CR 2004/25

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2004

Public sitting

held on Wednesday 16 June 2004, at 10 a.m., at the Peace Palace,

President Shi presiding,

***in the case concerning* Certain Property (Liechtenstein *v.* Germany)**

VERBATIM RECORD

ANNÉE 2004

Audience publique

tenue le mercredi 16 juin 2004, à 10 heures, au Palais de la Paix,

sous la présidence de M. Shi, président,

***en l'affaire relative à* Certains biens (Liechtenstein c. Allemagne)**

COMPTE RENDU

Present:	President	Shi
	Vice-President	Ranjeva
	Judges	Guillaume
		Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
		Al-Khasawneh
		Buergenthal
		Elaraby
		Owada
		Tomka
	Judges *ad hoc*	Fleischhauer
		Sir Franklin Berman
	Registrar	Couvreur

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Présents : M. Shi, président
M. Ranjeva, vice-président
MM. Guillaume
Koroma
Vereshchetin
Mme Higgins
MM. Parra-Aranguren
Kooijmans
Rezek
Al-Khasawneh
Buergenthal
Elaraby
Owada
Tomka, juges
MM. Fleischhauer,
sir Franklin Berman, juges *ad hoc*

M. Couvreur, greffier

The Government of the Federal Republic of Germany is represented by:

Mr. Thomas Läufer, Director General for Legal Affairs and Legal Adviser, Federal Foreign Office,

H.E. Mr. Edmund Duckwitz, Ambassador of the Federal Republic of Germany to the Kingdom of the Netherlands,

as Agents;

Mr. Jochen Frowein, Director emeritus of the Max-Planck-Institute for Comparative Public Law and International Law Heidelberg, Professor of Public International Law, University of Heidelberg,

Mr. Christian Tomuschat, Professor of Public International Law, Humboldt-University of Berlin,

Mr. Pierre-Marie Dupuy, Professor of Public International Law at the University of Paris (Panthéon-Assas) and the European University Institute of Florence,

as Counsel;

Mr. Daniel Erasmus Khan, Privatdozent, Visiting Professor at the University Bayreuth,

Mr. Andreas Paulus, University of Munich,

Ms Karin Oellers-Frahm, Max-Planck-Institute for Comparative Public Law and International Law Heidelberg,

Ms Susanne Wasum-Rainer, Head of the Public International Law Division, Federal Foreign Office,

Mr. Reinhard Hassenpflug, Federal Foreign Office,

Mr. Götz Reimann, Embassy of the Federal Republic of Germany,

as Advisers;

Ms Fiona Sneddon,

as Assistant.

The Government of the Principality of Liechtenstein is represented by:

H.E. Mr. Alexander Goepfert, Freshfields Bruckhaus Deringer, Düsseldorf, Special Commissioner of the Principality of Liechtenstein,

as Agent;

H.E. Mr. Roland Marxer, Ambassador, Director of the Office for Foreign Affairs of the Principality of Liechtenstein

as Advocate;

Le Gouvernement de la République fédérale d'Allemagne est représenté par :

M. Thomas Läufer, directeur général des affaires juridiques et conseiller juridique du ministère fédéral des affaires étrangères,

S. Exc. M. Edmund Duckwitz, ambassadeur de la République fédérale d'Allemagne auprès du Royaume des Pays-Bas,

comme agents;

M. Jochen Frowein, directeur émérite de l'Institut Max-Planck pour le droit public comparé et le droit international à Heidelberg, professeur de droit public international à l'Université de Heidelberg,

M. Christian Tomuschat, professeur de droit international public à l'Université Humboldt de Berlin,

M. Pierre-Marie Dupuy, professeur de droit international public à l'Université de Paris (Panthéon-Assas) et à l'Institut universitaire européen de Florence,

comme conseils;

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M. Andreas Paulus, Université de Munich,

Mme Karin Oellers-Frahm, Institut Max-Planck pour le droit public comparé et le droit international à Heidelberg,

Mme Susanne Wasum-Rainer, chef de la division du droit international public du ministère fédéral des affaires étrangères,

M. Reinhard Hassenpflug, ministère fédéral des affaires étrangères,

M. Götz Reimann, ambassade de la République fédérale d'Allemagne à La Haye,

comme conseillers;

Mme Fiona Sneddon,

comme assistante.

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S. Exc. M. Alexander Goepfert, Freshfields Bruckhaus, Deringer, Düsseldorf, commissaire spécial de la Principauté de Liechtenstein,

comme agent;

S. Exc. M. Roland Marxer, ambassadeur, directeur de l'office pour les affaires étrangères de la Principauté de Liechtenstein,

comme avocat;

Mr. Dieter Blumenwitz, Professor of Public International Law, University of Würzburg and Munich,

Mr. Thomas Bruha, Professor of Public Law, University of Hamburg,

Mr. James Crawford, S.C., Whewell Professor of International Law, University of Cambridge, member of the English and Australian Bars, Member of the Institute of International Law,

Mr. Gerhard Hafner, Professor of Public International Law, University of Vienna, Associate Member of the Institute of International Law,

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, member and former Chairman of the International Law Commission,

as Counsel and Advocates;

Mr. Malcolm Forster, Professor of International Law, University College, London, Freshfields Bruckhaus Deringer, London,

Ms Juliane Hilf, member of the Chamber of Lawyers of Germany, Freshfields Bruckhaus Deringer, Cologne,

Ms Lucy Reed, member of the State Bar of New York, Freshfields Bruckhaus Deringer, New York,

as Advocates;

Mr. Daniel Müller, Temporary Lecturer and Research Assistant at the University of Paris X-Nanterre,

Mr. Stephan Wittich, Assistant Professor at the University of Vienna,

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Ms Gabriele Klein, Freshfields Bruckhaus Deringer, Düsseldorf,

as Assistants;

Mr. Thomas Dillmann, ECC Kohtes Klewes,

Mr. Thomas Pütz, ECC Kohtes Klewes,

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M. Thomas Bruha, professeur de droit public à l'Université de Hambourg,

M. James Crawford, S. C., professeur de droit international, titulaire de la chaire Whewell à l'Université de Cambridge, membre des barreaux d'Angleterre et d'Australie, membre de l'Institut de droit international,

M. Gerhard Hafner, professeur de droit international public à l'Université de Vienne, membre associé de l'Institut de droit international,

M. Alain Pellet, professeur à l'Université de Paris X-Nanterre, membre et ancien président de la Commission du droit international,

comme conseils et avocats;

M. Malcolm Forster, professeur de droit international à l'University College de Londres, Freshfields Bruckhaus, Deringer, Londres,

Mme Juliane Hilf, membre de la chambre des avocats d'Allemagne, Freshfields Bruckhaus, Deringer, Cologne,

Mme Lucy Reed, membre du barreau de l'Etat de New York, Freshfields Bruckhaus, Deringer, New York,

comme avocats;

M. Daniel Müller, attaché temporaire d'enseignement et de recherche à l'Université de Paris X-Nanterre,

M. Stephan Wittich, professeur adjoint à l'Université de Vienne,

comme conseillers;

Mme Nadine Heider, Freshfields Bruckhaus, Deringer, Cologne,

Mme Gabriele Klein, Freshfields Bruckhaus, Deringer, Düsseldorf,

comme assistantes;

M. Thomas Dillmann, ECC Kohtes Klewes,

M. Thomas Pütz, ECC Kohtes Klewes,

comme attachés d'information.

The PRESIDENT: Please be seated. The sitting is now open. This morning the Court will hear the first round of oral argument of Liechtenstein. I give the floor first to Dr. Alexander Goepfert, Agent of Liechtenstein.

Mr. GOEPFERT:

1. INTRODUCTION TO THE TEAM

1. Mr. President, distinguished Members of the Court, it is a great honour for me to appear before you today as the Agent of the Principality of Liechtenstein. On behalf of Liechtenstein, may I express our appreciation to Professor Carl-August Fleischhauer and Sir Franklin Berman for their willingness to serve as judges *ad hoc*.

2. This is a case of paramount importance for Liechtenstein, because its sovereignty and neutrality are being denied by Germany under international law. Moreover, the international law issues at stake are such that the importance of the case extends far beyond Liechtenstein.

3. I am also honoured to introduce to you the persons representing Liechtenstein, who will submit to you our arguments supporting your jurisdiction over the Application filed on 30 May 2001, and the admissibility of that Application.

4. Ambassador Roland Marxer, Director of the Office for Foreign Affairs of the Principality of Liechtenstein will speak first. After I make a short further introductory statement concerning the true nature of this case, the five advocates who will follow — certain of them already well known to you — are Professor James Crawford, Professor Dieter Blumenwitz, Professor Thomas Bruha, Professor Gerhard Hafner, and Professor Alain Pellet.

5. In this matter I am further accompanied by counsel, including my law partners Professor Malcolm Forster, Dr. Juliane Hilf and Ms Lucy Reed, together with the advisers and assistants to the advocates and counsel.

6. To take care of administrative details, I note that we have provided a judges' folder containing copies of key materials referenced and that full citations to all references appear in the written version of our submissions.

7. It is my pleasure to introduce Ambassador Marxer. Mr. President, I would ask you to call upon Ambassador Marxer.

The PRESIDENT: Thank you, Dr. Goepfert. I now give the floor to Ambassador Marxer.

M. MARXER :

2. INTRODUCTION

Monsieur le président, Madame et Messieurs les juges,

1. C'est un grand honneur pour moi de me présenter aujourd'hui devant vous au nom de mon pays, la Principauté du Liechtenstein, dont je suis le directeur du ministère des affaires étrangères.

2. Avant toute chose, je tiens à renouveler les assurances de la grande estime de mon gouvernement pour la République fédérale d'Allemagne et à préciser que nous avons la ferme conviction que la solution que vous apporterez à la présente affaire renforcera la confiance entre les deux pays.

3. Monsieur le président, vous n'ignorez pas que ce n'est pas la première fois que le Liechtenstein saisit la Cour. Il reconnaît le rôle éminent qu'elle joue dans le règlement pacifique des différends entre Etats, tout spécialement en assurant une protection effective des petits Etats comme le Liechtenstein contre les actes illicites commis par des Etats plus grands.

4. Le Liechtenstein est une monarchie constitutionnelle, devenu un Etat indépendant il y a presque deux cents ans, en 1806, après l'effondrement du Saint-Empire romain germanique. D'une superficie de 160 kilomètres carrés, il compte environ trente-cinq mille habitants. Voisine de l'Autriche et de la Suisse, la Principauté est à quelques kilomètres seulement de la frontière allemande. En tant que membre du Conseil de l'Europe et de l'Espace économique européen, elle entretient des relations économiques et politiques étroites avec les autres Etats européens. En outre, Membre des Nations Unies, d'un certain nombre d'institutions spécialisées et de l'Organisation mondiale du commerce, elle participe activement aux relations internationales au plan mondial.

5. Le Liechtenstein a réussi à préserver sa neutralité durant les deux guerres mondiales. Cela n'a pas été chose aisée, surtout durant le second conflit mondial, face à la forte pression exercée par

le Reich allemand. La Principauté n'en a pas moins été le seul Etat européen qui n'a pas reconnu l'accord de Munich consacrant l'annexion illicite de la Tchécoslovaquie par l'Allemagne nazie.

6. Il va de soi que le Liechtenstein attachait une importance toute particulière au principe de neutralité. Mais la non-reconnaissance de l'accord de Munich a été également motivée par des considérations d'ordre historique et géographique. Un certain nombre de familles liechtensteinoises, au premier rang desquelles la famille princière, possédaient de vastes propriétés foncières et des biens importants en Tchécoslovaquie, notamment en Moravie et en Bohème, qui font aujourd'hui partie de la République tchèque, un des deux Etats successeurs de l'ancienne Tchécoslovaquie.

7. Lundi dernier, l'Allemagne a cru bon de comparer la prétendue inaction du Liechtenstein à la suite des confiscations des biens de ses ressortissants par la Tchécoslovaquie aux négociations fructueuses qu'a menées la Suisse avec ce pays[1]. Cette comparaison n'a pas lieu d'être. En effet, le Liechtenstein est loin d'être resté inactif. Tout comme la Suisse, il a, au contraire, rapidement essayé de négocier avec la Tchécoslovaquie. Mais, contrairement à ce qui s'est produit pour la Confédération helvétique, le nouveau régime tchécoslovaque a rejeté la demande du Liechtenstein que, à la différence des gouvernements précédents, il refusa de reconnaître. Le Liechtenstein n'a pas même pas été admis à participer aux négociations auxquelles l'Allemagne a fait référence lundi dernier[2]. Depuis lors, et jusqu'à ce jour, le Liechtenstein a, sans succès, multiplié les tentatives afin de trouver une solution à son différend avec la Tchécoslovaquie et ses Etats successeurs. Comme vous le savez, le prince — qui possède la grande majorité des biens en question — a, avec persévérance mais sans aucun succès, tenté de faire valoir ses droits devant les tribunaux tchécoslovaques. J'ai le regret d'ajouter que, depuis 1998, les choses se sont encore compliquées du fait que la République tchèque s'est appuyée sur la décision de la Cour constitutionnelle allemande dans l'affaire du *Tableau de Pieter van Laer*[3].

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[1] CR 2004/24, p. 30, par. 82 (M. Frowein).

[2] *Ibid.*

[3] Déclaration écrite de la République tchèque du 26 mai 1999 concernant la déclaration de la Principauté du Liechtenstein du 25 mai 1999, mémoire du Liechtenstein, vol. III, annexe 44, p. A495 (traduction du Greffe), p. 36-37 du texte français.

8. Monsieur le président, je ne reviens sur ces faits historiques que parce que l'Allemagne a jugé utile de les évoquer lundi dernier. Je ne saurais cependant trop insister sur le fait que, malgré les allégations contraires et répétées de l'Allemagne, notre différend avec l'ancienne Tchécoslovaquie, et aujourd'hui avec ses Etats successeurs, *ne constitue pas* le litige que la Principauté a soumis à la Cour. Celui-ci concerne — et concerne seulement — l'application, faite récemment *par l'Allemagne*, du régime des réparations de guerre aux biens appartenant au Liechtenstein et à ses nationaux. Ces actes, *de l'Allemagne*, sont contraires aux principes fondamentaux du droit international, ce que l'Allemagne persiste à refuser de reconnaître et, encore moins, d'y remédier, malgré les occasions que le Liechtenstein s'est efforcé de ménager à cette fin, par exemple lors des deux *rounds* de consultations diplomatiques à ce sujet, dont le dernier a eu lieu en juin 1999.

9. Ces consultations n'ont abouti qu'à une déclaration commune reconnaissant l'existence d'un différend qui pourrait être soumis à la Cour[4]. Bien qu'il ne m'appartienne pas de discuter des questions juridiques qui vont vous être présentées par les avocats du Liechtenstein, je tiens à souligner que cette déclaration commune du Liechtenstein et de l'Allemagne, en elle-même, démontre que cette situation sérieuse constitue un différend entre les deux Etats — contrairement aux allégations faites par la Partie allemande dans ses exceptions préliminaires[5].

10. Permettez moi, Monsieur le président, de clore ma présentation en insistant sur le fait que le Liechtenstein ne peut considérer les actes de l'Allemagne que comme, à la fois, une grave mise en cause de sa souveraineté et des droits résultant de son statut de neutralité, et une atteinte à ses droits de propriété et à ceux de ses nationaux.

11. Madame et Messieurs les juges, je vous remercie de votre bienveillante attention et je vous prie, Monsieur le président, de bien vouloir donner à nouveau la parole à M. Alexander Goepfert, agent du Liechtenstein.

The PRESIDENT : Thank you, Ambassador Marxer. I now give the floor to Dr. Goepfert.

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[4] Observations écrites du Liechtenstein, annexe 48 (traduction du Greffe), p. 67 du texte français.

[5] CR 2004/24, p. 20-21, par. 39-44 (M. Läufer).

Mr. GOEPFERT:

3. Introduction — the true nature of the case

1. Mr. President, distinguished Members of the Court, as Ambassador Marxer has indicated, my purpose in returning to the podium is to refocus these proceedings on the true nature of the dispute between Liechtenstein and Germany. I must do this because, on Monday, Germany addressed a case that is not the case before you. If there is any "artificial construct" or "lack of clarity" or "l'atmosphère artificielle"[6], I regret to say it is on the part of Germany.

