DISSENTING OPINION OF JUDGE READ

I am unable to concur in the Judgment of the Court, which holds that the claim submitted by the Principality of Liechtenstein is inadmissible. It is, therefore, necessary for me to indicate my conclusions as to the proper disposition of the plea in bar, and to give my reasons. In doing so, I must examine certain of the grounds which were relied on by Counsel, in the Pleadings and during the Oral Proceedings, but which were not adopted as a basis for the Judgment.

At the outset, I consider that the very nature of a plea in bar controls the examination of the issues. The allowance of a plea in bar prevents an examination by the Court of the issues of law and fact which consitute the merits of the case. It would be unjust to refuse to examine a claim on the merits on the basis of findings of law or fact which might be reversed if the merits were considered and dealt with.

Accordingly, it is necessary, at this stage, to proceed upon the assumption that all of Liechtenstein's contentions on the merits, fact and law, are well-founded; and that Guatemala's contentions on the merits may be ill-founded.

There is another aspect of this case which I cannot overlook. Mr. Nottebohm was arrested on October 19th, 1943, by the Guatemalan authorities, who were acting not for reasons of their own but at the instance of the United States Government. He was turned over to the armed forces of the United States on the same day. Three days later he was deported to the United States and interned there for two years and three months. There was no trial or inquiry in either country and he was not given the opportunity of confronting his accusers or defending himself, or giving evidence on his own behalf.

In 1944 a series of fifty-seven legal proceedings was commenced against Mr. Nottebohm, designed to expropriate, without compensation to him, all of his properties, whether movable or immovable. The proceedings involved more than one hundred and seventy one appeals of various kinds. Counsel for Guatemala has demonstrated, in a fair and competent manner, the existence of a network of litigation, which could not be dealt with effectively in the absence of the principally interested party. Further, all of the cases involved, as a central and vital issue, the charge against Mr. Nottebohm of treasonable conduct.

It is common ground that Mr. Nottebohm was not permitted to return to Guatemala. He was thus prevented from assuming the personal direction of the complex network of litigation. He was

allowed no opportunity to give evidence of the charges made against him, or to confront his accusers in open court. In such circumstances I am bound to proceed on the assumption that Liechtenstein might be entitled to a finding of denial of justice, if the case should be considered on the merits.

In view of this situation, I cannot overlook the fact that the allowance of the plea in bar would ensure that justice would not be done on any plane, national or international. I do not think that a plea in bar, which would have such an effect, should be granted, unless the grounds on which it is based are beyond doubt.

With these considerations in mind, it is necessary to examine the single issue that the Court must decide in order to reject or allow the plea in bar based on the ground of nationality. The issue for decision is : *whether, in the circumstances of this case and vis-à-vis Guatemala, Liechtenstein is entitled, under the rules of international law, to afford diplomatic protection to Mr. Nottebohm.*

It is necessary to deal with the different grounds which have been relied on in the Pleadings and in the Oral Proceedings.

* * *

The first ground for holding that the claim is inadmissible, which is contained in paragraph 2 *(a)* of the Final Conclusions of Guatemala, may be stated shortly : that Mr. Nottebohm did not acquire Liechtenstein nationality in accordance with the law of the Principality. While the Judgment of the Court does not rely on this ground, I must state my position, in order to justify my conclusion that the plea in bar as a whole should be joined to the merits.

Here, the production of the certificate of naturalization, and the adoption of the claim by Liechtenstein, establish a *prima facie* case. The Court can go back of the certificate and disregard it on proof of fraud in the application for or grant of the naturalization, or in the obtaining or issuing of the certificate. But there has been no such proof.

It has been argued that the Court can and should examine the Liechtenstein law and the procedure followed by the Liechtenstein authorities when the naturalization was granted. It has been contended that they did not comply with the law and that, as a result of their defaults, the naturalization granted was a nullity.

I have reached the conclusion that the claim cannot be rejected on the ground of non-compliance with the national law, and shall give my reasons in summary form.

To begin with, it is necessary to take into account the jurisprudence of the Permanent Court. Two principles of law have been established. The judgment in *The Mavrommatis Jerusalem Con-*

cessions—Series A, No. 5, at page 30—settled the rule that the burden of proof is on the party, that alleges the nullity of a legal act under the national law, to prove it.

The other principle is to be found in a long series of decisions, which applied the principle : that "municipal laws are merely facts which express the will and constitute the activities of States" and that the Court does not interpret the national law as such.

