompensated taking of the property, but the forced sale of it by public authority, and the return of its proceeds, minus expenses, to the owner. It is true, said the Chamber, that Article 989 concerns a person who acquires the land lawfully and prior to his acquisition of a second nationality, but in the absence of any provision directly addressing the case of a person who, like the present claimant, acquires the land after his naturalization, Article 989 is the piece of legislation most relevant.

These observations led the Chamber to conclude that since the caveat was itself essentially an equitable instrument, its application by the Tribunal in such a way as to ignore the compensation that Iranian law itself envisaged, would not be justified. To the contrary, it would result in the unjust enrichment of the respondent, itself an inequitable outcome. In the event, the Chamber declined to hold that the caveat barred the claim, and compensated the claimant for the price of the property, minus a discount reflecting the reduced value of the property in an assumed forced sale. This aspect of the Award, too, must be commented upon.

The ruling in the present Case that in determining the impact of the caveat on a given claim, regards must be had to the consequences which the relevant national law attaches to the claimant's conduct is without precedent in the jurisprudence of this and other international tribunals. It is also wholly alien to the basic idea behind the caveat, and the principles of international law of which the caveat is a reflection.

As it has been seen, in any of the Cases before the Tribunal in which the caveat was discussed, from *Esphahanian* to *Karubian*, one thing was made abundantly clear: the caveat, if found applicable, would result in the dismissal of the claim irrespective of any other considerations. No allusion was made in any of these to the relevance of the legal consequences of the claimant's act under domestic law. And in any of the Cases in which the caveat was in fact applied – *Mahmoud, Schott, Saghi*, and *Karubian* – the application led to the dismissal

103 *Ibid*, at 387.
104 *Ibid*, at 385.

of the claims, again irrespective of how the claimant's conduct was treated domestically.

The same is true of the precedents of other international judicial fora on the impact of the application of any of the customary law's equitable principles, including the decision of the Commission in the *Flegenheimer* Case, the only international precedent cited by the Tribunal in relation to the caveat. The abusive conduct, it was there said, called for the rejection of the 'admissibility of a legal action'.[105] In fact, the totality of the impact of the caveat was a point shared by all the parties to dual nationality claims before the Tribunal. In their numerous briefings, they did argue over the applicability or otherwise of the caveat to a given circumstance, but they never doubted that, if applied, the caveat barred the claim in its entirety, whatever the circumstances.

Conceptually, too, the 'sanction theory' of *Aryeh (M)* seems quite misplaced. It is true that against the particular conduct of the claimant in *Aryeh (M)*, namely, the purchasing of real property in Iran after the acquisition of a second nationality, Iranian law happens to impose a sanction.[106] But this is neither necessary nor relevant to the application of the caveat, or of the principles of international law that the caveat represents. The reason is clear enough. The caveat and the principles of international law behind it are based on equitable considerations, operating to bar a claim where the claimant often has, but for his inequitable conduct, a valid claim in law. In fact, that inequity often stems, as noted, not from any single act of the claimant, but from the cumulative effect of what he does at the time of acquiring the right in question, and the posture that he subsequently adopts before the international tribunal. Because of the often-innocent nature of those single acts in isolation, sanctions do not normally come into play. Under the ruling in *Aryeh (M)*, the caveat in such instances applies, but with no impact on the outcome of the Case.

To give but a rather typical example, the claimant's daughter in *Schott* had purchased the shares at issue in her capacity as a national of Iran, her only capacity recognized by Iranian law. By itself and in isolation, then, this was a perfectly valid and lawful transaction under Iranian law. But then what the Tribunal said was, that a claim related to those shares could not be asserted before an international tribunal on the basis of a United States nationality; that the claimant there had to be 'estopped' from pursuing such a claim. Under the 'sanction theory', the caveat would still apply, meaning presumably that the claimant would still be 'estopped', but he would be fully compensated nevertheless, simply because

105 14 R.I.A.A. (1958), 327, at 378.

106 Not, contrary to the suggestion in *Karubian* and *Aryeh (M)*, the 'forced sale' of the property, but, as just noted, the rejection of the legality of the transaction.

the innocent act of the claimant's daughter understandably did not carry any penalties. This does not sound right; and it does not sound right because the 'sanction theory' and 'estoppel'[107] are two wholly different concepts with nothing in common.

That anomalous ruling in *Aryeh (M)*, going against each and every Case in which the Tribunal either applied or explained the caveat, was put right by Chamber One of the Tribunal in *Riahi* v. *Iran*,[108] the last Case on dual nationality, indeed, the last of the private Cases before the Tribunal. Frederica Lincoln Riahi was a United States citizen at birth, who had acquired Iranian nationality by virtue of her marriage to an Iranian national, and whose dominant United States nationality had been earlier upheld in an Interlocutory Award.[109] Her claims concerned certain apartments and shares that she had purchased in Iran after her acquisition of Iranian nationality.

Upon a review of the Tribunal's precedents, the Chamber once again confirmed the caveat's two fields of application.[110] This was then followed by a survey of the pertinent provisions of Iranian law, on the basis of which the Chamber concluded, in line with *Karubian* and *Aryeh (M)*, that under those provisions the right to acquire landed property in Iran was reserved for the nationals of Iran.

As noted, the claimant in *Riahi* was not, unlike the claimants in *Karubian* and *Aryeh (M)*, an Iranian national later naturalized by the United States, but a United States national later granted Iranian nationality by virtue of her marriage to an Iranian husband. This meant that her case was not directly covered by Articles 988 and 989, but rather by Article 986 of the Civil Code, under which a non-Iranian woman who acquires Iranian nationality through her marriage[111] may revert to her original nationality upon the death of her husband or the dissolution of the marriage. In that case, however, she will not be allowed to keep her real property in Iran in excess of what a foreigner is allowed, and if she fails to dispose of the excess within a year of renouncing her Iranian nationality, the excess will be sold by the local prosecutor, with the proceeds returned to her minus the sale expenses.

107 Or 'abuse of rights' or 'clean hands'.

108 37 IRAN-U.S. C.T.R. 11.

109 28 IRAN-U.S. C.T.R. 176.

110 It is worth noting here that this was the first and the only occasion on which the issue of the burden of proof in relation to caveat matters was specifically addressed: 'The Respondent has the burden of proving that a meritorious claims should nonetheless be dismissed due to the caveat'. 37 IRAN-U.S. C.T.R. 11, at 81.

111 Article 976 (6) of the Civil Code.

Mrs. Riahi had therefore acquired the apartments in question lawfully, albeit through her Iranian nationality, which nationality alone was recognized by Iran. As her husband was alive, and the couple's marriage not dissolved, her continued ownership of the property up to the time of the alleged expropriation was also lawful. In that respect, her case differed from those of the claimants in *Karubian* and *Aryeh (M)*, who under Iranian law were not entitled to acquire the properties in question. Still, what was important for the Chamber was the facts that the claimants in all the three Cases 'were dual nationals at the time they acquired the property in question, and Iranian legislation limited the right to acquire that particular property solely to Iranian nationals ... In other words, [the claimants in these Cases] … could not have used their United States nationality to acquire the claimed property'.[112] This, said the Chamber, required the application of the caveat.

Turning finally to the impact of the caveat, the Chamber was rather dismissive of the ruling in *Aryeh (M)* on this point. It noted the recurring references in the Tribunal's case law, both before and after *Aryeh (M)*,[113] to 'refusal of an award' in the instances coming within the scope of the caveat, and concluded that:

> Considering the above-mentioned precedents it seems very clear that when the caveat applies, whether it is the first situation (*i.e.*, legislation restricts foreigners' right to acquire certain property), or the second situation (*i.e.*, the claimant's conduct justifies refusal of an award), the caveat should bar a clam in its entirety.[114]

Based on this, the claimant's claims relating to her apartments in Iran were rejected.[115] Also rejected was the claimant's alternative submission that since

112 37 IRAN-U.S. C.T.R. 11, at 84.

113 For such references after *Aryeh (M)*, see: *George E. Davidson (Homayounjah)* v. *Iran*, 34 IRAN-U.S. C.T.R. 3, at 25: 'The caveat has been applied by the Tribunal as an instrument of equity intended to prevent abuses of right. Therefore, claims by dual nationals for benefits generally limited by relevant Iranian laws to persons who are nationals solely of Iran *have been considered barred*. Consequently, these persons have been *refused an award* in their favour.' (Emphases supplied); and *Sabet (Aram, Karim and Reja)* v. *Iran*, 35 IRAN-U.S. C.T.R. 3, at 43 (Partial Award). '[T]he Tribunal finds that the Claimants neither obtained any benefits reserved exclusively for Iranian nationals, nor abused their Iranian nationality such that they should be *barred from recovery*. Nothing in their conduct justifies *the refusal of an Award* in their favour.' (emphases supplied)

114 37 IRAN-U.S. C.T.R. 11, at 86.

115 'The Claimant acquired the … apartment by using the only possible nationality that she could invoke for purchasing that apartment, *i.e.*, her Iranian nationality. Now she claims the same ownership right against the Government of Iran as a United States national. Allowing the Claimant to recover against the Respondent in this situation would

during the relevant period no title deed had been issued to her, her claim was in the nature of a contractual right. The existence or otherwise of a title deed, said the Chamber, was irrelevant, since her claim was based on her rights as owner of the property.[116] On the other hand, her claims relating to her shares in a bank and in an Iranian legal entity were held not to have been affected by the caveat, for there was no evidence that the claimant had in those respects used her Iranian nationality to secure benefits not otherwise available to her, or had in any other way abused her Iranian nationality.[117]

The ruling by Chamber Three in *Aryeh (M)* that the impact of the caveat, when applied, is not an automatic dismissal of the claim, but depends on the sanctions, if any, imposed against the inequitable conduct by domestic legislation remains, therefore, an anomaly, not adopted by any of the Tribunal Cases decided prior to that Award or thereafter.

7.2.3 The Caveat and the Standard of Compensation

As a general rule, and subject to the exceptions to which reference will be made presently, the Tribunal has in its non-dual nationality Cases applied the standard of compensation adopted in the Treaty of Amity between Iran and the United States.[118] As interpreted by the Tribunal, that Treaty, considered as a *lex specialis* between the two States, requires under its Article IV the payment of 'full equivalent value' of the violated interests.[119] This standard stands in contrast to the standard of 'appropriate compensation', which is believed by a respectable body of authorities, including a former President of this Tribunal, to be the applicable standard in customary international law.[120] The 'full equivalent value' looks

be to permit an abuse of right.' *Ibid*, at para. 278.

116 *Ibid*, at paras. 279 and 283.

117 *Ibid*, at paras. 287 and 289.

118 The Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran, *signed* 15 *August* 1955, and *entered into force* 16 June 1957, 284 U.N.T.S. 93.