2. You heard the distinguished Agent and counsel for Germany state — again and again — that Liechtenstein has not identified the international legal basis on which Liechtenstein rests its claims[7]. Perhaps Germany thinks if it repeats this enough, it will become true. It is *not* true.

3. It is the heart of Liechtenstein's case that Germany bears international responsibility for infringing Liechtenstein's neutrality and sovereignty by allowing Liechtenstein assets to be treated, for the first time in 1995, as German external assets for purposes of the Settlement Convention. This is what this case is about.

4. Let me be equally clear as to what this case is *not* about. This case is *not* about the Beneš Decrees. This case is *not* about the legality of the Beneš Decrees. This case is *not* about Liechtenstein's dispute with Czechoslovakia — now the Czech Republic and the Slovak Republic — over property belonging to Liechtenstein and its nationals. This case is *not* about compensation for the Czechoslovak confiscations. This case is *not* about just one painting.

5. Yes, Liechtenstein does have disputes with the Czech and Slovak Republics, but those disputes are not before this Court. Yes, the Czechoslovak expropriations and the Beneš Decrees must be understood, but only as background. Germany pretends not to understand, but it is not complicated. With your leave, I will walk you through this again — but, I hope, without following Germany's example of venturing too far into the merits.

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[6]For example, CR 2004/24, p. 13, para. 11 (Mr. Läufer); p. 44, para. 119 (Professor Tomuschat); p. 56. para. 146, (Professor Dupuy).

[7]*Ibid.*, p. 12, para. 5 (Mr. Läufer).

6. Ambassador Marxer has mentioned the historic connections between Liechtenstein and Czechoslovakia. In 1945, in Beneš Decrees Nos. 12 and 108, the new Government of Czechoslovakia expropriated the property not just of German nationals but also of *Liechtenstein citizens* — calling it "property of persons belonging to the German people"[8]. According to these Decrees, the confiscation was not for reparations from Germany, but *explicitly* for internal political reasons related to social justice and land reform.

7. No State contemplated that Liechtenstein property could be equated with German property for purposes of the German reparations régime under the Settlement Convention.

8. This situation changed dramatically as of 1995. The German courts — and, as a consequence of those court decisions, the German Federal Government as well — for the first time treated the Liechtenstein property as German external assets, subject to the reparations scheme in the Settlement Convention.

9. Germany's stubborn refusal to acknowledge the nature of Liechtenstein's case is perhaps best illustrated by this statement of the Agent on Monday[9]: "Germany was however obliged, in order to regain a position as a sovereign State to promise in the Settlement Convention that it would not sit in judgment over past confiscations." This statement is only correct if it is limited to confiscations for the purpose of German war reparations. The German courts could only take refuge in Article 3 (3) of Chapter 6 of the Settlement Convention if they had already concluded that the property in question had indeed been taken not only as German property but as "German external assets" seized for the purpose of reparation[10]. As I have just explained, Beneš Decrees No. 12 and No. 108 expressly were *not* for the purpose of reparations.

10. Mr. President, honourable Members of this Court, it was only in 1995 that, for the first time, Germany — and not Czechoslovakia and not any other State in the world — treated the Czechoslovak measures against Liechtenstein property as *reparation* measures effected against German external assets. This is an assertion which not even Czechoslovakia or its successors has ever advanced. Furthermore, before the European Court of Human Rights, in a case between

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[8]Decree No. 12 of 21 June 1945 and Decree No. 108 of 25 October 1945 (Memorial of Liechtenstein (ML), Anns. 6 and 7).

[9]CR 2004/24, p. 15, para. 17 (Mr Läufer).

[10]Settlement Convention, Ch. 6, Art. 3 (1) and 3 (3).

different parties and involving different claims to those now before you, Germany has declared that these measures were defensible, and went even further to assert that Germany now considers Liechtenstein citizens to be "persons belonging to the German people" in the *ethnic meaning of the term*[11].

11. Czechoslovakia — now the Czech Republic and the Slovak Republic — had absolutely nothing to do with the treatment of Liechtenstein property as German war reparations. This was a *unilateral* action by Germany.

12. So, beginning in 1995, we have Germany treating Liechtenstein property as German external assets for the purposes of the Settlement Convention. This is what we mean by Germany "including" Liechtenstein in the reparations régime, the phrase Professor Tomuschat claimed, unconvincingly, not to understand on Monday[12]. We mean Germany's "application" of the Settlement Convention reparations régime to that property.

13. It is elemental in international law that one State may not use, or treat, the property of a neutral State as war reparations. Liechtenstein submits — and will prove, at the merits stage — that Germany is internationally responsible for bringing the property of Liechtenstein and its nationals under the Settlement Convention umbrella of German external assets seized for reparations purposes.

14. Whatever else it does, Germany's infringement of Liechtenstein's sovereignty and neutrality causes moral injury to Liechtenstein. Liechtenstein seeks a declaratory judgment to this effect.

15. Germany's evident disdain of Monday for the concept of economic damages was not warranted. By including Liechtenstein property within the German reparations régime, Germany has obtained a very considerable economic advantage vis-à-vis Liechtenstein. Contrary to what Professor Tomuschat stated on Monday[13], Germany still owes substantial sums to the Czech and Slovak Republics as war reparations, as it does to other Allied and associated Powers of the Second World War. If this issue were closed, there would have been no purpose for the 2000 Agreement

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[11]ML, Ann. 36 (judges' folder, tab 4).

[12]For example, CR 2004/24, p. 37, para. 105; p. 43, para. 117 (Professor Tomuschat).

[13]CR 2004/24, p. 43. para.117 (Professor Tomuschat).

between Germany and the United States concerning the Foundation, "Remembrance, Responsibility and the Future", which we have included in the judges' folder[14].

16. It is striking that Germany only adopted this peculiar new position concerning Liechtenstein *after* the revocation, in 1990, of Article 5 of Chapter 6 of the Settlement Convention, which imposed on Germany an international law duty to compensate the owners of German external assets for losses resulting from the use of such property for reparation purposes.

17. At the risk of venturing into issues of substance, I must emphasize that, if Germany's interpretation were correct that it can lawfully treat Liechtenstein property as German external assets settling German war reparation debts, this would mean that any State with reparation claims against Germany — and there are many — could regard itself as entitled to seize Liechtenstein property in their territory, and such property may be found in such States. Moreover, it cannot be the case that one State can settle unilaterally its accounts with another State with the assets of the citizens of a third State.

18. As a further result, Liechtenstein faces for the first time the alarming prospect that the holders of Liechtenstein property in former Czechoslovakia may now legitimately dispose of that property by channelling the disposal to Germany. Should they do so, the nationals of Liechtenstein would be debarred from successfully restraining that wrongful disposal in the German courts, and in any jurisdiction in which German judgments are recognized, and would be so debarred *entirely* by reason of the unjustifiable legal position taken by the courts and other public agencies of the Federal Republic of Germany in and after 1995.

19. This cannot be right in international law. Liechtenstein calls on this Court to say so, at the phase of the merits.

20. Mr. President, honourable Members of the Court, I thank you for your kind attention. I ask you please to call upon Professor Crawford to open the substantive pleadings on behalf of Liechtenstein.

The PRESIDENT: Thank you, Dr. Goepfert. I now give the floor to Professor Crawford.

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[14] Judges' folder, tab 8.

Mr. CRAWFORD:

4./5. The dispute before the Court and the Court's temporal jurisdiction over the dispute

1. Mr. President, Members of the Court, it is an honour to appear before you on behalf of the Principality of Liechtenstein.

2. My task is twofold. First I have to demonstrate that there is a legal dispute which has been brought to this Court by Liechtenstein, and here I respond to what was said by the learned Agent for Germany on Monday. Secondly, I will demonstrate that this legal dispute — *this* dispute — falls within your temporal jurisdiction under Article 27 *(a)* of the European Convention for the Peaceful Settlement of Disputes. Here I will respond to what has been said by Professor Frowein. These two tasks are closely connected. As soon as one understands what this dispute is about, one sees immediately that Germany's objection based on lack of temporal jurisdiction must fail.

A. The dispute brought before the Court

Two preliminary points

3. I turn then to my first task, which is to analyse the dispute brought before the Court, and to show that it is a legal dispute. I need to make two preliminary points, both I am afraid rather elementary.

(1) It is for the Claimant to formulate the case; Germany ignores the case Liechtenstein has actually brought in favour of another

4. The first point is, quite simply, that it is for the Claimant to present its case, and for the Respondent to reply to that case. It is an error that advocates sometimes make, to imagine the case they would like to have been brought before the Court and eagerly to refute that case, showing all its weaknesses. But this is not advocacy, it is a form of public wish fulfilment. The real case stands, if only because it has never been addressed.

5. Germany's Preliminary Objections committed this error in a persistent and evident way[15]. They attacked the case Germany believes Liechtenstein should have brought, the case it wishes Liechtenstein had brought, a case developed by Germany with only an indirect and passing

[15]See e.g., Preliminary Objections of Germany (POG), paras. 59-60.

resemblance to the actual case, a case Germany believes it can win. And it is striking that on Monday counsel for Germany barely let the word neutrality pass their lips or the concept of moral injury. All that was at stake, they said, was a "modest" interpretation of the Settlement Convention — the word was Professor Tomuschat's[16]. This "modest" interpretation turned Liechtensteiners into Germans for present purposes, and Liechtenstein assets into "German external assets". But apparently we are not supposed to mind.

6. Of course if this dispute brought to the Court was Liechtenstein's dispute with Czechoslovakia, Germany's task would be simple. Czechoslovakia has not been annexed by Germany, the Munich Agreement of 1938 was void, and anyway Czechoslovakia has ceased to exist, this time voluntarily. You cannot have an international legal dispute with a non-existent State.

7. Then if the dispute which has been brought to the Court was Liechtenstein's disputes with the Czech and Slovak Republics, well they exist, but Germany is not a party to them. It is the wrong Respondent. How silly Liechtenstein is to have brought a case against the wrong Respondent!

8. Similarly, on this hypothesis, temporal jurisdiction would be a problem; the dispute with Czechoslovakia arose in 1945 when the expropriations occurred, long before the European Convention of 1957. And so on and so on, right down to *Monetary Gold*.

9. But all such hypotheses are beside the point. It is for Liechtenstein to formulate its case, and it is a case against Germany. Liechtenstein as Applicant was entitled to bring this very specific case before the Court, based as it is on real facts and real actions of Germany occurring in the past decade. That case should be assessed in its own terms and in due order by the Court, if I may say so respectfully. If you, Mr. President, Members of the Court, will hear our case, we will be grateful, and will submit to your judgment; we will even put up with the concerted torrent of adjectives from counsel opposite, "strange" from Professor Frowein[17], "*étrange*" from

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[16]CR 2004/24, p. 44, para. 121 (Professor Tomuschat).

[17]*Ibid.*, p. 22, para. 46 (Professor Frowein); also CR 2004/24, p. 12, para. 8 (Mr. Läufer).

Professor Dupuy[18], and from Professor Tomuschat that annihilating adjective "modest"[19]. All Germany asks is its modest interpretation, to treat us as German — and then it cannot understand our case!

(2) Germany asks the Court to dismiss the case on the merits at the stage of Preliminary Objections, contrary to the Court's practice and Rules

10. This brings me to my second preliminary point, which concerns the proper relation between jurisdictional objections and the merits. For Germany's Preliminary Objections have a second persistent failing: they attempt to have the Court decide the merits of the case in Germany's favour at this preliminary stage — in other words, they attempt a premature rejection of the case. And we heard more of the same on Monday. Germany's Agent called for us to make out "the international legal basis on which Liechtenstein wishes to rest its claims" — that is to say, to make out its case on the merits[20]. In French he lamented "*l'absence d'une quelconque base juridique concevable*", and again he went on to speak at some length on the merits[21]. For their part Germany's counsel repeatedly made conclusory assertions relating to the merits of Germany's position and the demerits of Liechtenstein's, on which the Court is *now* supposed to act. For example — I paraphrase, the precise references are in the transcript: there has been no change of position[22]; Germany has always been consistent[23]; the Settlement Convention is clear[24]; what courts say in their decisions is irrelevant under international law[25]; for decades Germany has not owed any other State any war reparations[26]; Germany had "no information whatsoever" as to a Liechtenstein property[27]; there is no possible basis for the German national authorities including courts to concern themselves with title to expropriated property[28], and so on, and so on. Now no

[18] CR 2004/24, p. 46, para. 125 (Professor Dupuy).

[19] *Ibid.*, p. 44, para. 121 (Professor Tomuschat).

[20] *Ibid.*, p. 12, para. 5 (Mr. Läufer).

[21] *Ibid.*, p. 19, para. 38 (Mr. Läufer).

[22] *Ibid.*, pp. 23-25, paras. 54-58, p. 26, para. 63 (Professor Frowein).

[23] *Ibid.*, pp. 12-13, para. 8 (Mr. Läufer).

[24] *Ibid.*, pp. 44-45, para. 121 (Professor Tomuschat).

[25] *Ibid.*, p. 33, para. 95, p. 31, para. 87 (Professor Frowein).

[26] *Ibid.*, p. 43, para. 117 (Professor Tomuschat).

[27] *Ibid.*, p. 25, para. 59, p. 27, para. 69 (Professor Frowein).

[28] *Ibid.*, pp. 25-26, para. 62, p. 33, paras. 94-95 (Professor Frowein).

doubt each of these assertions can be discussed; in fact, we dispute each of them. But the present point is that they are all assertions as to the merits.

11. Mr. President, Members of the Court, in taking this line Germany misunderstands the well-established procedure of this Court. When a preliminary objection is lodged, the case on the merits is automatically suspended: Article 79 (3) of the Rules. The Court thereafter *cannot* proceed to the merits, unless either it dismisses the preliminary objections entirely or, exceptionally, joins them to the merits under Article 79 (7).

12. At least three of Germany's Preliminary Objections are particularly evident examples of attempts to get the Court to pronounce on the merits. These are the first — that there is no dispute; the second — the plea of domestic jurisdiction, and the fourth — that the claim is not substantiated. I will leave to colleagues the task of dealing with the second and the fourth Objections, but I need to say something about the first.

The substance of the first Preliminary Objection

13. In doing so I wish to make three main points. The first is historical: this dispute arose in fact in the period after 1995. The second is diplomatic, but has clear legal consequences. In the discussions and correspondence that then took place, Germany accepted that there was a dispute. The third is straightforwardly legal: the disagreement which then arose qualifies as a dispute within the meaning of Article 38 (1) of the Statute of the Court. It is not a dispute about the content of German law. It is not an attempt to appeal from a decision or decisions of a German court, or for that matter from a decision of the European Court of Human Rights under a convention on which Liechtenstein does not and cannot rely here before this Court. Rather it is a disagreement arising from a conflict of positions between two States over the treatment by one of them of the status, rights and claims of the other.

(1) The dispute arose after 1995

14. First then, as a matter of history, the dispute arose after 1995. It arose following the discovery in Germany of a painting which had been lent to a German municipal gallery for the purpose of an exhibition — lent in 1991. The reigning Prince claimed the painting. The matter was taken to the German courts, which decided, eventually, that the painting could not be claimed.

In the course of the German court processes, Liechtenstein raised the issue, in a graduated way, at the inter-State level. In an aide-memoire of 4 October 1995, Liechtenstein expressed concern at the apparent position taken by the municipality of Cologne — a State entity — that Liechtenstein assets were to be considered as German assets, and it asked Germany to ensure that such a position was not supported or avowed by its agencies[29]. But in their decisions of 10 October 1995 and 9 July 1996 the German civil courts dismissed the claim on the basis of Article 3 (3) of Chapter 6 of the Settlement Convention, that is to say, on the express basis that the property in question constituted "German external assets" whose seizure was beyond examination in German courts. The details of those judgments are set out in the pleadings and I will not repeat them[30]. The internal processes within Germany culminated in a decision of the Federal Constitutional Court in January 1998, affirming those decisions based on the Settlement Convention[31]. After due consideration, Liechtenstein raised the issue formally at the inter-State level in an aide-memoire of 3 June 1998[32]. The decision of the Federal Constitutional Court, according to the aide-memoire,

> "constitutes a violation of the legal status guaranteed by virtue of international law both with respect to the Liechtenstein Head of State and the State of Liechtenstein itself . . . Regardless of the recognition of the independence of courts, [the Government of the Principality of Liechtenstein] cannot accept the legal injury caused thereby."

