

Claims of Dual Nationals in the Modern Era: The Iran-United States Claims Tribunal

The Iran-United States Claims Tribunal¹ was established in 1981 with the goal of terminating all litigation between the two parties by deciding the “claims of nationals of the United States against Iran and claims of Iran against the United States.”² Under the Declaration establishing the Tribunal, a national is defined as a “natural person who is a citizen of Iran or of the United States.”³ Thus, the position of an

1. The 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, *initialed* Jan. 19, 1981, United States-Iran, *reprinted in* 20 I.L.M. 230 (1981) [hereinafter cited as Claims Settlement Declaration], provides for the establishment of an international arbitral tribunal. The Claims Settlement Declaration was one component of a broader settlement between the two states that resulted in the release of Iranian assets frozen in the United States and the freeing of the United States' diplomatic personnel in Iran. The companion agreement, the Declaration of the Government of the Democratic and Popular Republic of Algeria, *initialed* Jan. 19, 1981, United States-Iran-Algeria, *reprinted in* 20 I.L.M. 224 (1981) [hereinafter cited as the Algiers Declaration], contains a statement of general principle, a pledge of nonintervention by the United States in Iranian affairs, and several agreements concerning the return of Iranian assets and the settlement of claims of the United States. Presidential authority for executing the Algiers Declaration was affirmed in *Dames & Moore v. Regan*, 453 U.S. 654 (1981). The Tribunal is composed of nine judges: three American, three Iranian, and three neutral. See *International Tribunal Awaits Claims Against Iran*, N.Y.L.J., June 15, 1981, at 1, col. 4; 2, col. 5, for a discussion on the judges. Claims of more than \$250,000 are presented by the claimants themselves. Claims of less than \$250,000 are presented by the government of the claiming national. Claims Settlement Declaration, *supra*, art. III, cl.3. Iran must maintain a \$500 million minimum balance in an escrow account, out of which the claims are to be satisfied. Algiers Declaration, *supra*, points II & III, cl. 7.

See generally Carter, *The Iran-United States Claims Tribunal: Observations on the First Year*, 29 UCLA L. REV. 1076 (1982); *Recent Developments*, 22 HARV. INTL. L.J. 443 (1981); *Symposium on the Settlement with Iran*, 13 LAW. OF AM. 1 (1981) [hereinafter cited as *Symposium*].

2. Claims Settlement Declaration, *supra* note 1, art. III, cl. 1. The Claims Tribunal has narrowly interpreted its jurisdiction. In *Interpretation of the Algerian Declarations of 19 Jan. 1981 (Claims Against U.S. Nationals)*, Dec. 21, 1981, *reprinted in* 62 I.L.R. 595 (Iran-U.S. Claims Trib. 1982), the Tribunal decided that the Claims Settlement Declaration does not provide for jurisdiction over claims by the Islamic Republic of Iran against United States nationals.

Unofficial reports of a U.S. Treasury census of American claims against Iran in 1980 indicate 1700 claims for amounts less than \$250,000 and 800 claims for larger sums. Brower, *Claims Against Iran Face Continuing Confusion*, LEGAL TIMES OF WASH., Feb. 23, 1981, at 30, col. 1; 39, col. 1 n.4. An October 1984 report indicated that \$305 million had been awarded to claimants, primarily to those in targeted industries, such as “pharmaceutical firms and military-related suppliers, which [Iran has] some need for.” *Iranian Debts*, N.Y. Times, Oct. 28, 1984, § 1, at 49, col. 2. An estimated \$6 billion of claims are still outstanding. *Id.*

3. See Claims Settlement Declaration, *supra* note 1, art. VII, cl. 1(a). The Declaration defines “national” to include certain corporations and other legal entities as well. *Id.* at cl. 1(b). Both “citizenship” and “nationality”

refer to the status of the individual in his relationship with the state The word “nationality” . . . has a broader meaning than “citizenship”, the latter being primarily the domestic law term applied to persons with full political and civil rights, while the term “national” includes both “citizens” and those persons who, while not citizens, owe permanent allegiance to the state and are entitled to its protection.

W. BISHOP, INTERNATIONAL LAW 488 (3d ed. 1971). See, e.g., 8 U.S.C. § 1101(a)(22) (1982)

individual who is a citizen of *both* Iran and the United States — a dual national — is not addressed.⁴ Pursuant to its grant of jurisdiction over all questions concerning the interpretation or application of the Declaration,⁵ the Claims Tribunal had to ascertain the standing of a dual national.

In its recent *Decision in Case No. A/18 Concerning the Question of Jurisdiction over Claims of Persons with Dual Nationality*,⁶ the Tribunal stated that the “dominant and effective nationality”⁷ of the claim-

(definition of U.S. national). The definition provided in art. VII, cl. 1(a) of the Claims Settlement Declaration eliminates this distinction for the purpose of ascertaining jurisdiction over a claimant by simply equating the term “national” with “citizen.”

4. See note 22 *infra* for an explanation of how dual nationality arises.

About 100 claimants possess dual nationality. Prior to the recent decision by the Tribunal on the subject, see note 6 *infra* and accompanying text, Iran raised the jurisdictional issue in virtually every claim brought by American citizens with Persian surnames. Memorial of the United States on the Issue of Dual Nationality Before the Iran-United States Claims Tribunal 2 (undated) (copy on file with the Michigan Law Review Association). Given the strong dissent of the Iranian judges to this opinion, see note 18 *infra*, it is likely that the Iranians will continue to raise the issue, even if to no avail.

Although dual nationality is frequently an issue in international disputes, most international claims-settlement treaties fail to address the matter expressly. Each tribunal is faced with determining its jurisdiction over these individuals. Consequently, the law is somewhat incoherent. See Griffin, *International Claims of Nationals of Both the Claimant and Respondent States — The Case History of a Myth*, 1 INTL. LAW. 400, 402 (1967).

Both the United States and Iran have stipulated the position of dual nationals in agreements with other states. See, e.g., Agreement Concerning Claims of Nationals of the United States, May 1, 1976, United States-Egypt, Agreed Minute, para. 4, 27 U.S.T. 4214, T.I.A.S. No. 8446 (with regard to the phrase “national of the United States,” the United States “recognizes and applies the principle of international law concerning the dominant and effective nationality of dual nationals”); Treaty Concerning the Promotion and Reciprocal Protection of Investments, Nov. 11, 1965, Federal Republic of Germany-Iran, protocol para. 10(d), 1967 BGBl, Teil II 2550, 2559 (explicitly providing that German/Iranian dual nationals could not claim rights under the Treaty); Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, Iran-United States, art. XVII, 8 U.S.T. 899, T.I.A.S. No. 3853 (identifying specific benefits available to sole nationals that are denied to dual nationals).

5. See Algiers Declaration, *supra* note 1, cl. 17. The parties have agreed that the Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27, reprinted in 8 I.L.M. 679 (1969), governs interpretation of the Declarations. See *Decision in Case No. A/18 Concerning the Question of Jurisdiction over Claims of Persons with Dual Nationality*, reprinted in 23 I.L.M. 489, 496 (Iran-U.S. Claims Trib. 1984) [hereinafter cited as *Case No. A/18*].

6. *Case No. A/18*, 23 I.L.M. 489. The decision was rendered pursuant to a request by Iran, under art. VI, cl. 4 of the Claims Settlement Declaration, for a hearing by the full Tribunal on the admissibility of the claims filed by nationals of Iran against the Islamic Republic of Iran. The request came in response to awards issued by Chamber Two in *Esfahanian v. Bank Tejarat* (Case No. 157), Awd. No. 31-157-2 (Mar. 29, 1983), reprinted in 2 IRAN-U.S. C.T.R. 157 (1983), and *Golpira v. Government of Iran* (Case No. 211), Awd. No. 32-211-2 (Mar. 29, 1983), reprinted in 2 IRAN-U.S. C.T.R. 171 (1983). The Iranian judge had dissented in both cases. The three Iranian judges dissented from the opinion rendered by the full Tribunal. Three concurring opinions were also filed.

7. The doctrine of dominant and effective nationality recognizes that “responsibility is sometimes claimed . . . on the ground that, by reason of habitual residence or other connection identifying [the injured person] more closely with the claimant than with the respondent state, [his] dominant or effective nationality is that of the claimant state.” RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 171, comment b (Tent. Draft No. 2, 1982). See, e.g., *Mergé Case* (U.S. v. Italy), 14 R. Intl. Arb. Awards 236 (1955); *Nottebohm Case* (Liecht. v. Guat.), 1955 I.C.J. 4

ant will determine jurisdiction.⁸ If the individual's connection to the claimant state predominates, his claim may be presented even against a state that also regards him as its subject. The Tribunal adopted this rule rather than the traditional doctrine of "nonresponsibility of states"⁹ asserted by Iran. While recognizing that both states are internally competent to bring the claim on behalf of the individual, the traditional doctrine provides that neither can present his claim against another state of which he is a national.¹⁰

The two competing doctrines may dictate opposite results in a given situation. The doctrine of nonresponsibility of states precludes the claim of a dual national, even if the claimant's ties are predominantly with one country.¹¹ Claims, perhaps otherwise justified, are rejected *ipso facto* because the individual also happens to be a national of the respondent country. In contrast, the rule of dominant and effective nationality *favors* allowing the individual an opportunity for redress if the facts indicate that he has a more substantial connection

(Judgment of Apr. 6); Canevaro Case (Italy v. Peru), Hague Ct. Rep. (Scott) 284 (Perm. Ct. Arb. 1912); Drummond's Case, 12 Eng. Rep. 492 (P.C. 1834).

For proponents of the doctrine, see generally I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 398-99 (3d ed. 1979); Bishop, *Nationality in International Law*, 37 AM. J. INTL. L. 320 (1943); Copithorne, *International Claims and the Rule of Nationality*, 1969 AM. SOC'Y. INTL. L. PROC. 30, 34; Griffin, *supra* note 4; Orfield, *The Legal Effects of Dual Nationality*, 17 GEO. WASH. L. REV. 427 (1949); Rode, *Dual Nationals and the Doctrine of Dominant Nationality*, 53 AM. J. INTL. L. 139 (1959).

8. *Case No. A/18*, 23 I.L.M. at 501.

9. State nonresponsibility was described by the International Court of Justice as 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." *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 186 (Advisory Opinion of Apr. 11).

The theory of nonresponsibility of the respondent state is described in E. BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD 588 (1915). See also N. BAR-YAACOV, DUAL NATIONALITY 210, 236 (1961); 2 C. HYDE, INTERNATIONAL LAW 886 (2d ed. 1947); 1 L. OPPENHEIM, INTERNATIONAL LAW 348 (Lauterpacht 8th ed. 1955); J. RALSTON, THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS 172 (1926). Many cases are traditionally cited as supporting this doctrine. However, the contention that the doctrine of nonresponsibility was the basis for these decisions is of questionable accuracy. See notes 108-09, 114 *infra* and accompanying text. See also Note, *The Standing of Dual Nationals Before the Iran-United States Claims Tribunal*, 24 VA. J. INTL. L. 695 (1984) (comprehensive discussion of the precedents).

10. The Hague Convention states the principle as follows: "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses." Convention on Certain Questions Relating to the Conflict of Nationality Laws, *opened for signature* Apr. 12, 1930, art. 4, 179 L.N.T.S. 89 [hereinafter cited as Hague Convention]. At the time of the Convention, the United States and a minority of other states proposed that a qualification to the principle of absolute nonresponsibility be added precluding protection only if the individual were "habitually resident" in the "defendant state." See generally Flournoy, *Nationality Convention, Protocols and Recommendations Adopted by the First Conference on the Codification of International Law*, 24 AM. J. INTL. L. 467 (1930).

The Harvard Draft Convention on Responsibility of States provided that: "A state is not responsible if the person injured or the person on behalf of whom the claim is made was or is its own national." DRAFT CONVENTION ON RESPONSIBILITY OF STATES FOR DAMAGE DONE IN THEIR TERRITORY TO THE PERSON OR PROPERTY OF FOREIGNERS art. 16(a) (Harv. Law School 1929), *reprinted in* 23 AM. J. INTL. L. 133, 200 (Spec. Supp. 1929).

