DISSENTING OPINION OF JUDGE KOOIJMANS

Existence of a dispute — Subject-matter of the dispute.
Limitation ratione temporis *— Facts and situations prior to critical date — Whether Germany changed its position — Previous case law of German courts on application of Settlement Convention — Application of Convention to seized neutral assets in* Pieter van Laer Painting *case established new situation — Jurisprudence of Permanent Court of International Justice and International Court of Justice — Objection on temporal limitation unfounded.*

Other preliminary objections without merit.

1. To my regret, I find myself unable to subscribe to the Court's finding that Germany's second preliminary objection must be upheld, and that it thus has no jurisdiction to entertain Liechtenstein's Application. In the following pages, I will state the reasons for my disagreement with the Court's conclusion. Since I am of the opinion that the Court has jurisdiction and that Liechtenstein's Application is admissible, I will subsequently consider — albeit briefly — the preliminary objections raised by Germany which have not been dealt with by the Court.

2. The present case epitomizes the need to distinguish sharply between preliminary issues and matters of substance. In their reasoning on the preliminary objections, both Parties to this rather peculiar case have used arguments which actually belong to the merits. That is perhaps unsurprising: the interpretation and application of the relevant provisions of the 1952 Settlement Convention, which are at the centre of the dispute, are also of relevance for the consideration of preliminary questions, in particular those involved in the second and fifth objections. That makes it all the more important not to confuse preliminary or mainly procedural matters and substantive issues.

In the following, I will try to confine myself strictly to what I consider to be the preliminary issues. Whatever my views on the validity of Liechtenstein's claims may be, they are not relevant to the present stage of the proceedings. Since the case will not reach the merits phase, I will refrain from any comments in that respect.

A. The Subject-Matter of the Dispute

3. I share the Court's view that Germany's first preliminary objection, according to which there is no dispute between the Parties to the case,

must be dismissed. Liechtenstein claims that Germany has breached obligations owed to it under international law; Germany emphatically denies this claim. As the Court states, Liechtenstein's claim was positively opposed by Germany, and there is credible and convincing evidence that, on various occasions, Germany recognized the existence of a dispute (Judgment, para. 25).

4. Germany has reproached Liechtenstein for artificially transforming its long-standing dispute with Czechoslovakia and its successor State(s) about the confiscation of Liechtenstein property under the Beneš Decrees — the alleged unlawfulness of this confiscation is not a matter of dispute between Liechtenstein and Germany — into a dispute with Germany. This contention makes it all the more necessary to determine the subject-matter of the dispute which has been brought before the Court. In the *Right of Passage* case, where the parties were as much in disagreement as to what the legal dispute before the Court was as in the present case, the Court stated, "[i]n order to form a judgment as to the Court's jurisdiction it is necessary to consider what is the subject of the dispute" (*Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, p. 33); and, as in the present case, the Court did so, before dealing with the preliminary objection concerning a limitation *ratione temporis*.

5. In its Application, Liechtenstein describes the dispute as concerning

> "decisions of Germany, in and after 1998, to treat certain property of Liechtenstein nationals as German assets having been 'seized for the purposes of reparation or restitution, or as a result of the state of war' [this wording reproduces that used in the 1952 Convention on the Settlement of Matters Arising out of the War and the Occupation, hereinafter, "Settlement Convention"] . . . without ensuring any compensation for the loss of that property to its owners, and to the detriment of Liechtenstein itself" (Application of Liechtenstein, para. 1).

Whereas Germany contends that its courts had no choice but to apply Article 3, Chapter Six, of the Settlement Convention in the *Pieter Van Laer Painting* case (as described in paragraph 16 of the Judgment), Liechtenstein maintains that by so doing they violated Liechtenstein's rights under general international law, thus engaging Germany's international responsibility.

