DISSENTING OPINION OF M. GUGGENHEIM, JUDGE "AD HOC"

[Translation]

Having, to my regret, been unable to concur in the Judgment of the Court I feel it my duty to state my dissenting opinion.

In my view, the submission of the Government of Guatemala that the claim of Liechtenstein should be declared inadmissible on the ground that F. Nottebohm does not possess Liechtenstein nationality should have been joined to the Merits and the proceedings adjourned to enable the Government of Liechtenstein to obtain and collect documents in support of its observations on the new documents produced by Guatemala. I have reached this conclusion for the following reasons :

I

1. Every legal system itself lays down the requisite conditions for the validity of municipal legal acts. This also applies to the legal system of Liechtenstein with respect to the grant of its nationality ; from the point of view of the Court, that is a procedure under municipal law. Naturalization is a fact which has to be proved for the purposes of international proceedings and the Court is entitled to ascertain, at least up to a certain point, whether the facts relied upon correspond to the real and effective situation, that is to say whether the naturalization is genuine and effective from the point of view of municipal law. The power of enquiring into the circumstances of a naturalization is not therefore limited to an examination of certain conditions, as was maintained, for example, in the Salem case in the dissenting opinion of the American arbitrator, Nielsen, who considered that the researches of an international tribunal should be confined exclusively to the question whether the certificate of naturalization was obtained by fraud or favour (see *Reports of International Arbitral Awards*, United Nations, Volume II, pp. 1204 *et sqq.*). According to the prevailing view in international judicial decisions, there is no doubt that an international tribunal is entitled to investigate the circumstances in which a certificate of nationality has been granted. This view was adopted in the decision of the German-Rumanian Mixed Arbitral Tribunal, of November 6th, 1924, in the case of Meyer-Wildermann *v.* Stinnes heirs and others (*Reports of the Decisions of the Mixed Arbitral Tribunals*, Volume IV, p. 842). Indeed the Tribunal in this case expressly reserved its right to investigate the circumstances of the official recognition of nationality. Among the many decisions supporting the right of international courts and arbitral

tribunals to examine certificates of nationality, reference may also be made to the decision of Commissioner Nielsen in the case of Hatton *v.* United Mexican States (*Reports of International Arbitral Awards*, United Nations, September 26th, 1928, Volume IV, p. 331) which rightly places emphasis on the obligation to furnish proof of nationality. "Convincing *proof* of nationality is requisite not only from the standpoint of international law, but as jurisdictional requirement."

2. These decisions are in accordance with a more general rule: the rule requiring proof of nationality is only a particular application of the rule that an international tribunal is competent to decide upon the validity of a rule or an act under municipal law if such rule or act is relevant to the international dispute under examination. The rule or act under municipal law is to be regarded merely as a fact but such facts may be proved "by means of any researches which the Court may think fit to undertake or to cause to be undertaken". (P.C.I.J., Brazilian Loans case, Series A 20/21, p. 124). Moreover the same decision states: "all that can be said in this respect is that the Court may possibly be obliged to obtain knowledge regarding the municipal law which has to be applied". Cf. also P.C.I.J., Series A, No. 7, p. 19; Series A, Nos. 20/21, p. 46; Series A/B, No. 62, p. 22; Series A/B, No. 76, p. 19.

3. An international tribunal is not therefore bound to confine itself to the statements of national authorities relating to their application of the rules of municipal law. Accordingly it may consider the facts in a manner different from that of municipal courts. But an international tribunal must never lose sight of the fact that it is called upon to consider municipal law for the purpose of exercising a competence conferred on it by international law. It is not its function to decide upon the domestic validity of municipal law, that is to say, to exercise the powers of a court of appeal with regard to municipal law. What then is its function? An international tribunal must only be concerned with municipal law and, in particular, with nationality, as a fact determining the admissibility of a claim brought before an international judicial organ. The plaintiff must therefore *prove* that nationality has been conferred by means of a valid act in accordance with the municipal law of the claimant State; and the defendant, if he disputes this, must establish the contrary (P.C.I.J., Series A, No. 5, p. 30).

4. I have reached the conclusion that it was for the Court to determine whether F. Nottebohm validly and effectively acquired nationality in accordance with the municipal law of Liechtenstein in such a manner that the validity and effectiveness of the naturalization cannot be the subject of any doubt.

