

NATIONALITIES OF CONVENIENCE, PERSONAL  
JURISDICTION, AND ACCESS TO INVESTOR-  
STATE DISPUTE SETTLEMENT

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I.	INTRODUCTION . . . . .	63
II.	INTERNATIONAL LAW’S REGULATION OF NATIONALITY . . . . .	68
	A. <i>Nationality in General International Law</i> . . . . .	68
	B. <i>The Regulation of Nationality in ISDS</i> . . . . .	80
III.	THE RELAXATION OF NATIONALITY-BASED JURISDICTIONAL THRESHOLDS . . . . .	90
	A. <i>The Expansion of Personal Jurisdiction Through the Rule of Dominant or Effective Nationality</i> . . . . .	91
	B. <i>The Denationalization of Jurisdictional Thresholds</i> . . . . .	97
IV.	CHANGES TO DIPLOMATIC PROTECTION AND LIMITS ON THE USE OF FORCE . . . . .	100
V.	NATIONALITIES OF CONVENIENCE, ACCESS TO ISDS, AND ABUSE OF RIGHTS . . . . .	105
	A. <i>Nationalities of Convenience and Personal Jurisdiction in ISDS</i> . . . . .	105
	B. <i>Abuse of Rights in ISDS</i> . . . . .	114

I. INTRODUCTION

This Article addresses the controversial issue of nationalities of convenience, in the controversial field of Investor-State

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Dispute-Settlement (ISDS).<sup>1</sup> Nationality has always played an important role in international law. Ascriptions of nationality allow states to allocate control over a scarce and valuable resource: people.<sup>2</sup> Today, nationality is the most influential metric of group association,<sup>3</sup> replacing other conceptions of kinship drawn along ethnic, tribal or religious lines.<sup>4</sup> In the field of international adjudication, one of the main functions of na-

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1. Investor State arbitration—and arbitration in general—has been the subject of a heated debate, particularly in the context of the inclusion of ISDS in multilateral trade agreements like the Transatlantic Trade and Investment Partnership (TTIP) and the Trans-Pacific Partnership (TPP). See Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST, Feb. 25, 2015, (“Agreeing to ISDS in this enormous new treaty would tilt the playing field in the United States further in favor of big multinational corporations. Worse, it would undermine U.S. sovereignty. ISDS would allow foreign companies to challenge U.S. laws—and potentially to pick up huge payouts from taxpayers—without ever stepping foot in a U.S. court.”); see also Letter from Judith Resnik et al. to Majority Leader McConnell, Minority Leader Reid, Speaker Boehner & Minority Leader Pelosi, WASH. POST, Apr. 30, 2015, [https://www.washingtonpost.com/r/2010-2019/WashingtonPost/2015/04/30/Editorial-Opinion/Graphics/oppose\\_ISDS\\_Letter.pdf](https://www.washingtonpost.com/r/2010-2019/WashingtonPost/2015/04/30/Editorial-Opinion/Graphics/oppose_ISDS_Letter.pdf) (“ISDS weakens the rule of law by removing the procedural protections of the legal system and using a system of adjudication with limited accountability and review. It is antithetical to the fair, public, and effective legal system that all Americans expect and deserve.”). In the context of domestic arbitration—admittedly, a substantially different institution—opposition has also grown. For a report that gained considerable media attention, see Jessica Silver-Greenberg and Michael Corkery, *In Arbitration, a Privatization of the Justice System*, N.Y. TIMES, Nov. 1, 2015, <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>.

2. W. MICHAEL REISMAN ET AL., *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* 357 (2d ed. 2004).

3. See generally Peter J. Spiro, *A New International Law of Citizenship*, 105 AM. J. INT’L L. 694, 697 (2011).

4. See Siegfried Wiessner, *Blessed Be the Ties That Bind: The Nexus Between Nationality and Territory*, 56 MISS. L.J. 447, 447–49 (1986) (“In former times, [people] have been kept together by invocation and enforcement of group myths such as common ancestry, birth on common soil, or perpetual allegiance. The modern myth is the concept of nationality.”); PAUL WEIS, *NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW* 31–32, (1956); Helen Silving, *Nationality in Comparative Law*, 5 AM. J. COMP. L. 410, 410 (1956) (“Nationality law is closely connected with the political structure of a country, more so than most branches of law. It determines who shall be a ‘citizen,’ and thus what shall be the composition of the ‘nation.’”). But see Robert Sloane, *Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality*, 50 HARV. INT’L L.J., 1 (2009).

tionality is to regulate the personal jurisdiction of international courts or tribunals. Thus, in some cases, holding a certain nationality is required to access international justice.<sup>5</sup> The central question of this Article is whether nationalities of convenience are valid in both international law generally, and international investment law specifically.

First, however, it is necessary to define nationality of convenience. The term derives from the notion *flag of convenience*, developed in maritime law.<sup>6</sup> A ship is said to fly a flag of convenience when there is no real nexus between the ship (and its crew) and the flag state;<sup>7</sup> the flag state, moreover, is one usually known to be lax in exercising its regulatory supervision over the vessel. Since its conception, the term has a pejorative connotation. The usual objective behind choosing a flag of convenience was avoiding regulation. Thus, ships flying flags

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5. As will be discussed below in Part IV, nationality was originally a prerequisite that would enable a State to exercise diplomatic protection. This was based on the nationality of claims principle, also called the Vatellian fiction, as developed by the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case. *See Mavrommatis Case (Greece v. U.K.) (1924)*, P.C.I.J. Series A, No. 2, at 11 (“It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights — its right to ensure, in the person of its subjects, respect for the rules of international law.”).

6. The seminal definition of a flag of convenience is attributed to Lord Rochdale, who headed the United Kingdom Committee charged with elaborating the Inquiry into Shipping in May 1970. *See COMMITTEE OF INQUIRY INTO SHIPPING, REPORT 51 (1970)* (enunciating, after an extensive survey of shipping practices, six criteria that evidenced the existence of a flag of convenience, which include, among others: ease of registration, often at a consular office; low or no taxes on income from ships; permission of the manning of ships by non-nationals of the flag-state; and the flag-state’s lack of power to effectively impose either local or international regulations); *see also* Organization for Economic Cooperation and Development, *OECD Study on Flags of Convenience*, 4 J. MAR. L. & COM. 231 (1973) (conducting a study of flags of convenience).

7. One author has considered that flags of convenience imply that “there exists no genuine link between the State and the ships and, in particular, under which the State does not effectively exercise its jurisdiction and control in administrative, technical, and social matters over ships flying its flag.” *See* B.A. BOCZEK, *FLAGS OF CONVENIENCE: AN INTERNATIONAL LEGAL STUDY* 3 (1962).

of convenience were called “rust buckets, pirate ships . . . run-away ships.”<sup>8</sup> Unsurprisingly, opposition to flags of convenience grew and they were eventually proscribed by Article 91 of the United Nations Convention on the Law of the Sea, which establishes that “[t]here must exist a genuine link between the State and the ship.”<sup>9</sup> Therefore, in contemporary maritime law, the rules governing the nationalities of ships reject flags of convenience by requiring the existence of material connections between the ship and the flag state.

Drawing from the concept of flag of convenience, this Article contends that an ascription of nationality, either of a physical or a legal person, can be considered a *nationality of convenience* when two conditions are met. First, if there is only a minimum, sometimes merely formal, link between the person and the state of nationality; and second, if one of the primary motivations for acquiring said nationality is gaining access to international fora.

One further terminological clarification is in order. While there are similarities between flags of convenience and shell or brass-plate companies—indeed one of the main drivers behind incorporation of shell companies is escaping from taxation<sup>10</sup>—the term nationality of convenience is preferred because it is broader. While the term shell company can only be applied to legal persons, nationality of convenience can be attained by both physical and legal persons.

The conundrum posed by nationalities of convenience is illustrated by a practice that has been called *treaty shopping*<sup>11</sup> or

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8. Rex S. Toh & Sock-Yong Phang, *Quasi-Flag of Convenience Shipping: The Wave of the Future*, 30 *TRANSP. J.* 31, 31 (1993).

9. U.N. Convention on the Law of the Sea, art. 91, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994).

10. See generally Yitzhak (Isaac) Hadari, *Tax Treaties and Their Role in the Financial Planning of the Multinational Enterprise*, 20 *AM. J. COMP. L.* 111 (1972) (exploring the impact of tax systems on financial planning and corporate development).

11. The term treaty shopping was originally developed in the context of tax treaties as “a proliferation of tax avoidance strategies involving third-country nationals’ use of tax-haven entities to gain advantages under tax treaties between the United States and the tax-haven jurisdictions.” See Richard L. Reinhold, *What is Tax Treaty Abuse (Is Treaty Shopping an Outdated Concept?)*, 53 *TAX LAW.* 663, 664 (2000). Reinhold further argues that there is a difference between treaty shopping and treaty abuse, defining the latter as “the use of a tax treaty provision by a person, or in a way, not intended by

*treaty abuse*.<sup>12</sup> Treaty shopping allows the diligent investor to channel her investment in a way that, by means of a nationality of convenience, attains access to the investment treaty protection of a third-state, including ISDS. A more extreme situation is also possible: an investor may, through careful nationality planning,<sup>13</sup> structure an apparently domestic investment as an international one in order to bring an ISDS claim against the presumed home state.<sup>14</sup>

Striking as that may sound, this Article will illustrate why in some cases (and in some cases only), nationalities of convenience are permitted by international law and, therefore, are a valid means of accessing international fora. This conclusion is based on four related arguments, each addressed in a separate part of this Article. The first argument is that international law's regulation of nationality—and, in particular, its choice of formal, bright-line rules—are compatible with nationalities of convenience. The second one is that international courts and tribunals have often adopted an expansive interpretation of their personal jurisdiction, in particular when dealing with nationality-based jurisdictional thresholds. The third argument is that changes in international regulation of the use of force and diplomatic protection have diminished the threats represented by liberal conferrals of nationality. The fourth and final

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the treaty drafters." *Id.* at 673. For further discussion on the issue, see generally Richard O. Loengard, Jr., *Foreign Investors and Nimble Capital: Another Look at the U.S. Policy Towards Treaty Shopping*, Tax Forum No. 439 (1988); STEF VAN WEEGHEL, *THE IMPROPER USE OF TAX TREATIES* (1988).

12. The terms, both in the tax and the investment contexts, are somehow treated as interchangeable. Part V will address why that is not so and, moreover, why reliance on the doctrine of abuse is misguided. For a thoughtful reflection that, however, equates the two terms, see Javier García Olmedo, *Claims by Dual Nationals under Investment Treaties: A New Form of Treaty Abuse?*, EJIL: TALK! (Dec. 9, 2015), <http://www.ejiltalk.org>. For another take on that award, see Clovis Treviño, *Treaty Claims by Dual Nationals: A New Frontier?*, KLUWER ARBITRATION BLOG (Oct. 8, 2015), <http://www.kluwerarbitrationblog.com>.

13. Although nationality planning usually is done through shell or brass-plate companies, in some cases it may also be done through the acquisition of a nationality by a physical person. This situation—although in the context of diplomatic protection—arose in the *Nottebohm* case. See Part II.A, *infra*.

14. This situation has arisen in a series of international investment arbitrations. For the most notable example, see *Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 3 (Apr. 29, 2004), 20 ICSID Rev. 205 (2005).

point is that, in some circumstances, relying on a nationality of convenience to access international adjudication does not constitute an abuse of rights.

## II. INTERNATIONAL LAW'S REGULATION OF NATIONALITY

### A. *Nationality in General International Law*

The main tenet of international law's regulation of nationality is that states are allowed to regulate nationality through their domestic law. It is, therefore, an issue that is considered to be within the sovereign, reserved domain of each state.<sup>15</sup> Although this principle is overwhelmingly recognized by international law, there is one main exception: the ICJ's ruling in *Nottebohm*—a controversial case in which the Court relied on an unprecedented interpretation of nationality, including novel substantive requirements for its validity, as a ground to reject jurisdiction. That case, however, has been criticized and was not followed in later international practice.<sup>16</sup>

International law makes a distinction in its regulation of physical and legal persons. In the case of physical persons, international law does not provide any general, substantive rules that regulate the ascription of nationality.<sup>17</sup> In the case of legal persons, however, the test adopted by international law is lax and formal: a legal person will be considered a national of the state under whose law it was incorporated.<sup>18</sup> Of course specific

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15. See, e.g., *Nationality Decrees in Tunis and Morocco*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 22–23 (Feb. 7) (“The words ‘solely within the domestic jurisdiction’ seem rather to contemplate certain matters which, though they may very closely concern the interest of more than one State, are not, in principle, regulated by international law. As regards such matters, each State is sole judge. The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends on the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain.”).

16. *Nottebohm (Liech. v. Guat.)*, 2nd Phase Judgment, 1955 I.C.J. Rep. 4 (Apr. 6).

17. This conclusion was originally set forth in *Nationality Decrees in Tunis and Morocco*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 23–24.

18. The ICJ reached that conclusion in both *Barcelona Traction, Light & Power Co., Ltd. (New Application: 1962) (Belg. v. Spain)*, Judgment, 1970 I.C.J. Rep. 3, 42 (Feb. 5) and *Ahmadou Sadio Diallo (Republic of Guinea v. Dem. Rep. Congo)*, Preliminary Objections, 2007 I.C.J. Rep. 582,

regulations may be included by states through treaties, which will then be the *lex specialis* applicable to the issues regulated therein.<sup>19</sup>

However—and this is a point worth repeating—international law does not have a substantive, overarching definition of nationality. This allows states to diverge in how they regulate ascriptions of nationality in their domestic law. Provided that they respect some base limits,<sup>20</sup> domestic regulations of nationality are valid under international law. International law's liberal definition of nationality under domestic law should not be seen as an absence of rules. There are some rules, although the majority of them are negative ones. International law establishes some base limits to conferrals of nationality.

The objective of those limits is avoiding abusive situations implying massive, unilateral—and often coercive—conferrals of nationality. While these situations are unlikely today, they have occurred in the past. In sum, international law establishes

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605 (May 24). See also M. Sornarajah, *The International Law on Foreign Investment* 198 (3d ed. 2010) (“Customary international law shows no inclination to depart from incorporation as the test of corporate nationality.”). Cf. *Anglo-Iranian Oil Co. (U.K. v. Iran)*, Judgment, 1952 I.C.J. Rep. 93, at 102 (July 22) (although not addressed directly, the Court made reference to “a Company incorporated in the United Kingdom” and briefly afterwards considered it to be a “British company”); *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, 2007 I.C.J. Rep. at para. 61.

19. Definitions of nationality have often been included in the constitutive treaties of international courts and tribunals. The practice dates back to the first international mixed arbitral tribunals (claims commissions) and is still used. See, e.g., *Algiers Accords, Iran-U.S.*, art. 2(1), Jan. 19, 1981 (“An international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States.”); U.N. S.C. Rep. of the Security Council, Dec. 13 2000, U.N. Doc. S/2000/1183 (2000), at 7 (Article 5(1) of the Ethiopia-Eritrea Agreement discusses “[t]he mandate of the Commission [established] to decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party”).

20. The purpose of these base limits is to avoid massive, unilateral conferrals of nationality, usually by operation of law and without the conferees' consent. See *The Law of Nationality*, 23 AM. J. INT'L L. (SPEC. SUPP.) 11, 53 (1929) [hereinafter *Harvard Research*].

outer limits or margins to state's discretion to regulate ascriptions of nationality. If states operate within those margins, the conferrals of nationality are deemed valid; if they exceed them, they are not.

The principle that states have freedom to regulate nationality within the wide margins established by international law has been recognized since the eighteenth century—the moment that the nation state and, with it, modern conceptions of nationality, garnered strength. When writing on nationality, Pufendorf concludes that in the absence of international custom, domestic law must be followed.<sup>21</sup> Other nineteenth and early twentieth scholars agree. Bluntschli and Rivier, writing in 1874, claim that: “Each state has the right to freely determine the conditions by which it will grant or withdraw the condition of citizen of that state.”<sup>22</sup> Cogordan holds a similar position, affirming that: “Each state, being independent from others, is free to regulate in its fashion the formalities and conditions on which the acquisition or the loss of the condition of national will depend,” respecting the diversity of municipal legislation.<sup>23</sup> Oppenheim, in the 1905 edition of his influential treatise, claims that “it is not for International but for Municipal Law to determine who is and who is not to be considered a subject.”<sup>24</sup>

Arbitral tribunals of that time generally concurred, with arbitral awards such as *Medina*,<sup>25</sup> decided in 1860, and

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21. SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO*. 2 1055 (William Abbott Oldfather trans., Oxford ed. 1934) (1660) (Pufendorf even titles a chapter “The ways in which a man may cease to be a subject”, Book VIII, Chapter XI).

22. JOHANN CASPAR BLUNTSCHLI & ALPHONSE RIVIER, *LE DROIT INTERNATIONAL CODIFIÉ* 218 (1895) (author's translation) (“Chaque état a le droit de fixer librement les conditions auxquelles il accorde et retire la qualité de citoyen de l'état.”). Bluntschli's main argument is that nationality, like all other matters of internal organization, belongs to the field of constitutional law and is reserved to each State.

23. GEORGE COGORDAN, *DROITS DES GENS: LA NATIONALITÉ AU POINT DE VUE DES RAPPORTS INTERNATIONAUX* 16 (1879) (author's translation) (“Chaque État, étant indépendant des autres, est libre de régler à sa guise les formalités et conditions d'où il fait dépendre l'acquisition et la perte de la qualité de national.”).

24. LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 348 (1905).

25. JOHN BASSETT MOORE, *INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY*, 2584 (1898).



*Lizardi*,<sup>26</sup> decided in 1868, recognizing that issues of nationality should be settled in accordance with the domestic laws of each state. The arbitral tribunals in the *Esteves*,<sup>27</sup> *Angarica*,<sup>28</sup> and *Flutie* awards also followed that conclusion.<sup>29</sup> The Permanent Court of International Justice (PCIJ) further legitimized that position in its Advisory Opinion on the Tunis-Morocco Nationality Decrees (Tunis-Morocco),<sup>30</sup> holding that: “in the present state of international law, questions of nationality are, in the opinion of the Court, in principle, within this reserved domain.”<sup>31</sup>

The few international instruments to address the issue also support that conclusion: within the boundaries established by international law states have discretion to regulate nationality. The Bustamante Code of 1928<sup>32</sup> is a remarkable example. The Code establishes that each state would “apply its own law to determine the nationality of origin of any person, natural or juridical.”<sup>33</sup> The Bustamante Code is also the first international instrument addressing the nationality of legal persons, declaring that their nationality will be determined by the “laws of the State that authorizes or approves them,”<sup>34</sup> thus

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26. *Id.* at 2483.

27. *Esteves Case* (Spain v. Venezuela), 10 R.I.A.A. 739, 740 (1903).

28. MOORE, *supra* note 25, at 2621.

29. JACKSON RALSTON, VENEZUELAN ARBITRATIONS OF 1903, S. Doc. No. 316, 38–45 (2d Sess. 1904).

30. Nationality Decrees in Tunis and Morocco, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 21; *cf.* Acquisition of Polish Nationality Case, 1923 P.C.I.J. (ser. B) No. 7, at 16 (“One of the first problems which presented itself in connection with the protection of minorities was that of preventing these States from refusing their nationality, on racial, religious or linguistic grounds, to certain categories of persons, in spite of the link which effectively attached them to the territory to one or other of these States.”). Although the Polish case could be interpreted as a recognition of the *genuine link* principle later established in the *Nottebohm* case, it is important to bear in mind that, in this particular case, there was a specific treaty (the Polish Minorities Treaty) establishing the *jus solis* principle.

31. Nationality Decrees in Tunis and Morocco, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 24. The reserved domain refers to the state’s domestic legislation.

32. Code on Private International Law (Bustamante Code), Feb. 20, 1928, O.A.S.T.S. 34 [hereinafter Bustamante Code].

33. *Id.* at art 9 (author’s translation).

34. *Id.* at art. 16 (author’s translation).

recognizing that the nationality of legal persons may be determined by their state of incorporation.

Two other relevant instruments, the *Harvard Research in International Law: The Law of Nationality*<sup>35</sup> and the *Hague Convention on Certain Questions Relating to the Conflicts of Nationality Laws* of 1930,<sup>36</sup> reach similar conclusions. Both instruments declare that the regulation of nationality continues to be an issue reserved to the discretion of states, while, at the same time, recognizing that such discretion is bound by some general limits imposed by international law.

The idea that international law should limit states' discretion in regulating nationality was motivated by some unfortunate experiences of collective and unilateral naturalizations, procedures through which states would forcibly impose their nationality on aliens. Some Latin American states carried out naturalizations by operation of law in the late nineteenth and early twentieth centuries<sup>37</sup>—and they had already been rejected by arbitral tribunals.<sup>38</sup> Perú, for example, conferred nationality to all aliens who bought property in the country; Brazil took an even bolder step: it unilaterally naturalized all foreigners residing in its territory.<sup>39</sup>

The *Harvard Research* also includes an interesting hypothetical, claiming that: "if State A should attempt to naturalize all persons in the world holding a particular political or religious faith or belonging to a particular race"<sup>40</sup> it would be violating the limits imposed by international law. The proposition that international law could regulate substantive issues of nationality was new at that time; but a detailed reading of both instruments evidences that those regulations would only take the form of outer limits, designed to avoid extreme circumstances like those mentioned above.

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35. Harvard Research, *supra* note 20, at 13.

36. Convention on Certain Questions Relating to the Conflict of Nationality Laws, art. 1, Apr. 12, 1930, 179 L.N.T.S. 89 [hereinafter Hague Convention].

37. Harvard Research, *supra* note 20, at 53.

38. See also, the *Fayette Anderson* and *William Thompson* arbitral awards, cited in Moore, *supra* note 25, at 2479–81.

39. See JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 302–11 (1906) (including the cases mentioned therein).

40. Harvard Research, *supra* note 35, at 26.

The International Law Commission's *Report on Nationality, Including Statelessness*,<sup>41</sup> one of the most authoritative studies in the matter, reaches a similar conclusion, affirming that states have discretion to regulate nationality, with international law only establishing outer limits that must be respected. The Report reaffirms what Brownlie called nationality's *locus classicus*: the principle that the regulation of nationality falls within the reserved domain of each state.<sup>42</sup> The Report, however, endorses the "genuine link" principle for naturalizations.<sup>43</sup> Those limits, however, were designed to curtail attempts at coercive, mass naturalizations, like the one carried out by Brazil,<sup>44</sup> and other cognate situations, like Germany's conduct of carrying out forced naturalizations during the Second World War.<sup>45</sup>

The rules relating to the nationality of legal persons have received less attention, yet there is still relevant practice and some authoritative instruments. Here, however, international law has not granted states as much freedom. Indeed, international law has generally considered that a legal person is considered to have the nationality of the state under whose laws it was created (incorporated). For better or worse, international

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41. Special Rapporteur on Nationality Including Statelessness, *Rep. on Nationality Including Statelessness*, Int'l Law Comm'n, U.N. Doc. A/CN.4/50 (1952) (by Manley O. Hudson) [hereinafter ILC Report on Nationality].

42. *Id.*, at. 6. Nevertheless, Córdova, Hudson's successor as Special Rapporteur, has claimed that International Law is increasingly regulating more of nationality law, diminishing the State's margin of appreciation in determining who are its nationals: It follows that international law sets forth the limits of the power of a State to confer its nationality. This power necessarily implies the right to deprive an individual of that nationality; consequently, international law may also restrict the authority of the State to deprive a person of its own nationality. There are cases in which international law considers that a certain national legislation is not legal because it comes into conflict with the broader interests of the international community . . . . In the present state of international law, it is not, therefore, unwarranted to affirm that the right of individual States to legislate in matters of nationality is dependent upon and subordinate to the rules of international law on the subject, and that, therefore, these questions of nationality are not, as has been argued, entirely reserved for the exclusive jurisdiction of the individual States themselves. A/CN.4 /64 ; *I.L.C. Yearbook* (963-II), P. 167, ¶¶ 6–7 and 13–14.

43. ILC Report on Nationality, *supra* note 41, at. 8.

44. ILC Report on Nationality, *supra* note 41, at. 8.

45. ILC Report on Nationality, *supra* note 41, at. 8.

law opted for a very formal, bright-line rule. The rationale behind this choice is that the recognition of legal personality depends on the will of a state, as expressed in its domestic law; therefore, the legal person should be considered a national of the state which allowed its creation.<sup>46</sup>

The place of incorporation rule is recognized as customary international law.<sup>47</sup> In the few instances where the ICJ has addressed the issue—namely, the *Barcelona Traction* and the *Diallo* cases—it applied that rule. This is not surprising, as historically, international bodies used that test. In addition to being established in the Bustamante code, the League of Nations' committee on experts also concluded that the nationality of legal persons was determined by their place of incorporation.<sup>48</sup> This position also found support in arbitral jurisprudence. For example, the U.S.-German Mixed Claims Commission recognized the principle in *Agency of Canadian Car and Foundry*.<sup>49</sup> Similarly, the U.S.-Mexican Claims Commission reached a similar conclusion in the *Greenstreet* arbitration.<sup>50</sup>

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46. See SONARAJAH, *supra* note 18, at 198.

47. See *Barcelona Traction, Light & Power Co., Ltd. (New Application: 1962) (Belg. v. Spain)*, Judgment, 1970 I.C.J. Rep. 3, 42 (Feb. 5); *Ahmadou Sadio Diallo (Republic of Guinea v. Dem. Rep. Congo)*, Preliminary Objections, 2007 I.C.J. Rep. 582, 605 (May 24); see also Peter T. Muchlinski, *Corporations in International Law*, in Max Planck Encyclopedia of Public International Law 1513 (June 2014) (“Usually, nationality is determined by reference to the place of incorporation. Domicile usually follows incorporation.”).

48. The League of Nations Committee of Experts on the Nationality of Commercial Corporations and Their Diplomatic Protection established that the nationality of a legal person should be determined “by the law of the contracting party under whose law it was formed and by the situation of the actual seat of the company which may only be established in the territory of the state in which the company was formed.” *Report to the Council of the League of Nations on Nationality of Commercial Corporations and Their Diplomatic Protection*, League of Nations Doc. V. Legal.1927.V.12, reprinted in 22 AM. J. INT’L L. (SPEC. SUPP.) 171, 204 (1928); see also David Harris, *The Protection of Companies in International Law in the Light of the Nottebohm Case*, 18 INT’L & COMP. L.Q. 275, 296 (1969) (exploring the ramifications of *Nottebohm* for corporate protections under international law).

49. *Agency of Canadian Car and Foundry Co. v. Germany*, 8 R.I.A.A. 460 (Mixed Claims Comm’n 1939) (considering that the nationality of the shareholders was not the determining factor in the nationality of a legal person).

50. *Greenstreet Case (U.S. v. Mexico)*, 4 R.I.A.A. 462, 463 (1903) (“[E]ven if it be considered as doubtful whether . . . [an American citizen] has the authority to dispose of the present claim on behalf of an [American

Yet all that theoretical framework suffered a near fatal blow when the ICJ decided the *Nottebohm* case (Second Phase) in 1955. The case deals with complex facts. Nottebohm was German by birth, lived for a long time in Guatemala, but, before the outbreak of World War II, acquired Liechtenstein nationality, purportedly to avoid the sanctions that the laws of war allow to be imposed on enemy nationals. When Guatemala declared war on Germany, Nottebohm was imprisoned in the United States; his extensive properties in Guatemala confiscated. After being released, he was refused entry to Guatemala, forcing him to return to Europe and settle in Liechtenstein. In 1951 Liechtenstein, exercising diplomatic protection on behalf of Nottebohm, brought a case against Guatemala before the ICJ.

Yet the ICJ dismissed Liechtenstein's claim on admissibility grounds.<sup>51</sup> The ICJ's reasoning was that Nottebohm's naturalization as a Liechtensteiner did not satisfy the threshold necessary to determine a "social fact of attachment" and a "genuine connection of existence, interest and sentiments" between him and that state. The Court's conclusion appears to be based on a rather romantic conception of nationality, implying that:

[N]ationality 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

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company] . . . still existing as a going concern in the State of Delaware, where it is incorporated, the Commission is of the opinion that from the point of view of international law the claim, as having been espoused and presented by the Government of the United States, is duly presented" (emphasis added)); see also Harris, *supra* note 48, at 284 ("The Commission unanimously rejected the argument as irrelevant: the real question was the nationality of the company. The Commission found that, being incorporated in Delaware, it had U.S. nationality and hence its claim was properly presented by the United States.").

51. The decision has drawn its fair share of criticism. See Josef L. Kunz, *Nottebohm Judgment (Second Phase)*, 54 AM. J. INT'L L. 536 (1960); J. Mervyn Jones, *The Nottebohm Case*, 5 INT'L & COMP. L.Q., 230 (1956); Sloane, *supra* note 4. But see Ian Brownlie, *The Relations of Nationality in Public International Law*, 39 BRIT. Y.B. INT'L L. 284 (1963) (defending the ruling from the start); H. F. VAN PANHUYS, *THE ROLE OF NATIONALITY IN INTERNATIONAL LAW: AN OUTLINE* 182 (1959).

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. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national.<sup>52</sup>

Thus the Court diverges from traditional international law by requiring the existence of social and psychological links (which it deems *genuine*) between the individual and the state. That conclusion was problematic. Not only did it lack grounding on positive international law; it also deprived Nottebohm of access to international justice—amounting, maybe, to an international denial of justice.

The ruling was duly criticized.<sup>53</sup> One of its most vocal opponents was one of the judges of the Court, John Read. In his dissenting opinion, Judge Read argued that, in accordance with international law, Liechtenstein was free to determine the conditions under which it could make an ascription of nationality.<sup>54</sup> Academic commentary followed, with Kunz, for example, making a strong critique of the ruling,<sup>55</sup> arguing that the Court had effectively turned Nottebohm into a stateless person.<sup>56</sup> More recently, Sloane has claimed that the ICJ did not

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52. Nottebohm (Liech. v. Guat.), 2nd Phase Judgment, 1955 I.C.J. Rep. 4, 23 (Apr. 6).

53. See Kunz, *supra* note 51; Jones, *supra* note 51; Sloane, *supra* note 4.

54. Kunz, *supra* note 51, at 552 (remarking that neither counsel for Guatemala nor the Court managed to provide any citations for cases or custom that establish the genuine link principle).

55. *Id.* at 561–62 (commenting on the “extreme dualistic conception” which informs the *Nottebohm* judgment and thereby separates municipal and international law).

56. Reducing someone to statelessness has grave consequences. See Myres S. McDougal et al., *Nationality and Human Rights: The Protection of the Individual in External Arenas*, 83 YALE L. J. 900, 960–61 (1974) (calling statelessness “dramatic,” especially because stateless persons have been considered “an international vagabond”); see also HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 297 (2d ed. 1958) (statelessness means “the loss of a community willing and able to guarantee any rights whatsoever”).

intend to establish the “genuine link” principle as a rule of international law.<sup>57</sup>

Brownlie, however, was a supporter. He considered that “State freedom in the matter of attribution, would be subversive of the legal order.”<sup>58</sup> Brownlie’s take on the issue must be contextualized: the memory of German unilateral conferrals of nationality was fresh, and international adjudication was still underdeveloped. Considerations about restricting access to international justice must have seemed secondary—if they were considerations at all.

Most relevant international rulings after *Nottebohm* rejected its holding. Instead, courts and tribunals opted to return to the position stated in *Tunis-Morocco*. The most important of those rulings is *Barcelona Traction*,<sup>59</sup> decided by the ICJ in 1970. *Barcelona Traction* involved a claim of diplomatic protection filed by Belgium against Spain for the expropriation of the Barcelona Traction, Light, and Power Company, a legal person incorporated in Canada in which the majority of the shareholders were Belgian nationals. Canada had initiated claims of diplomatic protection, but when the Canadian minority shareholders were compensated, dropped the claim. Belgium thus sought to bring the claim before the ICJ on behalf of its nationals. Spain, however, successfully challenged Belgium’s standing to exercise diplomatic protection and bring a case before the Court.

The law of diplomatic protection, the Court argued, “attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office.”<sup>60</sup> Furthermore, the ICJ rejected the analogous application of the genuine link principle to the protection of legal persons, so the Court concludes that “in the particular field of diplomatic protection of corporate entities, no absolute test of the ‘genuine connec-

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57. See Sloane, *supra* note 4, at 3 (“[D]espite the oft-quoted rhetoric of the Nottebohm majority, which ostensibly supports the genuine link theory, scrutiny of the opinion as a whole reveals that the ICJ’s actual concern in Nottebohm had little to do with genuine links.”).

58. Brownlie, *supra* note 51, at 364.

59. *Barcelona Traction, Light & Power Co., Ltd. (New Application: 1962) (Belg. v. Spain)*, Judgment, 1970 I.C.J. Rep. 3 (Feb. 5).

60. *Id.* at 42.

tion' has found general acceptance."<sup>61</sup> This conclusion is important, and it is applicable to investor-state arbitration. The ICJ thus chose to revive the holding of *Tunis-Morocco*, recognizing that the nationality of a legal person must be determined by the domestic law of the state of incorporation.<sup>62</sup> That conclusion was not isolated. The Court has accepted the place of incorporation test. Indeed a chamber of the Court relied on that test in *Elsi*;<sup>63</sup> while the Court did so more recently in *Diallo*.<sup>64</sup>

Another important rebuke of the genuine-link test set forth in *Nottebohm* was the ICJ's decision in *LaGrand*.<sup>65</sup> In that case, the Court accepted that Germany was entitled to exercise diplomatic protection on behalf of Karl and Walter LaGrand—two brothers who had been sentenced to death in the U.S.—despite the fact that they were not aware of their German nationality.<sup>66</sup> The acceptance of an extremely formal ascription of nationality—one in which it cannot be said, under any pretense, that LaGrand had any form of genuine-link, tie, or allegiance towards Germany—implies yet another departure from the *Nottebohm* standard.

The ILC has also rejected *Nottebohm*, opting in its influential *Draft Articles on Diplomatic Protection*<sup>67</sup> for the traditional

61. *Id.*

62. LAURENT LEVY, *LA NATIONALITÉ DES SOCIÉTÉS* 125 (1984) (referring to the case, he concludes that "the International Court of Justice enshrines . . . the determination of the nationality of the companies in the domestic law concerned") ("la Court international de justice consacre . . . la détermination de la nationalité des sociétés par le droit interne concerne").

63. *Elettronica Sicula, S.p.A. Case (U.S. v. It.)*, Judgment, I.C.J. Rep. 1989 (July 20), at 23. In this case the Court (and indeed the Respondent State, Italy) accepted that the United States had the power to exercise diplomatic protection over a legal person incorporated in the United States, according to the applicable domestic laws.

64. Ahmadou Sadio Diallo (*Republic of Guinea v. Dem. Rep. Congo*), Preliminary Objections, 2007 I.C.J. Rep. 582, 605 (May 24).

