INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING CERTAIN PROPERTY
(LIECHTENSTEIN v. GERMANY)

OBSERVATIONS

OF

THE PRINCIPALITY OF LIECHTENSTEIN

15 NOVEMBER 2002

INTERNATIONAL COURT OF JUSTICE

Principality of
Liechtenstein

Special Commissioner and Agent for the case brought before the International Court of Justice

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The Six German Preliminary Objections

1. These Written Observations respond to Germany's Preliminary Objections of 27 June 2002. They are filed in conformity with the President's Order of 12 July 2002.

2. In an attempt to prevent the Court from considering the merits of the dispute, Germany presents six rather disparate Preliminary Objections to the claims presented by Liechtenstein. These objections are:

> first, that there is no dispute between the parties;[1]
>
> secondly, that any dispute arose prior to 18 February 1980 and is accordingly excluded from the Court's jurisdiction by Article 27 (b) of the European Convention for the Peaceful Settlement of Disputes;[2]
>
> thirdly, that (if there is a dispute) it relates to a matter within Germany's domestic jurisdiction;[3]
>
> fourthly, that Liechtenstein's claims are not adequately substantiated and are inadmissible for that reason;[4]
>
> fifthly, that the dispute really concerns the Czech Republic alone, and that Germany is protected by the *Monetary Gold* principle from being sued for decisions of its own courts and other organs;[5]

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1 *Preliminary Objections of the Federal Republic of Germany* (hereafter GPO), Vol. I, paras. 34-63.

2 GPO, paras. 64-105.

3 GPO, paras. 106-114.

4 GPO, paras. 115-150.

5 GPO, paras. 151-180.

sixthly, that Liechtenstein's claim is inadmissible because there has been a failure to exhaust local remedies, and this notwithstanding the decision of the highest German court, which Germany itself presents as authoritative.[6]

3. In these Written Observations, the six German Preliminary Objections will be addressed in turn, in the order set out above. Part I deals with the existence of a dispute (Preliminary Objection 1). Part II deals with issues of jurisdiction under the European Convention (Preliminary Objections 2 and 3). Part III deals with issues of admissibility (Preliminary Objections 4 - 6). There follow Liechtenstein's submissions.

4. It may be noted that Germany's Preliminary Objections do not cover the whole field of Liechtenstein's claim as presented in its Application and developed in its Memorial. For example, Germany fails to deal directly with the argument that it was lawful vis-à-vis Liechtenstein to treat the Liechtenstein property as falling within the scope of the Settlement Convention on condition of payment of compensation for that property. Likewise the argument that local remedies have not been exhausted clearly can have no application to Liechtenstein's claim affecting the property of the Prince of Liechtenstein personally; it is plain that he has exhausted all local remedies available in Germany. Since, for the reasons to be given below, each and every one of the German Preliminary Objections should be rejected outright, no question arises as to the possible severance of any aspect of Liechtenstein's claims.

5. Before turning to the Preliminary Objections, four remarks of a general character are called for.

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6 GPO, paras. 181-208.

Germany previously accepted that there was a dispute between the parties under international law

6. In the first place, the Preliminary Objections now presented by Germany stand in marked contrast to its own earlier attitudes towards this dispute, as revealed in the two rounds of consultations between German and Liechtenstein delegations and in certain other public statements of German officials. For example, during the consultations between the two States on 14 June 1999, it was recognized by the head of the German delegation as stated in an internal report of Liechtenstein:

> *"Deutschland könne auch nicht einräumen, daß es völkerrechtliche Ansprüche bzw. Völkerrecht verletzt habe. Es sei damit ein Gegensatz an Rechtsauffassungen entstanden und dieser Meinungsgegensatz bestehe auch nach dieser Konsultationsrunde fort. Eine Auflösung könne nur auf höherer Ebene erfolgen. Es bestehe die Möglichkeit des Austauschs von Aide-Mémoires vor einer möglichen nächsten Runde oder aber eine gerichtliche Regelung ohne weitere Schritte."* [7]
>
> Translation:
> "Neither could Germany concede that it had violated international law or claims under international law. As a result, contrary legal opinions had been created and this divergence of opinion would continue to exist even after this round of consultations. A solution could only be found at a higher level. There was the possibility of an exchange of Aide-Mémoires prior to a possible further round or otherwise a settlement by judicial decision without any further steps."

It is precisely such a settlement by judicial decision that Germany now seeks by any and all means to avoid.

Germany misapprehends the dispute before the Court, seeking to convert it into a different dispute involving different States

7. In the second place, Germany seeks to hide behind the Czech Republic, consistently misrepresenting the dispute Liechtenstein has brought to the Court and confusing it

with a separate dispute between Liechtenstein and the Czech Republic. In short, it rewrites Liechtenstein's Application with a view to formulating preliminary objections against the rewritten version. But the Court has to treat the claim actually brought by Liechtenstein against Germany, not the (different) claim Germany would have the Court believe has been brought.

8. It is fair to state at once - and Liechtenstein has never made any secret of it - that there is a dispute between Liechtenstein and the Czech Republic concerning the application of, in particular, Beneš Decree No. 12 to the Liechtenstein property. That unresolved situation is part of the factual background to the present dispute.[8] If the Czech Republic had not seized the Liechtenstein property in 1945, the present dispute would never have arisen. But the disputes are nonetheless completely different; they arose between different parties at different times and they concern different factual and legal issues. Germany seeks to confuse the two at every step, asserting (contrary to the clear terms of the Application and the documentary record) that Liechtenstein's "real" case is against the Czech Republic.[9]

9. The present Application is not based on a mistake of identity. Liechtenstein may have a dispute with Germany and at the same time a distinct dispute with the Czech Republic, each of them founded on its own factual and legal grounds. And that is, indeed, the case. Germany fails to confront Liechtenstein's *actual* case against it, and thereby commits the sin of "inventiveness" of which it several times accuses Liechtenstein.[10] More importantly, it thereby fails to bring its Preliminary Objections into any actual relation with the case that is before the Court.

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7 Annex 48, para. 20.

8 Germany infers that the legal issues raised as a result of the Beneš Decrees are dead issues, of purely historical significance. This is of course not the case: on the contrary, they remain matters of active public and international controversy, including in Germany itself.

9 GPO, paras. 59-60.

10 E.g., GPO, para. 8 ("an artificial construct purposefully invented").

10. That case is, in summary, as follows.[11] Both Liechtenstein and Germany before 1990 treated the questions arising from the Beneš Decrees, and in particular Beneš Decree No. 12, as open questions. In particular the regime of the Settlement Convention was not applied by Germany to the neutral Liechtenstein property; there was at no stage any suggestion by Germany that the Liechtenstein property constituted "German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war" within the meaning of Article 3 of Chapter Six of the Settlement Convention. Had the regime of the Settlement Convention been applied to the Liechtenstein property, Germany would have been called upon under Article 5 of the Convention to compensate Liechtenstein nationals for doing so.

11. In 1990, at Germany's suggestion, in its negotiations with the United States, the United Kingdom and France, the compensation obligation in Article 5 was terminated, on the basis that no new categories of property existed which could be brought within the scope of the regime. At the same time the Settlement Convention regime, previously envisaged only as a temporary measure pending a final peace treaty, was made permanent. Then, by a decision in 1995 finally endorsed by its highest court in 1998, Germany decided that the Liechtenstein property was subject to the regime of the Settlement Convention, i.e., that it was after all to be treated as "German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war", and this despite the acknowledged facts that Liechtenstein was neutral in World War II, that Liechtenstein property was not included in the category of "German external assets", and that such property was not "seized for the purpose of reparation or restitution, or as a result of the state of war". Liechtenstein immediately protested against these decisions and was met with the reply by Germany that they were binding, were correct or at least reasonable, and were of general application, not being limited to the single painting that was at issue in the German courts. This was the first time that Germany had taken such a position vis-à-vis the Liechtenstein property.

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[11] See the Application and Memorial for further detail.

12. Germany thus took the position that it was entitled vis-à-vis Liechtenstein (which, of course, as a neutral was never party to the Settlement Convention) to treat its property as German and as covered by the regime of the Convention, while at the same time denying any obligation to compensate Liechtenstein for the loss of that property. In consequence Liechtenstein not merely lost any claim to individual assets located in Germany (including the Pieter van Laer painting), but is now faced with the prospect that any persons within German jurisdiction will be able, for the first time, without any fear of claims by Liechtenstein owners, to acquire and deal with items of the Liechtenstein property - all this to the evident detriment of Liechtenstein and its nationals.

13. It will immediately be seen that the dispute outlined in the previous paragraph has the following characteristics:

(i) it arose between Liechtenstein and Germany and involved a difference of opinion on legal and factual issues between the two States;

(ii) it involves the question whether Germany is entitled to apply provisions of the Settlement Convention, an international treaty, to a neutral, non-party State and to its nationals;

(iii) it arose after 1990 (and thus after 1980);

(iv) it is amply substantiated in Liechtenstein's Application and Memorial, and in the documents annexed thereto;

(v) it does not involve as a precondition the resolution of any legal claim against a third State, or any judicial finding as to any such claim; and

(vi) it does involve a final decision of the highest German courts on the very question in issue, a decision which Germany admits is irreversible and of general application.

14. As will be demonstrated in more detail in later Chapters, it follows from these six characteristics of the situation that each of the six German Preliminary Objections is untenable and must be rejected.

Germany denies that it has changed its position with respect to the Liechtenstein property

15. The third preliminary point is as follows. Again and again, Germany seeks to defend itself against Liechtenstein's claim by arguing that it had always taken the position espoused by the German courts in the 1990s.[12] Germany (by this account) had been perfectly consistent as to the scope of the Settlement Convention throughout. There was accordingly no change of position. If there is now a dispute, it is a dispute which arose from a legal situation pre-dating 1980, thus falling outside the temporal scope of the European Convention for the Peaceful Settlement of Disputes. Moreover the substantive Liechtenstein claim based on the change of position is without foundation; there was no such change.

16. This *leitmotif* of the German Preliminary Objections calls for a number of comments.

(a) It is based upon a German reading of German case-law. But the assertions Germany now makes were never at any stage articulated before 1990. The shared assumption was that the Settlement Convention applied to German external assets, i.e., to assets having some proper (albeit possibly indirect) relation to Germany itself, and not to neutral third States. It cannot seriously be suggested that Liechtenstein, or any other State, would have sat by, con-

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[12] E.g., GPO, paras. 7, 8, 32, 56.

tent to see its property classified as "German external assets", especially when such a classification carried with it significant adverse legal consequences. Yet Germany now suggests that Liechtenstein accepted this situation for many years. There is not the slightest evidence that it did so. Indeed, the evidence suggests the contrary, both so far as Liechtenstein *and* Germany were concerned.

(b) Even if, for the sake of argument, it be accepted that earlier decisions of the German courts carried the potential that Liechtenstein property would in future be subjected to the regime of the Settlement Convention, that was a mere potentiality. None of the earlier cases concerned Liechtenstein property. It is not incumbent upon third States to dissect the internal case-law of other States in matters not concerning them directly, in order to discern some threat of future detriment. The dispute between Liechtenstein and Germany arose in fact in the 1990s as a result of actual decisions in that decade by the German courts. Even if academic observers could have seen in the earlier decisions the potential for this to happen (and could have agreed on this), the fact is that it did not happen until after 1990.[13] International disputes arise when they arise, not because they might be predicted as possible or even likely from some vantage point of perfect foresight.

(c) In any case, the position taken by the German courts in the 1990s was not contained in the earlier case-law. It is a new development. The position is dealt with in some further detail in an Appendix to these Written Observations, to which the Court is respectfully referred.[14] The following points as to the German case-law emerge. None of the previous cases concerned Liechtenstein or other neutral property. None concerned Beneš Decree

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13 In fact, however, German scholars at no stage suggested or anticipated that the Liechtenstein property fell within the scope of the inadmissibility rule in the Settlement Convention. The position in the German literature is briefly analyzed in the Appendix I, paras. A12-A18.

14 See the Appendix I, paras. A2-A11.

No. 12, under which all or most of the Liechtenstein property was seized. In only two of them was the "no objections" rule of Article 3 of Chapter Six of the Settlement Convention applied. One of these cases concerned assets already identified by a United States' court as "enemy-associated" assets.[15] The other concerned German-owned shares in a Dutch company which were seized under the Dutch enemy property law.[16] Taken as a whole the pre-1990 cases support the conclusion (which German legal thought at the time also supported[17]) that the German courts retained *Kompetenz-Kompetenz* in terms of the scope of application of the Settlement Convention. The analysis of all the cases (in its Preliminary Objections Germany ignored several of them) does not support Germany's theory of juridical stasis *in any event.*

(d) Finally, even if, for the sake of argument, it is accepted that there was no *change* of position by Germany, but simply an as-yet-unrealized potentiality, the fact remains that the position taken in the 1990s had never actually been taken before. What its international legal consequences are in terms of the relations between Liechtenstein and Germany is evidently a matter for the merits.

Germany tries to convert issues concerning the merits into issues of jurisdiction or admissibility

17. This leads to the fourth preliminary point. It is evident from a reading of the Preliminary Objections that Germany attempts to introduce considerations essentially related to the merits into the case at this stage. Seeking to avoid an open consideration of the merits of the claim after a full and orderly preliminary objection process, it calls on the Court to inject an (evidently partial) consideration of merits issues into this phase. Indeed at one point Germany accordingly openly calls on the Court to develop

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15 See GPO, Annex 3.

16 See GPO, Annex 2.

beyond the existing law of admissibility in order to encompass its position.[18] In Liechtenstein's view, there is no need or justification for such a development. It is true that the Court retains the power to join preliminary issues to the merits, where this is necessary.[19] But it has exercised that power sparingly. The converse power (allowing merits arguments to obtrude into and affect the preliminary objections phase) does not exist,[20] and for good reason. Germany's arguments would tend to produce the result that the preliminary objections phase was a "dress rehearsal" for the merits, producing difficulties for the Court and inequality between the parties. In such circumstances, the Defendant State would be free to change its position on the merits in line with the Court's decision on the "preliminary" objections, while the Applicant would have no such freedom. The time for merits arguments is when the phase of the merits has been reached.

18. For these reasons, Liechtenstein respectfully suggests that the confusion attempted by Germany as between genuinely preliminary issues and the merits of the present dispute ought not to be entertained. A clear understanding of the dispute presented by Liechtenstein reveals, clearly, that the Court has jurisdiction and that Liechtenstein's claim is admissible. That being so, remaining issues of proof and of legal analysis on questions of substance can and should be left to the merits phase.

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17 See the Appendix I, paras. A11-A17.

18 GPO, para. 43.

19 Compare Article 79 (7) of the Rules.

20 On the contrary, on the presentation of preliminary objections, consideration of the merits is suspended, see Article 79 (5) of the Rules.

PART ONE

THE DISPUTE BETWEEN LIECHTENSTEIN AND GERMANY

CHAPTER 1

GERMANY'S ARGUMENT THAT THERE IS NO DISPUTE

A. Introduction

1.1 In its First Preliminary Objection, Germany alleges that no dispute exists between Liechtenstein and Germany.[21] Germany does not support this allegation but, in essence, uses this objection to accuse Liechtenstein of having invented a dispute.[22] Indeed, Germany itself proceeds to illustrate the existence of a dispute by setting out its disagreement with Liechtenstein's positions in detail. Therefore, Germany's First Preliminary Ojection must fail.

1.2 Liechtenstein cannot agree with Germany that the Court must "further develop and specify the concept of 'dispute'", in order to enable it to decline "artificially constructed cases".[23] The jurisprudence is clear that it is for the Court - and only the Court - to decide on an objective basis whether a dispute exists. If the Court should be confronted with a case that it does not regard as a "real dispute", the existing legal principles already allow and require the Court to declare such a case inadmissible. However, the present case is not such a case.

1.3 The Court has established clear criteria defining whether a dispute exists between two states under international law. In numerous judgments, the Court has referred to the definition of dispute as a

> "disagreement on point of law or fact, a conflict of legal views or interests between parties".[24]

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21 GPO, paras. 35-63.

22 GPO, paras. 37, 50 and 51.

23 GPO, paras. 42-43.

24 *Mavrommatis Palestine Concessions,* Judgment No. 2, 1924 PCIJ, Ser. A, No. 2, p. 11; *Northern Cameroons, I.C.J. Reports* 1963, p. 27; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, *I.C.J. Reports* 1988, p. 27, para. 35; *East Timor (Portugal v. Australia)*, 30 June 1995, *I.C.J. Reports* 1995, pp. 99-100, para. 22; *Land and Maritime Boundary between Cameroon and Nigeria*, Jurisdiction and Admissibility, *I.C.J. Reports* 1998, pp. 314-315, para. 87.

Accordingly, in order to establish the existence of a dispute,

> "it must be shown that the claim of one party is positively opposed to the other".[25]

It is, in addition, not for one of the Parties to decide whether there is a dispute or not. As the Court has stated:

> "whether there exists an international dispute is a matter for objective determination".[26]

1.4 The established criteria are fulfilled in the case at hand. The submissions to date reflect, quite starkly, that Liechtenstein and Germany have different legal opinions on many issues, including whether Germany's conduct in subjecting neutral Liechtenstein property to the scope of the reparations regime of the Settlement Convention without compensating Liechtenstein was lawful under international law (B). This dispute is squarely between Liechtenstein and Germany (C).

B. Liechtenstein's claims are opposed by Germany

1.5 As set out in the Memorial, following the decisions of German courts from 1995 to 1998, Liechtenstein has - on numerous occasions - presented its legal position regarding Germany's wrongful conduct to the German Government. The German Government on every occasion has opposed Liechtenstein's view. Quite surprisingly, and without explaining how and why the dispute that undoubtedly existed has vanished, Germany now asserts that there is no dispute since there are no claims positively opposed to each other.

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25 *South West Africa*, Preliminary Objections, *I.C.J. Reports* 1962, p. 328.

26 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, *I.C.J. Reports* 1950, p. 74.

1.6 It is hard to imagine a more striking opposition of views. At the second consultation held on 14 June 1999 in Vaduz the head of the German delegation, Dr Hilger, declared according to an internal report of Liechtenstein:

> *"Deutschland könne nicht einräumen, daß es völkerrechtliche Ansprüche bzw. Völkerrecht verletzt habe. Es sei damit ein Gegensatz an Rechtsauffassungen entstanden und dieser Meinungsgegensatz bestehe auch nach dieser Konsultationsrunde fort. Eine Auflösung könne nur auf höherer Ebene erfolgen. Es bestehe die Möglichkeit des Austauschs von Aide-Mémoires vor einer möglichen nächsten Runde oder aber eine gerichtliche Regelung ohne weitere Schritte."* [27]
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> Translation:
> "Neither could Germany could not concede that it had violated international law or claims under international law. As a result, contrary legal opinions had been created and this divergence of opinion would continue to exist even after this round of consultations. A solution could only be found at a higher level. There was the possibility of an exchange of Aide-Mémoires prior to a possible further round or otherwise a settlement by judicial decision without any further steps."

Moreover, the German Foreign Minister's letter dated 20 January 2000, referring to the aide-mémoire of Liechtenstein of 9 December 1999 (Annex 44 of the Memorial) contains the wording:

> *"Die Bundesregierung teilt die darin vertretene Rechtsauffassung bekanntlich nicht."*[28]
>
> Translation:
> "It is known that the Government does not share the legal opinion expressed therein."

It is therefore simply wrong for Germany to maintain that Germany agrees with Liechtenstein's opinion arising from the decisions of German courts from 1995 to 1998.[29]

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27 Annex 48, para. 20.

28 Memorial, Annex 45, p. A 505.

29 GPO, para. 55.

1.7 The Parties also have opposing views as regards the lawfulness of Germany's conduct under international law. Liechtenstein asserts that a change took place when Germany included Liechtenstein property in the scope of the Settlement Convention, thereby applying a reparations regime to neutral property without compensation, and thus failing to respect Liechtenstein's sovereignty and neutrality as well as the rights of Liechtenstein and its nationals. Germany denies that a change of position ever occurred and therefore is of the opinion that its conduct is, and always has been, lawful. This opposition of views clearly evidences a dispute.

