Purchased nationality: A functional approach to address the risks associated with its recognition by other states and the exercise of diplomatic protection

Nacionalidad adquirida: Un enfoque funcional para abordar los riesgos asociados a su reconocimiento por otros estados y al ejercicio de la protección diplomática

Nationalité achetée: Une approche fonctionnelle pour traiter les risques associés à sa reconnaissance par d'autres États et à l'exercice de la protection diplomatique

Santiago **Yarahuán Dodero**[1]

https://orcid.org/0009-0008-4447-2428

Instituto Tecnológico y de Estudios Superiores de Monterrey. México
Correo electrónico: santiago.yarahuan@outlook.com

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Abstract: This paper focuses on reviewing the validity of citizenship by investment programmes with international law. This paper will demonstrate that what the Second Judgement of the *Nottebohm* Case of the International Court of Justice really intended was to rule against naturalizations granted contrary to the general principle of law prohibiting abuses of rights. Moreover,

[1] Head of Departamen at the Legal Office for International Trade Law of the Ministry of Economy of Mexico. The opinions expressed in this paper are personal opinions of the author and do not reflect the opinions/posture of the Mexican government or any firm/company/organization/institution where the author may collaborate in the future.

this paper will provide a functional approach to citizenship by investment programmes that will enable States to attract investors while naturalizing them in accordance with international law, as they will generate significant links, avoiding the risks associated with the recognition of their nationality by other States and within the scope of diplomatic protection.
Keywords: nationality; citizenship by investment; Nottebohm case; genuine link; predominant link; good faith; abuse of rights; international law.

Resumen: El presente artículo se centra en la revisión de la conformidad de los programas de ciudadanía por inversión con el Derecho internacional. Este artículo demostrará que lo que realmente pretendía la Segunda Sentencia del Caso Nottebohm de la Corte Internacional de Justicia era pronunciarse en contra de las naturalizaciones concedidas en contra del principio general del derecho que prohíbe los abusos de derechos. Además, este artículo ofrecerá un enfoque funcional para los programas de ciudadanía por inversión que permitirá a los Estados atraer inversores al tiempo que los naturalizan de conformidad con el Derecho internacional, ya que generarán vínculos significativos, evitando riesgos asociados al reconocimiento de nacionalidad por parte de otros Estados y en el ámbito de la protección diplomática.
Palabras clave: nacionalidad; ciudadanía por inversión; caso Nottebohm; vínculo genuino; vínculo predominante; buena fe; abuso de derechos; derecho international.

Résumé: Cet article porte sur l'examen de la validité des programmes de citoyenneté par l'investissement au regard du droit international. Il démontre que l'intention réelle du deuxième arrêt de la Cour Internationale de Justice dans l'affaire Nottebohm était de s'opposer aux naturalisations accordées en violation du principe général du droit interdisant les abus de droit. En outre, cet article propose une approche fonctionnelle des programmes de citoyenneté par l'investissement qui permettra aux États d'attirer les investisseurs tout en les naturalisant conformément au droit international, puisqu'ils généreront des liens significatifs, en évitant les risques liés à la reconnaissance de leur nationalité par d'autres États et dans le cadre de la protection diplomatique.
Mots-clés: nationalité; citoyenneté par l'investissement; affaire Nottebohm; lien réel; lien prédominant; bonne foi; abus de droit; droit international.

Summary: I. *Introduction*. II. *Problem contextualization*. III. *The Nottebohm Case*. IV. P*redominant nationality for diplomatic protection in cases of dual-nationality*. V. *A functional approach for purchased nationality*. VI. *Conclusions*. VII. *Bibliography*.

I. Introduction

In today's world of economic globalization and migration, nationality remains a centerpiece of global relations, as it defines the permanent population belonging to a State, comprising a legal relationship between the individual

and the State.[2] In this sense, international law has conferred on States the sovereign right to decide, in accordance with their laws, who are their own nationals and to protect them. Despite a long-standing understanding of the meaning and purpose of nationality, a number of States, in an effort to obtain significant economic benefits and stimulate development, decided to introduce citizenship by investment programmes to offer high-net-worth individuals the possibility of acquiring their nationalities in order to benefit from the advantages their passports possess. Naturally, this scheme has generated a considerable amount of controversy, as it does not require investors to establish any significant ties to the countries, which runs counter to the genuine link theory of the famous Second Phase Judgment of the *Nottebohm* case of the International Court of Justice (ICJ).

Is the genuine link theory legitimized and capable of assessing whether a State abuses its right to decide who its nationals are and its nationality law in light of a citizenship by investment programme? This paper holds that *Nottebohm's* genuine link theory is a solid and legitimate precedent to condemn naturalizations carried out in violation of the general principle of law of good faith, as it provides a limit to State discretion, which preserves the values associated with the sacrosanct concept of nationality. Therefore, the objective of this paper is to propose a functional approach to citizenship by investment programmes that will enable States to attract investors while naturalizing them in accordance with international law.

I will proceed in the following way: first (II, *infra*), I will contextualize the problem; in a second section (III, *infra*), I will examine the *Nottebohm* case, in order to understand its reasoning and determination under the lens of a general rule of law and as a violation of the general principle of law prohibiting abuses of rights, as well as the criticisms of its judgment; then (IV, *infra*), an explanation of the predominant nationality principle in dual nationality cases will be addressed; fourthly (V, *infra*), I will offer a functional approach to acquired nationality in order to bring these programmes in line with international law; and lastly (VI, *infra*), I will offer some concluding remarks.

[2] Dörr, Oliver, "Nationality", *Max Planck Encyclopedias of International Law*, 2019, ¶ 1.

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II. Problem contextualization

Since the 2000s, Investor Immigration Programmes (IIP) have proliferated in a number of countries in order to attract investments from high-net-worth individuals in exchange for residency and even citizenship rights.[3] The foregoing, taking into account that more than a quarter of the world's countries offer specialized entry, settlement, and passport programmes for wealthy foreigners, which is a profitable practice for States to obtain important economic benefits and stimulate development.[4]

However, IIPs have received substantial criticism, as they raise legitimate security, social, and, above all, legal concerns. This, considering that within the IIPs, there are programmes that effectively marketize citizenship because they offer the granting of their nationalities through the payment of a rather large sum of money without the fulfillment of any other significant requirement.[5] These modalities are called citizenship by investment programmes (CIP), commonly known as checkbook citizenship, purchased nationality, or golden passports. Prats defines them in the following way: "CIPs are laws that in a systematic way grant citizenship in exchange for economic transactions, which waives or significantly reduces requirements that other naturalization applicants need to fulfill, such as, but not exclusively, residence, language, or civic tests".[6]

Not many countries have IIPs of this nature, namely only Antigua and Barbuda, Austria, Cambodia, Dominica, Egypt, Grenada, Jordan, Malta, Moldova, North Macedonia, Saint Kitts and Nevis, Saint Lucia, Turkey, Vanuatu,[7]

[3] Parker, Owen, "Commercializing Citizenship in Crisis EU: The Case of Immigrant Investor Programmes", *Journal of Common Market Studies*, Vol. 55, Issue 2, March 2017, p. 332; *see also* Van den Brink, Martijn, "Revising Citizenship within the European Union: Is a Genuine Link Requirement the Way Forward?", *German Law Journal*, Vol. 23, 2022, pp. 79-96.

[4] Sachar, Ayalet, "Citizenship for Sale?" in Sachar, Ayelet *et al.* (eds.), *The Oxford Handbook of Citizenship*, United Kingdom, Oxford University Press, 2017, p. 940; *see also* Donner, Ruth, "Dual Nationality in International Law", *Acta Juridica Hungarica*, Vol. 47, No. 1, 2006, pp. 15-25.

[5] Parker, Owen, "Commercializing Citizenship...", *cit.*, p. 333.

[6] Prats, Elena, "Citizenship by Investment Programmes: Express Naturalisation for Bulky Wallets. An Arbitrary de Jure Stratification?", *UNED Revista de Derecho Político*, No. 106, septiembre-diciembre 2019, 2019, p. 354.

