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ARTICLE

In Fairness to *Nottebohm*: Nationality in an Age of Globalization

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Abstract

The *Nottebohm* judgment from the International Court of Justice (ICJ) has recently come under attack in the context of the European Commission's position on "golden passports" programmes. The judgment has long received intense criticism from a consensus of scholars. This article challenges the conventional wisdom of *Nottebohm*. The ICJ did not, as critics argue, depart from international law on nationality, nor did it seek to create an international rule based on a "genuine link" requirement. A closer look at the majority's reasoning reveals that the ICJ's conception of nationality as something more than a mere formal classification was prompted by problems that can arise precisely from the phenomenon of globalization, including the instrumentalization of nationality. It further shows that the "substance-over-form" approach adopted by *Nottebohm* may, or already does, operate in more contemporary contexts.

Keywords: Nationality; Citizenship by Investment; Diplomatic Protection; Investment Arbitration; Human Rights; Instrumentalization; Globalization

The *Nottebohm* judgment[1] has seen renewed attention in recent discussions on the controversial Citizenship by Investment (CBI) schemes, also known as "golden passports". These schemes allow wealthy individuals to obtain citizenship in a host country in exchange for a financial contribution, which may include the purchase of government bonds, real estate, or a donation. They offer faster and smoother gateways to acquire citizenship compared to more traditional naturalization methods, which often include conditions such as residency periods, local language knowledge, and civic tests. The global market for such schemes has increased over time and are in operation in more than sixty countries around the world.[2]

The commodification of citizenship triggered a backlash in the European Union (EU). Since 2014, the European Parliament and the European Commission have called on Member States to cancel their CBI schemes. Until recently, three Member States (Bulgaria, Cyprus, and Malta) had CBI programmes, enabling third-country nationals to buy EU citizenship. Following pressure from the Commission, Bulgaria and Cyprus terminated their regimes on 5 April 2022 and 1 November 2020, respectively. Thus, Malta is

[1] *Nottebohm* (*Liechtenstein v Guatemala*) (*Second Phase*), Judgment of 6 April 1955, [1955] I.C.J. Rep. 4 [*Nottebohm*].
[2] For a list of countries offering CBI regimes, see Henley & Partners, "Investment Migration Programs 2022: The Definitive Comparison of the Leading Residence and Citizenship Programs", Ideos Publications, Report, 2022.

currently the only Member State operating a CBI regime. In September 2022, after having failed to heed its calls, the Commission referred Malta to the Court of Justice of the European Union (CJEU), claiming that its programme is incompatible with EU law.

The pushback from EU institutions against CBI schemes is driven by concerns that these schemes create side effects as regards security, money laundering, tax evasion, and corruption. Since the nationality of Member States is a gateway to EU citizenship and associated rights, such as free movement across the bloc, CBI schemes have implications for other Member States and the EU as a whole. In framing its position against CBI regimes, the European Commission relied on the *Nottebohm* judgment and argued that "each Member State needs to ensure that nationality is not awarded absent any genuine link to the country or its citizens".[3] This reliance on *Nottebohm* has triggered intense criticism, repudiating the judgment itself and questioning its relevance within the framework of EU law.

The predominant view among commentators is that *Nottebohm* is "bad law".[4] At the time the International Court of Justice (ICJ) decided the case, Nottebohm only held the nationality of the claimant State, Liechtenstein. What tends to go unnoticed is that Nottebohm acquired Liechtenstein nationality with the sole purpose of obtaining diplomatic protection against Guatemala. The ICJ held that Guatemala was entitled to refuse to recognize Nottebohm's nationality given "the absence of a real bond of attachment between Nottebohm and Liechtenstein".[5] The ICJ determined this "bond of attachment", commonly referred to as the "genuine link", by considering, among other factors, Nottebohm's habitual residence, the centre of his interests, and his family ties.[6] The Court thus evinced a conception of nationality that goes beyond the formal legal classification of this status.

Critics argue that, in so holding, the ICJ wrongly drew from a rule of customary international law that deals with diplomatic protection claims by dual nationals: the rule of "real and effective" nationality. From an EU law perspective, scholars assert that requiring Member States to grant their nationality on the basis of a "genuine link" constitutes a direct incursion by EU institutions into a domain that falls within the exclusive

[3] *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions on Investor Citizenship and Residence Schemes*, 23 January 2019, COM/2019/12 final [*European Commission's Report 2019*] at 6.

[4] Dimitry Vladimirovich KOCHENOV, "Investor Citizenship and Residence: the EU Commission's Incompetent Case for Blood and Soil" *Verfassungsblog* (23 January 2019), online: Verfassungsblog https://verfassungsblog.de/investor-citizenship-and-residence-the-eu-commissions-incompetent-case-for-blood-and-soil/. See also, Martijn van den BRINK, "Revising Citizenship within the European Union: Is a Genuine Link Requirement the Way Forward" (2022) 23(1) German Law Journal 79; Peter J. SPIRO, "*Nottebohm* and 'Genuine Link': Anatomy of a Jurisprudential Illusion", Investment Migration Working Papers, IMC-RP 2019/1, online: *Investment Migration* https://investmentmigration.org/wp-content/uploads/2020/10/IMC-RP-2019-1-Peter-Spiro.pdf; Daniel SARMIENTO, "EU Competence and the Attribution of Nationality in Member States", Investment Migration Working Papers, IMC-RP 2019/2, online: *Investment Migration* https://investmentmigration.org/wp-content/uploads/2020/09/IMC-RP-2019-2-Sarmiento.pdf; Audrey MACKLIN, "Is It Time to Retire *Nottebohm*?" (2018) 111 American Journal of International Law Abound 492; Rayner THWAITES, "The Life and Times of the Genuine Link" (2018) 49 Victoria University of Wellington Law Review 645. For early critics, see generally, A. MAKAROV, "Das Urteil des Internationales Gerichtshofs in Fall Nottebohm" (1955–6) 16 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 407; Madeleine GRAWITZ, "Cour Internationale de Justice" (1955) Annuaire Francais de Droit International 261; J. Mervyn JONES, "The *Nottebohm* Case" (1956) 5 International and Comparative Law Quarterly 230; Hans GOLDSCHMIDT, "Recent Applications of Domestic Nationality Laws by International Tribunals" (1959) 28 Fordham Law Review 689; Josef L. KUNZ, "The *Nottebohm* Judgment" (1960) 54 American Journal of International Law 536.

[5] *Nottebohm*, *supra* note 1 at 26.

[6] *Ibid*., at 22.

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competence of Member States.[7] There is also the argument that the CJEU has, at any rate, rejected *Nottebohm*, holding that Member States should not impose additional conditions for the recognition of the nationality of other Member States.

This article challenges these views in an attempt to do justice to the *Nottebohm* decision and to show its overlooked growing relevance to our globalized world. Section I will take on the critics' legal position. It will show that the ICJ took, and rightly so, a functional approach to the application of an accepted rule of international law to tackle problems that can arise precisely from the dynamics of globalization and human mobility. One of these problems relates to the liberal international legal framework governing nationality, which does not regulate situations where migrants, like Nottebohm, acquire a citizenship of convenience to evade a rule of law and to seek advantages not available to other citizens. In this respect, *Nottebohm* can also be read as a decision that sought to prevent an abusive manipulation of the right of states to confer nationality.

The remaining sections of this article will argue that, if the *Nottebohm* judgment does in fact form good law, there exists no reason to confine the scope of its operation. The rationale contained therein may operate as an appropriate and effective regulatory instrument in a variety of contemporary contexts. *Nottebohm* can offer equitable means to address the effects of global mobility in other areas of law, including EU law, international investment law, and international human rights law. Section II will argue that *Nottebohm*'s "substance-over-form" approach can serve as a tool to address the concerns raised by CBI regimes. It will also show that the CJEU has, in fact, construed an understanding of nationality under EU law that reflects *Nottebohm*'s conception of nationality, with a view to protect meaningful bonds of attachment between the individual and the State. Section III will show that *Nottebohm* may operate in international investment law as a norm of exclusion against the manipulation of nationality by investors with the purpose of gaining access to investment treaties. Section IV will examine how the *Nottebohm*-style determination of an effective nationality can work positively as a ground for inclusion in the field of human rights law protecting against nationality under-reach in immigration cases. Section V concludes.

I. *Nottebohm* is not Bad Law

A. Revisiting the Facts and the ICJ's Mandate

Friedrich Nottebohm was originally a German national born in Hamburg. At an early age, Nottebohm crossed the Atlantic to join his brothers' business, Nottebohm Hermanos, a banking and trading house that would soon become the second-largest producer of coffee in Guatemala.[8] For more than thirty years, Nottebohm spent most of his time in Guatemala, only occasionally returning to Germany for business.[9] As Casey explains "[l]ike countless transatlantic migrants in the nineteenth and early twentieth centuries,

[7] Petra WEINGERL and Matjaž TRATNIK, "Relevant Links: Investment Migration as an Expression of National Autonomy in Matters of Nationality" in Dimitry Vladimirovich KOCHENOV and Kristin SURAK, eds., *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* (Cambridge: Cambridge University Press, 2023),161; Dimitry Vladimirovich KOCHENOV and Elena BASHESKA, "It's All [A]bout Blood, Baby! The European Commission's Ongoing Attack Against Investment Migration in the Context of EU Law and International Law", The Centre on Migration, Policy, and Society (COMPAS), University of Oxford, Working Paper No. 161, November 2022; Hans Ulrich Jessurun D'OLIVEIRA, "Golden Passports: European Commission and European Parliament Reports Built on Quicksand", COMPAS, University of Oxford, Working Paper No. 162, January 2023; Jo SHAW, "Citizenship for Sale: Could and Should the EU Intervene?" in Rainer BAUBÖCK, ed., *Debating Transformations of National Citizenship* (Cham: Springer, 2018), at 61.

[8] *Nottebohm*, *supra* note 1 at 13.

[9] *Ibid.*

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Nottebohm never obtained Guatemalan nationality, but rather retained his status as a German national".[10] This is not surprising since, at the time and still today, foreign investors had more protection than nationals of the host country. If the host country expropriated or confiscated their property, "they had a further remedy: they could run to their nearest consul and ask for intervention and protection, a privilege that their naturalized and native neighbors certainly did not have".[11]

Nottebohm kept his German nationality until it became a liability. In October 1939, after Germany invaded Poland, Nottebohm travelled to Liechtenstein with the sole purpose of obtaining the Principality's nationality.[12] Having experienced the First World War as an enemy alien in Guatemala, Nottebohm wanted to avoid the consequences that might ensue for him or his business given his German nationality.[13] On 9 October 1939, he applied for naturalization in Liechtenstein, which was granted in exchange for the payment of 40,500 Swiss Francs in fees and 30,000 as a deposit.[14] Thus, as Shachar aptly observes, "*Nottebohm*, the main precedential case in this field, was decided by the International Court of Justice following an early exemplar of citizenship for sale."[15]

Upon acquiring his Liechtenstein passport, Nottebohm lost his German nationality by virtue of German law and returned to Guatemala to continue his business activities.[16] He barely maintained links with Liechtenstein other than holding his new passport. It is critical to emphasize that Nottebohm "changed" his nationality to that of Liechtenstein to become the subject of a neutral power and a new foreign subject in Guatemala. This would allow him to evade probable consequences under the international law of war, such as becoming an enemy alien, and to eventually seek diplomatic protection.[17] Indeed, the State's right to espouse a diplomatic protection claim derives from the bond of nationality between the espousing State and the injured individual.[18] Nottebohm thus acquired Liechtenstein nationality as a matter of convenience.

In 1943, after Guatemala joined the Allies in the war, Nottebohm was deported to the United States as part of a programme for the detention of contributors to enemies.[19] By the time of his release, Guatemala had seized most of his assets and he asked Liechtenstein, his more recent and only State of nationality, to exercise diplomatic

[10] Christopher A. CASEY, *Nationals Abroad: Globalization, Individual Rights, and the Making of Modern International Law* (Cambridge: Cambridge University Press, 2020) at 171.

[11] *Ibid*., at 49.

[12] *Nottebohm*, *supra* note 1 at 26.

[13] Cindy G. BUYS, "Nottebohm's Nightmare: Have We Exorcized the Ghosts of WWII Detention Programs or Do They Still Haunt Guantanamo?" (2011) 11 Chicago-Kent Journal of International and Comparative Law 3–4.

[14] Casey, *supra* note 10 at 172.

