

“Checkbook Citizenship”: Renewed Relevance for the Nottebohm Ruling

Written by Craig R. Myers

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CRAIG R. MYERS, OCT 5 2020

“Nottebohm is a remarkable decision in one respect only: there may be no other judgment of an international tribunal which has had so much purchase on the imagination at the same time as it has so little traction on the ground.” That quote by Peter Spiro captures the conventional wisdom regarding the 1955 ruling by the International Court of Justice in the Nottebohm case. It was based on the principle that citizens who obtain a second citizenship must have a “genuine link” with that state in order to receive diplomatic protection from it. Despite being prominently featured in many International Relations courses and textbooks as a key ruling in international law, it has from Day One been questioned, criticized, ignored, dismissed and even ridiculed with descriptions such as “jurisprudential illusion” (the subtitle of Spiro’s paper). But 65 years later the Nottebohm seems to be gaining some “traction” due to renewed relevance in the debate over “checkbook citizenship”—formally known as Citizenship by Investment Programs—which offer a fast track to a passport in exchange for various levels of investment in that state. A 2019 European Commission report titled “Investor Citizenship and Residence Schemes in the European Union” concludes that easy pathways to residency and citizenship offered by member states to wealthy investors could damage the “sincere cooperation” and good faith between them by inviting security gaps, money laundering, corruption, and tax evasion. Such mounting criticism may be slowing the CIP craze, as Moldova just canceled its program and Bulgaria seeks to salvage its program with amendments. There in the text of the European Commission report appears the Nottebohm ruling, speaking judgment from the past like Caesar’s Ghost.

Nottebohm: The Man With Three Countries

The Nottebohm case dealt with the question of nationality for the purpose of determining whether Liechtenstein could represent defendant Friedrich Nottebohm in a dispute with Guatemala. Nottebohm was a German national who moved to Guatemala in 1905 to establish residency and a business in commerce and plantations. At the start of World War II in 1939, he applied for naturalization as a Liechtenstein citizen under a procedure that required acceptance into a Home Corporation of a Liechtenstein commune, proof of loss of former nationality, and establishment of residency in that country for at least three years. However, those requirements were waived after he provided certain fees, taxes, and documents. Nottebohm took an oath of allegiance and obtained a Liechtenstein passport, then returned to Guatemala in 1940 to continue his business activities. When Guatemala entered World War II against Germany in 1943, authorities passed laws expelling Germans and confiscating their property. Nottebohm was arrested and sent to an internment camp in the U.S. during the war because he was still deemed to be a German citizen. When he was released in 1946, he discovered Guatemala had taken most of his property based on laws regarding “enemy aliens.” In 1951, Liechtenstein filed suit in the ICJ on behalf of Nottebohm against Guatemala. The suit accused Guatemala of violating international law by arresting and expelling him and seizing his property without compensation. The court did not deal with the merits of the case but sided with Guatemala based on its first defense—that Nottebohm’s naturalization as a Liechtenstein citizen was not in accordance with generally recognized principles, but had been fraudulently obtained even though he had no “durable” link to that nation. The ICJ ruling stated:

“These facts clearly establish ... the absence of any bond of attachment between Nottebohm and Liechtenstein and, on the other hand, the existence of a long-standing and close connection between him and Guatemala, a link which

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his naturalization in no way weakened. That naturalization was not based on any real prior connection with Liechtenstein, nor did it in any way alter the manner of life of the person upon whom it was conferred in exceptional circumstances of speed and accommodation...It was lacking in genuineness requisite to an act of such importance...it was granted without regard to the concept of nationality adopted in international relations.”

(Nottebohm Case, 26)

The decision further stated that the Liechtenstein citizenship was granted to allow Nottebohm to “substitute for his status as a national of a belligerent state that of a national of a neutral state, with the sole aim of thus coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life or of assuming the obligations—other than fiscal obligations—and exercising the rights pertaining to the status thus acquired.” (26) The court concluded that “Guatemala is under no obligation to recognize a nationality granted in such circumstances.” (26)