In this connexion, however, the Court must confine itself within certain clearly defined limits. This limitation upon the competence of the Court is based on two entirely different considerations : on the one hand, when investigating the application of the municipal law by the municipal authorities, the Court must confine itself to examining whether such application is in accordance with the obligations which international law imposes on the State in question ; on the other hand, having regard to the fact that, according to the practice of international law, municipal law does not form part of the body of legal rules which it applies directly, the Court is obliged to reach a decision in regard to municipal law on the basis of evidence submitted to it in the proceedings. It cannot *freely* examine the application and interpretation of municipal law but can merely enquire into the application of municipal law as a question of fact, alleged or disputed by the parties and, in the light of its own knowledge, in order to determine whether the facts are correct or incorrect.

5. Since the law of Liechtenstein applies primarily within the national sphere, it is the competent State authorities, and these authorities alone, which are entitled to determine whether the law relating to naturalization has been correctly applied, that is to say, whether, in the present case, sufficient reasons existed for waiving the requirement that the applicant must have "ordinarily resided in the territory of the Principality of Liechtenstein at least three years" and whether the application for naturalization was "deserving [of] special consideration" and also whether the applicant could be exempted from this requirement "by way of exception" (see Art. 6 of the Liechtenstein Law on the Acquisition and Loss of Nationality of 4th January, 1934). Even the State Court of Liechtenstein is incompetent to review the considerations of expediency upon which legal acts, decided upon and applied by virtue of a discretionary power of the administrative authorities, are based. This is in accordance with the generally recognized principles of Swiss and German administrative law. It has, moreover, received confirmation in the judicial decisions of the State Court of the Principality, as is shown by its decision of 20th July, 1950, concerning the grant of a concession for a hotel *(Gastbewerbehaus-Konzession)*. (See *Rapport de Gestion* of the Princely Government to the Diet for the year 1950, pp. 83 *et sqq.*) It was there stated that, in accordance with Article 40 of the Law relating to the State Court, the latter could only give decisions on questions of law and not with regard to the discretionary power of administrative authorities. In my opinion the Court is not entitled to assume the functions of a supervisory judicial body which does not exist under the domestic law.

6. If the question of F. Nottebohm's acquisition of Liechtenstein nationality is considered from this angle, it is beyond doubt that

he must be regarded as a national of the Principality. A naturalization to which the supreme organs of the Principality, the Reigning Prince and the Diet, have given their consent, in accordance with Article 12 of the Law on the Acquisition and Loss of Nationality—as they did in the case of F. Nottebohm—is a valid naturalization. Moreover there is also a presumption *juris* and *de jure* in favour of the validity of the acts of these supreme authorities, since Liechtenstein law does not provide for the judicial control of acts performed by these authorities in the exercise of their discretionary power.

7. Moreover, in order to determine the validity of a naturalization, an international tribunal must also bear in mind that, from the moment of his naturalization, Liechtenstein has never ceased to regard F. Nottebohm as one of its nationals ; this attitude was likewise adopted by Switzerland, the Power representing Liechtenstein interests abroad, as appears from the Certificate of the Swiss Clearing Office of 24th July, 1946 (Reply, Annex 18, p. 90), and probably also by Guatemala, at least until a date which it is difficult to determine from the documents. Finally, F. Nottebohm, who in fact lost his German nationality in consequence of his naturalization, has never invoked the protection of any State other than Liechtenstein ; he returned to Liechtenstein in 1946 and never changed his residence thereafter.

II

1. In addition to the question whether Liechtenstein nationality was validly and effectively granted to F. Nottebohm according to Liechtenstein law, a further question arises, as is stated in one of the Conclusions of Guatemala, namely, whether Liechtenstein nationality was granted to F. Nottebohm in accordance with the generally recognized principles in regard to nationality. In my opinion, however, it is not this abstract problem which calls for consideration in the present case, but rather the more concrete problem of determining whether diplomatic protection resulting from the grant of Liechtenstein nationality can be relied upon as against Guatemala in virtue of the general rules of international law.

2. For this diplomatic protection by Liechtenstein might be inoperative for two different reasons which must be clearly distinguished. In the first place, the nationality of F. Nottebohm may not in itself be valid on the international level and this would entail its invalidity, with the result that Liechtenstein could not exercise its right of diplomatic protection. Alternatively, it is possible that the nationality of F. Nottebohm might, in itself, be valid from the international standpoint but could not be relied upon as against States in regard to which Liechtenstein might seek to exercise diplomatic protection in the same circumstances as in regard to Guatemala.