[15] Ayelet SHACHAR, "Citizenship for Sale?" in Ayelet SHACHAR et al., eds., *The Oxford Handbook of Citizenship* (Oxford: Oxford University Press, 2017), 789 at 812.

[16] Kunz, *supra* note 4 at 548.

[17] *Nottebohm*, *supra* note 1 at 26.

[18] *Report of the International Law Commission of its Fifty-Eighth Session (1 May-9 June and 3 July-11 August 2006)*, UN Doc. A/61/10 (2006) [*ILC Draft Articles on Diplomatic Protection*] at 30. The International Law Commission (ILC) explains that:

> [A]rticle 3 asserts the principle that it is the State of nationality of the injured person that is entitled to exercise diplomatic protection on behalf of such a person. The emphasis in this draft article is on the bond of nationality between State and national which entitles the State to exercise diplomatic protection.

See also, *Panevezys-Saldutiskis Railway (Estonia v Lithuania)*, Judgment of 28 February 1939, [1938] Permanent Court of International Justice, Ser. A/B, No. 76 at para. 65, where the Permanent Court of International Justice held that "it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection".

[19] *Nottebohm*, *supra* note 1 at 25.

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protection on his behalf.[20] Having failed to resolve the situation amicably with Guatemala, Liechtenstein brought proceedings on behalf of Nottebohm before the ICJ, claiming reparations for his detention and for the expropriation of his property.[21]

Guatemala asked the Court to dismiss the claim on different grounds, including that Nottebohm had not "properly acquired Liechtenstein nationality in accordance with the law of the Principality",[22] and 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, and without any genuine intention to establish a durable link, excluding German nationality, between the Principality and himself.[23]

The ICJ decided not to rule on the validity of Nottebohm's naturalization. It confirmed the widely recognized rule of international law found in the Hague Convention on Certain Questions Relating to the Conflicts of Nationality Laws (1930 Hague Convention), which provides that "[i]t is for each State to determine under its own law who are its nationals".[24] The ICJ was, in other words, not concerned with the conditions set by Liechtenstein for conferring its nationality and respected Liechtenstein's sovereign right to regulate the matter.[25]

The ICJ then observed that the 1930 Hague Convention also stipulates that the attribution of nationality under domestic law "shall be recognized by other States insofar as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality".[26] The International Law Commission (ILC) Draft Articles on Diplomatic Protection confirm that "[a]lthough a State has the right to decide who are its nationals, this right is not absolute".[27] Accordingly, to use the words of Liechtenstein's counsel, "the essential question" for the ICJ was "whether Mr. Nottebohm, having acquired the nationality of Liechtenstein, that acquisition of nationality is one which must be recognized by other States".[28] More concretely, "whether such an act of granting nationality by Liechtenstein directly entails an obligation on the part of Guatemala to recognize its effect, namely, Liechtenstein's right to exercise its protection".[29]

B. "Real and Effective" Nationality and the Genuine Link Theory

To decide this question, the ICJ resorted to decisions by courts and tribunals that were faced with "the same issue".[30] In the much-quoted extract that is often labelled the "genuine link" requirement, the ICJ observed that:

[20] *Ibid.*, at 31.
[21] *Ibid.*, at 6–7.
[22] *Ibid.*, at 11.
[23] *Ibid.*
[24] *Ibid.*, at 20–3. *Convention on Certain Questions Relating to the Conflict of Nationality Laws*, 12 April 1930, 179 L.N.T.S. 89 (entered into force 1 July 1937) [*1930 Hague Convention*], art. 1. See also, L. OPPENHEIM, *International Law: A Treatise* (London: Longmans, Green, and Co, 1905) at 16–7 and *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion of 7 February 1923, [1923] P.C.I.J. Ser. B No. 4 at 24.
[25] *Ibid.*
[26] *Nottebohm*, *supra* note 1 at 23; *1930 Hague Convention*, *supra* note 24, art. 1.
[27] *ILC Draft Articles on Diplomatic Protection, supra* note 18.
[28] *Nottebohm*, *supra* note 1 at 17.
[29] *Ibid.*, at 20.
[30] *Ibid.*

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> According to the practice of States, to arbitral and judicial decisions, and to the opinions of writers, nationality 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, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.[31]

And in another oft-quoted passage, the Court 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.[32]

The ICJ noted that this substantive understanding of nationality, which accords importance to the factual realities of the individual rather than the abstract status of nationality, had been applied in "cases of dual nationality, where the question [also] arose with regard to the exercise of protection".[33] In these cases, the ICJ continued, tribunals had "given preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved".[34]

The rule of "real and effective" nationality has been widely recognized as a rule of customary international law.[35] It is typically applied in cases where the injured individual has the nationality of both the espousing and respondent States. For the claim to be admissible, the injured individual's "factual ties" with the claimant State must go beyond the mere possession of a passport. The ICJ decided to apply this rule and listed the relevant factors to determine whether Nottebohm's nationality was "real and effective" as follows:

> [T]he habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.[36]

[31] *Ibid*., at 23.
[32] *Ibid*.
[33] *Ibid*., at 22.
[34] *Ibid*.
[35] For a discussion of the customary rule of "real and effective" nationality, more commonly known as the rule of "dominant and effective" nationality, see *ILC Draft Articles on Diplomatic Protection, supra* note 18 at 43–7. For an analysis of the origin of the rule and its application in cases preceding *Nottebohm*, see William L. GRIFFIN, "International Claims of Nationals of Both the Claimant and Respondent States – The Case History of a Myth" (1967) 3(1) International Lawyer 400; and Zvonko R. RODE, "Dual Nationals and the Doctrine of Dominant Nationality" (1959) 53(1) American Journal of International Law 139. More recently, the rule has been applied by the Iran-United States Claims Tribunal in a number of cases (see Mohsen AGHAHOSSEINI, *Claims of Dual Nationals and the Development of Customary International Law* [Leiden: Brill-Nijhoff, 2007] at Chapters 2 and 3) and by arbitral tribunals in disputes under investment treaties (see Javier García OLMEDO, "Recalibrating the International Investment Regime through Narrowed Jurisdiction" (2020) 69(2) International and Comparative Law Quarterly 301 at 308–12).
[36] *Nottebohm*, *supra* note 1 at 22.

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The ICJ found that Nottebohm's "actual connections with Liechtenstein were extremely tenuous" and thus his nationality was not "real and effective".[37] Therefore, it concluded that Guatemala was under no obligation to recognize his Liechtenstein nationality for the purposes of diplomatic protection. For the Court, therefore, a mere formal relationship between an individual and a State could not bestow upon the State the right to exercise diplomatic protection on his behalf. This finding has long met widespread criticism. Scholars commonly argue that the ICJ's reasoning is "wrong as a matter of international law"[38] or "discontinuous with pre-existing law".[39] The predominant view is that the ICJ wrongly drew from a rule of customary international law that only applies to dual nationals:

> [T]he theory [of "genuine link"] reflected a novel extrapolation of a principle [of "real and effective" nationality] 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.[40]

I respectfully disagree with this view. The ICJ's sole mandate was to determine "whether full international effect was to be attributed to the nationality invoked".[41] The very same question was raised before the "international arbitrators" who decided cases of diplomatic protection involving dual nationals.[42] These arbitrators did not have to decide, "strictly speaking", on whether diplomatic protection could be exercised on behalf of a dual national but, rather, whether the claimant State could rely on the dual national holding its nationality against the respondent State.[43] They answered this question by applying the rule of "real and effective" nationality and found the claim inadmissible where, as in *Nottebohm*, the injured national barely maintained factual connections with the claimant State. Therefore, the ICJ took a functional approach to the application of an accepted rule of international law, which does not make the decision wrong as a matter of law. Crawford agreed that "the principle of effectiveness is not restricted to cases of dual nationality. If the principle exists, it applies to the *Nottebohm* permutation also."[44] Accordingly, the ICJ did not, nor did it intend to, create a "genuine link" requirement as a general condition for the international recognition of nationality, let alone as a condition for the attribution of nationality.

Critics also assert that the judgment is morally problematic. The argument goes that, by allowing Guatemala to refuse the recognition of Nottebohm's nationality on the ground

[37] *Ibid*., at 25–6.

[38] Brink, *supra* note 4 at 79.

[39] Spiro, *supra* note 4 at 34.

[40] Robert D. SLOANE, "Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality" (2009) 50 Harvard International Law Journal 1 at 14. He cites the dissenting opinion of Judge Read, per *Nottebohm*, *supra* note 1 at 40–2:

> [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.

See also, Thwaites, *supra* note 4 at 657–9; Goldschmidt, *supra* note 4 at 699; Kunz, *supra* note 4 at 557–660.

[41] *Nottebohm*, *supra* note 1 at 22.

[42] *Ibid*., at 21.

[43] *Ibid*.

[44] James CRAWFORD, *Brownlie's Principles of Public International Law,* 8th ed. (Oxford: Oxford University Press, 2012) at 516.

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that it was not "real and effective", the ICJ "prevented justice from being done to Nottebohm".[45] He was, in this respect, rendered stateless for the purpose of diplomatic protection. On this point, commentators considered that the ICJ's conception of nationality ignored the fact that, in the mid-twentieth century, thousands of individuals, including Nottebohm, lived and did business in a State other than that of their formal nationality.[46] Under this view, applying the "real and effective" nationality test, which requires identifying migrants' ties across the borders of states, can have negative consequences since it would deprive a large number of people of diplomatic protection. This criticism applies, *a fortiori*, in today's world of increasing permeability of State borders and the enhanced capacity for individuals to maintain connections with different countries.

As discussed below, far from being morally problematic, the approach adopted by the ICJ was prompted by problems that can arise precisely from the dynamics of globalization and human mobility. One of these problems relates to the instrumentalization of nationality.

C. The Instrumentalization of Nationality and Abuse of Rights

In his dissenting opinion, Judge Read observed that applying the "real and effective" nationality test in the sense of *Nottebohm* would leave hundreds of thousands of foreign nationals living or doing business abroad without diplomatic protection.[47] The ILC also remarked that the so-called "genuine link" requirement 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 [the] law of States with which they have the most tenuous connection.[48]

This criticism is misplaced. The ILC has rightly noted that the Court:

> did not extend to expound a general rule applicable to all States but only a relative rule according to which a State in Liechtenstein's position was required to show a genuine link between itself and Mr Nottebohm in order to permit it to claim on his behalf against Guatemala with whom he had extremely close ties.[49]

This reading of the decision seems difficult to reconcile with the preoccupation that Nottebohm's "real and effective" nationality test would deprive "millions of persons" of diplomatic protection. This is, at any rate, an exaggerated concern, for only a very limited number of persons, such as foreign investors, would, if at all, be willing to seek

[45] Spiro, *supra* note 4 at 10, citing Kunz, *supra* note 4 at 566.

[46] Macklin, *supra* note 4 at 494; Thwaites, *supra* note 4; Aonghus HEATLEY, "Diplomatic Protection of Northern Irish Residents by the Republic of Ireland and the Regulation of Nationality in International Law" in Jean ALLAIN and Siobhán MULLALLY, eds., *The Irish Yearbook of International Law, Volume 3, 2008* (Oxford: Hart Publishing, 2011), at 64; Alfred M. BOLL, *Multiple Nationality and International Law* (Leiden: Brill-Nijhoff, 2006) 111; Annemarieke VERMEER-KÜNZLI, "Nationality and Diplomatic Protection: A Reappraisal" in Alessandra ANNONI and Serena FORLATI, eds., *The Changing Role of Nationality in International Law* (London: Routledge, 2013), 76.

[47] *Nottebohm*, *supra* note 1 at 44.

[48] *First Report on Diplomatic Protection, by Mr John R. Dugard, Special Rapporteur*, International Law Commission, UN Doc. A/CN 4/506 (7 March and 20 April 2000) [*First Report on Diplomatic Protection*] at para. 117.

[49] *Ibid*.

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diplomatic protection against the domestic policies of host countries. In fact, in the post-*Nottebohm* era, Hailbronner writes, "no comparable case amounting to a refusal of diplomatic protection has ever been decided by international courts".[50] Moreover, diplomatic protection has been replaced by alternative methods of dispute resolution, such as investor-state dispute settlement mechanisms under investment treaties.[51] One cannot, however, deny that the ICJ did allow Guatemala to refuse the recognition of Nottebohm's Liechtenstein nationality for the purpose of diplomatic protection. Yet the Court's findings are justifiable.