[7] Global Citizen Solutions, *Citizenship by Investment*, 29 July 2024. https://www.globalcitizensolutions.com/citizenship-by-investment/

Cyprus (terminated in 2020),[8] and Bulgaria (abolished in 2022).[9] That is, sixteen countries, out of a total of 193 worldwide (less than 10%), decided that nationality could be granted through a direct cash transfer, without any other significant link to those countries, which would allow buyers to benefit from the wide range of advantages that their passports possess, such as visa-free travel, tax benefits, among others.

Naturally, a wide range of stakeholders have been involved in strong opposition against the installment of CIPs. Particularly, in the context of the Maltese CIP and the European Union (EU), there was a huge backlash coming from the European Parliament and the European Commission. The latter, since first of all, when the initial scheme of their CIP was announced back in 2014, the European Parliament debated what it termed "Citizenship for sale", where there were statements such as that of the Commissioner for Justice, Fundamental Rights, and Citizenship, who said that "[M]ember states should only award citizenship to persons where there is a 'genuine link' or 'genuine connection' to the country in question[…] Citizenship must not be up for sale!".[10] Similarly, the European Commission protested against Malta's CIP and threatened to bring the case before the Court of Justice of the EU because, according to its legal reasoning, granting EU citizenship in return for pre-determined payments or investments without any genuine link under the terms of the *Nottebohm* case of the ICJ to the Member State concerned was not compatible with EU law or international law.[11]

Although this threat was useful in bringing Malta to the negotiating table and amending its first CIP to generate a more genuine link between the applicants and Malta, as well as limiting the granting of nationality to 1,800 applications,[12] in 2020 Malta released a new version of its CIP that the European Commission deemed illegal. Therefore, the Commission initiated infringement proceedings against Malta in 2020[13] and referred its case in 2022

[8] Global Citizen Solutions, *Cyprus Ends its Citizenship by Investment Program*, 16 June 2024. https://www.globalcitizensolutions.com/cyprus-ends-citizenship-investment-program/

[9] Euronews, *Bulgaria abolishes 'golden passport' scheme for wealthy foreigners*, 24 March 2022. https://www.euronews.com/2022/03/24/bulgaria-abolishes-golden-passport-scheme-for-wealthy-foreigners

[10] Parker, Owen, "Commercializing Citizenship...", *cit.*, p. 339.

[11] European Commission, *Investor citizenship scheme: Commission refers Malta to the Court of Justice*, 29 September 2022. https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5422

[12] Prats, Elena, "Citizenship by Investment Programmes...", *cit.*, p. 365.

[13] European Commission, *Investor citizenship schemes: European Commission opens infringements*

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to the Court of Justice of the EU because its "golden passport" scheme undermined the essence of EU citizenship and posed serious risks for security, money laundering, tax evasion, and corruption.[14]

These events provoked a heated doctrinal debate on the relevance of the genuine link requirement in matters of nationality since many experts believe that such a condition is not compatible with a globalized world in which millions of persons are nationals of more than one country. For instance, authors such as Kochenov argued that the European Commission had acted contrary to its own law because it showed a misunderstanding of international law in the matter since the genuine link derived from the *Nottebohm* case was a repugnant and long-dead ideal, incompatible with a "[W]orld that has left behind perpetual loyalty and the glorious mystifications of blood nationalism".[15] Consequently, the CIPs controversies brought the 68-year-old Second Phase Judgement of the *Nottebohm* case to the forefront of the dispute.

Is the genuine link theory legitimized and capable of assessing whether a State abuses its right to decide who its nationals are and its nationality law in light of a CIP? If that is the case, what are the legal risks for countries that decide to implement a CIP? Furthermore, will States be obliged to recognize a naturalization under a CIP and will diplomatic protection of persons naturalized under such a scheme be possible? This paper will address these questions not only for EU member states, but also for other non-EU states, which must be at the center of the debate as well.

III. The Nottebohm Case

1. *Nottebohm's Genuine Link Theory*

On September 16, 1881, Mr. Friedrich Nottebohm was born in Hamburg (Germany), and his story, which was intertwined with the scourges of the

against Cyprus and Malta for "selling" EU citizenship, 20 October 2020. https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1925

[14] European Commission, *Investor citizenship scheme: Commission refers Malta…*, *cit.*

[15] Vladimirovich Kochenov, Dimitry, "Policing the Genuine Purity of Blood: The EU Commission's Assault on Citizenship and Residence by Investment and the Future of Citizenship in the European Union", *Studia Europejskie – Studies in European Affairs*, Vol. 25, Issue 1, 2021, pp. 43 & 51.

Second World War, gave rise to the landmark case of the ICJ on nationality. The latter, since in 1955, the ICJ delivered its famous Second Phase Judgement of the *Nottebohm* case, in which the genuine link theory of nationality was introduced for the first time, triggering a heated debate on the meaning and scope of the correctness of naturalization regimes.

Since Mr. Nottebohm was born on German soil (*ius soli*) and from German parents (*ius sanguinis*), he was a German citizen until 1939, when he opted to naturalize as a Liechtenstein national in order to avoid undesirable probable consequences in his private enterprises in Guatemala.[16] This, taking into account that on September 1, 1939, the German Reich (Nazi Germany) decided to invade Poland and thus began the Second World War with the retaliatory declarations of war by the United Kingdom and France[17]. Following the attack on Pearl Harbor orchestrated by the Empire of Japan against the United States on December 7, 1941,[18] Guatemala, like many other Latin American countries, declared war on the Axis Powers that same month.[19]

In that vein, Mr. Nottebohm, who returned to Guatemala at the beginning of 1940, found himself in a country where citizens of countries belonging to the Axis Powers were considered hostile and were therefore under the Guatemalan rule of war. Despite the fact that he was issued a Guatemalan visa in his Liechtenstein passport on December 1, 1939, and that upon his return to Guatemala his status was changed in the Registry of Aliens and in the Civil Registry, as well as in his identity card,[20] to reflect that he had adopted Liechtenstein's nationality, on October 19, 1943, Mr. Nottebohm was arrested by the Guatemalan authorities and handed over to the United States armed forces on the grounds that he was German.[21]

During his two-year internment in the United States, Guatemala initiated fifty-seven legal proceedings against him to confiscate all his movable and im-

[16] Kunz, Josef L.,"The Nottebohm Judgment", *American Journal of International Law*, Vol. 54, Issue 3, July 1960, p. 536.

[17] Hobsbawm, Eric, *Historia del Siglo XX: 1914-1991*, translation of Faci, Juan *et al.*, Planeta, 2019, p. 46.

[18] *Ibidem*, p. 49.

[19] Encyclopedia Britannica, *Guatemala | History, Map, Flag, Population, & Facts*, 22 November 2023, https://www.britannica.com/place/Guatemala/The-postcolonial-period

[20] Second Phase Judgment, *Nottebohm Case (Liechtenstein v. Guatemala)*, International Court of Justice, 1955, pp. 17-18.

[21] Kunz, Josef L., "The Nottebohm…", *cit.*, p. 536.

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movable property, and in 1949, all of his possessions were effectively seized by the latter country under its law.[22] The above, considering that Mr. Nottebohm, from 1905 onwards, took up residence in Guatemala to develop prosperous business activities in the field of commerce, banking, and plantations.[23] Notably, at the time of the relevant events, he was the head of the firm Nottebohm Hermanos, and, after being released from internment in 1946, he attempted to return to Guatemala in order to dispute all pending litigation against him, but his admission was denied.[24]

It is in this context that the *Nottebohm* case takes place, since in 1951, Liechtenstein initiated proceedings before the ICJ against Guatemala in the exercise of its right of diplomatic protection in relation to its national, Mr. Nottebohm. On the one hand, Liechtenstein requested the Court to hold and declare that Mr. Nottebohm's arrest, detention, expulsion, and refusal to pay compensation were contrary to international law since his naturalization was in accordance with its domestic law and not contrary to international law, which deprived him of his German nationality. On the other hand, Guatemala contested the inadmissibility of Liechtenstein's claim due to a lack of prior diplomatic negotiations and failure to prove that Mr. Nottebohm duly acquired his nationality in accordance with domestic and international law.