Not a Precedent

While it seemed to be a momentous decision, its impact was momentary. Just five years after the ruling, Josef L. Kunz wrote in an article titled “The Nottebohm Judgment,” published in the *American Journal of International Law*, that it remained “very controversial” and the so-called “genuine link” principle had no precedent in international law or custom. Kunz wrote that the ruling seemed to have a very narrow basis and range that was “very much cut to this particular case.” Even at that time, Kunz pointed out that many states do not demand a “genuine link” as a precondition for granting nationality by naturalization. “Judgements of the International Court of Justice are binding the specific case on the parties concerned, but do not constitute international law. But they may become international law by the practice of states through custom or treaty. On the other hand, the practice of states may act in such a way as to preclude the norm laid down in a judgement from becoming international law.” (Kunz, 567) His analysis was prescient, as the criticism and dismissal of Nottebohm increased exponentially over the years. It has not been successfully used in any major international case, hasn’t achieve the status of international custom or norm, and in the past few decades did nothing to stem to tide of Citizenship by Investment Programs. Joe Myers writes in “Countries Where You Can Buy Citizenship,” that “Economic programmes are allowing foreigners to legitimately purchase citizenship or a residency permit – in return for a substantial investment. The International Monetary Fund has highlighted the rapid growth of this trend, suggesting that in the current geopolitical climate people are looking for ‘political and economic safe havens.’” CIPs have exploded in smaller European and Caribbean nations including Antigua, Cyprus, Dominica, Malta, and St. Kitts, along with larger ones such as Australia, Canada, the UK and U.S. Requirements for CIP participation vary considerably. For example, Australia’s “significant investor” visa is open to those who invest more than AU \$5 million, while those apply for a “premium” visa get on a fast-track to residency within 12 months in exchange for AU \$15 million. Portugal’s golden visa program grants residency to investors in exchange for property or capital investments, coupled with “extremely reduced minimum stay requirements.” Wealthy investors can acquire “passports of convenience” from some Caribbean and the Pacific islands without having to inhabit, or even visit, the issuing nation.

Three EU Examples

Three EU nations with the most controversial CIPs—Bulgaria, Malta, and Cyprus—will be the focus of this paper because of the wider benefits that Union citizenship conveys regarding travel and relocation. In “Citizenship by Investment Programmes: Express Naturalisation for Bulky Wallets,” Elena Prats describes Malta’s program as the most detailed CIP. Starting with a minimum investment of €650,000, the applicant must:

1. Prove residency in Malta throughout 12 months immediately preceding the date of application
2. Have resided in Malta for periods amounting in the aggregate to not less than 4 years during the 6 years immediately precedent the period of 12 months
3. Have good Maltese/English knowledge
4. Be of “good character”
5. Be a suitable citizen of Malta

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However, Prats concludes that even these efforts to establish a link to the Mediterranean island nation might not be enough to meet the Nottebohm standard if it was raised in a legal conflict with another state over checkbook citizenship. “Yet, these additional personal requirements, that are not demanded from other general applicants, only prove the legal clearness of the applicants but do not prove any genuine link with the state (or the EU)...Since the Nottebohm case (*Liechtenstein v. Guatemala*, 1955), on the international plain, the grant of nationality is entitled to recognition by other states only if it represents a genuine connection between the individual and the state granting its nationality. This case has been interpreted by some scholars as the existence of a genuine link requirement between the naturalised person and the state when granting citizenship.” (Prats,371) Yet the virtually undisputed consensus for the past two decades has been that Nottebohm is null and void when it comes to CIPs. For example, in September 2019 immigration attorneys with the Chetcuti Cauchi law firm, which specializes in the Maltese CIP cases, published an article titled “Maltese Citizenship in Light of the Nottebohm Case.” They sought to reassure potential clients that all is well, despite the soon-to-be published European Commission Investor Citizenship Report that would conclude States should “award citizenship in a spirit of sincere cooperation.” At the time of the attorneys’ online editorial, EU Commissioner for Justice, Fundamental Rights and Citizenship Viviane Reding had been quoted as saying that in order to comply with the criterion used under public international law, member states should only award citizenship to those individuals where there is that genuine link. Nonetheless, attorneys Antoine Saliba Haig and Jean-Philippe Chetcuti concluded that under the current international legal regime “physical presence is not a necessary requirement for one to obtain citizenship.” This is evident if one looks at the thousands of Argentinian nationals obtaining Italian citizenship by descent without setting foot in Italy or else if one considers the law passed by Hungary, whereby over half a million individuals whose ancestors lived in the Austro-Hungarian Empire obtained a Hungarian (EU) Passport. (Haig et al)

Moldova ends, Bulgaria amends CIPs

But is the tide turning? The Chetcuti Cauchi law firm’s website also had until recently been promoting Europe’s newest CIP in the tiny former Soviet Union state of Moldova, one of the poorest in Europe, offering visa-free travel to 122 nations including those in the EU Schengen Zone. But in June 2020, the Moldovan Parliament repealed the program—which had been under moratorium—based on pressure from the EU and non-governmental organizations such as Transparency International Moldova. The EU had threatened to withdraw EU macro-financial aid valued at 100 million euros if Moldova did not end the CIP program. On its website, Transparency International said the CIP allows “resources of fraudulent origin, undermines efforts to combat major corruption and investigate bank frauds, and affects the national integrity.” The Moldovan CIP law had been enacted in 2017 even though Moldova is not even a full member of the EU. It enjoys some EU benefits through the European Neighbourhood Policy by virtue of bordering with member state Romania. Meanwhile, faced with mounting scrutiny and criticism, Bulgaria announced it was canceling its program in 2019, but instead amended it in an effort to address concerns. Those amendments regarding security checks include:

- All applicants must present certificates of no criminal record issued not only by their home country but also their state of permanent residence.
- A Council for Citizenship opinion on nationality applications, following a written statement by the Ministry of the Interior and the State Agency for National Security.
- This Agency carries out checks on all applicants seeking Bulgarian nationality (not only those applying through CIP) with a focus on counter-terrorism, counter-intelligence, and organized crime and corruption.

The Micheletti case

Whether the Moldova CIP repeal and the Bulgarian amendments represent the high-water mark of such programs remains to be seen. They have been multiplying almost unhindered over the past 20 years in an international law regime that gives states wide latitude in setting citizenship requirements and expects all other states to honor them. This environment came about as Nottebohm struggled to gain acceptance from international law scholars, and a series of other cases further undermined it. Key among them was the Micheletti decision by the Court of Justice of

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the European Union (CJEU). It began in 1990, before the 1993 Treaty of Maastricht introduced the concept of the EU citizenship. Mario Vicente Micheletti was born and raised in Argentina and possessed both Italian and Argentinian citizenship. He emigrated to Spain and wanted to settle there and work as a dentist, invoking his “freedom of establishment.” Spanish authorities, however, refused to recognize his Italian nationality based on the argument that in cases of dual nationality, when neither nationality is Spanish, the nationality of the country of habitual residence before arrival in Spain is given precedence. Therefore, Spain treated Micheletti as an Argentinian, not as an Italian national, and denied him the right of establishment on the basis of the Treaty. By the time the case reached the CJEU, it found Spain to be in breach of EU law. Because Italy granted Micheletti its nationality, Spain had to unconditionally recognize Micheletti as Italian. It helped establish the principle that,

“under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality. It can be assumed that Mr. Micheletti did not have a genuine link with Italy. But, the CJEU did not apply a genuine link test and the Nottebohm case was not mentioned. In fact, no important decisions from international tribunals have adopted its rationale. In a jurisprudential sense, Nottebohm was dead on arrival.”

(Weingerl and Tratnik, 107)

To such critics, taking the “genuine link” test too seriously would amount to discrimination based on nationality, interference with free movement rights, and violation of the sovereignty of states to establish their own standards for citizenship. A subtext of the Nottebohm criticism, however, is found in its frequent description as a romanticized view that equates citizenship with nationality. And nationality is the natural enemy of globalization. Wingerl and Tratnik argue that the International Law Commission (ILC) has expressly rejected the genuine link standard as the basis for diplomatic protection because that would exclude millions “as in today’s world of economic globalization and migration there are millions of persons who have moved away from their State of nationality and made their lives in States whose nationality they never acquire or have acquired nationality by birth or descent from States with which they have a tenuous connection.’ (106) They argue the CJEU decision in Micheletti imposes on EU member States an “unconditional obligation” to recognize any grant of nationality by another EU Member State. “(W)e may conclude that the CJEU not only confirmed, but even emphasised the principle of national autonomy. The grounds for the acquisition of the nationality of Member States are a matter of their national autonomy. Member States grant their nationality based upon ‘links’ that they consider relevant. No ‘mystical’ genuine link is needed.” (Weingerl and Tratnik, 114) Spiro joins in on that argument, mocking as “jurisprudential illusion” the principle of genuine link. “As individuals become more highly mobile and are enabled to maintain multiple citizenships, the prospect of sorting supposedly authentic citizenship from instrumental citizenship is a fool’s errand. A chorus of academic commentary has declared ‘genuine link’ a dead letter.” (Spiro, 2)

Terms like mystical, romanticized, illusory stem from the historical context of Nottebohm in World War II. To critics it was not a case about citizenship in general, but about “measures during wartime, i.e. in very specific circumstances, and it was decided more than half a century ago, in times when migrations were not as common as they are today, especially in the EU context.” (Weingerl and Tratnik, 105) In the post-WWII world, it is not uncommon for a person to have a close connection to more than one State, so the concept of genuine link used in the Nottebohm decision was “overblown and limited” (Spiro, 14). “In our opinion, the decision in the Nottebohm case is obsolete, or as Advocate General Tesauro so eloquently put it in the Micheletti case, the decision should be relegated to the ‘romantic period of international law.’” (Weingerl and Tratnik, 105-106)

Rising From the ‘Dead Letter’?

