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RECENT APPLICATIONS OF DOMESTIC NATIONALITY LAWS BY INTERNATIONAL TRIBUNALS

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PROPERTY restitution or indemnification has constituted one of the more complexing legal problems emerging from World War II,[1] entailing the determination of the nationality of persons or assets involved in litigation, whether they be nationals who had disposed of their holdings under duress by the Axis powers, or even German citizens who had switched their allegiance to other nations, perhaps in anticipation of the inevitable end. Judicial pronouncements by international tribunals on this problem merit particular attention for their application of domestic laws to the issue of nationality. This is especially true with respect to two decisions which represent, albeit for different reasons, novel and unprecedented approaches to determining the relevancy of domestic nationality laws before international tribunals. An analysis of the *Nottebohm*[2] decision by the International Court of Justice and *United States ex rel. Flegenheimer v. Italy*,[3] decided by an Italian-United States Conciliation Commission, serves to illustrate the confusion that results in international law when new, and even old, legal questions are treated in a unique and perfunctory manner.

While the principle of stare decisis has not been fully recognized on the international level,[4] an effort has been made, nonetheless, "at least in the interest of regularity, to preserve as far as possible uniformity of decision."[5] An examination of *Nottebohm* and *Flegenheimer* underscores the necessity for adhering as much as possible to legal tradition and precedent in international law, especially where domestic nationality laws are applied. The unusual significance of these decisions lies not so much in their purported contributions to the development of international law as in their novel and unusual treatment of domestic law, which constituted the principal issue in both cases.

I. NOTTEBOHM CASE (LIECHTENSTEIN V. GUATEMALA)

Friedrich Nottebohm, born in Germany in 1881, transferred his residence and business center to Guatemala in 1905, remaining there

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1. See generally Symposium, War Claims, 16 Law & Contemp. Prob. 345-553 (1951).

2. Nottebohm Case (second phase), [1955] I.C.J. Rep. 4.

3. United States ex rel. Flegenheimer v. Italy, Italian-United States Conciliation Commission, Sept. 20, 1958 [hereinafter cited as Flegenheimer], noted in 53 Am. J. Int'l L. 944-58 (1959). See also 42 Rivista di diritto internazionale 94-120 (1959).

4. See, e.g., Ralston, The Law and Procedure of International Tribunals 123-25 (rev. ed. 1926).

5. Id. at 123. See also Moore, History and Digest of the International Arbitrations to Which the United States Has Been a Party 2733 (1898).

until 1943 without ever applying for Guatemalan citizenship. Between 1930 and 1940, he made several trips to Germany and Liechtenstein for family and business reasons. In October 1939, shortly after the German invasion of Poland, he applied for naturalization in Liechtenstein, the laws of which required three years residence in the Principality, as well as proof that the applicant would lose his former nationality as a result of the requested Liechtenstein naturalization.[6] Having been granted citizenship, Nottebohm took the oath of allegiance to Liechtenstein on October 20, 1939, thereby forfeiting his German nationality.[7] Traveling on a Liechtenstein passport, he returned to Guatemala early in 1940. The Minister of External Affairs of Guatemala changed the Nottebohm entry in its registry of aliens from "German" to "Liechtenstein" national.[8]

Arrested in Guatemala by local authorities on October 19, 1943, Nottebohm was subsequently deported to the United States where he was interned for over two years in North Dakota as an enemy alien.[9] During his internment, legal proceedings were instituted against Nottebohm as an enemy alien by the Guatemalan Government, seeking to expropriate his valuable Guatemalan property without compensation. Under legislation enacted in 1949,[10] and applied retroactively to 1938 when he still possessed German citizenship, Nottebohm was classified as an enemy alien under municipal law, and his extensive properties, valued at several million dollars, were expropriated without compensation. Released from internment in North Dakota, Nottebohm was denied readmittance into Guatemala and established a Liechtenstein residence in 1946. When the *Nottebohm* decision came down in 1955, Nottebohm had been a resident of Liechtenstein for about nine years.

Liechtenstein petitioned the International Court of Justice to declare that the actions of Guatemala with respect to Nottebohm and his property violated international law.[11] In reply, Guatemala, among other defenses, declared that the Liechtenstein claim was inadmissible since

6. Law of January 4, 1934, [1934] Landes-Gesetzblatt (Liechtenstein). See I.C.J. Rep. 13-14.

7. German citizenship was lost by virtue of the Law of July 22, 1913, [1913] Reichsgesetzblatt pt. 1, at 583 (Ger.). See also Flournoy, Nationality Laws 310 (1929).

8. I.C.J. Rep. 17.

9. Guatemala justified this arrest and deportation as in accordance with Resolution XVII (on subversive activities) passed at the 1942 Meeting of the Ministers of Foreign Affairs of the American Republics. Counter-Memorial of Guatemala 23. See also 36 Am. J. Int'l Law Supp. 78 (1942).

10. Law on Liquidation of Matters Arising On and Of the War, Decree 630 of July 19, 1949, [1949] Boletin Numero 15, Congreso de La Republica (1950) (Guatemala). The law defined who were enemy aliens and established procedures for the expropriation of their property.

11. I.C.J. Rep. 6-7.

the Principality of Liechtenstein has failed to prove that M. Nottebohm, for whose protection it is acting, properly acquired Liechtenstein nationality in accordance with the law of the Principality;

because, even if such proof were provided, the legal provisions which would have been applied cannot be regarded as in conformity with international law;

and because M. Nottebohm appears in any event not to have lost, or not validly to have lost, his German nationality . . . .[12]

In rejecting the Liechtenstein claim, the Court did not delve into the domestic validity of Nottebohm's Liechtenstein naturalization,[13] but declared that his naturalization could not be accorded international recognition.[14] The Court applied the rule of "effective nationality," the so-called "link theory," noting that there was no sufficient "bond of attachment" between Nottebohm and Liechtenstein, since he had not been "wedded to its traditions, its interest, its way of life" or assumed the obligations of Liechtenstein citizenship.[15] Hence, Liechtenstein was precluded from extending its diplomatic protection to Nottebohm vis-à-vis Guatemala. In invoking this "link theory," however, the Court cited as precedents cases involving "dual nationality," where courts of third States or international arbitrators resolved a conflict between two nationalities by preferring the "real and effective nationality" determined according to subjective international criteria.[16]

While admitting that international law permits each State to formulate rules governing the grant of its *own* nationality, the Court maintained, however, that a State could not demand recognition of these rules by other States "unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States."[17] Consequently, the Court deemed it necessary to ascertain whether the factual connection between Nottebohm and Liechtenstein in the period preceding, contemporaneous with, and subsequent to, his naturalization was "sufficiently close, so preponderant in relation to any connection which may have existed between him and any other State,"[18] that it was possible to regard Nottebohm's Liechtenstein nationality as "real and effective, as the exact juridical expression of a social fact of a connection which

12. Id. at 9.
13. Id. at 20-21.
14. Id. at 26.
15. Ibid.
16. Id. at 21-22.
17. Id. at 23. "National laws reflect this tendency when, inter alia, they make naturalization dependent on conditions indicating the existence of a link. . . . The Liechtenstein Law of January 4th, 1934, is a good example." Id. at 22. (Italics omitted.)
18. Id. at 24.

existed previously or came into existence thereafter."[19] In finding this factual connection, this "bond of attachment" or *link* between Nottebohm and Liechtenstein absent, the international tribunal concluded:

> Naturalization was asked for not so much for the purpose of obtaining a legal recognition of Nottebohm's membership in fact in the population of Liechtenstein, as it was to enable him to substitute for his status as a national of a belligerent State that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life or of assuming the obligations—other than fiscal obligations —and exercising the rights pertaining to the status thus acquired.[20]

On this basis, eleven judges rejected the claim submitted by Liechtenstein, with three jurists, Klaestad, Read, and Guggenheim (judge *ad hoc* appointed by Liechtenstein) writing dissenting opinions.

II. Review of the Nottebohm Decision

A. *Lack of Precedent*

The *Nottebohm* majority in effect abandoned the well-entrenched principle of international law that the "effectiveness" of a claimant's nationality on the international level is relevant *only* where such claimant has *more than one* nationality. The International Court failed to discuss why the relevancy of "effective" nationality on the international level could, and should, presuppose the existence of two (or more) nationalities and, thus, present the possibility of *conflict* and *choice.*

This is particularly disturbing since Article 38[21] of the Statute of the International Court of Justice expressly provides that the Court must apply international law *as it is*—positive law—and *not* "as it might be, if a Codification Conference succeeded in establishing new rules limiting the conferring of nationality by sovereign States."[22] It is necessary, as Judge Read asserted in his dissenting opinion, "to consider whether there are any rules of *positive international law* requiring a substantial rela-

19. Ibid.

20. Id. at 26. "Liechtenstein consequently is not entitled to extend its protection to Nottebohm vis-à-vis Guatemala and its claim must, for this reason, be held to be inadmissible." Ibid.

21. Article 38 provides:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
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> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
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> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
>
> 2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto. (Italics omitted.)

22. I.C.J. Rep. 39 (Read, J., dissenting).

tionship between the individual and the State, *in order that a valid grant of nationality may give rise to a right of diplomatic protection.*"[23] One looks in vain for as much as a hint of Article 38 in the majority opinion to justify the Court's bold step. Instead a perfunctory effort is made to indicate a "trend" towards expanding the "effectiveness test."[24] It is noteworthy that the views of the *Nottebohm* majority had not even been argued by victorious Guatemala! Nowhere in their pleadings had Guatemala or Liechtenstein argued that the "link theory" be applied where only *one* nationality was at issue. Judge Read therefore questioned "whether the firm view of the law on which the two Parties are in complete agreement should be rejected."[25]

The reliance of the *Nottebohm* majority on Article 1 of the 1930 Hague Convention on the Conflict of Nationality Laws is particularly astonishing, since, as Judge Guggenheim remarked, "this rule . . . contains no criterion requiring an 'effective' bond in the case of nationality."[26] He emphasized that "such a dissociation of nationality from diplomatic protection is not supported by any customary rule nor by any general principle of law . . . within the meaning of Article 38 . . . ."[27]

23. Ibid. (Emphasis added.)

24. Id. at 21-23. See also note 17 supra. The criteria on which the Court relies are far from convincing. For example, reference is made to the practice of certain States to decline to extend their protection to a naturalized person who has "by his prolonged absence, severed his links with what is no longer for him anything but his nominal country. . . ." Id. at 22. This attitude supposedly reflects the State's own view that nationality "in order to be capable of being invoked against another State" must correspond with the factual situation. Ibid. This, however, is a poor standard, as it is elementary that the relationship between the individual and the State, dealing with the former's right, if any, to demand diplomatic protection from his own State, is governed by rules basically different from those affecting relations between States, since it concerns the right of that State to assert the diplomatic protection of its citizen on the international level. For an excellent analysis of this basic distinction, see Doehring, Die Pflicht des Staates zur Gewaehrung diplomatischen Schutzes (1959).

25. I.C.J. Rep. 40.

26. Id. at 56 (dissent). Makarov states that the effectiveness test has been developed where a judge or administrative agency, in a case involving a conflict between two or more nationalities, was called upon to give preference to the "relatively stronger" attachment. Makarov, Das Urteil des Internationales Gerrchtshofes in Fall Nottebohm 16 Zeitschrift für ausländisches, öffentliches Recht und Völkerrecht 407 (1956). He asserts that the "effectiveness" concept was never intended to determine an absolute minimum of attachments to a State. Id. at 415-16. Makarov correctly observes that Article 5 of the Hague Convention of 1930, on which the Nottebohm Court erroneously relied, (I.C.J. Rep. 23), also refers to this problem of "relative" strength only, presupposing the existence of two or more nationalities. Id. at 415-16.

27. Id. at 60. It is interesting that Judges Guggenheim, Read, and Klaestad, while disagreeing on several points, independently arrived at the conclusion that the majority's violation of Article 38 was one of the compelling reasons for their dissents. Id. at 30 (Klaestad), 39 (Read), 60 (Guggenheim). While it is universally agreed that the "effectiveness" test

The *Nottebohm* decision has evoked widespread comment.[28] Endeavors have been made to restrict the new doctrine to the issue therein presented.[29] This evades the problem. If the novel thesis is good law, there is no reason to confine its scope to the accidental circumstances responsible for its birth. If it is bad law, it should be rejected, rather than accepted on narrow grounds.

B. *Relevancy of the "Blood Link"*

Nottebohm had become a Liechtenstein citizen by naturalization. The decision is obscure on whether the *Nottebohm* majority desired to confine its thesis of "effective nationality" to cases involving naturalization. Judge Guggenheim assumed that the new doctrine would be confined to cases of naturalization, and thus contrasted situations of a "mere blood link."[30] However, J. Mervyn Jones[31] maintains that the

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enunciated in Nottebohm is applicable only in cases of dual nationality, it has been suggested that this test be further circumscribed by requiring that the two nationalities involved be those of the litigating parties. See Canevaro (Italy v. Peru), in Scott, Hague Court Reports 284 (Perm. Ct. Arb. 1912); Barthez de Montfort v. État Allemand, 6 Rec. des Decis. des trib. arb. mixtes 806 (1926). See also 3 Hackworth, Digest of International Law 167 (1942). The Nottebohm opinion, without touching upon this aspect, of necessity abandons this principle, if only impliedly.

28. See, e.g., Ko Swan Sik, De Meervoudige Nationaliteit 10-11, 16 (1957); van Panhuys, The Role of Nationality in International Law 95-103 (1959); von Dieckhoff, Fehlerhaft erworbene Staatsangehoerigkeit im Voelkerrecht 13-30 (1956); Bastid, L'affaire Nottebohm devant la Cour Internationale de Justice, 45 Revue Critique de Droit International Privé 607 (1956); Glazer, "Affaire Nottebohm" (Liechtenstein v. Guatemala)—A Critique, 44 Geo. L.J. 313-25 (1956); Grawitz, Cour Internationale de Justice, in Annuaire Français de Droit International 262-77 (1955); Jones, The Nottebohm Case, 5 Int'l & Comp. L.Q. 230 (1956); Loewenfeld, Der Fall Nottebohm, 5 Archiv des Voelkerrechtes 387 (1956); Makarov, op. cit. supra note 26, at 407-26; Seidl-Hohenveldern, Der Fall Nottebohm, 1 Recht der internationalen Wirtschaft 147 (1955); Verzijl, 3 Nederlands Tijdschrift voor Internationaal Recht 33 (1955).