To resolve the case, the Tribunal assessed whether or not Mr. Nottebohm acquired his Liechtenstein nationality in accordance with international law. This, taking into account that it is a general principle of international law that States have the sovereign right to decide, in accordance with their law, who are their nationals.[25] This principle was positivized in Article 1 of the 1930 Convention on Certain Questions Relating to the Conflict of Laws Concerning Nationality (CCNL), since it states that: "Article 1. *It is for each State to determine under its own law who are its nationals*. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality" [emphasis added].[26]

[22] *Idem*.

[23] Second Phase Judgment, *Nottebohm Case…*, *cit.*, p. 13.

[24] Kunz, Josef L.,"The Nottebohm…", *cit.*, p. 536.

[25] Crawford, James & Brownlie, Ian, *Brownlie's Principles of Public International Law*, 8th ed., United Kingdom, Oxford University Press, 2019, p. 495.

[26] Convention on Certain Questions Relating to the Conflict of Laws Concerning Nationality (CCNL), Art. 1, 1930.

Although the second part of this article will be addressed shortly, it shows that States possess a general freedom of action to decide the procedure they will undertake to assess who are their nationals. Moreover, this general principle of law was confirmed in the *Nationality Decrees in Tunis and Morocco* case of the Permanent Court of International Justice (PCIJ), where it was stated that questions of nationality are, in principle, within the reserved domain of each State.[27] Hence, the Court in the *Nottebohm* case determined that it was not necessary to assess whether international law imposed any limitations on its freedom to decide who were their nationals since "[I]t is for Liechtenstein as, it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality".[28]

However, the Court stated that although they did not dispute that fact, what was at stake was whether Nottebohm's naturalization as a Liechtenstein national had international effects for the latter country to exercise diplomatic protection before the ICJ,[29] effectively separating "nationality" from the municipal law concept of citizenship.[30] The latter, bearing in mind that the right of States to decide who their nationals are is not absolute. According to the aforementioned Article 1 of the CCNL, which is generally treated as a statement of customary international law,[31] States may refuse to recognize a nationality if the law allowing its acquisition is contrary to international conventions, international custom, and the principles of law generally recognized with regard to nationality.[32] Consequently, the rules governing the granting of a State's own nationality are not entitled to be recognized by other States unless they are in conformity with international law.[33]

In addition, Crawford established that nationality law resembles the law relating to territorial sovereignty because it involves the assignment of persons to states.[34] In the *Fisheries* case, it was decided that states do not have

[27] Advisory Opinion No. 4, *Nationality Decrees Issued in Tunis and Morocco Case (France v. United Kingdom)*, Permanent Court of International Justice, 1923, p. 24.

[28] Second Phase Judgment, *Nottebohm Case…*, *cit.*, p. 20.

[29] *Ibidem*, p. 21.

[30] Kunz, Josef L.,"The Nottebohm…", *cit.*, p. 546.

[31] Thwaites, Rayner, "The Life and Times of the Genuine Link", *Victoria University of Wellington Law Review*, 2018, Vol. 49, Issue 4, p. 648.

[32] CCNL, Art. 1, 1930.

[33] Second Phase Judgment, *Nottebohm Case…*, *cit.*, p. 20.

[34] Crawford, James & Brownlie, Ian, *Brownlie's Principles…*, *cit.*, p. 495.

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complete autonomy to prescribe the extent of their territorial sea in national law since international forums are enabled to revise the validity of such prescription using criteria in international law.[35] Therefore, and by analogy, the nationality law of a State is not absolute and may be reviewed by an international court if a third State contests its conformity with international law.[36]

In that order of ideas, the Court turned to the analysis of the generally recognized principles of law on nationality. This, in light of the practice of international arbitrators to decide through them in cases of dual nationality, in order to determine whether full international effect should be attributed to the nationality invoked.[37] This practice, which has been perpetuated to this day, is that of seeking the real and effective nationality from an individual who has more than one nationality, weighting between factors such as: "[T]he habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country, and inculcated in his children, etc.".[38]

The weighting occurs because the principle of non-responsibility, enshrined in Article 4 of the CCNL, mandates that States may not exercise their right of diplomatic protection when their nationals also possess the nationality of the opposing State, so the third-party adjudicator is obliged to assess which nationality has a closer link to the individual. For example, in the *Mergé* case,[39] the Italian-United States Conciliation Commission received a petition, through the exercise by the United States of diplomatic protection, from a dual Italian-United States citizen against Italy.[40] In order to resolve the issue, the Commission assessed Ms. Mergé's effective nationality because, if her United States nationality had a closer and more effective link with her, the

[35] Judgment, *Fisheries Case (United Kingdom v. Norway)*, International Court of Justice, 1951, p. 132.

[36] Vermeer-Künzli, Annemarieke, "Nationality and diplomatic protection: A reappraisal" in Annoni, Alessandra *et al.* (eds.), *The Changing Role of Nationality*, New York & London, Routledge Research in International Law, 2013, p. 79.

[37] Second Phase Judgment, *Nottebohm Case…*, *cit.*, p. 23.

[38] *Ibidem*, p. 22.

[39] Interestingly, the final decision in the *Mergé* case was issued on June 10, 1955, two months after the issuance of the final judgment in the *Nottebohm* case, reflecting the ICJ's precision with the practice they choose to resolve the case.

[40] Decision No. 55, *Mergé Case*, Italian-United States Conciliation Commission, 1955, p. 236.

principle of non-responsibility would yield to the principle of effective nationality, as the content of the CCNL expresses *opinio iuris communis.*[41] Consequently, they decided to reject the petition since the United States could not exercise diplomatic protection because Ms. Mergé had a closer and more effective link with Italy, and therefore the principle of non-liability prevailed.[42]

Consequently, the Court in the *Nottebohm* case, after carefully assessing the practice of States, arbitral and judicial decisions, and the opinion of experts, resolved that nationality acquisition must be based on a "[…]a social fact of attachment, a genuine connection of existence, interests, and sentiments, together with the existence of reciprocal rights and duties".[43] This conclusion conforms the famous genuine link theory of nationality, which stipulates that:

> [A] State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defense of its citizens by means of protection as against other States.[44]

In conclusion, the Tribunal decided that Liechtenstein's claims were inadmissible because it was not entitled to extend its protection to Mr. Nottebohm against Guatemala. This, taking into account that Mr. Nottebohm acquired Liechtenstein's nationality without regard to the concept of nationality adopted in international relations,[45] as his actual connections to the latter country were extremely tenuous.[46] The above, given that his sole motive for naturalizing as a Liechtenstein national was to dissociate himself from the Government of the German Reich in order to evade the Guatemalan rule of war and to afford Liechtenstein's diplomatic protection against Guatemala, which does not comprise a genuine intention to generate a legal bond with Liechtenstein.[47]

41 *Ibidem*, p. 243.

42 *Ibidem*, p. 248.

43 Second Phase Judgment, *Nottebohm Case…*, *cit.*, p. 23.

44 *Idem*.

45 *Ibidem,* p. 26.

46 *Ibidem,* p. 25.

47 *Idem*.

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2. *Nottebohm and the Principle of Good Faith in its Aspect of Abuse of Rights*

Some scholars argue that the reasoning used by the Court to conclude that Mr. Nottebohm had extremely tenuous ties to Liechtenstein was not to generate a genuine link rule on nationality but rather to demonstrate opposition to the abuse of the right to confer nationality.[48] According to Shaw, good faith is perhaps the most important general principle of law, as it underpins many international legal rules, constituting an indispensable part of the rules of international law.[49] The foregoing, considering for example that Article 2 (2) of the UN Charter establishes that States must fulfill in good faith the obligations assumed therein, which shows that the principle of good faith is a cornerstone of the international system.[50]

For instance, in the *Nuclear Tests* case, both Australia and New Zealand initiated proceedings against France because of the latter country's intention to conduct nuclear weapons tests in the atmosphere of the South Pacific region, which produced radioactive fallout in their territories.[51] The Court decided that since France had made a series of public announcements in 1974 expressly denoting its Government's commitment to stop nuclear testing in the atmosphere, given that the level of their nuclear technology allowed them to continue their programme with underground testing,[52] Australia's claim no longer had any object and that the Court should therefore not decide on the matter.[53] The rationale that led to that conclusion was based on the following:

> One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international cooperation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of pacta sunt

[48] Sloane, Robert D., "Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality", *Harvard International Law Journal*, Vol. 50, Issue 1, 2009, p. 19.