Polish Upper Silesia—Series A, No. 7, page 19.
Serbian Loans—Series A, Nos. 20/21, page 46.
Brazilian Loans—Series A, Nos. 20/21, page 124.
Lighthouses Case (France/Greece)—Series A/B, No. 62, page 22.
Panevezys-Saldutiskis Railway Case—Series A/B, No. 76, page 19.

In the present case, Guatemala has alleged the invalidity or nullity of the legal act of naturalization under the national law. The burden of proof is on Guatemala to prove it. But Guatemala has not furnished any admissible evidence ; such as the testimony of a jurist learned and experienced in Liechtenstein law, or an opinion from the Highest Court in that country. The case has been presented as if this Court was competent to interpret the Liechtenstein law as such, and to pass upon its application to the special circumstances of this case. It has been argued without consideration of the provisions of the Liechtenstein law regarding the interpretation of statutes or of the decisions of its courts.

Accordingly, the contention of the respondent Government, as regards invalidity under the national law, fails through lack of evidence to support it.

But this is not merely a case of failure of proof. Even if the Liechtenstein Law of 1934 is interpreted without regard to the rules of interpretation, procedure and administrative law in force in that country, it is impossible to reach the conclusion that the naturalization was a nullity. There is a fundamental error in the method of interpretation adopted by Counsel, both in the Pleadings and in the Oral Proceedings.

It has been argued that the Liechtenstein authorities disregarded the provisions of the Law of 1934 in two respects : it is said that they inverted the order in which the different steps in the procedure were to be carried out. It is also said that they did not comply with certain essential requirements laid down in the Law. The conclusion was reached that the naturalization was invalid, because of non-conformity with the laws of the Principality.

This interpretation was based on consideration of particular provisions, without taking into account the Law as a whole. In particular, it ignored a provision which is of crucial importance, Article 21, which contains the following paragraph :

Section 21

"The Princely Government may, within five years from the date of acquisition thereof, deprive a foreign national of the citizenship of the Principality which has been granted to him, if it appears that the requirements laid down in this law as governing the grant thereof were not satisfied. It is entitled, however, at any time, to deprive a person of the citizenship of the Principality if the acquisition thereof has come about in a fraudulent manner."

It is clear that the naturalization of Mr. Nottebohm could have been revoked at any time within five years of the grant, if it had appeared that any of "the requirements laid down in this law were not satisfied". It is equally clear that, after the expiration of the five-year period—i.e. in October 1944—the naturalization became indefeasible, apart from fraud. In such circumstances, it is not open to me, nearly sixteen years after the event and in the absence of fraud, to find that the naturalization was invalid under the Liechtenstein law.

* * *

The second ground for holding that the claim is inadmissible, which is contained in paragraph 2 *(b)* of the Final Conclusions of Guatemala, may be stated shortly: that naturalization was not granted to Mr. Nottebohm in accordance with the generally recognized principles in regard to nationality.

Conclusion 2 *(b)* is obviously defective. The Court cannot determine "generally recognized principles" or decide cases on the basis of such principles. Its competence is limited by the peremptory and mandatory provisions of Article 38 of the Statute, to decision "in accordance with international law".

However, the position taken by Counsel makes it clear that the Final Conclusion 2 *(b)* was intended to raise the issue of abuse of right.

Abuse of right is based on the assumption that there is a right to be abused. In the present case it is based upon the assumption that Liechtenstein had the right under international law to naturalize Mr. Nottebohm, but that, in view of the special circumstances and the manner in which the right was exercised, there was an improper exercise of the right—an exercise so outrageous and unconscionable that its result, i.e. the national status conferred on Mr. Nottebohm, could not be invoked against Guatemala.

The doctrine of abuse of right cannot be invoked by one State against another unless the State which is admittedly exercising its rights under international law causes damage to the State invoking the doctrine.

As this ground is not relied upon in the Judgment of the Court, it is unnecessary for me to examine the particular grounds relied

on by Counsel. It is sufficient to point out that Liechtenstein caused no damage to Guatemala, and that it is therefore necessary to reject the Final Conclusion 2 *(b)*.

* * *

The third ground for holding that the claim is inadmissible, which is contained in paragraph 2 *(c)* of the Final Conclusions of Guatemala, is based on fraud.