Liechtenstein accordingly sought talks at the diplomatic level as soon as possible, and two rounds of talks were held, on 10 July 1998 and 14 July 1999. The diplomatic correspondence is set out in the pleadings.

15. The record shows clearly, then, that this specific dispute arose between Liechtenstein and Germany in the 1990s. It concerned Germany's increasingly emphatic acceptance of the proposition that property of Liechtenstein citizens could rightfully be treated as "German external assets" for the purposes of the Settlement Convention, with adverse consequences both for the individuals concerned and for Liechtenstein itself as a neutral State. Moreover this German position, originally adopted in the course of litigation concerning a single painting, became a

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[29]ML, Anns. Vol. III, p. A413.

[30]See ML, paras. 3.17-3.25.

[31]ML, paras. 3.26-3.30 and Ann. 32.

[32]ML, Ann. 41, Vol. III, p. A481.

general position, applicable to Liechtenstein as such and to all the Liechtenstein property. It was maintained and adopted by German officials, who declared that they had no option but to remain loyal to the decisions of their own courts. There was no hypothesis here; there was no attempt to explain away the *van Laer* decision as based on its own special facts; there was no suggestion, as there seems to have been in the *Nottebohm* case, that the individual concerned had German affiliations, was an enemy alien in disguise. Unlike Nottebohm, the individuals had *never* been German nationals. What the German courts decided for the one case the German Government made its own position, categorically.

16. Before 1995 there is no trace in the historic record of a dispute between Liechtenstein and Germany on this issue. After 1995, and especially after 1998, the situation is entirely different. As a matter of simple history that is when the dispute arose.

(2) Germany acknowledged the existence of a dispute

17. I turn to my second main point: Germany acknowledged in the subsequent discussions that there was a dispute.

18. Thus during the consultations the head of the German delegation expressly recognized that:

> "contrary legal opinions have been created and this divergence of opinion would continue to exist . . . A solution could only be found at a higher level. There was a possibility of an exchange of aides memoires prior to a possible further round or otherwise a settlement by judicial decision without any further steps."[33]

Thus Germany acknowledged that there was a divergence of legal opinions on a concrete question and that it "would continue to exist". Moreover one solution was "a settlement by judicial decision without any further [diplomatic] steps". And now it is said there is no dispute.

19. One may compare the acknowledgment by the German Minister for Foreign Affairs in his letter to his Liechtenstein counterpart of 20 January 2000. The letter acknowledges as a fact that "the German Government does not share the legal opinion" of the Government of Liechtenstein[34]. The letter continues: "In the event that you feel additional talks are required to discuss these claims, I would suggest that this be done on the level of specialized senior officials in

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[33]Observations of Liechtenstein (OL), Ann. 48.

[34]ML, Ann. 45, Vol. III, p. A503.

continuation of the consultations of 10 July 1998 and 14 June 1999." Thus the German Minister for Foreign Affairs, Mr. Fischer, acknowledged the existence of the Liechtenstein claims and of a divergence of legal opinion over those claims. In doing so, of course, Mr. Fischer was facing the facts. That makes it even stranger that Germany now alleges that no dispute exists between the two States.

(3) The record discloses the existence of a dispute between Liechtenstein and Germany

20. I turn to my third point which, in the light of what I have said, can be brief. The record discloses the existence of a legal dispute between the two States. In this context I need hardly remind the Court of its constant jurisprudence. Under Article 38 of the Statute, your "function is to decide in accordance with international law such disputes as are submitted" to you. And you have always defined a dispute broadly: it is "a disagreement on a point of law or fact, a conflict of legal views or interests between parties"[35]. Here there is a disagreement on a point of law. There is a conflict of legal views; indeed that is manifest. There is also a conflict of legal interests. It may be in Germany's interests to resolve its disputes with the Czech and Slovak Republics as to the post-war treatment of Germans expelled from Czechoslovakia. Although Germany denies that it has changed its position, it is common knowledge, it is a matter of current record, that these disputes have not been formally resolved, that their informal steps towards their resolution have been taken in the recent past. Well, that is a matter for Germany. But what is clear to Liechtenstein — and has been made clear in a series of diplomatic démarches including, for example, the Note Verbale of 10 June 1997[36] — is that any efforts by Germany in this direction cannot be at the expense of Liechtenstein and cannot treat the rights and interests of Liechtenstein and its nationals as if they were German rights and interests.

21. Nor is it the case that the conflict of legal views which is brought to this Court relates to a purely historical or abstract controversy. The present dispute is about subsisting rights and interests. Germany does not plead mootness (by analogy with the *Nuclear Tests* cases), nor (by analogy with *Northern Cameroons*) does it plead that the dispute has been definitively settled by a

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[35]See case concerning *East Timor*, *I.C.J. Reports 1995*, p. 99, para. 22, with references to earlier decisions.

[36]ML, Ann. 39, Vol. III, p. A477.

competent body. The dispute has not been settled so far as Liechtenstein is concerned. Liechtenstein is the bearer of its own rights and the custodian of its own interests, and it is entitled not to have them compromised by being treated as German through some strange perversion of the *Mavrommatis* principle. Similarly it is entitled not to have them "settled" by some strange perversion of the Settlement Convention. This, Liechtenstein says, Germany has done — and if Germany denies doing so, that only adds one more element of disagreement on a point of law or fact, of conflict of legal views and interests, to the array of disagreements disclosed by the diplomatic correspondence.

Conclusion

22. Mr. President, Members of the Court, to summarize, in the years after 1995 Germany took the position that it was entitled vis-à-vis Liechtenstein to treat the Liechtenstein property as "German external assets" covered by the Settlement Convention, while at the same time denying any obligation to compensate Liechtenstein in the event that it did so as it did. Liechtenstein denied this claim as soon as it was made, and has done so consistently since. It denied that the Settlement Convention could lawfully be applied to Liechtenstein. Any such application, irrespective of whether actual harm was caused to specific individuals, involved an injury to Liechtenstein as a sovereign and neutral State. But in addition, harm was threatened and caused to Liechtenstein nationals. Now that is a legal dispute, if ever there was one. Moreover it is a dispute between these two States. For these reasons Germany's first Preliminary Objection must be rejected.

B. Germany's argument of temporal jurisdiction: Article 27 *(a)* of the European Convention

23. Mr. President, Members of the Court, I turn now to the third Preliminary Objection, Germany's claim that the present dispute falls outside the Court's temporal jurisdiction. This Objection is based on Article 27 of the European Convention for the Peaceful Settlement of Disputes, which provides as follows: "The provisions of this Convention shall not apply to: *(a)* disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute; . . ." As between Germany and Liechtenstein the Convention came into force on 18 February 1980, which is thus the critical date for present purposes.

24. Now the Parties agree that on 18 February 1980 no actual dispute had yet arisen between them concerning the application of the Settlement Convention to the Liechtenstein property. That is true both as concerns the van Laer painting and the Liechtenstein property generally. The German courts had never been confronted with the issue, and the question how they would apply the Settlement Convention to the Liechtenstein property had never been resolved; indeed it had never been publicly raised. I put the matter neutrally. In fact Liechtenstein claims that there was an understanding between the two States that the Settlement Convention did not apply, or at any rate that this was a position which Liechtenstein was entitled to believe that Germany was taking. If the question had arisen — if Germany had ever applied the Settlement Convention to Liechtenstein property, in a particular case or in general — issues of compensation under the Convention would have arisen. But that did not happen for the good historical reason that the claim that Liechtenstein assets were "German external assets", though considered internally by German lawyers, was never raised by Germany in any public forum.

25. Now Germany does not disagree that, if a dispute arose, it did so in the 1990s. But it argues vehemently, through Professor Frowein, whose overdue accession to the Bar I welcome, but this is irrelevant[37]. The non-existent dispute may have arisen in 1995 but it concerned facts and situations dating from 1945. Evidently Liechtenstein has been asleep these 50 years, deeply, like Sleeping Beauty. We've had Grimm's stories, I think we'll introduce Sleeping Beauty. For 50 years Liechtenstein has been asleep, deeply comatose. Liechtenstein has failed to notice the fact or situation concerning Germany until, in a new variation on the fairy tale, it is the Prince who is brought back to life, not by a kiss but by a decision of the civil court of Cologne! Not so much amour as amour propre.

The Court's approach to temporal objections

26. Mr. President, Members of the Court, before I deal with the German arguments on this point I need to outline the applicable legal test for temporal jurisdiction. For you have a settled jurisprudence on temporal objections, and Professor Frowein did not dispute that this jurisprudence

[37] CR 2004/24, pp. 22-23, para. 48 (Professor Frowein).

applies equally to Article 27 *(a)* of the Settlement Convention. Allow me to summarize the position briefly.

27. The issue first arose before your predecessor, the Permanent Court, in *Phosphates in Morocco*[38]. The question was whether a dispute which arose from a Moroccan decree of 1920 and a decision of the Moroccan Mines Department in 1925 had arisen before the critical date of 1931. Professor Roberto Ago, as he then was, argued that the breach was only committed when local remedies were exhausted. The Permanent Court disagreed (as, I might say, the International Law Commission was later to disagree[39]). According to the Permanent Court:

> "If, by establishing the monopoly, Morocco and France violated the treaty régime of the General Act of Algeciras of . . . 1906, and of the Franco-German Convention of . . . 1911, that violation is the outcome of the dahirs of 1920. In those dahirs are to be sought the essential facts constituting the alleged monopolization and, consequently, the facts which really gave rise to the dispute regarding this monopolization."[40]

28. Italy argued that, irrespective of the legality of the decrees themselves, the decision of the Mines Department gave rise to a continuing wrongful act, and to a denial of justice which was committed after 1931. But again the Court disagreed:

> "In its Application the Italian Government has represented the decision of the Department of Mines as an unlawful international act . . . That being so, it is in this decision that we should look for the violation of international law — a definitive act which would, by itself, directly involve international responsibility . . . In these circumstances the alleged denial of justice, resulting either from a lacuna in the judicial organization or from the refusal of administrative or extraordinary methods of redress designed to supplement its deficiencies, merely results in allowing the unlawful act to subsist."[41]

29. In other words, in a State responsibility case, limits on temporal jurisdiction are to be applied not by looking at the source of the obligation said to have been violated, nor by looking at the surrounding factual situation, but by asking what is the "fact with regard to which the dispute arose", the "definitive act which would, by itself, directly involve international responsibility", on the case presented in the Application. The authoritative French text of the Judgment is even

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[38] *1938, P.C.I.J., Series A/B, No. 74.*

[39] See ILC Articles on Responsibility of States for Internationally Wrongful Acts, annexed to General Assembly resolution 56/83, 12 December 2001, Art. 44 *(b)*; cf. Draft Articles on State Responsibility as adopted on First Reading (1996), Art. 22.

[40] *Ibid.*, pp. 25-26.

[41] *Ibid.*, pp. 28-29 (emphasis added).

clearer: it refers to the situations or facts *"qui doivent être considérés comme générateurs du différend"*[42]. If that definitive act, that *"fait générateur"*, to adopt the concept of Roberto Ago which was adopted by the Commission, occurs before the critical date then there is no jurisdiction; if subsequent to it, then there is. The point was likewise expressed by the Permanent Court in the *Electricity Company of Sofia and Bulgaria* case when it said: "The *only* situations or facts which must be taken into account from the standpoint of the compulsory jurisdiction . . . are those which must be considered as being the source of the dispute"[43]. And the Court went on to distinguish between the source of the rights relied on by the Claimant and the source of the dispute; what matters is the point at which the rights are denied. And this must be so, otherwise the 1957 Convention and similar instruments, would produce the result that old rights, old treaties, would become enfeebled by lapse of time, even in relation to recent denials of those rights or to recent breaches.

30. The point is equally clear from this Court's jurisprudence, going back to the *Right of Passage* case. The rights in question there were certainly old rights. They went back to the Maratha period of India before colonization. India denied that the rights had *ever* existed; it also claimed that its denial of the rights in 1954, if they existed, was lawful. But the Court held that the whole dispute, including the dispute as to the very *existence* of rights going back to the eighteenth century, only concerned a situation which arose in 1954. You said:

> "It is clear from the material placed before the Court that before 1954, passage was effected in a way recognized as acceptable to both sides. Certain incidents occurred, but they did not lead the Parties to adopt *clearly-defined legal positions* as against each other . . ."[44]

So, although there may be some lack of agreement between the parties, and even "minor incidents", it is only when the parties "adopt clearly-defined legal positions" that the dispute arises, and it arises *in relation to* the triggering event, not the whole legal and factual matrix against the background of which the event is to be understood.

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[42] *Ibid.*, p. 23.

[43] *1939, P.C.I.J., Series A/B, No. 77,* pp. 81-82 (emphasis added).

[44] *Ibid.*, pp. 34-35 (emphasis added).

31. In best common lawyer's fashion, Professor Frowein sought to distinguish the *Right of Passage* case. He did so on the ground that there was a common position in 1954 as to the right of passage which was only denied by India at that time[45]. But that is not true and it is not what you said. What you said was that, although there were earlier symptoms of disagreement, which occurred before the critical date, the situation had been managed up to that date. You said that the crucial fact or situation with respect to which the temporal objection or the temporal reservation operates, only arises when the dispute is triggered by a denial of the right, in this case the right of passage, leading the parties to "adopt clearly-defined legal positions as against each other". That was the focal point of the dispute, the *fait générateur*. It was with respect to that fact or situation that the dispute arose.

32. The point can be demonstrated equally from what you said in the provisional measures phase in the *NATO* cases. The situation there was like that in *Phosphates in Morocco* and quite unlike that in the present case. The Kosovo bombing campaign had started before the critical date and had already given rise to a dispute. By definition that dispute related to facts or situations prior to the critical date. You emphasized in your Provisional Measures Order that there were no "new disputes, distinct from the initial one" which related to facts or situations after the critical date[46]. But the relevant fact or situation there was the immediate crisis in Kosovo leading to the bombing campaign; it was not the Battle of Kosovo Polje in 1389!

The Court's test applied: Germany's legal arguments

33. Against this background I turn to the facts of the present case. The position is clear. This dispute was triggered — was triggered — by decisions of German courts, and subsequently by positions taken by the German Government, in the period after 1995. That was its focal point. It is true that the background situation and the legal rights and obligations of the Parties had an older source. But that is irrelevant, just as it was irrelevant in the *Right of Passage* case. As you said in *Right of Passage*, "[t]he facts or situations to which regard must be had in this connection are those with regard to which the dispute has arisen . . ."[47] This dispute arose in the 1990s with regard to

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[45]CR 2004/24, p. 27, para. 68 (Professor Frowein).

[46]*I.C.J. Reports 2001,* pp. 134-135, para. 29.

[47]*I.C.J. Reports 1960*, p. 35.

the conduct of organs of the German State. It was only then that Germany actually decided to treat the Liechtenstein property as falling within the Settlement Convention, as "German external assets", to quote the language of that Convention. In this respect I would draw your attention to the survey of German case law and doctrine which is Appendix 1 to Liechtenstein's Written Observations. This shows the fact quite clearly, and indeed Germany does not seem to dispute it. To borrow again your language, "[i]t was from all of this that the dispute referred to the Court arose; it is with regard to all of this that the dispute exists. This whole, *whatever may have been the earlier origin of one of its parts*, came into existence only after [the critical date]"[48].

34. Now Germany resists this conclusion with three arguments.

(1) The Court will have to examine transactions and events occurring before 1980

35. *First*, Germany claims that in order to resolve the present dispute the Court is going to have to investigate and analyse transactions and events occurring before 1980, and also to explore the meaning of treaties concluded before that date, especially, of course, the Settlement Convention. As Germany put it in its written pleadings: "[t]he case brought before the Court could not be decided without judging upon the reparations regime established in 1945 and thereafter"[49]. But the present dispute did not arise because of the reparations régime, any more than *Phosphates in Morocco* arose because of the Treaty of Algeciras. Or as Germany put it on Monday, this case could not, it said, be decided without adjudicating upon the Beneš Decrees[50]. But the present dispute did not arise because of the Beneš Decrees and, as Professor Pellet will shortly show, it does not require you to adjudicate upon them. It was the decision by Germany to apply the Settlement Convention to the Liechtenstein property which gave rise to the dispute, and that is the essential fact. Of course in dealing with the dispute the Court will have to inform itself as to the reparations régime. But in the *Right of Passage* case, the critical date for which was in the 1950s, the Court clearly dealt with the régime of passage between Goa and the Portuguese enclaves, and in doing so had regard to treaties and practice going back to the eighteenth century. Nonetheless it did so with respect to a dispute which it held only arose in 1954, when the legal positions of the

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[48]*Ibid*. (emphasis added).

