THE AUSTRALIAN-HUNGARIAN CONSULAR TREATY OF 1988 AND THE REGULATION OF DUAL NATIONALITY

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PART ONE

1. Introduction

In early 1988 it was reported that Hungary had signed a consular agreement with Australia.[1]

The agreement is clearly the first fruit of seeds planted as much as ten years ago, when the then Australian Minister for Foreign Affairs, Mr Peacock, made a statement to the effect that Australia should give high priority to negotiating bilateral agreements to overcome dual nationality problems.[2]

At that time, it is apparent, Australia's position was that, while it would do all it could to protect its nationals overseas, its consular officers could not assist when a dual national was in the State of his other nationality and the jurisdiction of that other State was being asserted.[3]

Further reference to the subject occurred in 1981 in a statement by another Minister for Foreign Affairs, Mr Street, who observed that Australia was actually seriously considering the possibility of negotiating such bilateral agreements.[4] This statement was made in the context of a new Soviet citizenship law,[5] which came into force in 1979. Mr Street noted that Australia could face difficulties in affording protection to its citizens in States which also claimed that status for the individual concerned. In other words, Australia's power in such situations was limited

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[1] The Australian, 8 March 1988.

[2] Brown (ed.): Australian Practice in International Law 1981-1983. *10 Aust. Y.I.L.* 454-455.

[3] Statement to the House of Representatives by the Minister for Foreign Affairs, 26 May 1978. In: Australian Practice in International Law 1978-1980. *8 Aust. Y.I.L.* 363.

[4] Note 2, *supra*, at 455.

[5] Note 15, *infra*.

by the rights of other States. However, Mr Street added reassuringly that all Australians, including those who are citizens of other States, " . . . when abroad will be given *all possible* (emphasis added) assistance by Australian diplomatic missions and consular posts."[6] The only snag is that "all possible assistance" may mean none at all in States which simply (and probably legitimately) refuse to recognize the Australian citizenship of the dual national (or which, if they recognize dual nationality, nevertheless maintain that the Australian one has no effect in the other State).

It was against this background of States which either refused to recognize dual nationality at all or, if they recognized it, maintained that the dual national could not claim the protection of Australia in the second State, that yet another Minister for Foreign Affairs, Mr Hayden, was able to announce in 1983 that Australia was engaging in discussions with certain interested countries with a view to identifying sufficient common ground to warrant the commencement of negotiations with the States concerned.[7]

In 1988 the Australian-Hungarian consular treaty[8] with its Exchange of Notes was concluded, to be followed, it is anticipated, by several agreements of similar scope and purpose. The aim of this article is to discuss the provisions of the Note and consider how the agreement may fit into the existing body of rules relating to the protection of dual nationals.

The signing of a consular treaty is not normally an event of major legal significance and the agreement concluded by Australia and Hungary is, in most respects, no exception.

This agreement deals with those matters normally found in such instruments, including the establishment of consular relations,[9] privileges and immunities of consular staff and posts[10] and the description and exercise of consular functions.[11] However, what is most interesting about this treaty is that it is accompanied by an Exchange of Notes between Australia and Hungary, in which, for the first time, a socialist State has made what may be seen as a significant concession in consular relations with Australia, viz., that some Hungarian citizens who also possess Australian citizenship should, in certain circumstances and for certain purposes, be treated as Australians even when in Hungary.

It is not unknown for similar privileges to be accorded to individuals

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[6] Note 2, *supra.*

[7] *Ibid.*, at 456.

[8] Agreement on Consular Relations between Australia and the Hungarian People's Republic, signed in Canberra on 7 March 1988. The author would like to thank the Department of Foreign Affairs and Trade, Canberra for supplying him with a copy of this agreement.

[9] Chapter Two.

[10] Chapter Three.

