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**BREAKING THE GENUINE LINK:  
THE CONTEMPORARY INTERNATIONAL LEGAL  
REGULATION OF NATIONALITY**

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## Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality

Robert D. Sloane\*

*The concept of nationality traditionally mediated the relationship between the individual and the state in a bygone era in which international law regarded only the latter as a genuine subject of the law; today, its international legal functions have expanded. Yet, as in the past, it remains unclear whether and how international law limits the otherwise almost plenary competence of states to confer their nationality by their internal laws in a way entitled to international recognition. After the International Court of Justice's ("ICJ") 1955 judgment in *Nottebohm*, however, lawyers began to express this limit with a kind of doctrinal mantra: a state's national, to be a bona fide national entitled to recognition as such at the international level, must have a "genuine link" to that state. This Article critiques the genuine link theory and proposes a functional account of nationality, which, it argues, is descriptively more accurate and normatively more appealing. *Nottebohm* is properly read as a narrow decision in which the ICJ tacitly invoked a general principle of law, viz., abuse of rights, to prevent what it saw as a manipulative effort by the claimant to evade a critical part of the law of war. But whatever the merit of this revisionist reading of *Nottebohm*, the genuine link theory proves anachronistic today in view of profound changes in the manifold functions that nationality serves in contemporary international law. To illustrate, the Article suggests that the abuse-of-rights principle would also be more appropriate and effective than the genuine link theory to regulate nationality in one contemporary context that has provoked debate recently: investor-state arbitration. But the abuse-of-rights principle is no panacea. An atomized conception of nationality, which has been liberated from the genuine link theory and regulated by its functions, would best serve the policies of contemporary international law in diverse subfields.*

### I. INTRODUCTION

Since the basic structure of classical international law originated in the early public law of Europe (an origin conventionally dated to the Peace of Westphalia), nationality has been a key strut of the system. Because states were conventionally the principal subjects of international law, nationality became an indispensable legal concept, "the link between the individual and the law of nations."<sup>1</sup> It mediated the derivative rights and obligations of individuals relative to states in diverse areas, including diplomatic protection, war, state responsibility, jurisdiction, and extradition.<sup>2</sup> Yet nationality is a legal term of art which, as Justice Holmes wrote of words, "may vary

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\* Associate Professor of Law, Boston University School of Law. I acknowledge with gratitude the thoughtful critiques and suggestions of Daniela Caruso, Anthony J. Colangelo, Gary Lawson, William W. Park, W. Michael Reisman, Kenneth W. Simons, Anthony C. Sinclair, Peter J. Spiro, and Siegfried Wiessner; and the research assistance of Alessandro Sacerdoti and Mary Lord.

1. J. Mervyn Jones, *The Nottebohm Case*, 5 INT'L & COMP. L.Q. 230, 239 (1956).

2. See OPPENHEIM'S INTERNATIONAL LAW 849, 857-59 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 374 (6th ed. 2003).

greatly in color and content according to the circumstances and time in which it is used.”<sup>3</sup> It can best be defined in terms of the aggregate, protean bundle of rights and duties attached to it by law, both national and international.<sup>4</sup> While nationality serves vital roles in international law (insofar as states may, for example, prescribe law governing their nationals, exercise extraterritorial jurisdiction over them, espouse claims on their behalf, and incur liability for their wrongs), by far the most significant legal consequences of nationality remain internal:<sup>5</sup> they consist in the rights a person enjoys and the duties he, she, or (for juridical entities) it bears under the internal law of the national’s state.<sup>6</sup>

International law, in part for that reason,<sup>7</sup> affords states broad latitude to confer nationality. The Permanent Court of International Justice (“PCIJ”) said in the *Tunis-Morocco Nationality Decrees* opinion that nationality falls within a domain of legal competence reserved to internal law, although it may be limited by treaty obligations.<sup>8</sup> Yet apart from treaty limits, efforts to codify the international regulation of nationality generally include no more than vague assertions that “the power of a state to confer its nationality is not unlimited.”<sup>9</sup> The 1930 Hague Convention characteristically stipulated that “[i]t is for each State to determine under its own law who are its nationals,”<sup>10</sup> but that a state’s ascription of nationality under internal law “shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.”<sup>11</sup> It did not specify the content of

3. *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

4. See Siegfried Wiessner, *Blessed Be the Ties That Bind: The Nexus Between Nationality and Territory*, 56 *Miss. L.J.* 447, 451 (1986); see also PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 31–32 (1956); Helen Silving, *Nationality in Comparative Law*, 5 *AM. J. COMP. L.* 410, 410 (1956).

5. *Nottebohm (Liech. v. Guat.)*, 1955 I.C.J. 4, 20 (Apr. 6) (emphasizing that “nationality has its most immediate, its most far-reaching and, for most people, its only effects within the legal system of the State conferring it”). For consistency, I will generally use the word internal (rather than the semantically equivalent adjectives national, local, domestic, or municipal) to refer to the law of a sovereign state in contradistinction to international law.

6. *Id.* (“Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals.”); see also Silving, *supra* note 4, at 411; cf. *Kawakita v. United States*, 343 U.S. 717, 734 (1952) (“American citizenship, until lost, carries obligations of allegiance as well as privileges and benefits.”).

7. The ICJ said in *Nottebohm* that “the diversity of demographic conditions has thus far made it impossible for any general agreement to be reached on the rules relating to nationality, although the latter by its very nature affects international relations. It has been considered that the best way of making such rules accord with the varying demographic conditions in different countries is to leave the fixing of such rules to the competence of each State.” *Nottebohm*, 1955 I.C.J. at 23.

8. *Nationality Decrees Issued in Tunis and Morocco (French Zone)*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 24 (Feb. 7); see also *Acquisition of Polish Nationality*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 7, at 16 (Sept. 15).

9. *The Law of Nationality* art. 2, 23 *AM. J. INT’L L. SPEC. SUPP.* 11, 13 (1929) [hereinafter *Harvard Convention*].

10. *Convention on Certain Questions Relating to the Conflict of Nationality Laws* art. 1, Apr. 12, 1930, 179 L.N.T.S. 89 [hereinafter *Convention on Conflict of Nationality Laws*] (the Convention never entered into force).

11. *Id.*

the international custom or generally recognized principles to which it referred. Nor, sixty-seven years later, did the 1997 European Convention on Nationality, which largely reiterated the Hague Convention formula.<sup>12</sup>

In fact, except by the use of hyperbolic examples—for example, where a state purports to confer its nationality on all persons within a five-hundred mile radius of it or everyone with a particular political persuasion<sup>13</sup>—it has proved difficult to specify the general limits, if any, on state competence to confer nationality. Rather than articulate constraints on the *right* of states to confer their nationality, international law takes an indirect approach: it limits the *obligation* of states and international fora to recognize exorbitant or unreasonable ascriptions of nationality.<sup>14</sup> That is, it limits the ability of states and their nationals to project the legal rights and consequences of nationality into the international arena.

After the ICJ's judgment in *Nottebohm*,<sup>15</sup> international tribunals and lawyers began to express this limit with a kind of doctrinal mantra derived from that decision: a national, it is said, must evince a "genuine link" to his state of nationality. This link, in *Nottebohm*'s words, denotes "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."<sup>16</sup> Subsequent international decisions, jurists, and others adopted and expanded *Nottebohm*'s genuine link theory—even though those parts of the opinion that expound it should be characterized as dicta. Jurisprudence and scholarship invested it with an imprimatur of positive legal authority. It became a dogmatic constraint on the otherwise almost plenary competence of states to confer nationality by internal law. Yet despite the oft-quoted rhetoric of the *Nottebohm* majority, which ostensibly supports the genuine link theory, scrutiny of the opinion as a whole reveals that the ICJ's actual concern in *Nottebohm* had little to do with genuine links. The genuine link theory fails to capture both the social context and political dynamics that animated the opinion, and it disregards the ICJ's self-conscious effort to narrowly circumscribe the scope of its holding.

This Article critiques the genuine link theory and proposes a functional account of nationality's regulation, which, it argues, is descriptively more accurate and normatively more appealing.<sup>17</sup> It argues that the genuine link theory—not in every particular context but as a purported *general* norm of

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12. European Convention on Nationality art. 3, Nov. 6, 1997, 37 I.L.M. 44 (the Convention entered into force in March 2000).

13. Harvard Convention, *supra* note 9, at 26.

14. *Iran v. United States*, Case No. A/18, 5 Iran-U.S. Cl. Trib. Rep. 251, 260 (1984) ("International law . . . does not determine who is a national, but rather sets forth the conditions under which that determination must be recognized by other States.")

15. *Nottebohm* (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6).

16. *Id.* at 23 (emphasis added).

17. Of course, *Nottebohm*'s genuine link theory did not purport to regulate nationality for *all* purposes; only for certain ascriptions of nationality, as explained below. But its practical effect has been disproportionate to that relatively modest scope.

international law—originates in a misreading of *Nottebohm*. In particular, it originates in an unwarranted reliance on *Nottebohm*'s romantic dicta about nationality. Today, if not at the time of the *Nottebohm* judgment, that theory often proves either anachronistic or incongruous in theory and practice. Furthermore, properly construed and limited by the ICJ's own words, *Nottebohm* does not involve, as early critics charged, judicial legislation (except insofar as its dicta has been confused with its holding, as it has been). Instead, it involves the ICJ's tacit application of a general principle of law, one of the enumerated sources that Article 38(1) of the ICJ Statute<sup>18</sup> enjoins the Court to apply—that of abuse of rights.

Briefly, in the weeks immediately before Germany invaded Poland, Friedrich Nottebohm, a German national by birth but longtime resident of Guatemala, with the acquiescence of the tiny Principality of Liechtenstein, abused the liberal international legal regulation of nationality in an effort to evade the law of war. The ICJ refused to countenance this, although it thereby left him without a remedy for what may have been a viable claim. And in an opinion written in the wake of World War II, Nottebohm's status as a former Nazi may well have influenced the ICJ's decision.<sup>19</sup> But whatever the accuracy or wisdom of the decision relative to Nottebohm, the long-term consequences of the Court's judgment lie in the regrettable fact that the majority seized the opportunity to expound a conception of nationality that rapidly "radiated throughout the international law of nationality,"<sup>20</sup> well beyond the particular context of the *Nottebohm* judgment. Notwithstanding the genuine link theory's questionable pedigree and anachronistic vision of nationality, international lawyers began to, and often still do, view nationality through the prism of that theory.

In part, then, this Article questions the traditional reading of *Nottebohm*, in particular, as it has developed into a kind of unreflective dogma about general international law. But the Article also has an affirmative agenda. It proposes that contemporary international law should candidly analyze and regulate nationality in terms of its functions so as to better effectuate the diverse roles that nationality serves today. At times, abuse of rights may well offer an appropriate and effective tool for the modern legal regulation of nationality—for example, in the context of the burgeoning field of investor-state arbitration. In this and comparable contexts, it supplies international adjudicators with a coherent and flexible rationale, which may be applied in place of the misguided genuine link theory, to deter or void manipulative ascriptions of nationality. Yet the abuse-of-rights principle is not a regulatory panacea. In other areas of the law, the genuine link theory elaborated in *Nottebohm*'s dicta may remain appropriate and effective. For example, it may

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18. Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993 [hereinafter ICJ Statute].

19. See Josef L. Kunz, *The Nottebohm Judgment (Second Phase)*, 54 AM. J. INT'L L. 536, 540 (1960).

20. *Iran v. United States*, Case No. A/18, 5 Iran-U.S. Cl. Trib. Rep. 251, 263 (1984).

be proper in certain human rights cases, where nationality serves to protect precisely the kind of deep social bonds stressed in *Nottebohm* against a formal nationality imposed by law.<sup>21</sup> In the context of armed conflict and international criminal law, still another regulatory approach<sup>22</sup> may be appropriate. And so forth.

Part II analyzes how traditional international law regulated the ascription of nationality, insofar as it did. What emerges is that although general international law theoretically imposed limits on state competence in this regard, those limits could not be articulated concretely. They also lacked a coherent conceptual basis.

Part III revisits *Nottebohm* in some detail. It argues that the decision should be read as a relatively narrow application of the abuse-of-rights principle. The ICJ did not, despite dicta suggesting otherwise, judicially legislate from whole cloth a novel doctrine of international law regulating nationality, viz., that a national, to *be* a bona fide national entitled to recognition as such at the international level, must possess a genuine link to his state of nationality. Analysis of the opinion as a whole exposes this theory as technically inaccurate, based on the positive law of the era, and substantively misguided in terms of international policy.

Part IV argues that the sociopolitical, romanticist vision of nationality articulated by the *Nottebohm* majority has also become increasingly anachronistic and misplaced today. Part V first offers an extended illustration of how abuse of rights (the actual and more cogent rationale for *Nottebohm*) may operate to regulate ascriptions of nationality in one of the manifold fields of contemporary international law in which it serves a key role: investor-state arbitration. It also shows how functionally analyzing nationality and then regulating it commensurately may (or already does) operate in several other fields, such as international humanitarian law, EU law, and human rights.

The Article concludes that a conception of nationality that has been liberated from the genuine link theory and reconceptualized by function offers a more accurate and constructive way to understand and regulate nationality in contemporary international law. In short, the form that international regulation of nationality takes should be commensurate with the functions that it serves in each of its diverse modern contexts.

## II. THE INTERNATIONAL LEGAL REGULATION OF NATIONALITY

Nationality has long been a puzzle for international law: it permeates the international legal system, but that system relegates its definition and regulation, with few exceptions, to—often diverse—internal legal systems. On

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21. See, e.g., *Beldjoudi v. France*, 234 Eur. Ct. H.R. (ser. A) (1992). For analysis, see *infra* text accompanying notes 296–301.

22. See, e.g., *Prosecutor v. Delalić*, Case No. IT-96-21-A, Judgment, ¶¶ 56–84 (Feb. 20, 2001). For analysis, see *infra* text accompanying notes 304–314.

the one hand, that is, because of its traditional role as the intermediary between the individual and the state, it is indispensable to many areas of international law:<sup>23</sup> states may, for example, espouse the claims of nationals (but only their nationals);<sup>24</sup> prescribe law for and exercise extraterritorial jurisdiction over their nationals,<sup>25</sup> and increasingly, those who harm their nationals;<sup>26</sup> and assert wartime rights on behalf of their nationals, who enjoy protection *as* nationals of a “High Contracting Party” to the Geneva Conventions.<sup>27</sup> In the modern era, international human rights law also creates obligations for states principally (though not exclusively) relative to their own nationals;<sup>28</sup> the contemporary international regime for the protection of refugees relies on the concept of nationality,<sup>29</sup> and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“ICSID Convention”), a centerpiece of modern investor-state arbitration, restricts the Centre’s jurisdiction in part by nationality requirements for foreign investors.<sup>30</sup> Investment instruments that supply the substantive protection for foreign investments, including, for example, more than 2000 bilateral investment treaties (BITs),<sup>31</sup> the North American Free Trade Agreement (NAFTA),<sup>32</sup> and the European Energy Charter Treaty,<sup>33</sup> likewise limit their scope by nationality.

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23. See Kim Rubenstein & Daniel Adler, *International Citizenship: The Future of Nationality in a Globalized World*, 7 IND. J. GLOBAL LEGAL STUD. 519, 525 (2000).

24. *Panevezys-Saldutiskis Railway (Est. v. Lith.)*, 1939 P.C.I.J. (ser. A/B) No. 76, at 16 (Feb. 28) (“This right [to resort to ‘diplomatic action or international judicial proceedings’] is necessarily limited to intervention on behalf [of the state’s] own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection.”).

25. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (1987).

26. Passive personality (or passive nationality) jurisdiction remains controversial, but states increasingly accept it as a legitimate basis for the exercise of jurisdiction under certain circumstances. See *id.* § 402 cmt. g.

27. *E.g.*, Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

28. *E.g.*, International Covenant on Civil and Political Rights art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. Furthermore, because nationality is itself the source of countless rights and privileges under internal law, international human rights law is solicitous of the right *to* a nationality. Universal Declaration of Human Rights art. 15, G.A. Res. 217A (III), at 71, U.N. Doc. A/217 (Dec. 8, 1948) [hereinafter UDHR]; see Convention on the Rights of the Child art. 7(1), Nov. 20, 1989, 1577 U.N.T.S. 3; American Convention on Human Rights art. 20, Nov. 22, 1969, 1144 U.N.T.S. 123; see also Myres S. McDougal et al., *Nationality and Human Rights*, 83 YALE L.J. 900 (1974).

29. Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 150; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

30. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 25, Mar. 18, 1975, 17 U.S.T. 1270, 575 U.N.T.S. 160 [hereinafter ICSID Convention].

31. *E.g.*, Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., arts. I(1)(c), II, Nov. 14, 1991, S. TREATY DOC. 103- 2 (1994).

32. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 107 Stat. 2057.

33. Energy Charter Treaty art. 1(7), Dec. 17, 1994, 2080 U.N.T.S. 102.



On the other hand, international law still does not, with few and vague exceptions, seek to regulate the sovereign competence of states to designate national or juridical persons as their nationals. Classical international law regards the ascription of nationality as a question of internal law subject only—vis-à-vis the obligation of other states to recognize some ascriptions of nationality—to limits imposed by treaty and (perhaps) also custom or general principles. In 1923, the PCIJ said in well-known dicta that “in principle” nationality remains within a “reserved domain” of national legal competence, although states may voluntarily accept constraints imposed by treaty.<sup>34</sup> The same court’s 1923 *Polish Nationality* opinion confirmed that although “generally speaking, it is true that a sovereign state has the right to decide what persons shall be regarded as its nationals, it is no less true that this principle is applicable only subject to the Treaty obligations” of that state.<sup>35</sup> The devil is in the (lack of) details in the qualification, “generally speaking.”

While *Tunis-Morocco* seemed to suggest that, absent treaty obligations, custom did not, at least at that stage in international law’s development, limit state competence to ascribe nationality,<sup>36</sup> it quickly became clear that many international lawyers thought otherwise: namely, that, customary limits exist, even if their precise content is difficult to define concretely. In 1929, research at the Harvard Law School culminated in a draft convention and commentary on the international regulation of nationality. Picking up on the “generally speaking” qualification in *Polish Nationality*, the commentary suggested that the PCIJ had intended this phrase to refer “not only to the limitations which a state may voluntarily accept through conventions with other states, but also to the limitations placed upon the freedom of a state to claim persons as its nationals by international law.”<sup>37</sup> It implied, that is, that custom and general principles—and not only treaty obligations—limit the reserved domain of states’ internal competence to confer nationality.<sup>38</sup> But the commentary did not specify the nature or content of those limits.

The draft convention stipulated that “each state may determine by its law who are its nationals, subject to the provisions of any special treaty to which the state may be party; but under international law the power of a state to confer its nationality is *not unlimited*.”<sup>39</sup> The commentary explained:

It may be difficult to precise [sic] the limitations which exist in international law upon the power of a state to confer its national-

34. Nationality Decrees Issued in Tunis and Morocco (French Zone), Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 24 (Feb. 7).

35. Acquisition of Polish Nationality, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 7, at 16 (Sept. 15) (emphasis added).

36. See Nationality Decrees Issued in Tunis and Morocco (French Zone), 1923 P.C.I.J. at 23.

37. Harvard Convention, *supra* note 9, at 25.

38. See, e.g., Nationality Decrees Issued in Tunis and Morocco (French Zone), 1923 P.C.I.J. at 23.

39. Harvard Convention, *supra* note 9, at 13 (art. 2) (emphasis added).

ity. Yet it is obvious that some limitations do exist. They are based upon the historical development of international law and upon the fact that different states may be interested in the allegiance of the same natural person. If State A should attempt, for instance, to naturalize persons who have never had any connection with State A, who have never been within its territory, who have never acted in its territory, who have no relation whatever to any persons who have been its nationals, and who are nationals of other states, it would seem that State A would clearly have gone beyond the limits set by international law.<sup>40</sup>

By offering this hyperbolic example,<sup>41</sup> however, the commentary did little to clarify the limits that general international law imposes.<sup>42</sup> Nor did it propose limits, *de lege ferenda*, based on the competing policies or values at stake.

Article 1 of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws similarly elided the issue.<sup>43</sup> Echoing the Harvard Convention, it simply provided: "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."<sup>44</sup> The Hague Convention itself did not specify what limits "international custom" or "the principles of law generally recognised with regard to nationality" impose. The Preparatory Committee apparently had in mind certain typical practices such as the accepted validity (1) of bestowing nationality based on descent, birth on state territory, marriage to a state's national, and the transfer of territory; and (2) conversely, of divesting a person of nationality based on the acquisition of a new nationality, marriage to a foreign national, or "*de facto* attachment to another country accom-

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40. *Id.* at 26.

41. While hyperbolic, the example is not hypothetical. After the Bolshevik Revolution, for example, Russia purported to naturalize all workers and peasants worldwide.