119 See, for examples, *INA Corp.* v. *Iran*, 8 IRAN-U.S. C.T.R. 373, at 379; *Phelps Dodge* v. *Iran*, 10 IRAN-U.S. C.T.R. 121, at 131-2; *Petrolane Inc.* v. *Iran*, 27 IRAN-U.S. C.T.R. 64, at 99; *Birnbaum* v. *Iran*, 29 IRAN-U.S. C.T.R. 260, at 271.

120 See the 'Separate Opinion of Judge Lagergren' in *INA Corp.* v. *Iran*, 8 IRAN-U.S. C.T.R., at 385. See also the *Oil Field of Texas Inc.* v. *Iran*, 1 IRAN-U.S. C.T.R. 347, at 356. In *SEDCO* v. *NIOC*, however, it was held that full equivalent was due for the expropriated interests 'whether viewed as an application of the Treaty of Amity or, independently, of customary international law …', 10 IRAN-U.S. C.T.R. 180, at 189.

exclusively to the claimant's loss, while the 'appropriate compensation' seeks to take into account all the relevant circumstances, and to strike a balance between the loss of the claimant and the interests of the expropriating State. It is important to note, however, that although the Tribunal has, because of the Treaty, been theoretically rather inflexible,[121] it has consistently displayed a good measure of flexibility in action. It has done so by adopting different methods of valuation appropriate to the circumstances of the disputes before it. It has, at any rate, always limited its awarded compensation to actual damages (*damnum emergens)*, as against lost profits (*lucrum cessans*).[122]

Turning now to claims of dual nationals, it was suggested by Iran in some such Cases that whatever the Treaty's standard of compensation, it was clear that it did not apply to dual nationals; and this for a number of reasons. *First*, the text of the Treaty makes no reference to dual nationals.[123] *Second*, a Treaty of Amity is by its very nature concerned with the reciprocal treatment of nationals of one State living as aliens in the territory of the other State, thus clearly leaving out dual nationals who by definition are regarded as nationals in both States. *Third*, any interpretation of the Treaty so as to include dual nationals would be incompatible with the domestic laws of both Iran and the United States, under which a dual national is regarded, respectively, as the sole national of Iran or the United States.[124] Based on these, Iran suggested that claims of dual nationals, falling as they did outside the ambit of the Treaty standard, deserved a lower standard of compensation.

Similarly, though not quite identically, it was suggested by an observer commenting on the decision in *Saghi* that the 'fundamental considerations of equity' to which that decision refers require that if dual nationals, who are not expressly covered by the terms of the Treaty, are allowed at the jurisdictional level to assert

121 At any rate with regard to what is known as 'individual expropriation', as against 'nationalization'. See *SEDCO* v. *NIOC*, 10 IRAN-U.S. C.T.R. 180, at 184-8.

122 An extensive expose of these concepts is given in *Amaco International Finance* v. *Iran*, 15 IRAN-U.S. C.T.R. 189.

123 The only place in which the Treaty alludes to dual nationality is in its Article 17, under which certain exemptions provided in the Treaty 'shall not apply to nationals of the sending state who are also nationals of the receiving state …' This, however, is a well-known customary rule pertinent to the consular part of the Treaty and, as such, has nothing to do with the economic or commercial part of the Treaty, in relation to which alone the standard of compensation in Article IV is set.

124 It is now an established rule of customary international law that '[e]ch of the States whose nationality a person possesses may regard him as a national'. P. WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW, 2nd Ed., Alphen aan den Rijn: Sijthoff & Noordhoff, 1979, at 244.

their claims, their losses should not at the merits level receive full compensation. This, according to him, was how the ruling in the A/18 that 'the other nationality may remain relevant to the merits of the claim' could be sensibly applied.[125]

Finally, it was argued by Iran in some other Cases that the lack of any knowledge on its part that these Iranian claimants also possessed a foreign nationality – the absence of any fault on its part in this respect – was a factor relevant to the determination of the standard of compensation, even if fault was not considered an essential element of liability. This is a position supported by a good number of commentators:

> [T]he element of fault should play an important part in any examination of the consequences … of the wrongful act … It is indeed the almost automatic practice of the tribunals, once a breach of obligation has … been established and attributed to a State, to pass on to a second stage at which they ascertain whether and to what extent the relevant conduct by the State concerned was malicious or wilfully harmful.[126]

Still, none of these suggestions has found favour with the Tribunal. Instead, the Tribunal has often held that it applies the Treaty standard to claims of dual nationals 'without deciding whether [the Treaty itself] is applicable to claims of dual nationals', and even though '[i]n none of these cases … was that question raised or argued by the parties'.[127] True, the Tribunal in *Ebrahimi* came to the conclusion, after an exhaustive review of the literature, that the currently applied

125 Flavia Lattanzi, *Iran-U.S. Claims Tribunal 22 Gennaio 1993*, Rivesta dell' Arbitrato (1993), No. 3, 513.

126 M. Bedjaoui, *Responsibility of States: Fault and Strict Liability*, in R. Bernhardt (ed.), ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, Instalment 10, Amsterdam: North Holland, 1987, 358, at 359. Of the same view is the International Law Commission's former Special Rapporteur: 'Whether or not there are cases in which responsibility is attributed regardless of the absence of any degree of fault, there is no doubt, in our opinion, about the relevance of fault with regard to the specific determination of the *consequences* of an internationally wrongful act. One thing would be to say that the presence of fault is not essential for an act to cross the threshold separating the lawful from the unlawful. Another thing is to say that the legal consequences of an act which has passed that threshold are the same whether or not any fault (*dolus* included) is present in any degree.' Second Report on State Responsibility, Addendum, UN Doc. A/CN.4/425/ADD.1 (22 June 1989), para. 163, at 3-4. (emphasis original)

127 *Sabet (Aram, Karim and Reja)* v. *Iran*, 36 IRAN-U.S. C.T.R. 203, at 206-207. See also: *Saghi*, 29 IRAN-U.S. C.T.R. 20, at 46; *Khosrowshahi*, 30 IRAN-U.S. C.T.R. 76, at 88-9; *Ghaffari(F)*, 31 IRAN-U.S. C.T.R. 60, at 85; *Protiva*, 31 IRAN-U.S. C.T.R. 89, at 120; and *Hakim*, 34 IRAN-U.S. C.T.R. 67, at 93-4.

standard of compensation was the 'appropriate' standard.[128] Similarly, it was stated in *Tavakoli* that in the circumstances of the Case, it was 'appropriate to award full compensation'.[129] But these were conclusions on the standard of compensation in general, and had nothing to do with the above-noted arguments made specifically in relation to the claims of dual nationals before the Tribunal.

7.2.4 A Nutshell Summary of All These

Three main points with regard to the caveat, relating, respectively, to its origins, *raison d' être*, and scope of application may now be very briefly recaptured. *First*, the caveat, pronounced *sua sponte* in *Esphahanian* and later affirmed in A/18, was not an innovation. It was, rather, a recognition by the Tribunal that once the rule of dominant nationality was borrowed from customary international law and read into the Algerian Declarations, other principles and rules of customary international law relevant to the admissibility of claims could not be left out. In fact, even if the caveat had not been expressed, the Tribunal still would have been required to observe those principles pursuant to the terms of its constituent instruments.[130] Because it was expressed, those principles received the added force of treaty provisions.

Second, so far as regards its *raison d' être*, although the caveat was nowhere conceptually explained, it is clear that the Tribunal saw it as a necessary and indispensable safeguard against, or a counter balance to, the rule of dominant nationality. As others have correctly observed, the rule of non-responsibility, rejected by the Tribunal in favour of the rule of dominant nationality, rests on two separate foundations, namely, the equal sovereignty of States, and the need

128 '[O]nce the full value of the property has been properly evaluated, the compensation to be awarded must be appropriate to reflect the pertinent facts and circumstances of each case.' 30 IRAN-U.S. C.T.R. 170, at 201. The fact that the Tribunal said nothing of the Treaty of Amity indicates that in view of the Tribunal, appropriate standard was also applicable under the Treaty.

129 33 IRAN-U.S. C.T.R. 206, at 227.

130 Article 5 of the Claims Settlement Declarations requires the Tribunal to 'decide all cases on the basis of respect for law, applying such … principles of commercial and international law as the Tribunal determines to be applicable …' The point is reflected in the A/18 Decision itself: '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' …' 5 IRAN-U.S. C.T.R. 251, at 260.

to prevent abuse of rights through dual nationality.[131] If the first is replaced by the laudable idea that the individual must at the international level be protected against wrongful acts of the State as much as possible, the other still stands, and is represented by the caveat. In other words, protection of the individual must not be allowed to thwart the need also to protect the rights of the State against the misconduct of the individual,[132] and the caveat is there to prevent such misconduct. In this sense, the rule of dominant nationality and the important caveat not only are in harmony, but supplement each other.

Third, with respect to its scope of operation, the generality with which the caveat was originally expressed led to a great deal of initial arguments and counter arguments as to its true field of application. This was gradually but consistently put right by the Tribunal. As later developed, the caveat was said to require the examination of 'all circumstances' of a Case, and the rejection of the claim in its entirety, in two separate situations: where the rights in question were reserved for the nationals of the respondent State, and where the claimant's conduct, in any other way, was such as to justify the dismissal of the claim.

The determination of the instances falling within the former situation has not been that difficult. As for the determination of the instances falling within the latter, the Tribunal has spoken of the 'fundamental considerations of equity' as part of the applicable law, but also of discrete principles of international law, such as 'abuse of rights' and 'estoppel'.[133] Broadly speaking, the Tribunal seems to have adopted a middle position. It has, on the one hand, rejected the arguments by Iran that the mere facts that a claimant, for instance, stayed or worked in Iran without a permit, or failed to give notice of his foreign nationality, or acquired the rights in question by producing his Iranian identity card, must trigger the caveat. It has, on the other hand, not accepted the contrary argument by the United States and the United States claimants that there must be proof of a clear 'unconscionable, fraudulent or wrongful' conduct. The Tribunal has made it clear, at any rate, that conduct does not mean conduct of the claimant exclusively in relation to the facts arising before the proceedings, but includes his conduct within the context of the proceedings.

131 G. Perrin, *Les conditions de validité de la nationalité en droit international public*, in Recueil d'études de droit international en hommage à P. Guggenheim (1968), 853, at 871-2.

132 This was indeed the main message of the International Court of Justice in the *Nottebohm* Case.

133 The Permanent Court of International Justice has held that in ascertaining international law on a given subject, it does not confine itself to the principles relied upon by the parties. *The S. S. Lotus* Case, Judgment No. 9, PCIJ, Series A (1927), No. 20, 3.

Against this sketch of the precedent, there have been two anomalies. *First*, the two Awards in which the caveat-related issues were examined in relation to the claimant's dominant nationality,[134] as against the rest of the Cases in which the Tribunal first satisfied itself of the claimant's dominant nationality of the claiming State, and only then examined his conduct as part of the substance of the claim. *Second*, the single Award in which the impact of the caveat was determined on the basis of the sanction provided by the relevant national law for the conduct in question,[135] as against the rest of the Cases in which the caveat either led to, or was said to lead to, the barring of the claim in its entirety, irrespective of any possible sanctions against the conduct by domestic law.