The subject-matter of the dispute is, therefore, not whether Germany was under a treaty obligation to apply the relevant provisions of the Settlement Convention to property confiscated during or after the Second World War by Allied States, but whether Germany could lawfully apply it to confiscated property belonging to nationals of a State which remained neutral during that war and which, moreover, is not a party to that Convention.

6. Likewise, the relevant question is not whether the German courts were obliged or entitled under international law to apply a legality test to Czechoslovak expropriations of assets of Liechtenstein nationals. Counsel for Germany stated,

> "[l]eaving aside the issue of the Settlement Convention, German courts would have applied rules of private international law and the international law of confiscations. They would have rejected any claim concerning movable property confiscated more than 50 years ago." (CR 2004/24, p. 28, para. 75; see also Preliminary Objections of Germany, pp. 56-59, paras. 91-95.)

"Leaving aside the Settlement Convention" would, however, transform the dispute into a completely different one, which has not been submitted to the Court. The question the Court is asked to answer is whether the German authorities could lawfully apply the Settlement Convention to neutral assets or — to put it differently — whether neutral assets could be considered as "German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war" for the purposes of applying the Settlement Convention. From this point of view, the legality or illegality of the confiscation of Liechtenstein property under the Beneš Decrees is irrelevant, and the Court is not asked to consider that issue.

7. For these reasons, I agree with the Court's identification of the subject-matter of the dispute in paragraph 26 of the Judgment.

B. The Limitation *Ratione Temporis*

8. Once the subject of the dispute has been defined, it becomes possible to consider whether that dispute relates "to facts or situations prior to the entry into force" of the 1957 European Convention on Dispute Settlement and thus, by virtue of its Article 27 *(a)*, is excluded from the jurisdiction of the Court, as Germany maintains in its second preliminary objection. The critical date in this respect is 18 February 1980, the date on which the European Convention entered into force as between the two States.

9. The Parties agree that the present controversy between them has arisen not earlier than 1995. According to Germany, however, it relates to facts or situations dating from 1945, the year when the Beneš Decrees were promulgated; or from 1955, the year of the entry into force of the Settlement Convention; or from the consistent application of the latter by the German courts — all of which predate the critical date. Liechtenstein, for its part, contends that the temporal limitation of Article 27 *(a)* of the European Convention on Dispute Settlement must be interpreted as referring to facts or situations with regard to which the dispute arose:

"what is . . . the 'definitive act which would, by itself, directly involve international responsibility'" (CR 2004/25, p. 25, para. 29). In this respect, Liechtenstein has referred to a common position of the Parties and a subsequent change of position by the German authorities which allegedly occurred in the years after 1990 (Application of Liechtenstein, para. 9).

10. By so doing, Liechtenstein, in my view, has obscured the relevant issues. Both Germany and Liechtenstein may have considered or still consider the confiscation of Liechtenstein property under the Beneš Decrees as unlawful, but this is a matter which — I repeat — is not relevant to the present dispute. At no time was there a common position, or even an explicit or implicit unilateral one on the part of Germany, on the question of whether seized or confiscated property of nationals of neutral States was covered by the 1952 Settlement Convention (see Memorial of Liechtenstein, p. 62, paras. 3.15 and 3.16). Consequently, there was no position which, in the years after 1990, could have been changed by the German authorities. That issue simply had not presented itself.

11. The Court, therefore, correctly observes that it

> "has no basis for concluding that prior to the decisions of the German courts in the *Pieter van Laer Painting* case, there existed a common understanding or agreement between Liechtenstein and Germany that the Settlement Convention did not apply to the Liechtenstein property seized abroad as 'German external assets' for the purposes of reparation as a result of the war" (Judgment, para. 50).

In the same paragraph, however, the Court, without much argument, states,

> "[m]oreover, German courts have consistently held that the Settlement Convention deprived them of jurisdiction to address the legality of any confiscation of property treated as German property by the confiscating State".

It is this sentence which fails to appreciate properly the true subject-matter of the dispute: the Court's observation does not constitute evidence of already existing case law with regard to seized or confiscated *neutral* property, nor of an unaltered position of Germany in this regard.