42. A couple of exceptions set forth in the Harvard Convention deal with the children of diplomats. See, e.g., Harvard Convention, *supra* note 9, at 13 (arts. 5–6). Other proposed substantive exceptions appear in Article 4, which prohibits a state from conferring its nationality on a person "at birth (*jure* [sic] *sanguinis*) upon a person born in the territory of another state, beyond the second generation of persons born and continuously maintaining an habitual residence therein, if such person has the nationality of such other state," and Article 14, which prohibits a state from naturalizing "an alien who has his habitual residence within the territory of another state." Yet all of these limitations were *de lege ferenda*; none had achieved the status of clear positive law. *Id.*

43. See Convention on Conflict of Nationality Laws, *supra* note 10.

44. *Id.* art. 1. Article 3 of the European Convention on Nationality provides in equally uninformative terms that "[e]ach State shall determine under its own law who are its nationals" and that "[t]his law shall be accepted by other States in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognised [sic] with regard to nationality." European Convention on Nationality, *supra* note 12.

panied by a failure to comply with provisions governing the retention of the nationality, [and] transfer of territory.”<sup>45</sup>

None of these affirmative practices indicate what limits, if any, general international law imposes on internal law that might affect the obligation of other states to recognize a national at the international level. At any rate, because “[t]he representatives of Governments in the First Committee of the Hague Conference of 1930 could not agree on” the content of custom or general principles in this regard, ultimately “the rule was . . . adopted in the form contained in Article 1,” as quoted above.<sup>46</sup> In short, international lawyers in the interwar period seem to have affirmed the existence of limits, beyond those assumed by treaty, imposed by international law on state competence to ascribe nationality by internal law—or, more precisely, limits imposed on the obligation of *other* states and international fora to recognize certain ascriptions at the international level. Yet this affirmation rings a bit hollow. International lawyers during this era were unable to specify those limits except in uninformative and abstract terms. The situation at the time has been aptly characterized by one recent writer as “a mess.”<sup>47</sup>

After World War II, the advent of international human rights law, the humanization of the law of war,<sup>48</sup> and the creation of a new legal regime for refugee protection—and, in general, the introduction of the individual as a subject of international law—combined to enhance the importance of nationality and the perceived need for its international legal regulation. In 1951, the new International Law Commission (“ILC”) therefore appointed Manley O. Hudson as special rapporteur to prepare a study on nationality. In his final report, published in 1952, he asked the question left open by interwar international law: “whether there exist any rules of international law which limit the sovereign jurisdiction of a State to confer, withhold or cancel its nationality—apart from treaty obligations[.]”<sup>49</sup>

Hudson concluded that, with few exceptions,<sup>50</sup> national legal systems use descent (*jus sanguinis*) or territorial birth (*jus soli*), or a combination of these principles, to confer nationality at birth.<sup>51</sup> This state practice, he wrote, “seems to indicate a consensus of opinion of States that conferment of nationality at birth *has to be* based on either, on *jus soli* or on *jus sanguinis*, or on

45. Int’l L. Comm’n, *Report on Nationality, Including Statelessness*, 2 Y.B. INT’L L. COMM’N 3, 7, U.N. Doc. A/CN.4/50/1952 (1952) (prepared by Special Rapporteur Manley O. Hudson) [hereinafter *Report on Nationality, Including Statelessness*].

46. *Id.*

47. Devashish Krishan, *Nationality of Physical Persons*, in 2 INVESTMENT TREATY LAW: CURRENT ISSUES 57, 58 (Federico Ortino et al. eds., 2007).

48. See Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239 (2000) (discussing the evolution of the law of war as it was influenced by humanitarian concerns).

49. *Report on Nationality, Including Statelessness*, *supra* note 45, at 7.

50. Hudson cited in this regard the Vatican’s practice of ascribing nationality by virtue of a person’s exercise of an office or explicit authorization. *Id.*

51. See *id.*; see also RUTH DONNER, *THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW* 31–33 (2d ed. 1994) (explaining *jus soli* and *jus sanguinis*).

a combination of these principles.”<sup>52</sup> The italicized mandatory language, however, is a non-sequitur and an example of the well-known naturalistic fallacy: that an “ought” may logically be inferred from an “is.” If it is true, as the PCIJ’s *Lotus* opinion famously put it, that “[r]estrictions upon the independence of states cannot be presumed,”<sup>53</sup> and that, in international law, whatever the law does not affirmatively prohibit, it permits, then, given this positivist methodology, only a consensus *against* state practices other than *jus sanguinis* and *jus soli* could establish a custom forbidding states from conferring their nationality at birth on the basis of other principles. No such practice, however, had been established. *Jus sanguinis* and *jus soli* were undoubtedly the most common grounds for ascription, but others existed and drew no general objection.

Hudson also concluded that state practice on naturalization, that is, the acquisition or change of nationality after birth, varied considerably, so that

[i]t cannot be said that rules of international law can be deduced from the practice of States as to the conditions on which such conferment of nationality can be considered as consistent with international law; in order to justify it, a personal or territorial link between the conferring State and the individual must exist. As to the *nature* of this link, the various modes of acquisition must be distinguished.<sup>54</sup>

Some precedents indicated that international arbitral tribunals and states would disapprove certain modes of conferring nationality automatically or by operation of law. These included the naturalization of aliens who had acquired real property or resided for only a brief period in certain Latin American states, as well as the purported imposition of German nationality on peoples in the territories occupied by Nazi Germany in World War II—a policy that in any event violated the law of belligerent occupation.<sup>55</sup> These examples aside, however, no clear conceptual line based on state practice could be drawn at the time between internationally accepted and rejected modes of automatic ascription under internal law.<sup>56</sup>

These matters stood before *Nottebohm*, the seminal ICJ decision that is generally thought to have supplied the missing conceptual basis on which

52. *Report on Nationality, Including Statelessness*, *supra* note 45, at 7 (emphasis added). States disputed, however, whether birth on a merchant vessel flagged to a particular state qualified for purposes of applying the *jus soli* criterion, and consequently, Hudson concluded that “it cannot be maintained that a rule of international law exists on it.” *Id.* at 7–8.

53. *The Case of the S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7); *see also id.* (“The rules of law binding upon States . . . emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.”).

54. *Report on Nationality, Including Statelessness*, *supra* note 45, at 8 (emphasis added).

55. *Id.*

56. *See id.*

international law draws this line: the presence or absence of a genuine link between the putative national and the state of nationality. The genuine link formula derives much of its superficial appeal from its apparent ability to supply a unifying international concept that limits the otherwise plenary state competence to confer nationality as a matter of internal law. This may explain why international law rapidly adopted the genuine link formula. It seemed to invest abstract prewar formulations, which referred without specificity to limits on state competence to confer nationality by internal law, with substance. In fact, among other consequences, it substituted vague and subjective criteria (a standard) for a comparatively clear and objective, if formal, rule allocating this competence, with few exceptions, to the internal law of each state.<sup>57</sup>

### III. *NOTTEBOHM* REVISITED

#### A. *The Dubious Pedigree of the Genuine Link Theory*

Born in Hamburg, Germany to German parents (and thus a German by both heritage and birth on German soil), Friedrich Nottebohm moved to Guatemala in 1905.<sup>58</sup> There, he established prosperous business interests in agriculture, commerce, and banking, and he had his principal residence in Guatemala until 1943.<sup>59</sup> Occasionally, he went to Liechtenstein to visit a brother, but he otherwise lacked any links to that State.<sup>60</sup> Thirty-four years later, and about one month after Germany attacked Poland, initiating World War II, Nottebohm hastily secured his business interests and traveled to Europe.<sup>61</sup> While there, he abjured his nationality as a citizen of the Reich by acquiring the nationality of Liechtenstein, a neutral state, in strict conformity with the internal nationality laws of both states.<sup>62</sup> He swore allegiance to Liechtenstein on October 20, 1939, after a rapid and unusual—but in no way unlawful—naturalization process.<sup>63</sup>

It is critical to appreciate, as the ICJ did, that Nottebohm made these changes with the specific intent to evade the probable consequences of the international law of war.<sup>64</sup> In particular, Nottebohm foresaw that Guatemala would enter the war on the side of the Allies, as it did in 1941. At that time, Nottebohm knew that he would, absent a change in his nationality,

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57. See Kunz, *supra* note 19, at 571.

58. *Id.* at 536.

59. Nottebohm (Liech. v. Guat.), 1955 I.C.J. 4, 13 (Apr. 6).

60. See *id.* at 25–26.

61. See *id.* at 13.

62. See *id.* Nottebohm automatically lost his German nationality by virtue of Article 25 of the German Nationality Law of July 22, 1913. DONNER, *supra* note 51, at 60–61; Kunz, *supra* note 19, at 548.

63. Nottebohm, 1955 I.C.J. at 16; see also *id.* at 15–16 (describing the naturalization process, which included Nottebohm's successful request for "dispensation from the condition of three years' residence as prescribed by law," despite the absence of special circumstances justifying a waiver of this requirement).

64. *Id.* at 26.

become an enemy alien under international law. Guatemala could then deport him, as it did in 1943.<sup>65</sup> It might also seize his substantial assets and business interests, as it did by a series of lawsuits from 1944 to 1949.<sup>66</sup> Nottebohm changed his nationality in a vain effort to avoid these consequences. The key to *Nottebohm* lies in the ICJ's perception of this fact, as expressed in the antepenultimate paragraph of the judgment, where the Court emphasizes that Nottebohm acquired Liechtenstein's nationality "to substitute for his status as a national of a belligerent State that of a national of a neutral state, with the sole aim of thus coming within the protection of Liechtenstein."<sup>67</sup>

Yet this dimension of the case—the expedient and manipulative reason that Nottebohm changed his nationality—is often eclipsed in analyses of *Nottebohm* by a myopic focus on the extensive and (arguably) quixotic dicta in which the majority indulged. It is therefore worth stressing that, in 1940, Nottebohm's links to Germany, the state of his former nationality, could hardly have been said to be more "genuine" than his links to Liechtenstein. If anything, a bona fide appraisal of Nottebohm's nationality according to the genuine link theory as elaborated by the ICJ would have led the Court to the odd conclusion that Nottebohm had become Guatemalan. But of course he never sought to become Guatemalan or took any of the steps required for naturalization under Guatemalan law. Given this, it is difficult to believe that the ICJ relied on the genuine link theory, as such, to justify its holding. The oft-quoted language expounding that theory is dicta. Of course, in a legal system without a formal system of precedent or *stare decisis*, the common law distinction between dicta and holding has less salience. But in this case, it underlines a vital point about the opinion's scope and meaning.

Despite Nottebohm's formal change of nationality, in 1941, after Guatemala entered World War II on the side of the Allies, it treated Nottebohm

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65. *Id.* at 25. On October 19, 1943, Guatemala arrested Nottebohm and turned him over to the U.S. military, which removed him to the United States. There, he remained in detention for more than two years. *See id.* at 34 (Read J., dissenting).

66. *See id.* at 31 (Klaestad J., dissenting) (noting that expropriation measures were taken against Nottebohm's property in 1949 by virtue of Legislative Decree No. 630 of May 25, 1949); *id.* at 34 (Read J., dissenting) (noting that, with Nottebohm detained in the United States and unable to defend his person or property, some fifty-seven legal proceedings were initiated against him in Guatemala to confiscate all of his property); *see also* DONNER, *supra* note 51, at 59 n.81; Kunz, *supra* note 19, at 536.

67. Nottebohm, 1955 I.C.J. at 26. The ICJ dismissed the case on the basis of Guatemala's objection to admissibility "on the ground that Mr. Nottebohm appears to have solicited Liechtenstein nationality fraudulently, *that is to say*, with the sole object of acquiring the status of a neutral national before returning to Guatemala." *Id.* at 11 (internal quotation marks omitted) (emphasis added). But Guatemala had adduced no evidence of fraud—at least, not until immediately before the hearing, and even then, the claim of fraud involved an ancillary issue, namely, Nottebohm's alleged effort to conceal certain German assets, not fraud in the acquisition of Liechtenstein nationality. The Court chose not to adjourn the proceedings to enable it to examine this issue. *Id.* at 32–33 (Klaestad J., dissenting). This is probably because the more substantial issue raised by Guatemala's objection—and, in my view, the actual ground for the ICJ's decision—lies in an argument, which, despite the misleading fashion in which Guatemala framed its objections (i.e., "that is to say"), is in reality conceptually *distinct* from an allegation of fraud in the acquisition of nationality: abuse of rights.

as he had anticipated—as an enemy alien. Guatemalan authorities arrested him and turned him over to the U.S. military, which detained him for more than two years. Guatemala also confiscated his property and business interests. In 1951, after Nottebohm had resided in Liechtenstein for more than six years, Liechtenstein instituted proceedings in the ICJ on his behalf. It sought to exercise its traditional right of diplomatic espousal on behalf of a national. Liechtenstein asked for reparations for his arrest, detention, and expulsion, and for the expropriation of his property.<sup>68</sup> In form, at least, the case thus reflected the paradigm of diplomatic protection traditionally traced to Vattel.<sup>69</sup> By the time the ICJ heard the claim, Nottebohm had lived in Liechtenstein for more than a decade, and his connections to that state in 1955 more than sufficed under the genuine link theory. Tellingly, however, the ICJ chose to focus instead on the manner and circumstances in which he had acquired Liechtenstein's nationality more than fifteen years earlier.

Guatemala initially objected to the claim based on the alleged lapse of its declaration accepting the compulsory jurisdiction of the Court.<sup>70</sup> After that argument failed, its second effort to dismiss the case, which it framed in terms of objections to admissibility, not only included the claim that Nottebohm did not properly acquire Liechtenstein's nationality; it also sought to dismiss the case based on (1) the alleged absence of previous diplomatic negotiations and (2) Nottebohm's failure to exhaust local remedies in Guatemala.<sup>71</sup> The ICJ did not address these latter two issues. It framed the issue it proposed to address with extraordinary caution and care. The admissibility of Liechtenstein's claim, it said, did not depend on the validity or propriety of Liechtenstein's internal nationality law. Indeed, the ICJ took considerable pains to place that law beyond the scope of its avowedly narrow holding. Admissibility, according to the ICJ, depended solely on Guatemala's obligation to recognize a *particular* ascription of nationality for a *particular* purpose: diplomatic protection before the ICJ. At the outset, the ICJ therefore precisely circumscribed the question that it purported to answer:

Counsel for Liechtenstein said: “the essential question is whether Mr. Nottebohm, having acquired the nationality of Liechtenstein, that acquisition of nationality is one which must be recognized by other States.” This formulation is accurate, *subject to the twofold reservation* that, in the first place, *what is involved is not recognition for all purposes but merely for the purposes of the admissibility of the*

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68. *Id.* at 6–7.

69. See EMER DE VATTEL, THE LAW OF NATIONS 298 § 71 (Béla Kaposy & Richard Whatmore eds., 2008) (1758); see also Edwin M. Borchard, *The Protection of Citizens Abroad and Change of Original Nationality*, 43 YALE L.J. 359 (1934).

70. Nottebohm (Liech. v. Guat.), 1955 I.C.J. 4, 4–5 (Apr. 6).

71. *Id.* at 9.

*Application*, and, secondly, that *what is involved is not recognition by all States, but only by Guatemala.*

The Court does not propose to go beyond the limited scope of the question which it has to decide, namely *whether the nationality conferred on Nottebohm can be relied upon as against Guatemala in justification of the proceedings instituted before the Court.*<sup>72</sup>

Admissibility before the ICJ, that is, depended on Guatemala's obligation to recognize Liechtenstein's conferral of nationality for a particular purpose: asserting its traditional right as a state to exercise diplomatic protection via judicial espousal on behalf of Nottebohm, one of its nationals.<sup>73</sup>

Yet beneath the surface of judicial craft, the ICJ fully appreciated that Nottebohm had abjured one nationality and acquired another solely as an expedient to evade the law of war. The extensive dicta later in the decision, which elaborated the genuine link theory, could not, after all, be justified based on custom, as several dissents noted and, indeed, as Guatemala itself conceded.<sup>74</sup> Judge Read correctly observed that the theory reflected a novel extrapolation of a principle drawn from certain late nineteenth- and early twentieth-century arbitrations that had answered a distinct question: whether dual nationals could avail themselves of diplomatic protection against one of their own states of nationality.<sup>75</sup> An international tribunal's independent scrutiny of the facts surrounding the acquisition of each nationality, in that context, and its analysis of the internal nationality laws of each state of alleged nationality in order to determine the "dominant" or "effective" nationality, arguably constituted a compromise. It ensured a measure of procedural fairness to both the claimant and respondent states. It supplied international tribunals with a fair means to decide whether a de jure national of one state who also had the de jure nationality of another could bring a claim against the former despite the ostensible customary rule that "[a]

72. *Id.* at 17 (emphasis added).

73. *See id.* at 20–21. The ICJ itself therefore "underlined the narrow basis and range of the decision." Kunz, *supra* note 19, at 540.

74. *See, e.g.*, Nottebohm, 1955 I.C.J. at 38–40 (Read J., dissenting); *id.* at 30 (Klaestad J., dissenting). For a thorough critique establishing the novel nature of the genuine link theory and the absence of any positive legal basis for it, see Kunz, *supra* note 19, at 551–60; Jones, *supra* note 1, at 238–44.

75. Nottebohm, 1955 I.C.J. at 40–42 (Read J., dissenting) ("[A]part from the cases of double nationality, no instance has been cited [by the majority] in which a State has successfully refused to recognize that nationality, lawfully conferred and maintained, did not give rise to a right of diplomatic protection."). Even in the context of dual nationality, precedent did not establish a uniform rule. *See, e.g.*, Canavero (Italy v. Peru), 11 R.I.A.A. 397 (Perm. Ct. Arb. 1912) (adopting the principle that for purposes of diplomatic claims espousal, a dual national shall be deemed to be a national of the state of dominant or effective nationality); *accord* Convention on Conflict of Nationality Laws, *supra* note 10, art. 5; Baron Frédéric de Born v. Yugoslav State, 4 Ann. Dig. 277 (Yugo.-Hung. Mixed Arb. Trib. 1926); William L. Griffin, *International Claims of Nationals of Both the Claimant and Respondent States—The Case History of a Myth*, 1 INT'L LAW. 400 (1966–67). *But see* Salem (Egypt v. U.S.), 2 R.I.A.A. 1161, 1187 (Arbitral Tribunal 1932) (rejecting the "effective nationality" principle).



State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.”<sup>76</sup>

But no treaty, custom, precedent, or other source of law enumerated in Article 38(1) of the ICJ Statute offered the majority any warrant to extend the dominant nationality test to the distinct circumstance faced by the ICJ in *Nottebohm*, where the claimant had only one nationality.<sup>77</sup> The logic and propriety of transposing, by what amounts to an *ipse dixit*, the “criteria designed for cases of double nationality to an essentially different type of relationship” is questionable.<sup>78</sup> The inherited positive international law on the legal regulation of nationality, as stressed, delegated this competence, subject to no such restriction, to states.

At this stage in the analysis, it will be helpful to clarify two potential problems that must be kept distinct: first, a state might confer its nationality on a person in an unreasonable manner that prejudices the rights of other participants in the international legal process, which, at the time of *Nottebohm*, remained principally states; second, two or more states, each acting *prima facie* reasonably, might innocently ascribe their nationalities to the same person, creating an individual with multiple nationalities. There is nothing *inherently* troubling about the latter scenario. Only in certain circumstances, including, among others, war between two of the person’s states of nationality,<sup>79</sup> or an action for diplomatic protection brought by the dual national against one of those states, might it raise an issue of international concern. In contrast, the former scenario involves exorbitant and unreasonable ascriptions of nationality by a state, which disturb the classical international legal order at a more foundational level.

But Liechtenstein’s conferral of nationality on *Nottebohm*, while carried out in what the ICJ referred to as “exceptional circumstances of speed and accommodation,”<sup>80</sup> cannot be deemed exorbitant. The majority did not say why a principle developed to deal with diplomatic protection claims by dual nationals against one of their own states should have been thought appropri-

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76. Convention on Conflict of Nationality Laws, *supra* note 10, art. 4. *But see* Griffin, *supra* note 75, at 402 (concluding that an analysis of the precedents supposedly supporting this rule “shows that [it] is a myth—or at best an inaccurate oversimplification of the body of precedents existing” in the early twentieth century). The rule nonetheless prevails today. *See, e.g.*, Int’l L. Comm’n, *Seventh Report on Diplomatic Protection*, art. 7, UN Doc. A/CN.4/567 (March 7, 2006) (*prepared by* Special Rapporteur John R. Dugard) [hereinafter *Seventh Report on Diplomatic Protection*].

77. *See* Flegenheimer (U.S. v. Italy), 14 R. Int’l Arb. Awards 327, 377–78 (Italian-U.S. Concil. Comm’n. 1958).

78. *See* *Nottebohm*, 1955 I.C.J. at 42 (Read J., dissenting); *see also* Int’l L. Comm’n, *First Report on Diplomatic Protection*, ¶ 111, U.N. Doc A/CN.4/506 (March 7, 2000) (*prepared by* Special Rapporteur John R. Dugard) [hereinafter *First Report on Diplomatic Protection*] (noting that *Nottebohm*’s genuine link principle finds little support outside of the particular context of dual nationality and that contemporary “State practice also shows little support for the *Nottebohm* principle”).

79. *Cf.* *Kawakita v. United States*, 343 U.S. 717 (1952) (sustaining conviction of a dual U.S.-Japanese national for treason based on his failure to disavow his U.S. nationality, and consequent continuing legal allegiance to the United States, while he militarily aided Japan during WWII).