11. See Kunz, *The Nottebohm Judgment (Second Phase)*, 54 AM. J. INTL. L. 536, 558 (1960).

with the claimant state than with the respondent state.¹²

Thus, the decision of the full Tribunal in *Case No. A/18* may pre-empt greater opportunities for the protection and recognition of the rights of dual nationals before arbitral tribunals in the international arena.¹³ The effect of the decision may be diminished, however, by the Tribunal's inadequate justification for adoption of the dominant and effective nationality standard. The opinion simply asserts that dominant and effective nationality is the prevailing rule in international law.¹⁴ It oversimplifies a body of precedent that has been repeatedly construed to support the doctrine of state nonresponsibility¹⁵ and overlooks persistent commentary affirming the vitality of state nonresponsibility despite enunciations of a preference for the rule of dominant and effective nationality.¹⁶ The Tribunal merely concluded that "whatever the state of the law prior to 1945, the better rule at the time the . . . Declarations were concluded and today is the rule of dominant and effective nationality."¹⁷

Although the Tribunal failed to articulate why dominant and effective nationality is, and should be, the preferred standard, it could have found support for its choice by analyzing and exposing the inadequacies of the principles underlying the traditional doctrine of state nonresponsibility. The opinion should also have observed that the dominant and effective standard is consistent with the modern conception that nationality is premised on factual connections. The lack of a comprehensive theoretical framework is likely attributable to the controversial nature of the claims between the United States and Iran and to concern that the decision not jeopardize the continued functioning of the Tribunal.¹⁸

This Note will discuss the considerations, implicit in the Tribunal's opinion, that support substituting the doctrine of dominant and effective nationality for the rule of state nonresponsibility in cases involving claims of dual nationals. Part I of this Note briefly examines the traditional framework of diplomatic protection and demonstrates that the policies supporting the doctrine of state nonresponsibility are anachronistic and that strict adherence to them leads to inequitable results.

12. See I. BROWNIE, *supra* note 7, at 398.

13. See text at note 143 *infra*; *contra* N. BAR-YAACOV, *supra* note 9, at 236 (noting entrenchment of the rule of nonresponsibility).

14. *Case No. A/18*, 23 I.L.M. at 501.

15. See notes 107-19 *infra* and accompanying text.

16. See notes 88-90 *infra* and accompanying text.

17. *Case No. A/18*, 23 I.L.M. at 499.

18. The sensitivity of the issue of dual nationality is apparent in the dissenting declaration, which is the most vehement of any issued by an Iranian judge at this Tribunal. The Iranian Judges charged that the decision was "void of any credibility" and was "yet another clear manifestation of a bad faith interpretation rendered by [the] Tribunal." *Case No. A/18*, 23 I.L.M. at 502 (Declaration of the Iranian members of the Tribunal).

Part II argues that the doctrine of dominant and effective nationality is the preferred standard for determining the status of dual national claims. At the core of this doctrine is the modern concept that nationality constitutes more than a tenuous legal bond. Part III concludes with a review of the most recent treatment of claims of dual nationals — those submitted to the Iran-United States Claims Tribunal. These claims demonstrate the need to replace the traditional doctrine of state nonresponsibility with the dominant and effective nationality approach.

I. THE FRAMEWORK OF DIPLOMATIC PROTECTION: STATE NONRESPONSIBILITY

International law has generally assumed that a claim¹⁹ in the international arena belongs exclusively to a state regardless of who suffered the actual harm.²⁰ It is *solely* through the bond of nationality that an individual can ask his country to seek redress for a wrong inflicted by another nation.²¹ Matters of nationality in turn are regulated by municipal, not international, law.²² The inevitable result of the absence of a uniform international law to determine nationality is the anomaly of dual nationality:²³ two states may simultaneously confer their na-

19. An international claim is a demand of one government upon another through diplomatic channels or an international tribunal for redress of acts or omissions for which the respondent government is alleged to be responsible under international law or treaty provisions. See 2 C. HYDE, *supra* note 9, at 886.

20. Traditional dogma asserts that the state is actually injured by the harm to its national. This tenet was based on the fiction of an organic unity between the individual and the state as originally conceptualized by the international lawyer Vattel. P. JESSUP, *A MODERN LAW OF NATIONS* 9 (1948). See *Mavrommatis Palestine Concessions (Greece v. U.K.)*, 1924 P.C.I.J., ser. A, No. 2, at 11-12 (Judgment of Aug. 30) (only when the government took up the claim did the claim enter the "domain of international law"); see also Koessler, *Government Espousal of Private Claims Before International Tribunals*, 13 U. CHI. L. REV. 180, 184-86 (1946).

In the typical international claims situation, the private person lacks standing before an international tribunal, has no cause of action under international law, and is barred from suit by the doctrine of sovereign immunity. See *Symposium, supra* note 1, at 102; cf. note 126 *infra* and accompanying text. This is consistent with the state-oriented basis of international law in which the individual's legal significance derives solely from his relationship to one state through the link of citizenship or nationality. See P. JESSUP, *supra*, at 9; cf. note 35 *infra* and accompanying text.

21. See *Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania)*, 1939 P.C.I.J., ser. A/B, No. 76, at 16 (Judgment of Feb. 28). Modern thinking about the bond of nationality has evolved toward a less absolutist concept. Indeed,

the law has often fractured this link [the State as the medium between international law and its own nationals] when it failed in its purpose. For example, in the areas of black and white slavery, human rights and protection of minorities, international law has selected the individual as a member of the international community for rights . . . even against the national State.

D. O'CONNELL, *INTERNATIONAL LAW* 108 (2d ed. 1970). See J. SIMPSON & H. FOX, *INTERNATIONAL ARBITRATIONS* 109 (1959).

22. See *Tunis and Morocco Nationality Decrees (U.K. v. Fr.)*, 1923 P.C.I.J., ser. B, No. 4, at 24 (Advisory Opinion of Feb. 7); Hague Convention, *supra* note 10, arts. 1 & 2 (each state determines under its own law who its nationals are); 1 L. OPPENHEIM, *supra* note 9, at 508.

23. See 8 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 64-65 (1967); 3 J. MOORE,

tionality on the same individual.²⁴ Under the traditional doctrine of nonresponsibility a state may not fully protect a dual national because it may not assert the claim of its national against another state of which that individual is a citizen.²⁵

Two justifications have been advanced in support of the traditional doctrine of nonresponsibility of states — sovereign equality and local remedy. Both are anachronistic in the modern era and lead to the conclusion that the traditional doctrine should be rejected as a statement of international law.

A. *Sovereign Equality of States*

The first rationale for proscribing one state's assertion of a claim against another when both states regard the injured party as a national is the sovereign equality of states.²⁶ Respect for the independence of the defendant state has traditionally included the obligation to refrain

DIGEST OF INTERNATIONAL LAW 518 (1906); *Nottebohm Case (Liecht. v. Guat.)*, 1955 I.C.J. 4, 23 (Judgment of Apr. 6).

Dual nationality arises through inconsistencies between the municipal laws of nations. For example, dual nationality is acquired at birth by children born in a state that applies the principle of *jus soli* (conferring nationality upon persons born within the territory of that state) of parents who are nationals of a different state that applies the principle of *jus sanguinis* (under which nationality is acquired by descent, irrespective of place of birth). Dual nationality also arises when an individual who acquired a new nationality through naturalization retains the nationality of his home state. See notes 40-44 *infra* and accompanying text. Marriage creates dual nationality when one spouse acquires the nationality of the other while retaining his or her earlier nationality. N. BAR-YAACOV, *supra* note 9, at 3. See also Flournoy, *Dual Nationality and Election*, 30 YALE L.J. 545 (1921) (discussion of nationality laws of various countries, particularly those of the United States); Orfield, *supra* note 7, at 427-28, 432-42 (discussion of how dual nationality arises at birth and after birth).

24. The problem of dual nationality addressed in this Note is to be distinguished from the situation in which the claimant simultaneously holds more than one nationality, none of which belongs to the defendant state. For instance, an individual who is a national of the United States and of France and who asserts a claim against Iran would not pose a dilemma for the Tribunal; he would be treated as if he possessed only one nationality. That nationality is ascertained either by reference to his domicile or to the nationality to which he appears to be more attached in fact. Hague Convention, *supra* note 10, art. 5. See, e.g., *Flegenheimer Case (U.S. v. Italy)*, 14 R. Intl. Arb. Awards 327, 377 (1958); *Mergé Case (U.S. v. Italy)*, 14 R. Intl. Arb. Awards 236, 247 (1955); *Salem Case (U.S. v. Egypt)*, 2 R. Intl. Arb. Awards 1161, 1188 (1932); I. BROWNLIE, *supra* note 7, at 399-400.

25. See notes 9-10 *supra* and accompanying text.

26. The basic "constitutional doctrine" of the law of nations recognizes the sovereign and equal status of the nations comprising the international community. I. BROWNLIE, *supra* note 7, at 280. See, e.g., *Maninat Case (Fr. v. Venez.)*, 10 R. Intl. Arb. Awards 55, 79 (1905) (for France to intervene when the claimant is a Venezuelan by the laws of Venezuela and French under the laws of France would make the law of France "superior to the law of Venezuela, which is not permissible as between two sovereign nations"); *Laurent's Case (U.S. v. U.K.)* (1853), *reprinted in* 3 J. MOORE, HISTORY & DIGEST OF INTERNATIONAL ARBITRATIONS 2671, 2677 (1898) (United States argued that to give Britons domiciled in Mexico the advantage of British protection would be "entirely opposed to the notion of independence in other countries"); see also *Burthe v. Denis*, 133 U.S. 514, 520-21 (1890) ("It would be a remarkable thing, and we think without precedent in the history of diplomacy, for the government of the United States to make a treaty with another country to indemnify its own citizens for injuries received from its own officers.").

from interfering in relations between that state and its nationals.²⁷ Accordingly, in *Executors of R.S.C.A. Alexander v. the United States*,²⁸ an American-British Commission refused jurisdiction over the claim of a dual national with the explanation that “[t]o treat his grievances against that other sovereign as subjects of international concern would be to claim a jurisdiction paramount to that of the other nation of which he is also a subject.”²⁹ The requirement by one state that another pay compensation to its own nationals would seem to infringe the sovereignty of the defendant state.³⁰ However, when limited to the claims situation, this conclusion must be qualified.

First, the opportunity to subject the defendant state to liability arises through the mutual agreement of the states.³¹ Thereafter, any interference with a state’s assertion of nationality on behalf of claimants possessing dual nationality is for the limited purpose of deciding jurisdiction over a claim.³² Thus, the sovereignty of the defendant

27. “[T]he right of a state to deal unhampered with its own nationals has been considered a right superior to its duty to deal fairly with the nationals of another state.” P. JESSUP, *supra* note 20, at 100. See also Dunn, *The International Rights of Individuals*, 1941 AM. SOC. INTL. L. PROC. 14, 19 (remarks of Alwyn V. Freeman). However, the growing recognition of international human rights has infringed upon the states’ absolute sovereignty over their own nationals. See notes 35-36 *infra* and accompanying text.

28. (*Alexander’s Case*) (1872), 3 HALE’S REP. FOR. RELATIONS 15 (1875), reprinted in 3 J. MOORE, *supra* note 26, at 2529.

29. 3 J. MOORE, *supra* note 26, at 2531. The Commission reasoned that “[c]omplications would inevitably result, for no government would recognize the right of another to interfere thus in behalf of one whom it regarded as a subject of its own.” At its extreme, the potential for friction has been described as follows:

[S]uppose . . . the United States had to resort to war in order to enforce the claims, what would ensue? On the one side we should have, perhaps, the claimants themselves drafted into the military service of Venezuela, for the purpose of resisting the United States in enforcing the claims of her citizens, and on the other, the army and navy of that country spilling its blood and wasting its resources in an endeavor to establish a right in favor of the very persons who were opposing her efforts with arms in their hands.

The Hammer & de Brissot Case (U.S. v. Venez.) (1885), reprinted in 3 J. MOORE, *supra* note 26, at 2456, 2461.

30. See Hurst, *Nationality of Claims*, 7 BRIT. Y.B. INTL. L. 169 (1926).

[T]he general rule . . . may be summed up as being . . . that where a claimant is a citizen by the respective laws of both demandant and respondent countries, no recovery may be had, because it is the right of neither state to force upon the other its law in determining the question of right, and in parity of right the claim fails.

J. RALSTON, *supra* note 9, at 172.

31. See, e.g., Claims Settlement Declaration, *supra* note 1. Such agreements operate as waivers of sovereign immunity. See generally Note, *The Iranian Hostage Agreement Under International and United States Law*, 81 COLUM. L. REV. 822, 863-70 (1981).

32. “It is not a question of adopting one nationality to the exclusion of the other [but] simply [a problem] of determining whether diplomatic protection can be exercised in such cases.” Mergé Case (U.S. v. Italy), 14 R. Intl. Arb. Awards 236, 246 (1955). By framing the issue in this manner, the Italian-U.S. Conciliation Commission avoided a blatant interference with the principle of sovereignty. The International Court of Justice noted the limitation in its resolution of the *Nottebohm Case*: “[W]hat is involved is not recognition for all purposes but merely for the purposes of the admissibility of the Application, and, secondly . . . what is involved is not recognition by all States but only by [the defendant state].” *Nottebohm Case* (Liecht. v. Guat.), 1955 I.C.J. 4, 17 (Judgment of Apr. 6).