12. Germany argues that it has consistently interpreted Article 3, Chapter Six, of the Settlement Convention as barring German courts from looking into the lawfulness of any measures against property considered German property by the confiscating State. In this respect, Germany refers, in particular, to the decision of the Federal Court of Justice of 11 April 1960 (Preliminary Objections of Germany, p. 18, paras. 20-21; Ann. 3, p. 46) as being pivotal since, in that decision, the Court stated that it is the *intention* of the authority of the foreign country to confiscate

property as German property which is decisive for the application of this Article of the Settlement Convention. According to Germany, this case law has merely been confirmed by the court decisions in the *Pieter van Laer Painting* case (Preliminary Objections of Germany, p. 54, para. 87). The alleged change of position is, therefore, said to be a fabrication by Liechtenstein.

13. However, the pivotal issue is not that the German courts in the *Pieter van Laer Painting* case confirmed the previous case law, but that they applied it — for the first time — to neutral assets, and thus introduced a new element. In this respect, it is important to analyse the decision of the German Federal Court of 11 April 1960 since, of all the decisions cited, it is most analogous to the decisions in the *Pieter van Laer Painting* case. In 1960, the Federal Court stated,

> "[e]ven if the conditions of Article 3 paragraph 3 of Chapter Six Settlement Convention are not fulfilled, German courts lack jurisdiction in a case in which the Plaintiff is trying to raise an objection against measures mentioned in Article 3, paragraph 1 of Chapter Six Settlement Convention . . . For the application of this provision it is sufficient that the assets were seized as German assets." (Preliminary Objections of Germany, Ann. 3, pp. 47-48.)

14. The underlying facts (as far as I have been able to ascertain them) make clear that this decision cannot support the argument that the present dispute before the Court relates to facts and situations prior to 1980. In the 1960 case, the plaintiff, a non-German national, claimed that the defendant did not have title to the assets at the time when they were seized under a United States Vesting Order based upon the Trading with the Enemy Act. The plaintiff claimed that these assets had belonged to her and, therefore, that the defendant could not raise a civil claim concerning them. The German Federal Court of Justice rejected the claim, invoking Article 3, Chapter Six, of the Settlement Convention: "whether the assets seized . . . were in fact German or foreign assets is to be decided exclusively by the State which has seized the assets" (*ibid.*, p. 48).

15. However, in the 1960 case, the assets had been seized as assets belonging to a *German* national, and thus the application of the Settlement Convention was appropriate since the seizure itself came squarely within the definition of paragraph 1 of Article 3. In this respect, it was not relevant that in actual fact the assets probably had not belonged to the German defendant, who had perhaps mistakenly been considered to be the owner, but to a non-national of Germany.

In this decision, therefore, the Federal Court did not apply the Settlement Convention to the confiscation or seizure of assets which at the time undoubtedly belonged to nationals of a neutral State.

16. I respectfully disagree with the Court when it "points out that German courts did not face any 'new situation' when dealing for the first time with a case concerning the confiscation of Liechtenstein property as a result of the Second World War" and finds that "this case, like previous ones on the confiscation of German external assets, was inextricably linked to the Settlement Convention" (Judgment, para. 51).

17. In my view, this statement is beside the point, since it completely ignores the issue of whether the Settlement Convention can in any way be considered as *intended*, at the time of its conclusion, to be applicable to assets seized by the confiscating State as "German property for the purpose of reparation or restitution, or as a result of the state of war", whereas in actual fact these assets belonged to — and had belonged during the whole period of that state of war to — nationals of a neutral State. An affirmative answer to that question — which would in any case be part of the merits — would seriously affect the rights of neutrals under international law, and such a decision had not been taken by German courts previously.

18. My conclusion, therefore, can only be that the court decisions in the *Pieter van Laer Painting* case applied the Settlement Convention to neutral assets for the very first time, and that this introduced the new element I referred to earlier — or, to use the words of the Court, that the German courts faced a "new situation".