[49] Shaw, Malcolm N., *International Law*, 8th ed., United Kingdom, Cambridge University Press, 2017, p. 77.

[50] Charter of the United Nations, Art. 2 (2), 1945.

[51] Judgment, *Nuclear Tests Case (Australia v. France)*, International Court of Justice, 1974, p. 258.

[52] *Ibidem*, p. 266.

[53] *Ibidem*, p. 272.

servanda in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and *are entitled to require that the obligation thus created be respected*.[54]

Therefore, the Court assessed that the French Government had bound itself to stop conducting nuclear tests in the atmosphere because its public statements had the same legal effects as the ones that can usually only be attributed to a binding synallagmatic treaty.[55] The above, considering that the Court noted that unilateral declarations can generate obligations if they are made publicly and with a clear intention to limit the freedom of action of a given State, which receives the confidence of the receiving States, thus creating an obligation.[56] Consequently, the general principle of the law of good faith acts in this case as the rule regulating the legal effect of public declarations, which confirms its central role in international relations.[57]

However, Shaw further notes that good faith is not by itself a source of obligations where none would otherwise exist, rather it is "[…]background principle informing and shaping the observance of existing rules of international law and in addition constraining the manner in which those rules may legitimately be exercised".[58] On this last idea, it is apparent that the general principle of good faith law also fulfills a duty of control over the exercise of rights by States, which brings to the table the theory of abuse of rights, being merely an application of this function.[59]

According to Cheng, an important aspect of the theory of abuse of rights is the prohibition of malicious injury, as the exercise of a right must be done in furtherance of the legitimate interest the right protects, thus exercising a

[54] *Ibidem*, p. 268 (emphasis added).

[55] Reinhold, Steven, "Good Faith in International Law", *UCL Journal of Law and Jurisprudence*, Vol. 2, Issue 1, 2013, p. 48; *see also* Uçaryılmaz, Talya, "The Principle of Good Faith in Public International Law", *Revista Estudios de Deusto*, Vol. 68, Issue 1, september-december 2020.

[56] Judgment, *Nuclear Tests Case…*, *cit.*, p. 267.

[57] Reinhold, Steven, "Good Faith in…", *cit.*, p. 48.

[58] Shaw, Malcolm N., *International Law…*, *cit.*, p. 77.

[59] Cheng, Bin, *General Principles of Law as Applied by International Courts and Tribunals*, United Kingdom, Cambridge Grotius Publications Limited, 1984, p. 121; *see also* Schwarzenberger, Georg, "Uses and Abuses of the 'Abuse of Rights' in International Law", *Transactions of the Grotius Society*, Vol. 42, 1956, pp. 147-179.

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right for the sole purpose of causing injury is not valid.[60] Furthermore, the scholar explains that any fictitious exercise of a right to evade a legal rule or a contractual obligation constitutes an abuse of rights since the principle of good faith requires that all rights must be exercised in an honest and loyal manner.[61] Consequently, an abuse of rights implies an interdependence of rights and obligations deriving from both treaty law and general international law, between which a fair balance must be maintained with respect to the interest of the parties, delimiting their respective rights, since any crossing of that line by one of the parties in the exercise of its right would constitute a violation of good faith.[62]

Kiss pronounced himself similar to Cheng due to the fact that he defined an abuse of rights as "[A] State exercising a right either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another State".[63] Most relevant, however, is that he contextualized the three distinct sets of circumstances in which an abuse of right occurs, namely when: (i) a State exercises its right in such a way as to prevent another State from enjoying its own rights; (ii) a State exercises a right for a purpose for which it was not intended; and, (iii) an arbitrary exercise of a right that causes injury to another party.[64]

This, in turn, intimately relates the concept of abuse of rights to the element of discretion that a State has in relation to the exercise of rights.[65] The latter, as in order to avoid the abuse of such element, a State with a wide margin of discretion to exercise a right must do so reasonably and honestly, as well as in accordance with the spirit of the law and with due regard to the interests of others.[66] Consequently, abuse of discretion, and therefore also of rights, must be adduced taking into account either the intention or motive of the State, or the objective result of the exercise of rights, since if an

[60] *Ibidem*, pp. 121-122.

[61] *Ibidem*, p. 123.

[62] *Ibidem*, pp. 129-131.

[63] Kiss, Alexandre, "Abuse of Rights", *Max Planck Encyclopedias of International Law*, December 2006, ¶ 1.

[64] Reinhold, Steven, "Good Faith in…", *cit.*, p. 49.

[65] *Ibidem*, p. 50.

[66] Cheng, Bin, *General Principles of Law as Applied…*, *cit.*, p. 134.

unlawful intention can be established, or if the act is clearly irrational, there is an abuse of rights.[67]

On that account, abuse of rights is particularly useful for contesting alleged malicious exercises of sovereign rights in domestic law whose limits are not well defined, such as in the area of nationality law.[68] For instance, A.J.P. Thames at the 1075th Meeting of the International Law Commission (ILC) commented that when sovereign rights remain undivided, state responsibility does not arise from a violation of a primary rule of international law, it is rather determined "[…]on the basis of general rules providing for the settlement of disputes with 'due regard for' or 'reasonable regard for' the mutual interests of the parties concerned".[69] Moreover, in the *North American Dredging Co. of Texas* Case, the Mexican-United States General Claims Commission stated that no international tribunal should avoid finding limitations to the sovereign right of national jurisdiction in order to make it compatible with the general rules and principles of international law.[70]

As noted in the previous section, the Court in the *Nottebohm* case held that Mr. Nottebohm acquired his Liechtenstein nationality contrary to the recognized general principles on nationality because he lacked a genuine intention to generate a legal link with Liechtenstein.[71] According to Sloane, such conduct is an accurate description of an abuse of rights, given that Mr. Nottebohm acquired such nationality legally under Liechtenstein's domestic nationality law, but with the sole intention of evading the Guatemalan rule of war.[72] He further commented that the Court was not attempting to legislate a new rule requiring a national to demonstrate a genuine link to his State of nationality, but rather ruled against Mr. Nottebohm's abusive manipulation of Liechtenstein's nationality law to circumvent a rule of war.[73]

[67] *Idem*.

[68] Byers, Michael, "Abuse of Rights: An Old Principle, a New Age", *McGill Law Journal*, Vol. 47, Issue 2, 2002, p. 43.

[69] ILC, "1075th Meeting" in Yearbook of the International Law Commission 1970, Vol. 1, ¶ 40.

[70] Concurring Opinion by American Commissioner, *North American Dredging Co. of Texas Case*, Mexican-United States General Claims Commission, 1926, p. 27.

[71] Second Phase Judgment, *Nottebohm Case…*, *cit.*, p. 25.

[72] Sloane, Robert D., "Breaking the Genuine Link…", *cit.*, p. 19.