80. *Nottebohm* (Liech. v. Guat.), 1955 I.C.J. 4, 26 (Apr. 6).

ate to the distinct facts of *Nottebohm*. Furthermore, it is doubtful whether, even in the context of diplomatic protection, custom at that time required a claimant state to establish that it constituted the state of effective or dominant nationality when claiming on behalf of a dual national.<sup>81</sup> *Nottebohm* presented no comparable issue in any event. He lost his German nationality in 1939 and never acquired Guatemalan nationality. Either he had Liechtenstein's nationality, or he had no nationality. Yet the ICJ did not intimate that it regarded him as stateless—although its opinion left him with that status relative to judicial espousal before the ICJ. The ICJ also did not question Liechtenstein's general right to confer its nationality in the absence of the kind and nature of genuine link it described. Consequently, *Nottebohm's* genuine link theory, whatever else the ICJ arguably intended, did not establish a new rule limiting the internal competence of states to confer their nationalities. Rather, as this Article will propose should be done more candidly, the ICJ in *Nottebohm* effectively atomized nationality by *function* and scrutinized *one* of these functions: authorizing a person's state of nationality judicially to espouse a diplomatic claim in international fora.

Only for this purpose did the majority, selectively and questionably relying on certain dual nationality precedents, emphasize the absence of a “real and effective”<sup>82</sup> link between *Nottebohm* and Liechtenstein.<sup>83</sup> For it recognized that, given the “diversity of demographic conditions,” states had failed at that time to reach “general agreement . . . on the rules relating to nationality.”<sup>84</sup> Yet, in rhetoric that is often quoted acontextually, the ICJ nonetheless then launched into an extensive disquisition on nationality, the bulk of which is clearly dicta. Even though, for example, the ICJ had been at pains earlier to narrow and doubly qualify the scope of its holding,<sup>85</sup> it later seemed to suggest that it is a *general* rule of law that “a State cannot claim that the rules it has thus laid down [in its internal nationality law] 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 . . . .”<sup>86</sup> Again, no positive source of law enumerated in Article 38(1) of the ICJ Statute supported such a broad and novel rule. It could be justified, if at all, only as *lex ferenda*—the sort of robust, rather than interstitial, judicial lawmaking that courts almost invariably disavow. Many early critics of the ICJ opinion leveled precisely this charge against the majority. They said that the genuine link doctrine amounted to “a clear-cut instance of judicial legislation.”<sup>87</sup> I would agree except that, in context, the genuine link theory emerges as

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81. See Kunz, *supra* note 19, at 557–59; see also Griffin, *supra* note 75.

82. *Nottebohm*, 1955 I.C.J. at 24.

83. *Id.* at 22–23.

84. *Id.* at 23.

85. *Id.* at 17.

86. *Id.* at 23.

87. Kunz, *supra* note 19, at 560; see also Jones, *supra* note 1, at 244.

dicta that is far less critical to the ICJ's judgment than is generally supposed. The real basis for the Court's opinion lies elsewhere.

### B. *The Genuine Link Theory and Positive Law*

The genuine link theory conceptualizes nationality in romantic terms. Nationality, the ICJ said,

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. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred . . . is in fact more closely connected with the population of the State conferring nationality than with that of any other State.<sup>88</sup>

And in another oft-quoted passage, the majority wrote:

Naturalization is not a matter to be taken lightly. To seek and to obtain it is not something that happens frequently in the life of a human being. It involves his breaking of a bond of allegiance and his establishment of a new bond of allegiance. It may have far-reaching consequences and involve profound changes in the destiny of the individual who obtains it.<sup>89</sup>

Even at the time, these statements were descriptively dubious. The genuine link theory sat uneasily with existing positive law, which, as the Court acknowledged, established that states enjoyed an almost plenary power to ascribe nationality as they saw fit by internal law.<sup>90</sup>

Imagine, holding all other facts in *Nottebohm* constant, that Nottebohm had been born in Liechtenstein rather than Germany. *Jus soli* is a traditional and undoubtedly a valid basis for a state to ascribe its nationality. Yet the fortuity of Nottebohm's birth in Liechtenstein rather than Germany would not, *ipso facto*, create a genuine, or real and effective, bond of allegiance between Nottebohm and Liechtenstein. Nor, by itself, would it profoundly change Nottebohm's destiny. Even though, given only this minor change in the facts, Nottebohm would (or at least should) have doubtless been deemed a national of Liechtenstein, that designation would not necessarily imply "a social fact of attachment" or "a genuine connection of existence, interests and sentiments."<sup>91</sup> If the ICJ's holding really stands or falls on the viability of the genuine link theory, then, in this hypothetical, the ICJ would have been obliged to find Liechtenstein's case equally inadmissible even though

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88. *Nottebohm (Liech. v. Guat.)*, 1955 I.C.J. 4, 23 (Apr. 6).

89. *Id.* at 24.

90. See MYRES S. McDOUGAL & WILLIAM T. BURKE, *THE PUBLIC ORDER OF THE OCEANS* 1029–32 (1962).

91. *Nottebohm*, 1955 I.C.J. at 23.

Nottebohm acquired his nationality by virtue of *jus soli*, an unquestionably valid ground for ascription. The ICJ recognized that if any state could be said to satisfy the genuine link theory, it would be Guatemala,<sup>92</sup> the “main seat of his interests,”<sup>93</sup> where he lived, did business, and had most of his family for more than thirty-four years. None of this would change had he been born in Liechtenstein.

The unquestioned validity of both *jus soli* and *jus sanguinis* as bases for the ascription of nationality casts doubt on the genuine link theory, at least in the robust form expounded by the ICJ. These traditional grounds may be entirely fortuitous: “a child may have no specific link at all with the country in which it has been born,” and “a person may be a national of a state *jus sanguinis* without having the slightest genuine link with that country.”<sup>94</sup> Insofar as *Nottebohm* implicitly questioned these traditional grounds, it created more than a merely academic worry. In 1956, in the immediate aftermath of the judgment, one critic asked:

[W]hat becomes, for example, of the hundreds of thousands of British subjects in foreign countries who have never seen their native land and who, from generation to generation, have acquired British nationality by descent? . . . [T]he whole centre of their associations and interests is usually in the land of their birth. Is it to be said that in these cases, of which there must be a very large number, where such individuals possess no other nationality, that the sole nationality which they do possess is not effective to ensure protection before an international tribunal?<sup>95</sup>

Judge Read, in dissent, similarly remarked that thousands or even millions of Chinese, French, British, and Dutch nationals were apparently excluded from diplomatic protection by the majority’s new theory.<sup>96</sup>

The majority cannot have failed to appreciate this.<sup>97</sup> Yet it did not regard its decision as producing such absurd consequences. This observation, coupled with both the absence of precedent for the genuine link theory and the majority’s self-conscious, meticulous effort to narrow its holding to the particular context it faced,<sup>98</sup> suggests that it actually justified its decision on an alternative, even if tacit, ground. The majority saw *Nottebohm*’s formal change of nationality in 1939 for what it had been: a transparent—but *not* unlawful—abuse of the liberal international legal regulation of nationality

92. *Id.* at 26.

93. *Id.* at 25.

94. Kunz, *supra* note 19, at 553.

95. Jones, *supra* note 1, at 239–40.

96. *Nottebohm* (Liech. v. Guat.), 1955 I.C.J. 4, 44 (Apr. 6) (Read, J., dissenting).

97. *See id.* at 26 (majority opinion).

98. *See id.* at 17; *see also First Report on Diplomatic Protection, supra* note 78, ¶ 110 (observing that given the circumstances, “the *Nottebohm* requirement of a ‘genuine link’ should be confined to the peculiar facts of the case and not seen as a general principle applicable to all cases of diplomatic protection”).

by which, first with the acquiescence and later with the affirmative aid of Liechtenstein, he sought to evade the consequences of the law of war. Again, this is not to suggest fraud; the ICJ plainly did not rest its decision on that basis.<sup>99</sup> Rather, the opinion as a whole suggests that the ICJ found Liechtenstein's application on behalf of Nottebohm inadmissible based on a general principle of law within the meaning of Article 38(1) of the ICJ Statute—that of abuse of rights.

### C. *Abuse of Rights and the Juridical Equality of States*

The principle of abuse of rights denotes a violation of the core principle of good faith.<sup>100</sup> It “requires [that] every right . . . be exercised honestly and loyally. Any fictitious exercise of a right for the purpose of evading either a rule of law or a contractual obligation will not be tolerated.”<sup>101</sup> Not coincidentally, this is almost a precise description of Nottebohm's conduct: he exercised his right to acquire Liechtenstein's nationality to evade a rule of the law of war. While precise definitions of the principle of abuse of rights vary, and its status and utility as a private law concept in common and civil law jurisdictions alike remain controversial,<sup>102</sup> in international law it operates, more simply, as one corollary of the foundational obligation of good faith.<sup>103</sup> Because, as Bin Cheng wrote in his seminal work on general principles, “[e]very right is the legal protection of a *legitimate* interest,” it follows that “an alleged exercise of a right not in furtherance of such interest, but with the malicious purpose of injuring others can no longer claim the protection of the law.”<sup>104</sup> The latest edition of *Oppenheim* explains that “an abuse of rights occurs when a state avails itself of its right in an arbitrary manner in such a way as to inflict upon another state an injury which cannot be justified by a *legitimate* consideration of its own advantage.”<sup>105</sup> And Alexandre Kiss synthesized the doctrine as follows: “In international law, abuse

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99. Guatemala had adduced no evidence of fraud. Nottebohm, 1955 I.C.J. at 31 (Klaestad, J., dissenting).

100. See BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 121 (1953) (describing the principle of abuse of rights as part of the more general principle of good faith in international relations).

101. *Id.* at 123.

102. See H.C. Gutteridge, *Abuse of Rights*, 5 *CAMBRIDGE L.J.* 22 (1933–35); Anna di Robilant, *Abuse of Rights: The Continental Drug and the Common Law* (Aug. 4, 2008) (unpublished manuscript, on file with author).

103. CHENG, *supra* note 100, at 121 (“The theory of abuse of rights (*abus de droit*) . . . is merely an application of this principle [of good faith] to the exercise of rights.”); see also Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 158, WT/DS58/AB/R (Oct. 12, 1998) (“This principle [of good faith], at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right impinges on the field covered by a treaty obligation, it must be exercised bona fide, that is to say, reasonably.”) (internal quotation marks and alterations omitted).

104. CHENG, *supra* note 100, at 122 (emphasis added).

105. OPPENHEIM, *supra* note 2, at 407 (emphasis added).

of rights refers to 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.”<sup>106</sup>

In the preceding paragraph, the word “legitimate” has been stressed in the former quotations, and the italicized phrase in the latter, because it is vital to appreciate that the abuse of rights principle does not cast doubt on the right asserted; to the contrary, it implicitly affirms the right that allegedly has been abused. Rather, the principle interrogates the *purpose* for which that right has been conferred or recognized by law. It would be an abuse of rights, for example, were a state to exercise its right to designate the members of its diplomatic mission so as to immunize a national indicted by the host state.<sup>107</sup> The designating state would not, strictly speaking, be acting *ultra vires*. But under these circumstances, the host state probably would not be bound to recognize the otherwise clear diplomatic immunity of that individual. Similarly, as the PCIJ made clear, sovereign rights, even those ordinarily understood as plenary, may not be employed to evade international obligations.<sup>108</sup>

Nottebohm (and perhaps Liechtenstein) did precisely that. Nottebohm acquired Liechtenstein’s nationality, lawfully under the internal nationality law of Liechtenstein, solely to evade the consequences of the international law of war. The majority saw this as a clear abuse of rights, but as the ILC recently suggested, it may have hesitated to say so in order to avoid impugning the conduct of a sovereign state.<sup>109</sup> The Court also may have hesitated to invoke the principle because it was Nottebohm, more than Liechtenstein itself, who had abused the relevant rights, and yet the status of individuals as subjects of international law remained unclear at the time. But in substance the ICJ faced a paradigmatic case of the principle, that is, a situation where “a right is exercised intentionally for an end which is different from that for which the right has been created, with the result that injury is caused.”<sup>110</sup>

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106. Alexandre Kiss, *Abuse of Rights*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1, 4 (Rudolf Bernhardt ed., 1992) (emphasis added).

107. Michael Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 MCGILL L.J. 389, 407 (2002).

108. See CHENG, *supra* note 100, at 123 (deriving from these and other cases the general principle that “[a]ny fictitious exercise of a right for the purpose of evading either a rule of law or a contractual obligation will not be tolerated”). International tribunals will not give effect to abuses of rights. See, e.g., The Oscar Chinn Case (U.K. v. Belg.), 1934 P.C.I.J. (ser. A/B) No. 63, at 86 (Dec. 12) (“However legitimate and unfettered governmental action in connection with the management and subsidizing of national shipping may be, it is clear that this does not authorize a State to evade on this account its international obligations.”); Free Zones of Upper Savoy and District of Gex (Fr. v. Switz.), 1932 P.C.I.J. (ser. A/B) No. 46, at 167 (June 7) (“A reservation must be made as regards the case of abuses of a right, since it is certain that France must not evade the obligation to maintain the zones by erecting a customs barrier under the guise of a control cordon.”).

109. *First Report on Diplomatic Protection*, *supra* note 78, ¶ 108 (“Faced with the choice between finding that Liechtenstein had acted in bad faith in conferring nationality on Nottebohm and finding that he lacked a ‘genuine link’ of attachment with Liechtenstein, the Court preferred the latter course as it did not involve condemnation of the conduct of a sovereign State.”).

110. Kiss, *supra* note 106, at 5.

If this is correct, the ICJ did not, as past critics have charged, legislate a new rule requiring that a national show a genuine link to the putative state of nationality. Nor did it purport to establish even the more modest rule that a nationality conferred in the absence of a genuine link need not, as a general matter, be recognized at the international level. Were that so, it would be necessary to explain why the traditional *jus soli* and *jus sanguinis* criteria, without proof of more robust or meaningful genuine links, should be sufficient. Neither, in itself, necessarily establishes or implies “a social fact of attachment” or “a genuine connection of existence, interests and sentiments.” Yet, to reiterate, it is clear that *Nottebohm* did not cast doubt on these traditional criteria for ascription.

If we respect the ICJ’s careful framing of the issue, its holding may—and, I believe, should—be construed commensurately: abuse of the right to confer nationality by internal law “for the purpose of evading”<sup>111</sup> a rule of law (in *Nottebohm*, the rules governing enemy aliens in wartime) may vitiate the obligation of a respondent state to recognize an ascription in the context of the judicial espousal of a diplomatic protection claim. The ICJ accordingly concluded that “Guatemala is under no obligation to recognize a nationality granted in such *circumstances*.”<sup>112</sup> The “circumstances” to which it refers include the reason *Nottebohm* acquired a new nationality in 1939 and the nature of the case, a paradigmatic instance of diplomatic espousal. The expedient acquisition of Liechtenstein’s nationality in this context struck the ICJ as abusive and potentially prejudicial. *Nottebohm*’s “sole aim” had been “to substitute for his status as a national of a belligerent State that of a national of a neutral state,”<sup>113</sup> first, in an effort to evade application of the international law of war relative to enemy aliens; and second, after that effort failed, to enable Liechtenstein to espouse his claim in an international forum based on an injury to its national, which classical international law conceptualizes, in a recognized legal fiction,<sup>114</sup> as an injury to the state itself rather than the individual.<sup>115</sup>

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111. CHENG, *supra* note 100, at 123.

112. *Nottebohm* (Liech. v. Guat.), 1955 I.C.J. 4, 26 (Apr. 6) (emphasis added).

113. *Id.*

114. See, e.g., *Seventh Report on Diplomatic Protection*, *supra* note 76, ¶ 4; *First Report on Diplomatic Protection*, *supra* note 78, ¶ 12.

115. See *Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, 1970 I.C.J. 4, 44 (Feb. 5); *Panevezys-Saldutiskis Ry (Est. v. Lat.)*, 1939 P.C.I.J. (ser. A/B) No. 76, at 16 (Feb. 28); *Mavrommatis Palestine Concessions (Greece v. U.K.)*, 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30) (“By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights — its right to ensure, in the person of its subjects, respect for the rules of international law.”); see also Conference of Int’l Law Ass’n, London, U.K., July 25–29, 2000, *Interim Report on “The Changing Law of Nationality of Claims,”* 69 INT’L L. ASS’N REP. CONF. 631, 632 (prepared by Francisco Orrego Vicuña) [hereinafter *Changing Law of Nationality of Claims*].

Three years later, in *Flegenheimer*,<sup>116</sup> the Italian-U.S. Conciliation Commission construed *Nottebohm* in precisely these terms. It correctly understood the underlying rationale for the ICJ's holding as the imperative to preserve the juridical equality of states in diplomatic espousal cases before international fora.<sup>117</sup> The Commission wrote in this regard:

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.<sup>118</sup>

In *Nottebohm*, this “abusive practice” consisted of Nottebohm’s adoption of a nationality to evade the application by a belligerent, Guatemala, of one of the defensive actions available to it under the law of war. *Flegenheimer* involved the Commission’s application of a similar principle. The “broad powers of appreciation” to which it refers include the right of international fora to ascertain independently the validity of a conferral of nationality under internal law and, to that end, to scrutinize relevant documents and determine, without undue deference to a state’s own claims about its law, the actual requirements for acquiring nationality under that law.<sup>119</sup>

This is consistent with the proposed reading of *Nottebohm*. *Flegenheimer*, like *Nottebohm*, empowers international fora to refuse to recognize abusive manipulations of the right of states to confer nationality by internal law so as to preserve the essential principle of juridical equality in international

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116. *Flegenheimer* (U.S. v. Italy), 14 R.I.A.A. 327 (Italian-U.S. Concil. Comm’n. 1958). *Flegenheimer*’s complex factual background is summarized in *Nationality of Claimant – Interpretation of Italian Peace Treaty and Bancroft National Treaty, U.S. – Wurttemberg*, 53 AM. J. INT’L L. 944 (1958).

117. See Mergé (U.S. v. Italy), 14 R.I.A.A. 236, 246–48 (Italian-U.S. Concil. Comm’n 1955); see also Rubenstein & Adler, *supra* note 23, at 535. In *Flegenheimer*, the Commission also rightly construed *Nottebohm*’s “effective nationality” language as limited to the cases of dual nationality in which it originated rather than as a general principle constraining state ascriptions of nationality at the international level. *Flegenheimer*, 14 R.I.A.A. at 376. In fact, the Commission confirmed that “when a person is vested with only one nationality, . . . the theory of effective nationality cannot be applied without the risk of causing confusion. It lacks a sufficiently positive basis to be applied to a nationality which finds support in a state law.” *Id.* at 377.

118. *Id.* at 338 (emphasis added). Note that the converse could equally obtain: absent a limit on the right of states to ascribe their nationality, it would be open to a defendant state to affirm that any particular person has *its* nationality and, *mutatis mutandis*, the claimant would be powerless to prevent an abuse of that right.

119. See, e.g., *Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7 (July 7, 2004) (Decision of the *Ad Hoc* Committee on the Application for Annulment of Mr. Soufraki), reprinted in 12 ICSID Rep. 156, ¶¶ 60, 65–76 (2007).



adjudication. For were international tribunals required to treat passports, certificates, government affidavits, and like documents as more than prima facie evidence of nationality,<sup>120</sup> this would open the door for a state to confer nationality in order to achieve a jurisdictional advantage.<sup>121</sup>

To be sure, several dissents and early critics of *Nottebohm* rejected abuse of rights as a rationale for the majority opinion. Judges Klaestad and Read, for example, both suggested that the principle could not apply because it necessarily “presuppose[s] the infliction of some kind of injury upon the legitimate interests of Guatemala by the naturalization of Nottebohm.”<sup>122</sup> In the first place, however, an abuse of right need not always involve the infliction of an injury. “The exercise of a right . . . for the sole purpose of causing injury to another” is a manifestation of abuse of rights; it is not the exclusive one.<sup>123</sup> Another, which is more relevant to *Nottebohm*, is where the holder of a right engages in a “fictitious exercise of [that] right for the purpose of evading . . . a rule of law. . . .”<sup>124</sup> In the *Nottebohm* majority’s view, Nottebohm abjured his German nationality and acquired that of a neutral state to evade the rules of the law of war pertaining to enemy aliens. Liechtenstein acquiesced in this abuse and exercised its otherwise clear right to confer its nationality by internal law in a way that might, had the ICJ found the case admissible, have enabled Nottebohm to evade those rules.

Second, to the extent that Judge Read and others argued that the principle of abuse of rights requires injury to the litigant invoking the doctrine, but that “Lichtenstein caused no damage to Guatemala,”<sup>125</sup> they erred. Assuming Nottebohm were an enemy alien, manipulation of his nationality followed by his return to Guatemala during World War II would have in effect deprived Guatemala of a means of self-defense authorized by the law of war of that era. Were Nottebohm’s nationality sustained, shielding him from the consequences of the rules of the law of war pertaining to enemy aliens, Guatemala would have been effectively powerless to avail itself of these defensive measures. That is a legal injury, even if not, admittedly, a substantial one in the circumstances.