3. International law furnishes examples of situations in which the grant of nationality is invalid, with the direct consequence that it cannot form the basis of diplomatic protection. The inadmissibility of a claim on the ground that diplomatic protection cannot be invoked is then merely the result of the absence of the effects of nationality on the international level. This also gives rise to other consequences, such as the non-recognition of the personal status which, being claimed on the basis of the grant of nationality, is held to be null and void, or the loss of the right to claim the benefit of treaty rights reserved to nationals of the State concerned. If, on the international level, we examine the cases in which the absence of a valid bond between the State and the individual to whom the State has granted its nationality has been recognized in practice, it will be found that such a bond has only been held to be lacking when the person concerned possessed a second nationality or when his State of adoption has granted its nationality by compulsion, that is to say, without the consent of the person concerned, or without the State whose nationality is to be lost having consented to the withdrawal of its own nationality.

It is in such circumstances and in such circumstances alone, where the bond between the State and the individual is lacking to so great an extent, that third States are not bound to recognize the naturalization nor to accede to a claim to the right to exercise protection. Thus third States are not bound to consider the children of foreign diplomats born in the territory of a State which attributes its nationality to them as nationals of that State (cf. Article 12 of The Hague Convention of 1930 on Certain Questions relating to the Conflict of Nationality Laws). The ownership of land is not by itself a sufficient legal title for the grant of nationality (cf. the awards of the German-Mexican Claims Commission, *American Journal of International Law*, 1933, p. 69). The Ordinance of the German Reich of August 23rd, 1942, which authorized the grant of German nationality to certain classes of the population in territories not subject to German sovereignty but occupied by Germany, was not bound to be recognized by third States because it was contrary to certain obligations binding on Germany under general international law (cf. *Annuaire suisse de droit international*, Vol. I, 1944, pp. 79 *et sqq.*). The compulsory reintegration of a former national resident abroad is unlawful if the person concerned has lost his nationality by its withdrawal and if a new bond has not been created between him and the State wishing to reintegrate him in his former nationality (Jugdments of the Swiss Federal Court, Vol. 72, I, p. 410; Vol. 74, I, pp. 346 *et sqq.*).

All these situations are, however, somewhat exceptional. In the case of F. Nottebohm, the grant of Liechtenstein nationality did

not fall within any of these categories, all the more so since he voluntarily acquired Liechtenstein nationality and by so doing automatically lost his German nationality by virtue of Article 25 of the German Nationality Law of 22nd July, 1913, a fact which is, in my opinion, of vital importance for determining the "effectiveness" of Liechtenstein naturalization on the international level. No proof has been furnished in the proceedings to the effect that F. Nottebohm availed himself of the right granted by this Article, according to which nationality was not lost by a person who, before acquiring a foreign nationality, obtained from the competent authorities of his State a written authorization to retain his original nationality. On the contrary, the certificate of the Senate of the Free Hanseatic City of Hamburg of 15th June, 1954, attests the loss of German nationality by F. Nottebohm in consequence of his naturalization in Liechtenstein (Reply, Annex 19, p. 91).

4. Are there other situations, apart from those which have been referred to, in which third States are entitled to regard the naturalization of a foreign national as inoperative when the foreign national has agreed to the grant of nationality and when his former nationality has not been retained ? To be justified in saying so, it would be necessary to point to repeated and recurrent acts on the international level, which would establish that, in circumstances identical with or similar to those in which naturalization was granted to F. Nottebohm by Liechtenstein, third States have refused to recognize the naturalization so that it can be said that an established usage has developed displaying the characteristics of a general practice accepted as law (Article 38, paragraph 1 *(b)*, of the Statute of the Court and P.C.I.J., Series A, No. 10, p. 28 ; I.C.J. Asylum case, *Reports 1950*, pp. 276 *et sqq.*). No evidence of such a custom, which would forbid the grant of nationality in the circumstances in which Liechtenstein granted her nationality to F. Nottebohm, has been given in these proceedings. It is not sufficient for this purpose merely to affirm—without any evidence—that there is no other State law permitting naturalization in the circumstances in which it was granted to F. Nottebohm.