[73] *Ibidem*, p. 21

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This, in turn, as stated by the Court, did not generate in Guatemala any obligation to recognize his nationality under the circumstances,[74] understanding circumstances as the "[…]reason Nottebohm acquired a new nationality in 1939 and the nature of the case, a paradigmatic instance of diplomatic espousal".[75] Accordingly, in the *Flegenheimer* case, the Italian-US Conciliation Commission followed the abuse of law rationale of the *Nottebohm* case, stating the following:

> The profound reason for *these broad powers of appreciation* which are guaranteed to an international court for resolving questions of nationality, even though coming within the reserved domain of States, is based on the principle, undenied in matters of arbitration, that *complete equality must be enjoyed by both Parties to an international dispute*. If it were to be ignored, one of the Parties would be placed in a state of inferiority vis-à-vis the other, because it would then suffice for the Plaintiff State to affirm that any given person is vested with its nationality for the Defendant State to be powerless *to prevent an abusive practice of diplomatic protection by its Opponent*.[76]

Therefore, the Conciliation Commission reaffirmed the right of international fora to independently verify the validity of the attribution of nationality under internal law in order to recognize abusive manipulations of the right of States to confer nationality in order to preserve the essential principle of juridical equality in international adjudication.[77] To conclude, in the opinion of these scholars, the real basis of the *Nottebohm* case was to invalidate the abuse of law in the granting of nationality that occurred in the facts and circumstances of Mr. Nottebohm's naturalization as a citizen of Liechtenstein.

3. *Critique of the Nottebohm Case and its genuine link theory*

A. *Dissenting opinions of the Nottebohm Case*

Even though the *Nottebohm* case was approved by eleven votes to three, the opinions of the three dissenting Judges provoked a large amount of litera-

[74] Second Phase Judgment, *Nottebohm Case*…, *cit.*, p. 26.

[75] Sloane, Robert D., "Breaking the Genuine Link…", *cit.*, p. 21.

[76] Decision No. 182, *Flegenheimer Case*, Italian-United States Conciliation Commission, 1958, p. 388 (emphasis added).

[77] Sloane, Robert D., "Breaking the Genuine Link…", *cit.*, p. 22.

ture critical of the decision adopted therein, as well as of the genuine link theory, which makes the judgment highly controversial.[78] Namely, Judges Klaestad and Read, as well as Judge *Ad Hoc* Guggenheim, challenged the validity of the Phase II Judgment on both procedural and substantive grounds in their dissenting opinions.[79] Consequently, these opinions, instead of fading with time, gained new strength over the years, as several publicists broadened their scope and challenged the judgment with new arguments, some of them going so far as to argue that the *Nottebohm* case is now a "dead letter".[80]

First of all, the dissenting Judges observed that there were a series of procedural errors that generated a one-sided analysis of the case. In my opinion, the most relevant adduced procedural issue is related to the fact that the Court limited its jurisdiction to assessing only the admissibility of Liechtenstein's claim against Guatemala, which prevented it from ruling on the merits of the case.[81] This, considering that the real issue of the case was not whether Mr. Nottebohm acquired Liechtenstein's nationality according to international law, it was rather an issue of legality regarding the confiscation of his property as a war measure.[82] Therefore, Judges Read and Guggenheim contested that only analyzing the allowance of the plea in bar would ensure that justice would not be done either at the national or international level, since the merits of the claim would not be reviewed.[83]

Regarding substance, it is important to note that while it is universally recognized that an international court or tribunal is competent to investigate the true nationality of a claim[84], according to Judge Guggenheim it is also true that when a State disputes that attribution of nationality was done contrary to municipal/international law, it must prove it, since the burden of proof is on that State.[85] Therefore, the issues of fraud raised by Guatemala in relation to the granting of nationality to Mr. Nottebohm had to be proven by

78 Kunz, Josef L., "The Nottebohm…", *cit.*, p. 539.

79 *Idem*.

80 Spiro, Peter J., "Nottebohm and "Genuine Link": Anatomy of a Jurisprudential Illusion", *Investment Migration Working Papers*, IMC-RP2019/1, 2019, p. 21; *see also* Macklin, Audrey, "Is it Time to Retire Nottebohm?", *AJIL Unbound*, Vol. 111, 2017, pp. 492-497.

81 Kunz, Josef L.,"The Nottebohm…", *cit.*, p. 542.

82 *Ibidem*, p. 543.

83 *Idem*.

84 Opinion of Commision, *Flutie Cases*, American-Venezuelan Commission, 1903, p. 152.

85 Kunz, Josef L.,"The Nottebohm…", *cit.*, p. 544.

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the latter country, which did not occur in the opinion of the dissenting Judges.[86] Furthermore, Guatemala argued that Mr. Nottebohm had acted not in good faith, but fraudulently, in the granting of his Liechtenstein nationality because the use he gave to his naturalization was as a cloak for the property of enemy nationals in Guatemala.[87] This, in turn, was in the opinion of the dissenting Judges erroneous because: (i) Guatemala presented no evidence to support such claims; (ii) Mr. Nottebohm's motives for naturalization were hardly admissible and extremely complicated to prove; (iii) Guatemala was not in a state of war with the Axis Powers in 1939, the year of his naturalization; (iv) even if Mr. Nottebohm's only motive for naturalization was to evade the Guatemalan war rule, there was no rule of municipal or international law that would invalidate his naturalization for that reason; among others.[88] Therefore, they considered that the Judgment should have taken these issues into account to avoid a one-sided analysis.

However, the most important criticism of the dissenting Judges concerned the famous nationality genuine link theory developed in the *Nottebohm* case. The first criticism was that at the time of the decision, the Court and Guatemala were unable to cite treaties, general principles of law, or judicial precedents that presented the genuine link as a source of positive international law, since in their opinion such a conceptualization of nationality did not exist as it was a new rule imposed by the Court.[89] As a result, they considered that their judgment was based on mere tendencies since the Court never laid down any rule of international law to support its argument.[90] For instance, Judge Read stated the following:

> [I] do not question the desirability of establishing some limitation on the wide discretionary power possessed by sovereign States: the right, under international law, to determine, under their own laws, who are their own nationals and to protect such nationals. Nevertheless, I am bound, by Article 38 of the Statute, to apply international law as it is -*positive law*- and not international law as it might be if a Codification Conference succeeded in establishing new rules limiting the conferring of nationality by sovereign States. It is, therefore, *necessary to consider whether there are any rules of*

[86] *Ibidem*, p. 549.

[87] *Ibidem*, p. 550.

[88] *Ibidem*, pp. 549-550.

[89] *Ibidem*, p. 552-555.

[90] *Ibidem*, p. 556.

positive international law requiring a substantial relationship between the individual and the State, in order that a valid grant of nationality may give rise to a right of diplomatic protection.[91]

On the other hand, when it came to a rule of general customary international law conditioning the establishment of a genuine link for the acquisition of nationality, the dissenting Judges also objected to the existence of such a rule. The latter, since while it was true that the genuine link theory manifested itself in the practice of several States, it was clear that the practice of States conferring their nationality on individuals who had no specific link to their countries through *ius soli* or *ius sanguinis* was very frequent and had never been considered illegal.[92] For example, in Judge Guggenheim's dissenting opinion, he established that "[I]nternational law does not […] prohibit a State from claiming as its nationals […] the descendants of its nationals who have been resident abroad for centuries and whose only link with the State[…] is to be found in descent".[93] Consequently, in their view, the Court was unable to demonstrate a rule of customary international law that could validly support its theory of genuine link, because there was a consistent practice of States allowing nationality to individuals by *ius soli* or *ius sanguinis* who had severe tenuous links with them.

A final point of criticism was related to the arbitral and judicial decisions that the Tribunal used to evaluate its definition of nationality as those precedents were derived from the very particular and entirely different problem of dual and multiple nationality.[94] The foregoing, considering that it was not the case that Mr. Nottebohm had dual nationality since he was only a Liechtenstein national, and therefore the criteria derived from said precedents were not applicable to his case.[95] Therefore, Judge Read mentioned that "[I] do not think that it is permissible to transfer criteria designed for cases of double nationality to an essentially different type of relationship".[96] Moreover, they

[91] Dissenting Opinion by Judge Read, *Nottebohm Case (Liechtenstein v. Guatemala)*, International Court of Justice, 1955, p. 39 (emphasis added).

[92] Kunz, Josef L., "The Nottebohm…", *cit.*, p. 554.

[93] Dissenting Opinion by Judge Guggenheim, *Nottebohm Case (Liechtenstein v. Guatemala)*, International Court of Justice, 1955, p. 56.

[94] Kunz, Josef L., "The Nottebohm…", *cit.*, p. 556.