120. Flegenheimer, 14 R.I.A.A. at 344.

121. The proposed construction of *Nottebohm* in terms of abuse of rights and the need to preserve juridical equality in international fora finds further support in the more recent precedent of the U.N. Compensation Commission (“UNCC”), which the United Nations created to redress injuries suffered by Kuwaitis and others after the Gulf War of 1991. The procedures it established also created a potential for abuse. The UNCC therefore excluded dual nationals found to have acquired a non-Iraqi nationality solely as a means for claiming compensation—that is, those who, like Nottebohm, sought to abuse the lax international regulation of nationality to claim a benefit (or avoid a detriment) to which they would otherwise not be entitled. See U.N. SCOR Comp. Comm’n Governing Council, *Report and Recommendations Made by the Panel of Commissioners Concerning the Sixth Instalment [sic] of Claims for Departure from Iraq or Kuwait (Category “A” Claims)*, ¶¶ 29–31, U.N. Doc. S/AC.26/1996/3 (Oct. 16, 1996).

122. *Nottebohm* (Liech. v. Guat.), 1955 I.C.J. 4, 31 (Apr. 6) (Klaestad, J., dissenting).

123. CHENG, *supra* note 100, at 122; see Kiss, *supra* note 106, at 5 (distinguishing three applications of the principle).

124. CHENG, *supra* note 100, at 123.

125. *Nottebohm*, 1955 I.C.J. at 38 (Read, J., dissenting); see also Kunz, *supra* note 19, at 549.

Finally, it is noteworthy that the ILC recently adopted essentially the interpretation of *Nottebohm* advanced here. It observed that the decision may be attributed largely to the ICJ's desire to avoid imputing bad faith to a sovereign state, Liechtenstein—even though the ICJ *did* seem to have been mindful of, and concerned about, the unusual and perhaps abusive manner in which Liechtenstein had conferred its nationality on Nottebohm.<sup>126</sup> The ILC also correctly described the passages elaborating the genuine link theory as dicta.<sup>127</sup> Lastly, after tracing the history of scholarly and judicial views of *Nottebohm* to date, the ILC concluded that the ostensible limit imposed by *Nottebohm*, in the final analysis, “may be consolidated into a requirement of good faith.”<sup>128</sup> The principle of abuse of rights in international law, not coincidentally, may be conceptualized as one concrete manifestation of that abstract international requirement.<sup>129</sup>

#### D. Nottebohm's Reception: From Dicta to Dogma

*Nottebohm* drew its share of critics at the time.<sup>130</sup> Many commentators lamented that the majority apparently left Nottebohm, at least for the purposes of diplomatic protection, with no nationality, no state to espouse his claims, and therefore no remedy under international law.<sup>131</sup> In effect, it denied him an opportunity to be heard and due process of law based on what emerges, as a matter of the international law of the era, as a novel and contrived procedural barrier. Some of the *Nottebohm* dissents had precisely this concern in mind. Judge Read, for example, wrote:

I am bound to proceed on the assumption that Liechtenstein might be entitled to a finding of denial of justice, if the case should be considered on the merits. In view of this situation, I cannot overlook the fact that the allowance of the plea in bar would ensure that justice would not be done on any plane, national or international. I do not think that a plea in bar, which would have such effect, should be granted, unless the grounds on which it is based are beyond doubt.<sup>132</sup>

Others stressed “that there is often little connection between the individual upon whom nationality has been conferred and *jus soli* or *jus sanguinis* and

126. *First Report on Diplomatic Protection*, *supra* note 78, ¶ 108.

127. *Id.* ¶ 109.

128. *Id.* ¶ 118.

129. See CHENG, *supra* note 100, at 121; see, e.g., Free Zones of Upper Savoy, 1930 P.C.I.J. (ser. A) No. 24, at 12.

130. E.g., Kunz, *supra* note 19, at 537–38 & n.2 (collecting early commentary, much of it critical); see OPPENHEIM, *supra* note 2, at 853–54 n.12 (summarizing the principal critiques of *Nottebohm*); see MCDUGAL & BURKE, *supra* note 90, at 1031; Myres S. McDougal et al., *The Maintenance of Public Order at Sea and the Nationality of Ships*, 54 AM. J. INT'L L. 25 (1960).

131. E.g., Kunz, *supra* note 19, at 543.

132. *Nottebohm* (Liech. v. Guat.), 1955 I.C.J. 4, 35 (Apr. 6) (Read, J., dissenting); *accord id.* at 60, 63–64 (Guggenheim, J., dissenting).

that it is difficult to limit the genuine link requirement to cases of naturalization.”<sup>133</sup> Furthermore, had the ICJ reached the merits, the issue that Liechtenstein sought to raise would not have been trivial. The law of war at the time had not made clear whether a belligerent state could confiscate an enemy alien’s property in circumstances where that state had made only a nominal declaration of war, as had Guatemala.<sup>134</sup> Finally, were the genuine link theory accepted at face value, the absurd consequences cited by the dissent might follow,<sup>135</sup> whereby hundreds of thousands of foreign nationals living or doing business abroad could be deprived of diplomatic protection.

Yet many other international lawyers and tribunals found the genuine link theory appealing, perhaps in part for the reason suggested above: it seemed to supply the missing concept to inform the supposedly general international law limits on a state’s competence to confer its nationality by internal law. Postwar decisions rapidly picked up on the genuine link rhetoric—even though those cases, like the ones on which *Nottebohm’s* dicta had relied, typically involved the distinct issue of dual nationality.<sup>136</sup> The genuine link doctrine thus became, in short order, the case’s essential holding. In 1959, for example, only four years after the judgment, a major treatise said that not only in the diplomatic espousal context, but generally, “for purposes of recognition, there must in fact exist a genuine connection between the national and his State.”<sup>137</sup> More recently, Ruth Donner, the author of a leading treatise on the international regulation of nationality, described the genuine link theory as *Nottebohm’s* holding. She wrote that the ICJ found Liechtenstein’s claim on behalf of Nottebohm inadmissible because his “*connection* with Liechtenstein at the time of his naturalization” proved inadequate under international law.<sup>138</sup>

133. *First Report on Diplomatic Protection*, *supra* note 78, ¶ 112.

134. Kunz, *supra* note 19, at 543. A more recent critique of *Nottebohm* goes so far as to describe Guatemala’s actions as “an apparent grave human rights offense” and argues that Nottebohm “may have been” one of those who “resisted Nazi Germany’s policies.” Jacob Dolinger, *Nottebohm Revisited*, in *DOMENSAO INTERNACIONAL DO DIREITO: ESTUDOS EM HOMENAGEM A G.E. DO NASCIMENTAO E SILVA SAO PAULO* 141, 142–43 (2000).

135. The qualification is appropriate because the majority sought to limit its decision to the question of “whether the nationality conferred on Nottebohm can be relied upon as against Guatemala in justification of the proceedings instituted before *the Court*.” *Nottebohm*, 1955 I.C.J. at 17 (emphasis added).

136. See *Iran v. United States*, Case No. A/18, 5 Iran-U.S. Cl. Trib. Rep. 251, 263 (1984) (collecting Franco-Italian Conciliation Commission cases applying the “effective nationality” criterion to dual nationals); Stankovic, 40 I.L.R. 153, 155 (Italian-U.S. Concil. Comm’n 1963); Mergé (U.S. v. Italy), 14 R.I.A.A. 236, 247 (Italian-U.S. Concil. Comm’n 1955). For a more recent statement assuming that *Nottebohm’s* effectiveness rule applies generally in international adjudication, see *Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7 (July 7, 2004) (Decision of the *Ad Hoc* Committee on the Application for Annulment of Mr. Soufraki), reprinted in 12 ICSID Rep. 156, ¶ 55 (2007) (characterizing effectiveness as a requirement applicable to international tribunals deciding whether to recognize under international law a nationality conferred by internal law).

137. H.F. VAN PANHUY, *THE ROLE OF NATIONALITY IN INTERNATIONAL LAW* 158 (1959).

138. DONNER, *supra* note 51, at 62 (emphasis added); see also *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 211 reporters’ note 1 (characterizing *Nottebohm* as holding “that because there was no genuine link between Nottebohm and Liechtenstein, Guatemala did not have to recognize his Liechtenstein nationality”). This reading of the ICJ’s opinion implies that had Not-

The genuine link theory also received misguided recognition as a more general constraint applicable to a broad and diverse range of issues—well beyond the particular question so meticulously framed by the majority. Within a decade, the ILC adopted the genuine link theory and transposed it to vessels in the context of the law of the sea.<sup>139</sup> (This effort has been a manifest failure: as of 2003, vessels flying flags of convenience carried “over 60 percent of the total tonnage of the world’s merchant fleet.”<sup>140</sup>) While the ICJ formally disavowed the genuine link theory in the corporate context of *Barcelona Traction*,<sup>141</sup> the majority nonetheless spoke in language strongly redolent of *Nottebohm*. It remarked that “a close and permanent connection [to Canada] has been established, fortified by the passage of over half a century. . . . Barcelona Traction’s links with Canada are thus manifold.”<sup>142</sup> This language has led some to apply the genuine link theory to corporate entities.<sup>143</sup> Undoubtedly, corporate nationality, too, should be regulated internationally in some contexts. But it is incongruous to say that a corporate entity’s nationality, which international law generally regards as that of its state of incorporation, relates to “a social fact of attachment,” bonds of allegiance, or a “genuine connection of existence, interests and sentiments.”<sup>144</sup> It is more likely to relate to management’s perception of the jurisdiction’s tax laws. Still, the genuine link became a kind of mantra. Despite the majority’s effort to limit its decision to the circumstances of *Nottebohm*, the genuine link theory “radiated throughout the international law of nationality.”<sup>145</sup>

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tebohm demonstrated a closer connection, or a more genuine link, to Liechtenstein, the Court would have found the case admissible. That is, at a minimum, questionable.

139. McDUGAL & BURKE, *supra* note 90, at 1026–27 (1962); *see also id.* at 1030 (“The criteria which the Court specifies for giving content to its concept of ‘genuine link’ are, again, quite clearly relevant only to human beings and wholly inapplicable to inanimate objects, like ships.”); BROWNLIE, *supra* note 2, at 413, 471–72. Article 5 of 1958 Convention on the High Seas, Apr. 5, 1958, 450 U.N.T.S. 82, and Article 91(1) of the 1982 U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, nonetheless seek to impose a genuine link requirement on vessels.

140. Alexander J. Marcopoulos, *Flags of Terror: An Argument for Rethinking Maritime Security Policy Regarding Flags of Convenience*, 32 TUL. MAR. L.J. 277, 284 (2007).

141. *Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, 1970 I.C.J. 32, ¶ 71 (Feb. 5).

142. *Id.* (emphasis added).

143. One recent commentator argues that *Barcelona Traction* should be revisited today and that it would be appropriate for a genuine link requirement to be imposed on corporations. Lawrence Jahoon Lee, *Barcelona Traction in the 21st Century: Revisiting Its Customary and Policy Underpinnings 35 Years Later*, 42 STAN. J. INT’L L. 237 (2006).

144. *See, e.g.*, David Harris, *The Protection of Companies in International Law in the Light of the Nottebohm Case*, 18 INT’L & COMP. L.Q. 275, 289 (1969) (observing that the language in *Nottebohm* strongly militates against its application to juridical persons).

145. *Iran v. United States*, Case No. A/18, 5 Iran-U.S. Cl. Trib. Rep. 251, 263 (1984); *see also* DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 76 (2d ed. 2006) (noting that because “[t]he *Nottebohm* decision’s ‘genuine link’ language has had important influences on many areas of international law that involve tracing a connection between non-State actors and nations, [w]hether it is establishing the place of incorporation for a business or the proper State of registry for vessels or aircraft, a real—not fictional—connection is required”).

The theory, perhaps inadvertently, received further misguided support from the A/18 case, from which the preceding quotation is taken. Iran had asked the Iran-U.S. Claims Tribunal to consider whether the Algiers Accords vested that Tribunal with jurisdiction over claims brought by dual U.S.-Iranian nationals against Iran.<sup>146</sup> The Tribunal answered by reverting to the “dominant and effective” nationality test used by some tribunals in the pre-*Nottebohm* era to determine jurisdiction over diplomatic protection claims initiated on behalf of dual nationals against one of their states of nationality.<sup>147</sup> This answer apparently reflected a compromise among the arbitrators, but it may well have been inaccurate as a strict matter of treaty interpretation.<sup>148</sup> Still, it can at least be defended in principle. The parties to the Algiers Accords clearly “intended the function of the Tribunal to be the adjudication of international claims *on the basis of the exercise of diplomatic protection.*”<sup>149</sup>

Even in the diplomatic protection context, however, the status of the dominant nationality rule, which Edwin Borchard had asserted as custom in an influential early twentieth-century treatise,<sup>150</sup> remained “uncertain,” for “the precedents on which Borchard relied did not generally support his conclusion.”<sup>151</sup> The Tribunal therefore disavowed reliance on Borchard and those precedents. It turned instead to *Nottebohm*, which it characterized as one of the “two most important [postwar] decisions on the subject,” for guidance.<sup>152</sup> *Mirabile dictu*, it found that *Nottebohm* supported the same rule for dual nationals. This should not have come as a surprise. *Nottebohm*’s genuine link theory had itself been justified based on precisely the same precedents that the Tribunal had just dismissed in the previous paragraph as unreliable support for the rule.

The Tribunal’s somewhat circular reasoning in this regard ended with the curious observation that *Nottebohm*, while concededly not on point relative to the precise dual nationality issue raised by Iran, “demonstrated the acceptance and approval by the ICJ of the search for the real and effective nationality based on the facts of the case, instead of an approach relying on more

146. Case No. A/18, 5 Iran-U.S. Cl. Trib. Rep. at 251.

147. *Id.* at 258; see, e.g., *Canavero (Italy v. Peru)*, 11 R.I.A.A. 397 (Perm. Ct. Arb. 1912).

148. See Richard M. Mosk, Book Review, 102 AM. J. INT’L L. 215, 217–19 (2008) (reviewing MOHSEN AGHAHOSSEINI, *CLAIMS OF DUAL NATIONALS AND THE DEVELOPMENT OF CUSTOMARY INTERNATIONAL LAW* (2007)).

149. Case No. A/18, 5 Iran-U.S. Cl. Trib. Rep. at 254 (emphasis added); see also *id.* at 255–56 (enumerating five reasons why “[t]he Tribunal is to adjudicate claims on the basis of the exercise of diplomatic protection”).

150. EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 588 (2d. ed. 1927).

151. Case No. A/18, 5 Iran-U.S. Cl. Trib. Rep. at 262–63; see Griffin, *supra* note 75; see also David J. Bederman, *Nationality of Individual Claimants before the Iran-United States Claims Tribunal*, 42 INT’L & COMP. L.Q. 119, 124 n.32 (1993) (collecting arbitral awards and case law reflecting three distinct approaches taken by early arbitral tribunals to determine their jurisdiction where a dual national sued one of his or her states of nationality).

152. Case No. A/18, 5 Iran-U.S. Cl. Trib. Rep. at 263.

formalistic criteria.”<sup>153</sup> Yet the ICJ’s “acceptance and approval” does not create international law. The Tribunal’s statement is reminiscent of Justice Cardozo’s eloquent but often misguided dictum that “[i]nternational law, or the law that governs between states, has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the imprimatur of a court attests its jural quality.”<sup>154</sup> Ultimately, the A/18 case’s embrace of the dominant nationality rule for dual nationals seeking to bring claims before the Iran-U.S. Claims Tribunal, while unobjectionable in that particular context, conferred on the genuine link theory an unwarranted veneer of positive legal authority.

Today, despite the *Nottebohm* majority’s meticulous framing of the issue the Court proposed to answer, a cursory review of many treatises, codifications of international law, and jurisprudence shows that they often speak of the genuine link theory as a broadly applicable, generic constraint of general international law. In the United States, for example, the *Restatement (Third) of Foreign Relations Law* sets forth as a *general* rule that “an individual has the nationality of a state that confers it, but other states need not accept that nationality when it is not based on a genuine link between the state and the individual.”<sup>155</sup> Brownlie, in his well-regarded treatise, characterizes the theory as “a general principle with a variety of possible applications.”<sup>156</sup> The most recent edition of *Oppenheim*, while less opinionated in its appraisal of *Nottebohm*, explains the decision by the comparative quantity, quality, and durability of Nottebohm’s links with Guatemala in contrast to those with Liechtenstein.<sup>157</sup> International law textbooks and other teaching materials similarly tend to emphasize a broad reading of *Nottebohm*.<sup>158</sup> In 2000, the ILC issued its *First Report on Diplomatic Protection*. Accurately summarizing the current state of affairs, it provides: “The *Nottebohm* case is *seen as* author-

153. *Id.*

154. *New Jersey v. Delaware*, 291 U.S. 361, 383–84 (1934). “So few international cases reach courts, that if Cardozo’s judicial imprimatur were necessary, most of international law would be consigned to the twilight zone and beyond, indeed to Holland’s very ‘vanishing point of jurisprudence.’” W. Michael Reisman, *The Harold D. Lasswell Memorial Lecture: International Lawmaking: A Process of Communication* (Apr. 24, 1981), in 75 AM. SOC’Y INT’L L. PROC. 101, 103 (1981).

155. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 211 (1987); see also *Changing Law of Nationality of Claims*, *supra* note 115, at 632 (similarly characterizing *Nottebohm* in the context of diplomatic protection).

156. BROWNLIE, *supra* note 2, at 396. Brownlie defends the genuine link theory at length against its early critics. See *id.* at 396–406.

157. OPPENHEIM, *supra* note 2, at 854. Elsewhere, the treatise characterizes *Nottebohm* as holding that “a state may not espouse a claim on behalf of a person who has its nationality but has no real and effective link with that state, at least if the claim is against another state with which he does have such a link.” *Id.* at 514.

158. See, e.g., MARK W. JANIS, INTERNATIONAL LAW 256–57 (5th ed. 2008) (“[T]he International Court has insisted that a private party be protected only by a state with which it has a genuine link.”); SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 60 (2006) (“[T]o be entitled to recognition on the international plane, [a person’s] nationality must be based on a genuine link between the state and the person or entity.”).

ity for the position that there should be an ‘effective’ or ‘genuine link’ between the individual and the State of nationality, not *only* in the case of dual or plural nationality (where such a requirement is generally accepted), *but also* where the national possesses only one nationality.”<sup>159</sup>

#### IV. THE GENUINE LINK THEORY IN THE TWENTY-FIRST CENTURY

The preceding part of this Article has sought to establish, *first*, that the language in *Nottebohm* from which the genuine link theory derives should properly be characterized as dicta; *second*, that a better and probably more accurate, albeit tacit, rationale for *Nottebohm* is the general principle of law prohibiting abuses of rights; and *finally*, that even if, arguendo, *Nottebohm* should be interpreted as a case in which the ICJ judicially legislated a new general rule regulating the ascription of nationality at the international level, the rationale for that rule limits its application to the classical context of diplomatic claims espousal—in which the law presupposes and seeks to preserve the juridical equality of states: *cessante razione legis cessat ipsa lex*. This rationale, which *Flegenheimer* properly understood as one of the main concerns animating *Nottebohm*, offers a more cogent reason for the Court’s holding than does the genuine link theory. Not coincidentally, it also may be conceptualized with equal logic in terms of abuse of rights—for it operates to prevent states or their nationals from manipulating the liberal international legal regulation of nationality as a way to expand their right to bring diplomatic protection claims or, conversely, to render inadmissible the otherwise legitimate diplomatic protection claims of another state.

But the genuine link theory, and the dicta elaborating that theory, is not only a technically inaccurate reading of *Nottebohm*’s key rationale. It also reflects a questionable vision of nationality as a paramount form of sociopolitical association between individuals and collectives. The ICJ described the *legal* concept of nationality as

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. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred . . . is in fact more closely connected with the population of the State conferring nationality than with that of any other State.<sup>160</sup>

Natural persons, on this view, necessarily identify in a strong sociopolitical sense with the state of their legal nationality. Today, if not at the time of the *Nottebohm* decision, that proposition is doubtful.

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159. *First Report on Diplomatic Protection*, *supra* note 78, ¶ 106 (emphasis added).

160. *Nottebohm (Liech. v. Guat.)*, 1955 I.C.J. 4, 23 (Apr. 6).

A. *The Modern Sociopolitical Context of Nationality*

Now, at the outset, I should say that the arguments that follow, which call into question this proposition, should not be overstated. *Nottebohm's* sociological account of the legal meaning of nationality in the international sphere is certainly not wholly inaccurate. It reflects the historical origin of nationality in classical international law.<sup>161</sup> It is also doubtless still true that in many states people do self-identify, to a greater or lesser degree, by their nationality in the robust sociopolitical sense described by the genuine link theory. Legal bonds, national allegiance, and common sympathies and sentiments play a non-trivial role in the self-identification of members of collectives. So today, as well as historically, there is considerable truth in *Nottebohm's* dicta. Yet as Peter J. Spiro, among others, argues, globalization has increasingly pushed the state “from its pedestal among forms of human association.”<sup>162</sup> It no longer, if it ever did, stands “categorically above other membership organizations”<sup>163</sup> and forms of collective identity, be they tribal, ethnic, religious, political, martial, or otherwise.