5. Moreover, none of the attempts made to define the "bond of attachment" according to criteria other than those which have just been mentioned and which are in accordance with existing international law, has succeeded. This failure to arrive at such a definition is not fortuitous. It arises from the fact that in order to define the bond necessary to make naturalization binding, it is sought to supplement the objective criteria (absence of compulsion in relation to the applicant ; dual nationality ; the grant of nationality without withdrawal of nationality by the State to which the naturalized person formerly belonged) by subjective considerations such as the "genuineness of the application", "loyalty to the new State", "creation of a centre of economic interests in the new State", "the

intention to become integrated in the national community" ; or, again, rules are stated which are in no way in accordance with present international practice, or vague principles are formulated which would open the door to arbitrary decisions. International law does not, for example, in any way prohibit a State from claiming as its nationals, at the moment of their birth, the descendants of its nationals who have been resident abroad for centuries and whose only link with the State which grants its nationality is to be found in descent, without the requirement of any other element connecting them with that State, such as religion, language, social conceptions, traditions, manners, way of life, etc. (see, for example, Swiss Civil Code, Art. 263, para. 1, 270, 324, para. 1 ; and Art. 10 of the Federal Law on the Acquisition and Loss of Swiss Nationality of September 29th, 1952 ; Art. 4 of the Liechtenstein Law on the Acquisition and Loss of Nationality). It is difficult to see how it can be maintained that the conditions necessary to render naturalization valid and effective on the international level have only been complied with if at the time of application for naturalization there existed one of those subjective bonds of attachment which have just been referred to.

6. In order to judge as to the bond between the State and its national, that is to say, in order to ascertain whether this bond is real and effective and not merely fictitious, international law only has regard to the external elements of legal facts to which it attaches certain consequences, without concerning itself with the mental attitude of the legal person responsible for a juridical act such as the act of naturalization, and without considering the motives (which it is very difficult to determine), which have led the individual to apply for naturalization. This view is in no way inconsistent with the provisions of Article 1 of the Convention on Certain Questions relating to the Conflict of Nationality Laws adopted by the Conference for the Codification of International Law, held at The Hague in 1930. According to this Article, the law enacted by a State for determining who are its nationals "shall be recognized by other States in so far as it is consistent with .... international custom and the principles of law generally recognized with regard to nationality". This rule, the correct interpretation of which has been the subject of dispute among writers, contains no criterion requiring an "effective" bond in the case of nationality. It merely refers to the rules of international custom and the principles of law generally recognized with regard to nationality, principles which do not forbid the grant of nationality in the circumstances in which Liechtenstein granted its nationality to F. Nottebohm.

7. Nor is it possible to maintain that the bond established between a State and its national is in all circumstances closer than that existing between a State and an individual connected with it by some other link, as, for example, permanent residence. When the

development of modern law in civilized States is closely considered, it is even possible to affirm that the rights and duties of an individual vis-à-vis the State of his permanent residence, are frequently more numerous than those which link him to the State of which he is a national. There are certain rules of private law governing conflicts of law which clearly illustrate this situation. In these circumstances, the assertion that there exists an especially close link between the State and its national can hardly bear the absolute character which is frequently attributed to it. This link is, in any case, weakened when nationality becomes dissociated from permanent residence as well as in the case of dual nationality, where two or several States claim a right to the attachment of the individual in question and require him to fulfil the duties inherent in nationality, a situation which is in no way contrary to general international law. Moreover, international law contains no rule which makes the effectiveness of nationality dependent upon a sentimental bond between the naturalizing State and the naturalized individual.

8. It has, however, been asserted, both in the written and oral proceedings, that it is necessary to consider the problem of the validity of the act of naturalization apart from the existence of a specific rule of customary law prohibiting Liechtenstein from naturalizing F. Nottebohm in such circumstances, but that a more general complaint could be levelled against Liechtenstein on the one hand and Nottebohm on the other, namely, the absence of a real and genuine intent which is a condition for the validity of legal acts in international law. Nevertheless, it cannot be contended that the naturalization of F. Nottebohm was vitiated by the absence of a genuine intent on the part of Liechtenstein to naturalize him or on the part of F. Nottebohm himself. The reality of the naturalization cannot be called in question. There was no question of a fictitious marriage between Liechtenstein and Nottebohm. In this connexion it is necessary to have regard to the subsequent conduct of Nottebohm, which never varied after naturalization. He always behaved exclusively as a Liechtenstein national and, in taking up the case of its national, the Principality has shown the serious character of the bond linking it with its national. The extent to which the Court can consider the "genuineness" of naturalization as an element of proof in regard to the reality and effectiveness of naturalization, is confined within the limits which have just been stated.