[95] *Ibidem*, p. 559.

[96] Dissenting Opinion by Judge Read, *Nottebohm Case…, cit.*, p. 42.

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even refuted that those precedents contained a theory of the genuine link, since, as explained above, the assessment to find the effective and dominant nationality implies rather a weighting to evaluate which nationality has a closer link with the individual.[97]

In that order of ideas, the dissenting Judges of the *Nottebohm* case concluded that the legislation it laid down "restricted the right of diplomatic protection without any basis in positive international law and severs nationality as the principal link from diplomatic protection".[98] This, given that it crafted a theory of genuine link without respect for positive international law and established that a State, in granting its nationality and making its nationality law, acted purely on the domestic level of citizenship.[99] Hence, this rationale affected the connection that nationality had with diplomatic protection because, in their opinion, States must always recognize the nationality law of third States because international law attributed to them the right to confer their nationality in the way they considered proper, which generates an international act.[100]

B. *External criticisms of Nottebohm's genuine link theory*

Aside from the initial criticism that the genuine link theory received from the dissenting Judges Klaestad, Read, and Guggenheim, there were other external disapprovals. Firstly, in the aforementioned *Flegenheimer* case, the Italian-US Conciliation Commission also determined that: "[I]t is doubtful that the International Court of Justice intended to establish a rule of general international law in requiring, in the Nottebohm Case, that there must exist an effective link between the person and the State in order that the latter may exercise its right of diplomatic protection".[101]

Therefore, according to Spiro, the Commission effectively expounded that the genuine link theory was only applicable to the facts of the *Nottebohm* case.[102] The above, considering that the Commission also stated that it had no

97 Kunz, Josef L.,"The Nottebohm…", *cit.*, p. 558.

98 *Ibidem*, p. 565.

99 *Ibidem*, p. 551.

100 *Idem.*

101 Decision No. 182, *Flegenheimer Case…*, *cit.*, p. 376.

102 Spiro, Peter J., "Nottebohm…", *cit.*, p. 15.

grounds to refuse to recognize Flegenheimer's U.S. nationality, as long as it had been acquired in accordance with the nationality law of that State despite its nominal link.[103] Furthermore, in the *Micheletti* case, the Court of Justice of the European Union was faced with the case of a dual Argentinian and Italian national whose application for permanent residence in Spain was dismissed because the latter country considered that his effective nationality was the Argentinian due to his last habitual residence, which did not allow him to practice as a dentist in Spain.[104] The Court decided to reject "[T]he application of effective nationality, whose origin lies in a 'romantic period' of international relations and, in particular in the concept of diplomatic protection".[105]

Another important criticism of the genuine link theory occurred in the context of the International Law Commission (ILC) Draft Articles on Diplomatic Protection since Comment 5 of Article 4 mentions that States are not required to prove an effective or genuine link between themselves and their nationals in order to exercise diplomatic protection, along the lines of the *Nottebohm* case.[106] The latter, given that the facts of the *Nottebohm* case served to limit its applicability because the links between Mr. Nottebohm and Liechtenstein were extremely tenuous compared to those between him and Guatemala.[107] In addition, it further stated that, in the context of a globalized world, if the genuine link requirement were to be strictly applied:

> [I]t would exclude millions of persons from the benefit of diplomatic protection. Indeed, in today's world of economic globalization and migration, there are millions of persons who have moved away from their State of nationality and made their lives in States whose nationality they never acquire, or have acquired nationality by birth or descent from States with which they have a tenuous connection.[108]

In this vein, it is plausible to conclude that the status of the genuine link requirement for nationality as a general principle of international law and

[103] Decision No. 182, *Flegenheimer Case…*, *cit.*, p. 338.

[104] Judgment, Micheletti Case (Micheletti v. Cantabria), Court of Justice of the European Union, 1992, pp. 2-3.

[105] Spiro, Peter J., "Nottebohm…", *cit.*, p. 15.

[106] ILC Draft Articles on Diplomatic Protection with Commentaries, Art. 4, Comm. 5, 2006.

[107] *Idem.*

[108] *Idem.*

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customary law is highly contested. Therefore, in order to obtain a fruitful analysis for the case of naturalizations under the CIPs it is necessary to balance the positions for and against the genuine link theory, since both sides have solid arguments worthy of consideration.

IV. Predominant nationality for diplomatic protection in cases of dual nationality

As introduced in section III of this paper, the *Nottebohm* case based its assessment to find its famous conceptualization of nationality by reviewing, among others, the practice of arbitral tribunals to determine the effective nationality of the individual in dual nationality disputes. Notably, in said section, the *Mergé* case of the Italian-United States Conciliation Commission was analyzed to illustrate how competing nationalities are weighed to determine the dominant and effective nationality, which would give legitimacy to a State for diplomatic protection in respect of its national in cases where the principle of non-responsibility is implicated. However, it is still relevant to elaborate on the historical evolution of such a balancing process, since, in the case of naturalization under a CIP, individuals are most likely to possess more than one nationality. This section will therefore discuss the jurisprudential evolution of the weighting of effective nationality up to the modern conceptualization of predominant nationality enshrined in Article 7 of the ILC Draft Articles on Diplomatic Protection.

The *Stevenson* case, which involved individuals holding the nationalities of the United Kingdom and Venezuela, concluded that domicile or residence was the most important factor in assessing effective nationality.[109] For instance, in the *Stevenson* case, it was stated that: "Mrs. Stevenson is a British subject under British law and a Venezuelan under Venezuelan law the prevailing rule of public law, to which appeal must then be taken, is that *she is deemed to be a citizen of the country in which she has her domicile*; that is, *Venezuela*".[110]

[109] Vermeer-Künzli, Annemarieke, "Nationality and diplomatic protection…", *cit.*, p. 83; *see also* Arevalo-Ramirez, Walter *et al.*, "Dual nationality and international law in times of globalization. Challenges and opportunities for consular assistance and diplomatic protection in recent cases", *Brazilian Journal of International Law*, Vol. 17, No. 2, 2020, pp. 288-307.

[110] Arbitral Award, *Stevenson Case*, Mixed Claims Commission Great Britain-Venezuela, 1903, p. 500 (emphasis added).

The conclusion was derived from precedents that the umpires had at their reach at the time, such as the case of Elis Lebret, before the French and American Commission, where it was mentioned that "[T]he only reasonable way of settling the difficulty is to hold him subject to the laws of the country where he resides".[111] Subsequently, in the *Canevaro* case, the Arbitral Tribunal assessed whether Mr. Canevaro's Italian nationality was his dominant nationality as opposed to his Peruvian nationality, as it would allow the first country to exercise diplomatic protection against Peru. In this case, the Arbitral Tribunal innovated the scope because it now recognized that the way in which individuals used their nationality was an important factor to consider, especially the participation in the political life of a country.[112] The latter, noting that Mr. Canevaro conducted himself many times as a Peruvian citizen, given that he ran for the Senate and defended his candidacy, which made the nationality of that country dominant with respect to the Italian nationality.[113]

Furthermore, in the aforementioned Mergé case, it was also stated that apart from habitual residence, attention to the individual's conduct in his economic, social, political, civic, and family life was important in assessing effective nationality.[114] Last but not least, before going on to analyze the cases that occurred in the framework of the Iran-United States Claims Tribunal, the hitherto well-known *Nottebohm* case, pointed out the list of factors to be assessed in view of the arbitral practice to ascertain the effective nationality.[115]

The Iran-United States Claims Tribunal was established in 1981 as a result of the events related to the crisis in relations between the two countries following the Iranian revolution.[116] This Tribunal has been described as "the most significant arbitral body in history" due to the relevant precedents it has issued, of which there are several on diplomatic protection and dual nationality.[117] Specifically, the *Esphahanian*, *Golpira*, *Malek,* and *Danielpour* cases have

[111] *Idem*.

[112] Vermeer-Künzli, Annemarieke, "Nationality and diplomatic protection…", *cit.*, pp. 83-84.

[113] Arbitral Award, *Canevaro Claim (Italy v. Peru)*, Permanent Court of Arbitration, 1912, p. 3.

