DISSENTING OPINION OF JUDGE KLAESTAD

I consider that the case should have been adjourned for the following reasons:

The present Judgment deals with one of the three pleas in bar which, in this second phase of the proceedings, have been invoked by the Government of Guatemala. This plea in bar by that Government is based on the ground that the naturalization granted to Mr. Nottebohm by Liechtenstein is invalid because it is inconsistent with the national law of Liechtenstein as well as with international law.

I. As to the national law of Liechtenstein, it is argued that the authorities of that State, in applying their Nationality Law of 4th January, 1934, have not observed its provisions, but in various respects departed therefrom, particularly with regard to the prescribed order in which Government, Diet and Commune were to deal with the application for naturalization. On this ground, the Court is invited to declare that Mr. Nottebohm has not properly acquired Liechtenstein nationality in accordance with the law of the Principality.

It is generally recognized that questions of naturalization of aliens are, in the absence of conventional rules, in principle within the exclusive competence of States, and that international law has left it to the States themselves to regulate in what manner and under what conditions their nationality may be conferred upon aliens. But if a State has in principle the exclusive competence to regulate questions of nationality by its own legislation without interference by other States, it is difficult to see on what ground its own interpretation and application of this same legislation could be open to challenge by other States. Such a challenge is possible in theory on the ground that the legislation or the application thereof is inconsistent with international law; but the question now under consideration is only whether the authorities of Liechtenstein have applied their local law in a manner consistent with the provisions of that local law.

The Permanent Court of International Justice has on several occasions considered what attitude the Court should take with regard to the national law of States, such as in Judgments No. 7 concerning *German interests in Polish Upper Silesia* and Nos. 14 and 15 in the *Serbian and Brazilian Loans Cases*. In accordance with the view expressed in those Judgments, it may be said that it would not be in conformity with the function for which the

Court is established if it proceeded to examine and decide whether the competent authorities of Liechtenstein have applied the various provisions of their Nationality Law of 1934 in a correct manner. The Court is not deemed to know the national law of the different States. It would hardly be possible for it to place its own construction upon the provisions of the Liechtenstein Nationality Law and to disregard the interpretation and application made by the competent local authorities. By so doing, the Court would substitute itself for these local authorities and pronounce upon matters which have no bearing on international law, and which therefore are solely within the competence of these authorities.

What the Court, in my opinion, can and must do with regard to the application of the Liechtenstein Nationality Law, is to ascertain whether the naturalization in question was in fact granted by the authority to which that law has attributed this competence. Article 12 prescribes that it is the Reigning Prince who alone is entitled to grant the nationality of the Principality. On the evidence submitted to the Court, I am satisfied that the Prince did in fact give his consent to the naturalization of Mr. Nottebohm.

II. The Government of Guatemala further contends that the naturalization was not granted in accordance with international law. It invokes the fact that Mr. Nottebohm had not established his residence in Liechtenstein before he applied for naturalization, and that he left the country soon after it was granted. Apart from conventional rules, international law does not, however, require previous residence in the country as a condition for naturalization, nor does it presuppose a subsequent residence there. This is shown by the fact that the national laws of a great number of States have—though generally providing for previous residence in the country—allowed dispensation from that requirement. The national law of Liechtenstein equally requires such previous residence (para. 6 *(d)* of the Nationality Law of 1934) but provides that this requirement may be dispensed with, as in fact it was in the present case. To exercise this discretionary power of dispensation is a matter solely within the competence of the Government of Liechtenstein.

The validity of the naturalization of Mr. Nottebohm is also contested on the ground that the Government of Liechtenstein has not proved the loss of his German nationality, as required by paragraph 6 *(c)* of the same Law of 1934. But this requirement also may be dispensed with according to that provision. It appears, however, that such dispensation was considered unnecessary in view of the provisions of Article 25 of the German Nationality Law of 1913, according to which he would lose his German nationality by acquiring the nationality of Liechtenstein. That he there-

by in fact lost his German nationality was, on 15th June, 1954, certified by the Senate of Hamburg.

III. The view has been expressed that the relationship established between State and individual by naturalization must presuppose the existence of a physical or real link or a substantial connection attaching the individual to the State. It is thereby implied that a mere common and effective will, not vitiated by fraud, is not sufficient for the creation of the relationship of nationality. It may be questioned whether this view is a true expression of a binding rule of international law.

When the Court, in the *Asylum* case, was confronted with a contention relating to an alleged right of a unilateral and definitive qualification of the offence committed by the refugee, it based itself on the principle of State sovereignty and held that a party which relies on a custom derogating from that principle must prove that the rule invoked is in accordance with a constant and uniform State practice accepted as law. The same method would seem to be applicable in the present case. Having to base oneself on the ground that questions of naturalization are in principle within the exclusive competence of States, one should, as in the *Asylum* case, enquire whether a rule derogating from that principle is established in such a manner that it has become binding on Liechtenstein. The Government of Guatemala would have to prove that such a custom is in accordance with a constant and uniform State practice "accepted as law" (Article 38, para. 1 *(b)* of the Court's Statute). But no evidence is produced by that Government purporting to establish the existence of such a custom.

IV. 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 as 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. In such circumstances, it is difficult to discuss the merits of such a solution except on a theoretical basis; but I shall mention some facts which show how necessary it would have been, in the interest

of a proper administration of justice, to afford to the Parties an opportunity to argue this point before it is decided.