Ours is indeed an era of the greatest international mobility in recorded history.[52] The rapid "increase of in international migrants has been one of the main manifestations of globalization",[53] and has in turn altered "the structure and meaning of citizenship and nation in the contemporary world".[54] As Wagner notes, "[g]lobalization and liberalism … have created an environment that has unshackled the idea that nationality is a sacred status",[55] leading to the "'inevitable lightening' of citizenship in liberal societies".[56] The practice of States regarding facilitation for the acquisition of nationality and naturalizations, coupled with the absence of constraints imposed by international law in this realm, have transformed nationality into a manipulable category, "something that can be instrumentalized".[57]

As Joppke explains, "[w]hile states have always been strategists in matters of citizenship, particularly in inter-state relations, the novelty is to see individuals also in this role, seizing possibilities that states have often inadvertently created for them".[58] People can "collect citizenship at a very little cost without any meaningful attachment to those states in which citizenship is maintained".[59] As we shall see, CBI schemes is a perfect illustration of this phenomenon, which has raised a "citizenship industry".[60]

[50] Kay HAILBRONNER, "Nationality in Public International Law and European Law" in Rainer BAUBÖCK et al., eds., *Acquisition and Loss of Nationality, Volume 1: Comparative Analyses: Policies and Trends in 15 European States* (Amsterdam: Amsterdam University Press, 2006), 35 at 60.

[51] Ben JURATOWITCH, "The Relationship between Diplomatic Protection and Investment Treaties" (2008) 23(1) ICSID Review-Foreign Investment Law Journal 10.

[52] M. MCAULIFFE and A. TRIANDAFYLLIDOU, "World Migration Report 2022", International Organization for Migration, 2021, at 21. This Report indicates that "[t]he current global estimate is that there were around 281 million international migrants in the world in 2020, which equates to 3.6 per cent of the global population".

[53] Huiying ZHANG and Yikang LIU, "Do Foreign Direct Investment and Migration Influence the Sustainable Development of Outward Foreign Direct Investment? From the Perspective of Intellectual Property Rights Protection" (2022) 14(9) Sustainability 5364, citing Xiaohui LIU and Axèle GIROUD, "International Knowledge Flows in the Context of Emerging-Economy MNEs and Increasing Global Mobility" (2016) 25(1) International Business Review 125 at 125-9.

[54] Helga LEITNER and Patricia EHRKAMP, "Transnationalism and Migrants' Imaginings of Citizenship" (2006) 38(9) Environment and Planning A 1615 at 1615. See also, Rainer BAUBÖCK, "How Migration Transforms Citizenship: International, Multinational, and Transnational Perspectives", Centre for European Integration Research, IWE – Working Paper Series, 24 February 2002.

[55] Lorin-Johannes WAGNER, "Nationality as We Know It? – A Note on the Genuine Link" *EJIL: Talk!* (21 September 2020), online: EJIL: Talk! https://www.ejiltalk.org/nationality-as-we-know-it-a-note-on-the-genuine-link/.

[56] Christian JOPPKE, "The Inevitable Lightening of Citizenship" (2010) 51(1) European Journal of Social Sciences 9.

[57] Wagner, *supra* note 55.

[58] Christian JOPPKE, "The Instrumental Turn of Citizenship" (2019) 45(6) Journal of Ethics and Migration Studies 858 at 858.

[59] Peter J. SPIRO, *Beyond Citizenship: American Identity After Globalization* (Oxford: Oxford University Press, 2008) at 76.

[60] Jelena DŽANKIĆ, "Rollback of 'Golden Passports' Shows their Elusive Shine" *Migration Policy Institute* (5 October 2022), online: Migration Policy Institute https://www.migrationpolicy.org/article/golden-passports-citizenship-investment-rollback.

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Sloane aptly notes, therefore, that "as the obligations associated with citizenship dwindle, individuals increasingly adopt nationalities of convenience".[61] Individuals acquire a citizenship, for instance, to facilitate their mobility among States. Harpaz also refers to the concept of "compensatory citizenship", the practice where an individual seeks out a second citizenship to "fill a gap" where the current citizenship is deficient.[62] More relevant for present purposes, multinational businessmen often "carry two or more passports" to simultaneously benefit from the statuses of both domestic and foreign investors.[63]

The present international legal order governing nationality fails to reflect and regulate the instrumental turn of nationality, which can lead to ascriptions of "nationality on a person in an unreasonable manner that prejudices the rights of other participants in the international legal process".[64] Nationality can, in this regard, become a "weapon" with different functions, including its use against another State.[65] In *Nottebohm*, the ICJ attempted to reduce the distance and disjuncture that exists between potentially harmful acquisitions of nationality granted at the domestic level and the liberal international legal regulation of nationality. The way and the reasons why Nottebohm acquired Liechtenstein nationality is a clear and early example of how nationality can be instrumentalized.

Guatemala challenged the validity of Nottebohm's nationality, arguing that he obtained it "with the sole object of acquiring the status of a neutral national before returning to Guatemala".[66] The ICJ agreed with Guatemala that:

> Naturalization was asked for not so much for the purpose of obtaining a legal recognition of Nottebohm's membership in fact in the population of Liechtenstein, as it was to enable him to substitute for his status as a national of a belligerent State that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life, or of assuming the obligations – other than fiscal obligations – and exercising the rights pertaining to the status thus acquired.[67]

As such, in the ICJ's view, Liechtenstein nationality "was conferred in exceptional circumstances of speed and accommodation" with a twofold objective: first, to circumvent the application of the international law of war relating to enemy aliens and, second, if that effort failed, to enable Liechtenstein to exercise diplomatic protection on Nottebohm's behalf.[68] The newly acquired nationality was thus one of convenience.

Sloane has persuasively argued that *Nottebohm* should be "read as a narrow decision in which the ICJ tacitly invoked [the principle of 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".[69] The

[61] Sloane, *supra* note 40 at 33.

[62] Yossi HARPAZ, *Citizenship 2.0: Dual Nationality as a Global Asset* (New Jersey: Princeton University Press, 2019) at 1.

[63] Robert WISNER and Nick GALLUS, "Nationality Requirements in Investor-State Arbitration" (2004) 5 Journal of World Investment and Trade 927 at 927. See also, Javier García OLMEDO, "Claims by Dual Nationals under Investment Treaties: Are Investors Entitled to Sue Their Own States?" (2017) 8(4) Journal of International Dispute Settlement 695.

[64] Sloane, *supra* note 40 at 15.

[65] Neha JAIN, "Weaponized Citizenship: Should International Law Restrict Oppressive Nationality Attribution?" *EUI Global Citizenship Observatory* (6 September 2022), online: EUI Global Citizenship Observatory https://globalcit.eu/weaponized-citizenship-should-international-law-restrict-oppressive-nationality-attribution/.

[66] *Nottebohm*, *supra* note 1 at 11.

[67] *Ibid.*, at 26.

[68] *Ibid.*, at 24.

[69] Sloane, *supra* note 40 at 1.

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principle of abuse of rights "is known in many legal orders and is therefore accepted as a general principle of law by most scholars and in State practice, or as a part of international customary law".[70] It emanates from the foundational obligation of good faith and requires distinguishing between the existence and the exercise of a right. The rationale behind the principle is that, despite the existence of a State's right, the way in which it is exercised can still amount to an abuse:

> A state which, though not with the actual object of breaking an international obligation as such, uses its right to apply certain laws, or to apply them in a certain way, in such a manner that the obligation is not in fact carried out, may be said to have committed an abuse of rights.[71]

Put another way, the principle forbids a State from exercising a right conferred upon it under international law, such as its sovereign prerogative to regulate nationality "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".[72]

Sloane wrote that "[t]he expedient acquisition of Liechtenstein's nationality … struck the ICJ as abusive and potentially prejudicial" to Guatemala.[73] Although the ICJ was concerned about "the unusual and perhaps abusive manner in which Liechtenstein had conferred its nationality on Nottebohm", he notes, the Court preferred to apply a modified version of the rule of "real and effective" nationality to avoid "imputing bad faith to a sovereign state".[74] Other authors, including the former Special Rapporteur of the ILC, John Dugard, agreed with this reading of the judgment.[75] Besson similarly argues that, to the extent that *Nottebohm* was a clear case of instrumental citizenship through CBI, "one may consider that the 'abuse of rights' reading of the case and its applicability to dual nationality and/or diplomatic protection context is convincing".[76]

By applying the rule of "real and effective" nationality, the ICJ "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".[77] The ICJ, in other words, supplied the missing template for the regulation of an unreasonable instrumentalization of nationality facilitated by the lack of limitations on the State's competence to confer its nationality by internal law. Accordingly, as Brownlie aptly observed, the ICJ provided "the only logical approach to many problems of nationality

[70] Anne PETERS, "Extraterritorial Naturalizations: Between the Human Right to Nationality, State Sovereignty, and Fair Principles of Jurisdiction" (2010) 53 German Yearbook of International Law 623 at 676.

[71] Gerald FITZMAURICE, "The Law and Procedure of the International Court of Justice, 1951–4: General Principles and Sources of International Law" (1959) 35 British Yearbook of International Law 183 at 209.

[72] Alexandre KISS, "Abuse of Rights" (last updated December 2006) in Anne PETERS and Rüdiger WOLFRUM, eds., *The Max Planck Encyclopedias of Public International Law* (Oxford: Oxford University Press, 2008–), online: Oxford Public International Law, https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1371. See also, Michael BYERS, "Abuse of Rights: An Old Principle, A New Age" (2002) 47 McGill Law Journal 389; Bin CHENG, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: Cambridge University Press, 1953) at 121; Hersch LAUTERPACHT, *The Function of Law in the International Community* (Oxford: Oxford University Press, 1933) at 298; Robert KOLB, *La Bonne Foie en Droit International Publique* (Geneva: Graduate Institute Publications, 2000) at 463.

[73] Sloane, *supra* note 40 at 21.

[74] *Ibid*., at 24.

[75] *First Report on Diplomatic Protection*, *supra* note 48 at para. 108.

[76] Samantha BESSON, "Investment Citizenship and Democracy in a Global Age: Towards a Democratic Interpretation of International Nationality", Law Fribourg International Law Research Papers Series 01/2019, June 2019, at 16.

[77] Sloane, *supra* note 40 at 16.

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law and avoids the inconveniences and structural flaws in the system of law which flow from the principle of freedom in nationality matters".[78]

In light of the foregoing analysis, I argue that *Nottebohm* can be interpreted and defended as a norm of inclusion that recognizes social bonds of attachment beyond formal nationality and as a norm of exclusion against abusive ascriptions of nationality. As discussed in the remainder of this paper, *Nottebohm*'s double dimension can offer an appropriate and effective regulatory instrument in a variety of contemporary contexts. As Brownlie writes, the particular scenario in which this judgment was handed down, "does not obscure its role as a general principle with a variety of applications".[79] The ICJ's substantive conception of nationality, based on social facts of attachment rather the abstract nationality status, seems to play a role in the field of EU law with a view to protect the rights granted by EU citizenship. This conception of nationality, understood as the "genuine link" requirement, can also serve as a tool to address the concerns raised by CBI regimes. *Nottebohm*'s exclusionary anti-abuse standard reflects the approach taken by tribunals in the field of international investment law where arbitrators have applied the abuse of rights principle in an increasing number of cases involving manipulation of nationality. Identifying social bonds of attachment of the sort considered in *Nottebohm* has also become a regulatory mechanism used by the European Court of Human Rights (ECtHR) in deportation cases to strike a fair balance between the right of immigrants to family life and the legitimacy of deportation measures.

II. EU Law and CBI

As explained earlier, CBI schemes, also known as "golden passports", triggered a backlash in the EU. The European Commission has asserted, by reference to the *Nottebohm* judgment, that the conditions for the ascription of the nationality of Member States should be linked to the "genuine link" criteria. Scholars have criticized the European Commission's position, arguing that EU institutions are not competent to interfere in the field of nationality. This Section will first examine the concerns associated with CBI regimes. It will then show that Member States' autonomy in matters of nationality is subject to certain limitations posed by the derivative status of EU citizenship. In this regard, the CJEU held that Member States should apply the principle of proportionality when adopting nationality measures that may impact the person's rights as an EU citizen. In so holding, the CJEU has sought to bring the law of membership closer to factual reality, an approach that reflects the conception of nationality expressed in *Nottebohm*. This Section will argue that this approach can offer an appropriate tool to address the concerns raised by CBI schemes.