29. "It has no binding force beyond the issue which was submitted to the judges." Bastid, supra note 28, at 630. (Translation supplied.)

30. See I.C.J. Rep. 56, where Judge Guggenheim stated:

International law does not . . . in any way prohibit a State from claiming as its nationals, at the moment of their birth, the descendants of its nationals who have been resident abroad for centuries and whose only link with the State which grants its nationality is to be found in descent, without the requirement of any other element connecting them with that State, such as religion, language, social conceptions, traditions, manners, way of life. . . . It is difficult to see how it can be maintained that the conditions necessary to render naturalization valid and effective on the international level have only been complied with if at the time of application for naturalization there existed one of those subjective bonds of attachment which have just been referred to.

31. As Jones, supra note 28, at 239-40, comments:

Is the requirement of a factual basis for protection confined to cases of naturalized persons, and if so on what basis (as M. Guggenheim inquires in his dissenting opinion) can a stricter rule be applied to naturalization than to nationality acquired at birth? It does not appear from the judgment that the Court intends any such distinction, but if this is so, what becomes, for example, of the hundreds of thousands of British subjects in foreign

Court did intend to include cases of nationality acquired *jure sanguinis* and utilizes this extensive scope of the *Nottebohm* thesis as a starting point for an effective attack of the decision *per argumentum ad absurdum*. To apply the *Nottebohm* doctrine where merely a "blood link" existed between a national and his country would inequitably deprive hundreds of thousands of British, French, Swiss, Chinese, etc., "overseas" citizens of their "home" government's diplomatic protection on the international level.[32] If the *Nottebohm* doctrine does apply to cases of nationality by birth, or *jus sanguinis*, the proposed "irrelevancy" of the "blood link" would itself be sufficient grounds for its rejection.

C. *Continuity Rule*

Although the rule that a claimant should be a national of the plaintiff State from the time of the damage until the time the claim is asserted or decided is steadily losing ground, it still is entrenched in international law.[33] Thus, it would seem proper to test the *Nottebohm* thesis against this criterion. The *sovereign* decision of a *sovereign* State to recognize an individual as its citizen and to accord him diplomatic protection on the international level should be questioned and denied by an international tribunal only in cases of fraud, or abuse of right (*abûs de droit*).[34] There is no need for an "effectiveness test" within the context of the "continuity rule." Where an international claim presented by a State on behalf of an individual involves *neither abûs de droit nor fraud nor fabrication*, an international tribunal should not reject the claim merely because at the time the claimant suffered his damage, his nationality status was not yet "effective."

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countries who have never seen their native land and who, from generation to generation, have acquired British nationality by descent? The sole factual connection of such persons and of the nationals of other countries acquiring nationality in virtue of the same title, with the State whose nationality they possess is (if any) a blood tie, frequently remote, and the whole center of their associations and interests is usually in the land of their birth. Is it to be said that in these cases, of which there must be a very large number, where such individuals possess no other nationality, that the sole nationality which they do possess is not effective to ensure protection before an international tribunal? If the consequences of the principles espoused in the Court's judgment are as far-reaching as this the function of nationality in international law may well be rendered nugatory for considerable numbers of human beings.

32. See I.C.J. Rep. 44, where Judge Guggenheim declared:

Most States regard non-resident citizens as a part of the body politic. In the case of many countries such as China, France, the United Kingdom and the Netherlands, the non-resident citizens form an important part of the body politic and are numbered in their hundreds of thousands or millions. Many of these non-resident citizens have never been within the confines of the home State. I can see no reason why the pattern of the body politic of Liechtenstein should or must be different from that of other States.

33. For an analysis of this principle, see van Panhuys, op. cit. supra note 28, at 86-95.

34. The Nottebohm pleadings, in toto, evidence the strict adherence of both Guatemala and Liechtenstein to this principle. I.C.J. Rep. 40 (dissent). See also Scelle, Cours de Droit international public 84 (1948).

Even after the damage has been inflicted, an individual might be recognized by a State as a citizen at birth solely for the purpose of "sharing the spoils" of a successful international litigation. In such situations established principles of international law (relating to fraud and *abûs de droit*) should be sufficient to deny recovery. There would be no need for an "effectiveness test" within the context of the "continuity rule." Consequently, any combination of the "continuity rule" and the *Nottebohm* doctrine must be rejected.

D. *Inconsistency*

The International Court of Justice predicated its rejection of Nottebohm's claim on the *absence* of any "bonds of attachment" to Liechtenstein. Yet, these bonds were in fact present since 1946 and at all times during the *Nottebohm* proceedings before the Court. It would seem, therefore, that the majority believed these "bonds of attachment" must be established *at the time when naturalization is conferred upon the claimant,* and that any defect cannot be cured by subsequent events. The majority opinion, however, makes no such contention. In ascertaining whether a sufficiently close "factual connection" (*rattachement*) existed in the period "preceding, contemporaneous with and following" Nottebohm's naturalization, so as to render his nationality "real and effective, as the exact juridical expression of a social fact,"[35] the Court apparently considered Nottebohm's actions *following* his naturalization as also relevant. This, at least, is what the Court says. Logically, the three dissenting opinions[36] argued that the *Nottebohm* majority overlooked relevant facts, namely the undisputed and uninterrupted "close factual connection" between Nottebohm and Liechtenstein since 1946. This accusation would be unjustified if the majority was not referring to *any* subsequent period, but to that one *immediately following* Nottebohm's naturalization. Yet, on this vital point one can only speculate, for Nottebohm was undisputedly "linked" closely to Liechtenstein at all times since 1946, particularly when his damages were suffered, the action was brought, and the International Court's decision rendered.

35. I.C.J. Rep. 24.

36. Judge Klaestad observed that at the time Guatemala expropriated his property, Nottebohm "was a permanent resident in Liechtenstein," and that there existed a "link" between him and that country. I.C.J. Rep. 31. Judge Read pointed out that when Nottebohm was released in 1946 from his North Dakota internment, he returned and was admitted to Liechtenstein. "It was an unequivocal assertion by him through his conduct of the fact of his Liechtenstein nationality, and an unequivocal recognition of that fact by Liechtenstein." Id. at 45. Judge Guggenheim deemed it significant that the expropriation of Nottebohm's property was suffered "at a time subsequent to [his] . . . final establishment . . . in Liechtenstein." Id. at 61-62.

The dissenters' awareness of the "novelty" of the majority's theory is vividly demonstrated by Judge Read. Prior to showing that Nottebohm's behavior and actions met the requirements of a "subsequent link," he first declared that "there is no rule of international law which would justify me in taking into account subsequent conduct as relevant to the validity and opposability of naturalization."[37] There appears, as Judge Read indicates, to have been utter confusion in the minds of the majority. Either they considered the "subsequent link" relevant, which means they should have granted redress to Liechtenstein against Guatemala on the basis of the undisputed facts, or they considered the "subsequent link" irrelevant, in which event, they should have refrained from stating the exact opposite. If the dissent were correct in interpreting the majority's position, then *Nottebohm* is inherently inconsistent and merits rejection, if only for this reason.

E. *Conflict With the Trend Towards Elimination of Statelessness*

Basic international policy rightly seeks to eliminate the existence of stateless persons deprived of diplomatic protection. In contrast to the *Nottebohm* majority, Judge Guggenheim expressed keen understanding of the far-reaching consequences of the denial of a State's right to extend its diplomatic protection on the international level without compelling reasons. He contended that such a policy violates principles embodied in Article 15 of the Universal Declaration of Human Rights of 1948.[38] This is perhaps the greatest danger of *Nottebohm* on the international level. Makarov emphasizes that this aspect of the *Nottebohm* doctrine "raises insurmountable doubts," since the majority opinion not only constitutes an absolute *novum,* but openly conflicts with the trend of the last decades.[39] Except in the already mentioned cases of dual nationals, the right of a State to undertake the diplomatic protection of its citizens on the international level had never been doubted before.[40]

37. I.C.J. Rep. 44.

38. See I.C.J. Rep. 63-64, where Judge Guggenheim declared:

If the right of protection is abolished, it becomes impossible to consider the merits of certain claims alleging a violation of the rules of international law. If no other State is in a position to exercice [sic] diplomatic protection, as in the present case, claims put forward on behalf of an individual, whose nationality is disputed or held to be inoperative on the international level and who enjoys no other nationality, would have to be abandoned. The protection of the individual which is so precarious under existing international law would be weakened even further and I consider that this would be contrary to the basic principle embodied in Article 15(1) of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on December 8th, 1948, according to which everyone has the right to a nationality. Furthermore, refusal to exercise protection is not in accordance with the frequent attempts made at the present time to prevent the increase in the number of cases of stateless persons and to provide protection against acts violating the fundamental human rights recognized by international law as a minimum standard, without distinction as to nationality, religion or race.

39. Makarov, op. cit. supra note 28, at 414-15.

40. Ibid. Some States, mostly totalitarian in nature, have disclaimed their own citizens

The "effective link" doctrine of *Nottebohm* purports to establish an additional requirement for the right of a State to exercise this diplomatic protection. An American commentator, discerning an irreconcilable conflict between the *Nottebohm* thesis and Article 15(1) of the Universal Declaration of Human Rights of 1948 (which confirmed the principles of the earlier Hague Convention of 1930), questions whether "the International Court [should] now become an instrument for generating statelessness,"[41] diluting the "inadequate but concordant principles and presumptions"[42] now employed to ascertain nationality. In short, *Nottebohm,* while purportedly progressive, represents a decisive retrogressive step in conflict with general international policy, as well as that of the United States.[43]

F. *Judicial Short Cuts and Surprise Decisions*

A perusal of the *Nottebohm* pleadings suggests that Nottebohm—in view of his undeniably strong former ties with Nazi Germany—did not enjoy the all-important *favor judicis.* There is little doubt that a majority of the judges "felt" that his claims should not succeed. Instead of dealing with this claimant in the traditional manner and on a "stare decisis" basis, justice was meted out by an elegant, yet tenuous, "shortcut." Again, there was a "reason."

Guatemala complicated the proceedings by belatedly producing an overwhelming mass of documents allegedly demonstrating that Nottebohm was still a German citizen, and thus a dual national. Nottebohm's German nationality might be considered valid for some limited purposes,

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without, however, expatriating such persons. They have created a category of quasi-stateless persons. One is reminded of the plight of refugee White Russian groups, disowned by the Soviet Union, who found themselves dispersed in various countries. Their protection was partly assumed by the League of Nations. The refugee problem has been aggravated by the hundreds of thousands of displaced persons flocking into Western Europe since 1945. Efforts have been made to compensate for this lack of diplomatic protection by means of international treaties providing for "ersatz protection," such as the international agreement of July 24, 1951, dealing with the legal position of refugees, and the statute of the Office of the United Nations High Commissioner for Refugees, adopted by the United Nations General Assembly on December 14, 1950. See Makarov, op. cit. supra note 28, at 414-15.

41. Glazer, supra note 28, at 324-25.

42. Id. at 324. Glazer terms the Nottebohm majority opinion a "hollow triumph of form." Id. at 325.

43. The United States denies the right of any foreign government to pass judgment on the validity of an American decree of naturalization. 2 Hyde, International Law 1130 (1945); Moore, 2 Digest of International Law 513 (1906). Hence, Glazer correctly regards Nottebohm as "diametrically opposed" to United States policy. Glazer, supra note 28, at 324.

the undisputed provisions of German law notwithstanding.[44] Evidently, the Court was simply reluctant to wade through this tangle of conflicting factual and legal intricacies, this "penumbra of confusion."[45] The Court simply cut it short. Without undue moralizing, it should be emphatically stated that where problems of highest international legal significance are at stake, as undoubtedly were in *Nottebohm*, a court's responsibility is much more sharply defined than in situations of lesser importance. The "short cut" in *Nottebohm* is the more objectionable because the rationale for the decision came as a complete surprise to victorious Guatemala, as well as to defeated Liechtenstein. One can only conjecture why the International Court, in complete disregard of the relevant issues (dual nationality; fraud; *abûs de droit*, etc.) decided the case on grounds which *had not even been touched*—let alone properly argued—by either party.[46] Neither litigant was afforded an opportunity to argue the validity of Nottebohm's naturalization.[47] Liechtenstein was, in effect, deprived of its "day in court."

G. *Jurisdictional Defenses Before International Tribunals*

Released from his American internment, Nottebohm unsuccessfully tried to re-enter Guatemala before returning to Liechtenstein in 1946 to establish a permanent domicile. He was refused admittance by Guatemala, where a "complex network of litigation" dealing with the Nottebohm properties had developed in the courts.[48] Thus Nottebohm, prevented from assuming personal direction of such important litigation, was discriminated against by the domestic courts of Guatemala. Nevertheless, the Court felt unhampered by the fact that Nottebohm might have suffered such objectionable discrimination from the Guatemalan courts[49] and dismissed his claim on *jurisdictional* grounds.

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44. See van Panhuys, op. cit. supra note 28, at 97-98.

45. Glazer, supra note 28, at 322.

46. See Jones, supra note 28, at 238.

47. See I.C.J. Rep. 30-31, where Judge Klaestad stated:

The present Judgment does not decide the question, in dispute between the Parties, whether the naturalization granted to Mr. Nottebohm was valid or invalid either under the national law of Liechtenstein or under international law. Leaving this question open, it decides that the Government of Liechtenstein is not, under international law, entitled to extend its protection to him against Guatemala.

A solution upon these lines—severance of diplomatic protection from the question of nationality, and restriction of the right of protection—was never invoked by the Government of Guatemala, nor discussed by the Government of Liechtenstein. It does not conform with the argument and evidence which the Parties have submitted to the Court, and the Government of Liechtenstein has had no occasion to define its attitude and prove its eventual contentions with regard to this solution, whereby its claim is now dismissed.

48. Id. at 34. (Read, J., dissenting). In 1944, some fifty-seven legal proceedings were started against Nottebohm, "designed to expropriate, without compensation to him, all his properties, whether movable or immovable." Ibid. As Judge Read further observed, all of the cases charged Nottebohm with treasonable conduct "as a central and vital issue." Ibid.