A single nationality for all purposes may be desirable both for the individual and for the

state is violated only to a minimal extent.

In addition, the notion of sovereignty, as understood in the classical framework, has been modified in the modern era. Sovereignty can no longer be viewed as an absolute concept; inroads have been made by both human rights protection³³ and the growth of supranational institutions.³⁴ Concomitant with the ascent of the rights of the individual³⁵ through the recognition of international human rights must be restrictions on the sovereignty of the state.³⁶ Without delineating the extent to which the view of absolute sovereignty has been changed,

international order. The Preamble to the Hague Convention states: "[T]he ideal towards which the efforts of humanity should be directed in this domain is the abolition of all cases both of statelessness and of double nationality . . ." Hague Convention, *supra* note 10, preamble. See generally Orfield, *supra* note 7, at 442-45 (proposals for a uniform rule in determining nationality). See also notes 92, 98-100 *infra* and accompanying text (single nationality implicit in U.S. naturalization). Such a broad proposition is not essential to granting a dual national the right to present a claim before a claims tribunal, however. Furthermore, determination of a single nationality for all purposes would contravene the municipal laws of other countries, which continue to be valid in fora other than the claims tribunals. Thus, although the United States asserts that expatriation is a natural and inherent right, see note 43 *infra*, this position is not a principle of international law, "for that would be tantamount to interference with the exclusive jurisdiction of a nation within its own domain." *Coumas v. Superior Court*, 31 Cal. 2d 682, 686, 192 P.2d 449, 452 (Cal. 1948). See 8 M. WHITEMAN, *supra* note 23, at 76.

33. Although the United Nations Charter recognizes the sovereign equality of member states, U.N. CHARTER, art. 2, para. 1, the organization's competence to interfere with the sovereign member states' policies if these policies endanger international peace and security is provided for in arts. 39, 41, and 42. See R. FALK, HUMAN RIGHTS AND STATE SOVEREIGNTY ch. 3 (1981) (discussion of theoretical bases of human rights in world of sovereign states); L. Henkin, *Introduction*, in THE INTERNATIONAL BILL OF RIGHTS 14-15 (L. Henkin ed. 1981) (no invasion of state sovereignty because human rights are a matter of international concern not essentially within the state's domestic jurisdiction); Delbrueck, *International Protection of Human Rights and State Sovereignty*, 57 IND. L.J. 567, 571 (1982) ("[T]he obligation of the member states to promote respect for human rights . . . has been continuously interpreted as not to constitute an illegal and illegitimate inroad on national sovereignty . . .").

34. Perhaps the best illustration of the infringement on state sovereignty by a supranational institution is the European Economic Community. The regulations of the Community have direct effect in the member states and preempt conflicting state legislation. See generally P. MATHIJSSEN, A GUIDE TO EUROPEAN COMMUNITY LAW 3, 100 (3d ed. 1980); E. STEIN, P. HAY & M. WELBROECK, EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE (1976).

35. See generally L. HENKIN, THE RIGHTS OF MAN TODAY ch. 3 (1978); R. LILICH & F. NEWMAN, INTERNATIONAL HUMAN RIGHTS (1979); L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS (1973).

The trend in international law since World War II has been to confer basic rights on the individual independent of the state. Of particular note are the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 5, 1950, 213 U.N.T.S. 221 (1955), and The Universal Declaration of Human Rights, G.A. Res. 217(A)(III), U.N. Doc. A/810, at 71 (1948). The idea that individuals also have responsibilities under international law came to the forefront at the Nuremberg trials. See Judgment of the Nürnberg Tribunal, Sept. 30, 1946, *quoted in* W. BISHOP, *supra* note 3, at 1009-12, 1016-18; I. BROWNLIE, *supra* note 7, at 561-64. See also *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

36. See note 21 *supra*. The relationship between the move away from the formalistic concept that nationality is strictly within the domain of municipal law and the efforts to integrate human rights into international law is noted in P. WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 256 (2d ed. 1979).

the modern trend at least permits the questioning of *particular* exercises of sovereignty.

In the context of the Tribunal, the relevant inquiry focuses on the state's exercise of its sovereign prerogative to determine who shall be its nationals.³⁷ By continuing to claim as its subject an individual who has only tenuous links to the country,³⁸ the state can bar this individual from recovery under the doctrine of state nonresponsibility. The International Court of Justice has indicated that such an exercise of sovereignty might not be entitled to recognition at the international level: "[A] State cannot claim that the rules it has . . . laid down are entitled to recognition by another State unless it has acted in conformity with [the] general aim of making the legal bond of nationality accord with the individual's genuine connection with the State . . ." ³⁹ Many municipal laws that create dual nationality directly conflict with this statement.

Specifically, some countries do not allow an individual to expatriate himself,⁴⁰ even upon naturalization in another country. For instance, an Iranian citizen can renounce his Iranian nationality only

37. See note 22 *supra* and accompanying text. The solution of problems such as dual nationality is hindered by clinging to a notion of absolute sovereignty. Indeed, "[i]t is a widely held opinion that dual nationality is an undesirable phenomenon detrimental both to the friendly relations between nations and the well-being of the individuals concerned." N. BAR-YAACOV, *supra* note 9, at 4. See also E. BORCHARD, *supra* note 9, at 590-91 (stating that nations should adopt a uniform law on effect of naturalization). Professor Bishop attributed the inability of the 1930 Hague Conference to find a solution for dual nationality and statelessness to various states' "adher[ence] to their absolute sovereignty which gave them the right to decide who shall be their nationals." Bishop, *supra* note 7, at 324. See also 2 C. HYDE, *supra* note 9, at 1131.

For a discussion of the difficulties faced by the dual national, see generally E. BORCHARD, *supra* note 9, at 580-89; Orfield, *supra* note 7, at 428-32. Multilateral and bilateral agreements have ameliorated the specific problem of double military obligations. See, e.g., Protocol Relating to Military Obligations in Certain Cases of Double Nationality, Apr. 12, 1930, art. I, 178 L.N.T.S. 227 (adopting the principle of dominant nationality to exempt the individual from his obligation to the state with which his contacts are weaker).

38. The requirement of a "genuine link" was articulated by the International Court of Justice in *Nottebohm Case (Liecht. v. Guat.)*, 1955 I.C.J. 4, 22-23 (Judgment of Apr. 6). The *Restatement (Second) of Foreign Relations* advocates that nationality can be conferred upon an individual "provided there exists a genuine link between the state and the individual." RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 26 (1965). The comments to the section indicate that this is the natural interpretation of the International Court of Justice's language in *Nottebohm*. See I. BROWNLIE, *supra* note 7, at 393-407.

39. *Nottebohm Case (Liecht. v. Guat.)*, 1955 I.C.J. 4, 23 (Judgment of Apr. 6); accord *Barthez de Montfort v. Treuhander Hauptverwaltung*, 6 Trib. Arb. Mixtes 806, 3 Ann. Dig. 279 (1926) (holding that an international tribunal was not bound by municipal laws); Hague Convention, *supra* note 10, art. 1 (each state shall determine who its own nationals are, and that determination shall be "recognized by other States insofar as it is consistent with international conventions, international custom and the principles of law generally recognized with regard to nationality.").

40. "When an individual obtains naturalisation abroad without . . . securing the permission for foreign naturalisation required by the laws of his home State, that State has the right not to recognise the legal consequences of such naturalisation and to treat the individual concerned as its citizen." N. BAR-YAACOV, *supra* note 9, at 143. For general information on the expatriation laws of countries, see *id.* at 99-131.

after obtaining permission from the Council of Ministers.⁴¹ Such unbridled control over an individual's nationality is inconsistent with international expressions such as the Universal Declaration of Human Rights that assert the right to change nationality.⁴² If that right is to have any significance, it must encompass the liberty to forsake as well as to acquire a nationality.⁴³ The extension by a state of its municipal laws to prevent an individual from renouncing his nationality is one of the least defensible expressions of sovereignty.⁴⁴

41. Article 988 of the Iranian Civil Code requires prior authorization by the Council of Ministers for renunciation of an Iranian nationality. Further requirements include: (1) attainment of 25 years of age; (2) termination of active military service; and (3) transfer of all rights possessed in Iranian real property to Iranian nationals. Those who renounce their Iranian nationality must leave Iran or be expelled and can thereafter visit Iran once, and then only with "special permission" from the Council of Ministers. See *Case A/18*, 23 I.L.M. at 508 n.7 (Mosk, J., concurring).

In a few cases, the absence of an expatriation permit has not prevented an international arbitral tribunal from recognizing that expatriation had effectively occurred. See, e.g., *Apostolidis v. The Turkish Government*, 8 Trib. Arb. Mixtes 373, 4 Ann. Dig. 312 (1928) (Turkish national naturalized in France without obtaining permission of the Turkish authorities as required by Turkish law held entitled to bring claim as French subject against Turkey).

42. Article 15 of the Declaration provides that "[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." Universal Declaration of Human Rights, G.A. Res. 217(A)(III), U.N. Doc. A/810, at 71 (1948). The International Covenant on Civil and Political Rights provides that "[e]veryone shall be free to leave any country, including his own." G.A. Res. 2200/A, art. 12(2), U.N. GAOR Supp. (No. 16) at 62, U.N. Doc. A/6316 (1966). Professor Jagerskiold explains that the right to leave one's own country permanently implies a right to expatriate oneself, which is one of the most important aspects of the freedom of movement. Jagerskiold, *The Freedom of Movement*, in *THE INTERNATIONAL BILL OF RIGHTS 177-79* (L. Henkin ed. 1981). An unqualified recognition of the right of expatriation is essential for the assertion of the "dignity of man." H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 349 (1950).

43. See Orfield, *supra* note 7, at 438. The United States is a staunch supporter of the right of voluntary expatriation. See, e.g., 8 U.S.C. §§ 1481, 1483, 1488 (1982) (detailing how a U.S. citizen may lose his nationality). The language of the Act of July 27, 1868 expresses the attitude of the United States: "[T]he right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness . . ." Act of July 27, 1868, 15 Stat. 223, 223 (as reenacted in Rev. Stat. § 1999), quoted in Miller, *The Hague Codification Conference*, 24 AM. J. INTL. L. 674, 679 (1920). The chairman of the U.S. delegation at the 1930 Hague Convention eloquently stated that

[T]rue it is that allegiance is a duty, but it is not a chain that holds one in bondage and that he carries with him to a new life in a new land. It is a duty and an obligation of a free man that he casts off when he voluntarily assumes allegiance to the country of his new home and there takes over the duties and the rights of a national.

Id. at 679. The U.S. refusal to sign the Hague Convention because of its failure to endorse the right of voluntary expatriation is further evidence of adherence to this position. Flournoy, *supra* note 10, at 474-76.

44. Perhaps the logical conclusion of the language of the *Nottebohm Case*, see text at note 39 *supra*, is that "the nationality retained by a naturalised person owing to refusal of an expatriation permit without valid reason . . . [is] irrelevant in international law; [it does] not have to be recognized by other States or by international tribunals." P. WEIS, *supra* note 36, at 244. *Accord Case No. A/18*, 23 I.L.M. at 508 & n.8 (Mosk, J., concurring). Indeed, denial of the right of expatriation is "offensive alike to individual freedom and to the dignity of the State insisting on the retention of a grudging allegiance." 1 L. OPPENHEIM, *supra* note 9, at 649.

Ralston, rapporteur for the American-Venezuelan arbitrations, see *Convention for the Re-opening of the Claims Against Venezuela, concluded Dec. 5, 1885, United States-Venezuela*, 28 Stat. 1053, T.S. No. 371, reprinted in 5 J. MOORE, *supra* note 26, at 4810, specifically linked Venezuela's refusal to allow expatriation to the intention to deny the individual's claim. He observed that South American nations have forced citizenship on people for "the very purpose of

Municipal laws broadly applying the doctrine of *jus sanguinis*⁴⁵ can also create dual nationality without regard to the individual's connection to the state. Under this doctrine children are nationals if their parents are nationals, irrespective of the links (birth or domicile) between the child and the state. For example, Iran confers citizenship upon the children of Iranian men, wherever born.⁴⁶ This practice, when coupled with a refusal to allow expatriation, fails to give preference to the real and effective nationality of the individual. International tribunals should not sanction such actions out of rigid respect for the sovereignty of the defendant state.

B. *Assumption of Local Remedies*

The second justification for the doctrine of state nonresponsibility is that a dual national claimant should not enjoy the protection of two countries. Since the claimant is a dual national of the respondent country, she is presumed to have an opportunity for redress in the courts of that state.⁴⁷ To quote again from *Alexander's Case*, "[t]he practice of nations . . . is for [the] sovereign to leave the person who has embarrassed himself by assuming a double allegiance to the protection . . . provided for him by the municipal laws of that other sovereign to whom he thus also owes allegiance."⁴⁸

This argument ignores the realities of the claims process. Such an extraordinary measure as establishing a claims tribunal is undertaken

disqualifying the persons designed to be affected by such law from setting up any claim through a foreign country for redress." J. RALSTON, *supra* note 9, at 172.