134 *Mahmoud*, 9 IRAN-U.S. C.T.R. 350, and *Schott*, 24 IRAN-U.S. C.T.R. 203.
135 *Aryeh (M)*, 33 IRAN-U.S. C.T.R. 368.

8

THE LIKELY IMPACT OF THE TRIBUNAL'S JURISPRUDENCE

Such was the treatment of the issue – the claims of dual nationals of Iran and the United States against Iran – by the Tribunal. The main features of this treatment having now been examined, thoughts may be focused in this final Chapter on the possible future impact of the Tribunal's jurisprudence. The question, to be more precise, is whether and to what extent the precedent thus set by the Tribunal is likely to influence the international claims of nationals of both the claimant and the respondent States[1] and, through that, the law of state responsibility in general. With the number of dual nationals ever increasing, now running globally at hundreds of millions, the issue is obviously of some significance.

The answer to the query, it is suggested, very much depends on the results of three considerations, namely: the status of the law prior to the Tribunal's jurisprudence; the authority of the Tribunal itself; and the intrinsic value of what the Tribunal advocated. This is because it is where the law is unsettled, the forum is weighty, and the jurisprudence is sound that the impact is likely to be the greatest. Each of these will now be briefly addressed, though some have already been discussed for other purposes.

8.1 The Status of the Law Prior to the Tribunal's Involvement

This much is rather clear that, contrary to the parties' contention in A/18, the law on the subject prior to the Tribunal's involvement was anything but settled. Indeed, the very fact that to one party this settled law was the rule of non-responsibility, while to the other it was the rule of dominant nationality, does by itself demonstrate the controversial status of the law as it then existed. This is further

1 As noted, there is nothing in the Tribunal's jurisprudence dealing definitively with the different case of a claimant possessing the dual nationality of the claimant State and a third State.

supported by a number of commentators who in their exhaustive studies have consistently concluded that historically, each of the two rules of non- responsibility and dominant nationality has always had its adherents, even though as from the beginning of the twentieth century, the rule of non-responsibility became the primary rule of general international law.[2]

It will be recalled that the Tribunal in A/18 does not take issue with this view of the earlier law. What it does, instead, is to suggest that because of two 1955 judgments in *Nottebohm* and *Mergé*, the primacy of the rule of non-responsibility was decidedly reversed in favour of the rule of dominant nationality. As suggested earlier, such a reading of those two judgments is unsupported. *First*, although *Nottebohm* has had its supporters,[3] it has been most vigorously attacked by others.[4] Here is but one example of the latter, where the author at the end of a detailed and well-argued article concludes that *Nottebohm*'s doctrine of genuine link

> separates nationality from its recognition by other states, replaces a clear and objective criterion by vague and subjective criteria, severs nationality form diplomatic protection, dilutes diplomatic protection, contains no definition, makes it possible to deprive an individual of the only legal remedy he has, threatens millions of persons with statelessness, makes the diplomatic protection of nationals domiciled abroad for business activities questionable, and … tears apart the unity of the institution of nationality and separates the different aspects of diplomatic protection. Its over-all effect would, therefore, be international uncertainty and insecurity.[5]

The judgment is there further characterized as 'judicial legislation *stricto sensu*', and one that 'has, up to now, no chance of becoming international law; the municipal legislation and practice of many states is opposed to it, writers continue

2 See, *e.g.*, HERBERT W. BRIGGS, THE LAW OF NATIONS: CASES, DOCUMENTS AND NOTES, 2nd Ed., New York: Appleton-Century-Crofts, 1952, at 516; H. F. VAN PANHUYS, THE ROLE OF NATIONALITY IN INTERNATIONAL LAW: AN OUTLINE, Leiden: Sijthoff, 1959, at 73-81; and the Report of the International Law Commission on Diplomatic Protection, fifty-fourth session (2002), UNGAOR, 57th session, Supp. No. 10, UN Doc. A/57/10.

3 See, *e.g.*, Brownlie, who states that 'there is no reason to believe that the general principle of effective nationality is not 'a permanent feature of the landscape'. *The Relations of Nationality in Public International Law*, 39 BYIL (1963), 284, at 363.

4 For an exhaustive reference to the literature on the *Nottebohm* judgment up to 1960, much of it 'highly critical', see Josef Kunz, *The Nottebohm Judgment (Second Phase)*, 54 Am. J. Int'l L. (1960), 536, at 537-9.

5 Kunz, footnote 4 above, at 571. See further: J. Mervyn Jones, *The Nottebohm Case*, 5 Int'l & Comp. L. Q. (1956), 230, at 231; Jack H. Glazer, *Affaire Nottebohm – A Critique*, 44 Georgetown Law J. (1955-6), 313, at 314.

to attack it, and a recent international decision has expressly rejected it'.[6] Though the writer may have exaggerated the consequences of the ruling,[7] the discomfort felt by him is understandable. This was, after all, a judgment that disallowed a State to exercise diplomatic protection on behalf of an individual who at the time of the judgment had been a national solely of that State for sixteen years and had his domicile there for nine years.[8]

The purpose here is not to revisit the debate over the judgment. It is, rather, to suggest that a decision that was so unfavourably received by a good number of commentators may not be readily characterized as having settled the law. More concretely, there is no evidence that the genuine link requirement on which *Nottebohm* insisted was accepted in the practice of States with regard to either the granting of nationality,[9] or the exercising of diplomatic protection. Nor is there any evidence of its widespread adoption by other international judicial decisions.[10] *Mergé* is often mentioned as having adopted *Nottebohm*'s rule of genuine link. And yet Kunz in the article just cited refers to an oral confirmation by the presiding member in *Mergé*, Professor de Yanguas Messía, that the decision in that Case, related as it was to a situation of dual nationality, had nothing to do with the *Nottebohm* judgment.[11] There is, besides, the *Flegenheimer* Case that flatly rejects the concept of effective link outside the field of dual nationality:

> There does not in fact exist any criterion of proven effectiveness for disclosing the effectiveness of a bound with a political collectivity, and the persons by the

6 Kunz, footnote 4 above.

7 Brownlie suggests, in contrast, that the consequences of an affirmation of the principle of effective link are 'unlikely to be radical', especially if it is liberally applied. This, he says, is because in normal cases effective nationality matches the formal nationality. I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 6th Ed., Oxford: Oxford University Press, 2003, at 406.

8 Leaving Kunz to ask, rhetorically, whether the decision is in accord with, *inter alia*, Article 15 of the Universal Declaration of Human Rights under which 'everyone has the right to a nationality'. Footnote 4 above, at 566.

9 The International Law Commission's Special Rapporteur on Diplomatic Protection concludes in his First Report to the Commission (2000) that: 'Available State practice also shows little support for the *Nottebohm* principle.' A/CN.4/506, at 39. See also: Kunz, footnote 4 above, at 566-7, who refers to the case of millions of 'overseas Chinese'; and Mervyn Jones, footnote 5 above, at 239, who notes the case of 'hundreds of thousands of British subjects in foreign countries who have never seen their native land'.

10 Indeed, with regard to the shareholders in a juridical person, the concept of link was rejected by the International Court itself. *Barcelona Traction* (Second Phase), ICJ Reports (1970), 3.

11 Footnote 4 above, at 568.

> thousands who, because of the facility of travel in the modern world, possess the positive legal nationality of a State, but live in foreign States where they are domiciled and where their family and business center is located, would be exposed to non-recognition, at the international level, of the nationality with which they are undeniably vested by virtue of the laws of their national State, if this doctrine were to be generalized.[12]

Brownlie points to two instruments that have since *Nottebohm* adopted the rule of genuine link.[13] One is the Convention on the High Seas,[14] Article 5 of which stipulates, in relation to nationality of ships, that '[t]here must exist a genuine link between the State and the ship'. The other is the United Nations Convention on the Reduction of Statelessness of 1961,[15] 'the detailed provisions of which rely on various criteria of factual connexion and evidences of allegiance'. But these are very special and isolated instances. The former, in particular, must be seen in the light of the long-standing debate over the 'flags of convenience'.[16] It has, besides, been strongly criticized.[17]

All this, of course, with regard to the possible impact of the *ratio* of the judgment, namely, the requirement of genuine link for the recognition of the nationality at the international level. As for the more specific issue of the claim of a dual national against one of his two States of nationality, we have in the judgment at most a *dictum*. At most, because, as noted, there is no unanimity that what was there said about the practice of international arbitrators was meant to refer to that particular situation.[18]

12 14 R.I.A.A. (1958), 327, at 377.

13 Footnote 3 above, at 363.

14 Adopted by the United Nations Conference on the Law of the Sea, 29 April 1958. UN Doc. A/Conf. 13/L. 52 – L. 55.

15 UN Doc. A/CONF. 9/15, 1961; 989 U.N.T.S. 175, No. 14458. Entered into force in 1975.

16 Kunz, footnote 4 above, at 569-70.

17 By, amongst others, Sir Robert Jennings, 121 Recueil des cours (1967-II), 323, at 463. It may be noted further that, closer to our subject, the Convention specifically disapproves of dual or multiple nationality of ships, providing, under its Article 6, that '[a] ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality'.

18 See, for instance, Sir Gerald Fitzmaurice, a former member of the International Court of Justice, who only two years after the judgment in *Nottebohm* speaks of the application of the rule of non-responsibility with no reservations. *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 Recueil des cours (1957-II), 1, at 193. Brownlie suggests that the terms of the judgment in *Nottebohm*

The second of the two precedents to which the Tribunal attributes the effect of settling the law, the *Mergé* precedent, has not attracted as much attention as *Nottebohm*, and yet this, too, was anything but a settling precedent. The fact that it was a decision made on the basis of a peace treaty between a victorious power and a defeated State is very hard to ignore, even though the relevance of this aspect of the Case was ardently denied by the Commission. More significantly, it is the only Case in the long history of the subject that first denies any conflict between the two rules of non-responsibility and dominant nationality, and then proposes a 'compatible' application for the two that in practice invariably results in the rejection of the former rule in favour of the latter. The initiative, described by some commentators as a back door rejection of the rule of non-responsibility,[19] has received no subsequent support. It was discussed by the International Law Institute at its 1965 Warsaw session, but dismissed in favour of Article 4 of the Hague Convention.[20] The Tribunal, too, has refused to support that initiative, even though it has adopted the rule of dominant nationality.

Indeed, in the same 1965 year, the rule of non-responsibility received endorsement from the now widely ratified Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States.[21] Article 25 (1) of the Convention states that the jurisdiction of the Convention's International Centre for Settlement of Investment Disputes (ICSID) extends to 'any legal dispute between a Contracting State and a national of another Contracting State'. Article 25 (2) then defines the term 'Nationals of another Contracting State' as, *inter alia*, any natural person who on the relevant dates 'had the nationality of a Contracting State other than the State party to the dispute' but not including any person who 'had the nationality of the Contracting State party to the dispute'.