49. The Nottebohm pleadings reveal a determined effort by Liechtenstein to persuade

A domestic judicial decision which, absent compelling reasons, accords unfavorable treatment to non-citizens, as such, is discriminatory per se.[50] The discrimination against Nottebohm would seem to be undisputed, at least to the extent that he was refused re-entry into Guatemala, "prevented from assuming the personal direction of the complex network of litigation,"[51] and denied an opportunity "to give evidence . . . or to confront his accusers in open court."[52] Under these circumstances, Judge Read felt bound to proceed on the presumption that Liechtenstein vis-à-vis Guatemala, "might be entitled to a finding of denial of justice, if the [*Nottebohm*] case should be considered on the merits."[53] He asserted that a jurisdictional defense should not be granted "unless the grounds on which it is based *are beyond doubt.*"[54] Judge Read recognized that where there has been domestic judicial discrimination practiced by a State, the weight of evidence subsequently given by an international tribunal to jurisdictional defenses raised by this State should be affected by such previous domestic discrimination.[55] Therefore, Guatemala's jurisdictional defenses ought not to have been accepted merely on the preponderance of evidence, but should have been established "beyond doubt"[56] and "strictly interpreted."[57] To put it more succinctly: *Discrimination by domestic courts against foreign plaintiffs should affect the weight of evidence as to jurisdictional defenses presented before international tribunals.* This principle, it is submitted, accords with the demands of elementary justice, and constitutes an additional reason why *Nottebohm* should be rejected.

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the Court to overcome jurisdictional hurdles and proceed to the merits of the case. In particular, Professor Sauser-Hall of Liechtenstein deprecated the manner in which Guatemala, which could not possibly have been injured by Nottebohm's "switch" from German to Liechtenstein nationality in 1939 (two years before Guatemala became a belligerent nation on the allied side), injected the "Nazi-issue" ex jure tertii. 2 Nottebohm Case—Pleadings, Oral Arguments, and Documents 34 (I.C.J. 1955). See also Grawitz, op. cit. supra note 28, at 272-73.

50. Guggenheim, 2 Traité du Droit International 14 (1951).

51. I.C.J. Rep. 34 (dissent).

52. Id. at 35.

53. Ibid.

54. Ibid. (Emphasis added.)

55. Judge Guggenheim contended that under the circumstances, "a preliminary objection must be strictly interpreted. It must not prevent justice from being done." I.C.J. Rep. 64 (dissent). He recognized that "a refusal to recognize nationality and therefore the right to exercise diplomatic protection would render the application of the latter—the only protection available to States under general international law enabling them to put forward the claims of individuals against third states—even more difficult than it already is." Id. at 63. See also note 38 supra.

56. I.C.J. Rep. 35 (Read, J., dissenting).

57. Id. at 64 (Guggenheim, J., dissenting).

H. *Conceptual Confusion Entailing a Denial of Justice*

The *Nottebohm* majority pointed out that its consideration of the international effects of Nottebohm's naturalization was confined solely to those matters connected with the exercise of diplomatic protection.[58] Liechtenstein argued unsuccessfully that the Court should consider nationality, with respect to its validity in international law, in its general effects. The Court instead asserted that Nottebohm's recognition as a Liechtenstein national by Guatemala, for purposes of the control of aliens, was *immaterial* on the issue of diplomatic protection. Under this line of reasoning, Guatemala might be compelled to recognize Nottebohm's naturalization for some purposes, e.g., whether Guatemala was entitled to treat him as an enemy, but not with regard to matters relating to the exercise of diplomatic protection. As van Panhuys comments, the "rather curious result [would be] that, supposing that in view of his naturalization Guatemala had not the *right* to treat Nottebohm as a German national, no legal remedy could be resorted to on his behalf by the Government which granted the naturalization."[59] Evidently, the *Nottebohm* judges were unaware of this confusion. The obligation to recognize a foreign nationality is not "susceptible of division in such a manner that a person must be regarded in some respects as a national of State A, but in other respects as a national of States B or C, or even as a stateless person. . . ."[60] As van Panhuys concludes:

> But even so, it would seem that the right to resort to diplomatic protection may not in such case be denied to States A, B or C respectively, in so far as their claim is based on an alleged violation of rules of substantive law with regard to matters for which their nationality must be recognized. Translating this into terms of procedural law, *the exceptions raised by Guatemala on this point should have been joined to the merits of the case.* In the case under consideration the Court ought to have at least ascertained whether or not *with regard to the treatment as an enemy* Guatemala was bound to recognize the naturalization. Should the answer be in the affirmative, *then it would seem illogical to refuse Liechtenstein the title to exercise diplomatic protection on behalf of a national thus treated.*[61]

Aside from all other objections raised against the *Nottebohm* decision, its result, its legal reasoning, its underlying theories and other substantive and procedural aspects, van Panhuys' searching inquiry demonstrates that in treating the obligation to recognize a foreign nationality in a divisionary manner, *Nottebohm* may well lead to a *genuine denial of justice on the domestic and on the international level.*[62]

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58. Id. at 20-21.
59. van Panhuys, op. cit. supra note 28, at 97-98. (Emphasis added.)
60. Id. at 98.
61. Ibid. (Emphasis added.)
62. One may properly doubt whether the majority of the Court appreciated these dan-

The validity of the observations made by van Panhuys become particularly evident in the light of the *Flegenheimer* decision to be examined presently. It shall be demonstrated that Professor Sauser-Hall, defeated Liechtenstein's top adviser in the *Nottebohm* case, when presiding over the Italian-United States Conciliation Commission in *Flegenheimer,* distinguished and rejected the *Nottebohm* decision in such a manner as to compound, rather than rectify, the errors committed in *Nottebohm.*

III. The Flegenheimer Decision

In 1951 the United States Government sought cancellation of the sale of stock in an Italian company by an American citizen, Albert Flegenheimer.[63] The sale, on March 18, 1941, for a fraction of the actual value of the shares, was allegedly made under the duress of prevailing fascist anti-semitic legislation and persecution and of anticipated worse measures to come. The issue was presented to a Conciliation Commission created under the Italian Peace Treaty for the settlement of disputes between the Republic of Italy and the victorious allies regarding the property of United Nations nationals in Italy.[64] The Italian Government contended that since Flegenheimer was not a "United Nations national" within the scope of Article 78 of the Peace Treaty, his claim was inadmissible.[65] After the proceedings had commenced, Flegenheimer applied for a certificate of United States nationality which was issued on July 10, 1952.[66] On August 6, 1954, the

gerous implications. This suspicion would seem to flow from the decision's "intrinsic contradiction, in that on the one hand the Court has tried to confine its investigations to the international effects of naturalization in connection with the exercise of diplomatic protection only, whereas, on the other hand, arguments have been advanced of a much wider scope, the force of which can only be tested by discussing the question of the international effects of naturalization in its entirety." Id. at 102.

63. Flegenheimer's claim was presented by the United States in accordance with art. 78, para. 3, of the 1947 Italian Peace Treaty: "the Italian Government shall invalidate transfers involving property, rights and interests of any description belonging to United Nations nationals, where such transfers resulted from force or duress exerted by Axis Governments on their agencies during the war"; and art. III, § 16(b), of the Lombardo-Lovett Agreement, Aug. 14, 1947, T.I.A.S. No. 1757.

64. The Commission was established under art. 83 of the Italian Peace Treaty, Feb. 10, 1947, 61 Stat. 1245, T.I.A.S. No. 1648.

65. Flegenheimer 7-9. Art. 78, para. 9(a), reads:

(a) 'United Nations nationals' means individuals who are nationals of any of the United Nations, or corporations or associations organized under the laws of any of the United Nations, at the coming into force of the present treaty, provided that the said individuals, corporations or associations also had this status on September 3, 1943, the date of the Armistice with Italy.

The term 'United Nations nationals' also includes all individuals, corporations or associations which, under the laws in force in Italy during the war, have been treated as enemy. . . .

66. Flegenheimer 13-14.

American and Italian representatives on the Conciliation Commission acknowledged they could not reach a decision on the claim and a "Third Member," Professor Georges Sauser-Hall, of Switzerland, was named pursuant to Article 83 of the Peace Treaty. The three-man Commission then unanimously decided in favor of the Italian Government and dismissed the claim, holding that Flegenheimer was not a "United Nations national."[67]

Albert Flegenheimer's father, Samuel Flegenheimer, born in Baden, Germany, had emigrated in the 1860's to the United States and was naturalized as an American citizen in 1873. He returned to Germany in 1874 to live in the then kingdom of Wurttemberg, where Albert was born in 1890. On August 23, 1894, Samuel Flegenheimer was naturalized in Wurttemberg, his son, Albert, four years of age, being included in the father's naturalization. Albert lived in Germany until 1937, apparently ignorant of his father's former American citizenship—or at least of his own possible claim to such citizenship—until 1933, when the Nazis gained control of Germany. Flegenheimer approached several American consulates and embassies in Europe between 1933 and 1939 in an effort to ascertain whether he possessed a valid claim to American citizenship, but received either "ambiguous or completely negative information."[68] In 1937, Flegenheimer, being a Jew, left Germany under the threat of Nazi persecution, and proceeded to Italy. After Italy published anti-semitic decrees in 1938, he travelled to Switzerland, and thence to Canada, using a German passport at all times. On November 3, 1939, Flegenheimer submitted his first formal claim to American citizenship at the American Consulate in Winnipeg, Canada. On November 22, 1939, the Board of Special Inquiry of the Immigration and Naturalization Service of the United States decided that Flegenheimer was not an American citizen. On April 29, 1940, the Nazi German Government stripped Flegenheimer of his German citizenship by special decree, and he was subsequently admitted to the United States on a temporary visa and continued efforts for recognition of his American citizenship. On February 24, 1942, the Immigration and Naturalization Service finally acknowledged Flegenheimer's status as an American citizen by birth. In 1951, proceedings before the Italo-American Conciliation Commission on behalf of Flegenheimer were commenced by the United States Government.

The Commission found that Flegenheimer had acquired American nationality at birth, and German and Wurttemberg nationality as a result of his naturalization in Wurttemberg on August 23, 1894. But

67. Id. at 84.
68. Id. at 10, 14-15.

after five years residence in Wurttemberg, he was declared to have lost his American nationality under the Bancroft Treaty of July 2, 1868, between the United States and Wurttemberg.[69] The Commission refused to be bound by the certificate of American nationality of July 10, 1952, and based its rejection of the American claim primarily on the thesis that Flegenheimer had irretrievably lost his American nationality under the Bancroft Treaty.[70] In the alternative, it concluded that even if Flegenheimer had retained a "right of election" in favor of American nationality, this right was, nonetheless, exercised "too late."[71]

A. *Scope of Investigation*

The Commission initially had to decide whether it had the power to disregard the certificate of American nationality of July 10, 1952. While acknowledging that "every State is sovereign in establishing the legal conditions which must be fulfilled by an individual in order that he may be considered to be vested with its nationality,"[72] the Commission asserted that in an international dispute, official certificates do not have the same effect as in municipal law, and, when disputed, must be proved like any other allegation.[73] Thus, it proceeded to examine whether an administrative decision, as that taken in favor of Flegenheimer by the United States, was indeed convincing.

The Commission maintained that the scope of its powers of investigation in this regard was consonant with the views held by the majority of international tribunals and distinguished authors.[74] It emphasized, significantly, that these powers of investigation were valid and

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69. 16 Stat. 735. See Flegenheimer 13-14. The Commission concluded that Flegenheimer never reacquired his American nationality after attaining majority. Ibid.

70. The Italian Government argued that even if Flegenheimer were deemed an American citizen, this citizenship was not an "apparent nationality," because of his use of a German passport. In rejecting this contention, the Commission declared (Flegenheimer 71): Barring cases of fraud, negligence or serious errors which are not proved in the instant case, the Commission holds that there is no rule of the Law of Nations, universally recognized in the practice of States, permitting it to recognize a nationality in a person against the provisions of law or treaty stipulations, because nationality is a legal notion which must be based on a state law in order to exist and be productive of effects in international law; a mere appearance cannot replace provisions of positive law governing the conditions under which a nationality is granted or lost, because international law admits that every State has a right, subject to treaty stipulations concluded with other States, to sovereignly decide who are its nationals.

71. Flegenheimer 65.

72. Id. at 18.

73. Ibid. The United States maintained that the certificate of nationality issued to Flegenheimer was "legally valid proof of his nationality," and was binding on the Commission in the absence of any showing of "fraud or favoritism such as to allow the claimant to avail himself of the diplomatic protection of the United States." Id. at 19.

74. Id. at 26-29.

all the less disputable in that no American judgment of naturalization has been introduced during these proceedings but a mere administrative statement which, according to the international practice commonly followed, is subjected to the valuation of every court, whether national or international, to which the question of the validity of a nationality is submitted.[75]

Having noted the numerous grounds for doubt as to Flegenheimer's American nationality, the Commission reasoned that international tribunals may reject certificates of nationality impaired by fraud, favor, favoritism, serious error, or in conflict with treaties or general principles of the law of nations.[76]

B. *Bancroft Treaty*

While rejecting the Italian Government's objections to the validity of the citizenship of the elder Flegenheimer, the Commission did hold that Albert Flegenheimer had lost *his* American citizenship, acquired *jure sanguinis,* through naturalization with his father in Wurttemberg principally because of the Bancroft Treaty between the United States and Wurttemberg.[77] In interpreting this treaty, about which the litigating parties completely disagreed, the Commission analyzed the historical events leading to the Bancroft Treaties, which "not only had the purpose of regulating the diplomatic protection of naturalized persons but of determining their nationality as well."[78] The Commission declared that not only had the elder Flegenheimer lost his own American citizenship under the Bancroft Treaty with Wurttemberg, but under Article I, paragraph 2, "members of his family, under his control and guardianship as a husband and as a father, [also] lost their nationality."[79] Moreover, Albert Flegenheimer had been included in his father's naturalization, and in view of the five-year-residence requirement of the Bancroft Treaty,[80] the Commission asserted that young Flegenheimer consequently lost his American nationality at the latest in 1895.

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75. Id. at 29-30.

76. Id. at 32. "It is thus not sufficient that a certificate of nationality be plausible for it to be recognized by international jurisdictions; the latter have the power of investigating the probative value thereof, even if its prima facie content does not appear to be incorrect." Ibid.

77. The Commission rejected the American argument that no reliance should be placed on the Bancroft Treaty since it expired on April 6, 1917, when the United States entered World War I, because until that date the treaty had fully deployed its effects. Id. at 45. Italy's right to invoke the Bancroft Treaty, although not a signatory thereto, was also affirmed. "No distinction should be made according to whether a rule establishing the nationality of a person is contained in the municipal law of a State or in a treaty concluded by the State with another State." Id. at 46.