[11] Chapter Four.

who have the citizenship of a socialist and Western State.[12] However, never before has such an agreement been negotiated by Australia, and it would appear to be the first in a series of treaties to be concluded by Australia and other socialist States, namely Poland, the U.S.S.R., Romania, Yugoslavia, Czechoslovakia, Bulgaria and the G.D.R.[13]

The relevant provisions of the Exchange of Notes are as follows:

1. Persons entering the Hungarian People's Republic on the basis of Australian passports containing Hungarian entry visas permitting temporary visits shall be considered by the appropriate Hungarian authorities as foreigners (Australian nationals) and accordingly shall be entitled to consular protection provided for in Article 39 of the Agreement and the right of prompt departure without further documentation, regardless of whether they may also possess the citizenship of the Hungarian People's Republic.
2. Persons entering Australia for temporary visits on the basis of passports of the Hungarian People's Republic containing Australian entry visas shall be considered Hungarian citizens by the appropriate Australian authorities for the purpose of their entitlement to consular protection provided for in Article 39 of the Agreement and the right of prompt departure without further documentation, regardless of whether they may also possess the citizenship of Australia.
3. Persons mentioned in paragraphs 1 and 2, in the event of judicial or administrative proceedings temporarily preventing their voluntary departure, do not lose the right to consular protection and, upon termination of such proceedings including the serving of any sentence, the right of prompt departure without further documentation.[14]

In other words, Hungary appears to have agreed that certain Hungarian citizens will be treated as foreigners while in Hungary, with two specified practical applications: first, such persons will be entitled to consular protection in the event of detention and/or trial; second, such persons will have a "right" of prompt departure.

Hungary, it seems, has decided to accept the reality that some of

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[12] See, for instance, the Exchange of Notes of 31 May 1972 which accompanied the U.S.-Poland consular convention of the same date, which entered into force on 6 July 1973; U.S.T.S. 7642, pp. 81-82.

A similar, though less comprehensive, arrangement was made by Hungary and Canada in 1964. See: Exchange of Letters Constituting an Agreement between Canada and the Hungarian People's Republic Concerning certain Consular Matters and Passports.

". . . Hungarian citizens who are at the same time Canadian citizens (whether naturalized or natural-born) when visiting Hungary in possession of Canadian passports furnished with Hungarian visas are not denied permission to leave Hungary on the ground of their Hungarian citizenship". 862 U.N.T.S. 257, at 258.

[13] Sever: Consular agreements with Eastern Europe. Australian Foreign Affairs Record, March 1988, No. 3, 82.

[14] Article 39 of the Agreement deals with the rights of a consular officer, in respect of detention and trial of citizens of the sending State, to make contact with, and act on behalf of, such citizens.

its citizens may also have a foreign citizenship and, indeed, a closer link with the second State, by assuring that such persons, when visiting Hungary, will be able to call upon Australian consular assistance (where appropriate) and will be able to leave Hungary as easily as other foreigners. Given that the nationality laws of socialist States do not normally recognize dual citizenship,[15] the Hungarian action is all the more interesting a development in this field. However, several points and questions need to be discussed in this context, as the relevant provisions are more problematic and contentious than they might at first seem. It is quite possible that, from now on, dual Australian-Hungarian nationals will fly happily between Budapest and Sydney without any exit problems and that, on being arrested, they will receive all the consular assistance a detainee could wish for. But this will depend on how the agreement is applied in practice. It will also depend on an understanding of the precise ambit of these provisions.

2. The Provisions of the Agreement

There are, actually, several ways in which the agreement may not be exercised to the full extent of its apparent scope:

1. The Note applies to persons entering Hungary with Hungarian visas in Australian passports. This assumes that the Hungarian authorities will actually issue visas to the group of persons covered by the agreement. There is no obligation upon Hungary to do so. Indeed, it could insist that any dual Australian-Hungarian national wishing to travel to Hungary do so on a Hungarian passport, assuming that it knows the applicant to be a Hungarian citizen. Even if a dual national does arrive at the border with a valid visa in a valid Australian passport, entry may still be refused, unless the dual national can prove Hungarian citizenship.[16]

2. The Note applies to persons entering Hungary on Australian passports. In other words, dual nationals who entered Hungary on Hungarian passports would not be entitled to be treated as Australian nationals under the terms of the Note. Nor, for that matter, would

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[15] Law on Citizenship of the U.S.S.R., 1 December 1978. Article 8: "A person who is a citizen of the U.S.S.R. shall not be recognized as belonging to citizenship of a foreign State" in: Butler, Basic Documents on the Soviet Legal System, New York, London, Rome, 1983, at p. 265.