Based on the above, the result of our first enquiry, namely, the status of the law prior to the Tribunal's involvement, may now be briefly stated. There is no evidence that by the time the issue came before the Full Tribunal for decision in 1984, the uncertain status of the law – the enduring rivalry between the two

as well as the fact that 'one of the pieces of experience' on which the Court relied was the practice of arbitral tribunals in dealing with cases of dual nationality, 'lead easily to the conclusion that the decision is exclusive of dual nationality'. (footnote 3 above, at 360) He goes on to emphasize, however, that under the régime of effective nationality, 'the rule, that diplomatic protection cannot be invoked against a State of which the *de cujus* is also a national, will survive', though it will operate exceptionally. (*Ibid*, at 361)

19 See, *e.g.*, N. BAR-YAACOV, DUAL NATIONALITY, London: Stevens and Sons, 1961, at 210-38.

20 Annuaire de l'Institut de droit international (1965), Vol. 51-I, at 262-71.

21 Opened for signature 18 March 1965, entered into force 14 October 1966. 575 U.N.T.S. 159.

rules of non-responsibility and dominant nationality – had in any way been resolved or considerably diminished by the two precedents in *Nottebohm* and *Mergé*; a situation which provided the Tribunal with an opportunity to leave its marks.

8.2 The Tribunal's Stature

Clearly, in considering the possible impact of a precedent, the persuasive authority of the creating forum becomes highly relevant. This is particularly so in the field of international law, where *stare decisis* has no place. Now, with regard to the Iran-United States Claims Tribunal, the existence of certain characteristics makes it quite safe to assume that its jurisprudence on many areas of international law,[22] including the law of State responsibility, will be quite influential. Some of the more notable of these characteristics are: the Tribunal's unique institutional nature;[23] the sheer volume of its output;[24] the availability of its pronouncements to the public;[25] and the high standing of its members.[26] As a commentator has

22 Indeed, the Tribunal's contribution extends to other fields, including the field of international peace. See D.B. Magraw, *Significance of the Tribunal and its Jurisprudence*, in R.B. Lillich and D.B. Magraw (eds.), THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY, Irvington on Hudson (NY): Transnational, 1998, at 22: 'It is beyond cavil that the Tribunal has made an important contribution to world peace and the international legal system simply by resolving the individual disputes peacefully and to that extent, at least, lessening the tensions between Iran and the United States'. He suggests that the fact that the Tribunal has functioned so productively is a tribute to 'the individuals involved, the procedural mechanisms adopted by the Tribunal, and the apparent basic desire of both governments to ensure its continuation'.

23 The Tribunal has been justifiably described as 'a path-breaking … international legal institution'. Henry T. King, Jr., Foreword to: JOHN A. WESTBERG, INTERNATIONAL TRANSACTIONS AND CLAIMS INVOLVING GOVERNMENT PARTIES: CASE LAW OF IRAN-UNITED STATES CLAIMS TRIBUNAL, Washington D.C: International Law Institute, 1991, at XII. See also D. B. Magraw, footnote 22 above, at 23, referring to the Tribunal as 'the first dispute settlement institution in decades'.

24 The Tribunal has 'produced more international law than any law-making body in the history of mankind'. Abraham D. Sofaer, a former legal advisor of the United States' Department of State, quoted in Mealey's International Arbitration Report (July 1990), at 17. See further JOHN A. WESTBERG, footnote 23 above, at XIV, where he accurately speaks of 'the largest of any single international claims tribunal in history'.

25 Both in print (*e.g.*, IRAN-U.S. CLAIMS TRIBUNAL REPORTS) and online (*e.g.*, www.westlaw.com).

observed, '[t]he decisions of the [Tribunal] constitute perhaps the single greatest source of jurisprudential development of public international law in history'.[27]

True, some commentators have expressed doubts, particularly during the Tribunal's early life, about the international nature of the Tribunal and the source of law on which the Tribunal relies.[28] The argument was, mainly, that because individuals were allowed to pursue their claims before the Tribunal, and because the Tribunal did not resolve the submitted disputes exclusively on the basis of public or private international law, its jurisprudence was *lex specialis* and for that reason not entitled to much weight in the international law arena. Comprehensive studies, however, have now convincingly dispelled these doubts, showing that the Tribunal is nonetheless a prime example of an international claim institution.[29]

In view of the above, it may be suggested, with respect to our second enquiry, that here too the Tribunal's distinctive stature placed it in a unique position to influence the future course of the law, if and where other prerequisites were present.

26 The list of the Tribunal's present and past members is impressive. It includes a former president and many *ad hoc* judges of the International Court of Justice, a former president of the Supreme Court of France, a former president of the United Nations Tribunal for former Yugoslavia, many members and special rapporteurs of the International Law Commission, and a good number of world-renown publicists and arbitrators. See, further, Henry T. King, Jr., footnote 23 above, at XI, who speaks of 'an unprecedented body of decisions by a very distinguished international tribunal', reflecting 'the participation of some of the best known legal internationalists of our time'.

27 Charles N. Brower, *The Iran-United States Claims Tribunal: Its Genesis, Structure, Organization, Jurisdiction and History*, 224 Recueil des cours (1990-V), 123, at 227. See also R. Lillich, American Society of International Law Proceedings (1982), 1, at 5-6: 'The largest and the most important international arbitration to date, it surely will influence the development of international law well into the coming century.' The editors of the Tribunal Reports describe the Tribunal as 'the most important international claims tribunal to have sat in over half a century', whose 'jurisprudence is bound to make a uniquely important contribution to international law and, in particular, the law relating to aliens'. See the front page to, for instance, 34 IRAN-U.S. C.T.R.

28 D. Lloyd Jones, *The Iran-United States Claims Tribunal: Private Rights and State Responsibility*, 24 Virginia Journal of International Law (1984), 259; D. D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 Am. J. of Int'l L. (1990), No. 1, 104, at 131-7.

29 See, for example, M. MOHEBI, THE INTERNATIONAL LAW CHARACTER OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL, The Hague/London/Boston: Kluwer Law International, 1999; Magraw, footnote 22 above, at 25-37; and D.J. Bederman, *Eligible Claimants Before the Iran-United States Claims Tribunal*, in R.B. Lillich and D.B. Magraw (eds.), THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY, Irvington on Hudson (NY): Transnational, 1998, 47, at 56 *et seq*.

8.3 The Intrinsic Strength of the Tribunal's Jurisprudence

The Tribunal's prominent features nevertheless, it has been suggested with some justification that because of the political and psychological pressures under which the Tribunal operates, the precedential value of its decisions should not be assessed indiscriminately, but on a case-by-case basis, so as to determine, in relation to each decision 'both signs of its integrity and potentially debilitating characteristics'.[30] This calls for a very brief revisiting, for the present valuation purposes only, of the major characteristics of the Tribunal's jurisprudence on the subject.

8.3.1 The Tribunal's Treatment of its Mandate

The first of such characteristics was the Tribunal's holding in the A/18 Decision that the solution to the disputed issue of dual nationals' claims was to be found not in the Declarations, but in the pertinent rule of customary international law. Now, it is true that resort to customary international law is permissible and, indeed, is recommended by the Vienna Convention of 1969. But then, and as that Convention makes it clear, this may be done only where it is safely ascertained, *first*, that the terms of the parties' agreement provides no answer to the question, and, *secondly*, that the pertinent rule of international law is 'applicable in the relations between the parties'.

In its haste to turn to customary international law, however, the Tribunal largely ignores its primary task of examining the text of the Declarations in the light of certain recognized rules of interpretation, and offers no explanations as to whether and how the rule it later comes to support, the rule of dominant nationality, meets the requirement of being applicable in the relations between Iran and the United States.

The Tribunal does so in spite of the fact that some of these rules of interpretation – such as the one that requires restrictive interpretation of a clause that grants jurisdiction to an international tribunal,[31] or the one that allows a rule of inter-

30 Magraw, footnote 22 above, at 37.

31 It is true that the Vienna Convention makes no reference to this particular rule, and some writers have questioned its wide application. Brownlie, for instance, cautions that as a general principle of interpretation, it 'should not be allowed to overshadow the textual approach'. BROWNLIE, footnote 7 above, at 606. But, as noted earlier (see page 62, footnote 30, above), these writers seem to have been concerned with the determination of treaty obligations. In relation to jurisdictional determinations, the applicability of the rule has not been credibly questioned.

national law to be taken into account only if it is applicable in the relations between the parties – are devised to ensure that in pronouncing itself on the matter, the international tribunal has the consent of the parties; that what it says is not gratuitous or *ultra vires*. Indeed, the lack of consent was precisely what Iran was primarily concerned with in the A/18 proceedings. It argued that whatever the rule in customary international law, the parties to the Declarations had not vested the Tribunal with the authority to entertain the claims of dual nationals of Iran and the United States. The Tribunal disagreed, but made little effort to explain the reasons for its disagreement.

The Tribunal's dismissive attitude towards the parties' arguments on the interpretation of the text, together with its premature adoption of a rule of positive law in respect of a treaty which the Tribunal itself describes as not clear on the subject, is surely a structural weakness – 'a potentially debilitating characteristic' – of the Decision. It violates two settled rules. *First*, the rule that the judgement of an international tribunal must 'state the reasons upon which it is based',[32] including the reasons for which the parties' contentions are dealt with in a given way. As observed by Lauterpacht:

> [I]t is essential for the proper fulfilment of judicial function, and of the international judicial function in particular, that the decisions of the courts should give a full account of the law which they apply as well as on the grounds on which they are based, and that they should examine in all requisite detail the contentions put forward by the parties …[33]

And *second*, the rule that although an international tribunal may, beside its primary task of deciding concrete disputes in accordance with the law in force, contribute to the development of international law, it may not do so at the expense of a party.[34] Indeed, based on the circumstances, it can be safely said that the deep indignation felt by Iran, and expressed in the sharply-worded Statement of its then Prime minister,[35] was partly due to Iran's belief that without its consent, the occasion of its agreement to settle peacefully its disputes with the United States had been seized upon to promote a different agenda. The absence of consent can,

32 As required by Article 32 (3) of the Tribunal Rules. 2 IRAN-U.S. C.T.R. 405.

33 SIR HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT, London: Stevens & sons, 1958, reprinted by Grotius Publications Ltd., Cambridge, 1982, at 75.

34 Particularly a State party. See *ibid*, at 75-6, where the author says that the courts 'cannot experiment or innovate as easily in matters in which States have an interest as in those in which private individuals are concerned'.