45. See note 22 *supra*.

46. See THE CIVIL CODE OF IRAN, art. 976 (Musa Sabi trans. 1973).

47. Ordinarily, a prerequisite to redress in any international forum is the exhaustion of local remedies in the national's courts. *Interhandel Case* (Switz. v. U.S.), 1959 I.C.J. 6, 27 (Judgment of Mar. 21). However, if local remedies are obviously ineffective, the rule does not apply. RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 208 (1965). An "absolutely ineffective" local remedy has been defined as "obviously futile." *Finnish Shipowners Arbitration* (Fin. v. Gr. Brit.), 3 R. Intl. Arb. Awards 1479, 1503-05 (1934); *accord* *American Intl. Group, Inc. v. Islamic Republic of Iran*, 493 F. Supp. 522 (D.D.C. 1980) (American insurer not required to exhaust remedies in Iran since such a resort would be "impracticable or futile"). See also 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 501-02 (1943). One author asserts that the brief time period for filing provided for in the Claims Settlement Declaration, *supra* note 1, precludes application of the exhaustion of local remedies rule. See Jones, *The Iran-United States Claims Tribunal: Private Rights and State Responsibility*, 24 VA. J. INTL. L. 259, 273-74 (1984).

The Declarations establish the Tribunal as the mutually agreed-upon forum for the termination of all litigation between Iran and the United States. See *Algiers Declaration*, *supra* note 1, General Principles B; *Claims Settlement Declaration*, *supra* note 1, art. VII, cl. 2. United States courts are precluded from adjudicating any claim which falls within the jurisdiction of the Tribunal. Exec. Order No. 12294, 31 C.F.R. § 535.216 (1981), *reprinted in* 50 U.S.C. § 1702 (1982). See *Dames & Moore v. Regan*, 453 U.S. 654, 666, 686 (1981) (President had power to terminate claims of American nationals against Iran through binding arbitration in the Iran-United States Claims Tribunal). See also *Jafari v. Islamic Republic of Iran*, 539 F. Supp. 209 (N.D. Ill. 1982) (claim filed before Tribunal considered excluded from jurisdiction of courts of the United States or Iran).

48. *Alexander's Case*, *reprinted in* 3 J. MOORE, *supra* note 26, at 2531.

precisely because the states involved feel that their respective nationals will be unable to obtain adequate and efficient redress in the national courts.⁴⁹ Typically, governments have been called upon to espouse a claim after a war or revolution,⁵⁰ following a long period of incidents between the countries,⁵¹ or to deal with a particular problem or event.⁵² The background to the Iran-United States Claims Tribunal,⁵³ although perhaps more spectacular than that of its predecessors, nicely illustrates the impetus for a claims tribunal: a break in relations resulted in large outstanding claims and the desire to set up an expeditious mechanism for their resolution.⁵⁴ Presumably, the individuals affected could not obtain redress in the national courts. In particular, it is unlikely that an Iranian who has become a naturalized American citizen could enter an Iranian court with any expectation of fair dealing;⁵⁵ the pervasive prejudice against all that is affiliated with the

49. For example, in the Iranian situation, U.S. claimants would have had no genuine remedy in the Iranian courts because (1) access to the Iranian courts was effectively blocked and (2) U.S. claimants could not expect a fair hearing before the Iranian courts. Stein, *Jurisprudence and Jurists' Prudence: The Iranian-Forum Clause Decisions of the Iran-U.S. Claims Tribunal*, 78 AM. J. INTL. L. 1, 30-31 (1984). See also note 51 *infra*.

50. See, e.g., United States-Italian Conciliation Commission, Feb. 10, 1947, 61 Stat. 1245, T.I.A.S. No. 1648 (established under art. 83 of Peace Treaty with Italy); Mixed Claims Commission, United States-Germany, Aug. 10, 1922, reprinted in MIXED CLAIMS COMMISSION: UNITED STATES AND GERMANY 1 (1st and 2d Reports of R. Morris, 1923) (created by the Treaty of Versailles). See also J. SIMPSON & H. FOX, *supra* note 21, at 16-17 & generally at 1-16; Convention for the Settlement of Claims, concluded July 4, 1868, United States-Mexico, 15 Stat. 679, T.S. No. 212, reprinted in 5 J. MOORE, *supra* note 26, at 4773 (to settle outstanding claims after the Mexican War).

51. See, e.g., A. FELLER, *THE MEXICAN CLAIMS COMMISSIONS* 2-7 (1935).

52. See, e.g., Agreement Concerning the Establishment of the Lake Ontario Claims Tribunal (Gut Dam), United States-Canada, Mar. 25, 1965, 17 U.S.T. 1566, T.I.A.S. No. 6114 (the tribunal was preempted by lump sum settlement between the countries).

53. See note 1 *supra*.

54. See *Case No. A/18*, 23 I.L.M. at 498. The opinion noted that the Algiers Declaration came into being to resolve a crisis in relations between Iran and the United States. The major obstacles were the litigation by U.S. citizens against Iran in U.S. courts and judicial attachment of Iranian assets in the United States in connection with these cases. *Case No. A/18*, 23 I.L.M. at 498.

Since World War II, the United States has resolved nationals' claims through lump sum claims settlement agreements rather than by recourse to international arbitral tribunals. See generally I R. LILlich & B. WESTON, *INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS* 30-32 (1975). The return to the arbitral tribunal may be attributed to the desire of the United States and Iran to come to agreement quickly: lump sum settlement would have instead required lengthy and difficult negotiations to establish the size of the fund. *Recent Developments*, *supra* note 1, at 447-48.

The establishment of the Tribunal offers several potential advantages to U.S. nationals. First, recovery will not be limited to a portion of a lump sum negotiated by the government. Rather, full recovery is available. Second, Iran cannot raise the act of state defense because it has agreed to scrutiny of its actions by the Tribunal. Third, the award is enforceable against Iran in the court of any nation. Claims Settlement Declaration, *supra* note 1, art. IV. See Carter, *supra* note 1, at 1083; *Symposium*, *supra* note 1, at 29.

55. The prevalence of the anti-American attitude in Iran is exemplified by the new categories of capital offenses, which include: (1) expanding the influence of the imperialists, and (2) creating a "capitulating system of justice for American citizens." AMNESTY INTL., *LAW AND HUMAN RIGHTS IN THE ISLAMIC REPUBLIC OF IRAN* 105, 110 (1980). In addition, an umbrella

United States would preclude an unbiased determination.⁵⁶ If the parties create an arbitral body in response to a perceived need for an alternative forum, the tribunal's function should not be undermined by rendering ineligible a group of claimants encompassed within the agreement.

Thus, the Iran/United States claimant highlights a fallacy in the presumption that a dual national is accorded two opportunities for redress.⁵⁷ One can no longer assume the availability of a home remedy.⁵⁸ In fact, the denial of justice may be the rule rather than the

criminal act punishes "corruption on earth." This phrase refers to the "perversion" and "impurity" resulting from Imperial rule and the consequent disorder which corrupted Iran by tying it to "alien 'Western' conceptions." The revolutionaries believe that those who have created the "impurity" must be done away with, for they have "sown corruption on earth." *Id.* at 78. The tenor of these crimes suggest that one who has indicated his preference for the "imperialist" United States by emigrating from Iran could anticipate less than just treatment in an Iranian court. See generally Note, *Changed Circumstances and the Iranian Claims Arbitration: Applications to Forum Selection Clauses and Frustration of Contract*, 16 GEO. WASH. J. INTL. L. & ECON. 335 (1982).

56. See *Symposium, supra* note 1, at 29. "Overall, Iranian behavior suggests that Iranian policy toward the United States and U.S. nationals is still controlled by the extremists. To the extent that this behavior is imputable to the courts in which the claimant would litigate, the rights of the claimants would be endangered." Note, *supra* note 55, at 356 (footnote omitted). Hostility toward the United States is also indicated by the explicit promise in the Algiers Declaration that the United States will not intervene in Iranian affairs. Algiers Declaration, *supra* note 1, point I, cl. 1. The persistence of the hostility has been noted by *New York Times* journalists. See *N.Y. Times*, Nov. 14, 1982, at 4, col. 1 (stating that "Iran appears . . . more resolutely anti-American than ever" and that "Khomeini . . . remains convinced that Washington is the greatest enemy not only of Iranian nationalism but of the revolutionary regime"); *N.Y. Times*, Feb. 12, 1983, at 5, col. 4 (noting the celebration of the fourth anniversary of the Islamic Revolution with anti-American rallies in Teheran).

There is some speculation, however, that Iran is moving toward re-entering the international credit market and restoring normal commercial ties with the West. Additional pressures for moderation stem from the debilitating war with Iraq, economic stress at home and deepening unrest among segments of Iran's population. Horton, *Khomeini's Iran: A Turn Toward Moderation?*, U.S. News & World Report, Oct. 22, 1984, at 39. However, it does not necessarily follow that Khomeini or his successors would pursue a similar course of reasonableness toward the United States. See *id.*; *Bonn Official Says Iranians Seek a Revival of Contacts with West*, *N.Y. Times*, July 23, 1984, § 1, at 4, col. 4. Despite the pragmatic approach denoted by settlement of claims of American banks and companies, Khomeini continues to inveigh in his speeches against the United States and to couple his words with a ban on anything connected with the West, e.g., cosmetics, music, and dress. See generally Smith, *Iran: Five Years of Fanaticism*, *N.Y. Times*, Feb. 12, 1984, § 6 (Magazine) at 20, 22, 30, 32. As of July 1984, the Islamic militants in Teheran continued to publish photocopies of secret U.S. government documents and personal papers found when the U.S. embassy was seized on Nov. 4, 1979. Publication of the material is viewed by the group as part of a divine revolutionary mission to proclaim the United States' conspiracy against Iran. *Iran's Booty: A Rare Glimpse of U.S. Secrets*, *N.Y. Times*, July 18, 1984, § 1, at 1, col. 1; 8, col. 3.

57. Iranian judicial regulations also hint at discrimination against aliens. For example, one regulation "empowers the Islamic Revolutionary courts to adjudicate '[s]erious economic crimes, i.e., . . . the wasting of the national wealth in favor of the aliens.'" See Note, *supra* note 55, at 357 n.139, quoting Administrative Regulation Governing the Revolutionary Courts and Public Prosecutor's Offices, art. 2(3), OFFICIAL GAZETTE NO. 10,039 2/5/1358 (1979).

58. Rode noted that this assumption may have been justified in the nineteenth and early twentieth centuries "when social conditions in most of the civilized countries were stabilized, and denial of justice was an exception rather than the rule." Rode, *supra* note 7, at 143. Today the situation is different. "Communist governments do not even pretend to give protection to claim-

exception in countries throughout the world today.⁵⁹ Denial of justice occurs whenever an individual receives discriminatory treatment by virtue of his connection with another country.⁶⁰ An individual who has left a country⁶¹ and acquired citizenship elsewhere,⁶² but who cannot voluntarily renounce his former nationality⁶³ has a single opportunity for protection:⁶⁴ as a national of the claimant state. Under the

ants who seek compensation for injuries inflicted to their persons or property by deliberate actions of persecution, socialization, confiscation, et cetera." *Id.*

59. See generally U.S. DEPT. STATE, 98TH CONG., 1ST SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1982 (Jt. Comm. Print 1983).

60. An analogy can be drawn between this argument, which rests on discrimination against the individual in the courts of the respondent state, and the treatment of an alien specified in the *Restatement (Second) of Foreign Relations*. The *Restatement* provides that a dual national will be treated as a national of the "claimant state" if the respondent state, for purposes of the conduct causing the injury, treated him as a national of the other state. RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 171(b) (1965). See I. BROWNLIE, *supra* note 7, at 390-91 (discussion of claim in which Mexico was estopped from denying the American nationality of the claimant by reason of its having discharged him from employment because he was an American). In a similar vein, numerous cases decided under a peace treaty with Italy allowed individuals to recover as "United Nations nationals" on the ground that they had been "treated as an enemy" by the laws in force in Italy during the war. Treaty of Peace with Italy, Feb. 10, 1947, art. 78, para. 4, 49 U.N.T.S. 126. See, e.g., Vereano Case (U.S. v. Italy), 14 R. Intl. Arb. Awards 321, 322 (1957) (simultaneous possession of nationality of third state did not exclude a Turkish and U.S. national from benefits afforded U.N. nationals). See also W. BISHOP, *supra* note 3, at 801 n.67. These extraordinary provisions reflect a sensitivity to the fact that such individuals would *not* receive treatment equivalent to that of any other national of the respondent state. This should be a prime consideration in determining the status of an individual who is attempting to prosecute a claim.