65. *LaGrand Case (Ger. v. U.S.)*, Judgment, 2001 I.C.J. 466 (June 27).

66. *LaGrand Case (Ger. v. U.S.)*, Counter-Memorial of the United States, 2001 I.C.J. 466, at 7 (June 27).

67. There were also some previous attempts at codification, in particular the report commissioned by the League of Nations to the Committee of Experts in 1924. *Report Presented by the Comm. of Experts on the Responsibility of States in Respect of Injury Caused in Their Territory to the Person or Property of Foreigners*, League of Nations Doc. C.196M.70 1927 V (1927).



deferral of the issue to domestic law.<sup>68</sup> The Commission decided to expressly reject the genuine link theory.<sup>69</sup> The Draft Articles also tackle the issue of nationality of legal persons, stating in Draft Article 9 that, in principle, the nationality of a legal person is considered that of its state of incorporation.

In addition, the ILC contemplates a series of methodologies to determine the nationality of a legal person, mainly through tests based on control,<sup>70</sup> lack of effective business activities,<sup>71</sup> and *siege social*,<sup>72</sup> which may be used to reject formal ascriptions of nationality (that is, where the only link between the legal person and the of nationality is that it was incorporated under its laws). At a glance, the possibility of overriding a formal ascription of nationality could be seen as an acceptance of the genuine link principle and an express rejection of nationalities of convenience, but that is not the case. The ILC's objective, as evidenced in the Commentary, was to guarantee the broadest protection possible. Thus, the objective of the factual test is not to bar legal persons from accessing diplomatic protection, but rather to enhance their chances of accessing it. The test does not try to create a sort of stateless legal person, but instead tries to change the ascription of nationality from one state which, due to the lack of factual relations, is considered to be unfit to duly exercise diplomatic protection in favor of another state which could do so more appropriately<sup>73</sup>—thereby avoiding situations like *Barcelona Traction*, where the state of incorporation refused to continue exercising diplomatic protection.

Finally, one of the most recent rejections of the genuine link principle was made in the European Convention on Nationality,<sup>74</sup> which reaffirmed international law's traditional ap-

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68. *Draft Articles on Diplomatic Protection with Commentaries*, draft art. 4, Int'l Law Comm'n, U.N. Doc. A/61/10 (2006) ("For the purposes of the diplomatic protection of a natural person, a State of nationality means a State whose nationality that person has acquired, in accordance with the law of that State . . .") [hereinafter Draft Articles].

69. Draft Articles, *supra* note 68, draft art. 4 cmt. 5.

70. *Id.* draft art. 9.

71. *Id.* draft art. 9 cmt. 5.

72. *Id.*

73. *Id.*

74. European Convention on Nationality, art. 3(1)-(2), Nov. 6, 1996, E.T.S. 166 (stating that "[e]ach State shall determine under its own law who are its nationals" and "[t]his law shall be accepted by other States in so far as

proach to nationality.<sup>75</sup> The Convention recognized that, as long as states keep within the margins established by international law,<sup>76</sup> nationality should be determined by each states' domestic law.<sup>77</sup>

### B. *The Regulation of Nationality in ISDS*

Nationality plays a determining role in the personal jurisdiction of ISDS tribunals. Although several courts and tribunals may hear ISDS cases, the majority of ISDS disputes fall within the aegis of the International Convention for the Settlement of Investment Disputes (ICSID or the Convention). ICSID tribunals have limited subject matter and personal jurisdiction. The subject matter limitations require that the dispute concerns an *investment*.<sup>78</sup> The personal jurisdiction is, as in most of international adjudication, determined by the nationality of the parties. The general rule concerning personal jurisdiction is established in Article 25(1) of the Convention; it requires that the claimant investor be a national of one of the state party to the bilateral investment treaty (BIT) and that the

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it is consistent with applicable international conventions, customary international law and the principles of law generally recognized with regard to nationality") [hereinafter European Convention on Nationality].

75. It is important to distinguish the approach taken by the European Convention on Nationality to determine the nationality of legal persons from that adopted by the European Commission's Regulation 1215/1212 (the Brussels Recast Regulation), which adopts a different test to establish the domicile of legal persons. 2012 O.J. (L 351) 1. Although in the field of private international law nationality and domicile have been two of the factors that have historically been relied upon to determine the laws applicable to a person, there are important conceptual differences between the two—thus making the rules established in the Brussels Recast Regulation inapposite.

76. European Convention on Nationality, *supra* note 74, at art. 3(2).

77. Repeating the formula set out in the Hague Convention, *supra* note 36, at art. 1.

78. *See, e.g.*, Malaysian Historical Salvors, SDN, BHD v. Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, ¶¶ 74–81 (Apr. 16, 2009); Malaysian Historical Salvors, SDN, BHD v. Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶¶ 70–85 (May 17, 2007); Tradex Hellas S.A. v. Republic of Albania, ICSID Case No. ARB/94/2, Decision on Jurisdiction, ¶ 3 (Dec. 24, 1996). Those awards contained a detail discussion of the concept of investment, building on previous awards following the test set forward in *Salini*.

respondent state must be the other state party to the treaty.<sup>79</sup> Subsequently Article 25(2) establishes the specific rules applicable to determine the nationality of physical and legal persons, and, consistent with general international law, opted for a rule similar to the one set out in *Tunis Morocco*:

(2) “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 . . . 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.<sup>80</sup>

This article is relevant for two reasons: first, because it implies that, in accordance with most of the relevant sources of international law, ascriptions of nationality remain within the reserved domain of each state; and second, because it introduces a formula which relies on dual criteria to determine whether the Centre has personal jurisdiction.

On the one hand, article 25(2)(a) and the first clause of article 25(2)(b) rely on a formal criterion, one based solely on the ascription of nationality under domestic law—and nothing more. On the other hand, the second clause of article 25(2)(b) exceptionally relies on a material factor (foreign control) to determine if a legal person of the nationality of the defendant can bring a claim against that state. The latter has been considered a very limited authorization to pierce the cor-

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79. International Convention on the Settlement of Investment Disputes art. 25(1), Oct. 14, 1966, 17 U.S.T. 1270, 575 U.N.T.S. 159.

80. *Id.* art. 25(2).

porate veil,<sup>81</sup> restricted to the specific situation described in Article 25(2)(b), which, unlike the other provisions, does require proof of foreign control.

The exception contained in Article 25(2)(b) is problematic. As often happens with exceptions, some may be tempted to obviate its exceptional character and turn it into a general rule.<sup>82</sup> As Sinclair noted: “The reference to foreign control in Article 25(2)(b) does not impose a general requirement upon investors having the requisite nationality in order for them to submit a dispute to ICSID.”<sup>83</sup> In other words, the fact that in one exceptional circumstance—and in that circumstance only—the Convention makes reference to the need to prove foreign control does not mean that foreign control must be proven in all cases. The proof of foreign control is, thus, exceptional, not a general rule—a conclusion that has been followed by several tribunals.<sup>84</sup> Proof of foreign control is re-

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81. *TSA Spectrum de Argentina, S.A. v. Argentina*, ICSID Case No. ARB/05/5, Award, ¶ 147 (Dec. 19, 2008).

82. See, e.g., Markus Burgstaller, *Nationality of Corporate Investors and International Claims against the Investor's Own State*, 7 J. WORLD INV. & TRADE 857, 860 (2006) (arguing that “while the traditional criteria of incorporation or seat are used to determine corporate nationality, one may nevertheless detect a tendency towards looking for the true controllers”); see also ALBERT BADIA, *PIERCING THE VEIL OF STATE ENTERPRISES IN INTERNATIONAL ARBITRATION* 137 (2014) (“Treaties generally define the nationality of corporate investors by the place of incorporation. Just by incorporating a company in a Member State, an investor of a non-Member State would, in principle, benefit from the safety net of the treaty in question. In the case of groups, all what it takes is hanging a new subsidiary from the parent or holding company. This practice, known as ‘treaty shopping,’ does not tune in with the flows of capital, and the boost of wealth investment treaties are often committed with. So, very often, the mere incorporation of a company, without more, is insufficient to attract treaty protection.”). I respectfully disagree with that position. Neither Arbitrators—nor commentators—should look to introduce extra words that the Contracting Parties of a treaty did not include.

83. Anthony C. Sinclair, *ICSID's Nationality Requirements*, 23 ICSID REV. 57, 110 (2008). See generally Burgstaller, *supra* note 82 (discussing the nationality of investors vis-à-vis claims against the investor's own state).

84. *Camuzzi Int'l S.A. v. Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction, ¶ 30 (May 11, 2005); *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, ¶¶ 40–41 (May 11, 2005); *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision of the Arbitral Tribunal on Objections to Jurisdiction, ¶ 51 (Apr. 30, 2004).

quired in order to deviate from Article 25(1) of the Convention—which prohibits claims by individuals against their state of nationality—and thus to allow legal persons, by virtue of being subject to foreign control, to bring ICSID claims against their state of nationality.

The tribunal in *CMS Gas Transmission Company* framed the issue well: “the Convention does not really make such a requirement [control] a central tenet of jurisdiction but only an alternative for very specific purposes.”<sup>85</sup> Therefore, even though Article 25(2)(b)’s exceptional requirements of substantive elements may be understood as a brief departure from the Convention’s overarching formalism, it would be a serious mistake to consider those substantive requirements applicable to the other nationality provisions of the Convention.

Despite giving a definition of nationality, the ICSID Convention only seeks to establish a minimum objective limit<sup>86</sup> on the nature of the disputes that may be brought before the Centre—including, of course, the nationality of the parties involved. Apart from the exception contained in Article 25(2)(b), the Convention does not mention any substantive tests or conditions in order to recognize a nationality as valid. Instead, the Convention—drafted just a few years after the ICJ decided *Nottebohm*—expressly decided to opt for a formal international regulation of nationality but referred all substantive aspects to domestic law. The only exception was the specific case described in Article 25(2)(b).

Aron Broches—the main “architect”<sup>87</sup> of the ICSID Convention—follows that line of reasoning. He argues that the purpose of Article 25 was to “indicate the outer limits within which disputes may be submitted to conciliation or arbitration under the auspices of the Centre with the consent of the par-

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85. *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, ¶ 58 (July 17, 2003).

86. This has been accepted by ICSID Tribunals. See, e.g., *Vacuum Salt Prods. Ltd. v. Ghana*, ICSID Case No. ARB/92/1, Award ¶¶ 36-37 (Feb. 16, 1994); *Rompertol Grp. N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Preliminary Objections on Jurisdiction and Admissibility, ¶¶ 80-84 (Apr. 18, 2008).

87. CHRISTOPH H. SCHREUER ET AL., *THE ICSID CONVENTION: A COMMENTARY* 2 (2d ed. 2009).

ties thereto.”<sup>88</sup> According to Broches, the drafters of the Convention sought to adopt a different, more flexible approach toward nationality than the one taken at the time by the law of diplomatic protection,<sup>89</sup> which was mired in *Nottebohm’s* recently issued genuine link test. Instead, Broches claims that:

The significance of nationality in traditional instances of a espousal of a national’s claim should be distinguished from its relatively unimportant role within the framework of the Convention.

[Nationality is] not here of significance in the traditional sense of the link conferring the rights of protection on his State . . . and not of the essence of nationality itself . . . the significance of nationality in traditional instances of espousal of a national’s claims should be distinguished from its relatively unimportant role within the framework of the Convention.<sup>90</sup>

These statements, plus the plain text of Article 25, evidence the Convention’s aim of adopting a formal definition of nationality, based on the liberal standard of *Tunis Morocco*. This conclusion is recognized by several scholars. Orrego Vicuña, for example, has noted that ICSID’s formal regulation of nationality implies that the “link of nationality has lost to an extent its rigour in the context of international claims.”<sup>91</sup> Amerasinghe reaches similar conclusions, stating that under the ICSID Convention nationality just “serves as a means of bringing a private party within the jurisdictional pale of the Centre.”<sup>92</sup>

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88. MARTINUS NIJHOFF, *SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW* 207 (1995).

89. The current trend in the field of diplomatic protection has moved towards a more flexible conception of nationality, centered on expanding protection. See Part VI, *infra*.

90. *Chairman’s Report on the Preliminary Draft of the Convention*, DOCUMENTS CONCERNING THE ORIGIN AND FORMULATION OF THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES 579 (1968).

91. See FRANCISCO ORREGO VICUÑA, *INTERNATIONAL DISPUTE SETTLEMENT IN AN EVOLVING GLOBAL SOCIETY: CONSTITUTIONALIZATION, ACCESSIBILITY, PRIVATIZATION* 36 (2001).

92. C.F. Amerasinghe, *The Jurisdiction of the International Centre for the Settlement of Investment Disputes*, 19(2) *INDIAN J. INT’L LAW*, 166, 198 (1979).

Yet academic opinion is not unanimous. Christoph Schreuer, for example, holds a different view. He argues that the tribunals should realistically examine the true controllers of the investors (by evaluating foreign control or determining the origin of the capital), and, in consequence, blocking access to the Centre when the juridical persons are controlled directly or indirectly by nationals of non-Contracting states or nationals of the host state.<sup>93</sup> That argument, however, contradicts both the text of the Convention and general international law.

It is thus evident that the ICSID Convention deferred the substantive regulation of nationality to states. As one commentator remarks, “it is quickly apparent that the Convention does not set out any legal definition or tests of nationality . . . these are questions to be determined by applying the law of the respective Contracting State.”<sup>94</sup> Several tribunals agree, including the tribunal in *AES Corporation v. Argentine Republic*, which quotes Christoph Scheurer, concluding that: “During the Convention’s preparatory work, it was generally acknowledged that nationality would be determined by reference to the law of the State whose nationality is claimed subject.”<sup>95</sup>

Furthermore, because of the particular structure of the ICSID Convention, states also have the possibility of establishing specific regulations of nationality in their BITs. The Convention allows states to regulate the substantive aspects of nationality both through their domestic laws *and* through the investment treaties they sign. Despite some diverging awards, the main consensus is that in order for the Centre to have personal jurisdiction, the claimant must meet the nationality requirements of both the Convention and the BIT under which the claim is brought<sup>96</sup>—and, if the applicable BIT submits the

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93. SCHREUER, *supra* note 87, at 323, ¶849.

94. Sinclair, *supra* note 83, at 64; SCHREUER, *supra* note 87, at 460.

95. *AES Corp. v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, ¶ 79 (Apr. 26, 2005) (quoting SCHREUER, *supra* note 87, art. 25, ¶ 430).

96. This position is supported by both Aron Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 136 HAGUE ACADEMY OF INT’L L., RECUEIL DES COURS 331, 343 (1972) and SCHREUER, *supra* note 87, at 267, ¶ 426. *Cf.* *Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 13 (Apr. 29, 2004), 20

issue to the state's domestic law, then also to the conditions established therein.

This ample discretion means that states may, if they so choose, establish different regulations of nationality on the municipal and international levels. A state may, for example, adopt a very liberal and formal regulation of nationality domestically; while at the same time setting a higher threshold of connection for ISDS purposes. In a sense, states are free to determine the amount of *links* or *connections* that they consider necessary in order to recognize an ascription of nationality; these links operate in a continuum, from the minimum links established in *Tunis Morocco*, to the more substantive genuine links required by *Nottebohm*. However, there is no uniform substantive international regulation of nationality. If the domestic laws of state A provide that a legal person incorporated under the laws of state A is considered its national, then that legal person will be considered a national of state A, regardless of the nationality of the controlling shareholders.

Such a system is not only consistent with international law; it also assures that states retain the regulatory flexibility to determine ascriptions of nationalities. One issue that is often overlooked by those favoring the adoption of a univocal regulation of nationality is that such a one-size-fits-all solution may ignore the specific needs of some states and fail to reflect the desired policy choices of other states.

Moreover, the current structure of the international regulation of nationality does not mean that nationalities of convenience are accepted—only that it is states who will determine whether they are. A good example of this is the recent *Gaëta* award issued by an ICSID Tribunal.<sup>97</sup> In that case, the tribunal found that it had no personal jurisdiction because the claimant seemingly used a nationality of convenience. The conclusion, however, was based on French domestic law (the applicable law under the France-Guinea BIT), not on a purported rule of international law. French law presumes that legal persons incorporated under its laws are its nationals,<sup>98</sup> but that

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ICSID Rev. 205 (2005) (Weil, J., dissenting) (postulating a narrower means of determining nationality).

97. *Société Civile Immobilière de Gaëta v. Guinea*, ICSID Case No. ARB/12/36, Award (Dec. 21, 2015).

98. *Id.* at ¶¶ 136–37, 180.



presumption is rebuttable. For example, if the seat of management or the economic activities of the corporation are elsewhere, then the ascription of French nationality may be dismissed. The tribunal, operating under that framework, analyzed the facts and concluded that they met the threshold to rebut the presumption of French nationality—resulting in a lack of personal jurisdiction over the claim.<sup>99</sup>

Another illustration of how states may exercise their discretion in regulating the substantive requirements of nationality is through the inclusion of “denial of benefits” provisions in BITs.<sup>100</sup> Denial of benefits provisions are treaty clauses that allow a state to refuse to afford BIT protection to claimant’s who lack sufficient substantive links with the state party to the BIT. They are a way for a state to deliberately reject nationalities of convenience.<sup>101</sup> Denial of benefits provisions require stronger links between the claimant and the purported state of nationality; when these provisions are included in a BIT a nationality of convenience will fail to satisfy the personal jurisdiction requirements of the treaty.