78. Id. at 50.

79. Id. at 53.

80. Ibid. Protocol, Part I(1), states:

It is of course understood, that not the naturalization alone, but a five years uninterrupted

The Bancroft Treaty did not specifically extend to the minor children of an American citizen loss of their American nationality because of naturalization by the head of the family in Wurttemberg. Yet, while the Commission acknowledged that the alleged collective effect of the elder Flegenheimer's expatriation was by no means a necessary corollary of the collective effect of his naturalization, it determined that Albert Flegenheimer had lost any claims to American citizenship through a literal and teleological interpretation of the treaty, as well as a consideration of "the agreed intent of the contracting parties."[81]

IV. Review of the Flegenheimer Decision on Grounds of International Law

A. *The Conciliation Commission and Nottebohm*

While Flegenheimer's claim was disallowed by a purported application of American domestic law, the Commission's discussion of the *Nottebohm* decision merits particular scrutiny as the only extensive judicial pronouncement so far on *Nottebohm.*

Italy had alleged that no "effective bond of nationality" existed between the United States and Flegenheimer, since he was a German national by conduct, sentiments, and interests.[82] Consequently, even if Flegenheimer were conceded to be nominally and legally an American citizen according to American municipal law, in view of the *Nottebohm* decision, it was argued, the United States was not entitled to exercise the right of diplomatic protection in his behalf on the international level.[83]

The Commission, so as to distinguish *Nottebohm,* doubted whether the latter "intended to establish a rule of general International Law," requiring an effective "link" or bond of attachment between citizen and State as a prerequisite to the right of the State to assert diplomatic protection for the citizen on the international level.[84] However, there is a glaring discrepancy between *Nottebohm's* ostensibly restrictive character and the actual generality of its pronouncements.[85] Upon inspection, it becomes clear that any restrictive import is illusory and, in any event, provides no valid basis for distinguishing *Nottebohm* from *Flegenheimer,* as was obviously intended by the Conciliation Commission.

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residence is also required, before a person can be regarded as coming within the treaty; but it is by no means requisite, that the five years residence should take place after the naturalization.

81. Id. at 53-57.
82. Id. at 66.
83. Ibid.
84. Id. at 66-67.
85. Id. at 67.

The *Nottebohm* majority refused to recognize Nottebohm's Liechtenstein naturalization merely for the purpose of deciding the admissibility of his application. The Conciliation Commission was also concerned with the question of the "admissibility" of Flegenheimer's petition, and its findings as to his nationality therefore precluded any necessity for further examination of the actual merits of his claim. No valid distinction between *Flegenheimer* and *Nottebohm* would seem possible on this basis.

Another "restrictive" element the Commission found in the *Nottebohm* opinion was the fact that Liechtenstein sought recognition of Nottebohm's naturalization only by Guatemala. An analysis of *Nottebohm* would seem to reveal that no sound legal theory supports this distinction. While it was true, accidentally, that Nottebohm had lived in Guatemala for several decades and made Guatemala the center of his interests until he was deported, it is equally true that he had never attempted to become a Guatemalan citizen. One may dispute whether such a "bond of attachment" should be relevant in connection with a person's *citizenship* of the State to which he is, or fails to be, "linked." But there is no basis whatever for attributing legal relevancy—"defensively" so to say—to such "bond of attachment" where the person so attached never was, nor ever attempted to become a citizen of that State. Even on this rather flimsy ground, *Flegenheimer* could not have been distinguished from *Nottebohm* since Flegenheimer had established his permanent domicile in Italy in 1937 without any known intention of acquiring Italian citizenship, and surrendered his Italian domicile only under the duress of the fascist expulsion decrees. Thus, the two elements on which the *Nottebohm* majority professedly based the "restrictive" character of its findings are not only invalid but particularly unfit for distinguishing *Nottebohm* from *Flegenheimer*.

The Commission then proceeded to reject the *Nottebohm* doctrine, noting that the "link theory" developed in cases where at least two nationalities existed, and a choice was imperative.[86] Furthermore, it was confined to disputes between the two States of which the individual claimed to be a national, and was not intended to benefit a third State.[87]

86. See, e.g., Canevaro (Italy v. Peru), in Scott, Hague Court Reports 284 (Perm. Ct. Arb. 1912); Barthez de Montfort v. Treuhändler, 6 Rec. des décis. des trib. arb. mixtes 806, 809 (1926). Article 5 of the 1930 Hague Convention provides:

In a third State, the individual possessing more than one nationality shall be treated as if he were vested with one nationality only. Without prejudice to the rules of law applied in the third State in matters of personal status and subject to the conventions in force this State may, in its territory, recognize exclusively amongst the nationalities possessed by such individual, either the nationality of the country in which he mainly and principally resides, or the nationality of the State to which, according to the circumstances, he appears to be more attached in fact.

87. See, e.g., Salem (United States v. Egypt), 2 U.N. Rep. Int'l Arb. Awards 1188

The Commission reasoned that application of the "effectiveness" test to situations involving but a single nationality entailed "the risk of causing confusion."[88] However, this danger of "confusion" does not really exist, for the "link theory" is horribly clear. While *Nottebohm* is vulnerable to severe criticism, its thesis has yet to be rejected because of any fear of "confusion."

The Commission dismissed the "effectiveness" criterion as lacking "a sufficiently positive basis."[89] It is possible, albeit not clear at all, that here the Commission actually meant "positive law," or "precedent." If so, this should have been clearly expressed, since it does constitute a sound argument. If any other significance was intended, it is not intelligible from the Commission's decision. The Commission argued that "there does not in fact exist any criterion of proven effectiveness for disclosing the effectiveness of a bond with a political collectivity . . . ."[90] Yet, it would seem that the opposite is true. The test of "effective nationality" offers no particular difficulty when correctly applied, as in cases of dual nationality. The Commission aimed its well-meaning attack against *Nottebohm* in the wrong direction. In its final sally, the Commission asserted that if *Nottebohm* were to be followed,

> persons by the thousands who, because of the facility of travel in the modern world, possess the positive legal nationality of a State, but live in foreign States where they are domiciled and where their family and business center is located, would be exposed to non-recognition, at the international level, of the nationality with which they are undeniably vested by virtue of the laws of their national State. . . .[91]

This reasoning, unfortunately, is phrased in terms of a mere *argumentum de majore ad minus,* and is, as such, devoid of legal force. The reference to the "facility of travel in the modern world" is rather questionable since these facilities should render it easier for an "absentee" national to preserve some bonds of attachment with his homeland by occasional trips. In short, the Commission's laudable attempt to *reject* the *Nottebohm* doctrine was regrettably based on a rationale as objectionable as that employed to *distinguish Flegenheimer* from *Nottebohm.*[92]

(1932), followed by the Italian-United States Conciliation Commission's decision of June 1, 1955, United States ex rel. Strunsky Mergé v. Italy (Archives of the Commission, No. 55). For the text, see 1956 Rivista di diritto internazionale 77.

88. Flegenheimer 68.

89. Ibid.

90. Ibid.

91. Id. at 68-69.

92. This is especially disappointing since the Conciliation Commission acted under the presidency of Professor Sauser-Hall who, as Liechtenstein's principal pleader in Nottebohm, should have been acutely aware of the true defects in that decision (as a basis for its rejection), and the factual and legal points of distinction between the Flegenheimer and Nottebohm situations (as a basis for distinguishing both cases).

In both instances, the desirable end was achieved by a tenuous rationale which seriously impaired an effective critique of the *Nottebohm* case.

B. *Why Nottebohm Should Be Distinguished*

1. Citizenship by Birth

While the *Nottebohm* court did not explicitly confine its new thesis to cases of naturalization, Judge Guggenheim assumed it did so. Assuming that Guggenheim was correct, the immediate conclusion in *Flegenheimer* should have been that the *Nottebohm* thesis could not possibly be applied to a citizen "by birth," *i.e.*, by *jus sanguinis* or "blood link," which is the most primitive and easily understandable "link" between such descendant and his parents' state. Nevertheless, *Flegenheimer* is silent on this basic distinguishing feature.

2. "Blood Link" of the First Generation

Even if the *Nottebohm* doctrine also included citizens by birth, and the existence of a "blood link" were deemed insufficient, another distinguishing element should not have been overlooked, namely, that Albert Flegenheimer was the *son* and not a more distant descendant of a United States citizen. Being immediate descendants, the "blood link" connecting Albert with his father would still have been such as to constitute a legally relevant "link." Even the *Nottebohm* critics who employ the *argumentum ad absurdum* technique would confine the scope of the "link" theory to situations involving grandparents, great-grandparents, etc., especially when their descendants have resided abroad for centuries in unbroken sequence. The harmful effects of this application on "overseas citizens" has already been described.

3. Privileged Position of Guatemala

The Commission observed that Guatemala, and not some other third State, had denied Liechtenstein's right to assert diplomatic protection for Nottebohm on the international level. Guatemala, in the Hague Court's opinion, apparently enjoyed some privileged position due to Nottebohm's association of more than thirty years with the country. However, another element of distinction between Nottebohm and Flegenheimer becomes obvious. While Albert Flegenheimer had been a resident of Italy since 1937, *animo manendi*, until his expulsion less than two years later, Italy never as much as hinted—let alone relied upon—this fact before the Commission in a futile "analogy" with Guatemala's position vis-à-vis Nottebohm. If one adhered to the *Nottebohm* majority's ostensible reliance on those factual elements, the Commission should have encountered no difficulty in distinguishing *Flegenheimer*.

4. "Droit Coûtumier" and Treaty Claims

The basic difference between *Nottebohm* and *Flegenheimer* seems to be that the *Nottebohm* doctrine could and should be applied only where *droit coutumier,* or customary law, is being invoked, and not where claims are based upon treaties. Nottebohm's claim against Guatemala was indisputedly based on such *droit coutumier.* Accordingly, the International Court was properly concerned solely with whether in the absence of any treaty to this effect, Liechtenstein had the right to extend diplomatic protection to Nottebohm vis-à-vis Guatemala under general principles of international law. Had the Court been confronted with a treaty claim, none of the controlling considerations for its decision could have been employed since the Court would have been compelled, under Article 38 of its Statute, to confine its decision to whether the treaty invoked by the plaintiff justified the claim.

The Commission not only failed to observe this basic distinction, but equally overlooked the fact that the *Nottebohm* thesis constituted a *new* doctrine. Flegenheimer's claim was clearly based upon the Italian Peace Treaty. Obviously neither the United States nor the Italian Republic could possibly have intended, when they signed the 1947 Peace Treaty, that the term "status" (of a United Nations national), mentioned in Article 78, paragraph 9(a), should be qualified by the *Nottebohm* doctrine conceived seven and a half years later. To impute such intentions to the signatory powers would indeed violate internationally recognized principles of treaty construction, especially when the undisputed language[93] of the treaty makes a claimant's "status" the controlling factor.

The *Nottebohm* doctrine distinguishes between "effective" nationality which entitles a State to assert diplomatic protection of its national on the international level, and "non-effective," or, merely technical, nationality which does *not* entitle the State to so act. Even the staunchest supporter of the new *Nottebohm* doctrine must admit that "non-effective nationality" constitutes "nationality *status*" just as much as "effective nationality," for "status" by definition includes "effective," as well as merely "technical," nationality. Hence, where a treaty expressly uses "status" as the controlling prerequisite, this in itself excludes any possibility of applying the newly created distinction of the *Nottebohm* doctrine. The Italian Peace Treaty speaks of "status" and "status" only. Even had the treaty been concluded after the *Nottebohm* doctrine was created (or mis-created), its unequivocal language would still bar application of the doctrine. The use of "status" to define the controlling prerequisite is rather exceptional language, as can be deduced from a comparison of the Italian Peace Treaty with preceding treaties. This

93. See note 65 supra.

is an additional reason why such significant language should not have been disregarded.

5. Subsequent Link

One of the cloudiest parts of *Nottebohm* dealt with the relevancy of a "subsequent link." The International Court stressed the relevancy of a link following the time of the naturalization, while the dissenters believed that the majority in fact completely overlooked this basic point.[94] This riddle could possibly be solved by regarding a subsequent link as relevant if established immediately after, or at least soon after, naturalization, and not, as in the case of Nottebohm, more than seven years later. If the *Nottebohm* majority considered as legally relevant only that "link" which immediately followed the time of naturalization, again the Commission should have had no difficulty to distinguish *Flegenheimer* on this basis.

Flegenheimer undisputedly did everything in his power to obtain recognition of his United States citizenship several years prior to the date of the allegedly forced sale.[95] Flegenheimer was in the United States on a visitor's visa at or about the time of the allegedly forced sale; he renewed and accelerated his efforts to obtain recognition of his citizenship rights, residing in the United States, for all practical purposes, without interruption, having abandoned his Canadian domicile entirely in 1941. When his American nationality was recognized in February 1942, less than a year after the sale of his Italian holdings, he had already established a permanent legal residence in the United States and had been so "linked" to the United States—*and to no* other country—until the time of the decision by the Commission.

6. Controlling Dates

Assuming that the *Nottebohm* doctrine applies to cases of nationality by birth, what should be the period of time wherein the "relevant link" must be established? Should it be subsequent to *recognition* of citizenship by birth or the time at which the *damage* was inflicted? Where a treaty exists, the "relevant period" should be within the dates stipulated as controlling by the treaty. Thus, if it were at all possible to apply the *Nottebohm* doctrine to a claim based on a treaty—as distinguished from a claim based on *droit coutumier*—*Flegenheimer* should have been distinguished from *Nottebohm* on the basis of the simple fact that the sufficiently close connection between Flegenheimer and the United States undoubtedly existed at the "controlling dates" of the Peace Treaty, 1943-

94. See notes 35 & 36 supra and accompanying text.

95. Actually he did so without delay after the legal situation had radically changed, pursuant to Perkins v. Elg, 307 U.S. 325 (1939), and upon advice of counsel.

1947. There was no dispute between the litigants that at these "controlling dates," Flegenheimer was closely "linked" to the United States and to the United States only. Once again, however, the Commission disregarded a basic distinction.