[49]POG, para. 96.

[50]CR 2004/24, p. 48, para. 130 (Professor Dupuy).

parties crystallized following the outright denial by India of the right claimed by Portugal. As the Court noted, the dispute between India and Portugal did not arise because of the right of passage; it arose because the right had been denied. And that is the case here.

(2) The distinction between the source of the obligation and its breach is irrelevant and unworkable here

36. *Secondly*, Germany asserts that "[i]n the present case it is quite impossible to make a meaningful distinction between the source of the rights alleged by Liechtenstein and the source of the alleged dispute"[51]. But in the *Right of Passage* case, where again the source of the rights was not beyond doubt, the Court had no difficulty in drawing that distinction — and it did so even with respect to the aspect of the dispute that involved India's outright denial that there were any rights. Similarly, here there is a clear distinction in principle between the legal situation in which the Parties were placed, which arose partly before the critical date, and the event which caused the dispute, which was its actual source, which arose well after that date.

37. Professor Frowein complains vehemently that the effect of Liechtenstein's interpretation is to nullify the temporal objection entirely[52]. That is not so. The Court has given a reasonable interpretation to temporal limitations, neither delving too far back into the history of disputes, a history which — let us face it — underlies so many international conflicts in Europe and elsewhere, nor focusing on the other hand exclusively on the latest diplomatic manifestation of a well-established fact or situation which is at the heart of a dispute. It looks at the focus of the dispute as a whole, not its various ingredients considered in isolation. Far from nullifying the temporal exception this gives it due effect, which is the aim of all treaty interpretation.

(3) The change of position argument

38. *Thirdly*, Germany denies, vehemently, that there was any change in its position after 1980. It is said to follow from this that any dispute which arose after 1980 was only the manifestation of something which must have existed before. You will have noticed that this put Professor Frowein in a somewhat difficult position. He denied vehemently that there was a

[51]POG, para. 77.

[52]CR 2004/24, p. 31, para. 86 (Professor Frowein).

common position before 1980[53]. He said you could not exercise jurisdiction over this non-existent dispute because the non-existent common position must relate to facts or situations before 1980[54]. And then Germany accuses us of being hypothetical!

39. I should first of all observe that the change of position argument is part only of Liechtenstein's claim, and not its exclusive basis, as Professor Frowein apparently believes. Liechtenstein claims that for Germany to treat Liechtenstein assets as "German external assets" for the purposes of the Settlement Convention is a violation of international law in the specific situation which faces us here. We do not put forward encyclopaedic categories of claims relating generically to the treatment by national courts of stolen assets; we do not engage in general debate as to conflict of law theory, interesting though it is. We say that in this specific context in which these two States were placed after 1990, for Germany to do as it did is a violation of our rights. The debate about change of position is an aspect of that specific context, and it is of course a debate for the merits.

40. But let us consider three possibilities. Let us assume first of all that German and Liechtenstein had actually agreed in a treaty, before the critical date, that the Liechtenstein assets were not to be considered German external assets for the purposes of the Settlement Convention. Then in 1998, after the critical date, the Federal Constitutional Court refuses to give effect to that agreement. In such a case the temporal limitation would not apply. The source of Liechtenstein's rights would go back to the agreement, but the source of the dispute would be recent. And, as far as I can tell, Professor Frowein expressly accepts that[55].

41. Then let us take the opposite case. Let us assume that the matter was never considered before 1980, so there was no common position. That, Professor Frowein vehemently said, is the truth[56], although it is not a truth he wants you to take into account for the purposes of the third Preliminary Objection. On that basis, on the assumption that the matter had never been considered before the critical date, the source of Liechtenstein's rights will have to be found elsewhere, in

[53]CR 2004/24, p. 26, para. 63 (Professor Frowein).

[54]*Ibid.*, p. 26, para. 63 (Professor Frowein).

[55]*Ibid.*, p. 28, para. 74 (Professor Frowein).

[56]*Ibid.*, p. 26, para. 63, p. 29, para. 79 (Professor Frowein).

general international law. But *a fortiori* in this case the focus of the dispute will be the denial of those rights. Of course, at this stage they are claimed rights, clearly not of the merits. And that denial occurred in the 1990s.

42. And now we have a third possibility, that there was no formal agreement as to the legal situation, but something like a common assumption that Liechtenstein assets are not "German external assets" for the purposes of the Settlement Convention. Such an assumption would no doubt have influenced the Parties in their behaviour until 1990. Then, in 1995, Germany contradicts the assumption. Is the position any different? Of course it is not. Still the focal point of the dispute, the situation or fact to which the dispute relates, *le fait générateur*, is not the underlying legal and factual grounds of the right that is claimed but the situation or fact in which the right has been denied. It is as simple as that.

Conclusion

43. Mr. President. Members of the Court, in the situation in which it was placed in 1980 or in 1990, it was not incumbent upon Liechtenstein to anticipate what German courts might do, or what attitude the German courts might adopt, in the event that a case involving the Liechtenstein property were to arise. The present dispute concerns the question whether Germany was entitled as a matter of international law to treat any item of Liechtenstein property as "German external assets" covered by the Settlement Convention. The German judicial and executive positions, taken in the 1990s, were the necessary and sufficient source or cause of the international dispute that then immediately arose — its *fait générateur*. For all these reasons, Liechtenstein submits that the Court has temporal jurisdiction to deal with the present case.

Mr. President, I would now ask you to call on Professor Blumenwitz who will deal with Germany's second Preliminary Objection, concerning domestic jurisdiction.

The PRESIDENT: Thank you, Professor Crawford. I now give the floor to Professor Blumenwitz.

Mr. BLUMENWITZ:

6. Germany's domestic jurisdiction argument

1. Mr. President, distinguished Members of the Court, it is a great honour for me to appear today for the first time before this Court. In my presentation I shall deal very briefly with the issue of domestic jurisdiction. For the convenience of the Court, I recall Article 27 *(b)* of the European Convention for the Peaceful Settlement of Disputes[57], according to which the provisions of this Convention shall not apply to "*(b)* disputes concerning questions which by international law are solely within the domestic jurisdiction".

2. As to Article 27 *(b)* itself, there is little to add to what my learned colleague Professor Frowein said on Monday[58]. Article 27 *(b)* refers to the concept of domestic jurisdiction under international law[59]; there is no question of any subjective assessment by the respondent State. It also requires — and this has not been addressed by Professor Frowein — that the dispute in question be one which, as a matter of international law, is *solely* within the domestic jurisdiction of the respondent State.

(a) **Domestic jurisdiction in the case law of the Court**

3. In applying Article 27 *(b)*, it is useful to refer to the case law of this Court. Both this Court and its predecessors have been consistent in their treatment of the domestic jurisdiction exception. You have refused to allow the plea of domestic jurisdiction to be used to convert issues of the merits into preliminary or jurisdictional issues. Domestic jurisdiction is a genuinely jurisdictional plea — it applies only, solely, to those cases where it is *exclusively* a matter for the respondent State to decide what is to be done in relation to the subject-matter of the dispute. Thus the Permanent Court in the case of the *Tunis and Morocco Nationality Decrees*[60] rejected the plea even in a case involving conferral of nationality — a matter prima facie within the reserved domain

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[57]United Nations, *Treaty Series*, Vol. 320, No. 4646, pp. 243 *et seq.*; judges' folder No. 1.

[58]CR 2004/24, p. 31, para. 87 (Professor Frowein); see also Observations, pp. 25-37, Ch. 2.

[59]See generally on this concept G. Guillaume, Art. 2, para. 7, in: J.-P. Cot/A. Pellet (ed.), La Charte des Nations Unies, 2nd ed. (1991), Paris: Economica.

[60]*1923, P.C.I.J., Series B, No. 4.*

of the State — on the basis that France's conferral of nationality was disputed on international law grounds. The Court said in a famous passage:

> "when once it appears that the legal grounds *(titres)* relied on are such as to justify the provisional conclusion that they are of juridical importance for the dispute submitted to the Council, . . . the matter, ceasing to be one solely within the domestic jurisdiction of the State, enters the domain governed by international law"[61].

There is a nice contrast in this passage between the term "provisional" and the consequence: once the *provisional* conclusion is reached that the arguments are of juridical importance for the dispute, then the matter *definitively* ceases to be one of domestic jurisdiction.

4. Although *Tunis and Morocco Nationality Decrees* concerned the competence of the League Council under Article 15 (8) of the Covenant, the principle has been applied in the context of contentious cases by this Court, which has never upheld an objection based on the argument of domestic jurisdiction under international law[62].

5. For example, in the *Interhandel* case, the United States submitted that the seizure of shares of a Swiss company, which was allegedly controlled by a German company was, according to international law, a matter within the domestic jurisdiction of the United States. This Court confined itself to considering:

> "whether the grounds involved by the Swiss Government are such as to justify the provisional conclusion that they may be of relevance in this case and, if so, whether questions relating to the validity and interpretation of those grounds are questions of international law"[63].

6. In the *Right of Passage* case, this Court stressed that the existence of a dispute "on the plane of international law" was in and of itself sufficient to preclude a matter falling within the domestic jurisdiction. In its Judgment on the merits, the Court held that the mere assertion by India that the rights claimed by Portugal did not exist was not a basis for invoking its domestic jurisdiction. The point was that the Court could only determine that the rights did not exist "after first establishing its competence to examine the validity of these (Portuguese) titles"[64].

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[61]*Ibid.*, p. 26.

[62]See also the Advisory Opinion "Interpretation of Peace Treaties with Bulgaria, Hungary and Romania", *I.C.J. Reports 1950*, pp. 65 *et seq.*, pp. 70-71, on Art. 2 (7) United Nations Charter, *I.C.J. Reports 1959*, pp. 6 *et seq.*, *I.C.J. Reports 1957*, pp. 125 *et seq.*

[63]*I.C.J. Reports 1959*, pp. 6 *et seq.*, p. 24.

[64]*I.C.J. Reports 1960*, pp. 6 *et seq.*, pp. 32-33.

***(b)* The Court's test applied to the facts of the case**

7. The question is therefore whether the arguments of Liechtenstein may provisionally be considered to be "of juridical importance for the dispute". If so, then the dispute is definitively not within Germany's domestic jurisdiction.

8. So, what is the dispute? Mr. President, distinguished Members of the Court, as you have heard, it is a dispute concerning Germany's treatment of certain property claimed by Liechtenstein under international law. Germany through its official organs refused to decide Liechtenstein's claims relying on another rule of international law, that is contained in the Settlement Convention[65]. Liechtenstein disputed the application of the Settlement Convention: in its view, Germany's interpretation of the Convention was wrong, and anyway Liechtenstein is not a party to the Convention and is not bound by it. Germany rejected Liechtenstein's protests and affirmed, in categorical terms, the decisions of the German courts. The arguments raised by Liechtenstein are all based on international law. In due course, it will be for you to decide on them. But it is undeniable that they are provisionally of juridical importance to the dispute presented before you. Germany purported to act on a certain basis under a treaty. On various grounds, Liechtenstein challenged its rights so to act. That is what the dispute is about. It is not about something intrinsically or inherently German.

9. On Monday, Professor Frowein explicitly acknowledged that international legal issues arise in this case[66], and he referred repeatedly to the Settlement Convention, an international treaty[67]. But at the same time he claimed that international law was silent as to the obligations of third States in relation to the confiscated property[68]. And he introduced the purely hypothetical argument that the outcome of the German court decisions in question might have been the same, if no international rule had been invoked[69]. Here, Mr. President, distinguished Members of the Court, I must stress that questions of the fate of the painting under the rules of private international law were not argued before the German courts, nor were they raised in the bilateral consultations.

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[65]Convention on the Settlement of Matters Arising out of the War and the Occupation of 26 May 1952 as amended on 23 October 1954, *Bundesgesetzblatt*, 1955, Part II, pp. 406-459, judges' folder tab 2.

[66]CR 2004/24, p. 32, para. 89 (Professor Frowein).

[67]*Ibid.,* p. 32, para. 91 (Professor Frowein).

[68]*Ibid.*, p. 33, para. 93 (Professor Frowein).

[69]*Ibid.*, p. 33, para. 94 (Professor Frowein).

They have no bearing whatsoever on the present dispute, which is based entirely on the principles of public international law.

10. Professor Frowein cited no authority for his proposition that international law is not concerned with the reasoning of municipal courts but only with the results of the decisions. And this is not surprising since there is no authority to that effect. Under international law any statement capable of being attributed to the State may have an international law impact. For example, unlawful discrimination may be revealed much more by what a court says than by the actual outcome of the case. And this is even more true if the offending statement is subsequently adopted by the Government at the international level — as happened in the present case.

11. On Monday, Professor Frowein argued that, because there is no rule of public international law applicable to the treatment of property in the domestic courts of any State, therefore the matter falls within Germany's domestic jurisdiction[70]. That argument is strongly reminiscent of India's fifth preliminary objection in the *Right of Passage* case that Portugal's asserted rights did not exist or were not reasonably arguable[71]. Such an assertion is clearly a matter for the merits.

12. It is relevant that in the two rounds of diplomatic consultations on the present dispute, Germany at no time argued that this was a matter within its domestic jurisdiction[72]. Instead, it sought to justify its conduct as valid and lawful under international law, or at any rate as involving an arguable construction of the Settlement Convention. The issue was not whether this was a matter for Germany alone, but whether neutral property seized as a result of a war could be treated by German courts as "German external assets" which were "seized for the purpose of reparation or restitution"[73] as a result of the Second World War.

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[70]CR 2004/24, pp. 33 and 34, paras. 93 and 97 (Professor Frowein). See also POG, p. 65, para. 109. See also Bundesverfassungsgericht (German Federal Constitutional Court), decision of January 28, 1998 in the proceedings concerning the constitutional complaint of Prince Hans Adam II of Liechtenstein – 2BvR 1981/97 – II, 1 of the Reasons for the decision.

[71]*I.C.J. Reports 1960*, pp. 32-33.

[72]See report, second round of bilateral consultations on 14 June 1999 in Vaduz in the matter "Decision of the German Bundesverfassungsgericht (Federal Constitutional Court) of 28 January 1998 (Kalkofen Judgment)", Observations, document deposited in the Registry of the Court according to Article 50 (2) of the Rules of Court, 15 November 2002. The first round of talks in this matter had taken place in Bonn on 10 July 1998.

[73]See Article 3, para. 3, and para. 1 of Chapter 6 of the Settlement Convention regarding "German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war . . .".

13. Finally, Germany argues that its courts did not definitively decide that the Czech position on the Settlement Convention was correct; they merely deferred to it, as they were obliged to do under the Convention. But, whether one State must defer to the alleged views of a second State on such a question, in face of the claim of a third State, is transparently one which arises on the plane of international law. It is not a matter within the domestic jurisdiction of the forum State.

Mr. President, Members of the Court, I wonder whether it would now be suitable to have the usual short break. After the break, would you be kind enough to call upon my colleague and friend Professor Bruha. Thank you very much for your kind attention.

The PRESIDENT: Thank you, Professor Blumenwitz.

The Court will now adjourn for ten minutes, after which I will call on Professor Bruha to take the floor.

The Court adjourned from 11.15 to 11.30 a.m.

The PRESIDENT: Please be seated. I now give the floor to Professor Bruha.

Mr. BRUHA:

7. Germany's fourth Preliminary Objection

1. Mr. President, distinguished judges, it is a great honour and a personal pleasure for me to appear for the first time before this Court. I shall deal with the fourth Preliminary Objection of Germany, which is that Liechtenstein has not sufficiently substantiated its claims.

2. In the oral pleadings on Monday, my esteemed colleague Professor Tomuschat, among others, reshaped the Liechtenstein case into one entirely different from the one actually before you. In these circumstances, it is not surprising that he finds insufficient substantiation. If it were Liechtenstein's case that Germany must be, in the words of Professor Tomuschat, "held responsible for the financial losses suffered by Liechtenstein in 1945 at the hands of the Czechoslovak authorities"[74], then substantiation could have posed a problem. But as has already been explained, the nature of Liechtenstein's case is entirely different.