Individuals whose situations resemble that of an Iran/United States dual national can be classified into "functional groups." The first group consists of individuals affiliated with the once-dominant economic power from which the current regime seized power. The second group includes those who, in addition to their dual nationality, are members of a minority group which receives unfavorable treatment in the respondent state (e.g., Jews in Yemen; Armenians in Turkey). See, e.g., R. LILlich & F. NEWMAN, INTERNATIONAL HUMAN RIGHTS 16 (1979).

61. Not all individuals who fled the country of injury and who now seek to claim as the national of another state will be within the purview of claims agreements between the two countries. To illustrate with the Iran-United States Claims Tribunal, unless the claimant left Iran several years ago and reestablished his life in the United States, he probably has not satisfied the prerequisites for American citizenship and so will not be covered by the Claims Settlement Agreement. See note 70 *infra*. The international law doctrine of continuity also requires that the individual be a national of the claimant state at the time of injury. See E. BORCHARD, *supra* note 9, at 666; 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 802 (1943); 2 C. HYDE, *supra* note 9, at 893; I R. LILlich & B. WESTON, *supra* note 54, at 44, 48-51; cf. Freidberg, *Unjust and Outmoded — The Doctrine of Continuous Nationality in International Claims*, 4 Intl. Law. 835, 849-52 (1970) (arguing against the doctrine). The doctrine of continuity is incorporated in the Claims Settlement Declaration, *supra* note 1, art. VII.

62. The argument in favor of affording an opportunity for redress is particularly forceful for those who are naturalized in another country.

[T]he voluntary nature of the act [of naturalization] supplements other social and residential links. Not only is the act voluntary but, in regard to obtaining nationality, it is specific: it has that very objective. The element of deliberate association of individual and State is surely important and should rank with birth and descent

Brownlie, *The Relations of Nationality in Public International Law*, 39 BRIT. INTL. Y.B. 284, 310 (1963). See also notes 102 (oath of naturalization signifying association with country) & 103 (I.C.J. recognition of significance of naturalization) *infra*.

63. See note 40 *supra*.

64. A harder case is presented when it appears that it would not be obviously futile for the

doctrine of state nonresponsibility this individual would be without any opportunity for redress.

Because the underlying premises of the doctrine of nonresponsibility of states — absolute sovereignty and the assumption of a home remedy — are anachronistic, a substitute doctrine must be formulated. This Note argues that the country which corresponds to the individual's dominant nationality should be allowed to present the individual's claim. The doctrine of dominant and effective nationality not only eliminates the injustice to dual nationals inherent in the concept of state nonresponsibility,⁶⁵ but also rests on a more adequate conception of nationality.

II. THE PREFERRED STANDARD: DOMINANT AND EFFECTIVE NATIONALITY

Although applied as early as 1834, the principal statement of the doctrine of dominant and effective nationality came in the *Mergé Case* in 1955.⁶⁶ The Italian-U.S. Conciliation Commission looked to the general principles of international law for resolution of the issue of

claimant to seek a remedy in the municipal courts of the respondent State. The initial reaction might be to deny this individual access to the arbitral body. However, if the traditional doctrine of nonresponsibility of states is to be fully rejected, then the same standard must be applied to this individual as to all others. It should be sufficient to recognize that, in the modern era, there exist a number of countries in which a remedy could not be had. See notes 58-60 *supra* and accompanying text.

65. See Copithorne, *supra* note 7, at 31 (traditional rule is "harsh and oppressive, and out of tune with postwar developments"); I G. SCHWARZENBERGER, *INTERNATIONAL LAW* 362-67 (3d ed. 1957).

66. *Mergé Case* (U.S. v. Italy), 14 R. Intl. Arb. Awards 236 (1955). The theory of dominant nationality first emerged in *Drummond's Case*, 12 Eng. Rep. 492 (P.C. 1834), but without explicit articulation of the doctrine. Drummond was born in Avignon (Papal territory), the son of an Englishman, but he was raised in France. The Privy Council concluded that although Drummond was "technically a British subject . . . he was also, at the same time, in form and in substance, a French subject, domiciled in France, with all the marks and attributes of French character." 12 Eng. Rep. at 500. Consequently, his property was seized by the French government in an exercise of its "municipal authority over its own subjects", and no recovery could be had. 12 Eng. Rep. at 500. The case is made even stronger by the holding that evidence showing Drummond was not technically a French national *jus soli* was immaterial; the decedent and his father "did sufficiently indicate *by their conduct* their intention to accept the character of French subjects." 12 Eng. Rep. at 507 (emphasis added).

An approximation of the test can also be seen in the *Canevaro Case* (Italy v. Peru), Hague Ct. Rep. (Scott) 284 (Perm. Ct. Arb. 1912). The Permanent Court of Arbitration concluded that "whatever Rafael Canevaro's status as a national may be in Italy, the Government of Peru has a right to consider him as a Peruvian citizen and to deny his status as an Italian claimant." Hague Ct. Rep. (Scott) at 286-87. The court found the following actions to be determinative:

Canevaro has on several occasions acted as a Peruvian citizen, both by running as a candidate for the Senate, where none are admitted except Peruvian citizens and . . . by accepting the office of Consul General for the Netherlands, after having secured the authorization of both the Peruvian Government and the Peruvian Congress.
Hague Ct. Rep. (Scott) at 287.

The Mixed Arbitral Tribunals of the 1920's also recognized the need to examine the facts supporting the asserted nationality. See *Baron Frédéric de Born v. Yugoslavian State*, 6 Trib. Arb. Mixtes 499, 3 Ann. Dig. 277 (1926); *Barthez de Montfort v. Treuhander Hauptverwaltung*,

dual nationality.⁶⁷ The Commission concluded that the “principle [of nonresponsibility], 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.”⁶⁸ The Commission then established the considerations by which the prevalence of the United States nationality would be evaluated: “habitual residence can be one of the criteria [along with t]he 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”⁶⁹ Although Mrs. Mergé’s claim was rejected because of her predominant contacts with Italy,⁷⁰ the analysis was subsequently used to *admit* claimants before the Commission on a finding of predominant ties with the United States — the claimant state.⁷¹

6 Trib. Arb. Mixtes 806, 3 Ann. Dig. 279 (1926) (“a combination of elements of fact and of law . . . must be followed by an international tribunal” to ascertain the active nationality).

The doctrine did not gain support until after World War II. Indeed, the Department of State did not adopt the dominant and effective approach until 1957. 8 M. WHITEMAN, *supra* note 23, at 1252; 1977 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 693-94. See also I R. LILLICH & B. WESTON, *supra* note 54, at 59-61.

67. Mergé Case (U.S. v. Italy), 14 R. Intl. Arb. Awards 236, 239-40, 241-46 (1955). The Commission looked to international law because the Peace Treaty did not address the issue of dual nationality.

68. 14 R. Intl. Arb. Awards at 247. See also Nottebohm Case (Liecht. v. Guat.), 1955 I.C.J. 4, 22 (Judgment of Apr. 6) (Preference is given 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.”).

69. 14 R. Intl. Arb. Awards at 247.

70. Mrs. Mergé was an American citizen by birth and an Italian citizen through marriage. The Commission held that since Mrs. Mergé did not reside habitually in the United States and the interests and the permanent professional life of her husband were established elsewhere, she could not be regarded to be dominantly a U.S. national within the meaning and for the purpose of the Treaty of Peace. 14 R. Intl. Arb. Awards at 248. The Commission cited the following facts: Mrs. Mergé had not lived in the United States since her marriage in 1933, she traveled on an Italian passport, she stayed in Japan during World War II with her husband, who was an official of the Italian embassy, and she was never interned as a national of a country enemy to Japan. 14 R. Intl. Arb. Awards at 248.

71. Following *Mergé*, the Conciliation Commission admitted 11 of the 52 claimants with dual nationality. Messia, *La Protection Diplomatique en Cas de Double Nationalité*, in HOMMAGE D'UNE GÉNÉRATION DE JURISTES AU PRÉSIDENT BASDEVANT 547-58 (1960). Claims by dual nationals whose American nationality was dominant were allowed in Zangrilli Case (U.S. v. Italy), 14 R. Intl. Arb. Awards 294, 296 (1956) (lengthy sojourn in Italy was not accompanied by an intention to reside permanently in Italy); Puccini Case (U.S. v. Italy), 14 R. Intl. Arb. Awards 323, 324 (1957) (travel on American passport and location of all assets and income in United States led Commission to conclude that a stay of two years in Italy was “not coupled with the intention of permanently retransferring her residence to Italy”); Gattone Case (U.S. v. Italy), 14 R. Intl. Arb. Awards 304, 305-06 (1957) (claimant lost his Italian nationality by taking the oath of American citizenship and establishing residence in the United States, so no question of dual nationality arose); Ruspoli-Droutzkoy Case (U.S. v. Italy), 14 R. Intl. Arb. Awards 314, 318, 319-20 (1957) (in looking for “animus,” *i.e.*, act of intent and “facto,” *i.e.*, physical fact, commission noted that Mrs. Ruspoli’s two prolonged stays in America, which coincided with World Wars I and II, and her adoption of a niece in New York, clearly indicated a preference for the United States); Ganapini Case (U.S. v. Italy), 14 R. Intl. Arb. Awards 400, 401 (1959) (claimant found to be head of family and to have her professional life centered in the United States). Other

In the period between *Mergé* and the Tribunal's recent decision in *Case No. A/18*, the doctrine of dominant nationality failed to supplant nonresponsibility of states as the rule for resolving jurisdiction over dual nationals. This may be attributed, in part, to an inadequate appreciation of the principles underlying the emergent doctrine. While the Tribunal's decision should have significant precedential value to any subsequent international bodies confronting the issue of jurisdiction over dual nationals,⁷² an application of the doctrine to confer jurisdiction will depend on recognition of these underlying principles.

A. *The Concept of Nationality Embodied in the New Standard*

The doctrine of dominant and effective nationality rests on two fundamental principles that reflect a contemporary view of the link of nationality. First, the concept of nationality embodies more than a tenuous legal bond asserted by municipal law. Nationality, according to the International Court of Justice, is a "legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."⁷³ It is, by nature, incapable of division between two or more states.⁷⁴ Second, nationality is a product of personal choice and action.⁷⁵ The conduct of the individual furnishes the only sound juridical foundation for recognition of a single nationality.⁷⁶

Both of these principles of nationality are implicit in the evaluation undertaken by an arbitral body when it determines the dominant connections of a claimant. To resolve the conflict of dual nationality, the tribunal looks to those factors indicating a "genuine link"⁷⁷ to a coun-

individuals were entitled to recover as "U.N. nationals." See also note 60 *supra*; W. BISHOP, *supra* note 3, at 801 n.67.

72. Although international law does not operate on the principle of *stare decisis*, case law is one component of the body of international law. See Statute of International Court of Justice (1945) art. 38, reprinted in U.N. CHARTER AND RELATED DOCUMENTS 21 (1945). Moreover, this decision should have a significant impact because it is the first statement on the issue in the 30 years since *Mergé*.

73. *Nottebohm Case (Liecht. v. Guat.)*, 1955 I.C.J. 4, 23 (Judgment of Apr. 6). See note 38 *supra*.

74. See Griffin, *The Right to a Single Nationality*, 40 TEMP. L.Q. 57, 63-64 (1966).

75. Griffin defines the modern meaning of the bond of nationality as a "sociological reality": "The individual is a constituent element of the state and . . . the state is duty bound to contribute to the individual's welfare. Nationality has long ceased to be merely a formal legal category designating a status of belonging to a state . . ." Griffin, *supra* note 74, at 59. See also Copithorne, *supra* note 7, at 32 (element of control by individual over nationality; voluntary expatriation embodied in the Universal Declaration of Human Rights).

76. Griffin, *supra* note 74, at 64.

77. *Nottebohm Case (Liecht. v. Guat.)*, 1955 I.C.J. 4, 22-23 (Judgment of Apr. 6). *Nottebohm* provides an indication of what factors are taken into consideration, although the importance of each varies from case to case: "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 him for a given country and inculcated in his

try, such as professional life,⁷⁸ domicile,⁷⁹ and family,⁸⁰ as well as the motivation for acquiring the attachment.⁸¹ A jurisdictional decision based on this inquiry will be equitable⁸² insofar as it is more likely to be consistent with the reasonable expectations of the dual national than a decision reached under the traditional doctrine.⁸³

In giving international recognition to the nationality that accords with the individual's connections, the tribunal ratifies modern concepts of nationality.⁸⁴ This is in contradistinction to the classic notion of absolute sovereignty in which the sovereign acts irrespective of the will of the individual.⁸⁵ At the same time, the recognition of real and effective nationality at the international level is not inconsistent with the fact that each state determines who its nationals are through municipal law;⁸⁶ the resolution of the conflict of nationality by the tribu-

children, etc." See also text accompanying note 133 *infra* (setting forth factors to be considered by the Iran-United States Claims Tribunal).