*Nottebohm's* particular conception of nationality is instead contingent—historically, temporally, and demographically. Classical international law, which customarily dates to the Peace of Westphalia, saw the rise of a new form of political association, the *nation*-state. To a greater extent than its antecedents, the nation-state insisted on the unconditional loyalty and collective self-identification of its constituents.<sup>164</sup> To be sure, the accuracy or predominance of the nation-state, so conceived, has always been at least a partial fiction.<sup>165</sup> The borders of states, juridical entities, rarely correspond precisely to those of nations, which refer to a more complex composite of social, ethnic, cultural, political, and historical factors. Yet in the formative period of classical international law, that is, from about the late eighteenth century until the early twentieth century, “the idea of the ‘nation-state’ mostly corresponded to a ‘romantic’ ideology of the state, according to which states were in fact made up of ‘nations’ in the historic-biological sense.”<sup>166</sup> Many European states at the time saw nationality as a feature almost “ordained by nature,” rather than a feature that could be volitionally discarded.<sup>167</sup> Nationality signified more than a fortuitous membership in a particular political community. It implied, in *Nottebohm's* words, a durable

161. See Rubenstein & Adler, *supra* note 23, at 530.

162. PETER J. SPIRO, *BEYOND CITIZENSHIP* 6 (2008).

163. *Id.* at 137.

164. This form of polity reached its apex in the fascist ideological states of the twentieth century. See PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* 36 (2002).

165. See ALFRED M. BOLL, *MULTIPLE NATIONALITY AND INTERNATIONAL LAW* 67 (2007) (acknowledging that certain states, including the United States and post-revolutionary France, never really “fit the romantic idea of the nation-state in reality or ideology”).

166. *Id.*

167. SPIRO, *supra* note 162, at 62.



bond of allegiance and “a general connection of existence, interests, and sentiments,” in short, a “*social* fact of attachment.”<sup>168</sup>

Yet already by the mid-twentieth century, at the time the ICJ decided *Nottebohm*, this sociopolitical conception of nationality failed to accurately capture the legal use of the word in international law.<sup>169</sup> Countless persons at that time, including Nottebohm himself, had one nationality by virtue of a traditional basis, such as *jus soli* or *jus sanguinis*, but resided or did business elsewhere. Like Nottebohm, for many of these persons the center of gravity of their genuine links shifted gradually to a state other than that of their formal nationality. As early as 1957, in *Flegenheimer*, the Italian-U.S. Conciliation Commission, echoing the dissents in *Nottebohm*, recognized that

persons by the thousands who, because of the facility of travel in the modern world, possess the positive legal nationality of a State, but live in foreign States where they are domiciled and where their family and business centre is located, would be exposed to non-recognition, at the international level, of the nationality with which they are undeniably vested by virtue of the laws of their national State, if this doctrine [of the genuine link] were to be generalized.<sup>170</sup>

This argument applies, *a fortiori*, in the twenty-first century. Advances in technology and the increasing permeability of state borders enhance global mobility. They allow people to establish and preserve links with multiple polities instead of or in addition to the one (or ones) in which they reside.<sup>171</sup> The ILC’s *First Report on Diplomatic Protection* notes that, strictly construed, the genuine link theory

would exclude literally millions of persons from the benefit of diplomatic protection. In today’s world of economic globalization and migration, there are millions of persons who have drifted away from their State of nationality and made their lives in States whose nationality they never acquire. Moreover, there are countless others who have acquired nationality by birth, descent or operation of law of States with which they have a most tenuous connection.<sup>172</sup>

Yet no one has proposed (either before, in, or after *Nottebohm*) that for adjudicatory or other international legal purposes, determinations of a per-

168. *Nottebohm* (Liech. v. Guat.), 1955 I.C.J. 4, 23 (Apr. 6) (emphasis added).

169. Cf. MICHAEL IGNATIEFF, *BLOOD & BELONGING: JOURNEYS INTO THE NEW NATIONALISM* 4 (1993) (arguing that civic nationalism today “has a greater claim to sociological realism” than does ethnic or tribal nationalism).

170. *Flegenheimer* (U.S. v. Italy), 14 R.I.A.A. 327, 377 (Italian-U.S. Concil. Comm’n. 1958).

171. See SPIRO, *supra* note 162, at 20; *id.* at 22–23 (“[G]lobalization makes possible the intergenerational maintenance of nonterritorial ties . . .”).

172. *First Report on Diplomatic Protection*, *supra* note 78, ¶ 117 (footnote omitted).

son's genuine links be substituted for the traditional, brightline rule according to which the internal laws of states dictate nationality. To repeat, had Nottebohm's nationality truly depended on the comparative quantity, quality, and durability of his links to different states, Guatemala would have been his state of effective nationality.<sup>173</sup> And were that sufficient to make Nottebohm a national of Guatemala, Guatemala could not have expelled him and confiscated his property as an enemy alien. Rather, had Nottebohm retained his German nationality, Guatemala's remedy would have been to try him for treason.<sup>174</sup> But the *Nottebohm* majority did not, as I argued in the preceding part, really intend to substitute the genuine link theory for the accepted rule of international law that states enjoy an almost plenary competence to ascribe nationality by their internal laws. Neither *jus soli* nor *jus sanguinis* necessarily imply a genuine link, but the decision did not cast doubt on those criteria.

At any rate, if the genuine link doctrine was descriptively questionable in 1955, when the ICJ decided *Nottebohm*, it is far more so today because of, among other developments, "the changing structure of the international political economy."<sup>175</sup> After World War II, decolonization and the resulting creation of new states brought the number of U.N. member states from fifty-one in 1945 to (at least) 192 in 2008. Yet the virtual quadrupling of the number of states in the world did not, as a general matter, coincide with any effort to create new *nation*-states. To the contrary, despite the emergent principle of the self-determination of peoples,<sup>176</sup> international law in the postwar era, in part as a reaction against the virulent nationalism and abuse of minority-rights regimes that contributed to World War II, did not organize the creation of new states around the idea of nation-states, that is, politics comprised of persons with shared historic, biological, ethnic, cultural, or other identities and loyalties. The apparent failure of the minority-rights regimes administered by the League of Nations led to a sharp turn away from nationality as a sociopolitical term of art and toward a more formal legal conception.

In the postwar era, nationality also needed to serve new legal functions in areas of international law that either emerged or were reconceptualized be-

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173. Indeed, one commentator argues, for this reason, that "were it necessary to decide the *Nottebohm* case anew, it would be proper to compel Guatemala to regard Nottebohm as its citizen." Yaffa Zilbershats, *Reconsidering the Concept of Citizenship*, 36 TEX. INT'L L.J. 689, 732 (2001).

174. Cf. *Joyce v. Dir. of Pub. Prosecutions*, [1946] A.C. 347 (H.L.) (U.K.) (sustaining treason conviction where the defendant claimed to be a German national but held a British passport and had broadcast anti-British wartime propaganda from Germany during World War II).

175. Rubenstein & Adler, *supra* note 23, at 533; see also Francisco Orrega Vicuña, *Introduction to Nationality and Investment Treaty Claims*, in INVESTMENT TREATY LAW: CURRENT ISSUES II 3–4 (Federico Ortino et al. eds., 2007) ("The essence of the evolution taking place since the 1950s, is that step by step nationality has followed a process of de-linking from the nation State so as to become an element of interconnection with the framework governing the activities concerned.").

176. See ICCPR, *supra* note 28, art. 1; International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, 993 U.N.T.S. 3.

cause of the individual's introduction as a direct and genuine subject of international law. Furthermore, the *uti possidetis* principle carved up many former colonies along arbitrary lines established by European administrative and colonial borders.<sup>177</sup> The legal nationalities of many Africans today, for example, hardly correspond to a social fact of attachment or a genuine connection of existence, interests, and sentiments.

*Nottebohm's* anachronistic conception of nationality eroded further after the Cold War. The phenomena collectively called globalization increased the transborder movement of persons and information. It created new forms of association by facilitating rapid travel and communication but without generating a corresponding need (or, in most cases, desire) for changes in nationality. Rubenstein and Adler point out, for example, that “[g]lobalization emphasizes different identities of membership as the norm, according less reason to utilize a singular notion of citizenship, or a single legal status linking directly to the nation-State, as a central concept in domestic and international law.”<sup>178</sup> In fact, as the obligations associated with citizenship dwindle, individuals increasingly adopt nationalities of convenience. The reality of the modern global order is that people “can collect citizenships at very little cost and without any meaningful attachment to those states in which citizenship is maintained.”<sup>179</sup>

International law's attitude toward dual nationality has also changed. Classical international law, as reflected in *Nottebohm's* dicta, saw it as, at a minimum, undesirable, and often as a serious problem that states should try to reduce or eradicate.<sup>180</sup> In fact, many even regarded dual nationality as morally wrong, analogizing it to polygamy or to a slave serving two masters.<sup>181</sup> Modern international law, in stark contrast, recognizes that dual nationality is inevitable and perhaps desirable:<sup>182</sup> “As citizenship loses the sacral elements of exclusivity, it becomes just another form of belonging.”<sup>183</sup>

177. See Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT'L L. 590 (1996).

178. Rubenstein & Adler, *supra* note 23, at 524; cf. SPIRO, *supra* note 162, at 6 (“Citizenship law proves the ultimate unsustainability of a strong national community, as globalization undercuts community boundaries.”).

179. SPIRO, *supra* note 162, at 76.

180. See *id.* at 59–60; Rubenstein & Adler, *supra* note 23, at 531–32; Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411, 1414–15 (1997).

181. SPIRO, *supra* note 162, at 61.

182. See *id.* at 60 (“Plural citizenship is a fact of the new world and a reflection of citizenship's smaller place within it.”); Craig Forcese, *Shelter from the Storm: Rethinking Diplomatic Protection of Dual Nationals in Modern International Law*, 37 GEO. WASH. INT'L L. REV. 469, 490–91 (2005) (noting that “[d]ual nationality is inevitable in a world where people regularly cross international borders” and that, as of 2001, fifty-four states—more states than even existed in the years leading up to *Nottebohm*—recognized dual nationality); Spiro, *supra* note 180, at 1416 (arguing that we should embrace the “acceptance of dual citizenship [as] not only consistent with but demanded by republican, communitarian, and liberal conceptions of citizenship”).

183. SPIRO, *supra* note 162, at 79. But see IGNATIEFF, *supra* note 169 at 5–10 (describing the post-Cold War resurgence in many areas of the world of ethnic or tribal nationalism in contradistinction to civic nationalism).

This is not to suggest that the social conception of nationality at work in the genuine link theory has vanished; again, the case should not be overstated. But the diffusion of identity brought about by globalization makes nationality's role in collective self-identification far more contingent than it had been even sixty years ago.<sup>184</sup> Multinational businessmen, to take one prominent example, increasingly live and conduct business in one state while retaining their original nationality. Many, purely for convenience, "carry two or more passports."<sup>185</sup> In *Soufraki v. United Arab Emirates*,<sup>186</sup> the tribunal, while ruling against the investor on jurisdiction for reasons that will be considered below, recognized "that it is difficult for Mr. Soufraki, whose business interests span continents and who constantly travels the world, to reconstruct his actual residence during a twelve or thirteen month period more than ten years earlier."<sup>187</sup> It is hard to reconcile the peripatetic modern world of countless businessmen like Soufraki with the archaic vision of nationality articulated in *Nottebohm*, that of a durable, monolithic bond based on abiding loyalties and interests.

In terms of the consequences for international adjudication, *Feldman v. United Mexican States* is illustrative.<sup>188</sup> Marvin Roy Feldman Karpa, a U.S. citizen by birth, resided for twenty-seven years in Mexico, where he twice married Mexican nationals, raised four children, and ran his business.<sup>189</sup> The predominance of his links, quantitatively and qualitatively, were to Mexico, not the United States. But Feldman saw no need to either change his U.S. nationality or acquire Mexican nationality.<sup>190</sup> The tribunal convened to hear his claims against Mexico nonetheless rightly rejected Mexico's *Nottebohm*-inspired jurisdictional objection that Feldman should be deemed a de facto Mexican national and thus precluded from instituting international arbitration. It reaffirmed *Flegenheimer's* sensible interpretation of *Nottebohm's* dicta and stressed that scrutiny of a claimant's dominant, or real and effective, nationality requires, in the first place, "the existence of a double citizenship" as a matter of law.<sup>191</sup> Unlike the ICJ in *Nottebohm*, the *Feldman* tribunal also incisively observed that it did not find itself

confronted, in terms of the state-individual relationship, with a conflict between, on the one hand, permanent residence and, on the other hand, superficial or artificial conferral of citizenship, but

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184. SPIRO, *supra* note 162, at 107–08.

185. Robert Wisner & Nick Gallus, *Nationality Requirements in Investor-State Arbitration*, 5 J. WORLD INVESTMENT & TRADE 927, 927 (2004).

186. *Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7 (July 7, 2004) (Award on Jurisdiction), *reprinted in* 12 ICSID Rep. 158 (2007).

187. *Id.* at 169.

188. *Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1 (Dec. 6, 2000) (Interim Decision on Preliminary Jurisdictional Issues), *reprinted in* 40 I.L.M. 615 (2001).

189. *Id.* ¶¶ 27–28.

190. *Id.* ¶¶ 28–30.

191. *Id.* ¶ 32.

rather between the former and a citizenship which was conferred *under normal circumstances* in the first place and was not subsequently tainted by a total break of relationship.<sup>192</sup>

Other relevant distinctions between modern investor-state arbitration and *Nottebohm's* diplomatic protection context, should not be minimized. Feldman, as an investor, brought the arbitration on his own behalf against Mexico, the host state, under Chapter 11 of NAFTA, which operated in the arbitration as a substantive *lex specialis*. Because Mexico is not a party to the ICSID Convention, the tribunal adopted the Additional Facility procedural rules. The concerns expressed in *Flegenheimer* and elsewhere about the need to preserve juridical equality in international fora such as the ICJ, which hear interstate disputes, are less salient in this context. But *Feldman* appropriately rejected Mexico's contention that general international law required the tribunal to disregard Feldman's de jure U.S. nationality and to focus instead on his alleged "de facto"—genuine, dominant, real and effective, and so forth—Mexican nationality. Host states have raised similar objections in a handful of ICSID arbitrations instituted by natural persons, which will be analyzed below for illustrative purposes.<sup>193</sup>

The point of emphasis here is that *Feldman* and similar investor-state arbitrations reflect a more general truth about the modern international political economy: countless foreign nationals invest, work, and even, as a matter of simple convenience or efficiency, reside and raise their families abroad, without acquiring the nationality of the relevant foreign state. This is neither unlawful nor, necessarily, undesirable. To the contrary, it tends to promote transnational business and investment by enabling potential investors from developed, capital-exporting states to retain what they may well regard as critical legal rights and protections conferred by the law of the state of their original nationality while, at the same time, actively investing abroad—and thereby transferring capital, skills, and technology to developing states.<sup>194</sup> Beyond the role of this phenomenon in increasing global wealth, it may facilitate important international values like cross-cultural understanding.

### B. *The Retreat of the Genuine Link Theory in Diplomatic Protection*

Finally, in positive international law, *Nottebohm's* genuine link theory has been in retreat for some time even in the diplomatic espousal context in which it arose. As early as 1984, the Iran-U.S. Claims Tribunal, albeit in the *sui generis* framework of the Algiers Accords,<sup>195</sup> questioned the vitality of the

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192. *Id.* (emphasis added).

193. See *infra* Part V.A.

194. W. Michael Reisman & Robert D. Sloane, *Indirect Expropriation and Its Valuation in the BIT Generation*, 74 BRIT. Y.B. INT'L L. 115, 116–17 (2004).

195. Declaration of the Government of the Democratic and Political Republic of Algeria Concerning the Settlement of Claims by the Government of the United States and the Government of the Islamic Republic of Iran, Jan. 19, 1981, 20 I.L.M. 230.

traditional principle on which *Nottebohm* purported to rely. In the A/18 case, the tribunal held that dual nationals—at least in this particular treaty context—may sue one of their states of nationality, namely, the non-“dominant and effective” state of nationality. But the tribunal apparently reached this decision as a compromise after the Iranian members of the tribunal insisted on the complete exclusion of dual nationals. Other members of the tribunal believed that the Algiers Accords did not exclude dual nationals at all.<sup>196</sup> Consequently, while the tribunal ultimately affirmed *Nottebohm* in one sense, it also recognized “the contemporaneous development of international law to accord legal protections to individuals, even against the State of which they are nationals.”<sup>197</sup>

In 2000, the International Law Association (“ILA”) Committee on Diplomatic Protection of Persons and Property, after nominally reaffirming the genuine link theory,<sup>198</sup> explained that as the state has “lost its position of exclusivity in the international legal order,” developments in the international law of both human rights and foreign investment have increasingly led to the decline of the fiction of diplomatic protection and to a countervailing expansion of “[t]he direct standing of the individual under international law.”<sup>199</sup> For this reason, the ILA explained, even in the diplomatic protection context, “the link of nationality has lost to an extent its rigor in the context of international claims.”<sup>200</sup> In particular, “to the extent that the intervention of the State is reduced or eliminated as a requirement for submission of international claims, the link of nationality will loose [sic] somewhat its relevance.”<sup>201</sup> In 2006, finally, the ILC remarked in the Commentary to Article 4 of its Draft Articles on Diplomatic Protection, which defines the state of nationality for the purpose of diplomatic protection, that this provision “does not require a State to prove an effective or genuine link between itself and its national, along the lines suggested in the *Nottebohm* case, as an additional factor for the exercise of diplomatic protection, even where the national possesses only one nationality.”<sup>202</sup>

This is, I believe, a positive trend. Not only is the genuine link theory somewhat misguided as a descriptive matter—that is, both as a description of *Nottebohm*’s holding and as a doctrinal rule for recognition of the ascrip-

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196. Mosk, *supra* note 148, 217–18.

197. Iran v. United States, Case No. A/18, 5 Iran-U.S. Cl. Trib. Rep. 251, 265 (1984)

198. *Changing Law of Nationality of Claims*, *supra* note 115, at 635.

199. *See id.* at 633.

200. *Id.* at 638.

201. *Id.*

202. Int’l Law Comm’n, *Draft Articles on Diplomatic Protection and Commentaries, Report of the International Law Commission on its Fifty-eighth Session*, May 1–June 9, 2006, July 3–Aug. 11 2006, U.N. GAOR, 61st Sess., Supp. No. 10, at 32–33, U.N. Doc. A/61/10, available at <http://www.un.org/ga/61/documentation/list.shtml> (footnote omitted) (hereinafter *Draft Articles on Diplomatic Protection*). The ILC explains that “the Commission took the view that there were certain factors that served to limit *Nottebohm* to the facts of the case” and indicated “that the Court did not intend to expound a general rule applicable to all States but only a relative rule” applicable to the particular context before it. *Id.* at 33 (footnote omitted).

tion of nationality at the international level—it is also often needless. In fact, in some contemporary contexts, it may even inhibit the roles that nationality serves in international law. The general principle that prohibits abuses of rights—which, again, supplies the more cogent rationale for *Nottebohm* itself—often supplies a more appropriate and effective means to regulate nationality at the international level in situations comparable to that case. For purposes of illustration, Part V considers in some detail an example that has provoked scholarly and jurisprudential debate recently: the regulation of nationality in the context of investor-state arbitral jurisdiction under the ICSID Convention. It then briefly canvasses how the functional analysis and regulation of nationality in international law may, or already does, operate in several other contemporary contexts.

## V. REGULATING NATIONALITY BY FUNCTION

### A. *Investor-State Arbitration Under the ICSID Convention*

One of the most contentious areas in which arguments over variants of the genuine link theory application have arisen in recent years is modern investor-state arbitration. The vast majority of these arbitrations take place under the auspices of the ICSID Convention, Article 25 of which makes jurisdiction contingent on nationality.<sup>203</sup> The drafters chose diversity of nationality as the mechanism to ensure that arbitrations under its auspices would be international in the relevant sense,<sup>204</sup> for the ICSID Convention's chief goal, as expressed in its preamble, is to facilitate "international cooperation for economic development" by promoting "the role of private investment therein."<sup>205</sup> Article 25 provides in part:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State

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203. For simplicity of illustration, this part focuses on investor-state arbitration under the auspices of the ICSID Convention. The problem may arise in investor-state arbitration held under the United Nations Commission on International Trade Law ("UNCITRAL") or other auspices as well, for jurisdiction also depends on the investor's nationality as defined by the relevant investment instrument, typically a BIT, which authorizes resort to arbitration as a modality of dispute resolution—a critical procedural right for foreign investors. See Anthony C. Sinclair, *The Substance of Nationality Requirements in Investment Treaty Arbitration*, 20 ICSID REV.—FOREIGN INVESTMENT L.J. 357, 358–59 (2005). The following analysis may therefore be apt in a broader array of arbitral settings. Most BITs follow customary international law insofar as they define "national" for natural persons to mean simply "a natural person holding the nationality" of the relevant state under its internal law on nationality. See *id.* at 364 (citing MARGRETE STEVENS & RUDOLF DOLZER, *BILATERAL INVESTMENT TREATIES* 31–32 (1995)).

204. See 2 ICSID (W. Bank), *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* 150 (1968); Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 RECUEIL DES COURS 331, 355–56 (1972); see also CHRISTOPH SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* ¶ 427 (2001) (noting that the drafters rejected an alternative proposal that would have made jurisdiction contingent on the foreign origin of the investment capital).