19. For the present phase of the proceedings, it is also not relevant that Germany contends that the then Reigning Prince's claim in the *Pieter van Laer Painting* case would have been rejected anyhow, even without the application of the Settlement Convention. Germany refers in this respect to a decision of the Federal Court of Justice of 1991, where the claim of the plaintiffs was rejected on the basis of, *inter alia*, international expropriation law (Preliminary Objections of Germany, pp. 56-57, paras. 91-92; Ann. 4, p. 62; in that case, the Settlement Convention was not applicable since it concerned expropriations carried out in the former Soviet Zone of Occupation (East Germany) and thus not German external assets).

20. As I stated previously, the question of whether Liechtenstein is entitled to compensation by Germany, and, if so, on what basis, is a matter for the merits and has no relation to the question of whether the facts or situations to which the dispute about the application of the Settlement Convention relates are prior to the critical date.

21. It is undoubtedly true that, as the Court states, the decisions of the German courts in the *Pieter van Laer Painting* case cannot be separated from the Beneš Decrees and the Settlement Convention, which all predate the 1980 critical date, but I have serious doubts as to whether this justifies the conclusion that "these decisions cannot consequently be considered as the source or real cause of the dispute" (Judgment, para. 51). The Court, before coming to this conclusion, has analysed its case law and that of its predecessor, the Permanent Court of International Justice, concerning similar temporal limitations in declarations made under Article 36, paragraph 2, of the Statute (Judgment, paras. 40-42). I consider this analysis useful, even if it has to be admitted that the various Court decisions are focused on the specific case at hand and, therefore, do not reflect a transparent general policy. I cannot, however, subscribe to the conclusion the Court draws from this analysis.

22. The Court evidently sees an analogy between the present case and the *Phosphates in Morocco* case. In that case, the Permanent Court of International Justice noted that "situations or facts subsequent to [the critical date in 1931] could serve to found the Court's compulsory jurisdiction only if it was with regard to them that the dispute arose" (*Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 24). It then found that a number of *dahirs* (legislative acts), adopted in 1920 and which allegedly were unlawful, constituted the essential facts which really gave rise to the dispute. Such "facts", by reason of their date, fell outside the Court's jurisdiction (*ibid.*, p. 26).

Italy further relied on an alleged denial of justice to its nationals which was said to have become definitive as a result of certain acts subsequent to the critical date. The Court, however, observed that that part of the claim could not be separated from a decision of the Department of Mines, based on the 1920 *dahirs* and taken in 1925; an examination of that complaint, therefore, could not be undertaken either without extending the Court's jurisdiction to a fact which, by reason of its date, was not subject thereto (*ibid.*, p. 29).

23. I interpret this latter part of the Judgment as implying that, if the decision of the Department of Mines had been taken after the critical date, the Court would not have considered the temporal limitation applicable to that part of the Italian claim, in spite of the fact that that decision had been based on the 1920 *dahirs*. While there are undoubtedly differences between an administrative act and a court decision, that situation is comparable to the present dispute, where the Settlement Convention, which came into force prior to the critical date, was applied for the first time to neutral assets after the critical date.

24. This reading would also bring the present dispute into line with that of the *Electricity Company of Sofia and Bulgaria* case. In that case, the Permanent Court of International Justice stated,

> "[i]t 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." (*Judgment, 1939, P.C.I.J., Series A/B, No. 77*, p. 82.)

In the present case, the "real cause of the dispute" ("le fait générateur du différend") is the application by the German authorities of the Settlement Convention to the assets of nationals of a State which was neutral during the Second World War.

25. For all the above-mentioned reasons, I cannot but conclude that Germany's second preliminary objection cannot be upheld. In particular, I dissociate myself from the Court's finding that "[w]hile these decisions triggered the dispute between Liechtenstein and Germany, the source or real cause of the dispute is to be found in the Settlement Convention and the Beneš Decrees" (Judgment, para. 52). That conclusion, in my view, ignores the "new situation" established by these Court decisions.