7. Psychological Attachment

There was admittedly not the slightest psychological attachment between Nottebohm and Liechtenstein, either before or during the period of his naturalization, nor for over seven years thereafter, until 1946 when he established his permanent residence in Liechtenstein. Without arguing whether international law generally attributes any legal relevancy to the subjective element of psychological attachment (*rattachement psychologique*), there can be no doubt that this point was among the controlling considerations prompting the *Nottebohm* court to reject Liechtenstein's claim. It was notably the absence of "genuineness" in Nottebohm's behavior, his lack of intention of settling in Liechtenstein, his "lack of any desire to dissociate himself from the Government of his country"—which produced an adverse decision.[96]

The factual contrast between *Nottebohm* and *Flegenheimer* is quite evident. No link existed between Flegenheimer and any other country even remotely comparable to his link with the United States at the time of the allegedly forced sale, nor, of course, at the so-called "controlling dates," 1943 and 1947. The Commission, therefore, missed an opportunity in *Flegenheimer* to establish sound international law and correct the egregious defects of *Nottebohm*. Its opposition to the *Nottebohm* decision was certainly understandable, and not merely because the presiding Judge of the Conciliation Commission, Professor Georges Sauser-Hall, had been the principal agent of Liechtenstein in *Nottebohm*. While one may fully agree with the end result obtained by the Commission, viz., restriction of the novel *Nottebohm* theory and, even more so, its total rejection, the sound reasoning which could have effectively accomplished both purposes, rejection and restriction, is regrettably missing.

C. *The Commission's Threefold Excès de Pouvoir*

In the last analysis, *Flegenheimer* rests on an application of American domestic law. Before embarking on its expedition into American law, the Commission indulged in an extensive self-examination as to its pertinent powers of review. In at least three important aspects, the Commission dealt with the issue of these powers of review in a quite unique and questionable fashion. First, the Commission refused to

96. I.C.J. Rep. 25-26.

affirm the certificate of American nationality of July 10, 1952, rendered by competent United States officials, attesting to Flegenheimer's American citizenship. Instead it substituted its own evaluation of the validity of nationality. Secondly, in view of the previous discrimination practised by the Italian courts, under prevailing Italian property restitution laws, against all foreign claimants, the Commission should have rightly disregarded any jurisdictional defenses raised by Italy which were not proved beyond doubt and proceeded to the merits of Flegenheimer's claim. Finally, the Commission declined to accept an interpretation of domestic American law on which *both* parties to the controversy, the United States and Italy, were in express agreement.

1. Determination of Nationality

No objections will be raised where an international commission, for purposes of determining its jurisdiction, investigates facts relative to the nationality of parties on whose behalf claims are entered. What is authorized here, however, is only an *investigation* restricted to those facts pertinent to nationality. No decision was cited by the Commission which would justify going beyond this limit. Article 1 of the 1930 Hague Convention on Nationality provides in part that "it is for each State to determine under its own law who are its nationals." The only limitation imposed is that the "law [of each State] shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality." While absolute equality must be enjoyed by parties to an international dispute, this certainly would not authorize the Commission to substitute *its own determination of nationality* for that of a claimant State, absent claims of another State to the same individual, or allegations that a State asserted spurious or fraudulent nationality merely for the purpose of according diplomatic protection.

"Facts about nationality" include physical or natural facts (place of birth, blood relation, etc.) which States may consider in determining whether to confer nationality upon an individual, and the legal status, the nationality actually conferred. Nationality, as the legal consequence of a State's determination to grant protection to, and exact certain obligations from, an individual, is more than the mere interpretation of certain facts, statutes, and precedents. It is the authoritative prescription or ascription of a certain legal status. For an international commission, the authoritative decision by state officials that, because of certain facts (e.g., place of birth, blood relation), nationality has been ascribed to an individual for purposes of diplomatic protection or assumption of liability, vis-à-vis other States, constitutes also a "fact about nationality." One must distinguish between the facts of the

decision taken by national officials and the other *physical or natural* facts upon which such national officials act (and alone are authorized to act).

Another distinction should be made between *investigating* facts about nationality and the authoritative *determination* of nationality. An international commission, authorized to investigate facts about nationality in order to determine its own jurisdiction, is unauthorized to substitute itself for national officials in making authoritative determinations of nationality. For purposes of disposing of competing claims to the same individual, dismissing fraudulent presentations, or policing claims for their conformity to international law, an international commission may of course be empowered to make determinations of nationality against States, but not as a part of its investigatory competence alone, or where such overriding issues are not raised. In *Flegenheimer,* no State entered a competing claim, nor was any rule of international law proffered which precluded the United States from recognizing Flegenheimer as its national. There was no suggestion that the sponsorship of Flegenheimer's claim by the United States was in any way fraudulent or spurious.

For an international commission to delve into the authoritative decisions of a claimant State, in order to evaluate for itself the facts upon which the State has based its decision, and for such commission, further, to substitute its own evaluation for that of the competent state officials and find the latter's authoritative determination unlawful, may, we submit, be reasonably regarded as an unwarranted excess of power (*excès de pouvoir*). One may inquire whether the decision of the United States that Flegenheimer was its national so violated some rule of international law as to authorize the Commission to extend its competence beyond investigation to the overriding of this decision. Unless limited by international law, States are free, it may be recalled, to make authoritative ascription of their nationality upon such factors as they may choose. The United States had exercised an exclusive sovereign prerogative to determine its own nationals. No alleged general competence of international commissions to interpret treaties can override the right of the United States to determine its own nationals in the absence of a rule of international law compelling the contrary. The Commission cited no rule of international law that so restricted the United States. Indeed, the Commission emphatically rejected the *Nottebohm* "link" test[97] and the newly created theory of "apparent nationality."[98]

From a policy perspective, it appears well founded that international

97. See pp. 707-08.

98. See note 70 supra.

law preserves to States, in the absence of competing claims by other States or fraudulent presentations, the exclusive competence to determine their own nationals. Most limitations have been designed to resolve conflicts between two or more States claiming the same individual as their national. Apart from conflicting claims to the same individual, an extraordinary general policy is certainly required to preclude a State from ascribing its nationality to a person upon such a fact as—in the case of Flegenheimer—blood relation in the first generation to an American citizen. The contemporary policy which favors human rights and opposes leaving individuals stateless, lacking diplomatic protection against States, would appear to be an overriding consideration to the contrary.

The importance of continued adherence to traditional principles of international law is again demonstrated in other facets of *Flegenheimer*. The United States had reviewed Flegenheimer's behavior after majority and concluded that it revealed no intention to abandon his claim to United States nationality. The Commission, after examining this same behavior, arrived at a different conclusion. Yet no rule of international law was cited which deprives States of their exclusive competence to review and evaluate such facts or in any way qualifies or limits their judgment as to the reasonable inferences to be drawn therefrom. When an international tribunal goes behind the authoritative determination of State officials to review such facts, it is either reviewing the decisions of State officials on the merits, or subjecting them to collateral attack, without any warrant under international law and under no policy acceptable to the general community of States. Clearly States could not tolerate such review of, or attack on, their internal decisions. It is an invasion of the exclusive prerogatives of sovereign States. In the "excess of power" committed by the Commission in *Flegenheimer*, the citizenship and naturalization policies of States are plainly at stake.[99]

2. Previous Discrimination by Domestic Courts

In evaluating *Nottebohm*, it was observed that discrimination by domestic courts against foreign plaintiffs should affect the weight of evidence as to jurisdictional defenses presented before international tribunals. Since previous domestic discrimination renders the interna-

99. The U.N. Charter, art. 2, para. 7, and the Statute of the International Court, arts. 36 and 38, provide that no international jurisdiction exists in matters within a State's domestic jurisdiction. In Nationality Decrees Issued in Tunis and Morocco, P.C.I.J., ser. B, No. 4 (1923), the International Court correctly applied this universally recognized principle to domestic nationality laws. This underscores the Commission's "excès de pouvoir," since it professed to "follow the jurisprudence of the International Court" regarding the interpretation of municipal law.

tional tribunal, in effect, a "court of last resort," the latter should be precluded from reaching the merits of a claim only when jurisdictional defenses raised by the defendant State are proved beyond any doubt.[100]

The United States charged that the Italian domestic courts had unlawfully discriminated not only against Flegenheimer,[101] but generally against *all* foreign claimants as a class by excluding them from the benefits of the Italian property restitution laws.[102] The Commission was informed that Flegenheimer's claim had been rejected by a final decision of the highest Italian tribunal, not on its merits, but for no other reason than that he was not an Italian citizen.[103] This discriminatory jurisprudence of the Italian Supreme Court had been criticized by lower Italian courts in Naples,[104] Bologna,[105] Turin,[106] and Milan.[107] Competent Italian writers as Bigiavi,[108] Cottino,[109] Iachia,[110] Levi,[111] Rava,[112] Borghese,[113] Buttaro,[114] del Guercio,[115] and Dalmartello[116] particularly expressed their disagreement with the treatment given foreign and Italian Jews in the matter of property restitution. According to the American Govern-

100. These principles, discussed earlier, were developed mainly by Judges Read and Guggenheim in the Nottebohm case. See notes 51-57 supra and accompanying text.

101. Flegenheimer v. Montesi, Oct. 4, 1955, Corte di Cassazione (sezione unite), 1956 Giustizia Civile 487-94 (1956).

102. See, e.g., Judgment of October 10, 1953, No. 3301, Giustizia Civile 3187 (1953); Judgment of July 14, 1953, No. 2283, Giustizia Civile 2489 (1953); Judgment of Feb. 14, 1953, No. 378, Giustizia Civile 573 (1953); Judgment of June 26, 1950, No. 1264, 1 Foro Italiano 801 (1950); Judgment of July 18, 1949, No. 1837, 1 Foro Italiano 1055 (1949).

103. Judgment of October 4, 1955, supra note 101.

104. Judgment of May 14, 1951, Diritto e Giustizia 305 (1951).

105. Judgment of Jan. 14, 1949, 1 Foro Italiano 739 (1950).

106. Judgment of Jan. 11, 1949, 1 Foro Italiano 776 (1950).

107. Judgment of Oct. 21, 1948, 1 Foro Italiano 739 (1950); Judgment of May 20, 1948, 1 Giur. Ital. 2, 535 (1948).

108. Bigiavi, Annullamento di alienazioni immobiliari compiute da ebrei discriminati, 1 Giur. Ital. 2, 289 (1947).

109. Cottino, Sul concetto di persona colpita dalle leggi razziali, 1 Foro pad. 471, 483 (1949).

110. Iachia, Leggi reintegrative per cittadini di razza ebraica e discriminazione, Mon. trib. 153 (1947).

111. Levi, Leggi razziali e leggi riparatrici, Temi 423 (1950).

112. Rava, Sulla pretesa eccezionalità delle norme abrogatrici delle leggi razziali, Dir. e giur. 306 (1951).

113. Borghese, Considerazioni in materia di leggi e antileggi razziali, 1 Foro Italiano 739 (1949).

114. Buttaro, In tema di ebrei stranieri e di azione di rescissione, Giust. civ. 2035 (1953).

115. del Guercio, Annullamento di alienazioni di beni immobili fatte da cittadini colpiti dalle leggi razziali, Temi 376 (1948); Temi 104 (1949).

116. Dalmartello, In tema di annullamento di alienazioni compiute per sottrarsi all'applicazione delle leggi razziali, Temi 325 (1948).

ment, this was discrimination, despite the fact that the Italian Government's failure to provide reparation or restitution to Jewish foreigners for fascist-inflicted damages constituted as such an "international tort."[117] Hence, there was here a situation analogous to the discrimination Nottebohm had previously experienced in the domestic courts of Guatemala.

Following the principles developed by Judges Read and Guggenheim in *Nottebohm*,[118] it should have been incumbent upon the Commission to disregard the jurisdictional defenses raised by the Italian Government, which, with their unusual complications, were not "beyond doubt." The tremendous volume of legal arguments presented by the Italian Government, as well as the Commission's lengthy decision of September 20, 1958, itself, belie such contention. In view of the previous discrimination practiced upon Flegenheimer, classwise, in the Italian domestic courts, the Commission was obliged to disregard the jurisdictional defenses and proceed to the merits of the case. This it failed to do, thereby committing another "excess of power."

3. Disregard of "Fact" Agreements Between Litigants

Perhaps the most disturbing element in *Flegenheimer*, in terms of international law, was the Commission's treatment of domestic nationality law which violated the principle that an international tribunal must treat domestic law as "fact" in every respect,[119] and should consequently be bound by an agreement of the litigating parties on any given point of such domestic law. This reveals itself from a thorough analysis of *Flegenheimer*.

The Commission[120] declared that as a result of his naturalization in Wurttemberg on August 23, 1894, Flegenheimer lost his American nationality after five years residence there, *i.e.*, in 1895, under the Commission's construction of the Bancroft Treaty between the United States and Wurttemberg. The Commission started from the premise that "no distinction should be made according to whether a rule establishing the nationality of a person is contained in the municipal law of a

117. It is noteworthy that the Commission failed to mention the strong stand taken by the United States on this matter despite the lengthy opinion delivered.

118. See notes 51-57 supra and accompanying text.

119. The Commission correctly quoted from the decision of the International Court of Justice in Certain German Interests in Polish Upper Silesia, P.C.I.J., ser. A, No. 7, at 19, that "national laws are simple facts, an indication of the will and the activity of States, just like judicial decisions or administrative measures." Flegenheimer 18. See also Nottebohm, I.C.J. Rep. 36 (dissent), and cases cited therein.

120. Flegenheimer 84.

state or in a treaty concluded by the state with another state."[121] Yet, in analyzing American law, the Commission disregarded ninety years of legal tradition and formulated a completely new and unique view in actual conflict with American judicial decisions. In emphasizing "its freedom in evaluating the *facts* which, as far as the Commission was concerned, included "the *laws, administrative practice and the jurisprudence of States,*"[122] it seems that the Commission correctly understood the basic principle that domestic law before an international tribunal is but a "fact," and must, consequently, be treated as such.