205. ICSID Convention, *supra* note 30, pmbli.; see also SCHREUER, *supra* note 204, ¶¶ 11–13.

(or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.<sup>206</sup>

The phrase “[n]ational of another Contracting State” includes natural and juridical persons. A “natural” national is “any natural person who had the nationality of a Contracting State other than the State party to the dispute on the” dates of consent to arbitration and registration of the request for arbitration.<sup>207</sup> Echoing the classical rule that excludes dual nationals from suing one of their states of nationality, Article 25 clarifies that this definition “does not include any person who on either date also had the nationality of the Contracting State party to the dispute.”<sup>208</sup> The definition of a “juridical” national is more complex and merits separate and more extended treatment than can be supplied here.<sup>209</sup> In contrast, the ICSID jurisprudence on nationality in the context of natural persons is relatively limited and offers a more manageable illustration for purposes of this Article. It suffices here to note that the ICSID Convention does not supply a definition of nationality for juridical persons either. It does not specify that a company shall be deemed the national of its state of incorporation or its *siège social*, for example.<sup>210</sup>

Because nationality is one of the principal keys to jurisdiction but the ICSID Convention does not define it,<sup>211</sup> respondent (host) states predictably often object to jurisdiction on this basis. The ICSID Convention does not, as a rule, disturb the general presumption that, subject to treaty limits, international law leaves it to states to define the persons and entities they deem

206. ICSID Convention, *supra* note 30, art. 25(1).

207. *Id.* art. 25(2)(a).

208. *Id.*

209. Juridical nationality under the ICSID Convention raises analogous but much more complex questions: in part, this is because of its definition, which allows juridical nationals of the host state itself to be deemed *foreign* investors entitled to arbitrate under ICSID auspices based on foreign control; in part, it is because of the ease with which multinational corporations can create whole portfolios of foreign subsidiaries for various purposes; and, in part, it is because of a global economy in which “most international investment is channeled through complex structures consisting of companies incorporated in different jurisdictions and owned by nationals of different countries,” rendering it often “difficult to identify the rung on the corporate ladder that determines the nationality of the investors.” Wisner & Gallus, *supra* note 185, at 927. These considerations make the need for international legal regulation of juridical nationality particularly strong in the context of the ICSID Convention, but raise a number of issues that would require more extensive and digressive treatment than can be provided here. *See id.* at 945 (“At the time the ICSID Convention was drafted forty years ago, for example, we could sensibly talk about the nationality of a corporation and the national origins of capital. In the modern world of multinational corporations and instantaneous movement of capital, such labels are decreasingly relevant.”); *see also* Mark Kantor, *Nationality and Control Issues in ICSID Arbitrations*, in *ADR AND THE LAW* 384 (18th ed. 2001); Sinclair, *supra* note 203, at 368–87 (reviewing the relevant arbitral awards).

210. SCHREUER, *supra* note 204, ¶ 457. The *siège social* refers to “the place of central administration or effective seat” of the corporate entity. *Id.* ¶ 460.

211. *See id.* ¶¶ 422, 429; Broches, *supra* note 204, at 358 (explaining that the drafters deliberately “abstained from defining ‘nationality’”).



their nationals.<sup>212</sup> But arbitration under the ICSID Convention's auspices, while subject to the ordinary meaning of the text where it appears,<sup>213</sup> takes place within the framework of general international law. And the ICSID Convention does not define nationality. The question whether and, if so, which international legal limits apply must therefore be answered by the arbitrators in the exercise of their inherent power to determine their own jurisdiction—as the drafters, indeed, foresaw.<sup>214</sup> This axiom of international arbitration, *la compétence de la compétence*, is explicitly confirmed in the ICSID Convention.<sup>215</sup>

Just as the ICSID Convention does not supply a definition of nationality, so it does not specify whether inherited doctrines purporting to constrain state autonomy over nationality at the level of international claims apply equally (or at all) in the context of arbitrations under its auspices. To date, no ICSID arbitral tribunal has squarely decided the issue.<sup>216</sup> Yet recent awards evince a virtually uniform trend toward construing the nationality criteria of Article 25 in terms of their conformity with the formal requirements of internal law.<sup>217</sup> Tribunals have shown little inclination to search for robust substantive bonds of the sort stressed in *Nottebohm*.<sup>218</sup> This casts further doubt on the descriptive accuracy of the genuine link theory as a general doctrine of international law. But it also invites a normative question: whether the genuine link theory, or some variant of it, *should* have a place in arbitration under ICSID auspices.

As a matter of treaty interpretation, if the genuine link doctrine is an established part of general international law, then it constitutes one of the

212. SCHREUER, *supra* note 204, ¶ 429; *see also* *Siag v. Egypt*, ICSID Case No. ARB/05/15 (Apr. 11, 2007) (Decision on Jurisdiction), *reprinted in* 46 I.L.M. 863, ¶ 143 (2007) (“It is well established that the domestic laws of each Contracting State determine nationality. This has been accepted ICSID practice.”) (footnote omitted).

213. Insofar as the ICSID Convention itself limits state competence in this area—for example, by excluding natural-person dual nationals seeking to bring an arbitration against one of their states of nationality, *see* ICSID Convention, *supra* note 30, art. 25(2)(a)—those limits must be respected. *See* Vienna Convention on the Law of Treaties arts. 26, 31–32, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]; *see also* Acquisition of Polish Nationality, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 7, at 16 (Sept. 15).

214. Broches, *supra* note 204, at 358 (“[T]here was a general recognition that in the course of ruling on their competence Commissions and Tribunals might have to decide whether a nationality of convenience or a nationality acquired involuntarily by an investor could or should be disregarded.”) (citing *Nottebohm (Liech. v. Guat.)*, 1955 I.C.J. 4 (Apr. 6)).

215. ICSID Convention, *supra* note 30, art. 41(1) (“The Tribunal shall be the judge of its own competence.”). Indeed, arbitral jurisdiction to determine jurisdiction under the ICSID Convention is, almost alone among the institutions in modern investment or commercial arbitration, insulated from national judicial scrutiny. *See* William W. Park, *The Arbitrator's Jurisdiction to Determine Jurisdiction*, in INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 55, 59 n.14 (Albert Jan Van Den Berg ed., 2007).

216. *See* Sinclair, *supra* note 203, at 366–67 & n.32.

217. *See id.* at 362 (“Coupled with expansive investment treaties, practice has developed to the point where it appears that the ‘bond of nationality’ seems to have diminished often to a mere formality.”) (footnote omitted).

218. *See* *Iran v. United States*, Case No. A/18, 5 Iran-U.S. Cl. Trib. Rep. 251, 263 (1984) (contrasting *Nottebohm's* “search for the real and effective nationality based on the facts of the case” with “more formalistic criteria”).

“relevant rules of international law” that tribunals construing Article 25 of the ICSID Convention should consider in accordance with the Vienna Convention on the Law of Treaties (“VCLT”) and (for non-states parties to the latter) customary international law to the same effect.<sup>219</sup> That would not make the doctrine dispositive. Other and perhaps more weighty principles of interpretation, such as the ordinary meaning of the text, apply concurrently and may well take precedence.<sup>220</sup> Yet several scholars and arbitrators have suggested that it would be appropriate—indeed, mandatory—for ICSID tribunals to apply *Nottebohm’s* genuine link theory to disavow jurisdiction over investment disputes brought by natural persons who lack the kind of durable, meaningful links on which the ICJ had focused.<sup>221</sup> Before considering this suggestion and the relevant awards, it will be helpful to make explicit the worry that animates it—at least insofar as it is advanced in earnest, not merely as a litigation position.<sup>222</sup>

Suppose an Azanian national wants to invest in Ruritania. But no BIT or other investment treaty exists between Azania and Ruritania. Also, the investor believes that, in the event of a dispute, reliance on the internal legal system of Ruritania will prove futile, either because its law affords no relief to an investor so situated or because of corruption in the Ruritanian legal system. Fortunately, Ruritania has entered into a BIT with Khazaria, and the investor has highly placed friends in the Khazar government. A few weeks later, Khazaria (perhaps unusually but in strict conformity with its internal nationality law) confers the nationality of Khazaria on the Azanian

219. VCLT, *supra* note 213, art. 31(2)(c).

220. The VCLT requires that the ICSID Convention “be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” *Id.* art. 31(1). “[A]ny relevant rules of international law applicable in the relations between the parties” is only one of three factors that shall be “taken into account, together with the context.” *Id.* art. 31(3).

221. *See, e.g.,* *Siag v. Egypt*, ICSID Case No. ARB/05/15 (Apr. 11, 2007) (Decision on Jurisdiction) (Vicuña, dissenting in part), *reprinted in* 46 I.L.M. 863, 880 (2007); *cf. Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18 (Apr. 29, 2004) (Decision on Jurisdiction) (Weil, dissenting), *reprinted in* 20 ICSID REV.—FOREIGN INVESTMENT L. J. 205, 245 (2005) (comparable argument in the context of juridical nationality). For scholarly commentary, *see, for example*, SCHREUER, *supra* note 204, ¶ 429 (“Situations where nationality provisions of national law may be disregarded include cases of ineffective nationality lacking a genuine link between the State and the individual.”); C. F. Amerasinghe, *The Jurisdiction of the International Centre for the Settlement of Investment Disputes*, 19 INDIAN J. INT’L L. 166, 200–01 (1979); Sinclair, *supra* note 203, at 366; *cf. O.E. García-Bolívar, The Issue of a Foreign Company Wholly Owned by National Shareholders in the Context of ICSID Arbitration*, 2 TRANSNAT’L DISP. MGMT. 1, 6–7 (2005) (comparable argument in the context of the nationality of a juridical claimant).

222. Egypt, for example, has argued both sides of this issue. *Compare* *Champion Trading Co. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9 (Oct. 21, 2003) (Decision on Jurisdiction), *reprinted in* 9 ICSID REV.—FOREIGN INVESTMENT L. J. 275, 288 (2004) (contesting the argument of the natural-person claimants that the tribunal should apply a “real and effective” nationality doctrine to determine their nationality), *with* *Siag v. Egypt*, ICSID Case No. ARB/05/15 (Apr. 11, 2007) (Decision on Jurisdiction) (Vicuña, dissenting in part), *reprinted in* 46 I.L.M. 863, 880 (2007) (arguing that the tribunal should apply *Nottebohm’s* genuine link theory to find that the claimants, despite fulfilling the formal requirements of Italy’s internal law to gain its nationality and of Egypt’s internal law to renounce its nationality, remained de facto Egyptians and therefore should be precluded from invoking the Centre’s jurisdiction by Article 25(2)(a)).

investor. He then proceeds to invest in Ruritania as he had planned, secure in the knowledge that if the Ruritanian government subsequently adopts measures that violate the BIT, he may vindicate his newfound treaty rights before an independent international tribunal operating under the auspices of the ICSID Convention. In that arbitration, he will also enjoy robust rights and guarantees that would have been unavailable to him as an Azanian.

In a situation like this, it is thought, the genuine link theory offers the correct legal rationale for a tribunal to disavow jurisdiction and, by doing so, to discourage such potential abuses of the modern investor-state arbitral system, which seeks to respect the economic and contractual autonomy of states and investors alike. Conversely, while the problem has received less recognition, it is conceivable that, as suggested in the *Flegenheimer* opinion,<sup>223</sup> a host state might manipulate its internal law so as to claim a foreign national as, also, *its* national. It might then invoke Article 25(2)(a)'s exclusion of dual nationals as an expedient to avoid a tribunal's properly invoked jurisdiction.<sup>224</sup>

The policy considerations at work in *Nottebohm* clearly resemble those that animate contemporary arguments for applying the genuine link theory to the ICSID Convention. Absent constraints on the right of states to ascribe their nationalities (or of investors to acquire them), the worry is that the ICSID Convention's laudable framework for international arbitration might be jeopardized by the manipulation of nationality.<sup>225</sup> Investments could be structured, for example, to enable a nominal foreign investor, who remains in substance the respondent's own national (or the national of a state that has no investment agreement with the host state), to sue that state in an international forum. This would allow a foreign investor who would otherwise be ineligible for international arbitration under ICSID auspices to acquire this valuable procedural right by manipulating his nationality. Equally, in the context of juridical persons, absent some constraint, the worry is roughly that foreign investors will establish "mailbox" companies as mere investment vehicles to take advantage of corporate nationalities of convenience, which bring their investments within the scope of a BIT or other international instrument that authorizes resort to ICSID arbitration.<sup>226</sup>

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223. See *Flegenheimer* (U.S. v. Italy), 14 R.I.A.A. 327, 338 (Italian-U.S. Concil. Comm'n 1958).

224. ICSID tribunals may legitimately disregard the forcible imposition of a host state's nationality without reference to the genuine link theory. See Christoph Schreuer, *Commentary on the ICSID Convention*, 12 ICSID REV.—FOREIGN INVESTMENT L. J. 59, 75 (1997) (asserting, based on the ICSID Convention's *travaux*, that "the host State's nationality may be disregarded" where it has been imposed on the foreign investor to "deprive the investor of access to the Centre" in order to "defeat jurisdiction" *ex post facto*).

225. See Broches, *supra* note 204, at 355–56. ("There is no reason to have these international procedures be a substitute, even on an optional basis, for domestic procedures for the settlement of disputes between a State and its own citizens.")

226. This concern has been most eloquently and thoroughly expressed in *Tokios Tokelēs v. Ukraine*, ICSID Case No. ARB/02/18 (Apr. 29, 2004) (Decision on Jurisdiction) (Weil, dissenting), *reprinted in* 20 ICSID REV.—FOREIGN INVESTMENT L. J. 204, ¶¶ 19–20, at 245 (2005) (urging the adoption of an "origin of capital" constraint on juridical nationality).

Nor is this a trivial or frivolous worry. For the contemporary system of investor-state arbitration to function smoothly and achieve its international economic objectives, both the investors of capital-exporting states and the governments of capital-importing states must be able to ascertain the scope of international treaty protection for different investments and then plan, respectively, their business activities and laws accordingly. Were investors completely unconstrained in their ability to manipulate nationality in order to secure the procedural option of ICSID arbitration—and, typically, by the same token, the robust substantive investment protections and guarantees of a BIT—they would be foolish not to, and international lawyers would be derelict not to so advise them. In fact, to some extent, this has happened: “Recognising that investment protection treaties ‘have teeth,’ international legal practices now customarily advise their clients that, in addition to familiar and undeniably important tax and regulatory considerations, strategic structuring can ensure that an investment benefits from the protection of an effective investment treaty should a dispute arise.”<sup>227</sup>

This is not *per se* objectionable.<sup>228</sup> But it is surely correct to foresee a potential for abuse in such practices. The question is whether *Nottebohm’s* genuine link theory supplies the appropriate and effective means to deter or prevent these abuses. Several commentators and arbitrators suggest that it does. In an insightful article surveying the jurisprudence on nationality for both natural and juridical persons, Sinclair asks, “Is the mischief aimed at in seminal cases such as *Nottebohm* . . . not broadly similar to the situation where an investor seizes upon a US\$100 shelf company in a foreign jurisdiction to use as an investment vehicle so that it might attract investment treaty protection?”<sup>229</sup>

Without denying this problem—that is, the potential for investors and host states alike to abuse a quintessential component of the contemporary treaty framework and institutional regime for investor-state arbitration—I want to suggest that, as in *Nottebohm* itself, the better way to respond to such mischief lies in the principle specifically tailored to combat problems of this nature: the general principle of law prohibiting abuses of rights. Whatever the merits of the reinterpretation of *Nottebohm* offered earlier, it would be misguided to resolve the debate over Article 25’s nationality requirements by adopting what emerges, in the context of the ICSID Convention, as an anachronistic theory about nationality that is incongruous given the goals of contemporary international investment law. *Nottebohm’s* genuine link theory, even were it appropriate in the context of diplomatic claims, neither appro-

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227. Sinclair, *supra* note 203, at 357 (citing *Agua del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3 (Oct. 21, 2005) (Decision on Jurisdiction), *reprinted in* 20 ICSID REV.—FOREIGN INVESTMENT L. J. 450, ¶ 330 (2005)).

228. *Id.* Perhaps in some instances this is only for lack of an alternative. See SCHREUER, *supra* note 204, at 267–68.

229. Sinclair, *supra* note 203, at 366; *cf.* García-Bolívar, *supra* note 221, at 6–7.

priately respects the ICSID Convention's object and purpose nor accurately describes nationality's legal meaning in the modern era.<sup>230</sup>

To date, only a handful of jurisdictional decisions by ICSID tribunals have considered, in some manner, the applicability of *Nottebohm* and its progeny to the requirements of Article 25(2)(a) of the ICSID Convention.<sup>231</sup> It will be informative to consider them briefly.

### 1. Champion Trading

In *Champion Trading Co. v. Arab Republic of Egypt*,<sup>232</sup> the shareholders of the National Cotton Company, which had been formed to invest in Egypt's newly liberalized raw cotton trade, sued Egypt for expropriation and related violations of the U.S.-Egypt BIT.<sup>233</sup> Egypt objected to jurisdiction, arguing, among other things, that Article 25(2)(a) of the ICSID Convention precluded the natural person claimants, James, John, and Timothy Wahba, from bringing the arbitration against Egypt because they possessed Egypt's nationality under its internal law.<sup>234</sup> The Wahbas, the minor children of Dr. Mahmoud Wahba, a dual U.S.-Egyptian national, were born in Connecticut and had lived all their lives in the United States.<sup>235</sup> Under Egypt's internal law, however, their birth to an Egyptian father automatically conferred Egyptian nationality on them—unless Dr. Wahba had first requested and received official permission to renounce his Egyptian nationality, which he had not.<sup>236</sup>

The claimants argued, however, that although they *technically* held two nationalities (U.S. and Egyptian), international law obliged the tribunal to consider their “real and effective nationality,”<sup>237</sup> that is, to quote *Nottebohm*, the “juridical expression of the fact that the individual upon whom it is conferred . . . is *in fact more closely connected with the population of the State conferring nationality than with that of any other State.*”<sup>238</sup> This, the claimants argued, constituted “the prevailing definition of nationality in international law.”<sup>239</sup> Were they “to be considered Egyptian” by the tribunal, it would be “only because of Egyptian law which conferred Egyptian nationality on

230. See VCLT, *supra* note 213, art. 31(1).

231. After this Article entered the production stage, the ICSID tribunal issued a decision that supports the arguments advanced here and directly speaks to the relevance of *Nottebohm* to the nationality of natural person claimants under the ICSID Convention. See *Micula v. Romania*, ICSID Case No. ARB/05/20 (Sept. 24, 2008) (Decision on Jurisdiction and Admissibility), ¶¶ 69–106, 99–104, available at <http://ita.law.uvic.ca/documents/Micula.v.RomaniaJurisdiction.pdf>.

232. *Champion Trading Co. v. Egypt*, ICSID Case No. ARB/02/9 (Oct. 21, 2003) (Decision on Jurisdiction), reprinted in 19 ICSID REV.—FOREIGN INVESTMENT L. J. 275 (2004).

233. Treaty Concerning the Reciprocal Encouragement and Protection of Investments, U.S.-Egypt, Sept. 29, 1982, S. TREATY DOC. NO. 99-24, reprinted in 21 I.L.M. 927 (1982).

234. *Champion Trading*, 19 ICSID REV.—FOREIGN INVESTMENT L. J. at 280–81.

235. See *id.* at 282, 288.

236. *Id.* at 282–83.

237. *Id.* at 283.

238. *Nottebohm* (Liech. v. Guat.), 1955 I.C.J. 4, 23 (Apr. 6) (emphasis added).

239. *Champion Trading*, 19 ICSID REV.—FOREIGN INVESTMENT L. J. at 288.

them at birth,” even though, “in fact, they neither have today nor ever have had any particular *ties* or relations with Egypt”; and, they further argued, “such an involuntary nationality should not be taken into account when interpreting the ICSID Convention.”<sup>240</sup>

The *Champion* tribunal correctly dismissed this argument, although on an unduly narrow ground that elided the critical issue. It found *Nottebohm* and its progeny to be irrelevant, not as such, but because of an exception stated in the A/18 decision of the Iran-U.S. Claims Tribunal. That decision, it may be recalled, considered the right of dual Iranian-U.S. nationals to bring claims before the Tribunal under the *sui generis* Algiers Accords. The Tribunal concluded that, for this purpose, it would adopt the “dominant and effective” nationality of each claimant, consistent with the rule for dual nationals advanced by Borchard: “In view of the pervasive effect of this rule since the *Nottebohm* decision . . . references to ‘national’ and ‘nationals’ in the Algiers Declarations must be understood as consistent with that rule *unless an exception is clearly stated*.”<sup>241</sup> This is a questionable conclusion, as noted earlier, but what matters here is that the italicized phrase enabled the *Champion* tribunal to elide the real argument of the claimants. The tribunal said that unlike the Iran-U.S. Claims Tribunal relative to the Algiers Accords, it found itself “faced . . . with such a clear exception.”<sup>242</sup> Article 25(2)(a) of the ICSID Convention *explicitly* excludes dual nationals. The ordinary meaning of that provision, the tribunal reasoned, leaves no room for an interpretation of the treaty that would implicitly adopt a tacit “real and effective nationality” rule for dual nationals.<sup>243</sup>

*Champion*—and the A/18 decision on which it relied—both correctly note that parties to a treaty may lawfully depart from a rule of customary international law provided the rule is not *jus cogens*, from which derogation is, by definition, prohibited.<sup>244</sup> In general, this is accurate. Relative to the international legal regulation of nationality, it has been understood since at least 1923, when the PCIJ issued its opinions in the *Polish Nationality* and *Tunis-Morocco Nationality Decrees* cases.<sup>245</sup> The real problem with *Champion* is that it needlessly quoted the Iran-U.S. Claims Tribunal’s dubious claim that the genuine link theory had become a *general* rule of international law by virtue of the dicta in *Nottebohm*. In fact, as the ILC has accurately noted, the genuine link principle finds scant support in state practice.<sup>246</sup>

240. *Id.* (emphasis added).