A. Concerns Raised by CBI Schemes

CBI can be defined as a "privileged and fast-track naturalization"[80] procedure that allows high-net-worth individuals to acquire a second citizenship in exchange for an economic contribution to the granting State.[81] To be sure, "the applicant's wallet is the core, if

[78] Ian BROWNLIE, "The Relations of Nationality in Public International Law" (1964) 39 British Yearbook of International Law 284 at 285.

[79] James CRAWFORD, *Brownlie's Principles of Public International Law,* 9th ed. (Oxford: Oxford University Press, 2019) at 499.

[80] Ayelet SHACHAR, "Dangerous Liaisons: Money and Citizenship" in Rainer BAUBÖCK, ed., *Debating Transformations of National Citizenship* (Cham: Springer, 2018), at 9.

[81] For a detailed analysis of the economic requirements of CBI regimes, see Kristin SURAK, "Millionaire Mobility and the Sale of Citizenship" (2021) 47(1) Journal of Ethnic and Migration Studies 166.

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not the sole criterion determining whether gates of admission will open".[82] CBI is, in plain terms, a "passport-selling"[83] mechanism that contributes to the marketization of citizenship.[84] In this sense, CBI deviates from the traditional (and most used) birthright modes of citizenship acquisition wedded to the nation-state and territorial sovereignty, under which citizenship is acquired at birth based on *jus sanguinis* and *jus soli* rules.[85] In the EU, *jus sanguinis* remains the most common mechanism for the attribution of birthright citizenship, although some Member States combine this mode with *jus soli* rules.[86] Joppke argues that the practice of combining *jus sanguinis* and *jus soli* "approximate the 'genuine connection' requirement" as expressed in the *Nottebohm* judgment.[87]

CBI also differs from ordinary naturalization procedures. Most Member States have provisions in their domestic laws allowing foreigners to naturalize as citizens upon the fulfilment of multiple requirements.[88] A common requirement is that applicants must legally reside in the country for a certain period, which in most cases is between five and ten years.[89] Long-term resident status is often accompanied by other conditions such as the individual's knowledge of socio-cultural norms of the polity (assessed through language and culture tests), financial sustainability, and an expression of loyalty. These criteria, Kostakopoulou writes, "serve to unite the national community, to strengthen its identity, and revitalize the values of loyalty, allegiance, and of individual

[82] Shachar, *supra* note 15 at 794.

[83] Theodoros RAKOPOULOS, "The Golden Passport 'Russian' Eutopia: Offshore Citizens in a Global Republic" (2022) 30(2) Social Anthropology/Anthropologie Sociale 161 at 162.

[84] A SHACHAR, "The Marketization of Citizenship in an Age of Restrictionism" (2018) 32(Special Issue 1) Ethics & International Affairs 3; Kristin SURAK, "Marketizing Sovereign Prerogatives: How to Sell Citizenship" (2021) 62 (2) European Journal of Sociology 275.

[85] Barbara von RÜTTE, *The Human Right to Citizenship: Situating The Right to Citizenship within International and Regional Human Rights Law* (Leiden: Brill-Nijhoff, 2022) at 30; Gerard-Rene DE GROOT and Oliver Willen VONK, *International Standards on Nationality Law: Texts, Cases, and Materials* (Oisterwijk: Wolf Legal Publishers, 2016) at 3; Iseult HONOHAN and Nathalie ROUGIER, "Global Birthright Citizenship Laws: How Inclusive?" (2018) 65 Netherlands International Law Review 337 at 338. According to *jus sanguinis* (right of blood), the attribution of nationality is based on descent, i.e., at least one of the parents of the prospective national is a citizen of the State. According to *jus soli* (right of the soil), an individual obtains the citizenship of the country in which they are born. For an analysis of the use of *jus soli* and *jus sanguinis* worldwide, see Global Citizenship Observatory (GLOBALCIT), "Global Birthright Indicators", published on 8 February 2018, updated on 19 November 2022. See also, Dimitry Vladimirovich KOCHENOV and Kristin SURAK, "Introduction: Learning from Investment Migration" in Dimitry Vladimirovich KOCHENOV and Kristin SURAK, eds., *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* (Cambridge: Cambridge University Press, 2023), 1 at 7. They indicate that "98% of citizenships are inherited by blood".

[86] For a detailed analysis of *jus sanguinis* and *jus soli* rules in the EU, see Maria M. MENTZELOPOULOU and Costica DUMBRAVA, "Acquisition and Loss of Citizenship in EU Member States: Key Trends and Issues", European Parliamentary Research Service, Members' Research Service, PE 625.116, Briefing, July 2018.

[87] Christian JOPPKE, *Citizenship and Migration* (Cambridge; Massachusetts: Polity Press, 2010) at 45. See also, Rainer BAUBÖCK, "Genuine Links and Useful Passports: Evaluating Strategic Uses of Citizenship" (2019) 45(6) Journal of Ethnic and Migration Studies 1015 at 1020.

[88] For a detailed study of naturalization requirements in the EU, see Ashley MANTHA-HOLLANDS and Jelena DŽANKIĆ, "Ties that Bind and Unbind: Charting the Boundaries of European Union Citizenship" (2022) 49(9) Journal of Ethnic and Migration Studies 2091. They explain how Member States waive or ease ordinary naturalization requirements for nationals of all other Member States and provide for accelerated naturalization for specific categories of foreigners in cases involving family members and individuals with special historical ties to the State awarding citizenship.

[89] For a discussion of legal residency requirements in the EU, see Dimitry KOCHENOV and Martijn van den BRINK, "Legal Residence and Physical Presence: The Law and Practice of Naturalization in EU Jurisdictions", COMPAS, University of Oxford, Working Paper No. 165, August 2023.

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sacrifice for the common good".[90] In Van den Brink's words, "the requirements imposed by states typically guarantee that genuine links exist by the time of [regular] naturalization".[91]

CBI schemes enable wealthy individuals "to jump the regular naturalization queue".[92] They do not contain the standard conditions that apply to foreign individuals living in the conferral State, such as a substantial period of residency. In fact, "[i]n most cases of [CBI], it is the money rather than the investor, that must be physically present in the country".[93] As Kochenov and Surak note, "the act of migration, viewed as a unidirectional movement from A to B, is not a feature of [CBI schemes] in many if not possibly the majority of cases" but, rather, "the global extraterritorial rights" granted by the newly acquired citizenship.[94] Accordingly, to concur with Kälin, CBI is based on "an individualistic, depoliticizing liberal conception of citizenship that is formal, legalistic, and without ties to a collective identity or membership in a particular community".[95]

Until recently, three Member States (Bulgaria, Cyprus, and Malta) had CBI programmes that allowed third-country nationals to purchase their nationality.[96] Malta, for instance, offers citizenship to third-country nationals making a non-refundable donation, acquiring property of a certain value, and residing legally in the country for only twelve months, a requirement that does not involve physical presence in the country.[97]

In a 2019 report, the European Commission raised concerns about CBI regimes, pointing out that, though individuals may acquire the nationality of Member States through these regimes "for legitimate reasons", they "may also be pursuing illegitimate ends".[98] The Commission stated, in particular, that these citizenship policies "create risks to security … as well as risks of money laundering, corruption, and tax evasion".[99] The Commission relied on a study from the European Parliamentary Research Service (EPRS) that drew attention to various scandals and criminal investigations "shedding

[90] Dora KOSTAKOPOULOU, "Why Naturalization?" (2003) 4(1) Perspectives on European Politics and Society 85 at 92. See also, Jelena DŽANKIĆ, "The Pros and Cons of *Ius Pecuniae*: Investor Citizenship in Comparative Perspective", Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, European University Institute, RSCAS Working Papers No. 2012/14, at 1.

[91] Brink, *supra* note 4 at 86.

[92] Helen IRVING, *Allegiance, Citizenship, and the Law: The Enigma of Belonging* (Cheltenham; Massachusetts: Edward Elgar Publishing, 2022) at 142.

[93] Kristin SURAK, "Investment Migration Globally: The Dynamics of Supply and Demand", COMPAS, University of Oxford, Working Paper No. 161, November 2022, at 14.

[94] Kochenov and Surak, *supra* note 85 at 3–4.

[95] Christian H. KÄLIN, *Ius Doni in International Law and EU Law* (Leiden: Brill Nijhoff, 2019) at 405.

[96] For a comprehensive analysis of CBI schemes in the EU, see Meenakshi FERNANDES et al., "Avenues for EU Action on Citizenship and Residence by Investment Schemes European Added Value Assessment", European Parliamentary Research Service, European Added Value Unit, PE 694.217, 21 October 2021. This study shows that, by 2019, around 10,000 individuals had acquired citizenship through CBI programmes in the EU and that Russian nationals predominate among CBI participants, accounting for over 45% of all citizenships, followed by Chinese nationals and nationals from the Middle East, accounting for approximately 15% of naturalizations each.

[97] For an analysis of Malta's CBI regime, see Sergio CARRERA, "The Price of EU Citizenship: The Maltese Citizenship-for-Sale Affair and the Principle of Sincere Cooperation in Nationality Matters" (2014) 21(3) Maastricht Journal of European and Comparative Law 406 at 414. Carrera explains that the residence requirement ultimately constitutes a mere figurative obligation. Surak calls it a "'light touch' residence requirement", for "[t]he one-year obligation could be fulfilled by setting out a plan for developing connections to the island, joining local clubs, and donating to local charities, rather than physically residing on the island for twelve months". Surak, *supra* note 93 at 14.

[98] *European Commission's Report 2019*, *supra* note 3 at 9.

[99] *Ibid*., at 9 and 23.

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light on dubious practices" surrounding CBI schemes.[100] The EPRS alluded to the controversial backgrounds of some of the applicants, including persons accused of misappropriating financial assets and charged with breaching international sanctions.[101] Questions have, as such, been raised with respect to due diligence checks and transparency in the schemes. Corrado and Marsh, for instance, explain that Malta's scheme customer due diligence "remains subject to problematic case assessments" and "needs to be expanded to ensure the perpetuation of [CBI]".[102]

These risks, the European Commission rightly observed, "are exacerbated by the cross-border rights associated with citizenship of the Union".[103] As noted, investor migrants do not seek citizenship of a new country to settle there but, rather, to enjoy the extraterritorial rights granted by that citizenship. The external dimension of the rights granted through CBI schemes is particularly noticeable in the EU. A decision by one Member State to sell its nationality automatically leads to the conferral of EU citizenship and associated rights, including free movement within all Member States.[104] It is precisely the benefits of EU citizenship that are often advertised as the most attractive feature of CBI schemes.[105] To concur with Joppke, therefore, the "post-national" EU citizenship has "instrumentalism written on its forehead in terms of free movement rights".[106] In this context, "when one member state 'sells' national citizenship as a gateway to gaining Union citizenship, tension inevitably arises, since the state's action in doing so also affects other EU member states".[107] In the words of Transparency International and Global Witness, "a minority of Member States are reaping profit from jointly shared EU assets by hawking internal free movement and external visa-waiver agreements, and they are enjoying the spoils whilst exposing their neighbours to risk".[108]

[100] Amandine SCHERRER and Elodie THIRION, "Citizenship by Investment (CBI) and Residency by Investment (R.B.I.) Schemes in the EU", European Parliamentary Research Service, Ex-Post Evaluation Unit and European Added Value Unit, PE 627.128, 2 October 2018, at 27. For another report on the side-effects of EU CBI regimes, see Transparency International and Global Witness, "European Getaway: Inside the Murky World of Golden Visas", Transparency International and Global Witness, 30 October 2018, online: *Transparency International* https://www.transparency.org/en/publications/golden-visas.

[101] Scherrer and Thirion, *supra* note 100 at 28–9. See also, "Golden Passports: Infringement Procedures Against Cyprus and Malta the Right Move" *Transparency International* (20 October 2020), online: Transparency International https://www.transparency.org/en/press/golden-passports-infringement-procedures-against-cyprus-and-malta-the-right-move. This publication references the following remark made by Laure Brillaud, Senior Anti-Money Laundering Policy Officer at Transparency International EU: "[t]there is overwhelming evidence" that the Maltese scheme has "been serving corrupt interests, not the common good".

[102] Mark CORRADO and Kim MARSH, "Investment Migration and the Importance of Due Diligence: Examples of Canada, Saint-Kitts and Nevis, and the EU" in Dimitry Vladimirovich KOCHENOV and Kristin SURAK, eds., *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* (Cambridge: Cambridge University Press, 2023), 485 at 508.

[103] *European Commission's Report 2019*, *supra* note 3 at 5.