It is impossible to separate the aspects of fraud which are relevant to the plea in bar from those which concern the merits. The greater part of the evidence adduced in support of the charge of fraud was contained in considerably more than one hundred documents. From these documents a few were selected and brought to the attention of the Court. The remaining documents were not placed at the disposition of the Court.

In these circumstances, it is not possible for me to found any conclusion based on fraud at this stage in the case. I am therefore of the opinion that the Guatemalan Final Conclusion 2 *(c)* should be joined to the merits.

* * *

There is another aspect of the question, which must be considered. The Judgment of the Court is based upon the ground that the naturalization of Mr. Nottebohm was not a genuine transaction. It is pointed out that it did not lead to any alteration in his manner of life ; and that it was acquired, not for the purpose of obtaining legal recognition of his membership in fact of the population of Liechtenstein, but for the purpose of obtaining neutral status and the diplomatic protection of a neutral State.

This ground, to which I shall refer as the link theory, as it is based on the quality of the relation between Mr. Nottebohm and Liechtenstein, cannot be related to the Final Conclusions of Guatemala, or to the argument in the Pleadings and Oral Proceedings.

Accordingly, the matter is governed by the principle which was applied by this Court in the Ambatielos case (Jurisdiction), Judgment of July 1st, 1952, *I.C.J. Reports 1952*, at page 45 :

> "The point raised here has not yet been fully argued by the Parties, and cannot, therefore, be decided at this stage."

Indirectly, some aspects were discussed as elements of abuse of right, but not as a rule of international law limiting the power of a sovereign State to exercise the right of diplomatic protection in respect of one of its naturalized citizens.

As a Judge of this Court, I am bound to apply the principle of international law, thus declared by this Court. I cannot concur in the adoption of this ground—not included in the Conclusions and not argued by either Party—as the basis for the allowance of the plea in bar, and for the prevention of its discussion, consideration and disposition on the merits.

Nevertheless, in view of the course followed by the majority, I must examine this ground for holding that the grant of naturalization did not give rise to a right of protection, and indicate some of the difficulties which prevent my concurrence.

* * *

To begin with, I do not question the desirability of establishing some limitation on the wide discretionary power possessed by sovereign States: the right, under international law, to determine, under their own laws, who are their own nationals and to protect such nationals.

Nevertheless, I am bound, by Article 38 of the Statute, to apply international law as it is—positive law—and not international law as it might be if a Codification Conference succeeded in establishing new rules limiting the conferring of nationality by sovereign States. It is, therefore, necessary to consider whether there are any rules of positive international law requiring a substantial relationship between the individual and the State, in order that a valid grant of nationality may give rise to a right of diplomatic protection.

Both Parties rely on Article 1 of The Hague Draft Convention of 1930 as an accurate statement of the recognized rules of international law. Commenting on it, the Government of Guatemala stated in the Counter-Memorial (p. 7) that "there can be no doubt that its Article 1 represented the existing state of international law". It reads as follows:

> "It is for each State to determine under its own law who are its nationals. This law 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."

Applying this rule to the case, it would result that Liechtenstein had the right to determine under its own law that Mr. Nottebohm was its own national, and that Guatemala must recognize the Liechtenstein law in this regard *in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality*. I shall refer to this quality, the binding character of naturalization, as opposability.

No "international conventions" are involved and no "international custom" has been proved. There remain "the principles of law generally recognized with regard to nationality", and it is on this qualification of the generality of the rule in Article 1 that Guatemala has relied both in the Pleadings and in the Oral Proceedings.

In this regard the Government of Guatemala stated in paragraph 16 of the Counter-Memorial:

> "As to the first point, it is necessary in the first place to determine what, in the absence of general international conventions binding upon the Principality of Liechtenstein, is the content of international law in the light of which the international validity of that State's law must be examined.
>
> It must be acknowledged that in this connection there is no system of customary rules nor any rigid principles by which States are bound.
>
> As M. Scelle has indicated, it is rather in the realm of 'abuse of power' (or of competence or of right) that the courts must consider in each case whether there has been a breach of international law (Scelle—*Cours de Droit international public*, Paris, 1948, p. 84)."

This position was maintained in the Oral Proceedings.

It is therefore clear that the Government of Guatemala considers that there are no firm principles of law generally recognized with regard to nationality, but that the right of Liechtenstein to determine under its own law that Mr. Nottebohm was its own national, and the correlative obligation of Guatemala to recognize the Liechtenstein law in this regard—opposability—are limited not by rigid rules of international law, but only by the rules regarding abuse of right and fraud.