Law of 15 February 1962 on Polish Citizenship. Dziennik Ustaw 1962, No. 10, Item 49. Article 2: "According to Polish law, a Polish citizen cannot simultaneously be recognized as the citizen of another State."

The G.D.R. seems to acknowledge the existence of dual citizenship while denying any effect of it: Law on Citizenship of the G.D.R. of 20 February 1967. 1967 1 Gesetzblatt, p. 3.

[16] States have a general right not to admit aliens, or they may admit them under specific conditions. See McNair, International Law Opinions, Vol. 2 p. 105: "It cannot be denied that every independent State or nation is entitled to admit to exclude from its territories the subjects and citizens of foreign States, unless it has entered into any engagement by treaty on the subject . . ." (Report on Admission to Louisiana, 4 August 1843); Brownlie, Principles of Public International Law, Oxford, 1979, at p. 519. The general power to exclude aliens is acknowledged by Goodwin-Gill (International Law and the Movement of Persons between States, Oxford, 1978, Part II), who nevertheless shows that certain limitations may restrict this power.

Australian-Hungarian dual nationals who entered Hungary on the passport of a third State. Therefore, the traveller has to ensure that his status has been recognized prior to entering Hungary, i.e. by acquisition of a visa.

3. The provisions apply only to those making temporary visits. It therefore excludes dual nationals who might wish to return to Hungary permanently—to retire or to join a spouse, for instance. Such persons would not be considered as foreigners when in Hungary. This is hardly surprising; it is normal for a State to regard permanent residents who have the citizenship of the State of residence as well as that of another State as its own citizens.

4. Those covered by the agreement will be considered by the "appropriate Hungarian authorities" as foreigners. It is not entirely clear from the Note itself whether this means all, or only some, Hungarian authorities. The use of the word "appropriate" connotes the notion of only some authorities, especially as this is followed by the stipulation that, being considered as foreigners, the dual nationals are entitled to consular protection and to leave Hungary—as if only those authorities who might deal with the dual nationals in these two situations are obliged to treat them as foreigners. On the other hand, the provision could be interpreted to mean that, since these people are to be treated as foreigners, all Hungarian authorities are obliged to treat them as such. In this instance, the entitlement to consular protection and the right to leave Hungary would be the two particular rights expressly agreed upon for dual nationals. Nevertheless, by dint of being described as foreigners, they may be impliedly entitled to be treated as such by all authorities in Hungary. The difference is important: if some authorities are entitled to ignore the foreign status of the dual national, they could treat such persons as Hungarian citizens, for example, by obliging them to perform compulsory military service.

One way of approaching this problem is to take the view that, since one of the main purposes of the agreement is to allow Australian-Hungarian dual nationals in Hungary the right of prompt departure, any breach of this right—by whatever Hungarian authority—is contrary to the terms of the Note and therefore impermissible: thus, even if dual nationals are only to be treated as foreigners for some and not all purposes, any act which effectively removed the right of prompt departure might be deemed a breach of the agreement. This approach requires that the dual national be treated by all Hungarian authorities as Australian for the purposes of entitlement to consular representation and the right of prompt departure. In other words, where the rights to consular protection and prompt departure are concerned, all Hungarian authorities are "appropriate authorities". The actual meaning of the term "appropriate Hungarian authorities" may only be revealed in light of subsequent practice of the Parties.

5. The Note provides for the entitlement to consular protection "provided for in Article 39"—that is to say, with regard to detained

nationals. However, this is the only category of consular assistance specifically authorised by the terms of the Note. Other possible areas of consular protection are not covered, except in that Article 39 rights are, under Article 38(2),[17] deemed to include the right of consular officers to have communication with, and access to, nationals of the sending State. *Prima facie*, other types of consular protection would be excluded in the case of dual nationals. Thus, Article 37, which outlines general consular functions, including the protection in the receiving State of the interests of the sending State and its nationals,[18] would only entitle such protection to be exercised for dual nationals in the event of their being detained or put on trial. Other interests are not, apparently, covered under the terms of the Note.