Denial of benefits provisions are not new. The United States started including them after World War II in their Friendship, Commerce and Navigation Treaties.<sup>102</sup> The purpose of these provisions may have been to deny “the possibility of a ‘free ride’ by third-country interests”<sup>103</sup> because it was possible that “such third countries were not party to the reciprocal arrangements embodied in the treaty or for other reasons.”<sup>104</sup> In the specific case of the United States, a particular concern was to avoid extending treaty benefits to legal persons effectively controlled by nationals of states with which the U.S. did not have diplomatic relations.

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99. *Id.* at ¶¶ 175–80.

100. For a comprehensive study on the subject, see Mark Feldman, *Setting Limits on Corporate Nationality Planning in Investment Treaty Arbitration*, 27 ICSID REV. 281, 283 (2012) (discussing denial of benefits).

101. Anthony C. Sinclair, *The Substance of Nationality Requirements in Investment Treaty Arbitration*, 20 ICSID REV. 357, 378 (2005).

102. Kenneth J. Vandeveld, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT’L L.J. 201, 206 and 214 (1988).

103. Herman Walker Jr., *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT’L L. 373, 388 (1956).

104. *Id.* at 388.

While some years ago denial of benefits provisions were a particularity of investment and trade treaties to which the United States was a party,<sup>105</sup> today they are present in the BITs of other states—although they are still far from being the general rule. In addition to the United States, which continued to include a denial of benefits provision in its 2012 model BIT, these clauses have been included in BITs signed by Canada, Mexico, Japan, Korea, China, Australia, New Zealand, Perú, Lebanon, and Austria. They have also been included in Multilateral Investment Treaties (MITs) like the Energy Charter Treaty (ECT),<sup>106</sup> the Asean Comprehensive Agreement on Investment, and in the investment provision of free trade agreements like the North American Free Trade Agreement or the Dominican Republic-Central America Free Trade Agreement. Moreover, the TTIP seems to include a similar provision,<sup>107</sup>

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105. The United States still includes denial of benefits provisions in its model BITs:

Article 17: Denial of Benefits:

1. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if persons of a non-party own or control the enterprise and the denying Party: (a) does not maintain diplomatic relations with the non-Party; or (b) adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Treaty were accorded to the enterprise or to its investments.

2. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise.

*2012 U.S. Model Bilateral Investment Treaty*, available at <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.

106. Pinsolle, for example, considers that the ECT's denial of benefits provisions "is intended to protect contracting parties from abuse of the ECT by the nationals of non-contracting parties. It is not intended to deprive from treaty protection nationals of the host state." Philippe Pinsolle, *Selected Nationality Issues in ECT Arbitration*, in *LIBER AMICORUM BERNARDO CREMADES* 965, 973 (Miguel Ángel Fernández-Ballesteros & David Arias eds., 2010). With the exception of the use of the word *abuse*, I agree with that analysis.

107. Transatlantic Trade and Investment Partnership, Draft Art. 9 (establishing that "[a] Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of that Party and to investments of that investor if: (a) the investors of a non-Party owns or controls the enterprise"),

requiring a certain level of factual links between the claimant and purported state party to the treaty.

Despite the apparent rise in popularity of denial of benefits provisions, one final thing may be said in favor of formal, bright-line rules regarding nationality: regardless of their simplicity (or perhaps because of it), formal ascriptions of nationality may be more attuned to current needs. In the case of physical persons, the increased acceptance of multiple nationality, coupled with the growing mobility of the labor force, may make it almost impossible to pinpoint the genuine links mentioned by the *Nottebohm* majority. A person may be a national of state A by virtue of being born in its soil; a national of state B due to her parents' nationality; and opt to become a national of state C through naturalization. Those situations, which until recently were considered oddities, will become ever more common.

The situation is more evident in the case of legal persons. Consider, for example, the case of publicly traded companies. Trying to determine a company's nationality based on the nationalities of its shareholders may be impossible, as they may be scattered throughout the globe. Likewise, how can the nationality of a multinational NGO be determined? While the board of directors may meet in one state, the lion's share of operations may take place on another continent. Furthermore, in the age of the digital economy and web-based transactions, which, for practical purposes, implies a certain deterritorialization of economic activity, what geographical facts or elements will be conducive to a predictable ascription of nationality? Faced with these challenges, the simple certainty of formalism may be the best choice.

After reviewing the regulation of nationality in both general international law and in ISDS in particular, it is possible to reach the following conclusions. In the case of physical persons, the current state of international law—as reflected by international instruments, academic commentary, and rulings from international courts and tribunals—overwhelmingly supports the principle laid out by the PCIJ in *Tunis-Morocco*. This means that states have ample freedom to domestically regulate the conditions for ascribing their nationality to an individual.

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available at [http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc\\_153807.pdf](http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf).

Each state determines the number of links, or material facts of connection. Conversely, the genuine link principle articulated by the ICJ in *Nottebohm* has been rejected.<sup>108</sup> In the case of legal persons, the general rule of international law favors the formal criteria of place of incorporation—noting, however, that states may opt to include more substantive definitions through *lex specialis* (like BITs).

### III. THE RELAXATION OF NATIONALITY-BASED JURISDICTIONAL THRESHOLDS

This Part will analyze the decline of nationality-based limitations to the personal jurisdiction of international courts and tribunals. This process led to an expansion of the personal jurisdiction of said fora—and as a consequence, to an increase in the number of cases that these courts and tribunals can decide. This expansion of jurisdiction is the product of two main developments, each examined in further detail below.

First, international courts and tribunals enlarged their personal jurisdiction through an expansive interpretation of nationality-based jurisdictional threshold—thus increasing access to international justice. This jurisdictional expansion is possible due to the decentralized, archipelagic nature of international adjudication, which enables individual tribunals to determine their own jurisdiction (by virtue of the *kompetenz-kompetenz* principle).<sup>109</sup> A prime example of this practice is the development in general international law of the rule of dominant or effective nationality and the corresponding relaxation of jurisdictional bars affecting dual citizens.

The second factor is the denationalization of jurisdictional thresholds. Several constitutive treaties of international courts and tribunals—particularly those concerning human rights—have opted to eliminate nationality-based limits on

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108. Even if that were not so, contemporary developments have led some commentators to argue that “the link of nationality has lost to an extent its rigor in the context of international claims.” Francisco Orrego Vicuña, *Changing Approaches to the Nationality of Claims in the Context of Diplomatic Protection and International Dispute Settlement*, 15 ICSID REV. – FOREIGN INV. L. J. 340, 349 (2000).

109. See John J. Barceló III, *Who Decides the Arbitrators’ Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, 36 VAND. J. TRANSNAT’L L. 1115, 1124 (2003) (defining the positive conception of competence- as “arbitrators . . . empowered to rule on their own jurisdiction”).

personal jurisdiction altogether. Now access to those international fora no longer depends on a person's nationality, but on where the subject matter of the dispute took place.<sup>110</sup>

A. *The Expansion of Personal Jurisdiction Through the Rule of Dominant or Effective Nationality*

The relevance of nationality in determining the personal jurisdiction of international courts and tribunals originated with the development of the law of diplomatic protection. It is necessary to recall that until the second half of the twentieth century, any form of international dispute settlement involving damages to individuals was channeled through diplomatic protection.<sup>111</sup> Judicial forms of international dispute resolution were considered a subfield within diplomatic protection.<sup>112</sup>

Thus, the law of diplomatic protection was the first to rely on nationality to curtail the personal jurisdiction of international fora. The principle of equality of states was of particular relevance. That principle, which operates in cases of dual or multiple nationals, forbids a state from exercising diplomatic protection on behalf of one of its nationals against their other state of nationality.<sup>113</sup> Reasonable enough, however, before

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110. See generally MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 155 (2011) (“[T]he nationality of the victim of a human rights violation, on which the Commission may have relied, should have no bearing on the question of extraterritorial application.”).

111. The definition of diplomatic protection adopted by the Draft Articles on Diplomatic Protection still states in Article 1 that: “[D]iplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State . . . .” Draft Articles, *supra* note 68, art. 1.

112. Borchard, in his seminal study, considers arbitration (he wrote before the advent of international courts) “the method most frequently used to settle international pecuniary claims” and classified arbitration as one of the “amicable” methods of diplomatic protection. EDWIN MONTEFIORE BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD, OR, THE LAW OF INTERNATIONAL CLAIMS 442–43 (1915).

113. This principle was adopted in Article 7 of the Draft Articles, *supra* note 68. A lucid representation of the role that equality of states principle had in the personal jurisdiction of international courts and tribunals is found in the *Mergé* award of 1955. See F.S. Mergé, 22 I.L.R. 443, 455 (It.-U.S. Conciliation Comm’n 1955) (“The principle, based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nation-

the mid-twentieth century, many states required an individual to obtain governmental authorization in order to renounce her nationality; other states did not even allow for that possibility. This state of affairs put dual or multiple nationals at a considerable disadvantage, particularly regarding access to international justice.<sup>114</sup>

Several international arbitral tribunals and claims commissions sought to overcome the jurisdictional hurdles created by the principle of equality of states. International adjudicators achieved this through the development of the rule of dominant or effective nationality, which operated as an exception to the principle of equality of states. The rule of dominant or effective nationality allowed dual nationals to bring claims against one of their states of nationality, provided that their dominant nationality was that of the state exercising diplomatic protection.<sup>115</sup> Although most awards do not explicitly mention that the purpose of the rule was expanding personal

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ality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State. But it must not yield when such predominance is not proved, because the first of these two principles is generally recognized and may constitute a criterion of practical application for the elimination of any possible uncertainty.”); see also Peter J. Spiro, *Multiple Nationality*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 780, ¶ 11 (Apr. 2008) (“Prior majority practice (also reflected in the 1930 Hague Convention) had barred one State of nationality from making claims or exercising protection against another State of nationality, without regard to relative actual connections. That practice eroded during the 20th century, however, to expand the ‘dominant and effective’ test to apply as between States of nationality.”).

114. States did not want “to release a national from his allegiance and thereby lose a potential soldier.” Conflicts resulted—the War of 1812 among them—when European States insisted on extracting military service obligations from emigrants who had acquired US citizenship. See Special Rapporteur on Nationality Including Statelessness, *Rep. on Multiple Nationality*, Int’l Law Comm’n, U.N. Doc. A/CN.4/64 (1952) (by Roberto Córdova).

115. A good example of this is the case *Iran v. United States*, Case No. A/18, 5 of the Iran-United States Claim Tribunal. See *Iran v. U.S.*, Case No. A/18, 5 Iran-U.S. Cl. Trib. Rep. 251, 265 (1984). The function of this rule was extending access to international justice to dual nationals. See Draft Articles, *supra* note 68, at Draft Art. 7 cmt. 7 (“[T]he main objection to a claim brought by one State of nationality against another State of nationality is that this might permit a State, with which the individual has established a predominant nationality subsequent to an injury inflicted by the other State of nationality, to bring a claim against that State.”).

jurisdiction, allowing dual nationals access to international justice was the underlying motivation.

Most writers attribute this principle to the famous *Canevaro* arbitration<sup>116</sup> of 1912,<sup>117</sup> however, that is incorrect. The *Anthony Barclay* award issued by the United States-Great Britain Claims Commission formulated the principle forty years earlier,<sup>118</sup> holding that:

The decisions of the commission in these and other similar cases established the doctrine that, so far as relates to the question of jurisdiction, the national character of the party is to be determined by his paramount allegiance, where that is not double, irrespective of the fact of domicil.<sup>119</sup>

Furthermore, several other arbitral awards seem to recognize the dominant nationality principle without explicitly mentioning it. Many of them were issued by the claims commissions established in Venezuela in the beginning of the twentieth century to settle the claims between that state and several European powers.<sup>120</sup> The awards in *Mathison*,<sup>121</sup> *Milani*,<sup>122</sup> *Heirs of Jean Maninat*,<sup>123</sup> and *Corvaia*<sup>124</sup>—all cases concerning dual nationals—sought to determine the dominant nationality, thus evidencing the application of this test.<sup>125</sup> Another clear case of reliance on the principle of effective nationality came in 1888, at the Twelfth Session of the Institute of International Law,<sup>126</sup> which held that a person should only be considered a national of the place of his active nationality.<sup>127</sup>

116. *Canevaro* (It. v. Peru), 9 R.I.A.A. 397 (Perm. Ct. Arb. 1912).

117. See, e.g., PANHUYS, *supra* note 51, at 74; RUTH DONNER, *THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW* 24 (2d ed. 1994).

118. JOHN BASSETT MOORE, *INTERNATIONAL ARBITRATIONS*, 2728 (1898).

119. *Id.* I have searched for the “similar cases” mentioned therein, to no avail.

120. The cases have been compiled in RALSTON, *supra* note 29.

121. *Id.* at 438.

122. *Id.* at 754–62.

123. JACKSON H. RALSTON, *REPORT OF FRENCH-VENEZUELAN MIXED CLAIMS COMMISSION OF 1902*, at 69–80 (1906).

124. RALSTON, *supra* note 29, at 803.

125. PANHUYS, *supra* note 51, at 77 (making a similar observation, but reaching an opposite conclusion).

126. DONNER, *supra* note 117, at 43–44.

127. *Id.* at 25. See also DONNER, *supra* note 117, at 44.

The principle of dominant nationality was distinctly recognized as such in 1912, when the Permanent Court of Arbitration (“PCA”) decided the *Canevaro* case (Italy v. Peru).<sup>128</sup> In that case, the arbitral tribunal rejected Italy’s attempt to exercise diplomatic protection on behalf of Rafael Canevaro, a dual Peruvian-Italian national, on the grounds that Canevaro’s effective nationality was Peruvian.<sup>129</sup>

The French-German Mixed Arbitral Tribunal also applied the same principle in 1926, when it decided the *Barthez de Montfort v. Treuhander Hauptverwaltung* case.<sup>130</sup> There, the mixed tribunal determined that dual nationals must, for the purpose of diplomatic protection, be considered as nationals of the state to which they have the strongest and most substantial connection. The tribunal relied on the “principle of active nationality,”<sup>131</sup> which seeks to determine to which of two nationalities the person has the most significant ties based on considerations of “fact and law.”<sup>132</sup>

As is inevitable in a decentralized adjudicatory system, the position was not uniform. In 1931, the *Salem* tribunal<sup>133</sup> disagreed with *Canevaro*, rejecting its holding and (incorrectly) considering it isolated.<sup>134</sup> Despite that, the principle was invoked by the Italian-United States Conciliation Commission, which applied the dominant nationality rule when deciding the *Mergé* case in 1955.<sup>135</sup> Another important development was the *Flegenheimer* award,<sup>136</sup> which limited the application of the dominant nationality principle to cases of dual nationals—thus excluding the analysis of substantive elements (required to prove which nationality is dominant) in cases of people with a single nationality.

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128. *Canevaro* (It. v. Peru), 9 R.I.A.A. 397 (Perm. Ct. Arb. 1912).

129. *Id.*

130. *Barthez de Montfort v. Treuhander Hauptverwaltung* (Fr. v. Ger.), 3 French-German Mixed Arbitral Tribunal 279 (1926); DONNER, *supra* note 117, at 42.

131. DONNER, *supra* note 117, at 42.

132. *Id.*

133. *Salem* (Egypt v. U.S.), 2 R.I.A.A. 1161, 1187 (Arbitral Tribunal 1932).

134. *Id.* at 1187.

135. *Mergé* (U.S. v. It.), 14 R.I.A.A. 236, 246-48 (It.-U.S. Concil. Comm’n 1955).

136. *Flegenheimer* (U.S. v. It.), 14 R.I.A.A. 327, 377 (It.-U.S. Conciliation Comm’n 1958).



But perhaps the most important contribution to the expansion of access to international adjudication was that of the Iran-U.S. Claims Tribunal. The treaty that constituted the Tribunal, the Algiers Accords,<sup>137</sup> established that the tribunal had jurisdiction over cases of Iranian nationals against the United States, of United States nationals against Iran, and disputes between those two states.<sup>138</sup> It did not, however, mention potential claims filed by dual United States-Iranian nationals.<sup>139</sup>

The tribunal faced that issue in 1984, when a dual United States-Iranian national filed case *A-18*. The tribunal found the Algiers Accord ambiguous on the issue, and thus decided to apply general international law, concluding that it had jurisdiction over claims of dual nationals when “the dominant and effective nationality of the claimant during the relevant period . . . was that of the United States.”<sup>140</sup> This was a commendable decision; the tribunal’s interpretation of a nationality-based jurisdictional threshold optimized access to international justice—and allowed the claimant to obtain redress in what was probably the only viable forum.<sup>141</sup>

The tribunal, while expanding its jurisdiction and allowing dual nationals to file international claims against one of their states of nationality, also refined the rule of dominant nationality by establishing the following caveat: “In cases where the tribunal finds jurisdiction based upon a dominant and effective nationality of the claimant, the other nationality

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137. Declaration of the Government of the Democratic and Political Republic of Algeria Concerning the Settlement of Claims by the Government of the United States and the Government of the Islamic Republic of Iran, Iran-U.S., Jan. 19, 1981, 20 I.L.M. 230 [hereinafter Settlement of Claims]. See generally MOHSEN AGHAHOSEINI, CLAIMS OF DUAL NATIONALS AND THE DEVELOPMENT OF CUSTOMARY INTERNATIONAL LAW: ISSUES BEFORE THE IRAN-UNITED STATES CLAIMS TRIBUNAL (2007).

138. Settlement of Claims, *supra* note 137, art. II(1).

139. See Richard M. Mosk, Book Note, 102 AM. J. INT’L L. 215, 217–19 (2008) (reviewing MOHSEN AGHAHOSEINI, CLAIMS OF DUAL NATIONALS AND THE DEVELOPMENT OF CUSTOMARY INTERNATIONAL LAW (2007), and providing some potential explanations as to that absence).