Since F. Nottebohm was not himself subject to any duties based on the principles of international law, it is also unnecessary to consider whether he acted in "good faith" when he applied for naturalization. No rule of general international law—that is to say, no customary rule nor general principle of law recognized by civilized nations within the meaning of Article 38, 1 *(b)* and *(c)*,

of the Statute of the Court—lays down such a requirement and no international responsibility can be incurred by the Principality for not having considered the application for naturalization from this point of view, which would render the naturalization wholly or partly inoperative as against Guatemala, a neutral country at the time of the naturalization of Nottebohm. It would be inadmissible to seek to impose a requirement in this respect, that the naturalizing State or applicant for naturalization should foresee uncertain events which might take place in the future with a greater or lesser degree of probability.

9. Even if it were admitted that the Court is entitled to enquire into the motives which led F. Nottebohm to apply for Liechtenstein nationality, it is necessary to point out that F. Nottebohm in no way failed to observe the principles of good faith as defined by the municipal law of civilized States and in particular by Article 2 of the Civil Code of Liechtenstein of 1926. F. Nottebohm did not conceal any essential or subordinate element for the consideration of his application by the Liechtenstein authorities which could therefore decide upon the application with full knowledge of the facts. There was therefore no "lack of loyalty" on the part of F. Nottebohm, no failure to keep his word which, in certain circumstances, could render the legal act irregular for the purposes of the application and interpretation of the Liechtenstein Law on the Acquisition and Loss of Nationality. Only if it could be proved that F. Nottebohm acted in a fraudulent manner, for example, by concealing German property with the help of the naturalization, might it be possible, if certain conditions were fulfilled, to speak of a failure on the part of F. Nottebohm to observe the principle of good faith vis-à-vis the Principality and perhaps also vis-à-vis Guatemala. Such concealment might, as I shall show, justify the non-recognition of Liechtenstein nationality. In such a case, however, it would not be the absence of good faith which would be the decisive element in the fact that Liechtenstein nationality could not be invoked, but the wrongful character of the fraudulent transaction of concealment of which the acquisition of Liechtenstein nationality would only be *one* of the constituent elements.

10. Is it possible to accept the validity of F. Nottebohm's nationality for the purposes of the municipal law of Liechtenstein and yet to affirm that this nationality does not deploy all its international effects and that Liechtenstein is not, therefore, entitled to exercise diplomatic protection should the latter be disputed by Guatemala ? International law is indeed conversant with situations in which the municipal effects and even some of the international effects of nationality are recognized but in which *diplomatic protection* exercised on the basis of the acquired nationality may be successfully disputed. Thus, the individual who possesses two

nationalities can only avail himself of the diplomatic protection of *one* of the States of which he is a national vis-à-vis the other and this is so wherever he may be resident. According to the prevailing view, a State can only grant its diplomatic protection to an individual who possessed its nationality at the time when the event giving rise to the diplomatic protection took place, and who has retained such nationality uninterruptedly up to the time when the claim is presented. This dissociation of nationality from diplomatic protection is normally confined to situations in which the individual has two nationalities—either cumulatively or in succession—with the result that the right of protection may always be exercised by *one* State, thus preserving the possibility of a claim being asserted on the international level.

11. Nor is this statement of the position inconsistent with the fact that the courts of third States and international tribunals have, on many occasions, had to settle disputes in which two States claimed the same individual as their national and that in such cases the prevailing tendency has been to give preference to the real and effective nationality, a view which forms the basis of Article 5 of the Convention of 1930 relating to the Conflict of Nationality Laws. The test of *effective connection* with respect to nationality has only been laid down for the purpose of resolving conflicts arising out of dual nationality, in regard to which third States must choose between one nationality, held to be the more real and effective one, and a second nationality held to be the less real and effective. The test has also been applied between two States each of which wishes to exercise diplomatic protection on behalf of the same person.