6. The provision dealing with consular protection may be construed in several ways. Consular protection does not appear to be available to dual nationals who are refused the right of prompt departure from Hungary, unless the right of prompt departure is temporarily denied because of the individual's involvement in judicial or administrative proceedings.[19] The question is: what if dual nationals are temporarily detained for other reasons? It might be argued that the term "administrative proceedings" is wide enough to cover all reasons for preventing the individual leaving. That being the case, obviously the right of prompt departure would still apply. But what if "administrative proceedings" is given a strict construction so that it applies only to certain kinds of proceedings temporarily preventing voluntary departure? In such a case, if a dual national were detained for other reasons, the guarantee, in Paragraph 3, of the two rights of prompt departure and consular protection might be denied. In other words, if one is prevented from leaving Hungary for any reason other than judicial or administrative reasons, the right of prompt departure afterwards might not be available; nor might the right to consular protection.

The question arises: what is the legal position if a dual national is refused permission by the Hungarian authorities to leave Hungary? Article 39 of the Agreement provides for the right of consular representation if a " . . . national of the sending State has been detained within the consular district . . .".[20] In the absence of any other legal basis for the right to provide consular representation, it might be argued that the refusal of the right of prompt departure is itself tantamount to "detention" within the consular district. This is clearly not the meaning of Article 39, which deals with consular functions in respect of detention and trial (unless the person refused permission to leave the country is

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[17] Article 38(2): "Article 39 shall apply to communication with and access to detained nationals of the sending State".

[18] Article 37(a).

[19] Paragraph 3 of the Exchange of Notes.

[20] Article 39(1).

then actually detained in one place within the State). In general terms, it can be said that a refusal of the right of prompt departure would constitute a breach of an obligation undertaken in the Exchange of Notes, and Australia would then have an interest in ensuring that the breach be rectified.

Another possible interpretation is as follows: the provision says that the dual nationals " . . . shall be considered by the appropriate Hungarian authorities as foreigners (Australian nationals) and accordingly shall be entitled to consular protection . . . and the right of prompt departure . . .". The words after "foreigners (Australian nationals)" may be treated separately, as a supplement to the statement that the dual nationals are to be considered as foreigners. In other words, in this interpretation, the legally binding element is the duty to treat dual nationals as foreigners, with all that this implies, two specified consequences being given to avoid any doubt as to how the provision should be applied, viz., that there is a right of consular protection and that there is a right of prompt departure. However, if this is what the parties have actually agreed, it means that, in the interests of consistency, the document has to be interpreted so as to allow dual nationals to be treated just like any other foreigners—thus the Hungarian authorities would have no greater claim over such person than they would over complete aliens.

It is in this context that there may exist a substantive difference between Paragraphs one and two of the Note. While the wording of the two Paragraphs is not identical, despite apparently providing for reciprocal rights and duties in Australia and Hungary, the intended effect was surely the same: to provide rights to consular protection in and prompt departure from both States, by treating the dual national as a foreigner if he enters the State for a temporary visit on a foreign passport. It has been suggested above that, under Paragraph one of the Note, there may (according to one interpretation) exist a duty to treat the dual national as a foreigner *generally*, with—perhaps to stress the effect of the provision—specified rights to consular protection and prompt departure. Paragraph two cannot be construed in this way. It provides that those entering Australia for temporary visits on Hungarian passports with Australian entry visas " . . . shall be considered Hungarian citizens by the appropriate Australian authorities for the purpose of their entitlement to consular protection . . . and the right of prompt departure . . ." The significance of this statement is that, clearly, the persons affected can only be considered Hungarian citizens for the two specified purposes. This is because there is no equivalent statement that these persons are foreigners who are *accordingly* (i.e. by dint of being foreigners) entitled to consular protection and the right of prompt departure. In other words, it is not possible to sustain, in the case of Paragraph two, one of the interpretations suggested for Paragraph one—that dual nationals were to be treated as foreigners for all purposes, including those specified.

This raises the issue of whether or not the parties intended to assume

equal obligations. If that be the case, then a strict interpretation should be applied to Paragraph one and its effect restricted to an undertaking to treat dual nationals as foreigners for the two named purposes only, rather than all purposes. Alternatively, it may be that Hungary has agreed to a more onerous obligation than has Australia. It is evident that the actual legal effect of the Exchange of Notes will depend upon its interpretation by the parties. Once it is in force, the first Australian-Hungarian dual nationals to travel to Hungary on Australian passports will be guinea pigs whose treatment there will be governed by the Notes.