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

141. Indeed, Iran was quite incensed by the decision, with one of the Iranian-designated judges issuing a dissenting opinion where he claimed that the ruling “made the Tribunal lose all credibility to adjudicate any dispute between the Islamic Republic of Iran . . . and the United States, as the symbol of world capitalism.” *Id.* at 266.

may remain relevant to the merits of the claim.”<sup>142</sup> The caveat was used in the *Esphahanian v. Bank Tejarat* case, where the tribunal concluded that it did not have jurisdiction when “an individual disguises his dominant effective nationality in order to obtain benefits with his secondary nationality, not otherwise available to him.”<sup>143</sup>

Finally, ISDS also dealt with the expansion of personal jurisdiction in cases involving dual nationals. Several tribunals handled situations in which the claimant was a dual national of both states party to the BIT.<sup>144</sup> In some cases, the text of the applicable treaty expressly excludes dual nationals from accessing ISDS. In others, however, the only requirement for the tribunal to have personal jurisdiction is that the claimant be a national of one of the state parties. In this context, the reasoning of the tribunal that issued the recent *Serafin Garcia Armas* award is illustrative.<sup>145</sup> The case involves a claim brought under the Spain-Venezuela BIT, by an investor that was a national of both states. The tribunal concluded that it had personal jurisdiction over the dispute for two reasons. First, because of the Spanish nationality of the claimant which, although deemed merely “formal”, was valid under the applicable law (the domestic law of Spain).<sup>146</sup> Second, because—unlike other BITs that both states had entered into expressly excluding dual nationals from ISDS—there was no provision in the treaty that barred dual nationals from accessing

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142. *Id.* at 265–66.

143. *Esphahanian v. Bank Tejarat*, 2 Iran-U.S. Cl. Trib. Rep. 157 (1983); see also *Mosk*, *supra* note 139, at 217 (discussing the application of the dominant and effective nationality test by the tribunal).

144. *Ioan Micula v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction (Sept. 24, 2008); *Victor Pey Casado v. Chile*, ICSID Case No. ARB/98/2, Award (May 8, 2008); *Serafin García Armas v. Venezuela*, UNCITRAL Case No. 2013-3, Decision on Jurisdiction (Dec. 15, 2014); *Jan v. Slovak Republic*, UNCITRAL, Decision on Jurisdiction, ¶ 130 (Apr. 30, 2010); *Saluka Inv., B.V. v. Czech Republic*, UNCITRAL Case, Decision on Jurisdiction, ¶ 82 (May 7, 2004).

145. Illustrative because the reasoning is clear; however, the holding of the tribunal is not new. The tribunals mentioned in *supra* note 144 reached similar conclusions.

146. *Armas*, UNCITRAL Case No. 2013-3, Decision on Jurisdiction, ¶ 200 (Dec. 15, 2014).

international adjudication and, therefore, additional limitations could not be included to the text of the treaty.<sup>147</sup>

These cases show the consequences of the development of the rule of dominant or effective nationality and its continued expansion. The development of that rule, however, seems to be grounded more on procedural matters—allowing dual nationals access to international adjudication—than on the substantive notion of nationality in and of itself. The main result that the rule has produced is an expansion of the personal jurisdiction of international courts and tribunals; and, in consequence, the collapse of the jurisdictional results of the principle of equality of states.<sup>148</sup> Therefore, today the until-recently-unthinkable possibility of a person filing an international claim against their state of nationality is a reality.

### B. *The Denationalization of Jurisdictional Thresholds*

Nationality has always served as a limit to the exercise of diplomatic protection—and rightly so. Because, at their outset, international courts and tribunals were necessarily intertwined with diplomatic protection, nationality-based thresholds were common. Nevertheless, the expansion of international adjudication led to its separation from diplomatic protection and, consequentially, to the diminishing role of nationality as the gatekeeper of international justice.

The most notable example is that of specialized international human rights courts. Although international human rights courts are deeply embedded in international law's Westphalian paradigm, determining access to them based on criteria like nationality is discriminatory. By definition, international human rights courts could not adopt that approach. Human rights treaties aim to keep states from violating the rights established therein;<sup>149</sup> this goal requires a territorial approach, centered on the geographical space where the state

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147. *Id.* at ¶ 206.

148. Note that this applies only in the field of personal jurisdiction of international courts and tribunals. The main substantive features of the equality of states principle continue in force.

149. See Lea Brilmayer, *From "Contract 'to' Pledge": The Structure of International Human Rights Agreements*, 77 BRIT. Y.B. INT'L. L. 163, 165 (2006).

can exercise its powers.<sup>150</sup> This paradigm precludes distinctions based on nationality. Indeed a human rights treaty that would grant different levels of access based on nationality would be self-defeating and even oxymoronic.<sup>151</sup>

In that sense, both the European and the American Conventions on Human Rights adopted a similar position, shifting the jurisdictional threshold from nationality to territory. Article 1 of the European Convention illustrates the point. It requires states to guarantee the rights established in the Convention “within their jurisdiction.”<sup>152</sup> The point was articulated by Amerasinghe, who claimed that “[t]he requirement of the link of nationality which is the basis of diplomatic protection has been removed.”<sup>153</sup>

Moreover, in an effort to increase the scope of protection, the European Court of Human Rights has interpreted the term “within its jurisdiction” expansively and considered it applicable to acts of the state that will have effect outside its boundaries,<sup>154</sup> extending to those places where the state exercises “effective control.”<sup>155</sup>

Yet the denationalization of jurisdictional thresholds has not been the preserve of international human rights courts. The United Nations Compensation Commission—established to settle claims resulting from the Iraqi invasion of Kuwait in 1990—also applied the rule. In *Criteria for Additional Categories of Claims*, the Commission determined that, apart from claims suffered by their nationals, a state may “in its discretion also

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150. The issue of extraterritoriality is of interest, following a functional view of state power not limited to territory. See generally MILANOVIC, *supra* note 110, at 155 (discussing how nationality should not preclude questions of extraterritorial application).

151. It is important to distinguish between access to an international forum and substantive protection, as there may be some legitimate distinctions on that level.

152. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1 (Rome, 4 Nov. 1950), 312 E.T.S. 5. The text of Article 1 of the American Convention is almost identical.

153. CHITTHARANJAN FELIX AMERASINGHE, JURISDICTION OF SPECIFIC INTERNATIONAL TRIBUNALS 351 (2009).

154. *Loizidou v. Turkey* (preliminary objections); 310, Eur. Ct. H.R. (ser. A) at 62 (1995); *Drozd v. France*, 240, Eur. Ct. H.R. (ser. A) at 91 (1992); *Soering v. United Kingdom*, 161, Eur. Ct. H.R. (ser. A) at 86, 91 (1989).

155. *Medvedyev v. France* [GC], no. 3394/03, 63–64, ECHR 2010; *Ila?cu v. Moldova*, 2004-VII Eur. Ct. H.R. 314–316 (2004).

submit the claims of other persons resident in its territory,”<sup>156</sup> thus allowing non-national residents to have their claims adjudicated by an international forum. The Commission also made considerations regarding the possibility of international agencies to file claims on behalf of Palestinians who resided in other Middle Eastern states and in Israel.<sup>157</sup>

Another example of the relaxation of nationality-based jurisdictional threshold came in 1999, when the International Tribunal for the Law of the Sea, in the *M/V “SAIGA”* case,<sup>158</sup> recognized that a state may exercise diplomatic protection on behalf of non-national crew members of ships that fly its flag. This decision reaffirmed a principle long-recognized in the law of the sea, established in the late nineteenth century by the arbitral tribunal that decided the *McCready* case between the United States and Mexico.<sup>159</sup> The Draft Articles on Diplomatic Protection also incorporated the rule.<sup>160</sup> The solution, which only requires that the individual be a crew member of a ship flying the flag of the state exercising diplomatic protection, reaches a middle ground: the existence of a minimum link<sup>161</sup>—for example being a crew member of a ship flying that state’s flag—is enough to access international justice; this solution is yet another clear rejection of the genuine link test proposed in *Nottebohm*. That principle was long recognized in the law of the sea,

The cases above illustrate how international courts expanded their jurisdiction, in many cases through the relaxa-

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156. U.N. Compensation Comm’n, *Criteria for Additional Categories of Claims*, at 7, U.N. Doc. S/AC.26/191/7 (Dec. 4, 1991), [http://www2.unog.ch/uncc/decision/dec\\_07r.pdf](http://www2.unog.ch/uncc/decision/dec_07r.pdf).

157. See Seline Trevisanut, *Nationality Cases Before International Courts and Tribunals*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 853, ¶ 14 (May 2011).

158. *M/V Saiga* (No. 2) (St. Vincent v. Guinea), Case No. 2, Order of Jan. 20, 1998, 2 ITLOS Rep. 4, 5.

159. *McCready v. Mexico*, cited in JOHN BASSETT MOORE, INTERNATIONAL ARBITRATIONS 2536 (1898); see also Trevisanut, *supra* note 157.

160. Draft Articles, *supra* note 68, draft art. 18 (“The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act.”).

161. A. P. SERENI, 2 DIRITTO INTERNAZIONALE 601 (1958).

tion of nationality-based jurisdictional thresholds.<sup>162</sup> The two examples mentioned above evidence the trend of international courts to optimize access to international adjudication.

#### IV. CHANGES TO DIPLOMATIC PROTECTION AND LIMITS ON THE USE OF FORCE

Changes in the law of diplomatic protection also support the validity of nationalities of convenience. The main changes were the restrictions on the use of force that followed the Kellogg-Briand Pact and the adoption of the Charter of United Nations. Nevertheless, proponents of *Nottebohm*-inspired, genuine link tests often overlook that the law of diplomatic protection permitted the use of force until as recently as the twentieth century. In that context, the establishment of *some* international regulations on the subject of nationality had amongst its objectives the limitation of potential military aggressions.

First, some context is necessary. Although the relevance in international law of diplomatic protection has somewhat faded, it used to have a preeminent role.<sup>163</sup> Before the expansion of international adjudication and the creation of specialized international courts and tribunals, diplomatic protection was the main tool that states had to ensure the fair treatment of their nationals (and their property) abroad. As mentioned above, international adjudication, in its early days, was considered to be a subpart of diplomatic protection; it was only one of many options at a state's disposal.

The list of measures that a state could exercise as a means of diplomatic protection was broad, and even included hostile actions. In his influential treatise on the subject, Edwin Borchard divided the exercise of diplomatic protection between amicable and non-amicable methods, the latter including "a suspension of diplomatic relations, retorsion, a display of force, the actual use of force, reprisals and war."<sup>164</sup> Hence the common characterization of diplomatic protection as a euphemism for gunboat diplomacy.

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162. This development also implies, in a sense, a rejection of the genuine link principle. See AMERASINGHE, *supra* note 153, at 266 ("[I]t cannot be said that a general effective link theory has been accepted.").

163. *Id.*

164. Borchard, *supra* note 112, at 445.

The fact is that before the general interdiction of the unauthorized use of force, first established in the Kellogg-Briand Pact and later in the U.N. Charter,<sup>165</sup> diplomatic protection was used almost exclusively by strong, industrialized states, against weaker, poorer states—often in Latin America. For example, France seized custom houses in the Dominican Republic in 1894 in order to obtain security for the payment of claims.<sup>166</sup> Likewise, the “United States has on many occasion, either alone or in conjunction with other powers, used its military forces for the purpose of occupying temporarily parts of foreign countries to secure adequate protection for the lives and property of American citizens.”<sup>167</sup>

That situation led to the development, particularly among South American scholars, of a strong rejection of the institution of diplomatic protection. This resulted in the development of what has come to be known as the Calvo doctrine, originally conceived by the Argentinian jurist Carlos Calvo. The use of force under the guise of diplomatic protection was something that Calvo objected to:

America as well as Europe is inhabited today by free and independent nations, whose sovereign existence has the right to the same respect, and whose international law does not admit of intervention of any sort on the part of sovereign people, whoever they may be [ . . . ] Aside from political motives these interventions have nearly always had as apparent pretexts, injuries to private interest, claims and demands for pecuniary indemnities in behalf of subjects [ . . . ] According to strict international law, the recovery of debts and the pursuit of private claims does not justify *de plano* the armed intervention of governments, and, since European states invariably follow this rule in their reciprocal relations, there is no reason why

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165. CHITTHARANJAN FELIX AMERASINGHE, *DIPLOMATIC PROTECTION* (2008); See Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy, Aug., 27, 1928, 94 L.N.T.S. 27 (the Treaty was popularly known as the Kellogg-Briand Pact or the General Treaty for the Renunciation of War); U.N. Charter, Oct. 24, 1945, U.N.T.S. 1, art. 2.

166. Borchard, *supra* note 112, at 449.

167. *Id.*

they should not also impose it upon themselves in their relations with the nations of the new world.<sup>168</sup>

The situation was particularly acute in the case of the collection of debt, as this was one common reason behind the threat or actual use of force by military powers against weaker states. For example, in 1902 Great Britain, Germany, and Italy carried out joint military operations against Venezuela in order to obtain payment of contractual debt and reparations for damages to property owned by nationals of those European nations.<sup>169</sup> Similar situations arose in Haiti and the Dominican Republic in 1897 and 1904.<sup>170</sup>

This led the United States to propose a partial ban on the use of force for the collection of debt, which materialized in the Porter Proposition of 1907.<sup>171</sup> Despite those efforts—and the United States' interest, based on the Monroe Doctrine, of warding off European intervention in Latin America—the use of force was authorized when “the debtor state refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any *compromis* from being agreed on, or, after the arbitration, fails to submit to the award.”<sup>172</sup>

These examples illustrate how recourse to diplomatic protection entailed serious risks, risks that could even result in military aggression against a state. Thus, when the issue is framed in the proper historical context, it becomes evident that one of the reasons behind the establishment of limits to states' discretion in regulating nationality in international law was restraining the use of diplomatic protection—and, in consequence, restraining the use of force.<sup>173</sup>

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168. Calvo, I, § 205, cited by Borchard, *supra* note 112, at 792-793.

169. CHITTHARANJAN FELIX AMERASINGHE, *DIPLOMATIC PROTECTION* 29 (2008).

170. Borchard, *supra* note 112, at 447.

171. Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, Oct. 18, 1907, 537 U.S.T. 607 (Convention II of the 1907 Hague Peace Conference).

172. Borchard, *supra* note 112, at 319.

173. Indeed, preventing “nationality shopping” to obtain diplomatic protection was one of the argued reasons to keep the nationality of claims rule. *See* Draft Articles, *supra* note 68, draft art. 5 cmt. 1 (due to fears of nationality shopping from abandoning the nationality of claims rule, “draft article 5 retains the continuous nationality rule but allows exceptions to accommodate cases in which unfairness might otherwise result”).



In diplomatic protection, that link of nationality between the person purportedly injured by a foreign government and the state exercising diplomatic protection is represented by the “nationality of claims” rule,<sup>174</sup> also called the *Mavrommatis* formula<sup>175</sup>—a legal fiction, if there ever was one. The nationality of claims rule had an additional benefit: it managed to circumvent the fact that traditional international law did not recognize individuals as subjects.<sup>176</sup> Thus, in those days, the only way for an individual to obtain an international remedy was by having her state of nationality demand redress on her behalf.<sup>177</sup>

The nationality of claims rule emerged as a way of curbing any potential abuses of diplomatic protection. This preoccupation was articulated in 1925 by Umpire Parker, of the Mixed Claims Commission between the United States and Germany, who held that:

Any other rule would open wide the door for abuses and might result in converting a strong nation into a claim agency in behalf of those who after suffering injuries should assign their claims to its nationals or

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174. The issue is based on the Vattelian fiction. See EMER DE VATTEL, *LE DROIT DES GENS, OU, PRINCIPES DE LA LOI NATURELLE APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS* 368 (1758) (establishing that “whoever ill-treats a citizen indirectly injures the State, which must protect that citizen”).

175. *Mavrommatis Palestine Concessions* (Greece v. U.K.), 1924 P.C.I.J. (ser. A) No. 2 (Aug. 30); see also *Panevezys-Saldutiskis Railway* (Est. v. Lith.), 1939 P.C.I.J. (ser. A/B) No. 76, at 16 (Feb. 28) (“[I]t is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection.”).

176. The first instance of international arbitration that I am aware of that based its jurisdiction on the nationality of the claimants was the US – Mexican Claims Commission of 1849. See “Rules and Order of the Commissioners appointed under the act of 3 march 1849, entitled ‘An Act to carry into effect certain stipulations of the treaty between the United States of America and the Republic of Mexico, of the 2nd of February 1848’”, which specifically stated that: ‘All claims of citizens of the United States against the Government of the Mexican Republic’., quoted in Moore, *International Arbitrations*, Vol III, p. 2134.

177. See PANHUYS, *supra* note 51, at 182 (“The protection which States demand on behalf of their conglomerate of nationals, is the most prominent question in which nationality plays a part; this ‘right of protection’ manifests itself in the rules governing the treatment of aliens.”).

avail themselves of its naturalization laws for the purpose of procuring its espousal for their claims.<sup>178</sup>

And it is in this context that the drafters of the two most influential international instruments on nationality—the Hague Convention and the Harvard Draft Articles—were operating. The proponents of a substantive international regulation of nationality often anachronistically overlook that one of the main reasons behind international law’s establishment of outer limits to states’ discretion in regulating nationality was avoiding states’ reliance on dubious ascriptions of nationality as a justification for the use of force.