1.8 Liechtenstein argues that Germany and its courts interpreted the Settlement Convention in a way that is not required under the Convention itself or by the exchange of notes with the three Western Allies, and in a way that violates international law. On the contrary, Germany contends that it was required, by the Settlement Convention and the Exchange of Notes, to interpret the Convention to include the property of Liechtenstein, a neutral state, in the post-war reparations regime.

1.9 Furthermore, the arguments brought forward by Germany to support its First Preliminary Objection[30] go to the merits and not the admissibility of the case, thereby having the effect of underscoring the existence of a dispute on the merits. Germany declares that there might be a possible disagreement concerning the interpretation of the exclusion of jurisdiction of German courts over property "seized for the purpose of reparation or restitution, or as a result of the state of war by a third country".[31] However, Germany is of the opinion that it is legally obliged to conform to the provision of a treaty, the Settlement Convention, validly concluded with other States. But - and this is the core issue - Liechtenstein questions whether it was lawful for Germany to apply the Settlement Convention to Liechtenstein property and - if Germany was entitled to do so - argues that Germany then failed to compensate Liech-

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30 GPO, paras. 56-58.

31 GPO, para 58.

tenstein for the losses incurred. It is apparent that the Parties have opposing views on these issues on the merits.

C. The parties to the present dispute are Liechtenstein and Germany

1.10 Similarly misconceived is Germany's "admissibility" argument that Liechtenstein should demand compensation exclusively from the Czech Republic, but not from Germany, and that therefore there is no dispute between Germany and Liechtenstein.[32] Whether or not Liechtenstein may demand compensation from Germany is a question that belongs exclusively to the merits. When Germany states, without giving reasons, that "even if all statements on the facts made by Liechtenstein were held to be correct, they still would not justify a claim to compensation by Germany",[33] Germany objects to applying the compensation provisions in the Settlement Convention as well as the law of State responsibility. Germany itself is articulating a dispute that the Court has to decide on the merits.

1.11 Germany further asserts that somehow there is no dispute between Germany and Liechtenstein because there is (also) a dispute between Liechtenstein and former Czechoslovakia, which initiated the confiscations.[34]

1.12 Here, it is Germany that artificially tries to put another dispute before the Court. As noted already, there is a dispute between Liechtenstein and the Czech Republic. But the existence of such a dispute does not negate the existence of the separate dispute between Liechtenstein and Germany, which is based on Germany's unlawful conduct vis-à-vis Liechtenstein.

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32 GPO, para. 62.

33 GPO, para. 60.

34 GPO, para. 59-60.

D. Conclusion

1.13 In sum, by objective standards, a dispute exists between the Parties as to the lawfulness and legal consequences of Germany's conduct. There is, in particular, disagreement between the Parties as to whether Germany changed its position in the 1990s vis-à-vis Liechtenstein property when including it in the scope of the Settlement Convention, thus applying the reparations regime to neutral property. There is disagreement between the Parties as to whether Germany must compensate Liechtenstein. There is also disagreement between the Parties as to whether Germany failed to respect Liechtenstein's sovereignty and neutrality as well as the rights of Liechtenstein and its nationals. Hence, Germany's First Preliminary Objection must fail.

PART TWO

THE COURT'S JURISDICTION OVER THE DISPUTE UNDER THE EUROPEAN CONVENTION FOR THE PEACEFUL SETTLEMENT OF DISPUTES

CHAPTER 2

GERMANY'S ARGUMENT THAT ITS TREATMENT OF THE LIECHTENSTEIN PROPERTY IS WITHIN ITS DOMESTIC JURISDICTION

A. Introduction

2.1 In its Preliminary Objections, Germany argues that the dispute between the parties concerns a matter within Germany's domestic jurisdiction, which is correspondingly excluded from the Court's jurisdiction by Article 27 (b) of the European Convention for the Peaceful Settlement of Disputes (the European Convention).[35] This provides as follows:

> "The provisions of this Convention shall not apply to:
> ...
> (b) disputes concerning questions which by international law are solely within the domestic jurisdiction of States."

2.2 The three pages of Germany's Preliminary Objections[36] devoted to this issue are cursory in character. Not a single case of the Court dealing with the issue of domestic jurisdiction is cited; not a single authority is relied on.[37] Nor is there any detailed analysis of Article 27 (b) itself. Germany's pleading on this point is a summary attempt to avoid the Court dealing with the merits. As a preliminary plea it should - it is respectfully submitted - be summarily dismissed.

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35 Strasbourg, 29 April 1957, 464 *United Nations Treaty Series*, p. 243.

36 GPO, paras. 106-114.

37 The literature on domestic jurisdiction is of course extensive. See, e.g., C.B.H. Fincham, *Domestic Jurisdiction: the Exception of Domestic Jurisdiction as a Bar to Action by the League of Nations and the United Nations,* A.W. Sijthoff, Leiden, 1948; H. Waldock, "The Plea of Domestic Jurisdiction before International Legal Tribunals", *31 British Yearbook of International Law*, 1954, p. 96; M.S. Rajan, *United Nations and Domestic Jurisdiction,* 2nd ed., Asia Publishing House, London, 1961; R. Higgins, *The Development of International Law through the Political Organs of the United Nations,* Oxford University Press, London, 1963; D. Ciobanu, *Preliminary Objections Related to the Jurisdiction of the United Nations Political Organs,* Martinus Nijhoff, The Hague, 1975, pp. 37-45; A.A. Cançado Trindade, "The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organizations", *25 International and Comparative Law Quarterly*, 1976, p. 715; A.A. Cançado Trindade, "Domestic Jurisdiction and Exhaustion of Local Remedies: A Comparative Analysis", *16 Indian Journal of International Law*, 1976, p. 187; G.J. Jones, *The United Nations and the Domestic Jurisdiction of States: Interpretations and Applications of the Non-Intervention Principle,* University of Wales Press, Cardiff, 1979; G. Arangio-Ruiz, "The Plea of Domestic Jurisdiction Before the International Court of Justice: Substance or Procedure?" in V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice,* Cambridge University Press, Cambridge, 1996, p. 440; S. Rosenne, *The Law and Practice of the International Court, 1920-1996,* 3rd ed., Nijhoff, The Hague, 1997, pp. 774-778.

B. The interpretation of Article 27 (b) European Convention

2.3 The concept of domestic jurisdiction goes back at least to the Covenant of the League of Nations, and is of course reflected in the United Nations Charter, Article 2 (7). It has been dealt with on numerous occasions by the Court and its predecessor, so that questions of its interpretation are well enough known. This makes Germany's failure to refer to any of the authorities in point the more noteworthy.

2.4 Under Article 27 (b) of the European Convention, the obligations of peaceful settlement of disputes entailed by the Convention do not apply in certain limited cases. Article 27 (b) is thus an exception to a general provision intended to provide for the peaceful settlement of international disputes, and it should not be given an extensive interpretation. In any event its terms are clear and precise: it is only those disputes which "by international law" fall "solely" within the domestic jurisdiction of States that are excluded from the obligation of peaceful settlement.

"by international law"

2.5 The phrase "by international law" excludes any form of independent judgement on the part of the Defendant State, such as is implied in the so-called "automatic reservation" to the Statute of the Court. It picks up the Permanent Court's insistence, in the *Tunis and Morocco Nationality Decrees* opinion,[38] on international law as the criterion for what falls and what does not fall within the domestic jurisdiction of any State. Thus it is irrelevant that the object of a complaint is a law of the Respondent State or a decision of one of its courts; what may be domestic in origin may nonetheless concern a matter not within the domestic jurisdiction of that State. All this was well understood at the time of the conclusion of the European Convention.

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38 *Tunis and Morocco Nationality Decrees*, 1923 PCIJ, Ser. B, No. 4.

"solely"

2.6 Secondly, under Article 27 (b) it is necessary that the dispute fall "solely" within the domestic jurisdiction of the State invoking that exception. The negotiators of the European Convention would have needed no reminding of the significance of the term "solely" in this context. It was taken from Article 39 of the General Act for the Pacific Settlement of Disputes,[39] which in turn reflected Article 15 (8) of the Covenant of the League of Nations. Under these provisions, it was only when a matter was found to be solely within the domestic jurisdiction of a State that the Council was to abstain from making any recommendation for peaceful settlement. Thus a matter had not only to fall in principle within the reserved domain of domestic jurisdiction, it also had to do so "solely", i.e. exclusively or entirely. This contrasts with Article 2 (7) of the United Nations Charter, which uses the more flexible term "essentially". Faced with the choice between the terms "solely" and "essentially" - a choice which had been debated at the San Francisco Conference - the drafters of the European Convention opted for the more restrictive term.[40]

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39 Geneva, 26 September 1928, 93 *League of Nations Treaty Series*, p. 343.

40 See "*Final Report of the Committee of Experts on the Peaceful Settlement of Disputes and the Creation of a European Court of Justice*", in Council of Europe, Committee of Ministers, 13th Session, Strasbourg, 22 May 1953, CM (53) 58, p. 14 ("The Committee recognised that each of these texts had advantages and disadvantages and finally decided to adopt the formula of the General Act, which has therefore been used as the basis of its draft."). For discussions of the significance of the term "essentially" instead of "solely" see H. Lauterpacht, "The International Protection of Human Rights", *Recueil des Cours*, 1947-I, Vol. 70, pp. 5 *et seq.*, pp. 23-30; C.B.H. Fincham, *Domestic Jurisdiction: the Exception of Domestic Jurisdiction as a Bar to Action by the League of Nations and the United Nations,* A.W. Sijthoff, Leiden, 1948, esp. pp. 100-102; L. Preuss, "Article 2, Paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction", *Recueil des Cours*, 1949-I, Vol. 74, pp. 553 *et seq.*, pp. 597-604; M.S. Rajan, *United Nations and Domestic Jurisdiction,*2nd ed., Asia Publishing House, London, 1961, pp. 78-83; B. Simma (ed.), *The Charter of the United Nations: A Commentary,* Oxford University Press, New York, 1994, p. 142; H. Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems,* Lawbook Exchange, New Jersey, 2000, pp. 776-779.

C. The Court's approach to issues of domestic jurisdiction under international law

2.7 The Court's predecessor first addressed the issue of domestic jurisdiction in its Advisory Opinion No. 4, *Tunis and Morocco Nationality Decrees*.[41] The question there was whether Article 15 (8) of the League Covenant prevented the League Council dealing with a dispute concerning the conferral of Tunisian or Moroccan nationality on persons born respectively in Tunis or Morocco and having at least one parent born there. The Court held that this did not involve a matter solely within France's domestic jurisdiction under international law. In particular, the Court noted that

- Although paragraph 8 was intended to protect "the internal affairs of a country", it was in the nature of an exception and did "not therefore lend itself to an extensive interpretation".[42]

- The issue of domestic jurisdiction was a preliminary question. That is to say, "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, and that the question whether it is competent for one State to take certain measures is subordinated to the formation of an opinion with regard to the validity and construction of these legal grounds (*titres*), the provisions contained in Article 15 (8) cease to apply and the matter, ceasing to be one solely within the domestic jurisdiction of the State, enters the domain governed by international law".[43]

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41 *Tunis and Morocco Nationality Decrees*, 1923 PCIJ, Ser. B, No. 4.

42 *Ibid.*, p. 25.

43 *Ibid.*, p. 26.

- In that case, the parties relied on various international law instruments (e.g., the protectorate agreements concerning Tunis and Morocco),[44] on arguments drawn from international law (e.g., the *rebus sic stantibus* doctrine)[45] and on the practice of the parties (e.g., the alleged renunciation of rights by Great Britain or its alleged recognition of France's exclusive competence to legislate on matters of the nationality of Tunis).[46] Together and separately, these arguments and instruments justified the provisional conclusion "that the dispute [arose] out of a matter which, by international law, [was] not solely within the domestic jurisdiction of France".[47]

2.8 Three points may be drawn from the Permanent Court's careful and authoritative handling of the matter.

2.9 First, it is significant that *Tunis and Morocco Nationality Decrees* concerned an issue - the conferral of nationality - which has always been considered in the first place and in principle as a matter for each individual State, and thus in principle as falling within the reserved domain.[48] Yet even with respect to such a matter, the Court was at pains to stress that the invocation of a legal title and its denial by the other party was sufficient to take the matter outside the reserved domain, provided only that the Court could *provisionally* conclude that the title relied on was "of juridical importance for the dispute".[49]

2.10 Secondly, the primary effect of the challenged legislation in *Tunis and Morocco Nationality Decrees* was a matter which was internal to the territories in question and

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44 *Ibid.*, p. 27.

45 *Ibid.*, p. 29.

46 *Ibid.*, pp. 29-31.

47 *Ibid.*, pp. 31-32.

48 *Ibid.*, p. 24. See also *Nottebohm* case, *I.C.J. Reports* 1955, pp. 4 *et seq.*, p. 20; Convention on Certain Questions Relating to the Conflict of Nationality Laws, The Hague, 12 April 1930, 179 *League of Nations Treaty Series*, p. 89, Articles 1, 2.

49 *Tunis and Morocco Nationality Decrees*, 1923 PCIJ, Ser. B, No. 4, p. 26.

operated as a matter of their domestic law. Again, these considerations were not sufficient to trigger Article 15 (8). France's right to act in the matter was challenged by Great Britain, and the challenge involved arguments which the Court held, provisionally, were "of juridical importance". That determination in no way prejudged the merits of the dispute, on which the Court carefully refused to express any view whatever.

2.11 In the third place, the arguments and instruments relied on by the parties included treaties (the protectorate agreements) to which the United Kingdom was not a party. This did not prevent the Court from characterising the resulting situation as one falling within the international domain. France having invoked the protectorate agreements as a basis for its action, the interpretation of those agreements was thus provisionally of juridical importance to the dispute and prevented the matter falling within the scope of France's domestic jurisdiction.

2.12 The approach of the Permanent Court in *Tunis and Morocco Nationality Decrees* represents the approach of the Court to the present day. In fact the Court has never upheld a preliminary objection based on the characterisation of a dispute as falling within the domestic jurisdiction of the Defendant State under international law. It specifically refrained from doing so in the *Norwegian Loans* case, instead upholding Norway's invocation of the automatic reservation contained in France's Optional Clause declaration.[50]

2.13 The approach of the present Court can be seen in the *Right of Passage* case. There India's fifth preliminary objection concerned its reservation for matters "which by international law fall exclusively within the jurisdiction of the Government of India". India argued that there was no "reasonably arguable case" that any right of passage existed across Indian territory, and that therefore the matter fell within its domestic

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50 *Norwegian Loans* case, *I.C.J. Reports* 1957, pp. 9 *et seq.*, esp. p. 27.

jurisdiction.[51] It also argued that the parties (Portugal on the one side, the Marathas, Great Britain and India as successive territorial sovereigns on the other side) had always dealt with the issue "on the basis that it is a question within the exclusive competence of the territorial sovereign".[52] The Court did not address the question whether the claim was "reasonably arguable"; instead it noted that to interpret the practice of the parties "as signifying that the right of passage is a question which according to international law is exclusively within the domestic jurisdiction of the territorial sovereign" would require it to consider and interpret a substantial body of historical and other material, and that to do so would risk prejudging the merits.[53] It accordingly joined the fifth preliminary objection to the merits.

2.14 The Court returned to the issue in its merits judgment in 1960. It began by noting that the mere assertion by India that the rights invoked 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".[54] It went on to reject India's fifth preliminary objection, in the following passage:

> "In the present case Portugal is claiming a right of passage over Indian territory. It asserts the existence of a correlative obligation upon India. It asks for a finding that India has failed to fulfil that obligation. In support of the first two claims it invokes a Treaty of 1779, of which India contests both the existence and the interpretation. Portugal relies upon a practice of which India contests not only the substance, but also the binding character as between the two States which Portugal seeks to attach to it. Portugal further invokes international custom and the principles of international law as it interprets them. To contend that such a right of passage is one which can be relied upon as against India, to claim that such an obligation is binding upon India, to invoke, whether rightly or wrongly, such principles is to place oneself on the plane of international law ... To decide upon the validity of those principles, upon the existence

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51 *Right of Passage* case, *I.C.J. Reports* 1957, pp. 125 *et seq.*, pp. 149-150.

52 *Ibid.*, p. 150.

53 *Ibid.*

54 *I.C.J. Reports* 1960, pp. 6 *et seq.*, pp. 32-33.

> of such a right of Portugal as against India, upon such obligation of India towards Portugal, and upon the alleged failure to fulfil that obligation, does not fall exclusively within the jurisdiction of India."[55]

It may be noted that the fifth preliminary objection was rejected, despite the fact that in one crucial respect the rights of passage relied on by Portugal were held not to exist.

2.15 The authorities - in particular *Tunis and Morocco Nationality Decrees* and *Rights of Passage* - demonstrate that a matter will not fall solely or exclusively within the domestic jurisdiction of a Defendant State if, in respect of the disputed conduct, it has invoked arguments and instruments of international law, and / or the claimant State has invoked such arguments and instruments against it, with the result that the determination of the dispute may be considered - provisionally and without entering into the merits - to involve consideration of those arguments and instruments. In this respect no better test exists than that formulated by the Permanent Court in 1923: is it provisionally the case that the arguments and instruments relied on by either party may be considered "of juridical importance for the dispute"?

D. The test for domestic jurisdiction under international law applied to the present case

2.16 Applying that test to the circumstances of the present case, the answer is unequivocally yes, and consequently the matter is not solely within the domestic jurisdiction of Germany.

2.17 The present case concerns a dispute which arose when Germany, in and after 1995, asserted for the first time the right to apply the Settlement Convention to the property of Liechtenstein, a neutral in World War II. It arose with respect to property which

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[55] *Ibid.*, p. 33.

had been seized by a third State. Such a dispute is transparently not one solely within the domestic jurisdiction of Germany.

2.18 In the present case, Germany invoked the Settlement Convention, an international treaty, as a basis for its treatment of the Liechtenstein property. In and of itself that is sufficient to refute the argument based on domestic jurisdiction. There is a question, of juridical importance, whether the Settlement Convention is properly invoked vis-à-vis neutral property. There is a question, of juridical importance, whether a defeated State in a war is entitled to rely on a treaty such as the Settlement Convention vis-à-vis a non-party to that treaty. There is a question, of juridical importance, whether the Settlement Convention requires or permits Germany to defer to the erroneous classification of property as enemy property by an allied Power responsible for its seizure. There is a question whether, if so, any such provision of the Settlement Convention could be opposable to Liechtenstein. Not one of these questions (and they are only examples) is within the domestic jurisdiction of Germany even in principle - let alone *solely* within its domestic jurisdiction.

2.19 For its part, Liechtenstein claims that Germany was not entitled to treat the Liechtenstein property as coming within the scope of the Settlement Convention. It claims that Germany thereby has failed to respect Liechtenstein's sovereignty and neutrality. In the alternative it claims that Germany could only bring the Liechtenstein property within the scope of the Settlement Convention, as a matter of international law, on the condition that it pays compensation for the loss of that property. It claims that by treating Liechtenstein property as covered by the Settlement Convention, Germany was unjustly enriched; that Germany thereby acted to the manifest detriment of Liechtenstein, and that in consequence as a matter of international law Germany breached its international obligations to Liechtenstein. These claims may or may not prove to be ultimately well founded under international law - that is a matter for the merits. But they self-evidently do not raise issues which are solely or exclusively within Germany's domestic jurisdiction. As a result of the arguments and instruments relied on, the parties are placed "on the plane of international law" - to use the lan-

guage of the Court in the *Right of Passage* case[56] - and not solely or exclusively upon the plane of the domestic law or jurisdiction of Germany.