[104] For a detailed analysis of EU citizenship rights, see Manuel KELLERBAUER, "Article 20 TEU" in Manuel KELLERBAUER, Marcus KLAMERT, and Jonathan TOMKIN, eds., *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford: Oxford University Press, 2019), 192.

[105] Konstantinos ARVANITIS, "Sincere Cooperation and the Limits of National Competences in the Field of Residence by Investment (R.B.I.) and Citizenship by Investment (C.B.I)", Committee on Civil Liberties, Justice, and Home Affairs, European Parliament, Working Document on the Legislative Own-Initiative Report on Citizenship and Residence by Investment Schemes (DT\1240216EN), 1 October 2021, at 2. Several international firms assist individuals in applying for CBI regimes. The global leader in CBI, Henley & Partners, advertises visa-free entry to the EU and Europe's Schengen Area as one of the "key advantages" of Malta's CBI programme. See Henley & Partners, *supra* note 2 at 145.

[106] Christian JOPPKE, "The Rise of Instrumental Citizenship", in Henley & Partners, *supra* note 2, 26 at 26.

[107] Shachar, *supra* note 80 at 69.

[108] Transparency International and Global Witness, *supra* note 100 at 12.

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In addition, it has been argued that CBI threatens the conception of citizenship as membership based on ideals of equality and participation. The argument goes that since "only a tiny percentage of the world's population" can pay the price of a "golden passport", CBI schemes "are profoundly and intentionally inegalitarian and elitist".[109] In this regard, the EPRS also pointed to the "inherent lack of fairness" that the regimes represent.[110] As explained, the naturalization of ordinary foreigners is subject to several requirements, such as long-term residency status, that do not apply to CBI applicants. The implementation of the regimes, in fact, "occurred in parallel with the trend in Member States to place [even] more stringent [ordinary naturalization] requirements on migrants through labour market and social integration tests".[111]

As a result of these concerns, the European Commission called on Cyprus, Malta, and Bulgaria to terminate their CBI regimes. It also instituted infringement proceedings against Malta and Cyprus.[112] In response, only Bulgaria and Cyprus terminated their schemes, on 5 April 2022 and 1 November 2020, respectively.[113] Thus, Malta is currently the only Member State operating a CBI regime. In September 2022, after having failed to heed its calls, the Commission referred Malta to the CJEU.[114] In framing its position against CBI regimes, the Commission relied on the *Nottebohm* judgment and argued that, since EU citizenship is a consequence of acquiring the nationality of a Member State, "each Member State needs to ensure that nationality is not awarded absent any genuine link to the country or its citizens".[115] The Commission further asserted that "the granting of EU citizenship in return for pre-determined payments or investments without any genuine link to the Member State concerned undermines the essence of EU citizenship".[116] These arguments can be understood as an objection to the instrumentalization of EU citizenship and the ensuing cross-border implications of CBI schemes. As discussed below, the Commission's reference to *Nottebohm* faced strong opposition from a number of scholars.[117]

B. Genuine Links as a Condition to Acquire EU Citizenship

Scholars have raised two main objections against the European Commission's actions. The first is that, as Kochenov argues, requiring Member States to grant their nationality based on the genuine link theory constitutes a direct incursion "in a sphere of exclusive competence of Member States".[118] Sarmiento similarly asserts that the domain of nationality

[109] Irving, *supra* note 92 at 145.

[110] Fernandes et al., *supra* note 96 at 25–7. See also, Scherrer and Thirion, *supra* note 100 at 20–2.

[111] Fernandes et al., *supra* note 96 at 26.

[112] European Commission, "Investor Citizenship Schemes: European Commission Opens Infringements Against Cyprus and Malta for 'Selling' EU Citizenship" *European Commission* (20 October 2020), online: European Commission https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1925.

[113] See Reuters, "Cyprus to Revoke Passports of Four Sanctioned Russians-Sources" *Reuters* (7 April 2022), online: Reuters https://www.reuters.com/world/europe/cyprus-revoke-passports-four-sanctioned-russians-sources-2022-04-07/; Prabhu BALAKRISHNAN, "Effective 5 April 2022, Bulgaria Terminates CBI Program" *Best Citizenships* (30 September 2022), online: Best Citizenships https://best-citizenships.com/2022/09/30/bulgaria-closes-its-golden-passport-program/

[114] European Commission, "Investor Citizenship Scheme: Commission Refers MALTA to the Court of Justice" *European Commission* (29 September 2022), online: European Commission https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5422.

[115] *European Commission's Report 2019*, *supra* note 3 at 6.

[116] European Commission, *supra* note 112.

[117] Weingerl and Tratnik, *supra* note 7; Kochenov and Basheska, *supra* note 7; D'Oliveira, *supra* note 7; Sarmiento, *supra* note 4; Shaw, *supra* note 7.

[118] Kochenov and Basheska, *supra* note 7 at 47.

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falls within the scope of Member States' autonomy and that the *Nottebohm* judgment shall not "trigger new competences in favour of the EU".[119] The second is that, to quote D'Oliveira, the CJEU actually "denied the impact of *Nottebohm* for Community purposes" in the *Micheletti* case.[120]

These scholars are right to note that the CJEU rejected *Nottebohm* within the framework of the EU in *Micheletti*. As we have seen, the "substance-over-form" conception of nationality the ICJ expressed in *Nottebohm* served as a mechanism for exclusion in that case. The "extremely tenuous" connections that *Nottebohm* had with Liechtenstein led the ICJ to conclude that Guatemala was under no obligation to recognize his nationality for the purposes of diplomatic protection. In *Micheletti*, the Spanish authorities were reluctant to recognize the Italian nationality of Mr Micheletti, which he had acquired to establish a business in Spain, given that he was also (and initially) a national of Argentina. The CJEU held that it is impermissible for Member States "to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality".[121] In this context, it should be noted that the European Commission's reference to the "genuine link" requirement does not involve Member States' national rules on the recognition of nationality but, rather, on the acquisition of nationality. Indeed, the Commission argued that "each Member State needs to ensure that nationality *is not awarded* absent any genuine link to the country or its citizens" (emphasis added).[122] Although the European Commission mistakenly assumed that *Nottebohm* concerned the acquisition of nationality, this in no way invalidates its suggestion that the ascription of the nationality of Member States should be based on the idea of a "genuine link".

As critics also note, nationality is not included among the competences delegated to the EU pursuant to Article 5 of the Treaty on the European Union (TEU).[123] Accordingly, domestic rules on the loss and acquisition of nationality, in principle, fall within the reserved domain of Member States.[124] The competence of Member States to regulate nationality is, however, subject to certain requirements on account of the derivate status of EU citizenship. As we have seen, EU citizenship grants "a constantly growing number of rights",[125] which include freedom of movement. This right "is a central element of Union citizenship" and evidences the cross-border effects of the nationality of Member States.[126] This is the most attractive feature for the buyers of EU citizenship, and the major source of concern for Member States and the EU.

Access to EU citizenship is dependent on the acquisition of the nationality of a Member State. Article 20 of the Treaty on the Functioning of the European Union (TFEU) provides that "every person holding the nationality of a Member State shall be a citizen of the

[119] Sarmiento, *supra* note 4 at 26.

[120] D'Oliveira, *supra* note 7 at 13.

[121] *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria* (*Micheletti*), Judgment of the Court of 7 July 1992, Case C-369/90 at para. 10.

[122] *European Commission's Report 2019*, *supra* note 3 at 5.

[123] *Consolidated Version of the Treaty on European Union*, 26 October 2012, Official Journal of the European Union C 326/13, art. 5.

[124] See *European Convention on Nationality*, 6 November 1997, European Treaty Series – No. 166 [*ECN*], art. 3. This provision uses almost identical terms to those employed in the *1930 Hague Convention*, *supra* note 24, art. 1, confirming that: "[e]ach [Member] State shall determine under its own law who are its nationals".

[125] Dimitry KOCHENOV, "The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon" (2013) 62(1) International and Comparative Law Quarterly 97 at 117.

[126] Armin von BOGDANDY and Felix ARNDT, "European Citizenship" (last updated January 2011) in Anne PETERS and Rüdiger WOLFRUM, eds., *The Max Planck Encyclopedias of Public International Law* (Oxford: Oxford University Press, 2008–), online: Oxford Public International Law https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e615?prd=EPIL.

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Union. Citizenship of the Union shall be additional to and not replace national citizenship."[127] The term "being additional and not replace national citizenship" means that EU citizenship shall not be understood as being independent of national citizenship. EU citizenship is, therefore, considered as a derivative status.[128] Given the link between EU and national citizenship, the CJEU has consistently held that Member States must, before taking a decision to withdraw or confer their nationality, consider the consequences of such a decision for the person concerned as regards the loss of the rights they enjoy as an EU citizen. In this context, the CJEU has "begun to erode" the sovereignty of Member States in the field of nationality.[129] In so doing, it is submitted that the CJEU construed an understanding of nationality under EU law that reflects the "genuine link" approach and has so far adopted this understanding as a norm of inclusion.

In *Rottmann*, the CJEU held that while:

> Member States have the power to lay down the conditions for the acquisition and loss of nationality … the exercise of that power, in so far as it affects the rights conferred and protected by the legal order of the Union … is amenable to judicial review carried out in the light of European Union law.[130]

Rottmann was an Austrian national by birth who, after some years of residence in Germany, obtained German nationality by naturalization. He then automatically lost his Austrian nationality by application of Austrian law.[131] The German authorities thereafter deprived Rottmann of his German nationality because it was acquired by deception, thereby leaving him stateless. The Court observed, seemingly paraphrasing *Nottebohm*, that:

> [I]t is legitimate for a Member State to wish to protect the special relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality.[132]

In this respect, the Court considered that a Member State is entitled to revoke the nationality granted to an individual if "that nationality was obtained by deception".[133] However, the Court held that, in adopting that decision, the Member State concerned has to observe the principle of proportionality. This principle requires that national courts and authorities balance public interests, such as the acquisition of its nationality by fraud, against the "consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen

[127] *Consolidated Version of the Treaty on the Functioning of the European Union*, 26 October 2012, Official Journal of the European Union C 326/47, art. 20.

[128] Dimitry KOCHENOV, "*Ius Tractum* of Many faces: European Citizenship and the Difficult Relationship Between Status and Rights" (2009) 15(2) Columbia Journal of European Law 169.

[129] Toni MARZAL, "The Territorial Reach of European Union Law: A Private International Law Enquiry into the European Union's Spatial Identity" (2024) 73(1) International and Comparative Law Quarterly 29 at 50.

[130] *Janko Rottmann v. Freistaat Bayern* (*Rottman*), Judgment of the Court of 2 March 2010, Case C-135/08 [*Rottman*] at para. 48. For a discussion of this decision, see G.R. de GROOT and A. SELING, "The Consequences of the *Rottmann* Judgement on Member State Autonomy – the Court's Avant-gardism in Nationality Matters" in Jo SHAW, ed., "Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?", Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, European University Institute, RSCAS Working Paper 2011/62, 27.

[131] In general, Austrian citizenship law does not permit dual or multiple citizenship. In principle, anyone who voluntarily acquires a foreign citizenship thereby loses Austrian citizenship.

[132] *Rottman*, *supra* note 130 at para. 51.

[133] *Ibid*.

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of the Union".[134] The Court left it to German courts to proceed further with the issue regarding the principle of proportionality.

Just as in *Rottmann*, the CJEU in *Tjebbes* explained that a Member State's wish "to protect the special relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality" was legitimate.[135] This case concerned four Dutch citizens who also held the nationality of a non-EU State and had lost their Dutch nationality by operation of Dutch law due to their residence abroad (and outside the EU) for more than ten years. Dutch law seeks to combat multiple nationality and to ensure that Dutch nationals have and retain a "genuine link" with the Netherlands, which is deemed to be lost in the event of long-term residence outside the State.[136] The Court agreed with the Advocate General's view that requiring a "genuine link" between a Member State and its national is, in principle, legitimate for reasons of public interest.[137] However, the Court went on to state that, as also held in *Rottmann*, a decision entailing the loss of EU citizenship and associated rights must be proportional "so far as concerns the consequences of that loss for the situation of the person concerned".[138] The proportionality test, the Court noted, "requires an individual assessment" by the competent authorities and courts of how the domestic measure can "affect the normal development of his or her family and professional life".[139] According to the Court, "the circumstances of the individual situation of the person concerned, which are likely to be relevant in the assessment" include:

> particular difficulties in continuing to travel to the Netherlands or to another Member State in order to retain genuine and regular links with members of his or her family, to pursue his or her professional activity, or to undertake the necessary steps to pursue that activity.[140]

A final case worth considering is *JY*, the first in which the CJEU dealt with a situation where the acquisition of the nationality of a Member State was at stake. It is also the first case where the Court not only reminded national authorities of the general proportionality criteria established in previous cases but also conducted the assessment itself.[141] JY, an Estonian national resident in Austria, had applied to become an Austrian national through naturalization in 2008. She was assured that she would be granted that nationality if she relinquished her citizenship of Estonia as required by Austrian Law, which she

[134] *Ibid*., at para. 56.