That hypothetical situation is not far from reality, nor confined to the first half of the twentieth century. A state may attempt to confer its nationality on a group of individuals based on questionable grounds. It may then rely on that conferral of nationality to justify (rhetorically more than legally), aggressive conduct towards another state. A brief look at Russia’s passport policy in Georgia—and how “responsibility to protect,” instead of diplomatic protection, was used to justify a strong state’s use of force against a weaker neighbor<sup>179</sup>—shows that the intuition of the drafters of the Hague Convention and the Harvard Draft was not far off the mark.

Yet those worries, legitimate as they were, are not transferable to ISDS. First, contemporary international law has proscribed the unauthorized use of force; this change has been influential in the development of the law of diplomatic protection,<sup>180</sup> which no longer authorizes what Borchard called non-amicable methods. While it is true that diplomatic protection still includes some measures that are not particularly friendly—for example, the possibility of cutting foreign aid to states that nationalize foreign-owned property without compensation<sup>181</sup>—and there have been several protests against

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178. Admin. Decision No. V (U.S. v. Ger.), 7 R.I.A.A. 119, 141 (1925).

179. Kristopher Natoli, *Weaponizing Nationality: An Analysis of Russia’s Passport Policy in Georgia*, 28 B.U. INT’L L.J. 389 (2010).

180. A few years after the signing of the UN Charter, the ILC excluded the use of force as a valid measure from their project on diplomatic protection.

181. In the United States, for example, the Foreign Assistance Act (including the Hickenlooper Amendment) allows the United States to stop foreign aid to foreign States that expropriate property belong to US nationals without payment of compensation. See 22 U.S.C. § 2370(a) (2000), (establishing that “[n]one of the funds made available to carry out this Act, the Foreign

ISDS arbitration being used for cases involving sovereign debt.<sup>182</sup> Today's international law would not allow for gunships to blockade a country that has entered into default. Seen in perspective, adjudicating those kinds of dispute through a neutral third party decision-maker is the best alternative that the international community has formulated—in particular when compared to the aggressive methods of the past.

Second, the existence of limits to a state's regulation of nationality were aimed at restricting the potential abuse of diplomatic protection—not to curtail access to international adjudication. Despite that international adjudication was considered to be a part of diplomatic protection, it was still a developing and untested institution. Diplomatic protection, an institution capable of straining diplomatic relations between two states and permitting the threat or actual use of force, cannot be equated to the filing of a claim before an international court. International law's regulation of the former cannot be automatically applied to the latter.

## V. NATIONALITIES OF CONVENIENCE, ACCESS TO ISDS, AND ABUSE OF RIGHTS

### A. *Nationalities of Convenience and Personal Jurisdiction in ISDS*

This Section analyses whether nationalities of convenience are a valid form of access to ISDS. In particular, it will examine whether nationalities of convenience satisfy the personal jurisdiction requirements of ISDS tribunals. Moreover, it will tackle the issue of whether relying on a nationality of convenience in order to gain access to ISDS constitutes an abuse of rights.

As seen above, the formal and liberal structure of international law's regulation of nationality—and its relation with do-

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Assistance Act of 1961 [22 U.S.C. 2151 et seq.], or the Arms Export Control Act [22 U.S.C. 2751 et seq.] may be provided to a government or any agency or instrumentality thereof, if the government of such country (other than a country described in 22 U.S.C. subsection (d)— (1) has on or after January 1, 1956— (A) nationalized or expropriated the property of any United States person.”); see also Frank Walsh, *Flipping The Act Of State Presumption: Protecting America's International Investors from Foreign Nationalization Programs*, 12 TEX. REV. L. & POL. 369 (2008).

182. See generally Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 AM. J. INT'L. L. 711 (2007).

mestic law, which may also be formal and liberal—can lead to the legal validity of nationalities of convenience. In those cases, it is possible to rely on a nationality of convenience to access specific treaty protections. This practice, called “nationality planning,”<sup>183</sup> has been accepted by several tribunals.<sup>184</sup> In *Aguas del Tunari*, for example, the tribunal concluded that:

[I]t is not uncommon in practice, and—absent a particular limitation—not illegal to locate one’s operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for example, of taxation or the substantive law of the jurisdiction, including the availability of a BIT.<sup>185</sup>

Some commentators have adopted a similar view. Sinclair considers that “[t]here is no general doctrine or guidance in the text of the Convention, militating against jurisdiction where the claimant is a mere ‘shell’ or ‘mailbox’ company, absent a specific limitation . . . in any applicable treaty.”<sup>186</sup>

Despite the fact that international law generally recognizes the place of incorporation test for juridical persons, the use of so-called shell or brass-plaque companies to gain access to ICSID protection has been controversial.<sup>187</sup> It is particularly controversial in cases where there are allegations that the shell company is controlled by nationals of the respondent state.<sup>188</sup>

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183. Mark Feldman, *supra* note 100, at 282.

184. See cases cited *infra* notes 204–211.

185. *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, ¶ 330 (Oct. 21, 2005).

186. Sinclair, *supra* note 83, at 88; see also Robert Wisner & Nick Gallus, *Nationality Requirements in Investor-State Arbitration*, 5 J. WORLD INV. & TRADE 927, 930 (2004) (considering that, in the case of Article 25(2)(b) cases, tribunals may be prone to look through holding companies in order to determine the ultimate owner).

187. Despite the fact that, as seen above, international law recognizes that the place of incorporation test is an adequate way to regulate the ascription of nationality to legal persons. The issue was addressed by the *Gold Reserve* tribunal, which considered that: “The Canada-Venezuela BIT is clear – the criterion an investor must satisfy involves the place of incorporation: ‘any enterprise incorporated or duly constituted in accordance with applicable laws of Canada.’ The Parties could have chosen to include a ‘genuine link’ test or a ‘management’ test, but did not. The Tribunal cannot read these criteria into the BIT.” *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, ¶ 255 (Sept. 22, 2014).

188. This practice has been called, somewhat pejoratively, “round tripping.” See, e.g., M Sonarjah, *Good Faith, Corporate Nationality, and Denial of*

This was precisely the fact pattern facing the tribunal in *Tokios Tokelės*,<sup>189</sup> a case that generated wide discussion,<sup>190</sup> and where the president of the tribunal, Prosper Weil, issued a strong dissent.<sup>191</sup>

Before dealing with the issue of shell companies controlled by nationals of a respondent state, some clarifications are in order. First, the use of a shell company to acquire a nationality of convenience implies, by definition, that such company has a different nationality than the respondent state. Determining whether the number of links, either formal or material, are sufficient for the ascription of nationality to be considered valid is an issue that must be determined in accordance with the applicable law, as determined by the state parties, either in the corresponding treaty or their domestic law; not according to the personal, idiosyncratic views of arbitrators or commentators.<sup>192</sup>

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*Benefits, in GOOD FAITH AND INTERNATIONAL ECONOMIC LAW* 117, 124–25 (Andrew Mitchell et al. eds., 2015) (“A home state is unlikely to want to protect a postbox company or a company that is incorporated for the fraudulent purpose of obtaining standing under an investment treaty through round-tripping. Equally, the host state will not want to recognize companies whose intentions are fraudulent and in no way benefit the host state.”). Sonarajah, however, seems to hold a romanticized view of the law of nationality—not unlike the one set forth in *Nottebohm* (and later rejected by the majority of international jurisprudence). Indeed, he claims, “Unlike a physical person whose loyalties and ties to the state demonstrate citizenship of the state, mere incorporation in that state is sufficient for a corporation to acquire nationality of that state.” *Id.* at 127. That conclusion may be at odds with reality, particularly in the current scenario of greater acceptance of multiple nationality in the case of physical persons, where a person may be legally a national of a state towards which it has little to no “ties or loyalties.”

189. *Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶¶ 2–3 (Apr. 29, 2004), 20 ICSID Rev. 205 (2005).

190. Burgstaller, *supra* note 82; Wisner & Nick Gallus, *supra* note 186, at 942; Andriy Alexeyev & Sergiy Voitovich, *Tokios tokelės vector: Jurisdictional issues in ICSID case Tokios tokelės v. Ukraine*, 9 J. WORLD INV. & TRADE 519, 520 (2008); N. Junngam, *The Decision on Jurisdiction In Tokios Tokeles v. Ukraine, in THE REASONS REQUIREMENT IN INTERNATIONAL INVESTMENT ARBITRATION*, 191, 191 and ss (G.A. Alvarez and W.M. Reisman, eds., 2008).

191. *Tokios Tokelės*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 3 (Apr. 29, 2004) (Weil, J., dissenting).

192. *But see* Sonarajah, *supra* note 188, at 128 (disagreeing, and instead claiming that “the rule that incorporation alone is sufficient to create nationality in the corporation lends itself to abuse”). Despite the learned author’s marked preference for the *siege sociale* test, the fact remains that interna-

As discussed above, the text of Article 25(2)(b) bars the use of shell companies of the host state by establishing substantive requirements to allow a legal person to file a claim directly against its state of nationality. For example, the tribunal's ruling in *TSA Spectrum v. Argentina*,<sup>193</sup> a case involving an Argentinean holding company that was effectively controlled by Argentinean nationals, was correct. The tribunal considered that Article 25(2)(b) of the Convention required an objective and substantive determination of foreign control which was not met.<sup>194</sup> The tribunal's decision, however, is not applicable to those cases that do not fall within the scope of Article 25(2)(b) of the Convention. In a similar vein, cases involving disputes regarding the level of control exercised by domestic or foreign minority shareholders in corporations that have the nationality of the respondent state are also excluded from analysis.<sup>195</sup>

And second, the acquisition of nationalities of convenience, at least in the context of ICSID, is basically limited to legal persons. The text of the Convention forces that conclusion by establishing a different regulation of nationality for natural and legal persons.<sup>196</sup> It could be argued that this places natural persons at a disadvantage,<sup>197</sup> as it makes it more

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tional law has recognized the place of incorporation test as the means to regulate the ascription of nationality of legal persons.

193. *TSA Spectrum de Argentina, S.A. v. Argentina*, ICSID Case No. ARB/05/5, Award, ¶¶ 134–39 (Dec. 19, 2008).

194. *Id.*

195. *Camuzzi Int'l S.A. v. Argentina*, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction, ¶ 34 (May 11, 2005); *Vacuum Salt Prods. Ltd. V. Ghana*, ICSID Case No. ARB/92/1, Award, ¶ 53 (Feb. 16, 1994); *see also AMCO Asia Corp. v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction (Sept. 25, 1983); *Autopista Concesionada de Venezuela, C.A. v. Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction (Sept. 23, 2001); *Société Ouest Africaine des Bétons Industriels v. Senegal*, ICSID Case No. ARB/82/1, Decision on Jurisdiction (Aug. 1, 1984).

196. This was recognized by the tribunal in the *Soufraki* award. *See Soufraki v. U.A.E.*, ICSID Case No. ARB/02/7, Award on Jurisdiction, ¶ 83 (July 7, 2004) (“[H]ad Mr. Soufraki contracted with the United Arab Emirates through a corporate vehicle incorporated in Italy, rather than contracting in his personal capacity, no problem of jurisdiction would now arise. But the Tribunal can only take the facts as they are and as it has found them to be.”).

197. For cases analyzing the nationality of natural persons from a jurisdictional perspective, *see generally* *Siag v. Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction (Apr. 11, 2007); *Soufraki*, ICSID Case No. ARB/02/7, Award on Jurisdiction (July 7, 2004); *Olguín v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award (July 26, 2001).

burdensome for them to gain access to ICSID protection; but international law has historically regulated ascriptions of nationality to legal and corporate persons differently. For example, comparing the substantive tests used by the ICJ in *Nottebohm* to the formal test of incorporation it relied on in *Barcelona Traction*.

The following section will analyze the issue at play in *Tokios Tokelés* and similar cases: the use of shell companies to acquire nationalities of convenience and gain access to ICISD protection. In *Tokios Tokelés* the tribunal had to decide whether it had jurisdiction under the Lithuania-Ukraine BIT (which determined corporate nationality through the law of the place of incorporation) over Tokios Tokelés, a company incorporated in Lithuania with its registered address in Vilnius, Lithuania's capital. Tokios Tokelés, however, had no business activities in Lithuania, and 99% of its shares were owned by Ukrainian nationals. Two thirds of its management were also Ukrainian nationals. Furthermore, the company was created with Ukrainian capital and its headquarters were in the Ukraine.

The claim arose out of actions taken by the Ukrainian government against *Taki spravy*, a Ukrainian publisher wholly-owned by Tokios Tokelés. During the case, the Ukraine argued that Tokios Tokelés was not a genuine Lithuanian entity for BIT purposes, and requested that the tribunal pierce the corporate veil and apply a control test to determine the nationality of the ultimate owners. Moreover, the Ukraine argued that the tribunal should decline jurisdiction on policy grounds, as granting jurisdiction would allow Ukrainian nationals to bring international claims against their own state.<sup>198</sup>

The majority of the tribunal, however, rejected the Ukraine's argument. They argued that the parties to the treaty enjoyed discretion to define in a broad or narrow sense what would be considered as an investment. In this case, the only requirement was ownership by a legal person constituted and registered in accordance with the laws of one of the two states: "The registration of Tokios Tokeles by the Lithuanian Govern-

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198. For a good summary of the argument, see Sinclair, *supra* note 83.

ment indicates that it was founded in conformity with the laws and regulations of that country.”<sup>199</sup>

Nevertheless, the president of the tribunal, Prosper Weil, issued a strong dissenting opinion—and finally opted to resign from the tribunal. Weil claimed to disagree with the “philosophy of the decision”.<sup>200</sup> He further stated that:

[T]he ICSID mechanism and remedy are not meant for, and are not to be construed as, allowing—even less encouraging—nationals of a State party to the ICSID Convention to use a foreign corporation, whether pre-existent or created for that purpose, as a means of evading the jurisdiction of their domestic courts and the application of their national law. It is meant to protect—and thus *encourage*—international investment.<sup>201</sup>

In Weil’s opinion, Tokios Tokelės’ Lithuanian nationality was not sufficient for ICSID jurisdiction to arise, despite meeting the nationality requirements established in both the ICSID Convention and the BIT. On the contrary, Weil argues that “when it comes to ascertaining the international character of an investment, the origin of the capital is relevant, and even decisive.”<sup>202</sup> Nevertheless, Weil’s conclusion requires the inserting of extra words into the text of the treaty, words that were not included by the contracting states. Such an interpretation would be contrary to Article 31 of the Vienna Convention, which relies on ordinary meaning of the terms therein: if a treaty adopts a formal definition of nationality, the ordinary meaning of its words cannot be manipulated to include a control test.<sup>203</sup>

Indeed, Weil’s conclusion is the result of assuming that international law has a substantive and univocal regulation to determine the nationality of a legal person. That conclusion, for the reasons articulated above, is wrong. By arguing that

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199. Tokios Tokelės v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 29 (Apr. 29, 2004), 20 ICSID Rev. 205 (2005).

200. *Id.* at ¶ 1 (Weil, J., dissenting).

201. *Id.* at ¶ 30 (Weil, J., dissenting).

202. *Id.* at ¶ 20 (Weil, J., dissenting).

203. Vienna Convention on the Law of Treaties, United Nations, art. 31, May 23 1969, 1155 U.N.T.S. 331, (containing the general rules of treaty interpretation).



Tokios Tokelés' was not properly a Lithuanian legal person, despite applicable domestic law establishing the nationality of legal persons based on the place of incorporation, Weil and his followers assume that the only proper way to regulate corporate nationality is through a control test—a premise that has no backing in international law, as can be evidenced, for example, from the ICJ's repeated application of the place of incorporation test to analogous situations. Weil's argument also denies the ample discretionary margin that international law grants states in regulating ascriptions of nationality, opting, instead, for a one-size-fits-all approach that is far from optimal. The variety in different states' approaches to the issue evidences a lack of consensus that supports conserving the current framework. Weil's position implies that states which decide to regulate the nationality of legal persons by applying a place of incorporation test are wrong. There is no basis for such a conclusion.

The same reasoning applies to the claims that the object and purpose of the ICSID Convention is to foster *international* investment. This position considers that the lack of material links between the investor and the state of nationality deprives the investment of its international character. But, as already noted, international law does not require such material links. Moreover, because the ICSID Convention does not give a substantive definition of nationality—leaving the issue to international law and the domestic law of the state parties—arbitrators should not impose their subjective definitions of nationality; particularly when they clash with those of international law and the applicable domestic law.

The issue, no doubt, remains controversial, but, overall, ISDS tribunals have reached conclusions that arise from the application of rules on nationality chosen by the corresponding states. Several tribunals have decided to recognize nationalities of convenience when neither the treaty nor the applicable domestic law include any further substantive requirements. The *ADC* tribunal, for example, decided that the regulation of nationality was “settled unambiguously” by the BIT<sup>204</sup>, which determined that a national of a contracting party would be any legal person incorporated in one of the contracting states. The

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204. *ADC Affiliate Ltd. V. Hungary*, ICSID Case No. ARB/03/16, Award, ¶ 357 (Oct. 2, 2006).

tribunal in *Saluka Investment*,<sup>205</sup> *The Rompetrol Group*,<sup>206</sup> *Yukos*,<sup>207</sup> *Mobil Oil*,<sup>208</sup> *Gold Reserve*,<sup>209</sup> *KT Asia*,<sup>210</sup> and *Charanne*<sup>211</sup> reached similar conclusions.