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[74]CR 2004/24, p. 35, para. 102 (Professor Tomuschat).

3. In other words, Germany argues we have not substantiated *their* case. But we have substantiated *our* case, as I will show.

4. I will make two main points on substantiation. First, Liechtenstein's Application meets the requirements of the Court's Statute and Rules. Secondly, despite Germany's increasingly dramatic protests on Monday, Germany transparently understands the object and scope of Liechtenstein's claims. Thirdly, if there were in fact a lack of sufficient evidence for our case, which there is not, this would not be a preliminary matter but instead a question for the merits phase.

A. Liechtenstein's Application meets the requirements of the Court's Statute and Rules

5. Professor Tomuschat described the Application as being "tainted by such profound flaws" that the minimal requirements set out in Article 40 (1) of the Statute and Article 38 (2) of the Rules "cannot be deemed to have been met"[75].

6. But, Mr. President, Members of the Court, Article 40 (1) of the Statute and Article 38 (2) of the Rules of Court do not require an exhaustive statement of facts and grounds on which the claim is based in the application, but only a "succinct" one. This Court made this clear in the *Cameroon/Nigeria* case[76]. This is precisely what the Application does in the present case. It contains "a succinct statement of the facts and grounds on which the claim is based" and provides — I cite my colleague Professor Tomuschat — at least a "prima facie"[77] overview of the factual and legal issues to be argued and developed in the course of the proceedings. Liechtenstein has clearly indicated the underlying grounds for its claims against Germany, by describing the series of judicial decisions, subsequent conduct, and diplomatic exchanges, as well as the underlying factual and historical background. Similarly, it has set out the main legal grounds on which its claim is based.

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[75]CR 2004/24, p. 35, para. 100 (Professor Tomuschat).

[76]See *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 318, para. 98.

[77]CR 2004/24, p. 38, para. 106 (Professor Tomuschat).

B. Germany understands the object and scope of the present dispute

7. I turn to my second point. Professor Tomuschat opened his intervention on Monday by stating dramatically that there is such a "definite and incurable lack of substantiation" in Liechtenstein's Application that Germany cannot even "organize its defence"[78]. But the detailed way in which Germany has prematurely defended itself on the merits of our claims in its Preliminary Objections and again on Monday belies this accusation.

8. Many of Germany's observations patently go to the merits. To mention a few of these, in its Preliminary Objections, Germany contends that Liechtenstein has not demonstrated any interference by Germany with the Liechtenstein property[79], that it has distorted the German case law concerning the Settlement Convention of 1952[80], that it has improperly substantiated its claim as far as it invokes diplomatic protection[81], and that it has not established any violation of Liechtenstein's neutrality and sovereignty[82].

9. Mr. President, honourable Members of the Court, if these contentions have any relevance at all to the present stage of the proceedings, it is only to demonstrate that Germany evidently has no serious problem in understanding the claim. For example, Germany states in its Preliminary Objections:

> "Liechtenstein contends . . . that it . . . suffered direct damage through the *conduct of German authorities, primarily its courts.* It claims that Germany violated its sovereignty as an independent third State as well as its status of neutrality during the Second World War."[83]

Such a statement shows without the shadow of a doubt that Germany has understood the Application. Germany has clearly grasped that it is Germany's treatment of Liechtenstein property as German external assets under the Settlement Convention — in the 1990s and entirely as a result of German court decisions, subsequently endorsed by the German authorities — which is the cornerstone of the present dispute. Germany clearly grasps that this constitutes the internationally

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[78]CR 2004/24, p. 35, para. 100 (Professor Tomuschat).

[79]Preliminary Objections of Germany (POG), paras. 121-124; CR 2004/24, pp. 35-36, para. 102 (Professor Tomuschat).

[80]*Ibid.*, paras. 125-130; CR 2004/24, p. 37, para. 105 (Professor Tomuschat).

[81]*Ibid.*, paras. 131-142; CR 2004/24, pp. 40-41, paras. 110 and 111 (Professor Tomuschat).

[82]*Ibid.*, paras. 143-149; CR 2004/24, p. 44, para. 120 (Professor Tomuschat).

[83]*Ibid.*, para. 143.

wrongful act of which Liechtenstein complains, and that this is the "very essence" of the present dispute.

10. Equally, it is not open to Germany to argue, at this preliminary stage, that it is not able to "organize its defence". Even if they could be heard to say this, the difficulty only arises for them because they have in mind a particular defence to a case which is not Liechtenstein's actual case. This is revealed by Germany's rather specific complaints of lack of substantiation. In the Preliminary Objections and again on Monday, we heard about the following alleged deficiencies in the Liechtenstein case:

— the attribution to Germany of the losses sustained by Liechtenstein and its nationals[84];

— the reality and nature of these losses[85];

— the interpretation of the jurisprudence of the German courts[86];

— the conclusion to be drawn from Germany's endorsement of this case law[87]; and fifthly,

— the violation of Liechtenstein's neutrality and sovereignty[88].

These examples merely serve to reinforce the fact that the aspects referred to clearly belong to the merits phase, not its admissibility.

C. Lack of sufficient evidence is not a preliminary matter

11. I come to my last point — lack of sufficient evidence is not a preliminary matter. Once the claimant State has met the threshold of substantiation set out in the Court's Statute and Rules, which Liechtenstein has done, the respondent State may not properly ask, by way of preliminary objections, for more and more factual evidence. The test of the sufficiency and validity of a claim are to be met, as relevant, at the merits and quantum phases, not at the phase of preliminary objections.

12. It is true that Germany has consistently complained about the level of detail provided by Liechtenstein in relation to the identity and nationality of the owners of the confiscated property.

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[84]CR 2004/24, p. 37, para. 105 (Professor Tomuschat); POG, paras. 119-120.

[85]*Ibid.*, p. 38, para. 106 (Professor Tomuschat) and pp. 56-57, para. 146 (Professor Dupuy): POG, paras. 138-142.

[86]*Ibid.*, pp. 36-37, para. 104 (Professor Tomuschat); POG, paras. 123 and 125.

[87]*Ibid.*, pp. 36-37, para. 104 (Professor Tomuschat); POG, paras. 126-128.

[88]*Ibid.*, p. 44, para. 120 (Professor Tomuschat); POG, paras. 143-149.

On Monday, Professor Tomuschat repeatedly charged Liechtenstein with failing to identify all of the Liechtensteiner victims and their assets affected by its allegedly wrongful acts, and concluded that we have failed to articulate any basis for the exercise of diplomatic protection. But this is not the case.

13. In Annex 49 to its Memorial, Liechtenstein provided Germany with its list of persons who were the victims of the 1945 confiscation measures in Czechoslovakia. Moreover, as explained in the Memorial[89], the vast majority of the property confiscated was that of the reigning Prince of Liechtenstein and his family. Germany itself acknowledges that, as far as the Prince is concerned, it has sufficient information in order to present its defence. As a courtesy for both Germany and the Court, Liechtenstein annexed to its Observations its updated list of victims[90] as well as details of the confiscated assets. Whether Liechtenstein is now in a position to prove in all cases the existence of heirs of Liechtenstein nationality[91] does not matter. At the admissibility stage, it suffices that even one person on the list possesses Liechtenstein nationality and so falls into the category of persons eligible for diplomatic protection. This is indisputably the case as to the Prince, and to most other persons on the list.

14. In the *Cameroon/Nigeria* case, Nigeria made a similar objection to aspects of Cameroon's Application, an objection which the Court dismissed in the following words:

> "As regards the meaning to be given to the term 'succinct', the Court would simply note that Cameroon's Application contains a sufficiently precise statement of the facts and grounds on which the Applicant bases its claim. That statement fulfils the conditions laid down in Article 38, paragraph 2, and the Application is accordingly admissible. This observation does not, however, prejudge the question whether, taking account of the information submitted to the Court, the facts alleged by the Applicant are established or not, and whether the grounds it relies upon are founded or not. Those questions belong to the merits and may not be prejudged in this phase of the proceedings.[92]"

In Liechtenstein's respectful submission exactly the same considerations apply here.

15. Mr. President, Members of the Court, before closing let me make two ancillary points.

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[89]See e.g. Memorial, paras. 1.20-1.21.

[90]Observations of Liechtenstein (OL), 15 Nov. 2002, Ann. 48.

[91]CR 2004/24, p. 40, para. 110 (Professor Tomuschat).

[92]*Land and Maritime Boundary between Cameroon and Nigeria*, *Judgment, I.C.J. Reports 1998*, para. 100.

16. First, I should refer to Article 53 (1) of the Statute, which provides that: "Whenever one of the parties does not appear before the Court, *or fails to defend its case*, the other party may call upon the Court *to decide in favour of its claim*". It goes without saying that by "deciding in favour" of the requesting party the Court is called upon to pass a judgment on the merits. By analogy the expression "fails to defend its case" can be transposed to a situation where a State presents a claim but does not substantiate it. In such a case, it belongs to the Court to decide in favour of the other party on the points which have not been substantiated to its satisfaction. But this must be done at the merits stage, when the Court has the opportunity of hearing the parties present their cases in full, and not as a matter of admissibility. Indeed, in such a case in which the claimant State has failed, despite having argued its case *in extenso*, to establish necessary factual elements to the Court's satisfaction, on those points the respondent State is entitled to judgment on the merits by way of a *res judicata*, definitively resolving those aspects of the matter once and for all. This is something which the Court cannot do at the preliminary objections stage; it cannot give judgment on the merits when the merits are suspended in accordance with Article 79 (5) of the Rules of Court.

17. Secondly, I should refer — as the Court did in the *Cameroon/Nigeria* Judgment — to the right of the Applicant, until the end of the proceedings, to make later additions to the statement of the facts and grounds on which a claim is based, a right acknowledged by this Court in its jurisprudence[93]. The only limit is "that the result is not to transform the dispute brought before the Court into another dispute which is different in character"[94]. But Germany does not allege that Liechtenstein has so transformed the dispute in the present case.

Conclusion

18. Mr. President, Members of the Court, in conclusion, Liechtenstein's arguments on the alleged lack of substantiation may be summarized in two simple propositions:

(i) First, the substantiation in the Application meets the requirements of the Statute and the Rules of Court.

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[93] *Land and Maritime Boundary between Cameroon and Nigeria, Judgment, I.C.J. Reports 1998*, p. 318, para. 98.

[94] *Ibid.*, pp. 318-319, para. 99; see also *e.g.*: PCIJ, Judgment, 15 June 1939, *Société Commerciale de Belgique*, *Series A/B, No. 78*, p. 173 or ICJ, Judgment, 21 Nov. 1959, *Interhandel*, *I.C.J. Reports 1959*, p. 21.

(ii) Secondly, Germany's fourth Preliminary Objection is unfounded, as Liechtenstein has properly substantiated its claims in law and in fact.

Mr. President, honourable Members of the Court, thank you for your attention. Mr. President, I would ask you to call upon Professor Hafner to continue Liechtenstein's presentation.

The PRESIDENT: Thank you, Professor Bruha. I now give the floor to Professor Hafner.

Mr. HAFNER:

8. Exhaustion of local remedies

A. Introduction

1. Mr. President, Members of the Court. It is a great honour for me to appear today for the first time before this honourable Court.

2. The purpose of my intervention is to address the sixth Preliminary Objection of Germany, namely the contention that Liechtenstein's claims are inadmissible due to the non-exhaustion of local remedies. I will show that there are three grounds on which it can be concluded that this German objection is totally unfounded.

3. In the present proceedings, Liechtenstein raises claims against Germany primarily on its own account, and additionally on account of its citizens. As to the former — the claims brought by Liechtenstein directly on its own account, or the so-called "direct claims" — I will first demonstrate that the local remedies rule does not apply. With regard to diplomatic protection, the position is different. Even if the rule were applicable in such cases, I will secondly show that there were no local remedies available in Germany for Liechtenstein nationals in the present dispute. And thirdly, I will deal with the paradoxical German argument that the Liechtenstein nationals would have been required to exhaust local remedies in Czechoslovakia for violations suffered in Germany.

B. The local remedies rule is not applicable in that the claims submitted by Liechtenstein are predominantly claims for direct injury

4. Mr. President, Members of the Court, permit me now to turn to the first issue, that concerning the direct injuries suffered by Liechtenstein — an issue that Germany did not find necessary to discuss in its oral pleadings. In its Application[95] Liechtenstein raises claims against Germany primarily on its own account, as Germany's conduct directly violated Liechtenstein's own rights as a sovereign State and as a State which was neutral during the Second World War.

5. It is generally accepted that the local remedies rule is restricted to cases of diplomatic protection, but is not applicable to cases where a State is *directly* injured in its State-to-State rights. This distinction was endorsed by this Court in the *Interhandel*[96] and *ELSI*[97] cases and is unanimously accepted in international judicial and arbitral practice[98] as well as in doctrine[99]. This Court had a recent opportunity to decide on this issue in the *Avena* case and I will return to this case shortly.

6. Germany has time and again deliberately misstated Liechtenstein's claim. It consistently ignores the fact — even in its oral pleadings — that these two forms of direct injury caused to Liechtenstein by Germany, namely the injury to Liechtenstein's sovereignty and violations of the law of neutrality, form the essential part of Liechtenstein's claim. By ignoring this aspect of Liechtenstein's claims concerning direct injury, Germany makes a further attempt to present the case as being different to that which Liechtenstein is actually pleading.

7. That the local remedies rule is not applicable in cases of violation of the laws on neutrality has been recognized in practice; the Liechtenstein observations[100] quote a substantial number of cases and practice to this effect so that there is no need to repeat them here.

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[95]See also ML, Chap. 4.

[96]*I.C.J. Reports 1959*, p. 28.

[97]*I.C.J. Reports 1989*, para. 52.

[98]The M/V "Saiga" (No. 2) case; ITLOS 1997, reprinted in *International Legal Materials*, Vol. 38, 1999, p. 1323, para. 98; Air Service Agreement Arbitration, 1978, 18 United Nations, *Reports of International Arbitral Awards*, p. 431, para. 30; case concerning the *Heathrow Airport User Charges*, 1992, 102 *ILR*, p. 279.

[99]T. Meron, The Incidence of the Rule of Exhaustion of Local Remedies, *British Year Book of International Law* 35, 1959, 84-88; C. F. Amerasinghe, Local Remedies in International Law 108-132, 1990, Dugard, Second report on diplomatic protection, United Nations Doc. A/CN.4/514, paras. 21-23; S. Wittich, Direct Injury and the Incidence of the Local Remedies Rule, *Austrian Review of International and European Law* 5, 2000, 121.

[100]Observations, paras. 6.26-6.32.

8. Liechtenstein also claims that its sovereignty was injured by Germany, in that the latter extended the scope of the Settlement Convention, which according to its terms is restricted to German external assets only, to include the Liechtenstein assets as well. That such conduct amounts to a violation of a State's sovereignty is widely accepted in the doctrine, including the German doctrine[101].

9. Many international disputes contain elements of both diplomatic protection and direct injury, and the present case is of such a "mixed nature". This ensues from the fact that more than one concurrent rule of international law may be breached by one and the same conduct. If one examines Liechtenstein's submissions as a whole, in particular as set out in the Memorial[102], it will readily be seen that the direct injury inflicted by Germany upon Liechtenstein in violating Liechtenstein's sovereignty and neutrality is essential to Liechtenstein's claim. In this regard, Liechtenstein's claim is similar to that brought by the United States against Iran in the *Diplomatic and Consular Staff* case[103]. The Court considered the United States claim to be one of direct injury, even though private individuals were also affected by the violation. Likewise, in the *Nicaragua* case[104], Nicaragua claimed reparations as *parens patriae* for its citizens and, thus, exercised diplomatic protection. Again, no Nicaraguan citizen was required to exhaust local remedies before Nicaragua could pursue its claim.