[114] Decision No. 55, *Mergé Case…*, *cit.*, p 247.

[115] Second Phase Judgment, *Nottebohm Case…*, *cit.*, p. 22.

[116] Iran-United States Claims Tribunal, *About*, 17 November 2020. https://iusct.com/about/

[117] Caron, David D., "The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution", *American Journal of International Law*, 1990, Vol. 84, Issue 1, p. 104.

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interesting developments in the weighting of the effective and dominant nationality of both United States and Iran nationals, each of which will be evaluated in the following lines.

The *Esphahanian* case dealt with a controversy between Mr. Nasser Esphahanian and Bank Tejarat claiming payment of US$704,691.85 due to a dishonored check drawn by the latter bank's predecessor, Iranians Bank.[118] Iran contested that Mr. Esphahanian could not bring this claim against Iran because of his Iranian nationality,[119] which was in line with the principle of non-responsibility explained in section III of this paper. However, Mr. Esphahanian mentioned that due to the fact that he naturalized as a US citizen in 1959, he had closer links to the United States, which made valid his claim against Iran.[120]

The Tribunal decided that Mr. Esphahanian's factual ties prior to, contemporaneous with, and subsequent to his naturalization as a US citizen were closer to that country because, although he spent his childhood in Iran, retained his Iranian passport and made family visits in Iran, his link to the United States was more significant because he completed his education there, exercised his voting rights, was active in cultural, civic and business activities, and worked for a US company in Iran. In short, the Tribunal made use of the principle of effective and dominant nationality to perform the balancing, but as it also established that Mr. Esphahanian could maintain significant contacts with his Iranian nationality and it still would not be the effective one, Annoni & Forlati established that the Tribunal rather used the principle of predominance, which will be explained in detail in later lines.[121]

Given that the Iranian counterpart reproached the decision reached therein, Iran requested a principle decision by the full Tribunal to interpret the term "national" of the Algiers Accords,[122] in order to decide whether it covered dual nationals with the nationality of the respondent State.[123] In reality, this petition was basically a challenge between the principle of non-responsi-

[118] Final Award No. 31, *Esphahanian Case (Nasser Esphahanian v. Bank Tejarat)*, Iran-United States Claims Tribunal, 1983, pp. 2-5.

[119] *Idem.*

[120] *Idem.*

[121] Vermeer-Künzli, Annemarieke, "Nationality and diplomatic protection…", *cit.*, p. 86.

[122] The Algiers Accords is the legal document by which the Iran-United States Claims Tribunal got established.

[123] A/18 Decision No. 32, Iran-United States Claims Tribunal, 1984, p. 1.

bility and the principle of effective nationality,[124] as Iran considered that dual nationals could not make claims against them if they were also their nationals. Despite Iran's intentions, the full Tribunal ruled in Decision A/18 that "[T]he applicable rule of international law is that of dominant and effective nationality".[125]

Due to that decision, the Tribunal decided to solve cases involving dual nationals of both countries in light of the principle of predominance, thus the *Golpira*, *Malek,* and *Danielpour* cases followed the same rationale.[126] Moreover, the Tribunal did not add new criteria to determine predominance, but rather based its decisions on factors established in other case law, such as "habitual residence, center of interests, family ties, participation in public life and other evidence of attachment".[127] However, in the *Malek* and *Danielpour* cases, the Tribunal put special emphasis on the self-identification of the individual with respect to nationality for the purpose of diplomatic protection.[128] For example, in the interlocutory award of the *Malek* case, it was found that "[T]he entire life of the Claimant, from birth, and all the factors which, during this span of time, evidence the reality and the sincerity of the choice of national allegiance he claims to have made, are relevant".[129]

Hence, there is ample case law to establish that when a case of diplomatic protection arises in which an individual has both the nationality of the Claimant and Respondent, a balance of the factual links with both countries must be conducted based on the principle of predominant nationality. This was further confirmed in Article 7 of the ILC Draft Articles on Diplomatic Protection:

> Article 7: Multiple nationality and claim against a State of nationality
>
> *A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is pre-*

[124] Vermeer-Künzli, Annemarieke, "Nationality and diplomatic protection…", *cit.*, p. 87.

[125] A/18 Decision No. 32…, *cit.*, p. 1.

[126] Vermeer-Künzli, Annemarieke, "Nationality and diplomatic protection…", *cit.*, pp. 87-88.

[127] *Idem*.

[128] *Idem*.

[129] Interlocutory Award, *Malek Case (Reza Said Malek v. Iran)*, Iran-United States Claims Tribunal, 1988, p. 3.

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dominant, both at the date of injury and at the date of the official presentation of the claim.[130]

In addition, in Commentary 5 of Article 7, it was stated that the weight attributed to each factor depended on the circumstances of each case. Lastly, on the same Commentary, the ILC established a list of factors to be assessed, of which the elements of place, curricula, language of education, use of language, taxation, bank account, social security insurance, and military service stand out as they have not been shared in this section.

V. A functional approach for purchased nationality

1. *The real intention of the Nottebohm Case Judgement*

Having reviewed in detail the genesis, implications, and criticisms of the genuine link theory derived from the *Nottebohm* case, this paper will now turn to analyze whether such a doctrine is legitimized and capable of judging CIPs. First of all, I would like to stress that I consider, in line with the conclusions of the *Flegenheimer* case, that the ICJ never intended to establish in its judgment a general international law rule of genuine link requirement in matters of nationality in order for a State to exercise diplomatic protection. This would have been contrary to the factual conditions of the times in which it was issued, since according to the dissenting Judges Read and Guggenheim it was evident that even in those times, States granted their nationality to the descendants of their nationals residing abroad for centuries in an *ius sanguinis* rationale, without any other element of connection with the State.[131] Therefore, I consider that it is not conclusive to assume that the genuine link theory is a rule of general international law to exercise diplomatic protection, a reasoning that was confirmed by Article 4 of the ILC Draft Articles on Diplomatic Protection in the field, naturally, of diplomatic protection.

Likewise, on the specific issue of diplomatic protection, I partially concur with the views of the dissenting Judges on the inapplicability of the arbitral and judicial decisions that the Court used to assess the criteria necessary to

[130] ILC Draft Articles on Diplomatic Protection, Art. 7, 2006 (emphasis added).

[131] Kunz, Josef L.,"The Nottebohm…", *cit.*, p. 554.

determine genuine links to a nationality. The latter, since Mr. Nottebohm's case was not a dual or multiple nationality situation and the factors that the Court brought to the discussion were intended to weigh which nationality has a closer link to an individual. However, and as I will establish in later lines, I consider that the Court studied these factors with a different intention.

Nevertheless, in my opinion, the *Nottebohm* case did provide a solid and legitimate precedent to condemn naturalizations carried out in violation of the general principle of law of good faith. Specifically, in its aspect of abuse of rights due to the wide margin of discretion that States have in their sovereign right to decide who are their nationals. Indeed, the genuine link theory was brought to the analysis because of Mr. Nottebohm's extremely tenuous connections with Liechtenstein, given that he acquired the nationality of said State with the sole intention of evading Guatemala's rule of war against his property and person.

I therefore disagree with the views of the dissenting Judges that Mr. Nottebohm's motives for naturalization were hardly admissible and extremely complicated to prove because, among other reasons, Guatemala was not in a state of war with Germany when he acquired his Liechtenstein nationality, and that there was no rule of municipal or international law that would invalidate his naturalization on such a ground. The above, bearing in mind that from a simple historical account of the facts, Mr. Nottebohm conveniently acquired the nationality of a state that declared its permanent neutrality in the Second World War and divested itself of its German nationality only two months after the outbreak of the conflict. In addition, he fast-tracked the nationality of a neutral state (Liechtenstein) by means of a special agreement under which he effectively paid a *sui generis* naturalization tax for naturalization without delay. Hence, the rush with which he acquired his neutral Liechtenstein nationality after the immediate outbreak of the Second World War proves, in my opinion, that he was indeed trying to shield his assets from his status as an enemy alien in Guatemala, given that his fears were ultimately realized as Guatemala ended up declaring war on the Axis Powers.