35 The pertinent parts of which were quoted on pages 50-51 above.

no doubt, have its consequences. As Lauterpacht notes, albeit in relation to a particular judicial forum:

> An international Court which yields conspicuously to the urge to modify the existing law … may bring about a drastic curtailment of its activity. Governments may refuse to submit disputes to it …[36]

The 'curtailment of its activity' was not of course the type of peril that this Tribunal was ever likely to face, whatever its decisions. But where an international tribunal fails to stay within the limits of what it has been entrusted to do, the outcome, however desirable the proposed solution, might be not the development of international law, but resistance and active opposition, especially if it is based on the misinterpretation of an agreement between States. As cautioned by a commentator in relation to the link theory of *Nottebohm*: 'It seems … reasonable to suppose that in future Claims Conventions the prudent draftsman will endeavour to limit, to define, or even perhaps to exclude, the link theory'.[37]

8.3.2 The Weight of the Rule of Dominant Nationality

So much for the Tribunal's treatment of its mandate under the text of its constituent instruments. What, then, of the Tribunal's approach to customary international law and the choice of the rule of dominant nationality in preference to the rule of non-responsibility? Clearly enough, the possible strength of the rule of dominant nationality, or indeed of any other rule pertinent to the claims of dual nationals, cannot be properly assessed in isolation from the wider context of the incidence of dual nationality in general.

Now as we have seen, dual nationality was traditionally regarded, both in doctrine and in practice, as highly undesirable, not only because of a firm belief in the exclusivity of national interests, national identities, and national loyalties,[38] but also because of the practical problems it caused in areas such as diplomatic protection, military service, taxation and the like. As observed by a commentator:

36 Footnote 33 above, at 76.

37 Mervyn Jones, footnote 5 above, at 243.

38 In common law, for instance, there existed the doctrine of 'indefeasible allegiance', under which no renunciation of nationality without the consent of the sovereign was possible. See W. Blackstone, Commentaries, Vol. I, 369-70.

> Though dual nationality has been at the heart of many international controversies for more than a century, not a single commentator appears to have spoken in support of its acceptance or even its toleration. This view has persisted into more recent decades.[39]

This general distaste for dual nationality has slowly but distinctly changed, not because of any doctrinal conversion on the part of its opponents, but because of the practicalities of human life. Globalization, increased migration, residence beyond borders, cross-national marriage, and birth outside the native country – in short, a more interconnected and cosmopolitan world – together with the adoption in modern times of measures such as the rejection of discrimination against women, have resulted in the growth of plural citizenship.[40] The belief still is that dual nationality is not a virtue in itself, and hence should not be encouraged, but that so long as the acquisition and maintenance of nationality is left to the discretion of States, plural citizenships will exist and, because of the factors just mentioned, will grow increasingly common. This, in turn, has led to the realization that today the appropriate policy towards the phenomenon should be, not to regard it as an evil to be avoided or eliminated, but as a fact of life the impact of which must be regulated.[41]

A second development has had an equally profound effect on the subject. Traditionally, it was thought that '[i]nternational law has nothing to do with the

39 Peter J. Spiro, *Embracing Dual Nationality*, a paper delivered to an international migration programme in 1998, and quoted by David A. Martin, *New Rules on Dual Nationality for a Democratizing Globe: Between Rejection and Embrace*, 14 Georgetown Immigration L. J. (1999), 1, at footnote 81. It is worth mentioning that dual nationality has at times led to war. See P. McGarvey-Rosendahl, *A New Approach to Dual Nationality*, 8 Houston J. Int'l Law (1986), 305, at 307, footnote 22.

40 For the evidence of this proliferation under the present regime of nation-States, and of the increasingly liberal approach to the phenomenon, see the two references given on page 15, footnote 2, above.

41 A reflection of this change of attitude will be found in two European Conventions. The first is the 'Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality', adopted by the Council of Europe and opened for signature on 6 May 1963 (Europ. T.S. No. 43; 634 U.N.T.S. 221). As its title suggests, the Convention was specifically designed to reduce the incidence of multiple nationality. After a number of Protocols that amended this 1963 Convention, the same Council adopted 'the European Convention on Nationality', opened for signature on 6 November 1997 (Europ. T.S. No. 166; 37 ILM 44 (1998)). In contrast to the 1963 Convention, the 1997 Convention does not seek to resist multiple nationality, but tries to manage its impact.

authority exercised over a subject within the jurisdiction of a state'.[42] Today, though, this notion of exclusive domestic jurisdiction is no longer adhered to. Beginning from the end of the Second World War, a series of new instruments, most notably the Charter of the United Nations and the Universal Declaration of Human Rights, have vested the individual with a host of rights not on the basis of his link of nationality, but as a human being. Indeed, the creation and expansion of these human rights have been such as to lead some commentators to suggest that the concept of nationality is no longer relevant in this area. Although this is manifestly going too far, as suggested earlier, the fact remains that under these instruments, the individual is accorded protection even against the State of which he is a national.

The relevance of these modern developments to the international claims of dual nationals will be readily appreciated. Where dual nationality is looked upon with disdain, and the treatment of the individual by his State of nationality is considered to be no concern of international law, the application of the rule of non-responsibility to the international claim of a dual national against his own State seems quite natural. Not so where dual nationality is accepted as a very common phenomenon, and States are increasingly held responsible for the wrongs they commit against the individuals, including their own nationals. Clearly, of the two rules of non-responsibility and dominant nationality, it is the latter that is consistent with these last-mentioned conditions; it is that rule alone which accords legal protection, admittedly under certain conditions, to the individual, even against the State of which he is a national.

The Decision identifies itself with these trends and, for that reason, its fairness in contemporary international law can be confidently assumed. Does the Decision also enjoy the weight of authorities? It says that it does, though the evidence to which it refers in this respect is less convincing. Not surprisingly, it attributes the asserted primacy of the rule of dominant nationality to other sources, more specifically, to the 'radiating effect' of the judgments in *Nottebohm* and *Mergé*, both rendered back in 1955. As we have seen, however, this is unsupported. There is no evidence to believe that either of these two had exerted any particular influence on the controversy over the claim of a dual national against one of his States of nationality.

Still, the unsettled status of the law prior to the Tribunal's involvement was, as noted, a circumstance that enhanced, rather than reduced, the possibility of the Decision's future impact. With the *Nottebohm* ruling not particularly relevant,

42 W.E. HALL, A TREATISE ON INTERNATIONAL LAW, 8th Ed., edited by A. Pearce Higgins, Oxford: Clarendon Press, 1924, at 298.

and with the *Mergé* decision not particularly convincing, the Tribunal was given a unique opportunity to develop the law in line with the values of contemporary general legal order; and, as suggested earlier, it did so.

This is not to deny that where the law is unsettled, there is this risk that the tribunal may be tempted to go beyond its primary task of deciding concrete disputes on the basis of the law in force. The issue is of course a familiar one: the fine line that a judicial forum must draw and observe between the permissible task of contributing to the progressive development of the law, and the impermissible task of what Lauterpacht describes as 'embarking upon the hazardous course of judicial legislation'.[43] In our case, however, the Tribunal does not seem to have crossed this line in A/18. True, the suggestion by the Tribunal that it was there simply applying the 'better rule' of customary international law is hard to share. But then there can be no denying that the rule of dominant nationality to which the Tribunal lent its support had long existed in international law, even though gradually undermined.[44] Exercising the choice between the two rival rules was certainly a legitimate exercise of judicial functioning, even though the alternative rule, the rule of non-responsibility, based as it was on the traditional principle of sovereign equality, enjoyed the backing of the greater weight of the authority.

In short, then, it may be defensibly suggested that the Tribunal's support for the rule of dominant nationality was both a legitimate exercise of judicial function and, prompted primarily by a desire to accord the individual greater access to international justice, a theoretically laudable choice. It was also in line with the modern trend of promoting the international interests of the individual *vis-à-vis* the State.

What is particularly significant here is the fact that the legal aspects of this new trend – a trend that dates from the middle of the twentieth century and is the result of placing increasingly greater emphasis on human rights – had nowhere been authoritatively tested. By rejecting the rule of non-responsibility, under which

43 SIR HERSCH LAUTERPACHT, footnote 33 above, at 19. See also *ibid*, at 75, where the author says with reference to international tribunals that 'it is not their function deliberately to change the law so as to make it conform with their own views of justice and expediency'. He further notes, in relation to the International Court of Justice (*ibid*, at 76), that States are 'not prepared to allow or tolerate the exercise of [legislative functions] by a tribunal enjoined by its Statute to apply the law'.

44 As the International Court makes it clear in the *Asylum* Case, in order to show a customary rule of general international law, it is necessary to point to repeated and recurrent acts. ICJ Reports, (1950), 276 ff. The rule of dominant nationality seems to have met this condition, though, as suggested before, there is no evidence that it was a rule 'applicable in the relations between the parties', that is to say, in the relations between Iran and the United States.

the nationality of the respondent State deprives the individual of international protection, and by opting for the rule of dominant nationality, under which international protection is available in cases of closer ties with the claimant State, the Tribunal clearly lent its judicial support for, and markedly contributed towards the realization of, these new demands.

But the fact that the rule of dominant nationality is consistent with the modern tendencies, or is the better of the two rival rules, does not mean that it is a perfect rule. To the contrary, it suffers from certain structural and conceptual failings, some of which may now be briefly noted. *First*, the application of the rule can, if not properly checked, result in the abuse of rights. In the Tribunal's precedent, the device resorted to for confronting this problem is the 'important caveat', on which a few words will be said shortly.

Second, and much more significantly, the rule puts the individual, the dual national claimant, in an unpleasant position. It must not be forgotten, though most often it is, that he is not a person with one effective and one technical nationality. Where such is the case, the question of his two nationalities competing at the international level does not arise in the first place. He is, to the contrary, a person with two internationally effective nationalities.

Ordinarily and judging by common experience, he would speak proudly of his belonging to both communities, of his attachments to both cultures, of his family ties in both countries, and of his knowledge of the languages spoken in both societies. And yet the rule of dominant nationality, when applied, takes away from him this rather basic right. In theory, of course, it is open to him to strive to establish his stronger links with the claimant State, without seeking to deny his links with the defendant State. In practice, however, this is not how it works, as evidenced by the experiences before the Tribunal.

In order to prove his dominant nationality of the claimant State, the dual national invariably finds himself forced to play down, if not to deny altogether, his attachments to the defendant State. His desire to overcome the jurisdictional barrier leads him to belittle, for instance, his family ties in the respondent country, or his social or cultural attachments thereto. As we have seen, he is at times tempted even to deny, untruly, his familiarity with the language of his native or adopted country. And all this before an international Tribunal that will then proceed to record in its published award the details of the claimant's denial of links with the respondent State and its population. Exceptions apart, this cannot be a welcome experience.

Third, the rule requires the international tribunal to determine, as part of its jurisdictional enquiry, whether or not the claimant is more attached to the claimant State. There are, however, difficulties with this. For one, attachment is as much a personal and emotional phenomenon as it is a physical one. The former, with

no outward manifestation, is simply not a subject suitable for being measured by an outsider. For another, the very idea of labelling a person who possesses the effective nationalities of both the claimant State and the respondent State as the national more of the former rather than of the latter, is unappealing, particularly in the instances in which the issue is a close one.