This thesis resembles the well-known American legal principle that foreign law is a question of fact and must be proved as such.[123] On matters of fact, an agreement of the litigating parties will be binding upon the court.[124] This rule will not prevail, it is true, if such agreement does not conform to what is judicially known.[125] Some domestic statutes constitute an exception to the rule that foreign law is to be treated as a fact by the court.[126] Since no similar statute exists on the international level, the old rule should prevail. Domestic law, including the Bancroft Treaty which figured in *Flegenheimer,* is a "fact." The Commission should therefore have been bound by an agreement on such "fact" between the litigants.[127] It declared that "if it is correct

121. Id. at 46.

122. Id. at 41.

123. See, e.g., Hanna v. Liechtenstein, 225 N.Y. 579, 122 N.E. 625 (1919). This rule is not merely a technical one, but is founded upon basic principles of fairness and due process. See Busch, When Law is Fact, 24 Fordham L. Rev. 646 (1946). Thus, in Arams v. Arams, 182 Misc. 328, 45 N.Y.S.2d 251 (Sup. Ct. 1943), the court denied a judge such excursions "to discover [foreign law] by his own private researches, undisclosed to the parties," without affording the litigants "an opportunity to know what the deciding tribunal is considering and to be heard with respect to both law and fact. . . ." 182 Misc. at 330-31, 45 N.Y.S.2d at 253. Such a method was deemed "contrary to the plainest principles of fair dealing and due process of law." Id. at 331, 45 N.Y.S.2d at 253. As Judge Guggenheim pointed out in Nottebohm, surprise decisions conflict with the "proper administration of justice." Nottebohm Case, I.C.J. Rep. 31 (dissent). This is more so where, as in Flegenheimer, an unwarranted judicial probing into domestic law is undertaken despite the views held by the litigants. Such conduct may amount to an excess of power entailing the nullification of the decision.

124. See, e.g., People v. Walker, 198 N.Y. 329, 91 N.E. 806 (1910).

125. See, e.g., Russ v. City of Boston, 157 Mass. 60, 31 N.E. 708 (1892).

126. In New York, any trial or appellate court, in its discretion, may take judicial notice of a foreign law, and "consider any testimony, document, information or argument on the subject, whether the same is offered by counsel, a third party or discovered through its own research." N.Y. Civ. Prac. Act § 344-a(1)(c). Such law determined by the court shall be included in its findings or charged to the jury. N.Y. Civ. Prac. Act § 344-a(B). See also N.Y. Civ. Prac. Act § 391 (1933 amend.); Cherwien v. Geiter, 272 N.Y. 165, 5 N.E.2d 185 (1936).

127. While conceding that the powers of an international court in matters of nationality

that a body established by States *cannot freely interpret* municipal law," the Commission would "follow the jurisprudence of the International Court of Justice" on this issue.[128] Unfortunately only lip service was given to this otherwise laudable intention. The Commission professed that the jurisprudence of the International Court

permits it to 'verify, by its own knowledge, the application of municipal law *in connection with the facts alleged or denied by the parties* in order to determine whether these are correct or incorrect.' Decision of April 6, 1955, Nottebohm case (2nd phase) C.I.J. 1955, p. 52, Liechtenstein vs. Guatemala.[129]

This citation of *Nottebohm* is misleading in two important aspects. It is not from the *majority* decision in *Nottebohm,* but rather from Judge Guggenheim's *dissenting opinion;* and no "jurisprudence of the International Court of Justice" to that effect exists. Guggenheim actually said something entirely different:

It [the International Court] *cannot freely examine* the application and interpretation of municipal law but can merely *enquire into the application of municipal law as a question of fact, alleged or disputed by the parties* and, in the light of its own knowledge, in order to determine whether the facts are correct or incorrect.[130]

Thus, he correctly stresses that an international tribunal cannot freely examine the application and interpretation of municipal law and that the inquiry into its application presents "a question of fact, *alleged or disputed by the parties.*"

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has been restrictively interpreted by some authorities, the Commission denied nonetheless that this view predominated in international jurisprudence. Flegenheimer 28. Professors de la Pradelle and Politis maintain that an international court can only require that an act of naturalization conform with international law and be free of fraud. de la Pradelle & Politis, 2 Receuil des Arbitrages Internationaux 176 (1923).

128. Flegenheimer 28. (Emphasis added.)

129. Ibid. (Emphasis added.) The Commission goes on to state that a "similar viewpoint" had been adopted by the Permanent Court of International Justice in the Mavrommatis Palestine Concessions, P.C.I.J., ser. A, No. 5, at 30 (1925), 1 World Ct. Rep. 293 (1934). Yet a perusal of this case reveals just the opposite. The International Court declared that on a certain point of Turkish law (whether under Turkish law, Turkish nationality was or could be made essential to the validity of certain concessions), the respondent British Government had not made any allegations opposing the presentations of the plaintiff Greek Government, nor submitted any laws or documents contending such. 1 World Ct. Rep. 373. For this reason, the tribunal stated, "the question does not arise as to whether the Court should, if necessary, ascertain what rule would actually have been applied by Turkish law to the situation under consideration." Ibid. The Court therefore correctly assumed that, if no dispute existed between the parties on a point of domestic law, the international tribunal would be bound by such implicit agreement and neither should nor could undertake an independent investigation of the domestic law. This position is in harmony with the views expressed herein, and, by the same token, it is submitted, in irreconcilable contrast with the opinion of the Conciliation Commission.

130. I.C.J. Rep. 52 (dissent). (Emphasis added.) The parallel French text refers to facts "allégués ou contestés par les parties. . . ." Ibid.

There is no rational explanation for the Commission's erroneous use of *Nottebohm* to support its findings, when it actually takes an excerpt from a *dissenting* opinion and furthermore *misquotes the text in its only relevant point.*[131] The effect of this unprecedented approach becomes readily apparent. The most important legal consideration of the Commission, construction of the Bancroft Treaty between the United States and Wurttemberg, disregarded the rule that an agreement of litigating States on a point of municipal law should be binding upon an international tribunal. The United States had pleaded before the Commission that according to American law[132] and judicial pronouncements,[133] it was legally impossible that a minor, who was a citizen at birth of the United States, *jus sanguinis,* and in 1894 derived a foreign nationality through the naturalization of his father, could thereby *irretrievably* lose *his own* American citizenship. Significantly, the Italian Government did not challenge this argument.[134] This aspect was agreed upon by the litigating parties: *American domestic law knew of no involuntary irretrievable expatriation of a minor child in the nineteenth century.*[135] Disregard by the Commission of this agreement was an unjustified *excès de pouvoir.*

V. Review of the Flegenheimer Decision on Grounds of Domestic Law

A. *The Legal Nature of a Certificate of Nationality*

The Conciliation Commission maintained that its power to investigate whether Flegenheimer had validly acquired American nationality was all the less disputable since *"no American judgment of naturalization has been introduced during these proceedings but a mere administrative statement. . . ."*[136] Evidently, the Commission would have given greater probative value to an "American judgment of naturalization." This is patently erroneous, as undoubtedly a certificate of nationality, such as that of July 10, 1952, bears exactly the same probative value as a "judgment of naturalization," which is correctly denominated a judicial certificate of naturalization.

The rules governing judicial certificates of naturalization are well established in American law. As the United States argued before the Commission, unless void on its face, a certificate of naturalization cannot

131. This is almost as incomprehensible as the Commission's reliance upon the Mavrommatis case, supra note 129.

132. Expatriation Act of March 2, 1907, 34 Stat. 1228.

133. See, e.g., Perkins v. Elg, 307 U.S. 325 (1939).

134. "Ciò possiamo accettare." Final Counter-Reply of the Agent of the Government of the Italian Republic of November 9, 1957, at 73. (Italian text.)

135. This was impliedly admitted by the Conciliation Commission. Flegenheimer 42.

136. Id. at 29-30. (Emphasis added.) See note 75.

be impeached in any collateral proceeding.[137] Under the specific language of section 332(e) of the Immigration and Nationality Act of 1952,[138] there is no difference of dignity between a judicial certificate of naturalization and an administrative certificate of nationality. In other words, the decisive legal significance which the Commission apparently attributes to this distinction between a "judgment of naturalization" and a "mere administrative statement" is *non-existent* in American law.[139]

B. *Expatriation Under the Bancroft Treaty*

The Commission properly admitted that "no distinction should be made according to whether a rule establishing the nationality of a person is contained in the municipal law of a State or in a treaty concluded by the State with another State."[140] It logically follows that such a treaty must be interpreted in the same manner as the authorities and courts of the country whose nationality is at stake would have done. Therefore, the Commission's ultimate determination was purportedly based on an analysis of the applicable rules of American nationality law.[141]

Yet, the Commission's decision surprised *both* parties by a completely novel interpretation of the Bancroft Treaty—as part of American domestic law—and an ingenious "distinguishing" of the controlling *Perkins v. Elg*[142] case. The Conciliation Commission curiously reasoned:

> The Treaty of July 27, 1868 does not afford any exception to the rule of the loss of American nationality following the naturalization in Wurttemberg of minor children included in their father's change of nationality. There is therefore no ground for inserting it in the text of the Treaty and taking it for granted. . . .[143]
>
> * * * *
>
> The Commission must note that the Treaty of 1868 with Wurttemberg contains no reservation in favor of . . . [the] right of option. If it had been the intent

137. See, e.g., Johannessen v. United States, 225 U.S. 227, 236 (1912); Mutual Benefit Life Ins. Co. v. Tisdale, 91 U.S. 238, 245 (1875); Spiatt v. Spiatt, 29 U.S. (4 Peters) 392 (1830); Johanneson v. Staten Island Shipbuilding Co., 272 N.Y. 140 (1936).

138. Immigration and Nationality Act of 1952, ch. 2, § 332(e), 66 Stat. 253, 8 U.S.C. § 1443 (1958):

A certificate of naturalization or of citizenship issued by the Attorney General under the authority of this sub-chapter shall have the same effect in all courts, tribunals, and public offices in the United States, at home and abroad, of the District of Columbia, and of each State, Territory, and outlying possession of the United States, as a certificate of naturalization or of citizenship issued by a court having naturalization jurisdiction.

139. This has been specifically confirmed by the opinion of the Attorney General of January 19, 1960, on the Flegenheimer case. 41 Ops. Att'y Gen. No. 70 (1960).

140. Flegenheimer 46.

141. Since Italy was not a signatory of the Wurttemberg Bancroft Treaty, its use of the treaty as a defense was necessarily limited to the extent to which such treaty became part of domestic American law.

142. 307 U.S. 325 (1939).

143. Flegenheimer 54.

of the contracting parties to admit it, they would have introduced certain provisions in their agreement which the Commission cannot presume.[144]

This unique view runs counter to American judicial decisions. Never had it been held that under the Bancroft Treaties a *minor* would be *irretrievably expatriated* upon his parent's naturalization in another country.[145] The Italian and American Governments agreed that (a) in the relevant years about which the Court concerned itself, 1894 and 1895, American law did not know of an involuntary and irretrievable expatriation of a minor child through his parent's naturalization in a foreign State; (b) the well-known Supreme Court decision in the *Elg* case had authoritatively enunciated how and when the right of election of the minor regarding his American citizenship should be exercised.[146]

American nationality laws in the nineteenth century were characterized as lacking the "technical accuracy"[147] of later statutes, for "prior to the Act of 1907 . . . American law on expatriation was not very clear and gave rise to uncertain interpretations. . . ."[148] This frank evaluation of the quality of early American nationality law should have served as an additional "red flag" for the Commission prior to its assuming a definite negative position on an American citizen's nationality status during that time. The Commission conceded that the Bancroft Treaty with Wurttemberg (as was true of all other Bancroft Treaties, including that with Sweden discussed in the *Elg* case) contained no express provision with respect to the consequences of a minor's naturalization in a foreign State.[149] This silence on the all-important position of minors prompted the Commission to assert that "there is therefore no ground for inserting it in the text of the Treaty and taking it for granted; *'ubi lex non distinguit, nec nos distinguere debemus.'* Such is the wisdom of centuries."[150] This whole perspective is wrong since what is considered here is actually not an "exception" or "distinction" at all, which, to be upheld, should appear in the text itself. Exactly the opposite view was held in *Elg* by the United States Supreme Court:

There is no specific mention [in the Swedish Bancroft Treaty] of minor children who have obtained citizenship by birth in the country which their parents have left. And if it be assumed that a child born in the United States would be deemed to acquire the Swedish citizenship of his parents through their return to Sweden and resumption of citizenship there, still nothing is said in the treaty which in such case

144. Id. at 56.
145. See, e.g., Perkins v. Elg, supra note 142.
146. The pleadings on both sides fail to indicate any disagreement on these points.
147. Flegenheimer 36.
148. Id. at 40.
149. Id. at 54.
150. Ibid.

would destroy the right of election which appropriately belongs to the child on attaining majority. *If the abrogation of that right had been in contemplation, it would naturally have been the subject of a provision suitably explicit. Rights of citizenship are not to be destroyed by an ambiguity.*[151]

The Commission inferred from the "genesis of the Bancroft Treaties" that the main concern of the United States was to

put a stop to the evil usage and inconveniences of dual nationality, by adopting the rule that every naturalization in the United States accompanied by a permanent residence, entailed as a consequence, automatically, the loss of the former allegiance; and the United States succeeded in obtaining this result only by admitting, in its turn, by way of reciprocity, that American nationality would not continue to exist following naturalization, accompanied by permanent residence, of an American national abroad.[152]

Consequently, the principal purpose of the Bancroft Treaties was "to link every foreign naturalization in a State, the seriousness and sincere character of which is proved by a durable residence, with expatriation in the other State."[153] Assuming the correctness of the controversial contention that the Bancroft Treaties dealt with expatriation, and not merely the loss of diplomatic protection, this would not be inconsistent with the "right of election" of a minor child to reacquire his American nationality upon majority. This right of a minor child is at stake in this context and nothing else.[154]

C. *Intent of the Parties to the Bancroft Treaties*

That American law was clear, when the Bancroft Treaties were concluded, as to the "right of election" of a minor, is evidenced by the citations in *Elg*. It follows that the Commission's attempt to place Wurttemberg and American laws on naturalization in juxtaposition

151. 307 U.S. 325, 337. (Emphasis added.)