10. The most recent case where this view was endorsed is the *Avena* case[105]. Mr. President, Members of the Court, in your Judgment on the *Avena* case you asserted that Mexico based its claims not solely on the injuries caused to the Mexican individuals, but also on the injuries "it has

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[101]Hermann Weber, *Anmerkung zur "Liechtenstein-Entscheidung" des Bundesverfassungsgerichts vom 28 Januar 1998*, 36 Archiv des Völkerrechts 188, 192 (1998); K. Doehring, Völkerrechtswidrige Konfiskation eines Gemäldes des Fürsten von Liechtenstein als "deutsches Eigentum". Ein unrühmlicher Schlusspunkt, 18 Praxis des Internationalen Privat- und Verfahrensrechts 1998, p. 466; Ignaz Seidl-Hohenveldern, *Völkerrechtswidrigkeit der Konfiskation eines Gemäldes aus der Sammlung des Fürsten von Liechtenstein als angeblich "deutsches" Eigentum*, 16 Praxis des Internationalen Privat- und Verfahrensrechts 410 (1996); *id.*, *Nachwirkung der Kontrollratsgesetzgebung und die deutsche Souveränität — Zu den Urteilen über die "Bodenreform" und zur Fortgeltung des Klagestops nach dem Überleitungsvertrag*, in "Liber Amicorum Günther Jaenicke — Zum 85. Geburtstag" 975, 983-4 (V. Götz/P. Selmer/R. Wolfrum eds. 1998).

[102]ML, pp. 87-108.

[103]*Diplomatic and Consular Staff*, *Judgment*, *I.C.J. Reports 1980*, p. 6.

[104]*Military and Paramilitary Activities in and Against Nicaragua, Judgment, I.C.J. Reports 1986*, p. 19.

[105]Case concerning *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*, Judgment of 31 March 2004, paras. 40 *et seq.*

itself suffered, directly and through its nationals". This direct injury resulted from the violation by the United States of the obligations under Article 36 of the Vienna Convention on Consular Relations of 1963. The Judgment emphasized that the duty to exhaust local remedies did not apply. For these reasons, you did not find it necessary to deal with Mexico's claims of violation under a distinct heading of diplomatic protection, so that you dismissed this objection by the United States to admissibility[106]. This Judgment corroborates that, despite the mixed nature of a claim raised in a dispute between two States, the direct injury suffered by a State suffices to dispose of the necessity to exhaust the local remedies.

11. For these reasons, the nature and subject-matter of the present dispute and the legal relationship of the norms and obligations invoked by Liechtenstein and breached by Germany essentially concern direct rights of Liechtenstein. Therefore, since Liechtenstein has suffered injury in it own rights, and the local remedies rule is not applicable.

C. The exercise of diplomatic protection

12. Notwithstanding the inapplicability of the local remedies rule, I will nevertheless deal with the two arguments relating to the exhaustion of local remedies which were raised by Germany as legal impediments to the admissibility of Liechtenstein's claims: on the one hand, the futility of local remedies, on the other, the flawed argument as to the exhaustion of local remedies in Czechoslovakia, or now in the Czech Republic.

13. Even if and in so far as the local remedies rule were considered to be applicable to the present claim, there is no ground for denying the admissibility of the claim before this Court. Germany quite correctly concedes, and my learned colleague Professor Tomuschat confirmed last Monday[107] that, as far as the Pieter van Laer painting is concerned, local remedies have been exhausted. Germany itself asserted that decisions of the Federal constitutional court that had dealt with this matter cannot be challenged any more within the German legal system[108]. These German

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[106]*Ibid.*

[107]CR 2004/24, p. 58, para. 148 (Professor Tomuschat).

[108]POG, para. 191.

statements leave no room for any doubt that the requirement of the exhaustion of local remedies was fully complied with at least in relation to that particular item of property.

14. However, with regard to other Liechtenstein property, its owners do not need to exhaust local remedies when those remedies are ineffective, the exercise of exhausting such remedies would be futile or the opportunity to do so does not exist. This view is confirmed in case law as well as in doctrine quoted *in extenso* in Liechtenstein's Observations[109]. In the recent work of the International Law Commission on diplomatic protection, this exception to the rule of exhaustion of local remedies met with overwhelming support that reflects a general conviction concerning the existence of such an exception[110].

15. Indeed, any recourse to local remedies in Germany by Liechtenstein nationals would be futile. Can a Liechtenstein citizen reasonably be expected to resort to German local remedies if the Constitutional Court already delivered a negative decision in a case of the same kind? No Liechtenstein national applying to a German court would obtain a decision different from that of the Federal Constitutional Court in the *Pieter van Laer* case. Once the Federal Constitutional Court had reached a decision, no other decision can be expected from another German court in cases relating to subjects involving the same legal reasoning.

16. The rule that there is no obligation to resort to domestic remedies if a different decision could not reasonably be expected has gained overwhelming recognition in international judicial practice, as well as in international authorities[111].

17. As, for instance, the Human Rights Committee repeatedly has stated, wherever the jurisprudence of the highest domestic tribunal has decided the matter at issue, thereby eliminating any prospect of success of an appeal to the domestic courts, domestic remedies need not be exhausted in any similar case in the future[112]. Likewise, the Commission under the European Convention on Human Rights has established a consistent practice according to which "une

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[109]Observations, paras. 6.7-6.11.

[110]Report of the International Law Commission on the work of its 54th session 2002 (United Nations doc. A/57/10), p. 139, para. 181.

[111]See for instance John Dugard, Third report on Diplomatic Protection, United Nations doc. A/CN.4/523, p. 16.

[112]*Länsman et al.* v. *Finland*, Communication No. 511/1992, United Nations doc. CCPR/C/52/D/511/1992 (1994).

jurisprudence bien établie peut constituer une circonstance particulière de nature à dispenser un requérant, selon les principes de droit international généralement reconnus, d'épuiser les voies de recours internes"[113]. In other words, it is not necessary to have recourse to domestic tribunals if the result must inevitably be the repetition of a decision already pronounced.

18. That no other decision in Germany can reasonably be expected transpires also from the discussions between representatives of Germany and Liechtenstein. In these discussions, the German delegation pointed out that the German executive had taken cognizance of the decision of its supreme court. They said they were bound by that decision — and would also be bound in relation to any future cases[114].

19. Furthermore, Germany asserted the non-existence of available local legal remedies. As Professor Tomuschat reiterated last Monday[115], Germany justified this non-existence by arguing that the claim affects immovable property situated outside German jurisdiction and that "only the local judiciary is competent to rule on issues connected with the ownership of real estate"[116]. However, this legal reasoning is irrelevant for the present dispute, since Germany denied the jurisdiction of German courts on a different ground, namely by applying Article 3 of Section VI of the Settlement Convention. Germany could do so only because it declared Liechtenstein property as belonging to "German external assets" for the purposes of the Settlement Convention.

20. In any event, this additional German argument only corroborates the non-existence of local remedies in Germany to which Liechtenstein citizens could have resorted.

21. For all these reasons, a failure to exhaust local remedies can under no circumstances be invoked by Germany as a bar to the admissibility of Liechtenstein's claim.

D. Germany's reference to local remedies in Czechoslovakia

22. Finally I turn to the rather bizarre argument raised by Germany that Liechtenstein citizens should have resorted first to judicial devices in former Czechoslovakia before

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[113]*A et al.* v. *Germany*, Appl. N. 899/60, Collection, Vol. 9, p. 9.

[114]ML, para. 3.51.

[115]CR 2004/24, p. 59, para. 152 (Professor Tomuschat).

[116]POG, p. 59, para. 193.

Liechtenstein could exercise diplomatic protection against Germany on their behalf[117]. In his oral pleading, Professor Tomuschat focused on this argument that he qualified a "juridical innovation"[118]. Nevertheless, in Liechtenstein's view, such a legal requirement cannot be maintained.

23. This argument must fail, it must fail, because the idea behind the local remedies rule — and Professor Tomuschat stated it quite rightly[119] — is to allow the State to bring *its own* conduct towards that individual into conformity with what is required by international law. For this reason alone, it is only German courts which could have been resorted to in order to produce such an effect. It would be totally foreign to the system of diplomatic protection if the exercise of this right were made dependent on the exhaustion of local remedies of a State *other than that which had breached its international obligations or where the breach has occurred*. In particular, judgments of Czechoslovak courts could not have achieved the objective of the principle of exhaustion of local remedies, namely to make good the wrongfulness of the acts of *Germany*. It is totally irrelevant for the present case whether Liechtenstein citizens resorted to Czechoslovak courts. And it is very illustrative that Germany was not able to substantiate its argument by any precedent case. In this context, my learned colleague Tomuschat advanced the argument that "les ressortissants du demandeur, qui a endossé leurs réclamations, auraient pu empêcher les préjudices qui leur ont été infligés en ayant recours aux moyens disponibles dans l'Etat qui a causé les préjudices"[120]. Whatever the value of this argument may be, its reasoning is not defensible since it was Germany that caused the injuries of which Liechtenstein complains in this case and the decision of the Constitutional Court made any further local remedies redundant.

24. In this context, Professor Tomuschat tried to minimize Germany's conduct by qualifying it as "marginal"[121]. Whether Germany's conduct was "marginal" is a matter of subjective

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[117]CR 2004/24, p. 59, paras. 151 *et seq.* (Professor Tomuschat).

[118]*Ibid.*, p. 59, para. 151 (Professor Tomuschat).

[119]*Ibid.*, p. 59, para. 151 (Professor Tomuschat).

[120]*Ibid.*, p. 60, para. 153 (Professor Tomuschat).

[121]*Ibid.*, p. 60, para. 153 (Professor Tomuschat).

appreciation; what for one State seems only marginal could for another be a matter of substantial importance. What does, however, matter in this case is whether the conduct is in conformity with international law.

E. Conclusion

25. Mr. President, Members of the Court, in the light of all these considerations, the rule of exhaustion of local remedies does not form a legal obstacle to the admissibility of this case before the Court.

— First, the rule of local remedies does not apply to the present case, as the claim is made in respect of injuries predominantly suffered by the State of Liechtenstein itself.
— Second, even if the rule of exhaustion of local remedies were considered in principle applicable, this principle has been fully complied with as in the light of the decision on the *Pieter van Laer Painting* no local remedies were available anyway.
— Third, the argument put forward by Germany that Liechtenstein citizens should have resorted first to judicial devices in former Czechoslovakia before Liechtenstein could exercise diplomatic protection against Germany can under no circumstances be regarded as valid.

26. For these reasons Liechtenstein submits that the arguments raised by Germany with regard to the principle of the exhaustion of local remedies have to be dismissed. Now, I would like to ask you, Mr. President, to call on Professor Pellet in order to conclude the oral pleading. Thank you.

The PRESIDENT: Thank you, Professor Hafner. I now give the floor to Professor Pellet.

M. PELLET : Thank you, Mr. President.

9. L'exception allemande fondée sur l'absence à l'instance des Etats successeurs de la Tchécoslovaquie

Monsieur le président, Madame et Messieurs les juges,

1. Il me revient de réfuter l'exception d'irrecevabilité que l'Allemagne croit pouvoir tirer de l'absence à l'instance des Etats successeurs de l'ancienne Tchécoslovaquie, la République tchèque

et la République slovaque — bien que cette dernière soit, bizarrement, négligée par nos contradicteurs.

2. J'indique d'ailleurs d'emblée qu'étant donné que l'argumentation du Liechtenstein sur ce point ne dépend en aucune façon de la manière dont le problème de la succession d'Etats pourrait être posé et résolu, je parlerai indifféremment de «la Tchécoslovaquie» ou des «Etats successeurs» à celle-ci, ou des «Républiques slovaque et tchèque» : quelle que puisse être leur part dans la succession, ces deux Etats ne sont, de toutes façons, pas concernés par l'affaire dont la Principauté de Liechtenstein a saisi la Cour.

3. L'Allemagne le conteste en affirmant que «les demandes du Liechtenstein obligeraient la Cour à statuer sur les droits et obligations de la République tchèque en son absence et sans son consentement»[122]. Les deux premières exceptions d'incompétence relatives d'une part à la prétendue inexistence de tout différend entre les Parties à la présente procédure et, d'autre part, à l'absence supposée de compétence de la Cour *ratione temporis*, vont d'ailleurs, sous une autre forme, dans le même sens. Mon fréquent collègue et néanmoins toujours ami, James Crawford, a déjà montré ce matin que la Cour ne pouvait s'arrêter à ces objections; j'y reviendrai inévitablement; mais sous un angle différent.

4. En ce qui me concerne, il m'appartient de traiter plus particulièrement de l'usage que l'Allemagne tente de faire de la jurisprudence de l'*Or monétaire*. Pour faire court, il me semble qu'elle en fait une analyse convenable, mais une application à l'espèce totalement biaisée et inacceptable.

5. Pour ce qui est du premier point, l'analyse, le professeur Dupuy, avant-hier, a fort bien résumé votre jurisprudence[123]; il est inutile que j'y revienne : je ne ferais sûrement pas mieux, et la leçon d'agrégation n'est pas un genre dans lequel j'excelle. Du reste, ces développements n'étaient pas vraiment nécessaires : comme le Liechtenstein l'avait déjà indiqué dans ses observations[124], il

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[122] Exceptions préliminaires (ci-après : EP), p. 93; repris *in* CR 2004/24, p. 45 (Dupuy).

[123] CR 2004/24, p. 49-53, par. 132-137.

[124] P. 75, par. 5.4.

n'y a pas de désaccord entre les Parties à cet égard et nous pouvons souscrire aux conclusions que l'Allemagne tire de l'arrêt de 1954, éclairé par les affaires de *Nauru*[125] et du *Timor oriental*[126] :

> «The jurisprudence of the Court concerning the indispensability of third parties is crystal clear : *If* [and I stress this first «if»] the legal interests of a third State constitute the «very subject-matter» of a dispute brought to the Court and the third State is absent from the proceedings, the Court cannot exercise jurisdiction on the matter. Legal interests of a third State do constitute the very subject-matter of a dispute *if* [and this is an important second «if»] the Court cannot decide on the claims before it without prior determination as to the rights or obligations of the third State.»[127]

6. Là s'arrête cependant l'accord des Parties. Car les deux *«if»*, les deux «si», constituent des conditions *sine qua non* à l'accueil d'une exception préliminaire fondée sur la règle dite de «la partie indispensable». Or, contrairement aux allégations de l'Allemagne, en l'espèce, ni l'une ni l'autre de ces conditions (qui sont peut-être des manières différentes de dire la même chose) ne sont remplies.

7. En outre, la Partie allemande néglige complètement «l'autre versant» de la jurisprudence de l'*Or monétaire*, ce que l'on pourrait appeler son aspect «positif», en ce sens qu'il en résulte aussi que la Cour a non seulement le droit, mais aussi le devoir de se prononcer sur la requête, lorsque les droits d'un Etat tiers ne sont pas «l'objet même» de l'arrêt à intervenir, et quand bien même les intérêts de cet Etat tiers pourraient être «touchés»[128] ou un «intérêt d'ordre juridique» pourrait être pour lui «en cause»[129] ou si, comme dans l'affaire de *Nauru*, la décision de la Cour risquait d'«avoir des incidences sur la situation juridique des deux autres Etats concernés»[130]. Tel est le cas en la présente espèce dans laquelle, contrairement aux dires de l'Allemagne, ni l'illicéité des «décrets Beneš», ni le droit à des réparations de guerre de la Tchécoslovaquie, ne sont, en aucune manière, «l'objet même» de la présente procédure (A et B). C'est à ces deux points que je

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[125] Arrêt du 26 juin 1992, *Certaines terres à phosphates à Nauru (exceptions préliminaires)*, *C.I.J. Recueil 1992*, p. 259-262, par. 50-55.

[126] Arrêt du 30 juin 1995, *C.I.J. Recueil 1995*, p. 101-105, par. 26-34.

[127] EP, p. 103.

[128] Cf. arrêts du 15 juin 1954, *Or monétaire pris à Rome en 1943*, *C.I.J. Recueil 1954*, p. 32 ou du 13 septembre 1990, *Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras) — requête à fin d'intervention*, *C.I.J. Recueil 1990*, p. 116, par. 55.

[129] Cf. l'article 62 du Statut ou l'arrêt du 30 juin 1995, *Timor oriental*, *C.I.J. Recueil 1995*, p. 104, par. 34.

[130] Arrêt du 26 juin 1992, *Certaines terres à phosphates à Nauru*, *C.I.J. Recueil 1992*, p. 261, par. 55.

m'attacherai d'abord, avant d'en venir aux conséquences qui en résultent en ce qui concerne la compétence de la Cour (C).