78. In *Mergé*, the Italian-U.S. Conciliation Commission set forth the professional life of the head of the family as a specific criteria for evaluating the claimant's nationality. *Mergé Case* (U.S. v. Italy), 14 R. Intl. Arb. Awards 236, 247 (1955). This factor proved critical in several cases before the Commission. See, e.g., *Ganapini Case* (U.S. v. Italy), 14 R. Intl. Arb. Awards 400, 401 (1959); *Graniero Case* (U.S. v. Italy), 14 R. Intl. Arb. Awards 393, 395 (1959); *Salvoni Case* (U.S. v. Italy), 14 R. Intl. Arb. Awards 311, 313 (1957); *Spaulding Case* (U.S. v. Italy), 14 R. Intl. Arb. Awards 292, 293 (1956); *Mazzonis Case* (U.S. v. Italy), 14 R. Intl. Arb. Awards 249, 250 (1955).

79. See note 116 *infra*.

80. See *Gattone Case* (U.S. v. Italy), 14 R. Intl. Arb. Awards 304 (1957). In *Gattone*, the Italian Commissioner argued that the effective nationality of the claimant was Italian for, in departing for America, he left in Italy "his family, home and furniture . . . also . . . cattle and tools . . . and table utensils including a large tomato squasher." 14 R. Intl. Arb. Awards at 305. See also *Ruspoli-Droutzkoy Case* (U.S. v. Italy), 14 R. Intl. Arb. Awards 314, 315, 320 (1957) (intimate act of adopting a niece in New York sufficient to establish nationality).

81. See *Zangrilli Case* (U.S. v. Italy), 14 R. Intl. Arb. Awards 294, 296 (1956) (Italian national who reacquired his nationality as a matter of law because of lengthy sojourn in Italy without the *intention* of residing permanently in Italy deemed to have dominant American nationality).

82. *Mergé* noted the "evident justice" of the new standard. *Mergé Case* (U.S. v. Italy), 14 R. Intl. Arb. Awards 236, 246 (1955); cf. note 65 *supra* and accompanying text.

83. See, e.g., *Miliani Case* (Italy v. Venez.), 10 R. Intl. Arb. Awards 584 (1903), in which the Italian-Venezuelan Commission addressed the equities of the doctrine: "To declare them to be Venezuelans is not to deny them anything that they have ever felt in any essential way they possessed, and an option to choose Italian citizenship is scarcely to be inferred from the fact that" a claim has been filed on their behalf before the Commission. 10 R. Intl. Arb. Awards at 591.

84. The impact of the "genuine link" idea articulated by the International Court of Justice is evident in the Harvard Draft Convention on International Responsibility, which provides: "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." DRAFT CONVENTION ON THE INTERNATIONAL RESPONSIBILITY OF STATES FOR INJURIES TO ALIENS, art. 23(3) (Harv. Law School 1961), reprinted in 55 AM. J. INTL. L. 545, 578 (1961).

85. Borchard, *Basic Elements of Diplomatic Protection of Citizens Abroad*, 7 AM. J. INTL. L. 497, 503 (1913) ("[C]itizenship is imposed by the state by virtue of its sovereignty, on whomsoever it will, and independently of the will of the person. It is not created by or at the consent of the individual." (footnote omitted)).

86. *Nottebohm Case* (Liecht. v. Guat.), 1955 I.C.J. 4, 23 (Judgment of Apr. 6).

nal is solely for the purposes of deciding jurisdiction over a claim.⁸⁷

B. *Objections to the Dominant Nationality Standard*

Opponents of the new standard of dominant and effective nationality object to the apparent solicitude that will be given to an individual who changes his nationality.⁸⁸ The preeminent spokesman for this view was Professor Borchard, who charged that this individual obtains an unfair advantage by leaving his country and becoming eligible for satisfaction of his claims through the tribunal, while his neighbor back home can only petition the courts of the respondent nation.⁸⁹ The underlying concern is that the individual will forum shop for a strong state to assert his claim against a weaker state or that the individual will acquire protection in several states.⁹⁰ This objection reflects a basic misunderstanding of the concept of nationality.⁹¹

Forewarnings about the dangers of forum shopping ignore the practical restraints on changing nationality. Most states have established rigorous prerequisites to citizenship that provide safeguards against forum shopping. For example, naturalization in the United States is dependent upon five years of continuous residence in the United States, a working knowledge of the language, and an understanding of the history and government of the country.⁹² These requirements, as well as those of other countries, ensure that the nationality conferred reflects a genuine link. Individuals who desire a change of nationality will have to substantiate their attachment to the adopted country by showing significant factual connections.⁹³ This factual standard should dissuade those who seek to change nationality solely to establish jurisdiction over a claim.⁹⁴

87. See note 32 *supra* and accompanying text.

88. See, e.g., Borchard, *The Protection of Citizens Abroad and Change of Original Nationality*, 43 YALE L.J. 359, 382-83 (1934).

89. *Id.*

90. *Id.*

91. *Cf.* notes 73-76 *supra* and accompanying text.

92. The Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1423, 1427 (1982). The statute also requires a confirmed intent to reside permanently in the United States. 8 U.S.C. § 1451(d) (1982).

93. The authenticity of a claimant's naturalization was examined in *Nottebohm*. The Court concluded that Nottebohm had sought naturalization "with the sole aim of thus coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life or of assuming the obligations . . . and exercising the rights pertaining to the status thus acquired." *Nottebohm Case (Liecht. v. Guat.)*, 1955 I.C.J. 4, 26 (Judgment of Apr. 6). The Court invoked the theory of effective nationality to declare the claim brought by the Government of Liechtenstein against the Government of Guatemala inadmissible. See also *Flegenheimer Case (U.S. v. Italy)*, 14 R. Intl. Arb. Awards 327, 352-57 (1958) (issue of fraudulent nationality, not dual nationality).

In addition, at least one commentator has stated that despite the intrusion into the state's actions, an international court must investigate the true nationality of the individual because its jurisdiction depends on it. Kunz, *supra* note 11, at 545.

94. One commentator notes that the argument on forum shopping assumes that the nation

Another restraint on forum shopping is juridical. In the *Nottebohm Case*,⁹⁵ the International Court of Justice recognized the inherent requirement of *dominant* connections to the state of which the individual claims to be a national. The Court defined nationality as the "juridical expression of the fact that the individual upon whom it is conferred . . . is in fact more closely connected with the . . . State conferring nationality than with . . . any other State."⁹⁶ Essentially, one can only satisfy the *Nottebohm* standard of connections with a *single* nation.⁹⁷ Indeed, acquisition of American citizenship⁹⁸ is inconsistent with dominant or effective links to another state.⁹⁹ In the oath of allegiance taken upon naturalization, an individual must "renounce all loyalty to any other country."¹⁰⁰ In return for this total allegiance, the individual expects to receive the full rights of citizenship.¹⁰¹ The individual's right to redress from the defendant state should not be

will be willing to "play the claimant's game." However, "[c]ertainty, or a high probability, that a claim has been transferred or a nationality acquired for the sole purpose of enlisting the diplomatic protection of a given state is one of those unusual circumstances in which a nation, caring for its dignity, will not be impressed by the nominal nationality of the claim." Koessler, *supra* note 20, at 192-93.

95. *Nottebohm Case (Liecht. v. Guat.)*, 1955 I.C.J. 4 (Judgment of Apr. 6).

96. 1955 I.C.J. at 23. See I. BROWNIE, *supra* note 7, at 405-07 (the *Nottebohm* concept of an effective nationality as a natural reflection of a *fundamental concept* that has long been inherent in the materials concerning nationality on the international plane).

97. Many commentators cite exclusivity as one of the principles dominating the bond of nationality. See Borchard, *supra* note 85, at 509. *Accord* Comments by Delegate of the United States to the Nationality Convention, *quoted in* Flournoy, *supra* note 10, at 474 ("[I]f the nationality and the allegiance . . . is limited or divided, we can have no true body of citizenship."). See also William E. & William Barron v. United States (1871), *reprinted in* 3 J. MOORE, *supra* note 26, at 2518, 2521: "[N]owhere in the wide sphere of human thought can the great maxim that no man can serve two masters find a more direct application than in this province of allegiance." The Claims Commission went on to state: "[N]o one can be a citizen in the complete sense of the word . . . of two states or governments at one and the same time." *Id.* at 2522. See also J. RALSTON, *supra* note 9, at 172-73.

98. See 8 U.S.C. § 1101(a)(21) (1982) (defining a "national" as one who owes "permanent allegiance" to a state).

99. If the facts do not reflect total allegiance to the United States, the naturalization is fraudulent. See, e.g., *Knauer v. United States*, 328 U.S. 654 (1946); *United States v. Wurzenberger*, 56 F. Supp. 381 (D. Conn. 1944). See also N. BAR-YAACOV, *supra* note 9, at 145 ("[T]he acquisition of nationality through naturalisation has been considered as indicating a shift of allegiance, imposing on the individual the obligation to refrain . . . from such acts as prove his firm attachment and loyalty towards his country of origin and which are, therefore, held to be incompatible with the possession of his new nationality.").

100. The oath of naturalization requires the individual "to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject or citizen." 8 U.S.C. § 1448(a)(2) (1982).

101. See Freidberg, *supra* note 61, at 852:

When the United States magnanimously takes in a refugee, should he not be accepted with all his assets and liabilities, including his claim to be compensated for [the injury caused] by the government from which he fled? If the United States, to which he now owes allegiance, does not speak for him, no state will.

See also Orfield, *supra* note 7, at 428-32 (nationality is a two-way street); *Nottebohm Case (Liecht. v. Guat.)*, 1955 I.C.J. 4, 24 (Judgment of Apr. 6) (naturalization "involves [the] breaking of a bond of allegiance and [the] establishment of a new bond of allegiance").

measured by the rights of citizens in the country of his origin, but rather, should be identical to the rights available to any individual who satisfies the definition of "United States' national."¹⁰²

This argument does not deny that some individuals may attempt to forum shop. It merely illustrates that their ability to change nationalities is practically and judicially restrained. Indeed, concerns other than filing claims motivate most individuals who desire to assume new nationalities.¹⁰³ Commentators note that "[p]olitical and economic conditions prompt individuals to change their nationality."¹⁰⁴ The change is usually undertaken "regardless of the effect such action may have upon any claim that might be made against their former homeland."¹⁰⁵ The contention that the search for a state to espouse a claim will motivate a change in nationality is largely without merit¹⁰⁶ and is certainly insufficient to justify denying jurisdiction over dual nationals.

C. *The Body of Precedent: Implicit Use of Dominant Nationality*

Opponents of the dominant nationality standard cite a number of judicial and arbitral decisions for the proposition that nonresponsibility of states for dual nationals is the guiding principle of international law.¹⁰⁷ To its credit, the Tribunal dismissed this body of precedent, particularly that prior to World War II. In fact, upon a more careful analysis, it becomes apparent that the outcomes of these cases are

102. See G. HACKWORTH, *supra* note 61, at 823.

103. The International Court of Justice emphasized the significance of the act of changing nationality in *Nottebohm*:

Naturalization is not a matter to be taken lightly. . . . It may have far-reaching consequences and involve profound changes in the destiny of the individual who obtains it. It concerns him personally, and to consider it only from the point of view of its repercussions with regard to his property would be to misunderstand its profound significance.

Nottebohm Case (Liecht. v. Guat.), 1955 I.C.J. 4, 24 (Judgment of Apr. 6).

104. Koessler, *supra* note 20, at 193.

105. *Id.* ("Thousands today seek a new nationality, regardless of the effect such action may have upon any claim that might be made against their former homeland. . . . [T]hese individuals should not be penalized by being denied diplomatic protection by their adopted country.")

106. The notion that a person would acquire citizenship in order to acquire a state to espouse his claim "is not only fanciful but exaggerates the efficiency of the Department of State and other foreign offices as collection agencies." Freidberg, *supra* note 61, at 846 n.63.

107. See note 9 *supra*. See, e.g., *Salem Case (U.S.-Egypt)*, 2 R. Intl. Arb. Awards 1161, 1187 (1932) (Tribunal rejected validity of doctrine of effective nationality, stating use in *Canevaro* case was an isolated instance); cf. Rode, *supra* note 7, at 140-44.