Mr. Nottebohm went to Liechtenstein in 1946 after having been liberated from his internment in the United States of America. It is seen from Annex 5, paragraph 18, and Annex 6, paragraph 20, of the Memorial, and paragraph 106 of the Rejoinder, that he must have arrived in Liechtenstein before May 6th, 1946. He established his residence in that country and has lived there ever since.

The record of this case shows that a number of measures were taken by the Government of Guatemala against property of Mr. Nottebohm at a time when he was permanently residing in Liechtenstein. When expropriation measures were taken against his property by virtue of the Legislative Decree No. 630 of 25th May, 1949, he had been living in Liechtenstein for more than three years.

As the Judgment has not decided that the naturalization granted to Mr. Nottebohm on 13th October, 1939, is invalid under Liechtenstein law, one must, for the purpose of deciding the present plea in bar, assume that it is valid. In such circumstances, it is difficult to see on what legal basis the Government of Liechtenstein could be considered as being debarred from affording diplomatic protection to him in respect of measures taken by the Government of Guatemala against his property at a time when he was a permanent resident in Liechtenstein. His link or connection with that country was at that time of such a character that the reasons relied on in the Judgment should constitute a solid ground for the recognition of the right of the Government of Liechtenstein to extend its protection to him as against Guatemala in respect of all measures taken against his property during his permanent residence in Liechtenstein.

V. It is alleged by the Government of Guatemala that the Government of Liechtenstein, by granting its nationality to a German national at a time when Germany was at war, has committed an abuse of right or a fraud. For the purpose of the present case, it is unnecessary to express any views as to the possible applicability of the notion of abuse of right in international law. All I need say is that it would, if so applicable, in my view presuppose the infliction of some kind of injury upon the legitimate interests of Guatemala by the naturalization of Mr. Nottebohm. But it is not shown that an injury of any kind was thereby inflicted upon Guatemala, which at that time was a neutral State.

As to the contention that fraud was committed by the Government of Liechtenstein, it suffices to say that no evidence has been produced in support of such a contention. The various irregularities

in the naturalization procedure of which the Government of Guatemala has complained, and the financial conditions fixed for the grant of naturalization, cannot be considered as involving a fraud.

VI. The Government of Guatemala has finally contended that fraud was committed by Mr. Nottebohm when he applied for and obtained Liechtenstein nationality. It was argued that he fraudulently sought this naturalization solely for the purpose of escaping from the consequences of his German nationality under the shield of the nationality of a neutral State. As no documentary evidence in support of this contention was produced in the course of the written proceedings, the Agent of Guatemala, after the closure of those proceedings and a few days before the oral hearing, submitted to the Court a considerable number of new documents. The Agent of Liechtenstein having objected to the production of these documents, the Court on February 14th, 1955, decided to permit the production of all these new documents, stating that it :

> "Reserves to the Agent of the Government of Liechtenstein the right, if he so desires, to avail himself of the opportunity provided for in the second paragraph of Article 48 of the Rules of Court, after hearing the contentions of the Agent of the Government of Guatemala based on these documents, and after such lapse of time as the Court may, on his request, deem just."

On the basis of these new documents, Counsel for Guatemala submitted at the oral hearing the new allegation that part of the property of the firm Nottebohm Hermanos of Guatemala, which the Government of Liechtenstein now claims on behalf of Mr. Nottebohm, in reality belonged to the firm Nottebohm & Co. of Hamburg, and that Mr. Nottebohm, by obtaining Liechtenstein nationality, attempted in a fraudulent manner to protect German property from the consequences of the war. Counsel qualified the case as a "cloaking case".

These allegations of fraud, which now appear to constitute the main aspect of this case, affect the plea in bar concerning nationality as well as the merits. In its final Submissions as to the merits, the Government of Liechtenstein requests the Court :

> "(5) to adjourn the oral pleadings for not less than three months in order that the Government of Liechtenstein may obtain and assemble documents in support of comments on the new documents produced by the Government of Guatemala."

A consideration of the merits would render previous compliance with this request necessary. Not only has the Government of Liechtenstein acquired a right, by virtue of Article 48, paragraph 2, of the Rules of Court, to submit documents in support of its comments upon the new documents produced by the Agent of Guatemala, but this right was expressly reserved to the Agent of Liechtenstein by the Court's decision of February 14th. A finding on the plea

in bar concerning nationality (diplomatic protection) presupposes, in my opinion, a consideration of the merits ; it depends, as I have attempted to show, on the question whether Mr. Nottebohm committed a fraud when he applied for and obtained Liechtenstein nationality. This question of fraud is so closely connected with the merits of the case that it cannot be decided apart from them and without any appraisal of the various relevant facts which may be disclosed by a consideration of the merits, including the new documents produced by the Government of Guatemala and the documents which the Government of Liechtenstein has become entitled to produce.

This procedural situation also affects the two other pleas in bar invoked by the Government of Guatemala. The plea as to the alleged necessity of previous diplomatic negotiations could only arise if it were held that Mr. Nottebohm has validly acquired Liechtenstein nationality. Only in that case would the Government of Liechtenstein be qualified to present his claim to the Court. Only then could a relevant question arise as to negotiations between the two Governments concerning the claim. Similar considerations apply to the plea in bar as to the exhaustion of local remedies. If it were held that Mr. Nottebohm has not validly acquired the nationality of Liechtenstein, the question whether he has exhausted remedies in Guatemala could not arise before the Court.

For these reasons I have voted for the adjournment of the case.

(Signed) Helge KLAESTAD.