A. L'illicéité des décrets Beneš n'est pas «l'objet même du litige»

8. Monsieur le président, selon mon contradicteur et ami Pierre-Marie Dupuy, la République tchèque est, dans la présente affaire, une tierce partie indispensable car, affirme-t-il : «la détermination du caractère, licite ou illicite, des faits d'expropriation imputables à la Tchécoslovaquie est, en elle-même, un *préalable indispensable* à l'appréciation de la situation de l'Allemagne par rapport aux décrets Beneš»[131]. Cette affirmation repose sur une distorsion totale de la question dont le Liechtenstein a saisi la Cour. Et cela m'oblige à revenir une nouvelle fois sur l'objet même du différend que, volontairement ou non, l'Allemagne s'obstine à déformer.

9. Le Liechtenstein a un différend avec les successeurs de l'ancienne Tchécoslovaquie et n'en fait nullement mystère. Il considère qu'il a été (et que nombre de ses ressortissants ont été) victime(s) des décrets Beneš de 1945 qui ont entraîné la confiscation injuste des avoirs liechtensteinois assimilés à tort à des biens allemands. Mais ce différend qu'il a avec les Etats successeurs de la Tchécoslovaquie est tout à fait distinct de celui qui fait l'objet de la présente procédure :

— les Parties sont autres, cela va de soi; et,

— surtout, leur objet est distinct.

10. Dans sa plaidoirie de lundi dernier, le professeur Dupuy s'est employé à dresser un parallèle entre l'affaire de *l'Or monétaire* et celle qui nous occupe, entre lesquelles il a cru pouvoir déceler une «très grande similitude»[132]. Mais cette similitude n'existe que si, comme mon contradicteur, on se trompe de différend; si l'on postule que le Liechtenstein vous demande, Madame et Messieurs les juges, de condamner la Tchécoslovaquie «à travers» l'Allemagne ou celle-ci en lieu et place des successeurs de celle-là. C'est ce que, tel le chat botté des frères Grimm, dont il est un lecteur assidu, le professeur Dupuy voudrait vous faire croire. Mais ce n'est pas

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[131] CR 2004/24, p. 53, par. 139; les italiques sont dans le texte.

[132] *Ibid.*, p. 50, par. 133.

mieux établi que ne l'étaient les vastes propriétés que le rusé félin attribuait à son maître, le marquis de Carabas.

11. Or, ce que la Principauté reproche à l'Allemagne, ce n'est pas d'avoir confisqué certains biens liechtensteinois, ni, moins encore, bien évidemment, l'illicéité des décrets qui ont été à l'origine de cette confiscation. Contrairement aux allégations du professeur Dupuy qui, à trop lire Grimm, en vient à faire preuve d'une imagination qui ne le cède en rien à celle des célèbres conteurs, ce n'est pas la «responsabilité internationale» de la République tchèque «qui est en cause en tant qu'Etat successeur de la Tchécoslovaquie»[133]. Et «[l]'Allemagne n'est pas accusée … d'avoir reconnu illicitement des confiscations étrangères»[134]; elle nous dit d'ailleurs elle-même, avec insistance, par la voix autorisée de son agent, qu'elle continue à ne pas reconnaître la validité de ces décrets[135]. Aussi bien n'est-ce pas ce qui divise les Parties.

12. Comme l'ont montré l'agent du Liechtenstein et le professeur Crawford tout à l'heure, l'objet du présent différend est tout autre. Il avait déjà été exposé de manière concise au paragraphe 20 de la requête du Liechtenstein puis, de façon plus précise et détaillée, dans son mémoire[136] et, à nouveau, dans ses observations du 15 novembre 2002, notamment aux paragraphes 1.7 et 1.8, 4.6 à 4.9 et 5.15 et suivants; mais l'Allemagne s'acharne à croire — ou à vouloir — cet objet autre.

13. Il s'agit pourtant — et il s'agit exclusivement — de la décision, prise par l'Allemagne en 1995 et constamment maintenue depuis lors, de considérer les avoirs liechtensteinois comme tombant sous le coup de la convention de règlement du 26 mai 1952 amendée en 1954 :

— le 10 octobre 1995, le tribunal régional de Cologne a considéré que :

> «la disposition énoncée au paragraphe 3 de l'article 3 du chapitre sixième de la convention sur le règlement est applicable *mutatis mutandis* en l'espèce car elle vise manifestement à empêcher, sous quelque forme que ce soit, tout réexamen par les juridictions allemandes des mesures prises en vertu des paragraphes 1, 2 et 3 de l'article 3 du chapitre sixième de la convention sur le règlement»[137];

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[133] *Ibid.*, p. 49, par. 131.

[134] *Ibid.*, p. 54, par. 141.

[135] *Ibid.*, p. 13, par. 10, p. 19, par. 37 et p. 21, par. 42.

[136] Mémoire du Liechtenstein, p. 12-14, par. 13-16.

[137] Annexe 28 au mémoire du Liechtenstein (ci-après: «ML»), p. A260, par. 2, litt. *b) aa) [traduction du Greffe]*, p. 20 du texte français.

— à leur tour, la cour d'appel de Cologne, la Cour fédérale de justice puis la Cour constitutionnelle fédérale ont endossé cette position, à peu près dans les mêmes termes, par des décisions rendues respectivement les 9 juillet 1996[138], 25 septembre 1997[139] et 14 janvier 1998; pour ne citer que cette dernière décision : il s'agit, dit la Cour constitutionnelle, d'«une mesure prise à l'encontre *des avoirs allemands* à l'étranger au sens du paragraphe 1 de l'article 3 du chapitre sixième de la convention sur le règlement»[140];

— les autorités politiques ont fait leur cette thèse, qui contrastait totalement avec leurs positions antérieures, tant devant la Cour européenne des droits de l'homme que durant les négociations diplomatiques qui se sont déroulées entre les deux Etats.

14. Ces prises de position dépourvues d'ambiguïté sont présentées de manière assez détaillée aux pages 69 à 84 du mémoire du Liechtenstein. Je me bornerai à citer la déclaration de l'agent de l'Allemagne devant la Cour de Strasbourg, qui me paraît illustrer la position de ce pays :

> «le fait que les juridictions allemandes soient parties de l'hypothèse que les biens avaient été saisis à titre de biens allemands, n'est, en tous les cas, pas arbitraire et peut se défendre. L'article 3 du chapitre sixième de la convention sur le règlement est interprété trop strictement par le requérant si, par avoirs allemands à l'étranger, il entend les avoirs des citoyens allemands.»[141]

En réalité, Madame et Messieurs de la Cour : cette position *de l'Allemagne* ne peut nullement «se défendre»; et l'un des enjeux de la présente procédure est de le déterminer, lorsque vous serez conduits à examiner le fond de l'affaire.

15. Autrement dit, quelle qu'ait pu être sa position antérieure, depuis 1995, l'Allemagne considère que les avoirs de la Principauté et de ses ressortissants sont soumis au régime des réparations de guerre, au mépris et de la souveraineté du Liechtenstein, et de sa neutralité durant la seconde guerre mondiale. Pour en décider, comme le Liechtenstein le lui demande, la Cour n'a nul besoin de se prononcer sur la licéité des décrets Beneš. Celle-ci est indifférente aux fins du règlement du présent litige : que les décrets soient valides ou non, les biens liechtensteinois, que l'Allemagne estime maintenant soumis au régime des réparations, ne peuvent pas être soumis à ce

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[138] ML, annexe 29, voir note p. A309, par.2, *b) cc)*.

[139] ML, annexe 30.

[140] ML, annexe 32, p. A356, par. 1; traduction du Greffe, p. 45 du texte français; les italiques sont de nous.

[141] ML, annexe 36, p. A431, par. C.2.*a)*; traduction du Greffe, p. 15 du texte français.

régime et c'est ce que le Liechtenstein demande à la Cour de constater. La seule question qu'il vous pose, Madame et Messieurs les juges, est celle de savoir si l'Allemagne a pu, à bon droit, considérer les biens liechtensteinois comme relevant du régime des réparations de guerre. Vous pouvez y répondre sans vous interroger sur la conformité au droit international des décrets Beneš; cette autre question n'est ni «l'objet même»[142] du présent différend, ni une «condition préalable»[143] pour le trancher.

16. «Au pire», Monsieur le président — au pire pour nous, au mieux pour l'Allemagne — cette affaire pourrait être comparée à celle du *Détroit de Corfou* dans laquelle la Cour a estimé pouvoir condamner l'Albanie pour son manque de vigilance dans la surveillance du détroit alors même que le «délit principal» avait été commis par un autre Etat, absent de l'instance, la Yougoslavie. Ces deux faits internationalement illicites étaient à la fois liés et distincts, et la Cour a estimé qu'elle n'était pas empêchée de se prononcer sur l'un — le fait consécutif, les «graves omissions» de l'Albanie qui n'avait pas tenté de «prévenir le désastre»[144] — alors même qu'en l'absence de la Yougoslavie, il lui était impossible de se prononcer sur le fait illicite originaire, le minage du détroit. La Cour a considéré celui-ci comme une donnée de fait (qu'elle n'avait pas à qualifier juridiquement même s'il ne faisait aucun doute qu'il fût illicite), fait sur lequel s'est «greffé» un autre fait internationalement illicite dont elle a tenu l'Albanie responsable.

17. Dans ses observations, le Liechtenstein a invoqué ce précédent pour établir que le fait internationalement illicite qu'il reproche à l'Allemagne peut être reconnu comme tel par la Cour, sans qu'elle ait à s'interroger sur les violations imputables à un autre Etat[145]. Toutefois, à la réflexion, il me semble que, dans la présente affaire, la connexité entre le comportement de la Tchécoslovaquie d'une part, et celui de l'Allemagne d'autre part, est infiniment moins nette que les liens qui existaient entre la responsabilité de la Yougoslavie et celle de l'Albanie dans l'affaire du *Détroit de Corfou*. A l'inverse de la situation qui prévalait dans celle-ci, l'illicéité des faits attribuables à l'Allemagne est indépendante de celle du fait commis par la Tchécoslovaquie.

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[142] Arrêts, 15 juin 1954, *Or monétaire pris à Rome en 1943*, *C.I.J. Recueil 1954*, p. 32; 30 juin 1995, *Timor oriental*, *C.I.J. Recueil 1995*, p. 102, par. 28, et p. 104, par. 34.

[143] Arrêt du 26 juin 1992, *Certaines terres à phosphates à Nauru, exceptions préliminaires*, *C.I.J. Recueil 1992*, p. 261, par. 55.

[144] Arrêt du 9 avril 1949, *C.I.J. Recueil 1949*, p. 23.

[145] EP, p. 83-84, par. 5.22-5.23.

18. Cette dissociation est d'autant plus évidente que le fondement des mesures décidées par les décrets tchécoslovaques de 1945 n'est pas le régime des réparations de guerre. Les motifs des unes et les motifs des autres sont différents.

19. Qu'il s'agisse du décret n° 12 du 21 juin 1945[146] ou du décret n° 108 du 25 octobre de la même année[147], les biens confisqués étaient déterminés en fonction de l'appartenance de leurs propriétaires au «peuple» allemand ou hongrois, sur une base exclusivement ethnique et sans considération de nationalité. Il ne s'agissait nullement de réparations de guerre mais, aux termes des décrets eux-mêmes, de la confiscation des biens des «ressortissants allemands et hongrois et des traîtres et ennemis du peuple tchèque et slovaque»[148]. Du reste, la Tchécoslovaquie a communiqué à l'agence interalliée des réparations des informations sur les biens allemands saisis par elles et ces informations n'ont en aucune manière porté sur les confiscations réalisées par les décrets Beneš[149].

20. En d'autres termes, l'Allemagne n'a nullement «endossé» le fait internationalement illicite commis en 1945 par la Tchécoslovaquie au sortir de la guerre. Elle ne l'a pas «reconnu et adopté comme sien» au sens de l'article 11 du projet d'articles sur la responsabilité de l'Etat pour fait internationalement illicite annexé à la résolution 56/83 de l'Assemblée générale des Nations Unies. Elle a commis un autre fait illicite, distinct, en incluant les biens liechtensteinois dans le régime des réparations réglementé par la convention sur le règlement de 1952, qui est sans lien aucun avec les comportements de la Tchécoslovaquie derrière lesquels la Partie allemande tente maintenant de s'abriter.

21. Du reste, il est révélateur qu'au cours des procédures qui sont à l'origine de la très contestable position prise par l'Allemagne depuis 1995 et de la présente affaire, les cours et tribunaux allemands ne se sont, en aucune manière, prononcés sur la licéité des décrets Beneš. Bien au contraire, à l'image de la cour d'appel de Cologne, ils ont estimé qu'ils pouvaient se

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[146] ML, annexe 6.

[147] ML, annexe 7.

[148] Décret n° 12 — ML, annexe 6; traduction du Greffe, p. 6 du texte français; voir aussi l'annexe 7, *ibid.*, p. 9.

[149] Voir le rapport de l'Agence interalliée des réparations 1949, cité dans le commentaire d'Ignaz Seidl-Hohenveldern, *in Neue Juristische Wochenschrift*, 1953, p. 1390 (note 10) or Helmut Slapnicka, *Die rechtlichen Grundlagen für die Behandlung der Deutschen und der Magyaren in der Tschechoslovakei 1945-1948*, Intereg, Prague, 1999, p. 19.

prononcer *sans* avoir à examiner «la licéité ou la validité de la mesure de liquidation qui a été prise à l'encontre d'avoirs allemands à l'étranger et sur laquelle l'action est fondée»[150]. D'ailleurs, en plaidoirie, lundi dernier, nos amis allemands y ont insisté :

— «les tribunaux allemands ne se sont jamais prononcés sur le statut légal … d'aucun … avoir du Liechtenstein situé en République tchèque ou en République slovaque»[151] a dit l'agent de l'Allemagne;

— «Not a single word is devoted in these decisions to the substantive aspects of the case»[152] a renchéri le professeur Tomuschat.

22. De l'aveu de l'Allemagne, les tribunaux allemands n'ont pas estimé devoir se prononcer sur la validité (ou non) des décrets tchécoslovaques. Vous n'êtes pas davantage appelés à l'apprécier, Madame et Messieurs de la Cour : il vous suffira bien plutôt, au stade de l'examen au fond, de déterminer si, en décidant que les biens confisqués (licitement ou non, là n'est *pas* la question) relevaient du régime des réparations de guerre, l'Allemagne a agi conformément au droit international; si, ce faisant, elle a, ou non, violé la neutralité et la souveraineté du Liechtenstein, si elle s'est, ou non, injustement enrichie.

23. Nous sommes, Monsieur le président, bien loin du cas de figure des affaires de l'*Or monétaire* ou du *Timor oriental* : dans ces deux cas, la Cour a été empêchée de se prononcer parce que, pour ce faire, elle aurait dû, nécessairement, inévitablement, apprécier au préalable, dans l'affaire de 1954, les droits de l'Albanie sur l'or monétaire pris à Rome, dans celle de 1995, la licéité de la présence de l'Indonésie au Timor oriental. Ici, peu importe que les décrets Beneš fussent ou non licites : de toutes façons, la position de l'Allemagne qui assimile les biens en cause à des réparations de guerre (ce que la Tchécoslovaquie n'avait pas fait), porte atteinte aux droits de la Principauté de Liechtenstein — c'est en tout cas ce que celle-ci vous demande de décider au fond — et elle le fait en toute connaissance de cause, en sachant parfaitement qu'au stade du fond

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[150] Décision du 9 juillet 1996, ML, annexe 29, p. A303; traduction du Greffe : p. 33, point 2.*a)*; voir aussi la décision du tribunal régional de Cologne du 10 octobre 1995, ML, annexe 28, p. A264, section 2.*b.bb)*; traduction du Greffe, p. 21 du texte français.

[151] CR 2004/24, p. 19, par. 37.

[152] *Ibid.*, p. 37, par. 104.

elle ne pourra pas invoquer l'illicéité des décrets (qu'elle tient pour acquise mais pour d'autres raisons).