241. Iran v. United States, Case No. A/18, 5 Iran-U.S. Cl. Trib. Rep. 251, 265 (1984) (emphasis added).

242. *Champion Trading*, 19 ICSID REV.—FOREIGN INVESTMENT L.J. at 288.

243. *Id.*

244. VCLT, *supra* note 213, art. 53.

245. Acquisition of Polish Nationality, Advisory Opinion, 1923 P.C.I.J. (ser. B), No. 7 (Sept. 15); Nationality Decree Issued in Tunis and Morocco (French Zone), Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4 (Feb. 7).

246. *First Report on Diplomatic Protection*, *supra* note 78, ¶ 111.

But the *Champion* tribunal avoided these issues—perhaps appropriately in terms of judicial economy, although the general aversion to dicta has less force in a legal system without *stare decisis* or a formal system of precedent. In fact, the tribunal may have enriched ICSID jurisprudence by addressing the claimants' argument more directly.<sup>247</sup> And at any rate, the tribunal did not avoid dicta. It intimated that the genuine link theory *might* appropriately be applied on different facts:

This Tribunal does not rule out that situations might arise where the exclusion of dual nationals could lead to a result which was manifestly absurd and unreasonable (Vienna Convention, Article 32(b)). One could envisage a situation where a country continues to apply the *jus sanguinis* over many generations. It might for instance be questionable if the third or fourth foreign born generation, *which has no ties whatsoever with the country of its forefathers*, could still be considered to have, for the purpose of the Convention, the nationality of this state.<sup>248</sup>

The Tribunal's speculation here—that it might be appropriate for an ICSID tribunal to disregard a state nationality law that purports to confer nationality on a fourth foreign-born generation—may be correct. But its reasoning, which refers, in language reminiscent of *Nottebohm*, to “ties . . . with the country of its forefathers,” is misguided. One generation may be sufficient to destroy any social bond between a child and the state of his or her parent's nationality; it certainly would be sufficient to vitiate a genuine link in the robust sense elaborated in *Nottebohm*. The real problem in this hypothetical is therefore not that sustaining jurisdiction would violate the genuine link theory; again, doing so might equally violate the genuine link theory in the case of a first foreign-born generation child. But it is not clear why the sociopolitical conception of nationality in *Nottebohm* should be relevant here. Rather, the reason that it might be proper for an ICSID tribunal to disregard an exorbitant internal nationality law such as the one stipulated is because of the conclusion that might be drawn: it would be an abuse of rights to allow a state to rely on such an exorbitant international nationality law to preclude a would-be foreign investor from invoking arbitral jurisdiction under the Convention's auspices.<sup>249</sup> Such a “fictitious exercise of a right

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247. Cf. A.C. Sinclair, *Nationality Requirements for Investors in ICSID Arbitration – The Award in Soufraki v. The United Arab Emirates*, 1:4 TRANSNAT'L DISPUTE MGMT. 1, 2 (Oct. 2004) (“Therefore although the Tribunal was not called upon to rule on the question for the purposes of the Award (having found that Mr. Soufraki was not Italian and therefore not a dual national), the jurisprudence of ICSID and investment treaty arbitration would have been enriched if this esteemed Tribunal had also considered the UAE's alternative argument as to whether investment treaty arbitration encompasses a rule of effective nationality in the case of dual nationals . . .”).

248. *Champion Trading Co. v. Egypt*, ICSID Case No. ARB/02/9 (Oct. 21, 2003) (Decision on Jurisdiction), reprinted in 19 ICSID REV.—FOREIGN INVESTMENT L. J. 275, 288 (2004) (emphasis added).

249. To be clear, I do not mean to suggest that a state would enact internal nationality legislation principally with a view to manipulating the jurisdiction of international arbitral tribunals. Nationality

for the purpose of evading either a rule of law or a contractual obligation” need not—and, given the Convention’s object and purpose, should not—“be tolerated.”<sup>250</sup>

## 2. Soufraki

In *Soufraki*, the tribunal held that the foreign investor, Hussein Nuaman Soufraki, an Italian national by both birth and blood, had automatically lost that nationality by operation of Italian law when he became a Canadian national in 1991, and that he thereafter failed to reacquire Italian nationality in conformity with Italian law.<sup>251</sup> Because he brought the arbitration under the BIT between the United Arab Emirates (“UAE”) and Italy, but, on the relevant dates, did not have Italian nationality, the tribunal properly disavowed jurisdiction.<sup>252</sup> Consequently, in *Soufraki*, as in *Champion*, the tribunal apparently avoided inquiring into the relevance of the genuine link theory, even though the UAE had advanced it as an alternative ground for finding Soufraki to be Canadian rather than Italian.<sup>253</sup> Again, consideration of this alternative ground, while not necessary, may have enriched the jurisprudence.<sup>254</sup>

Yet *Soufraki* offers more guidance on the issue than may at first appear. In the first place, without saying so, the tribunal necessarily rejected the genuine link theory, at least in the strong form in which the *Nottebohm* majority described it. For if, as a general rule, rather than only in the special case of dual nationals, nationality in international law must constitute “the juridical expression of the fact that the individual upon whom it is conferred . . . is in fact more closely connected with the population of the State conferring nationality than with that of any other State,”<sup>255</sup> then the *Soufraki* tribunal asked the wrong questions. It should not have scrutinized exclusively whether Soufraki met the *formal* requirements of Italian law—as it did, quite meticulously and in spite of evidence that included two Italian passports, five certificates attesting to Soufraki’s Italian nationality, and a letter

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serves many functions, and that scenario strikes me as exceedingly unlikely. But a state might well invoke such a nationality law enacted for other reasons, or construe its nationality law exorbitantly, in this situation. International law might, in that circumstance, properly deem it an abuse of rights and disregard it.

250. CHENG, *supra* note 100, at 123.

251. See *Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7 (July 7, 2004) (Award on Jurisdiction), *reprinted in* 12 ICSID Rep. 158, ¶¶ 48–52 (2007).

252. *Id.* ¶ 84.

253. *Id.* ¶ 42. The UAE argued that Soufraki’s “dominant nationality” on the relevant dates was Canadian. *Id.* Soufraki countered that were the “effective nationality” test applied, the great weight of his connections would lie with Italy. *Id.* ¶ 44. During the initial phase of the Soufraki case, the UAE advanced the genuine link theory as its principal argument. Only after discovery did it become apparent that Soufraki may have lost his Italian nationality under Italian law, leading the UAE to include the latter challenge in its reply memorial. See *id.* ¶¶ 8–10.

254. Sinclair, *supra* note 247, at 2.

255. *Nottebohm (Liech. v. Guat.)*, 1955 I.C.J. 4, 23 (Apr. 6) (emphasis added).



from the Ministry of Foreign Affairs to the same effect.<sup>256</sup> Instead, or in addition, the tribunal should have asked about the comparative nature and durability of Soufraki's *substantive* ties to Canada and Italy. So as a descriptive matter, *Soufraki* is further evidence that the genuine link theory, in the strong form set forth by the ICJ in dicta, is not international law. Today, as in the pre-*Nottebohm* era, the right to confer nationality remains in a domain reserved to each state's internal legal competence.<sup>257</sup> But relative to the normative issue—that is, whether the genuine link theory should be applied to disavow jurisdiction over a foreign investor who formally meets the nationality requirements of a particular state in order to avert potential abuses of the ICSID system—*Soufraki*, like *Champion*, apparently offers little guidance.

Yet, also as in *Champion*, *Soufraki* includes a rather offhand remark and a hypothetical in dicta, which raises precisely that issue from an interesting angle. The *Soufraki* tribunal remarked casually, “in almost a postscript to the Award,”<sup>258</sup> that “had Mr. Soufraki contracted with the United Arab Emirates through a corporate vehicle incorporated in Italy, rather than contracting in his personal capacity, no problem of jurisdiction would now arise.”<sup>259</sup> In all likelihood, the tribunal intended only to point out the clear “disparity between the jurisdictional requirements for individual investors and those applicable to corporations” under Article 25(2) of the ICSID Convention,<sup>260</sup> an issue that merits analysis in its own right. But the accuracy of the tribunal's casual remark, and the cogency of the legal system it presupposes, is questionable. Suppose Soufraki had the foresight to adopt the tribunal's suggestion. Assuming he were formally a Canadian national, one might reasonably ask whether the creation of a corporate vehicle solely to bring his investment within the protection of the UAE-Italy BIT would constitute an abusive effort to manipulate Article 25's nationality requirements to secure investment protection for a person who would otherwise lack access to ICSID's arbitral machinery.

It is not at all clear that a Canadian investor who wishes to invest in the UAE (but will do so only if he can secure the guarantees of a BIT and the procedural right to vindicate them in an international forum) may simply incorporate a vehicle in Italy and thereby benefit from the UAE-Italy BIT *and* the ICSID Convention—to which Canada is not even a party. In fact, it would likely be deemed “manifestly absurd and unreasonable,” within the meaning of Article 32(b) of the VCLT, to construe Article 25 of the ICSID Convention to allow a national of a non-state party to benefit from the Con-

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256. Sinclair, *supra* note 247, at 1.

257. Nationality Decrees Issued in Tunis and Morocco (French Zone), Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 24 (Feb. 7).

258. Sinclair, *supra* note 247, at 2.

259. *Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7 (July 7, 2004) (Award on Jurisdiction), reprinted in 12 ICSID Rep. 158, ¶ 83 (2007).

260. Sinclair, *supra* note 247, at 2.

vention by the expedient of incorporating in a state party to the Convention. Nationals of non-states parties could then acquire the benefits of the ICSID Convention without those states being required to assume corresponding obligations. Note also that the genuine link theory would not be helpful in this context: a would-be Canadian investor might have substantial, durable links to Italy, as did Soufraki. The *real* issue—here, as in *Nottebohm*—is abuse of rights, not genuine links.

For an ICSID tribunal faced with an objection to jurisdiction based on comparable circumstances, the more direct and relevant question would therefore be whether the foreign investor had abusively manipulated the Convention's framework to secure a right to which he would otherwise not be entitled. To revert to the fictional Azania-Ruritania example set out above, a tribunal might want to ask whether Khazaria had conferred its nationality on the Azanian investor solely to enable that person to benefit from the Khazar-Ruritania BIT and thereby to offer him procedural and substantive investment guarantees to which he would not otherwise be entitled. Based on the general principle of law prohibiting abuses of rights, it would be appropriate for an ICSID tribunal confronting circumstances like these to decline jurisdiction (1) *even if* the foreign investor formally met the nationality requirements of a state's internal law and (2) *regardless* of whether the person in question had a genuine link, in the *Nottebohm* sense, to the state in question.

### 3. Siag

In *Siag v. Egypt*,<sup>261</sup> unlike in the previous two cases, the tribunal directly considered the relevance of *Nottebohm* to the ICSID Convention. Claimants Waguïh Elie, George Siag, and Clorinda Vecchi invested in a project, which had been promoted by the Egyptian Ministry of Tourism, to develop a resort on a parcel of land on the Gulf of Aqaba. After Egypt confiscated the property in 1996, Siag and Vecchi sought relief, to no avail, in the Egyptian court system.<sup>262</sup> In 2005, they brought international arbitration, alleging expropriation and related violations of the Italy-Egypt BIT.<sup>263</sup> While Egypt acknowledged that both claimants had Italian nationality,<sup>264</sup> it argued that they also remained Egyptians and were therefore jurisdictionally barred by the dual-nationality exclusion in Article 25(2)(a) of the Convention. After reciting the convoluted sequence of events bearing on the nationality of Siag and Vecchi and extensively analyzing Egypt's internal nationality law, the tribunal found that both claimants had lost their Egyptian nationality and,

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261. *Siag v. Egypt*, ICSID Case No. ARB/05/15 (Apr. 11, 2007) (Decision on Jurisdiction), *available at* [http://www.iisd.org/pdf/2007/itn\\_siag\\_vs\\_egypt.pdf](http://www.iisd.org/pdf/2007/itn_siag_vs_egypt.pdf).

262. *Id.* ¶ 17. According to the claimants, they obtained that relief, only to have Egypt's executive authorities disregard the relevant court orders. *Id.*

263. *Id.* ¶ 18.

264. *Id.* ¶ 142.

on the relevant dates for jurisdiction, had only Italian nationality.<sup>265</sup> But its analysis could not, and did not, end there. For Egypt had argued that even if the tribunal should so conclude, because Siag and Vecchi had durable, substantial links to Egypt, and virtually none to Italy, the tribunal should deem them Egyptians based on the genuine link theory regardless of their formal status under the internal laws of Egypt and Italy.<sup>266</sup>

The manner in which Egypt framed this argument is revealing. Each of the claimants, it said, were effectively using their “alleged loss of Egyptian nationality . . . as a *deus ex machina* to transform the domestic claims” they had previously advanced in Egyptian courts “into international claims. Formality over equity was the reality and substance of what the Claimants were now presenting to the Tribunal.”<sup>267</sup> Egypt argued, that is, that Siag and Vecchi had abused their nationalities as a way to avail themselves of international arbitration (and the BIT’s rights and investment guarantees) and to evade the requirement that national investors sue in the courts of their own state. Were the tribunal to disregard the genuine link theory and allow Siag and Vecchi to invoke jurisdiction under the ICSID Convention, it would be enabling an abuse of the Convention’s legal regime for foreign investment. The Convention had never been intended to authorize a state’s nationals to sue their own state.

The tribunal rejected Egypt’s argument, but again on a narrow ground—that questions of effective nationality require, in the first place, that the claimant possess a dual nationality as a matter of law.<sup>268</sup> Neither Siag nor Vecchi, the tribunal had found, possessed dual nationality. As in *Champion*, the tribunal speculated that circumstances could arise where international principles might “override” the internal law of the state of nationality.<sup>269</sup> But it did not specify the nature or content of those principles, and except for some variant of the genuine link theory, it is unclear what the majority may have had in mind. Arguably, its analysis does imply that the genuine link theory should apply given the right facts. That is how the dissent by Francisco Orrego Vicuña understood the majority’s award. In his partial dissent, Orrego Vicuña wrote that he and his colleagues agreed that *Nottebohm*’s “effectiveness” principle applies to the ICSID Convention:

As the ICSID Convention does not define nationality, the principles of international law governing this matter come into play instantly. Cardinal among such principles is that of effectiveness. Ever since the *Nottebohm* case, this has been the accepted premise

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265. *See id.* ¶¶ 173, 194.

266. *See id.* ¶¶ 73–74, 196.

267. *Id.* ¶ 74; *see also id.* ¶ 147 n.47 (quoting Egypt’s Reply, which argued that “Egypt is not required under international law to arbitrate investment with persons who have non-existent[*t*], spurious or insubstantial links to the State of which they may be formally nationals”) (alteration in original).

268. *Id.* ¶¶ 196–200; *see also id.* ¶ 196 n.76.

269. *Id.* ¶ 201; *see also* Charles Owen Verill, Jr., *Introductory Note to Siag v. Egypt* (Decision on Jurisdiction), 46 I.L.M. 859, 862 n.22 (2007).

in international law and the recent work on the diplomatic protection of persons and property of both the International Law Commission and the International Law Association so confirms. There is no difference of opinion on this question with my learned colleagues.<sup>270</sup>

The dissent's statement is doubly perplexing: first, in its assertion that because the Convention does not explicitly define nationality, principles of general international law apply "instantly," which is, at best, an incomplete and misleading statement of the established law of treaty interpretation;<sup>271</sup> and second, in its assertion about the views of the ILC and the ILA, which, as a whole, did not so much confirm as cast considerable doubt on the continuing vitality of the genuine link theory, particularly in contexts like that of ICSID arbitration.<sup>272</sup> Orrego Vicuña further argued that, unlike his colleagues, he understood *Nottebohm's* effectiveness rule "in broader terms," that is, as applicable to a diverse variety of situations beyond that of the dual national seeking to exercise diplomatic protection against one of his own states of nationality.<sup>273</sup> For that reason, Orrego Vicuña argued, Siag "is not a rightful claimant as far as jurisdiction is concerned because of the effectiveness of the connections he had with Egypt at all relevant times. Neither Italian nor Lebanese nationalities [the other nationalities that Siag possessed] play any meaningful role in [Siag's] life."<sup>274</sup>

The question here, as in the previous arbitral awards examined, is why durable, robust links of the sort described in *Nottebohm*—or, as Orrego Vicuña put it, a nationality with a "meaningful role" in the investor's life—should matter in view of the *function* served by nationality in the context of investor-state arbitration under the ICSID Convention. In international economic terms, there is nothing inherently defective about the investment of a foreign investor who lacks genuine links to his state of nationality but has that nationality by virtue of formal compliance with its internal legal requirements. In fact, the brightline rule supplied by the more detailed and specific internal legal codes of different states probably promotes the inter-

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270. *Siag v. Egypt*, ICSID Case No. ARB/05/15 (Apr. 11, 2007) (Decision on Jurisdiction) (Vicuña, dissenting in part), reprinted in 46 I.L.M. 863, 880 (2007).

271. See VCLT, *supra* note 213, arts. 31–32 (setting forth the interpretive principles generally accepted as customary international law, only one of which refers to "any relevant rules of international law applicable in the relations between the parties").

272. See *supra* text accompanying notes 198–202. Orrego Vicuña's assertion about the ILA is surprising because he served as a rapporteur of the committee that wrote the ILA's recent report on diplomatic protection, which, as noted, acknowledges that "the link of nationality has lost to an extent its rigor in the context of international claims" and that "to the extent that the intervention of the State is reduced or eliminated as a requirement for submission of international claims," as it is in ICSID investor-state arbitration, "the link of nationality will loose [sic] somewhat its relevance." *Changing Law of Nationality of Claims*, *supra* note 115, at 631, 638; see also Francisco Orrego Vicuña, *Introduction to Nationality and Investment Treaty Claims*, *supra* note 175, at 3–4.

273. *Siag v. Egypt*, 46 I.L.M. at 880.

274. *Id.* at 882.

national economic goals of the Convention better than does the indeterminate and vague genuine link theory.

Foreign investors must be able to determine their eligibility for treaty protection, and host states, conversely, must be able to determine the scope of a foreign investor's rights and potential liability to arbitration. Clear and ascertainable rules, which the internal nationality laws of states generally offer, seem far preferable to multifactorial, vague standards in this context. Consider the practical consequences were international tribunals actually to determine an investor's nationality by applying the genuine link theory of *Nottebohm*, according to which

[d]ifferent factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.<sup>275</sup>

Uncertainty and unpredictability deter investment. Insofar as the ICSID Convention seeks to promote it, the genuine link theory runs contrary to its object and purpose. It therefore may be unsurprising that arbitrators in the ICSID context have, to date, found objections based on the genuine link theory unpersuasive.

Again, this is not to deny the potential for abuses. Orrego Vicuña's dissent aptly captures the worry that in the absence of an appropriate limit on the ability of states to ascribe or impose nationality, the Convention may be manipulated in ways neither envisioned by its drafters nor desirable as a matter of international economic law and policy. But rather than apply an anachronistic and incongruous theory of nationality "instantly" in an effort to avert this, it would be advisable to consider the function that nationality serves in the context of the ICSID Convention. "Nationality, like any other legal concept, is a tool lawyers, judges and other decisionmakers use in order to determine what ought to be done in a given situation. It is only a means to a social end, not an end in itself."<sup>276</sup> There is no *a priori* reason to think that the social purpose of the legal concept of nationality, whether in the context of the ICSID Convention or otherwise, would best be regulated by a doctrine developed in another age, for another purpose.

#### 4. *Functional Analysis of Nationality in the ICSID Context*

If, as this Article suggests, the international regulation of nationality should be responsive to the function that nationality serves in context, then we should begin with the observation that the ICSID context differs signifi-

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275. *Nottebohm (Liech. v. Guat.)*, 1955 I.C.J. 4, 22 (Apr. 6).

276. Wiessner, *supra* note 4, at 450.

cantly from the traditional diplomatic claims espousal paradigm that faced the ICJ in *Nottebohm*.<sup>277</sup> In the ICSID context, nationality's role is jurisdictional—to ensure the international character of the arbitration in a minimal economic sense; it is not to limit the ability of states to espouse claims judicially in their own right. Modern investor-state arbitration involves a non-state actor as one of the litigants. Even in the A/18 decision, which relied on *Nottebohm*'s genuine link theory to support its holding as to dual nationals, the Iran-U.S. Claims Tribunal observed in this regard that

most disputes . . . involve a private party on one side and a Government . . . on the other, and many involve primarily issues of municipal law and general principles of law. *In such cases it is the rights of the claimant, not of his nation, that are to be determined by the Tribunal. This should be contrasted with the situation of espousal of claims in international law . . . .* Moreover, the object and purpose of the Algiers Declarations was to resolve a crisis in relations between Iran and the United States, not to extend diplomatic protection in the normal sense.<sup>278</sup>

Equally, the ICSID Convention's "object and purpose"<sup>279</sup> is not to enable or facilitate "diplomatic protection in the normal sense." Investors, whether juridical or natural persons, not states, institute the proceedings. Those investors, not states, prosecute the claims autonomously, and if successful, those investors, not states, collect the award directly rather than subject to the discretion of their state of nationality.