26. Of course, the Court could have concluded, as it did in the *Right of Passage* case, that it is not, at this stage, in a position to determine what the relevant facts or situations are, since that requires a further consideration of the 1952 Settlement Convention and its interpretation or application, which could "entail the risk of prejudging some of the issues closely connected with the merits" (*Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 152). If the Court's finding had consequently been that the objection does not have an exclusively preliminary character, I certainly would not have cast a negative vote. Regrettably, the present decision of the Court leaves me no choice.

C. The Other Preliminary Objections

27. I will now deal — in a rather summary fashion — with the remaining preliminary objections. I do so *pour acquis de conscience* and as a logical consequence of my disagreement with the Court's decision on the second objection.

28. In its third objection, Germany claims that the dispute concerns questions which, under international law, are solely within the domestic jurisdiction of States, and that the Application is thus excluded from the Court's jurisdiction by Article 27 *(b)* of the European Convention on Dispute Settlement, which provides that the Convention shall not apply to "disputes concerning questions which by international law are solely within the domestic jurisdiction of States".

29. Both Parties have relied extensively in their arguments on rules and principles of international law. The Respondent itself has consistently invoked its obligations under international agreements and arrangements. The dispute can, therefore, only be resolved by having recourse to

international law, which takes the matter out of the ambit of domestic jurisdiction. As the Permanent Court of International Justice observed in its Advisory Opinion in the case concerning the *Nationality Decrees Issued in Tunis and Morocco*:

> "once it appears that the legal grounds relied on are such as to justify the *provisional* conclusion that they are of judicial importance for the dispute submitted . . . the matter, ceasing to be one solely within the domestic jurisdiction of the State, enters the domain governed by international law" (*1923, P.C.I.J., Series B, No. 4*, p. 26; emphasis added).

The third objection thus fails.

30. Just as unfounded, in my view, is Germany's fourth objection, namely, that Liechtenstein's claims are not sufficiently substantiated. Germany appears to be perfectly aware of the object and scope of Liechtenstein's claims, and this is shown by its arguments. In the second round of the oral hearings, counsel for Liechtenstein took great pains in elucidating what was to be understood by the claim, even if, in so doing, he went deep into the merits.

31. The final sentence of Article 38, paragraph 2, of the Rules of Court provides that the application shall "specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based". This provision is based on a formula adopted by the Advisory Committee of Jurists in 1920:

> "Submissions are not presented in their final form in the application, that document merely giving a general indication sufficient to define the dispute and enable proceedings to be begun." (G. Guyomar, *Commentaire du Règlement de la Cour internationale de Justice*, 1983, p. 236; translation by the Registry.)

In my view, Liechtenstein's Application, as elaborated in its Memorial, meets this requirement in a satisfactory way, even if its claims are not fully substantiated with regard to the legal position of each and every Liechtenstein national mentioned.

32. In its fifth preliminary objection, Germany submits that the Court, if it found that it has jurisdiction, should have refrained from exercising it, since Liechtenstein's claim would have made it necessary for the Court to decide on the legality or illegality of acts of a third State which has not given its consent to the present proceedings (the Czech Republic as the successor State of Czechoslovakia).

In the present case, the Court should, therefore, apply its ruling in the *Monetary Gold* case, where it stated that the legal interests of a third State (Albania) would "not only be affected by a decision, but would form the very subject-matter of the decision" (*Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 32), thus establishing the so-called "indispensable third party" principle.

33. Liechtenstein denies that the alleged unlawfulness of the Beneš Decrees is "the very subject-matter of the dispute". In its view, the subject-matter of the dispute is that Germany has brought Liechtenstein assets under the reparations régime of Article 3, Chapter Six, of the Settlement Convention. The only question Liechtenstein asks the Court to answer is to determine whether Germany was entitled to do so. That answer can be given without considering the question of whether the Beneš Decrees were in conformity with international law (CR 2004/25, pp. 54-55, para. 15).