As noted, the Cases in which the Tribunal came to the conclusion that the claimant had strong ties with both his countries of nationality were many. Indeed, such a conclusion was only to be expected in the case of, for instance, a native of Iran who became a naturalized United States national in the middle years of his life, or a native of the Unites States who acquired Iranian nationality by virtue of her marriage to an Iranian husband and thereafter moved to and raised her family in Iran, or a person who acquired dual nationality at birth by virtue of being born to parents with different nationalities and then spent considerable periods of time in both his countries of nationality. And yet the Tribunal was in all such instances required, under the rule of dominant nationality, to declare publicly whether or not the claimant was more American than Iranian. The wisdom or expediency of such an exercise is hard to appreciate.

Fourth, the flaws of the rule are not in relation to the dual national claimant only, but extend to the respondent State as well. Attachment being for the most part of personal nature, the facts thereto are unlikely to be known or accessible to the respondent State. The evidence, for example, of the extent of the dual national's family links in one or the other country, or of his private lifestyle, or of the culture to which he is closer, or of the professional societies to which he belongs, or of the language he and his family speak at home, is ordinarily in the hands of the dual national alone, and is susceptible to being used by him selectively. To put it differently, the dual national and the respondent State are not equally positioned to contest issues that are ordinarily within the exclusive knowledge of the dual national.

These points have not been addressed in the literature, where any conceptual discussion of the rule of dominant nationality has been surprisingly avoided. True, the requirement of genuine link in relation to single nationality has been extensively debated and, although vigorously attacked, conceptually articulated. Nationality, say the proponents of the requirement, is the juridical expression of a social fact and, for that reason, it cannot be given international effect where it is not based on genuine links.[45] Indeed, even in the field of dual nationality, the suggestion

45 This much at least is clear that citizenship of convenience is a phenomenon not readily tolerated. As recently as June 2004, people in the Republic of Ireland overwhelmingly voted to amend the Irish Constitution, under which all children born in Ireland automatically acquired Irish nationality. This, according to Ireland's Justice Minister, had

that a nationality based on genuine links must prevail over a technical nationality is not theoretically hard to understand, though it has been traditionally resisted. The point is, however, that these conceptual justifications adduced in support of the requirement of link are not, whatever their merits, necessarily relevant to the entirely different issue of whether a person with two effective nationalities, as often as not fairly close in strength, can or should be labelled as a national more of one or the other State.

8.3.3 The Effect of the Tribunal's Approach to Diplomatic Protection

So much for the assessment of the rule of dominant nationality in general: a progressive but as yet not theoretically justified or articulated rule. As noted, however, the Tribunal's choice of the rule of dominant nationality over the rule of non-responsibility was not unqualified. Indeed, when the Tribunal came to address the Hague Convention of 1930, it suggested that one of the reasons why the Convention's rule of non-responsibility could not be applied to the claims of dual nationals before this Tribunal was the fact that these claims were not diplomatically espoused. As suggested earlier, this part of the ruling, based as it was on the asserted institutional peculiarities of the Tribunal and private nature of the claims before it, is uncorroborated. The question that must now be answered is whether this restriction, made quite without point, is likely to restrict the scope of the future impact of the Tribunal's jurisprudence on the subject. The answer must be in the affirmative.

It is true that the growth of the individual's standing under contemporary international law – both in the fields of human rights and protection of foreign investments – has led some to challenge the relevance of the concept of diplomatic protection.[46] Indeed, some have gone further and questioned the viability of the concept of nationality.[47] But these belong, whatever their intrinsic merits, to a very distant future, if at all. Although the incidence of claims not diplomatically

created a 'citizenship tourism', allowing foreign women to travel to Ireland to give birth in order to get Europeans Union citizenship for their children and for themselves. BBC News, UK Edition, Sunday 13 June 2004.

46 See, *e.g.*, F.V. García Amador, *State Responsibility: Some New Problems*, 94 Recueil des course (1958-II), 365, at 421, 437-9.

47 See, *e.g.*, DAVID JACOBSON, RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP, Baltimore and London: The Johns Hopkins University Press, 1996. For the flaws in these arguments, see the First Report of the International Law Commission's Special Rapporteur, footnote 9 above, pages 6-10.

protected may be in the increase,[48] the fact remains that for the present and as long as the existing nation-State system continues to govern international relations, the only remedy – as against rights – that the individual has in the absence of a human rights or investment treaty is through the intervention of his national State. This means that for the foreseeable future, we have with us the concept of nationality, and the classical rules that are based on that concept, including the rules *that* at the international level claims must in general be diplomatically espoused;[49] *that* only States may extend diplomatic protection;[50] and *that* they may do so only through the link of nationality.[51] In fact, it has been justifiably argued that the State system, and the diplomatic protection exercised thereunder, not only are not inconsistent with the modern elevation of human rights, but also are necessary tools for its further promotion.[52]

By distinguishing the claims of dual nationals before this Tribunal from the diplomatically espoused claims, the Tribunal has unwittingly limited the scope of its support for the rule of dominant nationality. Unwittingly, because the

48 See: Francisco Orrego Vicuña, Interim Report on 'the Changing Law of Nationality of Claims', in International Law Association, Report of the 69th Conference (2000), published by the International Law Association, at 633; Juliane Kokott, Interim Report on 'the Exhaustion of Local Remedies' in *ibid*, at 608-9.

49 The *Mavrommatis Palestine Concessions*, 1924, PCIJ, Series A, No. 2, at 12.

50 In its Advisory Opinion in *Reparation for Injuries Suffered in the Service of the United Nations*, the International Court supported the functional protection by international organizations of their officials (ICJ Reports (1949), 174). But functional protection is a wholly different concept based on the special relations between international organizations and their agents.

51 A recent affirmation of this will be found in Article 3 (1) of the International Law Commission's Draft Articles on Diplomatic Protection: 'The State entitled to exercise diplomatic protection is the State of nationality.' Under Article 7 of the same Draft Articles, only in exceptional instances, such as statelessness, claims of non-nationals may be espoused. Report of the International Law Commission on Diplomatic Protection, fifty-fourth session (2002), UNGAOR, 57th session, Supp. No. 10, at 169 *et seq*, UN Doc. A/57/10.

52 See, David A. Martin who observes that states are and will remain 'the principal stewards of the primary apparatus needed to honor human rights as a matter of routine within their own borders'. Footnote 39 above, at 12. See further the International Law Commission's Special Rapporteur on Diplomatic Protection, who concludes in his First Report (footnote 9 above, at 25) that 'diplomatic protection … is an accepted institution of customary international law … and one which continues to serve as a valuable instrument for the protection of human rights. It provides a potential remedy for the protection of millions of aliens who have no access to remedies before international bodies and it provides a more effective remedy to those who have access to the often ineffectual remedies contained in international human rights instruments'.

Tribunal makes this suggestion, as noted, only in reference to the 1930 Hague Convention, and not when it otherwise comes to discuss the place of the rule in international law. At any rate, the effect of this restriction can already be seen in at least one place, namely, the First Report of the International Law Commission's Special Rapporteur on Diplomatic Protection, where it is observed that '[t]he Iran-United States Claims Tribunal … does not provide for inter-State claims on behalf of nationals'.[53] What is particularly unhappy is that the Tribunal's suggested distinction was neither factually correct nor legally necessary.

Still, none of these is to deny the potential impact of the Tribunal's holding in A/18. Indeed, the very Report just mentioned goes on to observe that '[d]espite this institutional peculiarity there is no doubt that the jurisprudence of the Iran-United States Claims Tribunal has added considerably to the support for the dominant nationality principle.'[54] As for more concrete evidence, one difficulty here is that because of the often-private nature of the subject, published records of the post-A/18 State practice are hard to find.[55] Outside that sphere, the adoption of the rule of dominant nationality by the International Law Commission,[56] with express references to the Tribunal's endorsement of the rule,[57] is a recent manifestation of the impact of the Tribunal's ruling. And so is the report of the International Law Association's co-reporter on Diplomatic Protection,[58] in which the rule of dominant nationality – or, as it is there termed, 'the effectiveness of the link' – is also advocated, referring to the 'interesting insights' into the issue provided by the practice of the Tribunal and the dissenting views of its members.[59]

53 First Report, footnote 9 above, at 50.

54 *Ibid.*

55 The Commission's Special Rapporteur states, however, that the rare practice available suggests a 'change in favour of the acceptance of the principle of dominant or effective nationality'. But then the only source to which he refers in support is equivocal and relates to the field of human rights only. (First Report, footnote 9 above, at 52).

56 Article 6 of its Draft Articles on Diplomatic Protection, quoted on page 86 above.

57 See, *e.g.*, the Report, footnote 2 above, at 185.

58 Francisco Orrego Vicuña, Interim Report on 'the Changing Law of Nationality of Claims', in International Law Association, Report of the 69th Conference (2000), published by the International Law Association, at 641-2 and 646.

59 As noted earlier, the International Law Commission suggests (Report, footnote 2 above, at 185-6) that '[a]nother institution which gives support to the dominant nationality principle is the United Nations Compensation Commission', established by the Security Council to provide compensation for damages caused by Iraq's occupation of Kuwait. (UN Doc. S/AC.26/1991/7/Rev. 1, at para. 11) But this is incorrect. As we have seen (page 69, footnote 61, above), the Compensation Commission considers the claims of dual Iraqi citizens if they can prove that they have *bona fide* nationality of another State,

8.3.4 The Possible Impact of the Application of the Rule

The earlier review of the Tribunal's treatment of the claims of dual nationals must have made it abundantly clear that the Tribunal's contribution to the development of the subject has not been limited to its support for the rule of dominant nationality. For some nineteen years – from the adoption of the rule by the Full Tribunal in 1984 to the resolution of the last of the dual national Cases by a Chamber in 2003 – the Tribunal applied that rule and its salient features to tens of Cases, each presenting its own facts and circumstances. The result is an imposing, indeed an unparalleled, body of rules and guiding principles that must be of enormous benefit to those who will in future be called upon to decide similar disputes.

Of particular significance is the practice of the Tribunal in three areas forming the more important features of the Decision in A/18, namely, the requirement of continuous nationality, the criteria of dominance, and the relevance of the non-dominant nationality to the merits of a dispute. As to the first, the Tribunal's jurisprudence, though admittedly based on an express provision of the Algerian Declarations, reaffirms the requirement of continuous nationality and shows that talks about the replacement of the link of nationality with other concepts is premature. More importantly, it shows how that requirement must be applied in a variety of instances in which its application is challenged by a party.