[135] *MG Tjebbes and Others v Minister van Buitenlandse Zaken* (*Tjebbes*), Judgment of the Court of 12 March 2019, Case C-221/17 [*Tjebbes*] at para. 33. For a discussion of this decision, see Martijn van den BRINK, "Bold, But Without Justification? Tjebbes" (2019) 4(1) European Papers 409.

[136] *Tjebbes, supra* note 135 at paras. 34 and 37. The Court referred to Article 7(1) and (2) of the *ECN*, *supra* note 124, which provides that a State Party may provide for the loss of its nationality, inter alia, in the case of an adult, where there is no genuine link between that State and a national habitually residing abroad and, in the case of a minor, for children whose parents lose the nationality of that State.

[137] *Tjebbes, supra* note 135 at para. 35.

[138] *Ibid*., at para. 40.

[139] *Ibid*., at paras. 44 and 50. The Court referred to the Charter of Fundamental Rights of the European Union, 18 December 2000, Official Journal of the European Communities C 364/1, and held that national courts have "to ensure that the loss of nationality is consistent with the fundamental rights guaranteed by the Charter … and specifically the right to respect for family life as stated in Article 7 of the Charter".

[140] *Tjebbes, supra* note 135 at para. 46.

[141] *JY v Wiener Landesregierung*, Judgment of the Court of 18 January 2022, Case C-118/20 [*JY*]. For a discussion of this decision, see Ilaria GAMBARDELLA, "JY v Wiener Landesregierung: Adding Another Stone to the Case Law Built Up by the CJEU on Nationality and EU Citizenship" (2022) 7(1) European Papers 399.

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did in 2015.[142] In 2017, the Austrian competent authority rejected JY's naturalization application, offering a "public policy" justification for that decision due to the fact that she had committed a series of administrative offences, including driving a motor vehicle while under the influence of alcohol.[143] The Court found that "the gravity of the offences committed by" JY were not proportionate to "the significant consequences" that Austria's decision to revoke the assurance of naturalization, which entailed the permanent loss of EU citizenship, has for "JY's situation, as regards, in particular, the normal development of her family and professional life" in the EU.[144] This included "the right to respect for family life as stated in Article 7" of the Charter of Fundamental Rights of the EU.[145]

This consistent case law shows how the CJEU has "challenged Member State sovereignty in nationality law".[146] As the "final arbiter" in this domain,[147] the Court has "unreservedly embraced [the] position that Member States are not absolutely free in framing their nationalities as they see fit".[148] The European Commission itself observed that "while it is for each Member State to lay down the conditions for the acquisition and loss of nationality, they must do so having due regard to Union law" and, in particular, the proportionality principle.[149] This principle seeks to recognize and protect the personal, business, and territorial links between an individual and a Member State against nationality rules that may impact their rights as EU citizens. One can therefore argue that "the notion of nationality in EU law is based on a jurisdictional conception that builds on the idea of a genuine link", an idea that resembles *Nottebohm*'s "substance-over-form" understanding of nationality.[150] As Wagner puts it, "[n]ationality for the purpose of EU law and Union citizenship by extension … are construed on the basis of nationality as understood in international law reflecting the individual's embeddedness within the legal and social fabric of his/her [Member State]".[151]

However, unlike the circumstances and the position taken in *Nottebohm*, the conception of EU citizenship based on the idea of a "genuine link" has so far been used as a mechanism for inclusion with respect to measures concerning the acquisition and loss of the nationality of Member States. The question arises as to whether this understanding of EU citizenship should also apply to prevent individuals from acquiring EU citizenship based on a monetary payment alone; that is, when the individual does not maintain meaningful ties within the society of the Member State and the EU.[152] To concur with Van den Brink:

[142] *JY, supra* note 141 at para. 15.

[143] *Ibid*., at para. 17. As the Court noted:

> The Wiener Landesregierung (Government of the Province of Vienna) justified that decision by stating that JY had committed, since receiving the assurance that she will be granted Austrian nationality, two serious administrative offences (failing to display a vehicle inspection disc and driving a motor vehicle while under the influence of alcohol) and that she had committed eight administrative offences between 2007 and 2013, before that assurance was given to her.

[144] *Ibid*., at para. 74.

[145] *Ibid*., at para. 61.

[146] Jo SHAW, ed., "Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?", Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, European University Institute, RSCAS Working Paper 2011/62.

[147] Gareth T. DAVIES, "The Entirely Conventional Supremacy of Union Citizenship and Rights" in Shaw, *supra* note 145, 5 at 9.

[148] Kochenov, *supra* note 125 at 115.

[149] *European Commission's Report 2019*, *supra* note 3 at 5.

[150] Lorin-Johannes WAGNER, "Member State nationality under EU law – To be or not to be a Union Citizen?" (2021) 28(3) Maastricht Journal of European and Comparative Law 304 at 304.

[151] *Ibid*., at 305.

[152] *European Commission's Report 2019, supra* note 3 at 5.

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> The lack of a genuine link may be insufficient reason to refuse to recognize a grant of nationality, but that does not undermine the argument in favour of there being a genuine link for the purposes of its being granted.[153]

He observes, and rightly so, that it is precisely "the fact of globalization" and the capacity of individuals to maintain multiple nationalities that "supports the case for conditioning the granting of nationality on the existence of a genuine link".[154] "This is certainly so", he adds, "in highly integrated regions such as the EU, where the unwillingness of States to fashion naturalization policies with an eye to a genuine link creates the problems of" CBI regimes.[155]

A major concern about granting EU citizenship through investment is that this method has potential side effects for Member States. As we have seen, although citizenship can be acquired through CBI regimes for legitimate reasons, it can also be exploited by individuals and governments via money laundering, tax evasion, corruption, and other illegal activities. CBI programmes considered as an exercise of State sovereignty, combined with the lack of sufficient safeguards as to their implementation, are arguably the root cause of these problems. Given that EU citizenship includes the right to travel throughout the EU and to reside in a Member State of which the citizen is not a national, these risks extend beyond the States granting nationality through CBI regimes. Another legitimate concern is that CBI regimes facilitate naturalization and, thus, access to EU citizenship for a privileged few with deep pockets, while regular naturalization requirements are increasingly becoming more difficult to satisfy for most migrants. If CBI regimes "undermine the legitimate interests of other Member States [and exacerbate inequalities,] there would be reasons to make the acquisition of national and EU citizenship subject to a genuine link requirement".[156]

Having already imposed certain limitations on the power of Member States to deprive individuals of EU citizenship, it remains to be seen whether the CJEU will expand on its case law to restrict nationality practices such as the CBI regime implemented by Malta. Some believe the Court should do so[157] while others consider that "[i]t will be difficult for the Court to justify broadening the reach of its case law".[158] At any rate, what is clear is that the individual's life circumstances and social bonds with a given Member State and the EU are factors that the CJEU has considered as relevant when reviewing nationality measures that affect the status of EU citizenship. We can, in this respect, argue that *Nottebohm*'s understanding of nationality as "a social fact of attachment"[159] so far operates in the field of EU law as a norm of healthy inclusion. This is not, however, the only field where the *Nottebohm* judgment may play a role.

III. International Investment Law

Nationality plays a vital role in international investment law. This regime is governed by a network of more than 3,000 largely bilateral investment treaties (BITs) that contain broadly worded substantive protections and arbitration mechanisms for investors to bring compensation claims against host States. Investment treaties follow customary

[153] Martijn van den BRINK, "A Qualified Defence of the Primacy of Nationality of European Union Citizenship" (2020) 69 International and Comparative Law Quarterly 177 at 199.
[154] *Ibid*., at 200.
[155] *Ibid*.
[156] Brink, *supra* note 4 at 89.
[157] Carrera, *supra* note 97.
[158] Brink, *supra* note 153 at 201.
[159] *Nottebohm*, supra note 1 at 23.

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international law insofar as they only protect investors (legal and natural persons) holding the nationality of the home State party under its domestic laws.[160] The preferred instrument for the settlement of investment disputes, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), also limits jurisdiction to nationals of a Contracting State.[161] Despite nationality being one of the principal requisites to access the robust procedural and substantive protections of investment treaties, most of these instruments contain broad definitions of what constitutes an eligible national. A legal entity will often qualify as a protected national if it is lawfully incorporated in the home State party. Investment treaties do not tend to include additional requirements such as substantial business activities, effective management and control, or ownership of the investment.[162] As for natural persons, an individual to whom the home State has granted its nationality will normally be entitled to protection under the applicable investment treaty,[163] even if they hold other nationalities, including that of the host State, and maintain connections to different countries. Accordingly, investment treaty practice has developed to a point where the "bond of nationality" has diminished to a mere formality.

Expansive definitions of national, coupled with the increasingly complex ownership structures of multinational entities and the diffusion of identity brought about by globalization, have resulted in instrumental-strategic approaches towards both corporate and individual nationality. This phenomenon denotes the conduct by which investors change nationalities to access investment protection that would otherwise be unavailable. *Nottebohm*'s exclusionary standard based on the principle of abuse of rights may serve as a norm of exclusion in cases where investors resort to the manipulation of nationality for the purpose of gaining access to investment treaties. In fact, investment tribunals are

[160] Christoph SCHREUER, "Nationality of Investors: Legitimate Restrictions vs. Business Interests" (2009) 24(2) ICSID Review – Foreign Investment Law Journal 521 at 525.

[161] See *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 18 March 1965, 575 U.N.T.S. 159 (entered into force 14 October 1996) [*ICSID Convention*], art. 25(2), which provides that:

> National of another Contracting State means:
> (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and
> (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

[162] A standard definition of "corporate investor" can be found in art. 1(c)(i) of the *Agreement Between the Government of United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of El Salvador for the Promotion and Protection of Investments*, 14 October 1999, Treaty Series No.17 (2001) (entered into force 1 December 2000). The Treaty covers, with respect to the United Kingdom "corporations, firms, and associations incorporated or constituted under the law in force in any part of the United Kingdom". See also Florian FRANKE, *Der Personelle Anwendungsbereich des internationalen Investitionsschutzrechts* (Baden-Baden: Nomos, 2013). This Study shows that approximately 40% of investment treaties use incorporation in the home State party as the sole test, with no additional requirements.

[163] A typical definition of "protected natural person" can be found in art. 1(3) of the *Agreement Between the Government of the Republic of Finland and the Government of the Arab Republic of Egypt on the Promotion and Protection of Investments*, 3 March 2004 (entered into force 5 February 2005): "[t]he term 'investor' means, for either Contracting Party, (a) any natural person who is a national of either Contracting Party in accordance with its laws".

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increasingly willing to apply the principle of abuse of rights to regulate nationality by function and to refuse jurisdiction in cases involving abusive nationality planning.

A. Abuse of Rights and Legal Persons

In the context of juridical persons, "[c]ompanies today operate in ways that make it very difficult to determine nationality because of the several layers of shareholders ... operating from and in different countries".[164] This gives corporate investors the flexibility to create a diversity of nationalities with the aim of benefiting from investment treaty protections. A parent company incorporated in a State that has not signed an investment treaty with the host State of the investment can, for instance, incorporate a "mailbox" company, or transfer shares through an entity already located in a State having an investment treaty in force with the host State. These kinds of practices, commonly known as corporate restructuring, have been facilitated by the secular decline in legal barriers to cross-border trade and liberalized policies on foreign direct investment.[165]

The alteration of the investor's organizational structure to secure investment treaty rights resembles the instrumental attitude towards nationality adopted in *Nottebohm*. As 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?[166]

Although corporate restructuring has generally been considered a "perfectly legitimate goal",[167] a number of tribunals have begun to set limits to this practice. In doing so, they have scrutinized the functions of corporate nationality, adopting an approach that reflects the ICJ's exclusionary anti-abuse standard. The most prominent case is *Philip Morris v. Australia*.[168] This dispute arose out of the so-called plain packaging legislation that Australia passed on 21 November 2011. Australia announced its intention to introduce plain packaging measures on 29 April 2010, and, in the interim period, Philip Morris Australia (PM Australia) and its ultimate parent company, Philip Morris International (PMI), clearly stated their strong opposition to the proposed legislation.[169] The measures affected the shares held by the Swiss branch of PMI in PM Australia, but there was no investment treaty between Switzerland and Australia. In order to benefit from the protection of the Australia-Hong Kong BIT, a Hong Kong-based subsidiary of PMI acquired all the shares in PM Australia. The Australia-Hong Kong BIT defined

[164] Katia YANNACA-SMALL, "Who Is Entitled to Claim? The Definition of Nationality in Investment Arbitration" in Katia YANNACA-SMALL, ed., *Arbitration under International Investment Agreements: A Guide to the Key Issues*, 2nd ed. (Oxford: Oxford University Press, 2018), at 129–60. See also, Wisner and Gallus, *supra* note 63 at 927. As they explain, "[in] a globalized world economy, most international investment is channelled through complex structures consisting of companies incorporated in different jurisdictions".