The British-Mexican Claims Commission relied on the endorsement of state nonresponsibility by commentators, see E. BORCHARD, *supra* note 9; J. RALSTON, SUPPLEMENT TO THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS 161-85 (1936), in applying the theory of state nonresponsibility to deny the claims of dual nationals. See A. FELLER, THE MEXICAN CLAIMS COMMISSION 1932-34, at 98 (1935). See, e.g., *Oldenbourg v. United Mexican States*, 5 R. Intl. Arb. Awards 74 (1929); *Honey v. United Mexican States*, 5 R. Intl. Arb. Awards 133 (1931).

Although case law is given less weight as precedent outside the U.S. legal system, judicial decisions are among the sources for international law which may be applied by the International Court of Justice. Statute of the International Court of Justice (1945), art. 38, reprinted in 1 U.N. CHARTER AND RELATED DOCUMENTS 21 (1945).

largely consistent with results under the dominant and effective test.¹⁰⁸

There is persuasive support for the contention that the doctrine of state nonresponsibility is an inaccurate oversimplification of precedent.¹⁰⁹ In some cases tribunals have *affirmed* their jurisdiction over the claim of a dual national against one of the countries of which he was a national. In general, tribunals have either implicitly evaluated the dominant nationality,¹¹⁰ or have limited the inquiry to whether the individual was a national of the claimant state, irrespective of the individual's retention of the nationality of the defendant state.¹¹¹

108. See generally Griffin, *supra* note 4. Indeed, both the proponents of state nonresponsibility and the proponents of the rule of dominant and effective nationality sometimes cite the same decisions as authority for their position. Kerley, *Nationality of Claims — A Vista*, 63 AM. SOC'Y. INTL. L. PROC. 35, 38 (1969). For example, the Venezuelan Arbitrations discussed in note 116 *infra* can be interpreted as giving preference to the nationality that accorded with factual ties, Stevenson Case (Gr. Brit. v. Venez.), 9 R. Intl. Arb. Awards 494, 499 (1903) ("[T]he familiar scenes which had become woven into the warp and woof of [the claimant's] life, and were therefore a part of her life" were in Venezuela.); personal choice, *id.* ("[H]er citizenship came back to her domicile not only by the law of Venezuela but as her natural selection."); Mathison Case (Gr. Brit. v. Venez.), 9 R. Intl. Arb. Awards 485, 494 (1903) ("If citizenship is thereby imposed it is through the father's voluntary, intelligent selection."); The Hammer & de Brissot Case, *reprinted in* 3 J. MOORE, *supra* note 26, at 2456, 2458-59 ("[B]y their own free will they prefer the Venezuelan citizenship" as evidenced by continued residence there.); Massiani Case (Fr. v. Venez.), 10 R. Intl. Arb. Awards 159, 184 (1902) (The children "easily could have been French had they preferred to remain in Venezuela."); and psychological ties, Miliani Case (Italy v. Venez.), 10 R. Intl. Arb. Awards 584, 591 (1903).

Even *Alexander's Case*, which is cited as the classic case for the doctrine of nonresponsibility, is a dubious precedent. The Commission denied the claim because of Alexander's American nationality, saying that "he was not capable of divesting himself of his American nationality by mere volition and residence from time to time in Scotland and holding office there." *Alexander's Case*, *reprinted in* 3 J. MOORE, *supra* note 26, at 2529, 2531. Yet the Commission cited for its sole authority *Drummond's Case*, in which the claimant was treated as a French citizen because he was "in form and in substance, a French subject, domiciled in France, with all the marks and attributes of French character." *Drummond's Case*, 12 Eng. Rep. 492, 500 (P.C. 1834). See generally Griffin, *supra* note 74, at 61; Note, *supra* note 9, at 706; note 114 *infra*.

109. See generally Griffin, *supra* note 4. Griffin asserts that the general principle that a person having dual nationality cannot make one of the countries to which he owes allegiance a defendant before an international tribunal has always been a "myth." Griffin, *supra* note 4, at 402. See also Note, *supra* note 9, at 706.

110. One writer perceived the "rough harmony" between the theory of dominant and effective nationality and the decisions of most commissions. See Note, *supra* note 9, at 706. See, e.g., *Apostolidis v. The Turkish Government* (Fr. v. Turk.), 8 Trib. Arb. Mixtes 373, 4 Ann. Dig. 312 (1928) (Bar-Yaacov says that proper construction of the *Apostolidis* judgment is an attribution of predominant character to the French nationality in order to establish jurisdiction); *Barthez de Montfort v. Treuhander Hauptverwaltung*, 6 Trib. Arb. Mixtes 806 (1927), 3 Ann. Dig. 279 (1926) (claimant had effective French nationality because she never ceased to live in France). The Yugoslavian-Hungarian Mixed Arbitral Tribunal in *Baron Frédéric de Born v. Yugoslavian State*, 6 Trib. Arb. Mixtes 499, 3 Ann. Dig. 277, 278 (1926) stated:

[I]t was the duty of the tribunal to examine in which of the two countries existed the elements essential in law and in fact for the purpose of creating an effective link of nationality and not merely a theoretical one. . . .

. . . For that purpose it ought to consider where the claimant was domiciled, where he conducted his business, and where he exercised his political rights. The nationality of the country determined by the application of the above test ought to prevail.

111. See, e.g., Yugoslav Claims Commission, July 19, 1948, *United States-Yugoslavia*, 62 Stat. 2658, T.I.A.S. 1803; FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE UNITED

In the majority of cases, the examination of dominant connections did result in rejection of the individual's claim.¹¹² Commentators asserted that in these cases, the dominant and effective test merely reinforces the traditional rule of denying jurisdiction over the dual national.¹¹³ In fact, regardless of the rationale employed — nonresponsibility of states,¹¹⁴ genuine link,¹¹⁵ or domicile¹¹⁶ — in the cases in which the claim was denied, the claimant had closer ties with the defendant state.¹¹⁷ This is not surprising, for it is likely that greater contacts afford more opportunity for injury. Thus, as others note,¹¹⁸ the courts' determinations were not premised on the rule of state nonresponsibility. The actual bases for the courts' findings were predominant ties with the defendant state.¹¹⁹

STATES, DECISIONS AND ANNOTATIONS 20 (1968) ("The fact that claimant possessed the nationality of the foreign state was deemed not relevant to the question of whether he satisfied the nationality prerequisites under United States law."); *Georges Pinson Case (Fr. v. Mex.)*, 5 R. Intl. Arb. Awards 327, 328 (1928). The international arbitral tribunals after World War I asserted jurisdiction provided the claimant possessed the nationality of the victor state. See, e.g., *Grigoriou v. Bulgarian State*, 3 Trib. Arb. Mixtes 977, 2 Ann. Dig. 243, 244 (1924) (although claimant had been naturalized in Bulgaria, Tribunal held that he had not lost his Greek nationality and so could invoke the benefits of the Treaty); *Blumenthal v. German State*, 3 Trib. Arb. Mixtes 616 (1924) (simultaneous possession of German nationality when war measures were effected held irrelevant because claimant had French citizenship since time of the Treaty); *Hein v. Hildersheimer Bank*, 2 Trib. Arb. Mixtes 71, 1 Ann. Dig. 216 (1922) (sufficient to establish that claimant held nationality of one of the victorious powers regardless of simultaneous retention of German nationality); *accord Case No. A/18*, 23 I.L.M. at 507 (Mosk, J., concurring).

112. See, e.g., *Stevenson Case (Gr. Brit. v. Venez.)*, 9 R. Intl. Arb. Awards 494 (1903); *Brignone case (Italy v. Venez.)*, 10 R. Intl. Arb. Awards 542 (1903); *Mathison Case (Gr. Brit. v. Venez.)*, 9 R. Intl. Arb. Awards 485 (1903); *Maninat Case (Fr. v. Venez.)*, 10 R. Intl. Arb. Awards 55 (1905).

113. See *Kerley*, *supra* note 108, at 39; *Kunz*, *supra* note 11, at 559 (quoting *Nottebohm Case (Liecht. v. Guat.)*, 1955 I.C.J. 4, 22 (Judgment of Apr. 6)).

114. See, e.g., *Case of Elise Lebreit (Fr. v. U.S.)*, reprinted in 3 J. MOORE, at 2488, 2491-92 (U.S. argued that the treaty could not encompass compensation for dual nationals; demurrer sustained without rationale, but detailed factfinding and opinion of French Commission indicate that Lebreit's U.S. nationality was dominant); *Griffin*, *supra* note 4, at 410-11 (arguing that language of *Alexander's Case*, quoted at note 29 *supra*, indicates that a dual national is deemed to be a national of the government with which he has most contact at the time of loss or injury).

115. See *Nottebohm Case (Liecht. v. Guat.)*, 1955 I.C.J. 4, 22-23 (Judgment of Apr. 6).

116. The umpires of the Venezuelan Arbitrations operated under the principle that preference is given to the country in which the claimant has established or maintained a domicile. See, e.g., *Mathison Case (Gr. Brit. v. Venez.)*, 9 R. Intl. Arb. Awards 485, 484 (1903); *Stevenson Case (Gr. Brit. v. Venez.)*, 9 R. Intl. Arb. Awards 494, 498-501 (1903) (umpire discussed the facts under which claimant would have been considered to have a dominant British nationality); *Maninat Case (Fr. v. Venez.)*, 10 R. Intl. Arb. Awards 55, 56 (1905) (Commission determined the "nationality of fact" to be that which unites itself to domicile); *Brignone Case (Italy v. Venez.)*, 10 R. Intl. Arb. Awards 542, 548 (1903).

117. "Where substantial links were not present, tribunals have generally found a way, often a not particularly candid way, of denying [the claimant's] nationality for claim purposes." *Kerley*, *supra* note 108, at 40. This practice may be evidence of an implicit preference — even within a more traditional framework — for the real and effective nationality standard.

118. See generally I. BROWNLIE, *supra* note 7, at 386; *Griffin*, *supra* note 4, at 402, 423.

119. In this light, decisions such as *Nottebohm* reflect a "more candid expression of the actual motivation for previous decisions." See *Kerley*, *supra* note 108, at 40. The strength of this thesis might also be determined by reversing the facts in a case and then speculating on the

Unless the accurate basis for the treatment of the claimant in this body of precedent is ascertained, the dominant and effective nationality test is likely to be assimilated into the principle of state nonresponsibility.¹²⁰ If the facts attest to the predominant affiliation¹²¹ of the claimant with the claiming state, the tribunal must assert jurisdiction over the dual national as a member of the group for whom remedy may be had under a claims agreement. This was the approach taken by the Iran-United States Claims Tribunal.

III. THE IRAN-UNITED STATES CLAIMS TRIBUNAL ON THE ISSUE OF DUAL NATIONALITY

The decision of the full Claims Tribunal in *Case No. A/18* was rendered against the background of two decisions¹²² by Chamber Two in which the claims of dual nationals were admitted after the individual's dominant nationality was determined.¹²³ However, in neither

court's decision. For instance, in the *Canevaro* case, discussed at note 66 *supra*, the claimant had sufficient contacts for Peru to deny jurisdiction. Would these contacts have been sufficient if Italy had later wronged Canevaro and Peru sought to bring the claim? The facts given in this particular decision are insufficient to answer the hypothetical question. See W. BISHOP, *supra* note 3, at 512. See also Kunz, *supra* note 11, at 559. It is interesting to note that the Privy Council in *Drummond* undertook a similar analysis. After determining that Drummond was a French subject, the Privy Council observed that "[i]t is difficult to believe that if he had not emigrated, but had, during the war, been taken in arms on the side of the French, the Government of [Britain] would have allowed him to be executed for high treason." Drummond's Case, 12 Eng. Rep. 492, 500 (P.C. 1834).

120. See notes 112-13 *supra* and accompanying text.

121. See generally notes 70-71, 77-81, 96 *supra*.

122. *Esfahanian v. Bank Tejarat* (Case No. 157), Awd. No. 31-157-2 (Mar. 29, 1983), reprinted in 2 IRAN-U.S. C.T.R. 157 (1983) (*Esfahanian* sought payment of \$704,691.85, the amount of a dishonored check drawn by Iranians Bank, a predecessor of Bank Tejarat.); *Golpira v. Government of Iran* (Case No. 211), Awd. No. 32-211-2 (Mar. 29, 1983), reprinted in 2 IRAN-U.S. C.T.R. 171 (1983) (*Golpira* sought payment of \$450,000, the value of shares of stock in a medical group, the property of which he alleged was nationalized by Iran.). The Iranian judge dissented vigorously to both decisions, advocating the traditional principle of nonresponsibility of states. The *Esfahanian* case is discussed in depth in Note, *supra* note 9, at 711-22.