On the other hand, these acts, since they were a fictitious exercise of a right to evade a legal rule, constitute a violation of the general principle of law prohibiting abuses of rights. The foregoing, as Mr. Nottebohm's motives to naturalize, namely as a nationality of convenience to evade the Guatemalan rule of war without establishing a social fact of attachment and a genuine connection with Liechtenstein, constituted a violation of international law

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through the general principle of law previously stated, which counters the aforementioned opinions of the dissenting Judges. Consequently, this paper holds, along the lines mentioned by Sloane, that the real intention of the Second Phase Judgement of the *Nottebohm* case was to invalidate naturalizations carried out in violation of the general principle of law prohibiting abuses of rights and not to legislate a new rule mandating a genuine link requirement of nationality for a State to be able to exercise diplomatic protection.

Furthermore, it is argued that a situation of abuse of rights in the context of nationality conferral comes not only from the side of the applicant but also from the country that creates a nationality law that does not pay due regard for the concept of nationality observed in international relations. As stated in subsection B of section III, a State with a wide margin of discretion to exercise a right must do so reasonably and honestly, paying due regard for or reasonable regard for the mutual interests of the parties concerned. The limits of a country's sovereign right to define its nationals and its nationality law are not, in principle, well defined, hence they remain undivided. Therefore, when exercising this right, States must observe due regard for the principles of law generally recognised with regard to nationality, which are to possess significant ties, even if they are tenuous, but never extremely tenuous, with the State of nationality.

This is true considering that across the world, municipal law relies overwhelmingly on significant links between the individual and the State to acquire the nationality of a State.[132] Moreover, even from the times of Aristotle, citizenship was meant to comprise "[P]olitical relations; as such, it is expected to both reflect and generate notions of participation, co-governance, risk-sharing, and some measure of solidarity among those constituting the body politic".[133] Therefore, the concept of nationality, since memorable times, was intended to generate a social fact of connection and a genuine link with a country, which was exactly what the Court found in the *Nottebohm* case, using the criteria used in dual nationality cases to evaluate what the legal community understands by nationality; that was the true intention they assessed those precedents. Evidently, our globalized world has diminished the "romantic" conceptualization of nationality, but its true purpose remains strong, that of

[132] Crawford, James & Brownlie, Ian, *Brownlie's Principles...*, *cit.*, p. 495.

[133] Sachar, Ayalet, "Citizenship...", *cit.*, p. 940; Henrard, Kristin, "The Shifting Parameters of Nationality", *Netherlands International Law Review*, Vol. *65,* Issue 3, 2018, pp. 280-281.

creating a meaningful bond with a country, whether from the perspective of *ius soli*, *ius sanguinis,* or naturalization.

2. *The Need for Significant Links in CIPs*

It is completely understandable that, with budget crises and a general need to improve the availability of resources, States are looking for creative ways to generate new lucrative sources of revenue, but, as far as CIPs are concerned, this paper argues that States must ensure that such programmes generate significant links with them and their prospective nationals because nationality is not a commodity subject to marketization. That is, I am not entirely against CIPs, they obey a legitimate interest of the States in the exercise of a sovereign right, what I am against is the abuse of such modality of IIP, since investments should be followed by additional requirements to ensure that the investor produces a genuine link and social connection with the country. The above, in order to preserve the values stemming from the sacrosanct concept of nationality and prevent it from becoming a mere commodity subject to commercialization. Moreover, if countries continue with cash-for-passport schemes, their nationality might not be recognized by third countries, and diplomatic protection would be undermined because States would be legitimized to contest its conformity with international law, given that, in my opinion, such schemes of CIP are an abuse of the right of States to confer nationality.

The first risk linked to CIPs without due regard to the concept of nationality in international relations is that third States may legitimately refuse to recognize the nationality law that allowed the attribution of nationality. This, bearing in mind that the aforementioned Article 1 of the CCNL establishes that States have the right to do exactly that. Moreover, in the *Nottebohm* case, which interestingly also concerns a CIP that did not require any substantial requirement apart from money, it was also stated that States cannot claim that the nationality rules they have established are entitled to be recognized by another State unless they are in conformity with the general objective of establishing a genuine legal bond with the individual.

For instance, in 2014 the United States issued a warning about St. Kitts and Nevis' cash-for-passport CIP because applicants were abusing it to mask their identity and geographic provenance, since the latter country was only concerned about whether or not they made the wire transfer. Consequently,

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"[C]anada soon thereafter revoked St. Kitts and Nevis citizens' visa-free travel, due to security and due diligence concerns about the country's cash-for-passport programme".[134] These examples demonstrate that States are willing and able to restrict visa-free travel privileges to nationals of passport-selling countries; nothing prevents them from further refusing to recognize their nationality as a whole, they are legitimized to do it as CIPs without due regard to the concept of nationality in international relations are contrary to the general principle of law prohibiting abuses of rights.

Another risk that entangles this type of CIP concerns the field of diplomatic protection. The latter, as third States, may also challenge in the international arena the legality of a nationality granted under such conditions in a case before an international court or tribunal. This is without considering the genuine link theory of the *Nottebohm* case as a rule of international law for the exercise of diplomatic protection, but rather as a prohibition to grant naturalization in the context of abuse of rights. As seen in the *Nottebohm* case, the abuse of rights may come from the side of the applicant, that is, Mr. Nottebohm, or, as explained in this paper, from the nationality law of a State abusing its broad discretionary power to grant nationality. It is my opinion that if countries with this scheme of CIPs continue to grant nationality under these terms, we will see more cases of third States alleging violations of the general principle of good faith law because naturalizations arising from those CIPs are an abuse of rights since they fail to take due regard for the generally accepted concept of nationality. Moreover, it is evident that in dual or multiple nationality cases where the predominance principle is applied, the nationality of a CIP requiring only a wire transfer will in all likelihood be the nationality least proximate to an individual.

Therefore, and as a final note, this paper maintains that States must design CIPs that include requirements that produce significant links between them and the naturalized individuals, accepting cash to issue passports without any other substantial requirement is not in conformity with international law. As a best practice, I would like to highlight the Austrian CIP, which grants citizenship in exchange for a substantial investment (usually between 2 and 10 million euros) in the Austrian economy that generates a significant number of full-time jobs, a strong economic performance, among others. However, in order to apply, individuals must first prove: (i) a clean criminal record;

[134] *Ibidem*, p. 952.

(ii) that they have sufficient funds to make the investment; (iii) that the investment is legal and legitimate; (iv) they have German language skills; (v) that they have knowledge of Austria's democratic system and history of Austria and Vienna; (vi) uninterrupted legal residence; and (vii) must renounce to their current nationality (there are exceptions).[135] This model ensures both that the Austrian government attracts investment from wealthy individuals and that they establish meaningful links with their country, making this CIP a winning scheme that complies with international law and avoids the risks mentioned above.

VI. Conclusions

In his dissenting opinion of the Second Judgement of the *Nottebohm* case, Judge Read eloquently pronounced himself on the desirability of establishing limitations to the discretionary rights of States to decide who are their own nationals and to protect such nationals. This statement encompasses the ideal that underlies this paper since it is clear that, in the context of nationality, limits on State discretion are more important than ever in order to prevent the market from blurring the sacrosanct purpose of nationality in order to turn citizenship into a mere marketable commodity. In that sense, I hope this paper helps policymakers, politicians, legal scholars, lawyers, students, and anyone else interested in the global regime of nationality to design CIPs or other novel nationality regimes that do not undermine the social and political essence of nationality. All of this, to generate a broader conversation that recognizes that sovereign rights, even those outside the realm of nationality, are not absolute and are governed by the general principle of the law of good faith, which must continue to act as a guiding compass to maintain the stability of the international system that our forefathers and foremothers fought so hard to create.

[135] Global Citizen Solutions, *Austria Citizenship by Investment*, 30 April 2024. https://www.globalcitizensolutions.com/austria-citizenship-by-investment/

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