* * *

I have mentioned that no "international conventions" are involved and that no "international custom has been proved". It has been conceded by Guatemala that "there is no system of customary rules", but the link theory is supported by the view that certain international conventions suggest the existence of a trend. I must deal with this point before considering whether the firm view of the law on which the two Parties are in complete agreement should be rejected.

The first international convention is Article 3 (2) of the Statute, which deals with the problem of double nationality. It has nothing to do with diplomatic protection and is not in any sense relevant to the problem under consideration. It is true that it accepts as a test in the case of double nationality the place in which the person "ordinarily exercises civil and political rights". Even if this test

can be dragged from an entirely different setting and applied to the present case, it does not contribute much to the solution. Mr. Nottebohm has, in the course of the last fifty years, been linked with four States. He was a German national during thirty-four years, but exercised neither civil nor political rights in that country. He was ordinarily resident in Guatemala for nearly forty years, but exercised no political rights at any time in that country and has been prevented from exercising important civil rights for twelve years. He was a prisoner in the United States of America for more than two years, where he exercised neither civil nor political rights. Since his release, he has been accorded full civil rights in the United States and has exercised them freely, but he has had no political rights in that country. He has had full civil rights in Liechtenstein for nearly sixteen years, and has exercised full political rights for nine. Article 3 (2) certainly does not weaken the Liechtenstein position.

The United States of America, between the years 1868 and 1928, concluded bilateral conventions with about eighteen countries, not including Liechtenstein, which limited the power of protecting naturalized persons who returned to their countries of origin. The same sort of restriction on the opposability of naturalization was incorporated in a Pan-American Convention concluded at Rio de Janeiro in 1906. Liechtenstein was precluded from participation. Venezuela refused to sign the Convention. Bolivia, Cuba, Mexico, Paraguay, Peru and Uruguay signed the Convention but did not ratify it. Brazil and Guatemala have both denounced its provisions.

The fact that it was considered necessary to conclude the series of bilateral conventions and to establish the multilateral Convention referred to above indicates that the countries concerned were not content to rely on the possible existence of a rule of positive international law qualifying the right of protection. Further, even within that part of the Western hemisphere which is South of the 49th Parallel, the ratifications of the multilateral Convention were not sufficiently general to indicate consensus of the countries concerned. Taking them together, the Conventions are too few and far between to indicate a trend or to show the general consensus on the part of States which is essential to the establishment of a rule of positive international law.

* * *

It is suggested that the link theory can be justified by the application to this case of the principles adopted by arbitral tribunals in dealing with cases of double nationality.

There have been many instances of double nationality in which international tribunals have been compelled to decide between conflicting claims. In such cases, it has been necessary to choose; and the choice has been determined by the relative strength of the association between the individual concerned and his national State. There have been many instances in which a State has refused to recognize that the naturalization of one of its own citizens has given rise to a right of diplomatic protection, or in which it has refused to treat naturalization as exempting him from the obligations incident to his original citizenship, such as military service.

But the problems presented by conflicting claims to nationality and by double nationality do not arise in this case. There can be no doubt that Mr. Nottebohm lost his German nationality of origin upon his naturalization in Liechtenstein in October 1939. I do not think that it is permissible to transfer criteria designed for cases of double nationality to an essentially different type of relationship.

It is noteworthy that, apart from the cases of double nationality, no instance has been cited to the Court in which a State has successfully refused to recognize that nationality, lawfully conferred and maintained, did not give rise to a right of diplomatic protection.

* * *

There are other difficulties presented by the link theory. In the case of Mr. Nottebohm, it relies upon a finding of fact that there is nothing to indicate that his application for naturalization abroad was motivated by any desire to break his ties with the Government of Germany. I am unable to concur in making this finding at the present stage in the case. He had no ties with the Government of Germany, although there is abundant evidence to the effect that he had links with the country, as distinct from the Government. There are substantial difficulties which need to be considered.

In the first place, I do not think that international law, apart from abuse of right and fraud, permits the consideration of the motives which led to naturalization as determining its effects.

In the second place, the finding depends upon the examination of issues which are part of the merits and which cannot be decided when dealing with the plea in bar.

In the third place, the breaking of ties with the country of origin is not essential to valid and opposable naturalization. International law recognizes double nationality and the present trend in State practice is towards double nationality, which necessarily involves maintenance of the ties with the country of

origin. It is noteworthy that in the United Kingdom the policy of recognizing the automatic loss of British nationality on naturalization abroad, which had been adopted in 1870, was abandoned in 1948. Under the new British legislation, on naturalization abroad, a British citizen normally maintains his ties with his country of origin.