Conversely, other tribunals have rejected nationalities of convenience on the grounds that the applicable law on nationality requires substantive material links. Thus, the tribunals in *Soufraki*,<sup>212</sup> *Alps Finance*,<sup>213</sup> *Yaung Chi Oo*,<sup>214</sup> *Gaeta*,<sup>215</sup> and, on more technical grounds, *Guardian Fiduciary*<sup>216</sup> have rejected nationalities of convenience and other formal ascriptions of nationality when the substantive requirements established in the applicable law have not been met. For example, the tribu-

205. *Saluka Inv. B.V. v. Czech Republic*, UNCITRAL, Partial Award, ¶ 223 (May 7, 2004) (“There is no doubt that Saluka meets the only requirement expressly stipulated in Article 1 of the [BIT] for qualification as an investor, namely that it be a ‘legal person’ and be ‘constituted under the law of [Netherlands].”).

206. *Rompetrol Grp. N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Preliminary Objections on Jurisdiction and Admissibility, ¶ 83 (Apr. 18, 2008) (considering that the regulation of nationality was “a matter of free choice between the States Parties to the BIT under consideration” and that both had agreed upon relying on state of incorporation).

207. *Yukos Universal Ltd. (Isle of Man) v. Russia*, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, ¶ 411 (Nov. 30, 2009) (“[t]he Tribunal agrees . . . that in order to qualify as a protected Investor under Article 1(7) of the ECT, a company is merely required to be organized under the laws of a Contracting Party.”).

208. *Mobil Cerro Negro Holding, Ltd. v. Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶ 204 (June 10, 2010).

209. *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, ¶ 251–52 (Sept. 22, 2014).

210. *KT Asia Inv. Grp. B.V. v. Kazakhstan*, ICSID Case No. ARB/09/8, Award, ¶ 121 (Oct. 17, 2013).

211. *Charanne B.V. v. Spain*, SCC Case No. 062/2012, Award, ¶¶ 414–15 (Jan. 21, 2016).

212. *Soufraki v. U.A.E.*, ICSID Case No. ARB/02/7, Award on Jurisdiction, ¶ 83 (July 7, 2004).

213. *Alps Fin. & Trade AG v. Slovak Republic*, Investment *ad hoc* Arbitration, Award (redacted), ¶¶ 224–26, (Mar. 5, 2011).

214. *Yaung Chi Oo Trading Pte. Ltd. v. Myanmar*, ASEAN I.D. Case No. ARB/01/1, Award, ¶ 52 (Mar. 31, 2003).

215. *Société Civile Immobilière de Gaëta v. Guinea*, ICSID Case No. ARB/12/36, Award, ¶¶ 136–145, 168–82 (Dec. 21, 2015).

216. *Guardian Fiduciary Tr., Ltd. v. Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/12/31, Award, ¶¶ 136–39 (Sept. 22, 2015) (although in this particular case the Tribunal’s analysis hinged on the fact that the Claimant failed to prove it was controlled by Stichting Intetrust).

nal in *Alps Finance* noted that the applicable law on nationality required more substantive connections than the mere incorporation of a legal person in order to establish the tribunal's personal jurisdiction; absent those connections, the tribunal declined jurisdiction.<sup>217</sup>

Despite the apparently contradicting results, those awards were not capricious. They all reach correct results. The divergence of the results is due to differences in the law applicable to each dispute. Regulatory flexibility means variations in the applicable laws and, in consequence, variation of results. Granting states discretion to regulate the issue will lead to different regulations—consistency is the price paid for greater state discretion. The ICSID Convention does afford states flexibility to determine the quantity and quality of links they require to make valid ascriptions of nationality. States may choose between the formalism of a minimum link test like place of incorporation, or more substance-related tests, like *siege social* or principal place of business.<sup>218</sup>In addition, states have the possibility of including denial of benefits provisions, another way of enforcing substantive link requirements.

Finally, as thoroughly demonstrated above, the genuine link requirement has no basis in general international law. The most relevant contemporary instruments on the issue—the European Convention on Nationality and the Draft Articles on Diplomatic Protection—rejected the requirement. As determined by the *Flegenheimer* decision, tribunals should only apply the genuine link requirement to determine dominant or effective nationality in cases of dual nationality.

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217. *Alps Fin*, Investment *ad hoc* Arbitration, Award (redacted), ¶¶ 224–26, (Mar. 5, 2011).

218. For Example, the Agreement for Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference, June 5, 1981, <http://www.oic-oci.org/english/convention/Agreement%20for%20Invest%20in%20OIC%20%20En.pdf>, provides a substantive definition of investor in Article 1(6), requiring that the investor be “a national of a contracting party and who *owns* the capital” (emphasis added). A recent award that dealt with the issue of *siege social*, that, however, avoided entering into core issue at hand was: *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB 14/8, Award, ¶¶ 143–148 (July 26, 2016). One of the arbitrators in that case, Professor William W. Park issued a strong dissenting opinion, ¶¶ 2–22.

*Société Civile Immobilière de Gaëta v. Guinea*, ICSID Case No. ARB/12/36, Award, ¶¶ 136–145, 168–82 (Dec. 21, 2015).

## B. Abuse of Rights in ISDA

Abuse of rights is an emerging topic within ISDS disputes.<sup>219</sup> Arguments that a nationality of convenience can be rejected as an abuse of rights is an old topic. The argument was first used by Henry Rolin, Guatemala's counsel in *Nottebohm*, who claimed that the acquisition of nationality for the sole purpose of acquiring access to international adjudication constituted an abuse of rights.<sup>220</sup> The *Phoenix Action*, *Mobil Oil*,

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219. Margaret Ryan, *Gaillard on Tackling Abuse of Process*, GLOBAL ARB. REV., July 21, 2015, <http://globalarbitrationreview.com/article/1034630/gaillard-on-tackling-abuse-of-process>. The article, reporting on Emmanuel Gaillard's presentation, notes that: "Gaillard said that investment treaty arbitration is susceptible to similar abuses. Where an investment in a host state is made through a chain of companies incorporated in different states, companies at different levels of the corporate chain which are protected under different investment treaties, and possibly the local company under foreign control, might bring multiple claims against the host state in relation to the same interests." *Id.*

220. Henri Rolin, Oral Argument in *Nottebohm*, in Minutes of the Hearings Held on April 6, 1955 in *Nottebohm (Liechtenstein v. Guatemala)*, Second Phase, 1955 I.C.J. 4, at 226 (Apr. 6, 1955) ("By granting this naturalization, by the terms their law itself defines as exceptional, and by giving thereby, without any plausible reasons, to a belligerent national the status of neutral national, Liechtenstein acted in violation of the principles usually followed in terms of nationality and made itself guilty of an abuse of rights, if not of fraud.") ("En octroyant cette naturalisation, suivant des modalités que sa loi elle-même répute exceptionnelles, et en conférant ainsi, sans motif plausible, à un ressortissant belligérant un statut de ressortissant neutre, le Liechtenstein a agi en violation des principes généralement suivis en matière de nationalité et s'est rendu coupable d'un abus de droit, sinon d'une fraude."). Note, however, that in those same oral hearings, Sauser-Hall, counsel for Liechtenstein, insisted that harm is an indispensable element of abuse of rights. Sauser-Hall, Oral Argument in *Nottebohm*, in Minutes of the Hearings Held on April 6, 1955 in *Nottebohm (Liechtenstein v. Guatemala)*, Second Phase, 1955 I.C.J. 4, at 349 (Apr. 6, 1955) ("The abuse of rights never constitutes an unlawful act, and that is why, to be retained in *droit des gens* [law of nations], as in civil rights, for that matter, it has to cause significant damage to a subject of law. The Romans said, 'The one who exercises his right doesn't wrong anyone.' A proposition completed in modern law by the adage, 'The one who, by exercising his right, wrongs someone, without a real utility for himself, without interest, abuses his right.' Without lesion, there is no abuse of rights. Note that the same applies for the internationally unlawful act, the fraud: It can only lead to an action for damages of the State if a damage is caused. Without damage, there is no interest, and without interest, there is no action.") ("L'abus de droit ne constitue jamais un acte illicite, et c'est pourquoi, pour être retenu c'est droit des gens, comme en droit civil d'ailleurs, il faut qu'il cause un dommage à un autre sujet de droit. Les

*Pac Rim* and, quite recently, the *Levy and Grencitel* tribunals have applied, in one way or another, the abuse of rights theory. This Section analyzes and, when pertinent, critiques those awards.

Despite relying on abuse of rights, the four cases mentioned above cannot be lumped together. Only one of them, *Phoenix Action*, expressly rejects nationalities of convenience on grounds of abuse of rights.<sup>221</sup> The *Phoenix Action* tribunal claimed that it had a duty to “ensure that the ICSID mechanism does not protect investments that it was not designed for to protect [sic], because they are in essence domestic investments disguised as international investments for the sole purpose of access to this mechanism.”<sup>222</sup> This point of view remains isolated. Perhaps the peculiar—even egregious—circumstances involved justify its isolation.<sup>223</sup>

The other three tribunals adopted a different approach. They chose to focus on the *timing* of the acquisition of the nationality of convenience (rather than its issuance *per se*) to determine whether there had been an abuse of rights. Moreover in *Tidewater*, *Mobil Oil*, *Pac Rim*, and *Levy Grencitel*, the tribunals established in dicta that nationalities of convenience are allowed under current international investment law. For example, the *Mobil Oil* tribunal—chaired by Gilbert Guillaume, a former president of the ICJ—concluded that:

As stated by the Claimants, the aim of the restructuring of their investments in Venezuela through a Dutch holding was to protect those investments against breaches of their rights by the Venezuelan authorities by gaining access to ICSID arbitration through the BIT. The Tribunal considers that this

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Romains ont dit, ‘Celui qui use de son droit ne lèse personne,’ une proposition qui a été complétée en droit moderne par l’adage, ‘Celui qui, dans l’usage de son droit, lèse quelqu’un, sans véritable utilité pour lui-même, sans intérêt, abuse de son droit.’ Sans lésion, pas d’abus de droit. Remarquez qu’il en est d’ailleurs de même pour l’acte internationalement illicite, la fraude; elle ne peut donner lieu a une action en responsabilité de l’État que si un dommage a été causé. Sans dommage, pas d’intérêt, et sans iritéret, pas d’action.”)

221. *Phoenix Action Ltd. v. Czech Republic*, ICSID case No. ARB/06/5, Award, ¶ 144 (Apr. 15, 2009).

222. *Id.*

223. The case involved alleged violation of *erga omnes* norms.

was a perfectly legitimate goal as far as it concerned future disputes.<sup>224</sup>

These tribunals, however, considered that an abuse of rights or of process (two terms that are often—wrongly—used interchangeably) occurs when the change of nationality is made either after the dispute has arisen,<sup>225</sup> or, as framed by the tribunal in *Pac Rim*, when the party can “foresee a specific future dispute as a very high probability and not merely as a possible controversy.”<sup>226</sup> Timing, then, is of the essence. When the change of nationality is done with sufficient foresight it is considered valid, and ICSID jurisdiction may be established; but, when it is done after the alleged injury—or when the injury was imminent—then it must be rejected because it constitutes an abuse of rights.

The end results are reasonable, and the decision to rely on the moment of acquisition of the nationality of convenience is nuanced. A nationality of convenience acquired after or just before the cause of action arises is a practice similar to forum shopping and that offends “traditional notions of fair play.”<sup>227</sup> However, tribunals should not base their conclusions on abuse of rights. The misapplication of the concept of abuse of rights has potentially dangerous consequences.<sup>228</sup>

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224. *Mobil Cerro Negro Holding, Ltd. v. Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶ 204 (June 10, 2010). For similar views, see *Renée Rose Levy v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, ¶ 184 (Jan. 9, 2015) (“In the Tribunal’s view, it is now well-established, and rightly so, that an organization or reorganization of a corporate structure designed to obtain investment treaty benefits is not illegitimate per se, including where this is done with a view to shielding the investment from possible future disputes with the host state.”); *Tidewater v. Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, ¶ 184 (Feb. 8, 2013) (“[I]t is a perfectly legitimate goal, and no abuse of an investment protection treaty regime, for an investor to seek to protect itself from the general risk of future disputes with a host state in this way.”).

225. *Mobil Cerro Negro Holding, Ltd.*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶ 51 (June 10, 2010). This reasoning was also recently applied in: *Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama*, ICSID Case No. ARB/13/28, Award, ¶¶ 116-118 (June 2, 2016).

226. *Pac Rim Cayman, LLC*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, ¶2.99 (June 1, 2012).

227. *Int’l Shoe Co. v. Washington*, 360 U.S. 310 (1945).

228. It would also be a mistake to reach a similar conclusion on the grounds that the acquisition of the nationality of convenience was done in

An abuse of rights does not necessarily occur simply because a right is used in a way different from its original purpose. An abuse of rights requires that the right be used in a way that causes *harm* to the other party<sup>229</sup>—and this is where the tribunals err. An abuse of rights requires the existence of a concrete *harm*, which can be ascertained by subjective means, through the proof of *animus vicini nocendi*,<sup>230</sup> or through an objective test, determining whether the use of the right was “unnecessary” or caused “excessive damage.”<sup>231</sup> There can be no abuse of rights when no harm results.

By failing to address the element of harm in their analysis of abuse of rights, the tribunals have, in effect, given international recognition to a widely rejected civil law doctrine: the theory of relativity of rights. That theory of abuse of rights, championed by French scholar Louis Josserrand,<sup>232</sup> does not

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bad faith. On that subject, see Stephan W. Schill & Heather L. Bray, *Good Faith Limitations on Protected Investments and Corporate Structuring*, in *GOOD FAITH AND INTERNATIONAL ECONOMIC LAW* 102, 105 (Andrew Mitchell et al. eds., 2015) (“Good faith has a very small, if any, role to play in controlling nationality planning at the pre-investment stage. There is nothing *per se* legal or improper with an investor strategically organizing its investment in ways that maximize protection under an applicable investment treaty.”). See also Christoph Schreuer, *Nationality Planning*, in *CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION* 17, 19 (Arthur Rovine ed. 2013) (“The establishment of companies so as to obtain benefits from domestic law and treaties is neither unethical nor illegal and is standard practice in international economic relations. Nationality planning has become as much a standard feature of diligent management as tax planning.”).

229. The indispensable nature of harm in abuse of rights is a topic that is thoroughly treated by several of the classic French civil law scholars. See AMBROISE COLIN & HENRI CAPITANT, 2 *COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS* 365 (1931); MARCEL PLANIOL & GEORGES RIPERT, 2 *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL: CONFORME AU PROGRAMME OFFICIEL DES FACULTÉS DE DROIT* § 195 (1928); GEORGES RIPERT, *LA REÈGLE MORALE DANS LES OBLIGATIONS CIVILES* (1949). In the common law sphere, the issue has been addressed by H. C. Gutteridge, *Abuse of Rights*, 5 *CAMBRIDGE L. J.* 22, 25 (1933), and M. Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 *MCGILL L.J.* 389 (2002). See also J.D. Delgado Echeverría, *El Concepto de Validez de los Actos Jurídicos de Derecho Privado: Notas de Teoría y Dogmática*, 58 *ANUARIO DE DERECHO CIVIL* 14 (2005).

230. Gutteridge, *supra* note 229, at 25.

231. *Id.* at 26.

232. The theory was developed by Josserrand in his work. See LOUIS JOSSE- RAND, *DE L'ESPRIT DES LOIS ET DE LEUR RELATIVITÉ. THEORIE DITE DE L'ABUS DES DROITS* (2d ed. 1939). To my knowledge, the book was never translated into English. A Spanish translation is available. See *EL ESPÍRITU DE LOS DERECHOS Y*

require the infliction of harm. Rather, it contends that an abuse of rights occurs any time a right is used in a way different from the social function it was intended to serve.<sup>233</sup> That theory has been subject to extended debate, and there is certain consensus that “The theory of the relativity of rights in the form in which it is propounded by M. Josserrand [has] not found general acceptance.”<sup>234</sup>

Another strong indicator of the need for harm is the historical development of the German civil law institution of *Schikaneverbot*,<sup>235</sup> the main conceptual precursor of the theory of abuse of rights. The *Schikaneverbot* forbids the exercise of a right when its sole purpose is causing harm to another person. Moreover, the only legal system that appears to have manifestly adopted the relativity of rights theory advanced by Josserrand was the Soviet Code of 1923, which claims that “Civil rights are protected by the law except in those cases in which they are exercised in a sense contrary to their economic and social purpose.”<sup>236</sup> Soviet law, however, should not be relied upon as it “presents a strong analogy to martial law.”<sup>237</sup> Thus the broad majority of municipal legal systems recognize that

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SU RELATIVIDAD: TELEOLOGÍA JURÍDICA (José Luis Monereo Pérez trans. 2012).

233. JOSSEERAND, *supra* note 232 (particularly Section III, Chapter 2: “Le critère de l’abus. L’esprit des droits et le motif légitime,” or “The criterion of abuse. The spirit of the laws and legitimate reason”).

234. In the French Civil law, where it originated, Planiol is one of the main opponent of the theory of abuse of rights in general, claiming it is a “logomachy.” MARCEL PLANIOL & GEORGES RIPERT, *supra* note 229, at § 195; GEORGES RIPERT, *LA REÈGLE MORALE DANS LES OBLIGATIONS CIVILES* (1949); AMBROISE COLIN & HENRI CAPITANT, *COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS*, PAR AMBROISE COLIN ET H. CAPITANT. *OUVRAGE COURONNÉ PAR L’ACADÉMIE DES SCIENCES MORALES ET POLITIQUES* (Prix Chevallier). Vol. II, 365 (1931); *cf.* Gutteridge, *supra* note 229, at 35 (“[w]ith the exception of M. Josserrand the leading ‘civilistes’ are, in fact, somewhat coldly disposed towards the theory of abuse, and the general tendency of *doctrine* is against any further expansion of its ambit. The view most widely held appears to be that put forward by M. Capitant, amongst others, namely, that all that is meant by the theory of abuse is that a man must regard a right which has been conferred on him as carrying with it a duty to refrain from doing any harm to others which can be avoided”).