2.20 It is relevant to note that in the two rounds of diplomatic negotiations on the present dispute, Germany never suggested that the matter was exclusively within its domestic jurisdiction, with the result that Liechtenstein had no standing even to inquire into the treatment of the Liechtenstein property. On the contrary - as shown in Part One above and in further detail in the Appendix - Germany sought to justify its conduct as valid and lawful, or at any rate as involving an arguable construction of the Settlement Convention.

2.21 In fact other aspects of Germany's plea to the Court's jurisdiction themselves illustrate that the matter is not solely within its domestic jurisdiction. For example, Germany argues that issues of international responsibility cannot be determined in the absence of Czechoslovakia (or its successor States), which should properly be the Defendant. In short it relies on the *Monetary Gold* argument. The reasons why that argument cannot avail Germany in the present case are set out in Chapter 5, below. But in any event, it cannot be the case *both* that the *Monetary Gold* principle even arguably applies *and* that the matter falls solely within the domestic jurisdiction of the Defendant State. By definition the *Monetary Gold* principle involves cases where the legal positions of two States, the Defendant State and an absent State, are so intertwined that the former's rights or obligations cannot be determined in the absence of the latter.[57] Merely to invoke the *Monetary Gold* principle is, in effect, to accept that the matter is one on which certain international legal grounds (*titres*) are of juridical importance for the dispute - in other words, that the matter is not solely within the domestic jurisdiction of the State invoking that principle.

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56 *Ibid.*

57 See Case *concerning East Timor, I.C.J. Reports* 1995, p. 90.

2.22 Germany argues that because "a rule of public international law which German courts should have applied in this case does not exist", therefore the matter falls within Germany's domestic jurisdiction.[58] That argument is strongly reminiscent of India's fifth preliminary objection in the *Right of Passage* case - discussed above - that Portugal's asserted rights did not exist or were not reasonably arguable.[59] Such an assertion is a matter for the merits.

2.23 But in any event (1) Germany's argument assumes that the issue before this Court is exclusively the issue that was before the German courts, concerning the Pieter van Laer painting; and (2) that all this Court can do is to ask how the German courts should have decided the *Pieter van Laer* case. In both respects Germany is wrong.

2.24 As to the first point, it has already been explained that the present dispute concerns not just the treatment of the Pieter van Laer painting but the general position which it has become clear Germany now takes towards all the Liechtenstein property, viz., that it falls within the scope of the Settlement Convention, i.e. that it was "seized for the purpose of reparation or restitution" as a result of World War II. The question whether Germany is entitled to take that position is not a matter falling within Germany's domestic jurisdiction, even arguably - let alone solely.

2.25 As to the second point, it is not the function of international courts (in the absence of any special provision to the contrary) to act as courts of appeal of national courts. This Court is not asked to rewrite the judgments of the German courts but to determine for itself, in the light of applicable rules of international law, whether the conduct of Germany is or is not consistent with its obligations towards Liechtenstein, and whether, in light of Germany's conduct, it is obliged by international law to compensate Liechtenstein. Again, these questions do not fall (even arguably, let alone solely) within Germany's domestic jurisdiction.

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58 GPO, para. 109.

59 See above paras. 13-14.

2.26 For all these reasons, Germany's reliance on the domestic jurisdiction principle, as embodied in Article 27 (b) of the European Convention, must fail.

CHAPTER 3

GERMANY'S ARGUMENT THAT THE DISPUTE FALLS OUTSIDE THE COURT'S JURISDICTION *RATIONE TEMPORIS*

A. Introduction

3.1 Liechtenstein now turns to Germany's argument based on Article 27 (a) of the European Convention, i.e. concerning the temporal jurisdiction of the Court.

3.2 As stated in Liechtenstein's Application,[60] and elaborated in its Memorial, the present dispute between Germany and Liechtenstein arose as a result of a series of decisions of the German courts, beginning in 1995 and culminating in the final decision of the Federal Constitutional Court in 1998. As result of subsequent developments, including statements made by the Agent for Germany before the European Court of Human Rights (the ECHR)[61] and similar statements made by German representatives in bilateral discussions,[62] it became clear that the dispute was not limited to a single painting (the Kalkofen painting by Pieter van Laer) but that it extended to all the Liechtenstein property.

3.3 Despite these facts, Germany argues[63] that the present claim falls outside the Court's jurisdiction *ratione temporis*. In support of its temporal objection, Germany relies on Article 27 (a) of the European Convention, 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; ..."

3.4 It is agreed between the parties that the relevant date for the purposes of Article 27 (a) is 18 February 1980. This is the date on which the European Convention entered into force as between the two States. The question is whether the dispute between Liechtenstein and Germany is one "relating to facts or situations prior to the entry into force of this Convention" as between Liechtenstein and Germany.

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60 Application, para. 15.

61 Memorial, paras. 3.37-3.41.

62 See above paras. 6 and 1.6; Memorial, paras. 3.42-3.58.

63 GPO, paras. 64-105.

3.5 Before turning to the question of the interpretation of Article 27 (a), it is necessary to stress that the purpose of the European Convention is the settlement of disputes between European States. Too extensive an interpretation of the phrase "relating to facts or situations prior to the entry into force of this Convention" would undermine the object and purpose of the Convention. Most international disputes have a historical origin, often extending over a considerable period, and Europe is no exception. But, in applying or interpreting jurisdictional reservations or exceptions *ratione temporis*, the Court has never dwelt on the underlying or ultimate causes of disputes. Still less has it dwelt on the (often distant) origins of the legal situations in issue or of the obligations said to have been breached.

3.6 In invoking this exception to jurisdiction, Germany purportedly relies on a series of decisions of this Court and its predecessor, in particular *Phosphates in Morocco*, the *Electricity Company of Sofia and Bulgaria* case and the *Right of Passage* case.[64] But it gravely misreads these decisions. In effect it calls upon the Court - at the stage of preliminary objections - to act as a kind of forensic archaeologist, to dig deeper and deeper into the past so as to say that here, at some remote interval, lies the "real source", the *fons et origo*, the primal event without which there would now be no dispute. But this is not how the Court has interpreted these jurisdictional exceptions (B). Applying the Court's repeatedly reaffirmed test, the present dispute falls within jurisdiction (C).

3.7 As a preliminary point, it should be noted that most of the decisions dealing with the *ratione temporis* objection involved the so-called "Belgian" reservation, the two-pronged reservation limiting the Court's jurisdiction to disputes arising after a specific date with respect to situations or facts subsequent to that date. For the Court to have jurisdiction notwithstanding a reservation of this type, two distinct conditions

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64 *Phosphates in Morocco*, 1938 PCIJ, Ser. A/B, No. 74, p. 22; *Electricity Company of Sofia and Bulgaria,* 1939 PCIJ, Ser. A/B, No. 77, pp. 81 *et seq.*; *Right of Passage* case, *I.C.J. Reports* 1960, pp. 6 *et seq.*

must be met: the dispute must have arisen after the critical date, and it must be one relating to situations or facts subsequent to that date. In fact, Article 27 (a) of the European Convention contains only a single limitation, for "disputes relating to facts or situations prior to" the critical date. In its Preliminary Objections, Germany discusses the case-law dealing with the Belgian reservation on the basis that it is equally applicable to Article 27 (a).[65] Liechtenstein agrees with this approach. In the present case, no dispute existed between the parties as to the subject of the present proceedings prior to 1995. Thus the only question is whether the dispute which then arose relates to situations or facts prior to 1980, and that question is in substance exactly the same as the question raised by the second prong of the "Belgian" reservation.

B. The Court's approach to *ratione temporis* reservations

3.8 The issue of how to interpret reservations *ratione temporis* first arose before the Permanent Court in *Phosphates in Morocco*. In 1931 France had accepted the Court's jurisdiction "in any disputes which may arise after the ratification of the present declaration with regard to situations or facts subsequent to such ratification".[66] Italy, also a party to the Optional Clause, commenced proceedings in 1936 complaining that Italian nationals had been deprived of their rights to prospect for phosphates. In particular it pointed to a Moroccan decree of 1920 and a decision of the Mines Department in 1925. Italy argued that the international wrong was only perfected when the French authorities in Morocco failed to overturn these decisions or to provide any remedy for them.

3.9 The Court disagreed. In its view:

> "The situation which the Italian Government denounces as unlawful is a legal position resulting from the legislation of 1920; and... cannot be considered separately from the legislation of which it is the result ... If,

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65 See, e.g., GPO, para. 67.

66 *Phosphates in Morocco*, 1938 PCIJ, Ser. A/B, No. 74, p. 22.

> by establishing the monopoly, Morocco and France violated the treaty régime of the General Act of Algeciras of April 7th, 1906, and of the Franco-German Convention of November 4th, 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. But these dahirs are 'facts' which, by reason of their date, fall outside the Court's jurisdiction."[67]

Italy argued that the breach in question was a continuing wrongful act, and it also relied on later acts, in particular an alleged denial of justice in the period 1931 - 1933, to avoid the operation of France's reservation. The Court rejected both arguments. The notion of a continuing wrongful act was irrelevant from the point of view of its jurisdiction: if the dispute over an allegedly wrongful act arose before 1931 and concerned situations or facts prior to that date, whether the wrongful act continued after 1931 made no difference:

> "an examination of the justice of this complaint [as to a continuing wrongful act] could not be undertaken without extending the Court's jurisdiction to a fact [sc., the decision of 1925] which, by reason of its date, is not subject thereto".[68]

3.10 As to Italy's argument based on denial of justice, the Court said that it did not represent a "new fact which could have given rise to the present dispute":

> "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*. This act being attributable to the State and described as contrary to the treaty right of another State, international responsibility would be established immediately as between the two States. In these circumstances the alleged denial of justice, resulting either from a lacuna in the judicial organization or from the refusal of administrative

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67 *Ibid.*, pp. 25-26.

68 *Ibid.*, p. 29.

> or extraordinary methods of redress designed to supplement its deficiencies, merely results in allowing the unlawful act to subsist. It exercises no influence either on the accomplishment of the act or on the responsibility ensuing from it.
> ...
> Accordingly, whatever aspect of the question is considered, it is the decision of the Department of Mines of January 8th, 1925, which is always found, in this matter of the dispossession of the Italian nationals, to be *the fact with regard to which the dispute arose.*"[69]

3.11 Thus the Court interpreted the French reservation *ratione temporis* as requiring it to determine the "fact with regard to which the dispute arose", the specific act which (according to the claim presented in the Application) definitively gave rise to the Defendant's responsibility - or would do so if the view of the law and the facts presented by the Applicant were to be upheld by the Court. By clear implication, the background situation (even if necessary to the dispute in the sense that without it the dispute would not have arisen) was not a situation or fact capable of triggering the French exception *ratione temporis*. Nor of course was the origin or date of the obligation said to have been breached. Both the background situation and the obligation invoked were necessary to an eventual finding of responsibility in accordance with the Applicant's case, but neither individually nor together were they sufficient to sustain the claim.

3.12 The question may thus be presented as follows: which fact or situation was both necessary and sufficient, in the circumstances alleged by the Applicant, to give rise to responsibility, assuming of course, for this purpose, that the Applicant's legal arguments were to be sustained? In *Phosphates in Morocco* the necessary and sufficient cause was the decision of January 1925, and the French reservation accordingly applied.

3.13 That this is the correct interpretation of *Phosphates in Morocco* is clear from the treatment of that decision in subsequent cases. In the following year the Permanent

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69 *Ibid.*, pp. 28-29 (emphasis added).

Court upheld its jurisdiction under the Optional Clause notwithstanding a reservation *ratione temporis*, and in doing so authoritatively explained its earlier decision. Belgium's claim in *Electricity Company of Sofia and Bulgaria (Preliminary Objections)*[70] arose from a decision of a Mixed Arbitral Tribunal in 1923 and 1925, i.e., before the critical date of acceptance of jurisdiction, which was in 1926. Difficulties subsequently occurred in interpreting and giving effect to the Mixed Arbitral Tribunal's decision and a dispute arose after the critical date. Bulgaria argued that the crux of the dispute was the interpretation and application of the rate-fixing formula in the Tribunal's decision, and that the case therefore concerned a situation or fact prior to the critical date. The Court rejected that argument. It said:

> "It is true that it may be said that the awards of the Mixed Arbitral Tribunal established between the Belgian Electricity Company and the Bulgarian authorities a situation which dates from before March 10th, 1926, and still persists at the present time. *Nevertheless, the dispute between the Belgian Government did not arise with regard to this situation or to the awards which established it.* The Court would recall in this connection what it said in the Judgment of June 14th, 1938 (Phosphates in Morocco, Preliminary Objection). *The only situations or facts which must be taken into account from the standpoint of the compulsory jurisdiction accepted in the terms of the Belgian declaration are those which must be considered as being the source of the dispute.* No such relation exists between the present dispute and the awards of the Mixed Arbitral Tribunal. The latter constitute the source of the rights claimed by the Belgian Company, but they did not give rise to the dispute, since the Parties agree as to their binding character and that their application gave rise to no difficulty until the acts complained of. It is not enough to say, as it is contended by the Bulgarian Government, that if it had not been for these awards, the dispute would not have arisen, for the simple reason that it might just as well be said that, if it had not been for the acts complained of, the dispute would not have arisen. It is true that a dispute may presuppose the existence of some prior situation or fact, but it does not follow that the dispute arises in regard to that situation or fact. A situation or fact in regard to which a dispute is said to have arisen must be the real cause of the dispute. In the present case it is the subsequent acts with which the Belgian Government reproaches the Bulgarian authorities with regard to a particular application of the formula - which in itself has never been dis-

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70 *Electricity Company of Sofia and Bulgaria,* 1939 PCIJ, Ser. A/B, No. 77, pp. 81 *et seq.*

> puted - which form the centre point of the argument and must be regarded as constituting the facts with regard to which the dispute arose."[71]

The Permanent Court thus looked for the source of the dispute, not in the sense of an ultimate or anterior cause but in the sense of the direct occasion which gave rise to the dispute and which in fact constituted "the centre point of the argument".

3.14 The present Court has adopted the same approach in a number of cases.

3.15 In the *Right of Passage* case, India in its sixth preliminary objection invoked an Optional Clause reservation in similar terms to the Belgian reservation. The Court observed that the dispute had a number of aspects, concerning *inter alia* the very existence of a right of passage as well as the lawfulness of India's denial of that right in 1954. The Court had no difficulty in holding that the dispute relating to the denial of the right of passage could not have arisen until 1954.[72] But - more relevantly for the present case - it went on to hold that even that part of the dispute as to the *existence* of the right only arose in 1954. It said:

> "Even if we consider only the part of the dispute relating to the Portuguese claim, which India contests, to a right of passage over Indian territory, the position is the same. 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 ...
>
> Up to 1954 the situation of those territories may have given rise to a few minor incidents, but passage had been effected without any controversy as to the title under which it was effected ...".[73]

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71 1939 PCIJ, Ser. A/B, No. 77, pp. 81-82 (emphasis added).

72 *Right of Passage* case, *I.C.J. Reports* 1960, pp. 6 *et seq.*, p. 34.

73 *Ibid.*, pp. 34-35.

Thus even where there may be some lack of agreement between the parties, as manifested by "minor incidents", it is only when the parties "adopt clearly-defined legal positions as against each other" that the dispute arises.

3.16 Moreover the Court went on to draw implications from this approach for the second question under the "Belgian" reservation, viz., whether the dispute related to facts or situations after the critical date. As it said:

> "The facts or situations to which regard must be had in this connection are those with regard to which the dispute has arisen ...
>
> ... It was only in 1954 that such a controversy arose and the dispute relates both to the existence of a right of passage to go into the enclaved territories and to India's failure to comply with obligations which, according to Portugal, were binding upon it in this connection. It 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]. The time-condition to which acceptance of the jurisdiction of the Court was made subject by the Declaration of India is therefore complied with."[74]

In *Right of Passage*, this Court thus distinguished sharply between the situations or facts giving rise to the obligation said to have been breached and the situations or facts directly associated with the breach. Only the latter had to have occurred after the critical date. In this respect the approach adopted by the Court is entirely consistent with that of its predecessor, and in particular with the relatively strict interpretation of the notion of "real cause" adopted in *Electricity Company of Sofia and Bulgaria (Preliminary Objections)*.

3.17 The implications of the Court's approach can be seen very clearly from its consideration of the merits of Portugal's claim. In its judgment the Court referred to treaties concluded by the Maratha rulers of India in the 18th century and by the British in the 19th century, to Maratha *sanads* or decrees of 1783 and 1785 and to the practice of

the authorities in question over the entire period (including the period before the critical date of 1930). Crucial items of practice occurred in the period 1890-1891.[75] Yet none of this impaired the Court's jurisdiction under the Optional Clause declarations of the parties.

3.18 The decision in *Right of Passage* may be contrasted with that in the *NATO* cases. There, Yugoslavia had accepted the jurisdiction of the Court by an Optional Clause declaration on 25 April 1999, with a temporal reservation along the lines of the "Belgian" reservation. The bombing campaign of which it complained had already commenced before that date and continued thereafter. Before that date, Yugoslavia had already complained of the attacks, for example to the Security Council, and the various parties had already adopted "clearly-defined legal positions". In these circumstances the Court had no doubt that a legal dispute had arisen "well before 25 April 1999 concerning the legality of those bombings as such, taken as a whole".[76] That dispute arose between Yugoslavia and each of the States associated with the campaign. The Court added:

> "Whereas the fact that the bombings have continued after 25 April 1999 and that the dispute concerning them has persisted since that date is not such as to alter the date on which the dispute arose; whereas each individual air attack could not have given rise to a separate subsequent dispute; and whereas ... Yugoslavia has not established that new disputes, distinct from the initial one, have arisen between the Parties since 25 April 1999 in respect of subsequent situations or facts attributable to Belgium ..."[77]

3.19 Although this was not a final decision on the question of jurisdiction, it gives a clear indication of the Court's current approach to reservations *ratione temporis*. Again the

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74 *Ibid.*, p. 35 (emphasis added).

75 *Ibid.*, pp. 37-44. The scope of the material considered, and the materiality of the earlier practice, can be seen from the dissenting opinion of Judge Spender *ibid.*, pp. 101-108.

76 *Legality of Use of Force (Yugoslavia v. Belgium)*, Provisional Measures, Order of 2 June 1999, *I.C.J. Reports* 1999, pp. 124 *et seq.*, p. 134, para. 28.

77 *Ibid.*, pp. 134 *et seq.*, para. 29. The Court made equivalent findings in the parallel cases brought under the Optional Clause against other NATO Member States.

Court adopted the same approach to the *ratione temporis* issue as it had in the *Right of Passage* case and as its predecessor had in *Phosphates in Morocco*, and *Electricity Company of Sofia and Bulgaria (Preliminary Objections)*.

3.20 To summarize, in applying *ratione temporis* reservations or exclusions the Court looks at the facts or situations associated with the outbreak of the dispute itself. There must be a direct and proximate link between the facts or situations and the dispute: it is not enough that earlier facts or situations may have in a sense predisposed the parties in respect of the dispute. International disputes (like some industrial accidents) may be events waiting to happen. But not every potential dispute turns into an actual dispute (just as not every dangerous situation causes loss or injury). Thus in the *Right of Passage* case, the Court was prepared to overlook earlier incidents which it characterised as "minor". In retrospect it may be doubted whether India and Portugal were truly *ad idem* at any stage on the existence or extent of the right of passage, but nonetheless no dispute arose. For its part the Court looked at the events which actually occurred and identified a dispute (and the facts and situations relating to that dispute) only when the dispute actually arose, and not by way of speculation or anticipation. Under international law, there is no dispute until, as a matter of history, the crucial triggering event has occurred, leading the parties to define their opposing positions with some degree of precision. In such a case the earlier origin of some aspect of the dispute - still less of the obligation alleged to have been breached - is immaterial.