In the fourth place, I am unable to agree that there is nothing to indicate that Mr. Nottebohm's naturalization was motivated by a desire to break his ties with Germany. There are three facts which prove that he was determined to break his ties with Germany. The first is the fact of his application for naturalization, the second is the taking of his oath of allegiance to Liechtenstein, and the third is his obtaining a certificate of naturalization and a Liechtenstein passport.

* * *

The link theory is based, in part, on the fact that Liechtenstein waived the requirement of three years' residence. At the time of the naturalization, Mr. Nottebohm was temporarily resident in Liechtenstein ; but he had not established domicile, and had no immediate intention to do so. But I have difficulty in regarding lack of residence as a decisive factor in the case.

It has been conceded by Counsel for Guatemala that "the majority of States, in one form or another, either by their law or in their practice, allow for exceptional cases in which they exempt the applicant for naturalization from the requirement of proof of long-continued prior residence". This is another point on which both Parties are in agreement, and the position has been fully established in the case.

Counsel for Guatemala proceeded to contend that the lack of residence, in the circumstances, might be taken into account in determining whether there had been an abuse of right by Liechtenstein, but I have already dealt with that aspect of the case.

I am of the opinion that the parties were right, and that, under the rules of positive international law, Liechtenstein had the discretionary right to dispense with the residential requirement. That being so, I cannot—in the absence of fraud or injury—review the factors which may have influenced Liechtenstein in the exercise of a discretionary power. It is not surprising that no precedent has been cited to the Court in which—in the absence of fraud or injury to an adverse party—the exercise of a discretionary power, possessed by a State under the principles of positive international law, has been successfully questioned. If there had been such precedent, it would certainly have been brought to the attention of the Court.

* * *

It is also suggested that the naturalization of Mr. Nottebohm was lacking in genuineness, and did not give rise to a right of protection, because of his subsequent conduct: that he did not abandon his residence and his business activities in Guatemala, establish a business in Liechtenstein, and take up permanent residence. Along the same lines, it is suggested that he did not incorporate himself in the body politic which constitutes the Liechtenstein State.

In considering this point, it is necessary to bear in mind 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. Nevertheless I am unable to avoid consideration of his conduct since October 1939.

I have difficulty in accepting the position taken with regard to the nature of the State and the incorporation of an individual in the State by naturalization. To my mind the State is a concept broad enough to include not merely the territory and its inhabitants but also those of its citizens who are resident abroad but linked to it by allegiance. 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.

In my opinion Mr. Nottebohm incorporated himself in the non-resident part of the body politic of Liechtenstein. From the instant of his naturalization to the date of the Judgment of this Court, he has not departed in his conduct from the position of a member of the Liechtenstein State. He began by obtaining a passport in October 1939 and a visa from the Consulate of Guatemala. On his arrival in Guatemala in January 1940, he immediately informed the Guatemalan Government and had himself registered as a citizen of Liechtenstein. Upon his arrest in October 1943, he obtained the diplomatic protection of Liechtenstein through the medium of the Swiss Consul. On the commencement of the confiscation of his properties, he obtained diplomatic protection from the same source and channel. After his release from internment he was accorded full civil rights by the Government of the United States of America and instituted and successfully maintained proceedings and negotiations in Washington with a view to obtaining the

release of assets which had been blocked, upon the ground that he was a national of Liechtenstein. During the last nine years he has been an active and resident member of the body politic of that State.

As regards residence and business, there is no rule of international law requiring a naturalized person to undertake business activities and to reside in the country of his allegiance. However, considering the question of subsequent conduct, I am unable to disregard what really did happen.

To begin with, Mr. Nottebohm was 58 years of age at the time —or within two years of the normal retirement age in the type of business activity in which he was engaged. The evidence shows that he was actually contemplating retirement. In October 1939 he was largely occupied with plans to save the business, but I find it hard to believe that he was not also thinking in terms of retirement and that Vaduz was in his mind. Out of the 15½ years which have elapsed since naturalization, Mr. Nottebohm has spent less than four in Guatemala, more than two in the United States, and nine years in Vaduz.