34. As I stated previously, the claim as brought by Liechtenstein asks the Court to determine whether Germany acted wrongfully by treating Liechtenstein assets, for the first time in 1995, as German external assets for the purposes of the Settlement Convention, thereby infringing Liechtenstein's neutrality and sovereignty. With respect to *this* claim, the Beneš Decrees are mere facts, the legality or illegality of which are *not* the subject-matter of the dispute. The Court could therefore, in my view, have given a declaratory judgment on Liechtenstein's claim.

Of course, the Czech Republic could have asked permission to intervene in accordance with Article 62 of the Statute. But, as the Court has stated,

> "the absence of such a request in no way precludes the Court from adjudicating upon the claims submitted to it, provided that the legal interests of the third State which may possibly be affected do not form the very subject-matter of the decision that is applied for" (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, I.C.J. Reports 1992*, p. 261, para. 54).

35. Likewise, the other parties to the 1952 Settlement Convention and to the Exchange of Notes of 27 and 28 September 1990, which kept in force the provisions of the Convention relevant to the present case, could have intervened under Article 63 of the Statute if the case had come to the merits. That issue would, however, have provided no reason for upholding the fifth preliminary objection.

36. However, Liechtenstein asked not only for a declaratory judgment but also for compensation. That part of the claim is rather complicated, and it cannot be excluded that, in dealing with this question, the lawfulness of the Beneš Decrees could not have been left unconsidered. That, however, is part of the merits. Nevertheless, it would have been prudent to observe, as was done in the *Nauru* case, that the Court's ruling in the present stage of the proceedings "does not in any way prejudge the merits" (*I.C.J. Reports 1992*, p. 262, para. 56), or to have joined the objection to the merits as not possessing an exclusively preliminary character.

37. Finally, Germany contends that Liechtenstein's Application is not admissible since the Liechtenstein nationals have not exhausted the available local remedies.

38. Liechtenstein's Application contains a "mixed" claim, combining claims in its own right and also in the exercise of diplomatic protection of some of its citizens. In so far as this claim refers to the infringement of its sovereignty and neutral status, there is no requirement of the exhaustion of local remedies since that part of the claim is brought by the Applicant in its own right (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004*, p. 36, para. 40).

39. In so far as Liechtenstein's claim is a claim in the exercise of diplomatic protection of its nationals, it can safely be maintained that the then Reigning Prince has exhausted all available local remedies, including an appeal to the European Court of Human Rights. Liechtenstein's claim on his behalf is thus also admissible.

With regard to the other Liechtenstein nationals, Liechtenstein submits that in their cases exhaustion of local remedies is not necessary, as these have already been shown to be futile in the case of the then Reigning Prince.

That argument may sound persuasive, but it does not answer the underlying questions of why and on what ground the other Liechtenstein nationals could have been expected to seek redress from a German court. Unlike the Prince, whose former property — the Van Laer painting — was present on German territory, these other Liechtenstein nationals have no cause for action in the German courts, since their property never found itself within German national jurisdiction; and there is no decision against which they could have appealed.

40. That issue, however, is not an issue with regard to which the requirement of the exhaustion of local remedies is relevant. The question is simply whether Liechtenstein's contention of a breach by Germany of its obligations vis-à-vis those other Liechtenstein nationals can pass legal scrutiny, but that is a matter for the merits, *viz.* whether Germany as a result of the decisions of its courts has breached an international obligation towards them.

41. Since Liechtenstein claims in its own right and also in the exercise of diplomatic protection on behalf of one of its citizens — the then Reigning Prince — who has exhausted all local remedies, Germany's sixth preliminary objection has no merit.

42. In conclusion, I repeat my view that the Court has jurisdiction to entertain the case and that Liechtenstein's Application is admissible.

(Signed) Pieter H. KOOIJMANS.