24. C'est d'ailleurs pour cela, Monsieur le président, parce que les motifs de la responsabilité de l'Allemagne et de celle, éventuelle, des Etats successeurs de la Tchécoslovaquie sont distincts, que nous ne sommes même pas dans la situation qui prévalait dans l'affaire de *Nauru* dans laquelle la Cour n'a pas été empêchée de se prononcer sur la responsabilité de l'Australie alors même que celle-ci était nécessairement identique à la responsabilité de l'Empire britannique et de la Nouvelle-Zélande, et *pour les mêmes raisons*[153]. Par contraste, la solution que vous serez conduits à donner à la présente affaire, Madame et Messieurs de la Cour, sera sans effet sur la question de la responsabilité éventuelle des Républiques slovaque et tchèque :

— que, dans votre futur arrêt au fond, vous reconnaissiez ou non la responsabilité de l'Allemagne pour avoir inclus les biens liechtensteinois dans le schéma des réparations de guerre, ceci sera sans incidence aucune sur la responsabilité (ou l'irresponsabilité) de ces deux Etats pour la confiscation opérée par les décrets Beneš : que l'Allemagne ait, ou non, raison de considérer que les biens en question relèvent du régime des réparations de guerre, la question de la validité des confiscations opérées par les décrets demeurera entière (alors que, dans l'affaire de *Nauru*, la question de la responsabilité du Royaume-Uni et de la Nouvelle-Zélande aurait, en fait sinon en droit, été tranchée par l'arrêt que vous auriez rendu au fond, les mêmes causes produisant les mêmes effets — les trois Etats intéressés ne s'y sont d'ailleurs pas trompés, qui ont décidé d'indemniser conjointement Nauru pour une partie des préjudices qu'il alléguait);
— à l'inverse, vous pouvez parfaitement vous prononcer sur la responsabilité de l'Allemagne sans avoir à apprécier celle de la Tchécoslovaquie : que les confiscations auxquelles celle-ci a procédées fussent ou non licites, l'Allemagne ne pouvait, de toute manière, les considérer comme un élément du régime des réparations.

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[153] Cf. l'arrêt du 26 juin 1992, *C.I.J. Recueil 1992*, p. 261-262, par. 55.

B. Les droits à réparation de la Tchécoslovaquie ne sont pas davantage «l'objet même du litige»

25. En outre, et ce sera mon second point, la licéité (ou l'illicéité) des confiscations décidées par la Tchécoslovaquie en 1945 est tout aussi indifférente pour répondre à la question de savoir si, comme l'estime le Liechtenstein, l'Allemagne s'est ou non enrichie sans cause. Depuis 1945, ces biens sont, de fait, sous le contrôle de la Tchécoslovaquie; ceci est un fait et un fait qui est demeuré sans incidence sur «la richesse de l'Allemagne» aussi longtemps que celle-ci n'avait pas décidé d'en faire un élément des réparations.

26. Par elle-même, la confiscation des biens liechtensteinois par la Tchécoslovaquie était sans rapport avec les réparations et n'a d'ailleurs jamais été prise en compte à ce titre ni par l'Allemagne jusqu'à la naissance du présent différend, ni par les Alliés, ni par la Tchécoslovaquie elle-même. Ainsi que je l'ai rappelé il y a quelques instants, les décrets Beneš n'ont pas été adoptés dans la perspective des réparations de guerre mais, comme l'indique le titre même du décret n° 12, en vue de procéder à «la répartition accélérée des terres agricoles des ressortissants allemands et hongrois et des traîtres et ennemis du peuple tchèque et slovaque»[154]. C'est la décision de l'Allemagne de considérer que les biens liechtensteinois confisqués en vertu des décrets Beneš entrent dans le cadre des réparations de guerre qui constitue l'enrichissement sans cause dont la Principauté a lieu à se plaindre.

27. Pour le contester, l'Etat défendeur avance un curieux argument : la Cour, écrit l'Allemagne dans ses exceptions préliminaires, «could not decide on any compensation due for unlawful seizure of Liechtenstein property by Czechoslovakia without first determining the legal relationships between Germany and a third sovereign State, namely the Czech Republic»[155]. Cela laisse songeur, Monsieur le président : la thèse de l'Allemagne (la *nouvelle* thèse de l'Allemagne) repose sur l'idée que les biens qui sont l'objet du présent différend relèvent du régime des réparations. Ce n'est pas la République tchèque qui le dit, ce n'est évidemment pas le Liechtenstein qui le dit — c'est l'Allemagne; et c'est cette position *allemande* qui est à l'origine de toute l'affaire comme l'a d'ailleurs reconnu le professeur Frowein avant-hier : «the present dispute» he said, «came into being because the German courts found [in 1995 and the next years

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[154] ML, annexe 6, p. A.9; traduction du Greffe, vol. I, p. 6.

[155] EP, p. 107, par. 174.

— this I add] that they were prevented by the Settlement Convention from looking into the confiscation of the painting»[156] — ceci, je le rappelle sans avoir besoin de se prononcer sur la validité des décrets de 1945.

28. Et pourtant c'est ce même Etat qui vient affirmer devant vous que vous ne pourriez pas vous prononcer parce que, pour ce faire, il faudrait que vous déterminiez que ces réparations sont effectivement dues. En réalité, vous n'avez, Madame et Messieurs de la Cour, rien à décider de ce genre; il suffit bien plutôt que vous constatiez que l'Allemagne elle-même tient pour acquis qu'elle est tenue à réparations envers les successeurs de la Tchécoslovaquie, ne fût-ce que, précisément, dans les décisions prises par ses tribunaux nationaux entre 1995 et 1998. En incluant les biens liechtensteinois dans ces réparations, elle allège d'autant le fardeau de la dette lui incombant à ce titre.

29. J'ajoute que si l'Allemagne faisait erreur; si, contrairement à ce qu'elle dit et à ce qu'implique le comportement de ses organes, elle ne devait pas de réparation à la Tchécoslovaquie, la position qu'elle a prise en ce qui concerne les biens en question n'en serait pas moins évidemment illicite : elle les aurait alors inclus dans une dette imaginaire, une dette «de chat botté», si bien qu'au lieu de devoir les restituer aux successeurs de la Tchécoslovaquie, elle se les serait, en quelque sorte, appropriés. En tout cas, la position prise par ses organes judiciaires et politiques serait entachée d'une grave illicéité puisqu'elle repose sur le fait (inexact) qu'il s'agit de réparations de guerre qu'un Etat neutre aurait pu payer à sa place.

30. Au surplus, comme un très éminent conseil de l'Allemagne, ils le sont tous, l'a fait valoir dans l'affaire relative à la *Licéité de l'emploi de la force*, il n'existe pas de parallèle entre les droits et les obligations d'un sujet de droit; un Etat peut toujours renoncer à ses *droits*, mais ses obligations s'imposent à lui objectivement. Je cite ce très évident conseil :

> «It is trivial to note … that a State has a power of disposition over its rights, but not over its obligations. In the case of a multilateral treaty which generates rights and obligations in the relations between the different parties, transactions being effected between two parties do not entail legal effects for third parties.»[157]

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[156] CR 2004/24, p. 25-26, par. 62.

[157] *(Serbie et Monténégro c. Allemagne)*, 20 avril 2004, CR 2004/11, p. 20, par. 39; voir aussi p. 19, par. 36 (Tomuschat).

Il n'y a aucune raison que ce qui vaut pour les obligations assumées par la Serbie et Monténégro en vertu de la convention sur le génocide ne vaille pas également pour celles qui s'imposent à l'Allemagne en vertu de la convention de 1952, amendée en 1954.

31. En d'autres termes, Monsieur le président, si réellement la Cour estimait utile de déterminer si oui ou non l'Allemagne doit des réparations aux Républiques tchèque et slovaque (ce qui n'est pas nécessaire pour les raisons que j'ai indiquées), elle se prononcerait sur les *obligations* de l'Allemagne — qui, selon la Partie allemande elle-même, doivent et peuvent être déterminées objectivement — mais ne toucherait nullement aux obligations de ces deux pays dont les droits éventuels seraient, au contraire, parfaitement préservés.

32. En outre, ici encore, la question de l'enrichissement sans cause de l'Allemagne — qui est un problème de fond — est tout à fait indépendante de savoir si les confiscations décidées en 1945 par la Tchécoslovaquie étaient ou non licites. Ce n'est pas cette confiscation qui est à l'origine d'un enrichissement de l'Allemagne; c'est la décision de celle-ci — de celle-ci seule — d'inclure les biens en question dans le régime des réparations.

C. La Cour peut et doit se prononcer sur l'affaire, même si des droits des Etats successeurs de la Tchécoslovaquie devaient être «touchés»

33. Monsieur le président, les droits d'aucun Etat absent de la présente instance ne sont l'objet de celle-ci et il ne fait aucun doute que la Cour peut se prononcer sur la requête du Liechtenstein sans porter atteinte aux droits des Etats successeurs de la Tchécoslovaquie et sans avoir à apprécier leur responsabilité éventuelle à l'égard du Liechtenstein. Dans ces conditions, puisqu'il n'existe entre les Parties aucun désaccord quant à l'existence d'une base de compétence de la Cour — en l'espèce l'article 1er de la convention de Strasbourg pour le règlement pacifique des différends —, la haute juridiction peut et doit se prononcer sur le litige que la Principauté lui a soumis.

34. Il en va ainsi quand bien même les intérêts de certains Etats tiers pourraient être «touchés». Ceci résulte très clairement de la jurisprudence de la Cour, et, plus précisément, du précédent de l'*Or monétaire* dont il résulte que vous ne pouvez connaître d'une requête si les droits d'un Etat tiers à l'instance forment l'objet même du litige, mais aussi, à l'inverse, que la Cour n'est pas empêchée de se prononcer si les droits et intérêts d'un tiers peuvent être touchés.

35. Le Liechtenstein a exposé de manière assez détaillée ce second aspect aux paragraphes 5.5 et 5.6 de ses observations. Je me permets, Madame et Messieurs les juges, de vous y renvoyer. Mais il me paraît nécessaire d'ajouter deux remarques.

36. En premier lieu, comme la Principauté l'a également montré dans ces mêmes observations[158], ce principe doit trouver d'autant plus à s'appliquer en la présente espèce que l'article 32, paragraphe 1, de la convention de Strasbourg de 1957 dispose : «La présente convention demeure applicable entre les parties encore qu'un Etat tiers, partie ou non à la convention, ait un intérêt dans le différend.»

37. Cette disposition, adoptée très rapidement après l'arrêt de *l'Or monétaire* (donc en toute connaissance de cause), est un héritage direct de l'article 35 de l'Acte général d'arbitrage de 1928. Elle n'a rien d'obscur : les parties à la convention de 1957 ont voulu éviter le genre d'objections que soulève l'Allemagne. Aucun différend n'est complètement «étanche»; d'une manière ou d'une autre, des Etats tiers, parties ou non à la convention, sont souvent intéressés à la solution d'un litige. Il reste que les parties sont convenues que ceci ne constituerait pas un obstacle à la soumission de tels différends à la Cour internationale de Justice. Et je ne vois pas en quoi ceci constituerait une quelconque «Rechtsbeugung» comme l'avance le professeur Dupuy[159].

38. Bien entendu, ce faisant, les parties à la convention européenne n'ont pas entendu déroger au Statut de la Cour et elles n'eussent pu le faire. Aussi bien ce n'est pas le cas; cette disposition reflète simplement l'aspect de la jurisprudence de l'*Or monétaire* que l'Allemagne veut oublier : la Cour n'est pas empêchée de se prononcer sur un différend à l'égard duquel une tierce partie peut avoir un «intérêt». Au surplus, en prévoyant expressément, à l'article 33 (et pas à l'article 32, comme M. Dupuy le laisse entendre[160], ce qui montre qu'il s'agit de problèmes distincts), en prévoyant donc, *à l'article suivant*, une possibilité d'intervention en faveur des Etats tiers qui estiment que leurs «intérêts légitimes sont en cause», les rédacteurs de la convention se sont montrés parfaitement fidèles aux principes qui gouvernent la compétence de la Cour : la possibilité d'intervention prévue aux articles 62 et 63 du Statut a précisément pour objet de

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[158] EP, p. 77-78, par. 5.7 à 5.10.

[159] CR 2004/24, p. 56, par. 145.

[160] *Ibid.*

permettre à des Etats qui peuvent être intéressés par le règlement d'une affaire portée devant la Cour mais dont les droits ne sont pas l'objet même du différend, de faire valoir leur point de vue.

39. Au demeurant, et ce sera ma seconde et dernière observation, Monsieur le président, il ne faut pas exagérer l'intensité des intérêts que les Républiques slovaque et tchèque pourraient être conduites à faire valoir en la présente espèce.

40. D'une part, je l'ai montré et n'y reviens pas, ni leurs droits, ni leurs obligations, ne sont assurément l'objet même du différend dont le Liechtenstein a saisi la Cour. Et, d'autre part, ces deux Etats ont, finalement, un intérêt très limité à la solution du litige :

— la licéité des décrets Beneš n'est pas en cause;

— les obligations de réparation que l'Allemagne peut avoir à leur égard ne le sont pas non plus puisque seule est concernée la position que celle-ci a prise en ce qui concerne non pas le principe des réparations mais la soumission des biens du Liechtenstein au régime des réparations de guerre résultant de la convention de Paris de 1952 amendée en 1954. Et d'ailleurs, plus précisément, leur soumission *partielle* puisque l'Allemagne considère les biens en question comme relevant du mécanisme des réparations que pour autant que cela lui permet de «bénéficier» de l'interdiction faite à ses tribunaux de se prononcer sur les questions de réparation par l'article 3, paragraphe 3, du chapitre 6, de la convention de Paris. Mais l'Allemagne se garde bien de «ressusciter» en faveur du Liechtenstein et des Liechtensteinois spoliés, l'obligation d'indemnisation que posait l'article 5 de cet instrument, abrogé en 1990 au prétexte que toutes les compensations en résultant avaient été versées[161]. Même si ceci n'est pas ponctué par une sonnerie de téléphone intempestive, je crains d'avoir trouvé la «belle au bois dormant» — mais les baisers du prince ne la fléchissent point : cette belle endormie, c'est l'obligation de réparer. Ce sera donc à vous, Madame et Messieurs les juges, de lui redonner vie sous la forme appropriée dans l'arrêt que vous serez conduits à rendre sur le fond.

41. En conclusion, Monsieur le président, c'est un litige très authentiquement bilatéral qui a été soumis à la Cour :

[161] Voir l'échange de notes du 28 septembre 1990, *RTNU*, n°°28492.

— ce différend concerne la décision *de l'Allemagne*, et d'elle seule, d'inclure «certains biens» dans le système des réparations sans, pour autant, envisager d'indemniser les ressortissants du Liechtenstein concernés;

— du même coup, se posent de graves problèmes de principe concernant la souveraineté du Liechtenstein et son statut de neutralité durant la guerre, que la position adoptée *par l'Allemagne*, et elle seule, depuis 1995, remet en cause;

— pour trancher ces questions, il n'est nullement nécessaire que vous vous prononciez, Madame et Messieurs les juges, sur la validité des décrets tchécoslovaques de 1945, dont la licéité est, ici, indifférente; et,

— dès lors, les droits des Etats successeurs de la Tchécoslovaquie ne sont en aucune manière «l'objet même» du différend que le Liechtenstein vous a soumis.

42. Monsieur le président, mon intervention conclut le premier tour de plaidoiries de la Principauté du Liechtenstein. Il ne me reste donc, Madame et Messieurs de la Cour, qu'à vous remercier très vivement, au nom de toute notre équipe, de la bienveillante attention que vous avez bien voulu leur prêter.

The PRESIDENT: Thank you, Professor Pellet. Your statement indeed brings to an end the first round of oral argument by the Principality of Liechtenstein. I wish to thank each of the Parties for the statements presented in the course of this first round of oral argument.

The Court will meet again tomorrow from 10 to 11.30 a.m. to hear the second round of oral argument of the Federal Republic of Germany. At the end of tomorrow's sitting, Germany will present its final submissions. I recall that Liechtenstein will then take the floor on Friday 18 June from 10 to 11.30 a.m., for its second round of oral argument, and will present its final submissions at the end of this sitting.

Therefore, each Party will have a speaking time of one-and-a-half hours. I should nevertheless like to remind both Parties that, pursuant to Article 60, paragraph 1, of the Rules of Court, the oral presentations must be as succinct as possible. The purpose of the second round of oral argument, I would add, is to enable each of the parties to reply to the arguments advanced orally by the other party. The second round must not therefore constitute a repetition of past

statements. It therefore goes without saying that the parties are not obliged to avail themselves of the entire time allowed to them.

Thank you. The Court is adjourned.

The Court rose at 1 p.m.

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