But is the Nottebohm case truly “dead letter” when it comes to checkbook citizenship? Nottebohm delved into the question of citizenship in the context of diplomatic protection, but the underlying dilemma was whether he could bypass Guatemala’s security concerns by becoming a citizen of Liechtenstein rather than Germany. (Ironically, Nottebohm was no supporter of Germany in WWII and in fact sought to avoid returning to his home country due to the Nazis.) The saying “the past is never dead. It’s not even past” seems to apply here. In the post-911 world, security issues return to the forefront, especially in the EU, where the right passport can open doors of opportunity for

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mischief and escape from legal consequences. The 2019 report by the European Commission, the EU’s independent executive arm that draws up proposals for new European legislation, states as its main premise: “The Nottebohm case of the International Court of Justice establishes that, for nationality acquired through naturalisation to be recognised in the international arena, it should be granted on the basis of a genuine connection between the individual and the State in question.” (European Commission, 5) The report warns that CIPs could result in “possible security gaps resulting from granting citizenship without prior residence, as well as risks of money laundering, corruption and tax evasion associated with citizenship or residence by investment (and) ... challenges with respect to the governance and transparency of such schemes.” (European Commission, 2) It explains that a “bond of nationality” is traditionally based on:

- a genuine connection with the people of the country (by descent, origin or marriage)
- a genuine connection with the country, established either by birth in the country or by effective prior residence in the country for a meaningful duration.
- or other elements such as knowledge of a national language and/or of the culture of the country, or links with the community.

It concludes that efforts to manufacture such ties through CIP program requirements “confirms that Member States generally regard the establishment of a genuine link as a necessary condition for accepting third-country nationals into their societies as citizens.” (5) Owen Parker, writes in “Commercializing Citizenship in Crisis EU: The Case of Immigrant Investor Programmes,” that CIPs are a cancer eating away at the very definition of citizenship: “(T)hey are a particularly stark manifestation of the ‘commercialisation of sovereignty’... the danger of increasingly frequent links between wealth and privileged access to political membership threatens not only the implementation of the ideal [of citizenship], but the ideal itself.”

CIPs as Un-Democratic

Wingerl and Tratnik remain undeterred by efforts to resurrect Nottebohm as a check on checkbook citizenship. They argue that the ICJ ruling in a round-about way acknowledged the right of States to set their citizenship rules: “As to attribution, the ICJ expressly recognised the right of Liechtenstein to naturalise Mr. Nottebohm or any other person by its own nationality rules. We conclude from the foregoing that international law does not affect the power of Member States of the EU to adopt Citizenship by Investment Programs and at the same time requires other Member States to recognise the nationality acquired through such programs.” (123) In response, Samantha Besson writes in “Investment Citizenship and Democracy in a Global Age: Towards a Democratic Interpretation of International Nationality Law,” that CIP programs are simply un-democratic. “One sometimes reads that arguments against IC (Investor Citizenship), including arguments relying on the ‘genuine connection’ requirement in (international law), rely on a ‘romantic,’ ‘nostalgic’ and even ‘illusionary’ understanding of the political community and the State. Law is not about what people do, however, but about what they should be doing. Citizenship may well be have become a commodity (like labour, money and land before it), and States may have progressively turned into hotels, but it does not mean that they should, be it from the perspective of democratic theory or from that of international law.” (Besson, 18) Besson says CIP programs have created an urgent need to “counterbalance the individuation of citizenship, because “what is at stake is nothing less than the future of political equality domestically, but also, by extension, of the democratic legitimacy of international law itself.” (19)

Unequal “Stakes” in States

Along with security issues, inequality is a primary criticism of CIPS. The U.S. version of CIP is the EB-5 program, commonly known as the “golden visa,” begun in 1990 and renewed by President Trump in 2017. It establishes a path to securing lawful permanent residence status based on investment of \$1 million or a “discounted” rate of \$500,000 for funds designated for rural areas or areas with high unemployment. Despite that provision designed to help the poor, such programs draw accusations of unequal treatment in a world where refugees fleeing war-torn and poverty-stricken regions or children born to illegal aliens in the U.S. become state-less:

“The contrast between the DACA “Dreamers” and the EB-5 “Parachuters” reveals the sharp edge, and deep

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injustices, of current policies. The former have already become part of the fabric of the United States—including its society and economy —through their ongoing, peaceful, and productive presence, yet the sword of deportation continues to hang over their heads. On the other hand, the latter benefit from expedited and simplified pathways to obtain full-fledged legal membership, even if they fail to establish any tangible connections to their new home country.”