As for the Bancroft Treaties, which were invoked during the course of the proceedings, I consider it incorrect to regard these Treaties as constituting a precedent for the case of F. Nottebohm. Apart from the fact that these were bilateral treaties concluded in 1868 between the United States of America on the one hand and the States of Wurtemberg, Bavaria, Baden, Hesse and the North German Confederation on the other, they were abrogated on 6th April, 1917 (see Hackworth, *Digest of International Law*, Vol. III, p. 384), at the time of the entry of the United States of America into the first World War and cannot therefore be regarded as reflecting the rules of general international law, since these provisions were mainly concerned with the loss of nationality and the American diplomatic protection of persons of German origin, naturalized in the United States and taking up their residence again in Germany without the intention of returning to the United States. The main purpose of these treaties was to annul the effects of American nationality granted to persons who had no wish to reside in the United States and who returned to their country of origin frequently in order to evade the obligations of military service. As regards persons

possessing dual nationality—American nationality and the nationality of one of the German States in question—the Bancroft Treaties sought to give effect to the nationality of the country of habitual residence (cf. Moore, *A Digest of International Law*, Vol. III, pp. 358 *et sqq.*).

The present case is entirely different. F. Nottebohm was not a Liechtenstein national who went to Guatemala and was naturalized in that country and thereafter returned to Liechtenstein in order to take up residence there. Moreover, no conflict of dual nationality arises in his case. To allow Guatemala to hold that Liechtenstein's claim to exercise diplomatic protection is inadmissible against Guatemala would lead to the consequence that F. Nottebohm, having lost his German nationality by acquiring the nationality of Liechtenstein, would no longer be able to invoke the diplomatic protection of any State. Such a dissociation of nationality from diplomatic protection is not supported by any customary rule nor by any general principle of law recognized by civilized nations, within the meaning of Article 38 (1) *(b)* and *(c)* of the Statute of the Court. I consider that such a rule of international law could only be applied, in the present case, especially on consideration of a preliminary objection, with the consent of both parties, in accordance with Article 38 (2) of its Statute.

12. Moreover, to dissociate the question of the validity of nationality from that of diplomatic protection leaves a further problem unsolved. Is the question one of the general non-validity of the naturalization on the international level, thus going beyond the limited right of third States to deny the claim to exercise diplomatic protection, or does such non-validity merely affect the right of Liechtenstein to exercise diplomatic protection as against Guatemala ?

Since the reasons invoked for the purpose of denying the claim to exercise diplomatic protection are inevitably based on the manner in which F. Nottebohm acquired Liechtenstein nationality, and not on any special reasons which Guatemala may have had for refusing to recognize the effects of the nationality in the field of diplomatic protection, any third State will be in a position to draw conclusions going beyond the narrow limits of the right to exercise diplomatic protection and will thus be led to disregard other consequences, other effects of nationality on the international level. There would, for example, be nothing to prevent them from saying that the personal status of F. Nottebohm is that of a stateless person, Nottebohm having in fact lost German nationality without having validly acquired Liechtenstein nationality for international purposes. The fact that the Judgment only applies to the particular case and that the *res judicata* is not binding on third States in no way detracts from the force of these considerations.

The scope of the judicial decision extends beyond the effects provided for in Article 59 of the Statute.

13. On the other hand, the reasons relied on—namely the absence of a sufficient bond of attachment, which debarred Liechtenstein from exercising diplomatic protection as against Guatemala—affect the claims relating to damage caused at the time when F. Nottebohm had not yet established a permanent residence in the Principality. Even if these grounds are admitted, however, I consider that there is nothing to prevent Liechtenstein from putting forward claims relating to the period when F. Nottebohm took up permanent residence at Vaduz as from 1946 (see Rejoinder, p. 45). Since the events giving rise to the damage suffered by F. Nottebohm in respect of his property—as to which damage, claims have been put forward against Guatemala—occurred within the period subsequent to 1946, and in particular since Liechtenstein's application was presented to the Court on 17th December, 1951, and since the expropriation measures in regard to which reparation is claimed by the Principality were only applied after the year 1949, and in particular after the enactment of Legislative Decree No. 630 of 13th July, 1949, relating to the Law on the Liquidation of Matters arising out of the War (see Counter-Memorial, Annex 39, p. 126), there is nothing to prevent F. Nottebohm's nationality deploying its ordinary effects as against Guatemala, even if it is considered that factual ties stronger than those created in 1939 by naturalization, are essential for the purpose of enabling a State to exercise diplomatic protection on behalf of its nationals.