PART TWO

The Agreement in Context

1. Municipal Law

(a) Australia

The present Australian citizenship law remains the Australian Citizenship Act 1948 although this has been much amended during the 1980s. Under the 1948 Act, it was relatively easy to acquire citizenship; as in the U.K. it was enough, generally, to have been born there:

> "Subject to this section, a person born in Australia after the commencement of this Act shall be an Australian citizen."[21]

This position has been altered by the Australian Citizenship Amendment Act 1986.[22] It is no longer enough merely to have been born in Australia.[23] Rather, one has to have been born there having at least one parent who was either an Australian citizen or permanently resident there, or else the person claiming citizenship must have been ordinarily resident in Australia throughout the period of ten years commencing on the day the person was born.[24]

What is interesting is that it was and remains relatively easy for anyone born in Australia to possess dual nationality, given the high number of migrants to that country coming from States which allow their citizenship to be acquired by descent. It is enough for an individual to be born in Australia to a parent from such a State—who himself does not even have to be an Australian citizen, merely a permanent resident—to acquire Australian citizenship as well as the original nationality of the parent. This is all the more likely as there is at present no obligation on individuals

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[21] Australian Citizenship Act, 1948, s. 10(i). No. 83, 1948. It was also possible to acquire Australian citizenship by descent or grant.

[22] No. 70, 1986.

[23] Again, this change reflects the U.K. position where, after the entry into force of the British Nationality Act 1981, it ceased to be possible to acquire citizenship by birth alone in the U.K.

[24] 1986 Act, s. 4(a).

acquiring Australian citizenship by naturalization to renounce, or at least to attempt to renounce, their original citizenship. Indeed, until 1984 the only major restriction on the acquisition of dual nationality by Australians was to be found in section 17 of the 1948 Act, which provided:

> "An Australian citizen of full age and of full capacity, who, whilst outside Australia and New Guinea, by some voluntary and formal act, other than marriage, acquires the nationality or citizenship of a country other than Australia, shall thereupon cease to be an Australian citizen."

As has been noted elsewhere,[25] even this provision was quite restricted in its ambit: it only operated where an Australian citizen of full age and capacity acquired by some voluntary and formal act a foreign citizenship whilst outside Australia. Thus involuntary acquisition of another nationality would not have caused the loss of Australian citizenship. Nor, specifically, did acquisition of another citizenship through marriage. Moreover, it would appear to have been compatible with the retention of Australian citizenship to acquire voluntarily another citizenship while being in Australia.

These provisions were tightened up considerably by s. 13 of the Australian Citizenship Amendment Act 1984,[26] which repealed s. 17 and replaced it with the following:

> **Loss of citizenship of another nationality**
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> "17(1) A person, being an Australian citizen who has attained the age of 18 years, who does any act or thing—
> (a) the sole or dominant purpose of which; and
> (b) the effect of which,
> is to acquire the nationality or citizenship of a foreign country, shall, upon that acquisition, cease to be an Australian citizen.
>
> (2) Sub-section (1) does not apply in relation to an act of marriage."

The new legislation seems to have tied up the loopholes which were only too evident under the 1948 Act by emphasising the intention rather than the conduct of the individual concerned. However, one is prompted to wonder how exactly it will be decided whether any act or thing is done with "the sole or dominant purpose" of acquiring the citizenship of a foreign country. However such intent be established, it is clear that the act no longer has to be formal; nor does it have to take place outside Australia. These factors alone make it more difficult to acquire another citizenship while retaining the Australian one, but the amendments do not affect the position of the great majority of Australian dual nationals:

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[25] Pryles, Australian Citizen Law, Sydney, 1981, at pp. 121-122.

[26] No. 129, 1984.

those who acquire Australian citizenship *after* their first one and those who, born in Australia, have acquired another citizenship by descent.