It is true that, in the applications which were made in 1945 on his behalf with a view to his return to Guatemala, it was stated that he intended to resume his domicile in that country. But I am unable to overlook the fact that his return was absolutely essential in order to conduct the 57 law suits to which I have referred above and to clear his own good name from the charges of disloyalty which had been made against him. I do not think that too much weight can be given to the statements made by his kinsfolk in Guatemala with a view to obtaining the right of re-admission to that country.

The essential fact is that when, in 1946, he was released in mid-winter in North Dakota, deprived of all that he possessed in Guatemala and with all of his assets in the United States blocked, he went back to the country of his allegiance. In my opinion, the fact of his return to Liechtenstein and of his admission to Liechtenstein is convincing evidence of the real and effective character of his link with 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.

* * *

Further, I have difficulty in accepting two closely related findings of fact. The first is that the naturalization did not alter the manner of life of Mr. Nottebohm. In my opinion, a naturalization which led ultimately to his permanent residence in the country of his allegiance altered the manner of life of a merchant who had hitherto been residing in and conducting his business activities in Guatemala.

The second finding is that the naturalization was conferred in exceptional circumstances of speed and accommodation. There are many countries, beside Liechtenstein, in which expedition and good will are regarded as administrative virtues. I do not think that these qualities impair the effectiveness or genuineness of their administrative acts.

* * *

The link theory has been based on the view that the essential character of naturalization and the relation between a State and its national justify the conclusion that the naturalization of Mr. Nottebohm, though valid, was unreal and incapable of giving rise to the right of diplomatic protection. I have difficulty in adopting this view and it becomes necessary to consider the nature of naturalization and diplomatic protection and the juridical character of the relationships which arose between Guatemala and Liechtenstein on Mr. Nottebohm's return in 1940.

Nationality, and the relation between a citizen and the State to which he owes allegiance, are of such a character that they demand certainty. When one considers the occasions for invoking the relationship—emigration and immigration ; travel ; treason ; exercise of political rights and functions ; military service and the like—it becomes evident that certainty is essential. There must be objective tests, readily established, for the existence and recognition of the status. That is why the practice of States has steadfastly rejected vague and subjective tests for the right to confer nationality—sincerity, fidelity, durability, lack of substantial connection—and has clung to the rule of the almost unfettered discretionary power of the State, as embodied in Article 1 of The Hague Draft Convention of 1931.

Nationality and diplomatic protection are closely inter-related. The general rule of international law is that nationality gives rise to a right of diplomatic protection.

Fundamentally the obligation of a State to accord reasonable treatment to resident aliens and the correlative right of protection are based on the consent of the States concerned. When an alien comes to the frontier, seeking admission, either as a settler or on a visit, the State has an unfettered right to refuse admission. That does not mean that it can deny the alien's national status or refuse to recognize it. But by refusing admission, the State prevents the establishment of legal relationships involving rights and obligations, as regards the alien, between the two countries. On the other hand, by admitting the alien, the State, by its voluntary act, brings into being a series of legal relationships with the State of which he is a national.

As a result of the admission of an alien, whether as a permanent settler or as a visitor, a whole series of legal relationships come into being. There are two States concerned, to which I shall refer as the receiving State and the protecting State. The receiving State becomes subject to a series of legal duties vis-à-vis the protecting State, particularly the duty of reasonable and fair treatment. It acquires rights vis-à-vis the protecting State and the individual, particularly the rights incident to local allegiance and the right of deportation to the protecting State. At the same time the protecting State acquires correlative rights and obligations vis-à-vis the receiving State, particularly a diminution of its rights as against the individual resulting from the local allegiance, the right to assert diplomatic protection and the obligation to receive the individual on deportation. This network of rights and obligations is fundamentally conventional in its origin—it begins with a voluntary act of the protecting State in permitting the individual to take up residence in the other country, and the voluntary act of admission by the receiving State. The scope and content of the rights are, however, largely defined by positive international law. Nevertheless, the receiving State has control at all stages because it can bring the situation to an end by deportation.

The position is illustrated by what actually happened in the present case. Mr. Nottebohm went to Guatemala 50 years ago as a German national and as a permanent settler. Upon his admission as an immigrant, the whole series of legal relationships came into being between Guatemala and Germany. Guatemala was under a legal obligation vis-à-vis Germany to accord reasonable and fair treatment. Guatemala had the right to deport Mr. Nottebohm to Germany and to no other place. Germany had the right of diplomatic protection and was under the legal obligation to receive him on deportation.