As to the second, the Tribunal realizes, as do the international case law and the general principles of international law, that no very exacting list of factors pertinent to the determination of dominant nationality can be found, nor can any specific evidentiary value be attributed to each of such factors. What the Tribunal's jurisprudence offers in this respect, instead, is a wealth of materials on how a number of relevant factors can be interactively evaluated and employed. Whatever criticisms one may legitimately have about the Tribunal's failure to conceptualize and to explain the doctrinal content of its tests of dominant nationality, there can be little doubt that the Tribunal's case-by-case approach, and its elucidation of the relative weight to be given to each of the pertinent factors in the light of the specific facts of a given case, will in future be carefully studied and applied in like circumstances.

meaning, by implication, that they need not establish the dominant nationality of the presenting State. At any rate, the Compensation Commission is not strictly speaking a judicial body, but a claims resolution facility before which many of the traditional principles such as diplomatic protection, continuous nationality, and exhaustion of local remedies do not apply. See John R. Crook, *The United Nations Compensation Commission – A New Structure to Enforce 'State Responsibility'*, 87 Am. J. Int'l L. (1993), 144, at 149-50.

As to the third, the principle on which the 'important caveat' rests is an old one. It provides that a claimant who meets the jurisdictional requirements of an international tribunal, and who otherwise has a meritorious claim, may still find his claim barred on equitable grounds if it is shown that his conduct, in acquiring the assertedly violated right and in coming before the tribunal, falls short of certain prescribed measures. The Tribunal's contribution in this respect – and this is by no means insignificant – has been to turn this general principle into a clearly defined formula for rejecting the inequitable conduct of a dual national and, more importantly, to apply it to a host of concrete situations. It is, in other words, in the precedents of the Tribunal alone that one finds not only the first conceptual discussion of the principle in relation to the claims of dual nationals, but also by far the most comprehensive set of guidelines on how it may be applied. Once again, and whatever imperfections one may detect in these, the future influence of the Tribunal's practice on this area of the law can hardly be doubted.

8.4 All This in a Nutshell

Historically, with respect to the international claim of a dual national against one of his States of nationality, two different rules existed: the rule of non-responsibility, and the rule of dominant nationality. Because traditionally dual nationality was regarded with disdain, and the treatment that a State extended to its nationals was considered not to be the business of the international community, the former rule, the rule of non-responsibility, was often preferred and soon became the paramount of the two. But while as from about the middle of the last century those underlying concepts had begun to change, no occasions had arisen for an international judicial forum to pronounce itself directly on the subject.

It was under such circumstances that in 1983 the Iran-United States Claims Tribunal first became involved with the subject. The result was a Decision in 1984, in which the Tribunal initially set aside, with little or no explanation, the text of the Algerian Declarations in favour of the solution offered by customary international law. If Iran's resentment at the Decision was strong, it was mainly due to this dismissive approach of the Tribunal towards the parties' agreement.

Still, having so resorted to customary international law, the Decision lent its support to the rule of dominant nationality. Even though on strictly legal grounds the ruling is not readily supportable, there can be little doubt that the Decision will in future have its influence. This is so not only because of the especial stature of the Tribunal, and the centrality with which the issue was treated by all concerned, but more so because of the conformity of the supported rule, despite its

conceptual and practical shortcomings, with a long-standing trend towards enhancing the individual's rights at the international level.

All these make it possible to assume with some degree of confidence *that* those States that are unwilling to face their nationals before international tribunals will in future make sure that their unwillingness is reflected in the dispute settlement agreements to which they adhere, and *that* where this is not done, the rule of dominant nationality will likely be upheld. It is, however, in the areas of the application of the rule of dominant nationality that the Tribunal's jurisprudence will probably have its most impact; the areas, particularly, in which the process and means of determining the dominant nationality of a claimant are most comprehensively addressed by the Tribunal, and the equitable principles operating as bars to international arbitral remedies are identified and applied.

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Annex

THE BASIC TEXTS

1. DECLARATION OF THE GOVERNMENT OF THE DEMOCRATIC AND POPULAR REPUBLIC OF ALGERIA (General Declaration), 19 January 1981

The Government of the Democratic and Popular Republic of Algeria, having been requested by the Governments of the Islamic Republic of Iran and the United States of America to serve as an intermediary in seeking a mutually acceptable resolution of the crisis in their relations arising out of the detention of the 52 United States nationals in Iran, has consulted extensively with the two governments as to the commitments which each is willing to make in order to resolve the crisis within the framework of the four points stated in the Resolution of November 2, 1980, of the Islamic Consultative Assembly of Iran. On the basis of formal adherences received from Iran and the United States, the Government of Algeria now declares that the following interdependent commitments have been made by the two governments:

GENERAL PRINCIPLES

The undertakings reflected in this Declaration are based on the following general principles:

A. Within the framework of and pursuant to the provisions of the two Declaration of the Government of the Democratic and Popular Republic of Algeria, the United States will restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979. In this context, the United States commits itself to ensure the mobility and free transfer of all Iranian assets within its jurisdiction, as set forth in Paragraphs 4-9.

B. It is the purpose of both parties, within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, to terminate all litigation as between the government of each party and the nationals of other, and to bring about the settlement and termination of all such claims through binding arbitration. Through the procedures provided in the Declaration relating to the Claims Settlement Agreement, the United States agrees to terminate all legal proceedings in United States courts involving claims of United Sates persons and institutions against Iran and its enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.

POINT 1: NON-INTERVENTION IN IRANIAN AFFAIRS

1. The United States pledges that it is and from now on will be the policy of the United States not to intervene, directly or indirectly, politically or militarily, in Iran's internal affairs.

POINTS II AND III: RETURN OF IRANIAN ASSETS AND SETTEMENT OF U.S. CLAIMS

2. Iran and the United States (hereinafter "the Parties") will immediately select a mutually agreeable Central Bank (hereinafter "the Central Bank") to act, under the instructions of the Government of Algeria and the Central Bank of Algeria (hereinafter "the Algerian Central Bank") as depositary of the escrow and security funds hereinafter prescribed and will promptly enter into depositary arrangements with the Central Bank in accordance with the terms of this Declaration. All funds placed in escrow with the Central Bank pursuant to this Declaration shall be held in an account in the name of the Algerian Central Bank. Certain procedures for implementing the obligations set forth in this Declaration and in the Declaration of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States and the Government of the Islamic Republic of Iran (hereinafter "the Claims Settlement Agreement") are separately set forth in certain Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with Respect to the Declaration of the Democratic and Popular Republic of Algeria.

3. The depositary arrangements shall provide that, in the event that the Government of Algeria certifies to the Algerian Central Bank that the 52 U.S. nationals have safely departed from Iran, the Algerian Central Bank will thereupon instruct the Central Bank to transfer immediately all monies or other assets in escrow with the Central Bank pursuant to this Declaration, provided that at any time prior to the making of such certification by the Government of Algeria, each of the two parties, Iran and the United States, shall have the right on seventy two hours notice to terminate its commitments under this Declaration. If such notice is given by the United States and the foregoing certification is made by the Government of Algeria within the seventy-two hour period of notice, the Algerian Central Bank will thereupon instruct the Central Bank to transfer such monies and assets. If the seventy-two hours period of notice by the United States expires without such a certification having been made, or if the notice of termination is delivered by Iran, the Algerian Central Bank will thereupon instruct the Central Bank to return all such monies and assets to the United States, and thereafter the commitments reflected in this Declaration shall be of no further force and effect.

Assets in the Federal Reserve Bank

4. Commencing upon completion of the requisite escrow arrangements with the Central Bank, the United States will bring about the transfer to the Central Bank of all gold bullion which is owned by Iran and which is in the custody of the Federal Reserve Bank of New York, together with all other Iranian assets (or the cash equivalent thereof) in the custody of the Federal Reserve Bank of New York, to be held by the Central Bank in escrow until such time as their transfer or return is required by Paragraph 3 above.

Assets in Foreign Branches of U.S. Bank

5. Commencing upon the completion of the requisite escrow arrangements with the Central Bank, the United States will bring about the transfer to the Central Bank, to the account of the Algerian Central Bank, of all Iranian deposits and securities which on or after November 14, 1979, stood upon the books of overseas banking offices of U.S. banks, together with interest thereon through December 31, 1980, to be held by the Central Bank, to the account of the Algerian Central Bank, in escrow until such time as their transfer or return is required in accordance with Paragraph 3 of this Declaration.

Assets in U.S. Branches of U.S. Banks

6. Commencing with the adherence by Iran and the United States to this Declaration and the Claims Settlement Agreement attached hereto, and following the conclusion of arrangements with the Central Bank for the establishment of the interest-bearing Security Account specified in that Agreement and Paragraph 7 below, which arrangements will be concluded within 30 days from the date of this Declaration, the United States will act to bring about the transfer to the Central Bank, within six months from such date, of all Iranian deposits and securities in U.S. banking institutions in the United States, together with interest thereon, to be held by the Central Bank in escrow until such time as their transfer or return is required by Paragraph 3.

7. As funds are received by the Central Bank pursuant to Paragraph 6 above, the Algerian Central Bank shall direct the Central Bank to (1) transfer one-half of each such receipt to Iran and (2) place the other half in a special interest-bearing Security Account in the Central Bank, until the balance in the Security Account has reached the level of U.S.$1 billion. After the U.S.$1 billion balance has been achieved, the Algerian Central Bank shall direct all funds received pursuant to Paragraph 6 to be transferred to Iran. All funds in the Security Account are to be used for the sole purpose of securing the payment of, and paying, claims against Iran in accordance with the Claims Settlement Agreement. Whenever the Central Bank shall thereafter notify Iran that the balance in the Security Account has fallen below U.S.$500 million, Iran shall promptly make new deposits sufficient to maintain a minimum balance of U.S.$500 million in the Account. The Account shall be so maintained until the President of the arbitral tribunal established pursuant to the Claims Settlement Agreement has certified to the Central Bank of Algeria that all arbitral awards against Iran have been satisfied in accordance with the Claims Settlement Agreement, at which point any amount remaining in the Security Account shall be transferred to Iran.

Other Assets in the U.S. and Abroad

8. Commencing with the adherence of Iran and the United States to this Declaration and the attached Claims Settlement Agreement and the conclusion of arrangements for the establishment of the Security Account, which arrangements will be concluded within 30 days from the date of this Declaration, the United States will act to bring about the

transfer to the Central Bank of all Iranian financial assets (meaning funds or securities) which are located in the United States and abroad, apart from those assets referred to in Paragraphs 5 and 6 above, to be held by the Central Bank in escrow until their transfer or return is required by Paragraph 3 above.

9. Commencing with the adherence by Iran and the United States to this Declaration and the attached Claims Settlement Agreement and the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will arrange, subject to the provisions of U.S. law applicable prior to November 14, 1979, for the transfer to Iran of all Iranian properties which are located in the United States and abroad and which are not within the scope of the preceding paragraphs.

Nullification of Sanctions and Claims

10. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will revoke all trade sanctions which were directed against Iran in the period November 4, 1979, to date.

11. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will promptly withdraw all claims now pending against Iran before the International Court of Justice and will thereafter bar and preclude the prosecution against Iran of any pending or future claims of the United States or a United States national arising out of events occurring before the date of this Declaration related to (A) the seizure of the 52 United States nationals on November 4, 1979, (B) their subsequent detention, (C) injury to the United States property or property of the United States nationals within the United States Embassy compound in Tehran after November 3, 1979, and (D) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran. The United States will also bar and preclude the prosecution against Iran in the courts of the United States of any pending or future claim asserted by persons other than the United States nationals arising out of the events specified in the preceding sentence.

POINT IV: RETURN OF THE ASSETS OF THE FAMILY OF THE FORMER SHAH

12. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will freeze, and prohibit any transfer of, property and assets in the United States within the control of the estate of the former Shah or of any close relative of the former Shah served as a defendant in U.S. litigation brought by Iran to recover such property and assets as belonging to Iran. As to any such defendant, including the estate of the former Shah, the freeze order will remain in effect until such litigation is finally terminated. Violation of the freeze order shall be subject to the civil and criminal penalties prescribed by U.S. law.

13. Upon the making by the Government of Algeria of the Certification described in Paragraph 3 above, the United States will order all persons within U.S. jurisdiction to report to the U.S. Treasury within 30 days, for transmission to Iran, all information known to them, as of November 3, 1979, and as of the date of the order, with respect to the property and assets referred to in Paragraph 12. Violation of the requirement will be subject to the civil and criminal penalties prescribed by U.S. law.

14. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will make known, to all appropriate U.S. courts, that in any litigation of the kind described in Paragraph 12 above the claims of Iran should not be considered legally barred either by sovereign immunity principles or by the act of state doctrine and that Iranian decrees and judgments relating to such assets should be enforced by such courts in accordance with United States law.

15. As to any judgment of a U.S. court which calls for the transfer of any property or assets to Iran, the United States hereby guarantees the enforcement of the final judgment to the extent that the property or assets exist within the United States.

16. If any dispute arises between the parties as to whether the Unite States has fulfilled any obligation imposed upon it by Paragraphs 12-15, inclusive, Iran may submit the dispute to binding arbitration by the tribunal established by, and in accordance with the provisions of, the Claims Settlement Agreement. If the tribunal determines that Iran has suffered a loss as a result of a failure by the United States to fulfill such obligation, it shall make an appropriate award in favour of Iran which may be enforced by Iran in the courts of any nation in accordance with its laws.

SETTLEMENT OF DISPUTES

17. If any other dispute arises between the parties as to the interpretation or performance of any provision of this Declaration, either party may submit the dispute to binding arbitration by the tribunal established by, and in accordance with the provisions of, the Claims Settlement Agreement. Any decision of the tribunal with respect to such dispute, including any award of damages to compensate for a loss resulting from a breach of this Declaration or the Claims Settlement Agreement, may be enforced by the prevailing party in the courts of any nation in accordance with its laws.

Initialed on January 19, 1981
By Warren M. Christopher
Deputy Secretary of State of the Government of the United States by virtue of the powers vested in him by his Government as deposited with the Government of Algeria

2. 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 (Claims Settlement Declaration), 19 January 1981

The Government of the Democratic and Popular Republic of Algeria, on the basis of formal notice of adherence received from the Government of the Islamic Republic of Iran and the Government of the United States of America, now declares that Iran and the United States have agreed as follows:

Article I

Iran and the United States will promote the settlement of the claims described in Article II by the parties directly concerned. Any such claims not settled within six months from the date of entry into force of this Agreement shall be submitted to binding third-party arbitration in accordance with the terms of this Agreement. The aforementioned six months' period may be extended once by three months at the request of either party.

Article II

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 claim and counterclaims are outstanding on the date of this Agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights, excluding claims described in Paragraph 11 of the Declaration of the Government of Algeria of January 19, 1981, and claims arising out of the actions of the United States in response to the conduct described in such paragraph, and excluding claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts, in response to the Majlis position.

2. The Tribunal shall also have jurisdiction over official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services.

3. The Tribunal shall have jurisdiction, as specified in Paragraphs 16-17 of the Declaration of the Government of Algeria of January 19, 1981, over any dispute as to the interpretation or performance of any provision of that Declaration.

Article III

1. The Tribunal shall consist of nine members or such larger multiple of three as Iran and the United States may agree are necessary to conduct its business expeditiously. Within ninety days after the entry into force of this Agreement, each government shall appoint one-third of the members. Within thirty days after their appointment, the members so appointed shall by mutual agreement select the remaining third of the members and appoint one of the remaining third President of the Tribunal. Claims may be decided by the full Tribunal or by a panel of three members of the Tribunal as the President shall determine. Each such panel shall be composed by the President and shall consist of one member appointed by each of the three methods set forth above.

2. Members of the Tribunal shall be appointed and the Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the Parties or by the Tribunal to ensure that this Agreement can be carried out. The UNCITRAL rules for appointing members of three-member tribunals shall apply *mutatis mutandis* to the appointment of the Tribunal.

3. Claims of nationals of the United States and Iran that are within the scope of this Agreement shall be presented to the Tribunal either by claimants themselves or, in the case of claims of less than $250,000, by the government of such national.

4. No claim may be filed with the Tribunal more than one year after the entry into force of this Agreement of six months after the date the President is appointed, whichever is later. These deadlines do not apply to the procedures contemplated by Paragraphs 16 and 17 of the Declaration of the Government of Algeria of January 19, 1981.

Article IV

1. All decisions and awards of the Tribunal shall be final and binding.

2. The President of the Tribunal shall certify, as prescribed in Paragraph 7 of the Declaration of the Government of Algeria of January 19, 1981, when all arbitral awards under this Agreement have been satisfied.

3. Any award which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws.

Article V

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.

Article VI

1. The seat of the Tribunal shall be The Hague, The Netherlands, or any other place agreed by Iran and the United States.

2. Each government shall designate 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.

3. The expenses of the Tribunal shall be borne equally by the two governments.

4. Any question concerning the interpretation or application of this Agreement shall be decided by the Tribunal upon the request of either Iran or the United States.

Article VII

For the purpose of this Agreement:

1. A "national" of Iran or of the United States, as the case may be, means (a) a natural person who is a citizen of Iran or the United States; and (b) a corporation or other legal entity which is organized under the laws of Iran or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty percent or more of its capital stock.

2. "Claims of nationals" of Iran or the United States, as the case may be, means claims owned continuously, from the date on which the claim arose to the date on which this Agreement enters into force, by nationals of that state, including claims that are owned indirectly by such nationals through ownership of capital stock or other proprietary interests in juridical persons, provided that the ownership interests of such nationals, collectively, were sufficient at the time the claim arose to control the corporation or other entity, and provided, further, that the corporation or other entity is not itself entitled to bring a claim under the terms of this Agreement. Claims referred to the arbitration 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.

3. "Iran" means the Government of Iran, any political subdivision of Iran and any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof.

4. The "United States" means the Government of the United States, any political subdivision of the United States, and any agency, instrumentality or entity controlled by the Government of United States or any political subdivision thereof.

Article VIII

This Agreement shall enter into force when the Government of Algeria has received from both Iran and the United States a notification of adherence to the Agreement.

Initialed on January 19, 1981
By Warren M. Christopher
Deputy Secretary of State of the Government of the United States
By virtue of the powers vested in him by his Government as deposited with the Government of Algeria

3. UNDERTAKINGS OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN WITH RESPECT TO THE DECLARATION OF THE GOVERNMENT OF THE DEMOCRATIC AND POPULAR REPUBLIC OF ALGERIA, 19 January 1981

1. At such time as the Algerian Central Bank notifies the Governments of Algeria, Iran, and the United States that is has been notified by the Central Bank that the Central Bank has received for deposit in dollar, gold bullion, and securities accounts in the name of the Algerian Central Bank, as escrow agent, cash and other funds, 1,632,911.779 ounces of gold (valued by the parties for this purpose at U.S.$0.9397 billion), and securities (at face value) in the aggregate amount of U.S.$7.955 billion, Iran shall immediately bring about the safe departure of the 52 U.S. nationals detained in Iran. Upon the making by the Government of Algeria of the certification described in Paragraph 3 of the Declaration, the Algerian Central Bank will issue the instructions required by the following paragraph.

2. Iran having affirmed its intention to pay all its debts and those of its controlled institutions, the Algerian Central Bank acting pursuant to Paragraph 1 above will issue the following instructions to the Central Bank:

(A) To transfer U.S.$3.667 billion to the Federal Reserve Bank of New York to pay the unpaid principal of and interest through December 31, 1980 on (1) all loans and credits made by a syndicate of banking institutions, of which a U.S. banking institution is a member, to the Government of Iran, its agencies, instrumentalities or controlled entities, and (2) all loans and credits made by such a syndicate which are guaranteed by the Government of Iran or any of its agencies, instrumentalities or controlled entities.

(B) To retain U.S.$1.418 billion in the Escrow Account for the purpose of paying the unpaid principal of and interest owing, if any, on the loans and credits referred to in Paragraph (A) after application of the U.S.$3.667 billion and all other indebtedness held by United States banking institutions of, or guaranteed by, the Government of Iran, its agencies, instrumentalities or controlled entities not previously paid, and for the purpose of paying disputed amounts of deposits, assets, and interest, if any, owing on Iranian deposits in U.S. banking institutions. Banking Markazi and the appropriate United States banking institutions shall promptly meet in an effect to agree upon the amount owing. In the event of such agreement, the Bank Markazi and the appropriate banking institution shall certify the amount owing to the Central Bank of Algeria which shall instruct the Bank of England to credit such amount to the account, as appropriate, of the Bank Markazi or of the Federal Reserve Bank of New York in order to permit payment to the appropriate banking institution. In the event that within 30 days any U.S. banking institution and the Bank Markazi are unable to agree upon the amounts owed, either party may refer such dispute to binding arbitration by such international arbitration panel as the parties may agree, or failing such agreement within 30 additional days after such reference, by the Iran-United States Claims Tribunal. The presiding officer of such panel or tribunal shall certify to the Central Bank of Algeria the amount, if any, determined by it to be owned, whereupon the Central Bank of Algeria shall instruct the Bank of England to credit such

amount to the account of the account of the Bank Markazi or of the Federal Reserve Bank of New York in order to permit payment to the appropriate banking institution. After all disputes are resolved either by agreement or by arbitration award and appropriate payment has been made, the balance of the funds referred to in this Paragraph (B) shall be paid to Bank Markazi.

(C) To transfer immediately to, or upon the order of, the Bank Markazi all assets in the Escrow Account in excess of the amounts referred to in Paragraph (A) and (B).

Initialed on January 19, 1981
By Warren M. Christopher
Deputy Secretary of State of the Government of the United States
By virtue of the powers vested in him by his Government as deposited with the Government of Algeria

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