[165] For a comprehensive analysis of arbitral decisions on corporate structuring, see Jorun BAUMGARTNER, *Treaty Shopping in International Investment Law* (Oxford: Oxford University Press, 2016), chapter 7.

[166] Anthony C. SINCLAIR, "The Substance of Nationality Requirements in Investment Treaty Arbitration" (2005) 20(2) ICSID Review – Foreign Investment Law Journal 357 at 358–9.

[167] *Tidewater Inc and others v. Bolivarian Republic of Venezuela*, Decision on Jurisdiction of 8 February 2013, ICSID Case No. ARB/10/5 at para. 184.

[168] *Philip Morris Asia Limited v. The Commonwealth of Australia*, Award on Jurisdiction and Admissibility of 17 December 2015, UNCITRAL, PCA Case No. 2012-12 [*Philip Morris*].

[169] *Ibid*., at para. 152.

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corporate nationality merely by reference to incorporation.[170] The restructuring took place on 23 February 2011; that is, ten months before the contested plain packaging legislation was enacted, and PMI's Hong Kong subsidiary subsequently brought a claim under the BIT[171]

Australia challenged the jurisdiction of the Tribunal, arguing that the manipulation of PMI's corporate nationality amounted to an abuse of rights.[172] Relying on previous case law,[173] the Tribunal recalled that:

> the initiation of a treaty-based investor-state arbitration constitutes an abuse of rights (or an abuse of process, the rights abused being procedural in nature) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time when a specific dispute was foreseeable.[174]

Turning to the facts, the Tribunal found that PMI had changed its corporate structure to gain the protection of the BIT at a point in time when the dispute with Australia was foreseeable, and therefore declined jurisdiction.[175] A further factor that led to this finding was that the "main and determinative, if not sole, reason for the restructuring was the intention to bring a claim under the [BIT]".[176]

Similar to PMI's strategy, Nottebohm changed his nationality when he foresaw that Guatemala would enter the war on the side of the Allies and the ensuing consequences for him and his business. He acquired Liechtenstein nationality with "the sole aim of … coming within the protection of" international law,[177] which, as this article has argued, the ICJ considered an abuse of the liberal international legal regulation of nationality. The abuse of rights doctrine, as applied in *Nottebohm* and *Philip Morris*, can also offer a valuable tool to regulate the manipulation of nationality by natural persons. It should first be noted that the doctrine of abuse of rights has long been associated with corporate restructuring.[178] This is understandable given that corporations are the most frequent claimants in investment arbitration. However, while corporations have long been

[170] *Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China*, 26 March 2019 (entered into force 17 January 2020), art. 1 (b)(i). This provision defines protected legal persons "in respect of Hong Kong" as "corporations, partnerships, associations, trusts, or other legally recognized entities incorporated or constituted or otherwise duly organized under the law in force in its area".

[171] *Philip Morris*, *supra* note 168 at para. 450.

[172] *Ibid*., at paras. 420–5.

[173] *Pac Rim Cayman LLC v. Republic of El Salvador*, Decision on the Respondent's Jurisdictional Objections of 1 June 2012, ICSID Case No. ARB/09/12; *Renée Rose Levy and Gremcitel SA v. Republic of Peru*, Award of 9 January 2015, ICSID Case No. ARB/11/17; *Mobil Corp., Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., et al. v. Bolivarian Republic of Venezuela*, Decision on Jurisdiction of 10 June 2010, ICSID Case No. ARB/07/27.

[174] *Philip Morris, supra* note 168 at para. 554.

[175] *Ibid*., at para. 554.

[176] *Ibid*., at para. 584.

[177] *Nottebohm*, *supra* note 1 at 11.

[178] Emmanuel GAILLARD, "Abuse of Process in International Arbitration" (2017) 32(1) ICSID Review – Foreign Investment Law Journal 17 at 18. For other publications that examine the application of the abuse of rights doctrine in investment arbitration; see, Utku TOPCAN, "Abuse of the Right to Access ICSID Arbitration" (2014) 29(3) ICSID Review – Foreign Investment Law Journal 627; Muthucumaraswamy SORNARAJAH, "Good Faith, Corporate Nationality, and Denial of Benefits" in Andrew MITCHELL, Muthucumaraswamy SORNARAJAH, and Tania VOON, eds., *Good Faith and International Economic Law* (Oxford: Oxford University Press, 2015), 117; Hervé ASCENSIO, "Abuse of Process in International Investment Arbitration" (2014) 13(4) Chinese Journal of International Law 763; John David BRANSON, "The Abuse of Process Doctrine Extended: A Tool for Right Thinking People in International Arbitration" (2021) 38(2) Journal of International Arbitration 187.

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strategists in matters of nationality, individuals can also adopt this role seizing opportunities that States have inadvertently generated for them.

B. Abuse of Rights and Natural Persons

As previously explained, globalization increased the transborder movement of individuals and their capacity to acquire multiple nationalities. It created a "diverse array of transborder solidarities",[179] a global order of "overlapping authorities and criss-crossing loyalties".[180] As such, it is not excluded that natural persons also resort to strategic nationality practices with the intent to secure investment protection.[181] In a situation like this, might the principle of abuse of rights equally offer the correct legal rationale for a tribunal to disavow jurisdiction? Tribunals have faced this question in recent cases where the policy considerations that animated abuse of rights arguments resemble those at work in *Nottebohm*.[182] One of these cases was *Okuashvili v. Georgia*.[183] The Claimant, Zaza Okuashvili, instituted arbitration proceedings pursuant to the rules of the Stockholm Chamber of Commerce in 2019, alleging violations of the Georgia-United Kingdom BIT. Okuashvili, a Georgian national by birth, was the ultimate beneficial owner of a group of companies, the Omega Group, which had interests in the Georgian tobacco, distribution, printing, and television industries. The dispute arose out of a series of events that occurred between 2004 and 2015. In particular, the Claimant argued that Georgia sent armed men to invade and occupy the Omega Group in 2004 and that the occupation did not end until he agreed to transfer the license of his TV network to individuals associated with the former Georgian government. According to the Claimant, despite his repeated requests, Georgia failed to investigate the 2004 occupation, which, he claims, "constitutes a breach of the Treaty".[184]

Following the 2004 events, the Claimant moved to the United Kingdom where he naturalized as a British national in 2011. He thus became a dual Georgian-British national. It was undisputed that his investments in Georgia were made when he exclusively held Georgian nationality. Georgia raised a number of objections, including that the Claimant's claim "constitute[d] an abuse of right" on account of the fact that he had acquired British nationality "to internationalize his dispute with the Respondent".[185] According to Georgia, the Claimant acquired British nationality at a time when the dispute with Georgia was foreseeable, "this being conduct broadly similar to 'chang[ing]' nationality in order to secure jurisdiction under a [BIT]".[186] The Tribunal remarked that the principle of abuse of rights would "compel it to decline or to exercise jurisdiction" since it is "a generally accepted principle of general international law".[187]

[179] Hedley BULL, *The Anarchical Society A Study of Order in World Politics* (London: Red Globe Press, 1977) at 255.

[180] Jan Aart SCHOLTE, "The Geography of Collective Identities in a Globalizing World" (1996) 3(4) Review of International Political Economy 565 at 565. See also, Thomas FRANCK, *The Empowered Self: Law and Society in the Age of Individualism* (Oxford: Oxford University Press, 1999) at 65.

[181] Baumgartner, *supra* note 165 at 12.

[182] Notable examples include *Marko Mihaljević v. Republic of Croatia*, Award of 19 May 2023, ICSID Case No. ARB/19/35 [*Mihaljević*]; *Zaza Okuashvili v. Georgia*, Partial Final Award on Jurisdiction and Admissibility of 31 August 2022, SCC Case V 2019/058 [*Okuashvili*]; and *Leopoldo Castillo Bozo v. Republic of Panama*, Final Award of 8 November 2022, PCA Case 2019-40.

[183] *Okuashvili, supra* note 182. For an analysis of this award, see Javier García OLMEDO, "*ZAZA OKUASHVILI v GEORGIA*, Case V 2019/058, Partial Final Award on Jurisdiction and Admissibility" (2023) 117(4) American Journal of International Law 681.

[184] *Okuashvili, supra* note 182 at para. 69.

[185] *Ibid*., at para. 269.

[186] *Ibid*., at para. 280.

[187] *Ibid*., at para. 272.

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The Tribunal then relied on the approach taken in the decisions involving corporate restructuring practices and dismissed the objection, holding that the Claimant's decision to "be naturalized as a British citizen indicate[d] no impropriety or a desire to serve the instrumental purpose of mounting a Treaty claim".[188] Although the Tribunal ultimately rejected Georgia's objection, this case shows that the principle of abuse of rights can equally apply to natural persons.

Another case worth mentioning is *Mihaljević v. Croatia*, a dispute submitted to ICSID by Marko Mihaljević under the Croatia-Germany BIT. The Claimant was a dual national of Germany and Croatia at the time he submitted the request for arbitration.[189] The ICSID Convention contains a clear rule excluding individual claimants who also hold the nationality of the host State. Article 25(2)(a) provides that the Convention does not cover any person who had the nationality of the "State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered".[190] This "negative" nationality requirement placed the Claimant in a difficult position given his status as a Croatian national. In an attempt to fabricate ICSID's jurisdiction, the Claimant applied to renounce his Croatian nationality before the Croatian Interior Ministry,[191] following which he filed a second request for arbitration.[192] This strategy also resembles Nottebohm's conduct as he changed his nationality with the sole purpose of having a claim pursued on his behalf by Liechtenstein before the ICJ.

Croatia challenged jurisdiction on different grounds, including that the Claimant had committed an abuse of rights by trying to relinquish his Croatian nationality after the dispute had arisen with the sole purpose of circumventing ICSID's host State nationality restriction.[193] Croatia relied on the approach taken by tribunals that applied the abuse of rights doctrine in cases involving corporate restructuring.[194] In a legal opinion submitted by Professor Christoph Schreuer in support of Croatia's objection, he observed that the "policy considerations" that have led arbitrators to decline jurisdiction in those cases "apply with equal force to the manipulation of the nationality of individuals".[195] The Tribunal was "troubled by the Claimant's conduct", as "the facts strongly suggest [ed] that the sole reason for the Claimant's application to relinquish his citizenship was so that he could pursue arbitration against the Respondent".[196] The Tribunal did not, however, rule on Croatia's objection. Instead, it declined jurisdiction on the basis that the Claimant remained a Croatian national at the relevant times under Article 25(2)(a).[197]

Although the Tribunal ultimately rendered futile the Claimant's attempt to fabricate ICSID jurisdiction, one of the arbitrators considered it necessary to address the question of abuse of rights in a Concurring Opinion. She observed that tribunals have an obligation to prevent "an abusive manipulation of the system of international investment protection under the ICSID Convention and the [BITs]".[198] In her view, "[s]uch an abuse" can equally

[188] *Ibid.*, at para. 282.
[189] *Mihaljević, supra* note 182.
[190] *ICSID Convention*, *supra* note 161, art. 25(2)(a).
[191] *Mihaljević, supra* note 182 at para. 116.
[192] *Ibid.*, at para. 6.
[193] *Ibid.*, at para. 53.
[194] *Ibid.*, at para. 54.
[195] *Ibid.*
[196] *Ibid.*, at para. 137.
[197] *Ibid.*, at para. 135.
[198] *Marko Mihaljević v. Republic of Croatia*, Concurring Opinion of Maria Vicien-Milburn of 19 May 2023, ICSID Case No. ARB/19/35 at para. 2, citing *Phoenix Action, Ltd. V. Czech Republic,* Award of 15 April 2009, ICSID Case No. ARB/06/5 at para. 144.