C. Applying the Court's approach, the present case is within its jurisdiction

3.21 In the present case the dispute arose only after Germany, initially through its courts and subsequently through acts of its executive organs, asserted that the Liechtenstein property was from a German point of view to be treated under the Settlement Convention, i.e., that it could properly be considered by Germany as property seized for the purpose of reparation. That was an act or series of acts of Germany clearly lo-

cated in time, in the period from 1995 onwards.[78] It is true that like many State acts it has to be understood against the background of earlier events, including some before the critical date,[79] and that it took effect in relation to a legal regime, that of the Settlement Convention, which came into existence prior to that date. For the reasons given, however, none of this makes any difference to the application of the *ratione temporis* objection.

3.22 As this Court said in the *Right of Passage* case, "[t]he facts or situations to which regard must be had in this connection are those with regard to which the dispute has arisen ...".[80] The dispute arose in the 1990s, well after the critical date, with regard to the conduct of organs of the German State which occurred after that date. It was only then that Germany actually decided to treat the Liechtenstein property as falling under the Settlement Convention.

> "It 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]".[81]

Germany's two-fold approach

3.23 Faced with the Court's consistent jurisprudence, Germany adopts a two-fold approach. First, it denies that the Court's established test can be applied to the present case. Secondly, it re-characterizes, and in so doing caricatures, Liechtenstein's case.

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78 Germany complains that Liechtenstein is inconsistent in specifying precisely when the dispute arose, see GPO, paras. 31, 98. As so often, the dispute took some time to fully emerge, given the German court processes and subsequent events. No question arises, however, for the purposes of the present preliminary objection, whether the dispute arose in 1995 or 1998.

79 In this case, 18 February 1980 when Liechtenstein ratified the European Convention.

80 *Right of Passage* case, *I.C.J. Reports* 1960, pp. 6 *et seq.*, p. 35.

81 *Ibid.*

1. Germany's attempt to rewrite the Court's case-law

3.24 As to the first point, as has been demonstrated the Court's jurisprudence has consistently distinguished between:

(1) the central or catalytic fact which triggers the dispute, on the one hand, and, on the other hand, background facts which might have been necessary preconditions for a dispute to arise but which in themselves did not produce the dispute, and

(2) the actual and direct cause of the dispute, on the one hand, and, on the other hand, the bases for the right or obligation alleged to have been ignored or infringed.

3.25 In its Preliminary Objections, Germany tries to ignore both distinctions. For example, it 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".[82] This is mere assertion. In the *Right of Passage* case, the Court had no difficulty in drawing such a distinction, even with respect to that aspect of the dispute which concerned the scope of the rights claimed.[83] Similarly, here there is a clear distinction in principle between the legal situation in which the parties were placed after 1990 and the event which caused the dispute, i.e., which was its actual source.

3.26 Germany also argues that "[t]he case brought before the Court could not be decided without judging upon the reparations regime established in 1945 and thereafter".[84] But the present dispute did not arise because of the reparations regime as such. It was the decision by Germany to apply that regime to the Liechtenstein property which

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82 GPO, para. 77.

83 See above para. 3.16.

84 GPO, para. 96.

gave rise to the dispute. Of course in dealing with that dispute the Court will have to consider the reparations regime, but that does not make the regime the real source or center piece of the dispute in the sense of these terms adopted in the Court's jurisprudence. In the *Right of Passage* case the Court clearly "judged upon" the scope of the regime of passage between Goa and the Portuguese enclaves, and in doing so had regard to treaties and other instruments dating back to the 18th century.[85] Nonetheless it did so with respect to a dispute which only arose in 1954, when the legal positions of the 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 that right had been denied. It was this latter fact or situation which was the focus of the dispute, and which was determinative for the purposes of jurisdiction *ratione temporis*. Precisely the same situation applies here. The seizure of the Liechtenstein property by Czechoslovakia did not give rise to the present dispute. Nor did the reparations regime. What triggered the dispute was Germany's decision to treat the Liechtenstein property as covered by the reparations regime. That decision occurred long after the critical date for the purposes of Article 27 (a) of the European Convention.

3.27 In this regard Germany asserts that the position taken by its courts involved no novel doctrine, and that the German jurisprudence has always been clear and consistent.[86] But the German courts had never previously been faced with a case concerning Liechtenstein property. It was not incumbent upon Liechtenstein to anticipate what the German courts might do, or what attitude the German executive might adopt, in the event that a case involving the quite separate issue of the Liechtenstein property were to arise. When it did arise - in the 1990s - complex questions of German civil and constitutional law had to be dealt with, as the Court will discern from reading the decisions set out in Vol. II of Germany's Preliminary Objections.[87] But the present

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85 See above para. 3.17.

86 GPO, para. 100. See also *ibid.*, paras. 77, 83, 86, 90, 98.

87 Germany presents these issues as simple, straightforward and routine. Perhaps fortunately the Court is not asked to judge their degree of difficulty against some norm for German jurisprudence. But it may

dispute is not a dispute about the predictable or unpredictable content of German civil or constitutional law; it is a dispute about whether Germany was entitled as a matter of international law to treat any item of Liechtenstein property as covered by the Settlement Convention or as seized by way of reparation. The German judicial and executive positions, taken in the 1990s, were the necessary and sufficient source or cause of the international dispute which then immediately arose. In order to deal with this preliminary objection, the Court has no need to engage in some counter-historical speculation as to what might have happened if a similar question had arisen before the German courts before 1980. It is sufficient to say that it did not.

2. Germany's attempt to rewrite Liechtenstein's Application

3.28 Germany's second general strategy - in response to the well-established and rather narrow approach to temporal limitations on the Court's jurisdiction - is to reformulate Liechtenstein's claims, in effect to rewrite the Application. As noted already, Germany re-characterizes, and in so doing caricatures, Liechtenstein's case.

3.29 Germany adopts its own version of the case, which bears no relationship to the actual case. It asserts that Liechtenstein's "entire case revolves around the confiscation of Liechtenstein property by Czechoslovakia in 1945 and thereafter and possible legal consequences of those confiscations".[88] This is a simple misreading. For 35 years following the seizure of the Liechtenstein property under the Beneš decrees, there was no dispute on that subject between Liechtenstein and Germany. It was only in the 1990s - following the amendment to the Settlement Convention which deleted any reference to compensation - that Germany took the position that the Liechtenstein property could properly be considered German for the purposes of that Convention, i.e., that it was covered by the reparations regime. It was at this point, and not before,

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be noted that the three decisions of the German courts did not coincide in their reasoning in all respects, and that the Federal Constitutional Court granted interim relief before its decision in the Pieter van Laer case - an unusual if not entirely unprecedented step for that Court. See further Appendix I, paras. A2-A11, for an analysis of the German case-law.

88 GPO, para. 77.

that a dispute arose. As has already been explained, it was that decision, or series of decisions, by Germany which gave rise to the dispute and which constitutes the focal point of the present case.

3.30 Indeed Germany itself recognizes - rather oddly in terms of its submission on this point - that there was no dispute between Liechtenstein and Germany in 1980. It states that "[n]o factual or legal situation existed in 1980 on which Liechtenstein could rely".[89] As against Germany, in 1980, that was true - in the sense that there was no issue between Germany and Liechtenstein in 1980 as to the scope of the Settlement Convention, nor any confusion between them as to whether Liechtenstein property was to be treated as if it were German property. Indeed, that is precisely the point. To the extent that Liechtenstein was "completely inactive" vis-à-vis Germany in the period 1980 - 1995,[90] the reason was that the issue had not yet arisen.

3.31 Germany argues that Liechtenstein's presentation of the case focuses exclusively on events prior to 1980 - in its own words, "always prior to 1980".[91] Again this is simply untrue. Liechtenstein's Application and Memorial deal with events both before and after 1980, as appropriate. Liechtenstein has already demonstrated by reference to the Court's case-law why events prior to the critical date for the purposes of jurisdiction *ratione temporis* may nonetheless be relevant in deciding a dispute which arose subsequently and which relates to some catalytic event subsequently occurring.

3.32 In this context Germany asserts that it is "quite incorrect to see [the *Pieter van Laer* case] as the real source of the present case".[92] Yet as a simple matter of history the *Pieter van Laer* case was the trigger of the dispute, which was subsequently exacerbated when Germany applied the same principle to the Liechtenstein property in general. That case, and subsequent developments set out in Liechtenstein's pleadings,

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89 *Ibid.*

90 See GPO, paras. 101-102.

91 GPO, para. 72.

92 GPO, para. 79.

made it clear for the first time that Germany regarded the Liechtenstein property as coming within the scope of the reparations regime. Whether those decisions marked an actual change in Germany's position, or whether they applied earlier German cases to a new situation, is irrelevant for present purposes. On either hypothesis, the treatment of Liechtenstein assets as German actually occurred for the first time after 1990. It is not enough for Germany to assert that its position would have been the same if the issue of the treatment of Liechtenstein property had arisen prior to 1980. First of all, it is by no means clear that this is true: the matter was never tested, as has been shown in Chapter 1, and in further detail in Appendix 1. Indeed it was never even envisaged as a possibility, either in the case-law or in the legal literature. But even if it were to be accepted (for the sake of argument) that the *Pieter van Laer* case might have gone the same way had it arisen for decision by the German courts before 1980, to assert this is to ignore the actual history of the matter. It may be that, in the *Right of Passage* case, India would have blocked the transit of arms across its territory if an insurrection had broken out in the enclaves in 1949. But that was not what happened. For the purposes of a *ratione temporis* objection, the Court has to look at the facts as they occurred, and not to speculate on alternative scenarios. Disputes between States are historical events, not exercises of the imagination.

3. Germany's attempt to avoid a merits hearing by repeated conclusory assertions

3.33 Finally, Germany makes a series of conclusory assertions on issues belonging properly to the merits.

- For example, it asserts that Germany never changed its position after 1955.[93] Liechtenstein disagrees, has specified the changes of position involved, and has shown that they occurred after 1980. That being so, *whether* there has been such a change of position is a matter for the merits.

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93 GPO, para. 77; similarly GPO, para. 85.

- Germany asserts that "no ... legal situation had ever been recognized between" Germany and Liechtenstein.[94] Again, Liechtenstein disagrees. In its view, until the 1990s the parties had a common understanding that Liechtenstein property was not German property and was not covered by the reparations regime. If Germany can show that Liechtenstein and Germany proceeded on a different assumption prior to 1995, that would be relevant to the merits, but the German argument amounts simply to a denial of Liechtenstein's case and has nothing to do with jurisdiction *ratione temporis*.
- Germany asserts that the issues of the scope of the reparations regime and the position of World War II neutrals "had run their full course prior to 1980". Yet again, Liechtenstein disagrees. These questions are still entirely live ones, capable of affecting legal and other developments to this very day.

3.34 For all these reasons, Liechtenstein submits that the Court has jurisdiction to deal with the dispute which arose between Liechtenstein and Germany in the 1990s, and that there is no relevant temporal limitation or exclusion on the Court's jurisdiction.

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94 GPO, para. 81.

PART THREE

THE ADMISSIBILITY OF LIECHTENSTEIN'S CLAIMS AGAINST GERMANY

CHAPTER 4

GERMANY'S ARGUMENT BASED ON LACK OF SUBSTANTIATION

A. Introduction

4.1 Germany devotes 25 pages of its Preliminary Objections to an attempt to demonstrate that "Liechtenstein's claims are not sufficiently substantiated"[95]. In Liechtenstein's views, this Fourth Preliminary Objection is manifestly misconceived and does not deserve such a lengthy answer, all the more so as the main part of this "objection" is devoted in fact to discussing the substance of the case.

4.2 Germany alleges that Liechtenstein has not presented sufficient evidence as to the object and scope of the dispute and that, therefore, it is not in a position to properly argue its case. In substance, Germany contends that Liechtenstein has not demonstrated any interference by Germany with Liechtenstein property[96], that it has distorted the German case-law concerning the Settlement Convention of 1952,[97] that it has improperly substantiated its claims as far as it invokes diplomatic protection,[98] and that it has not established any violation of Liechtenstein's neutrality and sovereignty.[99] According to Germany, all these alleged weaknesses in Liechtenstein's case are the results of the choice of the wrong State as Defendant.[100]

4.3 The summary above - based simply on the titles of the sub-sections of Chapter II, Section I, of Germany's Preliminary Objections - is sufficient to conclude that this so-called "objection" is by no means preliminary in essence: it shows that Germany disputes the *merits* of Liechtenstein's case. At the same time it does confirm beyond any doubt that there exists a dispute between Liechtenstein and Germany.[101]

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95 GPO, paras. 115-150.

96 GPO, paras. 121-124.

97 GPO, paras. 125-130.

98 GPO, paras. 131-142.

99 GPO, paras. 143-149.

100 GPO, paras. 118-120.

101 See above Chapter 1.

4.4 It is apparent from the very drafting of Germany's statements that it has perfectly well grasped the object and scope of the dispute and is thus in a situation to present its own case - which indeed it does throughout that Section of its Preliminary Objection devoted to the fourth so-called "Preliminary Objection" (B). In consequence, there can be no doubt that Liechtenstein's Application and Memorial do meet the requirements of the Court's Statute (Article 40 (1)) and Rules (Article 38 (2)) (C). Moreover, if it were true that Liechtenstein has not given sufficient factual or legal evidence of its case, it is certainly not a preliminary matter and it falls on Liechtenstein to lay out its case at the stage of the merits (D).

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

4.5 Germany alleges:

> "The present case ... is absolutely unique in the history of adjudication in that the Applicant refrains from providing almost all of the relevant factual data. Neither can Germany guess what is really at stake, nor will the Court be able to grasp the essence of this case, in particular its factual dimension".[102]

4.6 With respect to the violation of Liechtenstein's sovereignty and neutrality, Germany has no difficulty in grasping the object of Liechtenstein's case and adds:

> "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".[103]

4.7 Such statements show without the shadow of a doubt that both the Application and the additional clarifications and developments in the Memorial have been rightly un-

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102 GPO, para. 117.

103 GPO, para. 143.

derstood by Germany. Definitely, the inclusion of Liechtenstein's assets under the reparations scheme as a result of the decisions of the German courts, subsequently endorsed by the German authorities, during the 1990s, is the cornerstone of the present dispute and constitutes the (complex) internationally wrongful act that Liechtenstein complains of. It is thus the "very essence" of the present dispute, and Germany perfectly understood this. Furthermore, the German courts had not previously dealt with Liechtenstein assets: that is not in dispute.

4.8 Moreover, Germany complained of the insufficient substantiation of Liechtenstein's allegations making impossible any attempt to "organize its defence". Once again, the drafting of the Preliminary Objections and their content demonstrate the contrary. Germany is not at all in the "dire situation"[104] it blames Liechtenstein for. The entire Forth German Preliminary Objection constitutes a discussion (albeit unconvincing) of the merits of Liechtenstein's claims.

4.9 The core of this Section of the Preliminary Objections consists of Germany's allegations according to which the facts and the legal arguments brought to the Court by Liechtenstein are not founded or amount only to a "purposeful invention". This is apparent in respect with:

- the attribution to Germany of the losses sustained by Liechtenstein and its nationals;[105]

- the reality and nature of these losses;[106]

- the interpretation of the jurisprudence of the German courts which initiated Germany's change of position;[107]

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104 GPO, para. 116.

105 GPO, paras. 119-120.

106 GPO, paras. 138-142.

107 GPO, paras. 123 and 125.

- the conclusions to be drawn from Germany's endorsement of this case-law;[108]

- the violation of Liechtenstein's neutrality and sovereignty.[109]

4.10 The preliminary objections phase is, by no means, the proper occasion for a rebuttal of these ill-founded arguments and Liechtenstein does not intent to present a response to these allegations at this stage of the proceedings. However they certainly prefigure the German argument on the substance of the case and show that Germany was effectively in a position to develop a defence to Liechtenstein's submissions, and that it undertook to do this by using the facts and legal statements contained in both the Application of 30 May 2001 and the Memorial of 28 March 2002. Consequently, it is to be acknowledged that Germany is certainly not in the "dire situation" it claims.

4.11 Germany is in fact seeking to slip over to the merits stage of the case trying to establish the absence of its "change of position". Time and again, Germany denies that it changed its position by any means whatsoever. Thus, it states

> "explicitly that the alleged 'change of position of Germany' never occurred and is neither based on or supported by any demonstrable facts".[110]

4.12 This allegation, which is the very essence of Germany's argument in its "Preliminary Objections", is clearly an argument on the merits of the case, not a preliminary matter. It confirms not only that, contrary to Germany's First Preliminary Objection ("There exists no dispute between Liechtenstein and Germany"), there is a real dispute between Germany and Liechtenstein concerning the meaning and the conse-

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108 GPO, paras. 126-128.

109 GPO, paras. 143-149.

quences of the German tribunals' decisions and the interpretation of the facts as well as the subsequent endorsement of these decisions by the German Government. Moreover, this allegation is not of a preliminary nature; it pertains to the merits of the case, not to its admissibility.

4.13 As Shabtai Rosenne explained:

> "it is probable that when the facts and arguments in support of the objection are substantially the same as the facts and arguments on which the merits of the case depend, or when to decide the objection would require a decision on what, in the concrete case, are substantive aspects of the merits, the plea is not an objection but a defense to the merits".[111]

This holds true for virtually all the "objections" raised by Germany, not only the fourth one: in the present case, the Court could not make a pronouncement on any of them without prematurely taking a position on facts and arguments pertaining to the merits of the case.

C. The Lichtenstein's Application and Memorial meet the requirements of the Court's Statute and Rules

4.14 The fact that Germany grasps perfectly well the "very essence" of the dispute from Liechtenstein's Application and Memorial constitutes strong evidence of their conformity with the requirements of the Court's Statute and Rules. Article 40 (1) of the Statute of the Court provides:

> "Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated".

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110 GPO, para. 32.

111 S. Rosenne, *The Law and Practice of the International Court, 1920-1996*, 3rd ed., Nijhoff, The Hague, 1997, Vol. II, p. 915.

Article 38 (2) of the Rules of the Court further details these requirements with regard to the Application:

> "The application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based; it shall also specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based".

4.15 Germany has correctly explained the meaning and scope of these requirements.[112] These provisions do not require a "complete" statement of facts and grounds, but only a "succinct" one.[113] In the *Northern Cameroons* case, the Court decided

> "that whilst under Article 40 of its Statute the subject of a dispute brought before the Court shall be indicated, Article 32 (2) of the Rules of Court [presently Article 38 (2)] requires the Applicant 'as far as possible' to do certain things. These words apply not only to specifying the provision on which the Applicant founds the jurisdiction of the Court, but also to stating the precise nature of the claim and giving *a succinct statement of the facts and grounds on which the claim is based*".[114]

4.16 This is precisely what the Application of 30 May 2001 does in the present case. It contains "a succinct statement of the facts and grounds on which the claim is based" and provides an overview of the factual and legal issues of the case which is to be argued and developed in the course of the proceedings. Liechtenstein has clearly indicated the underlying grounds, i.e. the change of position of Germany by a series of judicial decisions, subsequent conduct, and diplomatic exchanges,[115] including a brief summary of the relevant facts which occurred prior to the change of position.[116] Simultaneously it has set out the main legal grounds on which its claims are based.

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112 GPO, para. 117.

113 See *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, 11 June 1998, *I.C.J. Reports* 1998, p. 318, para. 98.

114 *Northern Cameroons* case, Preliminary Objections, *I.C.J. Reports* 1963, p. 28 (emphasis added).