It would appear reasonable to conclude, therefore, that despite the apparent legislative hostility towards the voluntary acquisition by Australians of other citizenships, other factors make it likely that large numbers of Australians will possess multiple citizenships. These factors are: first, the large migrant population in Australia, many of whom may retain their original citizenship even on acquisition of Australian citizenship; second, the descendants of such migrants will often acquire a non-Australian citizenship through the operation of the *jus sanguinis* rule. In such a situation it is hardly surprising that Australia has embarked on a course of negotiations designed to bring about a comprehensive network of agreements governing matters of dual nationality with the European socialist States.

(b) Hungary

It is interesting that the first of the socialist States to enter into agreement with Australia regarding matters of dual nationality should have been Hungary, because Hungary itself seems to take a different legislative attitude towards the possession of multiple citizenship. The relevant law is the Hungarian Citizenship Law of 9 June 1957,[27] which replaced the Nationality Act of 24 December 1948.[28]

Under the 1948 law, Hungarian citizenship was generally acquired by *jus sanguinis*—though descent was through the father only[29] unless the child was born illegitimately to a Hungarian mother and no Hungarian was established as the father.[30] The reason for this was that the 1948 law followed the pattern of nationality laws adopted by many other States and emphasised the "unity" of citizenship, whereby a woman on marriage automatically acquired the citizenship of her husband and lost her own if it was foreign. Thus it was quite logical, in this frame of things, for a child to acquire the citizenship of its father. The 1957 Law altered the rule slightly so that, while citizenship continued to be acquired by descent, it could be through either parent:

> "A Hungarian citizen is anyone who (a) is a child of a parent of Hungarian citizenship;"[31]

Thus over a substantial period of time it has been quite possible to acquire Hungarian citizenship by descent, regardless of where the

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[27] Magyar Kozlony, Budapest, Nr. 64 v.9 June 1957, pp. 374-377. Reproduced in: 1957 Osteuropa-Recht, pp. 114-119.

[28] United Nations Legislative Series. Laws Concerning Nationality. New York, 1954, at pp. 219-226. (ST/LEG/SER.B/4).

[29] Article 2(1)(a).

[30] Article 2(1)(c).

[31] Article 1(i)(a).

individual was born. The largest emigration of Hungarians in recent times occurred after the Soviet invasion of Hungary in 1956, during the currency of the 1948 Act. A large number of these emigres found their way to Australia, and there is no reason to doubt that some of them have acquired Australian citizenship themselves and have had children who, born in Australia, acquired Australian citizenship through *jus soli* and Hungarian citizenship through *jus sanguinis*.

The 1948 Act did not in principle preclude or prohibit the possession of some citizenship other than Hungarian, except inasmuch as female Hungarian spouses of foreigners lost their own citizenship on marriage unless they did not acquire the nationality of the husband on marriage.[32] However, under Article 23, dual nationals were to be treated as Hungarians:

> "A Hungarian national who is at the same time a national of another State shall be considered to be a Hungarian national until such time as he loses his Hungarian nationality by virtue of this Act."

Article 23 survived almost intact in the 1957 Act, which provides, in Article 4:

> "A Hungarian citizen who is at the same time a citizen of another State shall be considered to be a Hungarian national for such time as he has not lost his Hungarian citizenship through release or deprivation."

The essence of both provisions is that one can continue to be a Hungarian citizen even after acquisition of a foreign citizenship, although one will only be treated as a Hungarian while in Hungary. This is in contrast to the position in Australia outlined above, whereby the voluntary acquisition of another citizenship may result in the loss of the Australian one. It is also in contrast to the citizenship laws of other socialist States, such as Poland and the U.S.S.R., which do not at present even recognise the possibility that their citizens may also be citizens of other States.[33]

The significance of this provision is that it is relatively easy for Hungarians to have more than one citizenship. Hungarians resident outside Hungary may become naturalized; and because of the transmission of nationality through *jus sanguinis*, such persons may pass on their citizenship to their descendants.

2. *International Law*

It is appropriate to consider the general international law relating to dual nationals in either State of nationality in order to assess to what

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[32] Article 12: "A woman contracting marriage with a foreign national should lose her Hungarian nationality unless she does not acquire by such marriage the nationality of her husband."

[33] See Note 9, supra.

extent, if any, the agreement represents a departure from the standard position.