In fact, the Convention establishes a *lex specialis* that expressly *prohibits* states from affording diplomatic protection "in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration . . ." <sup>280</sup> Aron Broches, "the ICSID Convention's principal architect,"<sup>281</sup> emphasized the distinction between nationality's purpose in the diplomatic protection context and its

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277. See *Olgufin v. Republic of Paraguay*, ICSID Case No. ARB/98/5 (July 26, 2001) (Award), reprinted in 6 ICSID Rep. 164, ¶ 62 (2003); see also Amerasinghe, *supra* note 221, at 198 (contrasting the purpose of nationality in the diplomatic protection context with its more limited role in the context of the Convention); see generally Frank Berman, *The Relevance of the Law on Diplomatic Protection in Investment Arbitration*, II INVESTMENT TREATY L.: CURRENT ISSUES 67 (2007); Prosper Weil, *The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of a Ménage à Trois*, 15 ICSID REV.—FOREIGN INVESTMENT L.J. 401 (2000).

278. *Iran v. United States*, Case No. A/18, 5 Iran-U.S. Cl. Trib. Rep. 251, 261 (1984) (emphasis added).

279. VCLT, *supra* note 213, art. 31(1).

280. ICSID Convention, *supra* note 30, art. 27(1); see also Draft Articles on Diplomatic Protection, *supra* note 202, art. 17 (excluding application of the Draft Articles "to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments").

281. SCHREUER, *supra* note 204, ¶ 2.

more limited role under the ICSID Convention.<sup>282</sup> Indeed, “the direct investor-state dispute resolution mechanisms created by NAFTA, innumerable BITs, national investment laws, and individual contracts,” which supply substantive law for the investor-state arbitrations conducted under ICSID auspices, “are not only different from, but were specifically designed to displace, the traditional diplomatic-protection regime.”<sup>283</sup> Even were the genuine link theory an established doctrine for regulating nationality in the diplomatic protection context, it would therefore be misguided to transpose that doctrine mechanically to the conceptually distinct context of modern investor-state arbitration.<sup>284</sup>

Rather than sharply circumscribe international arbitral jurisdiction, Article 25 of the ICSID Convention seeks only to establish the “outer limits within which the Centre . . . can act.”<sup>285</sup> Within those limits, if the ordinary meaning of a treaty term, such as nationality, is unclear, international law requires consideration of its context and the treaty’s object and purpose.<sup>286</sup> There is little dispute here. The World Bank sought to promote the flow of capital from developed to developing states by providing a mechanism to alleviate the political risks that deterred investment.<sup>287</sup> To that end, in the early 1960s, the Bank decided that it “might make a modest contribution by creating facilities for the voluntary settlement of investment disputes through . . . arbitration proceedings to which the host country and the foreign investors would be parties on an equal procedural footing . . .”<sup>288</sup> As noted in the *Report of the Executive Directors on the Convention*, the drafters sought

to strengthen the partnership between countries in the cause of economic development. The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.<sup>289</sup>

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282. See, e.g., Broches, *supra* note 204, at 351. But see Amerasinghe, *supra* note 221, at 200–03 (suggesting that the genuine link theory may still have a place within the jurisdictional regime established by the ICSID Convention).

283. See Matthew S. Duchesne, *The Continuous-Nationality-of-Claims Principle: Its Historical Development and Current Relevance to Investor-State Investment Disputes*, 36 GEO. WASH. INT’L L. REV. 783, 804 (2004).

284. See C.F. Amerasinghe, *Jurisdiction Ratione Personae Under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, BRIT. Y.B. INT’L L. 227, 244 (1974–75).

285. Broches, *supra* note 204, at 351.

286. VCLT, *supra* note 213, art. 31(1).

287. See Broches, *supra* note 204, at 342–43; see also *Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18 (Apr. 29, 2004) (Decision on Jurisdiction), reprinted in 20 ICSID REV.—FOREIGN INVESTMENT L.J. 205, ¶ 3 (2005) (Weil, dissenting).

288. Broches, *supra* note 204, at 344.

289. ICSID, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, art. III, § 9 (March 18, 1965), reprinted in 1 ICSID Rep. 23 (1993).

The ICSID Convention thus seeks to establish a favorable investment climate for both host states and investors.<sup>290</sup> The Convention should be interpreted in this light.

The question how best to promote foreign investment is empirical.<sup>291</sup> In part for that reason, the ICSID Convention deliberately gives states discretion and flexibility to shape diverse investment instruments, such as BITs, contracts, concession agreements, and the like, and thereby to expand or contract the ability of different foreign investors to access its arbitral machinery.<sup>292</sup> Provided that a particular instrument does not violate the ICSID Convention's outer limits, as the majority argued in *Tokios Tokelès*, "the parties should be given the widest possible latitude to agree on the meaning of 'nationality.'" <sup>293</sup> It seems needless, and potentially even counterproductive, to constrain that latitude by transposing to the investor-state arbitral context a doctrine of nationality that originated in another era to serve a distinct function. For example, a common feature of the handful of natural-person jurisdictional awards canvassed in the preceding section is that the foreign investor tends to be cosmopolitan: he carries more than one passport; has business interests in several states; often has cultural ties and associations in the host state; travels frequently; and may reside in different states at different times. It is precisely this kind of person who will be inclined to and capable of engaging in the kind of foreign investment that the ICSID Convention functions to facilitate or promote.

Within the limits established by the ICSID Convention's explicit text and the need to avert abuses, states should therefore be free to define nationality—without reference to the genuine link theory—more or less broadly in investment instruments authorizing resort to ICSID arbitration so as to afford them the maximum flexibility to further their particular economic, developmental, or other sociopolitical needs, as well as the values of their polities.<sup>294</sup> Grafting *Nottebohm's* genuine link theory onto the ICSID Con-

290. Broches, *supra* note 204, at 348.

291. Sinclair, *supra* note 203, at 363. "At present, the consensus view seems to be that there is a positive association between FDI inflows and growth provided receiving countries have reached a minimum level of educational, technological and/or infrastructure development." Ilhan Ozturk, *Foreign Direct Investment—Growth Nexus: A Review of Recent Literature*, 4-2 INT'L J. APPLIED ECONOMETRICS & QUANTITATIVE STUD. 79, 80 (2007). A related body of legal literature examines the empirical claims made for and against investment treaty arbitration in particular. See, e.g., Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1 (2007).

292. See Broches, *supra* note 204, at 359–60; Sinclair, *supra* note 203, at 363.

293. TOKIOS TOKELÈS V. UKRAINE, ICSID CASE NO. ARB/02/18 (APR. 29, 2004) (DECISION ON JURISDICTION), reprinted in 20 ICSID REV.—FOREIGN INVESTMENT L.J. 205, ¶ 25 (2005) (citing Broches, *supra* note 204, at 361); see also SCHREUER, *supra* note 204, ¶ 464 ("An agreement to submit to ICSID's jurisdiction should be upheld unless it would lead to a use of the Convention for purposes for which it was clearly not intended."); C.F. Amerasinghe, *Interpretation of Article 25(2)(B) of the ICSID Convention, in INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY* 223, 232 (Richard B. Lillich & Charles N. Brower eds., 1993).

294. The ICSID Convention seeks to respect a "basic postulate of public international law," viz., "that every territorial community may organize itself as a State and, within certain basic limits prescribed by international law, organize its social and economic affairs in ways consistent with its own



vention would constrain states from tailoring the definition of nationality in BITs and other investment instruments to their local interests by either expanding or limiting the access of different types of foreign investors to international arbitration under its auspices.

So, if the emerging jurisprudential trend on the definition of nationality under Article 25 of the ICSID Convention apparently privileges form over substance and genuine links, that need not be cause for concern. To the contrary, it may well be sound law and policy. The real worry animating suggestions to apply *Nottebohm's* genuine link theory to Article 25 is that, absent an appropriate constraint, investments might be structured *abusively*, that is, either to enable (1) a nominal foreign investor, who remains in reality the state's own national, to sue that state in an international forum; or (2) a foreign investor, who would otherwise be ineligible for arbitration under the ICSID Convention, to acquire that right by manipulating his nationality. Suggestions that arbitral tribunals repair to *Nottebohm's* genuine link theory to avert such abuses misdiagnose the problem and consequently prescribe the wrong cure. There is no need to graft a contextually incongruous theory onto Article 25 in select cases, for as the *Soufraki* analysis above suggests, *Nottebohm's* theory may not even work as a legal mechanism to avert the kind of abuse that animates the need for regulation of nationality in this context. Rather, in the first place, states should be entitled to design investment agreements to prevent the invocation of ICSID jurisdiction by nationals other than those to whom the state intends to extend this right.<sup>295</sup> And, as in *Nottebohm*, assuming the accuracy of the reading proposed earlier, the abuse-of-rights principle, as part of general international law, offers an appropriate legal mechanism that may be capable of remedying abusive manipulation of ICSID's nationality requirements without perpetuating the fiction of the genuine link.

### B. *A Brief Look at Nationality's Regulation in Other Fields*

The preceding section shows how the functional analysis and international legal regulation of nationality might operate in one contemporary context. But as emphasized at the outset of this Article, nationality serves

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national values." W. Michael Reisman, *The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of Its Threshold*, 15 ICSID REV.—FOREIGN INVESTMENT L.J. 362, 366 (2000). International law's presumption has long been that "the legislative expression of these variations in the law of different states is internationally lawful and entitled to respect." *Id.* at 367.

295. Certainly, if states find it in their interest, the dominant-and-effective nationality rule for dual nationals may be established explicitly by treaty, as the United States has done in the 2004 U.S. Model BIT. See Office of the U.S. Trade Representative, 2004 U.S. Model Bilateral Investment Treaty (BIT), available at [http://www.ustr.gov/assets/Trade\\_Sectors/Investment/Model\\_BIT/asset\\_upload\\_file847\\_6897.pdf](http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf) (defining "investor of a Party" as, inter alia, "a national or an enterprise of a Party . . . provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality"). Nothing, however, in the ICSID Convention excludes dual nationals as such. See *Olguin v. Republic of Paraguay*, ICSID Case No. ARB/98/5 (July 26, 2001) (Award), reprinted in 6 ICSID Rep. 154, ¶ 61 (2003).

many diverse functions in contemporary international law. The abuse-of-rights principle may operate as an appropriate and effective regulatory concept in *one* modern context of international law. The point of emphasis, however, is that in international law, the concept of nationality is not one but many. No single principle will be appropriate to the international legal regulation of nationality generally. Consider, briefly, a few other examples.

Since its symbolic inception in the Universal Declaration of Human Rights (“UDHR”), international human rights law has sought to protect the right *to* a nationality. It does this because it correctly recognizes that, in general, a functioning state with obligations to its nationals that can be enforced by effective domestic institutions best protects the vast majority of individual human rights.<sup>296</sup> Here, unlike in the context of investor-state arbitration, the concept of nationality at work often connotes “a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.”<sup>297</sup> International human rights law, among other things, tries to protect these social bonds of attachment against a merely formal nationality imposed by law.

Thus, in *Beldjoudi v. France*,<sup>298</sup> for example, although it is not technically a decision about nationality, the European Court of Human Rights (“ECHR”) in effect protected a “quasi-national” from being deported to a state to which he lacked any genuine links. Beldjoudi had been born and raised in France. He lost his French nationality as a minor, however, because, at the time of Algerian independence, his parents failed to make the required declaration under French law.<sup>299</sup> Yet he lived his entire life in France, received his education there, married a Frenchwoman, maintained close relationships with his French relatives residing in France, and, in short, lacked “*links* with Algeria apart from that of nationality.”<sup>300</sup> Subsequently, France sought to deport him as a threat to public order, based on a history of criminal convictions.<sup>301</sup>

The ECHR, following its established jurisprudence, held that this concededly legitimate aim would be disproportionate to the degree of interference that deportation would impose on Beldjoudi’s right to “private and family life” under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>302</sup> Put otherwise, the ECHR effectively applied a variant of the genuine link theory as a means to protect

296. See MICHAEL IGNATIEFF, WHOSE UNIVERSAL VALUES? THE CRISIS IN HUMAN RIGHTS 19 (1999); see also IGNATIEFF, *supra* note 169, at 13.

297. *Nottebohm (Liech. v. Guat.)*, 1955 I.C.J. 4, 23 (Apr. 6).

298. *Beldjoudi v. France*, 234 Eur. Ct. H.R. (ser. A) (1992).

299. *Id.* ¶ 9.

300. *Id.* ¶ 77 (emphasis added); see also *id.* ¶ 71 (noting Beldjoudi’s claim “that all their family ties, social links, cultural connections and linguistic ties were in France”).

301. *Id.* ¶ 15.

302. *Id.* ¶ 79; see European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 222.

Beldjoudi's *substantive* nationality against a merely formal nationality imposed by the internal nationality law of France.<sup>303</sup> For this purpose, it adopted *Nottebohm's* conception of and regulatory mechanism for nationality in the distinct context of international human rights law. In view of the distinct function that nationality serves in human rights law, whatever one's view of the merits, the decision—appropriately—adopted a methodology commensurate with that function.

Now consider the related field of modern international humanitarian law (“IHL”) and international criminal law. In this context, similarly, the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) has properly considered the function served by nationality in a trilogy of decisions implicating Geneva Convention IV,<sup>304</sup> which protects civilians “who . . . find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”<sup>305</sup> A formal construction of nationality in contemporary IHL—that is, an interpretation in terms of nationality's technical conferral according to the internal law of a state—might have led the ICTY to conclude that the victims in these cases shared the nationality of the defendants: that both the victims and defendants were Yugoslav. But the Appeals Chamber stressed that nationality, in the context of Article 4 of Geneva Convention IV, must “be interpreted within the framework of humanitarian law.”<sup>306</sup>

Consequently, applying Article 31(1) of the VCLT, the ICTY considered the object and purpose of the treaty and eschewed reliance on “formal bonds and purely legal relations.”<sup>307</sup> Rather than construe nationality as a static concept fixed in time in 1949, the Court considered the contemporary function of nationality in IHL within the framework of Geneva Convention IV:

This legal approach, hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and *ethnicity rather than na-*

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303. See *Stewart v. Canada*, Comm'n No. 538/1993, UN Doc. CCPR/C/58/D/538/1993, reprinted in 4 No. 2 INT'L HUM. RTS. REP. 418 (1997). The Human Rights Committee established by the ICCPR rejected the applicant's comparable claim on similar facts because it held that Stewart's privilege not to be “arbitrarily deprived of the right not to enter his own country” under Article 12(4) of the ICCPR had not been infringed in view of Canada's legitimate security and criminal justice interests. *Id.* at 430. But the committee affirmed that the phrase “own country” in Article 12(4) should be understood more broadly than “country of his nationality” given the purposes of that provision. *Id.* at 429.

304. *Prosecutor v. Delalić*, Case No. IT-96-21-A, Judgment, ¶¶ 56–84 (Feb. 20, 2001); *Prosecutor v. Aleksovski*, Case No. IT-95-14/1, Judgment, ¶¶ 151–52 (Mar. 24, 2000); *Prosecutor v. Tadić*, Case No. IT-94-1, Judgment, ¶¶ 163–69 (July 15, 1999).

305. Geneva Convention IV, *supra* note 27, art. 4.

306. *Delalić*, Case No. IT-96-21-A, ¶ 75.

307. *Tadić*, Case No. IT-94-1, ¶ 168.

*tionality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance.*<sup>308</sup>

Based on this reasoning, the ICTY extended the Convention's protection (and, accordingly, allowed a conviction for war crimes) to the situation of certain civilians who were de facto members of another party to the conflict even though they arguably shared the same formal nationality as their captors.<sup>309</sup> Put otherwise, in this context, nationality functioned to identify the class of persons in need of the Convention's protection, and the Court appropriately construed it to serve that function.

Finally, although an extensive discussion of E.U. law lies well beyond the scope of this Article, the idea of analyzing nationality by function and regulating it commensurately has long been appreciated in the European Union.<sup>310</sup> The introduction of E.U. citizenship for the first time decoupled nationality from the nation-state.<sup>311</sup> It thereby created an explicit need to define the comparative functional competences of the Union, on the one hand, and its member states, on the other, in the realm of nationality. It is noteworthy that the Union, too, has adopted a functional approach to the analysis and regulation of nationality for these purposes.

In *Zhu & Chen v. Secretary of State*,<sup>312</sup> for example, the European Court of Justice ("ECJ") affirmed the E.C. treaty rights of residence and travel of a Chinese mother and daughter even though the mother deliberately gave birth to her second child in Ireland to avoid China's one-child policy, to avail herself of Ireland's *jus soli* rule, and thereby to benefit from the E.U. citizenship conferred automatically on her new daughter. As the child's principal caretaker, the ECJ held, the mother must also be afforded the right to remain and "reside with the child in the host Member State."<sup>313</sup> In a situation like this, which is strongly redolent of Nottebohm's acquisition of Liechtenstein's nationality in "exceptional circumstances of speed and ac-

308. *Id.* ¶ 166 (emphasis added).

309. Aleksovski, Case No. IT-95-14/1, ¶ 151 (confirming that "Article 4 may be given a wider construction so that a person may be accorded protected status, notwithstanding the fact that he is of the same nationality as his captors.").

310. See, e.g., J.H.H. Weiler, *To Be a European Citizen—Eros and Civilization*, 4 J. EUR. PUB. POL'Y 495 (1997).

311. Karolina Rostek & Gareth Davies, *The Impact of Union Citizenship on National Citizenship Policies*, 22 TUL. EUR. & CIV. L.F. 89, 91 (2007); see also *id.* at 101–03.

312. Case C-200/02, *Zhu and Chen v. Sec'y of State for the Home Dep't*, 2004 E.C.R. I-9925; see, e.g., Rostek & Davies, *supra* note 311, at 130–35 (analyzing *Chen* and its reception in Ireland and elsewhere in Europe, including concerns that an "unconditional *ius soli* principle" would lead to abuses to acquire E.U. citizenship, which, in turn, "could cause difficulties in Ireland's relations with other member states" (internal quotation marks omitted)). I am grateful to Daniela Caruso for calling my attention to this case.

313. *Chen*, 2004 E.C.R. I-9925, ¶ 45 ("It is clear that enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his or her primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence.").

commodation,”<sup>314</sup> might the abuse-of-rights principle be an equally appropriate legal tool? Almost certainly not, given the paramount interests of the child. But the real point of emphasis is that here, too, the manner of nationality’s extra-national regulation calls for analysis in terms of the functions—the rights and duties—that together comprise the concept of nationality. In the Union, nationality has perforce been disaggregated in terms of its functions because of the creation of E.U. citizenship and the consequent need to allocate the assignment and regulation of nationality’s rights and privileges among the Union and its member states.

## VI. CONCLUSION

Scrutiny of *Nottebohm* suggests that the rationale for the ICJ’s refusal to honor Liechtenstein’s conferral of nationality on Nottebohm and its effort to espouse his claims diplomatically resided in the general principle of law prohibiting abuses of rights. Reading *Nottebohm* in this way also avoids the descriptive inaccuracy of the genuine link theory and relaxes the tension generated by the genuine link theory and nationality’s diverse functions in contemporary international law. At times, and particularly in situations comparable to the *Nottebohm* case, the principle of abuse of rights, which this Article has argued the ICJ tacitly applied, supplies one valuable legal concept to deter or void the use of nationality in ways that may prejudice other participants in the contemporary international legal process. But any determination of abuse of rights requires an appreciation of the scope and legitimate purpose of the right purportedly abused, and the doctrine must be “wielded with studied restraint.”<sup>315</sup> It is not a panacea. It offers one way to regulate nationality in modern international law, which may be appropriate in certain international adjudicatory settings.

In short, nationality is not a monolithic concept. It would be a serious error to treat or regulate it as though it were. Fortunately, contemporary international law in many areas appears to be moving away from a single theory and toward the kind of functional analysis and commensurate regulation of nationality advocated here. The conception of nationality expressed in *Nottebohm*’s dicta certainly describes one plausible vision of nationality, and it continues to have salience in some areas of international law. But the genuine link theory is neither the only nor, necessarily, the most appropriate, regulatory tool. No single doctrine will be effective and well-suited to the international regulation of nationality in every circumstance. Rather, international law would be better served by atomizing the concept by its distinct functions and regulating (or not regulating) nationality at the international level commensurately.

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314. *Nottebohm (Liech. v. Guat.)* 1955 I.C.J. 4, 26 (Apr. 6).

315. Byers, *supra* note 107, at 406–07, (quoting HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 164 (1958)).

Today, as in the past, nationality has “its most immediate, its most far-reaching and, for most people, its only effects within the legal system of the State conferring it.”<sup>316</sup> For many purposes, reserving its legal regulation to the internal competence of states remains sound international policy. But at the international level, nationality serves more and more diverse functions in the twenty-first century than at any time in history. Relative to some of these functions, it undoubtedly needs to be regulated by international, not only internal, law. But it is past time to liberate international law in this area from the fiction of the genuine link as a generic, broadly applicable norm regulating the ascription of nationality. Rather, in each field, the form that the international legal regulation of nationality takes today should be responsive to its diverse contemporary functions.

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316. Nottebohm, 1955 I.C.J. at 20.