115 Application, paras. 17-20.

116 Application, paras. 4-16.

4.17 As for the Memorial of 28 March 2002, it does "contain a statement of the relevant facts, a statement of law, and the submissions" as required in Article 49 of the Rules of Court. It clearly meets the requirements enunciated by the Permanent Court of International Justice in the *Phosphates in Morocco* case when it stated that it was necessary

> "that the explanations furnished in the course of the written and oral proceedings enable it to form a sufficiently clear idea of the nature of the claim ...".[117]

4.18 In its Memorial, Liechtenstein has detailed its presentation of the decisions of the German courts and tribunals concerning the *Pieter van Laer* case,[118] the statements of the Municipality of Cologne[119] and of the Federal Republic.[120] All these explanations sustain its claims. Furthermore, very detailed legal arguments have been made in the Memorial - a fact which has been acknowledged by Germany,[121] more specifically on the violations of international law constituted by the German conduct.

4.19 Of course, it is Germany's right to challenge Liechtenstein's views both concerning the facts and the law at the stage of the merits and, as shown above (paras. 4.11 - 4.12), this is precisely what Germany does in its Preliminary Objections, more particularly in Section 1 of Chapter II of Part III. However, the mere fact that Germany is in a position to do so, suffices to show that Liechtenstein's Application and Memorial comply with the requirements of Article 40 of the Statute and Articles 38 (2) and 49 (1) of the Rules of the Court, and deprives the fourth German Preliminary Objection of any justification.

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117 *Phosphates in Morocco*, 1938 PCIJ, Ser. A/B, No. 74, p. 21.

118 Memorial, paras. 3.17-3.30.

119 Memorial, paras. 3.31-3.36.

120 Memorial, paras. 3.37-3.58.

121 GPO, para. 116.

4.20 One more specific point must be dealt with. Germany alleges that Liechtenstein fails to indicate the identity of the victims and assets affected by its allegedly wrongful acts[122] and concludes that "Liechtenstein has failed to demonstrate that the right to diplomatic protection which it invokes does in fact exist".[123] This German argument is factually erroneous and legally misleading.

4.21 It is not true that Liechtenstein failed to indicate the name of the victims: it has provided the Court and Germany with a list of the families affected by the confiscation measures of 1945 - this list appears in Annex 8 to the Memorial and is commented in the Memorial itself, as acknowledged by Germany.[124] Moreover, as explained in the Memorial,[125] the main victims are the Reigning Prince of Liechtenstein and his family and Germany itself acknowledges that, as far as he is concerned, it has sufficient information in order to present its case:

> "In any event, to date, Germany has no clues who, *apart from the ruling Prince himself*, in 1995 believed to have property claims against the Czech Republic which, allegedly, were brought to extinction by the jurisprudence of the German courts".[126]

4.22 Liechtenstein certainly accepts that its case is, partly, based on diplomatic protection: as a consequence of Germany's new position (initially on the occasion of the case of the *Pieter van Laer* painting) all the owners of the property confiscated in 1945 are affected by the Germany's wrongful act. However, it must be firmly recalled that the present case cannot be seen as exclusively a diplomatic protection case. As a consequence of its new position, Germany has violated the rights of Liechtenstein itself under international law.

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122 GPO, paras. 132-142.

123 GPO, paras. 132-142.

124 GPO, para. 133.

125 See, e.g., Memorial, paras. 1.20-1.21.

126 GPO, para. 135 (emphasis added).

4.23 As is made apparent by the Submissions in the Memorial, the Court is requested "to adjudge and declare that: (a) by its conduct with respect to Liechtenstein (...), Germany has failed to respect the sovereignty and neutrality of Liechtenstein...".[127] The declaration by the Court that Germany's conduct entails its responsibility vis-à-vis Liechtenstein itself is a prerequisite to any pronouncement on its responsibility based on diplomatic protection. The obligation of Germany to compensate the losses sustained by Liechtenstein's nationals stems from the inclusion of the Liechtenstein assets in the reparations regime under its breach of the neutrality and sovereignty of the Principality.

4.24 Moreover, what is required from the Court as to the responsibility of Germany in the Memorial of Liechtenstein is, in a first stage of the proceedings, purely a declaration that Germany has violated the rights of Liechtenstein and its nationals and that:

> "(c) consequently, Germany has incurred international legal responsibility and is bound to provide appropriate assurances and guarantees of non-repetition, and to make appropriate reparation to Liechtenstein for the damage and prejudice suffered".[128]

4.25 As is made very clear in paragraph 2 of Liechtenstein's Submissions, the issue of compensation will be the object of the second phase of the proceedings:

> "Liechtenstein further requests that the amount of compensation should, in the absence of agreement between the parties, be assessed and determined by the Court in a separate phase of the proceedings".[129]

4.26 Such a request is far from being unusual before international courts and tribunals, including the International Court. It has been formulated, for example, in the following cases:

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127 GPO, Submission 1 (a).

128 Memorial, p. 187, Submissions, para. 1 (c).

129 Memorial, p. 187.

- *Military and Paramilitary Activities in and against Nicaragua*;[130]
- *Oil Platforms*;[131]
- *Gabčíkovo-Nagymaros Project*;[132] and
- *Land and Maritime Boundary between Cameroon and Nigeria.*[133]

In none of these cases, has the Court objected to such a request and it has expressly granted it in all the cases where the procedure reached the phase of the merits.

4.27 Thus, in *Nicaragua,* the Court, after having established the legal obligation of the United States to pay compensation[134] granted the request of Nicaragua and decided "that the form and amount of such reparation, failing agreement between the Parties, will be settled by the Court, and reserves for this purpose the subsequent procedure in the case".[135] Moreover, in the motives of its Judgment, the Court considered

> "appropriate the request of Nicaragua for the nature and amount of the reparation due to it to be determined in a subsequent phase of the proceedings. ... The opportunity should be afforded Nicaragua to demonstrate and prove exactly what injury was suffered as a result of each act of the United States which the Court has found contrary to international law. ... It goes without saying however, that in the phase of the proceedings devoted to reparation, neither party may call into question such findings in the present judgment as have become *res judicata*".[136]

Liechtenstein accepts that the same will hold true in the present case.

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130 See *Merits*, 27 June 1986, *I.C.J. Reports* 1986, p. 20, para. 15.

131 See *Preliminary Objection*, 12 December 1996, *I.C.J. Reports* 1996, p. 807, para. 9 (Application) and 10 (Memorial) or Order, 10 March 1998, *Counter-Claim*, pp. 191-192, para. 1 (Application) and 2 (Memorial).

132 See Judgment, 25 September 1997, *I.C.J. Reports* 1997, pp. 15-17, para. 13 (Submissions in the Memorials of both, Hungary and Slovakia), para. 14 (Submission in the oral pleadings of Slovakia).

133 See *Preliminary Objections*, 11 June 1998, *I.C.J. Reports* 1998, p. 282, para. 16-17 (Application) and p. 284, para. 18 (Memorial).

134 Operative paragraphs 13 and 14 of the Judgment.

135 Operative para. 15 of the Judgment, adopted by 14 votes to one, *Merits,* 27 June 1986, *I.C.J. Reports* 1986, p. 149.

136 *Ibid.*, pp. 142-143, para. 284.

4.28 In the case concerning the *Gabčíkovo-Nagymaros Project*, the Court pointed out that it had "not been asked at this stage to determine the quantum of damages due, but to indicate on what basis they should be paid.",[137] thus implicitly deferring the determination of the compensation for a subsequent phase of the proceedings.

4.29 It is only when it has decided that Germany bears responsibility for its internationally wrongful acts that the Court will be called upon to decide on the compensation for the losses sustained by Liechtenstein as a consequence of these acts. And it is only during this subsequent phase of the proceedings that the Parties will be in a position to discuss the Liechtenstein assets concerned and the amount of compensation to be paid by Germany. It would therefore have been most inappropriate for Liechtenstein to deal, in its Memorial, with facts and data which can only be relevant in this last and subsequent phase of the procedure.

4.30 Since the purpose of the first merits phase of the proceedings is exclusively to obtain from the Court a declaration acknowledging the responsibility of Germany Liechtenstein has limited itself to set out all the necessary elements to this aim - and these elements only. However, since Germany seems to imply that Liechtenstein is trying to hide "indispensable facts" from both the Court and the Defendant, Liechtenstein has annexed to the present Statement a partially updated list of the persons whose assets are affected by the present proceedings as well as indications of the assets concerned.[138]

4.31 As for the principle of Germany's responsibility, which alone is at stake during the first stage of the procedure on the merits, a simple reading of Liechtenstein's Application and Memorial shows that the factual and legal allegations put forward by Liechtenstein are neither vague nor imprecise. They are more than sufficient to per-

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137 *Gabcikovo-Nagymaros Project,* 25 September 1997, *I.C.J. Reports* 1997, p. 81, para. 152.

138 Annex 49.

mit Germany to answer these arguments which, alone, are relevant at this stage of the proceedings - and Germany is prematurely attempting to do so. Thus both Liechtenstein's Application and its Memorial are sufficiently substantiated and meet the requirements of Article 40 (1) of the Statute and Articles 38 (2) and 49 (1) of the Rules of Court.

D. Lack of sufficient evidence is not a preliminary matter

4.32 The claims made by Germany in this respect cannot be reconciled with the usual rules of evidence before international tribunals as they are embodied in the Rules of the International Court.

4.33 All the writers who have discussed this matter concur in thinking that the burden of proof falls on the party which alleges a fact. According to D.W. Sandifer in his well-known book, *Evidence Before International Tribunals*,

> "The broad basic rule of burden of proof adopted, in general, by international tribunals resembles the civil law rule and may be simply stated: That the burden of proof rests upon him who asserts the affirmative of a proposition which if not substantiated will result in a decision adverse to his contention".[139]

Similarly, according to Witenberg:

> "En d'autres termes, le grand principe sera d'imposer à celui même qui a avancé le fait, la charge de la preuve" ("In other terms, the main principle consists in imposing the burden of proof on the one who alleges the fact)".[140]

4.34 This has been the clear position of the I.C.J. in the case concerning *Military and Paramilitary Activities in and against Nicaragua*:

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139 Foundation Press, Chicago, 1939, pp. 92-93.

140 J.-C. Witenberg, "*Onus probandi* devant les juridictions arbitrales", *Revue général de Droit inter-*

> "Ultimately ... however, it is the litigant seeking to establish a fact who bears the burden of proving it; and in cases where evidence may not be forthcoming, a submission may in the judgment be rejected as unproved, but is not to be ruled out as inadmissible *in limine* on the basis of an anticipated lack of proof".[141]

4.35 In its Judgment of 11 June 1998 on the *Preliminary Objections* in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, the Court endorsed this statement and recalled that "[i]t is the applicant which must bear the consequences of an application that gives an inadequate rendering of the facts and grounds on which the claim is based".[142] Again, in its Judgment of 10 October 2002, the Court rejected the Parties claims relating to the responsibility of, respectively Cameroon and Nigeria, based on facts not sufficiently proven by the other Party.[143]

4.36 This is in keeping with Article 53 (1) of the Statute according to which:

> "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 failing party the Court is called upon to pass a judgment on the merits, while the expression "fails to defend its case" can be transposed, *mutatis mutandis*, to a situation where a State defends it case but does not substantiate it properly. In such a case, it is upon 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, not as a matter of admissibility.

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national public, 1951, p. 323.

141 *I.C.J. Reports* 1984, p. 437, para. 101.

142 *Land and Maritime Boundary Between Cameroon and Nigeria*, Preliminary Objections, 11 June 1998, *I.C.J. Reports* 1998, p. 319, para. 101.

143 Case concerning the *Land and Maritime Boundary Between Cameroon and Nigeria*, paras. 321- 324.

4.37 It is all the more logical and self-evident that "Article 38, paragraph 2 [of the Rules of Court], does ... not preclude later additions to the statement of the facts and grounds on which a claim is based".[144] And, similarly, Article 49 imposes on the Applicant the obligation to state the relevant facts and law in the Memorial (paragraph 1) and authorizes it to complete its case in the Reply (paragraph 3), and, to a limited extent (see Articles 56 and 60) during the hearings.

4.38 The only limit on the freedom of the Applicant to present new facts and legal considerations until the end of the procedings

> "is 'that the result is not to transform the dispute brought before the Court in another dispute which is different in character' (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. united States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 427, para. 80)".[145]

But Germany does not allege that Liechtenstein has done so in the present case.

4.39 It therefore must be concluded that:

(i) Liechtenstein has properly substantiated its claims in law and in fact;

(ii) The substantiation of the Application and the Memorial meet the requirements of Articles 38 and 49 of the Rules of Court;

(iii) In the guise of challenging the admissibility of Liechtenstein's claims, Germany, in fact, discusses them on the merits;

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144 *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, 11 June 1998, *I.C.J. Reports* 1998, p. 318, para. 98.

145 *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, 11 June 1998, *I.C.J. Reports* 1998, pp. 318-319, para. 99; see also, e.g., *Société Commerciale de Belgique*, 1939 PCIJ, Ser. A/B, No. 78, p. 173 or *Interhandel* case, 21 November 1959, *I.C.J. Reports* 1959, p. 21.

(iv) This discussion shows that Germany has well grasped the substance of Liechtenstein's argument, even if it does not answer it convincingly;

(v) Such a discussion belongs to the merits of the case, not to its admissibility;

(vi) It is only at the end of the proceedings that the Court will be in a position to evaluate the evidence submitted by both Parties; and

(vii) Each Party takes responsibility for substantiating its own claims.

CHAPTER 5

GERMANY'S ARGUMENT RELATING TO THE ABSENCE OF THE CZECH REPUBLIC FROM THE PRESENT PROCEEDINGS

A. Introduction

5.1 In its Fifth Preliminary Objection Germany challenges the admissibility of the present proceedings due to the "so-called indispensable third party rule".[146] In its view, the successor States of Czechoslovakia, in particular the Czech Republic, which have not consented to the jurisdiction of the Court, are indispensable parties to the present case. Allegedly, the Court could not decide on the responsibility of Germany but by addressing the issues of, first, the existence *vel non* of any reparations claim between Germany and the Czech Republic, and second, the lawfulness of the Beneš Decrees.

5.2 Germany has elaborated on the meaning of the "so-called indispensable third party rule" by reference to well-known extracts of Judgments delivered by this Court.Liechtenstein does not disagree with this presentation as far as it goes; but it is nevertheless very partial. Therefore it deems it necessary to make clearer the exact scope of the said rule (B). However, even if Germany's argument concerning the content of the indispensable third party rule is acceptable in substance, the consequences it draws from these findings are erroneous. Neither Czechoslovakia nor any of its successor States are an indispensable third party to these proceedings (C).

B. The "indispensable third party rule"

5.3 The German Preliminary Objections devote much effort to clarifying, once again before this Court, the regime of the "indispensable third party rule" resulting from the

> "well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent".[147]

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146 GPO, para. 151.

147 *Monetary Gold Removed from Rome in 1943,* 15 June 1954, *I.C.J. Reports* 1954, p. 32.

5.4 On the basis of the Court's judgments in the *Monetary Gold*,[148] *Certain Phosphate Lands in Nauru*[149] and *East Timor*[150] cases which it cites at length, the Defendant State reaches the following conclusion:

> "The jurisprudence of the Court concerning the indispensability of third parties is crystal clear: 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 the Court cannot decide on the claims before it without prior determination as to rights or obligations of the third State".[151]

Liechtenstein agrees with this conclusion which reflects the content of the "*Monetary Gold* principle".

5.5 However, this principle has two different aspects, and Germany deliberately omits to take into account the other aspect of the "indispensable third party rule", or of the rule of "consensual jurisdiction". In effect, the findings of the Court in the *Monetary Gold removed from Rome in 1943* case also imply that the Court *is not barred* from delivering a judgment for the sole reason that a third and absent State might be "affected" by a decision. As the Court put it in the *Continental Shelf (Libya / Malta)* case:

> "In the absence in the Court's procedures of any system of compulsory intervention, whereby a third State could be cited by the Court to come in as a party, it must be open to the Court, indeed its duty, to give the fullest decision it may in the circumstances of each case, unless of course, as in the case of the *Monetary Gold Removed from Rome in 1943*, the legal interest of the third State 'would not only be affected by a decision, but

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148 *Monetary Gold Removed from Rome in 1943,* 15 June 1954, *I.C.J. Reports* 1954, p. 19.

149 *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, 26 June 1992, *I.C.J. Reports* 1992, p. 240.

150 *East Timor (Portugal v. Australia)*, 30 June 1995, *I.C.J. Reports* 1995, p. 90.

151 GPO, para. 166.

> would form the very subject-matter of a decision' (*I.C.J. Reports 1954*, p. 32), which is not the case here".[152]

This is also the meaning of the Court's statement in its Judgment concerning Nicaragua's Application to intervene in the *Case concerning the Land, Island and Maritime Frontier Dispute*:

> "Thus, the Court's finding [in the *Monetary Gold Removed from Rome* in 1943 case] was that, while the presence in the Statute of Article 62 might impliedly authorize continuance of the proceedings in the absence of a State whose 'interests of a legal nature' might be 'affected', this did not justify continuance of proceedings in the absence of a State whose international responsibility would be the 'very subject-matter of the decision'".[153]

5.6 This doctrine is also reflected in the Court's Judgment in the *Nauru* case. The Australian objection regarding the absence of the United Kingdom and New Zealand, the two other States parties to the Trusteeship Agreement, in the proceedings was rejected by the Court since the interests of the United Kingdom and of New Zealand did not form the "subject matter" of that dispute.[154] However, the Court pointed out that those States were free to refer to Article 62 of the Statute in order to intervene, if an interest of a legal nature belonging to them might be affected by the decision of the case. It continued:

> "But the absence of such a request [to intervene] in no way precludes the Court from adjudicating the claims submitted to it, provided that the legal interests of third States which may possibly be affected do not form the very subject-matter of the decision that is applied for. Where the Court is

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152 *Continental Shelf (Libyan Arab Jamahiriya/ Malta)*, Italy's Application to Intervene, 21 March 1984, *I.C.J. Reports* 1984, p. 26, para. 40.

153 *Land, Island and Maritime Frontier Dispute (El Salvador/ Honduras)*, Judgment on Nicaragua's Application to Intervene, 13 September 1990, *I.C.J. Reports* 1990, pp. 115-116, para. 55 (emphasis added).

154 *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, 26 June 1996, *I.C.J. Reports* 1992, pp. 261-262, para. 55.

> so entitled to act, the interests of the third State which is not a party to the case are protected by Article 59 of the Statute of the Court ...".[155]

5.7 The underlying idea of this same principle is furthermore expressed in Article 32 of the European Convention which constitutes the basis for the jurisdiction of the Court in the present case. Article 32 (1) of this Convention expresses clearly this other aspect of the *Monetary Gold* rule:

> "This Convention shall remain applicable as between the Parties thereto, even though a third State, whether a Party to the Convention or not, has an interest in the dispute".

5.8 This provision simply reproduces the text of Article 35[156] of the Geneva General Act of Arbitration (Convention on the Pacific Settlement of International Disputes) of 26 September 1928[157] and does not seem to have been the object of any discussion during the *travaux préparatoires* of the European Convention. It seems apparent from the very text of this provision that it aims at overcoming the possible objections linked with the existence of third States interests in a given case. As acknowledged by Professor Jean Salmon:

> "En ce qui concerne les intérêts d'une tierce Puissance, ils sont en principe écartés par l'article 32 de la convention qui prévoit que la convention demeure applicable entre les parties, encore qu'un État tiers partie à la convention ou non ait un intérêt dans le différend. Cependant, les intérêts sont protégés par les possibilités d'intervention".[158]

5.9 However, it is Liechtenstein's submission that it is not necessary to try to determine whether it was the intent of the drafters of the Convention to depart from the first as-

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155 *Ibid.*, p. 261, para. 54.

156 Paragraph 1 of Article 35 of the Geneva General Act reads as follows: "The present General Act shall be applicable as between the parties thereto, even though a third Power, whether a party to the Act or not, has an interest in the dispute".