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arise in cases of acquisition as well as renunciation of nationality by natural persons, "since both [may] entail an alteration of form designed to obtain a right that would not otherwise exist".[199] She considered that the abuse of rights doctrine played an even greater role in the present case, in view of the clear ICSID's automatic bar to actions instituted by host State nationals. In her view, "[f]or an individual to renounce his or her nationality in order to gain the protection of the ICSID Convention could therefore ... constitute an abuse of process".[200] She concluded that, even if the Claimant had secured jurisdiction under Article 25(2)(a) of the Convention, "his institution of this arbitration would still have amounted to an abuse of process rendering his claims inadmissible".[201]

This Section has shown that *Nottebohm*'s exclusionary anti-abuse standard is reflected in the contemporary system of investment arbitration. Arbitrators have also atomized nationality by function and scrutinized one of these functions: enabling an investor to bring an investment treaty claim. This means that, in investment law, nationality on paper is not always sufficient to access investment treaty protection. Arbitrators are willing to promote the doctrine of abuse of rights as the norm of exclusion to deter investors from employing abusive manipulations of nationality with a view to protect the legitimacy of the investment treaty system as a whole.

IV. Human Rights Law

Nottebohm may also operate in the field of human rights law. The ECtHR has taken an approach that resembles *Nottebohm*'s conception of nationality in immigration cases to establish a fair balance between the protection of human rights and States' traditional autonomy to regulate migration flows. Human rights law gives individuals standing to personally vindicate their rights before international and regional bodies.[202] The European Convention on Human Rights (ECHR) provides that the ECtHR "may receive applications from any person, non-governmental organization, or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth".[203] This right coexists with the right of the contracting States to bring claims. However, an individual's standing to vindicate their rights under treaties does not depend on their State of nationality. This means that:

> nationality disappears as a *vinculum juris* for the exercise of protection ... sufficing that the individual complainant – irrespective of nationality or domicile – is (even though temporarily) under the jurisdiction of one of the States Parties to the human rights treaty at issue.[204]

Notwithstanding the "denationalization" of the protection of human rights, as Rubenstein and Adler note, "the cases evolve where human rights law is called upon to

[199] *Ibid*., at para. 3.

[200] *Ibid*., at para. 5.

[201] *Ibid*., at para. 1.

[202] See, generally, Manfred NOWAK and Karolina Miriam JANUSZEWSKI, "Non-State Actors and Human Rights" in Math NOORTMANN et al., eds., *Non-State Actors in International Law* (Oxford: Hart Publishing, 2015), 113 at 115-6.

[203] *European Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocols Number 11 and Number 14*, 4 November 1950, European Treaty Series 5 (entered into force 3 September 1953) [*ECHR*], art. 34.

[204] Antônio Augusto Cançado TRINDADE, *The Access of Individuals to International Justice* (Oxford: Oxford University Press, 2011) at 28 and footnote 38. See also, Robert MCCORQUODALE, "The Individual and the International Legal System" in Malcolm EVANS, ed., *International Law*, 3rd ed. (Oxford: Oxford University Press, 2010), 284 at 294–5.

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imbue an individual with certain rights associated with nationality though nationality is formally lacking".[205] Rights that have traditionally been linked to nationality, such as the right to entry, stay, and exit, are becoming more connected to the status of social membership. Under Article 8 of the ECHR, for example, non-nationals who have their family or social life in a country to which they migrated could enjoy protection against forced removal notwithstanding the position of the state of residence.[206] In these cases, the concept of nationality elaborated by *Nottebohm* as a "a social fact of attachment, a genuine connection of existence, interests, and sentiments, together with the existence of reciprocal rights and duties"[207] has played an important role.[208] International human rights law, among other things, tries to protect those social bonds between an individual and a State irrespective of their formal nationality.

Beldjoudi v. France, decided by the ECtHR, illustrates the relevance of *Nottebohm* in this context.[209] Mohand Beldjoudi was an Algerian citizen born in France to Algerian parents. He did not have French citizenship because he did not comply with the relevant statutory procedure for converting his "special civil status" to full citizenship.[210] Yet, the ECtHR observed that "he ha[d] spent his whole life – over forty years – in France, was educated in French and appear[ed] not to know Arabic [and he did not] seem to have any links with Algeria apart from that of nationality".[211] Because of his history of criminal convictions resulting in a number of terms of imprisonment, France considered him "a threat to public order" and sought to deport him.[212] Beldjoudi alleged that the deportation order against him violated several provisions of the ECHR,[213] including Article 8, which provides as follows:

> (1) Everyone has the right to respect for his private and family life, his home, and his correspondence.
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[214]

Based on this provision, the main question before the ECtHR was whether expelling a person from the country in which their immediate family resides amounts to a violation of "the right to respect for his private and family life" when weighed against what may be characterized as justified "interference" pursuant to Article 8(2). For the ECtHR, deportation, insofar as it "may interfere with a right protected under paragraph 1 of Article 8", must be "necessary in a democratic society … and, in particular, proportionate to the legitimate aim pursued".[215] Beldjoudi claimed that "all their family ties, social

[205] Kim RUBENSTEIN and Daniel ADLER, "International Citizenship: The Future of Nationality in a Globalized World" (2000) 7(2) Indiana Journal of Global Legal Studies 519 at 538.
[206] *ECHR*, *supra* note 203, art. 8.
[207] *Nottebohm*, *supra* note 1 at 23.
[208] Sloane, *supra* note 40 at 56–8.
[209] *Beldjoudi v France*, Judgment of 26 March 1992, Case No. 55/1990/246/317, Application No. 12083/86 [*Beldjoudi*].
[210] *Ibid*., at paras. 9 and 40.
[211] *Ibid*., at para. 70.
[212] *Ibid*., at para. 15.
[213] *Ibid*., at para. 61.
[214] *ECHR*, *supra* note 203, art. 8.
[215] *Beldjoudi*, *supra* note 209 at para. 74.

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links, cultural connections, and linguistic ties were in France" and, therefore, "there were no exceptional circumstances which could justify deportation".[216] The ECtHR agreed, holding that France's "legitimate aim" would be disproportionate to the degree of interference that deportation would impose on Beldjoudi's right to "private and family life" given his strong and longstanding connection to France.[217]

Rubenstein and Adler rightly observe that "the Court's discussion of the level of the interference caused by deporting the applicant engages the discourse of effective nationality".[218] Indeed, the ECtHR applied a modified version of the rule of "real and effective" nationality with the aim of protecting a "quasi-Frenchman",[219] despite his formal Algerian nationality and his lack of French nationality under French law.

The ECtHR's decision in *Beldjoudi v. France* reflects its case law on Article 8 of the ECHR.[220] This jurisprudence has prevented States from deporting individuals who have lived within their territory for an extended period of time during which they have developed a "network of personal, social, and economic relations that make up the private life of every human being".[221] Thym notes that this case law signals that sovereign States have lost the power to control the entry and stay of foreigners within their borders.[222] The context of international human rights law can, therefore, reveal how international norms might further limit the power of State sovereignty.

In *Stewart v. Canada*, the Human Rights Committee, established under the International Covenant on Civil and Political Rights (ICCPR), rejected an applicant's claim based on similar facts to those of *Beldjoudi v. France*.[223] Charles Edward Stewart was a British national who, from the age of seven, had lived with his family in Ontario, Canada.[224] He thus considered himself to be a Canadian national for most of his life, although he had never been naturalized and, consequently, had never achieved that status.[225] He was convicted of several criminal offences, which led the Canadian government to deport him to the United Kingdom in accordance with the Canadian Immigration Act.[226] Stewart claimed that this act by Canada violated, among others, Article 12(4) of the ICCPR, which provides that: "[n]o one shall be arbitrarily deprived of the right to enter *his own country*" (emphasis added).[227] The Human Rights Committee held that Stewart's right under Article 12(4) of the ICCPR had not been infringed in view of Canada's legitimate security and criminal justice interests. However, the Human Rights Committee affirmed that the concept "own country" in Article 12(4) was broader than the concept of "country of his nationality":

> Since the concept "his own country" is not limited to nationality in a formal sense, that is, nationality acquired on birth or by conferral, it embraces, at the very least, an

[216] *Ibid*., at para. 71.
[217] *Ibid*., at para. 79.
[218] Rubenstein and Adler, *supra* note 205 at 540.
[219] *Beldjoudi*, *supra* note 208, Dissenting Opinion of Judge Pettiti.
[220] For a comprehensive analysis of this case law, see Daniel THYM, "Residence as *De Facto* Citizenship? Protection of Long-Term Residence Under Article 8 ECHR" in Ruth RUBIO-MARÍN, ed., *Human Rights and Immigration* (Oxford: Oxford University Press, 2014), 106.
[221] *Slivenko et al. v Latvia*, Grand Chamber Decision on Admissibility of 9 October 2003, Application No. 48321/99 at para. 97.
[222] Thym, *supra* note 220 at 130.
[223] *Stewart v Canada*, Human Rights Committee, UN Doc. CCPR/C/58D/538/1993 (1996) [*Stewart*].
[224] *Ibid*., at 4.
[225] *Ibid*.
[226] *Ibid*.
[227] *Ibid*., at 5 and 15. See also, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976), art. 12(4).

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> individual who, because of his special ties to or claims in relation to a given country cannot there be considered to be a mere alien.[228]

In a dissenting opinion, Elizabeth Evatt and Cecilia Medina Ouroga similarly considered that "[t]he words 'his own country' on the face of it invite consideration of such matters as long[-] standing residence, close personal and family ties, and intentions to remain (as well as to the absence of such ties elsewhere)".[229] As Albanese and Takkenberg observe, "this approach had already been affirmed by the ICJ in the *Nottebohm* case", which did not consider Liechtenstein to be Nottebohm's "own country" for diplomatic protection purposes.[230]

V. Concluding Remarks

Scrutiny of *Nottebohm*'s origins and legacy suggests that current resentment towards the decision is misplaced. It is hard to deny that *Nottebohm* can play a role today with a variety of applications and that it offers equitable means to address the effects of globalization in other areas of law. The *Nottebohm*-style determination of an effective nationality can work positively as a ground for inclusion (protecting against nationality under-reach and reflecting human rights norms in immigration cases), and negatively as a ground for exclusion (protecting against nationality over-reach in cases involving manipulation of nationality in investment arbitration). In EU law, *Nottebohm*'s "substance-over-form" approach can serve as a tool to address the concerns raised by CBI regimes and is reflected in the way the CJEU understands the relationship between EU and national citizenship. These examples represent only a sample of the potential applications of *Nottebohm*.

Peters, for instance, argues that *Nottebohm* also offers a regulatory mechanism to address the "Russian passportization policy", which provides a fast-track extraterritorial naturalization *en masse* of residents from various districts of Ukraine's Donetsk and Lugansk regions. She considers this kind of naturalization as "exorbitant" and contends that "the conferral of nationality on the citizens of another state without sufficient factual links, especially without a residence requirement, and on a large scale" should not be recognized or accepted by "third states (including the former patron state)".[231]

The lesson of *Nottebohm* is that the dynamics of globalization, especially global mobility, challenge the classic legalistic understanding of nationality based on the nation-state model. The legal principles associated with nationality need refashioning to better reflect the realities of nationality in a globalized world. The international legal order governing nationality, which largely conceives this concept as a formal legal status, does not comprehensively address the cross-border effects of nationality. Nationality has become a tool that individuals and, when applicable, corporations conveniently use for different purposes. Sooner or later, the discussion on the role and instrumentalization of nationality on the international plane will need to address efforts to codify the international legal regulation of nationality. The task here is to reduce the distance and disjuncture that exists between law and the reality that it should seek to govern. The ICJ's decision in *Nottebohm* could supply a template for these efforts.

[228] *Stewart*, *supra* note 223 at 15–16.

[229] *Ibid*., at 21.

[230] Francesca P. ALBANESE and Lex TAKKENBERG, *Palestinian Refugees in International Law*, 2nd ed. (Oxford: Oxford University Press, 2020) at 366 and footnote 317.

[231] Anne PETERS, "Passportization: Risks for International Law and Stability – Part II" *EJIL: Talk!* (10 May 2019), online: EJIL: Talk! https://www.ejiltalk.org/passportisation-risks-for-international-law-and-stability-part-two/.

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