152. Flegenheimer 54-55.

153. Id. at 55.

154. The Commission's efforts to justify its unique interpretation of the raison d'être of the Bancroft Treaties must fail. If the treaties did purport to reduce occurrences of dual nationality, this goal was achieved by virtue of Article 4 of the Wurttemberg Treaty which provided that in case of reintegration into the "first" or original country, the "second" nationality (viz., that acquired by naturalization) will be lost. This provision was ignored by the Commission. Consequently, there was no need for the Commission's interpretation which entailed the "expatriation of a minor child," since even without such expatriation, no dual nationality situation would have arisen. At some later date, a decision between the two nationalities had to be made. If the option to elect was not exercised, there was no reintegration, and thus no dual nationality. If the option was exercised, however, reintegration occurred under Article 4, and the previously acquired nationality was lost. Again, we have no dual nationality. The Commission's reasoning is all the more untenable in its seeking to eliminate a "danger" which, upon closer inspection, doesn't exist at all.

leads nowhere and permits no relevant conclusion as to the "agreed intent of the contracting parties." Moreover, no consideration was given to numerous American administrative decisions dealing with the derivative naturalization of a child through his parents' naturalization in a country with which a Bancroft Treaty had been signed, such as Prussia, Denmark, and Norway, among others. The United States had considered the child's "right of election" an *indispensable complement* to the effects of the parents' naturalization upon the citizenship status of the minor.[155] Also overlooked was a representative declaration by United States Attorney General Edward Pierrepont in the *Steinkauler* case,[156] quoted by the Supreme Court in *Elg*:

> The son being domiciled with the father and subject to him under the law during his minority, and receiving the German protection where he has acquired nationality and declining to give any assurance of ever returning to the United States and claiming his American nationality by residence here, I am of the opinion that he cannot rightly invoke the aid of the Government of the United States to relieve him from military duty in Germany during his minority. But I am of opinion that when he reaches the age of twenty-one years he can then elect whether he will return and take the nationality of his birth, with its duties and privileges, or retain the nationality acquired by the act of his father.[157]

The Commission's search for the "agreed intent" of the parties to the Wurttemberg Bancroft Treaty should have rather recognized the prevailing presumption in favor of the *preservation* of this right of election.

D. *Perkins v. Elg*

As the views of the Commission conflicted with American domestic jurisprudence, as initially enunciated in *Elg,* it is understandable that the Commission felt compelled to justify its unorthodox position by "distinguishing" *Elg* from *Flegenheimer.* The Commission found a relevant difference in the fact that Miss Elg was born in the United States and was an American citizen *jure soli,* while Flegenheimer, born abroad, was an American *jure sanguinis.*[158] This distinction has no validity. The Supreme Court gave no indication that its conclusions would have been different if Miss Elg's American citizenship had been acquired *jure sanguinis* rather than *jure soli.*[159] The Commission also observed that the

155. See the authorities discussed in Perkins v. Elg, 307 U.S. at 329-34.

156. 15 Ops. Att'y Gen. 15 (1875).

157. 307 U.S. at 330-31.

158. Flegenheimer 60.

159. The Supreme Court pointed out that the laws of the United States purport to confer citizenship by virtue of both jus sanguinis and jus solis. 307 U.S. at 344. "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States. . . ." Rev. Stat. § 1993, now found in 8

naturalization of Flegenheimer's father expressly mentioned his son, Albert, whereas nothing on this point was said in *Elg*.[160] The fact that the Supreme Court did not inquire into the "technical" manner in which Miss Elg had acquired Swedish citizenship through her parents' naturalization would seem to be incontrovertible proof that this point was deemed irrelevant. This is further demonstrated by the Court's approval of the *Anderson* matter[161] in which the naturalization of a minor in Denmark, upon *his own application,* was held not to have deprived him of his right of election. Thus, the Commission again perceived a "distinguishing" factor where actually no valid distinction could be made.[162]

The Commission's decision further alleged that the Bancroft Treaty with Sweden (Article III), pertinent to *Elg,* differed decisively from the Bancroft Treaty with Wurttemberg (Protocol and Article IV).[163] Article III of the Bancroft Treaty with Sweden conferred a "discretionary power" on the contracting State "for establishing the conditions of reintegration of a naturalized person,"[164] while the Wurttemberg Treaty provided that such naturalized person could be reintegrated "only in the same manner as other aliens" in conformity with the laws and regulations established by the Protocol and Article IV of the Treaty.[165] Article IV stated:

If a Wurttemberger naturalized in America renews his residence in Wurttemberg without the intention to return to America, *he shall be held to have renounced*

U.S.C. § 1401(a)(3) (1958). In Rueff v. Brownell, 116 F. Supp. 298 (D.N.J. 1953), the court was faced with deciding the citizenship status of one born an American citizen jus sanguinis and applied the principles laid down in Elg.

160. Flegenheimer 60.

161. 307 U.S. at 340.

162. The Commission was impressed by the fact that Miss Elg had elected her American citizenship by going to the United States immediately upon reaching her twenty-first birthday, while Flegenheimer did not "elect" American nationality until he was forty-nine, indicating he was too dilatory in his election to justify application of the Elg doctrine. Flegenheimer 61. The failure to elect immediately upon majority would seem immaterial if a claimant was unaware of his citizenship status and the rights flowing therefrom. See Rogers v. Patokoski, 271 F.2d 858 (D.C. Cir. 1959).

163. Flegenheimer 61-62.

164. Article III of the Bancroft Treaty with Sweden stated: "If a citizen of the one party, who has become a recognized citizen of the other party, takes up his abode once more in his original country and applies to be restored in his former citizenship, the government of the last-named country is authorized to receive him again as a citizen on such conditions as the said government may think proper." Naturalization Convention and Protocol with Sweden, May 26, 1869, 17 Stat. 810. In connection with this article, the Protocol provided: "It is further agreed that if a Swede or Norwegian, who has become a naturalized citizen of the United States, renews his residence in Sweden or Norway without the intent to return to America, he shall be held by the government of the United States to have renounced his American citizenship." 17 Stat. 812.

165. Flegenheimer 62.

his naturalization in the United States. Reciprocally, if an American naturalized in Wurttemberg renews his residence in the United States without the intention to return to Wurttemberg, *he shall be held to have renounced* his naturalization in Wurttemberg.[166]

The Commission relied in particular on Part III of the Protocol,[167] construing Article IV, which had a twofold purpose. First, a former Wurttemberg citizen, who, after having become a naturalized American citizen, returned to Wurttemberg for more than two years without intending to go back to the United States (and, consequently, was held to have renounced his American naturalization), could not be made a Wurttemberg citizen again against his free will and, possibly, without his knowledge. Second, Wurttemberg was under no special obligation to accept such a former citizen again as its citizen.[168] In substance, then, the Protocol prevented unintentional repatriation and excluded a special duty to repatriate by the country of origin. The Commission did not grasp this significance, and read something into the Protocol which is not really there. Emphasis on the words "in the same manner as other aliens" would signify a mutual obligation incumbent on the contracting parties to convey citizenship to returning emigrants *only* under the same rules which *would apply to aliens who had never before been citizens of the naturalizing country.* However, nothing of that kind is actually said in the Protocol. The words "as other aliens" simply refers to all aliens not within the scope of the respective Bancroft Treaty, such as former Americans naturalized in a foreign country other than Wurttemberg, or aliens who had never been Americans before.

Briefly put, the pertinent language of the Protocol does *not* say, as the Commission erroneously believed, "that the State to which the

166. 16 Stat. at 736. (Emphasis added.)

167. See Flegenheimer 51-52:

It is agreed that the fourth article shall not receive the interpretation, that the naturalized citizen of the one State, who returns to the other State, his original country, and there takes up his residence, does by that act alone recover his former citizenship; nor can it be assumed, that the State, to which the emigrant originally belonged, is bound to restore him at once to his original relation. On the contrary, it is only intended to be declared, that the emigrant so returning, is authorized to acquire the citizenship of his former country, in the same manner as other aliens in conformity to the laws and regulations which are there established. Yet it is left to his own choice, whether he will adopt that course, or will preserve the citizenship of the country of his adoption. With regard to this choice, after a two years residence in his original country, he is bound, if so requested by the proper authorities, to make a distinct declaration, upon which these authorities can come to a decision as the case may be, with regard to his being received again into citizenship of his further residence, in the manner prescribed by law.

168. Despite its reciprocal character, the Protocol was of actual practical importance only for Wurttemberg for the simple reason that for thousands of returning former citizens of Wurttemberg, there may have been a few returning former Americans. The fact that this Protocol has no exact equal in any of the other Bancroft treaties would tend to confirm the view that it was designed primarily to satisfy Wurttemberg, not the United States.

emigrant originally belonged is not bound to restore him at once to his original status, *even if that is provided by the municipal law of that State,*" but simply "that the State to which the emigrant originally belonged is not bound to restore him at once to his original status, *if that is not in conformity to the laws and regulations which are there established.*"

Part III of the Protocol to the Wurttemberg Bancroft Treaty, while employing different language, provides in substance exactly what Article III of the Bancroft Treaty with Sweden stipulated, viz., that "the government of the . . . [original] country is authorized to receive . . . [the returning emigrant] as a citizen on such conditions as the said government may think proper."[169] In particular, the Wurttemberg Protocol nowhere speaks of any special naturalization procedure as a prerequisite for reintegration. On the other hand, the Swedish Bancroft Treaty clearly provided for no reintegration unless the person in question "*applies* to be restored to his former citizenship."[170] Still, any difference of language existing between Article III of the Swedish Treaty and Article IV of the Wurttemberg Treaty (supplemented by the Protocol) had not the slightest bearing upon the status of a minor's American nationality when he attained majority.[171]

Even if the Commission's interpretation of the Wurttemberg Bancroft Treaty were correct, its conclusions, nevertheless, would remain untenable. The tribunal should have concluded that the option right, allegedly lost by Flegenheimer in 1894, was reacquired on April 7, 1917, when the treaty expired.[172] In discussing whether this expiration was relevant to determination of Flegenheimer's status, the Commission observed:

> In order to determine the conditions and the effects of a naturalization, the legal and conventional provision at the time the act was accomplished apply, an issue which is in any event admitted by . . . the United States. . . . Now, from 1894, the date of Albert Flegenheimer's naturalization, until he attained majority in 1911, and even later during a period of five years, until April 1917, the Bancroft Treaty with Wurttemberg was actually in force and definitively established the nationality of the individual concerned. The Commission is of the opinion that, even if only by way of hypothesis the jurisprudence developed by the Supreme Court in the Perkins v. Elg case were to apply, he lost his American nationality before the repeal of the aforesaid Treaty.[173]

169. See note 164 supra.

170. Ibid.

171. The correctness of this conclusion has been recently confirmed by the Immigration and Naturalization Service of the United States Department of Justice, which has labeled the Commission's interpretation of the Wurttemberg Bancroft Treaty as "incorrect." 41 Ops. Att'y Gen. No. 70 (1960).

172. See note 77 supra. See also 3 Hackworth, Digest of International Law 334 (1942).

173. Flegenheimer 62.

If one takes the erroneous position, as the Commission did, that Flegenheimer's option rights did *not* survive the 1894 naturalization in Wurttemberg because of the Bancroft Treaty, the question arises whether these rights were not revived on April 7, 1917, when the Bancroft Treaty with Wurttemberg expired. Insofar as the treaty constituted an obstacle to applying general rules of American nationality law, its elimination should have automatically led to re-application of these rules thereafter. So as to fully appreciate the relevancy of the treaty's expiration in 1917 upon Flegenheimer's situation, the following observations are in order.

If the Wurttemberg Bancroft Treaty rendered it impossible to accord Flegenheimer the same treatment Miss Elg received, it would seem obvious that Flegenheimer's situation, once the treaty expired, certainly should not have been worse than that of Miss Elg at the time the Bancroft Treaty with Sweden was in force. If Miss Elg's option right was recognized, as the Commission asserts, because the Bancroft Treaty with Sweden "permitted" the United States to accept a returning former American citizen (who had become a naturalized Swedish citizen during minority), why should this freedom of action have not applied with at least equal force in the case of Flegenheimer, once the alleged obstacle, namely the Bancroft Treaty with Wurttemberg, was removed. Had the Commission recognized this elementary aspect, it would have—even on the basis of its own untenable legal premises—then faced the question whether Flegenheimer's reintegration, which undisputedly occurred in 1942, should be regarded as an acknowledgment of his status as an American citizen retroactive not only to 1890, or 1894, or even 1895, but rather to April 7, 1917, when the impediment supposedly created by the Wurttemberg Treaty (and the resulting municipal law), had been eliminated. To raise this question would have meant, it is submitted, an affirmative answer. Be it noted in this context that for the purpose of the Commission's proceedings,[174] such alternative reasoning would have necessarily led to the identical result.

E. *Belated Exercise of the Right of Election*

The United States contended that if Flegenheimer had a duty to "elect" American citizenship within a reasonable time after attaining majority—as assumed by the decision of the Department of Justice in his favor on July 10, 1952—this duty had been met in a timely fashion.[175]

174. The United States sought to invalidate a property transfer made in 1941, relying upon the provision of the Italian Peace Treaty establishing "controlling dates" regarding the claimant Flegenheimer's nationality as September 3, 1943, to September 15, 1947.

175. Final Observations of the Agent of the Government of the United States, Oct. 28, 1957.

Flegenheimer had learned of his own possible claim to American citizenship in 1933 and from there on acted with reasonable speed.[176] The period between 1911, when he attained majority, and 1933 cannot be held against him, as it was not established that he was then cognizant of any right to American nationality or any duty to elect. Election by definition presupposes knowledge of facts upon which a choice may be made.

However, it is submitted, Flegenheimer was under no duty to elect at all. The issuance of the certificate of American citizenship on July 10, 1952, which assumed the existence of a duty to elect, failed to reflect accurately American law as subsequently clarified by *Perri v. Dulles*[177] and *Rueff v. Brownell.*[178] It is now clear that prior to the Nationality Act of 1940, a minor, an American at, or by, birth, was under no duty to disavow his involuntary naturalization in a foreign State by returning to the United States or by making a declaration of retaining or electing American citizenship upon majority. A minor's derivative naturalization by virtue of his parents' naturalization in a foreign State cannot be deemed a voluntary act of expatriation by such minor,[179] particularly where the minor is born outside the United States of American-naturalized parents,[180] as was the case with Flegenheimer.

The Commission erroneously assumed that since Flegenheimer did not act to elect American citizenship until he was in his forties, he forfeited any nationality claims by acting too late.[181] This ignored the clarified state of American law, known to the Commission, that no duty to elect existed at all upon majority, thus obviating the need for deciding whether this (non-existent) duty was discharged in a timely manner. In addition to the *Elg* decision, the precedents cited by the United States in support of its position that there could be no forfeiture of any right to "elect" were dismissed as not pertinent on the unconvincing theory that in these cases no Bancroft Treaty existed between the United States and the country wherein the American minor had been natural-

176. Flegenheimer 10, 15.

177. 206 F.2d 586 (3d Cir. 1953).

178. 116 F. Supp. 298 (D.N.J. 1953). See also note 159.

179. See, e.g., Mandoli v. Acheson, 344 U.S. 133 (1952); Perri v. Dulles, 206 F.2d 586 (3d Cir. 1953); Rueff v. Brownell, 116 F. Supp. 298 (D.N.J. 1953).