157 Geneva, 26 September 1928, 93 *League of Nations Treaty Series*, p. 343.

158 J. Salmon, "La Convention européenne pour le règlement pacifique des différends", 63 *Revue général de droit international public* 1959, p. 50; on the argument based on the possibilities of an intervention, see also below para. 5.10.

pect of the *Monetary Gold* principle as recalled above:[159] in any case, this provision clearly reinforces this second aspect and makes clear that the mere existence of an interest of a third State in a dispute might allow that State to intervene in the proceedings in accordance with Article 33 of the Strasbourg Convention, but it does not preclude the Court from being seized of and deciding the case even in the absence of a request to intervene from the State whose interests are or may be affected by the decision of the Court.

5.10 This is confirmed by the history of the predecessor of Article 33 of the Strasbourg Convention relating to intervention of third States in a procedure before the Court, that is Article 36 of the Geneva General Act. The draft of Article 35 of the Convention on the Pacific Settlement of International Disputes adopted in first reading by the Committee of Arbitration and Security obliged any third State being a party to the Convention to accept the invitation of the Parties to join the proceedings.[160] This very unusual mechanism under international law was changed following an observation by the Registrar of the Permanent Court, who pointed to its incompatibility with the Rules of Court. The Draft Article 35 was consequently amended and a new Article 36 was introduced and aligned with Article 62 of the Statute, simply giving any third State which considers itself as having an interest of a legal nature in the dispute the option to intervene in the proceedings.[161] It thus clearly follows from those *travaux* that neither Article 35 of the Geneva General Act nor Article 32 of the Strasbourg Convention necessitates the participation of a third State having an interest in the dispute and that they do not preclude the Court from being seized of that dispute and deciding it, even in the absence of that State.

5.11 Article 32 of the European Convention, as well as the consequences of the *Monetary Gold* rule resulting from the Court's case-law - if properly analyzed - are entirely ap-

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159 See above paras. 5.5 and 5.6.

160 Journal officiel de la Société des Nations, XI, No. 5, p. 618.

161 G. E. Gallus, "L'Acte général d'arbitrage", 190 *Revue de droit international et de législation comparée* 1930, pp. 898-899.

plicable to the present case. Indeed, it cannot be completely ruled out that the interests one of the successor States of Czechoslovakia or both might be "affected" by a decision of the Court in the present proceedings. However, they would certainly not be "affected" in the way Albania's interest was in the *Monetary Gold* proceedings or Indonesia's in the *East Timor* case; they are by no means the "subject matter of the dispute". Contrary to what Germany has suggested, it is not a necessary precondition to determining the responsibility of Germany for the Court to rule on any obligation or responsibility or any right owed or enjoyed by Czech Republic or Slovakia.

C. The Czech Republic (or Slovakia) is not an indispensable third party in the present case

5.12 Germany argues that Czechoslovakia, or one of its successor States, is an indispensable Party because, first, the Court would have to pass judgment on the lawfulness of the Czechoslovakian Beneš decrees[162], and second, the Court is said to have to decide on the existence *vel non* of any Czechoslovak or Czech right to reparations.[163]

5.13 Concerning the first point, the German allegations are based on a most serious distortion of Liechtenstein's case and claim. Contrary to the German assessment, a prior decision regarding the lawfulness or the unlawfulness of the Czechoslovakian measures taken in 1945 is not necessary. Liechtenstein does not seek to establish the international responsibility of Germany on the basis of recognition of an internationally wrongful act committed by a third State, i.e. Czechoslovakia. Any possible Czech or Slovak responsibility is outside and independent of the present proceedings. Consequently, it does not form the very "subject matter" of this case. The same holds true with respect of the existence *vel non* of any entitlement to reparations of these two States, the second argument put forward by Germany.

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162 GPO, paras. 168-173.

163 GPO, paras. 174-176.

1. The lawfulness of the Beneš decrees is not at stake and the Court does not need to decide this point

5.14 According to the Preliminary Objections:

> "The Czech Republic is an indispensable third party concerning the question of the lawfulness of the Beneš Decrees. The Court cannot decide on any claims of unlawful recognition of foreign confiscations or unjust enrichment on the part of Germany without passing judgment on the Czechoslovak seizures of Liechtenstein property".[164]

This is, of course, right and Liechtenstein fully agrees, but this abstract general point is of no relevance in the present case: the "unlawful recognition of foreign confiscations" is not at issue and Liechtenstein has not hinted at any such claim in its Application, which relates exclusively to the inclusion, *by Germany*, of Liechtenstein's assets in the reparations regime.

5.15 Germany again distorts the Liechtenstein case, even though it is very well aware of what is really at stake, i.e. the wrongful inclusion of the Liechtenstein property in the reparations regime.[165]

5.16 Moreover, Germany quotes some extracts of the Memorial in a very unusual manner, disrupting the meaning of the words and the real intention of the authors. Thus, in paragraph 170 of its Preliminary Objections, Germany makes a partial quote of paragraph 6.42[166] of the Liechtenstein Memorial:

> "The picture changed completely when Germany contended, following the Pieter-van-Laer case, that the Liechtenstein nationals' assets confiscated by Czechoslovakia had been rightly treated as German assets, as defined by the reparations regime".[167]

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164 GPO, para. 167.

165 See above paras. 4.6-4.9 and para. 1.7.

166 The Preliminary Objections mistakenly refer to para. 6.41 of the Memorial (GPO, p. 105, Footnote 2).

167 Memorial, para. 6.42.

But it omits to quote the end of this passage:

> "In other words, Germany now accepts that these properties were 'seized for the purpose of reparation or restitution, or as a result of the state of war', within the meaning of Article 3 (1) of the 1952 Settlement Convention (Annex 16)".[168]

5.17 This second sentence is necessary to correctly appreciate the meaning of the first one: Liechtenstein's claims relate exclusively to German international responsibility for acts and omissions imputable to Germany alone. Indeed, as Germany has perfectly understood, Liechtenstein complains, not of the confiscation of its assets by Czechoslovakia in 1945, but of the change of position of Germany concerning this confiscation, a change of position vis-à-vis Liechtenstein, which first occurred with the rulings of the German courts in the *Pieter van Laer* case. It is this conduct, which resulted in the inclusion of the Liechtenstein assets in the reparations regime, which amounts to a violation of several international obligations by which Germany was bound towards Liechteinstein, e.g. respect of Liechtenstein's sovereignty and neutrality and respect of Liechtenstein property as neutral property. These internationally wrongful acts have nothing to do with the wrongfulness or rightfulness of the confiscations as such by Czechoslovakia.

5.18 Another example of Germany's distortion of Liechtenstein's case can be found in paragraph 175 of the Preliminary Objections:

> "Even if, for the sake of argument, one accepted Liechtenstein's contention that Germany had somehow changed its position regarding the lawfulness of the Beneš Decrees in the 1990s ...".[169]

This is not at all what Liechtenstein is claiming: the Applicant does not contend that Germany has changed its position concerning "the lawfulness of the Beneš Decrees

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168 *Ibid.*

169 GPO, para. 175.

in the 1990s"; it does contend that Germany has changed its position with regard to the inclusion of the confiscated assets into the reparations regime established particularly by the Paris Agreement of 1952.

5.19 This inclusion has nothing to do with the lawfulness, *vel non*, of the Beneš Decrees: whether they were lawful or not, the fact is that, now and in contrast with the position it constantly maintained between 1945 and the 1990s, Germany treats the Liechtenstein property as subject to the reparations regime. It is this German position - which has only been adopted in the second part of the 1990s - which constitutes the cornerstone of this case. The lawfulness or wrongfulness of the Beneš Decrees has never been an issue and has nothing to do with the position Germany now takes. Whether the confiscation was lawful or not does not change the picture: the fact is that Liechtenstein property cannot be included in the reparations regime and that Germany now contends that it is.

5.20 In consequence, a legal assessment by the Court of the lawfulness of the Beneš Decrees is not necessary to the establishment of the responsibility of Germany. The responsibility of Germany for its inclusion of the Liechtenstein assets in the reparations regime is entirely independent of the lawfulness of the Beneš Decrees, and of a prior decision over the possible responsibility of Czechoslovakia or of the Czech and Slovak Republics: even supposing the Beneš Decrees were lawful - a fact on which Liechtenstein has not to take position in the framework of the present proceedings. Germany does not consider the Liechtenstein property as part of the reparations regime (the more so as there is no suggestion in the Beneš Decrees themselves at all that they are part of the reparations regime), or, if it does, it must assume the consequences of such a position.

5.21 Of course, the Beneš Decrees have a factual role to play in the present proceedings: they constitute the factual presupposition of the present dispute. Nevertheless, the possible Czech responsibility for the damages caused by these Decrees to Liechtenstein is not the subject of the present proceedings and does not constitute the very

"subject matter" of this dispute between Germany and Liechtenstein. Germany's international responsibility does not arise because of any collaboration in an internationally wrongful act by Czechoslovakia or the Czech Republic. Its responsibility has to be determined according to the principle of "independent responsibility" referred to by the International Law Commission in its Commentary to the Articles on Responsibility of States for Internationally Wrongful Acts:

> "The principle that State responsibility is specific to the State concerned underlies the present Articles as a whole. It will be referred to as the principle of independent responsibility. It is appropriate since each State has its own range of international obligations and its own correlative responsibilities".[170]

5.22 The present claim is for the present purpose more like the *Corfu Channel* case[171] than any of the cases which Germany relies on. In that case, the United Kingdom sued Albania for the damages, including losses of human life, caused by the mining of two British destroyers in Albanian waters. The mines were laid by a third State, which appeared later being Yugoslavia - a State which was not a party to the dispute. Although the United Kingdom had complained of collusion between the Albanian and the Yugoslav governments, the Court did not have to decide, and did not decide, on the responsibility of Yugoslavia, but only on Albanian responsibility. The Court held Albania responsible for the violation of its own obligation - to warn the United Kingdom of the presence of mines in its waters -, but not for its recognition of, or its involvement in, an internationally wrongful act of a third State - the laying of the mines.[172] Thus, the Albanian responsibility was independent, and primarily did not derive from the wrongfulness of conduct of a third State even though, absent this conduct, there would simply have been no case.

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170 Report of the International Law Commission on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10* (A/56/10), p. 150.

171 *Corfu Channel* case, Merits, 9 April 1949, *I.C.J. Reports* 1949, p. 4.

172 *Ibid.*, p. 22.

5.23 The context of the present case is very similar. Whether or not the seizure of the Liechtenstein property by Czechoslovakia was an internationally wrongful act, the fact is that Germany has changed its position regarding the inclusion of the confiscated assets in the reparations regime and this inclusion is precisely what Liechtenstein complains of. By this inclusion, Germany was in breach of its own international obligations. The responsibility whose recognition by the Court Liechtenstein is seeking is thus an "independent responsibility" (in the words of the ILC), and not a derived one.

5.24 Contrary to the German allegations,[173] the present case is not close to the *Monetary Gold removed from Rome in 1943* case or to the *East Timor* case where this Court would have had to establish the responsibility of an absent third State as a "necessary prerequisite".[174] It is not even comparable to the *Nauru* case where a problem of simultaneous responsibility was at stake which proved not to be of such a nature as to exclude the admissibility of that case with respect of the "indispensable third party rule" because the responsibility of the "affected" third States - New Zealand and the United Kingdom - was not the very "subject matter" of the dispute.[175] In the present case, the responsibility of Germany and the possible responsibility of Czechoslovakia, or of its successor States, are completely different issues, which are not bound by any logical link. They are neither conditioned one by the other, nor simultaneous. They are only different, based on different acts, committed at different times, with different consequences.

5.25 Furthermore, in its Preliminary Objections, Germany alleges that the question concerning the enrichment of Germany could not be decided upon without a prior determination of the lawfulness of the Czechoslovakian measures, i.e. the Beneš De-

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173 GPO, paras. 157-159.

174 *East Timor (Portugal v. Australia)*, 30 June 1995, *I.C.J. Reports* 1995, pp. 102 and 104, paras. 28 and 33; see also *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, 26 June 1992, *I.C.J. Reports* 1992, pp. 261-262, para. 55.

175 *Ibid.*

crees.[176] This argument too is erroneous. The lawfulness of the Beneš Decrees is just as indecisive for the unjust enrichment claim as it is for any other claim presented by Liechtenstein. Indeed, as Liechtenstein has shown in its Memorial,[177] the concept of unjust enrichment is independent of the existence of a wrong committed by the enriched party (or by anyone else). Relief under this principle is granted as a remedy for unfair consequences resulting from an unjustified transfer of property. It is thus a general principle of law based on equity, not on wrongfulness.

5.26 Moreover, the Beneš Decrees do not even constitute the act giving rise to the enrichment and the correlative impoverishment of which Liechtenstein complains. Germany, once again, misinterprets the Liechtenstein Memorial by alleging that the Czechoslovak decrees caused the impoverishment of Liechtenstein. As the Liechtenstein Memorial has clearly explained, "Germany now accepts that these properties were 'seized for the purpose of reparation or restitution, or as a result of the state of war', within the meaning of Article 3 (1) of the 1952 Settlement Convention".[178] Consequently, "[b]y acknowledging that Liechtenstein's assets are part of its debt Germany has, therefore, enriched itself since its debt has been lessened in the same proportions".[179] This would be true whether the Beneš Decrees were lawful or unlawful: the fact is that Germany seeks to enrich itself by including Liechtenstein property in the reparations regime. With regard to the unjust enrichment claim, the Beneš Decrees again constitute a mere factual background. The direct causation of Germany's enrichment has to be found in its own acts, i.e., the change of position described at length in the Memorial. As Liechtenstein has highlighted:

> "... the direct causation of Germany's enrichment lies in its own behaviour and the confiscation of the assets in 1945 is a mere fact in this respect, the qualification of which as legal or not does not matter".[180]

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176 GPO, para. 169.

177 Memorial, para. 6.8.

178 Memorial, para. 6.42.

179 Memorial, para. 6.44.

180 Memorial, para. 6.47.

5.27 Therefore, it appears that, with respect to unjust enrichment too, the circumstances of the present case are entirely different from those of the *Monetary Gold* case. In that case, the Court declined to admit the claims on the ground that a decision on the rights of Italy would have required a legal assessment of the Albanian responsibility without the consent of Albania.[181] By contrast, in the present case and so far as the unjust enrichment claim is concerned, the responsibility of Czechoslovakia, or of one of its successors, is entirely irrelevant: the unlawful enrichment of Germany stems from its own new position and has nothing to do with the Czechoslovak acts.

5.28 All these elements show that the Fifth German Preliminary Objection has to be rejected as unfounded in regard of the question of lawfulness of the Beneš Decrees. A legal assessment of this question is not a necessary prerequisite for the decision of the Court in the present case. It is not the very subject matter of the dispute and it is not even clear how the Czech (or Slovak) interests could be "affected" by the Court's decision in this respect.

2. The existence of a Czechoslovakian right to reparations has no relevance with regard to the unjust enrichment claim

5.29 The second German argument put forward in support of a "*Monetary Gold* situation" in the present case concerns the existence *vel non* of a Czechoslovak, or Czech or Slovak, right to reparations from Germany. According to Germany's allegations, the mere existence of this right must be decided before the Court could possibly address the unjust enrichment claim.[182] It is then apparent that, according to the German argument itself, a decision would have to be taken concerning the *rights* - not the *obligations* as was the case in the *Monetary Gold* case - of an absent, third State. How-

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181 *Monetary Gold Removed from Rome in 1943,* 15 June 1954, *I.C.J. Reports* 1954, p. 19.

182 GPO, para. 167 (point (2)).

ever, Germany contends that such a situation would equally fall under the "Indispensable Third Party Rule".[183]

5.30 In this respect, Liechtenstein maintains that there is no point in determining whether the Court could, or not, pronounce on the *rights* of third States (even though it does not clearly see why it could not). In any case, the Applicant cannot share the view of Germany that ...

> "the Court 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".[184]

5.31 Once again, Germany deliberately misreads Liechtenstein's Application and its elaboration in the Memorial, so that the initial claim is interpreted as a mere expropriation claim by Liechtenstein directed towards the wrong defendant. As already shown,[185] the present proceedings do not entail the responsibility of Czechoslovakia or one of its successor States for any wrongful seizure of property. It concerns exclusively German acts, i.e. the change of position of Germany with respect of the Liechtenstein property, now included under the reparations regime *by Germany itself.*

5.32 By doing so, *Germany* itself assumes that it owes reparations to the Czech Republic. Undeniably Germany applied Article 3 (3) of Chapter Six of the Settlement Convention to the Liechtenstein property in the *Pieter van Laer* case. This bears witness of its conviction that the Czechoslovakian measures concerning the Liechtenstein assets fell under the provisions of paragraph 1 of this same Article and were therefore "measures which have been ... carried out with respect to German external assets or other property, *seized for the purpose of reparation or restitution*". The Court has nothing to decide in this respect. Suffice it to take Germany at its own words.

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183 GPO, paras. 174-175.

184 GPO, para. 174.

185 See above paras. 5.15-5.17.

5.33 Any other position taken by Germany before the Court would be contrary to the general principle of international law known as *allegans contraria non est audiendus*.[186] As Cheng put it, this principle is

> "yet another instance of the protection which law accords to the faith and confidence that a party may reasonably place in another, which ... constitutes one of the most important aspects of the principle of good faith.".[187]

Decisions of international tribunals have recognized and applied this principle in a particularly consistent way. In the *Eastern Greenland* case, the Permanent Court held that:

> "Norway reaffirmed that she recognized the whole of Greenland as Danish; and thereby she has debarred herself from contesting Danish sovereignty over the whole of Greenland."[188]

Similarly, in the case concerning the *Arbitral Award made by the King of Spain on 23 December 1906* between Honduras and Nicaragua this Court affirmed:

> "In the judgment of the Court, Nicaragua, by express declaration and by conduct, recognized the Award as valid and it is no longer open to Nicaragua to challenge the validity of the Award".[189]

Particularly close to the present proceedings is the case of the *S.S. "Lisman"* decided by arbitration between the United States and the United Kingdom.[190] The sole Arbi-

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186 Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals*, Stevens, London, 1953, pp. 141 *et seq.*

187 *Ibid.*, p. 144. See also R. Kolb, "La bonne foi en droit international public", 31 *Revue belge de droit international*, 1998-2, p. 685.

188 *Legal Status of Eastern Greenland*, 5 April 1933, 1933 PCIJ, Ser. A/B, No. 53, p. 68-9.

189 *Arbitral Award made by the King of Spain on 23 December 1906,* 18 November 1960, *I.C.J. Reports* 1960, pp. 192 *et seq.*, p. 213.

190 *UNRIAA*, Vol. III, pp. 1767 *et.seq.*, p. 1779.

trator refused to consider an allegation of the Claimant which was in substance contrary to its previous contentions in another proceeding:

> "by the position he deliberately took in the British Prize Court, that the seizure of the goods and the detention of the ship were lawful, and that he did not complain of them, but only of undue delay from the failure of the Government to act promptly, claimant affirmed what he now denies, and thereby prevented himself from recovering there or here upon the claim he now stands on, that these acts were unlawful, and constitute the basis of his claim".[191]

The Iran-United States Claims Tribunal also confirmed this principle when it applied the

> "general rule of evidence that contradictory statements of an interested party should be construed against that party".[192]

If follows therefrom that Germany cannot reasonably defend the lawfulness of the application of the Settlement Convention to the Liechtenstein property and, at the same time, sustain the absence of any legal obligation of Germany to compensate war damages to Czechoslovakia or its successor states. However, the Court has not to decide that point either.

5.34 Whether Germany owes reparations to the Czech Republic (and to Slovakia) has no relevance in the present case. The fact is:

- that Germany assumes that it owes reparations to those States;

- that it includes the Liechtenstein assets in the reparations; and

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191 *Ibid.*, p. 1790.

192 Iran-United States Claims Tribunal, Award No. 73-67-3, 2 September 1983, *Woodward-Clyde Consultants v. The Government of the Islamic Republic of Iran and the Atomic Energy Organization of Iran*, 3 *Iran-United States Claims Tribunal Reports* 239, 1983-II, p. 249.