(Shachar)

For Besson, while citizenship cannot be restricted by issues of race, religion, etc., neither should it be granted primarily on the basis of a financial transaction. Instead, it must constitute some level of shared “stakes” in the state. Therefore, while acknowledging the Nottebohm decision was limited in its focus, she argues it has merit because the “genuine connection” requirement is best interpreted in contemporary circumstances as a test for the sharing of such equal and interdependent stakes. The Nottebohm test requires that nationality reflect and be based on a “social fact of attachment that makes nationality real and effective.” (Besson, 10) Without the Nottebohm principle, the financial stake that CIP participants earn cannot be considered equally shared. The problem with such programs is “not the arbitrariness of wealth itself as a criterion, but its inability to track the sharing of equal and interdependent stakes and hence the connection between a future citizen and others.” (12) Being born in or residing in the same place, or having ancestors or a spouse who does, makes it more likely that someone will share those stakes and claim public equality and turn democratic citizenship, Besson argues. “Shorthands” like residence or marriage track a genuine connection between people characterized by sharing equal and interdependent stakes in a way that wealth or financial investment never could. (12-13)

“It is only when people’s shared interests spread over a sufficiently broad range of issues and in a sufficiently equal way, indeed, that their political equality matters and that democracy can be justified. ... A mere monetary connection of the kind required by IC (Investment Citizenship), by contrast, does not guarantee that the concerned people share stakes with other members of the relevant political community that are sufficiently equal and interdependent for that community to remain a State and a democratically legitimate one in particular.”

(Besson, 4)

“Effective Residence” Not Required

Even the requirement of residency in these CIPs is not what it appears. The European Commission report goes into more detail about so-called residency requirements of the three CIP programs. It concludes that in these Member States, applicants are issued with a residence permit at the beginning of the procedure to apply for citizenship. “Merely holding a residence permit for the required timeframe is sufficient to qualify for the scheme. However, effective residence, meaning physical presence for a regular and extended period in the territory of the Member State concerned, while holding the permit, is not required.” (European Commission, 4) More specifically:

- In Malta, an “e-Residence” card must be held for at least 12 months preceding the issuance of the certificate of naturalization.
- In Cyprus, the applicant must have a residence permit for at least 6 months before the naturalization certificate can be issued.
- In Bulgaria, the applicant must hold a permanent residence permit for five years (ordinary scheme) or one year (fast-track scheme) in order to be able to apply for Bulgarian citizenship.

So at the time of the report’s publication, these EU programs didn’t even require the person to live there in order to gain citizenship. “This means that applicants can acquire citizenship of Bulgaria, Cyprus or Malta – and hence Union citizenship – without ever having resided in practice in the Member State. (4) And a person who obtains an EU State’s passport gains the right to not only travel to, but relocate and reside in, all other EU Member States. So in effect one EU member state’s requirements for citizenship become those of the entire Union. Even that isn’t enough to move Spiro, who acknowledges that while the CIP trend has revived consideration of Nottebohm, it is still irrelevant. “Similarly, some political theorists have latched onto the ‘genuine link’ formulation in an effort to shore up

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the state as a location for the redistribution of resources and the protection of rights. These liberal nationalists ... have centred ‘genuine links’ as part of their programme to limit the citizenry to those who have a common interest in collective governance and as a counterpoint to the rise of what Shachar calls ‘nominal heirs’, those who are allocated citizenship in countries in which they have never lived.” (Spiro, 22)

Conclusion

For 65 years, the Nottebohm ruling has been marginalized as “mystical” and minimized as too narrow in scope to create an international norm. But in recent years it has been brought out of retirement by critics searching for legal ammunition to use in the battle against CIPs. Besson points to the resiliency of the “genuine connection” test as a “shorthand” for the connection between citizens and the criteria used for “acquisition of nationality in domestic law.” For that reason, she believes Nottebohm should remain a “relevant part of contemporary discussions of (international law).” (11) Whether it will be successfully argued in a case against a CIP remains to be seen, but it has been with effective political impact by the EU. To Shachar, CIPs detach citizenship from any meaningful kind of connection or nexus:

“The golden visa route exacerbates inequity by vindicating the exclusivity of prized citizenship rewards. With mounting revelations of a global elite bent on tax offshoring and evading obligations to compatriots, citizenship ought to remain a realm of political relations grounded in real, everyday civic ties. Selling it to the highest bidder will eviscerate it from within. Allowing wealth to become a golden passport to citizenship will leave us with a world in which, as Oscar Wilde once put it, too many of us “know the price of everything and the value of nothing.”

(Shachar)

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