It cannot be denied, if this reasoning, which I consider goes beyond the requirement of general international law, is adopted, that F. Nottebohm, after a permanent residence of more than three years in Liechtenstein, is entitled to put forward certain of his claims against Guatemala, and that Liechtenstein is entitled to take up the case of its national. Since F. Nottebohm certainly had Liechtenstein nationality, which was supported by a "bond" of residence at the time when the claim was addressed to Guatemala (1951), Liechtenstein, in this connexion, fulfils all the requirements which, in international practice, have been the subject of dispute, as to the date which is to be preferred, that is to say, the date when the national Government espouses the claim, the date when the claim is presented to a representative of the defendant Government, the date when it is brought before an international tribunal, or even the date when the claim is settled (cf. E. Borchard, *Protection diplomatique des Nationaux à l'Étranger*, Annuaire de l'Institut de droit international, 1931, Vol. I, p. 284).

On the other hand there is no doubt that the events giving rise to the dispute, that is to say, the damage suffered in respect

of expropriated property, occurred at a time subsequent to the final establishment of F. Nottebohm in Liechtenstein. In this connexion it is also necessary to point out that all the strict tests laid down for the purpose of determining the national character of a claim, which were considered during the preliminary discussions for the 1930 Conference on the Codification of International Law, were complied with in the present case (cf. League of Nations, Doc. C.75.M.69.1929.V., pp. 140 *et sqq.*).

The fact that the Guatemalan Law of 1949 on the Liquidation of Matters arising out of the War, in accordance with Article 7 of Legislative Decree No. 630, regarded as enemy nationals those persons who possessed the nationality of any of the States with which Guatemala was at war or who had such nationality on 7th October, 1938, although they claimed to have acquired another nationality after that date, does not further modify the essential elements of the question under consideration, that is to say, that the events giving rise to the dispute occurred at a time when F. Nottebohm was a Liechtenstein national. It is not for a third State to decide the validity of a foreign nationality for the purpose of rendering inoperative the exercise of diplomatic protection, with the possible exception of the special case of concealment of enemy property, which will be dealt with under III below and which, being a matter concerned with the merits of the case, cannot be considered in connexion with a plea in bar.

Since no final measure of expropriation, in respect of which a claim for reparation has been put forward by Liechtenstein, was adopted before F. Nottebohm's return to the State, of which he was a national, in 1946, and since all these measures were only carried out after he took up permanent residence in Liechtenstein, I fail to see how it is possible to invoke the absence of any bond of attachment between Liechtenstein and F. Nottebohm (even if in this connexion one were to admit the existence of requirements going beyond what is laid down by general international law on this question) for the purpose of denying that Liechtenstein had the right to take up the case of its national in 1951 with respect to unlawful acts alleged to have been committed after 1946.

14. A decision that Liechtenstein's application is inadmissible on the ground that F. Nottebohm does not possess effective nationality, and that therefore the applicant State is not entitled to exercise the right of diplomatic protection as against Guatemala would involve three important consequences :

(a) The rule of international law that nationality should not be dissociated from diplomatic protection in cases where the protected person has only *one* nationality, and where the facts giving rise to the dispute have occurred after the grant of such nationality, would be modified retroactively sixteen

years after F. Nottebohm's naturalization in Liechtenstein. This situation is all the more serious since the main facts giving rise to the dispute only occurred after 1949, three years after F. Nottebohm finally established himself in Liechtenstein and, by prolonged residence there, created solid bonds of attachment, the absence of which has been relied upon by the respondent party in the written and oral proceedings as a ground for the view that Liechtenstein is not entitled to exercise diplomatic protection in favour of F. Nottebohm against Guatemala. I consider that even if one shared this view, one must at least recognize the right to exercise diplomatic protection as regards the injury suffered by F. Nottebohm after 1946, especially the injury resulting from the measures taken following the enactment of Legislative Decree No. 630 of July 13th, 1949.

(b) Even if it be admitted that nationality can be dissociated from diplomatic protection in the present case, there remains the question as to what are the consequences of the total or partial invalidity under international law of a nationality validly acquired under municipal law. Is the invalidity confined to the sphere of diplomatic protection, or does it extend to the other effects of nationality on the international level, for example, treaty rights enjoyed by the nationals of a particular State in regard to monetary exchange, establishment and access to the municipal courts of a third State, etc. ?