As a result of the naturalization in October 1939, the whole network of legal relationships between Guatemala and Germany as regards Mr. Nottebohm came to an end.

Mr. Nottebohm returned to Guatemala in January 1940, having brought about a fundamental change in his legal relationships in that country. He no longer had the status of a permanently settled alien of German nationality. He was entering with a Liechtenstein passport and with Liechtenstein protection.

The first step taken by him was the obtaining of a visa from the Guatemalan Consul before departure. On arrival in Guatemala he immediately brought his new national status to the attention of the Guatemalan Government on the highest level. His registration under the Aliens' Act as a German national was cancelled and he was registered as a Liechtenstein national. From the end of January 1940 he was treated as such in Guatemala.

In my opinion, as a result of Mr. Nottebohm's admission to Guatemala and establishment under the Guatemalan law as a resident of Liechtenstein nationality, a series of legal relationships arose between Guatemala and Liechtenstein, the nature of which has been sufficiently indicated above. From that time on Guatemala had the right to deport Mr. Nottebohm to Liechtenstein, and Liechtenstein was under the correlative obligation to receive him on deportation. Liechtenstein was entitled as of right to furnish diplomatic protection to Mr. Nottebohm in Guatemala, and when that right was exercised in October 1943, it was not questioned by Guatemala.

I am unable to concur in the view that the acceptance of Mr. Nottebohm by the Guatemalan authorities as a settler of Liechtenstein nationality did not bring into being a relationship between the two Governments. I do not think that the position of Guatemala is in any way different from that of other States and I do not think that it was possible for Guatemala to prevent the coming into being of the same kind of legal relationships which would have taken place if Mr. Nottebohm had landed as a settler in any other country.

When a series of legal relationships, rights and duties exists between two States, it is not open to one of the States to bring the situation to an end by its unilateral action. In my opinion such relationships came into being between Guatemala and Liechtenstein when the former State accepted Mr. Nottebohm in 1940. It was open to Guatemala to terminate the position by deportation but not to extinguish the right of Liechtenstein under international law to protect its own national without the consent of that country.

* * *

There is one more aspect of this question to which I must refer. It is suggested that Mr. Nottebohm obtained his naturalization with the sole motive of avoiding the legal consequences of his nationality of origin. He was a German and Germany was at war, but not with Guatemala. There can be little doubt that this was one of his motives, but whether it was his sole motive is a matter of speculation.

There is apparently abundant evidence on this aspect of the case to which I have not had access ; evidence which would prove or disprove the contention that the naturalization was part of a fraudulent scheme. But it is not permissible for me to look at that evidence in dealing with a plea in bar. I must proceed at this stage on the assumption that the naturalization was obtained in good faith and without fraud.

It has been complained that the purpose of the naturalization was to avoid the operation of war-time measures in the event that Guatemala ultimately became involved in war with Germany. In

October 1939, if Mr. Nottebohm read the newspapers—which is highly probable—he knew that Guatemala, in concert with the other Pan-American States, was making every effort to maintain neutrality. It is far more likely that, remembering the experience of Nottebohm Hermanos during the first World War, he was seeking to protect his assets in the United States. The suggestion that he foresaw Guatemalan belligerency is not supported by any evidence and I cannot accept it.

Further, even if his main purpose had been to protect his property and business in the event of Guatemalan belligerency, I do not think that it affected the validity or opposability of the naturalization. There was no rule of international law and no rule in the laws of Guatemala at the time forbidding such a course of action. Mr. Nottebohm did not conceal the naturalization and informed the Government of Guatemala on the highest level on his return to the country.

I do not think that I am justified in taking Mr. Nottebohm's motives into consideration—in the absence of fraud or injury to Guatemala—but even if this particular motive is considered, it cannot be regarded as preventing the existence of the right of diplomatic protection.

* * *

In view of the foregoing circumstances it is necessary for me to reach the conclusion that the two Parties before the Court were right in adopting the position that the right of Liechtenstein to determine under its own law that Mr. Nottebohm was its own national, and the correlative obligation of Guatemala to recognize the Liechtenstein law in this regard are limited not by rigid rules of international law, but only by the rules regarding abuse of right and fraud.

Accordingly I am of the opinion that the Court should reject the Guatemalan Final Conclusions 2 *(a)* and 2 *(b)*, join the Conclusion 2 *(c)* to the merits, and proceed to an examination of the other pleas in bar contained in the Guatemalan Final Conclusions 1 and 3.

(Signed) J. E. READ.