(a) The status of dual nationals in international law

It is not the purpose of this study to consider the status of dual nationals in third States whose citizenship they do not possess. The intention of the writer is to look only at the status of the dual national while in either of the States of which he is a citizen, as this is the kind of situation which the Australian-Hungarian agreement purports to regulate.

The right, if any, of a State to accord diplomatic or consular protection to its national in another State of which that person is also a national is controversial.[34] Two views have developed with regard to such situations. One is that a State may not provide diplomatic or consular protection for its own nationals vis-a-vis the State of their other nationality, except perhaps where the other State consents. The second opinion is that, where a situation arises in which protection might normally be accorded, it is the dominant or effective nationality that prevails, i.e. the State with which the dual national has the closer links is entitled to protect the dual national, even in the State of that person's other nationality.

Both views have substantial support in case law and State practice. The former is to be found in the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws,[35] Article 4 of which provides:

> "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses."

States have not flocked to ratify or accede to the treaty—only about twenty are parties to the Convention.[36] Nor can it be assumed, given the extent of contrary practice, to be part of customary international law.

The I.C.J. seemed to support the proposition in the *Reparations Case*, referring to the " . . . ordinary practice whereby a State does not exercise protection on behalf of one of its nationals against a State which regards him as its own national . . .".[37] Furthermore, some States adhere to this view, notably the United Kingdom,[38] which goes to the extent of printing

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[34] Brownlie, Note 16, supra, at 398-399.

[35] 179 L.N.T.S. 89.

[36] Bowman and Harris, Multilateral Treaties. Index and Current Status, London, 1984, at p. 84.

[37] *Reparations for injuries suffered in the service of the United Nations*, Advisory Opinion: I.C.J. Reports 1949, p. 174, at p. 186.

[38] "We do not normally make representations in such cases, as we are not entitled under international law to afford protection to one of our nationals who has dual nationality in the country of his second nationality".

Statement by the Minister of State, Foreign and Commonwealth Office, 14 December 1982, cited in: Marston (ed): United Kingdom Materials on International Law, 1982 *LIII BYIL* 493.

The same view was still held by the U.K. in 1985: Marston (ed): United Kingdom Materials on International Law, 1985 *LVI BYIL* 513.

a warning in each British passport that the holder may not be able to receive protection from the U.K. while in the State of his other nationality.

Nevertheless, there would appear to be substantial evidence in favour of the second view, viz., that the dominant or stronger nationality rule will indicate whether a State can protect its citizen in the State of his other nationality. In the *Merge Claim*,[39] the Conciliation Commission argued that the two principles were consistent, but that the effective nationality one was stronger. It noted (para. 5):

> "The principle, based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State."

This might seem to exclude the first principle, but the Commission immediately added:

> "But it must not yield when such predominance is not proved, because the first of these two principles is generally recognized and may constitute a criterion of practical application for the elimination of any possible uncertainty."

In other words, the Commission seemed to be saying that the effective nationality should be followed, if it could be established. If it could not be established, then the first rule would prevail. The Commission seemed to think it was following the judgment in the *Nottebohm Case*,[40] in which the I.C.J. had based its ruling on what it believed to be the principle of effective nationality.

The principle has also found favour among States. Even the U.K. would seem to have made a certain limited acknowledgement of the rights of the second State, in the Rules Regarding Nationality issued by the Foreign and Commonwealth Office in 1983, Rule III of which provides:

> "Where the claimant is a dual national, HMG may take up his claim . . . HMG will not normally take up his claim as a U.K. national if the respondent State is the State of his second nationality, but may do so if the respondent has, in the circumstances which gave rise to the injury, treated the claimant as a U.K. national."[41]

The U.S., on the other hand, has taken a more definite posture in favour of the effective nationality rule:

> "It is the policy of the United States Government to provide all emergency and protection services to dual nationals when the facts clearly indicate that the habitual residence of the individual in

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[39] *Italian-United States Conciliation Commission* 22 I.L.R. 443.

[40] *Liechtenstein v. Guatemala*. I.C.J. Reports 1955, p. 4.

[41] Marston (ed): United Kingdom Materials on International Law, 1983 *LIV BYIL* 520-521.