- that this inclusion has, in itself, a negative impact on Liechtenstein and its citizens since, as shown in the Memorial,[193] the mere fact of including the Liechtenstein assets in the reparations regime deprives them of any possibility to claim any compensation.

5.35 The *Pieter van Laer* case has been both the catalyst and a clear illustration of this situation: the German courts have decided that the painting was subject to the reparations regime; *as a consequence* of this inclusion, they deemed themselves incompetent to decide on the case brought by the Prince of Liechtenstein. Whether or not reparations are due by Germany to the Czech and Slovak Republics is an entirely different matter which only concerns the relations between them; the fact is that in its relations with Liechtenstein Germany has applied this regime with all the negative consequences this application entails (impossibility to sue in a German court and, now, to obtain compensation). With the endorsement of the findings of the courts by the German Government, this now applies to all the Liechtenstein assets confiscated in 1945.

5.36 It follows that Germany's allegations concerning a necessary determination of "hypothetical claims of reparations between the Czech Republic"[194] and itself are no better established than its contention concerning the [un]lawfulness of seizure of Liechtenstein property: in both cases, the elements on which Germany bases its assertions may have a factual incidence on the present case, but it is not for this Court to pass a judgement on them:

- the Liechtenstein assets were confiscated by Czechoslovakia; this is a fact; but, irrespective of whether this was lawful or not, Germany draws conclusions from this fact and only those consequences are before the Court;

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193 For a summary, see, e.g., Memorial, para. 6.73.

194 GPO, para. 175.

- Germany has included the Liechtenstein assets in the reparations regime; this too is a fact; but, again, whether or not Germany is liable to pay reparations to Czechoslovakia or its successors is not the question before this Court. This Court is only called upon to draw the legal consequences of this fact in relations between Liechtenstein and Germany.

5.37 Germany asks:

> "If no reparations are due, why should Germany be enriched by an alleged change of position in 1995?".[195]

The answer is given by Germany itself: *it* considers that it is liable for reparations and, consequently, it has included the Liechtenstein assets in the reparations regime. It is entirely incompatible with the principle of good faith for Germany now to assert the contrary in order to enable it to draw conclusions which are adverse to Liechtenstein in this respect, and it is therefore estopped from doing so. This is however, clearly an issue for the merits stage of the proceedings. The question of the use of this property effectively to satisfy the claims of Czechoslovakia is not at issue in the present case: whether or not Germany is liable for reparations to the Czech (or the Slovak) Republic, Germany now behaves as if it were so liable and the consequences of this position (whether it is right or not) are detrimental to Liechtenstein and its citizens. However, this is also an issue of the merits only.

5.38 It follows from all these arguments that no right or obligation of Czechoslovakia or any other third State forms the "very subject matter" of this case. Therefore, the *Monetary Gold* principle is not applicable and the Court should determine the dispute.[196] The mere fact that a legal interest of a third State might be "affected" does not change the picture. In this situation the third State is entirely protected by Article 59 of the Statute of the Court:

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195 *Ibid.*

196 See above paras. 5.6-5.9.

"The decision of the Court has no binding force except between the parties and in respect of that particular case".

5.39 In conclusion,

(i) A decision on the lawfulness of the Czechoslovak Beneš Decrees is not a prerequisite to a decision on the international responsibility of Germany or the unjust enrichment claim, and that question does not constitute the very subject matter of the dispute;

(ii) A decision on the existence *vel non* of the right of Czechoslovakia or the Czech or Slovak Republics to receive reparations from Germany is not necessary in order to determine the unjust enrichment claim;

(iii) Consequently, the Czech (or Slovak) Republic, as a successor State of Czechoslovakia, is not an "Indispensable Third Party";

(iv) No consent of a third State is needed for the decision on the present dispute. The present dispute can be decided in the absence of consent of this third State.

5.40 For all these reasons, the Principality of Liechtenstein requests the Court to reject the Fifth Preliminary Objection of Germany.

CHAPTER 6

GERMANY'S ARGUMENT BASED ON THE LOCAL REMEDIES RULE

A. Introduction

6.1 In Part III, Section III of its Preliminary Objections, Germany argues that Liechtenstein's action is inadmissible because it is pursued in the exercise of diplomatic protection and Liechtenstein nationals have failed to exhaust local remedies. But, Germany itself concedes that no exhaustion of local remedies in Germany was required and, further, that no such local remedies were available. For this reason alone, Germany's Sixth Preliminary Objection must be rejected. Nevertheless, for the sake of completeness, Liechtenstein will demonstrate in this section that the local remedies rule was fully complied with to the extent that it is applicable to the present case.

6.2 It will further be explained that, insofar as the present claim is made in respect of injuries suffered by the State of Liechtenstein itself, the rule of local remedies does not apply.

B. The Liechtenstein nationals have, in effect, complied with the local remedies rule

6.3 In its Memorial, Germany discusses at length the problem of exhaustion of local remedies, claiming that Liechtenstein nationals have failed to exhaust available local remedies, as follows from the wording of the title of Section III.[197]

6.4 Within that section itself, however, Germany makes a statement which is entirely incompatible with other parts of the same section, namely

> "that, although in principle the case must be classified as exercise of diplomatic protection, the requirement of the exhaustion of local remedies does not apply."[198]

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197 GPO, paras. 181-208.

198 GPO, para. 194.

This statement not only excludes any further possibility of invoking the rule of exhaustion of local remedies, but also totally obfuscates Germany's discussion of the exhaustion of local remedies in its Preliminary Objections, making it difficult to discern whether or not Germany conceives Liechtenstein's claims as addressing direct injury or as being one in exercise of diplomatic protection. In any case, this statement that the requirement of the exhaustion of local remedies does not apply in itself precludes Germany from invoking a failure to exhaust local remedies as a means of denying the admissibility of Liechtenstein's claims.

6.5 Nevertheless, insofar as the rule on exhaustion of local remedies is applicable to the present claim, there is no ground for denying the admissibility of the claim before this Court. The rule of exhaustion of local remedies requires that before a State can bring a claim against another State either by diplomatic means or before an international tribunal, the individual on whose behalf the claims are brought must have resorted to the national courts of the Defendant State. The idea behind this principle - as Germany stated quite rightly[199] - is to allow the State to bring its conduct towards that individual into conformity with what is required by international law.

6.6 Germany quite correctly pointed out that, as far as the Pieter van Laer painting is concerned:

> "It is clear, therefore, that in the painting dispute local remedies, which include also the application under the European Convention on Human Rights, have indeed been exhausted."[200]

Irrespective of whether or not the ECHR represents a form of local remedy the exhaustion of which is required, this statement of Germany removes any doubt that this condition has been fulfilled and that Germany itself has recognized this fulfillment. That there does not exist any other judicial means in Germany which could be resorted to in order to appeal against the final judgment is confirmed also by the state-

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199 GPO, para. 196.

200 GPO, para. 190.

ment in the judgment of the Federal Constitutional Court itself that its decision was unappealable.[201] Germany itself asserted that

> "decisions of the Federal Constitutional Court cannot be challenged any more within the German legal system".[202]

This legal consequence was confirmed in the proceedings before the ECHR in the *Prince Hans-Adam II of Liechtenstein* case since Germany did not plead any point concerning exhaustion of local remedies, even though Article 26 of the European Convention makes the admissibility of any complaint dependent on this condition having been fulfilled. The ECHR saw no need to deal with this matter when, in its admissibility decision of 6 June 2000, it declared the complaint brought by the Reigning Prince Hans-Adam II to be admissible.[203] It can be inferred from this decision that, even in the view of the ECHR, the condition was met, so that one cannot speak of the failure to exhaust the local remedies. In this regard, the title which Germany has used for Section III is incorrect and misleading.

1. In the present case, the exhaustion of local remedies is not required

6.7 To the extent that this case is one of diplomatic protection to which the rule of the exhaustion of local remedies applies, Germany's further statements concerning the assets other than the Pieter van Laer painting are equally perplexing. On the one hand, the title used for Section III suggest that local remedies have not been exhausted by Liechtenstein nationals, which means that (in Germany's view) available and efficient local judicial remedies still exist in Germany, of which Liechtenstein nationals must take advantage. Germany's further reference to the absence of any litigation by the other Liechtenstein nationals before German courts concerning their

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201 Memorial, Annex 32.

202 GPO, para. 191.

203 ECHR, *Prince Hans-Adam II of Liechtenstein against Germany*, Application No. 42527/98, Decision of 6 June 2000.

assets seized under the Beneš Decrees points in the same direction. On the other hand, however, it clearly denies the existence of such local legal remedies:

> "Notwithstanding the inference already drawn that the requirement of exhaustion of local remedies applies to the facts submitted to the Court by Liechtenstein, Germany has great difficulties in specifying what legal remedies the alleged victims should have taken."[204]

6.8 Germany's statements regarding the lack of available legal remedies are the more decisive, as the burden lies upon Germany to prove the existence of legal remedies which remain to be exhausted. In such a case, according to the arbitral award in the *Ambatielos* case, the burden of proof is on the Defendant State to prove that there still are effective remedies available which have not been exhausted:

> "In order to contend successfully that international proceedings are inadmissible, the defendant State must prove the existence, in its system of international law, of remedies which have not been used. The view expressed by writers and in judicial precedents, however, coincides in that the existence of remedies which are obviously ineffective is held not to be sufficient to justify the application of the rule."[205]

The judgment of this Court in the *ELSI* case,[206] as well as other judicial decisions,[207] confirm this view so that it is to be considered as generally accepted. In view of the burden imposed on Germany to prove the existence of further local remedies, Germany's assertion that relevant local remedies are non-existent bars it from any further contention that Liechtenstein is precluded from presenting its claim because of lack of exhaustion of local remedies.

6.9 In this context, it must be emphasised that, in its Preliminary Objections, Germany contradicts itself since, on the one hand, it states that no German court would have

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204 GPO, para. 191.

205 GPO, para. 197.

206 Case concerning *Elettronica Sicula S.p.A. (ELSI)*, *I.C.J. Reports* 1989, para. 63.

207 So, for instance, *Ambatielos* claim (1956), *UNRIAA*, Vol. XII, pp. 83 *et seq.*, p. 119.

competence, while, on the other hand, it argues that no other case has been brought before such a court.[208] It is precisely because no German court would grant jurisdiction and decide the case on the merits, as Germany itself asserts, that no other cases were brought before German courts.

6.10 As there are no legal remedies available, there is no duty to exhaust local remedies before Liechtenstein can exercise its right of diplomatic protection. This consequence is in full conformity with the limitations to the principle of the exhaustion of local remedies, since there "is no need to exhaust local remedies when such remedies are ineffective or the exercise of exhausting such remedies would be futile".[209]

6.11 This limitation on the principle that local remedies must be exhausted is generally accepted, as is confirmed by a brief review of international judicial practice such as *Panevezys-Saldutiskis Railway* case,[210] the *Arbitration under Article 181 of the Treaty of Neuilly*[211] or, before the ECHR, the case *Akdivar v. Turkey*[212] or the case *Englert v. Germany.*[213] According to judicial decisions,[214] legal doctrine,[215] and well

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208 GPO, para 193.

209 E. M. Borchard, *The Diplomatic Protection of Citizens Abroad*, 1915, p. 821; *Ambatielos Claim (Greece v. UK),* 6 March 1956, 3 *United Nations Reports of International Arbitral Awards* 119; *De Wilde, Ooms and Versyp*, 18 June 1971, ECHR, 14 *Yearbook of the European Convention on Human Rights* 806; Harvard Draft Articles on State Responsibility, Art. 19 (2), 55 *American Journal of International Law*, 1961, p,. 577; I. Brownlie, *Principles of Public International Law*, 5th ed., 1998, pp. 499-500.

210 1939 PCIJ, Ser. A/B, No. 76, pp. 4 *et seq.*, p. 1.

211 *Arbitration under Article 181 of the Treaty of Neuilly*, reported in 28 *American Journal of International Law*, 1934, pp. 760 *et seq.*, p. 789.

212 *Akdivar and others v. Turkey*, 16 September 1996, Case No. 99/1995/605/693, para. 67.

213 *Englert v. Germany*, 25 August 1987, Case No. 9/1986/107/155, para. 32.

214 In his third report on Diplomatic Protection, UN Doc. A/CN.4/523, p. 7, Special Rapporteur J. Dugard quotes in support of this view: *Robert E. Brown* claim, 6 *United Nations Reports of International Arbitral Awards*, 1923, pp. 120 *et seq.*, p. 129; *Finnish Ships Arbitration*, 3 *United Nations Reports of International Arbitral Awards*, 1934, pp. 1479 *et seq.*, p. 1497, *Panevezys-Saldutiskis Railway* case, 1939 PCIJ, Ser. A/B, No. 76, pp. 4 *et seq.*, p. 19; *Ambatielos* claim, 12 *United Nations Reports of International Arbitral Awards,* 1956, pp. 83 *et seq.*, pp. 122-123; *Interhandel* case, 21 November 1959, *I.C.J. Reports* 1959, pp. 27-29.

215 Dugard in his third report (*supra* note 214, at p. 14) refers to E. M. Borchard, *The Diplomatic Protection of Citizens Abroad,* 1915, p. 823; R. Jennings and A. Watts (eds.), *Oppenheim's International*

established State practice[216] there is no necessity to exhaust local remedies when such remedies are ineffective or the exercise of exhausting such remedies would be futile.

6.12 Futility in the context of the obligation to exhaustion local remedies exists in particular when, for instance, "there is no justice to exhaust".[217] Germany itself admitted the non-existence of available local legal remedies by its assertion that it had "great difficulties in specifying what legal remedies the alleged victims should have taken".[218] It can be deduced from this assertion that Germany does not provide for any further available judicial means to redress the unlawful situation produced by its conduct. This statement also reveals that it is not because of ignorance or incorrect legal advice, but because of the lack of local remedies in Germany, that Liechtenstein nationals cannot exhaust local remedies.

6.13 Germany also justifies the non-existence of further available measures on the lack of competence of German courts to rule on ownership of real estate situated outside Germany. However, the German argument that "only the local judiciary is competent to rule on issues connected with the ownership of real estate"[219] is not relevant in the present case. The decisions of German courts, as well as subsequent statements of German officials, in which the German conduct complained of is manifested, did not

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Law, 9th ed., 1992, p. 525; I. Brownlie, *Principles of Public International Law*, 5th ed., 1998, p. 500; C. F. Amerasinghe, *Local Remedies in International Law*, 1990, pp. 197 *et seq.*; C. F. Amerasinghe, "Whither the Local Remedies Rule?", 1990, 5 *I.C.S.I.D. Review*, pp. 292 *et seq.*, p. 306; E. Jiménez de Aréchaga, "International Responsibility", in M. Sørensen (ed.), *Manual of Public International Law*, 1968, pp. 531 *et seq.*, pp. 587-588; Verzijl, in 46 *Annuaire de l'Institut de Droit International,* 1956, p. 266; A. Verdross and B. Simma, *Universelles Völkerrecht: Theorie und Praxis*, 3rd ed., 1984, p. 883; C.H.P. Law, *The Local Remedies Rule in International Law*, 1961, p. 69; G. Schwarzenberger, *International Law*, 3rd ed., 1957, Vol. 1, p. 608.

216 Third Restatement of the Law of the Foreign Relations Law of the United States, 1989, Part II, para. 713, cmt. (f) at p. 219; C. Warbrick, "Protection of Nationals Abroad: Current Legal Problems and codifications of the local remedies rule", 37 *International & Comparativ Law Quarterly* 1988, pp. 1002 *et seq.*, p. 1008. F. V. García Amador, Sixth report, Yearbook of the International Law Commission 1961, Vol. II, p. 48, UN Doc. A/CN.4/134 and Add. 1, Articles 18 (2) and 3 (2).

217 Third report on Diplomatic Protection, *supra* note 214, at p. 13.

218 GPO, para. 191.

219 GPO, para. 193.

deny German jurisdiction on the basis of Article 23 of the German Code of civil procedure, which refers to the local judiciary. This conduct denied the competence of German courts by reference to Article 3 of Chapter Six of the Settlement Convention. It is the denial of German jurisdiction on this ground that prompted Liechtenstein to apply to this Court. In any event, in the present case, Article 23 would not be sufficient to deny German jurisdiction, since property other than immovable property is similarly affected by the German position.

6.14 Even if there were any local remedies available, any recourse to them by Liechtenstein nationals would be futile, since no Liechtenstein national who applied to a German court would obtain a decision different from that of the Federal Constitutional Court in the Pieter van Laer case. The latter decision not only excluded the possibility of any further relief by German courts in the *Pieter van Laer* case itself, but has provided a binding precedent for any other proceedings requiring a decision by any German court relating to Liechtenstein property seized under the Beneš Decrees.

6.15 The rule that there is no obligation to resort to domestic remedies if a different decision could not be expected has met with overwhelming recognition in international judicial practice, as well as in international authorities.[220] Accordingly,

> "it is not necessary again to resort to municipal courts if the results must be a repetition of a decision already given".[221]

6.16 In its Preliminary Objections, Germany itself applied this rule to this case:

> "It is true that if a dispute concerning the land owned formerly owned by Liechtenstein citizens ever came before a German court that court would have to decline jurisdiction to rule on the merits of the case."[222]

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220 Third report on Diplomatic Protection, UN Doc. A/CN.4/523, p. 16.

221 *Panevezys-Saldutiskis Railway* case, 1939 PCIJ, Ser. A/B, No. 76, pp. 4 *et seq.*, p. 18.

222 GPO, para. 129.

6.17 This assertion convincingly proves that any German court would follow the decision of the Federal Constitutional Court, with the result that any further attempt by Liechtenstein citizens to obtain redress in a German court would be bound to fail. Under such circumstances, any resort to German courts must be judged to be futile and unreasonable, so that there can be no obligation for individual citizens to resort to German courts before Liechtenstein could espouse these claims on their behalf. The decision of the Federal Constitutional Court not only excluded the granting of any further relief by Germany, but precluded any other conclusion in proceedings before any German court on the status of Liechtenstein property seized under the Beneš Decrees.

6.18 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 claims.

2. Germany's reference to local remedies in Czechoslovakia

6.19 Germany surprisingly further contends

> "that the Liechtenstein victims of the Czechoslovak confiscation policy should have contested before the courts of the former Czechoslovakia the confiscation measures taken to their detriment. They should at least have attempted to avert the losses which Czechoslovakia inflicted upon them by depriving them of their possessions. In fact, the Czechoslovak measures were the proximate cause of the damage which constitutes the heart of the present dispute. Liechtenstein itself confines itself to contending that Germany brought into being a second cause, a remote cause, for that damage."[223]

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223 GPO, para. 195.

Although it agrees that

> "[t]he requirement of the exhaustion of local remedies is designed to provide the alleged wrong-doing State with an opportunity to make good any incorrect action it may have taken"[224]

it nevertheless requires Liechtenstein citizens to have resorted first to judicial devices in former Czechoslovakia before Liechtenstein could exercise diplomatic protection against Germany.

6.20 The central point is a simple one. Lack of exhaustion of the Czechoslovakian or, after the demise of this State, the Czech and Slovak legal remedies can never serve as a bar to a claim against Germany. It is Germany which is the only defendant party in this dispute. The activities relevant for the present case are those which constitute Germany's position taken in the 1990s. It must be recalled that it was Germany that declared Liechtenstein property to be among the assets subject to reparation measures. It was Germany that declared Liechtenstein property to be German property against which reparation measures within the meaning of the Settlement Convention could be taken. Only Germany can make good its own incorrect acts and, thereby, achieve the objective of the rule of exhaustion of local remedies if such remedies were available; neither former Czechoslovakia nor any of its successor States could achieve such a result.