123. *Esfahanian's* noteworthy contacts with the United States included residence, army service, marriage, investments, and payment of U.S. taxes. 2 IRAN-U.S. C.T.R. at 166. However, he also had significant contacts with Iran, including contacts with relatives still living in Iran, numerous visits, and maintenance of his principal residence in Iran for seven years (as required by his American employer). 2 IRAN-U.S. C.T.R. at 166-67. The Tribunal noted that all of *Esfahanian's* actions, with the exception of the use of an Iranian passport and nominal stock ownership in an Iranian company, could have been performed by a non-Iranian. Thus *Esfahanian's* dominant and effective nationality was deemed to be that of the United States. 2 IRAN-U.S. C.T.R. at 168.

In *Golpira*, Chamber Two cited *Esfahanian* in concluding that "in the period preceding, contemporaneous with and following" the injury, *Golpira's* contacts were predominantly with the United States. 2 IRAN-U.S. C.T.R. at 174. These contacts included residence in the United States since 1953, medical training in American hospitals, rearing of two children in the United States, and maintenance of his principal business and professional life in the United States. His brief contacts with Iran consisted of three visits to see relatives, for which he used his Iranian passport. 2 IRAN-U.S. C.T.R. at 174. The Chamber noted that this use was made necessary by the stringent Iranian nationality laws. 2 IRAN-U.S. C.T.R. at 174. Finally, the damages sought were related primarily to his American nationality; all of his actions relevant to the claim could

case did Chamber Two undertake an analysis of what the general law with respect to the claims of dual nationals before an arbitral body *should* be.

In the first case on dual nationality, *Esphahanian v. Bank Tejarat*,¹²⁴ Chamber Two avoided a determination of the relative merits of the doctrines of nonresponsibility of states and dominant and effective nationality.¹²⁵ Instead, the Chamber distinguished the case as one in which the dual national, rather than the state, brought his own claim before the international tribunal against one of the states whose nationality he possessed.¹²⁶ The Chamber therefore assumed the position of a court of a third state faced with the claim of a dual national: the effective nationality governed jurisdiction.¹²⁷ The subsequent case

have been performed by a non-Iranian. 2 IRAN-U.S. C.T.R. at 174-75. Thus, Golpira was a national of the United States within the meaning of the Claims Settlement Declaration. 2 IRAN-U.S. C.T.R. at 175. See Dissenting Opinion of Dr. Shafie Shafeiei on the Issue of Dual Nationality, Cases Nos. 157 and 211, *reprinted in* 2 IRAN-U.S. C.T.R. at 178. The Iranian judge presented the facts in a different light. 2 IRAN-U.S. C.T.R. at 215-23. For example, he noted that although Golpira took the naturalization oath he appeared at the Consular Section of the Iranian Embassy in Washington and declared himself Iranian in order to get an Iranian national identity card for his baby daughter. The dissent concluded that this "obvious lack of the principles of true faith and allegiance for the flag he has sworn to respect renders" him stateless. 2 IRAN-U.S. C.T.R. at 222.

124. *Esphahanian v. Bank Tejarat* (Case No. 157), Awd. No. 31-157-2 (Mar. 29, 1983), *reprinted in* 2 IRAN-U.S. C.T.R. 157 (1983). See notes 122-23 *supra*.

125. In *Esphahanian*, Iran sought dismissal of the claim, contending that the Tribunal had no jurisdiction because the claimant was an Iranian national. (*Esphahanian* had never renounced his Iranian nationality in accordance with Iranian municipal law. See notes 40-41 *supra* and accompanying text.) Iran further argued that the theory of absolute nonresponsibility of a state for claims of its own citizens prohibited the Tribunal from exercising jurisdiction. In response, the claimant asserted that the Tribunal had jurisdiction over dual nationals by virtue of the definition of "national" in the Claims Settlement Agreement as being a "citizen" of either Iran or the United States, without restriction regarding dual nationals. See text at notes 3-4 *supra*. Chamber Two rejected *both* arguments. 2 IRAN-U.S. C.T.R. at 160.

126. *Cf.* notes 20-21 *supra*. The Claims Settlement Declaration specifically provided for this procedure for claims over \$250,000. See note 1 *supra*.

It is questionable whether an individual who presents his own claim is distinct enough from the dual national whose claim is presented by the state to warrant a different analysis. Indeed, it may be argued that despite the classic fiction that it is the state that is injured through the injury to its national, the claim presented has always in fact been the individual's. The government merely acts as a representative of its national because of procedural considerations, namely the greater ease with which the cases can be handled by the government as well as the absence of fora to which the individual has direct access. See Koessler, *supra* note 20, at 181 ("It is not because the protecting state feels offended . . . but in order to give the latter a workable substitute for the inaccessibility of an international forum, that the strong arm of the government is extended to the private interest."). The individual is given a right of direct petition to the court in art. 25 of the European Convention on Human Rights. See F. JACOBS, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 7-8 (1975). Individuals also have standing before the Court of Justice of the European Economic Community, but the prerequisites are stringent. Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 173, 298 U.N.T.S. 11 (1958). For previous opportunities in which the individual could bring claims directly against the state, see, e.g., *Steiner & Gross v. Polish State*, 4 Ann. Dig. 291 (1928) (Decisions of Upper Silesian Arbitral Tribunal) (convention conferred in unequivocal terms jurisdiction upon the Tribunal irrespective of the nationality of the claimants); Jurisdiction of the Courts of Danzig, 1928 P.C.I.J., ser. B, No. 15, at 17-21 (Advisory Opinion). See generally I. BROWNLIE, *supra* note 7, at 562-66.

127. See note 24 *supra*.

of *Golpira v. Government of Iran*¹²⁸ added little to the development of the law, for the Chamber merely cited the precedent of *Esphahanian* as the basis for its determination.¹²⁹

In contrast, the rendering of the full Tribunal in *Case No. A/18* represents the most affirmative statement to date that the applicable rule of international law with regard to dual nationals is that of dominant and effective nationality. To its credit, the Tribunal ignored the procedural distinction that had been adopted in *Esphahanian*.¹³⁰ In reviewing the body of law and legal literature on the issue of dual nationals, the Tribunal also discounted the statements of nonresponsibility in the 1930 Hague Convention¹³¹ as well as the "considerable effect" of Borchard, arguing that the precedents that Borchard relied on did not generally support his conclusion.¹³² The Tribunal culled from this body of precedent the factors it considered relevant in determining the dominant and effective nationality of a claimant, including "habitual residence, center of interests, family ties, participation in public life, and other evidence of attachment."¹³³

The Claims Tribunal was presented with the easiest possible situation in which to supplant the traditional doctrine. Iran's refusal to allow voluntary expatriation is an exercise of sovereignty that the international order should not promote.¹³⁴ Such restrictions, as well as the broad application of *jus sanguinis*,¹³⁵ operate irrespective of the predominant nationality of the individual as indicated by personal choice and actions. In particular, in cases involving naturalized American citizens, the mere acquisition of American citizenship is inconsistent with dominant links to Iran.¹³⁶ Furthermore, the Tribunal offers the only realistic prospect of redress for these claimants because of the likelihood that they would not find justice in the respondent country.¹³⁷ The situation of the Iran/United States dual national epitomizes the reasons for replacing the traditional doctrine.¹³⁸

The Tribunal's preference for the dominant and effective nationality rule supports this Note's conclusion. The Tribunal's opinion re-

128. *Golpira v. Government of Iran* (Case No. 211), Awd. No. 32-211-2 (Mar. 29, 1983), reprinted in 2 IRAN-U.S. C.T.R. 171 (1983). See notes 122-23 *supra*.

129. See notes 122-23 *supra*.

130. See text accompanying notes 124-26 *supra*.

131. *Case No. A/18*, 23 I.L.M. at 497-99. The Judges stressed both the age of the pronouncement of the Hague Convention and the limited number of signatories. 23 I.L.M. at 497.

132. 23 I.L.M. at 499; accord Griffin, *supra* note 4, at 402. See generally notes 107-19 *supra* and accompanying text.

133. 23 I.L.M. at 501.

134. See notes 40-44 *supra* and accompanying text.

135. See notes 23, 45-46 *supra* and accompanying text.

136. See notes 98-102 *supra* and accompanying text.

137. See notes 55-57 *supra* and accompanying text.

138. See, e.g., notes 55-57, 61 *supra*.

mains troubling, though, for it is written as a reassertion of existing rules¹³⁹ rather than as the herald of a developing doctrine of international law. The opinion contains an extensive review of authority, but lacks any direct analysis of the relative merits of the two doctrines. Since the same authorities have been used to support both rules,¹⁴⁰ the Tribunal's approach may be a disservice to the next group of dual national claimants.

An analytical approach to the case would have highlighted the inequity of denying a dual national his sole opportunity for redress out of rigid deference to the defendant sovereign. Such a direct analysis may have been perceived as unwise in the highly charged context of Iran-United States affairs at the time.¹⁴¹ Still, a close reading of the opinion reveals the judges' sensitivity to the concerns raised in this Note.

Citing to article 1 of the Hague Convention, the Tribunal stated that a "determination by one State as to who are its nationals will be respected by another State *'in so far as it is consistent'* with international law governing nationality."¹⁴² This statement suggests that providing for nationality on the basis of *jus sanguinis* or restricting voluntary expatriation is contrary to the International Court of Justice's articulation of international law. And, in its most comprehensive statement, the majority observed that "[t]his 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."¹⁴³ Thus, those who look to the

139. The Tribunal pointed to the "decisive effect" of the *Nottebohm* and *Mergé* decisions. *Case No. A/18*, 23 I.L.M. at 499-500. However, tribunals and commentators have frequently failed to recognize dominant and effective nationality as a doctrine under which relief can be granted to the dual national or have applied it so as to deny relief to dual nationals. See text at notes 112-13 *supra*.

One writer observes that the vigorous defense of the doctrine of state nonresponsibility suggests that the issue is far from settled in the eyes of many international participants. See Note, *supra* note 9, at 699. In fact, the decision in *Case No. A/18* was met by furious protests on the part of the three Iranian judges, who found the decision to be "void of any credibility." *Case No. A/18*, 23 I.L.M. at 502 (Declaration of the Iranian members of the Tribunal).

140. See notes 107-08 *supra* and accompanying text.

141. Indeed, even relations among the judges of the Tribunal have been tense. The situation peaked in September 1984 when two Iranian judges hit Swedish judge Nils Mangard at the Tribunal. The Iranian judges defended their action, claiming that the Swedish judge had favored the United States in every case in the last three years. *Iranians Accuse Swede Of Favoring U.S. Claims*, N.Y. Times, Sept. 22, 1984, § 1, at 5, col. 6. One Iranian judge was quoted as saying: "If Mangard ever dares to enter the tribunal chamber again, either his corpse or my corpse will leave it rolling down the stairs." *Iranian Judge Threatens A Swede at The Hague*, N.Y. Times, Sept. 7, 1984, § 1, at 5, col. 2. Subsequently, the Tribunal's President suspended all tribunal proceedings. *U.S.-Iran Arbitration Suspended at The Hague*, N.Y. Times, Sept. 20, 1984, § 1, at 9, col. 1.

142. *Case No. A/18*, 23 I.L.M. at 497 (emphasis added).

143. *Case No. A/18*, 23 I.L.M. at 501.

Tribunal's resolution of the standing of dual nationals should be guided toward the rule of dominant and effective nationality.

CONCLUSION

Even traditionalists have recognized that the established law should be changed when it is "based upon misconceptions or outworn conceptions."¹⁴⁴ This Note has shown that the justifications for state nonresponsibility for a dual national — absolute sovereignty and the presumption of local remedy — are anachronistic. Individuals who find themselves tied to two nations, often involuntarily, must not be deprived of their only opportunity for justice. Refusal to extend protection to these dual nationals is inconsistent with contemporary attempts to provide a minimum standard of protection for the human rights of individuals, irrespective of nationality.¹⁴⁵

The repeated implicit use by tribunals of the dominant and effective nationality analysis reveals their sensitivity to the equities of a case: it is the *active nationality* which should be given recognition on the international plane, not the nationality which may theoretically survive along side it.¹⁴⁶ In turn, the dominant nationality can be ascertained only by reference to the actions and contacts of the individual. Therefore, an individual who seeks redress from a tribunal which has been established for the "nationals" of a country must be admitted if he is predominantly affiliated with that country. After all, this predominance of ties should be inherent in the true definition of "national" as contemplated by any agreement.

144. See Borchard, *supra* note 88, at 374.

145. See *Greece v. Bulgaria* ("tendency of international law to consider diplomatic protection as the necessary means of safeguarding individual rights"), cited in J. RALSTON, *supra* note 107, at 77.

146. Resolution of Inst. Intl. Law 1888, in ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 1888-89, at 25, cited in *Barthez de Montfort v. Treuhander Hauptverwaltung*, 6 Trib. Arb. Mixtes 806, 3 Ann. Dig. 279, 279 n.1 (1926); *Baron Frédéric de Born v. Yugoslavian State*, 6 Trib. Arb. Mixtes 499, 3 Ann. Dig. 277, 278 (1926).