> question over a period of years has been the United States, and that the person is temporarily visiting in the country of the other nationality."[42]

Even more explicit was the U.S. position as stated in the decision in *Case No. A/18* of the Iran-U.S. Claims Tribunal in 1984:

> "A State is not required to recognize a claim asserted against it by another State on behalf of an individual possessing the nationality of both States, unless such individual has a closer and more effective bond with the claimant State."[43]

It is interesting that, while the notion of the dominant nationality is certainly regarded as preeminent, it would appear that the underlying rule, in the U.S. view, is that no protection may be accorded to the dual national in his second State—that is, unless, that person has a closer link with the first State.

In *Case No. A/18*, the Tribunal, which consisted of three U.S. members, three Iranian members and three from third States, decided by six votes to three (the Iranian members being in the minority) in favour of the U.S. and applied the effective nationality principle. The Tribunal held that "whatever the State of law prior to 1945, the better rule . . . today is the rule of dominant and effective nationality."[44] It based its decision on not only the *Nottebohm* and *Merge Cases* but also on a consideration of writings on the subject. It is clear, however, that the Nottebohm decision, which did not even involve a dual national, formed the backbone of the Tribunal's ruling.[45]

The present position indicates a preference for the effective nationality rule either instead of, or, at least, being superior to, the no-protection rule. However, opinion is by no means unanimous. In particular, State practice remains ambiguous. The major weakness of the dominant nationality rule is that a State which regards itself as providing the dominant nationality of a particular individual will nevertheless be unable to offer protection to that person in States which either do not recognize dual nationality at all (and hence do not acknowledge the jurisdiction of the other State); nor will protection be available vis-a-vis those States which adhere to the view that the individual may not be afforded protection in the State of the other nationality.

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[42] Contemporary Practice of the United States. 1980 74 A.J.I.L. 163.

[43] Iran-United States Claims Tribunal: Decision in Case No. A/18 Concerning the Question of Jurisdiction over Claims of Persons with Dual Nationality, citing U.S. State Department Memorandum of 19 February 1962. 1984 I.L.M. 489 at 497.

[44] *Ibid.*, at 499.

[45] "The relevant rule of international law which the Tribunal may take into account . . . is the rule that flows from the *dictum* of *Nottebohm*, the rule of real and effective nationality . . .". The Tribunal acknowledged what it considered to be the pervasive effect of this rule since the *Nottebohm* decision". *Ibid.*, at 501.

(b) The position of dual nationals in light of the Australian-Hungarian Treaty

In the view of this writer, the agreement may be regarded either as innovative or conservative. On the one hand, it seems to follow neither of the two basic rules concerning dual nationality; it is clearly permissible for one State to offer diplomatic or consular assistance to its national while the national is in the other State (so long as all the other conditions stipulated in the Exchange of Notes are met); moreover, there is no provision that such protection may only be provided by the State of the dominant nationality: as long as the dual national meets the conditions, protection may be available from either State.

On the other hand, the agreement may also be considered as an acknowledgement of the strength of the existing rules: its conclusion may be interpreted as recognition by Australia (and this is certainly indicated by the ministerial statements quoted above) that, normally, a State *may not* protect its nationals in the State of the second nationality. In other words, the agreement may be seen as a specific, necessary and deliberate departure from the normal position; it was necessary just because the traditional rule remains otherwise valid.

Again, the agreement is capable of being construed as a reflection of the dominant nationality rule. This is because, in practice, the great majority of dual nationals covered by the agreement will actually be travelling from the State with which they have the closest link (perhaps through permanent residence) to the second State, most likely for a temporary visit. This will be all the more so in the case of dual nationals born in the State of their permanent residence who have acquired the citizenship of the second State through *jus sanguinis*. The agreement provides some support for this interpretation—it covers dual nationals travelling to the second State, using the passport of the first State, for a temporary visit only. Clearly, the agreement stresses the tie between the dual national and the State with which that person has the closest link.

The significance of the treaty lies in the fact that Australia has agreed with another State to treat some of their own citizens as foreigners while they are in the State of their second nationality. This is not unique,[46] but never before has Australia participated in such arrangements.

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[46] Note 12, *supra*.