235. BÜRGERLICHES Gesetzbuch [BGB] [CIVIL Code] art. 226 (Ger.).

236. Gutteridge, *supra* note 229, at 41.

237. *Id.* at 42.



the element of harm, the *animus vicini nocendi*, is an indispensable element of abuse of rights.

This is not to say that facing ISDS claims cannot cause some harm to states; of course it can. States may be forced to pay significant damages; they may suffer a decrease of foreign direct investment flows; or, even if they emerge victorious from the proceedings, they may have to pay a large legal bill.<sup>238</sup> However, an abuse of rights requires more than the existence of objective harm. Traditionally, abuse of rights does not only require objective harm, it requires subjective intent to produce that harm. This is the main reason why the acquisition of a nationality of convenience is not an abuse of rights; the reason for obtaining a nationality of convenience is, in many cases, to gain access to a neutral forum, not to deliberately harm the respondent state by maliciously filing an arbitral claim against it.

Moreover, international law establishes that submitting a claim to international adjudication is not wrongful. For example, Article 5 of the *Manila Declaration on Peaceful Settlement of Disputes between States* establishes that “Recourse to judicial settlement of legal disputes . . . should not be considered an unfriendly act.”<sup>239</sup> It is thus important to consider that, although the respondent state may eventually suffer from an adverse ruling, acquiring a nationality of convenience to gain access to ISDS is not inherently wrongful conduct in itself.

Yet despite the importance of harm (subjective or objective) in abuse of rights, it is notoriously absent from most international discussions on the subject (not so in domestic ones). The first international courts and tribunals that dealt with the issue, however, did consider the infliction of harm an indispensable element for the existence of an abuse of rights. The first of those instances was the *Fur Seal* arbitration,<sup>240</sup> where the president of the tribunal deliberately asked whether the actions had been “done maliciously,” to which the British agent answered that the disputed action would constitute an abuse of rights if they had been done with the “malicious pur-

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238. Although the possibility to condemn in costs when the claim is unfounded is increasing.

239. G.A. Res. 37/10, *Manila Declaration on Peaceful Settlement of Disputes Between States* (Nov. 15, 1982).

240. *Preservation of Fur Seals* (U.K. v. U.S.), 27 R.I.A.A. 263, 266 (1893).

pose of injuring the lessees.”<sup>241</sup> In this case, it is evident that all the parties considered both the subjective and objective elements of harm in determining whether there was an abuse of rights.

The PCIJ held similar views. In *German Interests in Polish Upper Silesia*,<sup>242</sup> the Permanent Court, just a few pages after an oft cited passage on abuse of rights,<sup>243</sup> concludes that the disputed sale of a factory did not constitute an abuse of rights because it “was not designed . . . to deprive the other [Party] of an advantage he was entitled.”<sup>244</sup> Later, the same Court reached a similar conclusion in the *Free Zones of Upper Savoy* case.<sup>245</sup> That dispute involved the establishment of an “import” tax applicable in places that, by treaty obligations, should have remained free of customs barriers.<sup>246</sup> Even if the PCIJ did not make specific reference to the issue of harm, the disputed actions harmed—or could have harmed—the other party. In *German Interest in Polish Upper Silesia*, the consequence of the purported abuse was to deprive the Polish government of property to which it claimed rights, and in the *Free Zones of Upper Savoy* case, the presumed abuse concerned the imposition of taxes that would have caused direct economic harm to Swiss producers.

The exclusion of the element of harm in the application of the theory of abuse of rights may have begun in 1925, when Nicolas Politis delivered his *Hague Lectures*,<sup>247</sup> *Les Problèmes des*

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241. BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 122 (1953).

242. *Certain German Interests in Polish Upper Silesia* (Ger. v. Pol.), 1925 P.C.I.J. (ser. A) No. 7 (Aug. 25).

243. *Id.* at 30 (“Germany undoubtedly retained until the actual transfer of sovereignty the right to dispose of her property, and only a misuse of this rights could endow an act of alienation with the character of a breach of the Treaty; such misuse cannot be presumed, and it rests with the party who states that there has been such a misuse to prove his statement.”).

244. *Id.* at 37–38. *But see* CHENG, *supra* note 241, at 121 (arguing that the German Government admitted in that case that the “exercise of a right for no serious motive except the purpose of injuring others constitutes an abuse of rights”).

245. *Free Zones of Upper Savoy and the District of Gex* (Fr. v. Switz.), 1932 P.C.I.J. (ser. A/B) No. 46 (Jun. 7).

246. *Id.* at 167.

247. Nicolas Politis, *Les Problèmes des Limitations de la Souveraineté et la Théorie de l'abus des Droits dans les Rapports Internationaux*, 6 *RECUEIL DES COURS* (1925).

*Limitations de la Souveraineté et la théorie de l'abus des droits dans les rapports internationaux* (The Problems of the Limitations of Sovereignty and the Theory of Abuse of Rights in International Relations). Politis's lectures were the first scholarly study on the application of the theory of abuse of rights to international law—and were quite influential.<sup>248</sup>

Despite Politis's stature as a scholar,<sup>249</sup> two things must be taken into account: First, Politis was a staunch supporter of Josserand's theory of the relativism of rights,<sup>250</sup> and thus considered that the only necessary factor for an abuse of rights to occur was for the right to be used for a different purpose than that imagined by the Legislator—a theory that, as seen above, was widely rejected. And second, Politis based his theory of abuse of rights on the French administrative law<sup>251</sup> concept of *détournement de pouvoir* (deviation of power) developed by the *Conseil d'Etat* to annul discretionary governmental actions that were committed with a different purpose than that established in the law.<sup>252</sup> Politis even admits that his theory of abuse of rights in international law is based on the concept of deviation of power.<sup>253</sup>

But applying a theory of abuse of rights based on deviation of power to international law encounters insurmountable obstacles. On the one hand, deviation of power rests on some of the basic tenets of municipal legal systems: separation of powers and the existence of a legislature, which are hardly exportable to the decentralized international legal system. Deviation of power implies the existence of an executive branch that may only act to the extent that the legislature grants its authorization; the particularities of law-making in the interna-

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248. HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* (2011) and TRIFU SELEA, *La Notion de l'abus du Droit dans le Droit International* (1940) were heavily influenced by Politis.

249. For a good overview of Politis' work, see Umut Oszü, *Politis and the Limits of Legal Form*, 23 *EUR. J. INT'L. L.* 244 (2012).

250. Politis, *supra* note 247, at 79–83.

251. Indeed, Politis cites Gaston Jèze, a leading French administrative law scholar, as the main authority on the issue. See Politis *Problème des Limitations*, *supra* note 247, at 87 fn.1. For Jèze's views on administrative law, see GASTON JÈZE, *LES PRINCIPES GÉNÉRAUX DU DROIT ADMINISTRATIF* (2004).

252. Politis, *supra* note 247, at 83–86.

253. *Id.* at 86–87.

tional plane simply do not accord with those at the domestic level.

Moreover, Politis's idea of abuse of rights cannot be applied to individuals for the same reasons that French administrative law does not apply *détournement de pouvoir* to individuals. Unlike the executive, individuals do not require legislative authorization to act; they may do anything not expressly prohibited by law.<sup>254</sup> This is the standard difference between positive and negative relation to the legal system common in continental administrative law.<sup>255</sup> Thus, Politis's particular version of abuse of rights seems ill suited for general application in international law.<sup>256</sup>

Despite those shortcomings, Politis's writings were quite influential. Hersch Lauterpacht,<sup>257</sup> for example, was swayed by Politis—and considered Jossierand to be an appropriate exponent of the whole of French civil law, omitting any references to his (numerous) detractors. Furthermore, Lauterpacht, possibly influenced by Politis, does not consider harm a relevant element in the study of abuse of rights.<sup>258</sup> In the particular context of international economic law—and particularly addressing corporate nationality—Sornarajah writes that “Good faith cannot exist in circumstances where a right is exercised

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254. Although in state-state relations it is possible to argue, under the *Lotus* principle, that anything that is not prohibited is permitted. This, however, does not necessarily apply to ISDS claims which deal with relations between individuals and the state.

255. In civil-law systems, administrative law is based on the principle of legality, which states that the Government may only act insofar as it is authorized by law to do so. For a detailed account of the application of this principle in a civil-law system, see Francisco Rubio Llorente, *El Principio de Legalidad*, 39 REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL 9 (1993).

256. For a correct application of deviation of power by an international tribunal, see *Granier v. Venezuela* (Radio Caracas Televisión), Merits, Reparations, and Costs, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 293, ¶ 197 (June 22, 2015). There, the Inter-American Court considered that Venezuela had violated the American Convention on Human Rights because it had used legally established powers to regulate the allocation of broadcasting licenses, “with the objective to editorially align a media outlet with the government.” *Id.* (author's translation). For an overview of that case, see Manuel Casas Martínez, *Granier v. Venezuela*, 110 AM. J. INT'L L. 109 (2016).

257. LAUTERPACHT, *supra* note 248, at 286 (2011).

258. *Id.* at 298–300.

in an unreasonable manner so as to defeat the purpose for which the right was created.”<sup>259</sup> Harm is never mentioned.

Nevertheless, Politis’s influence was not all-encompassing. Judge Klaestad, in his dissent in *Nottebohm*, argues that harm is a necessary element of abuse of rights.<sup>260</sup> A similar position is held by Bin Cheng, who writes that “The exercise of a right—or the supposed right, since the right no longer exists—for the sole purpose of causing injury to another is thus prohibited.”<sup>261</sup> Cheng also provides a persuasive argument against the social-function approach to abuse of rights, by declaring that:

Money thrown into the sea would presumably not be fulfilling its destined social function, but it is doubtful whether a State acting in this way would be legally chargeable with an abuse of right. The functional criterion is above all inadequate. It affords no juridical explanation why an unsocial or anti-social exercise of a right is unlawful.<sup>262</sup>

Contemporary authors like Kolb also recognize that harm is a necessary element of abuse of rights. He claims that “doctrine affirms that to be constitutive of an abuse of right, the abusive act must be joined by harm.”<sup>263</sup> Finally, Triantafyllou, analyzing the European Court of Justice’s stance on abuse of

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259. See Sonarajah, *supra* note 188, at 126.

260. *Nottebohm* (Liech. v. Guat.), 2nd Phase Judgment, I.C.J. Rep. 1955 (Apr. 6) (Klaestad, J., dissenting) (claiming that the “Government of Liechtenstein, by granting its nationality to a German national at a time when Germany was at war, has committed an abuse of right or a fraud. For the purpose of the present case, it is unnecessary to express any views as to the possible applicability of the notion of abuse of right in international law. All I need say is that it would, if so applicable, in my view presuppose the infliction of some kind of injury upon the legitimate interests of Guatemala by the naturalization of Mr. Nottebohm. But it is not shown that an injury of any kind was thereby inflicted upon Guatemala, which at that time was a neutral State.”).

261. CHENG, *supra* note 241, at 122.

262. *Id.* at 131 n.28. It is puzzling why such an articulate and important argument would be relegated to a footnote.

263. ROBERT KOLB, *LA BONNE FOI EN DROIT INTERNATIONAL PUBLIC: CONTRIBUTION À L’ÉTUDE DES PRINCIPES GÉNÉRAUX DE DROIT* 469 (1st ed. 2000) (author’s translation) (“La doctrine affirme que pour être constitutif d’un abus de droit, un dommage doit s’ajouter à l’acte abusif.”). A very exhaustive survey of the authors that have dealt with the issue may be found therein.

right, claims that said Court analyzes whether the conduct caused “grave prejudice to the legitimate interest of the other.”<sup>264</sup>

It is therefore safe to argue that in both municipal and international law abuse of rights requires that the conduct deemed abusive cause harm. By failing to incorporate that factor into their analysis, the reasoning of the *Mobil Oil*, *Pac Rim*, and *Levy Gremcitel* tribunals is incorrect according to a variety of international decisions and broad scholarly consensus.

In addition to the doctrinal claim, there is also a relevant normative claim. Using a nationality of convenience to gain access to ISDS may be normatively justified. Critics of arbitration usually praise the advantages of domestic courts.<sup>265</sup> There are many advantages to a well-functioning domestic court system, with independent judges and enough resources to provide justice quickly, but not all states have that luxury. Sadly, in many states municipal courts lack the capacity to enforce the rule of law, the independence to rule against the state, and the integrity to avoid bias towards certain parties. In those cases, acquiring a nationality of convenience with the hope of gaining access to an international forum is a reasonable action. By acquiring a nationality of convenience, individuals are simply, like Pufendorf claimed, securing for themselves “some excellent protection.”<sup>266</sup>

As mentioned above, the acquisition of a nationality of convenience after a dispute has arisen, or when it is clearly foreseeable, is problematic. International law, however, has a tool different from abuse of rights to reject the validity of the nationality in those cases, the principle of continuous nationality, developed in the field of diplomatic protection.<sup>267</sup> The

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264. Dimitris Triantafyllou, *L'interdiction des Abus de Droit en tant que Principe Général du Droit Communautaire*, 5.6 CAHIERS DE DROIT EUROPÉEN 611, 623 (2002). The Mobil Oil Tribunal cites this work as authoritative that the European Court of Justice applies the theory of abuse of rights, at ¶ 175, footnote 116. *Mobil Cerro Negro Holding, Ltd. v. Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶ 204 (June 10, 2010).

265. See Warren, *supra* note 1; Resnik et al., *supra* note 1; Silver-Greenberg & Corkery, *supra* note 1; see also ARMIN VON BOGDANDY & INGO VENZKE, IN WHOSE NAME? A PUBLIC LAW THEORY OF INTERNATIONAL ADJUDICATION (2014).

266. PUFENDORF, *supra* note 21, at 1349.

267. See generally Draft Articles, *supra* note 68.

principle of continuous nationality restricts the ability of states to exercise diplomatic protection, requiring that the person who suffered the injury was their national both at the time of the injury as well as the time at which diplomatic protection is exercised.<sup>268</sup> With the corresponding modifications, this principle allows tribunals to reach the same result, but avoids the pitfalls of the (mis)application of the theory of abuse of rights.

Although there is some contention over the acceptance of nationalities of convenience in ISDS, the few tribunals that have rejected them based their reasoning on the *timing* of their acquisition rather than the convenient nature of the nationality itself or on grounds of abuse of rights. Tribunals can reach the same result by applying the principle of continuous nationality established in the law of diplomatic protection.

### CONCLUSIONS

International law lacks an extensive regulation of nationality. Instead, it opts for bright-line, formal rules. At the same time, international law defers the bulk of the issue back to states. This framework allows each state to regulate nationality in its domestic law in the way it deems fit. Certain limitations apply. International law establishes some negative limits on domestic regulations of nationality in order to avoid abuse and (often unilateral) conferrals of nationality that would generate instability and conflict. Provided that those limits are respected, states are free to regulate as they will.

This flexibility has resulted in divergent regulations of nationality. Some states are generous—promiscuous, even—with their ascriptions of nationality: they grant it to those born in their territory, regardless of their parent's nationality, their race, religion or material connections with the land. Others, however, prefer to be more conservative and reserve the rights and privileges of their nationality to limited numbers. The same applies to legal persons. Some states only require depositing some papers in a government office; while others demand that the legal person set up an office (furniture included) in the country and that board members use said furniture for their meetings. Some states are tolerant of passport polygamy and allow their people to have more than one na-

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268. *Id.* draft art. 5.

tionality; while others are more jealous, requiring those who wish to become naturalized to renounce their former allegiance and to swear fidelity to their new nation. Perhaps out of concern over impinging sovereignty, perhaps out of epistemic humility, international law recognizes that plethora of alternatives as valid. So be it.

There was a brief departure from that tolerant flexibility. The genuine link principle, developed by the ICJ in *Nottebohm*, which has almost been uniformly rejected. Indeed, latter ruling by various international bodies replaced it with the principle of dominant or effective nationality, with the noble purpose of maximizing access to international adjudication. This trend is bolstered by the denationalization of jurisdictional thresholds: the expansion of the personal jurisdiction of international courts and tribunals in a way that optimizes the individual's possibilities to access international justice.

International investment law and, particularly the ICSID Convention, have followed suit. The Convention deliberately avoids providing a substantive definition of nationality. States are free to determine the rules that will regulate nationality. They can do so by remitting the issue to their domestic law, or by including a substantive definition in their BITs. Thus, in some cases, nationalities of convenience are tolerated; they will satisfy the personal jurisdiction requirements of ISDS tribunals. Most ISDS Tribunals have recognized the validity of nationalities of convenience, but have rejected them when they have been acquired after or soon before the cause of action arises. Those Tribunals, however, have erred in the application of the abuse of rights theory by omitting the element of harm. The same results could be reached by applying the continuous nationality principle established in the law of diplomatic protection.

Finally, the main purpose of this Article, more than analyzing the validity of nationalities of convenience from the vantage point of public international law in general, and international investment law in particular, is to draw attention to the limitations of personal jurisdiction of international courts and tribunals. Increased access to international adjudication—particularly in places where domestic courts are malfunctioning—is normatively appealing. Perhaps the best alternative for international economic law is to completely denationalize jurisdictional thresholds, as some regional human rights courts have



done. Alas, concerns over state sovereignty are still strong, and this option seems unlikely. Nationalities of convenience may be a way to allow increased access to international justice, and are therefore worth defending.