180. Perri v. Dulles, supra note 179; Rueff v. Brownell, supra note 179.

181. Flegenheimer 60-61. The Commission reasoned that since the Supreme Court in the Elg case had stressed that the right of election in favor of American nationality be made "upon attaining majority" and Miss Elg had in fact elected promptly in taking up an American residence, any dilatory exercise of the right would be fatal. The Commission maintained that this result would follow even if Flegenheimer's version of belated discovery of his citizenship status were accepted. Ibid.

ized.[182] This misunderstanding of the American position violates elementary logic. If the Commission believed—as it actually did—that Flegenheimer had forfeited his option rights (assuming its existence), the Commission was, of course, obligated to take issue with the precedents proffered by the American Government. The very same option rights existed in these cases, and the courts looked into those circumstances, if any, under which such rights might be forfeited. One cannot summarily dispose of these precedents, as the Commission did, by merely asserting that there no Bancroft Treaties were involved.

1. Mandoli v. Acheson

In *Mandoli v. Acheson*,[183] the United States Supreme Court had to decide whether an American-born citizen, who by foreign law derived from his parents Italian citizenship, had lost his United States nationality by prolonged foreign residence after majority.

Born in the United States of alien Italian parents, Mandoli was brought to Italy while still an infant. When fifteen years old, he was refused permission to enter the United States since he was deemed too young to travel alone. Due to subsequent military service in the Italian army, Mandoli was denied entry in the United States in 1937. The district court held that Mandoli had expatriated himself by voluntary service in the Italian armed forces and continued residence in Italy after majority, acts which were deemed an election between dual citizenship in favor of Italy.[184] The court of appeals, relying on the *Elg* case, affirmed on the ground that Mandoli's failure to return to the United States upon attaining majority operated to extinguish his claims to American citizenship.[185] The Supreme Court reversed, declaring that "the dignity of citizenship which the Constitution confers as a birthright upon every person born within its protection is not to be withdrawn or extinguished by the courts except pursuant to a clear statutory mandate."[186] The Court observed that in enacting the Expatriation Act of March 2, 1907,[187] Congress had limited the presumption of expatriation from foreign residence to the case of naturalized, not native-born, citizens.[188] The Court held, therefore, that when Mandoli became of full age in 1928, he was then under no duty, as a native-born Ameri-

182. Flegenheimer 62-65.

183. 344 U.S. 133 (1952).

184. Id. at 135. The district court's opinion is not reported.

185. 193 F.2d 920 (D.C. Cir. 1952).

186. 344 U.S. at 139.

187. 34 Stat. 1228.

188. 344 U.S. at 137.

can, to make an election and return to the United States for permanent residence if he chose United States citizenship.[189]

The Court distinguished *Elg*, since Miss Elg had promptly elected American citizenship and decisively evidenced this action by resuming United States residence, and declined to accept *Elg* as dispositive of the question of the consequence attendant to failure to elect American citizenship:

> What it [*Elg*] held was that citizenship conferred by our Constitution upon a child born under its protection cannot be forfeited because the citizen during nonage is a passive beneficiary of foreign naturalization proceedings. It held that Miss Elg had acquired a derivative dual-citizenship but had not suffered a derivative expatriation. In affirming her right to return to and remain in this country, it did not hold that it was mandatory for her to do so.[190]

When analyzing the effects of an American-born minor's derivative naturalization in a foreign country upon his American citizenship, the Mandoli and Flegenheimer situations become obviously comparable. The Commission's main argument was based on the thesis that a right to "elect" is conceptually comprehensible only where the person involved has *two* nationalities from which to choose. This right to elect expired (in the Conciliation Commission's opinion) when—as the Commission erroneously assumed—Article I of the Bancroft Treaty effected the minor's *loss* of American citizenship upon acquisition of another nationality abroad. Yet, this shopworn thesis of "avoiding abuses of dual nationality" cannot certainly be employed where the "dual nationality" concerns a person with one nationality (German), who at the same time has the right to elect another nationality (American), retroactively, by exercising an option, and in so doing, lose his German nationality.

However, be that as it may, from the viewpoint of domestic American law, it is perhaps possible and natural to denominate a person, having presently one nationality and the right to elect another, as some species of a dual national. There can be no doubt of the relevancy of the *Mandoli* case in refuting the Commission's alternative argument concerning Flegenheimer's belated right of election of American citizenship. Flegenheimer could have forfeited his right to elect American nationality only by a conscious and voluntary act of expatriation or election in favor of German citizenship, not by a mere belated election of American nationality.

The Commission rejected other cases presented by the United States in support of its arguments because these were decided *after* the enact-

189. Ibid.

190. Id. at 138-39.

ment of the Nationality Act of 1940.[191] However, these judicial decisions deal with factual situations occurring before 1940, and constitute valid law with respect to the pre-1940 period. This is especially true of *Rueff v. Brownell,*[192] which is similar to *Flegenheimer.* Miss Rueff, born in Germany of native American parents, was eight years old when she acquired German nationality through her mother's naturalization in 1918. In 1934, at the age of twenty-four, she first sought recognition of her American nationality. This was some six years before the Nationality Act of 1940 was passed. The federal district court held that Miss Rueff's failure "to elect United States citizenship after . . . majority, even though followed by prolonged residence in a foreign state, did not result in her expatriation. . . ."[193] The *Rueff* decision should not have been ignored as an important precedent even though no Bancroft Treaty was then in force between Germany and the United States, for the Commission had based its alternative reasoning on the assumption that the Wurttemberg Bancroft Treaty *did not* affect Flegenheimer's right of election.

2. Perri v. Dulles

The Commission's rejection of decisive American precedents is particularly objectionable with respect to *Perri v. Dulles.*[194] Perri, born in Italy of a naturalized American citizen, acquired Italian citizenship at fifteen upon his father's naturalization in 1928, and thus became a dual citizen. Recognition of his claim to American nationality was first attempted in 1947, when Perri was twenty-four years of age. The United States court of appeals had to determine whether Perri expatriated himself by not electing United States citizenship *and* returning to the United States upon attaining majority in 1934. Following the rule promulgated in *Mandoli,* the court held that *no duty to elect or return* existed *prior* to the Nationality Act of 1940.[195] It pointed out that the lower court had erroneously applied the *Elg* dictum, establishing

191. Flegenheimer 63-65.

192. 116 F. Supp. 298 (D.N.J. 1953).

193. Id. at 305. The Court declared: "The citizenship acquired by the plaintiff . . . is deemed to continue, notwithstanding her acquisition of a derivative foreign citizenship during minority, unless she has been deprived of it by either operation of law or voluntary action in conformity with applicable legal principles." Id. at 303-04. It went on to comment: "The defendant . . . argues that the conduct of the plaintiff, to wit, her failure to elect 'between dual citizenship' within a reasonable time after she attained her majority and her prolonged residence in a foreign state, was tantamount to a renunciation of her United States citizenship and an election of her German citizenship. We are of the opinion that this argument is without merit." Ibid.

194. 206 F.2d 586 (3d Cir. 1953).

195. Id. at 591.

such a duty, which had been manifestly negated by the Supreme Court in *Mandoli*.[196]

Under section 401(a) of the Nationality Act of 1940,[197] American citizens acquiring foreign citizenship through the naturalization of a parent during minority were required to return and take up United States residence *within two years* after the effective date of the act, January 13, 1941. Failure to do so conclusively denoted surrender of American citizenship. Perri had *clearly not complied with the statute*, and had not acted on his claim until 1947. In noting that expatriation necessitated a voluntary act, the court held that Perri did not forfeit his American nationality claims because of his failure to satisfy the statutory period of limitation:

> [W]e conclude that the two years period of limitation must . . . be regarded as not beginning to run until . . . [Perri] *learned that he had a claim to American citizenship*. For to provide that a citizen 'shall be forever estopped' from claiming citizenship by his failure to return to the United States at *a time when he was wholly unaware of his citizenship* would certainly be to deprive him of it arbitrarily and without his knowledge, much less his concurrence.[198]

The tolling of the statutory two-year period under the 1940 Nationality Act until a person has knowledge of his claim should have been coupled with the *Elg* rule whereunder the right must be asserted at majority or within a reasonable time thereafter—lack of knowledge rendering every delay a "reasonable" one. In the absence of any reasons of public policy for determining "reasonableness" on objective standards, it is quite evident that the subjective element of knowledge must, of necessity, be a factor in ascertaining what is or is not "reasonable." Even the Commission found no valid grounds for suspecting that Flegenheimer knew of *his own claim* to American citizenship at any time prior to 1933. The Commission manifestly confused the claimant's knowledge of his *father's* status with the claimant's knowledge of his *own* claim to American citizenship.[199]

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196. Ibid.

197. 54 Stat. 1183.

198. 206 F.2d at 591. (Emphasis added.) It should be noted that the Immigration and Naturalization Service has also taken the position, in reliance on the Perri case, that the Commission's view on the issue of "lack of knowledge" is erroneous. 41 Ops. Att'y Gen. No. 70 (1960).

199. The American Government relied upon Lehmann v. Acheson, 206 F.2d 592 (3d Cir. 1953), and Podea v. Acheson, 179 F.2d 306 (2d Cir. 1950), as demonstrating that, assuming a duty of "prompt election," any period of time lost while a claimant was unaware of his existing valid claims to American citizenship could not be counted against him, especially where the lack of knowledge was based on erroneous information given by State Department officials. In this context, it should be remembered that Flegenheimer, in consulting American consular offices in Europe between 1933 and 1939 regarding his

The above conclusions have been significantly corroborated by the recent decision of the court of appeals in *Rogers v. Patokoski*.[200] Patokoski, born in Finland of a naturalized American citizen, served in the Finnish Army and voted in at least one Finnish election.[201] The United States Attorney General contended this conduct constituted a voluntary abandonment of Patokoski's American citizenship. Patokoski maintained that he was not aware of any United States citizenship claims at that time. Patokoski admitted "his father's telling him of his father's being a naturalized United States citizen . . . and . . . that shortly before her death [his] . . . mother showed him his father's United States citizenship papers. . . ."[202] The court, however, recognized that knowledge of his *father's* status was certainly not inconsistent with genuine ignorance of Patokoski's *own* status. This was so "partly because of the language barrier against appellee's easily realizing the expansive significance of his father's status as an American citizen and against easily realizing the meaning of his father's citizenship papers. . . ."[203] The court thus concluded that Patokoski's assertions of *ignorance* as to his *own* status were worthy of belief and relevant, and therefore held "that he never knew that he ever was such [a] citizen"[204] until April 1949, when he was already forty-two years old.

The Commission was skeptical of Flegenheimer's professed ignorance of his citizenship claims until his later adult years. It declined to give credence to the "*ex parte* affidavits and statements established by third parties,"[205] since it was difficult to reconcile them with Flegenheimer's

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nationality claims, had received "negative or ambiguous information." Flegenheimer 10. The Commission rejected the Podea and Lehmann cases, stating that they did not involve any naturalization problem. Flegenheimer 65. While this may be true, there was no reason why the general principles propounded in these cases should not have applied with equal force to Flegenheimer. Flegenheimer had not indulged in any affirmative act of expatriation that would have impaired his claims, unlike Podea and Lehmann who had served in the armed forces of a foreign state and taken incidental oaths of allegiance.

200. 271 F.2d 858 (9th Cir. 1959).

201. Id. at 859. There were three separate periods of Patokoski's Finnish Army service. The first two periods occurred before section 401(c) of the Nationality Act of 1940 took effect. Only the third period occurred after the 1940 Act became law. It is significant that the Attorney General treated only the third period of army service as important, 271 F.2d at 859 n.3, indicating thereby that the vital change in American nationality law on the question of "involuntary expatriation" and the "right to elect" occurred only after 1940. Thus, departmental practice, as demonstrated by the Attorney General's position in the Patokoski case, completely agrees with the author's view of the law.

202. 271 F.2d at 860.

203. Ibid.

204. Ibid.

205. Flegenheimer 61.

birth certificate and other documents which stated that his father had been a naturalized American.[206] While these documents could have possibly given Flegenheimer an inkling of *his father's* status as an American citizen until 1894, they could not have conveyed positively the notion that he, *himself,* had a claim to American nationality. Flegenheimer certainly was not a specialist in public international law. Again, American nationality law was relatively obscure in the nineteenth century until some light was first shed in *Elg.* The Commission's conclusions, insofar as they are predicated on Flegenheimer's irrelevant knowledge of his father's status, being untenable, should be rejected.

In retrospect, the Commission's ill-fated "expedition" into American domestic law failed to measure up to the exacting standards applied by American courts in matters affecting nationality. The Commission generally overlooked the crucial fact that the burden of proof upon one who affirmatively alleges expatriation and loss of citizenship is indeed a "heavy one."[207] As Chief Justice Warren affirmed in *Perez v. Brownell*:

> Citizenship *is* man's basic right for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his countrymen. He has no lawful claim to protection from any nation, and no nation may assert rights on his behalf. His very existence is at the sufferance of the state within whose borders he happens to be.[208]

CONCLUSION

An attempt has been made to show that the *Nottebohm* and *Flegenheimer* decisions mark approaches in new and inconsistent directions to the application of domestic nationality law by international tribunals.

In *Nottebohm,* an abortive effort was made to impose unprecedented and legally untenable restrictions upon a sovereign State's right to extend diplomatic protection to its citizens on the international level. In *Flegenheimer,* by contrast, while issue was taken with the errors of the *Nottebohm* decision, the laudable result of rejecting the *Notebohm* doctrine was unfortunately achieved through faulty reasoning. Moreover, in *Flegenheimer,* the Commission not only committed an *excès de pouvoir,* but in delving into American domestic nationality law, it disregarded American jurisprudence as enunciated in judicial decisions. Even if the Commission had properly interpreted American legal tradition, its investigation would have nonetheless been objectionable for reasons of international law. *Flegenheimer* demonstrates the cumulative effect of a violation of *international* law principles coupled with a completely untenable ap-

206. Ibid.
207. Lehmann v. Acheson, 206 F.2d at 598.
208. 356 U.S. 44, 64 (1958) (dissent).

praisal of *American domestic nationality* law. It is this cumulative effect which lends particular significance to this decision. Both *Nottebohm* and *Flegenheimer* demonstrate the real dangers flowing from a lack of that adherence to tradition and precedent by international tribunals which remains a necessary requisite in a field wherein reliance upon safe, simple, and unambiguous rules is of vital importance. It is hoped that both decisions will sound as a warning signal for future deliberations of international tribunals. If so, then perhaps even these unfortunate judicial pronouncements may have served a useful purpose after all.