(c) A refusal to recognize nationality and therefore the right to exercise diplomatic protection, would render the application of the latter—the only protection available to States under general international law enabling them to put forward the claims of individuals against third States—even more difficult then it already is.

If the right of protection is abolished, it becomes impossible to consider the merits of certain claims alleging a violation of the rules of international law. If no other State is in a position to exercice diplomatic protection, as in the present case, claims put forward on behalf of an individual, whose nationality is disputed or held to be inoperative on the international level and who enjoys no other nationality, would have to be abandoned. The protection of the individual which is so precarious under existing international law would be weakened even further and I consider that this would be contrary to the basic principle embodied in Article 15 (1) of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on December 8th, 1948, according to which everyone has the right to a nationality. Furthermore, refusal to exercise protec-

tion is not in accordance with the frequent attempts made at the present time to prevent the increase in the number of cases of stateless persons and to provide protection against acts violating the fundamental human rights recognized by international law as a minimum standard, without distinction as to nationality, religion or race.

15. The finding that the Application is not admissible on the grounds of nationality prevents the Court from considering the merits of the case and thus from deciding whether the respondent State is or is not guilty of an unlawful act as regards Liechtenstein and its national, who has no other legal means of protection at his disposal. Moreover, a preliminary objection must be strictly interpreted. It must not prevent justice from being done.

III

As regards the criticism made during the written and oral proceedings, that F. Nottebohm had sought Liechtenstein nationality for the purpose of changing his status from a subject of a belligerent State to that of a subject of a neutral State, it is necessary to make the following observations:

1. There is no rational principle or judicial decision in either private or public international law to justify the view that a new nationality which has been acquired for the purpose of avoiding, in the future, certain effects of a former nationality should be regarded as invalid. Even if it were admitted, although this has not been proved, that F. Nottebohm became a Liechtenstein national with the object of evading the consequences of his German nationality, it is necessary to point out that this change in his status was not effected during the War between Guatemala and Germany but long before that time. It is therefore impossible to speak of a change in the status of a person from that of an enemy national to that of a neutral national which might, in certain circumstances, have been the case had the naturalization taken place while Guatemala and Germany were in a state of war.

2. On the other hand, could it be said that Nottebohm's nationality was fraudulent and defective if it had been proved that he applied for naturalization in Liechtenstein, for the purpose of using such naturalization as a cloak for the property of enemy nationals in Guatemala? It might be considered that a nationality acquired for the sole purpose of claiming the diplomatic protection of a neutral State cannot be invoked vis-à-vis the belligerent State against which the acts of concealment of enemy property were

directed, on the ground that a legal act may be vitiated by fraud and that the respondent party is therefore justified in alleging that it is a nullity.

The acquisition of nationality in such cases forms part of a transaction which is to be regarded as generally fraudulent, with the possible result that the injured belligerent State may refuse to recognize the change of nationality, and not merely that diplomatic protection cannot be relied upon. Nevertheless, it will always be difficult to prove the existence of such a fraudulent operation.

3. Moreover, whatever the solution of this problem may be, it would have been necessary, for the purpose of examining it and of arriving at a solution, to consider the merits of the dispute. In this connexion, the Court should have given the applicant party the opportunity of collecting all the evidence with the object of enabling the Court to ascertain whether, in the particular case, the allegation of concealing property was justified and that therefore Guatemala was not bound to recognize the Liechtenstein nationality of F. Nottebohm. Since proof of concealment of property has not been adduced, I consider that the Court should have joined the objection to the admissibility on the ground of nationality to the merits. This should also have been the case as regards the two other grounds of inadmissibility, since their fate is bound up with the objection based on nationality. Indeed, if the latter objection is upheld, it becomes unnecessary to consider Guatemala's objection to the admissibility on the ground of prior diplomatic negotiations and non-exhaustion of local remedies.

4. Moreover, the decision of the Court given at the public sitting of February 14th, 1955, expressly reserved the right of Liechtenstein, under Article 48, paragraph 2, of the Rules of Court, to submit documents in support of its comments on the new documents produced by the other Party. The Court should therefore have granted the application for an adjournment made by the Government of the Principality of Liechtenstein.

(Signed) GUGGENHEIM.