6.21 Germany's view is also incorrect in that it identifies the measures under the Beneš Decrees as the centerpiece of the claims:

> "The interference which matters in fact is the strategy of confiscation pursued by Czechoslovakia in 1945-46. Even according to Liechtenstein's pleadings, Germany is at most second in the chain of events, or rather the third actor, inasmuch as the stipulation in Article 3, paragraph 3, of Chapter Six of the Settlement Convention goes back to a specific demand of the Three Western Powers which made the abolition of the occupation regime dependent on Germany's consent to a clause which

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224 GPO, para. 196.

> would make all the measures taken with a view to enforcing reparations or restitution immune from scrutiny by German courts." [225]

6.22 In fact, this view confuses the historical background to the claims with the events which are legally significant in the present case. What is significant in legal terms is not the measures under the Beneš Decrees themselves, but the inclusion of Liechtenstein property that had been subject to the Beneš decrees into the reparations regime.

6.23 Germany argues that it is only because of the failure of the Liechtenstein nationals to resort to local remedies in Czechoslovakia that Liechtenstein is bringing the present action against Germany:

> "In this special and absolutely extraordinary configuration the last actor in a chain of three cannot be denied the benefit of invoking the failure of the Claimant's nationals to contest the primary cause of the calamity that befell them, namely the Czechoslovak measures of confiscation."[226]

This argument, however, again combines two different causes of action which must necessarily be distinguished: the first is the measures taken against Liechtenstein property under the Beneš Decrees, which, however, is not the subject matter of the present claim; the other is the wrongful inclusion of Liechtenstein property into the reparations regime within the meaning of the Settlement Convention. The present claim is confined to the latter issue only and no resort to legal remedies in Czech Republic or Slovak Republic (as successor of the former Czechoslovakia) could remedy the German wrongful acts.

6.24 In the conclusions of its Preliminary Objections, Germany refers again to this issue:

> "Should the Court not share the view that the non-exhaustion of local remedies in Czechoslovakia and the Czech Republic qualifies as a preliminary objection that can be raised by Germany, Germany would develop the argument more fully in its written pleadings on the merits - in

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225 GPO, para. 197.

226 GPO, para. 197.

> case the dispute should ever reach that stage. In any event, that failure would have to be taken into account as contributory negligence. If the victims abstained from fighting for their rights in the appropriate fora, they cannot expect that the losses confirmed by their passivity will be assumed by a third party which neither had any duty of diligence with regard to the property concerned, nor had the power to stop the unlawful actions committed by the Czechoslovak Government."[227]

6.25 These conclusions again reveal a deliberate misunderstanding of the true cause of action. In its claim against Germany, Liechtenstein is not asking for a remedy in relation to the measures taken under the Beneš Decrees, but for a remedy for the appropriation by Germany of Liechtenstein property for the purposes of Germany's reparations as a consequence of the World War II, irrespective of any legal assessment of the Beneš Decrees. This German argument as to failure to have recourse to Czech or Slovak legal remedies (as the case may be) has no bearing on this dispute, which is a dispute between Liechtenstein and Germany exclusively and in which Liechtenstein is invoking Germany's sole responsibility. Germany's argument amounts merely to a further attempt to distort the real nature Liechtenstein's claim and to present it in a form in which Liechtenstein has never cast it.

C. The local remedies rule is not applicable in that the claim submitted by Liechtenstein is a claim for direct injury

6.26 It is generally accepted that the application of the local remedies rule is restricted to cases of diplomatic protection, i.e. to cases where a State has inflicted injury to aliens on its territory. In contrast, the rule is not applicable to cases where a State is violated in its direct, State to State rights. This principle was endorsed by the Court in the *Interhandel*[228] and *ELSI*[229] cases and is unanimously accepted in international judicial and arbitral practice[230] as well as in doctrine.[231]

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227 GPO, para. 208.

228 *Interhandel* case, 21 November 1959, *I.C.J. Reports* 1959, p. 28.

229 Case concerning *Elettronica Sicula S.p.A. (ELSI)*, *I.C.J. Reports* 1989, para. 52.

230 *The M/V "Saiga" (No. 2) Case*; ITLOS 1997, reprinted in 38 *International Legal Materials* 1999, p. 1323, para. 98; *Air Service Agreement* Arbitration, 1978, 18 *United Nations Reports of Interna-*

6.27 Direct injury affects the State in its status as an independent personality and in its quality as a sovereign entity in international law. In cases of direct injury, it is State prerogatives that are at stake. Examples of direct injury are violations of the territorial sovereignty or, more generally, the territorial rights of a State, damage to State property, or violations of the rules arising from diplomatic and consular law.[232]

6.28 Two forms of direct injury are of particular importance for the present case. The first are violations of the law of neutrality.[233] Neutrality defines the legal status and the legal capacity of the (neutral) State in relation to other States in time of war[234] and therefore directly concerns its legal personality in the international legal order. In this "status-related" sense, a breach of neutrality is comparable to a violation of sovereignty. A violation of the law of neutrality necessarily affects the neutral State in its status and quality as an international legal person and therefore amounts to *direct* injury to the neutral State, even if nationals of the neutral State are also prejudiced. When e.g. Germany violated Swiss neutrality in World War I, causing personal injury and material damage to Swiss nationals, the latter were not required to exhaust local remedies in Germany as a condition precedent to Switzerland being able to bring a claim against Germany.[235]

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tional Arbitral Awards, p. 431, para. 30; *Case Concerning the Heathrow Airport User Charges*, 102 *International Law Reports* 1992, p. 279.

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

232 See, e.g., Greig, *International Law*, 1970, pp. 399-402; Chappez, *La règle de l'epuisement des voies de recours internes*, 1972, pp. 36-42.

233 I. Brownlie, *System of the Law of Nations. State Responsibility*, Part I, 1983, p. 238.

234 K. Hailbronner, "Der Staat und der Einzelne als Völkerrechtssubjekt", in W. Graf Vitzthum (ed.), *Völkerrecht*, 2nd ed., 2001, pp. 212-213, where a declaration of neutrality is considered as an exercise of sovereign jurisdiction.

235 *Répertoire suisse de Droit international*, Vol. III, 1975, pp. 1773-1775, para. 8.52.

6.29 The second form of direct injury invoked by Liechtenstein is the breach of Liechtenstein's sovereignty by Germany. It is generally acknowledged that direct injury is caused when a State transgresses the "limits of national jurisdiction under the general rules of international law" to the detriment of another State.[236] In the present case, Germany treats Liechtenstein nationals as German nationals *pro tanto* to their detriment. By so doing, Germany has violated the personal jurisdiction and authority of Liechtenstein over its, i.e., Liechtenstein's, own nationals.

6.30 Many international disputes contain elements of both diplomatic protection and direct injury, and the present case is of such a "mixed nature", which ensues from the concurrence of different rules of international law breached by one and the same conduct. Liechtenstein further agrees with Germany that, in mixed cases, the various elements of a dispute have to be scrutinised in order to determine whether the direct or the indirect injury element is preponderant.[237] However, Liechtenstein rejects Germany's application of this test to the present case. In particular, Germany maintains that "the case contains no single element outside the property issue which might give it a tinge that would remove it from the area of diplomatic protection".[238] In other words, Germany argues that Liechtenstein's claim only addresses indirect injury and is exclusively concerned with diplomatic protection. Yet, if there is not a single element of direct injury, it might be asked why Germany applies the preponderance test at all.

6.31 Apart from this contradiction in Germany's reasoning, Germany ignores Liechtenstein's arguments with regard to sovereignty and, in particular, neutrality. With regard to the applicability of the local remedies rule, Germany does not establish that Liechtenstein's claim arising out of Germany's breach of its duty to respect the neu-

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236 W. Riphagen, Second report on the content, forms and degrees of international responsibility, *Yearbook of the ILC* 1981, Vol. II, Part One, p. 91.

237 This "preponderance test", initially developed by Meron, was incorporated by ILC's Special Rapporteur on diplomatic protection into his second report on diplomatic protection, UN Doc. A/CN.4/514, paras. 21 and 23 and Draft Article 11.

238 GPO, para. 188.

trality of Liechtenstein and of Liechtenstein nationals is not a direct claim which renders the local remedies rule inapplicable. The reason for Germany's silence in this respect is obvious: There is no doubt that any violation of the laws of neutrality constitutes a *direct injury* of the neutral State, i.e., Liechtenstein, and gives rise to a *direct claim* of Liechtenstein against Germany.

6.32 Germany refers to the *ELSI* and the *Interhandel* cases and argues that these two cases were similar to the present one.[239] However, Liechtenstein submits that, contrary to Germany's submission, the present case substantially differs from these two cases. In the *Interhandel* case, Switzerland requested the Court to declare that the United States was under an obligation to restore the assets of Interhandel, a Swiss company. The assets in question consisted of 90 per cent of the shares in a United States company which were owned by Interhandel and which had been confiscated by the United States Government under the Trading with the Enemy Act on the grounds that Interhandel belonged, or was at least controlled by, the German company IG Farbenindustrie. Switzerland was only requesting the restitution of assets of a Swiss company and thus merely securing the interest of one of its nationals.[240] Even the alternative Swiss claim (as regards the obligation of the United States to submit the dispute to arbitration or conciliation) was exclusively directed to securing the restoration of the assets of the Swiss company.[241] Therefore, the Court concluded that "one interest, and one alone, that of Interhandel" was the basis for the Swiss claim.[242] In other words, the *only* interest Switzerland had in instituting proceedings before the International Court was the restoration of property rights to a Swiss company; there was no additional element in the Swiss claim which pointed to direct injury suffered by Switzerland in its status as an international legal person. Although Switzerland

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239 GPO, paras. 185-186.

240 *Interhandel* case, 21 November 1959, *I.C.J. Reports* 1959, pp. 28-29.

241 *Interhandel* case, 21 November 1959, *I.C.J. Reports* 1959, p. 29. Switzerland itself was of the opinion that this alternative submission did not differ in substance from its principal submission and thus was only concerned with the property rights of the Swiss company, see *Interhandel* case, *I.C.J. Pleadings* 1959, p. 406.

242 *Interhandel* case, 21 November 1959, *I.C.J. Reports* 1959, p. 29.

invoked an obligation of the United States under an international treaty,[243] this did not suffice in itself to establish direct injury, and there was no other basis to establish direct injury.

6.33 Likewise, in the *ELSI* case, the United States claimed that Italy had violated its international obligations with regard to foreign companies, which is clearly a claim in exercise of the right to diplomatic protection. The United States further argued that its claim was "based exclusively on the violations of a treaty", viz., the bilateral Treaty of Friendship, Commerce and Navigation (FCN). The United States went on to argue that the "case was occasioned by damage to particular United States nationals, but the claim before this Court is an assertion of broader rights and interests of the United States under the Treaty".[244] Like Switzerland in the *Interhandel* case, the United States in the *ELSI* case only adopted the cause of its nationals whose property rights were allegedly violated by Italy in breach of the bilateral treaty. Despite the United States argument, there were no "broader rights and interests of the United States" at stake. Consequently, the Chamber of this Court held that it was impossible in that case "to find a dispute over alleged violations of the FCN Treaty resulting in direct injury to the United States, that is both distinct from, and independent of, the dispute over the alleged violation in respect [of the two companies]".[245]

6.34 Both these cases have to be distinguished from the present dispute. Liechtenstein claims in the first place that Germany violated its international obligations towards Liechtenstein arising from the laws of neutrality and from the inherent right to sovereignty. Germany in its Preliminary Objections ignores this fact. It argues that "[a]s can be seen from the requests formulated in the Application, Liechtenstein is primarily interested in obtaining financial compensation for the losses its nationals suf-

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243 The pertinent treaty was the Washington Accord concluded in 1946 between Switzerland, the United States of America, the United Kingdom and France.

244 Case concerning *Elettronica Sicula S.p.A. (ELSI), I.C.J. Pleadings*, Vol. III, p. 284.

245 Case concerning *Elettronica Sicula S.p.A. (ELSI), I.C.J. Reports* 1989, para. 51.

fered".[246] In the section of its Preliminary Objections dealing with the exhaustion of local remedies, Germany does not mention Liechtenstein's principal claim elaborated extensively in its Memorial.

6.35 Germany bases its selective argument on Article 40 (1) of the Statute of the Court and on the Court's statement in the *Nuclear Tests* cases. However, Germany has misread both sources. Contrary to Germany's contention,[247] Article 40 (1) of the Statute does not provide that the Application "defines the subject of the dispute". According to that provision, the "subject of the dispute [...] shall be *indicated*" in the Application (emphasis added). The Application only serves as one among several tools to identify the subject of the dispute. This is corroborated by the Court's statement in the *Nuclear Tests* cases. Indeed, as Germany observed, the Court declared that the Application "must be the point of reference for the consideration by the Court of the nature and existence of the dispute brought before it".[248] However, the Court's reasoning was quoted by Germany in a rather selective manner; what remains unsaid by Germany is that only a few paragraphs later,[249] the Court was more explicit in determining the method how to "ascertain the true object and purpose of the claim". It added that "in doing so [...] it must take into account the Application as a whole, the arguments of the Applicant before the Court, the diplomatic exchanges brought to the Court's attention, and public statements made on behalf of the applicant Government". And indeed, in the *Nuclear* Tests cases, the Court heavily relied on the submissions and arguments made by the Applicant in the Memorial and, in particular, in the oral proceedings.[250]

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246 GPO, para. 188. See also *ibid.*, paras. 181-182.

247 GPO, para. 181.

248 *Nuclear Tests* cases, *I.C.J. Reports* 1974, p. 260, para. 24; *ibid.*, p. 463, para. 24.

249 *Ibid.*, para. 30.

250 *Ibid.*, para. 27.

6.36 If one takes a look at Liechtenstein's submissions as a whole, in particular as laid down in the Memorial,[251] it will readily be seen that the direct injury inflicted by Germany upon Liechtenstein and consisting in the violation of Liechtenstein's neutrality and sovereignty is essential to Liechtenstein's claim. Therefore, contrary to the German submission, the *Interhandel* and the *ELSI* cases cannot be taken as precedents for the present case.

6.37 With regard to direct injury, Liechtenstein's claim is similar to that of the United States against Iran in the *Diplomatic and Consular Staff* case,[252] where United States nationals (diplomatic and consular personnel as well as private individuals) were held hostage in the premises of the United States Embassy in Tehran. In that case, none of the United States nationals, not even the private individuals, were required to exhaust local remedies, although the United States in its submissions explicitly stated that it exercised "its right of diplomatic protection of its nationals".[253] The Court considered the United States claim as one of direct injury, although private individuals were (also) affected by the violation. Likewise, in the *Military and Paramilitary Activities in and Against Nicaragua* case, 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.[254]

6.38 There are numerous other decisions by international courts and tribunals where the factual and legal situations bear resemblance to the present case and which support Liechtenstein's submission. Thus, in the *Air Service Agreement* arbitration between the United States and France, the tribunal held that the distinction between direct and indirect injury in relation to the application of the local remedies rule is based "on the *juridical* character of the *legal relationship* between States which is invoked in sup-

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251 Memorial, paras. 4.1-4.43.

252 *I.C.J. Reports* 1980, p. 3.

253 *I.C.J. Reports* 1980, pp. 6-7.

254 *I.C.J. Reports* 1986, pp. 19 *et seq.*

port of the claim".[255] The tribunal considered the right to conduct air transport services by one air carrier as a right "granted by *one government* to the other *government*".[256] Thus, although it was the air carriers as private companies which were injured by a breach of these rights, they were not required to exhaust local remedies before their States of nationality could bring an international claim against the wrongdoing State.

6.39 This line of reasoning was confirmed by the tribunal in the *Heathrow Airport* arbitration between the United States and the United Kingdom.[257] There, the tribunal, in addressing the question of the applicability or otherwise of the local remedies rule, thoroughly examined the legal relationship between the litigating States underlying the dispute. It analysed the subject matter of the dispute and drew an important distinction between the direct rights of the States and the rights of designated airlines. Although the "Bermuda Agreement" of 1977 referred to designated airlines, it did "not thereby confer independent rights on such airlines or alter the fact that the rights that it enshrines are those of the Contracting States".[258] The tribunal was influenced by the consideration that the conduct of air services was by its nature a State prerogative and thus prevailed over any interest of the private air companies. It concluded:

> "Although examination of the nature of [the United States'] claims and of the airlines' potential claims reveals that they overlap to a certain extent, at the same time they present significant differences; and taking the case as a whole and undivided into its constituent parts, the Tribunal is of the opinion that the predominant element is the direct interest of the US itself. Thus, examination of the subject matter of the dispute as a whole indicates that [the United States'] claim is properly to be regarded as distinct and independent."[259]

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255 *Case Concerning the Air Service Agreement of 27 March 1946*, 1978, 18 *United Nations Reports of International Arbitral Awards*, pp. 417 *et seq.*, p. 431, para. 30 (emphasis in the original).

256 *Ibid.*, para. 31 (emphasis in the original).

257 *Case Concerning the Heathrow Airport User Charges*, 102 *International Law Reports* 1992, p. 216.

258 *Ibid.*, para. 6.11.

259 *Ibid.*, paras. 6.14, 6.15 and 6.18.

6.40 Finally, in the *Saiga* case decided by the International Tribunal for the Law of the Sea under the 1982 United Nations Convention on the Law of the Sea,[260] the Tribunal held that the breaches claimed by the applicant State were direct violations of the rights of that State, although they caused severe damage to private individuals and although Article 295 of the Convention on the Law of the Sea explicitly provides for the local remedies rule.[261]

6.41 The similarity between these cases and the present one is striking. In all these cases, direct State prerogatives were at stake, which prevailed over the interests of the private individuals also affected and injured by the breach. In the present case likewise, it is the State prerogative of Liechtenstein, i.e. that its interest that its neutrality and sovereignty be respected, which forms the very subject matter of the dispute. The fact that property rights of Liechtenstein nationals were infringed is a necessary corollary of the direct violations inflicted upon Liechtenstein by Germany, just as was the case with the private airline companies in the *Air Service Agreement* and the *Heathrow Airport* arbitrations or the private individuals in the *Saiga* case.

6.42 Germany lays much stress on the fact that Liechtenstein requests compensation from Germany for the losses suffered by Liechtenstein nationals[262] in order to show that Liechtenstein's claim preponderantly concerns indirect damage to its nationals. It is true that the remedy sought is sometimes considered to indicate whether the applicant State vindicates a direct right or whether it acts in the exercise of diplomatic protection.[263] However, this reparation remedy is only one among various others requested by Liechtenstein. Germany fails to mention that Liechtenstein also claims a variety of remedies for the direct injury it has suffered, in particular cessation, assurances and guarantees of non-repetition, declaratory relief and restitution. Further, in

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260 *The M/V "Saiga" (No. 2) Case*; ITLOS 1997, reprinted in 38 *International Legal Materials* 1999, p. 1323.

261 *Ibid.*, para. 98.

262 See GPO, paras. 182 and 189.

263 See Dugard, Second Report on diplomatic protection, UN Doc. A/CN.4/514, Draft Article 11, p. 11.

all the cases mentioned above, the applicant States likewise requested substantial amounts of financial compensation, but this fact did not prevent the tribunals from deciding that the applicant States were vindicating direct rights and that the local remedies rule was not applicable.

6.43 For these reasons, Liechtenstein submits that the nature and subject matter of the dispute and the legal relationship of the norms and obligations invoked by Liechtenstein and breached by Germany essentially concern direct rights of Liechtenstein. Therefore, Liechtenstein has suffered direct injury, and the local remedies rule is not applicable.

SUBMISSIONS

For all these reasons, and reserving the right of the Principality of Liechtenstein to supplement them in view of any further German arguments, it is respectfully submitted:

(a) that the Court has jurisdiction over the claims presented in the Application of the principality of Liechtenstein, and that they are admissible;

and correspondingly

(b) that the Preliminary Objections of Germany be rejected in their entirety.

Dr. Alexander Goepfert
Agent of the Principality of Liechtenstein
Vaduz
15 November 2002

LIST OF ANNEXES

LIST OF APPENDICES